No. 17-874

IN THE SUPREME COURT OF THE UNITED STATES

AVERY MILNER,

Petitioner,

v.

MAC PLUCKERBERG,

Respondent.

ON WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR RESPONDENT SEEKING AFFIRMANCE OF THE RULING BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT

Team 3
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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighteenth Circuit erred in concluding that a private entity hosting a public forum did not engage in state action by applying its flagging policy; and

2. Whether the Eighteenth Circuit erred in holding that the private entity's Terms and Conditions is a content-neutral time, place, or manner restriction that is not violative of the First Amendment.

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The January 10, 2019 decision of the United States District Court for the District of Delmont, C.A. No. 16-CV-6834, granting Plaintiff Milner's motion for summary judgment and denying Defendant Squawker's motion for summary judgment is unreported and can be found in the Record, R. at 1-13. The decision of the United States Court of Appeals for the Eighteenth Circuit, No. 16-6834, reversing the district court's decision is unreported and can be found in the Record, R. at 25-36.

STATEMENT OF JURISDICTION

The United States District Court for the District of Delmont had original jurisdiction pursuant to 18 U.S.C. §3231 (2019), because this case involves allegations of an abridgement of speech as protected under the First Amendment to the United States Constitution. R. at 1-2. The United States Court of Appeals for the Eighteenth Circuit had jurisdiction over this appeal under 28 U.S.C. §1291 (2019), because the appeal was taken from a final judgment of the district court entered on January 10, 2019. R. at 13. This Court has jurisdiction under 28 U.S.C. §1254(1) (2019), because this Court granted certiorari. R. at 37.

CONSTITUTIONAL PROVISION

This case involves the First Amendment of the United States Constitution, which provides in relevant part, "Congress shall make no law . . . abridging the freedom of speech." *U.S. Const. amend. I.*

STATEMENT OF THE CASE

Statement of Facts

Squawker is a social media platform that was founded by Mackenzie "Mac" Pluckerberg in February 2013. R. at 21. Squawker is a multinational social media platform. R. at 14. Squawker allows persons to become a user, a "Squeaker" by creating a profile from which users may then post "squeaks." R. at 15. "Squeaks" are sentences containing 280 words of less. R. at 15. Users may create their own squeaks, or they may post/share links to other types of media on their profile. R. at 15. Once a squeak is posted by a user, it is uploaded to their profile and other users may interact with the squeak. R. at 15. Users can interact with each other by posting comments to squeaks or liking or disliking another user's squeak. R. at 15.

All users who join the platform must consent to the Terms and Conditions of the platform, otherwise they cannot create a profile or post squeaks. R. at 15. If a user violates the Terms and Conditions of Squawker, their account will be flagged according to the flagging policy. R. at 15. Accounts will be flagged based on the following: …"behavior that promotes violence against or directly attacks or threatens other people on the basis of race, ethnicity, national origin, gender, gender identity religious affiliation, age, disability, or serious disease." R. at 15. Squawker also prohibits the use of emojis in a violent or threatening manner. R. at 15. Users are also prohibited from squeaking in high frequencies, being four or more squeaks squawked within 30 seconds of each other. R. at 15. Squeakers who have violated the Terms and Conditions will have their account flagged, which can be removed through a short training video and an online quiz. R. at 16. Being flagged, however, does not delete the Squeaker's account or any or its comments; rather another user may view the flagged content by consenting to it. R. at 28.

On July 26, 2018, Governor Dunphry of Delmont posted a squeak that contained the link to a description of a recent bill proposal. R. at 29. Mr. Milner, a freelance journalist and resident of Delmont, had severe disdain for the bill and commented on the Governor's squeak after drinking several alcoholic beverages. R. at 28-29. Mr. Milner posted: "We gotta get rid of this guy," as well as three emojis displaying an elderly man, a needle, and a coffin. R. at 29-30. Milner posted these comments in rapid succession, posting them all within the same minute. R. at 30. Mr. Milner's comments about Governor Dunphry received over one thousand dislikes and were reported to Squawker's creator, Mr. Pluckerberg, over two thousand times. R. at 30. Mr. Pluckerberg was monitoring the Governor's account and flagged Mr. Milner's account for violating Squawker's Terms and Conditions. R. at 30. The following day, Milner received a notification that his account was flagged by Squawker, along with directions about how to successfully complete the video and quiz so that the flagging could be removed from his account. R. at 30. Milner contends that other "workarounds" to engage with the Governor's account are unduly burdensome. R. at 31. Milner does not want to partake in the creation of another Squawker account, viewing the Governor's squeaks without being logged into Squawker and therefore unable to comment, nor does he want to watch the video and complete the test to have his account unflagged. R. at 31.

Procedural History

On or about December 2018, Petitioner's brought suit in the United States District Court for the District of Delmont alleging that Squawker violated his First Amendment rights to the freedom of speech by flagging his Squawker account. R. at 1-2. On December 5, 2018, Petitioner and Respondent filed cross motions for summary judgment. R. at 2. The legal issues involved were allegations that Squawker is a state actor and that its flagging policy violates the First

Amendment. R. at 2. The United States District Court for the District of Delmont held that Squawker is a state actor and therefore the Terms and Conditions that govern Squawker user Mr. Milner substantially burdens his speech as a violation of the First Amendment, which is applied to Delmont through the Fourteenth Amendment. R. at 2.

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States should affirm the decision of the United States Court of Appeals for the 18th Circuit because the 18th Circuit did not err in concluding that Squawker did not engage in state action when it applied is flagging policy to Mr. Milner, and it did not err in concluding that Squawker's Terms and Conditions is a content-neutral time, place, or manner restriction that is not violative of the First Amendment. Squawker is a private entity and as such does not constitute a state actor under the First Amendment. The prohibition against regulating speech is reserved solely for government actors, which means that a private party like Squawker did not engage in any prohibited regulation of speech when it flagged Avery Milner's account. To be a function of the state, the government must have traditionally performed that function. Private entities regulating content on social media is not traditionally a government function. Squawker did not violate Petitioner's right to free speech under the First Amendment because as a private entity, Squawker's flagging policy uses its own discretion and is not bound by constitutional constraints.

In the alternative, Squawker's Terms and Conditions are content neutral because they are not directed at Milner's speech. Squawker seeks to make its platform a safe and usable environment for all, and its Terms and Conditions are in place to keep violent or hatred speech out of the squeaks as well as making sure all users can fairly use the platform. The Terms and Conditions are content neutral even though they may have had an incidental effect on Milner or

other users. Squawker's Terms and Conditions were narrowly tailored because they sought to regulate the specific interest of keeping their platform safe and usable for others. Further, Petitioner had other adequate means of achieving his communication. Therefore, this court should affirm the finding of the 18th Circuit because Squawker is a private entity that is not constrained by the First Amendment, and in the alternative, Squawker's Terms and Conditions were content-neutral and not aimed at Milner, meaning his First Amendment rights were not violated.

ARUGMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT DID NOT ERR IN CONCLUDING THAT SQUAWKER DID NOT ENGAGE IN STATE ACTION WHEN IT APPLIED ITS FLAGGING POLICY TO PETITIONER

The First Amendment of the United States Constitution states in pertinent part that "Congress shall make no law . . . abridging the freedom of speech." *U.S. CONST. amend. I*. Such protections have also been applied to the several states through the doctrine of incorporation through the Due Process Clause of the Fourteenth Amendment. "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." *U.S. CONST. amend. XIV*. However, even though the right to free speech is protected against abridgement, "The Free Speech Clause does not prohibit private abridgement of speech." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). In the instant matter before the Court, Respondent is the Chief Executive Officer of Squawker, a privately owned and operated social media platform; therefore, when Squawker applied its flagging policy to Petitioner's account, it did so as a private entity and did not engage in any prohibited state action.

A. Squawker Is A Private Entity and It Did Not Engage In State Action By Applying Its Flagging Policy To Petitioner's Account Because The Operation Of A Social Media Platform Is Not A Traditional Or Exclusive Function Of The State.

Squawker is a private social media platform and when it applied its flagging policy to Petitioner's account it did not engage in state action because the operation of a social media platform is not a traditional or exclusive function of the state. The prohibition against the policing of free speech is held strictly against the Federal and State governments, making private parties immune to actions brought against them for the abridgment of free speech rights under the Constitution. However, this Court has recognized that a private entity may act in the place of the state through the State-Action Doctrine. The "state action doctrine distinguishes the government from individuals and private entitles." *Halleck* at 1928. By distinguishing "between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty." *Id*. A private entity may qualify as a state actor when it exercises a function "traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 352 (1974). "To qualify as a traditional, exclusive public function within the meaning of [sic] state-action precedents, the government must have traditionally and exclusively performed the function. *Halleck* at 1929.

In *Packingham v. North Carolina,* this Court announced that the First Amendment applies to the "vast democratic forums of the Internet in general . . . and social media in particular." *Packingham v. North Carolina*, 137 S. C.t 1730, 1735 (2019). However, a growing consensus of lower courts are dismissing actions brought by individuals alleging an abridgment of free speech rights by private social media platforms because private entities and are not constrained by the First Amendment. *See Nyabwa v. FaceBook*, 2018 U.S. Dist. LEXIS 13981 (S.D. Tx. 2018) (dismissing an action brought against Facebook alleging an abridgment of free

speech rights because the Supreme Court has not declared a cause of action against private entities such as Facebook for such violations of free speech rights protected by the First Amendment); *Williby v. Zuckerberg*, 2019 U.S. Dist. LEXIS 101876 (N.D. Cal. 2019) (dismissing an amended complaint with prejudice with respect to the First Amendment, where plaintiff alleged an abridgement of speech by Facebook, but the court found that private companies like Facebook are not bound by the First Amendment like the government); *Fed. Agency of News LLC v. Facebook, Inc.,* 395 F. Supp. 3d 1295, 1308 (N.D. Cal. 2019) (finding that Facebook's deletion of a profile page is private conduct and does not constitute governmental action.) Furthermore, ". . . private businesses [sic] do not become 'state actors' based solely on the provision of their social media networks to the public." *Fed. Agency of News LLC v. Facebook, Inc*., 395 F. Supp. 3d 1295, 1308 (N.D. Cal. 2019) (citing *Freedom Watch Inc., v. Google, Inc*., 368 F. Supp. 3d 30, 40 (D.D.C. 2019)).

In the present controversy before the Court, the relevant function at issue is Respondent's operation of Squawker, a private social media platform, and the collateral ability of Respondent to exercise control over speech on its platform. There can be no doubt that the operation of a social media company is neither a traditional nor exclusive function of the state.

There is no tradition of the state operating social media platforms. The very concept of a social media platform could not exist without the Internet, which did not come into existence as we know it today until the creation of the World Wide Web in 1990. Even then, social media companies such as Facebook, Twitter and Squawker did not come into existence until the 2000s.

Squawker came into existence in 2013 but was predated by other social media platforms like LinkedIn[1], Facebook[2] and Twitter[3].

Moreover, there is clearly an absence of exclusivity of government provision of social media platforms. Popular social media platforms like Facebook, Twitter or LinkedIn are owed by private companies. Further scarce regulation over social media companies by the government make it hard to believe that "there is a sufficiently close nexus between the State and the . . . entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* at 351. Thus, in the absence of exclusive provision by the state of social media platforms to the public, Squawker is not a state actor by providing a social media platform to the public.

Therefore, when Squawker applied its flagging policy to Petitioner's account, it engaged in private action not state action because there is not tradition or exclusivity of the government providing social media platforms to the public for general use.

B. Squawker Did Not Violate Petitioner's First Amendment Rights When It Engaged In Editorial Discretion On A Public Forum Because Squawker Is A Private Entity And Not Bound By First Amendment Constraints.

Squawker did not engage in prohibited action when it exercised editorial discretion over the public forum of Governor Dunphry's Squawker account by applying its flagging policy to Petitioner's account because private entities are not constrained by the First Amendment. In *Packingham v. North Carolina*, this Court held that the First Amendment does apply to social media, see *Packingham v. North Carolina*, 137 S. Ct. 1730 (2019).; but this Court did not

[1] LinkedIn was founded in 2002. ABOUT LINKEDIN, https://about.linkedin.com/ (last visited Jan. 28, 2020).
[2] Facebook was founded in 2004. ABOUT FACEBOOK, https://about.fb.com/company-info/ (last visited Jan. 25, 2020).
[3] Twitter was founded in 2006. HISTORY.COM EDITORS, Twitter Launches, History (Jan. 29, 2020, 10:31 AM), https://www.history.com/this-day-in-history/twitter-launches

announce a test or standard as to how the First Amendment may be applied. The farthest any court has announced any standard when it comes to interactions on social media is the United States Court of Appeals for the Second Circuit in *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019).

Knight First Amendment Inst. at Columbia Univ. v. Trump, involved a First Amendment question of the ability of a government actor to block constituents on the social media platform Twitter. In that case, the President of the United States, Donald Trump utilized Twitter's blocking feature to block two individuals who commented in the President's comment section on a recent tweet. The Second Circuit upheld the finding of the United States District Court for the Southern District of New York that "the 'interactive space' associated with each tweet constated a public forum for First Amendment purposes because it was a forum 'in which other users may directly interact with the contents of the tweets by . . . replying to, retweeting or liking the tweet.'" *Knight* at 233. The Second Circuit further held that "the First Amendment does not permit a public official who utilizes a social media account for all manner of official purpose to exclude persons from an otherwise-open online dialogue." *Id*. at 230.

The determination that government actors are prohibited from engaging in blocking on social media has been affirmed by subsequent courts. *See Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (holding that the interactive component of a county board chair's social media page constituted a public forum for the First Amendment purpose).; *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (granting a motion for summary judgment after finding that a government actor violated the plaintiff's first amendment rights by blocking plaintiff on Twitter.). However, the issue of private social media companies from exercising editorial discretion on government profiles has not been addressed.

"When the government provides a forum for speech (known as the public forum), the government may be constrained by the First Amendment, meaning that the Government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint, or sometimes on the basis of content." *Halleck* at 1930. However, "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor." *Id*. at 1930.

Presently at issue is Petitioner's claim that Squawker impermissibly infringed upon his free speech rights when Squawker applied its flagging policy to Petitioner's account when interacting with a government actor. On the night of August 26, 2018, Petitioner engaged in a spamming action on the verified Squawker profile of Governor Dunphry of Delmont. Petitioner's profile was flagged because he violated the Terms and Conditions of service, which Petitioner agreed to on two occasions. Once when he initially created his Squawker profile and a second time when Squawker instituted its flagging policy for verified accounts. Petitioner now contends that such action was a violation of his free speech rights. Petitioner is flawed in several respects to the policing actions of speech by a private entity. First, the Petitioner engaged into a contract with Squawker, a private entity when he agreed to be bound by the Terms and Conditions of service for use of the Squawker profile. It can be said that Petitioner was put on notice as to the flagging policy when he agreed to be bound by the Terms and Conditions of service. *See* footnote 2 in *Knight First Amendment Inst. at Columbia Univ. v. Trump.* "The private entity may [sic] exercise editorial discretion over the speech and speakers in the forum." *Halleck* at 1930. Thus, because there is an agreement for terms of use between Squawker, a private entity, and Petitioner,

Second, there is a key flaw in the Petitioner's claim against Squawker and that is the fact that Squawker is a private entity, not a state actor. This is an important fact because in order for

Petitioner's free speech rights to have been impermissibly abridged, state action of some kind is required. The Second Circuit made that point clear in *Knight,* when it held that government officials are prohibited from exercising editorial discretion over their social media pages. Such prohibitions cannot be said to be held against private entities. Furthermore, "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints. *Halleck*. at 1930.

Therefore, when Squawker applied its flagging policy to Petitioner's account, it did not engage in the abridgement of his free speech rights because there was an agreement for the usage of Squawker between the parties and Squawker is a private entity and is not held to the same standards as state actors for the exercise of editorial discretion over a public forum. Thus, Squawker did not impermissibly abridge Petitioner's free speech rights by flagging his profile.

II. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT DID NOT ERR IN CONCLUDING THAT SQUAWKER'S TERMS AND CONDITIONS IS A CONTENT-NEUTRAL TIME, PLACE, OR MANNER RESTRICTION THAT IS NOT VIOLATIVE OF THE FIRST AMENDMENT

The First Amendment prohibits the enactment of laws that abridge the freedom of speech, and the Supreme Court of the United States has repeatedly held that content-based laws have a presumption of unconstitutionality unless the government can show that the law is narrowly tailored to protect a legitimate state interest. *Reed v. Town of Gilbert, Ariz.,* 135 S. Ct. 2218, 2226 (2015). A content-based law, according to *Reed*, is one that targets speech based on its "communicative content," meaning that the law is directed at a specific speech because of its topic, idea, or message. *Id.* The recent wave of internet and social media platforms has shifted the horizon to a completely new way of looking speech. The Supreme Court itself has noted that for First Amendment purposes, it is necessary that each "medium of expression" be assessed

though specific standards suited to that particular medium. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

Even decades prior this Court understood the importance of looking at the context of each medium in First Amendment cases, as "each may present its own problems." *Id.* This Court has also stressed the important precedent of the First Amendment, holding that there ought to be no justification for an exception to the First Amendment based on a specific type of medium. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (holding that motion pictures are not subject to the precise rules of other methods of expression, but the basic principles of free speech still apply.) According to this case, "Each method tends to present its own peculiar problems." *Id.* It follows then that Squawker, a relatively new medium of communication, must be looked at in its own light in consideration with its context.

A. Squawker's Terms and Conditions are Content-Neutral and Not Specifically Directed to the Content of Milner's Speech.

The Supreme Court has held, "…even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech…" *Ward v . Rock Against Racism*, 491 U.S. 781, 791 (1989). The Court has also ruled that expression that is subject to reasonable restrictions can be oral, written, or symbolized by conduct. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The *Clark* Court stated that these kinds of restrictions are valid if they are "…justified without reference to the content of the regulated speech…narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id*. The Supreme Court has also understood that the purpose of the regulation should be what controls the consideration of it, and "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not

others." *Ward* at 791. The Court has also commented on the necessity of some censorship by the government to protect the needs of its people. *Id.* at 790 (stating music as a form of expression that has oft been censored for the needs of the state, citing 2 Dialogues of Plato, Republic, bk. 3, pp. 231, 235-248 (B. Jowett transl., 4th ed. 1953) "Our poets must sing in another and a nobler strain").

The Supreme Court has repeatedly discussed the importance of protecting the rights of other speakers as well as listeners, and also instilling the important idea of fairness in First Amendment cases. In *Red Lion Broadcasting Co. v. F.C.C.,* a Pennsylvania radio station included in a 15-minute broadcast a discussion by Reverend Hargis about a book written by Mr. Fred Cook. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 371 (1969). Hargis made several statements about Cook, including statements that Cook was fired by a newspaper for making false charges against city officials and also worked for a Communist-affiliated publication. *Id.* Cook concluded that he was personally attacked by these statements and demanded free reply time by the radio station, which they refused. *Id.* at 372. The Court here held that requiring a broadcaster to give reply time to a someone who has been personally attacked or criticized is not a violation of the First Amendment. *Id.* at 396. Again, the *Red Lion* case also recognized the "rapidity" of technological advances." *Id.* at 399.

In the present case, Squawker's restriction on the Petitioner's speech was reasonable based on Squawker's terms and conditions. The purpose of Squawker's regulation is to "combat abuse motivated by hatred, prejudice, or intolerance." R. at 3. Squawker seeks to keep its social media platform a safe place for all of its users by prohibiting behavior that promotes violence or directly attacks or threatens other people, as well as prohibiting the use of emojis in a threatening manner. R. at 3. Squawker also reasonably prohibits spamming, meaning four or more squeaks

squawked within 30 seconds of each other. R. at 3-4. Squawker's main concern for its users is to "create a positive user experience that allows our users to engage authentically with each other and build communities within our platform." R. at 3. Squawker's content regulation is neutral because it does not focus on any specific type of speech, but rather a more neutral blanket of protecting its users from prejudice or intolerance, as well as keeping the platform usable by controlling the number of squeaks squawked.

The Petitioner's rapid squeaks including emojis were posted so quickly within the same minute that "other Squeakers complained he had made the forum unusable." R. at 6. Mr. Milner explains that this rapid succession is his way of "getting the last word," however, this causes the Squawker forum to be difficult or remotely unusable to other Squeakers who are also attempting to use the site at that time. This is a reasonable restriction on the "manner" of speech, as Mr. Milner was still able to post his Squeaks in a different way than his preferred speedy manner. This restriction allows the other members to control what they want to hear, as they have equal rights to the use of Squawker. It does not prohibit Mr. Milner's right to expression or other member's choices in seeing the speech.

Squawker's actions taken in regulating the Petitioner's speech shows Squawker's neutrality and reasonableness. Squawker flagged Mr. Milner's account in order to give notice to other users on the platform that they might find his squawks offensive, giving them the right to avoid the squeaks. This protection of other speakers and users of the platform is similar to the Court's ruling in *Red Lion*, whereby giving reply time to someone who felt attacked relates to the protection of the other squeakers by Squawker. It is vitally important, especially in the wake of technological advances such as Squawker, to create a neutral and fair platform where all users can participate in a safe environment.

Mr. Milner still has "ample alternative channels for communication of the information," as discussed in *Clark*. Other Squeakers are still able to see his communications if they wish; they are not prevented merely by the flagging of his account. Further, Miler is a freelance journalist, suggesting that he has other mediums of expression available to him in order to further his speech. The *Ward* Court stressed that although some regulation is content-neutral, it still can have an incidental effect on some speakers and not others. The regulation of the Petitioner's speech is purely incidental; the neutrality of the regulations are to make Squawker a user friendly place for all Squeakers, and although the flagging of Milner's account was incidental, it was not specifically targeted at Milner or the content of his speech.

The Petitioner incorrectly uses the *Tam* case in attempting to show that Squawker engaged in viewpoint discrimination. In *Tam*, a band calling themselves "The Slants" was denied from registering their name for a federal trademark under the Patent and Trademark Office. The band's application was denied based on federal law that prohibited the registration of trademarks that would "disparage" or "disrepute" any person. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (citing 15 U.S.C. § 1052(a)). The denial stemmed from the term "slants" being a derogatory term for persons of Asian descent. *Id.* The Supreme Court in *Tam* held that the disparagement clause of the Lanham Act was overbroad and not narrowly tailored, and therefore was unconstitutional under the First Amendment. *Id.* at 1765. The Petitioner points to *Tam*'s notion that "offense" is simply a viewpoint, and prohibiting speech based on it being disagreeable to society goes against the First Amendment. However, the First Amendment requires "viewpoint neutrality." *Id.* at 1750. Although Justice Kennedy reminds the Court that viewpoint discrimination is unconstitutional, he states the test for viewpoint discrimination. *Id.* at 1766. "At its most basic, the test for viewpoint discrimination is whether—within the relevant

subject category—the government has singled out a subset of messages for disfavor based on the views expressed." (Kennedy, J. concurring, citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806 (1985)).

In this case, Squawker is not specifically targeting the viewpoints of Mr. Milner. Squawker's Terms and Conditions were created specifically to control the quantity of Squeaks to ensure effective usability for all, as well as limiting harsh or vulgar comments to keep the Squawker environment free of hatred or prejudice. According to the *Cornelius* test for viewpoint neutrality, one must look first at the relevant subject category, here being the social medial platform of Squawker. Looking at the surrounding circumstances and context, Squawker is a relatively new form of technology as the rapid advances of the internet are approaching society and should be considered on its own rather than compared to other mediums of expression. The second part of the Cornelius test is whether or not there has been a singling out of certain messages "for disfavor based on the views expressed." Here, Petitioner's Squeaks were not singled out specifically for their disfavor of Governor Dunphry or his proposed bill, but rather were flagged because of their rapid succession as well as them having a general notion of hate or prejudice. Therefore, Squawker's Terms and Conditions are content-neutral and are not specifically directed to the content of Milner's speech.

B. Squawker's Terms and Conditions Were Narrowly Tailored to Serve a Legitimate Interest of Protecting Squawker's Usability

As stated by the Supreme Court in *Clark*, restrictions on speech are valid if they are "…justified without reference to the content of the regulated speech…narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark* at 293. Fellow Circuit Courts have also decided the meaning of "narrowly tailored." The United States Court of Appeals, Second Circuit has said:

"…whether a regulation is narrowly tailored can only be determined by considering the scope of its application relative to the government objectives being pursued, taking context into account." *Mastrovincenzo v. City of New York*, 435 F.3d 78, 102 (2nd Cir. 2006). The Ninth Circuit has also discussed the "ample alternatives" test, regarding whether or not there are alternatives to the speech that would allow the speaker's views to be conveyed. *Menotti v. City of Seattle*, 409 F.3d 1113, 1138 (9th Cir, 2005). The Ninth Circuit has also observed that the Supreme Court will not strike down an action "…for failure to leave open ample alternative channels of communication unless the governmental action will foreclose an entire medium of public expression across a landscape of particular community or setting." *Id.* The Supreme Court of the United States has also ruled that the First Amendment does not give a speaker a guaranteed right to communicate his or her views "…at all times and places or in any manner that may be desired." *Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 647 (1981).

In *Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* a group of supporters of a candidate for election to city council posted signs on public property, which was in violation of Los Angeles Municipal Code. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 792-93, (1984). The Court of Appeals reasoned that the ordinance was unconstitutional because it violated the First Amendment. *Id.* at 795. The Court discusses the various other means of communication that the supporters could use to spread the message about their candidate and stated: "…a restriction on expressive activity may be invalid if the remaining models of communication are inadequate." *Id.* at 812. The Court ruled that the ordinance did not affect an individual's freedom to exercise their speech or to distribute literature in the same place where the signs would be, which was an ample alternative that would allow the supporters to communicate for their candidate. *Id.* The Court also stated that there would be no

reason to believe that the same advantages of posting signs on public property could not be achieved through any other means. *Id.*

In the present case, the Petitioner argues that the restrictions on his account, specifically the use and frequency of his posts with emojis limit him from having an adequate means of expression. Squawker's Terms and Conditions, seen on page 3 of the Record, outline that the use of emojis is regulated in order to produce a safe environment, as emojis can be used to represent certain negative comments that Squawker seeks to control. In Pluckerberg's affidavit, he states that the protection of other Squeakers to use and enjoy the forum is a legitimate interest in regulating Petitioner's speech and protecting the other users. Users have a right to view their Governor's official page, and Mr. Milner's frequent and threatening emojis result in people abandoning the platform, as they are shut out from interacting with the Governor's page. R. at 22. According to Squawker's Terms and Conditions, Petitioner was not banned outright or blocked from following the Governor's official page, and none of his comments were deleted. His comments were only flagged so that users could choose whether or not they wanted to see them.

Petitioner argues that these restrictions of his page are overbroad, as he has lost followers and traffic on his squeaks and does not have other adequate means of communication. This argument is flawed, however, based on the fact that Mr. Milner considers himself a freelance journalist who frequently writes articles for various newspapers. R. at 19. The sole fact that Milner is a journalist leaves other mediums of expression open to him, such as the various newspapers he writes for, as well as other social media or internet platforms. Similar to the Court's ruling in *Taxpayers for Vincent*, there is no reason to believe that Milner's advantages of spreading his dislike for the Governor could not be achieved through any other means. His use of

emojis as his artistic medium in his preferred manner makes infringes upon the other users of Squawker's right to use the forum effectively. The remaining models of communication for Milner, such as newspapers or other internet sites as stated above, would not be inadequate means of achieving his communication because he already frequently communicates his speech to his audience through newspapers. Milner could communicate what his emojis are meant to portray through words via another medium. Further, Petitioner has the option of watching an online video and taking a quiz related to Squawker's Terms and Conditions in order to have the flagging removed from his account. R. at 6. Mr. Milner has refused to take part; however, his account is not banned from Squawker nor are any of his squeaks or comments deleted. Milner has adequate means of communicating his speech to others and simply does not wish to partake in his other options. Therefore, Squawker's Terms and Conditions are narrowly tailored to serve a legitimate interest of keeping the Squawker users able to communicate in an effective environment. The restrictions on certain uses and frequency of emojis as well as other restrictions meant to keep the platform free of threatening or hatred speech is narrowly tailored, and there are other adequate means of communication available for Petitioner to communicate his speech. Petitioner has stated no violation of his rights under the First Amendment of the United States Constitution.

CONCLUSION

The United States Supreme Court should affirm the judgement of the United States Court of Appeals for the 18th Circuit because the 18th Circuit did not err in concluding that Squawker did not engage in state action when it applied is flagging policy to Mr. Milner, and it did not err in concluding that Squawker's Terms and Conditions is a content-neutral time, place, or manner restriction that is not violative of the First Amendment.

Dated this 31st day of January 2020.

Team Number 3
Attorneys for Respondent

BRIEF CERTIFICATE TO VICE CHANCELLORS

Team Number 3 certifies that the work product contained in all copies of the team's brief is in fact the work product of the team members. We certify that we have complied fully with our school's governing honor code. We acknowledge that we have complied with all Rules of the Competition.