SEIGENTHALER-SUTHERLAND CUP NATIONAL
FIRST AMENDMENT MOOT COURT COMPETITION

No. 17-874

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2019

AVERY MILNER,
Petitioner,

v.

MACKENZIE PLUCKERBERG,
Respondent.

Brief of Respondent

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

---

Team 5
Counsel for Respondent

QUESTIONS PRESENTED

In 2013, CEO Mackenzie Pluckerberg launched the popular social media platform, Squawker, as a source of news information and a place where users could interact with each other through brief messages. To ensure wide accessibility and effective services, Squawker developed user policies that set outer limits on users' speech activities on the platform. Accordingly, users agree not to use emojis in a violent or threatening manner, or to spam four or more messages within a thirty second period. Squawker, in turn, enforces those policies by hiding the content of offending posts to nonconsenting viewers and, with respect to violations on elected officials' account pages, temporarily blocking the offending user's profile and future posts. Petitioner, Aaron Milner, challenges these policies on First Amendment grounds.

The questions on appeal are:

1. Should a social network company be treated as a government actor because it establishes policies regarding user speech?

2. Assuming that Squawker is a government actor, are its user policies content-neutral time, place, or manner restrictions, in accordance with the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

CASES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

The Eighteenth Circuit issued its opinion and entered judgement on November 15, 2019. A petition was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254 (1) (2018).

STATEMENT OF THE CASE

The founding states adopted the Bill of Rights to shield individual freedoms from government infringement, including the freedom of speech. Here, Avery Milner, a freelance journalist, attempts to repurpose those protections in order to compel Squawker, a social media platform, to change its user policies so he can use the platform as he pleases.

Milner agreed to Squawker's policies when he created his account, and he subsequently violated them by spamming an elected official's account. Squawker responded by blocking Milner's posts from nonconsenting viewers. This block was removable by watching a training video and passing a quiz on Squawker's user policies.

Milner, however, did not attempt to remove the block himself—he asked the court to do it for him. Arguing that his ability to interact with elected officials on Squawker is constitutionally protected, Milner claims that Squawker's terms have violated his free speech rights. The problem with that argument is that Squawker is a private actor and, therefore, is not subject to First Amendment restrictions, any more than an individual is in her own home. And even if the First Amendment functions in this way, Squawker's terms do not censor its users' protected speech. Squawker merely sets appropriate ground rules to ensure that all persons can benefit from what its platform offers.

Factual Background

Squawker and its Terms and Conditions

Squawker's founder, Mackenzie Pluckerberg, launched the social media platform in 2013 as a way to connect users with a wide range of news sources. R. 21. The platform allows users to create profile pages where they can post messages of up to 280 characters. R. 15. Users can "like" or "dislike" a post with a thumbs up or down, or otherwise respond with a comment of their own. *Id.* These comments appear on the original user's page where, in turn, others can similarly respond. *Id.*

Those with accounts can "follow" each other. Squawker then compiles a "feed," a list of posts authored by "followed" users that appears on the "following" user's homepage when accessing the platform. *Id.* Users can see who their "followers" are, as well as which users have viewed any of their messages. *Id.*

Before making a Squawker account, users must consent to the platform's terms and conditions. *Id.* Those policies state that Squawker is "committed to combating abuse motivated by hatred, prejudice,, or intolerance," especially speech that intends to silence marginalized voices. *Id.* Additionally, Squawker "aims for a positive user experience that allows . . . users to engage authentically with each other and build communities within [the] platform." *Id.*

Squawker's specific rules on user conduct include the following:

1. [W]e 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. . . .

2. [W]e prohibit the use of emojis (emoticons) in a violent or threatening manner. . . .

3. [S]pamming of any nature is prohibited[.] . . . [Spamming includes] facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies. Extremely high frequencies are four or more [messages posted] within 30 seconds of each other.[1]

[1] The stipulation of the parties appears to contain an error as to the phrasing of the no-spamming provision. Pluckerberg contends that the correct wording appears within the District Court's

R. 15 (numerals added).

Violations of these terms results in flagging of the offending user's post. *Id.* Flagging means that Squawker places a black box, bearing a white skull-and-crossbones, over the post at issue. R. 4. Consenting users can still view the content of the flagged user's message, simply by clicking the skull-and-crossbones. *Id.*

Verification and Milner's Post

By 2017, Squawker had grown in popularity, and many people used it as an alternative news source to traditional media. R. 3. This case involves two specific users, who each created a profile that year: Avery Milner and Governor William R. Dunphry. R. 19, 24.

Journalist Avery Milner, age 38, lives in the state of Delmont and frequently publishes articles in state newspapers regarding Delmont's elected officials. R. 19. Milner supports age restrictions on public officials and has been particularly critical of Governor Dunphry, age 68. R. 4. Aside from his print journalism, Milner frequently posts on Squawker under the name "DanceDad72." R. 16, 19. Prior to the events at issue, "DanceDad72" had obtained a following of over ten thousand users and an average of seven thousand views per post. R. 19. Milner attributes that following to his "irreverent use of emojis," and the artistic way in which he arranges them. R. 19–20. Particularly, Milner likes to use emojis in strings of comments, in quick succession, until they amount to something clever. *Id.*

Governor Dunphry also uses his Squawker profile frequently, but to communicate with constituents in the state of Delmont regarding new policy proposals and to obtain direct feedback. R. 24. In February 2018, upon receiving complaints from his constituents that a number of fake profiles were impersonating elected officials to spread false news reports,

---

opinion. R. 3.

Governor Dunphry reached out to Pluckerberg whom he had met years ago at preparatory school. *Id.* Specifically, Governor Dunphry suggested implementing a feature that would verify the profiles of Delmont's elected officials to help eliminate the problem. *Id.* One month later, Pluckerberg introduced such a feature and used Delmont as a testing ground. R. 22. Squawker verified authentic accounts, including Governor Dunphry's, and marked them with the Delmont state flag. R. 16.

Squawker also changed its flagging procedures with respect to the verified accounts, and users had to consent to the new policies in order to continue using the platform. *Id.* Under the new procedures, which Pluckerberg enforced personally, R. 22., posts that violated the terms and conditions in response to a verified user's post would trigger additional blocking mechanisms. R. 16. In addition to blocking the offending post, Squawker places a black square with a skull-and-crossbones over the user's future activities and profile page, and a skull-and-crossbones badge next to the user's name. *Id.* Like Squawker's general flagging procedures, other users can still consent to view all blocked content. *Id.*

Additionally, flagged users can remove the flagging themselves, minus that of the offending post, by watching a thirty-minute video on Squawker's user policies and completing a fifty-question, online quiz. *Id.* By watching the video and taking the quiz, users agree that they have violated the terms and conditions and commit to following the rules going forward. R. 6. After two failed attempts, the user must try again after a ninety-day waiting period. R. 16. Users that fail, or choose not to watch the video, can create a new profile but do not retain their followers. R. 6–7.

This dispute arose on July 26, 2018, after Governor Dunphry posted a link to a bill proposal that illegalized right-turns on red lights for the sake of pedestrian safety. R. 24.

Milner, who had just consumed several alcoholic beverages, commented four times on Governor Dunphry's post, with less than 30 seconds separating his first and last comments.[2] R. 20. The first comment stated, "We gotta get rid of this guy[,]" followed by three posts of emojis: an old man, plus a syringe, plus a coffin. R. 17.

Consistent with Squawker's updated policy, Pluckerberg flagged the comments and the "DanceDad72" account for "violent and/or offensive use of an emoji and spamming behavior." R. 22. Governor Dunphry received complaints about Milner's posts from more than 2,000 constituents, users who subsequently left the platform. R. 24. Pluckerberg reports that Squawker lost 29% of its user base and points to the over 1,000 "dislikes" on Milner's offending comments. R. 22.

Milner chose not to remove the block by watching the training video and reports that, after being flagged, he now only has 2,000 followers and receives fifty views per post. R. 20. He claims that he has posted four messages within thirty seconds in the past, yet, this is the first time Squawker had flagged his account. R. 20. Since then, Milner has obtained fewer freelance jobs and publishing opportunities in state newspapers. R. 20.

Procedural History

Milner brought suit against Pluckerberg in his capacity as CEO of Squawker in the U.S. District Court for the District of Delmont. R. 26. Milner argues that Squawker violated his First Amendment rights by imposing its Terms and Conditions on his expressive speech in a public forum. *Id.* Squawker does not challenge whether its platform is a public forum, but argues that, as a private actor, Squawker is not subject to First Amendment restrictions on

[2] The record indicates that Milner's posts occurred at 5:32:02, 5:32:14, 5:32:23, and 5:32:31 PM. R. 17.

government. R. 7. And even if a state actor, Squawker contends that its policies are content-neutral time, place, or manner restrictions, permissible under the First Amendment. *Id.*

The parties filed cross motions for summary judgment on December 5, 2018, and the District Court found for Milner. R. 2. The Court held, first, that Squawker's conduct amounted to state action because it hosted and regulated a public forum: Governor Dunphry's page. R. 8–9. Second, the Court found that the hate speech provision in Squawker's policies was not a content-neutral, time, place, or manner restriction on users' speech.

Squawker timely appealed, and the Eighteenth Circuit Court of Appeals reversed on both grounds. R. 26. Milner filed a petition for writ of certiorari. R. 37.

SUMMARY OF THE ARGUMENT

Squawker is a private entity, and therefore, not subject to First Amendment restrictions. Even if it were, its policies merely regulate unprotected speech, or otherwise constitute permissible time, place, or manner restrictions.

First, private action is only subject to constitutional restrictions where the conduct complained of is fairly attributable to the government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). While this inquiry entails a normative judgment on the part of this Court, none of this Court's prior precedent suggests that Squawker should be treated as a state actor, simply because it regulates speech on its own platform.

Second, assuming that the First Amendment governs Squawker's user policies, the policies at issue either regulate classes of unprotected speech, *see R.A.V.*, 505 U.S. 377, 383 (1992), or regulate the time, place, or manner of user speech in a permissible way. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Specifically, Squawker's hate

speech and emoji provisions affects speech that amounts to unprotected incitement, solicitation, fighting words, and true threats. And its spamming provision and flagging procedures regulate user speech based on content-neutral criteria. Those policies advance Squawker's substantial interests in supplying a usable forum of speech and facilitating interaction with elected officials, in a narrowly tailored manner, respectively. Finally, users still have ample alternative channels through which they can communicate what speech is regulated by those policies.

Because Squawker is neither a state actor, nor violative of the First Amendment because of its user policies, Pluckerberg asks that this Court affirm the holding below.

ARGUMENT

I. Squawker Is Not A State Actor Because Its Conduct Is Not Fairly Attributable to the Government.

The First Amendment ensures that "Congress shall make no law . . . abridging the freedom of speech," a right that applies to state actors via the Fourteenth Amendment. U.S. CONST. amend. I; *see id.* amend. XIV. Neither Amendment explicitly restricts *private* infringements of speech, yet this Court has recognized a narrow set of circumstances in which the state action doctrine applies so as to hold private entities to constitutional standards of conduct. *Manhattan Community Access Corporation v. Halleck*, 139 S. Ct. 1921, 1928 (2019). Determining when these circumstances arise is "a matter of normative judgment," *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001), but a common inquiry underlies the Court's precedent: whether the private action complained of "may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

This Court has recognized several instances where private entities are subject to constitutional restrictions, including when the government coerces or compels the private action, *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982); when the private entity is a joint participant in

unconstitutional government conduct, *Lugar v. Edmonson Oil Co., Inc.*, 547 U.S. 922, 937 (1982); and when the private entity performs a traditionally exclusive government function, *Jackson,* 419 U.S. at 352–53 (1974). However, in order to maintain "a robust sphere of individual liberty," these circumstances must necessarily prove the exception, not the norm of constitutional law. *Halleck*, 139 S. Ct. at 1928.

Accordingly, the threshold for applying the state action doctrine in circumstances of government coercion is exceedingly high; financial support and regulatory supervision are not enough. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). In *Rendell-Baker v. Kohn*, the Court held that teachers could not sue their former employer, a private high school, for violating constitutional norms, even though the State regulated the school's hiring decisions and footed 90–99% of its budget. *Id.* at 839–43. Similarly, in *Blum v. Yaretsky*, 457 U.S. 991, the Court held that decisions made by nursing homes to transfer patients to less extensive facilities were not attributable to the government, even though the state paid the majority of the patients' expenses through Medicaid and conditioned those funds on patients' eligibility to receive necessary healthcare services. *Id.* at 993–95, 998. Despite such significant pressure from the state, the Court found the state's efforts insufficiently coercive, because patients' eligibility turned on professional medical standards not established by the state. *Id.* at 1008.

Even more narrow is this Court's application of the state action doctrine in circumstances where the private entity carries out a traditional *and* exclusive government function. *Halleck*, 139 S. Ct. at 1928–29. That threshold has rarely been met, *id.* at 1929, and requires more of the private party than merely providing a public benefit, *see Rendell-Baker*, 457 U.S. at 842, or resembling the government in one or two respects.[3] *See Hudgens v. N.L.R.B.*, 424 U.S. 507, 520–

[3] This Court has expressly held that a wide array of functions are not traditionally exclusive

21 (1976). More specifically, this Court recently held that furnishing a public forum is not a traditionally exclusive government function because a myriad of private parties have consistently performed that role: "Property owners and private lessees. . . open their property for speech. Grocery Stores put up community bulletin boards. [And] Comedy clubs host open mic nights." *Halleck*, 139 S. Ct. at 1930.

The state action doctrine also applies to private parties that jointly participate with government actors in unconstitutional conduct. *Lugar*, 547 U.S. at 937. In these circumstances, "the question is whether the State was sufficiently involved to treat that decisive conduct as state action." *National College Athletic Association v. Tarkanian*, 488 U.S. 179, 192 (1988). Courts consider the extent of the private actor's reliance on government assistance and whether the government's involvement uniquely aggravated the plaintiff's injury. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 621–22 (1991).

Here, Squawker is not subject to the First Amendment because it is a private entity, and none of this Court's applications of the state action doctrine otherwise suggest that Squawker should be held to constitutional standards merely for regulating its own social media platform. First, Squawker's policies are not the product of government coercion. Rather, Pluckerberg implemented Squawker's Terms and Conditions on his own initiative, long before any government influence may have occurred. R. 21. While Governor Dunphry, a state actor, gave Pluckerberg the idea for Squawker's verification feature and might have elicited Pluckerberg's promise to enforce the new flagging policies personally, R. 22, 24., that level of coercion pales in

---

government prerogatives: "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, . . . supplying electricity[,]" or operating public access television channels. *Halleck* 139 S. Ct. at 1929 (citations omitted).

comparison to the extensive government funding and regulations at issue in both *Rendell-Baker* and *Blum*, which the Court held insufficient to establish state action. Furthermore, as in *Blum*, where the nursing homes' decisions were not attributable to the government because the government itself had not set the guiding standards, Pluckerberg's personal enforcement efforts were not coerced because they derived entirely from Squawker's own user policies.

Second, Squawker does not perform a traditionally exclusive government function by taking steps to regulate its platform. Under *Halleck*, hosting a public forum does not amount to state action, and neither should the act of regulating one. Grocery stores traditionally remove items from community bulletin boards, and comedy clubs inevitably have rules about open mic nights. Thus, the logical application of *Halleck* suggests that Squawker is not a state actor merely because it took the additional step of establishing a user policy to govern its platform.

Third, to the extent that Squawker has engaged in unconstitutional conduct, it has not done so jointly with government actors. While Governor Dunphry suggested the idea for the verification policy, R. 24., any involvement he might have had in developing or funding the policy is entirely nonexistent. And even if the encouragement he provided to Pluckerberg is more than de minimis involvement, users are not uniquely aggravated because of it. Rather, getting flagged for the amended policies is no more burdensome than had Pluckerberg developed the idea on his own, absent Governor Dunphry's suggestion.

For these reasons, holding Squawker to constitutional restrictions contradicts the breadth of this Court's existing precedent. Conversely, the District Court seemingly created a new criterion for the state action doctrine—whether applying it preserves the marketplace of ideas. But adopting such a standard would add unnecessarily to an already clouded area of

constitutional law,[4] and further threaten the "robust sphere of individual liberty." *Halleck*, 139 S. Ct. at 1928. Therefore, this Court should hold that Squawker is not a state actor for the purposes of Milner's First Amendment Claim.

II. Squawker's Policies Largely Restrict Unprotected Classes of Speech, and the Remainder Constitute Permissible Content-Neutral Time, Place, or Manner Restrictions.

The First Amendment provides that the government shall not "abridge the freedom of speech," U.S. CONST. amend. I, which this Court has interpreted to preclude laws that regulate speech "because of disapproval with the ideas expressed." *R.A.V.,* 505 U.S. at 382. Some speech, however, falls entirely outside the scope of the First Amendment because of its slight social value. *Id.* at 383. Likewise, the government has considerable breathing room to regulate speech for reasons unrelated to its communicative content, including "reasonable restrictions on the time, place, or manner of protected speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The policies relevant to this proceeding include (1) Squawker's hate speech provision, (2) the prohibition on "violent or threatening" uses of emojis, (3) the no-spamming provision, and (4) Squawker's flagging procedures, all of which comply with the First Amendment. First, Squawker's hate speech and emoji provisions merely affect unprotected classes of speech. Second, the latter three policies at issue represent permissible time, place, or manner restrictions on users' speech.

[4] *See* John Dorsett Niles, et al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 885–88 (2011).

A. Squawker's Policy Restricting Violent or Threatening Uses of Emojis Merely Restricts Unprotected Classes of Speech.

This Court's decisions have carved out several classes of speech that are outside the realm of First Amendment protection, among these: incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969), solicitation, *United States v. Williams*, 553 U.S. 285, 297 (2008), fighting words, *Cohen v. California*, 403 U.S. 15, 20 (1971), and true threats of violence. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003). The government can freely regulate such speech, but only "because of [its] constitutionally proscribable content." *R.A.V.*, 505 U.S. at 383. In other words, laws cannot restrict subclasses of speech unless the reasons for regulating the subclass are consistent with the reasons why the larger class is unprotected as a whole. *Id.* at 387–88.

Accordingly, incitement—speech "directed to inciting or producing imminent lawless action and is likely to [do so]"—is unprotected because the unlawful acts elicited by the speaker represent a public danger. *Brandenburg*, 395 U.S. at 447. Speech that merely advocates for unlawful acts "at some indefinite future time" remains protected. *Hess v. Indiana*, 414 U.S. 105, 108 (1973). But even where the directed action is not imminent, such speech amounts to unlawful solicitation, speech that induces others to engage in illegal activities. *Williams*, 553 U.S. at 297–99. That kind of detailed solicitation is unprotected because of the risks that the illegal activities will occur. *See, e.g.*, *id.* at 298–99 (offering to provide or request child pornography is categorically unprotected).

Fighting words refer to "personally abusive" speech, commonly expected to provoke a violent reaction in the recipient. *Cohen*, 403 U.S. at 20. Such speech is unprotected not because of its message, but because its "content embodies a particularly intolerable . . . *mode* of expressing *whatever* idea the speaker wishes to convey." *R.A.V.*, 505 U.S. at 393 (emphasis in original). For instance, the defendant in *Cohen v. California*, 403 U.S. 15, expressed

dissatisfaction with the Vietnam War effort by emblazoning his jacket with the words, "Fuck the Draft." While the Court held that the defendant's speech did not amount to fighting words because he had not targeted a particular person, it recognized that the speech otherwise embodied the kind of unseemly mode of expression that ordinarily merited the designation.

Similarly, the Constitution does not protect true threats: speech that communicates an intent to commit violence against an individual or group. *Black*, 538 U.S. at 359. Whether the speaker actually intends to follow through is irrelevant, *id.*, because the reasons for regulating threatening speech centers on the recipients; it protects them "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388. Thus, in *Virginia v. Black*, the Court held that the government could criminalize expressive cross-burning on another's property, because of cross-burning's "long and pernicious history as a signal of impending violence." *Black*, 538 at 347, 363 (but holding that nonintimidating cross-burnings are protected).

In the case at hand, Squawker's hate speech and emoji provisions only affect unprotected classes of speech. And although the provision admittedly regulates subclasses of those categories—hate speech that targets marginalized persons and violent or threatening uses of emojis—the reasons for regulating those subclasses are entirely consistent with the reasons why the unprotected categories are proscribable as a whole.

First, the hate speech provision affects speech "that (1) promotes violence against[,] . . . (2) directly attacks[,] or (3) threatens other people on the basis of race, ethnicity, national origin," or other protected attributes. R. 15. The first component of the provision, speech that promotes violence, encompasses incitement to the extent that the user imminently promotes it. But even where the user does not, such speech still amounts to solicitation, because the user

induces unlawful activity in the form of violence. Further, because crimes committed against marginalized persons are especially heinous, the government's reasons for preventing the incitement or solicitation of such crimes parallels the reasons why those classes of speech are unprotected in the first place.

The second component, direct attacks, covers fighting words. A direct attack based on any of the attributes identified in Squawker's policy (e.g. racial epithets or anti-LGBT rhetoric) clearly represents an intolerable mode of expressing a particular message. Also, Squawker uses the qualifier, "*directly* attacks," R. 15., to distinguish an offending user's speech from that of the defendant in *Cohen*, which was undirected at any particular person. Further, even though Squawker bans a subclass of fighting words, as opposed to *all* intolerable modes of expression, direct attacks based on one's protected attribute are especially intolerable and, therefore, constitute a permissible subclass of unprotected speech.

Additionally, the types of speech affected by the second and third components of the hate speech provision amount to true threats of violence. Like the cross-burning in *Black*, the direct attacks and threats covered by the provision communicate an intent to commit violence toward the recipient, regardless of the offending user's intent to carry it out. Moreover, given the pervasiveness of hate crimes, such speech likely places recipients in an increased state of fear and disruption. As such, Squawker's purpose for regulating the subclass of threats made against marginalized persons reflects the reasons underlying the unprotected category as a whole.

Squawker's emoji provision also affects unprotected classes of speech, including fighting words and true threats. Users cannot use emojis "in a violent or threatening manner," R. 15., which is precisely the kind of intolerable mode of expression with which fighting words are concerned.

Violent or threatening uses of emoji also constitute true threats because they communicate an intent to commit violence against the target. Although emojis are harmless in many applications, several emojis can still communicate violent intentions, for instance, a skull, a knife, blood, etc. Threatening combinations of emoji (e.g. "flames, a police officer, and guns pointing at the head of the officer") have even led to criminal charges in some circumstances. Jonathan Geneus, Note, *Emoji: The Caricatured Lawsuit*, 16 COLO. TECH. L.J. 431, 438–39. Those uses of emojis are what Squawker prohibits, and it does so in order to ensure that the public can use its platform without fear of violence or consequent life disruption.

Because Squawker's hate speech and emoji provisions affect categorically unprotected classes of speech, including permissible subclasses, those provisions need not comply with other First Amendment restrictions. Rather, Squawker can regulate that speech freely.

B. Squawker's No-Spamming and Flagging Policies Are Permissible Time, Place, or Manner Restrictions.

Consistent with the First Amendment, the government can regulate speech via reasonable time, place, or manner restrictions. Such restrictions are permissible if the law (1) is content-neutral in application, (2) advances a substantial government interest, (3) is narrowly tailored to accomplish that interest, and (4) "leave[s] open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293. Squawker's no-spamming and flagging policies each satisfy these criteria.

1. Squawker's No-Spamming and Flagging Policies Are Content-Neutral.

Time, place, or manner restrictions must be content-neutral. *Id.* Conversely, a law is content based if the "law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). This requires

"consider[ing] whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.*

Mere restrictions on the manner of speech, not its message, remain content-neutral. For example, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, demonstrators brought a First Amendment challenge against a federal regulation that prohibited camping at national parks. *Id.* at 289–92. Although the demonstrators sought to draw attention to the plight of the homeless by erecting and sleeping in a tent city on park lands, the Court upheld the regulation, in part, because it proscribed the manner of the demonstrator's speech, camping, without regard to their message. *Id.* at 289–92, 295. Contrast the sign code at issue in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, which applied different size and display requirements depending on the category of sign, for instance, ideological, political, or temporary directional signs. *Id.* at 2224–25. Because differing requirements applied based on the communicative content of the sign, the Court held that the code was impermissibly content based. *Id.* at 2227.

Here, Squawker's no-spamming and flagging policies regulate users' protected speech in a content-neutral manner. Most clearly, the no-spamming provision does not draw distinctions based on users' message. R. 15. Unlike in *Reed*, where the sign code applied differently depending on the content of the sign at issue, Squawker prohibits spamming regardless of what the messages contain, so long as the user posts four times within the same thirty second period. R. 15. Rather, the no-spamming policy more closely resembles the permissible camping ban at issue in *Clark*, which similarly applied regardless of the message the demonstrator's intended to express.

Neither are Squawker's flagging policies content based. Any time Squawker flags a user's posts or profile information, it does so only because the user has violated the user policies

and for no other independent reason. R. 15. As discussed above, those policies either affect unprotected speech or, in the case of the no-spamming provision, apply in a content-neutral manner.

Both these policies fail to make applicable distinctions based on the content of the offending user's speech. Therefore, the policies are content-neutral.

2. Squawker's Policies Further Several Substantial Government Interests.

Content-neutral time, place, and manner restrictions must advance a substantial government interest. *Clark*, 468 U.S. at 293. Although this Court has yet to adopt an explicit test for whether a government interest is *substantial*, the threshold of importance is lower than that required by strict scrutiny, where the law must serve a *compelling* government interest. *See McCullen v. Coakley*, 573 U.S. 464, 477–78 (2014). Tellingly, this Court has sometimes described substantial interests as merely "significant" or "legitimate." *E.g., Ward*, 491 U.S. at 791, 799.

Squawker has several substantial interests served by its user policies. The first is to ensure a "positive user experience," R. 15., or more fundamentally, ensuring that the platform provides an effective service to Squawker's user base. Second, given that state officials commonly use the platform as a means of communicating with constituents, R. 24., Squawker has an interest in facilitating users' ability to interact with their elected representatives.

a. *Effective use of the platform*

Ensuring access to public forums has proven a substantial government interest for the purposes of time, place, and manner restrictions. In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld a public entity's rule that confined proselytizing activities during a state fair to specific areas of the fairgrounds. *Id.* at 643–44, 654.

The rule served a substantial government interest in "protecting the 'safety and convenience' of persons using a public forum." *Id.* at 650; *see also Madsen v. Women's Health Center*, 512 U.S. 573 (1994) (holding that the State has a substantial interest in promoting order and free traffic flow in public forums).

In a similar vein, the Third Circuit has held that the government has a substantial interest in preventing particular voices from drowning out others'. *See Startzell v. City of Philadelphis*, 533 F.3d 183 (3d Cir. 2008). In *Startzell*, a group of protestors brought bullhorns, microphones, and other sound equipment to a gay pride event, held in a public area which the City had permitted for the event. *Id.* at 188. After police officers forcibly removed them from the permitted area, the protestors brought suit on First Amendment grounds against the City. *Id.* at 191. The Court, however, held that the City's actions amounted to reasonable time, place, or manner restrictions, justified by the City's substantial interest in respecting others' speech in the public forum—specifically, that associated with the pride event. *Id.* at 201.

Like streets and fairgrounds, social media platforms are among the most important of public forums, a reality that this Court observed in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (striking down a state law prohibiting sex offenders from using social media). The Court declared that social media represented "the most important [of] places," *id.* at 1735, and "the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 1737. For many, these services "are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern square, and otherwise exploring the vast realms of human thought and knowledge." *Id.* As such, cutting off access to these services would prove crippling to the public. *See id.*

Squawker is no exception, and it has enacted policies to ensure that its platform remains an effective service for its users. This interest is comparable to the substantial government interest identified in *Heffron*, where the public corporation's rule served to ensure public convenience in using the state fairgrounds. Similarly, Squawker makes sure users can use its services unhindered by others' obstructive speech. Like protesters with bullhorns, spamming accounts drown out ordinary users' speech by flooding feeds with high frequency messages and senseless comment strings. Without Squawker's no-spamming provisions, users' voices would become lost in the fray, and users would effectively be cut off from their "most powerful mechanisms" of expression. *Packingham*, 136 S. Ct. at 1737. Squawker prevents that outcome by blocking spamming users' posts from nonconsenting viewers.

Together with its flagging procedures, Squawker's no-spamming provision erects a dam against that flood and ensures that users can effectively use the platform for expression, access vital news resources, and otherwise interact with other users. As such, Squawker's policies sufficiently advance a substantial government interest.

b. *Interaction with elected officials.*

Squawker has a substantial interest in securing its users' ability to interact with their elected officials on the platform. Although this Court has never explicitly recognized such an interest in the context of a time, place, or manner restriction, it has consistently upheld the importance of the public's right to "petition their elected representatives and [to] otherwise engage with them in a direct manner." *Packingham*, 137 S. Ct. at 1735; *see United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("[T]he right to petition . . . [is] among the most precious of the liberties safeguarded by the Bill of Rights."). This includes interactions over social media. *Packingham*, 137 S. Ct. at 1735.

Squawker's amended flagging policies ensure that the public can communicate with their elected officials through its platform. As discussed previously, restricting users' ability to spam ensures that high frequency messages will not drown out the voices of officials' constituents. Tellingly, Governor Dunphry reports that 2,000 of his constituents have already left the platform, merely on account of Milner's one-time spamming—Pluckerberg reports even greater losses. R. 22, 24.

Additionally, Squawker has faced increasing numbers of fake profiles, R. 24., accounts that are typically responsible for spam across social media services.[5] By flagging not only the offending post but also the user's account and future posts, Squawker ensures that bot accounts will not impede users' ability to interact with government profiles, without having to enforce each spamming violation individually.

Each of the foregoing reasons represents a substantial government interest, enough to justify Squawker's policies as permissible time, place, and manner restrictions. Further, Squawker's policies materially advance one or more of those objectives.

3. Squawker's Policies Are Not Overbroad in Application or Unduly Burdensome on Affected Speech.

Time, place, and manner restrictions are narrowly tailored so long as they do not affect "substantially more speech than is necessary to further the government's legitimate interests," or regulate the implicated speech "in such a manner that a substantial portion of the burden . . . does not serve to advance its goals." *Ward*, 491 U.S. at 799. But the law need not be the least restrictive means of accomplishing the government interest, *id.*, and it remains valid even though

[5] *See* Irfan Ahmad, *Social Platforms Are Working Harder to Remove Fakes [Infographic]*, SOCIALMEDIATODAY (Sept. 8, 2019), https://www.socialmediatoday.com/news/social-platforms-are-working-harder-to-remove-fakes-infographic/562431/.

it leaves a significant amount of speech that similarly threatens the interest untouched. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810–11 (1984).

For example, in *Clark*, the Court determined that a camping ban at the National Mall and nearby parks was narrowly tailored to serve the government's interest in maintaining them "in an attractive and intact condition." *Clark*, 468 U.S. at 296. Although the National Park Service had issued demonstrators a permit to construct a tent city and hold a vigil for the homeless, the demonstrators sought to camp overnight as an act of expression. *Id.* at 289–92. The Court upheld the ban because camping frustrated the government's ability to maintain the parks, regardless of whether the permitted activities were just as detrimental to the parks or whether less restrictive means of regulation were available. *Id.* at 296–99.

Here, Squawker's policies do not restrict a substantial amount of speech that is unrelated to its substantial interests. First, Squawker's no-spamming provision affects no more speech than necessary to ensure a usable platform. Its scope is remarkably narrow, targeting only that speech which occurs within four messages over a thirty-second period. R. 15. Certainly, speech occurring at such a frequency, if left unchecked, would render Squawker unusable—demonstrable by the amount of users Squawker has lost in the aftermath of Milner's spamming activity. Second, while Squawker's flagging procedures affect a significant portion of users' speech (future posts and account information), with respect to combatting fake and bot accounts, that scope of regulation is necessary. Monitoring the platform for individual violations of the user policies would be insufficient to combat the incessant spamming employed by such accounts. Only by imposing an all-out block can Squawker expect to keep up, one removable by human users if mistakenly applied.

Neither do Squawker's policies unduly burden speech that *does* implicate its substantial interests. Although Squawker blocks more than just the offending content within a post by blocking the post as a whole, R. 16., that additional burden on the user's speech is minimal. After all, Squawker posts are confined to a 280-character limit. R. 15. There is little space for expression within a post, minus what the speaker uses to violate Squawker's user policies. Furthermore, in nearly all flagging circumstances, Squawker only prevents nonconsenting users from viewing the material, and a speaker's audience can still view the blocked posts if they so choose. R. 4. Lastly, in circumstances where a user violates user policies on a verified user's page, that user has procedures for removing it. R. 16.

While policies that more effectively accomplish Squawker's substantial interests might be conceivable, including less burdensome ones, either of those inquiries is immaterial for the purposes of a narrowly tailored time, place, or manner restriction. As in *Clark*, where the Court upheld the camping ban, despite the fact that the permitted activities similarly obstructed the government's interests; here, Squawker's policies need not strike a perfect balance between its users' free speech rights and the objectives it hopes to achieve. So long as Squawker's restrictions are not overbroad or unduly burdensome, they are sufficiently tailored to accomplish its substantial interests.

Both Squawker's no-spamming and flagging provisions are limited to speech that implicates its substantial interests, and its enforcement mechanisms do not unnecessarily burden other kinds of speech. Therefore, Squawker's policies are sufficiently tailored.

4. Squawker's Policies Are Limited in Application and Provide Ample Alternatives for Prohibited Speech.

Squawker's terms and conditions "leave open ample alternative channels" for the speech at issue. Ample alternatives are practical in cost, *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994),

allow the speaker to reach essentially the same audience, and do not implicitly prevent the speaker from communicating her intended message. *Id.* at 56—57.

Restrictions that only limit speech in specific contexts necessarily provide ample alternatives. Such was the case in *Frisby v. Schultz*, 487 U.S. 474 (1988), where the Court considered whether an ordinance prohibiting residential picketing violated the First Amendment rights of anti-abortionist protesters. *Id.* at 476–77. The prohibition only applied to picketing directed at a single residence, not to "general marching through residential neighborhoods, or . . . walking a route in front of an entire block of houses." *Id.* at 483. Upholding the ordinance, the Court held that "the limited nature of the prohibition ma[de] it virtually self-evident that ample alternatives remain[ed]." *Id.*

In contrast, *City of Ladue v. Gilleo*, 512 U.S. 43, involved a nearly universal ban on displaying signs on residential property. *Id.* at 45–47. A woman wanted to place an anti-war sign on her lawn and brought suit after the City denied her request for a variance. *Id.* at 45. The Court struck down the ordinance for failing to provide ample alternatives of speech, even though the City argued that the same message could be communicated through hand-held signs, flyers, or other means. *Id.* at 56. The Court reasoned that those alternatives entailed greater costs, different audiences, and thus, were inadequate substitutes for the preferred speech. *Id.* at 56–57.

Squawker's no-spamming and flagging policies, however, do provide comparable alternatives for communicating the affected speech on the platform. Particularly, the no-spamming policy provides an obvious alternative: the user need only wait thirty-one seconds before posting their fourth message. Similar to the residential picketing ban upheld in *Frisby*, Squawker's provision only applies in limited contexts. Like in *Frisby*, where picketers had unlimited means of expressing their message beyond directing it at a single residence, Squawker

users have no other frequency-related restrictions on their speech beyond the four messages per thirty-seconds limit. Furthermore, waiting an additional second imposes no cost on users, does not eliminate members of their audience, and does not affect what the user intends to express in each of her messages.

Milner argues that spamming messages in quick succession represents a unique form of artistic expression. But even if that is true, Squawker's no-spamming provision does not prohibit excessive posting, per se; it merely imposes a minimal waiting period between posts. Besides, there is little difference between a string of messages posted within thirty seconds, and a string of messages stretched to the permitted thirty-one second interval. And even if there were, only that sliver of users that observes the posts in real time, i.e., during the thirty second interval, would notice any difference.

Squawker's flagging policies also leave open ample alternatives, even in circumstances where the user's entire account and future posts are flagged. Flagging merely imposes a consent requirement for users that wish to see the blocked material; it does not entirely preclude them from receiving the user's intended message. Offending users can also watch the training video and take the user policy quiz to remove the block from their account and future posts.

Furthermore, if social media platforms are government actors merely because they impose user policies, *see supra* Section I, that standard implicates nearly all social media platforms. So the government has effectively provided several adequate substitutes for speech, each with comparable levels of exposure to others and free of cost. Moreover, given that individuals have seven distinct accounts across platforms, on average,[6] users certainly have access to the kinds of ample alternatives required by the First Amendment.

---

[6] *See Social Media Benchmark Report 2019*, OMNICORE,

Therefore, because Squawker leaves open adequate substitutes for expressing the speech it regulates through its no-spamming and flagging policies, those policies are reasonable time, place, and manner restrictions.

CONCLUSION

This Court should affirm the holding below because Squawker's policies are not fairly attributable to the government and, regardless, constitute permissible time, place, or manner restrictions on user speech.

https://www.omnicoreagency.com/social-media-statistics/ (last visited Jan. 31, 2020).

Certification Letter

Date: 1/31/2020

Team Number: 5

School: J. Reuben Clark Law School

Brief Side: Respondent

1. We certify that the work product contained in our brief is in fact the work product of our team members.

2. We certify that we have complied fully with our school's governing honor code.

3. We certify that we have complied with all Rules of the Seigenthaler-Sutherland Cup National First Amendment Moot Court Competition.

Team Member Signatures:	Date:
/s/ Stephen Arroyo	1/31/2020
/s/ Ashley Waddoups	1/31/2020
/s/ Cory Thompson	1/31/2020