No. 17-874

IN THE

SUPREME COURT OF THE UNITED STATES

AVERY MILNER

Petitioner,

v.

MAC PLUCKERBERG,

Respondent.

On Writ of Certiorari

to the Court of Appeals for the Eighteenth

Circuit

BRIEF OF RESPONDENT

TEAM NO. 1

Counsel for Respondent

QUESTIONS PRESENTED

1. Does a private entity hosting a public forum engage in state action when there is no close nexus between the private entity and the State?
2. Are a private entity's Terms & Conditions a content-neutral time, place, or manner restriction that does not violate the First Amendment when such a restriction is narrowly tailored to prevent abusive communication and only reaches unprotected speech, including true threats?

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OPINIONS BELOW

The District Court of Delmont granted Milner's motion for summary judgment on the grounds that Squawker's Terms & Conditions were a content-based viewpoint discrimination and not narrowly tailored as a reasonable time, place, or manner restriction. *Milner v. Pluckerberg*, No. 16-CV-6834 (D. Delmont 2019).

On appeal, the United States Court of Appeals for the Eighteenth Circuit ruled in favor of Pluckerberg when it held that Squawker was a private actor that did not unduly burden free speech with a Terms & Conditions policy that was narrowly tailored as a reasonable time, place, or manner restriction. *Milner v. Pluckerberg*, No. 16-6834 (18th Cir. 2019).

JURISDICTIONAL STATEMENT

Appellate court judgements "may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil . . . case . . . ." 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

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.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Squawker is a social media platform that Mackenzie (Mac) Pluckerberg launched in 2013. Pluckerberg Aff. ¶ 4. Squawker users ("Squeakers") create a personal profile page to post comments of 280 characters or less, known as "squeaks." Stip. ¶ 5. Squeaks are liked, disliked, or commented upon, and Squeakers can follow each other's comment feeds. *Id.* As Squawker has grown in popularity, many government officials obtained Squawker accounts as a way to convey political content and policies to their constituents in a public forum. Stip. ¶ 7. Governor William Dunphry of Delmont (hereinafter "Dunphry") obtained such an account to carry out official business. Imposter Squawker accounts posing as government officials began to appear, reporting false news to voters. Dunphry Aff. ¶ 7; Stip. ¶ 8.

To cut down on the amount of imposter accounts, Dunphry suggested the idea of a verification process for government Squawker accounts to his long-time friend, Pluckerberg. Stip. ¶ 8. In March 2018, Pluckerberg developed a verification system that (1) marked verified government Squawker accounts with the Delmont flag, and (2) flagged offensive squeaks on a verified user's page and the personal profile of the Squeaker who posted the offensive comments. Pluckerberg Aff. ¶ 9; Stip. ¶ 8. When Squawker implemented the new flagging policy, it updated its Terms & Conditions for verified pages and required all Squeakers who post a comment on a verified page to agree to the new policy. Stip. ¶ 6.

Squawker's Terms & Conditions make it a violation to behave in a way that promotes violence, attacks, or threatens other Squeakers in ten applicable categories and "prohibit[s] the use of emojis [emoticons] in a violent or threatening manner." Stip. ¶ 6. Further, the Terms & Conditions prohibit posting at "extremely high frequencies such that the platform becomes

unusable." *Id.* Squeakers who violate the Terms & Conditions when posting to a verified user's account are flagged and must click on a skull and crossbones emoji to clear a black box covering the offending comment, their future comments, and the content on their profile page. Stip. ¶ 9. The flag is removed from all but the original comment if the offender completes a training video detailing the Terms & Conditions and then passes an online quiz. *Id.*

Avery Milner is a Delmont resident and an avid critic of local government. Milner Aff. ¶¶ 1, 3. Milner is particularly critical of civil servants over age 65, including Dunphry, who is 68 years old. Dunphry Aff. ¶ 2. Milner frequently uses Squawker to critique the elected officials in Delmont. He has over ten thousand followers on his Squawker account, and he agreed to the new Terms & Conditions. Milner Aff. ¶¶ 5–6. After Dunphry posted a squeak containing a link to a description of a bill proposal that Milner did not like, he posted in rapid succession: (1) "We gotta get rid of this guy;" (2) an emoji of an old man; (3) an emoji of a syringe; and (4) an emoji of a coffin. Dunphry Aff. ¶ 10; Milner Aff. ¶¶ 7–8.

Squeakers reacted to Milner's threats with one thousand dislikes and two thousand reports to Pluckerberg. Pluckerberg Aff. ¶ 11. Subsequently, Squawker flagged Milner for "violent and/or offensive use of emojis and spamming" and notified him about the procedure for removing the flag. Milner Aff. ¶ 9. Refusing to follow the procedure for clearing the flag, Milner watched as his followers dropped off, and, due to this loss of viewership, Milner's writing income fell significantly. Milner Aff. ¶¶ 13–15.

II. PROCEDURAL HISTORY

Milner filed a complaint in the United States District Court for the District of Delmont alleging Squawker violated his right to freedom of speech pursuant to the First Amendment of the United States Constitution. *Milner v. Pluckerberg*, No. 16-CV-6834 (D. Delmont 2019). On

December 5, 2018, Milner and Pluckerberg filed cross motions for summary judgment on two contested legal issues: (1) whether Squawker hosting an official government page, which is a public forum, amounts to state action; and (2) whether Squawker's flagging Terms & Conditions violate the First Amendment. *Id.* The District Court granted Milner's motion for summary judgment on January 10, 2019. *Id.* On appeal to the United States Court of Appeals for the Eighteenth Circuit, the decision was reversed. *Milner v. Pluckerberg*, No. 16-6834 (18th Cir. 2019). The Eighteenth Circuit held that Squawker was a private actor that did not unduly burden free speech with a Terms & Conditions policy that is narrowly tailored as a reasonable time, place, or manner restriction. *Id.* Milner subsequently petitioned the United States Supreme Court for a writ of certiorari, which was granted. *Milner v. Pluckerberg*, No. 17-874 (2019).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the United States Court of Appeals for the Eighteenth Circuit and hold that Squawker did not violate the freedom of speech provision of the First Amendment.

The First Amendment prohibits state actors from passing laws that infringe upon the right to free speech. U.S. CONST. amend. I. A restriction on the time, place, or manner of speech is constitutional when it is content-neutral, serves a significant government interest, and leaves open ample alternative channels of communication. *Infra* Section III. Moreover, speech is altogether unprotected by the First Amendment if it is obscene, hate speech, or a true threat. *Infra* Section II. Finally, if a private entity behaves like a state actor, then it is held to the same standard under the First Amendment as the government and must act within the same constitutional bounds. *Infra* Section I.

Squawker, a private entity hosting a public forum, did not engage in state action when it applied its flagging policy. The Supreme Court recognizes several approaches for assessing state action on the part of a private entity, and Squawker satisfies each one. There is no close nexus between Squawker and the State, and Squawker was not coerced or controlled by the State, did not engage in joint activity with the State, and was not delegated any public functions by the State. Therefore, Squawker did not behave like a state actor. *Infra* Sections IA–B.

Even if Squawker were a state actor and was held to the same constitutional standard as the government, Squawker sought to restrict true threats that are not protected by the First Amendment. Squawker's Terms & Conditions made it a violation to behave in a way that promoted violence, attacks, or threatened other Squeakers. When Milner violated the Terms & Conditions by posting threatening comments, he demonstrated the necessary *mens rea* for a true

threat because he intended to communicate a threat. Moreover, the context in which Milner's comments were made, the conditional nature of his threats, and the reaction of other Squeakers established that these were true threats. *Infra* Section II.

Squawker's Terms & Conditions also comply with the First Amendment because they are a content-neutral time, place, or manner restriction which is narrowly tailored to achieve a significant government interest, and there are ample open channels of communication. The Terms & Conditions are content-neutral because they do not promote viewpoint discrimination. Further, the Terms & Conditions are narrowly tailored to achieve the significant government interests of preventing fear and protecting the free speech rights of all users. Finally, the Terms & Conditions leave open ample channels of communication because the process to lift a flag on prohibited content not overly burdensome and can be done on the same platform. *Infra* IIIA–C.

Therefore, Respondent respectfully asks this Court to affirm the decision of the United States Court of Appeals for the Eighteenth Circuit.

ARGUMENT

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. This rule against restricting speech applies only to government entities. *Id.* Private entities, on the other hand, generally enjoy the freedom to restrict speech in any manner they choose. *Id.* When confronted with challenges brought by advancing technology, the Supreme Court of the United States applied the First Amendment to new communication media by asserting that though "differences in characteristics of media justify differences in First Amendment standards applied to them," the basic principles of free speech "do not vary" simply because they are expressed in a novel medium. *Brown v. Entm't Merchs. Ass'n*., 564 U.S. 786, 790 (2011); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969). The Internet should hold the same First Amendment freedoms as the traditional forms of communication media. *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

Recently, the Court applied the First Amendment principles to a ubiquitous form of communication arising from the Internet: social media. In *Packingham v. North Carolina*, the Court clarified that doctrinal freedom of speech principles still apply to the Internet, and private entities operating social media platforms retain full First Amendment protections. 137 S. Ct. 1730, 1737 (2017). Because the Court recognizes that the Internet and social media have become "the most important venues for the exchange of information and ideas," it is of paramount importance not to deviate from established First Amendment jurisprudence. RODNEY A. SMOLLA, *Social Media Accounts of Public Office-Holders*, *in* SMOLLA & NIMMER ON FREEDOM OF SPEECH (Oct. 2019 Update).

Squawker, like other private entities that operate social media platforms, is protected by the First Amendment. At issue is whether Squawker's policy against abusive speech was

nevertheless prohibited under the First Amendment. It was not. Section I explains that Squawker deserves protection under the First Amendment because it did not behave like a state actor. If this Court nevertheless determines that Squawker is a state actor, Section II explains how Squawker's Terms & Conditions only exclude true threat speech not covered by the First Amendment. Further, Section III discusses that Squawker applied a content-neutral time, place, or manner restriction which is narrowly tailored to achieve a significant government interest and provided alternative channels for communication. Thus, Squawker did not violate the First Amendment.

I. SQUAWKER IS NOT A STATE ACTOR

Squawker, a private entity hosting a public forum, did not engage in state action when it applied its flagging policy. State action is attributed to the particular facts of a case but no single fact is a necessary or sufficient condition for a finding of state action. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). In keeping with this case-based determination, the Court has articulated numerous approaches for assessing whether a private entity is engaging in state action, including: (1) coercion of a private entity by the State through "significant encouragement, either overt or covert;" (2) control of a private entity by an "agency of the State;" (3) participation by a private entity in joint activity with the State; and (4) delegation to a private entity of a public function by the State. *West v. Atkins*, 487 U.S. 42, 56 (1988); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941 (1982); *Commonwealth of Pa. v. Bd. of Dir. of City Trusts of City of Phila.*, 353 U.S. 230, 231 (1957) (per curiam). The test favored by the Court, the close nexus test, looks to see when the relationship between the private entity and the state is such that the private entity's action "may be fairly treated as that of the State itself." *Id.* (quoting *Jackson v. Metro. Edison*

Co., 419 U.S. 345, 351 (1974)). Although a finding of state action need not satisfy all of the tests, based on the particular facts of this case, Squawker's application of its flagging policy survives each of these five inquiries. Hence, Squawker did not engage in state action. *See, e.g.*, SHELDON H. NAHMOD, *State Action and Color of Law in the Circuits*, *in* CIV. RIGHTS AND CIV. LIBERTIES LITIG.: THE L. OF SEC. 1983 (Oct. 2019 Update).[1]

A. There is no close nexus between Squawker's actions and the State.

Under the Court's preferred close nexus test regarding possible state action, Squawker's flagging policy could not be "fairly treated as that of the State itself." *Id.* at 295 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Squawker has two flagging policies: one that flags offensive squeaks appearing on a general user's page; and another that flags the offensive squeaks on a verified user's page along with the personal profile of the Squeaker who posted the offensive comments. While Dunphry suggested the idea of a verification process for government Squawker accounts to Pluckerberg, it was Pluckerberg who developed a system that marked verified accounts with the Delmont flag and implemented the aforementioned flagging policy for verified users. Dunphry's suggestion and Pluckerberg's verification system did not establish a close nexus between Squawker and the State.

[1] Of note is that many of the state action tests recognized by the Court arose from claims alleging deprivation of due process by the State acting "under color of" law in violation of Section 1983 of the Civil Rights Act or in direct contravention of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1, 42 U.S.C. § 1983 (1988). Further, state action inquiries under Section 1983 color-of-state-law claims and Fourteenth Amendment claims are identical such that conduct satisfying one constitutes action under the other. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 n.2 (2001); *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019). In *Brentwood*, the Court considered each of the possible state action tests in a claim that implicated both the First and Fourteenth Amendments. 531 U.S. at 295–96. Hence, in addition to the Fourteenth Amendment, state action tests apply to free speech color-of-state-law claims and to claims that directly involve the First Amendment.

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, a statewide private association comprised of, officiated by, and economically supported by representatives from the state's public schools, regulated interscholastic athletic competition among the schools. 531 U.S. 288, 290–91 (2001). The Court held that the regulatory activity of the association constituted state action "owing to the pervasive entwinement of state school officials in the structure of the association." *Id.* at 219. The Court reasoned that the State Board of Education, having expressly designated the association as the regulator of interscholastic athletics, entwined the association up to the State Board and down to the public schools to create an "overlapping identity" between the State and the private association. *Id.* at 300, 302, 303.

Dunphry's suggestion to create a verification process did not entwine his official position with Squawker. Squawker constructed and implemented the verification process without Dunphry's input or oversight. The verification process that Squawker developed marked verified users' accounts with the Delmont flag to distinguish these accounts for flagging policy purposes and did not imply that Delmont and Squawker shared an "overlapping identity." Further, Squawker does not challenge that Dunphry's account is a public forum. In fact, politicians routinely use social media to "express views on government and public policy," and, in so doing, this common practice does not establish a close nexus between a social media platform and the government. SMOLLA, *Social Media Accounts of Public Office-Holders* at 1. The only close nexus that potentially exists is between the "expressive activity of the politician and the official activity of government." *Id.* This still does not "transform[] otherwise private activity into [state] action." *Id.* As such, no close nexus existed between a government official and the creation of Squawker's Terms & Conditions.

B. The State did not coerce, control, engage in joint activity, or delegate a public function to Squawker.

Squawker's application of its flagging policy withstands each of the remaining state action tests. The coercion test looks to whether a state has "exercised coercive power or ha[s] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State" where "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Using the same coercion test that found no state action, Dunphry, a long-time friend of Pluckerberg, merely suggested the idea of a verification process; he neither "coerced" nor gave "significant encouragement" to Pluckerberg to follow through on his idea. That Pluckerberg approved of a verification process does not make Dunphry or Delmont responsible for Squawker's choice.

The state agency tests asks whether private entity is controlled by a state agency. In these instances, the private entity's actions are imputed directly to the state and constitute state action. For example, in *Commonwealth of Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, alleged discriminatory acts of a private school amounted to state action because the City of Philadelphia was its trustee. 353 U.S. 230, 231 (1957) (per curiam). However, the mere "fact that government has engaged in a particular activity does not necessarily mean that a [private] individual . . . of the same kind of undertaking suffers the same constitutional inhibitions." *Evans v. Newton*, 382 U.S. 296, 300 (1966). Instead, an agency relationship is more appropriately found when a private entity is engaged in an "integral part" of a community or governmental function. *Id.* at 301. That the government hosts public forums for free expression does not mean that *all* public forums are of government nature. Squawker is not engaged in an

integral part of Delmont's governmental activity; it merely provides a platform for communication.[2] Squawker is not an agent[3] of the State because it does not act on Delmont's behalf and is not controlled by Delmont.

The joint action test has also been applied to First Amendment claims against social media platforms. For instance, in *Federal Agency of News LLC v. Facebook, Inc.*, the district court did not find state action after Facebook removed a user's fake account, page, and content. 395 F. Supp. 3d 1295, 1311 (N.D. Cal. 2019). The United States District Court for the Northern District of California noted that the joint action test required private parties and state officials to "'act[] in concert in effecting a particular deprivation of constitutional rights,'" and the test "'can be satisfied either by proving the existence of a conspiracy or by showing that the private party was a willful participant in joint action with the State or its agents.'" *Id.* (quoting *Deeths v. Lucile Slater Packard Children's Hosp. at Stanford*, 2013 WL 6185175, at *10–*11 (E.D. Cal. Nov. 26, 2013)); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012)). Milner claims that Squawker's flagging policy resulted in his losing viewership and, ultimately, his writing income. According to the court in *Federal Agency*, conspiracy for joint action purposes does not involve simply providing information to the State. 395 F. Supp. 3d at 1311. Here, Squawker did not even communicate with Dunphry or any Delmont officials regarding the

[2] In *Lugar v. Edmondson Oil Company, Inc.*, a debtor claimed that his creditor acted jointly with the State and deprived him of due process under color of law when it attached his property in lieu of payment on a debt. 457 U.S. 922, 925–26 (1982). In holding that there was state action, the Court noted that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Id.* at 941.

[3] "A relationship that arises when one person (a principal) manifests assent to another (an agent) that the agent will act on the principal's behalf, subject to the principal's control, and the agent manifests assent or otherwise consents to do so." AGENCY, BLACK'S L. DICTIONARY (11th ed. 2019).

development and application of its flagging policy. Under this joint action test, Squawker did not participate jointly with the State because it operated its flagging policy independent of any opinions or input from Delmont officials.

The final state action test is the delegation test. This asks whether a public function has "traditionally *and* exclusively" been performed by the state. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019). In *Halleck*, the Court ruled in a free speech color-of-state-law claim that operation of public access channels by a private entity is "not a traditional, exclusively public function." *Id.* at 1921, 1926. The Court noted that unlike, for example, "running elections and operating a company town," public access channels have been historically operated by both private and public entities. *Id.* at 1929. It is in situations "when the government has outsourced one of its constitutional obligations to a private entity," such as contracting with a private doctor to provide medical care to prisoners, the private entity may be deemed a state actor. *Id.* at 1929 n.1 (citing *Atkins*, 487 U.S. at 56). The operation of a social media platform, such as Squawker, is not a "traditional and exclusive" public function, and Delmont did not outsource any constitutional obligations to Squawker because it did not designate Squawker as its official messenger for government and public policy. Having convincingly survived each of the state action tests recognized by this Court, Squawker is not a state actor and this Court should affirm the decision of the Eighteenth Circuit.

II. SQUAWKER'S TERMS & CONDITIONS PROPERLY EXCLUDED TRUE THREATS.

A. Milner's comments constitute true threats that were properly excluded from Squawker's platform per its Terms & Conditions.

Even if Squawker is deemed a state actor, the Terms & Conditions properly excluded Milner's comments because they were true threats, as evidenced by their context and public reaction. Although not all threatening language falls outside of First Amendment protection, expressive conduct constituting a true threat, rather than political hyperbole or statements uttered in jest, is excluded. *Virginia v. Black*, 538 U.S. 343, 359 (2003). As defined by the Supreme Court, true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* Importantly, the relevant *mens rea* for a true threat is the intent to *communicate* a threat, not the intent to actually carry out a threat. *Elonis v. United States*, 135 S. Ct. 2001, 2003 (2015). As such, intimidation constitutes a true threat where a speaker directs a threat to a particular person or group of persons with intent to place the victim in fear of bodily harm or death. *Id.* at 2027. To find intent, most circuits have adopted an objective test, which asks whether an ordinary, reasonable recipient familiar with the context of the communication would interpret the statement as a threat of harm. *See, e.g.*, *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013); *United States v. White*, 670 F.3d 498, 507–08 (4th Cir. 2012); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 & n.26 (5th Cir. 2004); *United States v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004); *United States v. Alaboud*, 347 F.3d 1293, 1297–98 & n.3 (11th Cir. 2003).

The definition of a true threat decidedly does not encompass political hyperbole or statements uttered in jest. In *Watts v. United States*, the defendant suggested during a public rally that he would harm the President if he ever joined the armed forces, a condition which he vehemently stated would never occur. 394 U.S. 705, 708 (1969). The *Watts* Court analyzed three factors: (1) the context in which the comments were made; (2) the conditional nature of the threat; and (3) the reaction of the listeners. *Id.* at 708. The statement was deemed mere political hyperbole, rather than a true threat, because it was made during a heated political debate in reference to an expressly conditional event which the petitioner vowed would never occur, and both the petitioner and the crowd present laughed after the comment was made. *Id.* at 707–08. In contrast, in *United States v. Castillo*, a social media post threatening the President was a true threat because there was no indication that the threat should not be taken at its face value when it was perceived as a threat by others who felt compelled to report it to the Secret Service. 564 F. App'x 500, 503–04 (11th Cir. 2014).

Applying the *Watts* factors to this case, Milner's comments were true threats. Milner posted his threats on Squawker in the context of Dunphry having just posted a squeak containing a link to the description of a bill proposal. Milner was an avid critic of local government, and he frequently used Squawker to critique the elected officials in Delmont. Milner was particularly critical of civil servants over age 65, including Dunphry who was 68 years old. Hence, Milner was not reacting with mere political hyperbole to Dunphry's bill proposal but was making specific threats against a Delmont official. Further, Milner's threat was not conditioned on the nature of Dunphry's bill because Milner did not direct his threats at the bill proposal. Milner instead targeted Dunphry directly with "[w]e gotta get rid of this guy" followed in rapid succession by emojis of an old man, a syringe, and a coffin. Threats communicated as emojis are,

by their nature, unequivocal and taken at their face value. PHILIP SEARGEANT, THE EMOJI REVOLUTION 37 (2019). Finally, Squeakers reacted to Milner's threats with one thousand dislikes and two thousand reports to Pluckerberg, meaning that viewers did not interpret Milner's comments as a jest.

Allowing Squawker's policy to prohibit threatening and abusive comments on its platform accords with the purpose and effect of the *Watts* constitutionally-limited definition of the term "threat" to regulate unequivocal, unconditional, and specific threats. *See, e.g.*, *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). The policy aligns with the three primary reasons why threatening language does not garner First Amendment protection: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V. v. City of St. Paul*, 507 U.S. 377, 388 (1992). Allowing Squawker to a ban true threats ensures a policy which constitutionally fosters an environment where the public can safely express their ideals, positive, negative, or otherwise, and without the fear of experiencing violent retaliation.

B. Squawker's restriction of true threats passes rational basis scrutiny.

While speech covered by the First Amendment is reviewed under strict scrutiny, true threats are reviewed under rational basis because they are not covered by the First Amendment. *See, e.g.*, *R.A.V.*, 505 U.S. at 406–07; *Ginsberg v. New York*, 390 U.S. 629, 639–40 (1968). The Terms & Conditions provision directly applicable here "prohibit[s] the use of emojis [emoticons] in a violent or threatening manner." Given that this is a facial challenge to the Terms & Conditions, the entire section must pass constitutional muster. It does so because the Terms & Conditions language serves a legitimate government interest by broadly prohibiting violence, attacks, or threats to users of the Squawker platform. The Terms & Conditions serve this interest

by preventing excessive posting and intimidating language, which infringes on the ability of all other users to access the platform. As such, the purpose of the Terms & Conditions are rationally related to a legitimate government interest.

III. SQUAWKER'S TERMS & CONDITIONS ARE PROPER TIME, PLACE, OR MANNER RESTRICTIONS.

Even if this Court believes Squawker was acting as a state actor and believes the Terms & Conditions reach more than true threats, this Court should affirm the decision below because Squawker's Terms & Conditions impose proper time, place, or manner restrictions. While the express language of the First Amendment forbids Congress from making laws "abridging freedom of speech," this First Amendment protection has not been read as absolute. *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 177 (1983); *Miller v. California*, 413 U.S. 15, 30 (1973); *Konigsberg v. State*, 366 U.S. 36, 49 (1961); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). One of the most commonly used restrictions on a person's speech is the restriction on the time, place, or manner of speech. These restrictions come in many forms, including noise and crowd size limitations, bans on early-morning or late-night demonstrations or parades, and permitting regulations regarding size and placement of signs on government property. *DiMa Coporation v. Town of Hallie*, 185 F.3d 823, 828—830 (7th Cir. 1999); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298—99 (1984). The Terms & Conditions are a restriction of this kind because they restrict the timing (frequency) of posts and method of posting. Reasonable restrictions on the time, place, or manner of expressive speech are justified, as long as they are (1) content-neutral; (2) a narrowly tailored time, place, or manner restriction; and (3) there are ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

A. The Terms & Conditions are content-neutral because they do not promote viewpoint discrimination.

A regulation is content-neutral when the viewpoint of the speaker is not burdened by either hostility or sympathy. *Young v. Am. Mini Theaters*, 427 U.S. 50, 67 (1976). Within a traditional public forum or a designated public forum, like Squawker, expressive activity is protected and viewpoint discrimination violates the First Amendment. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–48 (1983). Viewpoint discrimination restricts speech based on the speaker's opinion, ideology, or perspective. *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995). The principal question to be answered is whether a restriction was implemented because of the government's disagreement with the speaker's message. *Ward*, 491 U.S. at 791. Such an inquiry is answered in the positive in one of two ways: (1) when the regulation on its face draws distinctions based on the content of the speech; or (2) when a facially neutral regulation cannot be justified without referencing the content of the speech. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Laws or regulations with purposes unrelated to the content of the speech are content-neutral, even where certain types of speakers or messages are affected disproportionately. *Renton v. Playtime Theaters*, 475 U.S. 41, 47–48 (1986).

In *Hill v. Colorado*, the Court addressed the constitutionality of regulating expressive conduct within one-hundred feet of the entrance to a health care facility. 520 U.S. 703, 707 (2000). The statute in question made it unlawful to knowingly come closer than eight feet of a person for the purpose of handing out leaflets, engaging in oral protest, educating, or counseling the person. *Id.* Because the restriction on expression applied equally to individuals of all viewpoints, the Court reasoned, it was a content-neutral statute. *Id.* at 719.

Perhaps more illustrative is *March v. Mills*, where the First Circuit upheld the constitutionality of a Noise Provision that made loud noises intending to disrupt health care services unlawful because they "jeopardize[] the health of persons receiving health services within the building; or . . . interfere[] with the safe and effective delivery of those services within the building." 867 F.3d 46, 56 (1st Cir. 2017). The First Circuit found that the requisite intent to disrupt applied equally across all viewpoints, and similarly provided a way for all viewpoints to be expressed so long as the *intent* of the expression was not disruptive. *Id.* at 57. This even-handed applicability made the statute content-neutral.

Squawker's Terms & Conditions are similarly content-neutral, in particular the provision that reads "we prohibit the use of emojis [emoticons] in a violent or threatening manner." Stip. ¶ 9. This provision does not prescribe the type of threat prohibited, the personal or political opinions of the speaker, or any other content-based discernable characteristic that favors certain speakers over others. Like in *Virginia v. Black*, where the Court found constitutional a state statute making it unlawful to burn a cross with the intent to intimidate, Squawker's Terms & Conditions make it a violation to behave in a way that promotes violence, attacks, or threatens other Squawker users. 538 U.S. 343, 362 (2003).[4] The *Black* state statute did not single out or target cross-burning done to intimidate because of the victim's race, religion, union membership, or for any other reason, while permitting cross-burning done to intimidate for other reasons. *Id.* Similarly, Squawker's regulations apply equally to behavior and threats made regardless of the speaker's viewpoint. As demonstrated by the lack of *any* categories following the emoticon provision, Squawker's regulation is not intended to, that therefore does not, apply specifically to

[4] The statute was held unconstitutional because the prima facie provision would permit a jury to convict in every cross-burning case where the defendant exercised his or her constitutional right to not put on a defense. *Id.* at 365.

one type of viewpoint, but rather to any of the specified threatening behavior. Such words constitute true threats and are subject to content-specific restrictions under the First Amendment.

Although the Terms & Conditions prohibit behavior promoting violence, attacking, or threatening individuals, and list ten applicable categories, they neither limit prohibited threatening speech to the listed categories nor attach a viewpoint association to any of the listed categories. Like in *March v. Mills*, the clear purpose of the statute is to protect other users of the service, not to exclude or categorize particular viewpoints. 867 F.3d 46, 61–62 (1st Cir. 2017). Unlike in *Tinker v. Des Moines Independent School District*, where the Court found unconstitutional on First Amendment grounds a school's prohibition of a student wearing an armband in protest of the Vietnam War because it punished the student's political viewpoint and did not intrude upon school work or the rights of other students, the Squawker Terms & Conditions explicitly seek to regulate only squeaks that make the platform "unusable" and which prevent other users from "engag[ing] authentically with each other and build[ing] communities within [the] platform. 393 U.S. 503, 508 (1969), Stip. ¶ 6.

B. Squawker's Terms & Conditions are narrowly tailored to place as few restrictions as possible on speech within its platform and exclude only abusive categories of speech.

The time, place, and manner in which Squawker's flagging policy was applied was narrowly tailored because it merely restricted abusive content. "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 782–83 (1989). However, any such restrictions are not invalid "simply because there is

some imaginable alternative that might be less burdensome on speech." *Id.* at 797 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)). Rather, so long as the means chosen are not overbroad, "the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 800.

Squawker's policy is narrowly tailored to restrict ten categories of prohibitively abusive content, rather than a broad, sweeping ban on unsavory speech. It is not a ban on an undesired ideology or an attempt to "stifle fundamental personal liberties," but is a narrow regulation which protect the free speech of other users by fostering a safe environment for all. *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). To recognize the validity of the flagging policy is not to discount the importance of free expression; Squawker aligns with this Court's precedent by welcoming "provocative and challenging speech, so long as it does not evoke a clear and present danger." *Wooley*, 430 U.S. at 716 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

C. The Terms & Conditions leave open ample channels of communication for negative comments in a manner that does not restrict constitutional speech.

Squawker's Terms & Conditions are constitutional because it leaves open ample channels for communication within the same public forum. Supreme Court precedent is clear that "even in a public forum 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, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see*

Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). The requirement to leave open ample alternative channels for communication of the restricted language does not imply that such alternative channels must be perfect substitutes. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006). In most circuits, the proffered alternatives must offer "close proximity" to the intended audience or must "allow the speaker to reach his or her intended audience, in an equally effective manner as the prohibited speech, and without incurring meaningfully greater costs in time or money." *Marcavage v. City of New York*, 689 F.3d 98, 107–08 (2d Cir. 2012); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 955 (9th Cir. 2011) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 56–57 (1994)); *Linmark Associates, Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977). The focus of this inquiry typically lies in the number, variety, and type of alternative channels that remain available. *Perry*, 460 U.S. at 53. Further, though the Internet inherently offers alternative websites and social media platforms to express any given sentiment, these alternatives cannot overcome a restriction that targets specific users or content. *See, e.g.*, *Reno*, 521 U.S. at 879–83.

The constitutional concerns that follow a restriction on one channel of communication do not arise here. Squawker's Terms & Conditions clearly leave open ample alternative channels for communication of the information—in fact, it is the *same* channel of communication with merely one extra step. The alternative means are undoubtedly in close proximity to the intended audience, as a user wishing to view the flagged content must simply click once on the black box with the skull and crossbones emoji before the original, unaltered content is revealed. This provides an unhindered and equally effective manner to reach the intended audience, which

imposes no extra cost. Most importantly, the prohibition on abusive language is not specific to any given user, but instead regulates intimidation and true threats from any private user.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Eighteenth Circuit.

Respectfully submitted,

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Counsel for Respondent
January 30, 2020

STATEMENT OF COMPLIANCE

In accordance with Rule III.C.3 of the Official Rules of the 2020 Siegenthaler-Sutherland Moot Court Competition, Team 1 hereby submits this statement of compliance to certify that:

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