REGENT UNIVERSITY SCHOOL OF LAW

23rd ANNUAL LEROY R. HASSELL, SR.
NATIONAL CONSTITUTIONAL LAW MOOT COURT
COMPETITION

No. 23-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

HEADROOM, INC.,

Petitioner,

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Respondent.

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

Brief for Respondent

Team No. 22
Counsel for Respondent
Dated October 9, 2023

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QUESTIONS PRESENTED

I. Under the First Amendment's Free Speech Clause, (1) are widely-used major social media companies, who hold themselves open to distribute the speech of the broader public, common carriers, and (2) does this Court's decision in *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio* apply to the SPAAM Act's purely factual disclosure requirements?

II. Does a state law violate the First Amendment's Free Speech Clause when it restricts social media companies from engaging in viewpoint censorship?

STATEMENT OF THE CASE

I. Statement of Facts

Petitioner, Headroom, Inc. ("Headroom"), is one of the most popular social media companies in the U.S., boasting over 75 million monthly users. R. at 2, 3. In addition to the typical social media functions of posting and creating content in a comprehensive virtual reality environment, users also "depend on Headroom's services to support their businesses and livelihoods." R. at 3. Headroom holds itself out as providing a "community" "where all are welcome." *Id*. Headroom's mission is to "provide a space for everyone to express themselves to the world" and "promote greater inclusion, diversity, and acceptance in a divided world." R. at 2–3.

In order to create an account with Headroom, each and every prospective user must first agree to an identical Community Standards agreement ("CSA"). *Id*. Headroom's CSA forbids 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." R. at 3. The CSA also prohibits sharing what Headroom deems "disinformation." R. 3–4. Disinformation is defined as "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups," for example "fabricated stories, manipulated facts, manipulated images or videos, and misleading narratives." *Id*.

Headroom uses algorithms to flag speech that potentially violates the CSA. R. at 3. Once flagged, the content in question will be deprioritized by the very same algorithms that organize and order content based on user preferences and the algorithms' data tracking capabilities. *Id*. Prioritization of content by the algorithms is a valuable asset to users who have monetized their

profiles, as engagement with their content generates advertisement revenue, monetary donations, and business promotion. *Id*. Enforcement of the CSA led prominent users of the platform to accuse Headroom of viewpoint discrimination that resulted in economic harm. *Id*.

Following these accusations, the State of Midland passed the Speech Protection and Anti-Muzzling (SPAAM) Act. R. at 5. Before the statute was adopted, Midland's Governor Michael Thompson called a special session of the legislature to conduct hearings exploring the rash of complaints against Headroom's conduct. R. at 4.

Max Sterling, a popular Headroom user who comments on hot-button political and social topics, accused Headroom of causing his viewership to decline dramatically after his viral monologue was deprioritized by Headroom's algorithms. *Id*. Sterling further alleged that Headroom frequently adds content warnings, which assert that his speech contains "bullying and harassment," "promotion of violence against protected classes," and "sexist and racist language," to his posts. *Id*. Next, Mia Everly, an entrepreneur who runs a start-up fashion company, testified that, following her criticism of a controversial political candidate, purchases from her virtual store and engagement with her ads declined by 34 percent. R. at 4–5. Finally, Ava Rosewood, who runs a popular movie review site, testified that Headroom banned her account for spreading what it deemed "disinformation" and "hate speech" after she endorsed a controversial documentary. R. at 5.

Based on the evidence from the special session, the Midland legislature passed the SPAAM Act. R. at 7. Midland Representative Caldwell argued that "social media giants like Headroom have become virtual dictators, suppressing free speech and ruining hardworking Midlandians' livelihoods under the guise of moderation." R. at 5. The SPAAM Act's purpose is to "hold [Headroom] accountable" and to "ensure the protection of our democratic values." R. at 5.

Representative Barnes stated that "excessive censorship by tech behemoths is a clear violation of our fundamental rights. We need robust legislation to curb their power and restore the voice of the people." *Id*. Governor Thompson explained that the Act "will establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content." *Id*. The Speaker of Midland's House of Representatives, Nancy Thornberry, added that "speech is increasingly being centralized in unaccountable companies that threaten individuals' livelihoods. Our very ability to challenge political orthodoxy is under siege." R. at 5.

The Act identifies social media platforms as "the public square of the twenty-first century and common carriers of public speech." Midland Code ("MC") § 528.491(b)(1). Therefore, the Act first requires social media companies to publish "community standards" with "detailed definitions and explanations for how they will be used, interpreted, and enforced." *Id*. § 528.491(c)(1). Further, after a social media company enforces its CSA, the Act requires the company to "provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's…standards, and why the specific action (e.g., suspension, banning, etc.) was chosen." *Id*. § 528.491(c)(2).

Second, the Act prohibits "censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" because of "viewpoint." *Id*. § 528.491(b)(1). "[C]ensorship" is defined as "editing, deleting, altering, or adding any commentary" to user-created content. *Id*. § 528.491(b)(1)(i). The Act defines "deplatforming" as "permanently or temporarily deleting or banning a user." *Id*. § 528.491(b)(1)(ii). "[S]hadow banning" is defined 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." *Id*. § 528.491(b)(1)(iii). Exempted from the

section's requirement is content that is "obscene, pornographic or otherwise illegal or patently offensive." *Id*. § 528.491(b)(2).

Midland has tasked its Attorney General with enforcement of the Act. *Id*. § 528.491(d)(1). Users who have been harmed by a company's violation of the Act may either file a complaint with the Attorney General or sue under a private right of action. *Id*. § 528.491(d)(2). Courts may grant relief either by enjoining Headroom to comply or by imposing fines totaling $10,000 a day per infraction. *Id*. § 528.491(d)(3).

II. Procedural History

The SPAAM Act was passed by the Midland Legislature on February 7, 2022; it took effect on March 24, 2022. R. at 7.

On March 25, 2022, Headroom filed a pre-enforcement challenge against Respondent, Midland's Attorney General Edwin Sinclair, in the U.S. District Court for the District of Midland for permanent and temporary injunction against enforcement of the Act. *Id*. District Judge Roy Ashland granted Headroom's motion for a preliminary injunction on May 29, 2022. R. at 2, 15. Respondent then appealed to the U.S. Court of Appeals for the Thirteenth Circuit and the grant of preliminary injunction was reversed in an opinion by Chief Circuit Judge Mendoza on March 30, 2023. R. at 16, 19–20.

Headroom appealed to the U.S. Supreme Court, which granted certiorari on August 14, 2023. R. at 21.

III. Standard of Review

This Court reviews the decision to grant a preliminary injunction under an abuse of discretion standard but reviews legal findings *de novo*. *McCreary County v. ACLU*, 545 U.S. 844, 867 (2005). Since the only issues before this Court are First Amendment legal issues, *de novo* review is appropriate.

SUMMARY OF THE ARGUMENT

Petitioner is appropriately regulated as a common carrier. Further, the State of Midland may require Petitioner to disclose purely factual information to consumers in order to avoid confusion in the market. The SPAAM Act does not violate the Free Speech Clause ("FSC") because States may enact legislation in order to protect the First Amendment free speech rights of its citizens engaging in discussion of matters of public concern in public spaces. Petitioner purports to use the First Amendment as a shield in the one hand, to escape government regulation, and then as a sword in the other, to actively discriminate against disfavored viewpoints.

The First Amendment protections afforded to Petitioner in the commercial context are considerably weaker than those afforded to private individuals. Common carriers, or those who hold themselves open to the public on identical terms, are heavily regulated and prohibited from discrimination. Common carriage can also attach to those entities, not meeting the traditional definition, that have gained such prominence in the market as to affect the public interest.

Petitioners express mission statement is to provide a welcoming place for everyone to participate in discussion. Petitioner offers use of its platform on identical CSAs without making individualized decisions regarding who may use their services. Further, Petitioner is not liable for content posted on its forum. Thus, Petitioner is appropriately regulated as a common carrier.

However, even if Petitioner is not a common carrier, the SPAAM Act only requires purely factual, uncontroversial disclosures consistent with *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985). The regulation is not unduly burdensome because it merely requires Petitioner to provide an explanation for its enforcement decisions. The regulation is justified because Midland held a special legislative session where it uncovered instances of censorship and viewpoint discrimination perpetrated by Petitioner. Finally, the disclosure

requirements are intended to provide Midlandians with sufficient information about social media companies' CSAs to avoid confusion over unexplained enforcement decisions.

This Court reviews First Amendment challenges by reviewing the statute "as-applied" to Petitioner, then by considering facial challenges. The First Amendment does not apply to conduct. The State may regulate entities that hold themselves open to the public, even if expressive conduct is implicated, so long as the State does not compel the entity to speak or restrict the entity from speaking. This Court has, in appropriate cases, used editorial discretion as a factor in determining whether an entity is engaged in First Amendment-protected activity.

Overbreadth, a facial challenge unique to the First Amendment, is a doctrine that contravenes traditional standing principles and allows the Court to invalidate statutes where the petitioner has established the especially heavy burden of demonstrating that the statute reaches a real and substantial amount of protected conduct in relation to its plainly legitimate sweep.

The Content Moderation Restrictions ("CMR") do not violate the FSC because they regulate unprotected conduct, engaging in viewpoint discrimination, not speech. The CMR do not compel Petitioner to speak by requiring it to indiscriminately host third-party speech or by restricting Petitioner from speaking. Further, the CMR survive the facial overbreadth challenge because Petitioner has not met its heavy burden of demonstrating that a substantial number of the Act's applications are invalid in comparison to its plainly legitimate sweep.

For these reasons, the 13th Circuit should be affirmed.

ARGUMENT

I. The SPAAM Act does not violate the Free Speech Clause because social media companies are common carriers; further, the SPAAM Act's purely factual disclosure requirements, intended to avoid consumer confusion, are permissible under the *Zauderer* standard.

"Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I ("FSC"). First Amendment freedoms are "among the fundamental personal rights and liberties

protected by the due process clause of the" 14th Amendment "from impairment by the States." *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925) (internal marks and citations omitted); U.S. Const. amend. XIV, § 1.

There is "no…doubt" that the First Amendment also protects "commercial speech." *Zauderer*, 471 U.S. at 637 (internal marks and citations omitted). However, common carriers are not afforded the same First Amendment protections as private carriers. *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984). This is because the "speech interests" of common carriers are "relatively weak" and regulations regarding their access have "long been imposed without raising any First Amendment issue." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 741, 740 (D.C. Cir. 2016). Since social media companies are common carriers, they are not entitled to the First Amendment protections typically reserved for private carriers. However, even if this Court finds that social media companies are not common carriers, Midland can still regulate private companies by compelling them to provide purely factual disclosures to avoid consumer confusion about the use of their services. *Zauderer*, 471 U.S. at 651.

A. The SPAAM Act permissibly regulates social media companies as common carriers.

"A common carrier in the communications context is one that makes a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (internal marks and citations omitted).

Further, a business may rise from private to public concern, and thus become a common carrier, based on its power in the market and the public nature of the industry in which operates. *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 341 (1914); *Munn v. Ill.*, 94 U.S. 113, 125 (1876).

The 13th Circuit should be affirmed because it correctly identified Headroom as a common carrier. R. at 17.

1. Social media companies are common carriers because they hold themselves open to the public as willing to serve everyone.

Common carriers serve everyone "indiscriminately" by "not making individualized decisions, in particular cases, whether and on what terms to deal." *Telecom*, 825 F.3d at 740 (internal marks and citations omitted); *Midwest Video*, 440 U.S. at 701. In *Midwest Video*, this Court invalidated an agency determination that broadcasters were common carriers by virtue of the State's delegation to private companies the responsibility to run public access channels. In *Telecom*, the D.C. Circuit Court considered whether internet service providers ("ISPs") could be regulated as common carriers by the Federal Communications Commission ("FCC"). 825 F.3d at 710. Because ISPs provided "ubiquitous access" to their services for "the public…or substantial portion of the public," the court concluded that the FCC's reclassification of ISPs as common carriers was appropriate. *Id.* at 714, 715 (internal marks and citations omitted).

As a communications facility, Headroom offers ubiquitous service by expressly holding itself out to public in its mission "to provide a space for *everyone* to express themselves to the world." R. at 2 (emphasis added). Like the large user-bases of the ISPs in *Telecom*, Headroom's expansive user-base begets ubiquitous access, derived from making its "capacity available to the public indifferently." 825 F.3d at 710 (internal marks and citations omitted). Unlike the stations in *Midwest Video*, Headroom has been labeled as a common carrier by the legislature, not an agency. Further, Headroom comes across its obligations to serve the public not from a delegation by the State but by their own choosing.

Indiscriminate service was the key issue in *Semon v. Royal Indem. Co.*, where Semon's recovery was contingent on a determination that a fishing vessel was operating as a common carrier. 279 F.2d. 737, 739 (5th Cir. 1960). The Fifth Circuit held that because the vessel's captain always reserved his right to choose when and to whom he chartered his boat, the vessel could not

be considered a common carrier; a different outcome would have been compelled had the captain showed a "willingness to carry on the same terms and conditions any and all groups no matter who they might be." *Id*. "A refusal to serve is of no consequence" in determining whether the person is a common carrier. *Id at.* 740.

Unlike the ship captain in *Semon*, Headroom does not individually determine on what terms it will deal with any member of the public who engages with its services. Instead, Headroom provides a uniform CSA to every individual user. Headroom does not negotiate the terms of the CSA; Headroom does not make alterations for particular individuals nor do they allow potential users to bypass them. The CSA does not bar individuals from *using* Headroom's service, but merely explains the terms of service to be *enforced* against all users. Any contention that the CSA serves as an individualized decision that separates Headroom from the ranks of common carriers fails when compared to the discretionary picking and choosing of customers that resulted in the fishing vessel being labeled a private carrier in *Semon*.

Also in direct contrast with private carriers, social media companies are not liable for the content they host. 47 U.S.C. § 230(c) (1996) ("Telecommunications Act of 1996"). While the Telecommunications Act of 1996 does not construe its covered entities as common carriers, it does not prohibit a State from doing so. *See id*. § 223(e)(6) (1996). Headroom, therefore, further resembles a common carrier because it is not liable for the content posted by third-party users.

The value to Headroom of the statutory immunity with which social media companies operate is difficult to estimate. This immunity does not apply to private carriers, but is instead typically afforded to common carriers based on the nature of the service provided as a facilitator and not a publisher. Allowing Headroom to benefit from civil liability of common carriers while simultaneously removing any obligation to practice nondiscrimination permits Headroom to

discriminate with impunity while concurrently expanding their dominance. Permitting Midland's classification of these companies as common carriers is the most efficient way to allow Midland's legislature, as the directly elected representative of its people, to decentralize control over one of the most important areas for public discourse and economic activity.

Thus, this Court should hold that Headroom is a common carrier, subject to regulation by the State to prevent viewpoint discrimination.

2. Common carriage is further appropriate because social media companies have risen to such prominence as to affect public interest.

This Court stated in *Marsh v. Ala.* that the "more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. 501, 506, 516 (1946) (holding that "property rights" being "held by" private actors "is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties"). Any argument that the SPAAM Act cannot regulate Headroom because of the state actor doctrine is inapposite because the First Amendment applies to private entities in certain contexts, especially the commercial context. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931 n.2 (2019) (classifying regulation "requiring…private entities to open their property for speech by others" as one not implicated by the state actor doctrine).

Social media companies, like Headroom, present a fast-developing and important area of public discourse that was not conceivable in traditional common carrier analysis. In *Packingham v. N.C.*, this Court acknowledged the vast power social media companies have over public discourse. 582 U.S. 98, 107 (2017) (stating social media companies "allow a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any soapbox") (internal marks and citations omitted). Social media is one of the "most important

places for the exchange of views" and provides access to "topics diverse as human thought." *Id*. at 118 (internal marks and citations omitted). To bar access to it is to deny the exercise of "legitimate…First Amendment Rights." *Id*. at 108.

This Court has stated that social media companies are the "modern public square." *Id*. at 107. Further bolstering the common carriage conclusion is the fact that Midland's legislature justified the SPAAM Act with its considered finding that social media platforms are "the public square of the twenty-first century and common carriers of public speech." MC § 528.491 (b)(2). Headroom and other social media companies prosper because of their ubiquitous access and ease of use. Over 75 million Americans subscribe to take advantage of Headroom's public offering of a place for everyone to be heard. Social media companies enjoy the prosperity resultant from offering "relatively unlimited, low-cost capacity for communication of all kinds" to the general public. *Packingham*, 582 U.S. at 104 (internal marks and citations omitted). These companies "provide avenues for historically unprecedented amounts of speech" yet are controlled in the "hands of a few private parties." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021), *vacated as moot*, (Thomas, J., concurring).

As was the case in both *German All. Ins. Co.* (insurance) and *Munn* (railroads), a business may rise to such public importance that regulation as a common carrier can become the most appropriate means of protecting the public good. 233 U.S. 341; 94 U.S. 125. The contours of what circumstances may make a once private carrier rise to the level of public import necessary for common carrier regulation are not "fixed" or "inelastic" because such an approach would hinder attempts to acclimate to constantly developing socioeconomic and technological landscapes. *German All. Ins. Co.*, 233 U.S. at 411. What matters is that "such regulation becomes necessary for the public good." *Munn*, 94 U.S. at 125.

The SPAAM Act was passed in response to testimony from users who suffered a substantial economic injury based on Headroom's concentrated power to deplatform. The 13th Circuit correctly concluded that "Headroom's dominant market share in Midland and across the nation gives it substantial market share with almost uninhibited power to exclude disfavored speech." R. at 18 (internal marks and citations omitted). In the absence of common carrier classification and the corresponding regulation, Headroom will continue to hamstring not only the vibrant and fundamental discourse inherent in our political orthodoxy, but also the robust economic activity on its servers that have become indispensable to the livelihoods of many of its users.

Millions of Americans have grown to depend on social media for a litany of private and public needs. *Packingham*, 582 U.S. at 104; *Biden*, 141 S. Ct. at 1221. Like countless other technological developments, major social media companies have risen from the ranks of historical aberrations to innocuous necessities. If the power to arbitrarily dictate the use of this indispensable service is left unchecked, the public good will be defined solely by the judgment of private actors like Headroom. The public itself will be left without what has become the most important platforms for defining what the public good actually is. Because of the instrumental nature of the service social media companies provide, this Court should validate this legislation under the common carrier classification in order to protect the public good.

B. The SPAAM Act's disclosure requirements are permissible under the *Zauderer* decision.

Even if the Court finds that social media companies are not common carries, the SPAAM Act's disclosure requirements can be enforced against these companies under the standard set forth in *Zauderer*, 471 U.S. at 616, 651 (determining that purely factual disclosures "ensuring that potential clients were not misled regarding the terms" under which services would be offered were permissible if "reasonably related to the State's interest in preventing deception of consumers.").

Disclosures under this standard have been extended beyond the advertising context in which it was first developed. *See Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 251 (2010) (applying *Zauderer* to debt collection agencies); *Chrysafis v. Marks*, 141 S. Ct. 2482, 2484 (2021) (Breyer, J., dissenting) (stating mandatory disclosure of COVID-19 aid resources for tenants facing eviction would be permissible under Zauderer). *See also NetChoice, L.L.C. v. Att'y Gen.,* 34 F.4th 1196, 1227 (11th Cir. 2022) (*NetChoice I*) and *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 485–6 (5th Cir. 2022) (*NetChoice II*) (reaching same conclusion that *Zauderer* would apply to social media disclosure requirements despite reaching opposite conclusions on whether the laws at issue would pass scrutiny under the standard).

1. The SPAAM Act's disclosure requirements represent purely factual disclosures intended to eliminate confusion in the market over the conditions under which services will be offered.

Zauderer held that "purely factual and uncontroversial information" may be compelled from private companies. 471 U.S. at 651. In the present case, the disclosure requirements compel Headroom to provide purely factual information about what determination Headroom has made concerning a user's speech.

Further, the SPAAM Act's mandate that social media companies provide explanations upon enforcement of their CSAs also complies with *Zauderer* because the mandate serves the sole purpose of preventing confusion among social media users as to the reason their content is in conflict with the CSA. 471 U.S. at 651; MC § 528.491(c)(2). *See also Milavetz*, 559 U.S. at 250 (defining purely factual disclosures as those which explain the "character of the [service] provided").

Even the commercial context commonly associated with the *Zauderer* decision is present here. Headroom has become a "hub of business in cyberspace." R. at 3. The SPAAM Act was a direct response to the complaints of users who use Headroom for commercial purposes and who,

without explanation, were barred from engaging in lawful commercial activity. Their sense of confusion and deception spurned Midland's Legislature to pass the Act and alleviate these problems with the disclosure of factual information.

Thus, *Zauderer* applies to the SPAAM Act's disclosure requirements.

2. The factual disclosures are not unjustified or unduly burdensome such that they would chill free expression.

The finding that these are purely factual disclosures does not end the inquiry. The *Zauderer* standard further requires that disclosure requirements not be "unjustified or unduly burdensome" such that they would chill protected speech. *Zauderer*, 471 U.S. at 651.

The disclosure requirements are not unjustified because Midland held legislative hearings, heard testimony from users complaining about the adverse consequences they suffered for expressing controversial opinions, and determined that the disclosure requirements were necessary so that Midlandians would not be subject to unexplained economic consequences.

The disclosure requirements are further not unduly burdensome because, like the State in *Zauderer*, Midland is not compelling Headroom to speak. Headroom has already made a factual determination that particular conduct violates its stated CSA, and the disclosure requirements "ha[ve] only required them to provide somewhat more information than they [have] otherwise be[en] inclined to present." *Zauderer*, 471 U.S. at 650. The Act merely requires that Headroom enhance its existing infrastructure for enforcement of its CSA by providing a detailed definition of such standards and a *post hoc* explanation for how a user has violated them. Prior to the Act, Headroom applied these standards without explanation, so the fact that Headroom makes "countless…[decisions] to remove…content" is irrelevant because Headroom simply needs to supply the speech expressing the reasoning they have already applied. R. at 11 The requirement

that they explain why a given user does not deserve to be heard only adds a minor increase in resources.

Thus, the factual disclosures are not unjustified or unduly burdensome.

3. The disclosure requirements are reasonably related to the Midland's legitimate interest in preventing deception of consumers.

"[A companies'] rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651. Both the explanation and enforcement disclosure requirements comport with the *Zauderer* standard because it is reasonably related to Midland's interest in preventing confusion among Midlandians, who are subject to exacting enforcement mechanisms with no explanation from Headroom. Prominent users accusing Headroom of viewpoint discrimination resulting in economic harm reported that they were banned due to seemingly innocuous content, including commenting on a controversial political candidate and endorsing a controversial documentary. Midland has a legitimate interest in ensuring Headroom's users are provided with enough information about "the terms under which [its] services will be available." *Id*.

Thus, the SPAAM Act's disclosure requirements may be justified under *Zauderer*.

II. The Content Moderation Restrictions of the SPAAM Act do not violate the Free Speech Clause of the First Amendment to the U.S. Constitution.

The FSC is a "constitutional safeguard…fashioned to assure unfettered interchange of ideas" in what is referred to as the marketplace of ideas. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (internal marks and citations omitted); *see also* discussion, *supra*, Part I; *U.S. v. Associated Press* ("AP"), 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Learned Hand, J.) (The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.").

This Court has found that the government prohibition in the FSC "not [to] impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom." *AP v. U.S.*, 326 U.S. 1, 20 (1945). In this case, "[n]either precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment" as to expressly permit Headroom's viewpoint discrimination under the safeguard. *Amalgamated Food Emps. Union v. Logan Valley Plaza*, 391 U.S. 308, 325 (1968).

This Court reviews FSC challenges by determining if the law is constitutional as applied to the litigants before proceeding to overbreadth. *U.S. v. Stevens*, 559 U.S. 460, 484 (2010) (Alito, J., dissenting). The CMR do not violate the FSC for three reasons. First, the First Amendment is not implicated by the SPAAM Act. Further, even if the First Amendment is implicated, the CMR survive the as-applied challenge because they satisfy intermediate scrutiny. Finally, the CMR survive the overbreadth challenge because Headroom has not met its heavy burden of showing substantial unconstitutional applications to third parties that will chill protected expression.

A. The Free Speech Clause is not implicated by the Content Moderation Restrictions because they neither compel Headroom to speak nor restrict Headroom from speaking, and because Headroom is not exercising any protected editorial judgment.

First Amendment free speech rights include "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705 (1977).

However, this Court has recognized that States may regulate the conduct of hosts of public speech, granted that the regulation does not affect the host's own message. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (*FAI*R), 547 U.S. 47, 63 (2006). *See also PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 88 (1980) (holding that a law recognizing a right of the public to "exercise state-protected rights of expression" at a shopping mall infringed on neither the shopping mall's "property rights nor their First Amendment rights").

This Court has generally struck down laws which affect the host's message in two categories. First, laws which compel speech are generally unconstitutional. *See, e.g., W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (invalidating a law which forced schoolchildren to participate in the Pledge of Allegiance because it "require[d] affirmation of a belief and an attitude of mind"). *See also Wooley*, 430 U.S. at 715 (invalidating a law which required the State motto on license plates). Second, this Court has identified that laws which restrict the host's ability to "publicly dissociate themselves from the views of the speakers" would raise constitutional concerns. *PruneYard*, 447 U.S. at 88.

This Court has also considered, as a factor of whether First Amendment-protected activity occurred, whether a law has infringed on "the exercise of editorial…judgment." *Mia. Herald Publ'g Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (defining "editorial judgment" as "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and the treatment of public issues and public officials -- whether fair or unfair").

The FSC is not implicated by the CMR in the present case for four reasons. First, because Headroom is not speaking for purposes of the First Amendment when it exercises its CSA. Second, because any argument that Headroom is compelled to speak by the CMR's grant of public access has been precluded by this Court. Third, because Headroom is not restricted by the CMR from producing its own speech. Finally, because Headroom is not exercising protected editorial judgment when it enforces its CSA.

1. Headroom is not "speaking" when it engages in viewpoint discrimination.

In *United States v. O'Brien*, this Court upheld a law forbidding destruction of Selective Service cards as applied to petitioner, who had burned his card in protest of the draft during the Vietnam War. 391 U.S. 367, 369–70 (1968). Upholding the law at issue, this Court explicitly

rejected the idea that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id*. at 376.

In *FAIR*, this Court held that requiring schools to host military recruiters regulated "conduct" because it did not "dictate the content of speech at all," rather it "affect[ed] what law schools must *do*--afford equal access to military recruiters--not what they may or may not *say*." 547 U.S. at 60. The State's regulatory powers do not end "merely because the conduct was in part…carried out by means of language." *Id*. at 62 This Court considered as "strong evidence" that the law regulated conduct, not speech, the fact that "[t]he expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it." *Id*.

Like the law at issue in *FAIR*, the CMR do not dictate the content of Headroom's speech but affect what Headroom must do: namely, Headroom must not engage in viewpoint discrimination. Headroom's intention alone that their conduct be meaningful is not sufficient for granting the expressive components of the conduct First Amendment protection. Users of Headroom would have no way of discerning why a particular post disappeared from the platform unless Headroom expressly divulged that information; the post could just as easily have been deleted by the user themselves. In the cases in the record, Headroom appends a content label to the post expressly stating what objectionable content the user post contains. The fact that the expressive component of Headroom's conduct, acting to align user content with the goals of the company, can only be achieved by the speech accompanying it is strong evidence that the law in fact regulates Headroom's conduct. The 13th Circuit should be affirmed because it correctly reasoned that "Headroom does not 'speak' when it censors, shadow bans, or eliminates users' accounts. Instead, it *suppresses* speech, which it has no First Amendment right to do." R. at 19.

Thus, the FSC is not violated because the SPAAM Act regulates conduct, not speech.

2. Headroom is not compelled to speak when restricted from removing third-party content hosted on its platform.

The FSC "does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner Broad. Sys. v. FCC* (*Turner I*), 512 U.S. 622, 657 (1994) (internal marks and citations omitted). In *Turner I*, this Court found relevant that "cable television does not suffer from the inherent limitations that characterize" other media, resulting in "no practical limitation on the number of speakers who may use" the forum. *Id*. at 639. The broadcasters, as hosts in the forum, were acting as a "gatekeeper"; thus, "simply by virtue of its ownership" of the forum, the host could "silence the voice of competing speakers with a mere flick of the switch." *Id*. at 656.

This Court has repeatedly held that private property " open to the public" "by the choice of its owner" may be subject to State regulation in order to protect First Amendment freedoms in the forum. *PruneYard*, 447 U.S. at 87–88. In *PruneYard*, this Court reviewed a right of access law, which permitted "individuals to exercise free speech…on the property of a privately owned shopping center to which the public is invited." *Id*. at 76. Finding the law did not violate the Constitution, the Court considered relevant that the shopping mall, "[a]s a result of advertising and the lure of a congenial environment," "induced [25,000 people] to congregate daily" in order to "take advantage of the numerous amenities offered." *Id*. at 78.

This finding is especially likely where there is a low risk of attribution of the third-party speech to the host by those who consume the message. *See FAIR*, 547 U.S. at 65. *See also PruneYard*, 447 U.S. at 87 (concluding "the shopping center…is open to the public," so the views expressed by individuals exercising free speech "thus will not likely be identified with those of the

owner"); *Turner I*, 512 U.S. at 655 (finding "little risk" that users "would assume that the broadcast stations…convey ideas or messages endorsed by the cable operator").

The fact that social media companies are a critical pathway of communication is irrefutable. *See Packingham*, 582 U.S. at 104. Similar to the broadcasting companies in *Turner I*, the size limitations that plague other mediums are nonexistent on social media companies, making room for an infinite number of speakers. Also similar is the role of Headroom as a gatekeeper, silencing the voice of those with whom it disagrees with the flick of a switch.

Headroom also resembles the shopping mall in *PruneYard* because it holds itself out as willing to serve the general public, luring millions to congregate on its companies every day to take advantage of its offerings. The attribution risk to Headroom is similarly low because users are aware that they are viewing the personal content of individual owners of each account. Like in the case of the cable operator, Headroom's users are unlikely to assume that the company endorses the individual user-created content.

In *Miami Herald*, this Court invalidated a Florida right-of-reply statute because it told a newspaper "what it can [and cannot] print." *Mia. Herald*, 418 U.S. at 256 (internal citations and marks omitted). This Court considered the fact that "decisions [have to be] made as to limitations on the size and content of the paper" particularly persuasive to its holding. *Id*. at 258 . "A newspaper is more than a passive receptacle or conduit for news, comment, and advertising." *Id*. at 258.

In *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, this Court considered an order which awarded space in PG&E's monthly newsletter, included with their billing materials and resembling a "small newspaper," only to a group formed to oppose PG&E. 475 U.S. 1, 5, 13 (1986). A plurality found that the order "impermissibly require[d] [PG&E] to associate with speech with

which [it] may disagree." *Id*. at 15. This Court again found characteristics of the forum at issue particularly relevant. *Pac. Gas*, 475 U.S. at 18 (regulation "forces [PG&E] to disseminate [opposition] speech in envelopes that [PG&E] owns and that bear [PG&E's] return address").

Mia. Herald is inapposite to the present case for the same reason it was distinguished in *PruneYard*. 447 U.S. at 88 ("intrusion into the function of editors" was "obviously…not present" where the speech host was open to the general public) (internal marks and citations omitted). Further, the holding is couched in terms of free press, not free speech. *Mia. Herald*, 418 U.S. at 258. *Pacific Gas* is distinguishable because this Court found the regulation at issue to be a content-based law. 475 U.S. at 12, 16–17; *see infra* Part II, B, 1. Further, Headroom's forum does not resemble the newsletter because user content is credited to each individual that posts it, not Headroom. "[U]nlike newspapers," social media companies "hold themselves out as organizations that focus on distributing the speech of the broader public." *Biden*, 141 S. Ct. at 1224.

In *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Bos.*, this Court considered a State public access law in the context of a parade organizer. 515 U.S. 557, 570 (1995). This Court found that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message." *Id*. at 569. Once again, this Court analyzed the forum in which the speech was occurring. *See id*. at 568, 574, 576 (defining "parade" as "marchers who are making some sort of *collective point*"); (describing the parade organizer as a "composer" who "selects the expressive units of the parade from potential participants"); (observing a parade "does not consist of individual, unrelated segments… transmitted together for individual selection by…the audience") (emphasis added).

Just as this Court distinguished *Turner I* in *Hurley* (515 U.S. at 577–78), this Court should distinguish this case from *Hurley*. Unlike the petitioners in *Hurley*, Headroom does not "disclaim

any intent to exclude…as such." 515 U.S. at 572. Further, Headroom's content is the opposite of the parade's: it is transmitted together based on the individual preferences of the audience. This is a situation where "[t]he freedom asserted by" Headroom brings it "into collision with rights asserted by" another individual. *Barnette*, 319 U.S. at 630. This Court has recognized that those conflicts between competing individual rights "most frequently require intervention of the State to determine where the rights of one end and those of another begin." *Id*.

Thus, the CMR do not violate the FSC because they do not compel Headroom to speak by restricting its ability to remove third-party speech from its platform.

3. Headroom is not restricted from speaking to denounce user content.

When finding that a forum's ability to speak has been restricted by forced access, this Court has found particularly relevant the spatial limitations which prohibit, by proxy of the regulation, the forum from responding to the accommodated speech. *See Pac. Gas*, 475 U.S. at 24 (Burger, J., concurring in the judgment) (newsletter at issue was a "forum of inherently limited scope"). *See also Mia. Herald*, 418 U.S. at 258 (discussing "limitations on the size and content of the paper"); *NetChoice II*, 34 F.4th at 1205–07, 1222 (prohibiting social media companies from changing its "user rules, terms, and agreements more than once every 30 days" "impermissibly burden[ed] [the] companies' right to" edit "the messages they express.") (internal marks and citations omitted).

The spatial limitations that apply to the newspaper right of access cases do not apply to Headroom because the platform is virtually infinite in size. Further, the CMR do not include any provisions which restrict Headroom's ability to communicate regarding content it does not agree with. The CMR merely regulate the manner and the place in which Headroom may disagree: not by removing third-party content and not by appending speech on top of user speech.

Thus, the FSC is not violated because Headroom is not prohibited from speaking its own message.

4. Headroom is not exercising any protected editorial judgment when it exercises its content moderation policies.

Intrusion on editorial judgment has been considered by this Court as a factor in whether First Amendment-protected expression has taken place. *Mia. Herald*, 418 U.S. at 258. However, any argument that editorial judgment is a distinct protected category of expression overstates this Court's past holdings. *See, e.g., Turner I*, 512 U.S. at 636 (holding that since a cable operator "exercis[es] editorial discretion over which stations or programs to include in its repertoire," among other factors, they were engaged in protected activity) (internal marks and citations omitted). While both *Mia. Herald* and *Turner I* consider editorial discretion, neither case carved out editorial discretion as a wholly separate category of protected First Amendment expression. This Court should hesitate to adopt this categorical approach because "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Even assuming that editorial judgment is a category of protected expression, Headroom is nothing like the newspaper editors that the category would appear to protect. For instance, the *Miami Herald* had to take into consideration the "cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print." 418 U.S. at 256. *See also AP*, 52 F. Supp. at 372 (Learned Hand, J.) ("There is no part of a newspaper which is not the handiwork of those who make it up.").

By contrast, Headroom's content is by and large the handiwork of its millions of users. Headroom spends no time selecting content, choosing appropriate topics, or deciding whether and what treatment to give particular issues. Instead, individual users make these decisions, and then Headroom acts through algorithms, which engage in viewpoint discrimination *after* the speech has already been published. Those algorithms are also responsible for organizing and prioritizing the

content on the platform based on user preferences and data mining, not based on any independently exercised "judgment."

Thus, the FSC is not violated because Headroom is not exercising any sort of protected editorial judgment.

B. Even if the SPAAM Act's content-neutral prohibition on censorship infringes Headroom's constitutional rights, it should still be upheld because it survives intermediate scrutiny.

Content-based laws "that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" are inherently suspect and subject to "the most exacting scrutiny." *Turner I*, 512 U.S. at 643, 642 (internal citations and marks omitted). By contrast, content-neutral laws, which "confer benefits or impose burdens on speech without reference to the ideas or views expressed," "are subject to an intermediate level of scrutiny…because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from public dialogue." *Id*. (internal citations and marks omitted).

In the First Amendment context, this Court upholds regulations where the "content-neutral" restriction "furthers an important or substantial governmental interest," which is "unrelated to the suppression of free expression," and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to" achieve the State's interest. *U.S. v. Albertini*, 472 U.S. 675, 687–88 (1985) (citing *O'Brien*, 391 U.S. at 377) (internal marks omitted).

1. The Content Moderation Restrictions are content-neutral because they apply to all social media companies alike, regardless of viewpoint.

This Court identifies content-based restrictions by applying a "commonsense" test: "whether it targets the speech based on its communicative content," meaning it "draws distinctions based on the message the speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A content-based rule may discriminate based on viewpoint, or the rule may prohibit "an entire topic."

Id. at 169. A regulation is content-neutral "even if it has an incidental effect on some speakers or messages but not others…so long as it is *justified* without reference to…content of the…speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal citations omitted). Midland's purpose "is the controlling consideration." *Id.* . However, a finding of facial content neutrality does not end the inquiry because "evidence that an impermissible purpose or justification underpins a facially content-neutral restriction" will also lead this Court to find that a regulation is content-based. *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022).

The CMR are content-neutral because "there are no content-discriminatory classifications." *Austin*, 142 S. Ct. at 1472. In an undisturbed finding in the present case, both the District Court and the 13th Circuit correctly concluded that the SPAAM Act is content-neutral, because the Act's "provisions apply[] equally to social media companies regardless of ideological or political viewpoint." R. at 14. Further, Midland justified the SPAAM Act after its legislative hearings as intending to "ensure the protection of our democratic values." R. at 5. The purpose of the CMR is thus to protect Midlandians' First Amendment rights in a public forum, one that has been deemed permissible by this Court. *See, e.g.,* H*ague v. Comm. for Indus. Org.,* 307 U.S. 496, 515 (1939) (guaranteeing the use of public forums for expressive purposes is appropriate "[w]herever the title of streets and parks may rest").

Thus, the CMR are content-neutral, and intermediate scrutiny applies.

2. Midland has an important State interest in protecting its citizens' First Amendment rights in a public forum.

This Court reaffirmed in *Turner Broad. Sys. v. FCC* (*Turner II*) that "promoting the widespread dissemination of information from a multiplicity of sources" is "an important governmental interest." 520 U.S. 180, 189–90 (1997); *see also AP*, 52 F. Supp. at 372 (Learned Hand, J.) (describing this interest as "one of the most vital of all general interests"). This Court has

described this interest as "a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 663. This interest is "always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Id*. at 664.

Any argument that *Mia. Herald* demands a contrary result is inapposite. 418 U.S. at 250 (finding the interest in public debate insufficient to justify Florida's right of access statute). The law in that case was content-based, this Court did not apply intermediate scrutiny, and this Court held on narrow tailoring grounds without conceding the important interest. *Id*. at 256, 258.

Thus, Midland satisfies the important interest prong of intermediate scrutiny.

3. That important interest is unrelated to the suppression of expression.

In *O'Brien*, this Court found the government interest in regulating destruction of draft cards was unrelated to the suppression of expression because the regulation "substantially further[ed] the smooth and proper functioning" of the enlistment system and the regulation "specifically protect[ed]" that interest. 391 U.S. at 381. Midland's stated interest in protecting citizens' First Amendment rights is unrelated to the suppression of expression because the State seeks to ensure proper functioning of public forums by enhancing expressive capability with equal access to the forum. It is Headroom who, through its enforcement of the CSA, seeks to suppress speech. Midland is specifically protecting speech in the forum with its restriction on Headroom's ability to conduct viewpoint discrimination. Thus, Midland's important interest in guaranteeing First Amendment rights in a public forum is unrelated to suppression of expression.

4. The incidental restriction on Headroom's First Amendment rights is no greater than is essential to advance Midland's important interest.

In order to satisfy this prong, Midland must show that the CMR "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S.

at 799. The State "must demonstrate that the recited harms are real…and that the regulation will in fact alleviate these harms in a direct and material way," but there is no duty to "make a record…to accommodate judicial review." *Turner I*, 512 U.S. at 664, 666. This Court will not invalidate a regulation "simply because there is some imaginable alternative that might be less burdensome on speech." *Albertini*, 472 U.S. at 689.

Courts must accord "substantial deference" to the "predictive judgments" of the legislature because the legislature is "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon…complex and dynamic" issues. *Turner I*, 512 U.S. at 665 (internal marks and citations omitted). So long as the regulation "does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive… means of serving the statutory goal." *Hill v. Colo.*, 530 U.S. 703, 726 (2000). *But see Pac. Gas*, 475 U.S. at 20 (finding the content-based law was not narrowly tailored because "the State cannot advance some points of view by burdening the expression of others") (internal citations omitted).

The harms addressed by the statute have been made clear by Midland's legislative hearings, which revealed several instances of viewpoint censorship. Midland has not foreclosed any means of communication; in fact, it is not at all clear "that the [CMR] will necessarily impede, rather than assist," speaking *Id*. at 727. Therefore, Midland has no duty of demonstrating that the CMR are the least restrictive means. In *Pac. Gas*, this Court rejected the narrow tailoring of the State's compelling interest of "promoting speech by making a variety of views available." 475 U.S. at 20. Any argument that *Pac. Gas* dictates a different outcome is inapposite because there this Court applied strict scrutiny. *Id*. at 19.

Thus, the CMR satisfy the tailoring prong of intermediate scrutiny.

C. The SPAAM Act is not overbroad because Headroom cannot meet its especially heavy burden of showing that a substantial number of the provisions' applications are unconstitutional.

A "facial challenge must establish that no set of circumstances exists under which the law would be valid" or that the law is impermissibly "vague." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (internal marks and citations omitted); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) . Instead, Headroom has challenged the law as overbroad.

To invalidate, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). This Court examines "application[s] to real-world conduct, not fanciful hypotheticals" for a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Stevens*, 559 U.S. at 485 (2010); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984).

The principle of overbreadth is an exception to the fundamental rules governing constitutional adjudication. *N.Y. v. Ferber*, 458 U.S. 747, 768 (1982). *U.S. v. Sineneng-Smith*, 140 S. Ct. 1575, 1583 (2020) (Thomas, J., concurring) (Overbreadth "lacks any basis in the Constitution's text, violates the usual standard for facial challenges, and contravenes traditional standing principles"). Thus, its use "must be justified by weighty countervailing policies" because it is "manifestly, strong medicine" that should be used "only as a last resort." *Ferber*, 458 U.S. at 768 (internal marks and citations omitted); *Broadrick*, 413 U.S. at 613.

Overbreadth depends upon "the danger of tolerating, in the area of First Amendment freedoms, the existence of a *penal statute* susceptible of sweeping and improper application." *Button*, 371 U.S. at 433 (emphasis added). Therefore, the doctrine is applied "somewhat less rigid[ly] in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Broadrick*, 413 U.S. at 614. This Court will not

invalidate a carefully considered legislative decision "merely because [it] can conceive of a few impermissible applications." *Mass. v. Oakes*, 491 U.S. 576, 595 (1989) (Brennan, J., dissenting). This Court has invalidated as overbroad restrictions that "prohibit[] *all* protected expression" *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987). This Court considers "the penalty to be imposed [as] relevant" to an overbreadth analysis. *Ferber*, 458 U.S. at 773.

"Claims of facial invalidity often rest on speculation, especially where "they raise a risk of premature interpretation of statutes on the basis of factually barebones records," thereby "threaten[ing] to short circuit the democratic process. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 451 (2008) (internal marks and citations omitted).

The only First Amendment-protected expression that Headroom has alleged will be infringed by the SPAAM Act is their own. The State courts have had no chance to pass on this issue because the matter has reached this Court on a preliminary injunction to enforcement. Therefore, there are no "real" examples of unconstitutional application to be offered. The SPAAM Act carves out exceptions for speech not traditionally protected by the First Amendment, so any argument that the statute requires Headroom to host unprotected speech is inapposite. *See R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992).

By contrast, the SPAAM Act does not prohibit speech or expression; the SPAAM Act protects expression by prohibiting viewpoint discrimination. Headroom argues that the statute is overbroad because it "protects too many people in too many places," but this Court has already dispensed of that argument as having "no constitutional significance." *Hill*, 530 U.S. at 730–31. Here, as in *Hill*, "the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive." *Id.* at 731. Further, criminal sanctions are not available in this case, making it even more unlikely that the SPAAM Act would chill

expression. The $10,000 per day penalty pales in comparison to the amount of fines paid by a typical social media company. For instance, Meta (formerly Facebook) has paid significant single-penalty sums, including $5 billion in 2021. Press Release, Federal Trade Commission ("FTC"), FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019) (https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook) (last accessed October 7, 2023).

This Court should thus "consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant[]" expressions. *Sullivan*, 376 U.S. at 270. This Court, writing in the backdrop of WWII, warned that, "[s]truggles to coerce uniformity of sentiment…have been waged by many good as well as evil men." *Barnette* 319 U.S. at 640. "Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id*. at 641.

In stark contrast to these policies, Headroom would have this Court allow them to eliminate speech with which it disagrees. However, this Court "would…more faithfully interpret the First Amendment by holding that at the very least it leaves the people…free to…discuss public affairs with impunity." *Sullivan*, 376 U.S. at 296 (Black, J., concurring). Invalidation in this case would allow Headroom to use the First Amendment as a sword to engage in viewpoint discrimination. The SPAAM Act allows citizens of Midland to speak their mind on matters of public concern.

Thus, the SPAAM Act is not overbroad in unconstitutional applications compared to its plainly legitimate sweep.

CONCLUSION

Because the First Amendment should never be used to permit viewpoint discrimination, the 13th Circuit should be affirmed.

Dated: October 9, 2023

Respectfully Submitted,

s/ Team 22

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