No. 17-874

In the Supreme Court of the United States

October term, 2019

Avery Milner,
Petitioner

v.

Mac Pluckerberg,
Respondent.

On petition for a writ of certiorari
To the united states court of appeals
For the eighteenth circuit

Brief for the petitioner

Team 18
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Eighteenth Circuit erred in concluding that a private entity hosting a public forum did not engage in state action by regulating free speech in the public forum.
2. Whether the Eighteenth Circuit erred in holding that the private entity's Terms and Conditions is a content-neutral time, place, or manner restriction that is not violative of the First Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

FEDERAL CIRCUIT CASES

DISTRICT COURT CASES

CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighteenth Circuit is unreported, but available at *Pluckerberg v. Milner*, No. 16-6834 (18th Cir. 2019) and reprinted in the Record on pages 25–26.. The opinion of the District Court of Delmont is unreported, but available at *Milner v. Pluckerberg*, C.A. No. 16-CV-6834 (D. Delmont 2019) and reprinted in the Record on pages 1–13.

JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered final judgment on this matter on March 10, 2019. Petitioner timely filed a petition for a Writ of Certiorari to this Court which was granted. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I,

U.S. CONST. amend. XIV, § 1.[1]

STATEMENT OF THE CASE

A. Squawker Social Media Platform

Squawker, Inc. is a multinational social media platform aimed at keeping people connected, keeping people informed about current events, and fostering self-expression. Record at 2, 21, 26. Platform users, or "Squeakers," create a personal profile page where they can post "squeaks." *Id.* at 2, 15, 26. Each Squeaker's homepage shows a "feed" of Squeaks written by all the Squeakers that a user follows. *Id.* Squeakers interact with one another's squeaks by "liking" or "disliking" a squeak or by "commenting" on the squeak directly. *Id.* Such comments are visible to all users and other Squeakers can interact with those squeaks by likes, dislikes, and comments. Id. at 2, 26–27.

Mackenzie Pluckerberg is the developer and current CEO of Squawker, Inc. *Id.* at 14. Squawker was designed as a way for people to stay connected to local, national, and global news.

[1] See Appendix at 26.

Id. at 21. In fact, Pluckerberg intended his platform to be a rival to traditional media—a place where users go to read breaking stories. *Id.* at 21. Since February 2013, Squawker has grown in popularity and has seen its user base increase. *Id.* at 2–3. By mid-2017, many people used Squawker as their main source for information regarding national and local news. *Id.* at 3, 16.

Squawkers' popularity and frequent use as a news source attracted government officials to the platform. *Id.* Many government officials use their own Squawker accounts to communicate with constituents and spread policy ideas. *Id.* William R. Dunphry, Governor of Delmont, created a Squawker account in 2017 to reach his constituents. *Id.* at 3, 23–24. Governor Dunphry's Squawker page became his main way for carrying out official business.[2] *Id.* at 3. As government participation grew, so did imposter accounts. *Id.* at 3, 16..

Because of numerous complaints from his constituents about imposter and fake news accounts, Governor Dunphry approached his friend Pluckerberg in February 2018 about adding a verification feature to all Delmont elected officials' Squawker pages. *Id.* at 3, 22, 24. Pluckerberg agreed to add a Squawker verification process to verify accounts held by government officials in Delmont. *Id.* at 3. The new verification feature marks verified Delmont elected officials Squawker accounts with the flag of Delmont. *Id.* at 3, 16, 22. The verification flag is visible on the top of the profile page near the elected official's name. *Id.* at 3. Pluckerberg approved and monitored all verified Squawker accounts the first year of the features implementation. *Id.* at 3, 22. Currently, Delmont is the only state to utilize the verified Squawker platform. *Id.* at 16.

[2] All parties concede that Governor Dunphry's Squawker page is a public forum. Record at 17.

B. **Squawker's Original Terms and Conditions.**[3]

Any user that creates a Squawker account is subject to Squawker's Terms and Conditions. *Id.* at 3, 15. Squawker enforces its Terms and Conditions through a flagging policy where squeaks or comments that violate the Terms and Conditions will be deemed "offending content" resulting in the user's account being flagged. *Id.* at 4. Accordingly, a black box with a white skull and crossbones is placed over the user's offending squeak or comment. *Id.* This alerts other users that the content violates the Terms and Conditions, but may still be viewed if other users click on the skull and crossbones. *Id.*

C. Squawker's Verified Account Terms and Conditions.[4]

When the new verification feature was implemented for the Squawker accounts of Delmont elected officials, all users of Squawker had to agree to a new flagging provision for the verified pages. *Id.* at 4, 16. Under the revised Terms and Conditions, if a Squeaker posted a comment on a Delmont official's verified Squawker page that violated the Terms and Conditions, all of the content of that Squeaker's personal profile would be flagged, not just the offending comment. *Id.* at 4. Additionally, a skull and crossbones image would appear next to the Squeaker's name on their profile page. *Id.*

The flagging could be removed only if the Squeaker completed a thirty minute training video regarding the Terms and Conditions and successfully completed an online quiz. *Id.* at 4, 16. Two failed attempts would result in a ninety day hold on the user's account, after which they could watch the video again and retake the quiz. *Id.* at 16. Once a user gains access to their account, the offending comment would remain flagged but they may still delete it.

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[3] The original terms and conditions are found in the Record on pages 3–4, 15, 27–28 .

[4] The new Terms and Conditions created in response to the verified pages are found in the Record on pages 4, 16, 28.

D. The Present Controversy

Avery Milner, a Delmont resident, and is a freelance journalist who reports on news in Delmont. *Id.* at 4, 19. Milner created a Squawker profile in April 2017. *Id.* at 19. Milner is a frequent Squeaker and, prior to July 2018, had over ten thousand followers and, on average, seven thousand views per squeak. *Id.* at 4, 19. Milner attributes his popularity and large following to his use of emojis and creativity in crafting messages by stringing together comments on the same post in quick succession. *Id.* at 19–20. He artistically arranges emojis that evolve into greater meaning than their appearance. *Id.* In fact, he identifies his evolving emoji chains as his signature move. *Id.*

Since the launch of Governor Dunphry's officially verified account he has engaged with the people of Delmont on unprecedented levels, squeaking to them on a daily basis to inform them about major policy proposals coming through the state. *Id.* at 24. Governor Dunphry uses Squawker to allow citizens to engage in the democratic process by giving his office their frank input. *Id.* On July 26, 2018, Governor Dunphry posted a squeak that contained a direct link to a bill proposal that would ban right turns on red lights in Delmont in an effort to reduce pedestrian-vehicle related deaths. *Id.* at 5, 24. Milner made four comments opposing the bill on Governor Dunphry's squeak. *Id.* at 5, 20. Milner's post on Governor Dunphry's squeak was no different than his prior posts. *Id.* at 5, 20.[5]

On July 26, 2018, Pluckerberg flagged Millner's account because of the allegedly offensive use of an emoji and spamming behavior in violation of Squawker's Terms and Conditions. *Id.* at 22. Milner's profile has never been flagged prior to this incident nor has Pluckerberg flagged an account for excessive posting before. *Id.* at 20, 22. According to Governor Dunphry, he received

[5] The pictures of Milner's Squeaks, as well as Governor Dunphry's squeak, is found in the Record on pages 5–6, 17, 29–30.

over two thousand reports from constituents who were deeply offended by Milner's comments and left the platform. *Id.* at 24. Pluckerberg verified these reports and claimed that Milner's actions effectively shut down the forum for other users and led them to leaving the platform. *Id.* at 22.

On July 27, 2018, Milner was notified that his account had been flagged under the revised Terms and Conditions. *Id.* at 6, 17, 20. Milner's comments on Governor Dunphry's squeaks were blocked, his profile was blocked out, and a skull with crossbones was placed next to his name atop his profile page. *Id.* at 6. Milner was notified he had to watch and online video and complete a quiz, acknowledging that he had violated Squawker's Terms and Conditions if he wished to have the flagging removed. *Id.* Milner chose not to watch the video or complete the quiz. *Id.*

After three weeks of being flagged, Milner noticed a dramatic decrease in viewership of his profile. *Id.* By August 2018, Milner had only two thousand followers and, on average, fifty views per squeak. *Id.* at 6, 20. Milner's decreased viewership was followed by fewer freelance writing jobs which has dramatically impacted his ability to earn income and support himself. *Id.*

Milner's account is still flagged, and all alternatives that would allow Milner to engage with Governor Dunphry's account are unduly burdensome. *Id.* at 6. First, creating a new Squawker account would result in the loss of Millner's remaining two thousand followers. *Id.* at 7. Second, Milner could view Governor Dunphry's squeaks without being logged into a Squawker account, but that would not allow him to comment. *Id.* Lastly, Milner could watch their training video and complete the accompanying quiz to have the flagging removed, but that requires conceding that he violated the platform's Terms and Conditions. *Id.*

E. Procedural History

Milner brought suit against Squawker. *Id.* at 1. On December 5, 2018, Milner and Pluckerberg filed cross motions for summary judgment. *Id.* at 2. On January 10, 2019, the district

court held that Squawker regulated a public forum which was a state action, and Squawker's Terms and Conditions violated the First Amendment. *Id.* Pluckerberg appealed. *Id.* at 25. The Eogjteenth Circuit Court of Appeals reversed the judgment of the district court. *Id.* at 26. A Writ of Certiorari was granted. *Id*. at 37.

SUMMARY OF THE ARGUMENT

Under the State Action doctrine, the Constitution's protections only apply to government actions, not private conduct. However, there are three exceptions to the State Action doctrine where private conduct has to comply with the constitution. Although Squawker is a private entity, its actions of hosting a public forum and regulating free speech in that forum amounts to state action ,under all exceptions, thereby subjecting itself to the First Amendment.

The public function test is satisfied if the private entity has exercised powers that are traditionally the exclusive prerogative of the State. The Ninth Circuit has held that regulation of speech in a public forum is a traditional and exclusive public function. Here, Squawker concedes it hosted a public forum. Moreover, Squawker developed regulations that governed speech in that public forum. Because private regulation of a public forum constitutes state action, Squawker must comply with the Constitution.

Under the entanglement exception, a private party's conduct is state action where the government affirmatively facilitates, encourages, or authorizes the unconstitutional conduct. This Court has articulated a number of tests to determine if action is attributable to the State under this exception which include; the joint action test, the symbiotic relationship test, and the nexus test.

Squawker's actions satisfy the joint action test because it was a willful participant in the creation of the new verification feature and its flagging policy which effected a deprivation of Milner's constitutional right to free speech. Additionally, Squawker's actions satisfy the symbiotic

relationship test because Governor Dunphry's actions in his official capacity and Pluckerberg's acquiescence in such actions exemplify pervasive entwinement between the state and Squawker. Moreover, Squawker's actions amount to state action under the nexus test because but for Governor Dunphry's official status and personal relationship with Pluckerberg Squawker's new Delmont elected official verification feature would not have been implemented and Milner's constitutional rights would not have been infringed.

ARGUMENT

I. 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 when it regulated free speech in the public forum by applying its flagging policy.

The First Amendment "reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide open.'" *Boos v. Barry*, 485 U.S. 312, 318 (1988). "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda*, 497 U.S. 720, 737 (1990). One of those essential places is "the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Accordingly, this Court has recognized that the First Amendment protections of a public forum apply to social media. *See id.* at 1738 (finding that "the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.").

A. Squawker's application of its flagging policy is a State Action.

The First Amendment's Free Speech Clause "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019*); see, e.g.*, *Harris v. Quinn*, 573 U.S. 616, 629 n.4 (2014). This Court applies the state-action doctrine to

determine the line between governmental and private actors. *Halleck*, 139 S. Ct. at 1926. To show a state action, the plaintiff must prove that his "alleged constitutional deprivation [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person from whom the State is responsible, and that the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). The second prong is satisfied if the "allegedly unconstitutional conduct is fairly attributable to the State." *Id.* In effect, there must be "such a 'close nexus between the State and the challenged action' that private behavior 'may be fairly treated as that of the State itself." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

There are two exceptions to the state action doctrine used to determine if a private entity's action is "fairly attributable" to the state. First, the actions are fairly attributable if the private entity performs a public function. *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 264 (2d Cir. 2014) (citing *Brentwood Academy*, 531 U.S. at 296). Second, the actions are fairly attributable if the private entity's actions are so "entangled" with the government or governmental policies. *Id.* Squawker's application of its flagging policy to the public forum hosted on Squawker's social networking website is a state action under any of this Court's tests.

i. Squawker's application of its flagging policy is a State Action under the Public Function test.

a. Squawker's application of its flagging policy constitutes state action.

The public function test is satisfied "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.' " *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982). The functions must traditionally be "exclusive, or near exclusive" the function of the State. *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2nd Cir. 2004) . This test, also called the

"sovereign-function doctrine," focuses on if the activity "historically has been 'an exclusive prerogative of the sovereign." *Grogan*, 768 F.3d at 265 (citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159, 163 (1978). Private censorship of free speech in public forums satisfies the state action doctrine. *Lee v. Katz*, 276 F.3d 550, 550 (9th Cir. 2002)

The Ninth Circuit previously addressed the question of if the regulation of speech in a public forum is a public function. The Ninth Circuit held that regulation of speech in a public forum is a public function. In *Lee v. Katz*, the Oregon Arena Corporation (OAC) instituted speech regulations that governed public speech on the Rose Quarter Commons (Commons)—an outdoor area in Portland near several city-owned public facilities. 276 F.3d at 551. OAC leased the Commons from Portland and developed several regulations that addressed: (1) where public speaking could happen; (2) the conduct of the speaker; and (3) the volume of the speech. *Id.* at 552. The plaintiffs, "street preachers," violated the OAC's speech regulations and were "excluded" from the Commons. *Id.* The OAC conceded that the Commons was a traditional public forum. *Id.* OAC's policies, developed and administered independent of the City of Portland, prohibited "yelling or screaming" as well as "disturbing the peace." *Id.* They further created three "free speech zones" in the Commons. *Id.* at 553. The policies were enforced by "in-house security officers and contracted security personnel." *Id.* OAC concluded that the plaintiffs violated the speech regulations and prohibited the plaintiffs from entering the Commons for a set period of time. *Id.*

The Ninth Circuit found that regulating free speech within a public forum is a traditional and exclusive public function. *Id.* at 555. Canvassing this Court's past precedent, the Ninth Circuit noted several factors that supported this decision. Namely, where facilities are built and operated primarily to benefit the public . . . their operation is essential a public function . . ." and private

ownership of the property alone "is not sufficient to justify" allowing a private entity to violate an individual's First Amendment rights. *Id.* (citing *Marsh v. Alabama*, 326 U.S. 501, 505–06 (1946)).[6]

Applying this understanding to the case before them, the Ninth Circuit determined that the Common's was a public forum because it was a "freely accessible public forum" where people "gather[ed] . . . for public events." *Id.* Further, OAC "conceded" the Common's character as a public forum. *Id.* at 556. Accordingly, because the Commons is a public forum, "the regulation of speech in the Commons is a public function[.]" *Id.* Since the City of Portland "delegated" the regulation of public speech to the OAC, "OAC became a State actor."[7] *Id.*

Such a finding is consistent with traditional public functions analysis. For example, in *Evans v. Newton*, 381 U.S. 296, 302 (1966), this Court held that the public character of a park, regardless of private ownership, necessitated a finding of a public function. Further, in *Marsh*, 326 U.S. at 507, this Court found state action where a corporation owned a town that functioned as if it was a state owned municipality. In *United Church of Christ v. Gateway Economic Development Corp. of Greater Cleveland, Inc.*, the Sixth Circuit held that the private corporation's regulation of a public forum—there, a private sidewalk that is connected and indistinguishable from a

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[6] The Ninth Circuit also relied on this Court's decision in *Evans v. Newton*, 382 U.S. 296 (1966). While not a free speech case, this Court held that the history and use of the park dictated that the park be considered a public institution subject to the Fourteenth Amendment. *Id.* at 302. Thus, private control of the park did not mean that the trustees managing the park were not performing a public function. *Id.*; *see also Lee*, 276 F.3d at 555 (noting that the Supreme Court "rejected the argument that the transfer of the park to nominally private control meant that the trustees were not performing a public function.").

[7] The Ninth Circuit did acknowledge that not "everyone who leases or obtains a permit to use a state-owned public forum will necessarily become a State actor." *Lee*, 276 F.3d at 556. If the State "maintains the ultimate power to regulate activities in the [public] forum," then the private entity will not be a public forum. *Id.* However, because Portland retained "little, if any, power over the OAC's free speech policies governing the Commons," OAC exercised "exclusive regulation" of free speech within the Commons and was thus a State actor. *Id.*

publicly-owned sidewalk, and is open to the public as a through route—constitutes state action. 383 F.3d 449, 455 (6th Cir. 2004).

Here, Squawker's active application of its flagging policy constitutes state action. Similar to *Lee* and *United Church of Christ*, Squawker developed regulations that governed speech in a public forum. Whereas the OAC prohibited types of speech, such as "[y]elling or screaming" and "disturbing the peace," Squawker similarly prohibits speaking "at extremely high frequencies" that disturb other users. See Record at 15. This regulation, as in *Lee* and *United Church of Christ*, was used to prevent individuals from hearing Milner's speech. [8]

Because private regulation of a public forum constitutes state action, this Court should reverse the Eighteenth Circuit's decision.[9]

ii. Squawker's actions amount to state action under the "Entanglement Doctrine."

Under the entanglement exception, a private party's conduct is state action "[w]here the government affirmatively facilitates, encourages, or authorizes . . ." the unconstitutional conduct. *Jeffries v. Georgia Residential Finance Auth.*, 678 F.2d 919, 923 (11th Cir. 1982); *but see Am.*

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[8] While the Eighteenth Circuit correctly noted that merely hosting a public forum is insufficient to transform a private entity to a state actor, the lower court incorrectly characterized the action taken. Whereas the lower court characterized the action taken as "hosting" a public forum; the action at issue is whether Squawker's regulation, and subsequent enforcement, of public speech on a public forum is state action. *See* Record at 37 (showing that the Supreme Court of the United States granted a Writ of Certiorari to determine if "a private entity hosting a public forum did not engage in state action *by applying* its flagging policy[.]") (emphasis added).

[9] The Eighteenth Circuit relied on this Court's decision in *Halleck* that "a private entity . . . who opens its property for speech by others is not transformed by that fact alone into a state actor." 139 S. Ct. at 1926. Because of that, the Eighteenth Circuit found that Milner's claim has a "fundamental" flaw—Squawker is a private entity. Record at 32–33. However, this characterization of the state action doctrine is fundamentally flawed. The State Action doctrine exists to determine when a private entity will be treated as the state for purposes of the Fourteenth Amendment. *Halleck*, 139 S. Ct. at 1926. The doctrine is animated by the fact that private entities can be treated as a state entity if the State is responsible for the specific conduct complained of. *Blum*, 457 U.S. at 993–94. Thus, Squawker being a private entity is not a "fundamental" flaw.

Mfrs. Mut. Ins. Co., 526 U.S. 40 (narrowing the entanglement exception by requiring a determination that the government encouraged or caused the unconstitutional conduct). This Court has articulated a number of tests, or approaches, to determine if private action is attributable to the State under the Entanglement exception. *Tapia v. City of Albuquerque*, 10 F. Supp. 3d 1207, 1260–1262. (D.N.M. 2014).

a. Squawker's actions amount to state action under the joint action test.

Under the joint-action test, state action is found if the private party is a "willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). "Courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Gallagher v. Neil Young Freedom Concert*, 40 F.3d 1442, 1453 (10th Cir. 1995); *see, e.g.*, *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989); *Sims v. Jefferson Downs Racing Ass'n*, 779 F.2d 1068, 1076–80 (5th Cir. 1985). State action exists when there is a "substantial degree of cooperative action," *Collins*, 878 F.2d at 1154, or if there is "overt and significant state participation." *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991).

In *Federal Agency of News LLC v. Facebook, Inc.*, the district court considered whether Facebook violated the First Amendment by deleting a user's profile, page, and content, which was suspected of being an imposter account. 395 F. Supp. 3d 1295 (N.D. Cal. 2019). The plaintiff alleged that Facebook shut down his account because its activities were similar, or connected, to Russian Facebook accounts which sought to inflame social and political tensions in the US during the 2016 United States presidential election. *Id.* at 1300–01. The court held that Facebook's deletion of the profile, page, and content was private action, not state action. *Id.* at 1308. Specifically, the court found no willful participation in joint action with the government because

the government did not directly or jointly conceive, facilitate, or perform any action relating to Facebook's deletion of the account. *Id.* at 1313. Moreover, the plaintiffs only alleged that Facebook provided the government with information that might relate to the government's investigation into Russian interference with the 2016 presidential election. *Id.* at 1312–13.

Unlike *Federal Agency of News LLC*, here Governor Dunphry and Pluckerberg jointly conceived of—and caused the implementation of—the verification feature to all Delmont elected officials' Squawker pages along with which came the new flagging policy. In February 2018, Governor Dunphry approached his longtime friend Mac Pluckerberg, the owner and creator of Squawker, with the idea of implementing the new verification feature. Record at 24. Governor Dunphry acted after receiving numerous complaints about imposter and fake news accounts affecting his constituents. *Id.* In March 2018, Pluckerberg added the very feature that Governor Dunphry suggested. *Id.* at 22. Not only did Pluckerberg implement the feature at Governor Dunphry's request, he willfully participated in overseeing its function by personally approving and monitoring all Delmont elected officials' verified Squawker accounts during the first year of the feature to ensure Governor Dunphry's concerns were being adequately addressed. *Id.* Unlike *Federal Agency of News LLC*, Squawker did not merely provide information to the government; rather Squawker acted exactly how Governor Dunphry requested in his official capacity.

Here, there was a substantial degree of cooperative action between Governor Dunphry, acting in his official capacity, and Pluckerberg, acting in his official capacity as CEO of Squawker, in creating the verification feature. The state of Delmont's overt and significant participation with Squawker is further evidenced by the presence of the official Delmont flag to denote that a particular Squawker page belongs to a verified elected official of the state. *Id.* at 16. Moreover the

fact that Delmont is the only state that utilizes Squawker's verification program further illustrates the joint action between Squawker and Delmont. *Id.*

Additionally, by creating and continuing to use the verified Squawker platform, Governor Dunphry and Squawker acted in concert to deprive Milner of his First Amendment right to free speech. By requesting that a verification feature be added which prompted the new flagging policy, Governor Dunphry conscripted Pluckerberg to flag Milner's account thereby violating the First Amendment. This is shown by the fact that Governor Dunphry received over two thousand reports from constituents about Milner's comments and thereafter Pluckerberg flagged his account. *Id.* at 22, 24. Interestingly, this was the first time Pluckerberg ever flagged an account for excessive posting which was conduct that Milner had engaged in countless times before. *Id.* at 19–20, 22.

Because Governor Dunphry's and Pluckerberg's joint actions deprived Milner of his rights, this Court should find that Squawker is a state actor under the joint action test.

b. Squawker's actions amount to state action under the entwinement test.[10]

State action may exist when a private entity "is entwined with governmental policies, or when government is entwinned in [the private entity's] management or control. *Brentwood Acad.*, 531 U.S. at 296. Mere cooperation is insufficient to find state action. *Lansing v. City of Memphis*, 202 F.3d 821, 831 (6th Cir. 2000). In effect, the court asks if the "nominally private character [of the private entity] is overborne by the pervasive entwinement of public institutions and public

[10] In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, this Court found state action based on "entwinement." 531 U.S. 288 (2001). This Court neither used the term "entanglement" nor invoked the public function exception. While this seems to indicate a new exception to the state action doctrine; this Court neither held nor implied that it was in fact creating a new exception. The Tenth Circuit Court of Appeals, in light of *Brentwood Academy*, stated, "[a]lthough the nomenclature is new, its meaning appears to be comparable to what the court has previously described as a "symbiotic relationship." *Johnson v. Rodriguez*, 293 F.3d 1196, 1205 (10th Cir. 2002). Accordingly, we use entwinement and symbiotic relationship interchangeably.

officials in its composition and workings [thus] there is no substantial reason to claim unfairness in applying constitutional standards to it." *Brentwood Acad.*, 531 U.S. at 298. Moreover, the government need not coerce or encourage the specific act at issue; rather, entwinement is satisfied if the facts "show pervasive entwinement to the point of overlapping identity."[11] *Id.* at 303.

In *Brentwood Academy*, a private organization, the Tennessee Secondary School Athletic Association, was organized to regulate interscholastic sport between public and private high schools in Tennessee. *Id.* at 291. The organization was voluntary, and its voting membership was limited to the school principals, assistant principals, and superintendents of its members. *Id.* The Associations staff were not paid by the State, but were eligible to join the State's public retirement system. *Id.* The Tennessee State Board of Education has acknowledged the Associations functions and previously expressly designated the Association as the organization that regulated and supervised the athletic activities of Tennessee schools.[12] *Id.* at 292. The State School Board reviewed and approved the Associations rules for a period of 20 years. *Id.* at 292–93.

After the Association punished a private school for violating a rule prohibiting undue influence when recruiting an athlete, this Court was asked to determine if the Association, a private entity, was a state actor. *Id.* at 290–91. This Court found the Association to be a state actor because of "the pervasive entwinement of state school officials in the structure of the association . . . ." *Id.* at 291. The Association was predominately public schools represented by a state employee (a

[11] Entwinement is a "necessarily fact-bound inquiry" that depends on the particular facts of that case. *Brentwood Acad.*, 531 U.S. at 298. It does not turn on the statutory characterization of the entity or any legal acknowledgement of the entity's "inseparability" from government officials or agencies. *Id.* at 296; *see also Gallagher*, 40 F.3d at 1452.

[12] The State Board expressly recognized the Association as the regulator of public sports in Tennessee in 1972. *Brentwood Acad.*, 531 U.S. at 292. It "dropped" this rule in 1996, instead issuing a statement "recogniz[ing] the value of participation in interscholastic athletics and the role of [the Association] in coordinating interscholastic athletic competition." *Id.* at 292–93 (alterations in original).

principal or faculty member). *Id.* at 298. Those individuals acted within the scope of their official duties. *Id.* at 299. Those members "adopt[ed] and enforce[d] the rules that make the system work." *Id.* This creates an appearance of the public schools "exercising their own authority to meet their own responsibilities." *Id.* Because the Association would not be recognizable without the public school officials who both control and perform "all but the purely ministerial acts" of the Association, it was a state actor under the entwinement exception. *Id.* at 300.

Similarly, Governor Dunphry was involved in both the creation of the verified Squawker page as well as Milner's flagging. Governor Dunphry is a "longtime friend" of Mackenzie Pluckerberg, creator of Squawker. Record at 21–22, 24. He used Squawker to reach his constituents. *Id.* at 24. Governor Dunphry received complaints about "imposter and fake news accounts." *Id.* Because of his close relationship with Pluckerberg, Governor Dunphry met with Pluckerberg to suggest that Squawker add a verification feature. *Id.* at 22, 24. This verification feature was applied to all Delmont elected officials' Squawker pages. *Id.* at 22. Following the verification, Governor Dunphry engaged with his constituents on an "unprecedented level" through Squawker. *Id.* at 24. Pluckerberg personally monitored all verified Squawker accounts and flagged Milner's account for violations of the Terms and Conditions. *Id.* at 22. Both Governor Dunphry and Pluckerberg received the reports caused by Milner's actions. *Id.* at 22, 24.

Like *Brentwood Academy*, Governor Dunphry reviewed and approved Pluckerberg's verification feature. In fact, unlike *Brentwood Academy*—where the State simply reviewed and approved the Association's rules—Governor Dunphry came up with the verification feature himself. *Id.* at 24. He wanted the verification feature applied to all elected officials pages, further strengthening the bond between the State and Squawker. *Id.* at 22. Similar to *Brentwood Academy*, where the Association relied on its members for dues, Squawker relied on Governor Dunphry's

constituents for a large portion of its members. In fact, after Milner's tweets, several thousand of Governor Dunphry's constituents left Squawker. *See id.* at 22, 24. Because of this excessive posting that led users to leave the platform, Milner's account was flagged. *Id.* at 22.

Moreover, Governor Dunphry, as in *Brentwood Academy*, acted in his official capacity. Governor Dunphry suggested Squawker verify official pages for elected officials because of his constituents' complaints about imposter accounts. *Id.* at 24. He did so to facilitate sharing "major policy proposals" and soliciting "frank input" from his constituents. *Id.* He was driven by his desire to be a responsive elected official. *Id.* at 22.

Because Governor Dunphry acted in his official capacity when he suggested Squawker implement a verification policy, and because Squawker relied on Governor Dunphry's followers for a large portion of their business, this Court should find that Squawker acted as a State Actor because the State is pervasively entwined with Squawker's management.

c. Squawker's actions amount to state action under the nexus test.

Under the nexus test, "[s]tate action is present if the state has ordered the private conduct, or 'exercised coercive power or has provided such significant encouragement either overt or covert that the choice must be in law be deemed to be that of the State.'" *Tapia*, 10 F. Supp. 3d at 1260; (citing *Blum*, 457 U.S. 991, 993 (1982)). In effect, the plaintiff must show a "sufficiently close nexus between the State" and the action such that it is fair to treat the action as that of the State. *Jackson v. Metro. Edison Co*., 419 U.S. 345, 351 (1974).

Here, Governor Dunphry used his position as Governor to have Squawker implement an official verification feature. Record at 16, 22, 24. Governor Dunphry did so for his own benefit to eliminate misinformation finding its way to his constituents. *Id.* at 24. When Pluckerberg implemented this new feature—at Governor Dunphry's request—he created the new flagging

provision of the Terms and Conditions. *Id.* at 16. From the time the new flagging policy was in place in March 2018 until July 26, 2018, the date of the subject incident, Pluckerberg never flagged an account for excessive posting. *Id.* Even though Milner's signature move was to artistically arrange emojis and then string them together in quick succession of one another, he had never been flagged for this conduct under the new flagging policy. *Id.* at 19–20. Interestingly, it wasn't until Milner's comments were critical of Governor Dunphry's support of a bill proposal that Pluckerberg chose to flag Milner's account for violating the flagging policy. *Id.* at 22.

These facts illustrate the close nexus between Governor Dunphry who was acting in his official capacity for the state of Delmont and Pluckerberg acting in his capacity as CEO of Squawker. Such nexus is evident from Governor Dunphry's significant encouragement of Squawker's conduct and Squawker acting in accordance with such encouragement. Squawker went from hosting a public forum to regulating a public forum as a direct result of Governor Dunphry's insistence to do so. Thus, Squawker is a state actor under the nexus test.

d. Finding that Squawker's actions amount to state action will not open the floodgate of litigation.

This Court has recognized that one of the most important places for the exchange of views "[i]s cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Packingham*, 137 S. Ct. at 1735. Referring to social media as "the modern public square" implies that First Amendment principles protecting speech from government intrusion extend to social media. *Id.* at 1732.

This Court's admonition to exercise caution before extending the reaches of the First Amendment to social media platforms is well taken. *See Packingham*, 137 S. Ct. at 1744 (Alito J., concurring in judgment) (noting that courts should "proceed circumspectly, taking one step at a time" in applying "free speech protections" to the Internet). However, this case does not require

a finding or *per se* rule that all social media platforms are subject to the First Amendment. Rather, finding that Squawker is a state actor only extends the First Amendment's reach into social media based upon a very unique set of facts that warrant such a reach—where a private organization, working in tandem with the government to circumvent the Frist Amendment's protections for free speech, regulates a public forum.[13]

Moreover, this case is distinguishable from those denying to find state action where, although there is a public forum, it was the public official and not the social media platform that acted to restrict speech. *See e.g.*, *Knight First Amendment Inst. at Columbia Univ.*, 928 F.3d 226, 226 (2d Cir. 2019); *Davison*, 912 F.3d at 666. As *Knight* and *Davison* illustrate, the First Amendment does not permit a public official using a social media account to exclude persons who express views critical of official conduct of duties, fitness for office, or views with which the official disagrees. Here, it was Pluckerberg, as CEO for Squawker, who acted at the behest of Governor Dunphry to restrict Milner's speech. Although Governor Dunphry could not flag Milner's account, he could report it to Squawker and Squawker could flag the comments thereby violating Milner's First Amendment protections.

This case rests on two core principles. First, when a private company takes on a traditional and exclusive government function, like regulating free speech in a public forum, it must respect the speaker's First Amendment rights. Second, an individual's First Amendment protections should not be circumvented by private actions taken at the behest of government officials. Where,

[13] Squawker admits it hosts a public forum. Although there are cases where private social media companies have not been treated as state actors; the companies in those cases do not host a public forum. *See, e.g.*, *Howard v. Am. Online, Inc.*, 208 F.3d 741, 754 (9th Cir. 2000) (finding that AOL was not subject to the First Amendment; *Prager Univ. v. google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018). Because Squawker concedes it hosted a public forum, those, and similar, cases are inapposite.

as the case is here, the restrictions of speech are the result of private action so inextricably linked with government encouragement, the First Amendment's protections apply. *See Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 386 (1969).

II. The United States Court of Appeals for the Eighteenth Circuit erred in holding that the private entity's (Squawkers) Terms and Conditions is a content-neutral time, place, or manner restriction that is not violative of the First Amendment.

A. Squawker's Terms and Conditions are not a reasonable time, place, or manner restriction.

"A fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham*, 137 S. Ct. at 1732. "Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers 'relatively unlimited, low-cost capacity for communication of all kinds.'" *Id.* (quoting *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 870 (1997)).

Although communication over the Internet is new, "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (holding that video games qualify for First Amendment protection). As with other mediums, the government may impose reasonable time, place, or manner restrictions on social media provided the restrictions are (1) content neutral, (2) "narrowly tailored to serve a significant governmental interest," and, (3) "leave open ample alternative channels for communication of information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

i. Squawker's Terms and Conditions are not content neutral.

"The principal inquiry in determining content neutrality—in speech cases generally and in time, place, or manner cases specifically—is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id*. Government regulation of

expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech." *Id.* (emphasis in original).

Laws that " cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys . . . must also satisfy strict scrutiny." *Reed v. Town of Gilbert, Ariz*., 135 S. Ct. 2218, 2227 (2015) (internal quotations omitted). Courts must "verify that the 'predominate concerns' motivating the ordinance 'were with the secondary effects' " of the protected speech and not the content. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440–41 (2002) (citing *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47 (1986)).

In *Ward*, the Court held that a city's guideline which regulated sound-amplification at an outdoor amphitheater was content neutral because the city's principal justification—the desire to control noise levels in order to retain the sedate character of the park—had nothing to do with content. *Ward*, 491 U.S. at 792 (1989)). Further, the city had "disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers." *Id.*

Squawker contends that the restriction here is akin to the sound-amplification guidelines in *Ward.* However, the restriction in *Ward* did not "attempt to ban any particular manner or type of expression," *Id.* at 802. Music was still permitted in the amphitheater, albeit at a lower volume. *Id.* Instead, here, the restriction prohibits a unique mode of expression—the creation of strings of emojis to express a different meaning than any one emoji could express alone.[14] Squawker does not simply seek to turn the music down—it seeks to turn it off.

[14] Dr. Amir, an expert in the field of online communication and symbolic logic, testified that emojis and their collocation are their own media, communicating a message that is impossible to convey in the same manner as text alone. Record at 12.

Further, Squawker cannot justify this regulation without referencing the content of Milner's speech. Unlike *Ward*, where there was no evidence that the city displayed any animus against the type of music that was being played, here, the evidence shows that Milner's post was likely flagged because of disagreement with its message. Pluckerberg, Governor Dunphry's friend, personally monitored the verified pages before he flagged Milner's page. Record at 22. During that time period, he did not flag any other users. *Id.* In fact, since Squawker's inception in 2013, Pluckerberg has never flagged an account for excessive posting. *Id.* A "departure from normal procedures" supports an inference of discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 253 (1977). Pluckerberg also had a substantial monetary interest in flagging the posts to avoid losing any more users. Squawker's user base dropped 29% after Milner's comments, most of whom were over the age of 65. Record at 22; *see Arlington Heights,* 429 U.S. at 253 (1977) (noting that "[t]he specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purpose"). Because Pluckerberg flagged Milner's page because of its message, Squawker's Terms and Conditions are not content neutral. *See Reed*, 135 S. Ct. at 2229.

Squawker's claim that the restriction on excessive posting is aimed at secondary effects is undermined by Squawker's inconsistent enforcement of the policy. Since Milner joined Squawker in 2017, he has posted four or more squeaks within thirty seconds on countless other Squawker pages without being flagged. Record at 21. Despite his frequent use of the forum, Milner has never seen nor heard of a Squawker profile being flagged for excessive posting. *Id.* Finally, Pluckerberg admits that he has never flagged an account for excessive posting before Milner's. *Id.* at 22. Because the prohibition on excessive posting "cannot be justified without reference to the content

of the regulated speech," it is content-based and strict scrutiny applies. *Ward*, 491 U.S. at 791; *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

Squawker's regulation of speech is also content based. Squawker claims that the restriction on disparaging speech serves Squawker's substantial interest in "maintaining a respectful tone for the millions of [Squawker] users." Record at 12. However, as the Supreme Court explained in *Matal v. Tam*, even where the government creates a limited public forum, viewpoint discrimination is forbidden and "giving offense is a viewpoint." 137 S. Ct. 1744, 1749 (2017). Accordingly, Squawker may not prohibit disparaging language in the name of "maintaining a respectful tone," "merely because the ideas are themselves offensive to some of their hearers." *Id.* Any such restriction is viewpoint-based discrimination and not content-neutral.

Even if the restriction on the frequency of posts is facially content-neutral, it is unconstitutional as-applied to Milner's posts. The First and Ninth Circuits have held that a regulation that is "facially neutral and constitutional in all fact situations" may still be invalid if it is "enforced selectively in a viewpoint discriminatory way." *McGuire v. Reilly*, 386 F.3d 45, 61–62 (1st Cir. 2004); *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011) The challenger needs to show "a pattern of unlawful favoritism." *McGuire*, 386 F.3d at 64.

Here, the evidence shows that the prohibition on excessive posting was enforced selectively against Milner in a viewpoint discriminatory way. Although Pluckerberg did not flag an account for excessive posting before Milner posted a disparaging comment about his friend. Record at 22. Further, Milner had posted in excess of the restriction before without being flagged. *Id.* at 20. Because Squawker cannot explain the reason for its selective enforcement of the regulation, it is unconstitutional as-applied to Milner's speech. *See Arlington Heights.*, 429 U.S. at 266.

B. The restriction on excessive posting is not narrowly tailored to serve a significant governmental interest and does not leave open ample alternative channels for communication of the information.

Even if the restriction on excessive posting is content neutral, it is not narrowly tailored to serve a significant governmental interest. "For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 799)). While "[s]uch a regulation . . . need not be the least restrictive or least intrusive means of serving the government's interests," the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* (citations and internal quotations omitted).

In *McCullen*, this Court held that prohibiting knowingly stand on a public way or sidewalk within 35 feet of an entrance to an abortion clinic burdened substantially more speech than was necessary to further the government's legitimate interests. *Id.* at 466. The court explained that the act imposed serious burdens on the pro-life counselor's speech by "depriving them of their two primary methods of communicating with arriving patients: close personal conversations and distribution of literature." *Id.* Thus, "it [was] no answer" to say that the pro-life counselors could still protest since this was a vastly different form of expression than the one they wished to engage in. *Id.* The court noted that obstruction of the clinic could be addressed through existing local traffic ordinances, or by imposing criminal and civil sanctions for people *actually* harassing those attempting to enter. *Id.*

Here, Squawker's terms and conditions "burden substantially more speech than is necessary" to further Squawker's interests. Squawker's verified policy blocks out the entire content of a users' page, not just the offending comment. Record at 4. One sees that this is not

narrowly tailored by looking to Squawker's private accounts. If a private users' squeak is flagged, only the offending comment is blocked out—a skull and crossbones badge is not placed next to the user's name. *Id.* Like *McCullen*, Squawker's restriction does not only block out only offending comments, but unnecessarily blocks out other protected speech.

Squawker's regulation did not leave open ample alternative channels of communication. "It is no answer" to say that Milner could watch the video and have his account unflagged, because Milner would still be prohibited from using evolving emoji chains. Like *McCullen*, where the restriction was inadequate because it was substantially different from the desired speech, here, the fact that Milner can still post comments is of no avail because he is still prohibited from his preferred method of expression. *See McCullen*, 573 U.S. at 486.

Squawker contends that its flagging system leaves open ample alternative channels of communication because users can choose to see Milner's comments. However, the burden it imposes is clear from Milner's loss of viewership. Milner went from having over 10,000 Squawker followers and 7,000 views per squeak to only 2,000 followers and 50 views per squeak. Record at 4–6. Having his entire page flagged has significantly reduced the number of people that his speech will reach and violated the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the Eighteenth Circuit.

Respectfully submitted.

Team 18

Counsel for Petitioner

Dated: January 31, 2020

APPENDIX

U.S. CONST. amend. I.

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. XIV, § 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.

BRIEF CERTIFICATE

Team 18 affirms the following:

i. The work product contained in all copies of Team 18's brief is the word product of the members of Team 18 only;

ii. Team 18 has complied fully with its law school's governing honor code; and

iii. Team 18 has complied with all the Rules of the Competition.

Team 18.