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 TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

BRIEF FOR RESPONDENT

Team #27
Counsel for the Respondent

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QUESTIONS PRESENTED

I. Under the United States Constitution, does the Speech Protection and Anti-Muzzling Act violate the Free Speech Clause of the First Amendment when it requires purely factual disclosures from common carriers?

II. Under the United States Constitution, does the Speech Protection and Anti-Muzzling Act violate the Free Speech Clause of the First Amendment when it regulates conduct and is related to an important government interest?

STATEMENT OF CASE

A. Procedural History

On March 25, 2022, Headroom, Inc. filed suit in the United States District Court for the District of Midland seeking a preliminary injunction against Edwin Sinclair, Attorney General for the State of Midland in response to the Midland Legislature passing the Speech Protection and Anti-Muzzling Act ("SPAAM Act"). R. at 7. On May 29, 2022, the Honorable Judge Roy Ashland granted plaintiff's motion for a preliminary injunction. R. at 15. Defendant made a timely appeal to the United States Court of Appeals for the Thirteenth Circuit. R. at 16. On March 30, 2023, the appellate court reversed the district court's holding in favor of appellant and vacated the preliminary injunction. R. at 19-20. Following the appellate court's reversal, a timely petition was filed to the United States Supreme Court by the Appellee/Petitioner, Headroom, Inc. R. at 21. On August 14, 2023, the United States Supreme Court entered an order granting writ of certiorari. *Id.*

B. Statement of Facts

Headroom, Inc. ("Headroom") is a major social media company founded and headquartered in Bartlett, Midland. R. at 2. As one of the most popular social media companies in America with over seventy-five million monthly users, Headroom has become a major center for both business and social interaction amongst its users. R. at 2-3. Headroom set itself apart from other social media platforms through its mission to "provide a space for everyone to express themselves to the world" and "to promote greater inclusion, diversity, and acceptance in a divided world." *Id.* Through a virtual reality environment that users access using virtual-reality headsets, Headroom users can post content, solicit advertisers for their profile, accept donations from other users, and conduct business activities from their accounts. R. at 3.

Using algorithms to both categorize and order content, Headroom is able to manage the content that its users see along with deprioritize any information that Headroom's artificial intelligence flags as potentially violating its community standards. *Id.* Headroom's community 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" along with anything that it considers "disinformation." *Id.* at 3-4. Should Headroom's artificial intelligence flag a user's content as potentially violating the community standards or contain disinformation, users face a variety of penalties. R. at 4. Headroom will add commentary to a user's content stating that the content potentially violates the community standards and deprioritize it on the algorithms. *Id.* The worst penalties that Headroom utilizes include demonetizing the user's account, temporary suspension, restricting other users from viewing said content, or removal and banning from the Headroom platform entirely. *Id.*

After many prominent Midland users accused Headroom of discriminating against them and impacting their businesses based on their viewpoints, the Midland legislature passed the Speech Protection and Anti-Muzzling Act. R. at 4-5. The SPAAM Act was passed in order to protect the livelihoods and fundamental rights of their citizens from "excessive censorship by tech behemoths" and to "establish a system of oversight that guarantees the protection of civil liberties." *Id.* The SPAAM Act restricts social media platforms' ability to alter their users' content and prohibits any major social media platform from "censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" because of "viewpoint." R. at 6. The Act further requires social media platforms publish community standards with "detailed definitions

and explanations for how they will be used, interpreted, and enforced." *Id.* When the social media platforms enforce their penalties, they must "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. *Id.*

C. Standard of Review

This matter involves the constitutional validity of the State of Midland's Speech Protection and Anti-Muzzling Act. The issues at bar relate specifically to a potential violation of the First Amendment. The Court "'has an obligation to challenged judgements against the guarantees of the First Amendment[],' and in doing so 'this Court cannot avoid making an independent constitutional judgement on the facts of the case.'" *Rosenbloom v. Metromedia*, 403 U.S. 29, 54 (1971) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)). As a result, this Court reviews the decisions of the lower courts under a *De Novo* standard.

SUMMARY OF ARGUMENT

Through the First Amendment of the Constitution, the right to be free from governmental intrusion in speech is a cornerstone of American democracy. Interpretations of the First Amendment have established that the clause applies strictly to governmental restriction of speech, and not to the speech of private actors. However, such privilege afforded to private entities is not immeasurable. In fact, there are several ways in which the First Amendment does not act as a complete barrier from government involvement. Both this Court and the common law has recognized the concept of "common carriage" as one of these exceptions. Common carriers are entities which hold themselves out to the public and do so non-discriminately. Even if an entity does not fall under this doctrine, the government may regulate the speech of private parties when the speech involves purely factual disclosures. Under this Court's decision in *Zauderer*, a test was established to determine when a state may compel disclosures for commercial speech. The *Zauderer* test requires that the disclosure must be purely factual and uncontroversial, not unjustified, or unduly burdensome, and must be "reasonably related to the State's interest in preventing deception of consumers." Because the SPAAM Act only requires slightly more detail in Headroom's community standards and a reasonable description of the reasons for its enforcement, the Act is constitutionally valid under both the First Amendment and satisfies the *Zauderer* standard.

Further, any legislation passed by the United States government generally cannot hinder an individual's rights under the Free Speech Clause of the First Amendment. Regulations that do not compel speech nor suppress speech fall within the constitutional boundary and will be upheld. Additionally, the mere requirement of hosting third-party speech does not meet the threshold of compelled or restricted speech. Since social media content moderation does not rise to the unique

expressive level that a parade may engage in nor is it analogous to newspapers, social media companies are not subject to the same First Amendment protections.

Lastly, if the government enacts a law which targets the content of speech, the law is deemed to be content based and subject to strict scrutiny. However, if the law makes no mention of any particular speech or substance, the law is considered content neutral and is reviewed under intermediate scrutiny. Since the SPAAM Act was passed without requiring any particular speech or content, it is reviewed under an intermediate level of scrutiny and must be narrowly tailored to an important government interest. When reviewed under intermediate scrutiny, the SPAAM Act does not violate the First Amendment because its provisions are tailored to an important governmental interest and does not burden substantially more speech than necessary to further Midland's interest.

ARGUMENT

I. THE SPEECH PROTECTION AND ANTI-MUZZLING ACT IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE IT REGULATES COMMON CARRIERS.

One of the strongest foundational liberties that the United States was built upon is found in the First Amendment of the Constitution. The right to be free from governmental intrusion in speech was a vital part of this country's founding, and the Amendment explicitly states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amen. I. Also referred to as the Free Speech Clause, it serves to "…constrain[] governmental actors and protect[] private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). The history and understanding surrounding the Free Speech Clause have established that the Clause constrains "only governmental abridgements of speech. The Free Speech Clause does not prohibit private abridgement of speech." *Id.* at 1928. However, the First Amendment rights of private parties are not exclusively protected from government involvement in speech. In fact, the Supreme Court has long recognized several areas where the First Amendment does not act as a complete shield for private parties.

The concept of common carriage is a historic common law doctrine one in which private companies have broadened obligations to the general public concerning freedom of speech. *Biden v. Knight First Amen. Inst*., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring). The basic understanding of what constitutes common carrier status is "the 'requirement [to] hold[] oneself out to serve the public indiscriminately.'" *U.S. Telecom. Assoc. v. FCC*., 825 F. 3d 674, 740 (D.C. Cir. 2016) (quoting *Verizon v. FCC*, 740 F. 3d 623, 651 (D.C. Cir. 2014)). Traditionally, transportation services like railways and communications industries like telephone companies fell into the category of common carriers. *Biden*, 141 S. Ct. at 1223. However, with the advent of the internet, common carrier status has expanded to encompass new technologies. In fact, this Court

has noted that regulations imposed on common carriers may arise "even for industries not historically recognized as common carriers, when a 'business, by circumstances and its nature, . . . rise[s] from private to be of public concern.'" *Biden*, 141 S. Ct. at 1223 (quoting *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914).

Major social media companies, like Headroom, fall into the category of modern common carriers as, by design, they serve the public and carry information from user to user. By holding themselves out to the public as a community that welcomes and serves all, Headroom places itself in the distinct privilege of acting as the modern public square. In passing the Speech Protection and Anti-Muzzling Act, Midland acted under valid and constitutional grounds by finding that major social media companies are common carriers and by requiring factual disclosures be provided to its citizens.

A. The Speech Protection And Anti-Muzzling Act Is Constitutional Under The First Amendment Because Major Social Media Companies Are Common Carriers.

Though private parties have generally remained untouched by the speech constraining the government under the broad protections of the First Amendment, certain characteristics have placed private parties into the government's restricted realm. Common carrier status has long been imputed to those of a "quasi-public character, which arises out of the undertaking to carry for all people indifferently." *Nat'l Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 533 F. 2d 601, 608 (D.C. Cir. 1976). Though typically associated with transportation companies and the communication sector, many social media platforms meet the qualifications necessary to constitute common carrier status. Major social media platforms today hold the distinction of providing a platform for "historically unprecedented amounts of speech." *Biden*, 141 S. Ct. at 1221. Even more unprecedented is the "concentrated control of so much speech in the hands of a few private parties." *Id.*

This widespread power has transformed major social media companies into the public square of the modern age. In fact, in one of the first cases dealing with the First Amendment and the internet, this Court determined that social media companies serve as one of the most important public spaces for the exchange of views and speech. *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). This Court's decision in *Packingham* concerned a state law that made it a felony for a registered sex offender to access social media websites. *Id.* at 101. The statute was enacted by the legislature in an effort to keep convicted sex offenders away from minor children on the internet. *Id.* at 108. The Court held that the statute was unconstitutional, because "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* When looking at the scope of social media, the Court noted that those websites were the "modern public square" and allow anyone "with an internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Packingham*, 582 U.S. at 107 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

Serving as the public square of the modern age has also placed major social media companies into a unique position to serve the public at large. By offering "…entertainment, or other services to the public . . . in general," these digital platforms place themselves into a category of providing their platform services to all individuals and serving as a place of public accommodation. *Biden*, 141 S. Ct. at 1225 (quoting Black's Law Dictionary 20 (11th ed. 2019)). This service as a public platform differs from more traditional carriers like newspapers, in that social media companies primarily "focus on distributing the speech of the broader public" rather than curating specific points. *Id.* at 1224. By holding space and providing a platform for public speech, major social media companies stay true to the common law understanding that these public

accommodations hold a "duty to serve without unjust discrimination . . . and [] extends to any business that holds itself out as ready to serve the public." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2329 (2023) (Sotomayor, J., dissenting). This service of the public, however, does not place a burden on social media companies nor leave them without protections for providing a neutral speech forum. Rather, the Federal government has granted special protections to common carriers in the form of immunity from lawsuits that stem from the hosting of others' speech on their platforms. 141 S. Ct. at 1223. These protections provide further support for establishing common carrier status with the largest social media companies.

Some legal scholars have also posited that assigning common carrier status for companies with substantial market power is appropriate. *Id.* at 1222. This is because major social media companies benefit from a highly centralized market with almost no competition, which creates both "substantial barriers to entry" and major concerns around speech limitations. *Id.* at 1224. With this substantial market power, social media companies can control a significant amount of its user's speech. *Id.* While major social media companies are not the sole distributor of speech, when looking at substantial market power for these types of companies, "what matters is whether the alternatives are comparable." *Id.* at 1225. As Justice Thomas concluded, "[f]or many of today's digital platforms, nothing is." *Id.*

The relative newness of these platforms adds a layer of complexity in determining whether they fall under common carriage or a private company. Justice Thomas himself acknowledged that the application of these old doctrines to new platforms was not a straightforward process. *Id.* at 1221. Yet, the combined history of the common carriage doctrine and its application support a finding that major social media companies are common carriers. The hallmark characteristic of a common carrier is when the company holds itself out to serve the public indiscriminately, and

major social media companies, like Headroom, do just that. *U.S. Telecom. Assoc.*, 825 F. 3d at 740.

Headroom holds itself out as a community that is designed to provide a space for everyone to express themselves to the world, declaring that its goal is to "promote greater inclusion, diversity, and acceptance in a divided world." R. at 2-3. Between its substantial market power and the variety of speech that it hosts, Headroom overwhelmingly succeeds in providing that public space. Through its unique virtual reality mechanics and the virtual reality headsets required for users to access the website, Headroom embraces its role as the modern public square and is able to truly host users acting as the modern "town crier" on its vast platform. As a result, the SPAAM Act is constitutional because it properly regulates common carriers.

B. The Speech Protection and Anti-Muzzling Act's Disclosure Requirement Should Be Analyzed Under The Zauderer Test Because It Governs Commercial Speech That Is Factual And Not Unduly Burdensome.

While commercial speech is undoubtedly protected by the First Amendment, this Court carved out a special exception for when states may restrict commercial speech and not violate the Free Speech Clause of the First Amendment. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637-38 (1985). The resulting test from *Zauderer* provided guidance on when a state may compel disclosures for commercial speech. *Id.* at 651. The disclosure must be purely factual and uncontroversial, not unjustified, or unduly burdensome, and must be "reasonably related to the State's interest in preventing deception of consumers." *Id.* The SPAAM Act's disclosure requirements meet this threshold, as they are not unduly burdensome and concern purely factual and uncontroversial disclosures.

In *Zauderer*, an attorney contested the constitutionality of professional disciplinary rules set forth by the Ohio Supreme Court after he was reprimanded for failing to comply with a rule requiring certain disclosures on attorney advertisements. *Id.* at 650. The original advertisement

made no mention of the differences between "legal fees" and "costs," and the Ohio Supreme Court found the attorney's chosen language to be misleading when he said, "if there is no recovery, no legal fees are owed by our clients." *Id.* at 652. Such language was a violation of Ohio's professional rules governing advertising. *Id*. The Court found that the disclosure requirement did not violate the First Amendment, as the State's demand governed a general standard to apply to advertisements in "the form of a requirement that appellant include in his advertising purely factual . . . information about the terms under which his services will be available." *Id.* at 651. The Court further noted that there was a material difference between a disclosure requirement and prohibitions regarding speech, stating that the Ohio Supreme Court did not prevent attorneys from speaking out but rather "required them to provide somewhat more information than they might otherwise be inclined to present." *Id.* at 650.

While the *Zauderer* test is fairly deferential to state disclosure requirements, the Court has not found every disclosure to be factual. In *Nat'l Inst. of Family and Life Advocates v. Becerr*a, unlicensed and licensed crisis pregnancy centers in California challenged a state law concerning mandatory disclosures to patients that the centers would be bound to. 138 S. Ct. 2631, 2370 (2018). The law required that licensed crisis pregnancy centers in the state provide a notice and disclosure to patients that informed them of the state's public programs regarding abortion and other family planning services and be available in several different languages. *Id.* at 2369. The Court found that the standard in *Zauderer* did not apply because the notice was not limited to purely factual information and uncontroversial information. *Id.* at 2372. This was because the notice required the licensed facilities to "disclose information about state-sponsored services-including abortion, anything but an 'uncontroversial' topic." *Id.*

Should the disclosures be considered purely factual and not uncontroversial, they must still be reasonably related to the state's interest and not unduly burdensome or unjustified. *Zauderer*, 471 U.S. at 651. The Court clarified that disclosures that are unduly burdensome would serve to "chill" instances of protected commercial speech and be improper, but the disclosure will survive the constitutional scrutiny if the requirements of the disclosure are reasonably related to the state's interest in preventing deception of consumers. *Id.* In that analysis, the burden is on the state to show that reasonable relationship. *Becerra*, 138 S. Ct. at 2377.

Looking again at *Becerra*, the Court found that California's disclosures governing unlicensed crisis pregnancy centers was unduly burdensome. *Id.* Because the state's unlicensed disclosure required a "government-scripted" disclosure, only covered a narrow subset of speakers, and applied to "all print and digital advertising materials" for an unlicensed facility, the Court determined that the provision was unduly burdensome and did not match the state's interest in informing pregnant women that they were receiving care at an unlicensed facility. *Id.* at 2377-78.

When looking to the language of the SPAAM Act, the disclosures govern purely factual decisions by the social media platform. Midland Code § 528.491(c). The disclosures require companies like Headroom, Inc. to explain "what standards were violated, how the user's conduct violated the platform's community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen." *Id.* § 528.491(c)(2). Like the disclosure requirement in *Zauderer*, the disclosure only requests somewhat more information than what Headroom previously would have provided to users that its artificial intelligence algorithm deemed to have violated the community standards.

Further, the disclosure requirements in the SPAAM Act are not unduly burdensome and are reasonably related to Midland's interest in protecting their citizens. The Act requires that

community standards be clear, with "detailed definitions and explanations for how they will be used, interpreted, and enforced." *Id*. § 528.491(c)(1). Coupled with Midland's interest in protecting the free speech rights and livelihoods of its citizens, the SPAAM Act's disclosure requirement meets the deferential standard set out in this Court's decision in *Zauderer*. Unlike in *Becerra*, where the disclosures were unduly burdensome and unjustified because California mandated specific language to be used and could not show a rational relationship, Headroom will not be unduly burdened by these disclosures. The SPAAM Act does not dictate how Headroom must describe its Community Standards policy. Rather, it requires that more information be added for consumer disclosure. Furthermore, Headroom will not be unduly burdened because the same algorithms that it uses to categorize content shown to users are also utilized to deprioritize users who violate the Community Standards. As a result, the SPAAM Act passes the requirements set forth by *Zauderer* and is constitutional under the First Amendment.

II. THE SPAAM ACT IS CONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE IT DOES NOT COMPEL SPEECH FROM MAJOR SOCIAL MEDIA COMPANIES.

Through the Free Speech Clause of the First Amendment, both individuals and groups are protected from governmental interference in their speech, allowing those citizens to exercise the right to be silent or to speak freely. U.S. Const. Amend. I. This is because the Free Speech Clause "rests on the assumption that the widest possible dissemination of information from diverse . . . sources is essential to the welfare of the public." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). This sentiment is found in the compelled speech doctrine, which established that the government cannot force any individual or group to speak a message that they do not support. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Although the government cannot regulate constitutional speech, it can regulate conduct. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*., 547 U.S. 47, 60 (2006). In fact,

"[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Id.* at 61. Moreover, it has also been established that messages expressed by others are not a reflection of the views held by the party that hosts the speech. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). Should any government regulation seek to "suppress, disadvantage, or impose differential burden[s] upon speech because of content," they are considered content based and are subjected to strict scrutiny. *Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). However, should a regulation be passed that does not relate to any particular content of speech, that is considered content neutral and subjected to intermediate scrutiny. *Id.*

By passing the SPAAM Act, the Midland legislature validly acted within the bounds of its constitutional authority by seeking to regulate the conduct that Headroom engaged in when it restricted the speech of users.

A. The SPAAM Act Is Constitutional Under The Free Speech Clause Of The First Amendment Because It Regulates Headroom's Conduct And Not Speech.

Generally, the United States government may not regulate the speech of private actors. Protected under the shield provided by the First Amendment, individuals and groups are able to choose what they want to say and decide whether they want to say it. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). While there are limitations to what speech individuals and groups are able to have constitutionally protected, this principle of non-intrusion by government actors has been upheld stringently in regard to the press.

In the 1974 case *Miami Herald Publishing Company v. Tornillo*, a law enacted by the Florida legislature from 1913 was at the center of the dispute. 418 U.S. 241, 248 (1974). A political candidate brought suit against a newspaper under a little-used "right to reply" statute, which required that political candidates whose personal character was attacked were entitled to demand

a reply in the newspaper printed free of cost. *Id.* at 244. The Court found the statute to be a violation of the First Amendment and an intrusion into the newspapers' editorial judgment. *Id.* at 257-58. While the Court noted that "[a] responsible press is an undoubtedly desirable goal," it was not a power granted to the government and not found in the Constitution. *Id.* at 256. The Court reasoned that the history of the freedom of the press found within the First Amendment supported the newspaper's right to choose what material to include in its content. *Id.* at 257-58. However, when the freedom of the press is not implicated, sometimes the manner in which one party speaks is sufficient to prevent another party's free speech rights.

In *Hurley*, the Boston Irish-American Gay, Lesbian and Bisexual Group were denied participation in a veteran's parade put on by a private organization. 515 U.S. at 560-61. The Council refused to place the group in the parade because they did not want to endorse a message that they did not support. *Id.* at 562. This Court held that parade organizers could not be forced to host the group because it is "the choice of the speaker not to propound a particular point of view, [and] that choice is presumed to lie beyond the government's power of control." *Id.* at 575. Because the parade organizers were seeking to convey a collective message, they were entitled to select whichever participants they wanted to further that message. *Id.* at 572. The Court reasoned that parades are unique in that they "are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." *Hurley*, 515 U.S. at 568 (quoting Susan A. Davis, *Parades and Power: Street Theatre in Nineteenth-Century Philadelphia* 6 (1986)). Because the structure of a parade "does not consist of individual, unrelated segments that happen to be transmitted together," the choice of which parade units to include was determined by this Court to have contributed to the common theme and presented no opportunity for "private sponsors to disavow 'any identity of viewpoint'

between themselves and the selected participants." *Hurley*, 515 U.S. at 576-77. However, while an exception existed for a parade organizer to refuse to be compelled to host speech it did not agree with, this Court has determined that there were other instances where a private party must host the speech of another party.

The Court in *Rumsfeld* determined that the government held the ability to compel the hosting the speech of another without violating the private parties' First Amendment rights. 547 U.S. at 63. In *Rumsfeld*, an association of law schools sought to restrict access to military recruiters on their campuses due to the government's policy of denying homosexual individuals' entry into the military. *Id.* at 51. The government responded by passing legislation that would remove federal funding from higher education institutions "that either prohibits, or in effect prevents" military recruiters "from gaining entry to campuses" in equal scope as other recruiters. *Id.* at 52-3. This Court held that the First Amendment rights of the schools were not violated, as the legislation did not "limit[] what law schools may say nor requires them to say anything." *Id.* at 60. This was because the legislation regulated conduct and not speech, "affect[ing] what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.*

Further, the Court distinguished its prior precedents for compelled speech by noting that "the compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Id.* at 63. Because hosting interviews and recruiting receptions on a law school campus was not inherently expressive like a parade organizer's choice of parade units, the legislation did not violate the law school's First Amendment rights. *Id.* at 64. Importantly, the Court noted that the "recruiting services lack[ed] the expressive quality of a parade, a newsletter, or the editorial page of a

newspaper" and that "its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school." *Id.*

Unlike *Miami Herald*, where the newspaper was required to publish a political candidate's responses to criticism and attacks, Headroom is not being compelled to speak in any form. Headroom's actions in removing content from its user's speech is not analogous to a newspaper exercising its editorial judgement, but rather it acts as host to the speech of others. Further, Headroom's acts of content moderation do not rise to the level of expressive speech that the parade organizers held in *Hurley*. 515 U.S. at 572-73. The culling and removal of the speech of third parties lacks the expressive qualities of marching in public.

Additionally, Headroom is not compelled to speak under the SPAAM Act, as merely hosting the speech of others does not violate its rights under the First Amendment. *Rumsfeld*, 547 U.S. at 64. Like in *Rumsfeld*, where the court found that the speech of the military recruiters could not be imputed to the law schools themselves, the speech that Headroom's users engage in will not be imputed to Headroom. The nature of social media along with the content shared by users of Headroom is of a personal nature, and Headroom does not speak when it would engage in content moderation. As a result, the SPAAM Act is constitutional under the First Amendment because Headroom does not speak when it engages in content moderation.

B. The SPAAM Act Is Constitutional Because It Is Narrowly Tailored To An Important Government Interest.

Through the protections of the Free Speech Clause of the First Amendment, when the government passes a regulation that impacts the speech of groups or individuals, the Court looks to the language of the regulation to determine the level of scrutiny. If the government puts forth a law that "'target[s] speech based on its communicative content'" or "'applies to particular speech because of the topic discussed or the idea or message expressed,'" then the law is deemed to be

content based and subjected to the exacting strict scrutiny analysis. *City of Austin Texas v. Reagan National Advertising of Austin*, LLC, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). However, should the law not reference any particular part of speech or its substance, the law will be considered content neutral and reviewed under intermediate scrutiny. *Boos v. Barry*, 485 U.S. 312, 320 (1988). For a content neutral regulation to survive intermediate scrutiny, it must "advance important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner,* 520 U.S. at 189. In fact, this Court has held that states may expand the protection of the First Amendment for their citizens in some instances.

In the 1980 case *PruneYard v. Robins*, a group of students filed suit in the California Supreme Court after they were told to leave a privately owned shopping center for distributing pamphlets in violation of the shopping mall's regulations. 447 U.S. at 77. The policy restricted individuals from engaging "in any publicly expressive activity, including the circulation of petitions." *Id*. This Court held that the shopping center's individual rights were not infringed upon by the California Constitution granting its citizens additional rights involving free expression and petition. *Id.* at 80-81. The Court noted that the state had a legitimate interest in "adopt[ing] in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81. Further, the Court found that the views expressed by the individuals were likely not to be identified with those of the mall as nothing prevented the mall from "expressively disavow[ing] any connection with the message." *Id.* at 87.

However, some laws do not always further a substantial government interest. For example, in *Clark v. Jeter*, a mother filed suit on behalf of her minor daughter claiming that a Pennsylvania law was unconstitutional. *Clark v. Jeter*, 486 U.S. 456, 457-58 (1988). The law created a statute

of limitations for paternity actions, requiring a parent of an illegitimate child to prove paternity before seeking support from the father. *Id.* This Court held that the six-year statute of limitations was not substantially related to Pennsylvania's interests. *Id.* at 464. Pennsylvania's stated interest was to avoid litigation of stale or fraudulent claims. *Id.* However, this Court found that there were several circumstances where Pennsylvania had contradicted this interest when it permitted "the issue of paternity to be litigated more than six years after the birth of an illegitimate child." *Id*. Further, the Court noted that "recently Pennsylvania Legislature enacted a statute that tolls most other civil actions during a child's minority." *Id.* Such tolling has "cast doubt on the State's purported interest in avoiding the litigation of stale or fraudulent claims," in similar prior cases. *Id.* Simply put, Pennsylvania legislature had contradicting intentions between two laws. *Id.* The Court acknowledged that the legislative intent to limit litigation related to minors by implementing a six-year statute of limitations was contravened by the enactment of a statute that tolls most other civil actions during a child's minority. *Id.* Inconsistency of a state's intention such as this demanded scrutiny by the Court.

Indeed, this Court has determined that the analysis of governmental intent and protecting the public is critical to intermediate scrutiny review. In the 2017 case *Packingham v. North Carolina*, the Court reviewed the constitutionality of a statute enacted by North Carolina. 582 U.S. at 101. The statute prohibited registered sex offenders from accessing various websites, including social media sites. *Id.* The petitioner, a registered sex offender, violated the statute when he made a post on Facebook. *Id.* at 102. The court in its review found that the statute prevented a wide range of communication and expressive activity that was unrelated to achieving the government's purported goal. *Id.* at 103-04. North Carolina by enacting the statute, "with one broad stroke, bar[red] access to… principal sources for knowing current events, checking

ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. *Id.* at 107. In its reasoning the court expressed that the state could have instead "enacted narrowly tailored laws that would prohibit a sex offender from engaging in conduct that presages a sexual crime, such as contacting a minor using or using a website to gather information about a minor." *Id.* Because the statute was of such alarming breadth, the Court found that it burdened more speech than was necessary to satisfy the government's interest in protecting minors from sexual abuse. *Id.* at 108.

Like *PruneYard*, where the Court determined that California held an important interest in granting additional speech rights to its citizens, the SPAAM Act does not infringe upon Headroom's First Amendment rights because it is advancing an important governmental interest. Midland has an interest in preserving the free flow of information, providing users with sufficient information to make informed choices, and protecting its citizens' free speech from undue censorship. R. at 18. Using the SPAAM Act, Midland is seeking to impede Headroom from capitalizing on its power to the detriment of its users. Such abuse of power has resulted in real harm inflicted on the hardworking Midlandians' livelihoods under the guise of moderation. R. at 5. Midland took steps to remedy this harm through the prohibition of unnecessary censoring, shadow banning, or de-platforming and is attempting to restore the voice of its people. *Id*. Further, the SPAAM Act is distinguishable from the legislative limitation imposed by the Pennsylvania government because unlike *Clark*, Midland enacted a law that is not in conflict or inconsistent with other positions taken by Midland and does not create arbitrary limitations or requirements. To the contrary, Midland's intent is directly related to a legitimate government interest.

The government interest, however, cannot overburden more speech than necessary, meaning a carefully drafted regulation can survive intermediate scrutiny. Further, unlike the statute

in *Packingham*, Midland's SPAAM Act does not burden substantially more speech than necessary to further its interests. The provisions of the SPAAM Act are narrowly tailored to Midland's interest in protecting its citizens, as each stand to directly resolve the different harms inflicted on users. Through the prohibition of censoring, de-platforming, or shadow-banning users, Midland is alleviating the suppression of users' free speech which has affected their personal and professional livelihoods.

As a result, the SPAAM Act survives intermediate scrutiny because it furthers an important governmental interest and is narrowly tailored to ensure that it does not burden more speech than necessary to satisfy its objective.

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit and find that the SPAAM Act is constitutional under the First Amendment.

Respectfully submitted,

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