No. 17-874

IN THE

Supreme Court of the United States

AVERY MILNER,

Petitioner,

v.

MACKENZIE (MAC) PLUCKERBERG
in his official capacity as Chief
Executive Operator of Squawker, Inc.

Respondent.

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

BRIEF FOR RESPONDENT

Counsel for Respondent

Team 15

January 31, 2020

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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; and

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

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The United States District Court for the District of Delmont and the United States Court of Appeals for Eighteenth Circuit opinions have not been officially reported. The United States District Court for the District of Delmont opinion appears in the record at page 14. The United States Court of Appeals for Eighteenth Circuit opinion appears in the record at page 25.

JURISDICTION

The jurisdiction of this Court rests on Article 3, section 2 of the Constitution, which states that this Court shall have appellate jurisdiction over all cases arising under the Constitution. This case arises from the First Amendment of the Constitution. The petition for a writ of certiorari was granted from the decision of the Eighteenth Circuit.

STATEMENT OF THE CASE

Free speech and social media has been a hot topic in the legal realm for some time. Justice Kennedy, in a 2017 First Amendment case, went as far as to pronounce social media sites the modern day town squares. Even accepting that a social media site is a public forum, the question remains whether a person's speech on the site is protected under the First Amendment, and who that speech should be protected from. The Plaintiff asks that the Constitution be read as a document that is blind to the division between State and citizen. The First Amendment, first among equals, enshrines the opposite—the sacred ideals of this nation's founders that the people are to be free from constraint by governance, not their fellow citizens.

I. FACTUAL BACKGROUND

In 2013, Defendant, Mac Pluckerberg, launched a social media website called Squawker. Pluckerberg Aff. ¶ 4. Squawker is a platform where people of all ages can stay connected by

"following" each other's "squeaks" of 280 characters or less. Stipulation ¶ 5. Once the squeak is uploaded to one's account, the other users can see it and either (1) like or dislike the squeak by giving thumbs up or down or (2) comment on the squeak in 280 words or less. *Id*.

Governor William Dunphry of Delmont started using Squawker in 2017. After about a year on the platform, during which the Governor experienced a large number of disreputable squeaks and squawkers, Dunphry suggested to Mr. Pluckerberg that Squawker should implement a verification feature. Dunphry Aff. ¶¶ 7–8. Verification would distinguish public officials on the platform to prevent confusion. Stipulations ¶ 8. After this feature was implemented along with a new Terms of Service many Delmont government workers joined thousands of other Squawkers in squeaking about current events. Pluckerberg Aff. ¶¶ 5, 9. While Delmont is currently the only state with verified government officials, this is because the feature is being tested there. Stipulations ¶ 3. Since testing began in March of 2018, Governor Dunphry has used Squawker as a tool to reach his constituents, including to announce major policies. Dunphry Aff. ¶ 9. Each user has to accept Squawker's Terms and Conditions in order to create a profile page. Stipulation ¶ 6. Squawker prohibits behavior that promotes violence directly or indirectly against people on the basis of race, ethnicity, national origin, sexual orientation, gender, age, etc. Squawker also prohibits the use of emojis in a violent or threatening manner. No user is allowed to participate in automatic or manually facilitated posting and sharing at extremely high frequencies (four or more squeaks within thirty seconds of each other).

If any user violates the revised Squawker's Terms and Conditions, all of the content on that Squawker's personal profile page would be flagged with a black box. If a user makes an offensive comment, then his or her account and the comment itself will be flagged. In order to

get this flagging removed from the account, a Squeaker must complete a thirty-minute training video regarding the Terms and Conditions as well as an online quiz. However, the offending comment will remain flagged unless the user deletes the offensive comment.

Plaintiff, Mr. Milner, is a resident of Delmont and has had an account on Squawker since April 2017. Milner Aff. ¶ 1. He is a freelance journalist and an avid critic of his local government. Milner Aff. ¶ 3. The plaintiff was especially critical of civil servants over the age of 65, including Governor Dunphry, who is 68 years old. Dunphry Aff. ¶ 2. The plaintiff agreed to the new Terms and Conditions in March 2018 after the verification feature was implemented. Milner Aff. ¶ 5. Prior to July 2018, Mr. Milner had over ten thousand followers on his Squawker account and, on average, seven thousand views per squeak. *Id*. ¶ 6. On July 26, 2018, Governor Dunphry posted a squeak containing a link to the description of a bill proposal. Dunphry Aff. ¶ 10. The description stated that, in an effort to reduce the amount of pedestrian-vehicle related deaths, the bill would make it illegal for cars to turn right on any red light within the state of Delmont. *Id*. The plaintiff did not like the bill proposal and, as a result, posted four offensive comments that were less than thirty seconds apart from each other. Pluckerberg Aff. ¶ 12. Some Squeakers stated that the plaintiff had made the forum unusable. Pluckerberg Aff. ¶ 12. The defendant monitored the verified account and then flagged the plaintiff's account for violating the Terms and Conditions. On July 27, 2018, Mr. Milner received a notification from Squawker alerting him that his account had been flagged for violent and/or offensive use of emojis and spamming. Milner Aff. ¶ 9. The notification said that if the plaintiff wished to have the flagging removed, he would have to watch an online video and then complete an online quiz. *Id.* The plaintiff refused to do so because he believed his account was flagged unjustly. Milner Aff. ¶ 15.

The plaintiff then experienced a dramatic decrease in viewership of his profile. By August 2018, Mr. Milner had only two thousand followers and, on average, fifty views per squeak. *Id*. His decreased viewership was followed by fewer freelance writing offers and fewer articles accepted by statewide newspapers. Milner Aff. ¶ 14. With fewer freelance jobs, Mr. Milner's writing income has fallen considerably and he has struggled to make ends meet. *Id.*

II. PROCEDURAL BACKGROUND

The present action arises out of a dispute over certain restrictions put on Plaintiff Avery Milner's user account on the defendant's social media platform, Squawker. Plaintiff Milner filed an action in the District Court of Delmont, alleging that Squawker, as a state actor, violated his First Amendment rights. On January 10, 2019, the District ruled on the parties' cross-motions for summary judgment. The District Court ruled for Plaintiff, finding that (1) Squawker is a state actor and (2) Squawker's rules violated the Plaintiff's First Amendment rights. On appeal, the Eighteenth Circuit reversed, finding that (1) Squawker is a private actor and that (2) Squawker's rules were narrowly tailored enough to survive constitutional scrutiny. Respondent's writ of Certiorari was then granted for the present appeal.

SUMMARY OF ARGUMENT

The Constitution, including the First Amendment, is meant to protect individual citizens from the government. Although there are exceptions where an individual or private entity's conduct may be treated as state action, and may be held liable for constitutional violations, that is not the case here. Squawker did not engage in state action by regulating Governor Dunphy's page and subsequently restricting the Plaintiff's account according to its Terms and Conditions. Furthermore, the First Amendment is not an absolute right and is subject to certain restrictions in some cases. Even if the Court finds that a private social media company is engaged in state

action here, Squawker's Terms and Conditions are a content-neutral time, place, and manner restriction that is not violative of the First Amendment.

Three exceptions to the state action doctrine are the public function exception, entanglement exception, and the entwinement exception. When the conduct of a private entity or individual qualifies for one of these exceptions, the plaintiff may bring a claim of constitutional violation against the private party because there is some justification for treating the private party as the government itself in that particular instance. The facts at hand fail the tests for all three exceptions. Thus, state action cannot be attached to Squawker's conduct as a private entity, and a First Amendment claim cannot be brought against them.

The public function exception applies when the action is one that is "traditionally, exclusively reserved to the state." This exception is a limited one and the Court has decided to apply the exception only a handful of times in situations where the private party's conduct is such that it essentially "stood in the shoes of the state." There has been no successful evidence thus far that censoring on social media sites falls within the "very few" public function exceptions. The operation of a social media site has never been the responsibility of the government; social media sites lack the municipal characteristics of a government function; and the hosting of a public forum is not in and of itself a public function. Therefore, the operation of a social media site, including censoring, is not a traditional government responsibility and Squawker can hardly be characterized as standing "in the shoes of the state".

The entanglement exception applies when the action is such that holds "the power, property, and prestige" of the government. This is, again, a limited exception and the Court has only applied it where there is evidence of "the overt, significant assistance of state officials." The

suggestion that Governor Dunphry made to Mac Pluckerberg regarding the flagging of accounts does not grant Delmont a property interest in Squawker, nor does it protect a potential Squawker monopoly in the social media field. Therefore, Delmont has not placed its power and prestige behind Squawker and there is no entanglement of state and private action.

The entwinement exception will applies when the facts indicate that the state and private entity have "largely overlapping identities." The courts have rarely applied this exception outside of the context of athletic associations. There are few situations where the state and a private party are going beyond merely working together to the extent that they have an overlapping structure or composition. Delmont has no leadership or authoritative position within Squawker's corporate structure, nor do Delmont officials make up a significant portion of the Squawker userbase. Therefore, the government identity of Delmont is markedly separate from the corporate identity of Squawker and the entwinement exception cannot apply.

Even if the Court finds that one of the exceptions applies here, and that Squawker did engage in state action, speech may be restricted in accordance with the First Amendment if it is a content-neutral time, place, and manner restriction. Time, place, and manner restrictions are valid if (1) they are justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information. The Terms and Conditions regarding flagging accounts and user restrictions are content neutral restrictions because their purpose is to temper the volume and vociferousness of users' comments, not to target the Plaintiff's political position or viewpoint. The Terms and Conditions serve the significant interest of protecting the rights of other users to use and enjoy the forum; the flagging policy and user restrictions are sufficiently narrowly tailored because they does not restrict use completely and detail remedial

steps that the Plaintiff may take to gain unrestricted access again. These remedial steps, along with other opportunities outside Squawker's site, offer ample alternative channels for the Plaintiff to communicate his disagreement with the Governor's policies.

Squawker continues to contend that it is not a state actor, that there is no basis for an exception to the state action doctrine, and that the Plaintiff does not have standing to bring a First Amendment claim against them. Even if this Court finds that Squawker was engaged in state action, the Terms and Conditions are a time, place, and manner restriction that is content neutral, narrowly tailored to serve the significant interest of protecting the rights of other users, and leaves open ample opportunities for the Plaintiff to communicate his views. For the foregoing reasons, we ask that the Court affirm the decision of the Eighteenth Circuit.

ARGUMENT

I. SQUAWKER DID NOT ENGAGE IN STATE ACTION BY REGULATING THE GOVERNOR'S PAGE AND RESTRICTING AVERY MILNER'S ACCOUNT ACCORDING TO ITS TERMS AND CONDITIONS.

The parties agree that the Governor's Squawker page is a public forum. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 235 (2d Cir. 2019). However, Squawker's regulation of the Governor's page according to its Terms and Conditions does not amount to state action. This important distinction was made in a recent decision out of the Southern District of Texas:

> Although the Court recognized in *Packingham v. North Carolina*, 137 S. Ct. 1730, that social media sites like FaceBook and Twitter have become the equivalent of a public forum for sharing ideas and commentary, the Court did not declare a cause of action against a private entity such as FaceBook for a violation of the free speech rights protected by the First Amendment.

Nyabwa v. FaceBook, No. 2:17-CV-24, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018). In other words, while it has been recognized that social media platforms provide

an important purpose as a public forum for the exchange of ideas online, reviewing the actions of a private company with a level of judicial scrutiny normally reserved for government actions is an entirely different question.

The state action doctrine provides that the Constitution's protections of rights and liberties apply only to the government and actors on its behalf. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976). However, the doctrine conspicuously rejects its application to individual actors or private entities. *Civil Rights Cases*, 109 U.S. 3, 17 (1883) ("it is proper to state that civil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings"); *see also*, *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[the Constitution] erects no shield against merely private conduct, however discriminatory or wrongful"). To treat a private entity as a state actor, one of a few limited exceptions must be found. *See Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *5 (N.D. Cal. Mar. 26, 2018) (citing *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012)).

The public function, entanglement, and entwinement exceptions are the most relevant to the case at hand. Michael Patty, *Social Media and Censorship: Rethinking State Action Once Again*, 40 Mitchell Hamline L.J. Pub. Pol'y & Prac. 99, 100 (2019). The public function exception is applicable when a private entity exercises "powers traditionally exclusively reserved to the state." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). The entanglement exception applies where the state has significantly involved, or 'entangled' itself with the private action. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). The entwinement exception, an offshoot of entanglement, requires such a close nexus between the state and the private action that the private action may be treated as though it were of the state itself. *Brentwood Acad. v.*

Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting *Jackson*, 419 U.S. at 351) ("state action may be found if, though only 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.'"). None of these exceptions—nor any others—apply to the present case, and thus Squawker's regulation of the Governor's page as a public forum does not amount to state action.

A. Squawker's private actions should not be considered state action because the operation of a social media site is not a public function "traditionally exclusively reserved to the state."

The inquiry for the public function test is whether the action conducted by the private entity is one "traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). If the answer is yes, this Court has held that there is state action. *See, e.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946). If the answer is no, if the private actor did anything less than "[stand] in the shoes of the state," then the exception does not apply and plaintiffs have no standing for constitutional violations. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 519–20 (1976) (citing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568–69 (1972) (shopping center)).

The public function test is a limited one and will not be applied in just any circumstance where a private business is "affected with a public interest." *Jackson*, 419 U.S. at 353 (quoting *Nebbia v. New York*, 291 U.S. 502 (1934) ("the expressions 'affected with a public interest,' and 'clothed with a public use,' . . . are not susceptible of definition and form an unsatisfactory test")). Nor does private action become state action merely because it is a function "traditionally performed by governments." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). Rather, the exception will only be applied when the public function in question is "exclusively reserved to the State." *Jackson*, 419 U.S. at 352. The traditional situations in which the public function exception applies include "hold[ing] [public] elections," "govern[ing] a town," and "serv[ing] as

an international peacekeeping force." *Brunette v. Humane Society of Ventura County*, 294 F.3d 1205, 1214 (9th Cir. 2002) (citing *Terry v. Adams*, 345 U.S. 461 (1953), *Marsh v. State of Ala.*, 326 U.S. 501, 507–09 (1946), and *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1226–27 (5th Cir. 1982)).

In *Marsh*, a Jehovah's Witness claimed that the company owned town of Chickasaw had violated her First Amendment right when she was arrested for distributing religious materials in the town's business block. Except for the fact that the town was owned by Gulf Shipbuilding Corporation, it had "all the characteristics of any other American town." *Marsh,* 326 U.S. at 502. The Court appeared to open the door to a broader application of the public function exception when it said "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506.

The Court relied on this language from *Marsh* in a later case, and extended the application of the public function exception from company owned towns to shopping malls. *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). However, Justice Black, author of the majority opinion in *Marsh*, wrote a strongly worded dissent, saying that the *Logan Valley* Court completely misunderstood the ruling of *Marsh*: "Marsh was never intended to apply to [situations like shopping malls]. Marsh dealt with the very special situation of a company-owned town." *Logan Valley Plaza, Inc.*, 391 U.S. at 330 (1968) (Black, J., dissenting). Justice Black's dissent formed the basis for later decisions that led to overturning *Logan Valley*. *See, e.g.*, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976). The Court in *Lloyd* further emphasized the difference between a company town and a shopping mall, and reinforced the limited nature of the public function

exception, by saying "the owner of the company town was performing the full spectrum of municipal powers and *stood in the shoes* of the State" whereas the shopping center had "no comparable assumption or exercise of municipal functions or power." *Lloyd Corp.*, 407 U.S. 551 at 569 (emphasis added).

The law seems to be settled with regard to company owned towns, elections, and shopping centers, but the Supreme Court has yet to decide whether the public function exception applies in another context: social media sites. The lower courts, however, have started addressing the topic. *See Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939 (N.D. Cal. Mar. 26, 2018); *Nyabwa v. FaceBook*, No. 2:17-CV-24, 2018 WL 585467 (S.D. Tex. Jan. 26, 2018). In *Prager*, a conservative educational nonprofit alleged among other claims that Google and YouTube engaged in viewpoint discrimination, violating their First Amendment rights, by censoring some of the plaintiff's posted videos. *Prager Univ.*, 2018 WL 1471939 at *5. The plaintiff relied on *Marsh* in arguing that private entities, such as the defendants, who host a public forum for free expression are state actors, and are therefore subject to claims of First Amendment violations. *Id*. at 6. The District Court disagreed and re-emphasized the narrow reach of the public function exception by holding:

> Plaintiff does not point to any persuasive authority to support the notion that Defendants, by creating a "video-sharing website" and subsequently restricting access to certain videos that are uploaded on that website, have somehow engaged in one of the "very few" functions that were traditionally "exclusively reserved to the State."

Id. (citation omitted) (quoting *Flagg Bros.*, 436 U.S. 149, 158 (1978)).

→ Similar to *Prager*, Squawker's creation of a social media platform and subsequent restriction of certain Squawker accounts and comments can hardly be said to fall within the very few government functions applicable to the public function exception. In *Marsh*,

there was a heavy emphasis on the municipal function of the town; it operated almost identically to a public town with streets, sewers, residential buildings, a post office, and a business block. *See Marsh v. State of Ala.*, 326 U.S. 501 (1946). The private entity in that case was characterized as having "stood in the shoes" of the state, and the justification for attaching state action was that the residents were entitled to the same rights as they would be if they lived in a public town. *Prager Univ.*, 2018 WL 1471939, at *7. There is no such justification here. A social media site lacks the physical settings and the potential municipal responsibilities that are listed in the precedential cases: no sidewalks, sewers, residential buildings, post offices, business districts, or shopping centers.

Even if a physical setting is not required, and even accepting that the Governor's Squawker page is a public forum, hosting a public forum does not amount to state action in and of itself. Squawker is a private enterprise, the creation of a private individual—Mac Pluckerberg. Squawker grew into the popular, multinational social media platform that it is today because it, like other social media sites, meets a social demand for information sharing and self-expression. It is a user-based platform where individuals create their personal page and enter into a contractual relationship with Squawker by agreeing to its Terms and Conditions. These facts are entirely characteristic of a consumer relationship between private entities, rather than an official public function or utility.

The operation and regulation of social media sites has never been a municipal responsibility, much less a traditional function exclusively reserved for the state. When a private entity rather than a municipality owns and operates a town, the state action doctrine applies because there is no functional difference in the eyes of the law. There is

no comparable government function that the plaintiffs here, or plaintiffs in previous social media cases, can point to as a basis for the rationale that Squawker "stood in the shoes of the state." For those reasons, the Court should find that the public function exception does not apply, and state action should not be imputed on Squawker's private actions.

B. Squawker's private actions should not be considered state action because Delmont has not placed its power and prestige behind Squawker.

The entanglement exception to the state action doctrine applies when the state is significantly entangled with a private actor, such that its actions now carry the imprimatur of the state. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). Entanglement involves putting the state's "power, property and prestige behind the [private action]." *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). Entanglement is more than mere association, and courts should therefore look for "the overt, significant assistance of state officials." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 622 (1991) (quoting *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 486 (1988)). In *Edmonson*, that overt, significant, assistance was presented as the court using all the trappings of their prestige and power to enforce racially motivated peremptory strikes. *Id.* Similarly, the Court in *Shelley v. Kraemer* found that a private, discriminatory contract could not be enforced without putting the power of the judiciary behind policies that violate the constitution. 334 U.S. 1, 20 (1948). But judicial action is not the only way to get significantly involved.

In *Jackson v. Metropolitan Edison Co.*, the Court determined that a utility was not a state actor. 419 U.S. 345, 350 (1974). The state is not entangled even with heavy regulation. *Id.* at 351. To be considered a state actor, a utility would have to not only be highly regulated, but also

be a state-protected monopoly—but even that may not suffice. *Id.* (partial monopoly not enough); s*ee, e.g.*, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (provision of a liquor license was not significant enough involvement by the state, even where licenses were scarce) to consider it entangled with a club's refusal of service.

In *Burton* v. *Wilmington Parking Authority*, the state leased out portions of its public garage in order to finance construction. 365 U.S. 715, 718 (1961). A restaurant lessee then proceeded to refuse service to a black customer. *Id.* at 720. The Court noted that the space was publicly owned, upkeep responsibilities were payable out of public funds, and that the state and restaurant were interdependent. *Id.* at 722. The nature of their arrangement meant that the garage relied on the restaurant for revenue, while the restaurant required parking space for its customers.

Like *Jackson* and *Moose Lodge*, and unlike *Burton*, the state has no property interest in Squawker. This was no joint venture, but rather an independent project by Mac Pluckerberg. Delmont's involvement came by way of a Governor's suggestion to an old friend, many years after the service's inception, which led only to the initial testing of a feature intended for broad use. Although many Delmont official use Squawker, they do not pay for its staff or upkeep. Unlike the symbiotic relationship in *Burton*, Delmont is only a small part of Squawker's equation. For a platform as popular as Squawker, Delmont employees are the equivalent of a table of customers, not a parking garage. When customers are given a table to eat, we do not say they and the owner are now in a joint venture.

It is true that Delmont uses Squawker a lot, and that Mac has worked with Governor Dunphry to implement new features. Mac and Squawker have chosen to test this feature in Delmont, but like a waiter, Squawker is merely serving its customers. Responding to user

demand for verification services does not create interdependence, especially considering this feature is not particularly unique. *See, About Verified Accounts*, Twitter, https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts. Delmont is making a choice to use Squawker, like any other customer.

Delmont has not placed its power or prestige behind Squawkers actions. Delmont does not protect a Squawker monopoly—in fact, squawker has plenty of competition for social media platforms. Mac started testing out a suggestion, but this did not mean their relationship was anything beyond that of a user and a service provider. For that matter, there is nothing preventing Delmont users from choosing another platform. The facts and the law show conclusively that the entanglement exception does not apply to Squawker. The actions of Mac Pluckerberg are his own, and safeguarded by the First Amendment.

C. Squawker's private actions should not be considered state action because the government identity of Delmont is markedly separate from the corporate identity or Squawker.

Lastly, the entwinement exception to the state action doctrine applies constitutional guarantees to private actors when "the relevant facts show pervasive entwinement to the point of largely overlapping identity." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001). There must be 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.'" *Id.* at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974)).

In *Brentwood Academy*, the Court considered the case of a scholastic athletic association which included most public schools in the state. 531 U.S. 288 (2001). Employees were eligible for the state retirement system, they regulated and supervised interscholastic athletic activities in

lieu of the Board of Education, and all principal members of the association were public school administrators. The case arose when a member school made a First and Fourteenth Amendment claim against the association when it attempted to enforce a rule about recruitment. *Id.* at 292. The Court held that the association was properly considered a state actor due to the massive overlap between private entity and state:

> In sum, to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. at 299–300.

Since *Brentwood*, courts have been rare to find entwinement outside of the athletic association context. *See, e.g.*, *Jornigan vs. N.M. Mutual. Cas. Co.*, No. CIV 03-0813 JB/ACT, 2004 WL 3426437 (D.N.M. Apr. 19, 2004) (finding entwinement for insurance company created by statute, overseen by the legislature). Few circumstances rise to the level of involvement required. *See Everett–Dicko v. Ogden Entm't Servs., Inc.*, 36 F. App'x 245, 249 (9th Cir.2002) ("Under Brentwood, entwinement occurs when structural overlap between private and public defendants exists, not when parties simply work together."). The private entity must be "overborne by the pervasive entwinement of [government] officials in its *composition and workings*." *Fletcher v. Diamondhead Country Club & Prop. Owners Ass'n Inc.*, No. 1:13CV223-LG-JCG, 2014 WL 5456791, at *7 (S.D. Miss. 2014) (citing *Brentwood*, 531 U.S. at 298); *see Brittany O vs. New Boston Enterprises, Inc.*, No. 5:15-CV-5269, 2016 WL 3920394, at *5 (W.D. Ark. July 15, 2016) ("[Plaintiff] has not pointed to even a single public institution or public official that partakes in [the corporation]'s *composition or workings*—much less to any pervasive

public entwinement."); *Apodaca vs. Mesa County, Colo.*, No. CV 04-1379 MV/RHS, 2005 WL 8163504, at *6 (D.N.M. Oct. 27, 2005) ("Plaintiff does not allege that any public officials are on staff at [merchandise service company], nor does she allege that [company] employees participate in state programs or receive state benefits.").

The issue of entwinement as it relates to free speech was addressed in *Fletcher*, where a property owner association's rule against political signs and solicitations was challenged under the First Amendment. *Fletcher*, 2014 WL 5456791, at *1. Although the City was paying for space, they were like any other property owner in that respect. *Id.* at *6. The court also noted the entirely independent nature of the enforcement action challenged:

> Not only is there no issue of fact that the City is not responsible for enforcement of the [association]'s Master Covenants and rules, but the City's ordinances also actually allow what the [association]'s Master Covenants prohibit. This fact certainly weighs heavily against finding that the [association]'s action should be "fairly treated" as that of the City.

Id. Thus, significant weight should be given to the independence of an individually challenged act, even if the state is heavily involved in the entity itself. *See P.R.B.A. Corp. v. HMS Host Toll Roads, Inc.*, 808 F.3d 221, 223 (3d Cir. 2015) ("The parties agree that Mr. Dion's decision to have the brochures removed was his and his alone; he did not consult with or receive any direction from the Authorities.").

It is clear in the present case that Delmont is not entwined with Squawker. Far from *Brentwood*'s eighty percent, Delmont officials are only a portion of Squawker's userbase. Delmont officials are not in positions of authority in the company. Squawker operates as an independently successful social media platform who creates and enforces rules, outside of state control. Delmont, like the government in *Fletcher*, would allow what Squawker prohibits. The

facts and case law bear out the Squawker operates as a separate, autonomous, independent company whose decisions are all its own. The entwinement exception, nor any other exception, should apply to Squawker, and no constitutional claims should lie against it. This is the fundamental meaning of the state action doctrine.

II. EVEN IF THE COURT FINDS THAT SQUAWKER ENGAGED IN STATE ACTION, THE TERMS AND CONDITIONS ARE A CONTENT- NEUTRAL TIME, PLACE, AND MANNER RESTRICTION THAT IS NOT VIOLATIVE OF THE FIRST AMENDMENT.

In some instances, the government may lawfully restrict access to the public forum through time, place, and manner regulations. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In determining whether a restriction is constitutional, a court must determine whether the restriction is content-based or content-neutral. *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 295 (1984).

Time, place, and manner restrictions are valid if they are (1) justified without reference to the content of the regulated speech (content-neutral), (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *Clark*, 468 U.S. at 293. Content-based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).

A. Squawker's Terms and Conditions, including the flagging policy and account restrictions, are content neutral.

In this case, the issue is whether Squawker's Terms and Conditions were content-neutral restrictions. The first requirement that has to be met in order to treat a restriction as content-neutral is that it is not supposed to make reference to the content of the regulated speech. In *Clark v. Community. for Creative Non–Violence*, the Court states, "[t]he 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." *Clark*, 468 U.S. at 295. The regulation is not supposed to suppress one's point of view; instead, it must be neutral as to its content and also be narrowly tailored to serve a significant governmental interest. In this case, Squawker's regulations were content-neutral. They did not target the plaintiff's political position or viewpoint. Squawker's regulations were justified because the main purpose of the regulations was to temper the volume and vociferousness of its users' comments. The plaintiff's account was flagged due to the number of squeaks (four within 30 seconds of each other) that the plaintiff squawked on the defendant's Squawker page. Moreover, the plaintiff's comments were offensive to other users. The plaintiff knew that his page could be flagged if Squawker's Terms and Conditions were violated because each Squawker must consent to Squawker's Terms and Conditions in order to create a profile page. One of those terms was the following: "Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other." The plaintiff rapidly posted comments in such quick succession that other Squawkers complained he had made the forum unusable. Pluckerberg Aff. ¶ 12. Thus, Squawker had to flag the plaintiff's account in order to protect the other users' rights.

B. Squawker's Terms and Conditions were narrowly tailored to serve the significant interest of protecting the right of other users to use and enjoy the forum.

The Court will not set aside a restriction so long as it is narrowly tailored to serve the given interest. In order to judge the constitutionality of a regulation, courts apply an intermediate scrutiny test. *Horton v. City of Houston, Tex.*, 179 F.3d 188, 192–93 (5th Cir. 1999). In the context of intermediate scrutiny, narrow tailoring does not require that the least restrictive means

must be used. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). A court usually looks at the government's interest in promulgating the regulation, and the fit between the interest and the regulation. *Thomas v. Chicago Park Dist*., 534 U.S. 316 (2002). The Court in *Ward* further states that as long as the restriction promotes a substantial governmental interest that would be achieved less effectively absent the regulation, it would be considered narrowly tailored. *Ward*, 491 U.S. at 799. What constitutes a reasonable, narrowly tailored regulation depends on a variety of factors, including the character of the place in which the regulation is enforced. *Service Emps. Intern. Union, Local 5 v. City of Houston*, 595 F.3d 588, 599 (2010).

In this case, Squawker's Terms and Conditions were narrowly tailored in order to justify the importance of the government's interests. In particular, Squawker's policy was to protect the rights of other users to use and enjoy the forum. The defendant stated in his affidavit the following: "On July 26, 2018, I flagged the account of Avery Milner for violent and/or offensive use of an emoji and spamming behavior in violation of Squawker's Terms and Conditions. All told, Mr. Milner's comments received over one thousand dislikes and over two thousand reports about his obsessive and obscene comments replying to Governor Dunphry." Pluckerberg Aff. ¶ 11. Thus, the defendant met the second requirement.

C. There are ample alternative channels available, both on and off the Squawker site, for the Plaintiff to communicate his disagreement with the Governor's policies.

The other requirement that has to be met is the availability of ample alternative channels. A court should undertake the fact-specific determination of whether there are ample alternative avenues left open for the restricted communication. *Service Emps. Intern. Union v. City of Houston*, 542 F. Supp. 2d 617, 626 (2008). The First Amendment does not guarantee the right to communicate one's views (1) at all times as well as places or (2) in any manner that may be

desired. *Heffron v. Internat'l Soc. for Krishna Consciousness, Inc*., 452 U.S. 640, 647 (1981). Thus, the court in *Mastrovincenzo v. City of New York* stated that the alternative channels of expression need not be perfect substitutes for those channels denied to plaintiffs. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006). The alternatives need only "leave open sufficient alternative avenues of communication to minimize the 'effect on the quantity or content of the expression.'" *Ward*, 491 U.S. at 802. "In the 'ample alternatives' context, the Supreme Court has made clear that the First Amendment requires only that the government refrain from denying a 'reasonable opportunity' for communication." *Menotti v. City of Seattle*, 409 F.3d 1113, 1141–42 (2005). The First Amendment simply "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647.

According to Squawker's Terms and Conditions, "[t]o have this flagging removed from all but the original comment, 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." If the plaintiff does not want his account unflagged, he can create a new account on Squawker, use a different social media platform, or view Governor Dunphry's squawks without being logged into a Squawker account.

CONCLUSION

For the foregoing reasons, the judgment of the Eighteenth Circuit Court of Appeals should be affirmed.

Respectfully submitted.

Team 15
January 31, 2020

APPENDIX

The First Amendment to the United States Constitution provides:

> 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.

The Fourteenth Amendment to the United States Constitution provides:

> **Section 1.** 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.
>
> **Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> **Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Certificate of Compliance

We certify that Team 15's brief is in fact the work product of the team members. We have complied fully with our school's governing honor code. We have complied with all Rules of the Competition.

Sincerely,

Team 15