Docket No. 17-874

IN THE UNITED STATES SUPREME COURT
January 31, 2020

AVERY MILNER,

Petitioner

-against-

MAC PLUCKERBERG,
In his capacity as Chief Executive Operator of Squawker Inc.,

Respondent

On Appeal from the Order of the
United States Court of Appeals for the Eighteenth Circuit
In C.A. No. 16-CV-6834
(Hon. Beth Finsberg, Circuit Judge)

Brief for Respondent
Mac Pluckerberg
Team 9

QUESTIONS PRESENTED

I. Under the United States Constitution does a private entity hosting a public forum engage in state action by applying its flagging policy when the social media site has not long been used by the state to convey messages, is not closely identified within in the public mind with the state, and the state has no direct control over the messages conveyed by the entity.

II. Under the First Amendment does a private entity's Terms and Conditions pass the content-neutral time, place, or manner restriction when the terms and conditions flags users for the frequency of their posts regardless of their content, and for emojis used in threatening manners.

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STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eighteenth Circuit rendered its decision in favor of Mackenzie Pluckerberg. *Pluckerberg v. Milner*, no. 16-CV-6834 (18th Cir. 2019). A petition for Writ of Certiorari was filed and granted. This Court has jurisdiction over this matter pursuant to Squawker's Terms and Conditions.

STATEMENT OF THE CASE

In 2013, Mackenzie Pluckerberg ("Mr. Pluckerberg"), launched Squawker: a "multinational social media platform." Stipulation ¶3. Squawker was initially "designed as a way for people to stay connected to local, national, and global news," but soon attracted users of all ages who used the platform not only as a way to stay informed about current events, but also as a way to express themselves. Stipulation ¶5; R.2. Squawker allows users – "squeakers" – to create a personal profile page onto which they can post "squeaks," "which are sentences of 280 characters or less." Stipulation ¶5. The platform also enables users to like and dislike other squeakers' posts as well as comment on those posts. Stipulation ¶5. When a user comments on a squeak, that comment may be seen by all users connected to both the original user's profile page and the commenting user's profile page. Stipulation ¶5; R.2. Comments are open to interaction by other users in the form of likes, dislikes, or additional comments. Stipulation ¶5; R.2. Users can stay connected with other Squeakers by following one another on the platform. Stipulation ¶5; R.2. To stay up to date with each Squeaker that a user is following, Squawker compiles a list of all of the squeaks written by those Squeakers and displays them in a "feed" on the original individual's homepage. R.2. All users are able to see which Squeakers are following their account and who is liking, disliking or commenting on their squeaks. R.2.

After creating an account, Squeakers must consent to the platform's Terms and Conditions which include: an agreement to not promote violence or directly attack or threaten others based on their "race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease"; to not use emojis in a "violent or threatening manner"; and to resist from "the automatic or [manual] facilitated posting, sharing, content engagement, account creation, event creation, etc. at extremely high frequencies." Stipulation ¶6. Extremely high frequency was further defined as "four or more squeaks squawked within 30 seconds of each other." Stipulation ¶6. If users violate any of the Terms and Conditions, their profile is flagged. Stipulation ¶6.

With the growth in Squawker's popularity came the growth in user profiles. R.3. By 2017, Mr. Pluckerberg's initial design for the platform came to fruition as users began using Squawker as their "main source of information regarding national and local news." R.3. This spurred government officials to begin using the site as a way to connect with constituents and spread their policy ideas. Stipulation ¶7. Notably, Governor Dunphry of Delmont, a former classmate of Mr. Pluckerberg, began using the site in 2017 to engage with his constituents. Stipulation ¶8; Dunphry Aff. ¶7.

By February 2018, Governor Dunphry began receiving complaints about imposter accounts, so he contacted Mr. Pluckerberg about adding a verification feature to all Delmont elected officials' Squawker pages that would "denote which users [were] verified public officials," and ultimately weed out the imposter accounts. Stipulation ¶8; Pluckerberg Aff. ¶8; Dunphry Aff. ¶8. Mr. Pluckerberg agreed and implemented the new system in March of 2018, which included marking each government official's account with Delmont's flag. Pluckerberg Aff. ¶9. During the

verification system's first year, Mr. Pluckerberg himself approved and verified all accounts. Pluckerberg Aff. ¶9, 10; R.3.

After the verification system was implemented, a new flagging provision was added to the original Terms and Conditions. Stipulation ¶9. This new provision stated that if a user violated the Terms and Conditions with respect to a verified user's account, then the offending user's account would not only be flagged, but also would result in a skull and crossbones appearing over "(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." Stipulation ¶9. The skull and crossbones could be removed, however, if the offending Squawker watched a 30-minute training video and completed an online quiz consisting of fifty questions. Stipulation ¶9, 10. If the offending user failed the quiz twice, it would result in the user being placed on a three month hold before being able to watch the video and take the quiz again. Stipulation ¶10. Although refusing to take or failing the quiz would result in the offender's page remaining flagged, that offending user could still use the platform. Milner Aff. ¶13. Additionally, other Squeakers would still be able to view the offender's profile page and all of the offender's comments and activity by simply clicking on the skull and crossbones. Milner Aff. ¶13; Stipulation ¶9.

In July 2018, Avery Milner ("Petitioner"), a freelance journalist and avid Squeaker with over ten thousand followers, was flagged for "violent and/or offensive use of emojis" and "spamming behaviour." Milner Aff. ¶3, 6, 9. Petitioner, who supports legislation that would impose age restrictions on all public officials, commented on Governor Dunphry's page after Governor Dunphry posted a link to a proposed bill which would ban right turns on red lights. Milner Aff. ¶4, 7; Dunphry ¶10. Petitioner's four comments which he posted within 29 seconds of each other stated "we gotta get rid of this guy," followed by an old man emoji with a plus sign

next to it, an injection emoji with a plus sign next to it, and a coffin emoji with a plus sign next to it. R.5. These rapid-fire series of comments resulted in Petitioner's hijacking of the platform thus making it unusable for other Squeakers. R.5; Pluckerberg Aff. ¶12. Additionally, it led to over 1,000 dislikes, over 2,000 reports about Petitioner's obsessive and obscene comments, and the deletion of 29% of user accounts. Pluckerberg ¶11, 12, 14.

In response to Petitioner's rapid-fire comments, Mr. Pluckerberg flagged Petitioner's account for violating Squawker's Terms and Conditions, specifically the rule that restricts excessive posting and emojis used in a violent or threatening manner. Pluckerberg Aff. ¶11. Petitioner has never been flagged before this incident even though he claims to have posted four or more squeaks within 30 seconds before. Milner Aff. ¶11, 12. Petitioner refuses to watch the video or take the quiz required to remove his flagging because he thinks it is "stupid," "ridiculous," and "outrageous." Milner Aff. ¶15. Since being flagged, Petitioner's following has decreased from over 10,000 followers to 2,000 followers with an average of 50 views per squeak, and he states that has been turned down for a few jobs. Milner Aff. ¶6, 13. Petitioner's Squawker page currently remains flagged. Milner Aff. ¶16.

Petitioner argues that Squawker's Terms and Conditions are in violation of his First Amendment rights as they control the way he interacts with his elected officials. Milner Aff. ¶15. Governor Dunphry's page is a public forum because the Governor uses it to conduct official business; however, Governor Dunphry is not a party to this action. Stipulation ¶4. Squawker remains a private entity under the control of its CEO, Mr. Pluckerberg and Squawker maintains that its flagging provisions under the Terms and Conditions do not violate the First Amendment. Stipulation ¶3; R.7.

SUMMARY OF THE ARGUMENT

This Court should affirm the Court of Appeals' ruling and grant Respondent's motion for summary judgement because Squawker's Terms and Conditions are not violative of the First Amendment. The First Amendment applies only to State actors, and in order for a private entity to be considered a State actor and therefore bound by the First Amendment, the private entity must be acting in a role traditionally reserved to the States. The operation of a social media platform is not a traditional, exclusive public function and courts have held that there must be a sufficiently close nexus between the State and the private entity so that the actions of the private entity "may be fairly treated as those of the State itself. The government played no role in the creation of Squawker and it has no role in enforcing or reviewing the violations of the Terms and Conditions.

Although it is stipulated that Governor Dunphry's social media page is a public forum as he uses it to conduct the official business of the State of Delmont, neither the Governor nor the State enforces or supervises the activity of Squawker users on the platform. The State does not fund or govern the platform and although Governor Dunphry suggested the new verification feature, he did not participate in the implementation and enforcement of the new flagging provisions. There lacks a sufficiently close nexus between the State and Squawker which would transform the actions of Mr. Pluckerberg into the actions of the State.

Even if Mr. Pluckerberg's actions were considered State actions, they would not be violative of the First Amendment. "Even in a public forum … the government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Squawker's Terms and Conditions are content-neutral, narrowly tailored to serve their goal, and

leave open ample alternative channels for communication of the information. The flagging provisions are content-neutral because the content of Petitioner's emoji-laden comments were not why his comments were flagged, but rather the flagging stemmed from the manner in which he used the emoji's. This Court has held that expressive activity can be banned because of the action it entails rather than the ideas it expresses. Squawker has a legitimate interest in ensuring that its platform remains accessible to users, and Petitioner's high frequency squeaks "effectively shut down the forum for others and led to users leaving the platform." Furthermore, Squawker's means of achieving its goal is narrowly tailored and allows ample channels of communication for Petitioner's message. Although Petitioner's account was flagged, if other Squawker users wish to see what he says, they can simply click on the skull and bones flag over the comments and account page. Furthermore, the flagging of Petitioner's account does not prevent him from using the social media platform or attempting to engage in conversations with other Squawkers. For these reasons, Squawker's Terms and Conditions are not violative of the First Amendment.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY GRANTED RESPONDENT'S SUMMARY JUDGEMENT MOTION BECAUSE SQUAWKER IS NOT A STATE ACTOR FOR PURPOSES OF THE FIRST AMENDMENT.

This Court should affirm the Court of Appeals' ruling and grant respondent's motion for summary judgement because Squawker is a private entity not engaged in powers traditionally reserved by the State. The Supreme Court has found that factors contributing to a private entity's transformation into a State actor include: the private entity being controlled by the State; its delegation as a public function by the state; its entwinement with governmental policies; and the government's entwinement with the entity's management or control. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001). Squawker is a private entity that is not controlled by an agency of the State, but rather, a private citizen, Mr. Pluckerberg.

Stipulation ¶3. Although Governor Dunphry's page is considered a public forum, Squawker is a social media platform and does not perform a traditionally public function, nor has it been delegated one by the State; and the platform is not entwined with governmental policies nor is the platform controlled or managed by the state. Stipulation ¶3, 14.

A. Squawker Acted Solely as a Private Entity and Did Not Exercise a Function that is "Traditionally Exclusively Reserved to the State"

Squawker is a private entity run by a private actor as a social media platform that does not exercise a function that is "traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). In order to determine whether a private entity exercises a function that is exclusive to the State, courts look at (1) whether the entity has long been used by the state to convey messages, (2) whether the entity is closely identified in the public mind with the State, and (3) whether the State has direct control over the messages conveyed by the entity. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). *See also Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239 (2015) (where the Court held that Texas' specialty license plates constituted government speech). Squawker's platform has not historically been used by the State to display messages to the public, citizens do not closely associate the Squawker platform with the State, and the State does not have direct control over Squawker. Squawker is a private entity, run by a private citizen, and should not be considered a State actor.

In *Prager University v. Google LLC*, the U.S. District Court for the Northern District of California held that private social media corporations, as well as online service providers, are not State actors. No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018). Similarly, in *Young v. Facebook, Inc*, the same court declined to find that the social media website, Facebook, was a State actor. No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at *3 (N.D. Cal. Oct.

25, 2010). Therefore, private social media websites and private service providers, similar to Facebook, should not be considered State actors under this Court.

First, in *Summum* the Court held that the placement of permanent monuments in a public park was a form of government speech because of the deep-rooted history that monuments served as a platform for government messages. *Summum*, 555 U.S. 460 at 467. The Court explained that historically "when a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." *Id*. at 470. The government has had a long history and practice of accepting privately donated monuments in order to display a message to the public, and therefore, the monuments in that case served as government speech.

Second, the Court in *Summum* explained that viewers of publicly displayed monuments have often interpreted them as conveying a message on the property owner's behalf and because "public parks are often closely identified in the public mind with the government unit that owns the land," monuments in public parks were interpreted as conveying a message on the government's behalf. *Id*. at 472. Therefore, since the monuments were displayed on public property, the viewers associated the message with the government.

Third, the Court in *Summum* held that "throughout the nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." *Id*. at 471. The Court explained that "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals." *Id*. at 472. The city had "'effectively controlled' the messages sent by the monuments in the park by exercising 'final approval authority' over their selection." *Id*. at 473. Additionally, the city had selected the

particular monuments in question "for the purpose of presenting the image of the City that it wishe[d] to project to all who frequent the park." *Id.* The Court held that the privately donated monuments constituted government speech because the government's monument displays at issue satisfied all three factors.

In the present case, Squawker is not a government entity, and Mr. Pluckerberg's action of flagging Petitioner's Squawker account does not constitute government action. The three factors that the Court used in *Summum* to determine whether the monuments constituted government speech are not met here. First, unlike in *Summum* where the Court recognized that government's history of using monuments to portray a message to the public, here, Squawker's history does not portray a purpose of providing a platform in which the government can relay a public message. Since its launch in 2013, Squawker's history shows that "it is used by people of all ages as a way to stay connected, express themselves, and stay informed about current events." Pluckerberg Aff. ¶5. Squawker allows any person, including the public and government officials, to make a profile and write squeaks on a broad range of topics. Stipulation ¶5. In fact, government officials only began to obtain their own Squawker accounts as the platform grew in popularity in mid-2017, as a way to reach constituents and spread policy ideas. Stipulation ¶7. Therefore, Squawker's history does not solely involve hosting the speech of government officials, but instead hosts the speech of the general public, and any individual who wishes to make an account. Additionally, social media platforms have not been historically considered or recognized as State actors. Like in *Prager*, where the court declined to identify social media corporations as State actors, and similar to *Young*, where the court held that Facebook was a private entity and not a State actor, here, Squawker is a social media website and therefore cannot be defined as a State actor.

Second, unlike in *Summum* where the Court found that the public would identify the monuments as being government-affiliated, here, Squawker users would not closely identify the social media platform with the ideas of the State. Although government officials can use the platform to deliver political messages, so can any common citizen or celebrity. Stipulation ¶5. There is no dominant presence of government actors on the site, and Squawker's platform is not aligned with any government individual or political party. Rather, "Squawker is incredibly popular and is frequently used as a news source." Stipulation ¶7. When an individual uses the Squawker platform, it is implausible that they will associate the social media site with the government because it is not aligned with any particular governmental view or message, but rather, is a vehicle for portraying local and national news and for public conversations. Stipulation ¶7. Therefore, social media platforms such as Squawker are not closely identified by the public with the State.

Third, unlike in *Summum* where the government participated in selective approval of which monuments to display in public parks, here, the government does not maintain control over Squeaks posted on Squawker. Stipulation ¶5. Squeaks are not filtered or approved by the State, but instead are monitored by Mr. Pluckerberg, who is a private individual operating a private entity. Stipulation ¶6. Every squeak is posted unless Mr. Pluckerberg decides that it violates the site's Terms and Conditions. Stipulation ¶6. Therefore, because the government does not engage in approval or selection of Squeaks that are posted, it cannot be considered a State actor.

Finally, like the entities in *Prager* and *Young*, Squawker is a private online social media provider that cannot be identified as a State actor. Similar to Facebook, Squawker is an interactive social media site that is privately owned and open to the public. Therefore, a court would likely find that Squawker is almost identical to the description of Facebook and similar social media platforms, which courts have historically declined to label as State actors.

Although Squawker hosts a public forum, which is open to Squeaks from both governmental officials and nongovernmental individuals, the platform is not a State actor, and Mr. Pluckerberg's action of flagging Petitioner's profile did not constitute State action because Squawker is a private entity. The action of hosting government officials on social media platforms does not fall under a traditional, exclusive public function because it does not satisfy any of the three factors established in *Summums*.

Although the Court in *Packingham v. North Carolina* stated that the First Amendment applies to the wild and "vast democratic forums of the internet," this was not held to be absolute. 137 S. Ct. 1730, 1736 (2017). In fact, the Court cautioned that the law was still evolving and that "the forces and directions of the Internet [were] so new, so protean, and so far-reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Id*. Since *Packingham* was one of the first to address the relationship between the First Amendment and the internet, the Court stated that they would be exercising "extreme caution before suggesting that the First Amendment [does or does not] provide scant protection for access to vast networks in that medium." *Id*. The Court hesitated to set a rule regarding First Amendment protections for the internet in general and did not address the status of social media sites as private or State actors. *Id.*

Additionally, the statute in *Packingham* made it a felony for registered sex offenders "to access a commercial social networking web site where the sex offender knows that the site permits minor children to become members…" *Id*. at 1733. This is a far more restrictive situation than the present case. For instance, in *Packingham*, the petitioner was banned from using a multitude of webpages, including those that might be considered government actors. *Id.* In the present case, the Petitioner was flagged by a private social media site, rather than blocked from using social media sites altogether. Pluckerberg Aff. ¶ 11. Furthermore, the Petitioner was not banned from using

Squawker and interacting with other users after he was flagged. Pluckerberg Aff. ¶ 11. Instead, the Petitioner's content was covered by a black box with a skull and crossbones design requiring other squeakers to click in order to view the material. Milner Aff. ¶ 13.

B. Squawker is Not a State Actor Because it is a Private Entity That Lacks Significant Entwinement with the State

Squawker is a private entity that is not pervasively entwined with the State so as to be treated as a State actor or a government entity. *Brentwood*, 531 U.S. 288 at 291. As stated in *Jackson*, "State action may be found…only if there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Jackson*, 419 U.S. 345 at 351. In order to distinguish whether a private entity is so entwined with the state as to render it a State actor, the Court in *Brentwood* identified three factors: (1) whether the challenged activity results from the State's exercise of "coercive power," (2) whether the State provides significant encouragement, and (3) whether a private actor operates as a "willful participant in joint activity with the State or its agents." *Brentwood*, 531 U.S. 288 at 296. Mr. Pluckerberg's decision to flag Petitioner's account did not result from the State's "coercive power," the State did not provide significant encouragement, and Squawker did not operate as a willful participant in joint activity with the State. Therefore, Squawker is a private entity that is not sufficiently entwined with the State.

In *Brentwood*, the Tennessee Secondary School Athletic Association ("the Association") regulated interscholastic sports among Tennessee's public and private high schools. *Brentwood*, 531 U.S. 288 at 291. Since the state's public high schools were members of the Association, and made up the majority of the voting membership, the Court held that the Association had connections with the State that were pervasive and entwined, and that the Association's regulatory activity was State action owing to the "pervasive entwinement of State school officials in the

Association's structure." *Id*. The Court explained that "coercion and encouragement are like entwinement in referring to kinds of facts that can justify characterizing an ostensibly private action as public instead." *Id.* at 303. The Court described, "pervasive entwinement to the point of largely overlapping identity [creates] an implication of state action." *Id*. Further, "entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character." *Id*. at 302. Therefore, the Court determined that coercion and encouragement were crucial factors in determining the characterization of a private entity into a State actor.

First, the Court in *Blum v. Yaretsky* held that respondents failed to establish "State action" in a nursing home facility's decision to discharge or transfer Medicaid patients to lower levels of care because the private entity's involvement with the State did not amount to coercion. 457 U.S. 991, 1009 (1982). Although the State required the nursing home to complete forms when making patient transfers or discharges, the regulations did not require the nursing homes to rely on the forms when making those decisions, and thus did not demonstrate that the State was responsible for those decisions. *Id.* Instead, the decisions were determined by "medical judgments made by private parties…that are not established by the State." *Id*. The Court rejected the idea that the State's imposition of penalties on the private entity created coercion, holding that "[t]he State is authorized to fine health care providers who violate applicable regulations," however, those regulations do not dictate the decision to discharge or transfer. *Id*. at 1010. Therefore, the State's involvement was minimal and non-coercive. *Id*.

Second, the Court in *Blum* found that the State's "adjustments in benefit levels in response to the nursing home's decision to discharge or transfer a patient did not constitute approval or enforcement of that decision." *Id*. The Court in *Blum* emphasized that the State merely acted in response to a decision that the private entity made on its own. *Id*. Therefore, the nursing home did

not receive significant encouragement that would create serious entwinement with the State. Third, the Court in *Blum* found that "[private entities] providing services that the State would not necessarily provide, even though they are extensively regulated, does not make its actions 'State actions.'" *Blum*, 457 U.S. 991 at 1011. Therefore, the Court declined to consider the State as a "joint participant" in the nursing home facility's discharge and transfer activity because the State is not responsible for any of the decisions made within the process. *Id*.

In the present case, Mr. Pluckerberg's actions of updating Squawker's Terms and Conditions and instituting a flagging provision does not transform the private entity into a State actor. Unlike *Brentwood*, where the Court found significant entwinement between the Association and the State, here, Squawker is not pervasively entwined with the State and is therefore not a State actor because none of the three *Brentwood* factors are met. First, similar to *Blum*, the State did not take any coercive actions in implementing the updated Terms and Conditions of Squawker, or in flagging Petitioner's account. Governor Dunphry suggested a verification provision in order to combat the growing number of fraudulent Squawker accounts. Stipulation ¶8. Mr. Pluckerberg was aware of the imposter accounts reporting false news as of late 2017. Pluckerberg Aff. ¶7. Governor Dunphry's suggestion was solely an idea to combat this existing problem. Pluckerberg Aff. ¶8. Governor Dunphry did not coerce Mr. Pluckerberg to adopt his verification idea and did not provide any penalties or incentives for Squawker to implement the verification procedures.

Second, like in *Blum* where the Court found that the State's reaction to the private entity's decisions did not constitute encouragement, here, there was even less State involvement. After Governor Dunphry suggested the verification feature, he was not involved in Mr. Pluckerberg's implementation of the verification procedures or the updated Terms and Conditions. Pluckerberg Aff. ¶10. Instead, Mr. Pluckerberg, acting alone, took the initiative to add the verification feature

to Squawker, update the Terms and Conditions, and take on the responsibility of approving and monitoring all verified Squawker accounts during the first year of this feature. Pluckerberg Aff. ¶10. Therefore, there was no encouragement on the part of the State because after Governor Dunphry's suggestion, Mr. Pluckerberg acted alone in carrying out Squawker's updated policy.

Third, similar to *Blum* where the Court declined to find that the State was a joint participant in the nursing home's discharge and transfer activity, here, the State cannot be considered a joint participant in Squawker's updated provisions and in the flagging of Petitioner's account. The only action taken was when Governor Dunphry made the verification suggestion to Mr. Pluckerberg: This is not State involvement. This suggestion did not force Mr. Pluckerberg to implement changes to Squawker or to flag Petitioner's account. Mr. Pluckerberg and Governor Dunphry did not work together to bring about these changes and did not act as a joint entity to enforce Squawker's new policies. Mr. Pluckerberg acted alone in his capacity as the CEO of a private entity, and Governor Dunphry cannot be considered a joint participant in any of Mr. Pluckerberg's actions.

Although Governor Dunphry came up with the idea to introduce a verification feature only for government accounts, this did not turn Squawker into a State actor because there was not a sufficiently close nexus between the private entity and the State actor. The two were not pervasively entwined with one another for the private entity to be characterized as a public entity. Therefore, Squawker could not be considered a State actor since there was no State coercion or encouragement to implement changes to the platform, and the State did not assist or partake in the enforcement of the updated policies as a joint entity.

II. SQUAWKER'S FLAGGING PROVISIONS ARE NOT VIOLATIVE OF THE FIRST AMENDMENT BECAUSE THE PROVISIONS ARE CONTENT NEUTRAL, AND THEY ARE NARROWLY TAILORED TO ACHIEVE THE PRIVATE ENTITY'S GOAL OF HAVING A USER ACCESSIBLE WEBSITE.

Squawkers flagging provisions regulate the frequency and manner, rather than the content, of users posts to ensure that the forum does not become unusable and cause users to leave the platform. Pluckerberg Aff. ¶12. The Supreme Court has held that regulations on speech are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). It is Respondent's position that Squawker is not a State actor and should not be treated as such. However, assuming arguendo that Squawker is a State actor for purposes of the First Amendment, the flagging provisions do not violate the First Amendment because they are content-neutral, they are narrowly tailored to achieve their goal of a functioning forum for others, and they continue to give users access to the flagged posts.

A. Squawkers Flagging Provisions are Content-Neutral and Were Enacted with the Purpose of Avoiding Website Hijacking and Ensuring a Fully Functioning and Accessible Website for Other Users.

Squawker's flagging provisions are content-neutral as they restrict the frequency and the manner of messages rather than the content of the messages. "Content-based laws … are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert Ariz.*, 135 S. Ct. 2218, 2226 (2015). The "principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Supreme Court has held that "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*. In *Ward*, the Supreme Court held that a sound amplification guideline was content-neutral as the justification for the guideline had nothing to do with the artistic content of

the music. *Id.* at 792. The Court rejected the claim that the purpose of the city's guideline was to interfere with the artistic judgement of performers finding that the city's concern extended only to "the volume problems associated with inadequate sound mix." *Id.*

In *Turner Broadcasting System, Inc v. F.C.C.*, the Supreme Court held that provisions of the Cable Television Consumer Protection and Competition Act ("the Act") were content-neutral because the provisions imposed a must-carry burden on all cable programmers that was not "activated by any particular message spoken." 512 U.S. 622, 655 (1994). The must-carry provisions required cable operators to carry a "specified number of local broadcast television stations" with the goal of correcting the "competitive imbalance" between the cable television industry and the broadcast television stations. *Id.* at 630, 633. In *Turner*, the Court acknowledged that a regulation that is content-neutral on its face could still be content-based if "its manifest purpose [was] to regulate speech because of the message it convey[ed]." *Id.* at 643. Although the provision would impede on cable programmer's editorial discretion, the Court maintained the Act's content-neutrality as the provision was activated by the operator's channel capacity, rather than the programs the channel offered to subscribers. *Id.* at 644.

In. *R.A.V v. City of St. Paul, Minn.*, this Court held that a State ordinance prohibiting the placement of objects or symbols which would incite alarm or resentment "on the basis of race, color, creed, religion, or gender," was content-based. 505 U.S. 377, 380 (1992). The Court found issue with the fact that the ordinance did not simply prohibit "only those fighting words that communicate ideas in a threatening…manner" but rather it "proscribed fighting words of whatever manner that communicated messages of racial, gender, or religious intolerance." *Id.* at 393. The selectivity of the types of fighting words made the ordinance content-based. *Id.* at 394. The Court

stated that "the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the *basis of its content*." *Id.* at 392 (emphasis added).

In the present case, Squawker's flagging provisions are content-neutral in both design and in application. Like in *Ward*, where the purpose of the City's guidelines was to protect against inadequate sound mixing rather than to prohibit the artistic expression of performers, here, the purpose of the flagging provision is to protect against website hijacking rather than to prohibit the sharing of certain Squeaks. *Ward*, 491 U.S. at 792. Squawker's flagging provision states that spamming is prohibited, and users may not post at "extremely high frequencies to the effect the forum is unusable by others." Stipulations ¶6. The excessive volume of Petitioner's comments led to 2,000 reports, over 1,000 dislikes, the deletion of accounts, and a 29% decrease in users. Pluckerberg Aff. ¶12, 14. Similar to *Turner*, where the must-carry provision was not activated by the content of the channels, here, the flagging policy is activated by the number of times a user squeaks within 30 seconds, rather than the content of those squeaks. *Turner Broadcasting System, Inc.*, 512 U.S. 644. Stipulations ¶6. Like in *Turner*, where there was "no content-based penalty," and operators could not "avoid or mitigate [their] obligations under the Act by altering the programming [they] offer[ed] to subscribers," here, users found to have violated Squawker's Terms and Conditions will have their account flagged regardless of the content of their posts. *Turner Broadcasting System, Inc.*, 512 U.S. at 655, 644; Stipulation ¶6, 9.

The activation of the flagging provisions for hijacking the website as well as the resulting penalty, do not depend upon the content of the user's posts. Unlike in *R.A.V.*, where the State ordinance only prohibited violent or threatening acts against a select group of people, here, the prohibition of frequent posts applies to all users regardless of who their message is directed at or what it conveys. Stipulations ¶6. The flagging provision also supplies that when a Squeaker is

flagged after violating the Terms and Conditions, all of the content on the offending Squeaker's page will be flagged, not just the "offending squeak or comment." Stipulation ¶9. This further supports the fact that the flagging provision is content-neutral as the consequence of violating the Terms and Conditions is not solely focused on the violating post, but rather the user as a whole.

Furthermore, Petitioner's triggering squeaks consisted mainly of emojis rather than words. Stipulation ¶12. Although Mr. Pluckerberg stated that Petitioner was flagged for both his spamming behavior and the violent use of emojis, the Terms and Conditions provision pertaining to threatening emojis is still proscribable. Pluckerberg Aff. ¶11; Stipulations ¶7. Unlike in *R.A.V.*, where the Court found that the ordinance was content-based because it did not just prohibit fighting words which communicated threatening ideas, but rather prohibited fighting words which communicated threatening ideas toward particular groups, here, the Terms and Conditions prohibited "the use of emojis in a violent or threatening manner." *R.A.V.*, 505 U.S. at 393; Stipulations ¶6. "The reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." *Id.* Unlike the ordinance in *R.A.V* which "proscribed fighting words of whatever manner that *communicate messages of racial, gender, or religious intolerance*," here, Squawker's Terms and Conditions single out the mode of expression rather that the content of the words. *Id.* (emphasis added); Stipulations ¶6.

Although it could be argued that the flagging of Petitioner's account was content-based because it was not only the first time that Petitioner had been flagged, but it was also the first time that Mr. Pluckerberg had flagged an account for excessive posting, these claims are unsubstantiated. Milner Aff. ¶11; Pluckerberg Aff. ¶13. The flagging provisions were still

relatively new when Petitioner's account was flagged and although Petitioner claims to have posted in a similar spamming manner before, there is nothing in the record which supports that his prior spamming was made after the new provisions were enacted. Stipulation ¶11; Milner Aff. ¶9, 12. Furthermore, the flagging provision requires a user to post four squeaks within 30 seconds before their account is flagged for spamming, and in this case, Petitioner posted four squeaks within 29 seconds of each other. Stipulation ¶12. It is possible that Petitioner's prior spamming posts were not flagged because of an unaccounted two-second difference in his posts which allowed him to surpass the restrictions of the provisions. Stipulation ¶12. For these reasons, Squawker's terms and conditions are content-neutral and should be held to intermediate scrutiny.

B. Squawker's Flagging Provisions are Narrowly Tailored to Achieve Its Goal of Accessibility for Others and Also Allow Alternative Channels of Communication for the Flagged Information.

Courts have held that "regulations that are unrelated to the content of speech are subject to [intermediate scrutiny] because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc.*, 512 U.S. at 642. Squawker's content-neutral flagging provisions withstand intermediate scrutiny as they are narrowly tailored to achieve their goals of a user accessible website and positive user experience, and also allow alternative avenues of communication for the flagged information. Stipulation ¶6. The Supreme Court has stated that "[r]estrictions on the time, place, or manner of protected speech are not invalid 'simply because there is some imaginable alternative that might be less burdensome on speech.'" *Ward*, 491 U.S. 781 at 797 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

The Supreme Court has held that a content-neutral regulation "need not be the least restrictive or least intrusive means" of serving a State actor's interest, "rather, the requirement of narrow tailoring is satisfied 'so long as the … regulation promotes a substantial government

interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. 781 at 798 (quoting *Albertini*, 472 U.S. 675 at 689). Beyond a content-neutral regulation being narrowly tailored, it must also leave open alternative channels of communication for the information. *Ward*, 472 U.S. at 802.

In *Kleinman v. City of San Marcos*, the Fifth Circuit held that an ordinance that prohibited junked vehicles was not violative of the First Amendment because the content-neutral ordinance was narrowly tailored to achieve the City's goal of health and safety. 597 F.3d 323, 328 (2010). The ordinance at issue in *Kleinman* deemed all junked vehicles "to be a public nuisance and prohibit[ed] citizens from placing or keeping junked vehicles on their property." *Id.* at 325. Even though the ordinance made an exception for junkyards and dealerships, the court still found that the ordinance was reasonably tailored to achieve the city's goal of reduced blight and public nuisances, as commercial conduct created "different hazards and require[d] different regulations." *Id.* at 329. The court in *Kleinman* also found that the ordinance was permissible as it enabled alternative venues for the appellants to convey their message by displaying the junked vehicles "behind a fence, indoors, or in a garage enclosure." *Id.*

In *Heffron v. International Society for Krishna Consciousness* ("ISKCON"), the Supreme Court held that Minnesota's Agricultural Society's ("the Society") rule that prohibited the sale or distribution of merchandise on fairgrounds without a license was not violative of the First Amendment as the rule promoted the Society's interest in maintaining orderly movement on the fairground. 452 U.S. 640, 641 (1981). The Court found that less restrictive means would be inadequate because if the Society exempted ISKCON from the rule as suggested by appellants, it would lead to exemptions for similarly situated groups who wished to distribute their message, which would culminate in increased solicitation and disorder. *Id.* at 654. The Court further found

that there were sufficient alternative forums for ISKCON to communicate their message and practice their religion. *Id.* The rule did not prohibit ISKCON from practicing outside of the fairgrounds, nor did it exclude them from applying for a licensed booth with the Society, or from orally spreading their message among the fairgoers. *Id.* at 655.

The Supreme Court has held that "to meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). In *McCullen*, the Supreme Court found that Massachusetts's Reproductive Health Care Facilities Act (the "Act") which made it a crime to stand on a public sidewalk within 35 feet of an entrance to a reproductive health clinic, was not narrowly tailored enough to achieve its goal of maintaining public safety. *Id.* at 494. The Court found that Massachusetts failed to try less intrusive methods of achieving its goal even though it had a "variety of approaches that appear[ed] capable of serving its interests without excluding individuals from areas historically open for speech and debate." *Id.* at 493. The Court found it insufficient for "Massachusetts simply to say that other approaches ha[d] not worked." *Id.* at 496. Similarly, in *Packingham v. North Carolina*, this held that a State law making it a felony for a registered sex offender to access certain websites was not narrowly tailored to achieve its stated interest in protecting minors from sexual abuse. 137 S. Ct. 1730, 1733 (2017). The Supreme Court found that the law was overbroad as it barred offenders' access to social media altogether, a platform which many use not only for communicating with others, but also for keeping up to date with the news, looking for employment opportunities, and "exploring the vast realms of human thought and knowledge." *Id*. at 1737. "To foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.*

In the present case, Squawker's flagging provisions are narrowly tailored to achieve its goal of a user accessible platform and the provisions allow alternative channels for flagged users to disseminate their message to interested parties. Like in *Kleinman*, where the court found that the ordinance was narrowly tailored to achieve the city's goal of public safety, here, the flagging provision is narrowly tailored to achieve Squawker's goal of allowing users access to pages without another user hijacking the space. If a user posts more than four times within 30 seconds, the website remains inaccessible to others, which is what occurred when Petitioner hijacked the space with his rapid-fire emoji-laden squeaks. Stipulation ¶6; Pluckerberg Aff. ¶12. Squawker's flagging provisions for spamming squeaks were written to place only those restrictions which were necessary to ensure a user-friendly platform. Furthermore, like in *Kleinman* where the ordinance allowed spectators to view the junked vehicle through a window or fence, here, the flagging provision allows other users to view the flagged squeaks and profiles as long as they click on the skull and crossbones. Stipulation ¶6.

Similarly, like in *Heffron*, where the Court found that the Society's booth renting requirement was the least restrictive means to further its interest in maintaining order, here, Squawker's flagging provisions are the least restrictive means to ensuring a functioning website. Stipulation ¶6. Like in *Heffron*, here, there are alternative avenues available for users to see Petitioner's squeaks. Stipulation ¶9. If a user wishes to see a flagged squeak, they need only click on the skull and crossbones. Stipulation ¶9. Furthermore, if a user wishes to have their account unflagged, they need only complete a 30-minute training video and online quiz. Stipulation ¶9.

The flagging provisions provide a necessary safeguard for a functioning website without barring flagged users from using the site. Unlike *McCullen*, where Massachusetts had other laws to protect against the undesired behavior that the Act sought to prohibit, here, Squawker's only

way to protect the platform from being hijacked by spamming squeaks is to prohibit high frequency squeaks. *McCullen*, 573 U.S. at 493. Stipulation ¶6. This is supported by the fact that Squawker prohibits high frequency squeaks only "to the effect [that] the platform is unusable by others." Stipulation ¶6. Furthermore, unlike *McCullen*, Squawker's provisions do not exclude flagged users from using or posting on the platform, or having other users view the content posted by the flagged user. *McCullen*, 573 U.S. at 493; Milner Aff. ¶13. Unlike *Packingham*, where the Court found that the statute was overbroad in prohibiting any sex offender's access to certain websites, here, there is no prohibition to Petitioner's access to the site, nor any prohibition to other users' access to view Petitioner's page. *Packingham*, 137 S.Ct at 1737; Milner Aff. ¶13; Stipulation ¶9. Unlike the appellants in *Packingham*, Petitioner is not prevented from exercising his First Amendment rights. For these reasons, Squawker's flagging provisions pass intermediate scrutiny as they are narrowly tailored to achieve Squawker's goal and leave ample alternative channels of communication.

CONCLUSION

For the foregoing reasons, this Court should affirm the United States Court of Appeals and grant Mr. Pluckerberg's summary judgement motion.

Dated: January 31, 2020

Respectfully submitted,

Team 9

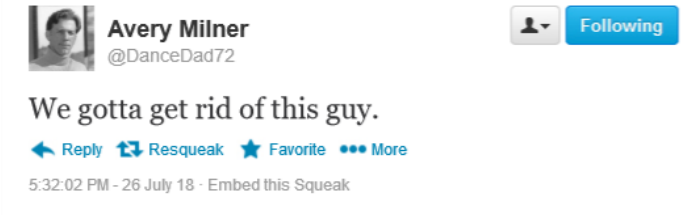
Attorneys for Respondent

APPENDIX A

Amendment I to the United States Constitution:

> 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.

APPENDIX B


Avery Milner
@DanceDad72
Following
We gotta get rid of this guy.
Reply Resqueak Favorite More
5:32:02 PM - 26 July 18 · Embed this Squeak


Avery Milner
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Avery Milner
@DanceDad72
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APPENDIX C

Squawker's Terms and Conditions:

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.

COMPETITION CERTIFICATE

Team 9 affirms the following:

1. All copies of the brief are the work product of the members of the team only;
2. The team has complied fully with its law school honor code; and
3. The team has complied with all the Rules of the Competition.

Sincerely,

Team 9