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No. 23-386

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2023

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HEADROOM, INC.,

*Petitioner,*

v.

EDWIN SINCLAIR,  
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

*Respondent.*

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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRTEENTH CIRCUIT

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BRIEF OF PETITIONER

TEAM 19

*Counsel for Petitioner*

October 9, 2023

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## QUESTIONS PRESENTED

- I. Under the First Amendment's Freedom of Speech Clause, do major social media companies count as common carriers when they are private entities, and would the Zauderer standard apply to the Midland's Speech Protection and Anti-Muzzling ("SPAAM") Act's disclosure requirement?
  
- II. Under the SPAAM Act, does denying users nondiscriminatory access to its services violate the First Amendment's Free Speech Clause when it restricts Headroom's expressive conduct by prohibiting content moderation and imposing disclosure requirements?

## STATEMENT OF THE CASE

Headroom, Inc. (“Headroom”), founded in Bartlett, Midland, is among America's most popular social media companies, with over seventy-five million monthly users. R. at 2 & 3. Headroom is similar to many other social media companies, allowing users to create profiles, design, post content, and share other users’ posts; however, Headroom also allows users to interact in a virtual reality environment through virtual reality headsets. R. at 3. In order to promote a safe environment for all users, all users must agree to Headroom’s Community standards before joining. *Id.* The Standards forbid users 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. *Id.* In addition to the standards, Headroom reserves the ability to discipline users who violate the Community standards as they deem fit. R. at 4.

After a disagreement on the disciplinary action Headroom took for users that violated the community standards, Midland’s governor called a special session of the Midland Legislature to discuss Headroom’s practices. *Id.* After consideration of testimony by Headroom users and Representatives, Midland enacted the SPAAM Act to establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content. R. at 5 & 7. The Act has two major requirements: (1) restricts social media platform’s ability to alter or remove user’s content except those involving obscene, pornographic or otherwise illegal or patently offensive” and (2) demands social media platforms to publish “community standards” with “detailed definitions and explanations for how they will be used, interpreted, and enforced. R. at 6. Additionally, if a social media platform concludes a post violates the community

standards, they are required 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. *Id.* Courts may grant relief to individuals harmed due to violations of the SPAMM Act by issuing injunctions or fines totaling 10,000 a day per infraction. R. at 7.

In response to the Act, Headroom filed a pre-enforcement challenge against Midland’s Attorney General, Edwin Sinclair (vested enforcement of the Act), in the U.S. District Court for the District of Midland on March 25, 2022. *Id.* Headroom alleged that the Act’s provision violated the First Amendment and requested a permanent injunction enjoining the Attorney General from enforcing the Act. Appellee’s arguments failed to overcome a preliminary injunction. R. at 15. The District Court found Headroom is likely to succeed on the merits as the SPAAM Act violated the First Amendment by burdening Headroom’s editorial judgment with disclosure requirements and by forcing Headroom to host content that contradicts its values. *Id.* Both requirements fail to pass strict scrutiny, and the preliminary junction is granted for Headroom. *Id.* The government subsequently appealed. R. at 16. The Court of Appeals reversed and vacated the District Court’s grant of preliminary injunction on the basis that the SPAAM Act’s restriction of Headroom’s censorship is substantially related to Midland’s important objective of preserving the free flow information and protecting citizens’ free speech from unfair viewpoint discrimination, stating the SPAAM Act does not in violate the First Amendment. R. at 19.

## SUMMARY OF THE ARGUMENT

- I. The appellate court's Order to Vacate the Preliminary Injunction should be reversed because the SPAAM Act is unconstitutional and violates Headroom's freedom of speech as Headroom is not a common carrier. Social media companies are not common carriers because they make individualized decisions when engaging in content-moderation. Additionally, the appellate court's Order should be reversed because the SPAAM Act's disclosure requirement under the Zauderer standard is unconstitutional as it imposes an undue burden on Headroom by compelling Headroom to speak. Thus, the appellate court abused its discretion when it reversed the preliminary injunction of the SPAAM Act because its provisions are substantially likely to violate Headroom's speech, which is protected under the First Amendment.
  
- II. The appellate court's Order to Vacate the Preliminary Injunction should be reversed because the SPAAM Act is unconstitutional and violates Headroom's freedom of speech under the First Amendment by restricting their power to deny users nondiscriminatory access to its services. Headroom's practice of content moderation and editorial judgment is expressive conduct and subject to the protection of the First Amendment. Consequently, the SPAAM Act is subject to First Amendment scrutiny because it restricts Headroom's constitutionally protected expressive conduct. With that said, the SPAAM Act has a substantial likelihood of violating Headroom's freedom of speech under the First Amendment because it does not survive strict scrutiny, let alone intermediate scrutiny. Thus, the appellate court abused its discretion when it reversed the preliminary injunction of the SPAAM Act because its provisions are substantially likely to violate Headroom's expressed conduct protected under the First Amendment.



## ARGUMENT

The Order to Vacate the Preliminary Injunction should be reversed because all four elements of the motion were satisfied. This Court should review the preliminary injunction motion under the abuse-of-discretion standard. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). A district court has abused its discretion in granting the injunction if it is clearly based on erroneous factual findings or erroneous conclusions of law. *Id.* Consequently, this Court should find that the appellate judge abused their discretion because they committed a clear error of judgment in reversing Headroom's Preliminary Injunction. *Id.*; *Libby v. Illinois High School Ass'n*, 921 F.2d 96, 98 (7th Cir. 1990).

A court may grant a preliminary injunction when the moving party has shown that (1) it will likely succeed on the merits; (2) it will suffer irreparable injury unless the injunction is issued; (3) the injury to the movant outweighs the damage that injunction may cause the non-movant party; and (4) injunction would serve the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The Free Speech Clause of the First Amendment is the basic principle that protects private actors and constrains governmental actors. U.S. Const. amend. I; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Social media platforms are private actors who create a virtual space for users to express themselves. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1204 (11th Cir. 2022). Social media platforms curate the content by prioritizing or deprioritizing certain content or even removing content that violates their community standards. *Id.* at 1205. Headroom's content-moderation and curation constitute speech within the meaning of the First Amendment because they are "speaking" when they are "curating" their platform. *Id.* at 1210. The SPAAM Act's provisions implicate Headroom's First Amendment rights and,

therefore, trigger First Amendment scrutiny. *Id.* at 1208.

First, major social media companies are not common carriers, and the SPAAM Act's disclosure requirements fall within the Zauderer standard but will fail under the standard. Second, the SPAAM Act violates Headroom's First Amendment's Free Speech Clause when it prohibits them from denying users nondiscriminatory access to its services. The Order to Vacate the Preliminary Injunction should be reversed.

**I. The Order to Vacate the Preliminary Injunction should be reversed because the Headroom is likely to succeed on the merits as the SPAAM Act violates the First Amendment.**

The Order to Vacate the Preliminary Injunction must be reversed because the SPAAM Act violates the First Amendment. Midland's SPAAM Act discriminates against social media platforms by restricting their ability to alter or remove users' content and requiring them to publish detailed explanations of community standards and when the users violate them. The SPAAM Act exposes social media platforms to excessive punishment for simply exercising their constitutionally protected right to engage in content-moderation under editorial judgment. Thus, this Court must reverse the appellate court's Order to Vacate the Preliminary Injunction.

**A. Under the First Amendment's Free Speech Clause, major social media companies are not common carriers as they only accommodate users who accept and abide by their community standards.**

A social media platform makes individualized decisions by engaging in content moderation and is not a common carrier. Social media platforms are private actors and not governmental actors because users are not obligated to contribute or consume the content that is available on the platform. *NetChoice*, 34 F.4th at 1204; *See also Am.*

*Orient Exp. Ry. v. Surface Transp. Bd.*, 484 F.3d 554, 557 (D.C. Cir. 2007) (explaining that common carriers serve the public indiscriminately and do not make individualized decisions). Social media platforms are not like common carriers, where entities make a public offering to provide communications facilities whereby all members of the public communicate or transmit intelligence of their own design and choosing. *NetChoice*, 34 F.4th at 1220. Social media platforms that require users as a precondition to accept their terms and conditions to abide by their community standards are not common carriers. *Id.* In the Telecommunications Act of 1996, congress distinguished internet companies from common carriers because they are antithetical to traditional common carriers' obligation of indiscriminate service. *Id.* at 1220-21; *See also* 47 U.S.C. § 223(e)(6).

Social media users are free to transmit messages of their own design and choosing unless doing so violates the social media platform's community standards. *NetChoice*, 34 F.4th at 1220. In *NetChoice*, the social media platform was engaging in expressive conduct by exercising editorial judgment, establishing that social media platforms are not common carriers. *Id.* at 1204. Social media platforms do not hold themselves out to be neutral because they engage in content moderation, which means removing users' speech if it violates their community standards. *Id.*

Headroom also exercises editorial judgment when it engages in content-moderation, just like social media platforms in *NetChoice*. Headroom is not a common carrier, where users have the ultimate freedom to communicate or transmit their own messages, because the users are free to post as long as the content abides by Headroom's community standards. Ultimately, users are not free to communicate their messages when social media platforms remove content that does not abide by their community standards. Social media platforms express themselves through their content-moderation, just like Headroom expresses itself when it prioritizes, deprioritizes, or

removes users' speech.

The state may argue that Headroom should be treated as a common carrier because it is widely popular, used by almost everyone, and has substantial market power. *NetChoice*, 34 F.4th at 1221. However, simply labeling a private entity as a common carrier does not modify the reality that social media platforms are inherently expressive. *Id.* Neither the law nor logic justifies a government entity to strip a private entity of its First Amendment rights by labeling it as a common carrier because doing so would threaten the public interest. *Id.* The United States Supreme Court has held that a private entity engaging in speech protected by the First Amendment does not lose its constitutional rights just because it is successful and popular in the marketplace. *Id.* at 1222; *See also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 251, 258 (1974).

Thus, social media platforms are not common carriers because they engage in content-moderation and do not make a public offering to provide communications without the risk of the user's message being taken down. The First Amendment protects social media platform's content-moderation activities under editorial judgment.

**B. The SPAAM Act's disclosure requirement is unconstitutional under the Zauderer standard because it is unduly burdensome to Headroom.**

The SPAAM Act's requirement to provide a detailed and thorough explanation every time Headroom exercises editorial judgment imposes an undue burden by compelling Headroom to speak. Under the Zauderer standard, a commercial disclosure requirement must be reasonably related to the state's interest in preventing deception of consumers, and it must not be unjustified or unduly burdensome such that it would chill protected speech. *Zauderer v. Off. Of Disciplinary Couns.*, 471 U.S. 626, 671-72 (1985). Commercial speech is defined as an expression related to the economic interests of the speaker and its audience, but it can also assist consumers by the

fullest possible dissemination of information. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561-62 (1980). Commercial speech is also entitled to the protection of the First Amendment. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983). Commercial speech that is not false or deceptive may only be restricted if it serves a substantial governmental interest. *Zauderer*, 471 U.S. at 638. A state's interest is to ensure that users are fully aware of the terms of the social media platform and are not misled about the platform's content-moderation policies. *NetChoice*, 34 F.4th at 1230. The commercial transaction happens when the user is providing data in exchange for access to the platform. *Id.*

Disclosure requirement is only valid if it involves commercial speech and where factual disclosure would prevent fraud or deception. In *Zauderer*, the attorney released a misleading and deceptive advertisement stating, "If there is no recovery, no legal fees are owed by our clients." *Zauderer*, 471 U.S. at 660. The court held that the attorney was required to disclose the contingent fee arrangements because a layman does not know the difference between "legal fees" and "costs." *Id.* at 652. The court requiring attorney to disclose that the clients will have to pay the costs even if their lawsuits are unsuccessful served the goal of ensuring that potential clients were not misled. *Id.* at 636.

Detailed notice requirement for every content-moderation action is practically impossible to satisfy considering the high frequency of posts on social media platforms. *NetChoice*, 34 F.4th at 1230. In *NetChoice*, social media platforms removed millions of posts per day and the Florida act required the platform to provide a detailed written notice within seven days. *Id.* at 1231. The Florida act also exposed the platforms up to \$100,000 in statutory damages per claim. *Id.* The Court held that the disclosure requirement and exposure to massive liability was unduly burdensome and would likely chill platform's protected speech. *Id.* The Court also held that the

disclosure provisions requiring a thorough rationale for each and every content-moderation decision they made violated the First Amendment. *Id.*

The disclosure requirements in *Zauderer* were mainly focused on the advertisements which essentially fall under commercial speech. Generally, requirement for a social media platform to disclose why they removed a user's content falls under noncommercial user-generated content. In this case, the speech could be commercial or content-based depending on the circumstances. Headroom allows users to not only post content, but also monetize their posts by soliciting advertisers to sponsor their posts. Ultimately, both Headroom and users are engaging in a commercial transaction because data is being exchanged for access to the platform. Whether commercial or noncommercial speech, the disclosure requirement regulation will fail under the *Zauderer* standard.

The disclosure requirement in *Zauderer* did not impose an undue burden on the attorney because the attorney only had to disclose the contingent-fee arrangements somewhere on the advertisement. An advertisement that is broadcasted to a group of potential clients is different than the SPAAM Act requiring Headroom to communicate to each user that violates their community standards. In this case, the undue burden outweighs the state's interest to ensure that users are fully aware of the community standards and are not being misled about Headroom's policies.

The disclosure provisions in *NetChoice* are similar to the ones in this case because the SPAAM Act requires social media platforms 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 was chosen. The Court in *NetChoice* was correct in holding that the disclosure requirement imposed undue burdensome on the platforms. This Court

must reverse the appellate court's Order to Vacate the Preliminary Injunction because only Headroom incurs the burden. It is impossible for Headroom to provide detailed and thorough explanations to each user because Headroom has millions of users. Doing so would put all the burden on Headroom to not just absorb the implementation cost but also expose themselves to litigation if the user wants to challenge the explanation. The imposition of the disclosure requirement would also have a chilling effect on Headroom's free speech rights and discourage Headroom to exercise its editorial judgment which is protected under the First Amendment.

The state would argue that enforcement explanation requirement does not violate the First Amendment because it only involves purely factual disclosures that do not affect Headroom's speech. However, it does affect Headroom's speech because the SPAAM Act would compel Headroom to speak when it has already spoken by engaging in content-moderation by removing or deprioritizing the user's content that violates the community standard. Headroom removing content that violates their community standards is a sufficient explanation to the user and would require the user to use commonsense. A detailed and thorough explanation would force Headroom to directly speak about content that has violated their community standards.

Thus, the Zauderer standard applies to the SPAAM Act's disclosure requirements as it falls under commercial speech but would fail to meet the Zauderer standard because of the undue burden on Headroom.

**II. The Order to Vacate the Preliminary Injunction should be reversed because the SPAAM Act violates Headroom's freedom of speech under the First Amendment by restricting their power to deny users nondiscriminatory access to its services.**

The Order to Vacate the Preliminary Injunction must be reversed because the SPAAM Act violates the First Amendment. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state authorities from restricting expressions based on their

message, content, or ideas. U.S. Const. amend. XIV; U.S. Const. amend. I; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). To that end, the First Amendment protects Headroom’s content moderation and editorial judgment because it is expressive conduct. Consequently, because the SPAAM Act restricts Headroom’s expressive conduct, the SPAAM Act is subject to First Amendment scrutiny. Furthermore, because the SPAAM Act’s restrictions are not the least restrictive means of achieving Midland’s government’s interest, it cannot strict nor intermediate scrutiny. Thus, the Court must reverse the appellate court’s Order to Vacate the Preliminary Injunction because Midland’s content-based restriction towards social media platforms violate Headroom’s First Amendment right.

**A. Headroom’s practice of content moderation and editorial judgment is expressive conduct and subject to the protection of the First Amendment.**

Headroom exercises expressive conduct when prohibiting or deprioritizing content. Conduct is expressive if “the reasonable person would interpret it as some sort of message, not whether an observer would infer a specific message.” *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021). If the conduct is determined to be expressive, “any law” attempting to regulate it “is subject to the First Amendment.” *Id.* A social media platform is free to exercise editorial judgment, through which they can choose to “convey some messages but not others,” thus, promoting their own agendas and creating expressive content. *NetChoice*, 34 F.4th at 1213. Editorial judgment in the form of content moderation is content-based speech and protected by the First Amendment because a reasonable person may perceive bias from the prohibition or deprioritizing of user content and from the platforms’ stated values and principles. *Id.* at 1214.

If an entity engages in expressive conduct, they are subject to the protection of the First



Amendment. *Coral Ridge Ministries Media, Inc.*, 6 F.4th at 1255. In *Coral Ridge Ministries Media* (“*Coral Ridge*”), the plaintiff is appealing the dismissal of a religious discrimination claim against Amazon, claiming that Amazon excluded the plaintiff from the AmazonSmile charity program because of their religious beliefs. *Id.* at 1250, 1254. The court concluded that the plaintiff’s allegations, if remedied, would force “Amazon to donate to organizations it does not support,” thus, violating Amazon’s First Amendment protection. *Id.* at 1254. Because Amazon expressly states how it determines which charity is eligible to participate in their AmazonSmile program, the court reasoned that a reasonable person would interpret that “Amazon [is] conveying [a message] about the organizations it wishes to support.” *Id.* Thus, Amazon is subject to the protection of the First Amendment because they engage in expressive conduct by choosing which charities to support. *Id.* at 1255.

Similarly, Headroom is subject to the protection of the First Amendment because they engage in expressive conduct by exercising editorial judgment in the form of content moderation. As in *Coral Ridge*, where Amazon expressly stated how they choose which charities to donate to, Headroom expressly states the content they will prohibit or deprioritize via Headroom’s Community Standards. Additionally, like in *Coral Ridge*, where the court reasoned that a reasonable person could interpret a message based on the charities Amazon supported, a reasonable person could interpret Headroom’s message based on the content it chooses to remove or deprioritize. Headroom’s act of prohibiting or deprioritizing content that violates their community standards conveys their message of creating “a welcoming community where all are respected and welcome.” Thus, like the court in *Coral Ridge* concluded that Amazon engages in expressive conduct by selecting certain charities to support, Headroom engages in expressive conduct by conveying their community standards through their practice of editorial judgment.

Therefore, Headroom’s editorial judgment via content moderation is expressive conduct and protected by the First Amendment because it conveys and promotes Headroom’s Community Standards and bias against the content it wishes to remove or deprioritize.

**B. The SPAAM Act is subject to First Amendment scrutiny because it restricts Headroom’s expressive conduct by prohibiting content moderation and compelling them to issue disclosures.**

The SPAAM Act’s restrictions towards the expressive conduct of social media platforms, like Headroom, are subject to First Amendment scrutiny. A statute triggers First Amendment Scrutiny if it restricts social media platforms’ ability to exercise their editorial judgment or imposes disclosure requirements. *NetChoice*, 34 F.4<sup>th</sup> at 1222. Additionally, social media platforms, like Headroom, do not renounce their constitutional protections under the First Amendment by combining various voices and messages on their sites. *See also Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995) (concluding that “a private speaker does not forfeit constitutional protection simply by combining multifarious voices.”)

A state statute is subject to First Amendment scrutiny if it aims to restrict or regulate a social media’s expressive conduct. *NetChoice*, 34 F.4<sup>th</sup> at 1223. In *NetChoice*, the plaintiffs sued Florida officials, alleging that S.B. 7072 content-moderation restrictions violate social media companies’ right to free speech under the First Amendment. *Id.* at 1203. The court concluded that S.B. 7072 is subject to First Amendment scrutiny because it restricted the social media companies constitutionally protected expressive conduct. *Id.* at 1205, 1223. Thus, because the provisions meant to regulate the plaintiff’s editorial judgment and content-moderation activities, it implicated the plaintiff’s First Amendment right, “therefore subject to First Amendment scrutiny.” *Id.* at 1223.

Additionally, a state statute is subject to First Amendment scrutiny if it imposes disclosure requirements because it compels a speaker to create speech. *303 Creative, LLC v. Elenis*, 143 U.S. 2298, 2308 (2023). In *303 Creative*, the plaintiff sued the state of Colorado, alleging that the state infringed on her First Amendment protections by statutorily compelling her to produce content-based speech on her website that was against her beliefs. *Id.* at 2308. The court held that the First Amendment prohibits a state from compelling a speaker to convey messages they disagree with or to force a speaker “to include” additional language that they “would prefer not to include.” *Id.* at 2312, 2313. The Court reasoned that the Colorado statute impermissibly infringed the First Amendment because it intended to compel the plaintiff to speak as they commanded “or face sanctions for expressing her own beliefs.” *Id.* at 2313. Thus, because the law meant to compel the plaintiff to create speech she did not desire to create, like a disclosure aims to compel the speaker to speak, it is subject to the First Amendment. *Id.* at 2307-08; *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) (stating that the state cannot quiet speech or burden speakers for expressions it finds to be “too persuasive.”)

The SPAAM Act is subject to First Amendment scrutiny because it aims to restrict Headroom’s editorial judgment and content-moderation practices. Similar to *Netchoice*, where the Florida law sought to restrict the plaintiffs’ ability to moderate their content, the SPAAM Act seeks to restrict Headroom’s ability to perform content-moderation by deprioritizing or removing users, etc. Consequently, like in *Netchoice*, where the court concluded that the Florida law is subject to strict scrutiny because it restricted the plaintiffs’ expressive conduct, the SPAAM Act is subject to First Amendment scrutiny because it restricts Headroom’s protected expressive conduct.

Furthermore, the SPAAM Act is subject to First Amendment scrutiny because it compels Headroom to create speech by imposing disclosure requirements. As in *303 Creative*, where the Colorado statute meant to compel the plaintiff to speak as directed or face sanctions, the SPAAM Act intends to compel Headroom to speak by imposing disclosure statements or face injunctions and fines. The SPAAM Act requires Headroom and any social media platform that violates the Act to issue detailed disclosures to explain their editorial judgment decisions. Midland Code § 528.491(c). Like in *303 Creative*, where the court found that Colorado meant to compel the plaintiff to create speech she did not wish to create or force a speaker to include language that they prefer not to include. *303 Creative*, 143 U.S. at 2312, 2313. Here, the detailed disclosures required by the SPAAM Act obligate Headroom to create speech they do not desire to create or wish to include in their content-moderation statements to users they find violate their Community Standards. Furthermore, the SPAAM Act is subject to First Amendment scrutiny because it compels Headroom to create speech they do not wish to create by imposing disclosure requirements.

Thus, because the SPAAM Act restricts Headroom's ability to exercise editorial judgment and imposes disclosure requirements, it triggers the First Amendment and is subject to First Amendment scrutiny.

**C. The SPAAM Act has a substantial likelihood of violating Headroom's freedom of speech under the First Amendment because it will likely not survive strict scrutiny, let alone intermediate scrutiny.**

The SPAAM Act is not substantially likely to survive strict scrutiny, let alone intermediate scrutiny; therefore, it is unconstitutional because it violates the freedom of speech under the First Amendment. A statute regulating content-based speech is subject

to strict scrutiny; consequently, the state must show that the statute furthers a substantial government interest and is narrowly drawn to achieve that interest. *Sorrell*, 564 U.S. at 572; *Reed*, 576 U.S. at 171. A statute is content-based if it was adopted by the state because “of disagreement with the message [the speech] conveys” or if it is meant to apply “to particular speech because of the” message it expresses. *Reed*, 576 U.S. at 163-64 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

**Pursuing** A statute cannot survive strict scrutiny if the state fails to show that its restrictions are “the least restrictive means of achieving the government’s interest.” *America’s Greatness v. Fed. Election Comm’n*, 831 F.3d 500, 511 (2016). In *Pursuing America’s Greatness* (“PAG”), the plaintiff is appealing the denial of a preliminary injunction, arguing that the Federal Election Commission (“FEC”) law prohibiting “unauthorized political committees...from using candidates’ names in the titles of their websites and social media pages” violates the First Amendment. *Id.* at 503. The FEC alleged that their governmental interest in enforcing its regulations was to avoid voter confusion from potentially misleading information published by unauthorized political committees. *Id.* at 510. The court held that the FEC’s restriction is substantially likely to violate the First Amendment; thus, the preliminary injunction should be granted. *Id.* at 504. The court reasoned that the FEC’s regulation is not the least restrictive because merely implementing a disclaimer could achieve its governmental interest. *Id.* at 510. Moreover, the court determined that the FEC’s regulation cannot survive strict scrutiny because they failed to show its restrictions were “the least restrictive means of achieving the government’s interest.” *Id.* at 511.

Additionally, the court in *PAG* found that the FEC’s regulation targets content-based speech because it “draws distinctions” based on what the plaintiff, an unauthorized political

committee, says. *Id.* at 509. The court also deemed the FEC regulation content-based discrimination because the FEC must assess the speech to determine if it violates the regulation. *Id.* at 509; *see also McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (stating that a statute is content-based if it requires that “enforcement authorities” assess the contents of the conveying message to conclude if there is a violation).

Firstly, the SPAAM Act is content-based because it was meant to apply to the message social media companies convey when practicing editorial judgement and content-moderation. Moreover, the SPAAM Act is content-based because the state of Midland applied it in response to some social media user complaints regarding Headroom’s practice of content-moderation on their posts. Furthermore, like in *PAG*, where the court determined the FEC’s regulation was content-based because its enforcement is vested in the FEC, the SPAAM Act is content-based because its enforcement is vested in Midland’s Attorney General and other enforcement authorities. Therefore, the SPAAM Act is content-based and subject to strict scrutiny.

Subsequently, the SPAAM Act is not substantially likely to survive strict scrutiny because Midland cannot show that its restrictions are the least restrictive means of achieving their governmental interest. Midland’s governmental interest for which the SPAAM Act was enacted to further is to “establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content.” Like in *PAG*, where the court reasoned that the FEC’s regulation is not the least restrictive because a disclaimer could have achieved their governmental interest, a mere disclaimer can also achieve Midland’s governmental interest. In fact, Headroom’s practice of requiring its users to consent to their Community Standards already serves to further the government’s interest in protecting civil liberties and curbing harmful content. Thus, the existence of Headroom’s Community Standards renders the SPAAM Act

ineffective because they sought to achieve the government's interest before they enacted the statute.

Furthermore, the SPAAM Act would still be deemed to violate the First Amendment even if the court were to conclude that the SPAAM Act is subject to intermediate scrutiny and that the statute is content-neutral. If a statute is subject to intermediate scrutiny, the state must show that the statute is narrowly tailored to achieve their governmental interest and that it is “unrelated to the suppression of free speech.” *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022); *Turner Broad. Sys. v. Fed. Commc'ns Comm'n*, 520 U.S. 180, 189 (1997). The SPAAM Act is not narrowly tailored because it compels Headroom to alter their expressive conduct by forcing them to host potentially obscene or patently offensive content it does not agree with, and that would risk violating the SPAAM Act. Midland Code § 528.491(b)(2); *See, e.g., Hurley*, 515 U.S. at 576 (holding that a statute requiring veterans to include voices they wished to exclude from their parade infringed their constitutionally protected speech because it would erroneously compel them to “alter the expressive content of their parade”).

Additionally, the SPAAM Act is substantially related to the suppression of free speech because the Act is actively acting in opposition to Midland's governmental interest of protecting the freedom of speech by infringing on Headroom's right to free speech. *Cf. Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 484-85 (5th Cir. 2022) (illustrating how a Texas statute prohibiting social media platforms from censoring speech survives intermediate scrutiny because “Texas's important governmental interest in protecting the widespread dissemination of information is unrelated to the suppression of free expression”). Therefore, it is substantially unlikely that the SPAAM Act will survive intermediate scrutiny because Midland cannot demonstrate that the

SPAAM Act is narrowly tailored to achieve their governmental interest and is related to the suppression of free speech.

Ultimately, the SPAAM Act is not substantially likely to survive any form of heightened scrutiny because Midland cannot show that SPAAM Act's restrictions are the least restrictive means of achieving their governmental interest or that they are even needed. To that end, the appellate court made a clear error in judgment by vacating the Preliminary Injunction because Midland's content-based restriction towards social media platforms violates Headroom's First Amendment right.



CONCLUSION

For the foregoing reason, Headroom respectfully requests that this Court reverse the decision of the Appellate Court and affirm the District Court's grant of the preliminary injunction in favor of Headroom.

Dated this 9<sup>th</sup> day of October, 2023.

Respectfully submitted,

*Team 19*

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ATTORNEY FOR PETITIONER