Team 11
Counsel for Respondent

No. 17-874

In the Supreme Court of the United States

AVERY MILNER,
Petitioner

v.

MAC PLUCKERBERG,
Respondent

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. 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?

II. 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Federal Appellate Court Cases

Constitutional Provisions

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighteenth Circuit is reported at R.25 (C.A. No. 16-CV-6834). The opinion of the United States District Court for the District of Delmont is reported at R.1 (C.A. No. 16-CV-6834).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgment. R. at 36. Petitioner filed a timely petition for a writ of certiorari, which was granted by the Court. R. at 37. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in Appendix A: U.S. Const. amends. I, XIV, § 1.

STATEMENT OF THE CASE

In 2017, Petitioner created an account on Squawker, the social media platform privately owned and operated by Respondent, Mackenzie Pluckerberg. Milner Aff. ¶ 5. Petitioner agreed to Squawker's Terms and Conditions when he created his account, which require users of the platform abstain from harassing and abusive behaviors that have historically excluded marginalized communities from public discourse. Milner Aff. ¶ 5; Stipulation ¶ 6. Squawker places warning boxes over posts that violate community standards, which require users click on the icons to view the concealed post. Stipulation ¶ 6. In 2018, Squawker updated its Terms and Conditions with a new flagging policy that applied to verified pages, pages managed by government officials that underwent verification of their identities to prevent imposter accounts. Stipulation ¶ 9. As one of the public's main sources of news and incorporation of the platform by government officials, who use it to communicate with and inform the public, disruption and

adulteration of the public's access to the platform hinders democracy. R. at 3. Thousands of reports of fake accounts that spread misinformation and lied to voters to disrupt democracy prompted Squawker to secure the platform with anti-spamming and anti-abuse countermeasures. Stipulation ¶ 8, 9. The new flagging policy for violative posts on verified pages placed the warning boxes on all of a violator's content, not just the original post, and marked their username with a skull icon. Stipulation ¶ 9. The flagging on all but the original post can be removed if the violator completes a thirty minute training video and passes an online quiz on the Terms and Conditions. Stipulation ¶ 9. Petitioner agreed to the new Terms and Conditions when it was modified in 2018. Milner Aff. ¶ 5. In 2018, Petitioner posted comments on Governor Dunphry's verified government page that were flagged for violating the community standards. Petitioner posted four posts in such quick succession that they received over one thousand dislikes and more than 2,000 complained Petitioner was disrupting access to the forum, making it virtually unusable. Pluckerberg Aff. ¶ 11, 12. Petitioner filed this suit, alleging Squawker's policy infringes on his freedom of speech under the First Amendment.

SUMMARY OF THE ARGUMENT

Squawker is not transformed into a state actor by hosting a public forum because doing so is not a public function. Further, Squawker is a private business rendering business judgments independently of government influence. Suggestions from government agents do not transform Squawker's private business judgement into concerted state action. Although Governor Dunphy suggested a verified user policy, Squawker retained ultimate discretion over the new verified user policy. Therefore, the First Amendment does not govern Squawkers editorial discretion.

Even if a state actor, Squakwer's flagging policy is a content-neutral manner restriction that is narrowly tailored to achieve a substantial state interest. Squawker's flagging policy merely

restricts the frequency user's may squeak so that the forum remains operable to its millions of users. Squeeks are still viewable with users' consent and account holders may continue to speak on Squawker even after their squeaks or accounts are flagged. In doing so it employs the least restrictive means to promote a marketplace of ideas. Further, if Squawker's verified page flagging policy is deemed content-based, Petitioner's speech is least burdened by the measure of placing a warning box over his harassing posts, which is necessary to preserve access to the platform by historically excluded communities.

ARGUMENT

I. SQUAWKER'S ENFORCEMENT OF ITS TERMS AND CONDITIONS DOES NOT CONSTITUTE STATE ACTION, EVEN WITHIN PUBLIC FORUMS.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. AMEND. I The Fourteenth Amendment incorporates the First Amendment's Free Speech Clause into the duties of states and agents of the state under the Due Process Clause. restrictions onto the states. U.S. Const. amend. XIV, § 1; *Gitlow v. New York*, 268 U.S. 652, 672 (1925). Generally, neither amendment prohibits private entities from abridging speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995). Rather, the First Amendment prohibits the government and its agents from abridging speech. *Id*. Private entities must comply with the mandates of the First and Fourteenth Amendments when their conduct qualifies as state action . *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001).

This Court has struggled to articulate factors under which private conduct constitutes state action. *See Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)*(noting an explicit test recognizing state action is an "impossible task"); *see also Brentwood Academy*, 531 U.S. at 295. However, this Court held private conduct will constitute state action where the

private entity performs a public function or where there is a "sufficiently close nexus" between the State and the challenged action. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974). Additionally, a private entity becomes a state actor if the government acts in tandem with a private actor, or if the government compels the private conduct. *Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019). Precedent requires "sifting facts and weighing circumstances," on a case by case basis. *Burton*, 365 U.S. at 722.

Here, Squawker is a private company and Petitioner is a private individual. Stipulation ¶ ¶ 1, 2. Neither are formally associated with or funded by any government entity. *Id*.; R. at 32. The Second Circuit held that the President's social media page constitutes a public forum even though it is hosted by a private company. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235 (2d Cir. 2019). Like the President, Governor Dunphry's uses Squawker to conduct similar legislative and executive functions including announcing major policy proposals to constituents, and his page should likewise be considered a public forum. Dunphry Aff. ¶ 9; Stipulation ¶ 14. Absent a finding of state action, the First Amendment does not govern the interactions between Squawker and Petitioner within the platform. *Brentwood Academy*, 531 U.S. at 295

A. The Government Has Not Traditionally or Exclusively Enforced Standards For User Interactions Within Public Forums, So It Is Not a Public Function.

Private entities become state actors when performing a public function. *Terry v. Adams*, 345 U.S. 461, 470, (1953). To qualify, an entity must exercise "powers traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 352. It is not enough to further the public good or advance a public interest in some capacity. *Halleck*, 139 S.Ct. at 1928-29. This Court held "very few" functions fall within this category. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). Recognized public functions include running elections and operating privately-owned company

towns. *See Terry*, 345 U.S. at 468-70 (elections); *Marsh v. Alabama*, 326 U.S. 501, 505-09 (1946) (company town). In contrast, operating public access channels and running recreational sports leagues. *See Halleck*, 139 S.Ct. at 1930 (public access channels); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544-45 (1987) (amateur sports league). This Court has yet to consider if a private company's regulation of a public official's social media page constitutes state action, possibly because "forces and directions of the Internet are so new, so protean, and so far reaching that…what they say today might be obsolete tomorrow." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

In *Halleck*, this Court held a private company managing mandated public access cable TV channels was not a state actor. *Halleck*, 139 S.Ct. at 1927. Television producers challenged the content-based suspension of their show by the private company operating public access channels. *Id*. This Court noted that public access channels had historically been operated by both public *and* private actors including private cable companies and private non-profit organizations. *Id*. at 1929. Producers argued the scope of the public function definition should include "operation of a public forum for speech." *Id*. at 1930. But this Court held that simply providing a forum for public expression, information, or entertainment does not transform a private actor into a state actor. *Id*. Further, operating a public forum is not an exclusive function of the state. *Halleck*, 139 S.Ct. at 1934. Even under the broader public function definition, neither regulating a public forum nor operating public access channels established state action. *Id*. at 1927.

Like the private cable company in *Halleck*, Squawker's management of the platform and infrastructure supporting the public's and government's social media has not exercised powers exclusively and traditionally reserved to the state. *Id*. Through forums inviting the public to engage in speech, both companies may subject users to terms of use and their editorial discretion.

Id.; Stipulation ¶ 6. The *Halleck* Court considered the non-exclusive management of public access channels by both public and private entities dispositive in concluding forum management was not always traditionally reserved to the state. *Halleck*, 139 S.Ct. at 1929. Squawker is one of many social media companies that have exclusively managed the content on their platforms for decades. Pluckerberg Aff. ¶ 4. Therefore, neither hosting nor regulating a public official's social media platform have been traditionally or exclusively performed by the state.

Likewise, broadly defining SQ's performed function as "hosting a public forum in general" will not establish a public function under the state action doctrine. Simply opening one's property for the speech of others does not conclusively establish state action. *Halleck*, 139 S.Ct. at 1930. When Squawker allows individuals to use its forum to engage in social media, Squawker is not transformed into a state actor. Therefore, social media companies like Squawker do not need to sacrifice their editorial discretion when they passively host public forums because this is not a function traditionally or exclusively reserved to the state. Even broadly defining Squawkers performed function, Squawker is not a state actor.

B. Absent Interdependence, Suggestions Between Government Officials and Business Owners Will Not Transform Private Business Judgement Into Concerted State Action.

Private conduct becomes state action where government entities acts jointly with private entities. *Halleck*, 139 S.Ct. at 1928. The government must act in tandem with a private entity or demonstrates such interdependence upon a private entity that challenged activity is not considered "purely private." *Burton*, 365 U.S. at 725. The two entities must become so pervasively entwined as to have "overlapping identities," that the private organization becomes a "surrogate" for the state. *Brentwood Academy*, 531 U.S. at 297-98, 303. When private entities incorporate state actors into their structure, the private conduct may qualify as state action. *National Collegiate Athletic Ass'n v. Tarkanian*, 88 U.S. 179, 193 (1988).

In *Tarkanian*, this Court held the public University of Nevada ("UNLV"), did not engage in state action when it suspending its basketball coach in compliance with National Collegiate Athletic Association ("NCAA") standards. *Tarkanian*, 88 U.S. at 182. At the time, 960 private and public schools comprised the NCAA. *Id*. at 181,183. Thus, although UNLV is a state actor, the rules it enforced were promulgated not only by UNLV but through the "collective membership, speaking through an organization that is independent of any particular State." *Id*. at 193. Although the university had some influence in the NCAA's rules, this Court ultimately concluded UNLV's connection to the NCAA too negligible to constitute state action. *Id*.

However, in *Brentwood Academy*, this Court held decisions of an athletic association, almost entirely comprised of public entities and public officials acting within their official capacity, amounted to state action when enforcing a rule against a member school. *Brentwood Academy*, 531 U.S. at 299-300. Nearly 290 Tennessee public schools comprised 84 percent of the association's membership, and private schools 16 percent. *Id*. at 291. This Court noted that the "nominally private character of the [a]ssociation is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." *Id*. at 298.

Here, Squawker does not rely on government guidance or resources to provide or manage its platform, and government officials' access to the platform is the same as any other member of the public. Pluckerberg Aff. ¶ 5. While verified status pages have different consequences for users who violate community standards, the measure's purpose was not to benefit the government. Stipulation ¶ ¶ 7, 9. Verification of government pages reduces false accounts that misinform users, and the more stringent flagging policy deters violations with the potential for decreasing other user's access to pages crucial to the democratic process. Stipulation ¶ 8, 9. While governments could call unfettered access to democracy an important interest, private

businesses that contribute to it may just be civically concerned, not state agents. Squawker's policies do not form an interdependent relationship with the officials. *Burton*, 365 U.S. at 725.

Governor Dunphry suggested his friend, Squawker's decisionmaker and Respondent Mac Pluckerberg, consider the verification measure, but that suggestion held no decisive weight over Squawker's decision as was the case in *Brentwood Academy*. Pluckerberg Aff. ¶ 8, Dunphry Aff. ¶ 8; *Brentwood Academy*, 531 U.S. at 299-300. Even if public officials participate in independent businesses' decision-making processes by offering suggestions that might benefit the business or the public, without consequence the suggestions have no controlling effect on the businesses and cannot constitute evidence of concerted effort. *Tarkanian*, 88 U.S. at 182. Hence, Governor Dunphry recommended Squawker implement *a* verification policy, but the ultimate discretion of whether to create such a policy, to whom the policy would apply, and how the policy would operate were decisions completely reserved for Pluckerberg and the other computer science experts at Squawker. Dunphry Aff. ¶ 8; Pluckerberg Aff. ¶¶ 8, 9.

If Governor Dunphry's suggestion had been the sole influence in adopting the new policies, then it may rightly be considered state action. *See Knight*, 928 F.3d 226, 236 (holding that President Trump violated the First Amendment when blocking seven constituents from his Twitter page); *Davison v. Randall*, 912 F.3d 666, 687–88 (4th Cir. 2019) (holding that a government official violated the First Amendment by banning a constituent from their Facebook page). Squawker cannot be a surrogate for the state when it is free to reject the suggestion. *Brentwood Academy*, 531 U.S. at 303. Likewise, Squawker could also be said to have engaged in state action if Governor Dunphry had played a similarly influential role in flagging Petitioner's account. However, these assertions contradict the facts of this case.

Further, there is no evidence Governor Dunphry was involved in flagging Petitioner's account. Stipulation ¶ 13; Pluckerberg Aff. ¶ 11. Two thousand other Squawker users also found Petitioner's content violated Squawker Terms and Conditions and took it upon themselves to flag Petitioner's squeaks. Pluckerberg Aff. ¶ 11. Thus, Squawker's adoption and enforcement of their Terms and Conditions cannot be attributed to the state because Squawker did not act jointly with a state actor.

C. Governor Dunphry Did Not Compel Pluckerberg to Accept His Suggestion, and Therefore the Flagging Policy Lacks Government Influence Required For State Action.

Where the government compels a private entity to take specific action, the conduct is state action. *Halleck*, 139 S.Ct. at 1928. However, government regulation of private entities alone does not establish state action. *Jackson*, 419 U.S. at 350; see also *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 175, 179 (1972) (holding that a state-issued liquor license does not transform a private social club into a state actor). Similarly, the state's "mere acquiescence" or approval of private conduct does not create state action. *Flagg Bros.*, 436 U.S. at 164-65. The state must exercise "coercive power" or provide "significant encouragement" such that the decision must be considered that of the state as a matter of law. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

In *Blum*, this Court held a private nursing home who reduced Medicare patient's level of care without advance notice did not engage in state action. *Blum*, 457 U.S. at 1012. Even though federal law required providers to follow specific procedures when altering care to Medicare patients, this Court did not extend state action to the nursing home because their connection to the State was "too slim." *Id*. at 1009-10. Ultimately, the federal Medicaid regulations and penalties for noncompliance did not dictate the nursing home's decision to alter the Medicaid recipients' location or type of care. *Id*. at 1010.

Like *Blum*, no government actor compelled Pluckerberg to adopt new terms and conditions for verified users. Governor Dunphry may have encouraged Pluckerberg, but he did not coerce Squawker into adopting the new flagging policy. Pluckerberg Aff. ¶ 8. Pluckerberg knew about the issue of fake Squawker accounts reporting fake news several months before Governor Dunphry approached Pluckerberg with his idea of adding a verification feature. *Id*. at ¶ 7. Utilization of a government official's advice for a problem does not make the solution state action. Therefore, the state action doctrine would be inappropriately applied here where there is no compelled government action.

D. Classifying Private Media as State Actors Will Eliminate Editorial Discretion and Reduce Access to the Free Marketplace of Ideas.

As this Court stated in *Halleck*, a private entity does not transform into a state actor simply by opening its property for public speech. *Halleck*, 139 S.Ct. at 1931. If the contrary were true, all private property owners opening their property to the public's speech would be subject to the First Amendment and "would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum." *Id*. These private individuals would thus "face the unappetizing choice of allowing all comers or closing the platform altogether." *Id*.

If required to provide a platform—and the costly infrastructure that accompanies it—to all speech the private business disagrees with, virtually all media companies will find themselves subsidizing an open floodgate of uncorroborated content. Otherwise the companies would have to exclude all government entities from the platform or cease operation. While virtually every newspaper or magazine with an opinions section invites members of the public to submit letters to the editor and columns for publication, the decision not to include some content is editing—not censorship—of the speech projected by their platform. Editorial discretion encapsulates the

freedom of speech inherent in every individual—the power to use their voice and their resources to support or reject ideas.

Moreover, closing or dramatically altering the structure of social media platforms will stifle open communication in this digital age. Squawker is a multinational platform empowering millions to express ideas, interact with others, and access information. Pluckerberg Aff. ¶ 5. Many rely on Squawker as their exclusive source of local and national news. Stipulation ¶ 7. Further, government officials like Governor Dunphry use Squawker as a medium for announcing new policies and engaging with affecting constituents. Dunphry Aff. ¶ 7. Platforms like Squawker boost civic engagement and promote government accountability. Without them, millions would lose access to important information and an accessible means of communication. Qualifying private media like Squawker as state actors will grossly reduce access to the free marketplace of ideas.

II. THE FIRST AMENDMENT PERMITS CONTENT-NEUTRAL MANNER RESTRICTIONS LIKE SQUAWKER'S TERMS AND CONDITIONS.

The First Amendment guarantees the right to freedom of speech. U.S. CONST. AMEND. I. Content-based restrictions in public forums are violate the First Amendment "regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Sable Communications of California v. Federal Communications Commissions* 492 U.S. 115 (1989). Although historically the courts view freedom of speech as a fundamental right, that "do[es] not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox v. State of La* 379 U.S. 536, 544 (1965). Thus, evaluations into the constitutionality of a regulation on speech, the Court must first determine if the regulation hinges on the content of one's speech. *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989). In *Ward,* this Court outlined, "The principal

inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id*. In addition, this Court emphasized that "the government's purpose is the controlling consideration" *Id.* at 791. If Squawker is deemed a state actor when its policy implicates speech on a public forum, its restrictions on speech must be narrowly tailored to serve a substantial government interest without consideration of the content of the speech. *Hill v. Colorado,* 530 U.S. 703, 726 (2000). Accordingly, Squawkers regulation must stem *solely from the content of Petitioner's speech in order to be held in violation of the First Amendment.*

A. Squawker's Terms and Conditions Regulate the Manner in Which Users Post to the Platform, Regardless of Their Content, to Maintain the Accessibility of the Forum.

The purpose of content-neutral regulations must be unrelated to the content of the speech. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Content discrimination includes different treatment based on the viewpoint or subject matter of speech. *Reed v. Town of Gilbert, Ariz,* 135 S.Ct 2218, 2230 (2015). However, even an "incidental effect on some speakers or messages but not others" is insufficient justification alone to render the regulation unconstitutional. *Ward* 491 U.S. at 791.

In *Ward,* the city created sound-amplification guidelines to control the noise levels at events to avoid disturbing residential and surrounding areas. *Id.* at 785. The Court decided that these guidelines are content-neutral because the policy had nothing to do with the content of the noise. *Id.* at 793. The primary purpose of these guidelines was to protect the public from excessive noise. *Id.* As well as to ensure the enjoyment of the park and performances. *Id.* Further, *Ward,* is a useful example of a content-neutral restriction.

Like *Ward,* Squawker's policy is a content-neutral manner restriction because the purpose of Squawker's flagging policy is to protect the public from harassment and allow the public to access the forum. The Terms & Conditions explicitly prohibit certain manners of speech that harass and disrupt access, such as "use of emoji's [emoticons] in a violent or threatening manner." and "spamming of any nature." Stipulation ¶ 6. As such, the purpose of Petitioner's account was not to curtail Petitioner's views, but rather to increase the positive user experience for the entire Squawker community. Squawker has grown in its popularity and connects users to the news, their legislatures and representatives. Stipulation ¶ 7. Thus, Squawker has a substantial interest in keeping the forum accessible to all. On Squawker, when Petitioner spammed the Governor's page, the forum became unusable to many users. Stipulation ¶ 12. Therefore, Squawker properly responded to Petitioner's harassment and violent use of emojis and spamming to prevent future shutdowns of the forum. Had Squawker failed to act and allowed Petitioner to continue spamming the platform, Squawker users would continue to lose access to Squawker. This would infringe on their right to obtain information from their local officials conducting official business via Squawker. Pluckerberg Aff. ¶ 12.

Squawker's policy does not seek to silence Petitioner but ensure all Squawker users can use the platform without it shutting down. Petitioner is free to express any views he wishes and can continue to do so even while his account is flagged. Stipulation ¶ 9. The only repercussion of the flagging policy is that other users must give their approval before viewing Petitioner's squeaks. Stipulation ¶ 9. It follows, this regulation like *Ward's* guidelines on sound amplification, temper the interruption of his squeaks but never prevent them from being seen. Stipulation ¶ 9. Just as the Court in *Ward* found there was a substantial government interest limiting the sound volume, Squawker presents a substantial interest in users complaining

Petitioner overpowered the forum. 491 U.S, at 784. Users left Squawker because Petitioner hijacked the space. Stipulation ¶ 12. Nonetheless, Squawkers regulations are equivalent to those in *Ward's*—they merely limit the volume of speech so that everyone can use the public forum.

B. Petitioner's Emojis Seek to Incite Violence on Another, and Squawker's Flagging is the Least Restrictive Way of Preventing the Unlawful Speech From Harming Another.

The First Amendment does not protect violence disguising itself as freedom of speech. *Brandenburg v. Ohio,* 395 U.S. 444, 448 (1969). In *Brandenburg v. Ohio,* this Court determined that we must decide if the expression "is directed to inciting or producing imminent lawless action and is likely to produce such action." *Id*. at 447.

It is uncontested that Squawker flagged Petitioner's post because of violent and or offensive use of emojis. Milner Aff. ¶ 9. Petitioner's use of a coffin and syringe emoticon paired with saying, "we gotta get rid of this guy," indicated that he advocated for the murder of the Governor. Stipulation ¶ 12. This kind of speech explicitly incites violence and is likely to cause individuals to harm Governor Dunphry. This conduct expressly violates the Terms & Conditions. Squawker's policy advocates for positive user engagement that allows individuals to stay up to date with their local news. Stipulation ¶ 7. Clearly, Squawker is not a forum that will tolerate users encouraging imminent lawless action, simply because the users disagree with another user's policy decisions.

Petitioner argues that some may classify his emojis as offensive and that this alone, was the motivating factor in the flagging on his page. While it is true, some may find his emoji's offensive and ageist, that does not negate the fact that they incite violence. R. at 35. Evidently, Petitioner's use of emojis and the collective "we" communicates his wishes to engage and encourage other users to take violent action against the Governor. Stipulation ¶ 12. At the time of his comment, Petitioner had over ten thousand followers and averaged thousands of views per

squeak. Milner Aff. ¶ 6. As Petitioner posted these squeaks, he invited his ten thousand followers to engage in violence against the Governor. Other Squawker users reported Petitioner's post two thousand times. Pluckerberg Aff. ¶ 11. Further, Mr. Pluckerberg, in flagging his posts, notified other users that his posts were violent, and that Squawker will maintain its policy of ensuring uninterrupted access to the platform. Stipulation ¶ 6. Flagging Petitioner's account did not silence him but served as a warning to users.

Additionally, the argument that Squawker silenced Petitioner's squeaks *solely* because they were offensive is without merit because *all* squeaks are still on Squawker. Yet, if Squawker truly wanted to silence his views because they were *purely* offensive, Squawker would not leave the comments on the forum, nor allow Petitioner to continue to use the platform. Accordingly, Squawker's policy is a content-neutral restriction on manner because it is a means to protect against harassment and ensure unfettered access to the forum. Petitioner's excessive posting in conjunction with violent emojis constructively incited violence and violated the Terms & Conditions. His posts made users feel unwelcome, causing more than 20% of users to leave Squawker completely because he "hijacked" the space. Pluckerberg. Aff ¶ 12. Therefore, like *Ward*, Squawker's flagging policy neutrally ensures that the Squawker remains open and accessible to all.

C. Squawker's Flagging Policy is Narrowly Tailored to Maintain Access to the Platform For All Users With the Least Burdensome Effects Petitioner's Speech.

Content-neutral regulations that are not time, place or manner restriction must be narrowly tailored to serve a substantial government interest. *Hill v. Colorado* 530 U.S. 703, 726 (2000). Further, the Supreme Court clarifies, to satisfy the narrowly tailored requirement the regulation cannot "burden substantially more speech than is necessary to further the

government's legitimate interests" *Ward,* 491 U.S. at 799. Additionally, the Court indicates that these restrictions must leave open ample alternative channels of communication. *Id.* at 703.

In *Hill,* this Court found that a statute prohibiting individuals from displaying signs and leafleting, within eight feet of a health clinic was narrowly tailored. *Hill,* 530 U.S. at 703. In reaching this conclusion, the Court indicated that the eight feet distance might make it more difficult for oral speech. Yet, there was no restriction on the size of their posters or other materials. *Id.* at 727. Additionally, although the leafleting restriction is the most burdensome, individuals can still stand close to the path, and the pedestrians walking by are free to accept or decline the leaflet. *Id.* Further, the Court emphasized that this kind of regulation is permissible in light of the First Amendment's protections to freedom of speech.

This case is analogous to *Hill* because both regulations serve to limit only some speech. *Hill,* 530 U.S. at 726. In the case at hand, Mr. Pluckerberg flagged Petitioner's account for violating the Terms and Conditions and disrupting the platform to the point where other users lost access. Pluckerberg Aff. ¶ ¶ 11, 12. Squawker flagged Petitioner's posts because his chosen mediums disrupted the forum by others. Squawkers policy ensures access to all and is the least intrusive way to maintain access to the public forum. Other users, if they wish, can agree to view his squeaks. R. at 35. This is similar to the statute in *Hill,* where pedestrians can agree or decline to hear the speech as they walk by. There, the Court upheld the restrictions and determined that the regulation was content-neutral and narrowly tailored. *Hill,* 530 U.S. at 725. In the instant case, the regulation on Petitioner's page is less extreme than *Hill.* Currently, Petitioner can do a training and get his account back without his account changing. Stipulation ¶ 9.

In *Hill,* this Court was concerned that the restriction on where individuals can stand, and express speech would hinder their ability to communicate with as many people effectively. Yet,

on Squawker, the squeaks stay up forever. Milner Aff. ¶ 13. There is no true issue of losing an audience if that audience *wants* to stay engaged. Petitioner can still reach the same audience every day even with squeaks that violate the terms and conditions. Milner Aff. ¶ 13. The only difference is that the Squawker policy now requires users to agree to see the squeaks of accounts that are flagged. R. at 35. Loyal followers can agree to view his squeaks and choose to stay engaged. Milner Aff. ¶ 13. However, in *Hill,* individuals could not ensure that their presence would withstand forever. Yet, this Court found the restriction permissible. Squawker maintains a substantial interest in regulating the frequency of squeaks and violent emoji used in the forum. As stated earlier, this regulation is vital for Squawker to ensure accessibility to all and prevent the platform from shutting down. Pluckerberg Aff. ¶12. Therefore, this restriction is the least restrictive means available to keep Squawker running efficiently. *Hill,* 530 U.S. at 726; R. at 35.

Without putting up safeguards and restrictions on Squawker, the forum may continue to shut down accounts and access to Squawker altogether. Thus, in only flagging his squeaks, and restricting spamming, Squawker protects other users' rights to use the forum. However, Squawker does not do this at the expense of Petitioner's speech, as they continue to let his squeaks be seen on affirmative assent. R. at 35. Accordingly, this is the most narrowly tailored restriction Squawker could implement.

D. Squawkers Policy Leaves Open Alternative Channels of Expression Since Petitioner's Content Remains Easily Accessible on the Forum.

Even if content-neutral regulations are narrowly tailored, they must still leave open ample channels of communication. *Hill v. Colorado* 530 U.S. 703, 725 (2000).

Petitioner objects that his popularity decreased on the forum because of the regulation. Milner Aff. ¶ 13. However, users may simply no longer wish to see his squeaks. It is possible that his base of viewers decreased independently of the flagging and warning boxes. Petitioner

also alleges that these regulations leave him without an adequate means to express himself. Milner Aff. ¶ 6. However, alternative channels of expression, "need not 'be perfect substitutes for those channels denied to plaintiffs.'" *SEIU v. City of Houston,* 542 F.Supp.2d 617, 627 (S.D. Tex. 2008) (quoting *Vincenty v. Bloomberg,* 476 F.3d 74, 88 (2d Cir. 2007). In order to satisfy ample channels of communication, the regulation cannot deny someone a "reasonable opportunity" for communication. *Menotti v. City of Seattle,* 409 F.3d 1113 at 1141 (2005). Given that Petitioner can still use his page in light of Squawker's policy, this Court should find that the regulation has not denied him ample channels of communications. *Hill v. Colorado,* 530 U.S., 703, 725 (2000). The only restriction on his communication, is that others must affirm to see his squeaks, which is the least restrictive form of enforcing Squawker's community standards. R. at 35. This policy essentially gives Petitioner the freedom to violate the policy with the only true consequence is the inconvenience of his supporters assenting to view his squeaks.

III. SQUAWKER'S COMPELLING GOVERNMENT INTEREST OF PUBLIC ACCESS TO OFFICIAL'S PAGES IS LEAST INTRUSIVELY SERVED BY PROHIBITING THREATENING AGEIST CONTENT.

If Squawker is deemed a state actor when it regulates content posted to a public forum, then its content-based prohibitions must satisfy strict scrutiny, which requires narrow tailoring of the restrictions to measures necessary to serve compelling government interests. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). Restrictions are content-based if they are facially content based, or cannot be "justified without reference to the content of the regulated speech." *Id*. 135 S. Ct. at 2227. Content-based discrimination includes viewpoint discrimination and subject matter discrimination. *Id*. Restrictions upon content that discriminates against a person's characteristic, or disparages persons with certain characteristics is viewpoint discrimination. *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

Here, Squawker's Terms and Conditions 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," as well as the use of emojis in a violent or threatening manner. Stipulation ¶ 6. Squawker applied this policy against Petitioner for his use of "violent and/or offensive emojis," which resulted in the creation of a warning box, that required other users to affirmatively agree to view the content that violated community standards. Stipulation ¶ 6. If this Court holds Squawker's policy would allow for the prohibition of speech that is disparaging, it constitutes viewpoint discrimination that must satisfy strict scrutiny. *Matal*, 137 S. Ct. at 1751.

A. Squawker's Flagging Policy Prevents Intimidation and Harassment, Preserving the Government's Compelling Interest in Unfettered Access to Public Forums.

This Court held in *Williams-Yulee v. Florida Bar* that content-based restrictions will rarely be necessary to serve a legitimate compelling government interest. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). However, this Court has acknowledged at least four circumstances in which it would recognize necessary content-based restrictions, including: preventing voter intimidation and election fraud by prohibiting solicitation of votes or display of campaign materials within 100 feet of polling places in *Burson v. Freeman* and preventing government corruption by prohibiting quid pro quo contributions to candidates in *McConnell v. Fed. Election Commission*. *Williams-Yulee*, 575 U.S. at 444 (2015) (citing *Burson v. Freeman*, 504 U.S. 191 (1992) and *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), overruled on different grounds by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)); see also *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

This Court recognized an even further degree of editorial discretion when state actors operate as an advertiser of or distributer of content, as long as it is not "arbitrary, capricious, or

invidious," which excluding speech not of a commercial nature from the government platform satisfied. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974). Even though this Court recognized in *Cohen v. California* that the public will have to avert their eyes to unwanted expletives because some social harm is warranted for the protection of speech, it drew the line at "captive audiences" without the ability to "turn the radio off" because it would sacrifice their use of public utilities like subsidized transportation. *Cohen v. California*, 403 U.S. 15, 21 (1971); *Lehman*, 418 U.S. at 302. Where the compelling interest prompting restriction was preventing obstruction of the public's access and use of government entitlements, this Court upheld restrictions with disproportionate burdens on political speech. *Burson*, 504 U.S. at 208.

In *Burson*, this Court recognized that political speech within 100 feet of polls interfered with the public's access to a constitutional entitlement, and therefore compelling government interest: voting. *Id*. Although this Court has held that buffer zones for comfortability fail the narrow tailoring requirement, it concluded in *Burson* that an obstruction rationale may support even restrictions that would disparately exclude certain viewpoints or subject matter. *Id*. Because voter intimidation and election fraud are difficult to detect, this Court upheld the buffer zone to accommodate the important government interest. *Id*.

Here, Squawker's warning boxes protect its community from being compelled to view speech in violation of the consented to community standards, which were designed to prohibit harassment of marginalized communities on the platform. Stipulation ¶ 6. This rationale is analogous to protecting voters from intimidation with solicitations and political speech near polling places and public commuters from being held captive to political messages in their public transport. *Burson*, 504 U.S. at 191; *Lehman*, 418 U.S. at 302. In *Burson* and *Lehman*, where the platform of speech is provided by the government, or would require the public to view speech to

access public accommodations (i.e. polling places, public transportation or, here, legislature communications), the government has a compelling interest to exercise some editorial discretion to prevent intimidation or harassment of the public. *Id*. Therefore, Squawker's regulations satisfy the compelling interest requirement of strict scrutiny.

B. Squawker's Community Standards Provide the Least Restrictive Impact on Petitioner's Speech Possible to Serve the Compelling Interest of Preserving Forum Access to All.

In the interest of preserving as much speech as possible, content-based regulations must be narrowly tailored to serve the compelling government interest. *Reed*, 135 S. Ct. at 2226. In *Williams-Yulee v. Florida Bar*, this Court recognized that the inclusion and exclusion of captured speech need not be perfect to satisfy narrow tailoring, as an all or nothing approach would be too unworkable for courts and legislatures to fashion the regulations necessary to preserve a compelling government interest. *Williams-Yulee*, 575 U.S. at 444. Examples of permissive regulations upon content include the line of polling place cases that limited content of political subject-matter to prevent intimidation of voters on election day. *See Mansky*, 138 S. Ct. at 1876; see also *Burson*, 504 U.S. at 191. While courts should not quantify the value of permissive speech, this Court in *R.A.V. v. City of St. Paul* recognized that some of the most detestable forms of speech have qualities exceeding mere expression and amounting to conduct that can injure others. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). Regulations seeking to prohibit permissive conduct will not fail for lack of narrow tailoring because it incidentally captures speech otherwise protected. *Id*.

While the statute in *RAV* was struck down for seeking to restrict viewpoints, not merely conduct, this Court upheld a content-based enhancement on criminal behaviors where motivated by discrimination against marginalized groups because the ideas motivating one's decision to injure others or violate the law are not protected under the First Amendment. *R.A.V.*, 505 U.S. at

390; *Wisconsin v. Mitchell*, 508 U.S. 476, 487–88 (1993). In *Mitchell*, sentencing statutes that enhanced punishment where terroristic threatening, harassment or other illegal abuses upon others were motivated by racism, sexism or other suspect characteristics satisfied narrow tailoring despite capturing protected viewpoints, since the motivations signal that the defendant's purposeful intent to bring about the injuries in excess of the mens rea necessary for most criminal convictions. *Id*. The destructive and potentially violent consequences of these motivations exceed viewpoint, and become conduct within the scope of the government's police power to safeguard the public, such that the technical permissiveness of the ideas when they have no injurious conduct attached to them will not defeat regulations that capture some viewpoints. *Id*.

Here, the purpose of Squawker's community standards is to protect the access to its portal for government information by restricting the abuses and threatening conduct that has historically excluded many marginalized groups from access. Stipulation ¶ 6. Its measures are similar to those employed at polling places in *Mansky*, where persons trying to access the portal for government participation were restricted from expressing speech that would intimidate other participants. *Mansky*, 138 S. Ct. at 1876. By placing a warning box over content that does not adhere to the community standards Squawker has found an even better way than the *Mansky* court to allow the speech to remain in the marketplace while preventing the harmful conduct inherent in the threatening speech—exclusion of marginalized communities. *Id*.

The warning box is much less invasive upon Petitioner's speech than the measures employed in *Mitchell*, though the conduct the regulations seek to prevent are comparable—discriminatory abuses for the purpose of excluding others from enjoying access to democracy as opposed to discriminatory motivations for criminal victimization. *Mitchell*, 508 U.S. at 487–88. With the warning box, Petitioner's speech can still be viewed by visitors to his and the

government page, with the qualification that the viewers are apprised of the violation of the community standards before they are subjected to the abuses they believed they would be protected from when accessing their legislature's page. Stipulation ¶ 9. Contrary to the punishment employed in *Mitchell*, the boxes and flagging of Petitioner's account can be resolved with the minimal effort of being re-informed of the platform's standards—a measure that should prevent future unnecessary flags by preventing users from inadvertently violating the standards they may not have been aware of. *Mitchell*, 508 U.S. at 487–88. While a permanent box remains on the threatening comments on the government page, the box itself is not an insurmountable barrier to Petitioner's speech, but merely additional information about the speech that informs other users of the content's harmful qualities before it can injure them. This is a narrowly tailored measure that creates no more barrier to Petitioner's speech than necessary to prevent the conduct attached to it from injuring other users of the platform, and denying them exercise of their constitutional freedoms. *Williams-Yulee*, 575 U.S. at 444.

C. Squawker's Flagging Policy Does Not Foreclose Petitioner's Chosen Medium of Communication, or the Ample Channels Available to the Rest of the Public.

Even if a content-based restriction upon speech is narrowly tailored to serve a compelling government interest, it must leave open alternative channels of communication. *Frisby v. Schultz*, 487 U.S. 474, 483–84 (1988). In addition, this Court criticized restrictions that foreclose an entire medium of speech as suspicious. *Id*. at 486. But even then, restrictions burdening a medium of expression like picketing, which has the ability to be used to harass individuals in their homes, can be upheld when there are sufficiently accessible alternatives, such as door to door outreach or publication by mail, that do not disadvantage certain groups of people, namely the poor. *Id*. However, when proposed workarounds cannot overcome the exclusion of not just certain mediums of expression but certain speakers from a public forum, courts will consider the

restriction as unnecessarily overbroad. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 238 (2d Cir. 2019).

In *Lloyd Corp. v. Tanner*, this Court held that alternative means of public streets, sidewalks, parks and buildings were sufficiently available to give public access to venues for speech and constitute a sufficient amount of alternatives. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 567 (1972). Places of business, while open to the general public, may prohibit speech of certain viewpoints or subject matter, because individuals are not entitled to exercise unlimited freedom of speech on another's private property. *Id*. The series of shopping center cases qualified by *Lloyd* had struggled to find a positive right within the First Amendment to speech in places accessible to the public but not public property, as opposed to a negative requirement upon the government not to interfere with speech *Id*. (citing *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)). This Court concluded that the public only has a positive right to speech when granted such by state law or state constitution. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). But *Lloyd* made it clear that private businesses' right to exclude persons and speech from their property was as fundamental as a homeowner's right to express speech within his property, and that doing so did not leave the public without ample venues for speech. *Lloyd*, 407 U.S. at 567.

Here, Squawker's policy on verified pages does not foreclose any medium of speech that does not amount to harassment, as was permissible in *Frisby*. *Frisby*, 487 U.S. at 483–84. Like the individual whose house is surrounded by an angry mob of anti-abortion protestors, the public—captive because of the necessity of the information on government pages—is entitled to refuse to listen to speech it has expressed it does not consent to viewing, much less is displayed for the purpose of intimidating and harassing them. *Id*. Despite this legitimate basis for excluding

the speech entirely, Squawker has found an alternative that allows Petitioner's speech without forcing it on the captive audience, by apprising viewers that the speech exceeds what users affirmatively consented to view before allowing them to view or ignore it. Stipulation ¶ 9.

Squawker has not gone as far as to completely block Petitioner from accessing or continuing to post and be viewed on the government page, as was the case in *Knight*. *Knight*, 928 F.3d at 238. Rather Squawker has left this channel open to Petitioner to continue speaking, and has not affected the other suitable channels this Court held sufficient to give the public a venue when excluded by a private business. *Lloyd*, 407 U.S. at 567. As the private owner of the infrastructure supporting this platform, Squawker is not required to maintain a positive right of freedom of speech for Petitioner any more than homeowners would be required to endure his harassment in their living rooms. *Id*. Ample channels of communication are still available to Petitioner, on or off Squawker's platform. *Frisby*, 487 U.S. at 483–84.

CONCLUSION

Respondent respectfully requests this honorable Court uphold the judgment of the Eighteenth Circuit Court of Appeals.

Respectfully submitted,

/s/ Team 11

Counsel for Petitioner

Dated: January 30, 2020

BRIEF CERTIFICATE

Team 11 certifies that the work product contained in all copies of Team 11 brief is in fact the work product of the members of Team 11only; and that Team 11 has complied fully with its law school's governing honor code; and that Team 11 has complied with all Rules of the Competition.

/s/ Team 11

Attorneys for Respondent

APPENDIX A: Constitutional Provisions

First Amendment 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." U.S. Const. amend. I

Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United 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." U.S. Const. amend. XIV, § I.