No. 17-874

IN THE
SUPREME COURT OF THE UNITED STATES

AVERY MILNER,

Petitioner

v.

MACKENZIE PLUCKERBERG,

Respondent.

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

BRIEF FOR PETITIONER

Team 4
Counsel for Petitioner

January 31, 2020

QUESTIONS PRESENTED

1. Whether a social media company engaged in state action by hosting and controlling the content allowed on a public forum, making it subject to constitutional constraints.

2. Whether a social media website's Terms and Conditions banning symbols and words deemed threatening to others based on age and other personal factors constitutes a valid time, place, and manner restriction on speech.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The district court's opinion is unreported but reproduced in the Record at 1. The Eighteenth Circuit's opinion is unreported but reproduced in the Record at 25.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eighteenth Circuit issued its opinion, and a petition for a writ of certiorari was timely filed and granted. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant constitutional provisions are reproduced in the appendix.

INTRODUCTION

Social media platforms are vital avenues for political speech, public debate, and free expression. The Internet's "vast democratic forums" serve as today's town squares and city parks for cultivating the marketplace of ideas. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997). The public forum doctrine requires the state and state actors to safeguard the exercise of unrestricted, uncensored speech in certain spaces. Increasingly, lower courts have recognized the outgrowth of virtual public fora, from the president's Twitter profile to a sheriff department's announcement page on Facebook. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237-38 (2d Cir. 2019); *Robinson v. Hunt Cty., Texas*, 921 F.3d 440, 447 (5th Cir. 2019). Because of the Internet's ever-growing and dynamic character, "the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

The right to free speech is not absolute, and this Court has upheld time, place, and manner restrictions in limited circumstances. These restrictions must be content-neutral and

narrowly tailored to achieve a legitimate purpose, and leave "ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Squawker, a social media company, broadly restricts speech based on its content. The company's policies amount to viewpoint discrimination and chill free expression in a public forum.

STATEMENT OF THE CASE

Petitioner Avery Milner brought this action against Respondent Mackenzie Pluckerberg, in his official capacity as chief executive officer of Squawker, for violating Mr. Milner's First Amendment right to free speech. Squawker is a popular social media platform created in 2013 by Mr. Pluckerberg. R. at 21. Mr. Milner, a Delmont resident, is a freelance journalist who gained a large following on the platform. R. at 19. Users of Squawker, called "squeakers," create profile pages and publish short posts, called "squeaks," which appear in their followers' "feeds." R. at 15. Other users may respond to these posts with likes, dislikes, or comments, which are visible to anyone viewing the original squeak. *Id*. Squawker has grown into a crucial news source and serves as a communication platform for government officials. R. at 16. William Dunphry, the governor of Delmont and a longtime friend of Mr. Pluckerberg, uses Squawker to communicate with constituents, announce policies, and solicit feedback. R. at 24. As the parties have stipulated, Governor Dunphry's Squawker page is a public forum. R. at 17.

Before creating an account, each user must agree to a standard-form Terms and Conditions notice. R. at 15. When agreeing to these terms, squeakers are told that Squawker will "flag" any impermissible squeaks and comments. *Id*. Squawker flags an offending post by placing a black box with a white skull and crossbones over it. R. at 4. Other users must click on the icon to view the post. *Id*.

Noting a rise in individuals posing as government officials on fake Squawker accounts, Governor Dunphry approached Mr. Pluckerberg in February 2018. R. at 24. He suggested that Squawker adopt a new feature to verify the accounts of Delmont government officials. *Id*. Mr. Pluckerberg approved the plan and promised to personally supervise the verification process for the first year. R. at 22. The feature launched in March 2018, and Squawker verified Governor Dunphry's account, placing an icon of Delmont's flag on his profile page. R. at 3.

With the verification process came updated Terms and Conditions. Under these restrictions, a user who publishes a violating squeak on a verified page receives a greater sanction whereby, in addition to blacking out the offending squeak, the site similarly flags all of the user's existing squeaks. App'x at 24. Squawker also flags all future content created by the offending user. *Id*. A squeaker can only remove the flags by watching a thirty-minute training video and passing an online test. *Id*. Completion of this program would lead to the unflagging of all squeaks except for the original violation. *Id*.

Mr. Milner, an avid squeaker, used the site to engage with and criticize his government and promote age limits for public office. R. at 4. Before July 2018, he had over 10,000 followers and averaged 7,000 views per squeak. *Id*. Mr. Milner ran into trouble with Squawker on July 26, 2018, after he responded to the governor's post linking to a bill prohibiting vehicles from turning right at red lights in Delmont. R. at 5. In response, Mr. Milner posted a string of four squeaks over the course of twenty-nine seconds. *Id*. The first was the text, "We gotta get rid of this guy." That squeak was followed by three separate emojis: an old man, a syringe, and a coffin. R. at 5-6. According to Mr. Pluckerberg, who was monitoring Governor Dunphry's page, users complained that the rapid string of emojis had rendered the platform "unusable," and the comments received more than 1,000 dislikes and 2,000 reports to Mr. Pluckerberg. R. at 6. Mr.

Pluckerberg flagged Mr. Milner's page and squeaks per the Terms and Conditions, and placed a skull and crossbones next to Mr. Milner's name on the site. *Id*. Mr. Pluckerberg has stated that he had never flagged a user for excessive posting prior to this incident. R. at 22.

Squawker notified Mr. Milner of the flagging on July 27, 2018, and told him that he had to watch the training video and complete the test to have the flagging removed. R. at 6. This notification also told Mr. Milner that, "by watching this video and completing the quiz, you agree that you have violated our Terms and Conditions and you reaffirm that you will abide by all Terms and Conditions." *Id*. Mr. Milner refused to watch the video and saw that, after the flagging penalties, he averaged only fifty views per squeak and his number of followers had fallen to 2,000. *Id*. This decline led to diminished opportunities for freelance journalism and a loss of income. *Id*.

The district court granted Mr. Milner's motion for summary judgment. On appeal, the circuit court reversed the judgment of the district court in favor of Mr. Pluckerberg.

SUMMARY OF ARGUMENT

The Eighteenth Circuit erred in holding that Squawker's hosting and regulation of a public forum did not constitute state action. It also erred in finding Squawker's Terms and Conditions to be reasonable restrictions on the time, place, and manner of speech. This Court should reverse.

Mr. Pluckerberg engaged in state action by flagging petitioner's account on a public forum, blotting out his posts and diminishing the reach of his message. The remedial action can be attributed to the State of Delmont under the public function test, the entwinement test, or the symbiotic relationship test. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*,

531 U.S. 288, 293 (2001). State actors such as Mr. Pluckerberg, operating through Squawker, are subject to constitutional constraints.

This Court has established a "bedrock First Amendment principle": the government may not ban speech simply because of offensive content. *Matal v. Tam,* 137 S. Ct. 1744, 1751 (2017). While cases such as *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1987) have granted narrow exceptions to free speech, including "fighting words … which inflict injury or tend to incite an immediate breach of the peace," this exception does not permit state actors to ban all offensive speech.

Constitutional regulation of the time, place, and manner of speech must be content-neutral and narrowly tailored, and it must "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. The circuit court erred in finding that Squawker's restrictions passed the test.

STANDARD OF REVIEW

The questions presented are reviewable *de novo*. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

ARGUMENT

The Free Speech Clause of the First Amendment prohibits governmental abridgment of speech and applies to the states through the Fourteenth Amendment. *Lovell v. City of Griffin, Ga*., 303 U.S. 444, 450 (1938). Its ambit does not reach private actors in non-public spaces. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Yet Squawker's status as a private social media company does not end the inquiry into whether it must uphold First Amendment protections. To separate conduct subject to constitutional scrutiny from conduct that is exempt, the Court applies the state-action doctrine, which allows private entities to be

considered state actors under certain circumstances. *Brentwood*, 531 U.S. at 295. Which arenas are constitutionally protected and which are completely private "cannot be a simple line between States and people operating outside formally governmental organizations." *Id*.

Mr. Pluckerberg joined with state officials of Delmont to create verified government profile pages. *See* R. at 17. Social media platforms count among the "vast democratic forums of the Internet" and provide some of the most important spaces for exchanging ideas *Packingham*, 137 S. Ct. at 1735. Governor Dunphry, for instance, on a daily basis used his verified page as a kind of town hall meeting room to engage with constituents, announce major legislation, and solicit feedback. R. at 24. Websites such as Squawker allow an average citizen surfing the platform — a "squeaker" — to "become a town crier with a voice that resonates farther than it could from any soapbox." *Packingham*, 137 S. Ct. at 1737 (quoting *Reno*, 521 U.S. at 870). By overseeing a public forum in tandem with the Delmont governor and controlling the content allowed therein, Mr. Pluckerberg and Squawker engaged in state action, triggering First Amendment protections for squeakers such as petitioner.

I. Pluckerberg's censorship of users on a public forum is equivalent to state action and subject to First Amendment constraints.

Mr. Pluckerberg, through Squawker, engaged in state action by flagging a user on a public platform vital for citizen engagement. While the State of Delmont does not own Squawker, ownership is not dispositive for First Amendment purposes. *See, e.g., Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547-52 (1975). What matters is government control, however temporary or "nonobvious" that control may be. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

A private entity that provides a forum for speech is typically not bound by the First Amendment, unless its conduct amounts to state action. *Manhattan*, 139 S. Ct. at 1930.

Determining whether a company should be deemed a state actor requires combing through the facts and circumstances of the case, because government involvement in ostensibly private conduct may not be immediately apparent. *See, e.g., Lugar v. Edmondson Oil Co., Inc*. 457 U.S. 922, 939 (1982). If there is a sufficient connection between the challenged act of a private entity and the government, then the act "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 351 (1974). The Court has developed various standards to differentiate state acts from private acts.

A. Pluckerberg's oversight of the page is sufficiently associated with the government to be considered state action under the public function test, the entwinement test, or the symbiotic relationship test.

The Court has articulated various factors and tests to determine whether private action can be attributed to the state: (1) the state coercion test, (2) the joint activity test, (3) the public function test, (4) the entwinement test, and (5) the symbiotic relationship test. *Brentwood*, 531 U.S. at 293, 296. The assorted tests notwithstanding, whether private conduct can be fairly attributed to the state "is a matter of normative judgment, and the criteria lack rigid simplicity." *Id*. at 295. Satisfying any one of the five tests may be sufficient to find state action. *See id*. at 303; *see also Tsao v. Desert Palace*, Inc., 698 F.3d 1128, 1139-40 (9th Cir. 2012). Under three of the tests, Mr. Pluckerberg's actions constitute state action. First, he performed a public function by overseeing and controlling a public forum. Second, his actions through Squawker were entwined with the state. Third, Mr. Pluckerberg and Squawker had a symbiotic relationship with Governor Dunphry and Delmont.

The public function test has historically asked whether the action was "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353. But the Court more recently suggested that old frameworks for analyzing First Amendment issues may not apply squarely to

the Internet. *See Packingham*, 137 S. Ct. at 1736. The power of cyberspace is "so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Id*.

Mr. Pluckerberg performed a public function by hosting and regulating Governor Dunphry's Squawker page — a public forum through which constituents can make their voices heard and stay abreast of legislation and government action affecting their lives. R. at 24. When users complained to Governor Dunphry about imposter accounts, he turned to his old friend, Mr. Pluckerberg, for help. *Id*. The governor's suggested cure, a verification process for officials like himself, was implemented on Squawker a month after he raised the idea with Mr. Pluckerberg. R. at 22.

The verification process and special Terms and Conditions that followed were intertwined with the government. Unlike the "verification badges" of Facebook, Twitter, and Instagram, which are signified through neutral blue checkmarks, Squawker marked verified government profiles, including Governor Dunphry's, with the official flag of Delmont. R. at 16. Mr. Pluckerberg himself personally approved and *monitored* all such government accounts after he introduced the feature. R. at 22.

Moreover, the revised Terms and Conditions — while not apparently Governor Dunphry's idea — established heightened repercussions for users who violated the policy on a verified government page. R. at 15-16. A post on a private citizen's account that violates the Terms and Conditions would simply be blacked out, requiring other squeakers to affirmatively opt-in by clicking on a skull and crossbones to view the offending post. R. at 4. Under the revised Terms and Conditions, when such a squeak is posted on a government official's account, not only would the offending comment be censored, but all the squeaker's past and future posts

would also be blacked out. R. at 15-16. Squeakers were required to agree to the adhesion contract to continue using the platform. *Id*. Mr. Pluckerberg's conduct embodies what the Court has described as "so entwined with governmental policies or so impregnated with a governmental character" it may then "become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

The relationship between Governor Dunphry, as the public forum's creator, and Mr. Pluckerberg, as the public forum's moderator, was symbiotic in nature. The governor said he created a Squawker account on "this awesome social media platform" to expand his reach to constituents, and the account has become an important channel of democratic engagement. R. at 24. For instance, Governor Dunphry has integrated his Squawker page with the process of announcing and revising legislation. *See id*. The page has served as the first point of distribution for new bills and as a barometer for public opinion, as the governor monitors his followers' "likes" and "dislikes" to gauge their reaction to his words and deeds. R. at 9. The verification rules helped Governor Dunphry by elevating his account over those of imposters and average users. *See* R. at 16. The new flagging policy also muted and removed from the governor's public forum squeakers like petitioner who were deemed to be rulebreakers. *Id*. Simply put, the governor benefited from the public forum generally and from the verification rules in particular. If the government "knowingly accepts the benefits derived from unconstitutional behavior," then the behavior can be treated as state action. *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).

Mr. Pluckerberg likewise benefited from the platform's relationship with the head of Delmont. The presence of political figures on the website arguably attracted new users, lent credence to the platform, and established Squawker as a "go to" for current events, given that

officials like Governor Dunphry personally broke news on the site, without going through the filter of the press. *See id*. at 21-22; *cf*. *Knight*, 928 F.3d at 231-32. Following petitioner's comments that prompted Mr. Pluckerberg's censorship, the governor claimed he received "over two thousand reports from constituents who were deeply offended" and who stopped using their accounts. R. at 24. Those reports also went to Mr. Pluckerberg, who used them as the basis for issuing the site's first-ever flag on Mr. Milner for excessive posting. R. at 22. An exodus of Governor Dunphry's followers from the platform, *id*., hurt both his political reach and Mr. Pluckerberg's business.

B. The use of private property in cyberspace for a public forum may complicate the traditional state-action doctrine, but the Court should nevertheless err on the side of protecting free speech.

The court below incorrectly held that free-speech protections for petitioner and other squeakers were unavailable because of a "fundamental" problem: Squawker's status as a private company. R. at 32. But, as this Court has repeatedly found, private ownership of a place does not settle the matter. In *Marsh v. State of Ala*., the Court rejected a company town's argument that it could bar a Jehovah's Witness from pamphleting because the corporation held legal title to the entire town. 326 U.S. 501, 505 (1946). "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id*. at 506.

Similarly, Mr. Pluckerberg's ownership over a segment of the public square, which Squawker has made accessible to all, does not render him immune from First Amendment scrutiny. The principles of free speech apply to "metaphysical" or intangible fora just as they do to historic parks and civic places. *Rosenberger v. Rector and Visitors of Univ. of Va*., 515 U.S. 819, 830 (1995); *see also Reno*, 521 U.S. at 870 (holding that "our cases provide no basis for

qualifying the level of First Amendment scrutiny that should be applied" to the Internet). When in doubt, the rights of the people to speak freely and practice religion freely take precedence over the rights of property owners to exclude. *Marsh*, 326 U.S. at 509.

A flurry of recent cases held that public officials who "blocked" critics from their public social media pages violated the First Amendment's prohibition on viewpoint discrimination. *See, e.g., Knight*, 928 F.3d at 237-38 (holding that the president could not exclude Twitter users critical of his policies from following or commenting on his official page); *Davison v. Randall*, 912 F.3d 666, 679-80 (4th Cir. 2019) (finding that a county supervisor engaged in state action by "banning" a boisterous voter from her public Facebook page); *Robinson*, 921 F.3d at 447 (holding that a sheriff department's policy of deleting "inappropriate" Facebook comments and banning followers of the department's page was unconstitutional).

Granted, other courts have dismissed causes of action against social media companies for limiting speech. *See, e.g., Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018). Merely providing a platform to the public does not transform a private entity into a state actor. The court in *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30, 40-41 (D.D.C. 2019), for instance, held that conservative activists who accused Google, Facebook, Twitter, and Apple of conspiring to suppress their speech failed to allege a nexus between the companies and a state function. It is also true that the Court recently held that a private company operating a public access channel on a cable system did not constitute state action, because such a function had "not traditionally and exclusively been performed by government." *Manhattan*, 139 S. Ct. at 1929. However, none of those cases involved a public forum such as the one Squawker hosted and moderated for Governor Dunphry.

R. at 17. And the Court cautioned that its holding in *Manhattan* should be read narrowly, bound only to the facts case before it. 139 S. Ct. at 1934.

Free speech in public fora is essential to our democracy, and "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161, 163 (1939). The Internet and social media have increasingly displaced streets and parks as the backdrop for the exchange of ideas. *Denver Area Educ. Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 803 (1996) (Kennedy, J., concurring in part). Given the power and prominence of web platforms, "the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." *Packingham*, 137 S. Ct. at 1736.

Affirming the decision below would allow Squawker to retain all the power and benefits associated with hosting a public forum while "employing its editorial control," shielded from constitutional constraints. R. at 32. The Court should err on the side of more speech, not less, and find that Squawker's oversight and regulation of a public form constituted state action subject to First Amendment constraints.

II. Squawker's Terms and Conditions are not a valid, time, place, and manner restriction on speech in a public forum.

As the Second Circuit acknowledged in *Knight*, 928 F.3d at 238, political speech on social media fora is protected by the First Amendment. Time, place, and manner restrictions on speech must be constitutionally limited. The *Ward* test asserts three prongs for determining validity. These restrictions must be content neutral, narrowly tailored to serve the "content-neutral interests" of the state, and "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. The Eighteenth Circuit's holding is incorrect because

Squawker's Terms and Conditions 1) were not content neutral, 2) were not narrowly tailored, and 3) did not leave sufficient alternative channels open for this type of expression.

A. Squawker's goals, terms, and enforcement procedures cannot be justified without reference to the content of the speech and therefore constitute viewpoint discrimination.

Ward's first prong requires content-neutrality. *Id*. This means that speech restrictions "may not be based upon either the content or subject matter of speech." *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980). Put differently, content-neutral regulations are those that can be justified "without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984). Laws which "by their very terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994).

Squawker fails to meet this prong in its 1) purpose for restricting, 2) violent content restriction, 3) anti-spamming rule, and 4) differential treatment of verified pages. Squawker's Terms and Conditions do not meet the high bar of content neutrality. The policy is geared toward "combating 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. By the letter, Squawker disfavors certain messages about certain people, and its goal cannot be justified without reference to the disfavored and offensive messages. Banning content due to offensiveness violates content neutrality because "giving offense is a viewpoint." *Matal*, 137 S. Ct. at 1749.

Similarly, Squawker's prohibition of "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" is content-based. R. at 3. Squawker only penalizes a particular variety of disfavored threats and, in so doing, "distinguish[es] disfavored speech from favored speech" based on content. *Turner*, 512 U.S. at 643. The ban on "violent or threatening" emojis likewise targets a particular type of message communicated through symbols. R. at 3.

This term closely mirrors the ordinance that this Court struck down in *R.A.V. v. Saint Paul*, 505 U.S. 377, 380 (1992), which banned the placing of symbols on private property "which one knows … arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The Court noted that the law allowed speech against "anti-Catholic bigots," without allowing the other side to ridicule "papists." *Id*. at 391-92. Because that law would allow "fighting words" about some topics while imposing "special prohibitions on those who express views on disfavored subjects," this Court deemed it unconstitutional. *Id*. at 391. Squawker's Terms and Conditions are similar in their prohibition of speech deemed offensive based on age, race, and other factors.

Squawker's Terms and Conditions are far more discriminatory than the Lanham Act disparagement clause, which was struck down in *Matal,* 137 S. Ct. at 1765. That statute banned the registration of trademarks that could "disparage … or bring … into contemp[t] or disrepute" anybody "living or dead" and proved offensive to a "substantial percentage of the members of any group." *Id.* at 1763. Unlike that law, which applied equally to all groups, Squawker's Terms and Conditions show greater animosity toward comments that are directed toward the "historically marginalized." R. at 15. Under *Matal*, where "giving offense is a viewpoint," this Court cannot uphold the Eighteenth Circuit's claim that the Terms and Conditions are content-neutral. 137 S. Ct. at 1763.

Lower courts have deemed similar online restrictions to be unconstitutionally content-based. For example, the Fifth Circuit objected to a policy on the Hunt County Sheriff's Office Facebook page, which stated that "ANY post filled with foul language, hate speech of all types and comments that are considered inappropriate will be removed and the user banned." *Robinson*, 921 F.3d at 440. This policy amounted to "censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate" and was therefore viewpoint discriminatory. *Id*. at 447. If a broad ban on hate speech and inappropriateness constitutes viewpoint discrimination, then so too does Squawker's policy of filtering content based on personal identifiers.

The regulations regarding the number of squeaks that a user may post per minute may appear content-neutral. But, as Mr. Milner points out, he has posted more than four squeaks within thirty seconds in the past without being flagged. R. at 20. In fact, Mr. Pluckerberg had never flagged an account for posting too many squeaks prior to this incident. R. at 22. Squawker enjoys broad discretion in flagging determinations, which it used for content-motivated flagging. While the spamming policy may appear content-neutral, its enforcement is not.

Under *Yick Wo v. Hopkins,* 118 U.S. 356, 373 (1886), facially equal laws that are unequally administered "so as practically to make unjust and illegal discriminations between persons" are prohibited by the Constitution. While *Yick Wo* concerned Equal Protection, the principle applies: unequal enforcement is unconstitutional. Squawker has used this restriction to put a content-neutral face on a content-based policy.

The additional censorship for policy violations on official pages is also viewpoint discrimination. Whereas a flagged squeak on an ordinary Squawker page would lead only to the flagging of that particular squeak, posting an offending squeak on a verified government account

leads to the covering of that squeak, all future squeaks, and the squeaker's entire profile. R. at 4. This differential treatment disfavors political speech and creates disproportionate, content-based punishment for certain fora and, with it, different types of speech.

The fact that Squawker blacked out the squeaks instead of taking them down does not excuse this viewpoint discrimination, as it constitutes preferential treatment for certain comments. The flagging had a significant effect on Mr. Milner's audience, leading his number of followers to drop from more than 10,000 to 2,000 and his average views per squeak to fall from 7,000 to fifty. R. at 4, 6. By diminishing his viewership, Squawker's actions had a similar effect to de-amplification of verbal speech. *Ward* permitted only content-neutral amplification guidelines. 491 U.S. at 792. Also, this Court has struck down a discriminatory volume regulation policy that denied loud speakers to certain people since speakers were "indispensable instruments of effective public speech." *Saia v. People of State of New York*, 334 U.S. 558, 561 (1948). Social media platforms likewise amplify people's voices, and the government can no sooner favor certain viewpoints over others than blatantly silence them. *See Sorrell v. IMS Health Inc.,* 564 U.S. 552, 556 (2011). Thus, while Mr. Pluckerberg did not entirely remove Mr. Milner's squeaks, he nevertheless censored them.

B. The Terms and Conditions are not narrowly tailored because they burden significantly more expression than necessary to achieve their purpose.

The *Ward* test also requires that time, place, and manner restrictions be "narrowly tailored to serve a substantial government interest." 491 U.S. at 791. Under *Ward,* a restriction is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id*. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Likewise, a restriction that "burdens substantially more speech than is necessary" is

not narrowly tailored. *Id*. at 807 (Marshall, J., dissenting). Squawker's terms do not meet this standard.

Squawker's stated purpose for the Terms and Conditions is to "combat[] abuse motivated by hatred, prejudice, or intolerance," especially as it relates to those "who have been historically marginalized." R. at 3. Squawker also seeks to promote "a positive user experience that allows [its] users to engage authentically with each other." R. at 3. Granted, these terms are narrower than the Lanham Act's disparagement clause, which applied to trademarks that "[disparage] any person, group, or institution." *Matal*, 137 S. Ct. at 1765. Nevertheless, the Terms and Conditions are overbroad, encompassing any promotion of violence, however slight, and any violent or threatening emoji, however facetious. R. at 3. Furthermore, the goal of promoting authenticity is not, per *Ward*, a "substantial government interest." If anything, a policy that silences certain views actually hinders authenticity, and therefore this restriction does not promote the government interest and cannot be deemed content-neutral. These terms are unconstitutionally broad.

C. The Terms and Conditions provide no adequate alternatives for Mr. Milner to express his messages and therefore fail *Ward's* third prong.

Ward requires that valid time, place, and manner restrictions do not "unreasonably limit" other channels of communication. 491 U.S. at 789 (quoting *United States v. O'Brien,* 391 U.S. 367, 377 (1968)). Squawker has listed several possible workarounds through which Mr. Milner might have been able to retain his right of free speech. These include creating a new account, viewing the page while being signed out of Squawker (although, in that case, he could not post himself), or watching a training video and taking a test. R. at 30-31. The first of these options, as the district court noted, would result in a loss of followers, and the second would free Mr. Milner to view comments but not to speak himself. Therefore, Squawker provides no adequate

"alternative [channel] for communication" and fails to grant him the right of speech that the First Amendment promises. *Ward*, 491 U.S. at 791. The final option is unfairly burdensome and Squaker's attempt to enforce it against those who have violated its content-based Terms and Conditions constitutes a punishment for the exercise of free speech. Most importantly, none of the options will result in either the un-flagging of Mr. Milner's original comments, or the reinstatement of his First Amendment right to post similar content in the future. Thus, while these workarounds may allow Mr. Milner to return to Squawker or even to publish certain squeaks, none of them provides the "alternative channels for communication of the information" that this Court required in *Ward*, 491 U.S. at 791.

The Second Circuit has refused to uphold free speech denials with similar workarounds. *Knight*, 928 F.3d 238. The panel noted that blocked users could create new accounts or even take screenshots of the blocking user's posts and republish the screenshots with their own commentary. *Id*. at 233. But the court held these alternative routes of speech unconstitutionally burdensome. *Id*. at 238. The Second Circuit relied in part on *Sorrell*, 564 U.S. at 556, which held that the government "may no more silence unwanted speech by burdening its utterance than by censoring its content." Squawker, therefore, acting as the state, has no greater right to make speech burdensome based on content than it does to censor speech entirely.

The notification that Mr. Milner received when he was flagged further intruded upon his First Amendment rights, as the notification stated: "by watching this video and completing the quiz, you agree that you have violated our Terms and Conditions and you reaffirm that you will abide by all Terms and Conditions." R. at 6. In requiring Mr. Milner to agree to this statement to have his publishing platform restored, Squawker is effectively forcing an utterance, which is unconstitutional as well. Under *W. Virginia State Board of Educ. v. Barnette,* 319 U.S. 624, 633

(1943), "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." Squawker ran afoul of the Constitution by attempting to silence Mr. Milner's viewpoint, then further intruded upon his First Amendment rights by requiring him to make a statement he did not want to make.

The emoji restriction also fails to leave adequate alternatives. Mr. Milner frequently used this method to convey his ideas, and he calls emojis his "signature move." R. at 20. As this Court has long recognized, "much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." *Cohen v. California*, 403 U.S. 15, 26 (1971). Thus, to silence a means of expression is to silence a message. The testimony of computer scientist Dr. Amir Hakami further indicates that emojis have formed "their own media, communicating a message that is impossible to convey in the same manner as in text alone." R. at 12. As the district court correctly noted, the restrictions of this medium echo the concerns expressed in *Bery v. City of New York,* 97 F.3d 689, 697 (2d Cir. 1996) that "an entire medium of expression is being lost." R. at 12. In short, these Terms and Conditions are neither content neutral nor narrowly tailored, and they do not leave sufficient alternative avenues for communication.

CONCLUSION

For the foregoing reasons, Mr. Milner respectfully asks this Court to reverse the decision of the Eighteenth Circuit and find that the Terms and Conditions enforced by Squawker, a state actor, violate the Free Speech Clause of the First Amendment.

APPENDIX

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Squawker's Terms and Conditions

Here at Squawker, we are committed to combating abuse motivated by hatred, prejudice or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized. For this reason, 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, we prohibit the use of emojis [emoticons] in a violent or threatening manner. We aim for a positive user experience that allows our users to engage authentically with each other and build communities within our platform therefore spamming of any nature is not prohibited for those participating in posting and commenting on the platform. A Squeaker may not participate in the automatic or manually facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies to the effect the platform is unusable by others. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other.

Squawker's Supplemental Terms and Conditions

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 a 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. To have this flagging removed, a Squeaker must complete a thirty-minute training video regarding the Terms and Conditions of the community and complete an online quiz. Two failed attempts will result in a ninety-day hold. The offending comment will remain flagged, although the user may still delete it.

CERTIFICATE

As required by Official Rule III(C)(3), Counsel of Record certifies the following:

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

s/_____

Team Number 4

Counsel for Petitioner