No.: 17-874

IN THE SUPREME COURT OF THE UNITED STATES

AVERY MILNER,
Petitioner

v.

MAC PLUCKERBERG,
Respondent

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

BRIEF FOR PETITIONER

Team 8
Counsel for Petitioner

Questions Presented

I. Is the State responsible for the deprivation of a social media user's freedom of speech when a private social media company acts with and under the direction of a state official?

II. Whether a social media website's Terms and Conditions requiring affirmative consent from its users to view content that has been flagged for its offensive nature violates the speaker's First Amendment rights.

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Statement of Jurisdiction

Petitioner, Avery Milner (hereinafter "Milner"), timely filed this appeal from the decision of the Eighteenth Circuit Court of Appeals. The Supreme Court of the United States has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254.

Statement of the Case

Factual Background

In 2013, Mackenzie Pluckerberg (hereinafter "Pluckerberg") created a multinational social media platform called Squawker. Pluckerberg Aff. ¶ 4. Squawker allows users to post "squeaks," which are sentences or emojis that appear on the user's page. Jt. Stip. ¶ 5. As Squawker grew in popularity, many government officials created accounts and used this platform to interact with their constituents. R. at 3.

Governor William Dunphry (hereinafter "Governor Dunphry") of Delmont created his own Squawker page in 2017. *Id.* He used the platform to announce new policies and engage with the citizens of Delmont. Squawker quickly became an important tool used by Governor Dunphry to carry on his official business. R. at 3. However, Governor Dunphry did have a problem with Squawker. To solve this problem, Governor Dunphry approached his old friend and Delmont resident, Pluckerberg with a solution. Dunphry Aff. ¶ 8. The two met in February 2018 to discuss this problem. *Id.* One month after this meeting, Squawker introduced a new verification process available only to Delmont public officials. Pluckerberg Aff. ¶ 9; Jt. Stip. ¶ 11. The verification process was accompanied by a change to Squawker's Terms and Conditions that users were required to consent to in order to use the platform. Jt. Stip. ¶ 9.

Milner lives in the state of Delmont. Milner Aff. ¶ 1. Milner is a freelance journalist who often writes articles for various newspapers within Delmont and critiques the quality and efficiency of the state's elected officials. Milner Aff. ¶ 3. Milner created a Squawker account in April 2017

and frequently used the platform. Milner Aff. ¶ 5. By July 2018, Milner's Squawker account had a following of over ten thousand users. Milner Aff. ¶ 6.

On July 26, 2018, Governor Dunphry posted a squeak that provided a link to the description of a bill proposal that Milner opposed. Dunphry Aff. ¶ 10. Milner responded to this squeak and expressed his disagreement. Dunphry Aff. ¶ 7. Milner monitored the thread and later responded to another user's post with additional negative comments. Milner Aff. ¶ 8. The initial comment included the phrase "We gotta get rid of this guy." Jt. Stip. ¶ 12. Milner followed that with three squeaks, each including an emoji and a plus sign. *Id.* Other users complained that the forum was unusable, though they continued to comment on the thread. Pluckerberg Aff. ¶ 11. Pluckerberg was carefully monitoring his friend's verified account and noticed Milner's string of negative comments. *Id*.

Pluckerberg deemed Milner's use of emojis in violation of Squawker's new Terms and Conditions and flagged his account, an action he had never previously taken. Pluckerberg Aff. ¶ 11, 13. Once his account was flagged, black boxes covered up Milner's comments on Governor Dunphry's page and on all of the content on Milner's page. Jt. Stip. ¶ 9. Users who wished to view Milner's content were forced to click on a skull and crossbones emoji. *Id.* The same black boxes also appeared on any new squeaks or comments Milner posted. *Id.* Further, a skull and crossbones badge were placed next to Milner's name as it appeared on Squawker. *Id*.

The next day, Squawker notified Milner that his account had been flagged for "violent and/or offensive use of emojis" and "spamming behavior." Milner Aff. ¶ 9. The notification outlined the steps Milner must take to have the flagging removed. He had to watch a thirty-minute video on Squawker's Terms and Conditions, and then complete an online quiz. Milner Aff. ¶ 15. The notification specifically stated, "by watching this video and completing the quiz, you agree

that you have violated our Terms and Conditions and you reaffirm that you will abide by all Terms and Conditions." R. at 6. Milner refused to admit fault when he knew his page was unlawfully and unjustly flagged. *Id.*

At first, Milner believed his followers would have no problem consenting to view his content by clicking on the box. Milner Aff. ¶ 13. To his surprise and dismay, after three weeks of being flagged, Milner experienced a shocking decrease in views of his profile. By August 2018, Milner's following had dwindled to only two thousand followers. *Id*. Milner has been turned down by multiple potential employers since his account was flagged, and as a result, he has suffered financially. Milner Aff. ¶ 14.

Procedural History

Petitioner, Milner, filed this action against Respondent, Pluckerberg, in the United States District Court for the District of Delmont. R. at 1. Milner alleged that Pluckerberg had violated Milner's First Amendment rights by flagging his Squawker account and restricting his ability to participate in a public forum. *Id.* The parties filed cross motions for summary judgement. R. at 2. The District Court granted Milner's motion, finding that Squawker's control over a public forum established state action sufficient to bring on the protections of the First Amendment, and that Squawker's Terms and Conditions constitute a form of content-based viewpoint discrimination and are not narrowly tailored as a reasonable time, place, or manner restriction on Milner's speech. R. at 13.

Pluckerberg timely appealed the District Court's decision to the United States Court of Appeals for the Eighteenth Circuit. R. at 26. On appeal, the court reversed the judgement of the District Court on both issues. *Id.* The court held that Squawker was a private actor, such that the First Amendment was not applicable and even if state action were present, Squawker's Terms and Conditions were narrowly tailored as a reasonable, time, place, or manner restriction. *Id.*

This Court granted Milner's petition for writ of certiorari. R. at 37.

Argument Summary

The Eighteenth Circuit ruled incorrectly in favor of Pluckerberg on both issues presented on appeal.

I. The Actions of Pluckerberg in This Instance Are Attributable to the State of Delmont.

The Eighteenth Circuit incorrectly concluded that Squawker was a private, rather than a state, actor despite evidence showing that Governor Dunphry played a significant role in restricting Milner's speech. R. at 33. A private entity's actions may be attributed to the States, if the private entity is deemed a state actor. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-22 (1961). Under this Court's state compulsion test and joint participation test, Pluckerberg should be considered a state actor based on his actions in this case.

The State compelled Pluckerberg's actions in this case by exercising coercive power and providing significant encouragement. *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Governor Dunphry exercised coercive power over Pluckerberg by using his position of influence to meddle with Squawker's decision to create verified accounts. Governor Dunphry provided significant encouragement to Pluckerberg by supplying him with the idea to create a verification process. Pluckerberg Aff. ¶ 8. Thus, the State is responsible for the actions of Pluckerberg.

Also, Pluckerberg was a willful participant in a joint activity with a State agent. Pluckerberg and Governor Dunphry worked together to deprive Milner of his constitutional rights. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 925 (1982). Accordingly, the State is responsible for the actions of Pluckerberg.

Finally, in the interest of protecting the right to freedom of speech, this Court should find that the State is responsible for the actions of Squawker in order to avoid creating a loophole for government officials to exploit.

II. Squawker Engaged in Both Content and Viewpoint-Based Discrimination When It Flagged Milner's Squawker Account For Violation of Its Terms and Conditions.

The Eighteenth Circuit incorrectly held that Squawker's Terms and Conditions were both content-neutral and viewpoint-neutral as the restrictions on speech imposed by such Terms and Conditions were narrowly tailored to serve a legitimate government interest and left open alternative channels of communication. R. at 34-35.

Squawker officials flagged Milner's Squawker account for his comments on a Delmont government official's Squawker page. Pluckerberg Aff. ¶ 11. The exclusion of Milner's comments and flagging of his profile page on Squawker was a violation of Milner's First Amendment right to free speech, as applied to the states through the Fourteenth Amendment. Squawker has engaged in content-based viewpoint discrimination by applying its Terms and Conditions to restrict Milner's right to post squeaks in opposition to a political figure. Milner has sued Squawker, seeking to determine that Squawker has violated his First Amendment right to freedom of speech and therefore, Squawker is required to restore his account so that it is no longer flagged. Public policy, together with an interest in promoting the democracy that this country was founded upon, dictates that this Court should hold that Milner's right to free speech was infringed upon.

Argument

I. IS THE STATE RESPONSIBLE FOR THE DEPRIVATION OF A SOCIAL MEDIA USER'S FREEDOM OF SPEECH WHEN A PRIVATE SOCIAL MEDIA COMPANY ACTS WITH AND UNDER THE DIRECTION OF A STATE OFFICIAL

The first section of the Fourteenth Amendment sets forth several prohibitions on state conduct. U.S. CONST. amend. XIV § 1. These restriction make void all "State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injuries them in life, liberty, or property without due process of law, or which denies to any of them equal protections of the law." *Civil Rights Cases*, 109 U.S. 3, 11 (1883). The application of these restrictions, as is emphasized above, is limited to conduct or actions that "may fairly be said to be that of the States." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Therefore, in general, private conduct is exempt from the restriction set forth in the Fourteenth Amendment.

The Free Speech Clause of the First Amendment is one of the privileges protected by the Due Process Clause. The Free Speech Clause "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1926 (2019). However, a private entity may be subject to the constraint provided by the Free Speech Clause if the actions of the private entity are fairly attributable to the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). There are limited circumstances where a private entity can qualify as a state actor. These include: (1) when the government compels the private entity to take a particular action; and (2) when the government acts jointly with the private entity. *Halleck*, 139 S.Ct. at 1928 (collecting cases).

A. Governor Dunphry Compelled Squawker To Take A Particular Action.

The Supreme Court in *Blum v. Yaretsky* set forth the state compulsion test as a means for determining state action. The *Blum* Court held that in order to hold the State responsible for a private action under this test, the State must have "exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982). However, the Court stated

that "mere approval of or acquiescence in the initiatives" of a private entity is insufficient to hold the State responsible for such initiatives under the Fourteenth Amendment. *Id.*

Governor Dunphry admittedly had a close relationship with Pluckerberg that dates back to when the two attended preparatory school together. Dunphry Aff. ¶ 7. Thus, when Governor Dunphry encountered an issue that stemmed from his Squawker page, he approached his old friend and Squawker CEO to address this problem. Dunphry Aff. ¶ 8. After their meeting, Pluckerberg implemented Governor Dunphry's solution, along with new Terms and Conditions, that specifically targeted Milner's posting style.

Governor Dunphry's actions demonstrate his coercive power. First, he used his position of influence to pressure Pluckerberg into implementing a verification process for Delmont public officials. Before the meeting between Governor Dunphry and Pluckerberg, there was no indication that Squawker had previously considered implementing a verification process. Pluckerberg Aff. ¶ 7-9. Following this meeting, however, Squawker quickly implemented a verification process. This new feature was solely Governor Dunphry's idea. Second, the Governor's influence forced Pluckerberg to flag his first ever Squawker account. Pluckerberg ¶ 13. Milner has a history of posting quick messages in a thread on Squawker, but before this instance he had never been flagged. Milner Aff. ¶ 12. After the meeting with Governor Dunphry, Squawker's Terms and Conditions were amended to prevent this type of posting. As a result, Pluckerberg was forced to flag Milner's account when he posted a string of messages in reply to Governor Dunphry's squeak. These examples prove that Governor Dunphry exercised coercive power over Pluckerberg and as such, the State should be held responsible for the actions of Pluckerberg.

In the event the Court declines to categorize Governor Dunphry's role as coercive, Pluckerberg's actions should still be attributed to the State under the state compulsion theory.

Governor Dunphry clearly encouraged Pluckerberg to create a verification feature for Squawker. As discussed above, there is no mention of Squawker implementing a verification process before the meeting between Pluckerberg and Governor Dunphry. Not long after this meeting, Squawker introduced a new verification feature for Delmont public officials. Thus, Governor Dunphry undoubtedly encouraged Pluckerberg's actions.

The significance of Governor Dunphry's encouragement is illustrated by the influence and manner in which Pluckerberg reacted to Governor Dunphry's suggestion. Governor Dunphry's use of Squawker to interact with his constituents and to introduce policy proposals no doubt increases the use of Squawker. As such, Pluckerberg would be receptive to his ideas. The swift resolution of Governor Dunphry's problem demonstrates the importance to which Pluckerberg afforded Governor Dunphry's suggestion. Accordingly, these facts amplify the significance of the encouragement Governor Dunphry provided Pluckerberg. Therefore, Pluckerberg's actions in restricting Milner's speech should be attributed to the State.

In *Albert v. Carovano,* the Second Circuit Court of Appeals was presented with a group of plaintiffs who were attempting to hold the state of New York responsible for the suspension of several students from a private college. *Albert v. Carovano,* 824 F.2d 1333, 1341 (2d Cir. 1987). The plaintiffs' presented evidence that those involved in passing the school's regulations felt as if they had no choice but to vote in favor of the regulations because of a New York statute. *Id.* The court held that this evidence was sufficient "to raise a substantial question as to whether the State . . . 'significantly encouraged' [the college] to take strict disciplinary action against campus disturbances." *Id.* Similar to those voting in favor of the college regulations in *Albert*, Pluckerberg was backed into a corner by Governor Dunphry. As one of the more influential users of Squawker, Governor Dunphry was able to pressure Pluckerberg into implementing a verification feature

which could be used to target conduct. Thus, Pluckerberg had virtually no choice but to take the "suggestion" of Governor Dunphry. Therefore, the restriction of Milner's speech by Squawker should be attributed to the State.

Finally, Governor Dunphry's actions amount to more than mere approval of or acquiescence in the initiatives of Squawker. The company was aware of the rise in imposter accounts but had yet to address this issue prior to Pluckerberg's meeting with Governor Dunphry. Jt. Stip. ¶ 8. However, in the immediate aftermath of the meeting between these two, Squawker developed and implemented a verification process for official government pages. Pluckerberg Aff. ¶ 9. Therefore, the origin of the plan to implement a verification process can be fairly attributed to Governor Dunphry's actions.

The Ninth Circuit Court of Appeals was presented with a plaintiff attempting to hold the local fire department chief responsible for the actions of a private individual. *Rimac v. Duncan*, *319* Fed. Appx. 535, 537 (9th Cir. 2009). In *Duncan*, the fire department chief provided a private individual with a letter that authorized him to remove several trees from the plaintiff's land after the individual had already removed the trees. The court held that, at most, the defendant "merely approved of or acquiesced in the removal of the trees." *Id.* Governor Dunphry's conduct in this case is clearly distinguishable. Governor Dunphry's actions spurred the implementation of a verification process on Squawker and thus, clearly took place before the deprivation of Milner's civil rights. *See* Jt. Stip. ¶ 8; Milner Aff. ¶ 9. Therefore, it is evident that Governor Dunphry played a vital role in the restriction of Milner's speech and did not merely approve of or acquiesce in the decisions of Squawker.

B. Governor Dunphry Acted Jointly With Squawker To Commit A Prohibited Action.

The State can also be held responsible for the actions of a private actor if the private actor functions as a "willful participant in a joint activity with the State or its agents." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970). The Supreme Court in *Lugar v. Edmonson Oil Co.* laid out a two-part test for finding joint participation. First, the plaintiff must prove that "the deprivation [was] caused by the exercise of some right or privilege created by the State or by some rule of conduct imposed by the state or by a person for whom the State is responsible." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937.

The first prong of the joint participation test is met because Milner's free speech right was restricted by the exercise of a privilege created by the State. As previously discussed, Squawker did not have a verification feature before Pluckerberg's meeting with Governor Dunphry. However, shortly thereafter, Squawker developed and implemented this feature. As such, the creation of the verification feature may fairly be attributed to the State.

A verified Squawker account is a privilege afforded only to government officials. The verification process, suggested by Governor Dunphry, allows Squawker to denote which accounts are actually run by public officials. Jt. Stip. ¶ 8. The elected official's account is marked with the official's state flag. *Id.* The only state that utilizes this verification feature is Delmont. *Id.* at ¶ 11. The exclusivity of this feature and the special designation afforded government officials prove that a verified Squawker account is a privilege.

The second prong of the joint participation test is met because Squawker acted jointly with Governor Dunphry in depriving Milner of his First Amendment right. The Supreme Court in *Lugar* explained that this prong of the joint participation test is satisfied if the party charged with the deprivation "acted together with or has obtained significant aid from state officials." *Lugar*, 457

U.S. at 937. Governor Dunphry and Pluckerberg's actions indicate that the two parties acted together to deprive Milner of his right to freedom of speech. Governor Dunphry, who is obviously a state official, was the mastermind of this scheme. He approached and suggested to Pluckerberg that he incorporate a verification process into Squawker. Pluckerberg was responsible for carrying out the scheme. He implemented the verification process along with the new Terms and Conditions and, shortly thereafter, restricted Milner's speech. The parties' actions in creating and executing this plan prove that Pluckerberg acted together with Governor Dunphry to deprive Milner of his freedom of speech right.

Furthermore, the deprivation about which Milner complains was clearly caused by the significant aid Pluckerberg received from Governor Dunphry. Therefore, this Court should hold the State responsible for the actions of Squawker because both prongs of the joint participation test are satisfied here

C. Public Policy Favors A Finding Of State Action.

Today, the Internet is one of the most important places for exchanging views. *Packingham v. N. C.*, 137 S.Ct. 1730, 1735 (2017). Thus, there is a public interest in protecting a citizen's right to freely speak on the internet, and in particular, on social media. *Id.* at 1735-36. Pluckerberg's, and thereby Squawker's, improper actions in this case are contrary to this public interest. Milner attempted to participate in a public forum by voicing his opinion on Governor Dunphry's page. Jt. Stip. ¶ 12, 14. Pluckerberg not only removed Milner's comments from Governor Dunphry's page, but also blocked other users from viewing the content on Milner's account. Pluckerberg Aff. ¶ 11. Ordinarily, a private company's actions would not be subject to First Amendment protections, but here these actions were motivated by the intervention of a state official. Accordingly, a finding of state action here would protect a fundamental public interest.

Courts have found that government officials violate the First Amendment when they engage in conduct similar to Pluckerberg's in this case. In *Knight First Amendment Inst. at Columbia Univ. v. Trump*, the President of the United States blocked the individual plaintiffs after they each posted critical replies to one of the President's tweets. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 232 (2d Cir. 2019). The President's actions prevented the plaintiffs from interacting with the President's account. *Id.* at 238. The court held that blocking the individual plaintiffs was a violation of the First Amendment. *Id.* at 239. Similarly, in *Davison v. Randall*, the plaintiff posted a negative comment on the Facebook page of the Chair of the Loudoun County Board of Supervisors. *Davison v. Randall*, 912 F.3d 666, 675 (4th Cir. 2019). The Chair quickly removed the comment and banned the plaintiff from the page. *Id.* The court affirmed the district court's holding that the defendant acted under the color of state law to deprive the plaintiff of a constitutional right by banning him from the public Facebook page. *Id.* at 680-81.

The actions of Squawker mirror those above. Milner's squeaks were critical of the legislation Governor Dunphry announced. Milner Aff. ¶ 7. Pluckerberg reacted to Milner's comments by flagging his account and severely limiting his ability to participate in the public forum. Pluckerberg Aff. ¶ 11. The only difference between the above-mentioned cases and the present case is that the depriving party here is a private entity. Jt. Stip. ¶ 2. However, this Court should still hold the State responsible for the actions of Pluckerberg because an agent of the State used a private entity to deprive a citizen of his constitutional right.

The decisions in *Trump* and *Randall* emphasize that public officials are forbidden from preventing citizens from interacting with official government social media pages. Governor Dunphry attempted to work around this rule here. Rather than blocking Milner, Governor Dunphry approached the founder of Squawker and suggested a plan to prevent Milner from posting on his

page. Pluckerberg Aff. ¶ 8. When Milner's account was flagged, it appeared as if the company had restricted his speech rather than a government official. The Court cannot allow this type of loophole to exist. Allowing government officials to act through a private entity to infringe on a citizen's freedom of speech violates the essence of the First Amendment. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) ("The Free Speech Clause restricts government regulation of private speech."). Thus, in order to avoid creating a loophole for public officials to exploit so that they may restrict private speech, this Court should hold the State responsible for the actions of Squawker.

Yet, Squawker is a private entity and just last year, the Supreme Court declared that "merely hosting speech . . . does not alone transform private entities into state actors subject to First Amendment constraints." *Halleck*, 139 S.Ct. at 1930. The Court's decision is in line with the majority of courts which have addressed the issue of whether or not private social media companies are state actors. *See Prager Univ. v. Google LLC*, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (collecting cases).

Squawker's actions are distinguishable from these cases where courts have found that state action did not exist. The significant difference is the substantial role that Governor Dunphry played in the actions of Squawker. Governor Dunphry sought out and provided Pluckerberg with the idea that would ultimately deprive Milner of his constitutional right. Pluckerberg, in an effort to please one of his company's most popular users, acted according to Governor Dunphry's direction. Thus, Squawker was not merely hosting speech, it acted with and under the influence of a state official to restrict private speech. By contrast, in both *Halleck* and *Prager*, private media companies decided to restrict access to their forums. *See generally, Halleck* 139 S.Ct. at 1921; *Prager*, 2018 WL 1471939, at *1. Both of these choices were based solely on the company's decision to act,

rather than governmental influence. *Id.* The differences between these cases are evident, and as such, this Court should hold the State responsible for the actions of Squawker so as to protect a fundamental public interest.

Milner invites this Court to deviate from its traditional view of the state action doctrine and take the next "step" in applying its free speech precedents to the Internet. *Packingham*, 137 S.Ct. at 1744 (Alito. J., concurring). Milner asks this Court to find the State responsible for the actions of a private entity because of the control and influence a state official exercised over the decision-making authority of the entity. If the Court refuses to find state action here, the actions of Pluckerberg and Governor Dunphry will set an example for future government officials to follow that suggests they can act through a private entity to restrict a citizen's speech. This Court cannot allow this type of behavior to persist and must protect a fundamental public interest. Therefore, this Court should hold that the actions of Pluckerberg are fairly attributable to the State, and as such, Pluckerberg is subject to the constraints set forth in the First Amendment.

II. SQUAWKER'S FLAGGING OF MILNER'S ACCOUNT IS INVALID UNDER THE FIRST AMENDMENT

Social media use is "protected First Amendment activity." *Packingham*, 137 S. Ct. 1735-36. The First Amendment prohibits the government from regulating speech, or another form of expression, based on its message, ideas, or content. "Content-based laws…are presumptively unconstitutional." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). Squawker's Terms and Conditions are presumptively unconstitutional because they require Squawker to flag users and/or their comments based on the message the squeaks convey. The Terms and Conditions also prohibit a particular form of expression, the emoji, if used in a violent or threatening manner. R. at 3. Furthermore, "spamming," or posting on Squawker in exceptionally high frequencies, is

forbidden by the Terms and Conditions. *Id.* In sum, Squawker's Terms and Conditions restrict a user's speech in three ways: content of speech, type of speech, and form of speech.

A. Squawker's Terms and Conditions Are A Form of Content-Based Discrimination

When a citizen's right to free speech is challenged, the "principal inquiry in determining content-neutrality…is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A law is content-based if "enforcement authorities" are required to "examine the content of the message" to decide whether there is a violation. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). Squawker's Terms and Conditions are not content-neutral on their face. Whether squeaks comply with Squawker's Terms and Conditions depends on what the squeaks say and how certain emojis are used in a particular context. Thus, Squawker must necessarily examine the content of the squeaks to determine whether the squeaks abide by the rules.

B. Squawker's Terms and Conditions Are A Form of Viewpoint Discrimination

The First Amendment protects a speaker from discrimination based on a particular viewpoint, irrespective of the nature of the forum. *Calvary Chapel Church, Inc. v. Broward Cty., Fla.*, 299 F.Supp.2d 1295, 1300 (S.D. Fla. 2003). *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001). "Viewpoint discrimination is…an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). In his *Perry* dissent, Justice Brennan concluded that "[v]iewpoint-based regulations have long been regarded as the most contemptuous, democracy-threatening restrictions on speech: 'censorship in its purest

form.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

Squawker's Terms and Conditions restrict the use of emojis promoting violence or threats, rather than restricting emojis in every context. *See Reed*, 135 S. Ct. at 2230. Squawker's Terms and Conditions state that their objective is to "combat [ ] abuse *motivated* by hatred, prejudice, or intolerance" by prohibiting 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." Jt. Stip. ¶ 6 (emphasis added). As such, Squawker engaged in content-based viewpoint discrimination when it flagged Milner's account after he commented unfavorable emojis on an official government page. There is no proof that Milner's comments were motivated by intolerance or hatred towards a bill supported by Governor Dunphry; Milner merely expressed his disagreement with this bill and Squawker attempted to silence this viewpoint.

Further, there is no indication that Milner's comments instigated violence or directly threatened another person. This Court in *Cohen v. California* acknowledged that states may ban "fighting words" where they are "inherently likely to provoke [a] violent reaction." *Cohen v. Cal.*, 403 U.S. 15, 20 (1971). However, the court further explained that a state may not ban these words where "no individual actually or likely to be present could reasonably have regarded the words . . . as a direct personal insult . . . and there was no showing that anyone…was in fact violently aroused" or that a violent result was intended. *Id.* Squawker cannot ban mere usage of "fighting words" or emojis, absent additional circumstances, such as a substantial likelihood of provoking violent behavior. There is no evidence that anyone was actually violently aroused or that Milner

intended a violent result when he made the comments. Therefore, Squawker infringed upon Milner's First Amendment right to free speech when it censored Milner's squeaks and profile page.

Additionally, the Illinois Supreme Court held that even a symbol as vulgar and offensive as a Nazi swastika could not be banned as it is a "symbolic form of free speech entitled to First Amendment protections," and its display on uniforms or signs could not be prohibited solely because "that display may provoke a violent reaction by those who view it." *Village of Skokie v. Nat'l Socialist Party of Am.*, 69 Ill.2d 605, 618 (1978). If a symbol this extreme, with a history of provoking violence and intense emotions, was found immune from the "fighting words" exception to free speech, this Court should find that three individual non-violent symbols (emojis) are also a form of free speech protected by the First Amendment.

Pluckerberg will likely argue that Milner's comments were a direct personal insult. However, this is unclear because Milner's comments were posted in response to another user's comment on Governor Dunphry's page. R. at 5. Additionally, it is unclear whether Milner's comments should even be categorized as threats, given that no one was actually mentioned by name nor was a picture of a specific person included. The Ninth Circuit in *U.S. v. Cassel* held that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *U.S. v. Cassel*, 408 F. 3d 622, 633 (9th Cir. 2005). There is no proof that Milner was actually intending to threaten the Governor, nor any indication that Governor Dunphry actually felt threatened by the emojis.

Finally, there was no person to person encounter here. In *Cohen*, this Court held that the provocative message displayed on Cohen's shirt was not "directed to the person of the hearer." *Cohen*, 403 U.S. at 20. Cohen was simply wearing the shirt in public for all who came into contact with him to see, rather than targeting a specific individual. Similarly, Milner's squeaks were

general propositions posted on a public forum for all who viewed the Governor's page to see. His squeaks were directed at the public, not at the Governor. Further, Milner's squeaks were posted separately and there is no evidence that he meant all four comments to be read together as one singular message. Lastly, there was no immediate threat of peace. In *Gooding v. Wilson*, Gooding told a cop, "[w]hite son of a bitch, I'll kill you" and the court overturned his conviction in part on the basis that the threat of peace was not imminent. *Gooding v. Wilson*, 405 U.S. 518, 534 (1972).

i. Presumption of Unconstitutionality

The Constitution does not permit the "official suppression of ideas," which is exactly what a viewpoint-based regulation does. "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828. In *Rosenberger*, this Court held that the denial of funding to a university student organization which published a newspaper containing Christian viewpoints was viewpoint discrimination. *Id.* at 820. Denying Milner the ability to express his views on Squawker is also viewpoint discrimination as the government cannot regulate Milner's speech just because it conveys a threatening or offensive message.

ii. Providing Differential Treatment to Certain Persons or Messages Is Indicative of Viewpoint-Discrimination

In *Reed*, the town of Gilbert, Arizona passed a sign code which inflicted varying restrictions on signs conveying differing messages. *Reed,* 135 S. Ct. at 2224. One type of sign was favored over the other, yet the only difference between the two was the content of the message conveyed on each sign. This is comparable to Squawker's situation because governmental figures are singled out with the Delmont flag on their page and given differential treatment. Squawker's Terms and Conditions impose greater limitations on a user's speech when interacting with "verified" pages, i.e. accounts held by government officials in the State of Delmont.

Squawker's Terms and Conditions also impose greater restraints on emojis that may appear violent or threatening, such as a coffin, by flagging comments that contain such emojis. In contrast, a flower emoji would remain unflagged. Again, the flower emoji is favored over the coffin, yet the only difference between the emojis is the content of the message each conveys. This policy is clearly an example of viewpoint discrimination as a violation of the Terms and Conditions is contingent upon what a squeaker says. *See McCullen*, 573 U.S.at 464 (2013).

Once the government authorizes discussion of a specific topic, it may not implement restrictions that discriminate among various viewpoints on that topic. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 61 (1983) (Brennan, J., dissenting). In Justice Brennan's dissenting opinion in *Perry*, he also clarified that "once access is granted to one speaker to discuss a certain subject access may not be denied to another speaker based on his viewpoint." *Id.* at 64. Another squeaker had posted comments before Milner, yet only Milner's account was flagged. This situation is the epitome of viewpoint discrimination. Milner's comment was deemed unacceptable based on the content of the message, and therefore, his speech was censored. By contrast, the other squeaker was free to express his "more favorable" opinion.

The court in *Doe v. Prosecutor* deemed prohibiting sex offenders from accessing social media extreme. *Doe v. Prosecutor, Marion Cty., Ind.*, 705 F.3d 694 (7th Cir. 2013). Similarly, flagging an entire account due to a few potentially offensive comments is extreme. Flagging the entire account is only the punishment when a user violates the Terms and Conditions on a verified page. Jt. Stip. ¶ 9. This demonstrates how Squawker favors verified pages over regular users' profiles and provides deferential treatment to such verified pages. This fact pattern is similar to that in *Reed* in which a town ordinance favored certain types of signs over others. This Court

determined that the town ordinance was unconstitutional. Following precedent, this Court should hold that Squawker's Terms and Conditions are also unconstitutional.

iii. Preserving the Public Peace Is Not a Legitimate Justification For Censoring Speech

In *R.A.V. v. City of St. Paul, Minn.*, this Court held that a town's desire to inform minorities that it did not tolerate "group hatred of bias-motivated speech" did not justify a town ordinance that categorized placing "a symbol…known to arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" on public or private property as disorderly conduct. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (internal quotations omitted). This is similar to how Squawker seeks to communicate that it does not condone bias or hate-motivated speech directed in particular at minorities on the basis of race, gender, and religious affiliation by implementing Terms and Conditions that categorize such behavior as inappropriate and worthy of the punishment of flagging. Squawker's Terms and Conditions are very similar to the town ordinance that this Court previously held was facially unconstitutional as a violation of the First Amendment protection for freedom of speech. *Id.*

The Terms and Conditions also prohibit the use of emojis in a violent or threatening manner, which is similar to the restriction on using a symbol "known to arouse anger, alarm or resentment in others" laid out in the town ordinance. *Id.* at 391. This Court ruled that the ordinance's content discrimination was unreasonable, irrespective of the justification that the ordinance was narrowly tailored to serve a legitimate state interest-guaranteeing basic human rights to groups historically discriminated against-because an ordinance "not limited to the favored topics…would have…the same beneficial effect." *Id.* at 396. Keeping in line with this Court's precedent, it does not follow that stating an opinion on Squawker based on age discrimination, which may have aroused alarm, is "flag-worthy" behavior.

iv. Offensive Content Is A Viewpoint

Speech cannot be restricted merely because the idea a message conveys is offensive. *Matal v. Tam,* 137 S. Ct. 1744, 1751 (2017). Offending Squawker users with the use of emojis is a viewpoint. Thus, Squawker's Terms and Conditions are a form of viewpoint discrimination.

The *Cohen* Court held that California lacked authority to criminalize the defendant's actions in wearing a shirt bearing the words "Fuck the Draft" based on the content of the message the words conveyed, provided there "was no showing of an intent to incite disobedience to or disruption of the draft." *Cohen*, 403 U.S. at 15. There is no proof that Milner intended to provoke violence against Governor Dunphry. Therefore, he should not be punished for stating his opinion.

The *Cohen* Court also held that the California statute's goal of preserving an "appropriately decorous atmosphere" was not enough to outweigh the burden placed on the defendant's speech. Similarly, Squawker's Terms and Conditions seek to promote a positive user experience, but this goal should not be enough to justify the undue burden placed on Milner by restricting his right to free speech. If the *Cohen* Court determined that it is acceptable to wear a shirt showcasing the words "Fuck the Draft," which conveys a very bold, straightforward message, it should also protect the conveyance of a subtler message by means of harmless emojis, as emojis are left to the subjective interpretation of the viewer.

Additionally, the government cannot restrict a person's speech in order to protect others from hearing it. *Id.* Since no privacy interests are being invaded in an intolerable manner by his comments, it is clear that Milner was silenced as a matter of Squawker's personal predilections. Absent such an intolerable invasion of privacy interests, Squawker is unable to shut off discourse in the interest of protecting other users from viewing potentially offensive comments, such as, allegedly, Milner's.

Furthermore, while some unwilling listeners might have been briefly exposed to Milner's comments, the Terms and Conditions are not concerned with protecting a captive auditor. Instead, the Terms and Conditions generally apply its prohibitions to all offensive conduct that disturbs any Squawker user. *Id.* However, as this Court in *Cohen* held, "one man's vulgarity is another's lyric." *Id.* at 25. Those offended can avert their eyes. Squawker users have the option to unfollow Milner or choose to disregard comments he makes on other pages; they are not forced to view any offensive content. As this Court held in *Cohen*, "[a]n undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 23.

This Court in *Cohen* also held that the constitutional right of free expression "is designed and intended to remove governmental restraints from the arena of public discussion…" *Id.* Squawker provides a public forum where users should have the right to discuss their views on various topics without restraint. Further, negative or potentially offensive views, such as Milner's, are important as it is valuable to hear arguments concerning both sides of an issue in order to produce a "more capable citizenry." *Id.* at 24. Finally, Squawker users make a conscious choice to use Squawker and view its contents. Therefore, Squawker's Terms and Conditions have unlawfully infringed upon Milner's right to freedom of speech.

C. Squawker's Terms and Conditions Are Not Narrowly-Tailored to Serve A Legitimate Government Interest

When a state attempts to regulate speech, the regulation must be content-neutral and "narrowly tailored to serve a significant governmental interest." *McCullen,* 573 U.S. at 486. The State must demonstrate that there is "no less restrictive alternative" to serve its purpose. *Washington Post v. McManus*, 355 F. Supp.3d 272 (D. Md. 2019). Although the Eighteenth Circuit determined that Squawker's restrictions on Milner's speech "are the least restrictive means this

court has ever seen," this does not mean that such restrictions are the least restrictive means in this case. For example, a less restrictive means would be providing a warning before flagging an entire account or flagging the individual comments.

Historically, courts have neglected to find a law narrowly tailored to serve a legitimate governmental interest when there was indeed an alternate, less-restrictive method of accomplishing the same goal. For example, the Seventh Circuit held that a statute forbidding registered sex offenders from utilizing social media websites was not narrowly tailored to the State's interest in protecting children from inappropriate sexual communication when the State's criminal statutes could also accomplish this goal. *Doe*, 705 F.3d 694. Similarly, Squawker's Terms and Conditions restrict more speech than necessary by prohibiting users from posting at high frequencies. There is no correlation between posting comments in high volumes and the accessibility of the forum. Thus, Squawker can achieve its purpose through less restrictive means.

A regulation that is unconstitutionally overinclusive or underinclusive may also fail the narrowly tailored prong of the strict scrutiny test. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 121-123 (1991). Squawker's Terms and Conditions are overinclusive as they prohibit the use of emojis "in a violent or threatening manner." This language encompasses a broad restriction on the speech of Squawker users. For example, war is violent and some squeakers may want to express their opinion in favor of the country going to war. Should the Court uphold the Terms and Conditions as constitutional, squeakers would not be able to comment about the war using emojis, as such emojis may be interpreted as having been used in a "violent manner." Favoring the war, however, is a viewpoint that cannot be suppressed by either the government or a private entity. As this example illustrates, Squawker's Terms and Conditions are not narrowly tailored because they are unconstitutionally overinclusive.

Even if Squawker's Terms and Conditions were content-neutral, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. Restricting Milner's expression of emojis is a more substantial burden than necessary to further the government's legitimate interest of protecting the rights of users to use and enjoy the forum. Users can still use and enjoy the forum without restricting Milner's speech; users have full governance as to what they see and read, so they can choose to avoid Milner's posts. Jt. Stip. ¶ 5. Users also have the ability to unfollow Milner. *Id.* In contrast, Milner suffered a substantial loss in the number of followers on Squawker and the loss of job opportunities. Thus, it is considerably more difficult for him to have online engagement in a public forum.

Furthermore, this Court in *Rosenberger* also held that the "[g]overnment offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, 515 U.S. at 828. Applying the language of this Court, it is clear that Squawker, a state actor, has violated Milner's First Amendment rights due to the financial burden Milner incurred. Milner Aff. ¶ 14.

D. Squawker's Terms and Conditions Are Not A Reasonable Time, Place, Or Manner Restriction

Governments may only restrict the time, place, or manner of speech provided the regulations are justified irrespective of the content of the speech, narrowly-tailored to serve a legitimate governmental interest, and provide for reasonable alternative channels of communicating information. *Ward*, 491 U.S. 781. The restrictions imposed by Squawker's Terms and Conditions are not justified because they are based on the content of one's message. The Terms and Conditions state that behavior promoting violence against or directly threatening other people is prohibited. Jt. Stip. ¶ 6. One must necessarily examine the content of each squeak in order to determine whether the message is violent or promotes abuse.

Any regulation based on the content of speech must satisfy strict scrutiny. *Pleasant Grove*, 555 U.S. at 469. Utilizing a strict scrutiny analysis, Squawker must demonstrate that their Terms and Conditions directly advance a substantial interest and there are no less restrictive means available to achieve this interest. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N. Y.*, 447 U.S. 557, 564 (1980). Squawker cannot meet this burden of proof because their Terms and Conditions allow for differential treatment of users and squeaks based on unfavorable viewpoints.

Further, even if a restriction does in fact serve a legitimate time, place, or manner interest, regulating a specific viewpoint still violates the First Amendment. *Olasz v. Welsh*, 301 Fed. Appx. 142 (3d. Cir. 2008). The government cannot open up a forum for discussion of a certain topic, then ban a specific viewpoint on such topic. *Denke v. Shoemaker*, 347 Mont. 322, 338 (2008). *See, e.g.*, *Rosenberger*, 515 U.S. at 827. Squawker did just that. It opened up a forum for public discussion about politics, then restricted Milner's ability to express his opinion which contained political viewpoints. Therefore, a violation of the First Amendment should be inferred.

In conclusion, Squawker has engaged in content-based viewpoint discrimination by flagging Milner's account based on the content of his comments on a government official's page. Squawker's Terms and Conditions prohibit behavior which promotes violence, rather than behavior that addresses violence, which is a form of viewpoint discrimination.

Conclusion

For the foregoing reasons, we respectfully request that this Court reverse the Eighteenth Circuit's decision that Squawker is a private actor. In addition, this Court should reverse the Eighteenth Circuit's decision that Squawker's flagging of Milner's account is valid under the First Amendment.

Brief Certificate

The work product contained within this brief is solely the work product of the members of Team 8. The members of Team 8 have fully complied with the honor code of Team 8's law school while preparing this brief. The members of Team 8 have fully complied with the rules of this competition.

Respectfully submitted,

/s/ Team 8