No. 17-874

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2020

AVERY MILNER,
Petitioner,

v.

MAC PLUCKERBERG,
Respondent.

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

BRIEF FOR THE PETITIONER

Team No. 26
Counsel for Avery Milner, Petitioner

QUESTIONS PRESENTED

I. Whether, in flagging Milner's account for comments made on of Governor Dunphry's verified Squawker Page, a public forum, Squawker's conduct constitutes state action.

II. Whether, in restricting Milner's speech, Squawker's Terms and Conditions fall outside the realm of a content-neutral, time, place, or manner restriction that does not violate the First Amendment

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

OTHER CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Disposition Below

This lawsuit concerns Squawker's Terms and Conditions, specifically its flagging policy, that violates the First Amendment. The flagging policy prohibited Petitioner, Avery Milner (hereinafter "Milner") from commenting on a public forum and from posting on Squawker generally. On December 5, 2018, Milner and Mackenzie "Mac" Pluckerberg (hereinafter "Pluckerberg"), in his official capacity as the Chief Executive Officer ("CEO") of Squawker, filed cross motions for summary judgment. (R. at 2.) On January 10, 2019, the district court granted Milner's motion for summary judgment and denied Pluckerberg's cross motion, holding that Squawker's Terms and Conditions amount to content-based viewpoint discrimination. (*Id*. at 13.) Specifically, the court found that the Terms and Conditions are not narrowly tailored as to a reasonable time, place, or manner restriction on Milner's speech. (*Id.*) On appeal, the circuit court reversed the district court's ruling. (*Id.* at 36.) Milner timely filed a petition for writ of certiorari, and this Court granted same. (*Id.* at 37.)

II. Statement of the Facts

A. Squawker's Unconstitutional Flagging Policy

Squawker requires all of its users to accept a series of Terms and Conditions associated with the platform. (*Id.* at 1.) These conditions prohibit content "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." (*Id.* at 15.) The use of emojis in a violent or threatening manner is also prohibited. (*Id*.) Furthermore, spamming of any nature is prohibited for those participating in posting and commenting on the platform. (*Id.* at 28.) The policy considers high frequency activity (spamming) to be four or more squeaks squawked within 30 seconds of each other. (*Id.*)

Squawker is an incredibly popular and frequented news source. So much so that "many government officials use the platform as a way to communicate with their constituents and spread policy ideas." (*Id.* at 16.) Governor Dunphry, Governor for the State of Delmont, sought to enhance the Squawker experience for elected officials in the state of Delmont and petitioned his longtime friend Pluckerberg (*Id.* at 22.) to create a verification process for the accounts of public officials. (*Id.* at 16). This process sparked the birth of a new set of Terms and Conditions that included a flagging policy for those who interact with verified Delmont state official accounts. (*Id*.)

B. Salient Facts Giving Rise to Milner's Account Being Flagging

Avery Milner, a citizen of the state of Delmont, works "as a freelance journalist reporting on news and current events within the state of Delmont." (*Id.* at 19.) In April of 2017, Milner created a Squawker page and agreed to the Terms and Conditions associated with a Squawker account at that time. (*Id.*) In March of 2018, Milner then agreed to the revised Terms and Conditions associated with Squawker's verification feature. (*Id.*) Milner is an avid squeaker, having over ten thousand Squawker followers, with his squeaks averaging seven thousand views per squeak. (*Id.*) Milner was well known throughout the Squawker community for his inventive and artistic use of emojis that allow his messages to develop a greater meaning than their first

appearance. (*Id.* at 19-20.) Milner is also known for his creativity in crafting his comments by stringing them together on the same post in quick succession. (*Id.* at 19.) Until July 27, 2018, Milner's account had never been flagged for his successive comments nor had he ever been warned that his actions would lead to any repercussions. (*Id.* at 20). Milner had never heard of or seen an account be flagged for successive comments and rightly so as Pluckerberg had never flagged an account for such action until he did so with Milner's. (*Id.* at 22.)

On July 26, 2018, Governor William R. Dunphry posted on his official Squawker page a link to a bill proposal. (*Id.* at 1.) Avery Milner posted his thoughts about Dunphry's proposal using emojis. (*Id.* at 5-6.) Milner's posts were highly critical of Governor Dunphry. (*See Id.* at 17) The initial post noted that Dunphry should be removed from his position as Governor. (*Id.* at 5.) The next three posts contained a series of emoji's namely an old man, a syringe, and a coffin. (*Id.* at 5-6.) Pluckerberg, personally finding Milner's thoughts to be in violation of Squawker's Terms and Conditions, flagged his account according to Squawker's new flagging policy. (*Id.* at 22.) This flagging caused all of the content on Mr. Milner's page, recent and prior (*Id.* at 4.), to be blocked out by black boxes. (*Id*.) Furthermore, Milner's account is now stained with a skull and crossbones badge next to his account name. (*Id.*) To remove these restrictions on his account Squawker demands that he watch a video and complete a quiz. (*Id.* at 6.) Milner rightly refused to do either as Squawker's Terms and Conditions are violative of the First Amendment.

Following these restrictions Milner experienced a dramatic decrease in the viewership of his profile, losing over eight thousand followers. (*Id.* at 19-20.) Additionally, each of his squeaks fell from an average viewership of seven thousand views per squeak to fifty views per squeak. (*Id.* at 20.) The mass decrease in viewership led to far fewer freelance writing opportunities for Milner,

significantly handicapping his primary method of income. (*Id.*) Milner now struggles financially to make ends meet. (*Id.*)

SUMMARY OF THE ARGUMENT

This Court should reverse the Eighteenth Circuit's decision because Squawker's conduct constitutes state action and its Terms and Conditions violate Milner's First Amendment free speech rights. To violate the First Amendment, as applied to the states by the Fourteenth Amendment, the challenged conduct must first constitute state action. Squawker's conduct constitutes state action because it can be fairly attributable to the State of Delmont. Squawker's conduct stemmed from the interdependent relationship between the parties, arose from Governor Dunphry's official status, and was intended to suppress speech critical of Governor Dunphry. Moreover, the connection between Squawker's challenged conduct and the State of Delmont is sufficient to constitute state action. Lastly, in an effort to preserve the purpose of the First Amendment and its vital principles, this Court should find that Squawker's conduct constitutes state action.

In constituting state action, Squawker's conduct is subject to the power of the First Amendment. As a result, Milner's speech has been unconstitutionally restricted because Squawker's Terms and Conditions restrict speech on the basis of content. Squawker has restricted Milner's speech because it may offend and because it disagrees with the viewpoints expressed. Such a restriction flies in the face of the First Amendment, effectively removing an opinion from the realm of public debate. Furthermore, Squawker has failed to narrowly tailor its restrictions in accordance with its interests. Instead, Squawker has opted to take a reckless and burdensome approach to censorship, restricting far more speech than is necessary. In restricting Milner's speech, Squawker also fails to leave open alternative channels of communication, effectively removing an entire manner of expression from the medium which it regulates.

ARGUMENT

The First Amendment states that "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. This prohibition is made applicable to the states by the Fourteenth Amendment. U.S. Const. amend. XIV. Sec. 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."). Squawker's conduct in flagging Milner's account for comments made on Governor Dunphry's official verified page constitutes state action for purposes of the Fourteenth Amendment. Furthermore, Squawker's restrictions are content based and thus, violate the First Amendment.

I. SQUAWKER ENGAGED IN STATE ACTION WHEN IT FLAGGED MILNER'S ACCOUNT BECAUSE ITS CONDUCT CAN BE FAIRLY ATTRIBUTABLE TO AND IS SUFFICIENTLY CONNECTED TO THE STATE OF DELMONT.

The Fourteenth Amendment prohibits state government actors from restricting an individual's freedom of speech under the First Amendment of the United States Constitution. In *The Civil Rights Cases,* the Court stated that "[a] wrongful act of an individual, unsupported by . . . [state] authority, is simply a private wrong . . . ." *The Civil Rights Cases,* 109 U.S. 3, 17 (1883). "To constitute state action, the deprivation must be caused by the exercise of some right or privilege created by the State…or by a person for whom the State is responsible . . . ." *Patterson v. Cty. of Oneida, N.Y.,* 375 F.3d 206, 230 (2d Cir. 2004). Therefore, to have a successful First Amendment claim, Mr. Milner must demonstrate that the challenged conduct made by Squawker, through the actions of its CEO Pluckerberg, is fairly attributable and sufficiently connected to the State of Delmont.

A. Squawker's conduct is fairly attributable to the State because it stemmed from the interdependent relationship between itself and Delmont, arose from Governor Dunphry's official status, and was intended to suppress speech critical of Governor Dunphry.

Conduct by private parties may be fairly attributed to the state in various circumstances. *See Burton v. Wilmington Parking Auth.,* 365 U.S. 715, 726 (1961). The fact that an actor is a public official is alone insufficient for deciding whether the challenged conduct is state action. *Patterson,* 375 F.3d at 230. Furthermore, the government does not need to "own" the property for its conduct in controlling it to be fairly attributable to the state. *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 545, 547-52 (1975). Neither Pluckerberg, nor any other employee of Squawker is a public official employed by the State of Delmont. Nor does the State of Delmont have a possessory interest in Squawker generally. Nonetheless, a private entity, in the present case Squawker, may act as a state actor in various circumstances. *Caviness v. Horizon Cmty. Learning Ctr., Inc.,* 590 F.3d 806, 812-13 (9th Cir. 2010).

1. Squawker's conduct stemmed from the interdependent relationship between itself and the State of Delmont.

When a private entity and state government mutually benefit from the relationship between one another, the state is a party to the conduct of the private entity. *Burton v. Wilmington Parking Auth.,* 365 U.S. at 724. In *Burton,* a private lessee of state property was found to have acted discriminatorily in violation of the Fourteenth Amendment's Equal Protection Clause by denying service to the Appellant. *Id.* at 717. The Court reasoned that because the lessee and the Wilmington Parking Authority ("WPA") were in a position of interdependence they could be held as joint participants. *Id.* at 724-25. The lessee enjoyed a tax exemption and parking for customers, while the state through the WPA, benefited by having a reliable business occupying the space. *Id.*

Therefore, in acting as a joint participant with the State, the lessee's discriminatory conduct constituted state action. *Id.* at 726.

Similarly, Squawker and the State of Delmont, specifically Pluckerberg and Governor Dunphry, were in an interdependent relationship. Squawker was responsible for hosting Governor Dunphry's official page on Squawker, a public forum. (R. at 17.) Governor Dunphry enjoyed the use of Squawker but "received numerous complaints about imposter and fake news accounts affecting [his] constituents." (*Id.* at 24.) Therefore, at Governor Dunphry's direction, Squawker created the verification feature for accounts of public officials (*Id.* at 16.)—personally monitored by Squawker CEO, Pluckerberg. (*Id.* at 22.) Both Governor Dunphry and Squawker benefited from their relationship through the implementation of the verification feature. Governor Dunphry benefited from this requested feature because he no longer suffered from the misinformation coming from impersonating accounts and was able to "engag[e] with the good people of Delmont on an unprecedented level." (*Id.* at 24.) Squawker also benefited from the implementation of the verification feature because it allowed public officials in Delmont to ensure that false messages were not being communicated and gave the public the confidence to trust the information on verified Squawker accounts. Therefore, as in *Burton,* Squawker and Governor Dunphry were in a mutually beneficial relationship and should be treated as joint participants in the challenged conduct.

Additionally, to constitute state action the challenged conduct must be connected to the relationship between the State and the private entity. *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 WL 4269301, at *3 (N.D. Cal. Oct. 25, 2010). A plaintiff must demonstrate enough of a connection between the State and the challenged action from the seemingly private entity to show that the conduct "may be fairly treated as that of the State itself." *Id.* at *2 (looking at the

context of § 1983 claims). In *Young v. Facebook, Inc.*, the Plaintiff argued that Facebook and the General Services Administration were connected through a series of government contracts between the parties. *Id.* The court held that Facebook could be a state actor when acting pursuant to those government contracts. *Id.* at *3. However, the Plaintiff failed to demonstrate that her injuries stemmed from the contractual relationship and thus, her claim failed. *Id.*

Contrarily, Squawker's challenged conduct stems directly from the relationship between Squawker and the State of Delmont—particularly from the relationship between Pluckerberg and Governor Dunphry. Governor Dunphry and Pluckerberg were old friends from College-Preparatory School. (R. at 22.) In February 2018, Governor Dunphry contacted his friend, the CEO of Squawker, to discuss impersonating accounts found to be disseminating false information. (*Id.*) Governor Dunphry explicitly recommended implementing a verification feature for the accounts of public officials in the State of Delmont. (*Id.*) In response, Squawker implemented this proposed verification feature, which marked the accounts of public officials in Delmont with the state flag. (*Id.*) At the time of this claim, "Delmont [was] the only state to utilize the verified Squawker platform . . . ." (*Id.* at 16.) Upon the creation of the verification feature, Squawker also added a new flagging provision to its Terms and Conditions. (*Id.* at 16.) Evidently, the creation of the verification feature, and in turn the flagging provision, stemmed from the relationship between Squawker's CEO, Pluckerberg, and the State of Delmont through Governor Dunphry. Thus, unlike in *Young*, Squawker's conduct stemmed directly from its relationship with the State of Delmont and is fairly attributable to the State.

2. Squawker's conduct arose out of Governor Dunphry's official status.

Challenged conduct is considered state action when that conduct is "linked to events which arose out of his official status." *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019). Plainly

stated, when a public official's status allows him or her to commit the challenged action, the conduct constitutes state action. *Id.* In *Davison,* the court found that the chair of the county board of commissioners acted "under the color of state law" when she banned a constituent from an official government page. *Id.* As such, the challenged conduct was "made possible only because the wrongdoer [was] clothed with the authority of state law" and thus, constituted state action. *Id.* at 679.

Likewise, Squawker and Governor Dunphry, "use[d] the power and prestige of [Governor Dunphry's] state office to damage the plaintiff." *Id.* at 681. The challenged conduct arose out of Dunphry's official status because he would not have experienced the plague of impersonating accounts absent his status as Governor. Furthermore, Squawker hosted, and Pluckerberg personally verified Governor Dunphry's official Squawker page. (R. at 22.) Governor Dunphry used his official verified page, a public forum, in his capacity as Governor of the State of Delmont. (*Id.* at 17.) Milner's account was flagged pursuant to the new Terms & Conditions applying only to verified Squawker pages, which was only available in the State of Delmont. (*Id.* at 16.) Thus, just like in *Davison,* the challenged conduct arose from the implementation of the verification feature which was made possible only because of Governor Dunphry's governmental authority.

3. Squawker's conduct suppressed speech critical of Governor Dunphry's official duties.

"In the context of an alleged First Amendment violation . . . a challenged action . . . is fairly attributable to the state when 'the sole intention' of the official in taking the action was to 'suppress speech critical of his conduct of official duties or fitness for public office.'" *Davison,* 912 F.3d at 680; *Hartman v. Moore,* 547 U.S. 250, 256 (2006) ("As a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions…for speaking

out . . . .”). The suppression of critical speech is a factor that reinforces a finding that the challenged conduct constitutes state action.

Here, Squawker, specifically Pluckerberg acting on behalf of Governor Dunphry, suppressed Milner’s speech which criticized Governor Dunphry. Subsequently, Squawker claimed to have flagged Milner’s account pursuant to its new Terms and Conditions. (R. at 17, 22.) However, Milner was never flagged for similar content. (*Id.* at 20.) Further, Pluckerberg admits that he had never “flagged an account for excessive posting before Avery Milner’s.” (*Id.* at 22.) During his time as a user, Milner used Squawker to post for an audience of over ten thousand followers and was known for his “use of emojis and creativity in crafting messages by stringing together comments on the same post in quick succession.” (*Id.* at 19.) It was not until his comments on Governor Dunphry’s account that Milner’s account was flagged, despite the numerous times he had “made four or more squeaks within thirty seconds” of each other. (*Id.* at 20.) Like the plaintiff in *Davison,* Milner’s account was flagged to suppress speech critical of a state official, specifically Governor Dunphry. Thus, the conduct is fairly attributable to the State of Delmont and constitutes state action.

B. The totality of the circumstances demonstrates that there is a sufficiently close connection between Squawker’s conduct and the State of Delmont to constitute state action.

What is determined to be fairly attributable to the state is determined by analyzing the totality of the circumstances to decide whether a “sufficiently close nexus” with the State exists. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). In *Jackson,* this Court set forth several factors that should be considered in determining whether the connection is sufficient to constitute state action. *See Id.* at 357. *See also Brentwood Academy v. Tennessee Secondary School Athletic Ass’n.,* 531 U.S. 288, 295-96 (2001) (outlining factors for courts to consider when the party

exercising control over a public forum is not a governmental entity). These factors include: the entity's status as a monopoly, whether it produced an essential public service, and whether the State specifically authorized or approved the practice. *Id.* Ultimately, this Court held that "[the state] [was] not sufficiently connected with the challenged [conduct] to make respondent's conduct attributable to the State . . . ." *Id.* at 358-59. *But see id.* at 368-373 (Marshall, J., dissenting).

This Court reasoned that state engagement in regulating a partial monopoly does not make the connection between the state and private actor sufficient to qualify the conduct as state action. *Id.* at 345. Specifically, the state was not sufficiently connected to the entity's status as a monopoly. *Id.* at 352. This Court also rejected the Petitioner's overbroad reading when he argued that any business affected with the public interest provided a public service. *Id.* Lastly, this Court held that the State did not specifically authorize or approve the practice complained of because the State never placed "its own weight on the side of the practice." *Id.* at 357.

Nevertheless, as the Court in *Jackson* stated, "differences in circumstances beget differences in law . . . ." *Id.* at 358. An analysis of the factors outlined in *Jackson* to the case at bar depict a sufficient connection between Squawker and the State of Delmont. First, Governor Dunphry exercised sufficient control, more than mere regulation, over the practice implemented to protect his official Squawker page. In a way, Governor Dunphry's page was a monopoly because the State of Delmont was the only state where Squawker's verification feature had been implemented. (R. at 16.) Squawker was not merely regulated by Governor Dunphry. Rather, it was significantly controlled by his and the State of Delmont's interests.

Second, in hosting Governor Dunphry's official page, a public forum, Squawker provided an essential public service. An essential public service has been defined as that which has been "traditionally exclusively reserved to the State." *Jackson*, 419 U.S. at 351. Read narrowly, hosting

of a public forum online through a social media platform has not been traditionally reserved to the State. However, the Court should find that acting as a host of public forum generally is a public service, not merely conduct concerned with the public interest. *See Id.* at 353; *Marsh v. Alabama,* 326 U.S. 501, 508 (1946) (finding that a citizen's First Amendment rights were violated by a corporation-owned town because of the way the entity functioned). Furthermore, "'facilities or location deemed to be public forums are usually operated by governments, [therefore] determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations.'" *Knight First Amendment Institute at Columbia Univ. v. Trump,* 302 F.Supp.3d 541, 568 (S.D. N.Y. 2018) (quoting *Halleck v. Manhattan Cmty. Access Corp*., 882 F.3d 300, 306–07 (2d Cir. 2018)). Moreover, the law is not stagnant and should be applied according to changes in society and technological advancements. *See Packingham v. North Carolina,* 137 S.Ct. 1730, 1736 (2017). As such, the Court should find that in hosting a public forum in the online context, Squawker provided a public service.

Lastly, the Court in *Jackson* looked at whether the State specifically authorized or approved the practice which the Plaintiff complained of. *Jackson,* 419 U.S. at 357. In *Jackson,* this Court did not find that the State authorized the provision in question because the State never placed "its own weight on the side of the practice." *Id.* Contrarily, Governor Dunphy explicitly put weight on the side of the verification feature by insisting that such be adopted by Squawker. (R. at 24.) Therefore, through Governor Dunphry, the State of Delmont authorized and approved Squawker's implementation of the verification feature and the Terms & Conditions implemented alongside it. Thus, there is a sufficient connection between the State of Delmont and Squawker's challenged conduct to constitute state action.

C. The purpose of the First Amendment is better served by finding that Squawker's conduct constituted state action.

The purpose of the First Amendment is to promote an open and free marketplace of ideas where truth will ultimately prevail, rather than to approve complete monopolization of that market. *Red Lion Broad. Co. v. F.C.C.,* 395 U.S. 367, 390 (1969). In *Red Lion,* the Court relied on the fact that the Federal Communications Commission's ("FCC") regulation "enhance[d] rather than abridge[d] the freedom[] of speech . . . protected by the First Amendment." *Id.* at 375. The goal of Congress in authorizing such a regulation was to produce an informed public. *Id.* at 392. Otherwise, in the absence of the regulation, radio stations would have enjoyed relatively unfettered discretion in deciding who to allow to communicate resulting in one-sidedness or control by the "highest bidders." *Id.* at 392. The First Amendment was not meant to protect private entities restricting speech contrary to their interests, when the platform is open to all. *Id.*

The Court in *Red Lion* stated that differences in media require differences in First Amendment standards to be applied to them. *Id.* at 386. Therefore, it is important to consider the breadth of the Internet and social media platforms, especially when used to host a public forum as in the case at bar. Today, cyberspace is the most important place for the exchange of views, particularly social media websites. *Packingham,* 137 S.Ct. at 1735. (citing to *Reno v. Am. Civil Liberties Union,* 521 U.S. 844, 868 (1997)). In *Packingham,* this Court struck down a North Carolina statute that prohibited sex offenders from using social media for violating the First Amendment. *Id.* at 1735-38. The Court reasoned that individuals' use of social media was pivotal for participation in conversations on "topics 'as diverse as human thought.'" *Id.* at 1736-37. Thus, once again, the Court reiterated the importance of speech in the online context.

First Amendment principles are better served by finding that Squawker's conduct constitutes state action. The Court has emphasized the importance of "producing an informed

public." *See Red Lion,* 395 U.S. at 392. By restricting Milner's speech, which criticized Governor Dunphry's policy proposal (R. at 20.), Squawker created a one-sided communication on a public forum. Milner had never been flagged for posting more than four squeaks within thirty seconds and Pluckerberg had never flagged an account for such activity. (*Id.* at 20, 22.) Based on this, the decision to flag Milner's account was grounded on the fact that his comments criticized Governor Dunphry. Surely, truth cannot prevail without allowing discussions that provide building blocks for individuals to make conclusions. The discourse restricted by Squawker in this case is exactly the type of communication the Court in *Red Lion* found the First Amendment sought to promote. *See Red Lion,* 395 U.S. at 390 ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964)).

Squawker's restrictions have far-reaching implications that directly contradict the goals outlined by this Court in *Red Lion.* Allowing Squawker to restrict content on the public forums it hosts online will give Squawker unrestrained power that is likely to result in monopolization of the market. In this case, by flagging Milner's posts on Governor Dunphry's account Squawker promoted those interests in alliance with those of Governor Dunphry and the State of Delmont. As mentioned, protection of First Amendment principles in the online context is of the utmost importance. *Packingham,* 137 S.Ct. at 1736 ("The Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."). To preserve First Amendment principles, the Court should find that the challenged conduct by Squawker in this case constitutes state action.

Moreover, when individuals' rights to free speech conflict with the rights of the speech forum's owners' rights to function as desired, individuals' rights to speak freely must prevail. *See F.C.C. v. Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940); *F.C.C. v. Allentown*

Broadcasting Corp., 349 U.S. 358, 361-62 (1955). Here, Squawker argues that it flagged Milner's account pursuant to its Terms & Conditions, which were implemented to allow for a "positive user experience." (R. at 15). Specifically, the Terms & Conditions prohibit the use of spamming—which is the reason Milner's account was flagged. (*Id.* at 22.) Even if that is so, First Amendment principles illustrate that individuals' free speech rights outweigh a forum's rights to function as desired when they conflict. Squawker's conduct is not justified merely because its economic interests were involved. As such, Milner's interest in his free speech outweighs Squawker and the State of Delmont's rights to function as desired.

Lastly, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad,* 420 U.S. at 553. In *Conrad,* the Court held that a municipal board denying its facilities for the production of a musical constituted unconstitutional prior restraint. *Id.* at 546. In its analysis the Court emphasized the importance of the First Amendment and its aversion to granting a private entity complete discretion over the content in certain contexts. *See Id.* at 553. Although Squawker didn't engage in prior restraint as in *Conrad,* the underlying values affected by its conduct are the same. In an age where public communication is almost exclusively done in the online context, it is imperative for the maintenance of our First Amendment principles that the State refrain from burdensome restrictions. Consequently, the purpose of the First Amendment is better served by finding that Squawker's conduct constitutes state action.

II. SQUAWKER'S TERMS AND CONDITIONS VIOLATE THE FIRST AMENDMENT BECAUSE THEY RESTRICT SPEECH ON THE BASIS OF CONTENT. FURTHERMORE, THE RESTRICTIONS ARE NOT NARROWLY TAILORED AND FAIL TO LEAVE OPEN AMPLE CHANNELS OF COMMUNICATION.

Squawker's Terms and Conditions stand in direct violation of Milner's constitutionally enshrined First Amendment right to free speech. Here, Milner's speech is that of a member of the

Delmont community who sought to engage with his fellow citizens in a political discourse. Milner's speech was ultimately targeted for restriction due to its content, content which Squawker disagrees with. Squawker cannot justify a restriction based on the content of one's speech without infringing on one's First Amendment protections. Even if this Court chose to apply a content-neutral analysis, Squawker's Terms and Conditions still stand in violation of the First Amendment as they are not narrowly tailored, nor do they leave open alternative channels of communication. Milner's speech is that of a citizen insulated by the First Amendment. Therefore, this Court should reverse the Eighteenth Circuit's decision by finding that Squawker's Terms and Conditions stand in direct violation of First Amendment protections.

A. Squawker's Terms and Conditions are unconstitutional because they restrict speech on the basis of content.

The First Amendment was designed to remove restraints from the arena of public discussion to "produce a more capable citizenry and more perfect polity." *Cohen v. California.*, 403 U.S. 15, 24 (1971) (citing *Whitney v. California*, 274 U.S. 357, 357-77 (1927) (Brandeis, J., concurring)). Furthermore, the ultimate function of free speech "is to invite dispute[] [and] [i]t may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Such consequences are "within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve." *Cohen*, 403 U.S. at 25.

The First Amendment prohibits the abridgment of speech and such protection does not end at the spoken or written word. *Johnson*, 491 U.S. at 404; *Mastrovincenzo v. City of New York*, 435 F.3d 78, 91-92 (2d Cir. N.Y. 2006). This is not to say that First Amendment protections are unlimited. However, in line with the goal of the First Amendment, regulation that restricts speech

based on its content or viewpoint expressed is presumed unconstitutional. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-43 (1994)); *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (citation omitted). Ultimately, "'[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 789 (1989) (citation omitted).

1. Squawker's Terms and Conditions are unconstitutional because they restrict Milner's speech on the basis that it offends.

"The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech . . . .'" *Id.* at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). For "[a]t the heart of our First Amendment jurisprudence lies the concern 'that if the government were able "to impose content-based burdens on speech," it could "effectively drive certain ideas or viewpoints from the marketplace."'" *Mastrovincenzo*, 435 F.3d at 97-98 (quoting *Hobbs v. County of Westchester*, 397 F.3d 133, 148 (2d Cir. 2005) (citation omitted)). The principle inquiry this Court must undertake in determining content neutrality is whether the regulation of speech occurred because of a disagreement with the message it conveys. *Ward*, 491 U.S. at 791 (citing *Clark*, 468 U.S. at 295).

"'[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal*, 137 S. Ct. at 1763 (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also Johnson*, 491 U.S. at 414; *see also McCullen v. Coakley*, 573 U.S. 464, 477 (2014). In *Matal v. Tam*, the lead singer of the music group 'The Slants' sought federal registration of his band's moniker on the principle register. 137 S. Ct. at 1754. The Patent

and Trademark Office (PTO) rejected the request under the *Lanham Act*'s disparagement clause. *Id.* at 1751, 1754 (PTO finding the term 'The Slants' offensive and disparaging due to its derogatory meaning towards those of Asian descent). This Court held that the disparagement clause violated the First Amendment because the clause prohibited speech based on its offensive content. *Id.* at 1763, 1765.

In *Cohen v. California,* the defendant was arrested under the Section 415 of the *California Penal Code* for "willfully disturbing the peace . . . by . . . offensive conduct . . . ." *Cohen*, 403 U.S. at 16 (internal quotation marks omitted) (arrested for wearing a shirt displaying the phrase "Fuck the Draft"). This Court held that a state cannot, "consistently with the First and Fourteenth Amendments," make Cohen's display a criminal act because "the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *Id. at* 25-26.

Here, Milner's speech is unconstitutionally silenced because Squawker's restrictions were implemented due to his speech's potentially offensive nature. Squawker's Terms and Conditions claim to create a "positive user experience" by restricting a vast ocean of speech that has historically been known to offend. (R. at 3.) (i.e. behavior that attacks others on the basis of age, gender, religion, race, etc.). Squawker's notice to Milner explicitly states that his account has "been flagged for violent and/or offensive use of emojis . . . ." (*Id.* at 20, 22.) The district court was correct in noting that Squawker's Terms and Conditions cannot be justified without reference to the content of the regulated speech, for even Squawker's own statement of justification (the notice sent to Milner) openly and plainly admits that Milner's account is being flagged because his speech was offensive. (*Id.* at 20, 22, 10-11.)

The appellate court's reliance on *Ward* and *F.C.C. v. Pacifica* is misplaced. The restrictions in *Ward* tempered audio quality and are not functionally similar to the restrictions in the case at hand. *See* 491 U.S. at 784. A functional equivalent would be the cutting short of an audible performance. Such a restriction would be equally as unconstitutional as the restrictions which Squawker implements. *Pacifica* is inapplicable to the case at hand for the speech with which this Court was concerned was that of blatant obscenity heard by a child. *See F.C.C v. Pacifica Found.*, 438 U.S. 726, 730 (1978). Milner's speech fails to fall into any classification of obscenity. *See Miller v. California*, 413 U.S. 15, 24 (1973). Furthermore, Milner's speech has not been shown to cause a similar harm to the public that would warrant Squawker's Terms and Conditions being upheld as constitutional.

Similar to both *Matal* and *Cohen*, Milner is being punished for the possible "offence" caused by his speech. *See Matal*, 137 S. Ct. at 1751; *see Cohen*, 403 U.S. at 16. Squawker's Terms and Conditions seek to punish the same category of speech that was punished by the disparagement clause of the *Landham Act* and Section 415 of the *California Penal Code*. *See Matal*, 137 S. Ct at 1753; *see Cohen*, 403 U.S. at 16. Therefore, this Court should hold that Squawker's Terms and Conditions are unconstitutional under the First Amendment because they seek to restrict speech on a content-natured basis, particularly on the basis that it offends.

2. Squawker unconstitutionally restricts Milner's politically oriented speech because of the viewpoint it expresses.

"The right to differ is the centerpiece of our First Amendment Freedoms." *Johnson*, 419 U.S. at 401. As such, "'[t]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Matal*, 137 S. Ct. at 1757 (quoting *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993)). When "a unit of government creates a limited public forum for private speech . . . 'viewpoint discrimination'

is forbidden." *Matal*, 137 S. Ct. at 1763. Furthermore, the "'government cannot mandate . . . a feeling of unity in its citizens.'" *Johnson*, 491 U.S. at 401 (citation omitted). To echo the words of Justice Jackson, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 415 (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)). Even when one went so far as to express ill intent towards our flag, a symbol of our great nation's identity, this Court refused to allow the prohibition of expression. *See Johnson*, 491 U.S. at 420 (holding that the burning of the American flag in protest of the Regan Administration cannot be criminalized); *see also Street*, 394 U.S. at 594 (holding that words critical of the flag cannot be criminalized); *see also Spence v. Washington*, 418 U.S. 405, 414 (1974) (holding that taping of a peace-sign to the American flag cannot be criminalized).

Here, Milner's speech was not only restricted for its possibility to cause offence but also because of its negative commentary towards Governor Dunphry. Squawker's original Terms and Conditions did not flag all of a user's posts after a single violation. (R. at 3-4.) It was only once Pluckerberg was contacted by his long-time personal prep school friend, Governor Dunphry, that he implemented a policy to flag all the offending user's content. (*Id.* at 3-4, 24.) Furthermore, the 2018 Terms and Conditions flagging policy only applies to verified accounts – like Governor Dunphry's – as opposed to all Squawker accounts. (*Id.* at 16.) In addition, Pluckerberg only implemented the verification policy in Delmont – Governor Dunphry's riding – and failed to flag any account prior to Milner's. (*Id.* at 16, 22.) Milner, an avid and well-known critique of Delmont's Governor Dunphry is being deliberately targeted because of his views towards Governor Dunphry and his policy choices. Under the guise of stopping fake news accounts (*Id.* at 24.) Governor

Dunphry has weaponized Squawker, continuing to use the platform to espouse his own views while simultaneously silencing those who oppose him.

Similar to *Johnson*, *Street*, and *Spence*, Milner is being punished for speaking his mind on the political issues which he feels plague his community. Similar to the States in *Johnson*, *Street*, and *Spence*, Squawker cannot restrict Milner's speech because of his aggressive views or the way in which he chooses to express them (emojis). The threat to Milner's speech is equally as significant as the threats in *Johnson*, *Street*, and *Spence* because it is also a political commentary. Political debate is of the upmost importance to the development and function of our nation. As noted by this Court in *McIntyre v. Ohio Elections Comm'n*, the "'[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our constitution.'" 514 U.S. 334, 346 (1995). Therefore, this Court should hold that Squawkers Terms and Conditions are not content neutral because they amount to viewpoint discrimination in the ever-important political realm.

3. Squawkers Terms and Conditions do not survive a strict scrutiny analysis.

While the First Amendment does presume content-based restriction to be unconstitutional, this is not to say that content-based restriction is entirely invalid. However, for a content-based restriction to pass constitutional muster it must satisfy a strict scrutiny analysis. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Squawker's Terms and Conditions drastically fail to do so.

To survive a strict scrutiny analysis, the regulation must be justified by a compelling government interest and the regulation must be narrowly drawn to serve that interest. *Id.* at 799. This "is a demanding standard", so much so that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Id.* The most common forms of content regulation

that survive strict scrutiny are those which target speech that causes breaches of the peace, *see Feiner v. New York*, 340 U.S. 315, 320 (1951) (holding speech that evidently incited violence was unprotected by the First Amendment), and those which protect vulnerable audience members, namely children. *See Pacifica*, 438 U.S. 726, 732 (1978) (holding obscene speech in the context of daytime radio broadcasting to be unprotected by the First Amendment).

Here, unlike the speech in *Pacifica*, Milner's speech fails to satisfy the definition of speech that is obscene, nor does it exist in the unique context of daytime radio broadcasting. *See Pacifica*, 438 U.S. at 731-32. Furthermore, unlike *Feiner*, the record is silent on whether Milner's speech has incited any violent actions by members of the public. *See Feiner*, 340 U.S. at 317. Squawker's Terms and Conditions ultimately fail to satisfy the demanding strict scrutiny analysis that was applied in *Pacifica* and *Feiner*. As a result, this Court should hold Squawker's Terms and Conditions to be unconstitutional.

B. Squawker's Terms and Conditions are unconstitutional as they are not narrowly tailored to serve a significant government interest and fail to leave open ample channels of communication.

Even if this court finds Squawker's Terms and Conditions do not restrict speech on the basis of its content, they are nevertheless unconstitutional. In *Ward*, this Court recognized a two-step test for determining if a content-neutral restriction of speech is constitutionally valid. 491 U.S. at 789. The regulation must (1) be narrowly tailored to serve a substantial government interest and (2) must not unreasonably limit alternative avenues of expression. *Id.* Unlike an analysis of content-based regulation, intermediate scrutiny is applied to the analysis of content-neutral regulation. *Mastrovincenzo*, 435 F.3d at 98.

1. Squawker's Terms and Conditions are not narrowly tailored to serve a substantial government interest because they burden more speech than is necessary.

When determining if a regulation has been adequately tailored, this Court need not find that the restriction is the "least intrusive means" of achieving a substantial government interest. *Ward*, 491 U.S. at 797. However, this does not mean that such a restriction can be unreasonable. "[A] time, place, or manner regulation [cannot] burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799. As this Court noted in *McCullen v. Coakley*, "silencing the speech is sometimes the path of least resistance." 573 U.S. at 486. The narrowly tailored (first) prong of the *Ward* test has been put in place to prevent one from too readily "sacrifice[ing] speech for efficiency." *Id.* (quoting *Riley v. National Federation of Blind of N. C. Inc.*, 487 U.S. 781, 795 (1988)).

In *Ward*, this Court found no First Amendment violation as the government had a significant interest in reducing unwelcomed noise. *See Ward*, 491 U.S. at 796. Furthermore, this Court held that the sound regulation was not overburdensome because the city's sound technician gives ample autonomy to the bandshell user with respect to the sound mix. *See Id.* at 802. In *McCullen*, an anti-abortion advocate challenged a state statute on First Amendment grounds as it prevented her from standing on a public way within thirty-five feet of an entrance of an abortion clinic. *See McCullen*, 573 U.S. at 469. This Court found the statute unconstitutional as the buffer zones created by the statute burdened substantially more speech than necessary to achieve the state's interests, citing numerous alternative and less burdensome measures. *See Id.* at 490, 494 (state interests being safety, ease of access to the clinics, and preventing congestion).

Here, Squawker argues that its Terms and Conditions serve two interests: (1) maintaining a respectful tone for its millions of users and (2) ensuring the ability of other users to post. (R. at 12.) Even if one finds Squawker's interests to be substantial, their regulation hopelessly fails to

pass muster under this Court's test in *Ward*. The means with which they attempt to fuel their interests burden substantially more speech than is ultimately necessary. For violating Squawker's Terms and Conditions, Milner has had all the posts associated with his account blocked, regardless of their content. (*Id.* at 16.) Squawker's flagging policy indiscriminately censors Milner's speech, even speech that falls in line with their interests. Unlike the city in *Ward*, Squawker engages in precisely the kind of activity that the first prong of the *Ward* test was created to prevent. *See McCullen*, 573 U.S. at 486. For the sake of efficiency Squawker engages in a lazy and careless method of censorship that, similar to *McCullen*, burdens substantially more speech that is necessary to serve their interests. *See Id.* at 490. Therefore, this Court should find Squawker's Terms and Conditions unconstitutional under the First Amendment.

2. Squawker's Terms and Conditions fail to leave open alternative channels of communication because they ban a manner and type of expression.

A picture paints a thousand words. A cliché to be sure but nevertheless true. Milner's speech stands as a unique form of expression that seeks to communicate ideas through the use of evolving imagery. By restricting his ability to post successive emojis, Squawker has significantly maimed the power and effect of Milner's unique form of speech, leaving him with no alternate channel of communication.

In *Ward*, this Court held that the second prong of the content-neutrality test was satisfied because the regulation did not seek to ban any particular manner or type of expression. *See Ward*, 491 U.S. at 802. Furthermore, the record provided no evidence to show that the city's limitations on volume lead to an inadequacy in communication. *See Ward*, 491 U.S. at 802.

Here, Squawker's Terms and Conditions once again directly conflict with this Court's test in *Ward*. Unlike *Ward*, Squawker's flagging policy has banned the manner and type of expression used by Milner. Because of the spam restriction he can no longer express himself unimpeded

through his chosen medium and manner of successive evolving emojis. The sound in *Ward* still largely maintained its powerful communicative effect, its expressive content left largely unrestricted. *Ward* would be much more similar to the case at hand if its regulation forced a musical performance to stop short of its conclusion, for this is the effect that Squawker's flagging has had on Milner's speech.

In his testimony, Dr. Amir Hakami, noted that "emojis and their collection… communicat[e] a message that is impossible to convey in the same manner as text alone." (R. at 12.) The District Court correctly noted that Milner's use of emojis has a unique emotive force and as a result Squawker's regulation of Milner's speech effectuates the loss of an entire medium of expression. (*Id.*) Furthermore, unlike *Ward*, the Record also speaks directly to the fact that Milner is severely impaired in his ability to communicate. *See Ward*, 491 U.S. at 802. Prior to his flagging Milner had over ten thousand followers and averaged seven thousand views per squeak. (R. at 19.) Now Milner only has two thousand followers, averaging fifty views per squeak, a drastic and damaging decrease in viewership. (*Id.* at 19-20.) Because Squawker's Terms and Conditions ban an entire manner of expression, this Court should find Squawker's Terms and Conditions to be unconstitutional.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Eighteenth Circuit's decision and find that Squawker's conduct violates the First and Fourteenth Amendments.

CERTIFICATION

This team certifies (i) the work product contained in all copies of this brief is in fact the work product of the team members; (ii) this team has complied fully with its school's governing honor code; and (iii) this team has complied with all Rules of the Competition.