NO. 17-874

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

Avery MILNER,

Petitioner,

v.

Mac PLUCKERBERG,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighteenth Circuit

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether a private entity hosting and regulating a public forum engaged in state action by applying its flagging policy and content restrictions, thereby inhibiting user access to a government official's designated public forum.

II. Whether a private company's Terms and Conditions prohibiting specific mediums and frequencies of user speech in a designated public forum, to control volume and vociferous nature of speech, serve a narrowly tailored and substantial government interest through the least restrictive means, so that it comports with the First Amendment.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit has entered final judgment. R. at 25. Petitioner filed a timely petition for writ of certiorari, which this Court granted. R. at 37. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) (2018).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the First Amendment to the United States Constitution, which 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 of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

In 2013, Mackenzie (Mac) Pluckerberg launched the multinational social media platform Squawker, which allowed people the forum to express ideas and stay informed, subject to Squawker's Terms and Conditions. R. at 2, 3. More users relied upon Squawker as a primary source of national and local news, further developing a trend of government officials using Squawker to engage constituents. R. at 3. With this increased use came a "significant increase in imposter Squawker accounts posing as official government accounts . . . ." R. at 3.

At the height of Squawker's popularity, one such official who experienced negative effects cause by imposter and "fake news" accounts, was Governor William Dunphry of Delmont, who had established Squawker's platform as a primary communication channel regarding policy announcements and other official business. *Id.* Governor Dunphry describes his reliance on Squawker as ensuring that constituents "always have a chance to engage in the democratic process . . . ." R. at 24. To safeguard the integrity and reliability of information disseminated by government officials' accounts Governor Dunphry engaged longtime friend and Squawker CEO, Mac Pluckerberg, and charged him with supplementing the official government accounts with an additional verification feature as an heightened security measure. R. at 3, 22. One month later, in March of 2018, the verification feature was implemented with an updated flagging policy in the Terms and Conditions that specifically revised the criteria as applied to violations involving verified accounts. R. at 22, 28. The revised policy states in part:

> This [policy] will require all [violators] to click on an emoji of a skull and crossbones in order to clear black boxes covering (1) the offending squeak or comment or comment; (2) the offender's future squeaks and comments; and (3) all content on the offending Squeaker's profile page. A skull and crossbones badge will also appear next to the offending Squeaker's name . . . . To have this flagging removed . . .a Squeaker must complete a thirty-minute training video regarding the Terms and Conditions of the community and complete an online quiz. . . . The offending comment will remain flagged, although the user may still delete it.

R. at 28.

On July 26, 2018, Governor Dunphry posted a squeak containing a link to the description of a bill proposal. R. at 24. The description of the bill outlined an effort to reduce pedestrian-vehicle-related deaths through making the right turns of cars on any red light now illegal within the state of Delmont. R. at 29. Following Governor Dunphry's squeak, Avery Milner, a Delmont resident and active Squawker user with over 10,000 followers, responded with four successive squeaks intended to express disapproval of the Governor's bill. R. at 20. Mr. Milner's initial

squeak at 5:32:02PM contained the phrase, "We gotta get rid of this guy." R. at 5. Mr. Milner followed with three more squeaks containing emoji's illustrating an elderly male character, a syringe, and a casket at 5:32:14, 5:32:23, and 5:32:31, respectively. Under the Squawker Terms and Conditions governing the volume at which users may comment on verified accounts, Mr. Pluckerberg flagged Mr. Milner's account for violating the provisions about spamming behavior and violent and/or offensive use of an emoji. R. at 22. Mr. Milner's account was the first to be flagged for an excessive posting violation. R. at 22.

Squawker informed Mr. Milner on July 27, 2018 of his account being flagged for violent and/or offensive use of emojis and spamming behavior. R. at. 20. To have the skull and crossbones flagging removed from labeling his account, Squawker further informed Mr. Milner that he would have to watch an online video outlining the site's Terms and Conditions followed by successfully passing a quiz. R. at 30. Additionally, Squawker provided notice "by watching this video and completing the quiz, you agree that you have violated our Terms and Conditions and you reaffirm that you will abide by all Terms and Conditions." R. at 30. Believing the flagging of his profile to be unlawful and unjust, Mr. Milner refused to watch the video and complete the quiz in pursuit of removing the account flagging. R. at 20. With the added requirement of having to click to consent to viewing all future content, Mr. Milner experienced a loss of approximately eight thousand followers and a decrease of over ninety-nine percent in views per squeak. R. at 30. Mr. Milner further contends that job offers, and the number of his freelance articles has declined to such a degree as to hurt his financial livelihood. R. at 30.

II. NATURE OF PROCEEDINGS

The District Court. Mr. Milner sued Pluckerberg in Federal District Court on two causes of action. R. at 1. First, Milner asked the court to declare that Squawker has violated his right to

freedom of speech pursuant to the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment. R at 1. Second, Milner asked the court to hold that the First Amendment requires the platform to restore his account so that it appears unflagged. R. at 1. Respondents argued that the First Amendment did not apply to its Terms and Conditions, although conceding the Governor's account was a public forum. R. at 1-2. Respondents further asserted that it is not a state actor, and that even if it were, it may still regulate the time, place, or manner of speech on that forum, and that its terms, including the Terms and Conditions, are content-neutral. R. at 2.

The parties filed cross motions for summary judgment. R. at 2. The court held that Squawker's function as a host and regulator of a public forum amounts to state action, and Squawker's Terms and Conditions governing Mr. Milner's Squawker account substantially burdens his speech in violation of the First Amendment as applied to the state of Delmont through the Fourteenth Amendment. R. at 2.

The Court of Appeals. Pluckerberg appealed to the Eighteenth Circuit, which reversed on the basis that even though the Governor's official page is uncontestably a public forum, Squawker remains a private actor not subject to First Amendment constraints on its Terms and Conditions. R. at 26. Even if it were a state actor, Squawker's Terms and Conditions do not unduly burden Mr. Milner's speech and is narrowly tailored as a reasonable time, place, or manner restriction. R. at 26.

SUMMARY OF THE ARGUMENT

I.

The court of appeals erred in finding that Squawker's hosting of a designated public forum and enforcement of a viewpoint-based restriction on speech did not amount to state action. While

the parties may have stipulated the existence of a public forum, the Court's two-prong analysis establishes: (1) the practice of Governor Dunphry, in his official capacity, utilized his Squawker account to solicit and address constituent feedback, and announce public policy updates; and, (2) the accessibility of Governor Dunphry's account, and the nature of the platform coupled with its compatibility for hosting nearly unlimited viewpoints constitutes a public forum where discrimination based on viewpoint is prohibited. In prior cases, defendants in capacities like Governor Dunphry have asserted that the speech contained in their individual social media accounts is immune from First Amendment protection as government speech. Focusing on the interactive space where users may reply and comment outside of the control of the government or the original posting user, there lacks the inherent selectivity and scarcity of access that accompanies government speech held immune from First Amendment safeguards. Furthermore, the relationship between Squawker CEO Mac Pluckerberg and Governor Dunphry served as the catalyst for implementing the challenged heightened "flagging policy," implicating Squawker as a willing participant in government regulation. This pervasive entwinement of the government and Squawker substantiates a finding of state action.

II.

The court of appeals also erred in concluding that the Terms and Conditions enforced by Squawker were a reasonable application of a content-neutral time, place, and manner restriction. Milner's use of emojis constitutes protected speech, thereby implicating First Amendment protection when regulated. Like photographs or paintings, Milner's use of emojis are an expression of an idea or belief that is inherently expressive and entitled to full protection under the First Amendment—rendering Squawker's Terms and Conditions prohibiting emoji use too vague to be constitutional. Moreover, Milner's emojis are also symbolic speech because they

convey a particularized message likely to be understood by those who view it. Therefore, Terms and Conditions are a content-based restriction on speech that must withstand the most exacting scrutiny. Even if an intermediate scrutiny form of review was applied to the policy, Squawker's Terms and Conditions will be invalid due to the restrictions being greater than necessary.

This Court should reverse the judgment of the court of appeals and reinstate the judgment of the district court.

ARGUMENT AND AUTHORITIES

The district court granted judgment on legal questions. R. at 2. This Court reviews questions of law de novo. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

I. SQUAWKER'S ACTION AS A PRIVATE ENTITY FUNCTIONING AS A HOST AND REGULATOR OF A PUBLIC FORUM AMOUNTS TO STATE ACTION.

This case initially implicates the First Amendment's public forum doctrine, which provides that the government facilitate speech by requiring that certain forums be made or held available for uncensored discussion, debate, and exercise of other First Amendment freedoms. *See, e.g.*, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). This doctrine, which grows out of the 1939 case of *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), imposes obligations on the government to facilitate speech without discrimination based on viewpoint within places traditionally devoted to or well-suited to exercising such freedoms, such as public parks, sidewalks and streets, as well as places opened for expressive purposes, whether those places are government-owned or privately-owned but government controlled.[1]

[1] *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) ("A basic rule, for example, is that a street or park is a quintessential forum for the exercise of First Amendment rights.").

The private ownership of social media sites also raises issues for applying the First Amendment's state action doctrine, which provides that the restriction of speech by and through private actors does not implicate the First Amendment except in narrow, limited circumstances. This Court explained in the *Civil Rights Cases* that the Fourteenth Amendment limits "state action" and not "individual invasion of individual rights." *United States v. Stanley*, 109 U.S. 3, 17 (1883). In other words, the Constitution and the Bill of Rights limit the actions of governmental actors, not private actors. But at times, however, this Court has stretched the state action doctrine. Perhaps most famously, the court ruled in *Marsh v. Alabama* that a privately owned company town was subject to First Amendment principles even though it was technically private. 326 U.S. 501, 506 (1946).

In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, the School Board and the City of Madison, Wisconsin, maintained that they had opened up a public forum that was limited in scope and that they were justified in limiting the petitioner's speech because it was outside that limited scope. 429 U.S. 167, 172 (1976). The Court held that, once a meeting of the Board of Education had been made open to the public, the Board could not discriminate against speakers based on their viewpoint. *Id.* at 175. There, the school board and the City of Madison had convened a public meeting with a broad agenda (which included employment matters) and invited all members of the public to attend. *Id.* at 171. During the meeting, the Board sought to silence the speech of an individual who intended to speak on collective bargaining matters. *Id.* at 173. While recognizing that the School Board could conduct private meetings that were not open to the public and to limit the agenda of its meetings, the Court explained that, once the Board opened up its meetings to the public for direct citizen involvement and sat to conduct public business and hear the views of its citizens, it could

not silence a speaker "seeking to express his views on an important decision of the government," nor could it discriminate among speakers based on the viewpoint or content of their speech or the nature of their employment. *Id.* at 171. The Court observed that "to permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Id.* at 175.

This Court's recent case of *Packingham v. North Carolina* sheds some light on the application of the public forum doctrine to social media sites and the use and misuse of such sites by government officials. 137 S. Ct. 1730, 1731 (2017). Particularly, Justice Kennedy's opinion in *Packingham* extends the Court's expansive conception of the public forum doctrine to non-traditional forums that function as forums for public discourse. *Id.* at 1735–36.

The Court has also clarified that, to constitute a designated public forum, the place in which speech occurs need not be an actual physical place. Rather, the Court has recently explained that public forums may also include virtual or "metaphysical" forums, like funding and solicitation schemes,[2] the airwaves,[3] cable television,[4] and now, internet[5] forums for expression.

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[2] *See, e.g., Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (finding that university funding scheme for student publications constituted limited purpose designated public forum, in which viewpoint discrimination was prohibited); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) (holding that Combined Federal Campaign, an annual charitable fundraising drive conducted through the federal workplace during work hours through the voluntary efforts of public employees, was a nonpublic forum in which viewpoint discrimination was prohibited).

[3] *See, e.g., Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998) (suggesting that if televised political debate had an "open-microphone format," it would constitute a designated public forum).

[4] *See, e.g., Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 774–75 (1996) (Kennedy, J., concurring) (describing that public access channels, which were channels that were available at low or no cost to members of the public, constituted designated public forums, and therefore cable operators' speech restrictions within such forums were subject to stringent scrutiny).

A. This Court Should Adopt the Criteria Used in *Cornelius* to Determine the Existence of Functional Equivalent of a Public Forum.

This Court addresses the state action requirement of the public forum doctrine as applied to a government-controlled website owned by a private entity. To find that the speech subjected to regulation is deserving of First Amendment protection, a forum analysis must be conducted. While the parties may have agreed that Governor Dunphry's page was a public forum for the First Amendment, the specific type of public forum designation will aid in determining the extent of such protection. R. at 26.

Where it is unclear whether the government has designated a public forum by opening up a nontraditional forum for public discourse, courts will look predominantly to two factors: (1) the policy and practice of the government or the government official regarding its use of the property; (2) the nature of the property and the compatibility of the property with expressive activity. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).[6]

1. Governor Dunphry used Squawker as an official communication channel.

In several recent cases involving citizens blocked by government officials from engaging with them on the officials' social media forums, the citizens' first established that the interactive space on the officials' accounts constituted a public forum from which they were

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[5] *See Packingham*, 137 S. Ct. at 1735 (identifying cyberspace as "the most important place . . . for the exchange of views").

[6] In *Cornelius*, the NAACP challenged its exclusion from the Combined Federal Campaign, an annual charitable fund-raising drive conducted through the federal workplace during work hours through the voluntary efforts of public employees. 473 U.S.at 790–93. In evaluating the NAACP's claims, the Court emphasized that the access the Fund sought was not to the federal workplace itself, but rather to participation as one of the choices in the fund-raising drive established by the Combined Federal Campaign. *Id.* at 800.

unconstitutionally blocked based on their viewpoints.[7] In each case, the government officials responded by asserting that the forums were not public forums under the First Amendment public forum doctrine. Instead, claiming that they were operating these accounts in their personal capacity not in their official government capacity, and that they therefore enjoy the First Amendment right to delete comments and/or block individuals from these forums.[8]

Most recently, in *Knight First Amendment Institute at Columbia University v. Trump*, the district court determined that the speech the plaintiffs sought to engage was protected by the First Amendment as the interactive space on the social media platform was properly characterized as a designated public forum, and the viewpoint-based exclusion of the individual plaintiffs was prohibited by the First Amendment. 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018). The court in *Knight* explained that to analyze plaintiffs' public forum claims, it must focus on the access sought by the speakers. *Id.* at 565. The court found that the access sought by the plaintiffs was narrow and specific in scope, like the access sought by the plaintiffs in the *Cornelius v. NAACP* and *Perry Education Ass'n* public forum cases.

Governor Dunphry launched the account to engage with constituents, which was accomplished on an "unprecedented level." R. at 24. This component distinguishes the analysis in *Knight*, as the @RDT account was created and in use before President Trump's election. 302

[7] *See* Complaint at 3, *Laurenson v. Hogan*, No. 8:17-cv-02162-DKC (D. Md. filed on Aug. 1, 2017) (alleging that Governor Hogan, through the social media policy "engag[ed] in unconstitutional viewpoint discrimination to remove certain ideas or perspectives from a broader public debate"); *see* Complaint at 7, *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. May 10, 2017) (No. 1:2016-cv-00932); *see also* Complaint at 2–3, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17 Civ. 05205).

[8] Motion of Government for Summary Judgment at 11, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17 Civ. 05205) (classifying Trump's Twitter use as an official's "routine[] engage[ment] in personal conduct that is not an exercise of state power").

F. Supp. 3d at 551. Upon creation of his official account, Governor Dunphry squeaked to constituents on a "daily basis and let them know about major policy proposals coming through the state," to give their "frank input." R. at 24. Applying the analysis in *Knight*, the Governor's use of Squawker extended the government and a tool for democratic governance.

2. Squawker's nature of operation is compatible with expressive activity.

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. In *Packingham*, the Court defined that streets and parks were the "quintessential forum[s] for the exercise of First Amendment rights" and that such traditional public forums—even in the modern age—are still essential venues for citizens to exercise these rights—for "public gatherings to celebrate some views, to protest others, or simply to learn and inquire." *See Packingham*, 137 S. Ct. at 1734, 1743. The Court acknowledged: "While in the past there may have been difficulty in identifying the most important places . . . for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.* at 1735.

Since inception, Squawker has served as a means for people to stay connected to one another as well as local, state, and national news. R. at 21. The facilitation of communication between the account posting information and another Squawker user is bidirectional. R. at 21. When a user squeaks or uploads an article or other posting, other users may show approval or disapproval for the content of the squeak by "liking" or "disliking" the squeak. R. at 26. Further, a user may interact with a squeak by authoring and posting their own "comment" directly. R. at 26. The comment is then open to interaction from other users via likes, dislikes, and comments. R. at 27. Squawker's function is consistent with the social media analysis in *Packingham*, and

when coupled with the practice and policy of Governor Dunphry's use, Squawker is conclusively designated as a public forum, prohibiting viewpoint discrimination.

B. State Action Exists Amidst a Close Nexus Among the State and the Challenged Action.

The determination of whether the regulation resulted from state action would be unnecessary if the Governor's comments constituted government speech, which this Court has held as immune from First Amendment protections. Further, this Court can distinguish the *Nyabwa v. Facebook* rationale of private ownership as a bar to a finding of state action, through consideration of the "pervasive entwinement" factors outlined in *Brentwood*. *See generally Nyabwa v. Facebook*, No. 2:17-CV-24, 2018 U.S. Dist. LEXIS 13981, at 2 (S.D. Tex. Jan. 26, 2018); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 303 (2001).

1. Governor Dunphry's speech was not government speech immune from protection.

In analyzing this crucial government speech versus forum analysis issue, the court in *Knight* turned to the central cases of *Pleasant Grove v. Summum*[9] and *Matal v. Tam*, where this Court established factors most relevant in resolving this issue: (1) whether the forum was constrained by inherent selectivity and scarcity, including whether a public forum classification would "lead almost inexorably to the closing of the forum" or whether the forum was "capable of accommodating a large [amount of speech] without defeating its essential function"; (2) whether the speech within the forum was closely identified in the public mind with the government; and (3) whether the government maintained control over the speech in the forum.

[9] Although the park was a traditional public forum for speeches and other transitory expressive acts, the display of the permanent monument in the public park was not a form of expression to which forum analysis applied; instead, the placement of the permanent monument in the public park was a form of government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

a. The interactive space associated with Governor Dunphry's squeaks is not characterized by inherent selectivity and scarcity.

The forum at issue in this case as well as in *Knight* is distinctly unlike the forum to which plaintiff's sought access in *Summum*, where this Court held that applying the public forum doctrine to the access sought by Summum would "almost inexorably lead to the closing of the forum." *See Pleasant Grove City v. Summum*, 555 U.S. 460, 480 (2009). Unlike the right of access to a public park to erect permanent monuments, the requested access in *Knight* was to a forum capable of accommodating—and regularly does accommodate—an unlimited amount of speech in replies and retweets. As the court held that the forum was not constrained by inherent selectivity and scarcity in *Knight*, the same objective assessment applies about the interactive space available to users which follows each one of the Governor's squeaks.

b. The interactive space associated with user comments is not associated with each individual squeak by the Governor.

In considering the second factor, whether the speech was closely identified in the public mind with the government, the court in *Knight* properly found that while the President's tweets themselves were identified in the public mind with the President, the same could not be said for the interactive space (individuals' replies, retweets, likes, etc.) associated with each presidential tweet. 302 F. Supp. 3d at 572. Notably, each reply to a presidential tweet is displayed with the account information of the replying user and is not endorsed by the government. *Id.* at 572 (emphasizing the "prominence" of the replying user's account information).

Milner's speech is akin to the speech in *Matal v. Tam*, where the trademarks that private entities create and seek to secure for protection by the Patent and Trademark Office were associated in the public mind with private speakers, not with the government, and to be private speech not government speech. 137 S. Ct. 1744, 1760 (2017). The *Knight* and *Matal* rationales

securely align in considering the interactive space reserved for user comments to Governor Dunphry's squeaks. The forum opened for comment and interaction cannot closely identified with the speech of the government.

c. The Government maintains no control over reply squeaks.

Finally, in evaluating whether the interactive space associated with each presidential tweet constituted government speech, the *Knight* court examined the third factor, whether the government maintained control over the speech. 302 F. Supp. 3d at 572. The court observed that each reply tweet to a presidential tweet is controlled solely by the replying user herself, so no other Twitter user (including the President) may alter the content of any reply, and that the government maintains no control over reply tweets or comments. *Id.* This is in contrast to the speech on the specialty license plates in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, in which the state exercised "sole control over the design, typeface, color, and alphanumeric pattern for all license plates," and was vested by law with the final authority to approve every specialty license plate design proposal before the design could appear on a Texas plate. 115 S. Ct. 2239, 2249 (2015). This rationale provides this Court the template for analyzing the forum on Governor Dunphry's page, as the Governor similarly has no control over the replies, comments, or likes of users such as Mr. Milner. The control exists in the authority of Squawker as a private actor with regulatory control over the content of all users. R. at 22.

Applying the factors of whether Governor Dunphry's account was constrained by inherent selectivity and scarcity, whether the speech within the forum was closely identified in the public mind with the government, and whether the government maintained control over the speech, this Court should conclude that the interactive space associated with each gubernatorial squeak

constitutes a public forum for private speech subject to the constraints of the Free Speech Clause, not government speech immune from applying the First Amendment.

2. Pluckerberg and Dunphry's relationship constitutes "pervasive entwinement."

The requirement of state action in the forum context rarely is analyzed separately from the government control-or-ownership requirement. But, as the court in *Knight* acknowledged, further analysis may be required when the party exercising control over the forum is a nongovernmental entity. 302 F. Supp. 3d at 568. The court recommends that consideration of the factors set forth by this Court in *Brentwood Academy* may be appropriate. *Id.* In *Brentwood*, when the Association penalized petitioner Brentwood Academy for violating a recruiting rule, Brentwood sued the Association and its executive director under 42 U.S.C. § 1983, claiming that the rule's enforcement was state action that violated the First and Fourteenth Amendments. 531 U.S. at 293. The Court held that the Association's activity constituted state action because of the pervasive entwinement of state school officials in the structure of the ostensibly private Association, and there was no substantial reason to claim unfairness in applying constitutional standards to the Association. *Id.* at 298. This "persuasive entwinement" test was developed through the Court's consideration of the "state nexus" litany of cases which sought to identify a close relationship between state and private parties to satisfy the "under color of state law" requirement of 42 U.S.C. 1983 and the state action requirement of the Fourteenth Amendment. *See United States v. Price*, 383 U.S. 787, 794 (1966). The Court's decisions in *Edmonson v. Leesville Concrete Co.*, and *Georgia v. McCollum* identified three basic factors to be considered in determining whether private acts could be described "in all fairness" as state action: (1) whether the private act involved a traditional government function; (2) whether the private actors received government assistance and benefits; and (3) whether the injury was "aggravated in a

unique way by the incidence of government authority." 500 U.S. 614 (1991); 505 U.S. 42 (1992). Nearly one decade later, the *Brentwood* Court included another factor: whether the government was "entwined in [the] management or control" of the private entity. *Brentwood*, 531 U.S. at 296 (quoting *Evans v. Newton*, 382 U.S. 296, 301 (1966)).

In defining the pervasive entwinement criteria in determining that a nexus exists, the *Brentwood* Court reviewed *Blum v. Yaretsky*, where the Court determined that a state may be liable for the actions of a private party where the state "has exercised coercive power or has provided such significant encouragement." *Id.* at 295 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). The Brentwood Court also listed "joint participation" as a factor that could lead to state action. *Id.* at 296. This facet of state nexus bridges the gap between private and state actors by finding the private actor to be a "willful participant in joint activity with the State or its agents." *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)).

The existence of a relationship between Governor Dunphry and Squawker CEO Mac Pluckerberg is undisputed. R. at 22. Further, the Governor's relationship with Pluckerberg served as the catalyst for adding a verification feature, which also resulted in the heightened terms and conditions about policy violations about the verified accounts. Without additional facts regarding the governor's request, the Court may find that the Governor's overt act of suggesting the verification feature does not satisfy the *Blum* definition of coercion. But, as Mr. Pluckerberg stated that the idea for the verification future was not implemented until suggested by his friend Governor Dunphry, suggesting that Squawker was complicit as a willful participant in joint activity with the State or its agents as defined as a factor in *Brentwood*. As the Court in *Brentwood* stated, "a challenged activity may be state action when . . . it is entwined with governmental policies or when government is entwined in [its] management or control." 531

U.S. at 296. With the actions of Governor Dunphry directly leading to the creation and implementation of an additional feature and revised policy, the involvement of government in Squawker's management or control establishes the pervasive entwinement sufficient to designate the enforcement of speech regulations as state action.

II. THE FIRST AMENDMENT'S FREE SPEECH CLAUSE PROHIBITS ENFORCEMENT OF A CONTENT-BASED RESTRICTION ON SPEECH WHICH SUBSTANTIALLY BURDENS AN INDIVIDUAL'S FREEDOM OF EXPRESSION WITHOUT A COMPELLING GOVERNMENT INTEREST.

The Free Speech Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, provides that the government shall make no law "abridging freedom of speech." U.S. Const. amend. I. The court of appeals found that Milner's chosen artistic medium, the emoji, was censored as the result of a content-neutral policy and not restricted to such a degree that the public could no longer access Milner's speech. R. at 35. In concluding this, the court below misapplied the basic concepts providing the bedrock of First Amendment freedoms, and allowing Squawker to violate Mr. Milner's First Amendment rights.

A. Emojis Are Protected Speech.

The protections afforded by the First Amendment extend well beyond written and spoken word. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). As this Court has repeatedly emphasized, one of the central freedoms protected by the First Amendment is the "freedom of thought." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Indeed, "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to foster such concepts. The right to speak and the right to refrain from speaking are components of the broader concept of "individual freedom of mind." *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). Thus, requiring Milner to ignore his sincerely held political beliefs and express those views of others through assenting to a policy endorsing the restriction

of his viewpoints violates the First Amendment. The finding of neutrality of Squawker's Terms and Conditions, thus, "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to the Constitution to reserve from all official control." *Id.* at 715.

Milner's posting qualifies as symbolic speech that is sufficiently communicative to be protected under the First Amendment. The Eighteenth Circuit's implication that Milner's emojis, being categorized as "threatening," and "ageist," are lacking an essential communicative element of speech deserving of protection demonstrates "an unduly restrictive view of the First Amendment and of visual art itself." *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996). Regardless of whether this Court concludes there must be a particularized message, Milner has established that his use of emojis is symbolic speech protected under the First Amendment.

1. *Hurley* reaffirmed that some conduct is inherently expressive and always received First Amendment protection.

Some conduct is inherently expressive and "always communicate[s] some idea to those who view it, and as such [is] entitled to full First Amendment protection." *Bery*, 97 F.3d at 696; *Ex parte Thompson*, 442 S.W.3d 325, 334 (Tex. Crim. App. 2014). This Court has applied "similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books." *Kaplan v. California*, 413 U.S. 115, 119 (1973). But in determining whether certain conduct possesses "sufficient communicative elements" to require protection under the First Amendment, federal circuit courts disagree about whether, and to what extent, there must be "'[a]n intent to convey a particularized message,'" and whether it would be highly likely "'that the message would be understood.'" *Johnson*, 491 U.S. at 404 (alteration in original) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974) (per curiam)).

Spence and *Johnson* considered "whether a symbolic act or display was sufficiently imbued with elements of communication to trigger First Amendment scrutiny." *Cressman v. Thompson*,

719 F.3d 1139, 1149 (10th Cir. 2013). In particular, the Court considered two relevant factors: (1) whether there was "an intent to convey a particularized message," and (2) whether, under the circumstances, there was "a great likelihood that the message would be understood by those who viewed the symbolic act or display." *Id.* (citing *Spence*, 418 U.S. at 410–11; *Johnson* 491 U.S. at 404). But, in a unanimous decision, this Court clarified in *Hurle*y v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc.* that a particularized message is not always required because "symbolism is a primitive but effective way of communicating ideas," and several of this Court's cases have recognized that "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. 557, 569 (1995). Furthermore, several of the federal circuit courts[10] have concluded that *Hurley* qualified the inquiry into whether conduct involves sufficient communicative elements to implicate First Amendment protection. Accordingly, this Court should continue to apply the factors from *Spence* and *Johnson* only when the conduct is not inherently expressive.

2. Milner's use of emojis is inherently expressive and therefore entitled to full protection under the First Amendment.

Milner's posting of emojis as commentary is inherently expressive conduct, which is entitled to full First Amendment protection, regardless of whether a specifically identifiable particularized message exists. As the paintings in *Hurley*, the visual representations as expression

[10] *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 160 (3d Cir. 2002) ("*Hurley* eliminated the 'particularized message' aspect of the *Spence-Johnson* test."); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (quoting *Hurley*, 515 U.S. at 569) (applying *Spence* but stating, "The threshold is not a difficult one, as a narrow, succinctly articulable message is not a condition of constitutional protection."); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) ("[T]he Supreme Court and our court have recognized various forms of visual expression as purely expressive activities . . . . We have afforded these expressive activities full constitutional protection without relying on the *Spence* test.").

set forth by Milner are "unquestionably shielded" by the protections of the First Amendment. 515 U.S. at 569. A "particularized message" is not always required, and such a strict analysis conflicts with this Court's precedent: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication." *Id.* at 569–70. Likewise, even if this Court concludes that Milner's emojis and the rate at which they were posted hindered his speech in being "wholly articulable," this Court should hold as it did in *Hurley* that the emoji, like a photograph, is a protected "form of expression," and as such is entitled to full First Amendment protections. A finding consistent with this Court's precedent will render Squawker's Terms and Conditions regarding emojis facially invalid viewpoint restriction on a user's chosen form of expression.

3. Milner's postings are also symbolic speech because emojis convey a particularized message likely to be understood by those who view them.

Nevertheless, even under *Spence* and *Johnson,* the act of posting an emoji as an expressive comment is still "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Johnson*, 491 U.S. at 404. There is "an intent to convey a particularized message" that would likely "be understood by those who viewed it." *Id.* This Court has long recognized that "pictures, films, paintings, drawings, and engravings" are entitled to First Amendment protection." *Kaplan*, 413 U.S. at 119–20. Because "paintings, photographs, prints, and sculptures . . . always communicate some idea or concept to those who view it," courts have found such to qualify as expressive conduct under *Spence*. *Bery*, 97 F.3d at 696. As *Bery* further qualified visual art to be in many ways a more effective means of expressing ideas

than written or spoken words, this Court should apply the same principles of First Amendment protection to Milner's symbolic speech via emoji.

When Milner crafts a squeak, he intends to convey a particularized message—often incorporating an "irreverent" use of emojis as part of his creativity. R. at 19. As Milner testified, he is known for his "artistically arranging emojis that evolve into a greater meaning than their first appearance." R. at 19, 20. The artistic arrangement has become Milner's style, constantly refining and expanding his messaging until achieving something clever that his 10,000-follower base appreciates. R. at 20. Like a painting or photograph, Milner's postings and the style in which they are delivered similarly "expresses the artist's perspective." *White v. City of Sparks*, 500 F.3d 953, 956 (9th Cir. 2007). The essential purpose of an artist's rendering of an event, akin to Milner's style of commentary, is to memorialize and reconvey a creative perspective of an event. Milner's series of comments and emojis tells a story from his perspective, and his expertise and signature style is why Squawker users follow Milner's account. R. at 20.

B. Squawker's Terms and Conditions Violate the Free Speech Clause.

Milner's First Amendment rights are implicated, and therefore, regardless of what standard is applied, the courts' application of Squawker's Terms and Conditions must withstand the proper level of scrutiny. The First Amendment is "subject to narrow and well-understood exceptions." *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Laws that regulate the content of protected speech are subject to strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 798 (2011). Strict scrutiny is required here because application of the policy regulates the content of Milner's protected expression. Even under an intermediate level of scrutiny, the Terms and Conditions are constitutionally invalid as applied to Milner.

1. Strict scrutiny applies because Squawker's Terms and Conditions create a content-based regulation of constitutionally protected speech.

Squawker's Terms and Conditions regulate the content of protected speech. The policy is therefore invalid unless it is narrowly tailored to serve a compelling governmental interest. *Brown*, 564 U.S. at 798. This Court has applied the "most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad.*, 512 U.S. at 642. Likewise, regulations "that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Id.* Accordingly, as this Court has stated, mandating a speech that a speaker would not otherwise make alters the content of the speech." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988).

Squawker's Terms and Conditions are subject to the most exacting First Amendment scrutiny, as the policy simultaneously prohibits and compels Milner's expression. The flagging of Milner's posts because of the content, and further requiring an additional act by an otherwise willing forum entrant imposes the differential burden. *Turner Broad.*, 512 U.S. at 642. Additionally, the flagging removal process that would require Milner to acknowledge violation of the Terms and Conditions, compel speech that Milner would not otherwise make and disclaim his First Amendment rights to expression. This "necessarily alters the content" of Milner's speech at issue. *Riley*, 487 U.S. at 796.

2. Squawker's Terms and Conditions fail strict scrutiny because they are not the least restrictive means of advancing a compelling government interest.

The Terms and Conditions regulate the content of speech, and the government's "interest in this case is directly related to expression." *Johnson*, 491 U.S. at 410. Therefore, the law "is invalid unless" it passes strict scrutiny—that is, . . . [j]ustified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 564 U.S. at 797. This is "a

demanding standard," and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000)). This Court has definitively held that "[c]ontent-based restrictions are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Even if there is a compelling government interest, this does not conclude the inquiry into whether the policy is valid. *Johnson*, 491 U.S. at 418. The issue then becomes "whether under our Constitution compulsion as here employed is a permissible means for achievement." *Id.* The policy in this case may be upheld only if Squawker can demonstrate that its application is the least restrictive means of achieving a compelling government interest. *Brown*, 564 U.S. at 791–92; *Playboy*, 529 U.S. at 813. Squawker cannot meet this standard.

This Court has even considered whether private companies, such as Squawker, are entitled to free speech protections. In *Pacific Gas*, this Court invalidated a state's order requiring "a privately owned utility company to include in its billing envelopes speech of a third party with which the utility company disagrees." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 4 (1986) (plurality opinion). A majority of the Court agreed that the order violated the Free Speech Clause of the First Amendment for several reasons. *Id.* at 19–21. Accordingly, applying strict scrutiny, the plurality noted how this Court's "cases establish that the State cannot advance some points of view by burdening the expression of others." *Id.* at 20. Moreover, because the order tended "to inhibit expression of appellant's views in order to promote" the views of others, the plurality held that the order was not the least restrictive means to advance the interest. *Id.*

Squawker's blocking of Milner's posts with the skull and crossbones symbol and effectively removing it from immediate view functions similarly to the order in *Pacific Gas*—the enforcement actions impermissibly violates Milner's First Amendment rights to promote the

speech of Governor Dunphry. Consistent with this Court's established precedent, Squawker cannot advance some points of view by burdening the expression of others." *Id.* According to the appellate court, the governmental interest here is "Squawker's desire to temper the volume and vociferousness of its users' comments." R. at 34. This interest could be easily achieved so it does not violate Milner's First Amendment rights. As Milner testified, the "evolving emoji chain" is a "signature move," that had been employed on several occasions without sanction. R. at 20. Therefore, Squawker's failure to restrict Milner's expression in this forum until in opposition to Governor Dunphry emphasizes Squawker's preference for the governor's viewpoint above Milner's constitutionally protected rights. Therefore, there is a genuine issue of material fact as to whether Squawker's Terms and Conditions can withstand strict scrutiny.

3. Squawker's Terms and Conditions fail intermediate scrutiny because the restrictions on Milner's First Amendment freedoms is greater than necessary.

Even if this Court finds that the Terms and Conditions are content-neutral and should only be subject to intermediate scrutiny, the policy is still invalid. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). Under *O'Brien*, a law is constitutional if (1) "it is within the constitutional power of the government"; (2) "it furthers an important or substantial government interest"; (3) "the government interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 376.

If the first three requirements are met, the law still fails to meet the standard required under *O'Brien* because the policy's restrictions on Milner are greater than necessary. Not only does the policy affect the ability of Milner to participate, but the burden extends to his followers in the

additional requirement of clicking each individual message to view its contents—a burden not required outside of Governor Dunphry's forum.

Further, the lower court has misapplied this Court's prior endorsements of time, place, and manner restrictions. To survive First Amendment constitutional challenges, such restrictions must satisfy a three-prong test outlined by the Supreme Court in *Ward v. Rock Against Racism* about municipally imposed limits on speech. 491 U.S. 781, 789 (1989). Under *Ward*: (1) The regulation must be content neutral, (2) It must be narrowly tailored to serve a significant governmental interest, and (3) It must leave open ample alternative channels for communicating the speaker's message. *Id.* The Eighteenth Circuit found that Milner had "ample alternative channels of expression" following his account being flagged. R. at 35. Citing the court in *Kleinman v. City of San Marcos*, the court held that a restriction that encloses a message but allows it to remain accessible to those who accept an invitation to receive it is considered "sufficiently narrowly tailored" to leave open adequate alternative avenues of communication. 597 F.3d 323, 327 (5th Cir. 2010). Squawker's policy did not simply enclose and invite users to view Milner's content, it enclosed and layered an additional imposition onto Milner's followers. Therefore, the application of Squawker's Terms and Conditions in flagging Milner's account violates Milner's free speech rights.

CONCLUSION

This Court should REVERSE the judgment of the Eighteenth Circuit and REINSTATE the judgment of the district court.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

BRIEF CERTIFICATE

Team 2 certifies the following:

1. The work product contained in all copies of the team's brief is in fact the work product of the members only; and,
2. This team has complied fully with its law school's governing honor code; and,
3. This team has complied with all Rules of the Competition.

/s/

TEAM 2

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APPENDIX "A"

CONSTITUTIONAL PROVISION

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.

APPENDIX "B"

STATUTORY PROVISION

42 U.S.C. § 1983 (2018)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.