No. 23-386

In the Supreme Court of the United States

HEADROOM, INC.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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

BRIEF FOR PETITIONER

October 9, 2023

Team 15
Counsel for Petitioner
Headroom, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

I. Background 1

II. Midland's SPAAM Act 2

III. Procedural History 3

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Court should affirm the District Court's ruling because Headroom, Inc. meets all necessary elements of a preliminary injunction. 5

II. Headroom is not a common carrier because it does not perform a traditionally exclusive public function. 6

III. The Zauderer case applies because Midland's SPAAM Act creates a chilling effect as a result of the act's unjust and undue burden. 8

IV. Midland violates the First Amendment by prohibiting major social media companies from denying their users nondiscriminatory access to its servers 11

A. Midland's SPAAM Act is an abridgment of Headroom's speech as it prohibits any effort to modify user content or access, interfering with its editorial judgment. 13

B. The preliminary injunction must be granted because the SPAAM Act fails to pass the intermediate scrutiny test. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Ashcroft v. American Civil Liberties Union,
542 U.S. 656, 660, 124 S.Ct. 2783, 2788, 159 L.Ed.2d 690 (2004)...……………….............18
City of Austin, Texas v. Reagan National Advertising of Austin, LLC,
596 U.S. 61, 76, 142 S.Ct. 1464, 1475, 212 L.Ed.2d 418 (2022).. 11
Clark v. Jeter,
486 U.S. 456, 461, 108 S.Ct. 1910, 1915, 100 L.Ed.2d 465 (1988) 11, 18, 19
Ex Parte Young,
209 U.S. 126, 203, 28 S.Ct. 441, 472, 52 L.Ed. 714 (1908) 3
F.C.C. v. League of Women Voters of Cal.,
468 U.S. 364, 375, 104 S.Ct. 3106, 3114, 82 L.Ed2d 278 (1984) 8
F.C.C v. Midwest Video Corp.,
440 U.S. 364, 380, 104 S.Ct. 3106, 3117, 82 L.Ed.2d 278 (1979) 7
Gitlow v. New York,
268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925) 12
Green v. Am. Online,
318 F.3d 465, 469 (3d. Cir. 2003) 6, 7, 13, 14
Manhattan Cmty. Access Corp. v. Halleck,
587 U.S. ___, 139 S.Ct. 1921, 1926, 204 L.Ed.2d 405 (2019)................................ 5, 6, 7, 8, 12
Massachusetts v. Oakes,
491 U.S. 576, 581, 109 S.Ct. 2633, 2637, 105 L.Ed.2d 493, 57 USLW 4787 (1989) 17
Miami Herald Publishing Company v. Tornillo,
418 U.S. 241, 244, 94 S.Ct. 2831, 2833, 41 L.Ed.2d 730 (1974) 8, 14, 15, 16
Pacific Gas and Elec. Co. v. Public Utilities Com'n of California,
475 U.S. 1, 17, 106 S.Ct. 903, 912, 89 L.Ed.2d 1(1986).. 15, 16
PruneYard Shopping Center v. Robins,
447 U.S. 74, 77, 100 S.Ct. 2035, 2038, 64 L.Ed.2d 741 (1980).. 15, 16
Ward v. Rock Against Racism,
491 U.S. 781, 802, 108 S.Ct. 2746, 2760, 105 L.Ed.2d 661 (1989) 11
Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008) 5
Zauderer v. Off. of Disciplinary Couns.,
471 U.S. 626, 651, 105 S.Ct. 2265, 2282, 85 L.Ed.2d 652 (1985) 8, 11

Statutes

Midland Code § 528.491(a)(1)……………………………………………………………………..2

Midland Code § 528.491(b)(1)………………………………………………………………………2

Midland Code § 528.491(b)(1)(i)……………………………………………………………………...2

Midland Code 528.491(b)(1)(ii)………………………………………………………………………….2

Midland Code § 528.491(b)(1)(iii)……………………………………………………………………. 2

Midland Code § 528.491(a)(2)(i)–(iv)…………………………………………………………………...2

Midland Code § 528.491(b)(2)…………………………………………………………………………..2

Midland Code § 528.491(c)(1)……………………………………………………………………2, 4

Midland Code § 528.491(c)(2)………………………………………………………………………3

Midland Code § 528.491(d)(2)……………………………………………………………………3, 9

Midland Code § 528.491(d)(3)………………………………………………………………………3

QUESTIONS PRESENTED

Under the First Amendment of the United States Constitution, which contains the Free Speech Clause, (1) are major social media companies common carriers, (2) does this Court's decision in Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio apply to the SPAAM Act's disclosure requirements, and (3) does a state violate the Free Speech Clause when it prohibits major social media companies from denying users nondiscriminatory access to its services?

STATEMENT OF THE CASE

I. Background

Headroom Inc. was founded and headquartered in Bartlett, Midland. R. at 2. It is one of the most popular social media companies in America. *Id.* Its mission is to "provide a space for everyone to express themselves to the world" and to "promote greater inclusion, diversity, and acceptance in a divided world." *Id.* Headroom users have the option to monetize their posts, solicit advertisers to sponsor their accounts and receive donations from other users. R at 2, 3. However, users must first agree to Headroom's Community Standards before they can utilize the services. *Id.* In agreeing to the Headroom's Community Standards, the user is agreeing to refrain from "creating, posting, or sharing content that either explicitly or implicitly promotes or communicates hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R at 3. Headroom also bans "disinformation." R at 4. Headroom's Community Standards defines disinformation as "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups."' *Id.* Consequences for violating the Community Standard may result in demonetization, de-prioritization, suspension, removal, and blocking others from accessing the user's account or banning the user from Headroom. *Id.*

/

II. Midland's SPAAM Act

In 2022, Midland's Governor conducted a hearing to investigate Headroom's alleged censorship practices. R. at 4. The hearing focused on the grievances of prominent Headroom users who had been accused of violating Headroom's Community Standard agreement. *Id*. The users suffered demonetization and de-prioritization for their content. R at 4, 5. In response, Midland passed the State of Midland's Speech Protection and Anti-Muzzling Act ("SPAAM Act"). MIDLAND CODE § 528.491 (2022). The Act was intended to "hold [social media platforms] accountable and ensure the protection of [the state's] democratic views." R at 5. The SPAAM Act alleges that it applies to any social media platform. § 528.491(a)(1). Under the Act, a "social media platform" is "any information service, system, search engine, or software provider that: (i) provides or enables computer access by multiple users to its servers and site; (ii) operates as a corporation, association, or other legal entity; (iii) does business and/or is headquartered in Midland; and (iv) has at least twenty-five million monthly individual platform users globally." §§ 528.491(a)(2)(i)—(iv).

"The Act has two main requirements." R at 6. "First, the Act restricts social media platforms' ability to alter or remove users' content by prohibiting any social media platform from 'censoring, deplatforming, or shadow banning' any 'individual, business, or journalistic enterprise' because of 'viewpoint.'" *Id*. § 528.491(b)(1). "The Act defines 'censorship' or 'censoring' as 'editing, deleting, altering, or adding any commentary' to a user's content." § 528.491(b)(1)(i). "The Act further defines 'deplatforming' as 'permanently or temporarily deleting or banning a user.'" § 528.491(b)(1)(ii). The Act defines "shadow banning" as "any action limiting or eliminating either the user's or their content's exposure on the platform or deprioritizing their content to a less prominent position on the platform." § 528.491(b)(1)(iii). "The Act exempts 'obscene,

pornographic, or otherwise illegal or patently offensive' content from the section's requirement." § 528.491(b)(2).

"Second, the Act places a burden on the social media platforms to publish 'community standards' with 'detailed definitions and explanations for how they will be used, interpreted, and enforced."' § 528.491(c)(1). The social media platform is burdened to "provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen."' § 528.491(c)(2). "Enforcement of the Act is vested in Midland's Attorney General." / § 528.491(d)(1). "Users who have been harmed by a platform's violation of the Act may either file a complaint with the Attorney General or sue on their own." § 528.491(d)(2). "Courts may grant relief either in the form of injunctions or fines totaling $10,000 a day per infraction." / / / / / § 528.491(d)(3).

III. Procedural History

The SPAAM Act became law on February 7, 2022. R at 7. In response, Headroom filed for preliminary injunctive relief against Midland's Attorney General on March 25, 2022. *Id.* Headroom also sought a permanent injunction against Attorney General Sinclair's enforcement of the Act. *See Ex Parte Young,* 209 U.S. 123, 155-56 (1908) (where this Court held that the Eleventh Amendment does not bar private actions against state officials). The court below granted Headroom's injunction; however, the judgment was later reversed by the Thirteenth Circuit. R at 19.

SUMMARY OF THE ARGUMENT

Headroom demonstrates that a preliminary injunction is appropriate. The Court must reverse the Thirteenth Circuit's decision as a matter of law as Headroom meets all elements

required to issue a preliminary injunction. Headroom will succeed on the merits because, for a statute to validly restrict the company's speech or actions, the entity would need to be reclassified as a common carrier, which it is not. Headroom, Inc. is a private entity.

A social media company does not perform a traditionally public function, and users who choose to interact with a social media platform cannot legally equate its role with the public square. The United States Constitution protects the individual people from any regulation of their speech by any form of government. It does not protect the people in the square from other individuals' speech.

The SPAAM Act places an undue burden on Headroom, Inc., specifically. The Act states that any effort to quell user violations of the platform's community standards must be accompanied by a "detailed and thorough explanation" that justifies the prescribed penalty. / / / / § 528.491(c)(1). The tedious and detailed explanations create a chilling effect, tying Headroom's hands, stifling its own speech, and compelling the company to speak in a way it may not have otherwise chosen. Fearing a perceived insufficiency of its explanations upon applying the community standards to violators, knowing that the application of the Act's precepts to its seventy-five million users is unrealistic and impracticable, Headroom will have no other recourse than to refrain from policing users' content to avoid legal action. Historically, regulations that chilled action have been held by this Court to be overbroad and unconstitutional.

This risk of irreparable harm tips the balance of equities in favor of Headroom and will lead this Court to reverse the Thirteenth Circuit's decision. It is in the public interest that the Midland Attorney General be enjoined from enforcing penalties against Headroom. In its current form, there is no showing by the Midland Legislature prohibiting a social media company from

restricting user access to its servers is the least restrictive method to protect the people from censorship.

The legislation's incidental consequences affect impermissible restrictions on Headroom, Inc. The language put forth by the legislation will give the Attorney General plenary power over all websites that qualify as social media platforms and therefore must conform their business practices to the requirements of the SPAAM Act. Notwithstanding the statute's aims to prevent the people of Midland from being censored, the statute lacks the necessary tailoring to prevent over-regulation of a privately owned company. By altering how a social media platform limns third-party content, the statute makes Headroom, Inc. less able to serve the interests of its user base. A preliminary injunction should be granted.

ARGUMENT

I. The Court should affirm the District Court's ruling because Headroom, Inc. meets all necessary elements of a preliminary injunction.

The Court must reverse the Thirteenth Circuit's decision on the merits because Headroom meets each element for a preliminary injunction by showing: (1) a likelihood of success on the merits; (2) that the corporation will suffer irreparable harm; (3) that the balance of equities favors the plaintiff; and (4) the preliminary injunction serves the public's interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Headroom will succeed on the merits because it is not a common carrier. Although it may appear that the social media company is open to the public, its prerequisite agreement to the Community Standards is evidence that Headroom does not perform an exclusively public function. *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 1921, 1926 (2019). Furthermore, the undue burden of the tedious and detailed explanations of Community Standard violations creates a chilling effect, tying Headroom's hands and potentially stifling its freedom of

expression. It is this risk of irreparable harm that tips the balance of equities in Headroom's favor, despite Midland's public interest, and will lead this Court to reverse the Thirteenth Circuit's decision.

/

/

II. Headroom is not a common carrier because it does not perform a traditionally exclusive public function.

Headroom, as a private entity, provides a forum for the public to speak. If the government is the party providing a public forum, it is constrained by the First Amendment and cannot restrict speech based on viewpoint. *Id.* at 1931. A common carrier is governed by the State Action Doctrine which protects individuals under the First Amendment and only prevents censorship by the government. *Id*. To be considered a state actor or common carrier Headroom would have to perform a traditionally "exclusive public function." *Manhattan Cmty. Access Corp. v. Halleck,* 587 U.S. 1926 ,1929 (2008).

In *Manhattan*, a cable tv show sued a non-profit corporation because the company chose not to play their show on the company's "all public access channel service" due to the content of the program provided by the cable tv show. *Id*. at 1924. The courts held that although the cable company did create a public platform that information alone was insufficient to transform the cable company into a state actor, thus ruling in favor of the cable company. *Id.*

In *Green v. Am. Online*, a social media site facilitated communication amongst its users and required subscribers to agree to the company's standards to utilize the site. *Green v. Am. Online*, 318 F.3d 465, 469 (3d. Cir. 2003). When a subscriber was hacked, bullied, and defamed by another user, he sued the site. *Id*. at 468. The court recognized the site as a conduit to internet connections which were available to the public but denounced that it was "devoted for public

use." *Id*. at 472. Furthermore, the court ruled that the company's standard agreements were not an invasion of one's right of freedom of speech because it was not restricting their speech but setting the tone for its company's "decent" standards. *Id.* Therefore, the court found that the company's subscriber's agreement did not violate its users' First Amendment rights. *Id*. at 472-73.

Here, Headroom is not a common carrier because it does not perform an exercise that is exclusively and traditionally a public function. *Manhattan*, 587 U.S. at 1929. Because it is not a common carrier Headroom may "exercise editorial discretion over the speech and speakers in the forum." *Id*. at 1922. Headroom may promote its mission as "a space for everyone to express themselves to the world" but the fact of the matter is Headroom's users have the option to not partake in Headroom's platform. R at 2. And by choosing to opt out of its services prospective users still have access to the great web for their own personal and business needs. But by choosing to agree to Headroom's Community Standards users' rights like in the cases mentioned above, are not being invaded upon because Headroom is only setting the tone of their Community's Standards to "promote greater inclusion, diversity, and acceptance in a divided word." R at 2, 3. Common carriers hold themselves out to the public without making individualized decisions. *F.C.C v. Midwest Video Corp.*, 440 U.S. 364, 689 (1979). Headroom's Community Standard agreement is evidence of Headroom making individualized decisions on behalf of their company's core principles and their discretion to limit or eliminate users. Although Headroom is a conduit to internet connections, Headroom cannot be a common carrier. *Green v. Am. Online*, 318 F.3d 465, 472 (3d. Cir. 2003).

Moreover, assuming Headroom is a common carrier, Midland's public interest argument favors Headroom when weighed against the undue burden placed on Headroom because the Act

is not tailored to the public's interest. *F.C.C. v. League of Women Voters of Cal.,* 468 U.S. 364, 375 (1984). Therefore, the court must find Headroom is likely to succeed on the merits.

III. The Zauderer case applies because Midland's SPAAM Act creates a chilling effect as a result of the act's unjust and undue burden.

The first amendment fortifies individual's and or company's right to speak candidly regardless of whether the government finds it to be rational or misguided. *Miami Herald Publ'g. Co. v. Tornillo,* 418 U.S. 241, 244 (1974). This protection is foiled when the government extends its control and backs one into a corner creating a "chilling effect" that may lead to one standing still and refusing to act as they normally would out of fear of the consequences. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). Even if the court deems the company is a common carrier its commercial speech, if all factually true, will be protected by the First Amendment. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 646 (1985). It is this "overbreadth" that allows companies the discretion to monitor its site and exercise editorial control over the speech of its users without fear of intervention by the government. *Manhattan*, 587 U.S. ___ at 1931.

In *Zauderer*, A lawyer advertised his services towards women on a contingent fee basis for injuries resulting from IUD use. *Zauderer*, 471 U.S. at 631. The advertisement also included an illustration and general legal advice. *Id.* It created a lot of buzz and the lawyer received over 200 inquiries. *Id.* The lawyer was later reprimanded because the state argued his advertisements violated state rules and did not contain a contingency disclaimer with enough information for the consumer to make a fair decision. *Id.* at 626—27. The court ruled that the state had the right to regulate the lawyer's advertisement regarding the portion about the contingency however, it was noted that the states conduct created a chilling effect because the lawyer's illustration was factual and non-deceptive. *Id*. at 627. The court ruled that such regulations were not an intrusion of the

lawyers First Amendment rights and did not create a chilling effect so long as they were nonburdensome and the state was "not suppressing other forms of truthful and non-deceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising." *Id*. at 646. The court ruled the state was within its rights to regulate "the [lawyer]'s speech because the [lawyer]'s rights [were] adequately protected as long as disclosure requirements [were] reasonably related to the State's interest in preventing deception of consumers." *Id*. The court reasoned this regulation as "appropriately required ... in order to dissipate the possibility of consumer confusion or deception." *Id*. at 651. Moreover, because the advertisement used legal jargon uncommon to average persons the courts held this could likely lead to confusion and or deception because the lawyer's potential client may not understand the contingency payment method and falsely believe it was a "no-lose proposition." *Id*. at 651—52.

Headroom will suffer irreparable harm because of the SPAAM Act's requirement of the detailed explanation. R at 6. Midland's SPAAM Act creates a chilling effect because Headroom's hands are tied. Headroom has 75 million users meaning that Headroom must decipher through 75 million profiles and postings when ensuring users meet the Community's Standards. R at 3. And because the SPAAM Act requires that Headroom provides each violator of the Community's Standard with a specific description as to why they did not meet the prerequisite standards it creates an undue burden on Headroom because of the time and money that would go into getting the task done. R at 6, 7. Furthermore, the detailed description is ambiguous because if the user is not subjectively satisfied with the explanation provided by Headroom the user "may either file a complaint with the Attorney General or sue on their own." MIDLAND CODE § 528.491(d)(2). Headroom's algorithm is designed to flag possible Community Standard violations expeditiously. R at 3. The SPAAM Act prohibits shadow banning which it

defines as "any action limiting or eliminating with the user or their content," thus Headroom would be unable to use its algorithm because it is designed to limit and or eliminate users and their content because it flags potential Community Standard violations. R at 6. Fines totaling $10,000 a day per infraction may soon lead to the financial breakdown of the company. R at 7. It is not contested that the SPAAM Act gives Headroom the opportunity to engage in some absolute prohibition for obscene behavior such as porn or illegal offenses. R at 6. The record will show Headroom is trying to prohibit the same obscenities the SPAAM Act prohibits but Headroom unlike the SPAAM is not impeding on anyone's First Amendment rights in the process. The extensive $10,000 fine per infraction per day creates a chilling effect because Headroom is forced to not act when a user steps outside of the threshold of the Community's Standards until the situation is so apparent as to put the public at risk of harm and Headroom at risk of irreparable injury and possible liability if the court does not grant preliminary relief.

Although Midland has an important interest its Act is not narrowly tailored to the public interest because it targets only Headroom. Here, we have a statute that on its face appears to be neutral because it includes language like "any social media platform," however, as the layers are pulled one will unravel a deliberate targeted attack towards Headroom. R at 5. The birth of the statute stems from only disgruntled Headroom users and the hearing solely focused on Headroom's practices. R at 4. Neither court below mentioned any competitors of Headroom in the record. In fact, the statute insidiously aligns with the characteristics of Headroom's platform in that it only applies to companies located or headquartered in Midland that "ha[ve] at least twenty-five million monthly…users globally," minimizing the pool of social media platforms the statute is aimed towards. R. at 5, 6. Moreover, the Midland State Representative of the act is quoted calling Headroom a "virtual dictator" fueling the notion that the act is targeting

Headroom. R at 5. If a statute is considered content-neutral (the regulation has "no effect on the quantity or content of [the] expression"), an appropriate level of scrutiny must be applied to determine if it violates the First Amendment. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). This Court has subjected content-neutral regulations of speech to intermediate scrutiny, which requires (1) a compelling government justification; and (2) that the act is narrowly tailored to such justifications. *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61, 76 (2022) (where a city sought to regulate where certain types of advertisements could be located); *see also Clark v. Jeter*, 486 U.S. 456, 461 (1988) (where a statute did not serve government interests). Midland argues that the SPAAM Act is intended to protect the rights of Midland residents which legitimately serves the public interest, but it is at the cost of one of their own. Headroom is a Midlandian as well, and the state should seek to protect their right of freedom of speech and expression alongside its other residents. Headroom's Community Standard agreement, like the lawyer's illustration, does not deceive or confuse Headroom users. *Zauderer*, 471 U.S. at 646. Its standards are simple to grasp and factually true; they represent the core values of Headroom. *Id.* The SPAAM Act is not narrowly tailored to the justifications of Midland's public interest but to the characteristics and functionality of Headroom. This overbreadth tips the balance of equities in favor of Headroom because in Midland's attempt to "hold [Headroom] accountable," they have unjustly overstepped and regulated protected and unprotected rights. R at 5.

IV. Midland violates the First Amendment by prohibiting major social media companies from denying their users nondiscriminatory access to its servers.

Midland's SPAAM Act violates the First Amendment's Free Speech clause by regulating how the private company functions. As a private entity, Headroom is free to "speak" or conduct itself freely, with only qualified limitations, distinguishing Headroom from a government role.

Manhattan, 587 U.S.___ at 1928. Under the State Action Doctrine, the Constitution prohibits only government abridgment of speech, and though not absolute, the Free Speech clause does not curtail private speech or conduct. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). To provide a user-friendly experience, Headroom's users are governed by published community standards that are agreed to at registration. R. at 3. In 2022, prominent users accused Headroom of discrimination and censorship. R. at 4. Midland State Representatives held hearings on Headroom's practices, ultimately leading to the SPAAM Act's introduction. R. at 5. Although Headroom's mission is to "provide a space for everyone to express themselves to the world," Midland Representatives stated that the Act would hold social media companies accountable and prevent suppression of free speech. R. at 3, 5.

The SPAAM Act expressly calls for Headroom users to have nondiscriminatory access in its language that prohibits the "censoring, deplatforming, or shadow banning" of Headroom users across the globe. R. at 6. Over seventy-five million monthly users have chosen to subscribe to Headroom's platform, and though the totality of these users are not residents of the state of Midland, the State's legislature seeks to guard Midlandians' ability to post and view all desired content on Headroom's social media platform. R. at 3. Headroom's inability to apply its community standards to govern the content on the website is a violation of Headroom's Free Speech rights. The Act restricts speech and controls the company in two ways. First, the Act passively editorializes the content on the site by making it unlawful to alter or limit exposure of user content, making all third-party content available to each user in its original, unmitigated form. R. at 6. Second, Headroom argues that the undue burden placed on the social media company to perform as a public forum is evidence of a law that is subject to Overbreadth

Doctrine. To determine whether it violates the Constitutional values of free speech, the SPAAM Act must withstand a scrutiny test.

A. Midland's SPAAM Act is an abridgment of Headroom's speech as it prohibits any effort to modify user content or access, interfering with its editorial judgment.

The SPAAM Act expressly prohibits Headroom's ability to censor users by altering their content. "Censorship" under the Act is the act of "editing, deleting, altering, or adding any commentary" to content posted on the platform by a user. R. at 6. If Headroom is unable to curate third-party content by removing content that is averse to its community standards, the company will lose its ability to decide what should be presented on its platform. The SPAAM Act's restrictions on what it considers censorship are the legislative equivalent of the State's appropriation of private property in an opportunity to disseminate information. Headroom argues that a statute that interferes with a private company's role in deciding what content is presented is unconstitutional.

In 2003, a member of a privately operated internet service provider sued the provider after his computer contracted an unwanted program and encountered what he considered defamatory comments by other users on the site. *Green v. Am. Online*, 318 F.3d 465, 469 (3d Cir. 2003). Additionally, the plaintiff alleged that his First Amendment rights were violated by the requirement to agree to America Online's ("AOL's") "Community Guidelines" to use the internet service in the first place. *Id*. at 469. On appeal, the court agreed with the district court's reasoning that to hold AOL liable for third-party content, the court would effectively classify the internet provider as the "publisher or speaker" of that content, even though the provider only served as a network for user communication. *Id.* at 470. The court noted the distinction between an internet service provider and the user-generated content. Moreover, this Court reinforced its

prior ruling that a private company inviting the public to make use of its services does not shift from a private company to a state actor. *Id*. *at* 473.

Much like the defending company in the *Green* case, Headroom hosts third-party content. *Id*. at 469. The users agreed to the terms America Online, Inc. ("AOL") presented when they subscribed to the internet service provider. *Id*. Like AOL, Headroom required its members to abide by the platform's Community Standards before being granted server access. R. at 3. An important distinction between *Green* and the current case is that the plaintiff centered his legal action around the harm he suffered under AOL's alleged negligence in allowing harmful content to remain on the network. *Green*, 318 F.3d at 471. Headroom brings this action to advocate for its right to retain editorial control over the type of user content that Mr. Green claimed to be harmed by. *Id.* Under Headroom's community standards, actions taken to modify user content serve to remove "hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R. at 3. Headroom seeks to remove harmful content and the SPAAM Act would restrict its ability to do so.

Headroom argues that a statute should not be allowed to govern a private company's speech by restricting its editorial control. This Court granted injunctive relief to a privately owned newspaper after a political candidate brought an action to exercise his rights under Florida's "right to reply" statute. *Miami*, 418 U.S. at 244. The challenged statute required a private company to act by printing content that it would not otherwise have printed, and this Court ruled the statute was an abridgment of the Constitution's Free Speech clause, recognizing that "[to dictate] what a newspaper must print was no different from dictating what it must not print." *Id.* at 245. A government regulation is unconstitutional when it compels a private

company's speech by "its intrusion into the function of editors." *Id.* at 258. The Court reasoned that editors choose the content and how the information is viewed by the readers; some content is given a higher priority and thus may be placed in a more visible position. *Id.* The parallels drawn between the *Miami Herald* case and Headroom's actions are these: (1) Headroom is privately owned, as was the newspaper, and therefore not required to print content based on State action (the right to reply statute); and (2) Headroom's decisions to promote, demote, or remove user content is analogous to the managerial decisions of a newspaper editor. *Id*.

The First Amendment protects an individual's or company's rights to speak without any interfering regulation by the government, including state appropriation of a company's private property to make room for varying viewpoints. *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1, 17 (1986). Pacific Gas and Electric Company challenged California's Public Utilities Commission's efforts to require a portion of their mailings to include political pamphlets and newsletters inside the envelopes that featured opposing viewpoints to those that Pacific Gas had authored in their proprietary newsletters. There, this Court ruled that the space inside the envelopes was not available to third parties because the envelopes themselves were the property of Pacific Gas. *Id*.

Headroom asserts its rights over its servers as private property while acknowledging that private ownership does not always absolve a party from hosting an outside party's speech. This Court ruled against a privately owned shopping center in California when it defended its decision to ask high school students to leave the premises because of their efforts to circulate a petition and distribute pamphlets. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 77 (1980). The shopping center argued that it acted on a written corporate policy by asking the students to leave and that forcing PruneYard to permit such activity despite its policy amounted to violating the

Takings Clause. *Id.* 82. In its review of the case, the United States Supreme Court found that PruneYard's First, Fifth, and Fourteenth Amendment rights were not violated. *Id.* There was no unconstitutional taking, and in regard to any abridgment of PruneYard's right to speech, the Court reasoned that the shopping mall could have arranged to appropriately disclaim any disagreement with the students' ideological message. *Id.* 87. The Court also reasoned that any views represented by the students would likely not have been inferred by the public to be correlated with the views of the owner. *Id.* 86.

The argument made by the shopping center in this case is similar to that of Headroom's: any protection of a private company's speech is interned by efforts to demand that third-party speech be hosted and protected above its own. However, an important distinguishing factor to note is that Headroom invites users to participate in the platform based on their express agreement to abide by Headroom's community standards, so the way the public interacts with the platform differs from that of business invitees in retail stores. Midland will argue that the SPAAM Act's explanation requirement for content functions as an adequate disclaimer to dispel any perception that Headroom, Inc. endorses the offending speech. Headroom argues that a statute that requires Headroom to disclaim its connection to speech is inconsistent with the agreement the user made with Headroom, Inc. at the outset. The explanation requirement is superfluous and contradictory.

Headroom also argues that the servers that store third-party data are private property, like the envelopes in the *Pacific Gas* case. *Pacific Gas*, 475 U.S. at 17. In both *Pacific Gas* and *Miami Herald*, the Court disfavored any action requiring a private company to "disseminate a message with which [it] disagree[s]." *Id.* at 18; see also *Miami*, 418 U.S. at 246. By restricting Headroom's ability to change user content by removing anything that does not align with the

community standards or prohibiting Headroom's decision to promote or demote users' posts at its discretion, the SPAAM Act abridges the company's speech by eliminating its editorial function.

B. The preliminary injunction must be granted because the SPAAM Act fails to pass the intermediate scrutiny test.

The implementation of the SPAAM Act provides users unfettered access to Headroom's servers, and the sweep of the legislation restricts the company's speech in favor of others' speech. Headroom argues that while the SPAAM Act is intended to serve an important public policy interest, Midland's law fails the scrutiny test because it is over-regulatory and lacks narrow tailoring to meet its objectives. The State has failed to show that a less restrictive statute could achieve the same result.

Headroom argues that the SPAAM Act is overbroad. A statute is considered "overbroad" if it "cause[s] persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions." *Massachusetts v. Oakes*, 491 U.S. 576, 581 (1989). The SPAAM Act regulates Headroom's function and speech by requiring a detailed explanation that justifies any action taken by Headroom to alter third-party content. R. at 6. The explanation requirement represents an undue burden, suppression of Headroom's own expression, and compelled government speech, all of which are the direct consequences of the statute's overbroad legislation. As a private entity, Headroom's speech is protected speech. Because the statute chills Headroom's actions and compels Headroom's speech, the statute is subject to the Overbreadth Doctrine. Based on a likelihood of impending civil litigation, and the ensuing punitive fines that will hold the social media company captive, Midland's goal to protect "democratic values" and prevent censorship of its citizens comes at a cost of Headroom, Inc.'s rights. R. at 5. Recognition of overbreadth triggers a scrutiny analysis to determine if a statutory

classification is unconstitutional. *Clark*, 486 U.S. at 461. Headroom asserts that while the aim of the statute represents an important public policy interest, an intermediate scrutiny test should be applied.

Headroom asks that the Court affirm the District Court's ruling granting the preliminary injunction. This Court has previously affirmed a lower court's injunction against enforcing internet-regulating legislation. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004). The Child Online Protection Act ("COPA") was enacted in 1998 to prevent minors from being exposed to sexually explicit material online. *Id.* The goals of COPA and the SPAAM Act are similar because they both were designed to safeguard the citizenry from harmful content on the internet. *Id.* The District Court found that the government had failed to meet its Constitutional burden to consider whether there were plausible, less restrictive measures than restricting websites based on content. *Id.* The Third Circuit affirmed the injunction, but for a different reason, holding that the statute's "community standards" language was overbroad and "not narrowly tailored to serve a compelling Government interest." In the end, this Court clarified that courts should analyze whether a government's efforts to restrict speech are unconstitutional based on the District Court's analysis. The issue is not whether the speech restriction achieves a governmental goal, because "[a]ny restriction on speech could be justified under that analysis." *Id.* at 666. A properly applied test seeks to determine if a challenged regulation meets its burden to prove that the government act is the "least restrictive means available." *Id.* The Court also noted in the *Ashcroft* case that a preliminary injunction produced a better result than litigating the statute after a petitioner files a complaint, because given a likely prosecution, "speakers may self-censor than risk the perils of trial." *Id.* at 670, 671. Much like

Congress did in this case, the Midland Legislature does not meet its burden to show whether less restrictive measures could accomplish its goals of protecting citizens from censorship.

Headroom argues that the SPAAM Act fails to meet both requirements of intermediate scrutiny. The Court applies varying levels of scrutiny to analyze whether legislation restricting speech is unconstitutional. *Clark*, 486 U.S. at 461. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Id.* at 461. The SPAAM Act was implemented when the legislature sought to prevent major social media companies from becoming "virtual dictators" and provided "robust legislation to curb their power and restore the voice of the people." While the legislators were clear on an important governmental objective to serve the citizenry, a lack of narrow tailoring chills Headroom's actions. Whether the statute could serve the same purpose with fewer restrictions remains to be seen, but because Midland has not made any showing in that respect, the statute fails intermediate scrutiny.

CONCLUSION

For all the forthgoing reasons, the Court should reverse the Thirteenth Circuit Court's ruling and grant the preliminary injunction.

Dated this 9th day of October 2023.

/s Team 15________________
Counsel for Petitioner
Headroom, Inc.