No. 17-874

In the Supreme Court of the United States

AVERY MILLNER,

Petitioner,

v.

MAC PLUCKERBERG,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Eighteenth Circuit

BRIEF FOR PETITIONER

Team No 6

QUESTIONS PRESENTED

1. Whether Squawker's moderation of a public forum, a function traditionally and exclusively performed by the government, renders it a state actor subject to the First Amendment?
2. Whether Squawker's content-based terms of service violated the First Amendment when utilized to restrict Mr. Millner's speech in a public forum?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

OPINIONS BELOW

The opinion of the Court of Appeals is not published in the Federal Reporter but is available at Docket No. 16-6834 (R. 25-36). The opinion of the District Court is available at Docket No. 16-cv-6834 (R. 01-13).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighteenth Circuit entered final judgment on this matter on November 1, 2019. The Petitioner's timely petition for a writ of certiorari was granted by this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1)

CONSTITUTIONAL PRINCIPLES AND STATUTES INVOLVED

> Congress shall make no law abridging the freedom of speech, or of the press… U.S. Const. amend. I.
>
> The Fourteenth Amendment states in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend, XIV, § 1.

STATEMENT OF THE CASE

On July 26, 2018, Avery Milner, freelance journalist and political commentator from Delmont, made four posts to Squawker, a major, multinational social media platform, to criticize Governor William Dunphrey of Delmont for supporting a law with which Mr. Milner disagreed. Mr. Milner was an active, popular Squawker user, known for his political commentary characterized by the rapid consecutive posting of emojis for expressive effect. Milner Aff. ¶ 6. Milner's account, user-named DanceDad72, had over 10,000 followers and an average of 7,000

views per post as of July 2018. Stipulation ¶ 1; Milner Aff. ¶ 6. Mr. Milner posted his four "squeaks" directly to Governor Dunphrey's Squawker page rapidly and consecutively in less than thirty seconds, in his usual style. Milner Aff. ¶ 8;12. The first squeak contained the words "We gotta get rid of this guy," and the latter three were emojis emphasizing Governor Dunphry's age (Dunphrey is 68). See Stipulation ¶ 12; Dunphrey Aff. ¶ 2.

Squawker requires all its users to consent to the following Terms and Conditions as part of their use of the platform:

> Here at Squawker, we are committed to combating abuse motivated by hatred, prejudice or intolerance, particularly abuse that seeks to silence the voices of those who have been historically marginalized. For this reason, we prohibit behavior that promotes violence against or directly attacks or threatens other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. In addition, we prohibit the use of emojis [emoticons] in a violent or threatening manner. We aim for a positive user experience that allows our users to engage authentically with each other and build communities within our platform therefore spamming of any nature is not prohibited for those participating in posting and commenting on the platform. A Squeaker may not participate in the automatic or manually facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies to the effect the platform is unusable by others. Extremely high frequencies are four or more squeaks squawked within 30 seconds of each other.
>
> Stipulation ¶ 6.

As with other major social media outlets, Squawker is frequently a primary source of news for its users, and a method used by politicians to communicate with their constituents and vice versa. Stipulation ¶ 7. Governor Dunphrey's page is marked as an official government page and actively monitored by his childhood friend, Squawker owner Mackenzie Pluckerberg, as part of verification platform for pages of government officials, which Dunphrey and Pluckerberg initiated in consultation with one another in March 2018 to cut down on imposter accounts. Stipulation ¶ 8; Pluckerberg Aff. ¶ 10. As part of this verification effort, Squawker implemented additional

Terms and Conditions for commenting on verified government pages, including harsher penalties for violations, 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, 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.
>
> Stipulation ¶ 9.

All Squawker users were required to assent to these added terms as a condition of continuing to use the Squawker platform. Stipulation 10. At present, no state other than Delmont uses the verified platform. Stipulation ¶11.

On July 27, a day after his four squawks, Milner received a notification that his account had been flagged for "violent and/or offensive use of emojis" and "spamming" behavior. Milner Aff. ¶ 14. Under the expanded Terms and Conditions governing verified pages, this flagging affected not only his post to Dunphy's page but also his account page and his posts on other pages. See Stipulation ¶ 9. By December of 2018, Milner had only 2,000 followers, and an average of 50 views per post. Milner Aff. ¶ 13, ¶ 14. This incident marked the first time Pluckerberg ever flagged an account for excessive posting. Pluckerberg Aff. ¶ 13.

Milner filed suit against Pluckerberg in the United States District Court for the District of Delmont, contending that the flagging of his account under Squawker's Terms and Conditions violated his First Amendment right to free speech as applied to the states under the Fourteenth Amendment. R. at 1-2. On cross-motions for summary judgment, the District Court granted

summary judgment to Milner and denied summary judgment to Pluckerberg on First Amendment grounds. R. at 13. Pluckerberg timely appealed the decision to the U.S. Court of Appeals for the Eighteenth Circuit, which reversed the judgment of the District Court. R. at 25-36. The Supreme Court granted certiorari to address the twin issues of whether a Pluckerberg engaged in state action in flagging Milner's posts to a public forum, and whether Sqauwker's Terms and Conditions violate the First Amendment. R. at 37.

SUMMARY OF THE ARGUMENT

It is universally acknowledged that the First Amendment serves as a bar to government, rather than private action. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). However, when a private entity such as Squawker steps into the shoes of government to carry out traditional and exclusive government functions, they become de facto state actors while engaged in that activity. *Halleck*, 139 S. Ct. at 1926; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974). This "state action doctrine" holds that when private action can be fairly attributed to the state, constitutional safeguards will apply. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Critically, "[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia v. McCollum*, 505 U.S. 42, 53 (1992).

The animating principles behind this "state action doctrine" are two-fold. First, it prevents an overzealous government from cloaking potentially unconstitutional activity by ascribing actions fairly attributable to the state as unprotected private action. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941–942 (1982). Second, it prevents powerful private entities, effectively operating as sovereigns, from trampling the rights of citizens without recourse to constitutional protections. *See, e.g., Marsh v. State of Ala.*, 326 U.S. 501, 508 (1946).

Mr. Milner's action against Squawker implicates both of these principles. In administering Governor Dunphry's page, Squawker stepped into a role traditionally and exclusively reserved for sovereign governments. Public forums are protected spaces in which the voices of the many come together in an attempt to be heard. These areas are the essential ingredient to a functioning representative democracy, and are accordingly protected from discrimination based on distaste for the viewpoint expressed, or the identity of the speaker. *Good News Club v. Milford Central School,* 533 U.S. 98, 106 (2001). Governor Dunphry and the State of Delmont cannot abdicate their First Amendment responsibilities to ensure the freedom of expression in such a space by leaving the moderation of such critical democratic infrastructure to a private third party.

When a state actor implements regulations restricting speech, those restrictions can be considered either content neutral, or content related. Content related restrictions on speech garner strict scrutiny because of the danger of state actors in restricting individual speech rights. Squawker's terms of service restrict speech motivated by various personal views, and those restrictions naturally are dependent on the content of the speech in question. Furthermore, Squawker restricts speech in a broad, vague way, reserving for himself near limitless power to decide what speech can and cannot be seen by the public.

Both the symbols expressed by Milner, and the frequency of squeaks, constitute speech subject to First Amendment protection. When Milner sent multiple emojis in sequence, he was creating an artistic expression creatively criticizing his government; this speech lies at the heart of First Amendment protection. Because this speech is protected, the state actor crafting content dependent restrictions must narrowly tailor the restrictions in order to serve a compelling state interest. Pluckerburg restricted speech in a broad, vague way, and the restrictions are not narrowly tailored. Additionally, Pluckerburg's restrictions do not serve any compelling state interest. Squawker

cannot be destabilized by four squeaks in thirty seconds, and the prevention of disagreeable speech is not a compelling state interest.

ARGUMENT

I. Squawker's Administration of a Public Forum Renders it a State Actor Subject to the First Amendment

The hallmark of the state action doctrine is that the constitution governs the administration of traditional and exclusive public functions regardless of whether that administration is performed by a private entity or the state itself. *Halleck*, 139 S. Ct. at 1929; *see also Jackson*, 419 U.S. at 351. The Court has identified three primary modes in which a private entity can qualify as a state actor. These include: (1) "when the private entity performs a traditional, exclusive public function"; (2) "when the government compels the private entity to take a particular action"; or (3) "when the government acts jointly with the private entity." *Halleck*, 139 S. Ct. at 1929 (internal citations omitted). The inquiry into whether private action can be fairly attributed to the state is "necessarily fact based." *Lugar*, 457 U.S. at 931.

Here, Mr. Millner's claim implicates the first and most prominent line of state action cases, the administration of a traditional and exclusive public function by a private entity. Unlike previous cases addressing the state actor status of social media platforms, Squawker's administration of Governor Dunphry and other Delmont state officials' pages left it filling a role traditionally and exclusively carried out by the government - the moderation of public forums. Therefore, Squawker's administration of these pages constitutes state action, which must necessarily comport with the strictures of the First Amendment.

Accordingly, this Court should reverse the decision below, and find that the application of Squawker's terms of service to Governor Dunphry's page must comply with the First Amendment.

A. The Administration, Moderation, and Regulation of a Public Forum is a Traditional and Exclusive Public Function Governed by the First Amendment

Creation, administration, and moderation of public forums is traditionally and exclusively the function of the government. *Marsh*, 326 U.S. at 508. This conclusion is bolstered by the fact that by definition public forums can *only* be established by the state. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-80 (1992). Thus, Squawker's moderation of Governor Dunphry's page, a public forum, makes it a state actor for the purposes of adjudicating claims regarding the moderation of these specific forums.

Indeed, the state action doctrine was originally generated in response to private entities restricting speech in public forums. *Marsh*, 326 U.S. at 508. In *Marsh*, a company town's restriction on religious pamphleting on privately owned streets and sidewalks, classic public forums, constituted a violation of the First Amendment. *Id*. at 504. Critically, the Court held that regardless of whether the title to these forums was held by a state or private entity, "the public in either case has an identical interest in the functioning of the community in such [a] manner that the channels of communication remain free." *Id*. at 506-507.

Thus, as a matter of law, the administration of public forums such as streets, sidewalks, and parks has been deemed a *traditional* public function for over 70 years. *Id. See also Evans v. Newton*, 382 U.S. 296, 299 (1966); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). That the sidewalks of a company town are different in character from the virtual public forum hosted as a part of the Squawker community is of no importance, the key factor is their status as public forums, regardless of their administration by a private entity. This court has repeatedly rejected a distinction between physical and metaphysical spaces when it comes to First

Amendment protections, *see Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995), and has continually upheld that where a public forum has been designated, First Amendment protections follow. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (listing cases).

Relatedly, public forums cannot be created through government inaction, nor by a private party simply providing a place for the public to speak. *Krishna Consciousness*, 505 U.S. at 678-80. Thus, the creation, and by extension, the administration of a public forum has continually been recognized as a traditional and exclusive public function.

B. While Moderating the Public Forum Created by the State of Delmont, Squawker Assumes the Role of a State Actor Subject to Constitutional Scrutiny

The fundamental principles of constitutional democracy demand that "[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties." *McCollum*, 505 U.S. at 53 (1992). The decision below, if affirmed, would upend this hallowed principle and hold that the State of Delmont can skirt its constitutional obligations under the First Amendment by outsourcing the administration of the historically protected "public square" to a profit-driven private entity.

In rejecting Mr. Millner's state action arguments, the Court below relied on the fact that "[t]he ordinary operation of social media platforms is not a traditional, exclusive public function." R. at 32. That is undoubtedly correct, while also revealing the fatal flaw in the lower court's analysis. The central issue in this case is not the ordinary operation of a social media platform, but instead the ordinary operation of a public forum. This distinction is critical because the operation of a public forum *is* a traditional exclusive public function, the performance of which places Squawker squarely within this Court's existing state action doctrine.

This Court's recent decision in *Halleck* demonstrates the importance of this point to the Court's state action analysis. 139 S. Ct. at 1921. The Court began its analysis by noting that the private entity administering New York's public broadcast channels was not a state actor, because "the operation of public access channels on a cable system . . . has not traditionally and exclusively been performed by the government." *Id*. at 1929. Then turning to the petitioner's arguments that the broadcast channels were public forums protected by the First Amendment, the Court held that they were not public forums because they did not meet the *"threshold*" state action requirement. *Id*. at 1930. Here then, the presence of a public forum on Squakwer's platform demands a *threshold* finding of state action.

While the *Halleck* court went on to state that "merely hosting speech by others . . . does not alone transform private entities into state actors," the Court below's reliance on that specific holding is misplaced in this case. *Id*. at 1930; R. at 32. Squawker is not "merely hosting speech by others," it is hosting and actively moderating a public forum.

The critical nature of this distinction is confirmed by the *Halleck* Court's reliance on the decision in *Hudgens v. N. L. R. B.* that private entities may exercise editorial control over private forums. *Id.* (citing *Hudgens v. N. L. R. B.*, 424 U.S. 507, 520-21 (1976)). In *Hudgens*, the Court held that the owner of a private mall was not subject to First Amendment requirements because the mall constituted a private rather than a public forum. 424 U.S. at 520-21. Building on this analysis in *Halleck*, the Court reasoned that "providing *some kind* of forum for speech is not an activity that only governmental entities have traditionally performed." 139 S. Ct. at 1930.

While providing *some kind* of forum is not a traditional and exclusive governmental function, providing a *public forum* is. *See id*. (holding the public broadcast channels not to be public forums because they did not meet the "threshold state action" requirement). Here, the

existence of the public forum, and Squawker's moderation of that forum is stipulated. This fact fundamentally changes the analysis regarding Squawker's status as a state actor while administrating that forum.

Further, the presence of a public forum also distinguishes Squawker from the various other social media platforms that courts have declined to label state actors. *See Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (listing cases, none of which include an instance in which the social media company at issue was moderating a public forum). Mr. Millner does not contend that all social media platforms, all Squawker pages, nor even every Squawker page run by a government official is governed by the First Amendment, only those that have been deemed public forums.

The government does not have a constitutional obligation to provide public forums, but when it does, their creation, administration, and moderation are subject to constitutional scrutiny. In that sense, Mr. Millner's claims are much more analogous to claims presented in *West v. Atkins* than they are to *Halleck* or the previously litigated social media platform state action cases. 487 U.S. 42, 43 (1988).

In *West*, the Court held that a private doctor administering care to state prisoners was a state actor for the purposes of what amounted to a constitutional claim. *Id*. The Court held that the Eighth Amendment requires states "to provide medical treatment to injured inmates," and "the delegation of that traditionally exclusive public function to a private physician [gives] rise to a finding of state action." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55 (1999).

Just as the state is not constitutionally obligated to open public forums, it is also not required to imprison inmates. When the government does undertake these actions however, it is required to do so within constitutional limitations. The Court in *West* held that the state cannot escape its

Eighth Amendment duties by contracting the care of prisoners out to a private entity. *West*, 487 U.S. at 43. Similarly, the State of Delmont cannot circumvent its obligations under the First Amendment in the administration of its public forums by leaving their moderation to private third parties.

The doctor in *West* was not a state actor in his private practice, just as Squawker is not a state actor outside of its administration of these designated public forums. Both scenarios are governed however by the fact that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh*, 326 U.S. at 507.

While the Court has rightfully been cautious in applying the First Amendment to Social Media platforms via the state action doctrine, here Squawker's administration of a public forum fundamentally changes the nature of the analysis. There is a fundamental difference between hosting private speech versus speech in a public forum and "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Brown v. Entertainment Merchants Ass'n,* 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952)).

Accordingly, this Court should reverse the lower court's decision, and hold Squawker to be a state actor subject to the First Amendment in its moderation of public forums.

II. Squawker's Terms and Conditions Are Content-Based in Violation of the First Amendment.

Squawker restricts speech based on the personal motives and opinions of the speaker, a content based restriction. The lower court erred in identifying the purpose of the restrictions in

Squawker's terms of service as the controlling factor in a content inquiry. This Court made it clear in *Reed v. Town of Gilbert*, any restriction that facially distinguishes between differing content is content-based, regardless of its subjective intent. 135 S. Ct. 2218, 2227 (2015). Accordingly, Squawker's speech restrictions are subject to strict scrutiny.

In addition to the facial distinction standard set forth in *Reed*, this Court has utilized four different factors to clarify whether conditions are content neutral, or content-related. First, courts assess whether a restriction is based on the content of the speech. *E.g. Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536 (1980). Second, courts assess whether a restriction depends on the communicative impact of the speech. *Texas v. Johnson*, 491 U.S. 397, 412 (1989); *Boos v. Barry*, 485 U.S. 312, 321 (1988). Third, courts assess whether the predominant concern of a restriction is with the content of the speech as opposed to secondary effects of the speech. *Renton v. Playtime Theatres*, 475 U.S. 41, 43 (1986). Finally, courts assess whether the actor restricted speech because of disagreement with the message of the speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Content-based restrictions on speech in a public forum are subject to strict scrutiny, while content-neutral "time, place and manner" restrictions receive a lower level of scrutiny. *Reed*, 135 S. Ct. at 2227.

A. Squawker's Terms and Conditions are Unconstitutional under Strict Scrutiny.

Content-based restrictions on protected speech are presumptively unconstitutional and any infringement must satisfy strict scrutiny. *Natl. Inst. of Fam. And Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). Squawker's Terms and Conditions do not approach this stringent bar. First Amendment strict scrutiny requires any restriction of protected speech to: (1) serve a compelling government interest; (2) be narrowly tailored to achieve that interest; and (3) accomplish that interest by the least restrictive means available. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,

460 U.S. 37, 45 (1983). The burden is on the state actor to prove that these narrow standards are met. *Becerra*, 138 S. Ct. at 2371 (2018).

1. Squawker fails to provide a compelling government interest for its restrictions on speech.

Plainly, justifications for the Terms and Conditions such as providing a more positive user experience fall far short of the extremely high compelling government interest standard. *See, e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1739 (2017) (protecting minors from interaction with convicted sex offenders is a compelling government interest); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (preserving the integrity of the election process is a compelling government interest). No group so vulnerable as minors, nor interest so fundamental as voting rights, is at issue here.

The loftiest justification articulated by the court below in favor of Sqawker's speech restrictions-- preventing abuse related to hatred and prejudice through hate speech restrictions-- has already been declared unconstitutional by this Court. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 394 (1992). The St. Paul hate speech ordinance in R.A.V. was unconstitutional because it regulated speech against some disadvantaged groups and not others, and thus on certain topics of public debate but not others. *Id.* Moreover, the restriction allowed one side (even if it is the more admirable side) full rein to use "fighting words" but banned the other side from doing so. *Id.* The Court reasoned that this amounted to the government choosing sides in a public debate and restricting the speech of its disfavored side, leaving the full palette of hostile expression available to the side with which the government agrees. *Id.* The same concerns apply to Squawker's Terms and Conditions both on their face and as applied by Pluckerberg, in a very targeted way, to Milner.

2. Squawker's Terms and Conditions are not narrowly tailored and are not the least restrictive means available to meet Squawker's goals.

Far from being the least restrictive method for achieving Squawker's stated goals (whether that is preventing identity-based abuse or providing a positive user experience on the forum), Squawker's Terms and Conditions overburden speech on multiple levels. The Terms and Conditions are not narrowly tailored to meet the goal of preventing abuse of historically marginalized individuals, and do not meet the close fit between means and ends required in strict scrutiny. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 210 (1992)(the fundamental right to vote is appropriately protected by a speech restriction within 100 ft from polling place, but could not be constitutionally expanded beyond that). In the case at bar, there is no plausible causal relationship between the undefined category of "offensive emojis" and the kind of abuse of historically disadvantaged groups that would permit an exception to the First Amendment. See *Spence v. Washington*, 418 U.S. 405, 414-15 (1974)(no evidence that an American flag with a peace sign would cause a breach of the peace); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Pluckerberg's restrictions on the rate and frequency of posting have an even more tenuous relationship to the end of protecting minority groups. Moreover, this Court held in *Rosenberger* that any means of restricting speech that evaluate the motivation of a speaker cannot be grounds for speech restrictions. 515 U.S. 819, 829 (1995) (finding a First Amendment violation where a University scanned and interpreted student publications to block funding for religious speech). This Court expressed fear in that case that a rule requiring official interpretation of publications would "[foster] a pervasive bias or hostility." *Id.* Thus, any subjective analysis of motivations behind speech is beyond the authority of state actors such as Squawker. Subjective means of evaluating speech, lending themselves to discriminatory enforcement, are by their nature not narrowly tailored to a particular policy goal.

3. The means used by Squawker to restrict speech are also unlawful due to their vagueness under First Amendment doctrine.

In addition to the under-inclusiveness problems raised above., and the absence of narrow tailoring, the Squawker restrictions are fatally vague under the longstanding doctrines employed by this Court in addition to strict scrutiny analysis in First Amendment protected speech cases. See *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). In the realm of free speech, "precision must be the touchstone." *Id.* (internal quotations omitted). A law is vague if a reasonable person cannot tell what speech is allowed and what speech is proscribed. *Id. at 438.* While vagueness is generally found to be a due process violation, this Court has carved out a special place for such challenges when it comes to free speech. *Reno v. ACLU*, 521 U.S. 844, 872 (1999). This Court has reasoned that not only are due process concerns like fair notice at issue when a law is vague, but also that there is a particularly high risk that vague restrictions will chill speech or prevent it entirely. *Id.* A reasonable person would be hard pressed to decipher with any confidence what a "violent emoji" is, for example—typical social media users employ death-related emojis symbolically to indicate everything from exhaustion to great amusement. Vague terms & conditions like Squawker's are thus likely to cause forum participants to censor their own speech in advance when commenting on the governor's page, and may deter conscientious members of the public from posting in the forum at all.

B. The provision banning a certain quantity of rapid, consecutive posts is not a constitutional time, place and manner restriction and violates the First Amendment.

1. Milner sent four squeaks to convey his message symbolically, which is protected because it comprises the "communicative impact" of an expressed idea.

Milner sent symbolic images sequentially in order to convey his displeasure with government policy. This Court has long recognized the crucial nature of such symbolism as

Milner's rapidly posted emojis. When an individual expresses a political idea symbolically, this symbolism is protected by the First Amendment. *Johnson*, 491 U.S. 397, 406 (1989) (finding expressive, overtly political nature of flag burning protected speech because it was a "powerful statement of symbolic speech" and "sufficiently imbued with elements of communication"). Courts must also utilize context to determine whether symbolism, or symbolic actions, are expressing a message. *Spence*, 418 U.S. at 409 (holding that affixing a peace symbol to a United States flag was a protected expression because the appellant "wanted people to know that [he] thought American stood for peace").

In a similar example of this Court upholding the importance of symbolic action as speech, in *W. Va. State Bd. of Educ. v. Barnette*, the Court held that children could not be forced to salute the flag because the First Amendment protected them from this type of compulsory speech. 319 U.S. 624, 642 (1943). The Court found that symbolism garners the same protection as other forms of speech. *Id.* at 632.

Milner criticized his government through symbolism; with the click of a button, Pluckerburg deleted Milner's First Amendment right. Milner emphasized his points visually, sending symbols in rapid succession in order to convey a political message of discontent with government officials. As this Court outlined in *Johnson*, dissatisfaction with policy lies at the heart of the First Amendment. 491 U.S. at 405. The internet provides great opportunity for diverse expression of ideas and the principles of the First Amendment cannot be abandoned because the expression in question is novel. These precedents show that the action of sending messages quickly is of itself speech.

2. Squawker's posting restriction does not meet the standard for Intermediate Scrutiny.

The Terms and Conditions provision governing the rate and quantity of posting may be fairly viewed as content-neutral, taken separately from the rest of the Terms and Conditions. Content-neutral speech restrictions in a public forum receive intermediate scrutiny. R. Randall Kelso, The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing, 8 Elon L. Rev. 291, 294–95 (2016). They must be: (1) "narrowly tailored to serve a significant, content-neutral government interest," and (2) "leave open ample alternative channels" for communication or dissemination of the information. *Ward*, 491 US at 791. The "least restrictive" standard of narrow tailoring used in strict scrutiny need not be met, but the state actor must demonstrate that the restriction does not "burden substantially more speech than is necessary to serve the government's legitimate interests." *Ward*, 491 U.S. at 799. Incidental speech may not suppressed simply for the sake of convenience or efficiency, even in resolving a legitimate problem or enforcing a legitimate speech ban. *McCullen v. Coakley*, 573 U.S. 464 (2014). First Amendment protection may not be circumvented as a result of a mere balancing of costs and benefits. *See U.S. v. Stevens*, 559 U.S. 460, 470 (2010).

While maintaining the usability of the platform on which a public forum is taking place sounds like a significant governmental interest, the facts show the significant overbreadth of the means used to accomplish that purpose. Four squeaks consecutively is an outrageously low threshold to set for platform-disruptive behavior. Rapid posting is not uncommon practice on social media sites – indeed, Milner himself has posted in this style many times on Squawker before, without incident. This behavior does not reflect a reasonable person's understanding of spamming, much less a practice that can bring a multinational platform to a halt. That other users were offended by Milner's speech shows only that it was unpopular, precisely the kind of speech that First Amendment protects. *Matal*, 137 S. Ct. at 1751.

Moreover, under the circumstances in the case at bar, the manner in which the four-squeak rule has been applied is not content-neutral at all. Unless one believes that no other Sqauwker user has ever posted four or more rapid squeaks, the rule was clearly selectively enforced against Milner based on the content of his squeaks. The circuit court erred in applying *Ward* to the present case for precisely this reason. The volume restrictions in *Ward* applied to all performers evenly, not merely to the performers whose music the state actor or the neighbors found offensive. 491 U.S. at 802. Restrictions that so clearly "distinguish among different speakers" in the manner that Pluckerberg has here are anathema to this Court's First Amendment jurisprudence. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010).

Finally, the consecutive squeak ban denies Milner adequate alternate methods of communication, in part because posting in any other format would alter the expressive content of his posts, but perhaps more significantly because in order to access the method of communication, Milner must pass a test. Once again, this is a clear First Amendment violation: this Court's precedent is firm in its insistence that no state actor may be allowed unfettered discretion to determine who is permitted to speak. *Freedman v. Maryland*, 380 U.S. 51, 56 (1965); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). In *City of Lakewood v. Plain Dealer Pub. Co.*, this Court held that even where a content-neutral restriction is itself constitutional, a state actor may not condition speech on obtaining a license or a permit in that official's "unbridled discretion." 486 U.S. 750, 757 (1988). Such absolute discretion lends itself to censorship, as can be seen from the case at bar, and is considered an unlawful prior restraint under First Amendment doctrine. *Id.* The flagging of Milner's account is a perfect example of the kind of arbitrary enforcement that can occur under Pluckerberg's currently unfettered ability to determine what speech is offensive and to personally restrict perceived instances of such speech. After all, of Squawkers many users, the lone violator

of the consecutive posting provision happens to be someone who was speaking critically of Mr. Pluckerberg's old friend.

CONCLUSION

First Amendment doctrine is formulated to protect precisely the kind of discourse that Petitioner engaged in—and to prevent just the kind of censorial role Pluckerberg is playing on behalf of Governor Dunphy in this public forum. While the medium in which this controversy takes place may be new, the policy of protecting such speech should remain the same. This Court should reverse the decision below and grant summary judgment in favor of Mr. Milner.

Brief Certificate

Team Six Certifies the Following:

1.The work product contained in all copies of the team's brief is in fact the work product of the team members.

2.This team has complied fully with its school's governing honor code.

3.This team has complied with all Rules of the Competition.