Case No. 17-874

IN THE
Supreme Court of the United States

AVERY MILNER,

Plaintiff-Petitioner,

v.

MAC PLUCKERBERG,

Defendant-Respondent.

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

BRIEF OF PETITIONER
Avery Milner

Team Number 12
January 31, 2020

Attorney for Avery Milner

QUESTIONS PRESENTED

(1) Whether a social media platform is bound by the First Amendment when contracted by the state to host a profile the state has opened as a public forum and uses as a main conduit for official state functions?

(2) Whether a set of Terms and Conditions violates the First Amendment where it flags any account that posts speech attacking certain groups of people and was intended to address misinformation and imposter accounts but has been poorly enforced?

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STATEMENT OF THE CASE

Petitioner Avery Milner ("Mr. Milner") is a freelance journalist who frequently expresses views on his home state of Delmont's government and advocates for policy change and reform. (R. at 4). In addition to writing for newspapers, one of Mr. Milner's chief journalistic outlets is a social media platform named Squawker. (R. at 4). Squawker users, termed "squeakers," create personal profiles and communicate with each other on the platform through profile posts, or "squeaks," in addition to "liking" other user's squeaks to signal approval, or commenting on other squeaks to open a dialogue. (R. at 2). Respondent and, trial-level defendant, Mackenzie Pluckerberg ("Defendant") is the founder and operator of Squawker. (R. at 2). This case arises from Mr. Milner being denied full access to Squawker as a journalistic outlet and denied the ability to critique his state government in a public forum. (R. at 6–7).

After launching in 2013, Squawker quickly achieved widespread popularity and became the main source of information and news for many of its millions of users. (R. at 2–3, 12). Many Delmont state officials, including sixty-eight-year-old Delmont Governor William Dunphy ("the Governor"), adopted Squawker as a means of conducting official state business. (R. at 3, 4). The Governor, longtime friend of Defendant, uses his Squawker profile on a daily basis to announce official state policy and gauge public sentiment thereabout through comments. (R. at 21, 24). Defendant has conceded that the Governor's profile is a constitutional public forum (R. at 31).

Each squeaker must agree to Squawker's Terms and Conditions before creating a profile. (R. at 3). The terms prohibit speech that attacks "historically marginalized" groups, including disparagement on the basis of age, in addition to use of emojis in a "violent or threatening" manner. (R. at 3). The terms also prohibit quick, repetitive posting, known as "spamming." (R. at 3). Defendant determines unilaterally if the speech at issue meets Squawker's definition of

prohibited speech and can respond by "flagging" the offending squeak. (R. at 4). Flagged content is marked by a skull and crossbones symbol that prevents viewing by other squeakers unless they click on and consent to see the flagged content specifically. (R. at 4).

Profiles of state officials—and only those of state officials—can be "verified" and subsequently enjoy special Terms and Conditions. (R. at 4). A verified profile is marked by a Delmont state flag that affirms its authenticity. (R. at 3). If a user posts something Defendant deems to have violated the Terms and Conditions on a verified profile, the content of the offender's entire Squawker profile can be flagged. (R. at 4). The only way to remedy a flagged profile is to watch a training video, complete a quiz, and acknowledge wrongdoing. (R. at 4). The purported purpose of the verification process is to eliminate misinformation and imposter profiles. (R. at 3). Squawker required each user to consent to the verified terms when verification debuted in order to continue using their profile. (R. at 16). Defendant adopted the verification process at the request of his friend, the Governor. (R. at 3).

On July 27, 2018, Mr. Milner's profile was flagged for comments he made in response to a squeak from the Governor regarding proposed legislation. (R. at 6). Specifically, Mr. Milner commented, "We gotta get rid of this guy," followed by emojis representing an elderly man, a syringe, and a coffin. (R. at 5–6). Mr. Milner's comments invoked strong feelings; they were reported to Defendant over two thousand times. (R. at 6). Subsequently, Squawker's user base dropped twenty-nine percent. (R. at 22). Defendant, who personally oversees all verified profiles, flagged Mr. Milner's profile for "violent and/or offensive use" and spamming. (R. at 22). This was the first time Defendant had ever flagged a profile for spamming. (R. at 22).

Since being flagged, Mr. Milner has dropped from ten thousand Squawker followers to two thousand, and he is now struggling to make ends meet as his decreased Squawker viewership

begot decreased freelance writing opportunities. (R. at 6). Mr. Milner refuses to follow Defendant's procedure for redeeming his profile because he has not been flagged for this behavior in the past and believes he has a right to interact with his state officials as he pleases. (R. at 20). Mr. Milner brought suit challenging Defendant's actions as impermissible burdens on his First-Amendment-protected criticism of the government. (R. at 1). The District Court for the District of Delmont granted summary judgment for Mr. Milner, holding both that Defendant was subject to the First Amendment and that his Terms and Conditions violated it. (R. at 9, 13). The Court of Appeals for the Eighteenth Circuit reversed both District Court holdings. (R. 36). Mr. Milner, eager to vindicate his constitutional rights, requested and was granted Certiorari on his contentions that Defendant is subject to the First Amendment and that Squawker's Terms and Conditions violate the First Amendment. (R. at 37).

SUMMARY OF THE ARGUMENT

I. Defendant's unique relationship to the government and its public forum make him subject to the First Amendment in maintaining the Governor's profile.

The First Amendment prohibits abridgement of citizens' freedom of speech by both government actors and private actors whose conduct can be attributed to the state. Defendant is a private actor, but his conduct in maintaining the Governor's Squawker profile can be attributed to the state of Delmont through state action doctrine.

Defendant's conduct is attributable to the state on three independent grounds. First, Delmont holds a property interest in the Governor's profile, and Defendant, having been contracted by Delmont to administer that property, is bound by the First Amendment in managing it. Second, even if the Governor's profile were wholly private property, Defendant is a state actor because he performs public functions traditionally and exclusively reserved to the

state and because Delmont is a joint participant in the administration of the Governor's profile. Finally, even if none of the proceeding state-action doctrine rationales applied, preserving First Amendment freedoms in the modern world demands social media companies be beholden to them when hosting public forums.

II. Defendant's Terms and Conditions violate the First Amendment.

The Defendant's Terms and Conditions do not constitute a permissible time, place, or manner restrictions and, therefore, violate the First Amendment. This Court will only find a time, place, or manner restriction in a public forum permissible where it is viewpoint-or-content-neutral, is narrowly tailored to serve a compelling governmental interest, and leaves open ample alternative channels of communication. The Terms and Conditions in the present case meet none of these requirements and are, therefore, impermissible.

The Terms and Conditions constitute constitutionally forbidden viewpoint discrimination because they prohibit speech expressing viewpoints deemed to attack certain groups of people. Even if the Terms and Condition were not viewpoint discrimination, they are still content discrimination because the restrictions on criticizing people based on age cannot be justified without reference to the age-related emoji content of Mr. Milner's speech.

The Terms and Conditions are not narrowly tailored to serve a compelling governmental interest. The interest identified as motivating the Terms and Conditions—addressing misinformation and imposter accounts on the Squawker platform—cannot be compelling because the restrictions both are underinclusive and have been poorly enforced by Defendant. Moreover, even if the interest were compelling, the Terms and Conditions are not narrowly tailored to address that interest because they restrict speech on broad, categorical grounds rather than being narrowly focused on the problem of misinformation and imposter accounts.

Finally, Defendant's Terms and Conditions do not leave open ample alternative channels for communication because they deny Mr. Milner adequate access to his intended audiences.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit has entered a final judgment in this matter. *Pluckerberg v. Milner*, C.A. No. 16-CV-6834 at *36 (18th Cir. 2019). Petitioner filed a timely petition for writ of certiorari, which this Court granted. This Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1) (2018).

ARGUMENT

I. DEFENDANT'S UNIQUE RELATIONSHIP TO THE GOVERNMENT AND ITS PUBLIC FORUM MAKE HIM SUBJECT TO THE FIRST AMENDMENT IN MAINTAINING THE GOVERNOR'S PROFILE.

The First Amendment prohibits abridgement of citizens' freedom of speech. U.S. Const. amend. I. Freedom of speech, especially the citizenry's ability to freely criticize the government, is a hallmark of American free society. *See, e.g., Rosenblatt v. Baer,* 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion."); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (describing citizenry's ability to inquire into, speak on, and debate about government issues as "a precondition to enlightened self-government"). Mr. Milner's government-critical squeaks were First Amendment expressions of the highest magnitude, and Defendant effectively silenced him.

The First Amendment's restrictions apply to governments primarily, but certain private actions can be attributed to the state via state action doctrine and, thus, become subject to First Amendment scrutiny. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Defendant's flagging Mr. Milner's profile constitutes state action for three independent reasons. First, the Governor's profile is state property for which Defendant was merely a contracted

administrator. Second, other state-action principles attribute Defendant's conduct to the state. Third, the First Amendment applies to social media as the modern public square.

A. Delmont's property interest in the Governor's profile subjects Defendant to First Amendment strictures.

The government has a duty to reasonably permit free speech under the First Amendment when it creates a public forum. *Halleck*, 139 S. Ct. at 1930. When the government has a constitutional duty through its property, as in a public forum, a private entity contracted to administer that property holds the duty as well. *Cf. West v. Atkins*, 487 U.S. 42, 56 (1988) (holding independent-contractor to Eighth Amendment requirements in state prison context). Here, Defendant concedes that Delmont has created a public forum with the Governor's profile. Therefore, Squawker is bound by the First Amendment in maintaining this public forum for two reasons. First, the Governor holds a significant property interest in his Squawker profile, which is attributable to Delmont. Second, as a private, contracted administrator of government property, Defendant may not violate the First Amendment in a way the state itself could not.

1. The Governor holds a significant property interest in his Squawker profile, which is attributable to the state because of the profile's official nature.

Social media users have a cognizable property interest in the profiles they create on a platform, despite not controlling the platform infrastructure that facilitates the profile's existence. *See In re CTLI, LLC*, 528 B.R. 359, 366–67 (Bankr. S.D. Tex. 2015) (ruling in bankruptcy context that debtor holds property interest in its profile); *see also In re Borders Grp., Inc.*, No. 11-10614 MG, 2011 WL 5520261, at *13 (Bankr. S.D.N.Y. 2011) (treating social media accounts as assets of debtor). Finding a property interest in social media is a logical extension of low-tech analogs, akin to a tenant's interest in property to which he does not hold title[1], or an or

[1] *Cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (subjecting operations of theater leased by city to First Amendment scrutiny despite theater being privately owned).

an advertiser's interest in a billboard owned by another, *see Halleck*, 139 S. Ct. at 1938 (Sotomayor, J., dissenting) ("The [property] right to convey expressive content using someone else's physical infrastructure is not new."). Property rights can be properly thought of as a "bundle of sticks." *United States v. Craft*, 535 U.S. 274, 278 (2002). Together the bundle constitutes the entire property, but single sticks can be disaggregated to separate individuals. *Id.* Social media users, including the Governor, do not hold the sum bundle, but they do hold the significant property right to operate their own profiles.

The Governor's interest in his profile is through his capacity as a state official; the account, therefore, is the property of Delmont. In *Knight First Amendment Institute at Columbia University v. Trump*, the Second Circuit considered President Trump's profile on a social media platform highly similar to Squawker to be property of the federal government, given the profile's governmental functions. 928 F.3d 226, 236 (2d Cir. 2019). The President in *Knight*, like the Governor in the present case, uses his profile to announce new policy initiatives and gauge public sentiment thereabout. *Compare Knight*, 928 F.3d at 231–32, *with* (R. at 9). In *Knight*, the Court held that this pattern of official use rendered the profile "government-controlled property." 928 F.3d at 235–36; *see also Davison v. Randall*, 912 F.3d 666, 682, n. 4 (4th Cir. 2019) (citing *Solomons v. United States*, 137 U.S. 342, 346–48 (1890)) (acknowledging a "good argument" that content created on social media by government officials is government property). In the present case, Delmont holds a similar property interest in the Governor's Squawker profile, because the Governor uses it in an official manner comparable to President Trump.

Indeed, the conceded existence of a public forum in the present case, (R. at 31), is itself evidence of a government property interest. This Court has previously engaged in public-forum analysis only where "the government . . . held at least some formal easement or other property

interest [in the forum]." *Denver Area Educ. Telecommc'ns Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 829 (1996) (Thomas, J., concurring). Multiple Justices have declared that no public forum can exist absent a governmental property interest. *See id.* Indeed, there would be little sense in labeling a forum "public," thereby requiring the government to maintain constitutional freedom of speech therein, if the forum was comprised of wholly private property. Because no public forum can exist without a governmental property interest, by conceding a public forum, Defendant has also conceded a governmental property interest in the Governor's profile.

2. Defendant has been contracted to manage state property and is thus as bound by the First Amendment as the state would be had it managed the property directly.

Delmont, through the Governor in his official capacity, contracted Defendant to maintain state property. Each squeaker contracts with Squawker when establishing a profile, as evidenced by Squawker's imposed Terms and Conditions. (R. at 15). The verification process entails an even greater contractual relationship, one only available to government officials, that includes an additional catalogue of Terms and Conditions. (R. at 16). The Governor himself requested Squawker adopt the verification process and then intentionally[2] contracted with Defendant in establishing a profile and again in seeking verification of his profile. Because these contracts involve maintaining the Governor's profile and because the Governor's profile is state property, Defendant is bound by the First Amendment in administering the property in the same way Delmont would be.

When the state incurs constitutional obligations through the use of its property, as is the case when the government opens a public forum, *Halleck*, 139 S. Ct. at 1930, it cannot delegate

[2] Each squeaker is asked to agree to the platform's Terms and Conditions before being allowed to create a profile. (R. at 3). Each squeaker was also required to agree to the new verification Terms and Conditions, immediately after they were introduced, to continue using the platform. (R. at 16). Therefore, the Governor was aware of and, in fact, affirmatively consented to the creation of a contract between himself and Squawker.

its responsibilities into non-existence by contracting them to private entities. *See West*, 487 U.S. at 56–58 (1988). This Court applied this principle to contractors facilitating public forums specifically in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). There, a plaintiff sponsoring a rock concert challenged a New York City rule mandating musical performers in Central Park use a sound technician selected by the city. *Id.* at 787. The technician was described as an independent contractor connected to a private sound company. *Id.* The plaintiff averred that the rule limited his access to the public forum that is Central Park and thus violated the First Amendment. *Id.* at 784. This Court analyzed whether the First Amendment's public forum requirements had been satisfied, in part, by looking to the behavior of the *contractor*. This Court noted that if the contractor had a "substantial deleterious effect" on the performance sponsors' ability to achieve their desired sound quality, the plaintiff's charge "would have considerable force." *Id.* at 801. Implicit in and inseparable from *Ward*'s logic is the fact that contractors are bound by the First Amendment when facilitating a public forum.

Defendant is similar to the contractor in *Ward*; therefore, Defendant's actions should have similar First Amendment implications. Both the contractor in *Ward* and Defendant in the present case work within the ambit of a public forum in which the state has a property interest: Central Park and the Governor's Squawker profile, respectively. In addition, both have been contracted by the state to facilitate the First Amendment activities for which their forums exist: the contractor in *Ward* operated the amplification equipment that broadcasted park performers' artistic expression and Defendant maintains the Squawker platform for public discourse. Just as the private contractor in *Ward* was bound by the First Amendment in facilitating a public forum, so too Defendant is bound by the First Amendment in facilitating a public forum.

The present case is distinguishable from *Manhattan Community Access Corporation v.*

Halleck, 139 S. Ct. 1921 (2019). In *Halleck*, this Court held that a private entity designated by New York City to operate public access channels was not subject to the First Amendment. *Id.* at 1934. The decision turned, in part, on the fact that New York City held no property interest in the public access channels, and the channels were therefore not a public forum. *Id.* at 1933. This Court admonished that its decision regarding the property interest "should not be read too broadly," however, and noted that the property-interest analysis would likely differ had the city elected to operate the public access channels itself. *Id.* This implies that had the city operated the channels itself, a property interest would exist and the operation of the forum would be subject to the first amendment. That circumstance is exactly the case at bar. Unlike *Halleck*, Delmont operates the forum that is the Governor's profile directly through the Governor, as opposed to delegating to a private entity. The state-operation of the profile creates the state property interest that *Halleck* lacked and renders Defendant "in essence simply managing government property on behalf of" Delmont. *Id.* at 1933. As the four dissenting justices in *Halleck* note, the state's opening of a public forum with its own property, as Delmont does here, is "a choice that triggers constitutional obligations" and, as such, when "contract[ing] out those constitutional responsibilities to a private entity, that entity. . . becomes a state actor." *Id.* at 1940. *Halleck's* majority acknowledges its decision does not control where the state holds a property interest in a public forum and implies that, along the *Halleck* dissent's line of reasoning, such a state property interest invokes First Amendment scrutiny. *Id.* at 1934.

B. Even if the Governor's profile were purely private property, state action doctrine dictates that Defendant is subject to First Amendment constraints.

State action doctrine also allows private entities operating on wholly private property to be regarded as state actors in certain circumstances. *See, e.g.*, *Halleck*, 139 S. Ct. at 1928. Even if Delmont's property interest does not subject Defendant to the First Amendment, two other

independent variants of state action doctrine make Defendant a state actor when maintaining the Governor's profile. First, Defendant performs public functions that are traditionally and exclusively conducted by the state. Second, Delmont is a joint participant in and derives benefit from Defendant's actions.

1. Defendant, through verifying and maintaining verified profiles, performs functions traditionally and exclusively reserved to the state.

Defendant is a state actor because Squawker serves public functions through the Governor's profile. A variety of state-action doctrine termed "public-function doctrine" considers private entities as state actors when serving a function "traditionally and exclusively reserved to the state." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974); *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978). This is a stringent test, and ""very few' functions fall into the [traditional and exclusive] category." *Halleck*, 139 S. Ct. at 1929 (quoting *Flagg Bros.*, 436 U.S. at 158). Defendant nonetheless qualifies as a state actor under the public-function doctrine because of the unique qualities of the Squawker verification process.

Here, the Court of Appeals erred by construing the public-function question too narrowly. *See* (R. at 30–31). The Court posed only "hosting and regulating official government [social media] pages" as the prospective public functions. *Id.* This appraises the fledgling medium of social media for traditionality and exclusivity in a vacuum—without identifying the conceptual functions social media serves in this case and how those compare to historical analogs. It is nonsensical for a court to restrict a test tinged in traditionality to the confines of social media; a technology this Court has described as so "new," and "protean," as to constitute a "revolution in human thought." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). Squawker itself is not even seven years old, (R. at 21), so delving into its traditionality is meaningless. Instead, this Court should analyze the conceptual functions Defendant is performing through social media

and whether those conceptual functions have been "traditionally and exclusively reserved to the state," *Jackson,* 419 U.S. at 352, irrespective of the technology behind them.[3] *Cf. Georgia v. McCollum,* 505 U.S. 42, 54 (1992) (deciding state-actor status on "the nature and context of the function [a public defender] is performing" rather than the general role of his position in the adversarial system).

One such public function performed by Defendant is the authentication of government messages through insignia that verify state origin. Squawker's verification serves this function by marking government profiles with the state flag. (R. 16). The government has traditionally self-authenticated its messaging exclusively; in fact, it is a federal crime to use authenticating government identifiers without authorization. *See* 18 U.S.C. §§ 506, 713, 1017 (2018). The government alone develops official government seals, utilizes government watermarks, issues government identifications, possesses exclusive rights to monikers that indicate government authenticity such as ".gov." *See, e.g.*, 15 U.S.C. § 1052(b) (2018) (prohibiting registration of trademarks bearing federal or state insignias). A Squawker verification is tantamount to an official government seal: only Delmont officials have them, and they are intended to signify government authenticity. Traditionally, no entity other than government is empowered to definitively confirm state messages using official symbolism.

As a second public function, Defendant is effectively facilitating notice and comment of the Governor's policies. Notice and comment procedure mandates that federal agencies publish new rule proposals in the Federal Register and accept public comments on said proposals before adopting them. 5 U.S.C. § 553 (2018). Many states have adopted notice and comment

[3] It is true that *Halleck* construed its public-function question in terms of public access television, but that medium is a much more mature technology, one in which traditions have had time to grow. Additionally, in *Halleck*, this Court expanded the breadth of their analysis beyond public access television later in the opinion. *See* 139 S. Ct. at 1930.

requirements analogous to the federal process. *See, e.g.*, Cal. Gov't Code § 11346.2 (West 2019); Ind. Code Ann. § 13-14-9-2 (West 2019); N.Y. A.P.A. Law § 202(1.)(a) (McKinney 2019). The process involves only government agencies, the Federal Register or applicable state register, and the public who chose to comment. Squawker replicates this process—the Governor posts notice of new policy, and the public delivers feedback directly to him. Assuredly, government registers and agencies are bound by the First Amendment in hosting notice and comment forums. *See Halleck*, 139 S. C.t. at 1930 (requiring First Amendment safeguards when state opens a public forum). Because these notice and comment forums are traditionally and exclusively hosted by governments, Defendant is likewise bound when hosting one.

In both of these functions, Defendant is "clothed with the authority of [the state]," *West*, 487 U.S. at 49, such that an independent observer could not readily discern that the actions emanate from a private entity rather than government. This is a commonality shared by all cases in which this Court has recognized a traditional, exclusive public function. Like a private entity holding public election primaries, *see Terry v. Adams*, 345 U.S. 461, 468–70 (1953); *see also Smith v. Allwright*, 321 U.S. 649, 662–66 (1944), or a private entity administering all the municipal services of a town, *see Marsh v. Alabama*, 326 U.S. 501, 509–510 (1946), Squawker is indistinguishable from the state when authenticating official messages and facilitating notice and comment. Additionally, the Governor placed a state imprimatur on the verification practice by requesting its implementation as something that would benefit the state. *See Jackson*, 419 U.S. at 357 (suggesting state action is present when state "put its own weight on the side of the proposed practice" with imprimatur). Defendant is a "private individual. . . endowed by the state with powers or functions governmental in nature" and has thus "become [an agent]. . . of the state and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

2. Delmont was a joint participant in Defendant's silencing Mr. Milner.

Private entities can also be treated as state actors "when the government acts jointly with the private entity," *Halleck*, 139 S. Ct.at 1928, such that the state "knowingly accepts the benefits derived from [the private entity's] unconstitutional behavior," *Nat'l Collegiate Athletic Ass'n v. Tarkanian,* 488 U.S. 179, 192 (1988). This entails a symbiotic relationship where "the state ha[s] so far insinuated itself into a position of interdependence with the [private entity] that it [is] a joint participant in the enterprise." *Jackson,* 419 U.S. at 357–58 (citing *Burton v. Wilmington Parking Auth.,* 365 U.S. 715 (1961)). Such a relationship is present here.

This Court pioneered the joint participation doctrine in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). In *Burton*, this Court declared the state was a joint participant in the racial discrimination of a restaurant that leased space in a parking facility owned by the city. *Id.* The financial survival of the city-owned parking facility and, consequently, the city's objective of providing parking services, depended on the tenant's rent payments. *Id.* at 723–25. The state thus directly benefitted from the tenant's profit-boosting discriminatory practices, making it a joint participant therein. *Id.* at 724. This state joint participant made the tenant's otherwise private actions subject to the constitutional restrictions on state action. *Id.* 724–25.

The present case presents a mirror image of *Burton*'s symbiotic tenant-landlord relationship. Here, Defendant is more akin to a landlord and Delmont is more akin to a tenant, but a similar "incidental variety of mutual benefits," aligns the two party's interests. *Tarkanian,* 488 U.S. at 196, n. 16 (quoting *Burton,* 365 U.S. at 724). Delmont officials' presence on Squawker is a powerful attractant for other users,[4] so powerful that Defendant accommodated the

[4] The Governor's profile alone might well be as indispensable to the success of Squawker as the discriminatory tenant was to the success of *Burton*'s parking facility. Twenty-nine percent of the platform's user base left

state with special terms, including verification, at the Governor's behest. *See* (R. at 16). The state too benefits immensely from its relationship with Defendant. The Governor's profile is "one of the main ways in which [he] carries out official business." (R. at 3).

Furthermore, like the city in *Burton*, Delmont benefits directly from Defendant's unconstitutional behavior. By flagging Mr. Milner's government critical posts, Defendant insulated Delmont from a previously visible detractor. Defendant's actions could also dissuade other citizens from speaking out against Delmont officials for fear of also being flagged. A citizenry silent for fear of retribution is exactly what First Amendment protections are meant to prevent. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions. . . for speaking out."). Here, as in *Burton*, Defendant and the state are entangled in a symbiotic relationship from which Delmont "knowingly accept[ed] the benefits derived from" Defendant silencing the Governor's political opponents. *Tarkanian*, 488 U.S. at 192.

C. The purposes of the First Amendment are best served by constraining social media companies in circumstances like the present case.

Even if none of the preceding rationales applied, preserving First Amendment freedoms in the internet age demands social media companies be bound by the First Amendment when hosting public discourse. "Differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 386 (1969). Social media deserves heightened First Amendment protection as this Court has identified it as the most important space for expression and exchange of ideas today. *See*

subsequent Mr. Milner's comments on the Governor's profile, (R. at 22). For Mr. Milner's comments to be the catalyst for this exodus, as Defendant seems to suggest, nearly a third of all Squawker users must have visited the Governor's profile to see the comments. A profile that produces such traffic is surely an invaluable asset to Defendant.

Packingham, 137 S. Ct. at 1735. The modern technology of social media requires new First Amendment safeguards—at least as it pertains to "speech concerning public affairs," which is "the essence of self-government." *Red Lion*, 395 U.S. at 390 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

Social media is the modern equivalent of public squares, streets, or parks—places this Court has identified as quintessential First Amendment public forums. *See Packingham*, 137 S. Ct. at 1735 (citing *Ward*, 491 U.S. at 796). This Court solidified this equivalency in *Packingham* by holding that the First Amendment prohibited North Carolina from barring sex offenders' access to social media sites. 137 S. Ct. at 1739. A key difference between social media and traditional, physical public spaces, however, is that the latter is typically controlled by the state whereas the former is typically controlled by private entities. This difference serves to heighten the need for First Amendment protection on social media. Private ownership enables social media operators, as Defendant does here, to hide behind their status as private entities while restraining individuals' access to these public spaces on any grounds they please. Allowing a private entity to exclude speech from a public forum so integral to modern communications, especially when that speech pertains to public issues, does not comport with the First Amendment's mission of "preserving an uninhibited marketplace of ideas." *Red Lion*, 395 U.S. at 390. It instead "permit[s] a corporation to govern a community of citizens so as to restrict their fundamental liberties," in the way *Marsh*, 326 U.S. at 509, disavowed. Therefore, to preserve First Amendment freedoms and to provide clarity in the "Wild West of constitutional law" that is the internet, (R. at 10), this Court must hold social media companies to First Amendment strictures when hosting public discourse.

II. DEFENDANT'S TERMS AND CONDITIONS VIOLATE THE FIRST AMENDMENT.

Defendant's Terms and Conditions violate Mr. Milner's First Amendment rights to speak

about public issues on social media. Under this Court's precedent, the content of Mr. Milner's social media posts should be afforded the highest level of constitutional protection. "Frequently," this Court has reaffirmed that "speech on public issues," like the social media posts made by Mr. Milner, are on the "highest rung of the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *Nat'l Ass'n for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). The Eighteenth Circuit's ruling both undermines this Court's recent holding in *Packingham* and severely chills debate about public issues in the "vast democratic forums of the Internet." *Packingham*, 137 S. Ct. at 1735 (citing *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)).

In a public forum, the government's ability to restrict speech is limited to certain time, place, or manner restrictions. This Court will only find a time, place, or manner restriction to be permissible when it meets specific requirements. *Ward*, 491 U.S. at 791 (outlining the relevant three-prong test); *see also McCullen v. Coakley*, 573 U.S. 464 (2014) (citing *Ward*, 491 U.S. at 796) (applying the three-prong test); *see generally* William M. Howard, Annotation, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park or Other Public Forum – Manner of Restriction*, 71 A.L.R. 6th 471 (2012) (surveying state and federal court precedent in First Amendment cases about restrictions on speech in public forums). Specifically, such restrictions must be viewpoint-or-content-neutral, be narrowly tailored to achieve a compelling governmental interest, and leave open ample alternative channels of communication. *Ward*, 491 U.S. at 791. In the present case, Defendant's Terms and Conditions meet none of those requirements. First, Defendant's Terms and Conditions constitute impermissible "viewpoint discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995), and cannot be "justified without reference to the content of the regulated speech," *Ward*, 491

U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Second, Defendant's Terms and Conditions are not "narrowly tailored" to serve a compelling governmental interest. *Id.* Last, Defendant's Terms and Conditions do not "leave open ample alternative channels for communication of the information" because they deny Mr. Milner adequate access to his intended audience. *Id.* Given that they satisfy none of these requirements, Defendant's Terms and Conditions are not permissible time, place, or manner restrictions and, therefore, violate the First Amendment.

A. Defendant's Terms and Conditions constitute impermissible viewpoint discrimination and cannot be justified without reference to the content of the regulated speech.

This Court always finds restrictions that amount to "viewpoint discrimination" to be "presumed impermissible when directed against speech" in a public forum. *Rosenberger*, 515 U.S. at 830. This Court may also find restrictions impermissible when they constitute "content discrimination," *id.*, which means that they cannot be "justified without reference to the content of the regulated speech," *Ward*, 491 U.S. at 791. Defendant's Terms and Conditions both constitute viewpoint discrimination and cannot be justified without reference to the content of the regulated speech.

1. Defendant's Terms and Conditions constitute impermissible viewpoint discrimination.

Defendant's Terms and Conditions constitute viewpoint discrimination. This Court has always found that restrictions amounting to viewpoint discrimination are "forbidden." *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (citing *Rosenberger*, 515 U.S. at 831). For example, in *Matal v. Tam*, this Court found unconstitutional prohibitions on approval of trademarks that "disparage" other people because the prohibitions amounted to viewpoint discrimination. *Id.* at 1751. The Court's reasoning in *Matal* applies to the present case for two specific reasons. First, in both cases, the restrictions prohibit criticism of certain types of people. In *Matal*, the Court

struck down the restrictions, even when the disparagement was on the basis of race and ethnicity. *Id.* at 1755–57. Similarly, in the present case, Defendant's Terms and Conditions prohibit speech that "directly attacks . . . other people" including "on the basis of . . . age." (R. at 15). Second, the restrictions on speech in the present case go even further than the restrictions in *Matal*. In *Matal*, the restrictions "evenhandedly prohibit[ed] disparagement of all groups," including "those arrayed on both sides of every possible issue." *Matal,* 137 S. Ct. at 1763. In contrast, the Defendant's Terms and Conditions are intended to protect from attack not "all groups," *id.*, but only those who are "historically marginalized," (R at 15). If the broad restrictions on all sorts of viewpoints in *Matal* constituted impermissible viewpoint discrimination, then the restrictions in the present case, which are only intended to restrict viewpoints critical of certain groups, are certainly impermissible viewpoint discrimination. *See also Knight First Amendment Inst. at Columbia Univ. v. Trump,* 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (finding that a social media account blocked immediately after it posted criticism of a public official constituted impermissible viewpoint discrimination).

To be sure, protecting marginalized groups is a laudable goal, and it is apparent that many residents of Delmont find Mr. Milner's opinions criticizing the aged to be reprehensible. *See* (R. at 22) (stating that over two thousand Squawker users reported Mr. Milner's posts). However, a "bedrock principle" of the First Amendment is that speech cannot be prohibited simply because society finds its content to be offensive. *Texas v. Johnson,* 491 U.S. 397, 414 (1989). In fact, this Court has specifically and repeatedly said that such "insulting, and even outrageous, speech" must be stringently protected in order to uphold the First Amendment. *Boos v. Barry*, 485 U.S. 312, 322 (1988) (striking down a District of Columbia law prohibiting signs criticizing a foreign government near an embassy); *see also, e.g.*, *Snyder v. Phelps*, 562 U.S. 443

(2011) (shielding Westboro Baptist Church protesters from liability for their offensive protests at a soldier's funeral based on First Amendment concerns). Therefore, the viewpoint discrimination in Defendant's Terms and Conditions cannot be justified because some Delmont citizens take offense at Mr. Milner's views. Instead, that fact means the speech must be stringently protected.

Additionally, the Eighteenth Circuit's three arguments on this issue do not hold muster. First, the fact that Mr. Milner's posts were merely flagged and not deleted cannot serve to overcome this Court's prohibition on viewpoint discrimination. *See* (R. at 34) (citing *Red Lion*, 395 U.S. at 396). The way in which the flagging operates does not change the fact that accounts are chosen for flagging via a process of viewpoint discrimination. Second, the Eighteenth Circuit's analogy to the broadcasting rules in *Red Lion Broadcasting Co. v. F.C.C.* is inapposite. Important to the Court's holding in *Red Lion* was the fact that "there are substantially more individuals who want to broadcast than there are frequencies to allocate." 395 U.S. at 388, 396–400. In contrast, there is not a similar supply-and-demand problem with social media, given the "relatively unlimited" ability of any person to participate in the medium. *Reno*, 521 U.S. at 868. Whether Mr. Milner's Squawker posts are visible does not affect whether another user can post her own Squawker posts. Third, the Eighteenth Circuit's analogy to *F.C.C. v. Pacifica Foundation,* 438 U.S. 726 (1978) is also incorrect. This Court said that case was about broadcast of indecent language. *Id.* at 744 ("[T]he question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language."). While Mr. Milner's posts may be offensive to a particular individual, the posts can hardly be labeled as indecent.

2. Defendant's Terms and Conditions are not content-neutral because they cannot be justified without reference to the content of the regulated speech.

Even if Defendant's Terms and Conditions were not viewpoint discrimination, they are still content discrimination because substantial portions of the Terms and Conditions cannot "be justified without reference to the content of" Mr. Milner's speech. *Ward,* 491 U.S. at 791. Even if the restrictions on rapid posts could be justified without reference to content, it is clear that restrictions on use of emojis to attack people based on age cannot be justified without reference to the emoji and age-related content of Mr. Milner's tweets. In fact, perhaps because it recognized this weakness, the Eighteenth Circuit did not even attempt to address these content restricitions, instead addressing only the rapid-post restrictions in its opinion. *See* (R. at 34).

B. Defendant's Terms and Conditions are not narrowly tailored to serve a compelling governmental interest.

Even if the Defendant's Terms and Conditions were not viewpoint discrimination or content discrimination, they still violates the First Amendment because the government interest identified is not compelling and the rules are not narrowly tailored to that interest.

1. The governmental interest identified is clearly not compelling given the underinclusive restrictions in the Terms and Conditions and Defendant's poor enforcement of them.

The record does identify a governmental interest for the new flagging policy as it relates to verified accounts: ensuring that imposter accounts and misinformation did not interfere with the Governor's ability to communicate with his constituents. (R. at 24); *see also* (R. at 16). However, in several First Amendment cases, this Court has suggested that underinclusive restrictions or poor enforcement of those restrictions show that the governmental interest is not actually compelling. *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (Scalia, J., concurring)) (stating that a restriction cannot be seen as furthering a compelling interest "when it leaves appreciable damage

to that supposedly vital interest unprohibited"). That reasoning applies here for two reasons. First, the Terms and Conditions do not actually prohibit imposter accounts or limit misinformation. Instead, they prohibit certain viewpoints and high-frequency posts. (R. at 15). To be sure, the Terms and Conditions do prohibit "automatic . . . posting," *id.*, which may indeed be a sign of an imposter account. But the rest of the Terms and Conditions do little to address either the misinformation or imposter accounts that purportedly justified the policy at the outset. Second, the Defendant has hardly enforced the Terms and Conditions, admitting that he had not flagged a single account for high-frequency posting between the enactment of the updated Terms and Conditions and his flagging Mr. Milner's account. (R. at 22). It strains credulity to believe that no violations of the terms occurred during that four-month period, given the sheer number of users and posts on the platform as well as the breadth of content restricted under the Terms and Conditions. Therefore, based on the reasoning of this Court in *Republican Party of Minnesota v. White*, both the underinclusive regulations and the Defendant's lack of enforcement of the restrictions show that the Terms and Conditions does not further a compelling interest.

2. The Terms and Conditions are not narrowly tailored because they restrict substantially more speech than needed to further the governmental interest

Even if there were a compelling governmental interest, the Terms and Conditions are not narrowly tailored to that goal because they burden substantially more speech than is necessary to further that governmental interest. The Supreme Court has repeatedly held restrictions are not narrowly tailored where they restrict substantially more speech than needed to further the government's interest. *See Packingham*, 137 S. Ct. 1730 (finding a law prohibiting sex offenders from accessing social media was not narrowly tailored to the governmental interest of ensuring they did not use the internet for further predation because it barred other non-predation-related uses of social media); *see also McCullen*, 571 U.S. at 486 (finding an abortion-clinic buffer-zone

law was not narrowly tailored because it went beyond protecting women and promoting safe sidewalks to interfering with the rights of abortion protesters to peacefully interact with women seeking abortions). In the present case, the Terms and Conditions are not narrowly tailored to the government's interest. Rather than focusing on characteristics of imposter accounts or accounts spreading misinformation, the Terms and Conditions instead bar all opinions critical of certain groups of people and bar rapid posts, even when done manually and not automatically. (R. at 15). Therefore, because the Terms and Conditions burden substantially more speech than needed to address the government's interest, they are not narrowly tailored.

C. Defendant's Terms and Conditions do not leave open ample alternative channels for communication of the information because they deny Mr. Milner adequate access to his intended audience.

Even if the Terms and Conditions were content-neutral and narrowly tailored, they still violate the First Amendment because they deny Mr. Milner adequate alternative channels to reach his intended audience.

This Court has found that restrictions do not leave ample alternative channels for communication where the intended audience could not be reached as well by available alternative means. *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994). For example, in *City of Ladue v. Gilleo*, this Court found that a city ordinance banning signs in residential yards did not leave ample alternative channels for communication because "the audience intended to be reached by a residential sign—neighbors—could not be reached nearly as well by other means." *Id.* That reasoning in *City of Ladue* applies to the present case. Just as a ban on yard signs would keep residents of Ladue from effectively reaching their neighbors, so Mr. Milner's flagged profile keeps him from effectively communicating with his intended audience: the other residents of Delmont and the Governor himself. Just as a residential yard sign is uniquely capable of reaching neighbors, so a Squawker post is uniquely capable of communicating with

the Governor and residents of Delmont interested in the Governor's policies. There are three specific reasons for this. First, Squawker is the main public forum used to discuss local public issues, so it is likely to reach the most individuals who are particularly interested in Mr. Milner's opinions on local Delmont issues. *See* (R at 3) ("By mid-2017, many people had begun using Squawker as their main source for information regarding national and local news."). Second, Mr. Milner has built a specific following on Squawker that he cannot reach nearly as effectively anywhere else. *See* (R at 4) ("Prior to July 2018, Mr. Milner had over ten thousand followers on his Squawker account and, on average, seven thousand views per squeak."). Third, Squawker is a uniquely effectively way to communicate with the Governor. Not only is Squawker "one of the main ways in which the Governor carries out official business such as announcing new policies," (R at 3), but it is also clearly closely monitored by the Governor, given his interactions with Defendant about management of the platform, *see, e.g.*, (R. at 16).

To be sure, even after being flagged on Squawker, Mr. Milner can continue his work as a freelance journalist writing articles for newspapers to critique Delmont officials. *See* (R at 4) ("Mr. Milner . . . is a freelance journalist and . . . often writes articles for various newspapers within his home state."). He has also not been banned from communicating via Squawker; rather, his account is only flagged per the Terms and Conditions. *See* (R. at 16). Nevertheless, neither of these facts is sufficient to constitute access to ample alternative channels of communication. First, his ability to write for newspapers will not enable him to reach his intended audience as effectively because newspapers are not the main source of information used to discuss local affairs and also because the record does not show that the Governor has the same degree of interaction with newspapers. Just as handbills, bumper stickers or handheld signs were inadequate alternatives to yard signs in *City of Ladue*, 512 U.S. at 56, so too newspapers are not

an adequate alternative to Squawker in the present case. Second, the flagging policy is certainly less than a full ban; however, the foreboding skull and cross bones combined with the affirmative click required for other users to view flagged Squeaks means that posting on Squawker from a flagged account is not nearly as effective in reaching other Squawker users. Despite his ability to write for newspapers and the fact that his account was only flagged, Mr. Milner will still be unable to reach his intended audience nearly as well. Therefore, under the precedent established in this Court's ruling in *City of Ladue*, this Court must find that the Terms and Conditions do not offer ample alternative channels of communication.

CONCLUSION

Three years ago, in *Packingham v. North Carolina*, this Court reaffirmed that, "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham,* 137 S. Ct. 1730, 1735 (2017). Furthermore, the Court noted that social media "websites . . . provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 1737. In the present case, Mr. Milner was utilizing the powerful mechanism of social media to make his voice heard when Defendant flagged his account, preventing him "from engaging in the legitimate exercise of First Amendment rights." *Id.* Protecting the First Amendment in this case means upholding Mr. Milner's right to participate in the "vast democratic forums of the Internet." *Id.* (citing *Reno* 521 U.S. at 868). Therefore, Mr. Milner respectfully requests that the decision of the United States Court of Appeals for the Eighteenth Circuit be reversed and the decision of the District of Delmont be reinstated.

CERTIFICATE OF COMPLIANCE

Pursuant to the Seigenthaler-Sutherland Official Rules, we, the under-signed counsel, certify that (i) this brief is entirely the work product of competition team members, (ii) the team has complied fully with its school's governing honor code; and (iii) the team has complied with all Rules of the Competition.

s/ TEAM 12

Dated: January 31, 2020

APPENDIX A: STATUTES AND CONSTITUTIONAL PROVISIONS

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.

5 U.S.C. § 553 (2018): Rulemaking

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

15 U.S.C. § 1052(b) (2018): Trademarks Registrable on principal register; concurrent registration

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—
. . .
(b) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State or municipality, or of any foreign nation, or any simulation thereof.

18 U.S.C. § 506: Seals of departments or agencies

(a) Whoever--
(1) falsely makes, forges, counterfeits, mutilates, or alters the seal of any department or agency of the United States, or any facsimile thereof;
(2) knowingly uses, affixes, or impresses any such fraudulently made, forged, counterfeited, mutilated, or altered seal or facsimile thereof to or upon any certificate, instrument, commission, document, or paper of any description; or
(3) with fraudulent intent, possesses, sells, offers for sale, furnishes, offers to furnish, gives away, offers to give away, transports, offers to transport, imports, or offers to import any such seal or facsimile thereof, knowing the same to have been so falsely made, forged, counterfeited, mutilated, or altered,
shall be fined under this title, or imprisoned not more than 5 years, or both.
(b) Notwithstanding subsection (a) or any other provision of law, if a forged, counterfeited, mutilated, or altered seal of a department or agency of the United States, or any facsimile thereof, is--
(1) so forged, counterfeited, mutilated, or altered;
(2) used, affixed, or impressed to or upon any certificate, instrument, commission, document, or paper of any description; or
(3) with fraudulent intent, possessed, sold, offered for sale, furnished, offered to furnish, given away, offered to give away, transported, offered to transport, imported, or offered to import,with the intent or effect of facilitating an alien's application for, or receipt of, a Federal benefit to which the alien is not entitled, the penalties which may be imposed for each offense under subsection (a) shall be two times the maximum fine, and 3 times the maximum term of imprisonment, or both, that would otherwise be imposed for an offense under subsection (a).
(c) For purposes of this section--
(1) the term “Federal benefit” means--
(A) the issuance of any grant, contract, loan, professional license, or commercial license provided by any agency of the United States or by appropriated funds of the United States; and
(B) any retirement, welfare, Social Security, health (including treatment of an emergency medical condition in accordance with section 1903(v) of the Social Security Act (191 U.S.C. 1396b(v))), disability, veterans, public housing, education, supplemental nutrition assistance program benefits,2 or unemployment benefit, or any similar benefit for which payments or assistance are provided by an agency of the United States or by appropriated funds of the United States; and

(2) each instance of forgery, counterfeiting, mutilation, or alteration shall constitute a separate offense under this section.

18 U.S.C. § 713: Use of likenesses of the great seal of the United States, the seals of the President and Vice President, the seal of the United States Senate, the seal of the United States House of Representatives, and the seal of the United States Congress

(a) Whoever knowingly displays any printed or other likeness of the great seal of the United States, or of the seals of the President or the Vice President of the United States, or the seal of the United States Senate, or the seal of the United States House of Representatives, or the seal of the United States Congress, or any facsimile thereof, in, or in connection with, any advertisement, poster, circular, book, pamphlet, or other publication, public meeting, play, motion picture, telecast, or other production, or on any building, monument, or stationery, for the purpose of conveying, or in a manner reasonably calculated to convey, a false impression of sponsorship or approval by the Government of the United States or by any department, agency, or instrumentality thereof, shall be fined under this title or imprisoned not more than six months, or both.
(b) Whoever, except as authorized under regulations promulgated by the President and published in the Federal Register, knowingly manufactures, reproduces, sells, or purchases for resale, either separately or appended to any article manufactured or sold, any likeness of the seals of the President or Vice President, or any substantial part thereof, except for manufacture or sale of the article for the official use of the Government of the United States, shall be fined under this title or imprisoned not more than six months, or both.
(c) Whoever, except as directed by the United States Senate, or the Secretary of the Senate on its behalf, knowingly uses, manufactures, reproduces, sells or purchases for resale, either separately or appended to any article manufactured or sold, any likeness of the seal of the United States Senate, or any substantial part thereof, except for manufacture or sale of the article for the official use of the Government of the United States, shall be fined under this title or imprisoned not more than six months, or both.
(d) Whoever, except as directed by the United States House of Representatives, or the Clerk of the House of Representatives on its behalf, knowingly uses, manufactures, reproduces, sells or purchases for resale, either separately or appended to any article manufactured or sold, any likeness of the seal of the United States House of Representatives, or any substantial part thereof, except for manufacture or sale of the article for the official use of the Government of the United States, shall be fined under this title or imprisoned not more than six months, or both.
(e) Whoever, except as directed by the United States Congress, or the Secretary of the Senate and the Clerk of the House of Representatives, acting jointly on its behalf, knowingly uses, manufactures, reproduces, sells or purchases for resale, either separately or appended to any article manufactured or sold, any likeness of the seal of the United States Congress, or any substantial part thereof, except for manufacture or sale of the article for the official use of the Government of the United States, shall be fined under this title or imprisoned not more than six months, or both.
(f) A violation of the provisions of this section may be enjoined at the suit of the Attorney General,

(1) in the case of the great seal of the United States and the seals of the President and Vice President, upon complaint by any authorized representative of any department or

agency of the United States;
(2) in the case of the seal of the United States Senate, upon complaint by the Secretary of the Senate;
(3) in the case of the seal of the United States House of Representatives, upon complaint by the Clerk of the House of Representatives; and
(4) in the case of the seal of the United States Congress, upon complaint by the Secretary of the Senate and the Clerk of the House of Representatives, acting jointly.

18 U.S.C. § 1017: Government seals wrongfully used and instruments wrongfully sealed

Whoever fraudulently or wrongfully affixes or impresses the seal of any department or agency of the United States, to or upon any certificate, instrument, commission, document, or paper or with knowledge of its fraudulent character, with wrongful or fraudulent intent, uses, buys, procures, sells, or transfers to another any such certificate, instrument, commission, document, or paper, to which or upon which said seal has been so fraudulently affixed or impressed, shall be fined under this title or imprisoned not more than five years, or both.

28 U.S.C. § 1254(1): Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Cal. Gov't Code § 11346.2: Notification of proposed agency action; public information

Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.
(1) The agency shall draft the regulation in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. The agency shall draft the regulation in plain English.
(2) The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations.
(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.
(b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:
(1) A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the

purpose and address the problem for which it is proposed. The statement shall enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute. These benefits may include, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things. Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

(2)(A) For a regulation that is not a major regulation, the economic impact assessment required by subdivision (b) of Section 11346.3.

(B) For a major regulation proposed on or after November 1, 2013, the standardized regulatory impact analysis required by subdivision (c) of Section 11346.3.

(3) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

(4)(A) A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. Reasonable alternatives to be considered include, but are not limited to, alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(B) A description of reasonable alternatives to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives.

(C) Notwithstanding subparagraph (A) or (B), an agency is not required to artificially construct alternatives or describe unreasonable alternatives.

(5)(A) Facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.

(B)(i) If a proposed regulation is a building standard, the initial statement of reasons shall include the estimated cost of compliance, the estimated potential benefits, and the related assumptions used to determine the estimates.

(ii) The model codes adopted pursuant to Section 18928 of the Health and Safety Code shall be exempt from the requirements of this subparagraph. However, if an interested party has made a request in writing to the agency, at least 30 days before the submittal of the initial statement of reasons, to examine a specific section for purposes of estimating the cost of compliance and the potential benefits for that section, and including the related assumptions used to determine the estimates, then the agency shall comply with the requirements of this subparagraph with regard to that requested section.

(6) A department, board, or commission within the Environmental Protection Agency, the

Natural Resources Agency, or the Office of the State Fire Marshal shall describe its efforts, in connection with a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues. These agencies may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues upon a finding of one or more of the following justifications:

(A) The differing state regulations are authorized by law.

(B) The cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with subdivision (b) if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the regulation that the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

(d) This section shall be inoperative from January 1, 2012, until January 1, 2014.

Ind. Code Ann. § 13-14-9-2: Public Comment Periods

Sec. 2. Except as provided in sections 4.5, 7, 8, and 14 of this chapter, a board may not adopt a rule under this chapter until the board has conducted at least two (2) public comment periods, each of which must be at least thirty (30) days in length.

N.Y. A.P.A. Law § 202 (McKinney 2019): Rule Making Procedure

1. Notice of proposed rule making.

(a) Prior to the adoption of a rule, an agency shall submit a notice of proposed rule making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule. Unless a different time is specified by statute, the notice of proposed rule making must appear in the state register at least sixty days prior to either.