No. 17-874

IN THE

Supreme Court of the United States

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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

_____

Team 7
Counsel for Respondent

STATEMENT OF THE ISSUES

1. Whether Squawker, a privately owned social media platform, transformed into a state actor under the state action doctrine when it hosted and regulated Governor Dunphry's account, though it was not performing a public function, it was not coerced to act by the State, nor was there a sufficiently close relationship between the State and Squawker?

2. Whether Squawker's Terms and Conditions, including its Flagging Policy are a reasonable time, place, or manner restriction when they were enacted to maintain an open forum for communication, merely present a click-through warning message for offending squeaks, and permit violators to remain on the platform?

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STATEMENT OF JURISDICTION

This case asserts a claim of a violation of the First Amendment to the United States Constitution as incorporated against the State of Delmont through the Due Process clause of the Fourteenth Amendment. *See* App'x. A. The United States District Court for the District of Delmont had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2018). The United States Court of Appeals for the Eighteenth Circuit had jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 (2012) because this is an appeal of a final judgment in a civil case. The Eighteenth Circuit entered final order, and the Writ of Certiorari was timely filed and granted pursuant to 28 U.S.C. §1254 (1) (2018).

STATEMENT OF THE CASE

1. Factual Background

Squawker, Inc. is a social media platform created and operated by its CEO, Mac Pluckerberg. R.14. The platform allows users, "Squeakers", to create personal profiles on which they can post 280 characters or less in a "squeak." R.15. Users may follow other Squeakers, and interact with each other by liking, disliking, or commenting on squeaks. R.14.

To create an account, one must consent to the Terms and Conditions (T&C), which prohibit violent speech in the form of text or emojis. *See* App'x B. It also contains a spamming prohibition, which prohibits "high frequency" squeaks. *Id.* High frequency is when four or more squeaks are posted within 30 seconds of each other. *Id.* If a Squeaker violates the T&C, the offending squeak is flagged with a black box, and a skull and cross bones is placed over it. *Id.* Squawker uses this Flagging Policy to protect against abuse and preserve a usable forum that allows the public to build online communities. *Id.* However, the Flagging Policy allows users to choose to view the content of a flagged squeak by clicking on the skull and cross bones. *Id.*

Squawker has become a popular source for news and communication in Pluckerberg's home state of Delmont. R.16. Delmont officials, including the Governor, frequently use Squawker to communicate with constituents and announce policy proposals. R.16. As a result, an increasing number of imposter accounts reporting misinformation have appeared on the platform. R.16. Concerned about this issue, Governor Dunphry approached Pluckerberg, his longtime friend, in February of 2018 with an idea to combat this fake news problem. R.22. The Governor proposed a verification feature which would indicate which accounts actually belonged to public officials. R.16. Pluckerberg added the feature and tested it exclusively in Delmont beginning in March 2018. Despite no further suggestions from the Governor, Pluckerberg chose to revise the Flagging Policy (Policy) to accommodate the new feature and to personally monitor all verified accounts pursuant to the updated Policy during the first year. R.22; *see* App'x B.

Under the updated Policy, if a Squeaker posts a comment on a verified page that violates the T&C, the offending squeak and the content on the squeaker's personal profile page is flagged with a black box and cross bones. R.16. A skull and cross bones will also appear next to the user's name. R.16. A Squeaker can have the flag removed from her account by watching a training video regarding the T&C and completing an online quiz. R.16. Like the original policy, other users can see the content of the flagged account by simply clicking on the skull and cross bones. R.16.

Avery Milner, a freelance journalist located in Delmont, has a Squawker account and is a self-professed "frequent squeaker." R.19. On July 26, 2018, after consuming several alcoholic beverages, Milner took to Squawker to comment on Governor Dunphry's latest post. R.20. In rapid-fire succession, Milner posted the comment, "We gotta get rid of this guy," followed by three squeaks each with a different emoji: an elderly man, a blood-filled syringe, and a coffin.

R.29-30; *see* App'x C. This stream of squeaks was reported for violating the T&C over 2,000 times by other Squeakers, and many deleted their accounts because "Avery Milner had hijacked the space." R.22. Ultimately, Squawker lost 29% of its users after Milner's comments. R.22.

Milner's comments violated the T&C because he posted threatening emojis and squeaked four times within 30 seconds of each other. R.17. Pluckerberg subsequently flagged Milner's account pursuant to the updated Policy. R.22. Milner refused to watch what he refers to as "the stupid video" or take "the ridiculous test," either of which would lift the flag from his account. R.20. Because his account remains flagged, Milner sued Squawker alleging violation of his First Amendment rights. R.20.

2. Proceedings Below

Milner brought suit against Pluckerberg in his official capacity as CEO of Squawker in the District Court of Delmont, seeking a declaration that the application of Squawker's T&C violated his First Amendment right of free speech. R.1. On December 5, 2018, Milner and Pluckerberg filed cross motions for summary judgment. R.2. The District Court ruled in favor of Milner, finding that Squawker's function as a host and regulator of a public forum amounted to state action, and that Squawker's T&C violated Milner's First Amendment rights as impermissible viewpoint discrimination. R. 2, 26. The Eighteenth Circuit reversed the decision of the District Court, holding that Squawker was a private actor, and, in the alternative, that the T&C were a valid time, place, or manner restriction. R.37. The Supreme Court of the United States granted Milner's Petition for Writ of Certiorari, certifying the questions presented above. R.37.

SUMMARY OF THE ARGUMENT

State Action. The Court of Appeals was correct to decline Petitioner's invitation to stretch the definition of "the state" to an unprecedented capacity. The First Amendment does not saddle a private entity with burdens that were created to check state power, unless that entity is standing in the state's shoes. Squawker is not a state actor or part of the Delmont government under any of this Court's state action tests.

To perform a government function requires the private entity to be engaged in conduct that has traditionally *and* exclusively been provided by the state. This Court has reserved that title for a very limited category of activities and has held that hosting and regulating speech is not such an activity. Though Governor Dunphry's page is a public forum, holding that Squawker cannot regulate the speech in that forum would chill the editorial discretion of private companies, a First Amendment value in its own right.

Further, it cannot be said that Squawker was coerced by Delmont, nor was the relationship between Squawker and Delmont entwined to the extent that would justify holding it liable as a state actor. Delmont did not enforce, plan, or assist in creating or implementing the speech regulation at issue in this case, and Squawker is controlled by private individuals, not government officials. It was Respondent, Squawker's CEO, who decided to alter, monitor, and execute his company's Policy. Attributing private conduct to state action because a friendship exists between a CEO and a Governor would threaten public-private sector collaboration, stifle the free flow of information, and set a dangerously low bar for the state action doctrine.

The First Amendment. In the event this Court finds Squawker to be a state actor, Milner's claim still fails because the T&C are a reasonable, time, place, or manner restriction as they are content neutral and narrowly tailored to serve a significant interest. The Court of Appeals

correctly held that the T&C are content neutral because Squawker enacted both the spam and violent emoji regulations for purposes unrelated to content. Squawker designed the spamming restriction to preserve the usability of the forum. It limits the amplification of speech to ensure no single user hijacks the space. The violent emoji regulation guards against the secondary effect of a closed forum because the mere presence of such squeaks silences the voices of others.

The T&C are narrowly tailored to serve a significant state interest because its corresponding Policy ensures a useable forum through minimal speech regulation. This Court has consistently recognized a significant interest in keeping a forum accessible to the public. The Policy is narrowly tailored because it effectuates that interest which would be achieved less effectively without it. Indeed, Milner's conduct demonstrates the necessity of such regulations; his squeaks effectively shut down the forum and drove 29% of users offline.

Lastly, the T&C leave open ample alternative channels for communication because Milner was not banned from speaking in the forum. Instead, Milner was still able to access and use Squawker, view the Governor's page, and all of his content remained online. In addition, Milner could have simply created a new page or taken the short quiz to lift the flagging. This Court should uphold the effect-based T&C and enable Squawker to continue operating as a leading news source that delivers the public its right to access social and political content.

ARGUMENT

I. The Court of Appeals Correctly Concluded that Squawker's Conduct, Hosting and Regulating Governor Dunphry's Page, does not Constitute State Action and, Therefore, the First Amendment does not Apply.

The Framers of the Constitution enacted the First Amendment to protect the People's marketplace of ideas from government censorship. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249-50 (1936). As a result, it limits only government regulation of speech. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019); *Flagg Bros., Inc. v. Brooks*, 436 U.S.

149, 156 (1978) (stating "most rights secured by the Constitution are protected only against infringement by governments.") Regulation of speech by a private party cannot deprive an individual of a Constitutional right and, therefore, only State actors can violate the First Amendment. *See The Civil Rights Cases*, 109 U.S. 3, 17-18 (1883).

A private actor can, however, be held responsible for Constitutional violations as a state actor under the state action doctrine. *Manhattan,* 139 S. Ct. at 1928. This happens only in exceptional cases when a court decides that a private actor has transformed into a state actor. *See Manhattan*, 139 S. Ct. at 1926. These cases are exceptional because "[o]ne of the great objects of the Constitution is to permit citizens to structure their private relations," and, therefore, using the Constitution to restrain private ordering stands in direct opposition to its goals. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

A private entity will be considered a state actor under the state action doctrine only when its conduct is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Requiring a finding of fair attribution "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power" to only touch state actors. *See Lugar*, 457 U.S. at 936-37; *see also Manhattan*, 139 S. Ct. at 1928 ("…state-action doctrine protects a robust sphere of individual liberty."). Accordingly, a court will qualify a private entity as a state actor only "in a few, limited circumstances." *Manhattan*, 139 S. Ct. at 1928.

Such circumstances can arise when (1) the private entity performs a traditional, exclusive public function; (2) the government compels the private entity to take particular action; or (3) the government has a close, overlapping relationship with the private entity. *See id.* These three instances are generally known as the public function test, the compulsion test, and the nexus test, respectively. *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012); *Groman v. Twp. of*

Manalapan, 47 F.3d 628, 639 (3d Cir. 1995); *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000); *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007).

In looking to whether the private actor's conduct satisfies any of these tests, the Court evaluates the totality of the circumstances and no single fact is dispositive. *See Burton v. Wilmington Parking Auth*., 365 U.S. 715, 722 (1961) (finding that State action is found "[o]nly by sifting facts and weighing circumstances"). Because Squawker, Inc. is a social media platform operated by a private individual, CEO Mac Pluckerberg, Squawker's actions must constitute those of the state under any of the above standards for the First Amendment to apply to its behavior. R.14. The following sub-sections will show why Squawker's flagging of Milner's squeaks did not create state action under any of the doctrinal tests.

1. Squawker is not a State Actor Under the Public Function Test because Hosting and Regulating a Public Forum is not a Traditional, Exclusive Government Function

Under the state action doctrine, a private entity may be considered a state actor when it performs a public function. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). A public function is activity which is "traditionally the exclusive prerogative of the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). A private actor cannot transform into the State merely because the state has engaged in similar conduct. *See Evans v. Newton*, 382 U.S. 296, 300 (1966). This would subject private parties to constitutional prohibitions simply because a government entity happens to perform the same type of service. *Id.*

To avoid unfair attribution, "the government must have traditionally *and* exclusively performed the function" for the conduct to qualify as a "public function within the meaning of [the Court's] state-action precedents." *Manhattan*, 139 S. Ct. at 1929 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Jackson*, 419 U.S. at 352–53, and *Evans*, 382 U.S. at 300) (emphasis in the original). The exclusivity requirement results in "very few functions fall[ing]

into this category". *See Manhattan*, 139 S. Ct. at 1929; *Flagg Bros.*, 436 U.S. at 158 (stating that very few functions have been exclusively reserved to the State).

Recently, the Court employed the public function test to determine that "merely hosting speech by others is not a traditional, exclusive public function." *See Manhattan*, 139 S. Ct. at 1930 (relying on the fact that public access cable channels were historically operated by private cable operators in large part and, therefore, is not exclusively reserved to the state). Analyzing the Court's previous decision in *Hudgens v. NRLB*, the *Manhattan* Court held that a private entity that chooses to host speech may "exercise editorial discretion over the speech and speakers in the forum." *See id.* (citing *Hudgens v. NRLB*, 424 U.S. 507, 520-521). Indeed, the First Amendment protects the editorial control of private content providers. *See Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that the First Amendment protects editorial control and judgment of a private newspaper). Therefore, hosting and regulating speech are not traditional and exclusive public functions which would transform a private entity into a state actor. *See Manhattan,* 139 S. Ct. at 1930.

In the present case, Squawker's conduct of hosting a public forum, Governor Dunphry's Squawker page, and regulating it by applying the Policy does not transform Squawker into a state actor under the public function test. *See id.*; R.20, 17. Like the cable operator in *Manhattan*, Squawker does not perform a public function merely by hosting and regulating users' pages. Hosting and regulating speech on social media platforms has been an exclusively private enterprise since social media's inception, and courts has not found that online service providers are state actors for First Amendment purpose based on this conduct. *See* Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack*

Thereof—to Third-Party Platforms, 32 Berkeley Tech. L.J. 989, 990-992 (2017). Accordingly, none of Squawker's conduct in this case constituted a public function.

The District Court incorrectly found that because Governor Dunphry's Squawker page is a public forum, Squawker's conduct amounts to state action under the public function test. R. 8-9, 17. This determination incorrectly conflates forum analysis and the public function test and "mistakenly ignores the threshold state action question." *Manhattan*, 139 S. Ct. at 1930. The state action doctrine assists the court in deciding *who* is ultimately responsible: the state or a private party. *See Lugar*, 457 U.S. at 937 (stating that under the doctrine "the party charged with the deprivation must be a person who may fairly be said to be a state actor"). Only when state action triggers the Constitution, does the forum of the speech regulation become relevant. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (stating "the Court has adopted forum analysis as a means of determining when the Government's interest in limited the use of property" outweighs the interest of other users). Accordingly, courts have historically considered whether a private regulator of speech is a state actor separately and before conducting any forum analysis as a matter of course. *See Manhattan*, 139 S. Ct. at 1930; *Hudgens v. NRLB*, 424 U.S. 507, 520-521 (1976); *Rundus v. City of Dall.*, 634 F.3d 309, 315 (5th Cir. 2011); *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir. 2005).

As an elected official operating an official government page, there is no question that Governor Dunphry would face First Amendment restrictions in his ability to control its content. *See Manhattan*, 139 S. Ct. at 1930 ("When the government provides a forum for speech (known as a public forum), the government may be constrained by the First Amendment…"). Although the Governor turned his page into a public forum by using it to conduct official state business, he played no role in managing its content. R. 22, 24. It was not the government but Squawker, a

private entity, that Milner claims violates his speech rights by screening his speech under its Policy. R. 8-9, 22. Squawker's actions demonstrate that it is the host of the platform and the regulator of its content, not the government. Because this Court has explicitly held that hosting and regulating a public forum is not a traditional, exclusive government function that can implicate a private party, and the government played no role in those activities in this case, Squawker's conduct cannot constitute state action under the public function test. *Manhattan*, 139 S. Ct. at 1930.

2. There is no State Action Under the Compulsion Test Because the State of Delmont did not Coerce or Significantly Encourage Pluckerberg or Squawker to Regulate Milner's Speech by Updating or Implementing Squawker's Flagging Policy.

A private party can be considered a state actor for the purposes of constitutional liability when the party's conduct arises from state compulsion. *Manhattan*, 139 S. Ct. at 1928; *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001). State compulsion exists when a government entity "has exercised coercive power or has provided [] significant encouragement, either overt or covert," to a private party such "that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 2785 (1982). Under the control test, the relevant choice is the decision to engage in the allegedly unconstitutional conduct. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (citing *Blum*, 457 U.S. at 1004 and stating, "our approach […] begins by identifying the specific conduct of which the plaintiff complains" (citations omitted)); *see also Nat'l Collegiate Ath. Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988) (stating "a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action.").

Mere government approval or acquiescence to the questioned conduct of the private party is not sufficient to find compulsion: the State must command a particular result or action. *See Sullivan*, 526 U.S. at 52 (1999) (citing *Blum*, 457 U.S. 1004-05); *Flagg Bros.*, 436 U.S. at 164. If the party's conduct is in no way dictated by the State, but instead is the product of an independent, professional judgment call, the conduct does not transform the private entity into a state actor. *See Sullivan*, 526 U.S. at 52; *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (holding that when an assignment entailed functions and obligations of a public defender that were in no way dependent on the State, there was no coercion).

When the government directs a private entity to take a specific, allegedly unconstitutional action, the private defendant's conduct is state action. *See Flagg Bros.*, 436 U.S. at 165 (holding that the State was not responsible when it permitted but did not compel the action); *Jackson*, 419 at 357 (finding there was no state action "where the commission has not put its own weight on the side of the proposed practice by ordering it"). In the context of private speech regulations, government direction has been found when the state enforces, plans, or assists in creating or implementing a speech regulation. *See Wickersham*, 481 F.3d at 598; *see also Bays v. City of Fairborn*, 668 F.3d 814, 820 (6th Cir. 2012). In *Wickersham*, the court found that the city's role at a private air show was more than mere acquiescence as the city "not only provided critical assistance in planning and operating the show, but also played an active role in enforcing the particular speech restrictions challenged in the action." *Wickersham*, 481 F.3d at 598. Similarly, in *Bays*, the Court found state action because the City "support[ed] and actively enforce[ed] the solicitation policy" at a private festival that the private organizers and owners of the event had put into place. *Bays*, 668 F.3d at 820.

In contrast to *Wickersham* and *Bays*, the Fifth Circuit in *Rundus* found that a private fair operator who prohibited the distribution of literature was not a state actor based on coercion even though the city police were used to enforce this speech regulation. *See Rundus*, 634 F.3d at 314-15. No state action existed because the City was not involved in the enforcement decision, and instead merely provided "neutral assistance" regarding enforcement. *Rundus*, 634 F.3d at 314-315. Here, the record does not contain any facts showing that Delmont aided in enforcing the flagging guidelines or participated in the decision to flag Milner's account. In fact, it was Pluckerberg, Squawker's CEO who adopted the Policy, monitored the verified accounts, and flagged Milner's account pursuant to the updated Policy. R.22. Therefore, there was no coercive state power behind the speech regulation in this case to satisfy the compulsion test.

Governor Dunphry's suggestion to Pluckerberg that Squawker should implement a verification feature for official accounts does not amount to compulsion for two reasons. First, under the compulsion test, the courts analyze the challenged conduct to determine if the State coerced or significantly encouraged that specific conduct: it does not look to find if the state encouraged just any conduct of the private party. *Sullivan*, 526 U.S. 40, 51; *Blum*, 457 U.S. at 1004; *Tarkanian*, 488 U.S. 179, 192; R. 8, 20. Creating the verification feature is not the conduct that Avery Milner alleges violated his constitutional right to free speech. R.7. Instead, he complains of the one-level screening placed over his online content. R.1. The Policy and its enforcement mechanisms were Pluckerberg's own ideas, none of which were mentioned by the Governor. Thus, any potential state coercion is not linked to the alleged constitutional violation.

Second, even if the Court looks to Governor Dunphry's suggestion though it is not the challenged conduct, it did not amount to such coercive state power or significant encouragement such that Squawker's choice to implement the verification feature was the state's decision as a

matter of law. *Blum*, 457 U.S. at 1004. This is because Delmont did not have any say in Squawker's internal decision making regarding the verification feature, and, like the flagging policy, had no role in enacting or enforcing it. *See Rundus*, 634 F.3d at 315. The verification feature was the product of a private party's independent decision to implement a mere suggestion from a friend who happens to be a government official. R.22

3. The Relationship Between Squawker and Delmont does not Illustrate Sufficiently Close Entwinement Under the Nexus Test Because Delmont did not Effectively Control Squawker nor Benefitted Financially.

Under the final test, a "state action may be found if … there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the state itself." *Brentwood*, 531 U.S. at 295. The close nexus test focuses on "the overlap or merger of public and private entities as a result of their shared leadership or other attributes that make it difficult to separate their public functions from their private ones." *P.R.B.A. Corp. v. HMS Host Toll Rds., Inc.*, 808 F.3d 221, 225 (3d Cir. 2015) (analyzing *Brentwood*). To find a close nexus, there must be a pervasive entwinement of the State with the private entity in the entity's composition and workings. *Brentwood*, 531 U.S. at 298.

Entwinement has been found by the Court in two main circumstances. First, entwinement exists when there is a relationship between the parties such that the State controls and "overwhelmingly perform[s] all but the purely ministerial acts" of the private entity. *See Brentwood*, 531 U.S. at 300. In *Brentwood*, the Court found state action based on entwinement when 84% of a non-profit organization's membership consisted of public schools "represented by their officials acting in their official capacity." *Brentwood*, 531 U.S. at 299-300. In that circumstance, the State effectively controlled the private entity as a whole such that state action doctrine was applicable. *See Brentwood*, 531 U.S. at 300. In contrast, Squawker is operated by a

private individual, Mac Pluckerberg, and no state officials are involved in the operation or control of the company whatsoever. R.22.

Second, entwinement has been found when, based on the specific relationship, the private and state party confer on each other "an incidental variety of mutual benefits" which lead to the parties being mutually concerned with the success of the other. *See Burton*, 365 U.S. at 724. In *Burton*, these mutual benefits were the property provided by a state agency to a private restaurant and rent payments from the restaurant to the state agency. *See Burton*, 365 U.S. at 723-24. The *Burton* Court noted that the restaurant's discriminatory policy also contributed to "the financial success of a government agency." *Id*. at 724. Here, the record is void of any evidence showing a relationship between Delmont and Squawker revealing a government interest in the success of the company like the parties in *Burton*. *See Burton*, 365 U.S. 715, 723-24.

The relationship between Squawker and the State of Delmont begins and ends with the personal relationship between Pluckerberg and Governor Dunphry. R.22, 24. Perhaps this personal relationship influenced Pluckerberg's decision to create and pilot the verified platform. However, Squawker and Pluckerberg maintained full control of revising and implementing the Policy and did not further involve the State. *See Brentwood*, 531 U.S. 300; R.22, 24. Because there is no evidence of the type of relationship between Squawker and the State of Delmont which would blur their identities or functions as private and public entities, no close nexus between them exists.

As the paragraphs above demonstrate, Squawker's conduct does not amount to a state action under the public function, compulsion, or nexus test. Because Squawker is not transformed into a state actor under the state action doctrine, as a matter of law it cannot violate the Constitutional rights of Avery Milner.

II. Squawker's Terms and Conditions are a Reasonable Time, Place, or Manner Restriction on Milner's Speech Because the Regulations were Enacted to Maintain an Open Forum and Merely Presented a Click-Through Warning Message to Prospective Viewers Prior to Receiving Access to Milner's Squeaks.

Squawker's T&C are a reasonable time, place, or manner restriction because they preserve an open forum for discourse, only impose a slight limitation on Milner's speech, and still permit access to his content to those that wish to view it. "The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 657 (1981). *See also Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (stating that a group of demonstrators could not insist on the right to cordon off a street and allow no one to pass who did not listen to their exhortations).

This Court has long permitted government to impose reasonable time, place, or manner restrictions on protected speech. *Heffron*, 452 U.S. at 657. Such restrictions must survive the three-part test articulated in *Ward v. Rock Against Racism*: a restriction must be (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and, (3) leave open ample alternative channels for communication. *See Ward v. Rock Against Racism*, 491 U.S 781, 791 (1989). Squawker's T&Cs satisfy all three parts of the *Ward* test.

1. Squawker's T&Cs are Content-Neutral Because the Regulation was Enacted to Preserve and Maintain an Open Forum for Communication.

In examining content-neutrality, the government's purpose is the controlling consideration. *Id.* at 792. Specifically, the central inquiry is whether the law is "justified without reference to the content of the regulated speech." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748, 771 (1976). Squawker enacted the T&C for the neutral purpose of preserving a useable forum for all account holders. R.15. To effectuate this purpose,

the T&C flags squeaks based on frequency and the use of violent or threatening emojis. Both types of regulation will be examined below.

When a regulation is aimed not at the content of the message but at another legitimate purpose, it is content-neutral. *See Ward*, 491 U.S. at 792-793. In *Ward*, the sponsor of a rock concert challenged a New York City regulation requiring all performers to use the City's sound equipment and technician. *Id*. at 789. In examining content-neutrality, the *Ward* Court emphasized the City's justification for the sound-amplification guideline: the desire to control noise level. *Id.* at 792. This Court held that because noise level is a purpose devoid of a content-consideration, the regulation itself was content-neutral. *Id.* at 793. The regulation was solely aimed at controlling the volume of the speech, and not enacted "because of disagreement with the message" of the speech, making it content-neutral. *Id*.

Squawker's restriction on high frequency squeaks is content-neutral because it serves the purpose of maintaining an open forum for communication. R.15. In *Ward*, the City sought to protect the character of neighborhoods immediately surrounding a concert-venue by limiting concert noise levels. *Ward*, 491 U.S. at 791. Similarly, the Policy was enacted to maintain a open forum "for the millions of users who wish to enjoy a … conversation online," by limiting the ability of any one user to Squeak at extremely high frequencies. R.15. Squawker's concern with providing a useable forum extends only so far as to prevent any single user from monopolizing the space and rendering the platform unusable to others, regardless of what is contained in the Squeaks. R.12. Thus, as the *Ward* Court found noise level regulation unrelated to the content of the sound, the restriction on spam is a comparable regulation of speech amplification, not content. *Ward*, 491 U.S. at 791. Accordingly, this regulation is content-neutral.

Likewise, government regulation of speech is content-neutral when the predominate concern is not the content, but the secondary effect of the speech. *Renton v. Playtime Theaters*, 475 U.S. 41, 49 (1986). In *Renton*, an adult movie theater challenged a zoning ordinance prohibiting such theaters from "locating within 1,000 feet of any residential zone … church, park, or school." *Id*. at 43. Although the ordinance singled out adult theaters for disadvantageous treatment under the law, the ordinance was still content-neutral because it was "aimed not at the *content* of the films … but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47. Because the ordinance was designed to prevent the secondary effects of crime and the decline in neighborhood quality, it was merely a "decision by the city to treat certain theaters differently because they have markedly different effects upon their surroundings." *Id.* at 48-50. As the predominate concerns were not with the content of the adult films themselves, the ordinance was content-neutral despite incidentally burdening one category of speech. *Id. See City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (finding neutrality where an "ordinance does not attempt to regulate the primary effects of the expression, *i.e.* the effect on the audience watching the nude erotic dancing, but rather the secondary effects, such as impact on public health.").

Squawker's restriction on violent and threatening emojis is content-neutral because the predominate concern of the restriction is preventing the secondary effect of an unavailable forum. R.15. As the ordinance in *Renton* was instituted to prevent crime, the Policy was implemented to allow Squawker to maintain a useable forum. *Id.* at 47; R.15. In *Renton*, the secondary effect of crime justified an ordinance regulating adult theaters because the mere presence of such theaters threatened the quality of the community. Similarly, here, the Policy ensures a workable forum by regulating spam and violent emojis because the mere presence of

either threatens the functionality of the forum. Indeed, 2,000 Delmont citizens were driven off the forum due to Milner's squeaks, causing the number of users on the platform to drop by 29%. R. 22, 24. Likewise, because Milner also squeaked four times in thirty-seconds, the "excessive volume" of Milner's squeaks "effectively shut down the forum for others." R.15.

Given the adverse effects of violent emojis and spamming on Squawker's viability as an online platform, the Policy's restriction on threatening emojis operates as the same type of content-neutral regulation as the zoning ordinance in *Renton.* Both regulations of the T&C demonstrate a desire to maintain the functionality of the forum that has nothing to do with the actual content of the speakers, but only the secondary effects that are unique to both rapid-fire and violent-emoji squeaking. Put simply, Squawker seeks to prevent such conduct because, as the T&C point out, it "silences the voices of others," not because it is offended by the content of Milner's speech. R.15. Thus, the T&C are content-neutral because they do not aim to suppress, but are predominately concerned with preserving Squawker as a forum for communication.

The district court – and Petitioner – incorrectly understate the targeted secondary effect of the Policy as merely preventing the use of crude speech on Squawker. R.12. The record shows that Squawker lost 29% of its users following Milner's squeaks. R.22. Unless Squawker can continue to implement reasonable guidelines to ensure the availability of its platform for all, it will continue to lose followers, effectively closing the forum. As Squawker has become a leading source of news in Delmont, such a result would put a much greater burden on speech than the Policy as it currently exists. R.21. This Court has held that "it is the right of the public to receive suitable access to social, political … and other ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Squawker's T&C promote that right. Therefore, like the ordinance in *Renton*, the Policy is not content-based, but effect-based.

Further, it is improper to categorize the T&C as a public tool for the censoring of offensive speech. In so doing, the District Court failed to take note of the break in the causal chain mandated by the T&C. R.15. The public can only "dislike" and report squeaks that are viewed as violating the T&C – that is where public involvement ends. R.15. Indeed, the Policy does not require public involvement at all. R.15. Instead, Mr. Pluckerberg is charged with making an independent judgment as to whether the squeak violates the policy. R.22. Here, it is clear, and Petitioner does not argue to the contrary, that Milner's squeaks violated both restrictions imposed by the T&C.

The Court of Appeals correctly rebuked the District Court's reliance on *Matal v. Tam*, 137 S. Ct. 1744 (2017), and its claim that the T&C's purpose is to silence viewpoints. R.34. While Respondent concedes that this is not the first time Milner engaged in spamming, the record is silent on the number of reports his squeaks received when he previously violated the T&C. However, with respect to Milner's squeaks at issue, flagging was warranted because Mr. Pluckerberg received over 2,000 reports that the platform had been hijacked because of Milner's rapid-fire squeaks. R.22. Thus, not only did Milner violate the letter of the T&C, but he caused the exact secondary effect that Squawker was trying to prevent: the closure of the forum. R.15.

2. Squawker's T&Cs are Narrowly Tailored to Serve a Significant Government Interest Because the Flagging Policy Imposes Only Partial Limitations on Speech to Foster an Orderly Forum.

Squawker's T&C are narrowly tailored to serve a significant government interest because the Policy ensures a useable forum through imposing only a minimal limitation on speech. For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* at 799. In other words, the unnecessary burden on speech must be substantial and, "the validity of such regulations does not turn on a judge's agreement" with the decisionmaker's

calculation as to the most effective policy option. *U.S. v. Albertini*, 472 U.S. 675, 689 (1985). The minimal burden imposed by the Policy survives these criteria.

a. *Maintaining a Useable Forum is a Significant Government Interest*

The State's interest is significant when a regulation is designed to keep a forum accessible to the public at large. *Clark v. Community for Creative Non- Violence*, 468 U.S. 288, 296 (1984). In *Clark*, the Court upheld a National Park Service regulation prohibiting camping in certain parks over a First Amendment challenge from demonstrators. *Id.* at 289. Holding that the regulation was a valid time, place, or manner restriction, it recognized the government's significant interest in maintaining the parks to keep them "readily available to the millions of people who wish to see and enjoy them by their presence." *Id.* at 296.

Squawker's purpose for implementing the Policy mirrors the significant interest that the Court recognized as legitimate in *Clark*. Like the *Clark* regulation that was enacted to ensure the availability of parks to all who wished to use them, Squawker adopted the Policy to similarly preserve an online public forum to all who wished to speak. R. 3, 22. Specifically, Squawker possesses a significant interest in safeguarding the availability of its platform "for the millions of users who wish to enjoy a … conversation online." R.12. In addition to support from this Court's precedent, the District Court in ruling for Petitioner recognized "the legitimacy of Squawker's interest in maintaining a useable forum." R.12.

b. *Squawker's Flagging Policy is Narrowly Tailored Because it Fosters a Viable Forum Without Imposing an Absolute Ban on Speech*

A time, place, or manner restriction is narrowly tailored when the regulation promotes a significant government interest that would be achieved less effectively without the regulation. *Albertini*, 472 U.S. at 689. In *Heffron*, a tailoring issue arose when members of the Krishna faith challenged a Minnesota State Fair regulation that required sale, distribution, and solicitation

operations to occur in a booth as opposed to throughout the fairgrounds. *Heffron,* 452 U.S. at 644. The International Society for Krishna Consciousness (ISKCON) asserted that this would suppress their unique religious practice that requires followers to go into public and distribute or sell religious literature. *Id.* at 644-645. The Court held that Minnesota's interest in maintaining orderly movement through the forum was significant, and that confining individual exhibitors to fixed locations accomplished that significant goal. *Id.* Therefore, because the restriction on speech promoted the government's interest and prevented "widespread disorder at the fairgrounds," it was narrowly tailored. *Id*. at 653.

The Policy is narrowly tailored because it promotes the significant interest of maintaining a usable forum that would likely be lost without such guidelines. Like ISKCON's desire to proselytize by moving through the crowds in *Heffron*, Milner also seeks to engage in a unique form of speech: "evolving emojis." R.19. Even though the Policy places some limits on emoji use, it is still narrowly tailored for two reasons. First, as addressed in the proceeding subsection, Squawker's interest in maintaining a usable forum is significant. Second, the Policy promotes that significant interest by condemning behavior that allows one user to hijack the space and "effectively shut down the forum for others," and does so without banning access to the offending squeaks or closing access to Squawker for the offending user. R.22. To permit violent emojis and spamming would be completely inimical to Squawker's purpose, as would be readily understood by each of the 2,000 Delmont citizens who endured the consequences of the activities of Milner and were compelled to leave the platform. R.24. Thus, because Squawker has a legitimate interest in preserving a useable forum, and the forum would be exposed to more harm without the T&C, the regulation is narrowly tailored.

The District Court's reliance on Milner's post-flagging decrease in viewership to demonstrate that the regulation is not narrowly tailored is an assumption that is entirely unsupported by the record. Milner's squeaks targeting Governor Dunphry received over 1,000 dislikes and 2,000 reports for abusive language and constructive closure of the forum. R.30. This evidence suggests that it was not the Policy that caused harm to Milner's popularity, but instead a sharp rebuke from Delmont Squawker users in response to his overtly violent and ageist squeaks. This explanation is especially compelling given that over thirty-percent of all Squawker users are over the age of sixty-five, and that of the twenty-nine percent of users to leave the platform following Milner's conduct, the majority were over sixty-five. R.22. Additionally, any loss of employment opportunity that the District Court attributed to Milner's flagging is overstated and unsupported by the record. It is equally likely that potential employers view Milner as too risky to hire considering his weeknight tendencies include drinking numerous alcoholic beverages and issuing death threats to elected officials on social media. R. 5, 20, 29.

3. Squawker's Flagging Policy Leaves Open Alternative Channels for Communication Because Milner is Permitted to Invite Other Users to View His Content and He is Still Able to Access the Forum.

To be open for alternative channels for communications, a time, place, or manner restriction "need not be the least restrictive or least intrusive means" of serving the government's interest. *Ward*, 491 U.S. at 798. Further, such a regulation is not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689. The Policy leaves open ample channels for communication because Milner is permitted to invite other users to view his content, and he is still able to access the forum. R.15.

A regulation leaves open ample alternative channels of communication when the speaker retains access to the forum. *Heffron*, 452 U.S. at 655. In *Heffron*, ISKCON also claimed that the state fair's rule left open no alternative channels for their expression. *Id.* at 654. The Court

rejected this claim because the rule did not serve as an absolute ban on speech and allowed ISKCON to: (1) actively sell or distribute religious literature directly outside the fairgrounds; (2) proselytize from a booth within the fairgrounds; and, (3) mingle with the crowd and orally propagate their views, so long as no transaction took place. *Id.* at 655. Because the "rule ha[d] not been shown to deny access within the forum in question," ample alternative channels for communication existed. *Id.*; *see also Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2nd Cir. 2006) (holding that alternatives need not be "perfect substitutes for those channels denied to plaintiffs by the regulation at hand.").

The Policy is narrowly tailored to leave open alternative channels of communication because Milner was not banned from the forum. R.6. As ISKCON was still able to access the fairgrounds, Milner was still able to access and use the Squawker platform despite being flagged. R.6. Further, Milner was still able to access the Governor's page, and all of his squeaks remained online. R.35. Additionally, as ISKCON had other options besides mobile distribution of literature inside the fair, Milner could create a new Squawker page or watch a short training video and complete an online quiz to lift the flag on his profile. R.16. Further, he has the third option of continuing to operate his profile under its flagged status. *Id*. While these options may be imperfect in Milner's eyes, because the Policy does not foreclose Milner's access to the forum or stamp-out his speech, ample alternative channels for communication exist.

Courts have also held that ample alternative channels for communication exist when the speech remains accessible to those who accept an invitation to hear it. *Kleinman v. City of San Marcos,* 597 F.3d 323, 328 (5th Cir. 2010). In *Kleinman,* an artist that decorates wrecked cars asserted a First Amendment claim alleging that a city ordinance preventing the public display of junked-vehicles left him without an alternative means for expression. *Id.* at 329. The court

disagreed because the artist was "free to display the car-planter behind a fence, indoors, or in a garage enclosure" and invite the public in to view it. *Id.* Thus, the court held that because the ordinance allowed accessibility to those who accepted an invitation to view the speech, the ordinance was narrowly tailored and left open alternative channels of expression. *Id.*

The Policy leaves open alternative channels of expression because Milner's content remains easily accessible. Like the ordinance in *Kleinman*, the Policy does not call for the removal of speech. R.16. Instead, the offending comment and the offender's profile are only screened from view. R.16. Much like erecting a fence around the expression in *Kleinman*, an offending Squeaker's content is placed behind a black box that can be removed by a viewer's single click. R.16. Under the Policy, any user can choose to bypass the warning symbol displayed over a flagged page or comment and view the content at any time. R.16. Thus, the Policy leaves open ample alternative channels for communication because Milner's content remained viewable to anyone who accepted an invitation to view it.

Accordingly, this Court should affirm the decision of the Court of Appeals because: (1) the T&C were adopted for the content neutral purpose of preserving a useable forum; (2) the Policy's slight limitation on speech effectuates the significant interest of maintaining a public forum; and, (3) Milner is permitted to access Squawker and invite users to view his content.

CONCLUSION

For all the foregoing reasons, Respondent Mac Pluckerberg requests this Court to affirm the Eighteen Circuit's Opinion and Order.

Dated: January 31, 2020 Respectfully submitted,

/s/ Team 7

CERTIFICATE

The work product contained in all copies of this brief is in fact the work product of Team 7. Team 7 has complied fully with our school's honor code. Team 7 has complied with all rules of the competition.

Respectfully signed,
Team 7

Appendix A

Relevant Constitutional and Statutory Provisions

1. Amendment I to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Amendment XIV to the United States Constitution

Section 1.
All persons born or naturalized in the Unites States, and subject to the Jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 28 U.S.C §1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
2. By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

4. 28 U.S.C. § 1291 provides:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5. 28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Appendix B

1. Terms and Conditions (R.15).

> Here at Squawker, we are committed to combating abuse motivated by hatred, prejudice or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized. For this reason, we prohibit behavior that promotes violence against or directly attacks or threatens other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. In addition, we prohibit the use of emojis [emoticons] in a violent or threatening manner. We aim for a positive user experience that allows our users to engage authentically with each other and build communities within our platform therefore spamming of any nature is not prohibited for those participating in posting and commenting on the platform. A Squeaker may not participate in the automatic or manually facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies to the effect the platform is unusable by others. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other.

2. Revised Flagging Policy for Verified Accounts (R.16).

> Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged. This will require all users to click on an emoji of a skull and crossbones in order to clear black boxes covering (1) the offending squeak or comment; (2) the offender's future squeaks and comments; and (3) all content on the offending Squeaker's profile page. A skull and crossbones badge will also appear next to the offending Squeaker's name on Squawker in order to warn the community. To have this flagging removed, a Squeaker must complete a thirty-minute training video regarding the Terms and Conditions of the community and complete an online quiz. Two failed attempts will result in a ninety-day hold. The offending comment will remain flagged, although the user may still delete it.

Appendix C


Avery Milner
@DanceDad72
Following
We gotta get rid of this guy.
Reply Resqueak Favorite More
5:32:02 PM - 26 July 18 · Embed this Squeak
Avery Milner
@DanceDad72
Following
+
Reply Resqueak Favorite More
5:32:14 PM - 26 July 18 · Embed this Squeak
Avery Milner
@DanceDad72
Following
+
Reply Resqueak Favorite More
5:32:23 PM - 26 July 18 · Embed this Squeak
Avery Milner
@DanceDad72
Following
+
Reply Resqueak Favorite More
5:32:31 PM - 26 July 18 · Embed this Squeak