No. 17-874

IN THE

SUPREME COURT OF THE UNITED STATES

March Term, 2020

Avery Milner,

Petitioner,

v.

Mackenzie (Mac) Pluckerberg,

Respondent.

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

BRIEF FOR PETITIONER

Team 22

Counsel for Petitioner

QUESTIONS PRESENTED

(1) Whether the United States Court of Appeals for the Eighteenth Circuit erred when concluding that a private entity hosting a public forum did not engage in state action by applying its flagging policy?

(2) Whether the Eighteenth Circuit in holding that the private entity's Terms and Conditions is content-neutral time, place, or manner restriction that is not violative of the First Amendment?

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered final judgment on this matter. Petitioner timely filed a petition for Writ of Certiorari to this Court, which this court granted. This court has jurisdiction over the matter pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In 2013, Mackenzie Pluckerberg ("Respondent") launched Squawker, a social media platform used across the globe to stay connected, express views, and stay informed about current events. (R. at 2.) In mid-2017, government officials, along with other citizens, obtained Squawker accounts to reach constituents and spread new policy ideas, including Delmont Governor William Dunphry. (R. at 2,3.) However, along with the rise of government officials on Squawker, imposter accounts increased as well. (R. at 3.) Governor Dunphry suggested to Respondent, and he subsequently complied, that Squawker begin to verify the proper government official accounts. (R. at 3.)

All Squeakers on the platform must abide by the Terms and Conditions of Squawker when creating an account. (R. at 4.) Squawker's Terms and Conditions regulate the way squeakers interact with each other on the basis of whether the squeak "promotes violence against or directly attacks or threatens other peopl[e]." (R. at 3). The Squawker Terms and Conditions state:

> We 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. In addition, [Squawker] prohibit[s] the use of emojis [emoticons] in a violent or threatening manner.

(R. at 3.) The Terms and Conditions were updated after the implementation of the new verification process. (R. at 4.) The new Terms and Conditions state:

> Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged…all users [must] click on an emoji of a

> skull and crossbones in order to clear black boxes covering (1) the offending squeak or comment; (2) the offender's future squeaks…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 on Squawker in order to warn the community.

(R. at 4.) All Squawker user are subject to the new Terms and Conditions flagging policy. (R. at 4.)

On July 26, 2018, Governor Dunphry posted a link to a bill proposal on his official Squawker page. (R. at 1.) In response to this new piece of legislation, Avery Milner ("Petitioner"), a freelance journalist who lives in Delmont, posted a series of tweets composed of emojis in rapid succession. (R. at 5.) The next day, Petitioner received a notification from Squawker that his account had been flagged as a result of his comments on the Governor's Squawker page. (R. at 6.) Petitioner used the Squawker platform to connect with his audience and managed to build a significant base of followers. (R. at 19.) After three weeks of being flagged on Squawker, Petitioner drastically lost followers on the platform: Petitioner's followers on the social media site went from ten thousand to a mere two thousand followers. (R. at 20.) Petitioner makes a living based on his activity on Squawker. Id. Additionally, Petitioner has been turned down for multiple jobs and is no longer able to financially support himself. (R. at 20.) The Terms and Conditions restriction significantly impacted Petitioner's livelihood costing him multiple jobs due to the loss in access to his Squawker account. Id. As a result of Petitioner's injury, this suit ensued.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Eighteenth Circuit erred when it concluded that a private entity hosting a public forum did not engage in state action. (R. at 33.) Squawker is a state actor by providing a public forum that supplied a governmental entity a manner in which to talk with constituents and introduce new policy, actions that solely belong to the state. Lee v. Katz, 276 F.3d 550, 554 (9th Cir. 2002). When a private entity provides a public forum for speech, its

editorial freedom becomes constrained as if it was a state actor itself. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019). Squawker operated a public forum which conducted state action; therefore, it must be "fairly treated as that of the State itself." Lee, 276 F.3d at 554.

"The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ides at the expense of others." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993). Squawker's Terms and Conditions place a clear unconstitutional restriction on squeaks whose content is deemed "violent" or "threatening" towards certain groups of people. (R. at 20.) The Terms and Conditions are content-based on its face and cannot be justified without reference to the content of speech. "As a general matter, government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002). "Content-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992). "Strict Scrutiny applies either when a law is content-based on its face or when the purpose and justification of the law are content based." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2228 (2015).

"Similarly, we have upheld reasonable 'time, place, or manner' restrictions, but only if they are justified without reference to the content of the regulated speech." Id. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). The flagging policy under the Terms and Conditions is an unconstitutional Time, Place, or Manner restriction because it does not leave "ample alternative avenues" for continued access to the Squawker platform once flagged. Squawker Terms and Conditions are an unconstitutional regulation of speech.

ARGUMENT

I. The Appellate Court Erred in Holding that Squawker's Hosting of a Public Forum Did Not Constitute State Action

A cornerstone principle of the First Amendment is that all people have access to forums where they can speak, listen, and then respond. Packingham v. North Carolina, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). The First Amendment's Free Speech Clause restricts government regulation of private speech, but not the regulation of government speech. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 467, 129 S. Ct. 1125, 1131, 172 L. Ed. 2d 853 (2009); Johanns v. Livestock Marketing Assn., 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 869 (2005). Generally, the conduct of private entities lies beyond the scope of the Constitution. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614, 111 S. Ct. 2077, 2079, 114 L. Ed. 2d 660 (1991). This court has held that when a private organization provides a forum for speech, said entity is not bound by the First Amendment; therefore, private entities can exercise "editorial discretion over the speech and speakers in their forum." Manhattan Cmty. Access Corp., 139 S. Ct. at 1930.

On the other hand, when the government provides a forum for speech, a public forum, it is constrained by the First Amendment: "the government ordinarily may not exclude speech or speakers from the forum on the basis of viewpoint, or sometimes even on the basis of content." Id. at 1930; *see generally*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 547, 555, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (private theater); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 93, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (sidewalks); Hague v. Committee for Industrial Organization, 307 U.S. 496, 515–516, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (streets and parks). When a private entity provides a public forum for speech, it opens itself up to constraints on editorial discretion in its forum based on the state action doctrine. Manhattan Cmty. Access Corp.,

139 S. Ct. at 1930; Jackson v. Metro. Edison Co., 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)).

State action is only found if there is a "close nexus between the State and the challenged action," so that the action of the private entity "may be fairly treated as that of the State itself." Lee, 276 F.3d at 554; Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (quoting Jackson, 419 U.S. at 351). This Court has held that there are limited circumstance in which a private entity can qualify as a state actor: (1) "when the private entity performs a traditional, exclusive public function;" (2) "when the government compels the private entity to take particular action;" or (3) "when the government acts jointly with the private entity." Manhattan Cmty. Access Corp., 139 S. Ct. at 1928.

The first category is referred to as the "public function test;" a private entity qualifies as a state actor when an action as one that is "traditionally the exclusive prerogative of the State." Davis v. Self, 960 F.Supp.2d 1276, 1308 (N.D. Ala.), aff'd, 547 F.App'x 927 (11th Cir. 2013) (citing Jackson, 419 U.S. at 395); see, Willis v. University Health Services, Inc., 993 F.2d 837, 840 (11th Cir.1993); see also, Fed. Agency of News LLC, No. 18-CV-07041-LHK, 2020 WL 137154, at *11 (citing Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1140 (9th Cir. 2012)). The test goes as follows: "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." Lee, 276 F.3d at 554-55 (citing Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966)). To satisfy the public function test, the action by a private entity must be both traditionally and exclusively governmental. Rendell–Baker v. Kohn, 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982).

The second category is referred to as the "state compulsion test;" a state must exercise some form of coercive power or significant encouragement, overtly or covertly, that "the choice of the private actor is deemed to be that of the state." Davis, 960 F.Supp.2d at 1308 (citing Willis, 993 F.2d at 840); S.H.A.R.K. v. Metro Parks Serving Summit Cty., 499 F.3d 553, 565 (6th Cir. 2007) (citing Lansing v. City of Memphis, 202 F.3d 821, 829 (6th Cir. 2000)); Blum v. Yaretsky, 457 U.S. 991, 1004-05, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). To meet the test, a party must show that the government "exercised 'coercive power' or 'significant encouragement' over a private entity." Woytowicz v. George Wash. Univ., 327 F. Supp. 3d 105, 117 (D.D.C. 2018). Extensive regulation, approval, or mere acquisition are not sufficient enough to meet the requisite nexus for finding governmental action; whereas, an activity that results from either governmental coercive power or significant encouragement is sufficient to meet the state compulsion test. Lyles v. Hughes, 964 F.Supp.2d 4, 7 (D.D.C. 2013); Woytowicz, 327 F. Supp. 3d 105, 116-17 (D.D.C. 2018); Vill. of Bensenville v. Fed. Aviation Admin., 457 F.3d 52, 64 (D.C. Cir. 2006); see Rendell-Baker v. Kohn, 457 U.S. 830, 841–42, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982); see also Jackson, 419 U.S. at 357–58.

The final category is referred to as the "nexus/joint action test;" a state has put itself into a position of "interdependence with the party that it was a joint participant in the enterprise." Davis, 960 F.Supp.2d at 1308 (citing Willis, 993 F.2d at 840). Additionally, when a private entity acts as a "willful participant" in joint activity with the government, it is considered state action. Lyles, 964 F.Supp.2d at 7.

i. ***Governor Dunphry's Squawker Page is a Form of State Action Under the Public Function Test***

Governor William R Dunphry's Squawker page is being used as a public forum to host government activity; therefore, Squawker engaged in state action. (R. at 9.) Both the District Court

and the Eighteenth Circuit agree with the two parties, Governor Dunphry's Squawker page ("page") is a public forum for First Amendment purposes. (R. at 8, 26.) According to the "public function test," a private entity must act in a manner that is both traditionally and exclusively reserved to the government for the entity to be considered a state actor. Rendell–Baker, 457 U.S. at 842, 102 S.Ct. at 73. In February 2018, Governor Dunphry approached Defendant with an idea to verify certain Squawker accounts to cut down on the amount of imposter accounts. (R. at 3, 24.) Defendant implemented Governor Dunphry's suggestion and verified his account along with many others government officials in Delmont. (R. at 3.)

It is a well-known fact in Delmont that the Governor uses his Squawker account to carry out official business, "such as announcing new policies for the first time." (R. at 3, 24.) Governor Dunphry himself stated that he uses his Squawker account to let his constituents know what "major policy proposals [are] coming through the state." (R. at 24.) Additionally, the Governor stated that he uses his account to communicate with the public on a daily basis, in his official governmental capacity. (R. at 9, 24.) Furthermore, he uses government staff to post to and maintain his account. (R. at 9.) The announcement of new policies, constituent outreach, and the use of government staff are factors that are traditionally and exclusively reserved to the government. Rendell–Baker, 457 U.S. at 842, 102 S.Ct. at 73. Thus, Squawker, a private organization, has given the government a public forum on which verified government officials can squeak, in their official capacity, new policies and responses to their constituents around the clock. (R. at 3.); Lee, 276 F.3d at 554. Governor Dunphry's page has made Squawker an instrumentality of the state; thus, it should be subject to constitutional limitations, such as the First Amendment, as it is a state actor. Evans, 382 U.S. at 299.

ii. ***Squawker is Subject to Constitutional Limitations as it is a Host to State Action on Behalf of Governor Dunphry's Page***

Squawker's control of Governor Dunphry's page, a public forum, constituted state action; therefore, Squawker is subject to the same constitutional limitations as any other governmental agency. Manhattan Cmty. Access Corp., 139 S. Ct. at 1930; Jackson, 419 U.S. at 352. When a private entity provides a public forum for state action, it is constrained by the First Amendment: the government cannot exclude speech or speakers from a forum based on viewpoint or even content. Manhattan Cmty. Access Corp., 139 S. Ct. at 1930. The exclusion of speech or speakers from a forum poses a burden on that individual, burdens "run afoul of the First Amendment." Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 238-39 (2d Cir. 2019). This Court has held that the government cannot "silence unwanted speech by burdening its utterance" as the act of silencing speech simultaneously censors its content. Sorrell v. IMS Health Inc., 564 U.S. 552, 566, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011).

The case at bar mirrors Knight First Amendment Inst. at Columbia Univ. v. Trump ("Knight First Amendment"); both cases revolved around a government official's social media account and whether the official was constitutionally allowed to block another social media user from his page. In Knight First Amendment, President Donald Trump appealed a judgment from the Southern District of New York to the United States Court of Appeals for the Second Circuit, concluding that he "engaged in unconstitutional viewpoint discrimination by utilizing Twitter's 'blocking' function to limit certain users' access to his social media account, which is otherwise open to the public at large, because he disagrees with their speech." Knight First Amendment, 928 F.3d at 230. The Second Circuit affirmed the district court's judgment, stating by blocking another individual on a social media platform, President Trump burdened the individual plaintiff's speech, a violation of the First Amendment. Knight First Amendment, 928 F.3d at 238. The appellate court held that when a "tweet" is "liked" on the social media network, it conveys approval or

acknowledgment; therefore, it is a symbolic gesture with expressive content. Id. at 237; see generally, W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 63 S. Ct. 1178, 1182, 87 L. Ed. 1628 (1943). Conversely, by blocking an individual from the social media platform, the person is prevented from viewing, replying, or liking a tweet; therefore, said person is excluded from a public forum, a direct violation of the First Amendment. Knight First Amendment, 928 F.3d at 238.

Petitioner is a "frequent squeaker" with over ten thousand follower on the social media site before the incident occurred. (R. at 19.) His squeaks would consist of "irreverent" emojis and crafty messages that he would string together in rapid succession. (R. at 19.) This was his modus operandi on the social media site, he was known to "artistically" arrange emojis to create clever innuendos for his followers to "jump on." (R. at 20.) As a result of expressing his artistic message in response to Governor Dunphry's policy announcement, he was flagged by the Squawker site. The flagging policy at Squawker is more drastic when it comes to comments or squeaks on a verified Squeaker's page. (R. at 4.) After Governor Dunphry approach Respondent about the verification process, the Terms and Conditions shifted, as well, making them more stringent against verified users. (R. at 4.) Squawker's flagging policy is as follows:

> Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged…all users [must] click on an emoji of a skull and crossbones in order to clear black boxes covering (1) the offending squeak or comment; (2) the offender's future squeaks…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 on Squawker in order to warn the community.

(R. at 4.) As a result of the flagging, Petitioner's followers on the social media site went from ten thousand to a mere two thousand followers. (R. at 20.) Additionally, as a freelance journalist reporting on news and current events, Petitioner needs his articles to be accepted by different newspapers to make a living. (R. at 19.) However, subsequent to the flagging, Petitioner has been

turned down for multiple jobs and is no longer able to financially support himself. (R. at 20.) Thus, Petitioner has suffered a financial injury from the burden imposed upon him by the flagging policy.

The flagging policy led to an undue burden on Petitioner since he suffered financial harm at the hands of the "skull and crossbones" badge across his account and his squeaks. (R. at 19-20.) The Second Circuit has held that viewpoint discrimination is not sanctioned by the government: the government cannot selectively silence or flag speech that it does not agree with. Knight First Amendment, 928 F.3d at 237. Since it has been proven that Squawker was acting in a governmental capacity through the public forum of Governor Dunphry's page, the protections of the First Amendment apply. (R. at 8.) The District Court was correct in holding that Squawker should not be allowed to control the speech in the public forum as it is a state actor. (R. at 9.)

Although it can be stated that since Squawker is a new form of social media, the First Amendment should not be applied as the platform is not funded by the government. Knight First Amendment, 928 F.3d at 236. However, social media users take to websites such as Squawker to "engage in a wide array of protected First Amendment activity" on topics ranging from politics to human thought. Packingham, 137 S.Ct. at 1735-36. Furthermore, this Court has held that "whatever the challenges of apply the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." (R. at 10.); Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952)). This Court has held that new technology, such as social media, should not be free from the protections of the First Amendment. (R. at 10.); Packingham, 137 S.Ct. at 1735-36. Therefore, Squawker's flagging policy violated the First Amendment right to free speech by marking Petitioner's page and all

squeaks as a violation. (R. at 6.). Petitioner suffered a great deal from the flagging policy and as such deserves restitution from this Court for the violation of his First Amendment right to free speech.

II. The Squawker Terms and Conditions are an unconstitutional content-based regulation on First Amendment Free Speech rights

i. The Squawker Terms and Conditions are content-based on its face and Strict Scrutiny should be applied

The First Amendment freedom of speech principles are also applicable to social media platforms. "Whatever the challenges of applying the Constitution to ever-advancing technology, '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 Merchants Ass'n, 564 U.S. 786, 790 (2011) (quoting Joseph Brustyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)). "The First Amendment means that government has not power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95, 92 S. Ct. 2286, 2290 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling interests." Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2222 (2015). A law may be found to be a 'content-based' regulation of speech "on its face" or by its function or purpose "defining regulated speech by particular subject matter." Id.

> Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny in a free speech challenge.

Id. A law is found to be content-based on its face if it "burdens disfavored speech by disfavored speakers." Sorrell v. IMS Health Inc., 564 U.S 552, 564, 131 S. Ct. 2653, 2663 (2011) (Holding a

Vermont law content-based on its face because the law restricted the sale, disclosure and use of its prescriber-identifying information disfavoring certain speakers.) "This commonsense meaning of the phrase 'content-based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." Reed, 135 S. Ct. at 2227; United States v. O'Brien, 391 U.S. 367, 377 (1968) (Holding "a law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' license, or a tax law prohibiting the destruction of books and records.")

In Reed, a town signage law defined different categories of signs, subject to different restrictions, based on the message being conveyed by the sign and thus was found to be content-based on its face. Id. The Town's Sign Code created categories of signs, such as "political signs" and "ideological signs" on the basis of their communicated message. Id. The law then placed different restrictions based on those categories. Id. As a result, the court found the Town's Sign Code to be content-based on its face and subject to strict scrutiny review. Id.

The Squawker Terms and Conditions are a facially content-based speech regulation. Squawker's Terms and Conditions regulate the way squeakers interact with each other on the basis of whether the squeak "promotes violence against or directly attacks or threatens other peopl[e]." (R. at 3). The Squawker Terms and Conditions state:

> We 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. In addition, [Squawker] prohibit[s] the use of emojis [emoticons] in a violent or threatening manner.

(R. at 3.) The Terms & Conditions define 'prohibited squeaks' on the basis of whether the squeak conveys a 'violent' or 'threatening' message directed at a specified group of people. Squeaks that contain 'prohibited content' are subjected to different restrictions through a

flagging policy that places "a black box with white skull and crossbones in the middle of the box" over 'offending' squeaks. (R. at 4.) The restrictions in the Terms and Conditions, though applicable to any given squeak, are only applied to squeaks found in violation based solely on the communicative content of the squeak. Squeaks found to be promoting violence against one of the protected classes of people will be flagged. Whereas, squeaks directed at that same group of people but not viewed as violent will not be flagged. More to the point, the Terms and Conditions to not prohibit violent content against groups of people that do not fall within one of the stated categories. Therefore, the language of the policy clearly only prohibits certain squeaks and makes that determination based on the content of the squeaks. On its face, the Terms and Conditions is content-based and strict scrutiny should be applied.

ii. The Purpose Behind the Squawker Terms and Conditions is Content-based and Strict Scrutiny Should be Applied

A law may also be considered a content-based regulation if, though facially content neutral, it defines "regulated speech by its function or purpose." Reed, 135 S. Ct. at 2227. "Government regulation of expressive activity is content neutral so long as it is 'justified without reference to the content of the regulated speech.'" Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984)). "A restriction of speech is content-neutral if it is justified without reference to the content of the regulated speech, whereas a restriction is content-based if it was adopted because of disagreement with the message the speech conveys." Price v. City of Fayetteville, N.C., 22 F. Supp. 3d 551, 560 (E.D. N.C. 2014). "The principal inquiry in determining content neutrality, in speech cases generally…is whether the government has adopted a regulation

of speech because of disagreement with the message it conveys." Id. "The government's purpose is the controlling consideration." Id.

"We think it clear that a government regulation is sufficiently justified if, (1) it is within the constitutional power of the Government, (2) it furthers an important or substantial governmental interest, (3) the government interest is unrelated to the suppression of free expression, and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." O'Brien, 391 U.S. at 375 (1968) (Holding, a law forbidding burning of a draft card, including for purposes of political speech, as constitutional because the purpose for the law was to regulate the Selective Service System not speech.) The court in Ward held that a sound-amplification regulation was content-neutral because the justification had nothing to do with content but instead, the purpose was the city's desire to control noise levels to avoid intrusion into residential areas and other areas of a park. Ward, 491 U.S. at 792.

This case differs from O'Brien and Ward because the Squawker Terms and Conditions restrictions clearly state their purpose was not to further an important government interest but to "combat abuse motivated by hatred, prejudice, or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized." (R. at 3.) The Terms and Conditions cannot be justified without reference to the content of the prohibited squeaks.

The purpose of the Terms and Conditions is specifically to prohibit squeaks that contain certain types of speech deemed offensive. "Here at Squawker, we are committed to combating abuse motivated by hatred, prejudice, or intolerance." (R. at 3.) Squawker cannot restrict the speech of certain users just because it finds the content to be offensive. "Speech may not be banned on the ground[s] that it expresses ideas that offend." Matal v. Tam, 137 S. Ct. 1744, 1751 (2017); Texas

v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.")

In Texas v. Johnson, the court held the act of burning the American flag during protest rally, although offensive to some, could not be prohibited since flag burning is allowed for other purposes, such as for proper disposal. Texas v. Johnson, 491 U.S. 397 (1989). The Terms and Conditions are similar to the law in Texas v. Johnson because it only prohibits violent speech towards certain groups of people. The policy does not prohibit violent squeaks aimed at groups of people that do not fall within its stated categories. Since the Terms and Conditions cannot be justified without reference to the content of the speech it prohibits, thus not content-neutral, strict scrutiny should be applied.

iii. The Squawker Terms and Conditions do not Survive Strict Scrutiny

Whether a law is content-based on its face or through its function and purpose, "both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." Reed, 135 S. Ct. at 2227. "As a general matter, content-based regulations of speech are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests, which is a stringent standard." National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby v. Schultz, 487 U.S. 474, 485 (1988).

Squawker's Terms and Conditions fail to satisfy Scrutiny. Although, Swquaker has a legitimate interest in providing "for a positive user experience", this is not a sufficiently compelling interest to justify the significant burden it places on speech. "It is firmly settled that

under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Street v. New York, 394 U.S. 576, 592 (1969).

"If a statute is not content neutral with respect to speech, then it must satisfy strict scrutiny, that is, it must be the least restrictive means of achieving a compelling state interest." McCullen v. Coakley, 573 U.S. 464, 478, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014). The Squawker Terms and Conditions do not satisfy this standard. Squawker has failed to present evidence proving there is no other alternative to achieve its goal of maintaining a harmonious platform. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000). The Terms and Conditions place a substantial burden on Petitioner's speech and have nearly cost him his livelihood. (R. at 20.) Petitioner makes a living based on his activity on Squawker. Id. Petitioner used the Squawker platform to connect with his audience and managed to build a significant base of followers. (R. at 19.) Since his account has been blocked, he has lost thousands of followers and has not been able to maintain his connections. (R. at 20.) The Terms and Conditions policy does not survive Strict Scrutiny.

iv. Even if the Squawker Terms and Conditions are Content-neutral, the Flagging Policy is an Unconstitutional Time, Place, or Manner Regulation

Content-neutral speech regulations are subject to intermediate scrutiny. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (Holding a government regulation of a cable operator with a purpose unrelated to the content of the cable operator's speech is subject only to intermediate scrutiny.) "Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech." Ward, 491 U.S. at 791. Time, place, or manner restrictions are valid if, "(1) they are justified without reference to the content of the regulated speech, (2) they

are narrowly tailored to serve a significant governmental interest, (3) and they leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293. The Squawker Terms and Conditions flagging policy cannot be justified without reference to the regulated speech. Although the state purpose of the flagging policy is to facilitate use of the platform, the main purpose it to block content it deems offensive. (R. at 3.) The flagging policy is not narrowly tailored because it does not just target the offensive content but once flagged, all of the Squeaker's content is flagged. (R. at 4.) The flagging policy states:

> Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged. This will require all users to click on an emoji of skull and crossbones in order to clear black boxes covering (1) the offending squeak 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 on Squawker in order to warn the community.

(R. at 4.) The flagging policy does not leave ample alternative channels for communication because it places black boxes covering the offending Squeaker's profile page and is only removed after an online quiz is taken and passed. If a user refuses to take the quiz, there is no other way to remove the profile flagging. Petitioner has suffered financial hardship because of the lack of alternate channels of communication. (R. at 20.) Petitioner has been unable to maintain his followers since the flagging policy. Id. Petitioner has no way of resuming his normal Squawker activity until the flagging policy is removed. The flagging policy fails intermediate scrutiny and is an unconstitutional time, place, or manner restriction.

"Even if the government may constitutionally impose content-neutral prohibitions on a particular manner of speech, it may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion." City of Lakewood v. Plain Dealer

Pub. Co., 486 U.S 750, 764 (1988). Here, Squawker has boundless discretion when deciding which squeaks it finds are in violation of its Terms and Conditions and subjected to the flagging policy. Although the Terms and Conditions mention specific categories of prohibited squeaks, it has full discretion in which squeaks fall within the prohibited content. The Terms and Conditions also prohibit 'excessive' posting and violations also lead to a flagged account. (R. at 15.) However, the interpretation of 'excessive' and subsequent account flagging is also subjective and left to the discretion of Squawker. This can also lead to a disproportionate application of the flagging policy. Petitioner had on previous occasions posted multiple squeaks within a short span of time, but this was the first time his account was flagged. (R. at 20, 22.) Further, Petitioner has never seen or heard of any other Squawker profile being flagged. (R. at 20.) This is strange considering Petitioner is a frequent user of Squawker and demonstrates the boundless discretion of the flagging policy. (R. at 19.) The flagging policy fails intermediate scrutiny and is an unconstitutional time, place, or manner regulation.

CONCLUSION

For the foregoing reasons, Petitioner asks this court to REVERSE the decisions of the United States Court of Appeals for the Eighteenth Circuit and find that Squawker did in fact act as a state actor and its Terms and Conditions are an unconstitutional restriction on speech under the First Amendment.

CERTIFICATE OF COMPLIANCE

(1) The work product contained in all copies of this team's brief is in fact the work product of the team members;

(2) This team has complied fully with their school's governing honor code; and

(3) This team has complied with all Rules of the competition.

TEAM 22

Counsel for Petitioner