IN THE
SUPREME COURT
OF THE UNITED STATES

No. 23-386

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 Thirteen Circuit

BRIEF FOR RESPONDENT

Team #3
Counsel for Respondent

Oral Argument Requested

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QUESTION PRESENTED

I. Whether a public accommodations law that treats major social media platforms as common carriers and compels them to make factual disclosures is valid under the First Amendment and this Courts holding in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio*.

II. Whether a public accommodations law prohibiting large social media platforms from censoring its users based on their viewpoint violates the First Amendment's Free Speech Clause.

STATEMENT OF THE CASE

Statement of Facts

Petitioner Headroom, Inc., is a popular social media company founded and headquartered in Bartlett, Midland "[whose] mission is to provide a space for everyone to express themselves to the world and to promote greater inclusion, diversity, and acceptance in a divided world." R. at 2-3 (internal quotations omitted). Headroom is unique because its users engage with each other in a virtual reality ("VR") environment accessed through VR headsets. In addition to posting content, Headroom users may monetize their posts via advertisements and donations. R. at 3. As a result of this practice, Headroom is commonly used to promote its users' businesses and livelihoods. R. at 3.

Headroom curates its users' experiences by using algorithms and data tracking to control the content that users see. R. at 3. Among these algorithms is a function that "deprioritizes information that Headroom's artificial intelligence has flagged as potentially violating Headroom's' Community Standards." R. at 3. These Community Standards – which are agreed to by each user prior to joining the site – explain the types of activity and content Headroom prohibits. R. at 3. Headroom users are prohibited "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. Additionally, the Community Standards ban a range of information deemed by Headroom to be "disinformation", defined as "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups", and can "take the form of

fabricated stories, manipulated facts…and misleading narratives." R.at 3-4 (quotations in original).

Violating the community standards can result in several different penalties, ranging from adding commentary to a post warning users of the potential violation, to deprioritizing users' content if Headroom believes it violates Community Standards, all the way to demonetizing, suspending, blocking, or outright banning a user from Headroom. R. at 4. As a result of this policy, several Headroom users alleged that Headroom "discriminated against them for their viewpoints." R. at 4. In response to these allegations, the Midland Legislature heard testimony from individuals who accused Headroom of censorship. R. at 4. These users testified that their content was deprioritized and their viewership declined after they spoke out in response to certain political topics. R. at 4-5.

In response to this testimony, Respondent State of Midland passed the SPAAM Act ("The Act"). R. at 5, 7. The Act only applies to large social media platforms with at least twenty-five million global users. R. at 5-6. The Act serves two purposes: first, it limits social media platforms' ability to censor users. R. at 6 (quotations in original). Prominent social media platforms are prohibited from "censoring, deplatforming, or shadow banning any [user] because of viewpoint." R. at 6 (quotations in original). Second, it requires social media platforms to inform users about their community standards by providing coherent definitions and explanations for how community standards are used, interpreted, and enforced. R. at 6. Additionally, social media platforms must advise sanctioned users about what standards they violated, how the user's content breached the standards, and why disciplinary action was enacted. R. at 6.

Procedural History

After the SPAAM Act went into effect on March 24, 2022, Headroom filed a pre-enforcement challenge against Midland's Attorney General in the United States District Court for the District of Midland requesting a permanent injunction enjoining Attorney General Sinclair from enforcing the Act on the grounds that the Act violated the First Amendment. R. at 7. Headroom also moved for a preliminary injunction, arguing that it is likely to succeed on the merits because the SPAAM Act violated the First Amendment by compelling Headroom to speak and infringed on its editorial judgment, and the remaining preliminary injunction criteria were met. R. at 7-8. Midland, meanwhile, argued that a preliminary injunction was inappropriate because the Act did not violate the First Amendment, Headroom does not exercise editorial judgment, and the remaining preliminary injunction factors weigh in Midland's favor. R. at 8. On May 29, 2022, the United States District Court for the District of Midland issued an order granting Headroom, Inc.'s preliminary injunction, stating that Headroom was likely to succeed on the merits, the content restrictions fail intermediate scrutiny, an injunction would serve the public interest, and the remaining factors favored Headroom. R. at 15.

On December 14, 2022, the Parties argued before the United States Court of Appeals for the Thirteenth Circuit. R. at 16. On March 30, the Court reversed and vacated the preliminary injunction, "disagree[ing] on all counts" and holding that the SPAAM Act did not violate the First Amendment and that Midland has "an important interest in ensuring the free flow of information and protecting citizen's free speech rights from undue censorship." R. at 17, 18. The Thirteenth Circuit also held that the Act survives intermediate scrutiny and the remaining preliminary injunction favors favor Midland. R. at 18.

On August 14, 2023, this Court granted Certiorari and directed the parties to address the following issues: I.) Under the First Amendment's Free Speech Clause, (1) are major social media companies common carriers, and (2) does this Court's decision in *Zuderer v. Disciplinary Counsel of the Supreme Court of Ohio* apply to the SPAAM Act's disclosure requirements? II.) Does a state violate the First Amendment's Free Speech Clause when it prohibits major social media companies from denying users nondiscriminatory access to its services?

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit Court of Appeals' decision to vacate Petitioner's injunction was correct. In the case at bar, the Thirteenth Circuit properly found that the SPAAM Act did not violate Petitioner's First Amendment, and that decision should be affirmed for two reasons:

First, Headroom is a company that holds itself out as open to the public indiscriminately and is, therefore, a common carrier. R. at 2. Headroom is a common carrier because all their terms are standard, and they do not do business on particularized contracts. R. at 3. Moreover, this Court's decision in *Zauderer* applies to the SPAAM Act's disclosure requirements because there is no fundamental right for a commercial speaker to not divulge accurate information about their services. *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio.*, 471 U.S. 626, 651 n. 14 (1985).

Second, § 528.491(b)(1)-(2) of the SPAAM Act does not violate Petitioner's First Amendment right to free speech. This public accommodation protects Midland residents' access to social media platforms by prohibiting service providers from engaging in viewpoint-based censoring. R. at 6. This provision exclusively regulates conduct and does not compel speech because it neither misattributes Petitioner's speech nor interferes with any of Petitioner's messages. Moreover, the provision does not compel speech because Petitioner possesses no editorial discretion when operating Headroom. However, even if Petitioner's conduct were protected speech, the SPAAM Act's hosting law is a valid content-neutral regulation; and it is, therefore, constitutional. Lastly, Midland Can prohibit Petitioner's censorship because Headroom, Inc. is a public forum. Therefore, Headroom should not be permitted to discriminate against users based on their viewpoints.

ARGUMENT

I. The Thirteenth Circuit Correctly Vacated Petitioner's Preliminary Injunction Because Headroom is a Common Carrier and *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* Applies to the SPAAM Act

A. Headroom is a Common-Carrier

A common carrier is a company that holds itself out to the public indiscriminately. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (citing *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (cert. denied, 425 U.S. 992 (1976)). A common carrier "in the communications context is one that makes a public offering to provide [communications facilities] whereby all members who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing…" *Id.* However, "[a] common carrier does not make individualized decisions, in particular cases, whether and on what terms to deal." *Id.* Under *Winter v. NRDC*, 555 U.S. 7, 20 (2008) to uphold their burden Petitioner must demonstrate that they are likely to succeed on the merits, will suffer an irreparable injury, the balance of the equities is in their favor, and the injunction is in the public's interest. *Id.* Therefore, the factors considered when seeking a preliminary injunction weigh against Petitioner.

Additionally, Courts have deferred to the FCC's interpretation of common carriers in the context of communications. *FTC v. Am. eVoice, Ltd.*, 242 F. Supp. 3d 1119, 1123-24 (D. Mont. 2017). Moreover, email service providers and internet service providers are treated as "information services" and are not treated as common carriers under the Communications Act of 1934. *Howard v. America Online, Inc.*, 208 F.3d 741, 752 (9th Cir. 2000) (quoting *In re Non-Accounting Safeguards*, 11 FCC Rcd 21905, 22034 (1996) (citing 47 U.S.C. §153(10))) (holding that internet service providers are not common carriers); *Am. eVoice, Ltd.*, 242 F. Supp. 3d at

1124. However, states have been permitted to promulgate anti-discrimination laws for those that hold their services out as open to the public. *Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 469 (5th Cir. 2022).

1. Headroom does not make Particularized Decisions in Individual Cases.

Historically, American, and before that, English law has "long subjected certain businesses, known as common carriers to special regulations, including a general requirement to serve all comers." *Biden v. Knight First Amendment Inst. At Columbia University*, 141 S. Ct. 1220, 1222 (2021) (Thomas J. Concurring) (citing Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J. L. & Tech 391, 398-403 (2020)). Moreover, the doctrine allows states to enact nondiscrimination regulations on "communication and transportation providers that hold themselves out to serve all members of the public without individualized bargaining." *Netchoice, L.L.C.*, 49 F.4th at 469.

Headroom has the same contract for every single user who signs up for their platform. R. at 3. This is precisely what makes them a common carrier. *Midwest Video Corp.*, 440 U.S. at 701. There is no particularized decision regarding the community standards or any other policy. R. at 3. Rather, all members of the public are free to join Headroom if they agree to these uniform terms. *Id.* Therefore, because everyone is agreeing to the same set of terms, they are not particularized because they are the same for everyone. *See Netchoice, L.L.C.*, 49 F.4th at 474 (discussing platforms terms of service). Thus, Headroom is a common carrier because it is not making particularized decisions in individual cases. *Midwest Video Corp.*, 440 U.S. at 701; R. at 3.

A carrier who does business on standard terms is a common carrier. *California v. FCC*, 905 F.2d 1217, 1240 n. 32 (9th Cir. 1990). Furthermore, "[b]asic telephone services are common

carrier services because they are offered to all consumers on standardized terms." *California*, 905 F.2d at 1240 n. 32. (citing *Computer II Final Decision*, 77 F.C.C.2d at 431). Historically, telegraphs because they "resemble[d] railroad companies and other common carriers," had to serve all customers without discrimination. *Biden*, 141 S. Ct. at 1223. Historically, carriers who hauled pursuant to "individual contracts with each customer" have not been considered common carriers. *Mack v. E Camden & Highland R.R. Co.*, 297 F. Supp. 2d 1052, 1059 (W.D. Tenn. 2003). The "sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently." *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (Internal quotation marks omitted). Moreover, Headroom calls their terms Community Standards, and this is because they are the same for everyone. R. at 3. Thus, one who deals with others "only pursuant to individual contracts, entered into separately with each customer is a private carrier." *Kieronski v. Wyandotte T.R., Co.*, 806 F.2d 107, 109 (6th Cir. 1986).

In 1973, the Supreme Court considered whether broadcast licensees were common carriers. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 97 (1973). This Court held that Congress refused to grant common carrier rights of access to all people who wished to speak out on public issues. *Id.* at 110. Rather, it chose consistency with the provisions of the 1934 Communications Act, which showed "a legislative desire to preserve values of private journalism." *Id.* at 109. However, broadcasting, either on the radio or television, is quite different from a social media site like Headroom whose mission is to "provide a space for everyone to express themselves to the world…" R. at 2. On the other hand, broadcasting licensees should not be forced to "turn over their microphones to persons wishing to speak out on certain public issues." *Midwest Video Corp.*,440 U.S. at 703. Thus, Headroom is different than

radio and television broadcast licensees in that it has set out to permit the entire public to enjoy their services. R. at 2.

Analogously, in the context of transportation, a common carrier is "one that holds itself out to the general public to engage in the transportation by motor vehicle of passengers or property." *United States v. Contract Steel Carriers, Inc.*, 350 U.S. 409, 410 n. 1 (1956) (citing 49 U.S.C. § 303(a)(14), (15)). In the railroad context, when a carrier is regularly engaged in carrying certain articles, "especially if that carrier be a corporation created for the purpose of carrying trade," then a special contract will not change its nature as a common carrier. *R.R. Co. v. Lockwood*, 84 U.S. 357, 377 (1873). Furthermore, "[c]ommon carriers could not discriminate in service or terms of service…" Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J. L. & Tech 391, 409 (2020).

Thus, it has long been held that a common carrier is a company that makes an offering to provide their service to all without making "individualized decisions, in particular cases, whether and on what terms to deal. *Midwest Video Corp.*, 440 U.S. at 701; *Lockwood*, 84 U.S. at 377; *Contract Steel Carriers, Inc.*, 350 U.S. at 410 n. 1. Moreover, states may enact anti-discrimination regulations based on common carrier status. *Netchoice, L.L.C.*, 49 F.4th at 469.

2. Midland can Regulate Petitioner Because Headroom Affects the Public Interest

Throughout United States history, states have successfully enacted anti-discrimination obligations for common carriers. *Netchoice, L.L.C.*, 49 F.4th at 469. For example, even though telephone companies could have reasonable regulations on how they dealt with the public, they could not discriminate in who they served. *Chesapeake & Potomac Tel. Co. v. Baltimore & Ohio Tel. Co.*, 66 Md. 399, 414 (Md. 1887). Moreover, if private property is dedicated to the public use, "it is subject to public regulation." *Munn v. Ill.*, 94 U.S. 113, 130 (1876). Additionally, the

Supreme Court recognized that state legislature could impose common carrier requirements if the company's services affect the public interest. *Id.* Furthermore, railroads have been found to be so affecting the public interest as to impose common carrier status. *Chicago, Burlington, and Quincy Railroad Company v. Iowa*, 94 U.S. 155, 161 (1876) (citing *Munn*). In addition, the Court upheld the states police power to impose an obligation on telegraphs to deliver messages "[impartially] and in good faith." *W. Union Tel. Co. v. James*, 162 U.S. 650, 651, 653 (1896).

Early on, state courts held that common carriers could not discriminate in whom they served. *See State ex rel. Webster v. Nebraska Telephone Co.*, 17 Neb. 126, 136-37 (Neb. 1885) (granting writ of mandamus compelling telephone company to install a telephone in the relator's office). Additionally, it was held that common carriers, though they were permitted to impose a toll, had a duty to serve all citizens equally. *New England Express Co. v. Me. Cent. R.R. Co.*, 57 Me. 188, 196 (Me. 1869). However, it is true that a state cannot simply declare any company to be a common carrier. *Miles Enumclaw Co-Operative Creamery Corp.*, 121 P.2d 945, 946 (Wash. 1942). Yet, its status is a question of law that is to be determined by how the business is conducted. *Id.* To be a common carrier "'he must, for the time, hold himself ready to carry for all persons, indifferently, who choose to employ him.'" *Id.* at 947. *See also Doe v. Lyft, Inc.*, 176 N.E.3d 863, 874 (Ill. App. Ct. 2020) (construing 625 Ill. Comp. Stat. § 57/25 as imposing common carrier obligation to carry all members of the public without discrimination on rideshare drivers). Therefore, Headroom can be declared a common carrier by a state because it affects the public interest and is ready to carry for all persons. *Munn*, 94 U.S. at 130; *Milles Creamery*, 121 P.2d at 947; R. at 3. Moreover, Headroom is essentially the modern equivalent of the telegraph and should be required to allow people to share their messages "[impartially] and in good faith." *James*, 162 U.S. at 651, 653.

Thus, states can prevent common carriers from picking and choosing whom they will serve in a discriminatory manner. *Netchoice, L.L.C.*, 49 F.4th at 470, 471. State courts have long upheld such regulations because of the common right they provided. *Missouri, K. & T. R. Co. v. New Era Milling Co.*, 79 Kan. 435, 448 (Kan. 1909). Thus, Midland can impose common carrier status on Headroom as they have held themselves out to serve all members of the public on standard terms. R. at 3.

B. This Court's Decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* Applies to the SPAAM Act's Disclosure Requirements

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, applies to commercial speech. *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio.*, 471 U.S. 626, 637 (1985). Commercial speech is speech that is an advertisement, speech that "refers to a particular product, and the speaker has an economic motivation." *IMDB.com Inc. v. Becerra*, 962 F.3d. 1111, 1122 (9th Cir. 2020). Clearly, Headroom has an economic interest in content moderation. *See* Clare Duffy, *More than half of Twitter's top 1,000 advertisers stopped spending on platform, data show*, CNN (Feb. 13, 2023 2:48 PM) www.cnn.com/2023/02/10/tech/twitter-top-advertiser-decline/index.html#:~:text=More%20than%20half%20of%20Twitter's%20top%201%2C000%20advertisers%20in%20September,exodus%20has%20been%20following%20Elon (discussing advertisers withdrawal from twitter over concerns regarding staff cuts and relaxed content moderation policies); Shirin Ghaffary, *Why advertisers aren't coming back to Twitter*, Vox (Mar. 14, 2023 11:05 AM) www.vox.com/technology/2023/3/23/23651151/twitter-advertisers-elon-musk-brands-revenue-fleeing (discussing concerns that company advertisements would appear near controversial tweets). Regardless, Headroom's economic interest must give way to Midland's interest in protecting their citizen's freedom of speech R. at 18.

While commercial speech is entitled to First Amendment protections, its protections are less than in the context of "'noncommercial speech.'" *Zauderer*, 471 U.S. at 637 (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)). Therefore, the states are "free to prevent" commercial enterprises from engaging in speech "that is false, deceptive, or misleading." *Id.* at 638. However, the states still have the power to regulate speech that is not deceptive to achieve a "substantial government interest…" so long as this is done through means "that directly advance that interest." *Id.* Additionally, there is no fundamental right for a commercial speaker to not divulge accurate information about his services. *Id.* at 651 n. 14. *Zauderer* asks whether the state's disclosure requirement is reasonably related to the state's interest. *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1062 (8th Cir. 2014). As long as a disclosure requirement is reasonably related to a state's interest the company has adequate protection. *Zauderer*, 471 U.S. at 651. As the record reflects, Midland has an important interest in protecting the free speech rights of its citizens. R. at 18. Moreover, "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

When the government requires that a company disclose purely factual information to consumers, the "company's First Amendment interest in withholding that information from its consumers is 'minimal'" *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 532 (D.C. Cir. 2015) (citing *Zauderer*, 471 U.S. at 651). Moreover, it does not offend the First Amendment values of promoting the efficient exchange of information or protecting individual liberty interests to require accurate factual disclosures. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-14 (2d Cir. 2001). Additionally, Headroom is not a publisher under 47 U.S.C. § 230 and therefore, cannot exercise editorial judgment.

It has long been held that there are "significant societal interests…" protecting the "public's interest in receiving information." *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 8 (1986). This is because "freedom of speech is indispensable" to the search, discovery, and "spread of political truth, and the best test of truth is the power of the thought to get…accepted in the competition of the market." *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980). Therefore, because "freedom of speech is indispensable" in a democratic system of government, Midland has an important interest in "encouraging freedom of expression" and preventing the censorship thereof. *Id.*; *Reno*, 521 U.S. at 855; R. at 18.

Thus, Midland's disclosure requirements are permissible under *Zauderer* as they are no more extensive than necessary to achieve Midland's interest in protecting their citizens' speech from censorship. *CTIA – The Wireless Ass'n City of Berkeley*, 928 F.3d 832, 842 (9th Cir. 2019). Moreover, the regulation is permissible as it regulates conduct rather than speech.

II. The Thirteenth Circuit Correctly Vacated Petitioner's Preliminary Injunction Because the SPAAM Act's Hosting Law Does Not Violate Petitioner's Right to Free Speech, and The Hosting Law Constitutes a Valid Content-Neutral Regulation

Moreover, the Thirteenth Circuit's decision should be affirmed because it was correct in finding that § 528.491(b)(1)-(2) of the SPAAM Act (hereinafter "hosting rule") does not violate Petitioner's First Amendment right. The hosting rule promotes online dialogue for Midland residents by prohibiting influential social media platforms from censoring their users based on their views. R. at 5-6. The hosting rule permits platforms to sanction those responsible for producing unprotected speech (i.e., child pornography, obscene material, etc.). R. at 6. To succeed on a First Amendment challenge, Petitioner must show that the hosting law either restricts their speech or compels them to speak. *Netchoice LLC*, 49 F. 4th at 459. In the present case, Petitioner can only show the latter because the hosting law does not limit Petitioner's

speech. Instead, the SPAAM Act solely prohibits Petitioner from censoring others' speech. R. at 6. Petitioner cannot demonstrate that the SPAAM Act's hosting rule compels speech because the Act solely regulates Petitioner's conduct, and Petitioner's censorship does not constitute editorial discretion. However, even if Petitioner's censorship were considered speech, the provision would still be constitutional as a content-neutral regulation under *United States v. O'Brien*, 391 U.S. 367 (1968). Finally, Petitioner's censorship is not protected because Headroom is a public forum. Thus, the Thirteenth Circuit correctly found that the hosting law does not violate Petitioner's First Amendment rights.

A. The SPAAM Act's Hosting Law Only Regulates Petitioner's Conduct

States "enjoy broad authority to create rights of public access." *Roberts v. Jaycees*, 468 U.S. 609, 628 (1984). This derives from states' compelling interest in eradicating discrimination within public forums. *Id*. Consequently, public accommodation laws have played a major role in "realizing the civil rights of all Americans." *303 Creative v. Elenis*, 143 S. Ct. 2298, 2314 (2023). Inherent in the states' authority is the power to extend statutory protection against private corporations seeking to abridge the free expression of others. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). As such, states may require businesses to "host another's speech." *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980). Hosting laws "generally regulate conduct," and they do not violate a host's First Amendment right when they neither restrict nor compel speech. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). In the case at hand, the SPAAM Act's hosting rule does neither; thus, it exclusively regulates conduct. As previously mentioned, it is only necessary to focus on whether it compels speech.

1. The SPAAM Act's Hosting Law Does Not Compel Petitioner to Speak.

To begin, the SPAAM Act's hosting rule does not compel Petitioner's speech. Generally, "public accommodation laws do not target speech, but instead prohibit the *act* of discriminating

against individuals in the provision of public available goods, privilege, and services." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1741 (2018). Accordingly, a public accommodation law will only compel speech if it has the effect of making "speech itself" the accommodation. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 657-659 (2000). Stated differently, a hosting law can only compel speech if it either forces the host to speak or alters their speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Speech encompasses inherently expressive conduct, such as burning a flag, saluting a flag, and wearing a uniform. *Texas v. Johnson*, 491 U.S. 391, 401 (1989); *West Va. Bd. Of Educ. v. Barnette,* 319 U.S. 624 (1943); *Schacht v. United States*, 398 U.S. 58 (1970). When determining whether compelled speech exists, this Court considers the law's application through the lens of a reasonable observer. *Rumsfeld,* 547 U.S. at 66 (applying reasonable-observer standard). Therefore, a public accommodation law does not compel speech if a reasonable observer would not find that it either forces the host to speak or interferes with the host's message. *PruneYard Shopping Center,* 447 U.S. 74; *Rumsfeld*, 547 U.S. 47.

The SPAAM Act's hosting law fails to compel speech because it does not require that Petitioner speak in any manner. Inevitably, a public accommodation law compels speech when it directly commands an entity to speak, for example, by forcing a newspaper to publish material or requiring a driver to uphold a state's motto on their license plate. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (law requiring newspapers to host the right to reply); See also *Pacific Gas & Electric Co.*, 475 U.S. 1; *Wooley v. Maynard*, 430 U.S. 705 (1977) (law requiring residents to carry the motto "Live Free or Die" on their license plates deemed compelled speech). In those cases, compelled speech exists because the government was ordering an entity to speak, and a reasonable observer would attribute the message to the speaker. Alternatively, a public

accommodations law may compel speech when a reasonable observer would associate third parties' speech with the host. *Hurley*, 515 U.S. 557. However, speech misattribution is less likely to occur in a public forum since views expressed are not usually identified with the private host. *Rumsfeld*, 547 U.S. at 61. This is especially true when the host is free to disclaim any messages it disagrees with, and there is no restriction on speech. *PruneYard*, 447 U.S. at 87.

For illustration, in *PruneYard,* the defendant was a large, privately owned shopping center whose policies prevented the plaintiffs from transmitting pamphlets and petitioning about Zionism on its premise. *Id*. at 83. The defendant contended it was being compelled to speak by being required to host the plaintiffs' speech on its property. *Id*. at 85-87. This Court rejected the defendant's argument because no reasonable observer would misattribute the plaintiffs' speech to the defendant. *Id*. at 88. This Court reasoned that it was unlikely for an observer to misattribute the plaintiffs' speech because the shopping center's unrestricted access prevented customers from associating third parties' speech with the defendant, the defendant had the authority to disassociate itself from any messages they disagreed with, and the defendant was not being forced to express anything. *Id*. at 87. Therefore, this Court found no compelled speech. *Id*. at 88.

Applying *Pruneyard* to the case at bar makes it clear that the SPAAM Act's hosting rule does not require Petitioner to partake in any speech. First, like the law in *PruneYard*, the SPAAM Act's hosting rule does not mandate that Petitioner transmit any message. R. at 6. Instead, it simply instructs them to allow others to speak. *Id*. That being said, *PruneYard* convincingly determines that no reasonable observer would misattribute Headroom users' speech to Petitioner. Like the shopping center, Petitioner's social media platform is open to the public. R. at 2-3. However, whereas the shopping center was intended for people to shop, Headroom is

specifically designed for users to express *themselves* to the public. R. at 3. Headroom's public availability, in addition to its expressed purpose of promoting speech for others, would undoubtedly prevent any speech misattribution from arising. R. at 2. This holds particularly true because users reading Headroom's Community Standards are immediately notified that the platform holds itself as nothing more than a "*community*" open to "*all*" people. R. at 3. Finally, like the shopping center, Petitioner possesses full authority to disassociate itself from any message posted on Headroom by disclaiming or condemning any message that it disagrees with. Therefore, under *PruneYard*, no reasonable observer would find that the SPAAM Act's hosting rule dictates Petitioner's speech.

Moreover, the SPAAM Act's hosting rule does not interfere with Petitioner's speech. A hosting law compels speech if it interferes with a reasonable viewer's perception of the host's message or its expressive contents. *Hurley*, 515 U.S. at 573. Like speech misattribution, message interference can arise from the presence of third parties' speech. *Hurley*, 515 U.S. 557. For example, this Court in *Hurley* recognized parades to be inherently expressive, reasoning that parades sought to convey a message by marching. *Id*. at 569. In that case, the public accommodation law required an organization dedicated to "traditional religious and social values" to allow an organization that sought to express pride in gay, lesbian, and bisexual sexuality onto its parade. *Id*. at 562. This Court found that the hosting law altered the content of the host's message because a reasonable observer would view the host as adopting messages it overtly opposed. *Id*. at 566. Therefore, this Court found that the public accommodations law compelled speech. *Id*. at 581.

However, message interference cannot arise when the host is not engaged in speech. A host's conduct does not constitute speech if it requires explanatory speech to convey a message.

Rumsfeld, 547 U.S. at 66. In *Rumsfeld*, Congress passed a bill requiring law schools to permit military recruiters access to their campus and resources as a response to law schools' censorship of military personnel from recruitment activities, which law schools enacted to express their disagreement with the military's adverse viewpoint on same-sex relations. *Id*. at 52. Law schools alleged that the bill compelled speech because requiring them to associate with military personnel affected their message. *Id*. at 65-66. This Court found that the bill did not compel speech because no reasonable observer would understand the message underlying the law school's censorship. *Id*. at 67. This Court reasoned that a reasonable observer viewing military recruiters alienated from campuses would not understand that the law schools' censorship was owed to the disapproval of the military's viewpoint unless explanatory speech accompanied it. *Id*. This Court emphasized that the necessity for explanatory speech indicated that law schools' conduct was not expressive. *Id*. Therefore, conduct fails to be expressive if it cannot convey a message without explanatory speech.

Here, Petitioner's censorship does not constitute inherently expressive activity because it would fail to convey a message to a reasonable observer. Just as in *Rumsfeld*, Petitioner's censorship fails to be expressive because a reasonable observer could not interpret someone who is not a user of Headroom as being owed to a Community Standards violation. There is a plethora of reasons that could contribute to someone not acquiring a Headroom account. For instance, a person may not like the application, choose to be private, dislike networking, or simply not utilize the internet. Nonetheless, a reasonable viewer would not attribute a Community Standards violation to someone without a Headroom account. Even if a reasonable observer did, they would not know which violation led to a user's sanction. Headroom's Community Standards do not provide any public commentary explaining its decision to censor;

thus, a reasonable observer would be left guessing which of Headroom's vague terminologies led to a user being censored. For example, a reasonable observer could not identify whether a user was censored because they violated Headroom's policies against communicating "hate speech," violence, etc. R. at 3. Hence, the only way for an observer to understand the message behind Petitioner's censorship is through explanatory speech, which indicates that Petitioner's conduct fails to be expressive. Thus, the SPAAM's hosting rule does not interfere with Petitioner's messages because their censorship fails to be expressive conduct.

To conclude, the SPAAM Act's hosting rule does not compel speech because, if enacted, Petitioner would not be forced to speak, nor would any message conveyed by Petitioner be interfered with. Therefore, the SPAAM Act's hosting rule only regulates Petitioner's conduct.

2. Petitioner Does Not Exercise Editorial Discretion when Operating Headroom

Furthermore, the SPAAM Act does not compel Petitioner's speech because Petitioner's operation of Headroom does not grant it editorial discretion. Editorial discretion refers to the decision-making taken by a host when choosing to express *their* message. This encompassed both the decision to publish and censor. Although the First Amendment does not formally recognize editorial discretion as speech, a host's editorial discretion is protected to the extent that it preserves or saves a message. *Netchoice, L.L.C.*, 49 F. 4th at 463. For example, in *Miami Herald*, this Court struck down a state law requiring newspaper publishers to host a right of reply in their editorials to political candidates that it criticized. *Miami Herald Pub. Co*, 418 U.S. 241. This Court emphasized that the newspaper was not a "passive receptacle or conduit for news, comment, and advertising," but rather a speaker when publishing their materials. *Id*. at 258. Therefore, this Court found that the right-to-reply law compelled speech because it violated newspapers' right to editorial control and judgment on the material they published. *Id*. Following *Miami Herald*, this Court in *Pacific Gas & Electric Co.,* enjoined a state agency's enforcement

action that mandated a public utility company to allow a third-party's adverse speech to be placed in its monthly newsletter every four months. *Pacific Gas & Electric Co.*, 475 U.S. 1. This Court reiterated its reasoning in *Miami Herald*, noting that the First Amendment protected the public utility's right to editorial judgment when publishing its newsletter. *Id*. at 17-19. Therefore, editorial discretion protects messages conveyed by a host.

An entity does not engage in speech when it operates as a mere conduit for communication. *Turner Broad Sys. v. FCC*, 512 U.S. 622, 665 (1994) (noting that cable operators' exclusive role of transmitting broadcasting signals prevents cable viewers from associating them with broadcasters' messages). As such, this Court has not found the application of viewpoint prohibitions to intrude on a host's speech when all it does is facilitate speech. *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 834 (1995). Thus, an entity lacks editorial discretion when it does not engage in speech or inherently expressive activity like publishing a newspaper or hosting a parade. For example, in *Rumsfeld*, this Court rejected the law schools' argument that they were engaged in editorial discretion when choosing to censor military recruiters. *Rumsfeld*, 547 U.S. at 64. This Court reasoned that hosting recruiting services lacked the same "expressive quality" as an editorial page. Therefore, editorial discretion ceases to exist for a host not engaged in speech. *Id.*

Here, Petitioner's operation of Headroom does not grant it editorial discretion because Headroom constitutes nothing more than a "conduit for news, comments, and advertising." For starters, unlike newspapers, Petitioner's operation of Headroom is intended for the purposes of publishing. Instead, Petitioner administers its platform with the purpose of providing a service for *others* to produce their message. On the contrary, newspapers aim to distribute their own messages. This is evidenced by the differences in Headroom's operation in comparison to a

newspaper. For instance, a newspaper operates extremely discriminatorily when selecting the material and editors they choose to publish *before* their message is conveyed. On the other hand, Petitioner censorship only occurs *after* their posts are published. The difference in timing of censorship is owed to the fact that newspapers actually engage in editorial discretion, that is – they seek to curate a specific message – whereas Petitioner does not. Even Congress recognizes that social media platforms like Petitioner are hosts, not speakers, when they provide communication services. 47 U.S.C. § 230(c)(1) (explicitly instructs courts not to treat social media platforms as the "publisher or speaker" for material shared by other users.) Petitioner's claim of editorial censorship is nearly the same argument universities made in both *Rosenberger* and *Rumsfeld*, which is editorial discretion exists solely by facilitating speech; however, as stated previously, this Court has expressly rejected this idea. Thus, Petitioner does not possess any editorial discretion through its mere ownership of its communications services. As a result, the SPAAM Act's hosting law cannot compel Petitioner's speech.

B. The SPAAM Act's Hosting Law is a Content-Neutral Regulation that Satisfies Intermediate Scrutiny

Furthermore, even when assuming Petitioner's censorship is protected speech, the SPAAM Act's hosting rule would still be constitutional because it is a valid content-neutral regulation. Content-neutral laws are generally applicable laws that aim to regulate adverse secondary effects of conduct or do not target a specific message or speaker. *Renton v. Playtime Theatres*, Inc, 475 U.S. 41, 47-48 (1986); *Young v. Am. Mini Theatres*, 427 U.S. 50 (1976). Content-neutral laws need not be the "least speech-restrictive means of advancing the Government's interest." *Turner Broad Sys.*, 512 U.S. at 662. Instead, they will be subject to intermediate scrutiny, which requires that they promote a substantial government interest that would be achieved less effectively absent the regulation *Ward v. Rock Against Racism*, 491 U.S.

781 (1989). Content-neutral laws are generally enforceable even if they incidentally burden speech. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *see also McCullen v. Coakley*, 573 U.S. 464 (2014) (upholding law prohibiting anyone from standing within 35 feet of an abortion clinic). Indeed, this Court has never recognized government actions as an abridgment of freedom of speech simply because the regulated conduct was "in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co*., 336 U.S. 409, 502 (1949). Even words can violate content-neutral laws directed against conduct, not speech. *R.A.V. v. St. Paul*, 505 U.S. 377, 389 (1992). Accordingly, content-neutral regulations are not invalid solely because they incidentally burden speech.

Even when assuming Petitioner's censorship to be speech, although it is not, the SPAAM Act's hosting law would still be valid as a content-neutral regulation under the framework laid in *O'Brien*. *O'Brien*, 391 U.S. 367. In *O'Brien*, the defendant was convicted for violating a federal criminal statute that prohibited the burning of draft cards. *Id*. This Court upheld the conviction despite the criminal statute's prohibition on "indisputably expressive" conduct. *303 Creative LLC*, 143 S. Ct. at 2334 (Sotomayor J. dissenting). This Court reasoned that content-neutral regulations do not run afoul of the First Amendment so long as: "1.) the regulation is within the government's constitutional power, 2.) the regulation furthers an important or substantial governmental interest, 3.) the governmental interest is unrelated to the suppression of free expression, and 4.) the incidental restriction is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. Therefore, government entities can regulate conduct containing speech elements so long as the elements laid out in *O'Brien* are met. This Court has consistently declined to extend First Amendment protections under content-neutral regulations

that satisfy *O'Brien*'s four-prong test. See *United States v. Albertini*, 472 U.S. 675 (1985) (upholding conviction for entering a military base despite defendant's public forum challenge under the *O'Brien* test); See also *City of Erie v. Pap's Am,* 529 U.S. 277 (2000) (upholding a city ordinance that criminalized public nudity under the *O'Brien* test).

Here, the SPAAM Act's hosting rule is a valid content-neutral regulation under *O'Brien*. The hosting law would be content-neutral because it seeks to prevent the secondary adverse effects of conduct, specifically, the removal of its citizens from the "modern public square." *Packingham v. North Carolina,* 582 U.S. 98, 107 (2017). The hosting law would satisfy *O'Brien*'s four-prong test because: (1) inherent to the states' power is their "broad authority to create rights of public access on behalf of its citizens." *Roberts*, 468 U.S. at 628. (2) The hosting rule seeks to promote public discourse and eliminate discrimination in areas of public access, both of which suffice as important governmental interests. (3) The hosting rule does not relate to censoring free expression, but quite the opposite, as it seeks to prevent the suppression of free expression. (4) Any incidental burden to Petitioner's censorship cannot outweigh Midland residents' access to the "modern public square." Therefore, the SPAAM Act's hosting law would be constitutional under *O'Brien*.

C. Headroom is a Public Forum.

Lastly, this Court should affirm the Thirteenth Circuit's decision because Headroom is a public forum. The Internet is a public forum, and viewpoint-based censorship violates users' First Amendment right to free speech. In *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 514 (1939) Justice Roberts articulated what became known as the "Public Forum Doctrine" after stating that streets and parks "have immemorably been held in trust for the use of the public and, time out of mind, have been used for purposes of communicating thoughts between citizens, and discussing public questions." *Id*. This history of use for public

communication places strict limitations on the way speech may be regulated within such public fora. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (internal quotations omitted)). Restrictions based on content must pass strict scrutiny, while restrictions based on viewpoint are plainly prohibited. *Summum*, 555 U.S. at 469.

When the Court determines whether a restriction on speech is permissible, they look to whether the speech occurred in a public forum. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The most important factor considered by the courts when determining whether an area is a public forum is tradition. If an area has traditionally been used for the free exchange of speech, it receives the highest level of protection under the First Amendment. *Hague*, 496 U.S. at 514; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). For the purposes of public forum jurisprudence, an area has "traditionally" been used for the free exchange of speech when that area has a long-established history of such use. *See, e.g.*, *Hague*, 307 U.S. at 515; *Perry*, 460 U.S. at 45. Social media sites have such a long history of being a forum for the free exchange of speech.

This Court's focus on tradition comports with the Public Forum Doctrine's purpose of promoting the free exchange of ideas between citizens. *See* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. Rev. 1975, 2011 (2011). To be sure, the drafters of the First Amendment believed that freedom of speech was "indispensable to the discovery and spread of political truth" and necessary to uphold both liberty and democracy itself. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969). This free exchange of ideas is the cornerstone of the traditional public forum, *Cornelius,* 473 U.S. at

800, and subsequently the First Amendment itself, *see Whitney,* 274 U.S. at 375. This is just as true on social media sites like Headroom and that is why they are a public fora.

Because freedom of speech supports the free exchange of ideas, the First Amendment requires that in the "marketplace of ideas" certain viewpoints are not favored over others. Ari Ezra Waldman, *Durkheim's Internet: Social and Political Theory in Online Society*, 7 N.Y.U. J. L. & Liberty 345, 372 (2013). Viewpoint Discrimination occurs when the restriction on speech is based on the speaker's views toward a particular subject. *Rosenberger*, 515 U.S. at 829. Viewpoint Discrimination is presumptively unconstitutional, and in many contexts, the Court considers it "flatly prohibited". Kerry L. Monroe, *Purpose and Effects: Viewpoint-Discriminatory Closure of a Designated Public Forum*, 44 U. Mich. J.L. Reform 985 (2011). Even if the government disagrees with or finds the speech offensive, this cannot justify prohibitions on speech; in fact, viewpoints that are "offensive or unorthodox" are "precisely" what the First Amendment seeks to protect. Michelle G. Lewis Liebskind, *Back to Basics for Victims: Striking Son of Sam Laws in Favor of an Amended Restitutionary Scheme,* 1994 Ann. Surv. Am. L. 29, 34 (1994).

While they receive broad protections under the First Amendment, not every space is considered a public forum. This Court's jurisprudence typically focuses on a small category of pre-existing public spaces: streets, sidewalks, and parks. *Verlo v. Martinez*, 262 F.Supp.3d 1113, 1145 (D. Colo. 2017). Nonetheless, the First Amendment's purpose of supporting the free exchange of ideas from differing viewpoints means that the Public Forum Doctrine goes beyond these traditional public spaces. This was recognized by Justice Kennedy in *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2711 (1992). In a concurring opinion, Kennedy recognized that the Public Forum Doctrine is intended to effectuate the First Amendment's broad

protections against censorship of speech, while also noting that "the policies underlying the doctrine cannot be given effect unless we recognize that open, public spaces…that are suitable for discourse may be public forums" regardless of their history or usage. *Krishna Consciousness, Inc.*, 112 S. Ct at 2717. Justice Kennedy reaffirmed this opinion twenty-five years later in *Packingham*, where he stated the internet was one of "the most important places…for the exchange of views" and that preventing someone from accessing social media "is to prevent the [person] from engaging in the legitimate exercise of First Amendment rights." *Packingham*, 582 U.S. at 104, 108.

Kennedy's opinion does not stand alone. Lower courts have recognized that several characteristics flow from public forums' purpose of fostering the free exchange of speech, and their opinions support Kennedy's belief that the doctrine applies to the Internet. First, the forum must be "intentionally opened…for public discourse." *Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019) (quoting *Cornelius*, 473 U.S. at 802). In *Davison*, for example, Davison filed suit against the Chairman of a county board of commissioners alleging that the Chairman violated the First Amendment by denying Davison access to a public forum when the Chair blocked his access to the Chair's Facebook. *Davison*, 912 F.3d 666. The court held that because there were no restrictions on the public's access to or use of the page, allowing any citizen to post what they want, the Facebook page was a public forum and denying Davison access by blocking him was a violation of his First Amendment rights. *Id*. at 687. This factor has also been considered by the Ninth Circuit, which opined that an area being a public thoroughfare with free and open access to the public supported the conclusion that the area is a public forum. *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1100-1101 (9th Cir. 2003).

Free and open access to the public is important in public forum analysis because when a forum is opened to speaking by even just some groups, excluding others from doing the same is prohibited viewpoint discrimination. *Denver Area Tech. Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 799 (1996) (Kennedy, J., concurring in part). Denying users access to social media, therefore, is viewpoint discrimination that violates the First Amendment. Dawn C. Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. Sci. & Tech. L. 1, 55 (2019).

Another factor courts consider is whether the "nature of the [forum] and its compatibility with expressive activity." *Cornelius*, 473 U.S. at 802. Courts in recent years have recognized that social media is compatible with hosting free speech which makes social media websites public forums. First, as early as 1997, this Court analyzed speech on the internet through the lens of the First Amendment. David J. Goldstone, *A Funny Thing Happened On the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. Colo. L. Rev. 1, 9 (1998). 20 years later, in *Packingham*, Justice Kennedy further emphasized his belief that the ease with which internet users – who make up 70 percent of America's Population – can engage in discussions on a diverse array of topics only supports the conclusion that such speech is protected by the First Amendment. *Packingham*, 582 U.S. at 104-105.

Justice Kennedy's opinion in *Packingham* explicitly states what his prior opinions have only suggested: that the Internet is a traditional public forum, akin to a town square or village green, and censorship of speech on the Internet violates the First Amendment. *See* Roberto A. Camara Fuertes, *Letting the Monster Out of the Closet: An Analysis of Internet Indecency Regulation*, 70 Rev. Jur. U.P.R. 129, 148 (2001). The First Amendment treats speech the same way regardless of whether it is shouted from a street corner or across a park, and there is no

reason that speech over the Internet should be treated any differently. D. Wes Sullenger, *Silencing the Blogosphere: A First Amendment Caution to Legislators Considering Using blogs to Communicate Directly with Constituents*, 13 Rich. J.L. & Tech. 15, 106 (2007). The Internet is the new public forum, the new "marketplace of ideas", and social media sites are the new town square; if this Court were to hold otherwise the First Amendment's protection of speech on the Internet would be eroded. Dawn C. Nunziato, *The Death of The Public Forum in Cyberspace*, 20 Berkeley Tech. L.J. 1115 (2005). Technological advances have changed the way people are affected by their civil liberties, and in the modern era these civil liberties "transcend physical space" to the cyber world. Adam Lamparello, *The Internet is the New Marketplace of Ideas: Why Riley v. California Supports Net Neutrality*, 25 DePaul J. Art, Tech. & Intell. Prop. L. 267, 272 (2015). It is imperative that the First Amendment "transcend physical space" as well. *Id*.

Even if the Internet were not a traditional public forum (though it is), this Court should nonetheless hold that it is a designated public forum. A designated public forum is property that the state has opened for use by the public as a place for expressive activity. *Perry*, 460 U.S. at 45. Designated public forums are "bound by the same standards [that] apply in a traditional public forum" and therefore speech within them is protected by the First Amendment: content-based restrictions must pass strict scrutiny, while viewpoint discrimination is prohibited. *Id*. at 46.

Designated public forums can only be created by intentional acts of the government. *Cornelius*, 473 U.S. at 802. When deciding whether the government intentionally acted to create a designated public forum, the Court determines the government's intent by looking at the "policy and practice of the government", along with the nature of the property and whether it is compatible with expressive activity. *Id*. Courts also look at the extent to which the government

has opened the forum. Thus, "almost unlimited access to [a] forum…is substantial evidence that [the government] creates a designated public forum." Remy T.B. Oliver, *Ridden with Controversy: Applying the Public Forum Doctrine to Public Transit Advertising*, 30 Wm. & Mary Bill Rts. J. 467, 486 (2021).

These factors are easily met in this case. First, the government of Midland intentionally acted to create a public forum by creating the SPAAM Act. The SPAAM Act was created by the intentional act(s) of the Midland government. R. at 4-5. Midland Representatives stated that the act was passed to discourage the suppression of free speech and support the expression of Midland citizens' views. R. at 5. Furthermore, this Court has held that the Internet – and social media in particular – is compatible with speech activity. *See Packingham*, 582 U.S. at 104-105. Perhaps most importantly, the Internet and social media – especially in light of the SPAAM Act's restrictions on censorship – offer any person (and, in fact, most of the country's population) the ability to use the Internet without any significant restrictions. *Id*. Taken together, these factors show that the SPAAM Act created a designated public forum subject to the same strict limitations of traditional fora.

Unlike *Lloyd v. Tanner*, 407 U.S. 551 (1972), Petitioner's identity as a corporation does not provide it immunity from being classified as a public forum. *Id*.; *See* R. at 2-3. When the owner of private property voluntarily opens their property for the public to come and go as they please, the private property in question is considered a free speech zone. *PruneYard*, 447 U.S. at 87. This Court in *PruneYard* distinguished that case from *Lloyd Corp* because, in *PruneYard*, the California Supreme Court recognized that, unlike the First Amendment, Art. 1 §§ 2 & 3 of the California Constitution establish the right to free speech on private property. *Id* at 79-81. Similar to the facts in *PruneYard*, Headroom opens its service to the public. R. at 2-3. More importantly,

Midland established the right to free speech on social media by passing the SPAAM Act. *See* R. at 5-6. Because the SPAAM Act establishes the right to free speech among Headroom users, Headroom is a designated public forum.

Because the Internet is a public forum, this Court should uphold the decision of the Thirteenth Circuit vacating the preliminary injunction against the SPAAM Act. Public forums are those areas which have "immemorably…been used for purposes of communicating thoughts between citizens." *Hague*, 307 U.S. at 514. The Internet has evolved significantly over the past 3 decades, and so has the way people use it. Even if it isn't a traditional forum, it has nevertheless become a public forum. The SPAAM act was passed by the Midland government to support citizens' First Amendment rights and encourage the free exchange of ideas on a platform this Court has stated is compatible with the First Amendment. R. at 5; *Packingham*, 582 U.S. at 104-105. The Internet is the new "marketplace of ideas" where people come together to freely communicate their thoughts and openly engage in speech. Nunziato, *Supra*. Because the SPAAM Act does not violate the First Amendment, Headroom is unlikely to succeed on the merits.

CONCLUSION

For the foregoing the forgoing reasons we ask this Court to uphold the decision of the Fifth Circuit.

Respectfully Submitted,

__TEAM 3__

Counsel for Respondent.

OCTOBER TERM 2023