No. 17-874

In the Supreme Court of the United States

AVERY MILNER,

Petitioner,

v.

MACKENZIE (MAC) PLUCKERBERG,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM 19
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a privately held social-media company is a state actor because it regulates users' violent speech on its online platform, including speech posted on public officials' accounts?

II. Whether Squawker's terms and conditions are permissible, content-neutral restrictions on Milner's free speech that are narrowly tailored to maintain peace in the social environment and prevent hijacking of the platform?

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The opinion of the United States District Court for the District of Delmont, granting petitioner's motion for summary judgment and dismissing respondent's motion for summary judgment, appears in the record at 1–13. The United States Court of Appeals for the Eighteenth Circuit's opinion, reversing the district court's decision, appears in the record at 25–36. Neither opinion is reported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit entered final judgment in this matter on March 10, 2019. Petitioner filed a timely petition for writ of certiorari, which this Court granted. R. at 37. This Court has jurisdiction under 28 U.S.C. § 1254 (2018).

CONSTITUTIONAL PROVISION INVOLVED

Appendix A includes the relevant constitutional provision: U.S. Const. amend. I.

STATEMENT OF THE CASE

Squawker is a popular social-media platform designed to distribute local, national, and global news. R. at 14, 21. Launched in 2013 by inventor-CEO Mackenzie (Mac) Pluckerberg, Squawker provides a platform for users ("Squeakers") to share blurbs of 280 characters or less ("squeaks") with Squawker's social environment. R. at 15. Other users may like or dislike these squeaks or respond with a comment, and the author can view who views and interacts with his or her squeaks. *Id.* Squeakers may follow other users' accounts, and Squawker compiles a Squeaker's followed posts into a continuous feed. *Id.*

By 2017, Squawker had evolved into many users' primary source of domestic and world news. R. at 16. So, public officials gravitated toward the channel to communicate policy initiatives to their constituents. *Id.* With this movement, many users created imposter accounts to masquerade as public officials and mislead voters. *Id.* Governor William Dunphry of Delmont suffered this fate, and in February 2018, he reached out to his former colleague (Pluckerberg) to address this prolific issue. R. at 16, 24. Dunphry suggested a system to verify public officials' accounts and assure the integrity of information on Squawker. R. at 22. Squawker implemented the change one month later. *Id.* Because Pluckerberg is a Delmont native, he chose Delmont public officials for testing of the verification program. R. at 21. But the verification process is not exclusive to Delmont or government officials generally. R. at 16. Now, a public official's verified Squawker account includes the Delmont flag to indicate its genuine status. *Id.* Squawker also adjusted its user Terms and Conditions alongside the verification program. *Id.*

All users must agree to the Squawker Terms and Conditions before using the platform. R. at 15. The Terms and Conditions regulate user interactions as follows:

> Here at Squawker, we are committed to combating abuse motivated by hatred, prejudice, or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized. For this reason, we prohibit behavior that promotes violence against or directly attacks or threatens other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. In addition, we prohibit the use of emojis [emoticons] in a violent or threatening manner. We aim for a positive user experience that allows our users to engage authentically with each other and build communities within our platform; therefore, spamming of any nature is prohibited for those participating in posting and commenting on the platform. A Squeaker shall not participate in automatic or manually facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies such that the

> platform becomes unusable. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other.

Id. If a user's post violates Squawker's Terms and Conditions, the user's profile is flagged. *Id.* When Squawker implemented the verification program it also adjusted the Terms and Conditions as follows:

> Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged. This will require all users to click on an emoji of a skull and crossbones in order to clear black boxes covering (1) the offending squeak or comment; (2) the offender's future squeaks and comments; and (3) all content on the offending Squeaker's profile page. A skull and crossbones badge will also appear next to the offending Squeaker's name on Squawker in order to warn the community. To have this flagging removed from all but the original comment, a Squeaker must complete a thirty-minute training video regarding the Terms and Conditions of the community and complete an online quiz. Two failed attempts will result in a ninety-day hold. The offending comment will remain flagged, although the user may still delete it.

R. at 16. So, a Squeaker who violates the terms and conditions with respect to a verified account risks flagging all his or her content on the site. *Id.* Other users may still view the flagged content, but they must click on the skull and bones icon to indicate consent. *Id.*

Avery Milner is a Delmont citizen, freelance journalist, and avid Squeaker—evidenced by his 10,000 followers and 7,000 views per squeak. R. at 14, 19. Milner is a zealous advocate for mandated age restrictions on public officials, and he regularly takes to Squawker to target and criticize Delmont public officials who are older than sixty-five. R. at 19–20. To gain access to Squawker's private social environment, Milner agreed to both its initial and revised Terms and Conditions. R. at 19. On July 26, 2018, Governor Dunphry squeaked about a new bill, which eliminated certain right-hand turns to reduce pedestrian deaths in Delmont. R. at 24. Milner

immediately responded to Dunphry's squeak, but not on the merits. R. at 17. Instead, Milner ridiculed Dunphry's age (sixty-eight) by rapidly posting multiple squeaks: "We gotta get rid of this guy," plus a grandpa emoji, plus a blood-filled syringe emoji, and finally a coffin emoji. R. at 17, 23. Many users reported they were unable to post during this time because Milner functionally hijacked the platform through rapid, incessant posting. R. at 22. Because nearly 30 percent of Squeakers are over the age of sixty-five, Squawker received widespread user outrage—over 2,000 Squeakers were deeply offended by Milner's posts and left the platform permanently. R. at 22, 24. Overall Squawker usage declined 29 percent based on Milner's abusive language. R. at 22.

Based on the overwhelming reports of Milner's conduct, Pluckerberg flagged the squeak as "violent and/or offensive use of an emoji and spamming behavior" in violation of Squawker's Terms and Conditions. *Id.* Because Milner's violative post was on a verified page, Squawker notified Milner that his account was flagged and instructed him to complete the Terms and Conditions video and quiz to restore his account. R. at 17, 20. But Milner refused to complete the quiz, and after three weeks, his followership decreased to 2,000 Squeakers and fifty views per squeak. R. at 20. Milner claims that because his account was flagged, he received less freelance journalism opportunities and suffered financially. *Id.*

But Milner consistently declined simple alternatives to his flagged account including (1) creating a new Squawker account, (2) viewing Squawker feeds without logging in, and (3) completing the quiz to restore his original account. R. at 6–7. Instead, Milner filed suit in the United States District Court for the District of Delmont alleging violation of his First Amendment right to free speech. *See* R. at 1, 20.

Though Squawker is a private entity, the district court held that Squawker is a state actor subject to the requirements of the First Amendment because it controls Dunphry's official, governmental page. R. at 13. As a state actor, the court held that Squawker violated Milner's constitutional rights by implementing content-based terms that were not narrowly tailored, reasonable restraints on Milner's free speech rights. *Id.* Squawker appealed, and the United States Court of Appeals for the Eighteenth Circuit reversed the district court's decision. R. at 33. The Eighteenth Circuit held that Squawker is not a state actor, and even if it was, the Squawker Terms and Conditions are content neutral and narrowly tailored in such a way that they did not overly burden Milner's constitutional right to free speech. R. at 34–36. This Court granted certiorari. R. at 36.

SUMMARY OF THE ARGUMENT

The First Amendment of the United States Constitution limits government action that impairs a private citizen's free speech. But the First Amendment only limits government action and leaves private actors unimpaired. The Court should affirm the Eighteenth Circuit's decision and refuse Milner's attempt to use the First Amendment as a weapon against a private company's editorial right to prevent hate and violence on its platform. Milner subverts the First Amendment in two ways: (1) Squawker is not a state actor subject to the confines of the doctrine, and (2) even if the First Amendment applied, the Squawker Terms and Conditions are content-neutral restraints on free speech that are narrowly tailored to achieve their purpose—to prevent hate and violence on the social-media channel.

First, Squawker is not a state actor subject to the First Amendment's requirements because hosting public officials' accounts on a social-media website is not a function

traditionally reserved to the government. Rather, private entities operate social media platforms almost exclusively. Because the First Amendment does not limit actions of private entities, its limits may only apply to a private entity when that entity performs a role traditionally and exclusively governmental, and thereby assumes the role of a state actor. A private entity can be considered a state actor only when, (1) it performs a traditionally exclusive public function, (2) the government compels private action, or (3) when private actors act alongside the government in furtherance of a government objective.

Though the parties agree Governor Dunphry's page is a public forum, Squawker's private regulation of its website (including the Governor's page) is not a traditional or exclusive government function. The First Amendment certainly limits Governor Dunphry's ability to control and suppress speech on his page, but this restraint does not limit Squawker's ability to monitor its private platform. Squawker's policy applied uniformly to all users—verified or not—and enacting these policies falls squarely within its editorial powers. Squawker is not a state actor simply because it hosts public officials on its private website, just as public officials may not abridge citizens' free speech on their pages as private actors because they use a private platform. Extending First Amendment protections in this way would chill speech on social media and force companies to choose between their values-driven policies and hosting public officials. Either the company must forfeit internal policies designed around corporate values and integrity, or they must prohibit government accounts. The second is more likely.

Even if Squawker is considered a state actor, the Terms and Conditions are permissible and content-neural restrictions on Milner's free speech rights. Whether a restriction is content neutral stems from its purpose rather than its effect. If a regulation is content neutral, even a state

actor may place reasonable time, place, and manner restrictions on speech. The regulation must be narrowly tailored to achieve a significant state interest and leave alternatives for speech, but it need not be the least restrictive measure possible.

Here, Squawker's purpose is to cultivate a non-violent social environment that allows users to communicate in peace. Its purpose does not target specific persons or the content of their speech, and this Court has held restrictions that maintain the quality of an environment are content neutral. Also, Squawker's terms and conditions are narrowly tailored to achieve its content-neutral purpose because they do not ban specific types of speech. Instead, the terms "flag" violent or offensive speech, but users may still consent to view the content. And in the case of a verified page, the user's account is released after taking remedial measures. Finally, Milner had ample alternative outlets to speak including: (1) starting a new account on Squawker, (2) watching the required movie and releasing his current Squawker account, (3) using the many alternative social-media platforms available, or (4) publishing his views in traditional media—i.e. the newspapers where he writes freelance. Because Squawker's Terms and Conditions are content-neutral restrictions that are narrowly tailored to serve an important state interest, and because Milner had a multitude of forums available for his speech, Squawker did not violate his First Amendment right to free speech.

ARGUMENT

I. The Eighteenth Circuit correctly held that Squawker's flagging policy did not constitute state action because operating a social-media website is not a function traditionally and exclusively reserved to the government.

The First Amendment imposes limits on governmental action that "[abridges] the freedom of speech," U.S. Const. amend. I, in an effort to "protect[] private actors." *Manhattan*

Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019). So, the only "constitutional guarantee of free speech is a guarantee . . . against abridgment by government, federal or state." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976); *see also Halleck*, 139 S. Ct. at 1928. The distinction between governmental and private action exists to "protect[] a robust sphere of individual liberty." *Id.* But Milner seeks to transform the First Amendment away from protecting private entities into regulating them as a government actor when they apply well-established company policies. This Court should uphold the Eighteenth Circuit's decision because Squawker was not performing an act traditionally and exclusively reserved for the government and holding it accountable as a state actor would place a significant chilling effect on social-media companies.

A. *Squawker is not subject to the restrictions of the First Amendment because it did not perform an action traditionally and exclusively reserved to the government.*

Because the Free Speech Clause permits private abridgment of speech, a private entity may only "be considered a state actor when it exercises a function 'traditionally exclusively reserved to the State.'" *Halleck*, 139 S. Ct. at 1926. This Court has outlined three limited circumstances when a private company acts as a state actor. *Id.* at 1928. First, performance of a traditionally exclusive public function. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–54 (1974). Second, when the government compels such private action. *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982). Third, when private actors act in tandem with the government. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941–42 (1982). Here, the parties agree that the government did not compel Squawker's actions nor did Squawker act with the government. Rather, Milner argues that Squawker's hosting and regulation of Governor Dunphry's official page constitutes

state action as performance of a traditionally exclusive public function—an extension of the state action doctrine far beyond this Court's precedent.

Although Governor Dunphry's page is a public forum, to be subject to the limits of the First Amendment, the government must have traditionally and exclusively hosted and regulated official government social-media pages. *See Halleck*, 139 S. Ct. at 1928–29; *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). As the Eighteenth Circuit aptly explained, "[t]he ordinary operation of social media platforms is not a traditional, exclusive public function." R. at 32. And although the government has traditionally performed many functions, "very few have been 'exclusively reserved to the State.' " *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). Indeed, even when the government contracts with or licenses private services, "unless the private entity is performing a traditional, exclusive public function" such action "does not convert the private entity into a state actor." *Halleck*, 139 S. Ct. at 1931.

In *Manhattan Community Access Corporation v. Halleck*, this Court held that a state's regulation over television networks did not establish that the networks were state actors because the public-access channels were operated historically by both private and public entities. 139 S. Ct. at 1929–30. There, this Court held that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints." *Id.* at 1930. The private actor thus maintained the ability to control speakers and their speech on the public access channels. *Id.* at 1933.

While courts are split on the issue over social-media regulation and the First Amendment, no court has gone as far as Milner asks this Court to go today because each of those cases involved a government actor. *See, e.g., Knight First Amendment Inst. at Columbia Univ. v.*

Trump, 928 F.3d 226, 235–36 (2d Cir. 2019); *Davison v. Randall*, 912 F.2d 666, 688 (4th Cir. 2019). In *Knight First Amendment Institute at Columbia University v. Trump*, the Second Circuit explained that Twitter, a site with interactive features much like Squawker, was a designated public forum and that the President's decision to block certain individuals violated the First Amendment. *Id.* at 237. But this action did not involve Twitter's policies or actions. *See id.* at 235–36 (discussing the President's conduct on the website). While Twitter could have disciplined the private user for violating its Terms and Conditions, it too could have disciplined the government official for his actions on the site. Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 8:33.25 (2019). And courts that have upheld First Amendment restrictions on social-media platforms have done so in the face of a government official taking action. *See, e.g.*, *Davison*, 912 F.2d at 688.

Here, the flagging policy was applied by Squawker—an action well within its "editorial discretion over the speech and speakers in the forum," *Halleck*, 139 S. Ct. at 1930— and not by a government actor. R. at 22. As this Court has held, opening a space for communication as a private entity does not transform that private actor into a state actor. *Halleck*, 139 S. Ct. at 1930 ("Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed."). And this uniform application indicates that the regulation of the website is not a function traditionally and exclusively reserved to the government.

Like *Halleck*, where the private entity was not a state actor when it opened its network for use by others, Squawker simply opened its medium for speech—an action that this Court has explained is insufficient to establish state action. Importantly, Squawker's flagging policy is applied uniformly, and a public official's account may also be flagged if he or she violates the

policy. *See* R. at 16 ("Squeakers who are found to have violated our Terms and Conditions with respect to a verified user's account will be flagged."); *id.* ("[A]ll users of Squawker were required to agree to the new flagging provision of the Terms and Conditions."). Because government pages were also bound by this policy, it cannot be the case that it was an exclusive function of the state to review and limit access to Squawker pages based on the Terms and Conditions.

Unlike *Knight*, where the President acted in violation of the First Amendment, here no government official acted in a way that is traditionally or exclusively reserved to the government. None of the factors that the district court found dispositive on the issue indicate that Squawker's actions were exclusively performed by the government. Although Governor Dunphry approached Pluckerberg about verifying his page, which Governor Dunphry used to communicate with the public, this request came as an attempt to limit fake accounts that portrayed themselves as public officials. R. at 22. Simply because Squawker may restrict access of any user (including government officials) for violating its policies, does not transform the website into a state actor that is subject to the restrictions of the First Amendment.

B. *Expanding the state action doctrine to social-media websites like Squawker places an unnecessary restriction on private companies and speech.*

Although social media—and more broadly the internet—present a paradigmatic change in the marketplace whereby individuals exchange ideas to seek the truth, this Court should not impose limits on social-media companies that, in effect, hamper the marketplace and place a chilling effect on speech. "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise."

Halleck, 139 S. Ct. at 1934. As this Court explained in *Packingham v. North Carolina*, social media and the internet are "the most important places . . . for the exchange of views, today." 137 S. Ct. 1730, 1735 (2017). Holding that a company is a state actor simply by hosting a government page and applying its policies to all users would produce serious consequences, including not permitting a government official to hold a page on the platform. As noted, social-media platforms provide individuals with the ability to communicate and for the free-flow of news. R. at 16. If a company fears that it will be penalized for enforcing its terms and conditions, it may prohibit public officials from maintaining profiles.

While the district court was right to recognize the importance of a vast marketplace of ideas, holding Squawker to the exacting standards of state action would do the exact opposite. Instead of permitting a marketplace whereby companies may control the content of their websites, restricting Squawker's right to moderate its platform would violate this Court's longstanding principal that companies maintain a right to "exercise editorial discretion." *Los Angeles v. Preferred Comms., Inc.*, 476 U.S. 488, 494 (1986). Given the serious concerns of overextending the state action doctrine to private social-media providers like Squawker, this Court should not hold Squawker to the rigorous fortifications of the First Amendment.

II. The Eighteenth Circuit correctly held that Squawker's Terms and Conditions were not content-based restrictions, as their purpose was to create a non-violent environment on the platform, and they are narrowly tailored to serve that purpose.

Even if this Court finds Squawker is a state actor, this Court should still affirm the Eighteenth Circuit's decision that Squawker's Terms and Conditions are a content-neutral in time, place, or manner restriction that is not violative of the First Amendment. When a court considers whether a regulation restricting speech is content-neutral, the principal inquiry is the

regulation's purpose. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others." *Id.* So long as the regulation is content-neutral, a state may impose reasonable restrictions on time, place, and manner of speech. *Id.* The regulation must also be "narrowly tailored to serve a significant governmental interest." *Id.* But while the regulation must be narrowly tailored, it need not be the least-restrictive or intrusive means of regulation. *Id.* at 798. Finally, the regulation must "leave open ample alternative channels for communication of the information." *Id.* at 791.

This Court should affirm the Eighteenth Circuit's decision and hold Squawker's Terms and Conditions constitutional for three reasons: (1) the purpose of Squawker's Terms—to create and keep a non-violent space where users can authentically build communities—is content-neutral; (2) Squawker's Terms are narrowly tailored to serve the company's substantial interest of keeping its platform a non-violent place; and (3) Squawker's Terms leave open ample alternative channels of communication within and outside of the platform.

A. *The purpose of Squawker's Terms and Conditions is content-neutral.*

When a space is used in such a way that it is considered a public forum, the government's ability to restrict expression is limited by the First Amendment. *United States v. Grace*, 461 U.S. 171, 177 (1983). However, the government may enforce time, place, and manner restrictions when the restrictions are content-neutral. *Id.* It is not the effect of the restriction that is the principal inquiry into whether the regulation is content-neutral, but the regulation's purpose. *Ward*, 491 U.S. at 791. This Court has held that time, place, and manner restrictions with a content-neutral purpose are acceptable, if they are also narrowly tailored to serve a significant

government interest and leave open alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

If the government's purpose is to preserve the quality of an environment, that is evidence of content-neutrality. *City of Renton*, 475 U.S. at 54. In *City of Renton v. Playtime Theatres, Inc.*, this Court reviewed whether a city ordinance that prohibited adult-motion-picture theaters within 1,000 feet of any residential zone, single-or multiple-family dwelling, church, park, or school violated the First Amendment. *Id.* at 43. Because the ordinance did not outright ban adult theaters but provided where the theaters could and could not be located, this Court held that the ordinance was a time, place, and manner restriction. *Id.* at 46. This Court agreed with the district court's "predominate intent" standard and held that the city's goals in enacting the ordinance were to preserve "the quality of urban life" and avoid the secondary effects of adult theaters, rather than the suppression of free expression. *Id.* at 48. Such goals were content-neutral because the city did not try to otherwise close or restrict the number of adult theaters, suppression of the theaters' content was not the goal of the ordinance. *Id.*

Similarly, controlling noise levels in a public forum to "retain the character" of the area satisfies the content-neutral requirement. *Ward*, 491 U.S. at 791. In *Ward v. Rock Against Racism,* a city sought to install its own sound technician to control the volume of music during a concert after the excessive noise drew complaints from nearby residents and other park users. *Id.* at 787–88. There, the city's justification for controlling the volume—even if it incidentally loweed the volume at which some bands wanted to express themselves—was "to avoid undue intrusion into residential areas and other areas of the park." *Id.* at 791. This Court held that this purpose "had nothing to do with content," and therefore satisfied the content-neutrality

requirement for time, place, and manner restrictions. *Id.* at 791 (quoting *Boos v. Barry*, 485 U.S. 312, 314 (1988)).

Here, the purpose of Squawker's Terms has nothing to do with the substance of the flagged content. The Terms state that Squawker "aim[s] for a positive user experience that allows our users to engage authentically with each other and build communities within our platform." R. at 15. In order to achieve that purpose, the Terms forbid both "the use of emojis . . . in a violent or threatening manner," and "spamming" in "extremely high frequencies." *Id.* Extremely high frequencies are defined as "four or more squeaks squawked within 30 seconds of each other." *Id.*

Squawker is not concerned with the content of Milner's posts. Instead, like the city's restriction of adult theaters in *City of Renton*, Squawker is predominantly concerned with the secondary effects caused by Milner's use of emojis and spamming. In Pluckerberg's Affidavit, he did not mention the content of Milner's posts, but instead focused on the effects Milner's posts had on the Squawker platform. "The amount of users on Squawker has dropped twenty-nine percent after Avery Milner's comments, the majority of whom were over the age of sixty-five." R. at 22.

Additionally, Squawker's control of Milner's spamming is analogous to the city's control of music volume in *Ward*. Just as the excessively loud music destroyed the environment for other park users and nearby residents in *Ward*, Milner's excessive posts and violent emojis destroyed the Squawker environment for other users. Pluckerberg specifically pointed to how Milner's comments destroyed the environment Squawker seeks to facilitate for its users: "The excessive volume of Avery Milner's comments and the offensive message he conveyed *effectively shut*

down the forum for others and led to users leaving the platform and *deleting their accounts for the stated reason that Avery Milner had hijacked the space*." R. at 22. (emphasis added).

While Pluckerberg refers to the manner of Milner's message, his primary concern is with the effects the volume of Milner's posts and violent emojis had on Squawker's online community. Similar to the regulations in *City of Renton* and *Ward*, Squawker's Terms also had incidental effects adverse to some users of its platform. However, despite those adverse effects, the purpose of the regulation is what controls when determining content-neutrality. And because Squawker's purpose is to preserve its online environment rather than to ban specific content, there is no question that Squawker's purpose for its Terms is content-neutral in time, place, and manner. Accordingly, Squawker's Terms and Conditions satisfy the content-neutrality requirement.

B. *Squawker's Terms and Conditions are narrowly tailored to serve Squawker's substantial interest of keeping its platform non-violent.*

Even when a regulation restricting speech is content-neutral in time, place, and manner, it must also be narrowly tailored to serve the stated substantial government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). While the regulation must be narrowly tailored, it does not need to be the least-restrictive or intrusive option available. *Id.* at 798. Rather, a regulation on speech is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). This does not give government free reign to make overly broad regulations, or to burden speech in ways that do not advance the government's stated goals. *Id.* at 799. However, even a "complete ban can be narrowly tailored,

but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Thus, the burden placed on speech must match the stated goal.

One narrowly tailored restriction that advanced substantial government interests was the adult theater ordinance in *City of Renton*. There, this Court found the city's goals of preserving "the quality of urban life" a substantial interest that justified the restriction on adult theaters. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986). The adult theaters argued the ordinance was under-inclusive due to the city's failure to regulate other adult businesses likely to create similar secondary effects as the theaters. *Id.* at 52. However, this Court dismissed this argument, noting there was no evidence other adult businesses were moving to Renton. *Id.* And while the city chose to tailor the ordinance to the secondary effects of adult theaters, the city could still address secondary effects of other businesses in the future. *Id.* at 52–53. This was enough for this Court to find the ordinance narrowly tailored to the city's substantial interest of preserving the quality of urban life. *Id.*

Similarly, protecting citizens from excessive and unwelcome noise is a substantial interest. *Ward*, 491 U.S. at 796. While this interest is greatest in the privacy of one's home, the interest extends to "such traditional public forums such as city streets and parks," and even the bandshell inside a park. *Id.* This Court rejected the appellate court's least-intrusive-means requirement. *Id.* at 800. Instead, this Court reasoned that, absent the requirement that the bands use the city's sound technician, the city's substantial interest would be worse off based on past citizen complaints after concerts. *Id.* Because the city needed to consider "all the varied groups"

using the area, the requirement was valid so long as the city determined its interests would be worse off without the requirement. *Id.*

Here, Squawker has legitimate, substantial interests and a policy narrowly tailored to serving those interests. Despite its adverse decision against Squawker, the district court still recognized Squawker had two legitimate reasons for its Terms: "1) its substantial interest in 'maintaining a respectful tone for the millions of users who wish to enjoy a peaceful conversation online'; and 2) the ability of other users to post to the same official page that Mr. Milner ha[d] dominated." R. at 12. With these substantial interests recognized, Squawker's Terms are narrowly tailored so long as the restrictions on speech target the acts whose secondary effects inhibit those interests.

Squawker's provision forbidding the use of violent emojis is grounded in its first interest of "maintaining a respectful tone for the millions of [other] users." This interest mirrors the City of Renton's interests in preserving the quality of urban life by restricting adult theater locations. Just as the city's goal was to keep certain areas free from the negative effects of adult theaters, Squawker's goal is to keep its platform free from the negative effects of violent emojis. Further, just as the City's interest was not in the adult theaters' content, but in their locations, Squawker's interest is not in the emojis' content, but in the manner they are used.

Additionally, Squawker's provision prohibiting spamming serves its second substantial interest in allowing all users the same ability to use public officials' pages. This interest is similar to the city's interest in *Ward*, in that Squawker's goal was to essentially control the "digital volume" of a user. Just as controlling the volume of music in a public park allows nearby

neighbors and users of the park to enjoy its uses, so too does controlling the digital volume of posts on a social media page allow other users to better enjoy the use of that page.

Moreover, Squawker did not—and does not seek to—ban Milner from the platform, just as the City of Renton did not outright ban or seek to shut down the adult theaters. Instead, Squawker seeks to restrict the time, place, or manner of certain acts in order to avoid the negative secondary effects of those acts. Indeed, Milner's posts already created a negative reaction, with the effective shut down of the forum where Milner posted, and the subsequent mass deletion of accounts. This negative reaction is enough to justify Squawker's Terms, just as the *Ward* Court stated that complaints about loud music justified the city's sound technician requirement. Far from being overly broad, Squawker's Terms are narrowly tailored to advancing its substantial interests.

C. *Squawker's Terms provide Milner with ample alternative channels to post his emojis.*

Finally, a content-neutral time, place, and manner restriction that is narrowly tailored to serve the government's substantial interest must still leave open ample alternative channels of communication. *Ward*, 491 U.S. at 791. Yet, the First Amendment simply "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981). Moreover, "alternative channels of expression . . . need not 'be perfect substitutes for those channels denied to plaintiffs.' " *Vincenty v. Bloomberg*, 476 F.3d 74, 88 (2d Cir. 2007).

This Court has upheld time, place, and manner restrictions more burdensome than Squawker's Terms. *Ward*, 491 U.S. at 802 ("That the city's limitation on volume may reduce to

some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate."); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53–54 (1986) (finding that leaving open just 5 percent of city land to adult theaters was a sufficient alternative channel for communication). This Court's holding in *Ward* is instructive here, for just as the concert's possible audience reduction was "of no consequence," Milner's follower reduction is also "of no consequence," as he has not shown his alternative channels of communication inadequate.

Comparing Squawker's Terms to the ordinance upheld in *City of Renton*, however, is inadequate. In particular, leaving 5 percent of city land open to adult theaters is the equivalent of Squawker restricting Milner to 5 percent of the pages on the platform. Instead, Squawker's policy is analogous to a scenario where the City of Renton allowed adult theaters everywhere, but then posted signs to warn passers-by of the theaters' dangers. There is simply no comparison, and because this Court found the City's ordinance left the adult theaters with ample alternative channels for communication, this Court should find the same for Squawker's less-restrictive Terms.

That Squawker's Terms offer ample alternative channels of communication is also easily shown when compared to cases involving government restrictions on the internet. For example, a North Carolina law made it a felony for registered sex offenders to use all social media sites such as Facebook, LinkedIn, and Twitter. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733, 1737 (2017). This Court recognized the state's interest in enacting specific laws to prevent sex offenders from contacting children. *Id.* at 1737. However, because the statute did not provide sex

offenders with alternative channels and prohibited all uses of social media, it unconstitutionally deprived the sex offenders of their rights and painted with too broad a brush. *Id.*

Similarly, Congress painted with too broad a brush in enacting provisions of the Communications Decency Act of 1996 that criminalized the "knowing transmission" of explicit material to anyone under eighteen years old. *Reno v. ACLU*, 521 U.S. 844, 844 (1997). Again, the Court recognized the government's interest in protecting children. *Id.* at 875. However, as the internet was in its infancy and there were not yet viable methods for content publishers to prevent minors from viewing the explicit material, this Court held that the provisions were too broad. *Id.* at 879.

Far from painting with the broad and restrictive brushes from *Packingham* or *Reno*, Squawker's Terms left Milner with ample alternative channels to communicate with his emojis. First, it is notable that both the *Reno* and *Packingham* restrictions criminalized conduct. In stark contrast, Squawker's flagging policy does not even prevent Milner from using the site after he violated its Terms. Instead, the flags simply act as a warning to other users that Milner's posts could disrupt the respectful environment Squawker seeks to provide. And of course, Milner could have resolved the entire situation in less than two hours by watching the thirty-minute video and passing the online quiz.

Even with his content flagged, Milner still had use of Squawker in his current capacity and had other viable alternatives for using the site. He could have created a new Squawker account and directed his followers to his new flag-free account. And if his concern was viewing Governor Dunphry's posts, he could do so without logging into Squawker. Instead, Milner allowed his content to remain flagged without using one of the many options available to him.

Finally, Squawker is not the only social media site on the internet, and not the only place where users post emojis. This is completely unlike the restriction in *Packingham*, where sex offenders were prohibited from all social media sites, and therefore missed out on their unique social benefits. Indeed, Milner is more than capable of moving his emoji-based messaging to one of the many other popular social media platforms, some of which would have no problem with his violent emojis or spamming. Squawker is but a drop in the ocean that is modern social media. Accordingly, Squawker's Terms provide ample alternative channels of communication.

Therefore, Squawker's Terms and Conditions do not violate the First Amendment. First, Squawker's Terms are content-neutral time, place, and manner restrictions. Next, Squawker's Terms are narrowly tailored to Squawker's substantial interest of maintaining a respectful environment on its platform. Third, Squawker's Terms provide for ample alternative channels of communication within the Squawker platform and on other social media sites.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Eighteenth Circuit Court of Appeals.

Respectfully submitted,

s/o Team 19
Attorneys for Respondent

CERTIFICATE OF SERVICE

Attorneys for respondent certify that on January 30, 2020, we served Petitioner Avery Milner with a complete and accurate copy of this Brief for Respondent via United States Postal Service certified mail. Postage was fixed and properly addressed.

Date: January 30, 2020

s/o Team 19
Attorneys for Respondent

BRIEF CERTIFICATE

Team 19 certifies that this brief, and all copies of it, are in fact the work product of Team 19 only. Team 19 also certifies that it complied fully with its law school's honor codes requirements and with the rules and regulations of this competition.

Date: January 30, 2020

s/o Team 19
Attorneys for Respondent

APPENDIX A: CONSTITUTIONAL PROVISION

"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. I.

BRIEF CERTIFICATE

Team 19 certifies that this brief, and all copies of it, are in fact the work product of Team 19 only. Team 19 also certifies that it complied fully with its law school's honor codes requirements and with the rules and regulations of this competition.

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