No. 17-874

IN THE SUPREME COURT OF THE UNITED STATES

AVERY MILNER,

Petitioner,

v.

MAC PLUCKERBERG,

Respondent.

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

BRIEF FOR PETITIONER

Team 20
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether the United States Court of Appeals for the Eighteenth Circuit erred in concluding that a private entity hosting a public forum did not engage in State action by applying its flagging policy; and

II. Whether the Eighteenth Circuit erred in holding that the private entity's Terms and Conditions is a content-neutral time, place and manner restriction that is not violative of the First Amendment.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered a final judgment. A petition for Writ of Certiorari was timely filed and granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

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.

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STATEMENT OF THE CASE

Petitioner Avery Milner ("Milner") is a freelance journalist who resides in the state of Delmont. Stipulation ¶ 1. Milner uses Squawker, the social media website owned by Respondent Mac Pluckerberg ("Respondent"), to engage with his government officials. Stipulation ¶ 1. Prior to July 2019, Milner had more than ten thousand Squawker followers and Milner's posts, or "squeaks," averaged seven thousand views per squeak. Milner Aff. ¶ 6. Milner made creative use of the Squawker platform by posting a combination of comments and expressive emojis to convey meaning to his followers. Milner Aff. ¶ 6.

On July 27, 2018, Milner logged in to his Squawker account and learned that his Squawker profile page had been flagged for "violent and/or offensive use of emojis" and "spamming behavior." Milner Aff. ¶ 9. Milner's account was flagged after he posted four short squeaks within thirty seconds of each other. Stipulation ¶ 13. Milner's four squeaks were as follows: at 5:32:02 PM, he wrote, "We gotta get rid of this guy." At 5:32:14 PM, he posted an emoji of an elderly man's face, followed by a plus sign. At 5:32:23 PM, he posted an emoji of a hypodermic needle, followed by another plus sign. At 5:32:31 PM, Milner posted his last squeak: an emoji of a coffin, followed by one last plus sign. Stipulation ¶ 12. Taken together, the squeaks expressed Milner's strong disapproval of a proposed new bill that would, if passed, alter traffic laws in the state of Delmont. Milner posted his squeaks in response to Governor William R. Dunphry, who had squeaked a link to the proposed traffic bill on his official, verified Squawker page. Milner Aff. ¶ 8. Even though Milner's full message took only thirty seconds to post, several users complained about his behavior and some even left the platform and deleted their accounts. Pluckerberg Aff. ¶ 12.

Milner's interaction with the Governor's Squawker page took place in the context of significant recent change to the website. Pluckerberg Aff. ¶ 9. Beginning in March of 2018, Squawker had started "verifying" the Squawker accounts of government officials in the state of Delmont. Stipulation ¶ 8. Squawker implemented the verification policy in response to concerns about imposter accounts that might post fake news and misinformation. Stipulation ¶ 8. Respondent, who grew up in Delmont, worked with Delmont government officials as he implemented the changes: in fact, it was Governor Dunphry, not Respondent, who suggested the idea of verified pages for government account. Stipulation ¶ 8. For purposes of this litigation, both parties have stipulated that "Governor Dunphry's Squawker page is a public forum because he uses [it] to conduct official business." Stipulation ¶ 14.

In addition to verifying the identity of Delmont politicians, Squawker's new policy also punishes users who interact with Delmont government accounts in certain ways: "Squeakers who are found to have violated [Squawker's] Terms and Conditions with respect to a verified user's account" are flagged, and their content is censored. Stipulation ¶ 9. Squeakers may only get their accounts unflagged if they watch a thirty-minute training video and pass a fifty-question quiz about Squawker's Terms and Conditions. Stipulation ¶ 9-10. Two failures to pass the fifty-question quiz results in a three-month suspension period before a user can rewatch the video and retake the quiz. Stipulation ¶ 10.

In relevant part, the Terms and Conditions "prohibit behavior that promotes violence against or directly attacks or threatens other people on the basis of . . . age." Stipulation ¶ 6. The Terms and Conditions also prohibit "the use of emojis in a violent or threatening manner," and "a Squeaker may not participate in the automatic or manually facilitated posting . . . at extremely

high frequencies to the effect the platform is unusable to others. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other." Stipulation ¶ 6.

After Milner's account was flagged, Squawker covered his "offending" squeaks with black boxes that obscured the content of his messages. Stipulation ¶ 9. Users interacting with Milner's squeaks can no longer see what he wrote unless they click on an emoji of a skull and crossbones. Stipulation ¶ 9. All of Milner's subsequent squeaks were also covered with black boxes, and so was all the content on his profile page. Stipulation ¶ 9. In the aftermath of his account getting flagged, Milner lost approximately eight thousand of his online followers, and his squeaks now receive, on average, only fifty views per squeak. Milner Aff. ¶ 13. The flagging of Milner's account also directly impacted Milner's ability to earn income and support himself: after his account was flagged, he was turned down for multiple jobs. Milner Aff. ¶ 14.

Milner asserts that prior to his account getting flagged, he had "never seen nor heard of a Squawker profile page being flagged for spamming or use of emojis." Milner Aff. 10. And although Milner had made four or more squeaks within thirty seconds of each other "on countless other Squawker pages in the past without being flagged," he had never been flagged before. Milner Aff. ¶ 11-12. Milner does not believe Squawker has the right to demand he take a test to prove he is "worthy of speaking on the platform," and he believes that by requiring such an action of its users, Squawker is "trying to control the way I interact with my elected officials, which is a violation of my First Amendment rights." Milner Aff. ¶ 15.

On December 5, 2018, Milner and Pluckerberg filed cross motions for summary judgment in the United States District Court for the District of Delmont. On January 10, 2019, the District Court granted summary judgment to Milner, holding 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." Milner v. Pluckerberg, C.A. No. 16-CV-6834 (D. Delm. 2019). Pluckerberg appealed, and the United States Court of Appeals reversed the District Court's decision, finding that although Governor Dunphry's official page is a public forum, Squawker is still a private actor and thus not subject to First Amendment constraints. The Court of Appeals also found that even if Squawker were a state actor, its Terms and Conditions "do not unduly burden Mr. Milner's speech" and are "narrowly tailored as a reasonable time, place or manner restriction." Pluckerberg v. Milner, No. 16-6834 (18th Cir. 2019). Following the Court of Appeals decision, Milner petitioned this Court for a Writ of Certiorari, which this Court granted.

STANDARD OF REVIEW

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as the any material fact and the movant is entitled to judgment as a matter of law." Fed R. Civ. P. 56(a). This Court "reviews a grant of summary judgment de novo, applying the same standard as the district court," and it will "view all disputed facts and inferences in the light most favorable to the non-movant." Rockwell v. Brown, 664 F.3d 985, 990 (5th Cir. 2011), cert. denied, 132 S. Ct. 2433 (2012).

SUMMARY OF THE ARGUMENT

The Eighteenth Circuit erred when it held that a private entity hosting a public forum did not engage in State action because regulating a public forum is a traditionally exclusive public function and Squawker's actions were extensively entwined with governmental policies. A finding of State action is necessary to prevent a dangerous loophole, where the government would be able to circumvent the First Amendment's protection of public forums by delegating regulatory authority to private entities. Furthermore, the Eighteenth Circuit erred when it held that Squawker's Terms and Conditions imposed a content-neutral restriction on speech, because it is not possible to justify the restriction on Milner's posts without referring to their content. The Eighteenth Circuit further erred when it held that Squawker's Terms and Conditions were reasonably tailored, because the Terms and Conditions significantly burdened all of Milner's speech on the platform, not just the "offending" squeaks, and did not leave any room for alternate avenues of expression.

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 BY APPLYING ITS FLAGGING POLICY BECAUSE REGULATING A PUBLIC FORUM IS A TRADITIONALLY EXCLUSIVE PUBLIC FUNCTION AND SQUAWKER'S ACTIONS WERE EXTENSIVELY ENTWINED WITH GOVERNMENTAL POLICIES.

The United States Court of Appeals for the Eighteenth Circuit incorrectly concluded that a private entity hosting a public forum did not engage in State action. Squawker's flagging of Mr. Milner's Squawker account was State action, and therefore, raised First Amendment concerns, under both the Public Function and the Close Nexus tests. Finding that Squawker's role in regulating the public forum is State action is also consistent with the First Amendment's purpose of protecting political speech, and it is necessary to avoid creating a dangerous loophole to the First Amendment's protection.

The First Amendment provides that "Congress shall make no law [abridging] the freedom of speech." U.S. Const. amend. I. For the First Amendment's protection to be invoked, there must be State action. However, the fact that Squawker is a private entity is not dispositive to the State action issue. Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296, 296 (2001) (citing Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995)) ("[T]he character of a legal entity is determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity's inseparability from recognized government officials or agencies."). This Court has recognized several circumstances when "a private entity can qualify as a state actor." Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019). Two of these circumstances include: (1) "when the private entity performs a traditional, exclusive public function," id. (citing Jackson v. Metropolitan Edison Co.,

419 U.S. 345, 352-54 (1974)); (2) "when the government acts jointly with the private entity," id. (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 941-42 (1982)).

The first issue in this case is whether Squawker's function as a host and regulator of a public forum results in State action when it regulates the public forum according to its Terms and Conditions. This issue in the context of social media platforms is novel, with virtually no case law on point. Knight First Amendment Institute at Columbia University v. Trump, a second circuit case, addressed a preliminary issue relevant to the issue in this case, but the opinion expressly did not "consider or decide whether private social media companies are bound by the First Amendment when policing their platforms." 928 F.3d 226, 237 (2d Cir. 2019). That case, with facts similar to the facts here, found that President Trump's official government use of his twitter account created a public forum. Consistent with that opinion, there is no dispute that Governor Dunphry's Squawker page is a public forum, the parties stipulated to this fact. Stipulation ¶ 14 ("Governor Dunphry's Squawker page is a public forum.").

Squawker's conduct is State action under at least the Public Function and Close Nexus tests. Under the Public Function test, Squawker's engaged in State action by performing a function traditionally exclusive to the government, namely, regulating a public forum. Under the Close Nexus test, Squawker's conduct was State action because it was extensively entwined with Governor Dunphry's policies and actions. Moreover, holding that there was no State action would allow a loophole, where government officials could circumvent First Amendment protections and suppress detractors by conducting official government business on privately regulated platforms.

A. Squawker's Regulation of a public forum is a function traditionally performed exclusively by the state, and therefore, its flagging of Mr. Milner's account is State Action.

Under the Public Function test, regulation of a public forum is State action because it is a function traditionally performed exclusively by the state. Halleck, 139 S. Ct. at 926. Federal courts that have looked at this issue outside the context of social media platforms, have consistently found that regulation of a public forum is a function traditionally exclusive to the state. See United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland, Inc., 383 F. 3d 449 (6th Cir. 2004) (finding that its earlier "decision that the Gateway Sidewalk is a public forum necessarily requires that the Sidewalk be treated as state owned for the purposes of the First Amendment"); see also Lee v. Katz, 276 F.3d 550 (9th Cir. 2002) (finding that "the regulation of free speech within a public forum is" is "quintessentially an exclusive and traditional public function"); see also Pindak v. Dart, 125 F. Supp. 3d 720 (N.D. Ill. 2014) (finding that "the fact that the Plaza is a public forum by itself requires the conclusion that the guards act under color of state law when deciding whether or not to remove panhandlers from the Plaza"). The only exception that lower courts have found to this general proposition is when the government "maintains the ultimate power to regulate activities in the forum." Lee, 276 F.3d at 556; see also Perez-Morciglio v. Las Vegas Metro. Police Dep't, 820 F. Supp. 2d 1100 (D. Nev. 2011) ("Venetian Defendants do not have any authority deriving from the State to police the public forum on the Venetian's private property [and] therefore are not state actors under the public function test as a matter of law."). Because Squawker's Terms and Conditions regulate a public forum and the government does not maintain the ultimate power to regulate the forum, Squawker's flagging of Mr. Milner's account was State action, and therefore, raises First Amendment concerns.

This conclusion is also consistent with this Court's reasoning in Halleck. 139 S. Ct. Although the majority in that case did not find State action, dicta in the case suggests that hosting a public forum would require State action. Id. at 1930. In Halleck, plaintiffs argued that the defendant was a state actor because it was operating a public forum. Id. In rejecting that there was a public forum, the court said that the plaintiffs' "analysis mistakenly ignores the threshold state-action question." Id. The court went on to distinguish circumstances where the government establishes a forum for speech (known as a public forum) from where a private entity opens a forum for speech (which is generally not a public forum). Id. By distinguishing these two categories of forums, this Court seems to suggest that operating and regulating a public forum assumes State action. This inference is also supported by the dissenting opinion in the case. Id. at 1939-40 (5-4 decision) (Sotomayor, J., dissenting) ("If New York's public-access channel are a public forum, it follows that New York cannot evade the First Amendment by contracting out administration of that forum to a private agent.").

Here, there is no disagreement that Governor Dunphry's Squawker page is a public forum. Stipulation ¶ 14. Governor Dunphry approached Mr. Pluckerberg, the current CEO of Squawker, to set up a new officially verified Squawker page. By creating the public forum on Squawker, Governor Dunphry delegated some level of regulatory authority over the official government account to Squawker. Additionally, the government did not reserve ultimate regulatory authority when it delegated power to Squawker. Governor Dunphry did not retain any sort of veto power over Squawker's flagging policy. See Lansing v. City of Memphis, 202 F. 3d 821, 828-29 (6th Cir. 2000) ("Although [festival organizer] had permission from the city to put its streets to special use during the time of the festival, the city retained ultimate control of the streets at all times."). Finally, it does not matter that Squawker also regulates other ordinary

accounts that are not public forums. Even if Squawker's primary role is something other than regulating the public forum at issue, "it is the [private entity's] function while working for the state not the amount of time [it] spends in performance of those duties or that [it] may be employed by others to perform similar duties, that determines whether [it] is acting under color of law." West v. Atkins, 487 U.S. 42, 56 (1988).

B. Regulation of Governor Dunphry's Squawker Page is State Action under the Close Nexus Test because Squawker's regulation of Governor Dunphry's Squawker page was entwined with official government policies and actions.

Under the Close Nexus test, "State action may be found only if there is such a 'close nexus' between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" Brentwood Academy, 531 U.S. at 295 (quoting Jackson, 419 U.S. at 351). "What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity." Id. "[S]tate action may exist when a private entity 'is entwined with governmental policies[.]'" Grogan v. Blooming Grove Volunteer Ambulance Corps, 768 F.3d 259 (2d Cir. 2014) (quoting Brentwood Academy, 531 U.S. at 296). Here, the Squawker's conduct is State action because it is pervasively entwined with governmental acts and policies.

Squawker's regulation of Governor Dunphry's account was extensively entwined with the Governor's policies to fairly treat Squawker's conduct as State action. First, the public forum in this case was set up at the direction of the government. Pluckerberg Aff. ¶ 8 ("[Pluckerberg] was approached by [his] longtime friend, William Dunrphy [sic], in February 2018 about the idea of adding a verification feature to all Delmont elected officials' Squawker pages."); see Brentwood Academy, 531 U.S. at 296 (listing "significant encouragement" as a relevant factor). Second, Squawker was a willing participant in setting up, running, and regulating Governor Dunphry's account. Brentwood Academy, 531 U.S. at 296 (listing "when a private actor operates as a willful participant in a joint activity with the State or its agents" as a relevant circumstance).

Third, Governor Dunphry's Squawker account was used extensively for official governments acts and to communicate with constituents. Dunphry Aff. ¶¶ 9, 10 (stating that Governor Dunphry uses his account to "speak to [constituents] on a daily basis and let them know about major policy proposals coming through the senate," and that he has posted at least one direct link to a bill) see Evans v. Newton, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."). Under the Close Nexus test, Squawker's regulation of Governor Dunphry's account was extensively entwined with governmental policies and acts to be considered State action.

C. There are no countervailing reasons against attributing Squawker's activity to the State, in fact, finding State action is necessary to prevent a dangerous loophole, where the government would be able to circumvent the First Amendment's protection of public forums by delegating regulatory authority to private entities.

In determining if there is State action, it is important to consider whether there are any "countervailing reason against attributing activity to the government." Brentwood Academy, 531 U.S. at 295-96. Not only are there no such countervailing reasons, finding State action is necessary to prevent a dangerous loophole. This Court should not allow Governor Dunphry to circumvent the First Amendments protection of public forums by delegating regulatory authority over this public forum to Squawker. A holding that there was no State action would allow a dangerous loophole, where the government could avoid the normal First Amendment protections of public forums by opening the forums through private entities. The government could pick private entities that already have policies in place that would suppress the speech that the government disfavors. Governor Dunphry cannot be allowed to avoid the First Amendment's prohibition against viewpoint censorship by delegating some regulatory authority to Squawker.

Finding State action is especially important in this case given the purpose of the public forum. Governor Dunphry opened this public forum to conduct his official business as Governor. Governor Dunphry uses the account "as a channel for communicating and interacting with the public about his administration." Dunphry Aff. ¶ 9. Governor Dunphry's Squawker account serves as an important platform for his constitutes to voice their opinions concerning his governance. Political speech of this kind "is central to the meaning and purpose of the First Amendment." Citizens United v. FEC, 558 U.S. 310, 329 (2010) (citing Morse v. Frederick, 551 U.S. 393, 403 (2007)). "Political speech is 'indispensable to decisionmaking in a democracy.'" Id. (quoting First National Bank v. Bellotti, 435 U.S. 765, 777 (1978)).

II. SQUAWKER'S TERMS AND CONDITIONS ARE NOT CONTENT-NEUTRAL, AND SQUAWKER'S FLAGGING POLICY DOES NOT CONSTITUTE A REASONABLE TIME, PLACE, OR MANNER RESTRICTION.

"If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas." Abrams v. United States, 250 U.S. 616, 630 (1919) (J. Holmes, dissenting). This Court has long recognized that governments may "impose reasonable restrictions on the time, place, or manner of protected speech" when that protected speech takes place in a public forum. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). But the government's power to place such restrictions is not unlimited. Squawker's Terms and Conditions are not reasonable as a time, place or manner restriction because they are not content-neutral, they are not "narrowly tailored to achieve a significant government interest," and they do not leave open alternative channels for flagged users. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

To the contrary, Squawker's Terms and Conditions specifically prohibit speech that is likely to offend, such as speech that targets people on the basis of age. Although it's true that the government does have a significant interest in the use of Squawker as a useable forum to disseminate information about proposed bills and policy changes, Squawker's punitive flagging system is not narrowly tailored to further that interest, particularly since flagging affects squeaks and profiles that are not affiliated with the Squawker pages of government officials. Finally, Squawker's Terms and Conditions don't leave open alternative channels for flagged users, because once a user is flagged, that user can't interact meaningfully with government Squawker pages.

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

"Time, place and manner restrictions" on protected speech in a public forum are not valid if the restrictions are "based upon either the content or subject matter of speech." Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648-49 (1981). And "speech may not be banned on the ground that it expresses ideas that offend." Matal v. Tam, 137 S. Ct. 1744, 1751 (2017). To determine whether a restriction is "content based," this Court considers "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015).

Squawker's Terms and Conditions explicitly prohibit "behavior that promotes violence against or directly attacks or threatens other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease." Stipulation ¶ 6. On its face, the Terms and Conditions singles out speech about marginalized groups "because of the topic discussed or the idea or message expressed." Reed, 135 S. Ct. at 2227. When Milner squeaked an emoji of an elderly man—an expressive, if crude,

reference to Governor Dunphry's age—he fell afoul of Squawker's Terms and Conditions. But this restriction on Milner's speech violates the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). A restriction on speech is not "content neutral" when it is "concerned with undesirable effects that arise from the direct impact of speech on its audience or listener's reactions to speech." McCullen v. Coakley, 573 U.S. 464, 481 (2014) (explaining that if speech outside an abortion clinic "caused offense or made listeners uncomfortable," that would not give the government "a content-neutral justification to restrict the speech"). Here, Squawker's prohibition on squeaking "attacks" on the basis of age or other characteristics is clearly a prohibition on content, and the Terms and Conditions clearly contain impermissibly content-based restrictions.

B. Squawker's punitive flagging system is not narrowly tailored to serve a substantial government interest.

Even to the extent that Squawker's regulations on frequent posting could be interpreted by this Court as content-neutral, "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests." Ward, 491 U.S. at 798. To be "narrowly tailored," the regulation "need not be the least restrictive or least intrusive means," but it also must not "burden substantially more speech than necessary to further the government's legitimate interests." Id. at 798-800. See also Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil.").

Squawker's Terms and Conditions burden far more speech than is necessary to achieve the government's goals of "a positive user experience that allows our users to engage authentically with each other an build communities." Stipulation ¶ 6. The prohibition on high

frequency posting is ostensibly to prevent the platform from "becoming unusable." Stipulation ¶ 6. Yet instead of simply hiding high-frequency posts, Squawker's policy is to black out the posts with a skull and crossbones emoji, black out all future posts by the offending user, and black out all the information on the offending user's profile page. This burdens not just speech that may have violated Squawker's Terms and Conditions, but constitutes a blanket ban on *all* speech from the offending user going forward, unless and until the user complies with the onerous requirement to watch a thirty-minute training video and pass a fifty-question quiz. And even a good-faith user who is willing to comply with the requirement might be punished still further if they watch the training video, take the required quiz, and fail twice—in which case they would be slapped with a three-month suspension, all for a handful of squeaks. "[T]he assertion of a valid governmental interest cannot, in every context, be insulated from all constitutional protections." Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017). In this case, the burden imposed by Squawker's punitive flagging policy is not enough to insulate Squawker from the requirements of the First Amendment.

Furthermore, the seemingly arbitrary enforcement of Squawker's policies is troubling. This Court has condemn "arbitrary application" of restrictions on speech "as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981). According to Milner's Affidavit, he has posted four or more squeaks in the space of thirty seconds in the past, but his account was never flagged before.

C. Squawker's Terms and Conditions do not leave open alternative channels for users whose accounts have been flagged.

"The First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'" 655. Heffron, 452 U.S. at 655. Squawker, in collaboration with Governor Dunphry and other Delmont politicians, has created a unique opportunity for residents to interact with their elected officials and share their own views about important political issues. But the punitive flagging system does not leave open alternative channels for users to continue reaching their audience. Indeed, following the flagging of Milner's account, he lost thousands of followers and has suffered financially because Squawker had made it impossible for him to effectively reach his audience. Because of the way Delmont government officials have integrated their policy announcements with the general public's use of Squawker, Delmont residents have a unique opportunity to engage in a kind of expressive speech that does not exist anywhere else.

This unique opportunity for expression dovetails with the "fundamental principle of the First Amendment" 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 1735. Traditionally, public forums were physical: located in county fairs, town squares, and public sidewalks. Those places still enjoy First Amendment protections, but the concept of the public forum has evolved to include intangible locations as well. "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) 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.

Social media is uniquely valuable because of the ease of interaction it provides for anyone who wishes to engage with others. "Social media offers 'relatively unlimited, low-cost

capacity for communication of all kinds,' and "social media users employ these websites to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" Id. at 1735-36 (quoting Reno v. ACLU, 521 U.S. 844 (1997)). Whereas in the past, an individual voice on the sidewalk might not have been loud enough to acquire much of an audience, the Internet provides new opportunities both to acquire followers and to express views in new and different ways. "Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. . . . These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" Id. at 1737 (quoting Reno, 521 U.S. at 870).

Milner's fast-paced, creative use of emojis perfectly illustrates this new phenomenon. As the district court acknowledged, emojis constitute a new and "entire medium of expression"—one that loses meaning out of context. Indeed, other courts have recognized that protected expression can go beyond pure speech. "The ideas and concepts embodied in visual art have the power to transcend these language limitations and reach beyond a particular language group to both the educated and the illiterate. . . . [V]isual images are 'a primitive but effective way of communicating ideas . . . a short cut from mind to mind.'" Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996) (quoting West Virginia State Board of Education, 319 U.S. 624, 632 (1924)). In Bery, the Second Circuit found that art sold on the streets of New York was entitled to "full First Amendment protection," not just because the visual medium was communicative, but because the specific context in which the art was sold conveyed an expressive political message: art should be accessible to everyone. Within certain contexts, unique and powerful

forms of self-expression can arise—and that when they do, they should be protected. Bery, 97 F.3d at 697 (finding that even though the City of New York has a "significant interest in keeping its public spaces safe and free of congestion," a license requirement barring artists "from displaying or selling their art on the streets" is unconstitutional because it deprives them of the proper context in which to communicate their chosen message).

By depriving Milner of the opportunity to express himself in his chosen medium of irreverent, fast-paced, emoji-laced squeaks, Squawker's Terms and Conditions leave no room for an alternative channel of expression: one does not exist. Squawker's Terms and Conditions are not a reasonable restriction of time, place, or manner, and this court should reverse the decision of the Eighteenth Circuit.

CONCLUSION

For these reasons, we ask that this Court REVERSE the judgment of the Court of Appeals for the Eighteenth Circuit, and grant summary judgment to the Petitioner.

Brief Certificate

i. All of the work product contained in all copies of our brief is in fact our work product;

ii. We have complied fully with our school's governing honor code; and

iii. We have complied with all Rules of the Competition.