Docket No. 17-874

IN THE SUPREME COURT OF THE UNITED STATES

AVERY MILNER,

Petitioner,

v.

MACKENZIE PLUCKERBERG, in his capacity as Chief Executive Operator of Squawker, Inc.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighteenth Circuit

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BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

Submitted: January 31, 2019

Team No. 23

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether Defendant is a state actor liable for constitutional claims when he operates a private business which supplies a service to the public, does not utilize governmental resources or personnel to run his business, and is not forced to adopt or enforce speech policies by law?

II. Whether the restrictions on emoji use and spamming behavior are considered constitutionally valid time, place, and manner restrictions when the restrictions serve the purpose of protecting access and usability of the Squawker platform for its users and narrowly apply only within the Squawker platform to types of speech within the public forum?

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The January 10, 2019 decision of the United States District Court for the District of Delmont granting Plaintiffs' Motion for Summary Judgment is contained in the record. R. at 1. The decision of the United States Court of Appeals for the Eighteenth Circuit reversing the district court's decision is contained in the record. R. at 25.

STATEMENT OF JURISDICTION

The United States District Court for the District of Delmont had federal question jurisdiction under 28 U.S.C. § 1331 (2012) because Plaintiff sought relief for a violation of his First Amendment rights made applicable to state actors through the Fourteenth Amendment. R. at 1. The district court entered a final order on February 1, 2019. R. at 1. The United States Court of Appeals for the Eighteenth Circuit has jurisdiction over appeals from all final orders of district courts located within the its boundaries. 28 U.S.C. §§ 1291, 1294 (2012). The Eighteenth Circuit issued a decision in favor of Defendant, reversing the holding of the district court. R. at 25. The Supreme Court of the United States has appellate jurisdiction over all cases arising under the United States Constitution. U.S. Const. art. III, § 2. This Court granted Petitioner's timely petition for a writ of certiorari. R. at 37. Therefore, this Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the interpretation of the Squawker Terms and Conditions in light of the First Amendment prohibition on the government abridgement of the freedom of speech, U.S. Const. amend. I, as applied to the states through the Fourteenth Amendment, U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Statement of the Facts

Defendant Mackenzie Pluckerberg developed the Squawker social media platform in 2013. R. at 2. Users may follow fellow users and view, like, dislike, and comment on other user's posts, called "squeaks," on this platform. *Id.* Many political figures use Squawker to reach their constituents, including Delmont's governor, William R. Dunphry. R. at 3. Governor Dunphry suggested Defendant add "verified" accounts for government officials to improve the social media site. *Id.* Defendant agreed and implemented the change. *Id.*

Squawker users must agree to the site's Terms and Conditions to create an account. R. at 3. The Terms and Conditions "prohibit the use of emojis [emoticons] in a violent or threatening manner" on Squawker. *Id.* They also ban spamming behavior, prohibiting the posting of more than four squeaks in a thirty-second period. R. at 3-4. The purpose of the restrictions is to ensure all users have a positive experience and can use the public forum. R. at 3. If a user violates the Terms and Conditions, Squawker "flags" the user's profile. R. at 4. When a user's profile is flagged, other users must take extra measures to view the flagged user's posts. *Id.* Flagged users may watch a thirty-minute video on the Terms and Conditions and take a quiz to remove the flagging. *Id.*

Plaintiff, Avery Milner, is a freelance journalist whose work primarily consists of critiquing Delmont government officials over the age of sixty-five. R. at 4. On July 26, 2018, Plaintiff responded to a squeak by Governor Dunphry, stating "We gotta get rid of this guy." R. at 5. He followed this squeak with three additional squeaks, which contained emojis of an elderly man, a syringe, and a coffin. R. at 5-6. The four squeaks were posted within thirty seconds, violating Squawker's Terms and Conditions. R. at 6. Further, Defendant received numerous

complaints that Plaintiff's violation made the forum "unusable." *Id.* Therefore, Defendant promptly "flagged" Plaintiff's account. *Id.* Plaintiff refused to watch the thirty-minute Terms and Conditions video or take the Terms and Conditions quiz to remove the "flagging." *Id.*

Procedural History

Plaintiff filed this action in the United States District Court for the District of Delmont alleging that Squawker's flagging of his account was a violation of his First Amendment rights. R. at 1. On December 5, 2018, Plaintiff and Defendant filed cross motions for summary judgment. R. at 2. On January 10, 2019, the district court granted Plaintiff's motion for summary judgment, holding that Squawker's flagging of the account was a state action and that the website's Terms and Conditions unconstitutionally burdened Plaintiff's speech. R. at 13. Subsequently, the United States Court of Appeals for the Eighteenth Circuit reversed the district court's judgment, holding that Squawker was a private actor free of First Amendment restrictions. R. at 26. Further, the court held that Squawker's Terms and Conditions to be valid time, place, and manner restrictions on speech. *Id.* This Court granted Plaintiff's writ of certiorari. R. at 37.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Eighteenth Circuit was correct in reversing the district court's grant of summary judgment in favor of Plaintiff, finding that (1) Defendant was not a state actor for constitutional purposes and (2) Defendant's Terms and Conditions are constitutionally valid time, place, and manner restrictions. First, Defendant is not a state actor under the government function, coercion, or joint participant tests. Providing a public forum through social media is not traditionally and exclusively associated with the state. Governor Dunphry's suggestion that Defendant use a verified account system does not establish state actor

status due to compulsion. Finally, hosting a public forum or providing the state social media services cannot be joint participation due to the use of Squawker by state officials. Therefore, Defendant is not subject to First Amendment claims because Squawker is not a state actor under the Fourteenth Amendment.

Second, even if this Court finds that Squawker is a state actor, Defendant's restrictions on emoji use and spamming behavior are valid time, place, and manner restrictions. Defendant's restrictions are not content-based, are narrowly tailored to a significant interest, and allow for ample alternatives for Plaintiff's speech. The restrictions are not content-based because their purpose is to preserve a usable, enjoyable forum and protect modern morality. The restrictions are narrowly tailored to the significant interest in ensuring that all can speak and access the forum and apply only to harmful activities on only the Squawker platform. Finally, the restrictions allow for ample alternative modes of expression because Plaintiff may express his views on other websites or using methods other than the ones specifically prohibited. Therefore, Defendant's time, place, and manner restrictions do not violate Plaintiff's First Amendment rights. As a result, this Court should affirm the circuit court decision in favor of Defendant.

ARGUMENT

Standard of Review

The district court granted summary judgment on the issues before this Court. R. at 33, 35–36. This Court reviews summary judgment cases *de novo*. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 247 (1986).

I. FLAGGING PLAINTIFF'S ACCOUNT DID NOT VIOLATE HIS FIRST AMENDMENT RIGHTS BECAUSE DEFENDANT IS NOT A STATE ACTOR UNDER THE FOURTEENTH AMENDMENT.

Defendant's flagging Plaintiff's Squawker account did not violate Plaintiff's First Amendment rights because Defendant is not a state actor under the Fourteenth Amendment. The

Fourteenth Amendment, which applies the First Amendment to the states, restricts only government actions. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). However, some circumstances allow a private party to be considered a state actor for constitutional purposes, including "(i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." *Id.* (internal citations omitted). Thus, this Court's inquiry ends if it cannot fairly attribute Defendant's actions to the state. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). This limitation serves to "preserve[] an area of individual freedom" by limiting the reach of federal courts to conduct the government can control. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). Therefore, the requirements to qualify vary depending on the circumstances brought before the court. *Id.* at 939. This Court has explicitly stated that the Fourteenth Amendment state actor test is identical to the "under color of law" test used in claims under 42 U.S.C. § 1983 (2012). *Id.* 928–29. Parties agree that Governor Dunphry's official Squawker page is a public forum. R. at 1.

Defendant is not a state actor for the purpose of constitutional claims when enforcing Squawker's Terms and Conditions. Defendant does not perform a government function because operating a forum, such as a social media network, is not exclusively associated with the government. Further, the governor's suggestion of a verified account system does not constitute coercion. Finally, providing a service to the government or operating a government forum is not a joint activity with the government. Therefore, this Court should affirm the circuit court's decision in favor of Defendant.

*A. **Defendant is not a state actor because hosting Governor Dunphry's Squawker account is not a government function.***

Defendant is not a state actor because he did not perform a government function. To be considered a "government function," an activity must be "traditionally and exclusively performed" by the government. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1929–30. This requirement applies even if the function is essential to the public. *Id.* The fact that the government performs or used to perform this function is not enough without traditional exclusivity. *Id.* at 1928. This Court has noted that elections are one of the "very few" functions traditionally exclusive to the government. *Flagg Bros. v. Brooks*, 435 U.S. 149, 158 (1978).

Hosting a forum for speech is not a government function under the state actor doctrine. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1930–31. In *Manhattan Community Access Corp.*, the city designated the defendant to operate its public access cable network under state law. *Id.* at 1926–27. This Court found that subjecting private property owners who host public forums to the First Amendment would "disregard the constitutional basis on which private ownership of property rests in this country." *Id.* at 1931 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 517 (1976)). Therefore, the Court held that hosting a public forum is neither a traditional nor an exclusive government function. *Id.* at 1930.

An entity is not performing a government function when it provides a public service as a state contractor. *See Rendell-Baker*, 457 U.S. at 842. In *Rendell-Baker*, the defendant was a private school that educated students who local public schools referred due to "difficulty completing public high schools" pursuant to contract. *Id.* at 831–33. This Court found that the funding relationship between the state and the defendant was immaterial. *Id.* at 842. Further, it held that education is not a government function even though it is a "public function" because education is not "the exclusive province of the State." *Id.*

An actor does not perform a government function on account of being the sole provider of an "essential public service." *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351–53 (1974). In *Jackson*, the defendant was a privately-owned utility company that was the sole electricity provider in plaintiff's area pursuant to a state certificate of public convenience. *Id.* at 346–47, 351. This Court stated that providing utilities is neither traditionally nor exclusively a function of the state, and the company's state-granted monopoly does not impact that analysis. *Id.* at 351–53. Further, the case did not involve the utility's exercise of state powers, such as eminent domain. *Id.* at 353. Therefore, this Court held that the defendant's service was not a government function. *Id.* at 351–52.

A privately-owned accommodation can be a government function if its function is public in nature and managed by the government. *Evans v. Newton*, 382 U.S. 296, 301–02 (1966). In *Evans*, a racially segregated park was owned by a private trust, but the city had formerly served as one of the trustees and continued to maintain the park. *Id.* at 301. This Court considered a park's nature by analogizing it to the public function of a police or fire department. *Id.* at 302. Therefore, it held that the park was subject to the Fourteenth Amendment because the service provided by the park was "municipal in nature" and "the tradition of municipal control had become firmly established." *Id.* at 301–02.

In this case, Defendant is not a state actor because he is not performing a traditional and exclusive governmental function. This is because hosting a forum for public speech is not traditionally or exclusively in the government's domain. In *Manhattan Community Access Corp.*, the defendant was designated by the city to operate a public access cable channel for residential use. 139 S. Ct. at 1926–27. Here, Defendant's business is the hosting of a forum for public speech in which the governor independently chose to participate by creating an official

Squawker account. R. at 2–3. In *Manhattan Community Access Corp.*, this Court held that hosting a public forum, even if the government chose the host, is not a government function. 139 S. Ct. at 1930–31. Therefore, this Court should hold that Defendant is not engaged in a government function.

Defendant is not performing a government function because he is simply providing a service to the public as a contractor for the state. In *Rendell-Baker*, a private school provided education to students removed from the public-school system as a contractor for the state and local school districts. 457 U.S. at 831–33. In this case, the governor contracted with Defendant to host his Squawker page by creating an account and agreeing to the Terms and Conditions, agreed to by every other user. R. at 3. Because this Court in *Rendell-Baker* held that the defendant was not performing a governmental function, 457 U.S. at 842, it should hold that Defendant is not performing a governmental function in this case.

Defendant does not perform a government function even if one assumes, *arguendo*, that he is the sole provider of an important public service. In *Jackson*, the defendant was the sole electrical utility in the plaintiff's state. 419 U.S. at 346–47, 351. Here, Defendant provides governmental communications as the sole company operating the Squawker platform. *See* R. at 14. It is unclear whether Defendant is also the sole provider of the governor's or the state's entire social media presence, although the account has significantly increased the governor's social media notoriety. R. at 24. The *Jackson* Court held that a monopoly on a public service, even a utility, is not a government function. 419 U.S. at 351–52. Therefore, the Court should hold that a monopoly over a government's social media presence or a social media platform should not be considered a government function.

Defendant's platform does not serve a government function because it is not maintained or managed by the state. In *Evans*, a park was transferred from government ownership to that of a trustee, but the municipality continued to maintain the grounds. 382 U.S. at 301. In this case, Squawker has been a private corporation operating under its inventor and chief executive operator throughout its history. See R. at 2, 14. The only involvement of the government in the platform's operation is the governor's one suggestion that it provide verified accounts. R. at 16. Because there is no history of government control or maintenance of the platform as there was in *Evans*, 382 U.S. at 301–02, the Court should hold that hosting the platform is not a government function. Defendant is not performing a government function and, thus, is not a state actor because his actions are not within the traditional and exclusive domain of the government.

B. Defendant is not a state actor because the State of Delmont did not coerce him into adopting Squawker's policies or flagging Plaintiff's Squawker account.

Defendant is not a state actor because the state did not coerce him into adopting these policies. A private party and the state are liable for depriving a person of his Fourteenth Amendment rights if the state compelled the offending act. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 170–71 (1970). However, "mere acquiescence" to private action is not enough to implicate state involvement. *Flagg Bros.*, 436 U.S. at 164. The government must have coerced the actor or "provided such significant encouragement" that the decision must be deemed to be state's. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The test may even be satisfied through significant compulsion using a state-mandated custom carrying the force of law, *Adickes*, 398 U.S. at 171, or a facially neutral statute, *Moose Lodge Number 107 v. Irvis*, 407 U.S. 163, 178–79 (1972).

A private party's policy is compelled when state law requires that party to comply with its own policies by law. *Moose Lodge No. 107*, 407 U.S. at 177–79. In *Moose Lodge Number*

107, the defendant had a rule prohibiting African Americans from joining the club, *id.* at 165–66, and had a private club liquor license that required the holder to enforce its membership rules, *id.* at 177. Although this Court found that the law was facially neutral and existed for legitimate reasons, its impact was to require the club to discriminate based on race. *Id.* at 177, 179. Therefore, this Court held that the defendant was a state actor due to compulsion. *Id.* at 178–79.

A private party's action is not compelled for the purpose of the state actor doctrine if it is only suggested by the government. *Flagg Bros.*, 436 U.S. at 164–65. In *Flagg Bros.*, the plaintiff claimed that the state's optional resale remedy adopted by statute constituted compulsion of defendant's remedial actions, making the defendant a state actor. *Id.* at 164. Despite suggesting a private remedy, this Court characterized its codification as the embodiment of deciding not to act and mere acquiescence to private dispute resolution. *Id.* at 164–65. Therefore, this Court held that the statute did not constitute coercion that would make defendant a state actor. *Id.* at 166.

In this case, Defendant is not a state actor because his actions are not compelled by the state. Defendant is not compelled by the state because there is no statute mandating the platform enforce its Terms and Conditions. In *Moose Lodge Number 107*, the defendant's membership criteria banned African Americans from joining, 407 U.S. at 165–66, and state law required the defendant to enforce its membership criteria, *id.* at 177. Here, the only involvement the state has had with Defendant's Terms and Conditions is the governor's suggestion that Defendant, his friend, allow verified accounts for public officials. R. at 3, 16. Further, there is no indication that any state laws were implicated or that the governor had any input on the flagging policy. *See* R. at 14–18, 21–24. This case does not implicate compulsion by state law, unlike that of *Moose Lodge Number 107*, 407 U.S. at 177. Therefore, this Court should hold that Defendant was not compelled to act.

The state is not compelling Defendant because a remedy suggested by a state is not sufficiently coercive to attribute its use to the state. In *Flagg Bros.*, the state provided the defendant with the optional remedy of selling the plaintiff's goods by statute. 436 U.S. at 164. Here, the state's involvement in Defendant's adoption of the Squawker Terms and Conditions is limited to the governor's mere suggestion that the platform give public officials verified account status. *See* R. at 16. In *Flagg Bros.*, this Court held that providing a remedy by statute was not coercive. 436 U.S. at 166. Therefore, this Court should hold that informally suggesting an improvement to Defendant's platform is not coercive. This Court should hold that Defendant is not a state actor due to compulsion because Defendant was not acting due to legal requirement and the governor merely suggested the addition of verified accounts.

C. Defendant is not a state actor because he did not jointly participate with the State of Delmont when it flagged Plaintiff's Squawker account.

Defendant is not a state actor because the state was not a joint participant in Defendant's actions. A party may be considered a state actor if "he has acted together with or has obtained significant aid from state officials." *Lugar*, 457 U.S. at 937. Thus, a non-state actor must be willfully participating in the conduct with the state or the state's agents. *Id.* at 941. Further, a private party's status as a government contractor does not make its independent actions "fairly attributable to the state" even if the contractor's entire business is dependent on government contracts. *Rendell-Baker*, 457 U.S. at 840–41. This Court has recognized that, because many private entities are granted government contracts, licenses, and monopolies, holding all similarly situated entities liable as state actors would envelop "a large swath of private entities." *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1932.

A private entity is not a joint participant simply because the government designates it to operate a speech forum. *See Manhattan Cmty. Access Corp.*, 139 S. Ct at 1932. In *Manhattan*

Community Access Corp., the city designated the defendant to operate its public access channel pursuant to state law. *Id.* at 1926–27. This Court recognized that the designation was similar to a government license or contract, which is not sufficient to designate an entity as a state actor. *Id.* at 1931. It stated that holding all such entities to be state actors would impact too many private entities. *Id.* at 1932. Therefore, this Court held that the defendant was not acting as a joint participant by hosting the channel. *Id.*

A party that uses state officers to act against another party is a state actor due to joint participation. *See Lugar*, 457 U.S. at 940–42. In *Lugar*, the defendant used the state's ex parte attachment procedures to restrict the plaintiff's property without proper grounds. *Id.* at 924–25. This Court noted that "jointly engag[ing]" in an act with the government as a "willful participant" was enough for the private party to be held liable as a state actor. *Id.* at 941–42. Therefore, it found that the use of state procedures constituted joint participation with the state. *Id.* at 941.

In this case, Defendant is not a state actor because he is not jointly participating with the government in flagging Plaintiff's account. Defendant is not a joint participant because he was merely designated to operate the government's forum. In *Manhattan Community Access Corp.*, the defendant was designated by the city to operate a public access channel required by state law. 139 S. Ct. at 1926–27. Here, the governor chose the Defendant's platform to operate his official social media presence by creating an account. R. at 2–3. This Court ruled that the defendant in *Manhattan Community Access Corp.* was not acting jointly with the government. 139 S. Ct. at 1932. Therefore, this Court should hold the same regarding Defendant in this case.

Defendant is not a joint participant because he did not invoke the assistance of state officers. In *Lugar*, the defendant used state judicial procedures to attach the plaintiff's property.

457 U.S. at 924–25. Here, Defendant enacted and personally implemented Squawker's Terms and Conditions. R. at 3. Further, Defendant enforced the Terms and Conditions by personally flagging Plaintiff's Squawker account. R. at 6. Unlike the defendant in *Lugar*, Defendant did not use state officers or procedures to enforce the Terms and Conditions. *See* 457 U.S. at 924–25. Therefore, this Court should hold that Defendant is not a joint participant with the state. Because Defendant did not use state officers to enforce the Terms and Conditions, he did not jointly participate with the government. Further, he is not a state actor for constitutional purposes because he was not acting jointly with the government, compelled to act by the government, nor performing a government function.

II. DEFENDANT'S SPEECH RESTRICTIONS DO NOT VIOLATE PLAINTIFF'S FIRST AMENDMENT RIGHTS BECAUSE THE RELEVANT PROVISION IS A CONTENT-NEUTRAL TIME, PLACE, AND MANNER RESTIRCTION.

Even if the Court finds that Defendant is a state actor pursuant to the Fourteenth Amendment, Defendant's Terms and Conditions do not violate Plaintiff's First Amendment rights because the applicable provisions are valid time, place, and manner restrictions. Government actors may restrictions the time, place, and manner of protected speech, consistent with the First Amendment, if the restriction is (1) content-neutral, (2) "narrowly tailored to serve a significant government interest," and (3) "leave[s] open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). One does not have the First Amendment right to communicate his message at any time, any place, or any manner he prefers. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). In applying these principles, this Court considers the special attributes of the medium of speech at issue. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969) ("Without government control, the medium would be of little use because of the cacophony of competing voices, none of which

could be clearly and predictably heard."). The defining principle is to protect a marketplace of ideas that allows all to express and hear different views. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

Squawker's Terms and Conditions are valid because they constitute a content-neutral time, place, and manner restriction. Defendant's bans on violent or offensive emoji use and spamming behavior are not content-based because they serve the purpose of promoting a usable platform, not of restricting the content or viewpoints expressed. Defendant's interest in maintaining an enjoyable and usable public space is a significant government interest he may pursue through implementing Squawker's Terms and Conditions. Further, the Terms and Conditions are narrowly tailored because they target only specific, problematic forms of speech in one specific segment of the internet. Finally, the restrictions provide ample alternatives for Plaintiff's speech because they merely limit the location and intensity of the speech. Therefore, this Court should affirm the circuit court's decision in favor of Defendant.

*A. **Defendant's emoji and spamming restrictions are constitutionally valid time, place, and manner restrictions because they are content-neutral.***

The restrictions are valid time, place, and manner restrictions because that are content-neutral. The test regarding content-neutral speech restrictions is a two-part test. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). First, a speech restriction is content-neutral if it does not, "'on its face[,]' draw[] distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)). Second, the speech restriction must be "justified without reference to the content of the regulated speech." *Id.* (quoting *Ward*, 491 U.S. at 791). This protection applies to both subject-matter and viewpoint-based content discrimination. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Court must consider the context of the speech and medium of expression when applying these tests. *FCC v. Pacifica Found.*, 438 U.S. 726, 744, 748 (1978).

Speech may be subject to a time, place, and manner restriction based on its content if the restriction is not based on a topic or viewpoint yet targets speech offensive to modern moral standards. *See Pacifica Found.*, 438 U.S. at 745–48. In *Pacifica Foundation*, the FCC cited a radio station for playing a monologue about offensive words one could not say on the radio, listing words numerous times. *Id.* at 729. The Court held that such vulgar and offensive words are not protected where they lack literary, political, or scientific value. *Id.* at 746–47. Further, it said such speech is not an "essential part of any exposition of ideas, and [is] of such slight social value . . . that any benefit . . . is clearly outweighed by the social interest in order and morality." *Id.* at 746 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

Specific types of speech may be subject to time, place, and manner restriction if they are based on that speech's negative effects rather than its content. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). In *City of Renton*, the defendant enacted an ordinance prohibiting pornographic theatres within 1,000 feet of any residential zone, house, park, school, or church. *Id.* at 43. The ordinance had the purpose of preventing "severe impact[s]" on other businesses or residents. *Id.* at 44. The Court held that the ordinance was content-neutral because its purpose was to "combat . . . undesirable secondary effects" such as maintaining property values and protecting city businesses. *Id.* at 48. Because the statute was not meant to suppress offensive speech, the Court held the restriction to be content-neutral. *Id.* at 49.

A restriction is not content-based if it limits the intensity of the speaker's message to protect the interests of others. *See Ward*, 491 U.S. at 792. In *Ward*, the defendant required users of a bandshell to take steps to limit its volume to ensure that the noise did not interfere with

others' use of nearby areas. *Id.* at 784. This Court held that the restriction "ha[d] nothing to do with content" and, thus, was constitutional. *Id.* at 792 (quoting *Boos v. Barry*, 485 U.S. 312, 320 (1988)). Further, the Court found that limiting the volume of the speech does not, alone, interfere with artistic control in a way that makes the restriction content-based. *Id.* at 792–93.

A restriction that applies to only speakers within a certain profession or with a certain message is content-based. *See Sorrell*, 564 U.S. at 563–64. In *Sorrell*, the defendant's statute targeted the access of pharmaceutical companies to prescriber-identifying information by banning its sale to entities using said information for marketing purposes. *Id.* This Court specifically noted that entities with numerous other purposes and viewpoints could purchase the information. *Id.* at 564. Therefore, it held that the restriction was content-based because it disfavored specific speakers and messages. *Id.*

A restriction that applies differently based on the speech topic is a content-based restriction. *Reed*, 135 S. Ct. at 2227. In *Reed*, the defendant enacted a sign ordinance that applied different restrictions on the size and duration of posting based on the type of message a sign conveyed, including political, ideological, directional, and garage sale messages. *Id.* at 2224–25. This Court found that the ordinance applied differently based on a sign's subject matter, function, or purpose. *Id.* at 2227. Therefore, it held that the ordinance was content-based on its face and, thus, subject to strict scrutiny. *Id.*

1. Defendant's ban on violent or offensive emoji use is not content-based because its purpose is not to restrict the content or viewpoints Plaintiff may express.

In this case, Defendant's restriction on the violent or offensive use of emojis is not content-based because its purpose is not to control Plaintiff's message; instead, it targets speech to enforce modern moral standards. In *Pacifica Foundation*, the plaintiff was cited for broadcasting offensive words in the middle of the day. 438 U.S. at 729. Here, Plaintiff was

flagged for violating the Terms and Conditions through the "use of emojis [emoticons] in a violent or threatening manner." R. at 3, 6. Like the prohibition on offensive words in *Pacifica Foundation*, banning the violent use of emojis upholds modern conceptions of moral speech without restricting the ideas expressed. 438 U.S. at 746–47. Therefore, this Court should hold that the restriction on violent use of emojis content-neutral.

The ban on using emojis in a violent manner is constitutional because it seeks to regulate Plaintiff's speech based on the speech's secondary effects. In *City of Renton*, the defendant passed an ordinance restricting the placement of adult theatres, 475 U.S. at 43, to prevent crime and protect area businesses and residents, *id.* at 48. Here, the purpose of the restriction on emoji use is to retain user interest in the platform. R. at 22. It is also meant to ensure that the platform is functional for all users. R. at 3–4. In both cases, the purpose of the restriction was not based on the viewpoint of the speaker or content of his speech. *See City of Renton*, 475 U.S. at 44. Because This Court should hold that Defendant's restriction is not content-based based on its holding in *City of Renton*. *Id.* at 48–49. Because the restriction on the violent or offensive use of emojis is not meant to restrict the speaker's message, it does not constitute a content-based restriction.

2. Defendant's ban on spamming behavior is not content-based because its purpose is to maintain a usable platform.

The ban on spamming behavior is not content-based because its purpose is not to restrict the type or viewpoint of speech even if this Court rules that the emoji restrictions are content-based. Defendant's ban on spamming behavior is not content-based because it merely limits the speech's intensity to accommodate other speakers. In *Ward*, the defendant required bandshell users to limit their volume to allow others to use nearby residences and quiet spaces without interference. 491 U.S. at 784. Here, Defendant is restricted from posting or sharing content by

squeak more than four times within a thirty-second period to ensure usability for all account holders. R. at 3–4. The *Ward* Court held that intensity restrictions applied to all speakers equally are not content-based. 491 U.S. at 792. Therefore, this Court should hold that Defendant's restrictions are not content-based.

Defendant's ban on spamming behavior is not content-based because it applies to all speakers, regardless of type or message. In *Sorrell*, the defendant prohibited the sale of patient data to pharmaceutical manufacturers or speakers who intended to use the data to market pharmaceuticals. 564 U.S. at 563–64. Here, the restriction applies to all speakers and speech without distinction based on type or message. *See* R. at 3–4. Unlike in *Sorrell*, 564 U.S. at 563–64, the spamming restriction does not make content-based or speaker-based distinctions. Therefore, this Court should hold that Defendant's restriction is not content-based.

Defendant's ban on spamming behavior is not content-based because it does not apply different standards to different categories of speech. In *Reed*, the defendant enacted an ordinance that applied different restrictions to signs based on the topic of each sign. 135 S. Ct. at 2224–25. In this case, the ban on spamming behavior applies the same standard to all speech that meets the frequency criteria. *See* R. at 3–4. The *Reed* Court held that the restriction in that case was facially content-based. 135 S. Ct. at 2227. Because this spamming restriction is not applied differently based on content, this Court should hold that this restriction is not content-based. Therefore, the restrictions on emoji use and spamming behavior are valid, content-neutral time, place, and manner restrictions.

B. Defendant's bans on spamming and violent emoji use constitutionally restrict the time, place, and manner of speech because they are narrowly tailored to serve a significant government interest.

The spamming and emoji restrictions are valid time, place, and manner restrictions because they are narrowly tailored to serve Defendant's asserted interest. A speech restriction is

valid if it is "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 796 (quoting *Clark*, 468 U.S. at 293). The regulation cannot "burden substantially more speech than is necessary to further" the interest such that a significant portion of the burden does not advance the government's interests. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). However, the restriction need not be the least restrictive means of advancing the Defendant's interest. *Clark*, 468 U.S. at 299. Further, the Court considers a forum's "special attributes," including its "characteristic nature and function," in determining the appropriate breadth of the restriction. *Heffron*, 452 U.S. at 650–51.

The government has a significant interest in preserving public fora for the public's use. *See Clark*, 468 U.S. at 296, 298–99. In *Clark*, the defendant prohibited sleeping as part of a demonstration in the National Mall based on its "substantial interest in maintaining the parks" in appearance and usability. *Id.* at 296. This Court recognized that all park users must abide by traffic, sanitation, and other laws to preserve public peace. *Id.* at 298. Further, it noted that mass refusal to comply with such rules could result in harm to the parks and inaccessibility to the public. *Id.* at 297–98. As a result, it held that the government had a substantial interest in preserving public property. *Id.* at 299.

The government has a substantial interest in protecting private and public spaces from excessive noise. *See Ward*, 491 U.S. at 796. In *Ward*, the defendant limited the volume of groups using the bandshell to prevent excessive noise from disturbing surrounding areas. *Id.* at 784. This Court held that limiting the intensity of speech was narrowly tailored to the government's significant interest in protecting "citizens from unwelcome noise." *Id.* at 796 (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)).

The government may limit specific modes of speech to or from specific areas pursuant to a significant interest. *See City of Renton*, 475 U.S. at 52. In *City of Renton*, the defendant required adult theatres to locate at least 1,000 feet from residential zones, houses, schools, and churches. *Id.* at 43. This Court recognized that adult theatres had unique secondary effects that justified targeting them specifically. *Id.* at 53. Therefore, it held that said restrictions targeting the theatres and limiting the areas of town where they may be located are narrowly tailored. *Id.* at 52.

A ban on certain forms of speech in a specific public forum may be narrowly tailored to a government interest. *See Clark*, 468 U.S. at 296. In *Clark*, this Court found that allowing camping in the monument parks was "totally inimical" to the purposes of the monuments. *Id.* Therefore, it found the ban was narrowly tailored to the government's substantial interest. *Id.*

1. The Terms and Conditions serve the government's significant interest in maintaining the forum for public use and preventing excessive noise.

Defendant's ban on the violent use of emojis and spamming behavior is a valid time, place, and manner restriction because it serves significant governmental interests. Defendant's ban serves Defendant's significant interest in maintaining the forum for public use. In *Clark*, the Court held that a ban on camping in the national monument parks served the significant interest of maintaining the parks' appearance and usability. 468 U.S. at 296. Here, the restrictions serve Defendant's interest in providing a usable platform and positive user experiences. R. at 3. Because this Court held that such an interest is significant in *Clark*, 468 U.S. 291–92, it should hold that the restrictions in this case serve a significant interest.

Defendant's restriction on spamming behavior is a valid time, place, and manner restriction because it serves Defendant's significant interest in protecting the public from excessive noise. In *Ward*, this Court held that the defendant's interest in protecting surrounding

areas from excessive noise was significant. 491 U.S. at 796. Here, the Defendant seeks to limit the frequency or intensity of the posting to provide for a usable forum and positive experience for users, ensuring all can speak. R. at 3. Because this Court held that protecting the use of surrounding areas from excessive noise was a significant governmental interest in *Ward*, 491 U.S. at 796, it should hold that Defendant's interest is also significant. Defendant's restrictions are narrowly tailored to a significant government interest because Defendant seeks to prevent excessive noise and maintain the public forum.

2. The restrictions are narrowly tailored to the government's interest because they apply only to specific types of speech and in one location.

Defendant's restrictions are narrowly tailored to the government's interest in protecting the usability and enjoyment of the Squawker platform. Defendant's restrictions on spamming behavior and emoji use are narrowly tailored zoning restrictions. In *City of Renton*, the defendant required adult theatres to locate 1,000 feet from certain buildings to limit that speech's effects. 475 U.S. at 43. Here, the restrictions and flagging provisions of the Terms and Conditions only apply to activity on the Squawker website. *See* R. at 3–4. Because Defendant only seeks to restrict individual modes of expression on one internet platform, the restrictions should be upheld as constitutional, similar to those in *City of Renton*, 475 U.S. at 43.

Defendant's restrictions on emoji use are narrowly tailored because the bans on spamming behavior and violent use of emoji apply to specific speech techniques. In *Clark*, the defendant banned camping in monument parks as part of a demonstration, 468 U.S. at 291–92, in order to protect the parks' appearance and usability, *id.* at 296. Here, the restrictions only apply to spamming behavior and violent or offensive emoji use. R. at 3–4. These strategies, similar to the camping in *Clark*, are "totally inimical" to the purpose and well-being of the platform. 468 U.S. at 296. Because this Court ruled that the *Clark* restrictions were narrowly tailored, *id.*, it

should hold so regarding Defendant's restrictions. Because the spamming and emoji restrictions only apply on the Squawker website and only to specific actions, they are narrowly tailored. Therefore, the restrictions are valid time, place, and manner limitations because they are narrowly tailored to a significant governmental interest.

C. Defendant's Terms and Conditions constitutionally restrict the time, place, and manner of speech because they allow ample alternate channels of communication.

The Terms and Conditions are a valid time, place, and manner restriction because they allow ample alterative channels for Plaintiff's speech. A speech restriction is not valid as a time, place, and manner restriction unless there are "availab[le] alternative channels of communication." *Members of the City Council of Los Angeles*, 466 U.S. at 815. When a time, place, and manner restriction places limits in a particular forum, it is constitutionally valid if the speaker is not denied complete access to the forum and has the ability to spread his message outside that forum. *See Heffron*, 452 U.S. at 654–55.

A place restriction that permits other physical locations for speech allows for ample alternative modes of communication. *See City of Renton*, 475 U.S. at 53–54. In *City of Renton*, the defendant's ordinance limited the location of adult theatres to five percent of the town's land area, some of which was already in active use. *Id.* at 53. This Court found that placing restrictions on specific speakers does not, by itself, deny the speaker ample alternate modes of expression. *See id.* at 54. It simply noted that the government may not have the "effect of suppressing, or greatly restricting access to, lawful speech." *Id.*. Therefore, this Court held that the ordinance provided ample alternate modes of communication. *Id.*

Restrictions that limit the intensity of speech in a venue allow for ample alternate modes of communication. *See Ward*, 491 U.S. at 802. In *Ward*, the defendant enacted restrictions in the forum to limit the volume of speech. *Id.* This Court recognized that the restriction still allowed

expression in the forum and did not effect "the quantity or content of that expression." *Id.* Therefore, this Court held that the restriction afforded ample alternative modes of communication. *Id.*

In this case, Defendant's restrictions are valid because they allow ample alternatives for Plaintiff's speech. The restrictions allow for ample alternative modes of expression because they only restrict the location of the speech. In *City of Renton*, the defendant restricted adult theatres to less than one-tenth of the town. 475 U.S. at 53. Here, the Terms and Conditions only restrict Plaintiff's speech within this forum, as opposed to the internet as a whole. *See* R. at 3–4. Because this Court held the restrictions in *City of Renton* constitutional, 475 U.S. at 54, it should hold Defendant's restrictions constitutional in this case.

Defendant's ban on spamming behavior, additionally, allows for ample alternative modes of expression because it merely limits the intensity of the speech. In *Ward*, the defendant restricted the volume of performances. 491 U.S. at 802. Here, the Terms and Conditions limit the intensity of Squawker users' speech by prohibiting four or more posts within thirty seconds. R. at 3–4. Therefore, because this Court held the restriction valid in *Ward*, 491 U.S. at 802, it should do so in this case. Defendant's restrictions are valid time, place, and manner restrictions because the limits on location and intensity of the speech allow for ample alternatives for Plaintiff's speech and are content-neutral and narrowly tailored.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the United States Court of Appeals for the Eighteenth Circuit.

Respectfully Submitted,

Team 23

Counsel for Responden

BRIEF CERTIFICATE

As required by competition Official Rule III(C)(3), the counsel of Team 23 certify the following:

1. The preceding brief is solely the work product of the members of Team 23;
2. Team 23 has conducted itself in accordance with the honor code governing the law school the members attend; and
3. Team 23 has complied with the governing competition rules.

s/_____

Team 23

Counsel for Respondent