**No. 22-386**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

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HEADROOM, INC.,

*Petitioners,*

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND

*Respondent.*

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

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# BRIEF FOR PETITIONERS

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## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iv

QUESTION PRESENTED ..... vii

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 5

ARGUMENT ..... 5

I. UNDER THE FIRST AMENDMENT'S FREE SPEECH CLAUSE, MAJOR SOCIAL MEDIA COMPANIES ARE NOT COMMON CARRIERS AND THE RULING IN *ZAUDERER V. OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO* DOES NOT APPLY TO THE SPAAM ACT'S DISCLOSURE REQUIREMENTS. ..... 6

A. Under the First Amendment's Free Speech Clause major social media companies are not common carriers. ..... 7

1. Major Social media companies do not offer the public indiscriminate access because they require all users to agree to and comply with community standards, then enforce those standards on a case-by-case basis ..... 7

2. Unlike common carriers, major social media companies provide a curated service involving individualized decisions regarding users and their use of the platform. ..... 8

B. Under the First Amendment's Free Speech Clause the Court's decision in *Zauderer* does not apply to the SPAAM Act's disclosure requirements. ..... 10

1. *Zauderer* does not apply because the enforcement actions subject to the SPAAM Act's disclosure requirements are not commercial speech ..... 11

2. Under the test dictated in *Zauderer* the SPAAM Act's disclosure requirements are unjustified and unduly burdensome, and therefore the Court's decision in that case does not apply.. ..... 12

a. The SPAAM Act's disclosure requirements are not justified as required by *Zauderer* because they are not reasonably related to the Act's purpose and are moot in the context of the whole Act. ..... 13

b. The SPAAM Act's disclosure requirements are impermissibly burdensome under *Zauderer* due to the volume of disclosures they would require and their effect on the use of artificial intelligence. ..... 15

II. A STATE VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE WHEN IT REQUIRES THAT MAJOR SOCIAL MEDIA COMPANIES GIVE USERS NONDISCRIMINATORY ACCESS TO THEIR SERVICES ..... 16

A. Major social media companies engage in First Amendment activity when they decide which users can access their platforms. ..... 18

1. Major social media companies engage in editorial judgment when they decide which users to ban temporarily or permanently, and how to prioritize content..... 18

2. Social media platforms engage in inherently expressive conduct when they decide to ban a user permanently or temporarily, or deprioritize a user's content..... 20

3. Social media companies engage in First Amendment activity and explicitly disagree with the speech they would be forced to host under the SPAAM Act, which distinguishes them from the forums in *PruneYard* and *FAIR*... ..... 21

B. The SPAAM Act's requirement that platforms not ban users or deprioritize content based on "viewpoint" is a content-based restriction of speech and thus subject to strict scrutiny..... 24

1. The SPAAM Act is a content-based restriction of speech on its face because it treats one category of speech, viewpoint-based speech, more favorably than others..... 24

2. The legislative history of the SPAAM Act shows the Midland Legislature specifically targeted viewpoint-based speech for preferential treatment. ..... 25

C. The SPAAM Act's viewpoint-based access requirements on social media platforms do not satisfy strict or intermediate scrutiny..... 27

1. The access requirements fail strict scrutiny because the state does not assert any compelling interest related to speech and if it has any compelling interest the requirements are overinclusive in how much speech they regulate..... 27

2. The access requirements fail intermediate scrutiny because Respondents do not assert any legitimate interest related to speech and because their regulation of speech does not serve the state's possible legitimate interests.. ..... 28

CONCLUSION ..... 29

## TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. Const., amend. I. ..... 20

UNITED STATES SUPREME COURT CASES

*Arkansas Educ. Television Comm'n v. Forbes*,
523 U.S. 666 (1998) ..... 18-19, 23

*Buckley v. Valeo,*
424 U.S. 1 (1976) ..... 28-29

*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*,
447 U.S. 557 (1980) ..... 11

*City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*,
596 U.S. 61 (2022) ..... 25, 28

*FCC v. Midwest Video Corp.,*
440 U.S. 689 (1979) ..... 6-7

*FCC v. Pacifica Found*.,
438 U.S. 726 (1978) ..... 6

*Gitlow v. People of State of New York*,
268 U.S. 652 (1925) ..... 16

*Glickman v. Wileman Bros. & Elliott*,
521 U.S. 457 (1997) ..... 11, 13

*Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*.,
515 U.S. 557 (1995) ..... 10, 16, 18-20

*Miami Herald Pub. Co. v. Tornillo*,
418 U.S. 241 (1974) ..... 17-19

*Milavetz, Gallop & Milavetz, P.A. v. United States,*
559 U.S. 229 (2010) ..... 13

*Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California,*
475 U.S. 1, 5 (1986) ..... 18-19

*PruneYard Shopping Ctr. v. Robins*,
447 U.S. 74 (1980) ..... 18, 21-23

*Reed v. Town of Gilbert, Ariz*,
576 U.S. 155 (2015) ..... 17, 24-25

*Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*,
547 U.S. 47 (2006) ..... 18, 21, 23

*Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*,
502 U.S. 105 (1991) ..... 17, 27-28

*Sorrell v. IMS Health Inc.*,
564 U.S. 552 (2011) ..... 24-25

*Standard Oil Co. of New Jersey v. United States*
221 U.S. 1 (1911) ..... 29

*Spence v. State of Wash.*,
418 U.S. 405 (1974) ..... 17-18, 20

*Texas v. Johnson*,
491 U.S. 397 (1989) ..... 20

*United States v. Eichman,*
496 U.S. 310 (1990) ..... 25-26

*Ward v. Rock Against Racism*,
491 U.S. 781 (1989) ..... 17, 27

*Zauderer v. Office of Disciplinary Counsel of Supreme Court*,
471 U.S. 626 (1985) ..... 6-7, 10-16, 29

UNITED STATES CICUIT COURT OF APPEALS CASES

*Green v. Am. Online (AOL),*
318 F.3d 465 (3d Cir. 2003) ..... 8

*NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1214 (11th Cir. 2022), *cert. granted in part sub nom. MOODY, ATT'Y GEN. OF FL, ET AL. v. NETCHOICE, LLC, ET AL.*, No. 22-277, (Sept. 29, 2023) ..... 20-21, 23

*United States Telecom Ass'n v. Fed. Commc'ns Comm'n*,
825 F.3d 674 (D.C. Cir. 2016) ..... 6-9

*Verizon v. F.C.C.*,
740 F.3d 623, 628 (D.C. Cir. 2014) ..... 7, 9

OTHER

John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*,
Cato Institute Policy Analysis, No. 865 (2020) ..... 20

Marie-Andrée Weiss*, Regulating Freedom of Speech on Social Media: Comparing the EU and US Approach,*
Stanford-Vienna Transatlantic Technology Law Forum, No. 73 (2021). ..... 9, 15

Mathew N. O. Sadiku et al*, Artificial Intelligence in Social Media,*
International Journal of Scientific Advances (2021) ..... 16

U.S. SURGEON GEN., SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY (2023). ..... 9

Yavar Batharee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*,
31 Harv. J.L. & Tech. 2 (2018). ..... 16

## QUESTIONS PRESENTED

I. Under the First Amendment do major social media companies meet the requirements for common carrier status and does the Court's decision approving certain limited factual disclosures apply to the SPAAM Act's sweeping 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?

## STATEMENT OF THE CASE

### I. Statement of Facts

Max Sterling thinks his freedom of speech is in danger. R. at 4. Sterling believes this because his incendiary posts on social media platform Headroom are often flagged for racism, sexism, and promotion of violence against protected classes. Id. Headroom did not remove any of these posts, but regardless Sterling's complaints prompted the Midland Legislature to pass sweeping and restrictive legislation targeting social media companies.

When its artificial intelligence system detects content that potentially violates the platform's community standards, Headroom attaches labels like the ones on Sterling's posts and steers less online traffic toward them. R. at 3. The standards and their enforcement help serve Headroom's mission of being a platform that promotes "greater inclusion, diversity, and acceptance." R. at 2-3. Aggrieved that posts marked with such labels received fewer views, users like Sterling successfully lobbied the Midland State Legislature into passing the Speech Protection and Anti-Muzzling (SPAAM) Act. R. at 4. This legislation is now the subject of the case at bar.

Headroom, Inc., is the largest social media company in Midland. R. at 16. Headroom differs from other social media platforms in that its users interact with each other in a virtual reality setting they access via headset, rather than a timeline-style platform accessed via smartphone or computer like X or Facebook. R. at 3. Headroom strives to provide an individually optimized experience for its seventy-five million monthly users by utilizing an algorithm which promotes content aligned with a user's preferences. Id. The algorithm also uses data gathered by Headroom's tracking systems to further individualize the experience users have on the platform. Id. In addition to posting content, Headroom users can earn income on the platform by

monetizing posts, getting advertisers to sponsor their accounts, and receiving donations from other users. Id.

All users must agree to the community standards before joining Headroom. Id. The standards forbid content that Headroom sees as antithetical to its vision, such as implicit or explicit hate speech, bullying and harassment, racism and sexism, homophobia and transphobia, negative comments or criticism of protected classes, and disinformation. Id. Aside from warnings like those attached to Sterling's posts, the community standards are also enforced by algorithmic deprioritization of posts that violate standards, demonetizations of a user's account, as well as temporary or permanent banning from Headroom's servers. Id.

The Governor of Midland, Michael Thompson, called a special session of the Midland Legislature in response to the complaints of users like Sterling. Id. At this special session the legislature heard testimony from Sterling and two other prominent headroom users. R. at 4-5. Fashion entrepreneur Mia Everly alleged that her business faltered after she "criticized a controversial presidential candidate." Id. Headroom user, Ava Rosewood, said the company banned her for spreading disinformation and hate speech after she praised a "documentary about immigration to Europe." R. at 5.

In response to the complaints voiced, Midland State Representatives Margaret Caldwell and Jonathan Barnes introduced the SPAAM Act. Id. Representative Barnes said the Act would prevent "excessive censorship by tech behemoths" and "curb their power." Id. The bill's authors also claimed the SPAAM Act's restrictions on social media companies were necessary to protect civil liberties and would restore the "voice of the people." Id. The Midland Legislature's Speaker of the House Nancy Thornberry claimed these "unaccountable companies" posed a threat to "individuals' livelihoods" and "our very ability to challenge the political orthodoxy." Id.

The SPAAM Act regulates any "information service, system, search engine, or software provider" which meet certain requirements. These requirements include that they are a "corporation, association, or other legal entity," and have at least twenty-five million monthly users globally. R. at 5-6. The SPAAM Act regulates entities through two statutory schemes, the first prohibits them from altering or removing content on the platform and the second imposes a two-pronged disclosure requirement. Id.

The first requirement of the SPAAM Act eliminates the discretion that companies like Headroom have over content moderation of their platforms. R. at 6. This requirement bans platforms from "censoring, deplatforming, or shadow banning" any content published on the platform by any "individual, business, or journalistic enterprise" based on "viewpoint." Id. While the term "viewpoint" limits the scope of this prohibition, that term is undefined in the statute. Id. The definitions of the barred actions are also broad. "Censoring" includes any action that deletes content, alters content, or adds commentary. Id. "Deplatforming" occurs when a user is either permanently or temporarily banned. Id. "Shadow banning" occurs when a platform wipes out a user or their content's exposure without explicitly banning them, or otherwise reduces the prominence of their content. Id. Social media platforms only retain discretion to take these actions when the content is "obscene, pornographic, illegal, or patently offensive." Id. Like "viewpoint," "patently offensive" lacks a statutory definition. Id.

The second part of the SPAAM act imposes two disclosure requirements on social media platforms. Id. The first requirement directs platforms to disclose "community standards," along with detailed definitions of the standards and explanations on how they will be "interpreted, used, and enforced." Id. The second requirement applies when platforms enforce their community standards against a user. Id. When a platform conducts an enforcement action, it must make a

"detailed and thorough" disclosure of what standard was violated, how the content violated that standard, and why the specific enforcement action was taken. Id.

The violation of any of the statute's requirements can result in a complaint filed by either the Attorney General of Midland or an independent suit brought by any Midland citizen. Id. These suits, if successful, impose significant penalties on the platforms in the form of either injunctions or a $10,000 fine per day for every violation found to have taken place. R. at 7. The Midland Legislature passed the SPAAM Act on February 7, 2022, and it went into effect on March 24, 2022. Id.

## II. Procedural History

Headroom ("Petitioner") filed a pre-enforcement challenge against Midland Attorney General Edwin Sinclair ("Respondent") in the United States District Court for the District of Midland on March 25, 2022. Id. Petitioner alleged the Act violated its First Amendment rights and sought both permanent and preliminary injunctions to prevent Attorney General Sinclair from enforcing the Act. Id. The District Court granted the preliminary injunction, finding that Petitioner was likely to succeed on the merits that the SPAAM Act violated its First Amendment rights. Id. The District Court held that the disclosure requirements of the Act impermissibly compelled Headroom to speak and intruded into Headroom's editorial process by forcing it to host content it disagreed with. R. at 11-14.

Respondents appealed to the Thirteenth Circuit Court of Appeals. R. at 16. The majority reversed the District Court's ruling on both First Amendment arguments, finding that the disclosure requirements required Headroom to disclose "purely factual and uncontroversial information" and that Midland could force Headroom to host content it disagreed with because people would not associate Headroom with content it hosts on its platform. R. at 19. Petitioners filed a writ of certiorari, and the Supreme Court granted it. R. at 21.

## SUMMARY OF THE ARGUMENT

This Court should strike down the SPAAM Act because enforcement will leave the Free Speech Clause of the First Amendment in tatters. Social media platforms are not common carriers because they do not offer indiscriminate access and use. The Court's prior approval of disclosure requirements on private enterprises should not be extended to this case. The SPAAM Act unjustifiably applies a disclosure requirement to non-commercial speech, which places an impermissibly high burden on the companies.

The SPAAM Act's mandate that social media platforms offer nondiscriminatory access also violates the Free Speech Clause of the First Amendment because it interferes with the editorial discretion platforms exercise via their inherently expressive content moderation policies. The Act treats one category of speech, viewpoint-based speech, more favorably than other categories which makes it a content-based speech regulation subject to strict scrutiny. Even if the Court does not apply strict scrutiny to this mandatory access portion of the SPAAM Act, it should still be struck down because it cannot survive strict or intermediate scrutiny.

## ARGUMENT

Americans have greater freedom of speech than any other democracy on the planet. As new online information forums emerge, the First Amendment's safeguards should continue to protect against governmental interference. This court should not allow the State of Midland to strangle these long-hallowed Constitutional protections in the cradle of the social media era.

The Court should reject Respondent's arguments that major social media companies are common carriers and do not engage in First Amendment activity. Social media platforms are not common carriers because of the individualized and inherently expressive nature of the decisions the platforms make every day regarding access to their servers. The disclosures required under the

SPAAM Act do not regulate commercial speech and place an impermissibly high burden on social media platforms, which distinguishes it from valid forced disclosure laws. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). While the Court should apply strict scrutiny to the SPAAM Act's mandatory access requirements, this portion of the Act should not survive because it fails both strict and intermediate scrutiny.

## I. UNDER THE FIRST AMENDMENT'S FREE SPEECH CLAUSE, MAJOR SOCIAL MEDIA COMPANIES ARE NOT COMMON CARRIERS AND THE RULING IN *ZAUDERER V. OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO* DOES NOT APPLY TO THE SPAAM ACT'S DISCLOSURE REQUIREMENTS.

As technology has developed the Court has recognized that every new medium of expression presents unique problems under the First Amendment. *FCC v. Pacifica Found*., 438 U.S. 726, 748 (1978). The Court has determined that a narrow class of speakers termed common carriers get less protection from the Free Speech Clause because they provide information infrastructure, but do not exercise editorial control over that infrastructure. *FCC v. Midwest Video Corp*., 440 U.S. 689, 701 (1979). The Court has allowed limited disclosure requirements upon commercial speakers under the Free Speech Clause so long as they are justified and not unduly burdensome. *Zauderer*, 471 U.S. at 651.

As major social media companies provide a curated and restricted service instead of mere information infrastructure, they are not common carriers. Use of social media platforms is distinguishable from use of a common carrier because social media use is contingent upon consent to a platform's individually enforceable community standards. *United States Telecom Ass'n v. Fed. Commc'ns Comm'n,* 825 F.3d 674, 689 (D.C. Cir. 2016). Unlike common carriers, major social media companies do not "merely facilitate the transmission of the speech of others." *Id*. at 741. Major social media companies provide a platform with content curated to each individual user and filtered for standards violations on a post-by-post basis.

The *Zauderer* decision upheld disclosure requirements because it considered both the nature of the speech the requirement burdened as well as the specific justification and level of burden placed on the speaker. *Zauderer*, 471 U.S. at 651. *Zauderer* dictates that the SPAAM Act's disclosure requirements be struck down because they burden non-commercial speech, are unjustified, and are unduly burdensome on major social media companies.

A. Under the First Amendment's Free Speech Clause major social media companies are not common carriers.

Common carriers are entities subject to less protection under the First Amendment's Free Speech Clause, and they are characterized by services which do not involve individualized decisions regarding users or use and are offered to the public indiscriminately. *United States Telecom Ass'n,* 825 F.3d at 738. Common examples include telegraphs, phone companies, and internet service providers. *Id*. at 741. Major social media companies, as recognized by the SPAAM Act itself, do not offer indiscriminate access but rather condition access upon agreement to community standards that dictate guidelines for use of the platform. R. at 6. Additionally, major social media companies like Headroom curate individualized user experience based on consumer preferences that are constantly monitored and accounted for.

1. Major social media companies do not offer the public indiscriminate access because they require all users to agree to and comply with community standards, then enforce those standards on a case-by-case basis.

The Court has established that indiscriminate public access to a service is a "basic characteristic" that distinguishes common carriers. *Verizon v. F.C.C.,* 740 F.3d 623, 651 (D.C. Cir. 2014). Because of the importance of unrestricted access to common carrier status, an entity that does make individualized decisions regarding "whether, and on what terms to deal" will not be deemed a common carrier. *Midwest Video*, 440 U.S. at 701.

As recognized by the District Court, social media companies are distinguishable from

common carriers because they condition access to their platform on a user's agreement to abide by community standards. R. at 11. As seen in the case of Headroom, consent to community standards does not grant free reign on the platform. R. at 3-4. Instead, agreement to the standards forms a contractual arrangement that allows use of the platform within certain bounds. Id. When an individual agrees to the community standards of a social media company and receives potentially lucrative access to the platform in return, a contract is formed to "establish standards of decency." *Green v. Am. Online* (AOL), 318 F.3d 465, 472 (3d Cir. 2003).

The conditional access continues after account formation, as the companies actively enforce community standards on a case-by-case basis and revoke access when a user violates that agreement. R. at 4. This conditional access is made clear by testimony heard in the Midland Legislature's special session prior to its passage of the SPAAM Act. Users who violated Headroom's community standards had their access to the platform reduced or revoked. R. at 4-5. This conditional and limited access is fundamentally different from the indiscriminate access associated with common carriers.

Because of the limited and individually moderated access major social media companies grant users, they are distinguishable from common carriers that offer service to the public indiscriminately. Therefore, the Court should find that the platforms are not common carriers.

2. Unlike common carriers, major social media companies provide a curated service involving individualized decisions regarding users and their use of the platform.

Common carriers are public infrastructure that "merely facilitate the transmission of the speech of others." *United States Telecom Ass'n,* 825 F.3d at 741. Common carriers do not make individualized decisions regarding users and the speech they use the carrier to convey. *Verizon,* 740 F.3d at 651. Common carriers provide infrastructure intended for their clients to utilize to

convey speech of their own design, the carriers themselves do not impose their own design or values. *United States Telecom Ass'n,* 825 F.3d at 739. An entity that engages in publisher-like editorial discretion regularly is not a common carrier. *Id.* at 742. Broadcasters, for example, were held to not be common carriers because they only disseminated third-party speech that they approved and engaged in their own speech by presenting that content curated for their desired audience. *Id.* at 741.

Social media companies like Headroom do much more than provide a mere conduit for speech, they present speech in a manner optimized for each individual user. R. at 3. Competition among social media companies, who are dependent on large user bases for their revenue, has skyrocketed in recent years as they each attempt to attract the most users through algorithmic content curation. Marie-Andrée Weiss, *Regulating Freedom of Speech on Social Media: Comparing the EU and US Approach*, Stanford-Vienna Transatlantic Technology Law Forum, No. 73 (2021). Headroom's curation method increases the platform's appeal to users by providing a stream of content aimed at each user's individual interests.
The individualized community standards enforcement decisions that companies like Headroom make serve the same competitive purpose as curation. These decisions ensure that the platform is palatable to the largest possible audience by removing offensive material that might reduce engagement. As children increase their social media use this commercial function becomes more important, as minors will be denied access to platforms that frequently host graphic or objectionable content. U.S. SURGEON GEN., SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY (2023).

Though social media companies do not engage in editorializing in the same manner as a newspaper or television broadcaster, the individualized decisions they do make play a fundamental role in their business model. Therefore, the Court should find that these

companies are distinguished from common carriers by their ability to choose which content they carry and their market-based need to present that content in the most user-optimized way.

B. Under the First Amendment's Free Speech Clause the Court's decision in *Zauderer* does not apply to the SPAAM Act's disclosure requirements.

Excluding specific exceptions, the First Amendment's Free Speech Clause prevents individuals or entities from being compelled to produce or publish speech by state action. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 573 (1995). One of the exceptions established by the Court is when laws require private enterprises to make factual disclosures that mitigate potentially deceptive impacts of their commercial speech. *Zauderer*, 471 U.S. at 651. The ruling in *Zauderer* was contingent on the commercial nature of the speech produced by the regulated party, the justification for the regulation, and the burden imposed by the required disclosure. *Id*. at 673. The SPAAM Act's disclosure requirements can be distinguished from the regulations in *Zauderer* on all three grounds.

First, the speech regulated by the SPAAM Act's disclosure requirements is not commercial speech, as was the case in *Zauderer*. *Id*. at 663. Second, an application of the test outlined in *Zauderer* does not lead to the same result as in that case, where the Court found that the burden placed on First Amendment interests was minimal given the justification. *Id*. at 651. The burden that social media companies face from the SPAAM Act's disclosure requirement is far greater than in *Zauderer* because of the nature of the speech, the frequency of the disclosures, and the volume of the required explanations. The connection between the purpose of the requirements and their practical impact is also much weaker than the connection in *Zauderer*. *Id*. at 653. Therefore, even if *Zauderer* applies to the SPAAM Act's disclosure requirements, they must still fail the test established in *Zauderer* for acceptable disclosure requirements.

1. *Zauderer* does not apply because the enforcement actions subject to the SPAAM Act's disclosure requirements are not commercial speech.

The *Zauderer* decision does not apply to non-commercial speech. *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 491 (1997) ("*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages."). The Court has defined commercial speech as speech that proposes a commercial transaction, including but not limited to advertising. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980). When speech is found to be commercial as in *Zauderer*, it has fewer First Amendment protections. *Zauderer*, 471 U.S. at 637.

Aside from the lesser degree of free speech rights involved, the nature of commercial speech was critical in the *Zauderer* holding because of the policy concerns posed by commercial speech. *Id*. at 643. It has been established that commercial speech has the potential to confuse or mislead consumers due to its role in influencing consumer decisions. *Cent. Hudson*, 447 U.S. at 561. In *Zauderer,* the speech in question was an advertisement for legal services on a contingency basis that promised clients would not owe attorney's fees if the case was lost but did not mention that court fees were owed regardless of outcome. *Zauderer*, 471 U.S. at 652. The Court found that the advertisement posed a risk of deceiving potential clients because of the omission, and therefore a requirement that such advertisements disclosed court costs was justified. *Id*.

Social media community standards enforcement actions that trigger the SPAAM Act's disclosure requirements lack the essential features of commercial speech. Commercial speech is primarily defined as proposing a commercial transaction. *Cent. Hudson*, 447 U.S. at 562. The SPAAM Act's disclosure requirements are prompted by enforcement of a preexisting agreement with the consumer. These enforcement actions do not propose a commercial transaction, instead they are always directed at existing customers already engaging with the

platform. The harshest enforcement action, a permanent ban from a platform, ends a user's interaction with a company. Not only does the expressive conduct in question lack the essential feature of commercial speech but in some instances, it accomplishes the opposite purpose and ends a commercial relationship.

The expressive conduct targeted by the SPAAM Act's disclosure requirements also does not implicate the same policy concerns that justified the First Amendment exception outlined in *Zauderer*. *Zauderer*, 471 U.S. at 652. *Zauderer* involved an advertisement for professional services to a lay audience that withheld critical information and, as a result, created a risk that consumers would be misled. *Id*. The context of that advertisement magnified a policy concern already present in commercial speech, the risk that false or misleading commercial speech could misinform consumers. *Id*. Social media companies enforcing their community standards does not create a risk of consumer confusion because every user reads and agrees to the community standards when they join a platform. Additionally, when the enforcement action taken is to place commentary beneath a post to indicate a community standards violation, it diminishes rather than enlarges the risk of consumer confusion.

The speech and expressive conduct subject to the SPAAM Act's disclosure requirements is neither commercial speech nor speech that poses the same public policy concerns as commercial speech. Therefore, the Court should find that *Zauderer* does not apply to the SPAAM Act's disclosure requirements.

2. Under the test dictated in *Zauderer* the SPAAM Act's disclosure requirements are unjustified and unduly burdensome, and therefore the Court's decision in that case does not apply.

Even if the Court's decision in Zauderer is found to extend beyond the context of commercial speech, the approval of factual disclosure requirements in that case was subject to

the condition that such requirements not be unjustified or unduly burdensome. *Zauderer*, 471 U.S. at 651. The justification for the SPAAM Act's compelled disclosures is diminished by both the context of the whole act and the lack of potential deception the affected speech poses. Furthermore, the SPAAM Act's disclosure requirements are not reasonably related to the purpose behind the regulation as required under cases that have applied *Zauderer*. *Glickman,* 521 U.S. at 491. Additionally, the burden posed by the requirement to disclose how a user violated a platform's community standards is massive because of social media companies' use of artificial intelligence and the number of disclosures the companies would have to make. R. at 3. The Court should thus find that the SPAAM Act's disclosure requirements fail the test established in *Zauderer*.

a. The SPAAM Act's disclosure requirements are not justified as required by *Zauderer* because they are not reasonably related to the Act's purpose and are moot in the context of the whole Act.

Under *Zauderer*, a disclosure requirement can only be justified if it is reasonably related to its declared purpose. *Zauderer*, 471 U.S. at 651. Such a requirement must be aimed at speech that implicates the state's policy goals. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 257 (2010).

The SPAAM Act's disclosure requirements are not reasonably related to the purpose of the Act as required by *Zauderer*. *Zauderer*, 471 U.S. at 651. The purpose of the SPAAM Act, as stated by one of its authors, is to restrict social media companies so that the "voice of the people" can be restored. R. at 5. Even assuming the enforcement of social media community standards deprives the people of their voice, the disclosure requirements do nothing to reverse or mitigate that alleged effect. R. at 5. The first requirement only dictates that a social media company gives detailed explanations of their platform's community standards and how they will be enforced. R. at 5-6. This does nothing to limit the scope of

these supposedly Orwellian standards or the extent of their enforcement. The requirement provides no way for a user to appeal the validity of a community standard they believe deprives them of their First Amendment rights. Id.

Likewise, the second requirement that enforcement decisions be accompanied by detailed disclosures does little to address the declared purpose of the act. These disclosures would be retrospective in nature, and no matter how detailed they are there is no mechanism for users to challenge the legitimacy of the justification or reverse the platform's action. Even if a legitimate justification is provided, the effect on user speech is the same and any alleged free speech deprivation remains.

The second disclosure requirement imposed by the SPAAM Act is overly broad in its scope and applies to speech the SPAAM Act recognizes as unworthy of protection. In the context of the entire SPAAM Act, the distance between the stated purpose for the second disclosure requirement and how that requirement actually operates becomes clear. The mandatory access portion of the SPAAM Act, which states that no user's access can be restricted because of "viewpoint", limits the type of enforcement actions that would trigger the act's second disclosure requirement. R. at 6. The only exception where these enforcement actions, such as banning a user or demonetizing their account, would still be allowed is when the challenged content is "obscene, pornographic, or otherwise illegal or patently offensive." Id. This limitation demonstrates that the Act disfavors speech that meets these qualifications. If the SPAAM Act is enforced however, speech that falls into these disfavored categories would still be protected by the Act's disclosure requirements when the platform performs an enforcement action. The second disclosure requirement thus protects user speech that the act disfavors.

The SPAAM Act's disclosure requirements do not serve the act's purpose of limiting a social media company's ability to suppress user speech. *Zauderer* and its progeny have held

that disclosure requirements that are not effective or reasonably related to their purpose are not justified, and the disclosure requirements imposed by SPAAM Act are neither reasonably related to their stated purpose nor justified.

b. The SPAAM Act's disclosure requirements are impermissibly burdensome under *Zauderer* due to the volume of disclosures they would require and their effect on the use of artificial intelligence.

In *Zauderer*, the Court held that if a disclosure requirement is unduly burdensome, then the requirement is improper. *Zauderer*, 471 U.S. at 651. The Court upheld the legal advertising disclosure requirement in that case because the required disclosure was small, and the resulting burden was reasonable given the likelihood of consumer deception posed by the advertisement at issue in the case. *Id*. at 652.

The SPAAM Act's second disclosure requirement places a massive burden on the affected platforms as some have billions of users. Weiss, *supra*, at 4. The SPAAM Act applies to social media companies that have a minimum of twenty-five million monthly users, let alone billions like Facebook. R at 5-6. The burden of providing a detailed explanation for every content moderation action is thus massive because of the volume of content and users on each affected platform. R. at 6. In *Zauderer,* the Court approved a requirement that called for a brief disclosure to be attached to an advertisement and reproduced. *Zauderer*, 471 U.S. at 651. Even if the audience of that advertisement had been as large as that of a social media platform the burden would still be miniscule compared to the individually tailored disclosures required by the SPAAM Act. *Id*. at 652.

The SPAAM Act's disclosure requirements represent a colossal burden on social media companies like Headroom due to their incompatibility with the use of artificial intelligence. Headroom uses artificial intelligence to ensure compliance with community standards and the law across all the content created by its user base, a task that would be

almost impossible for humans by themselves. R. at 3. This strategy is common among major social media companies. Mathew N. O. Sadiku et al, *Artificial Intelligence in Social Media*, International Journal of Scientific Advances (2021). However, a major limitation of artificial intelligence is the "black box" problem, where determining the rationale for a particular result generated by artificial intelligence can be challenging if not impossible. Yavar Batharee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 Harv. J.L. & Tech. 2 (2018). Therefore, social media companies faced with a requirement that they justify every enforcement decision performed by artificial intelligence would face just as daunting a task as they would if they abandoned artificial intelligence altogether.

The Court's decision in *Zauderer* only approved mandated factual disclosures if there was a proper balance between the mandate's justification and the burden on regulated enterprises. In the present case, there is little if any justification and an enormous potential burden on the organizations subject to the SPAAM Act. Therefore, even if the Court's decision in *Zauderer* does apply to any disclosure requirement for social media companies, it does not justify the SPAAM Act's disclosure requirements.

## II. A STATE VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE WHEN IT REQUIRES THAT MAJOR SOCIAL MEDIA COMPANIES GIVE USERS NONDISCRIMINATORY ACCESS TO THEIR SERVICES

The state action doctrine holds that the First Amendment restricts government actors, not private actors. *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925). The Court has declared non-speech conduct expressive enough to invoke the First Amendment's protections in a number of situations, holding that even parade organizers are protected in deciding which organizations to include in a parade. *Hurley*, 515 U.S. at 557.

Headroom's discretionary decisions as to which users they allow on their platform are First Amendment activities worthy of protection. Companies like Headroom engage in editorial

discretion when determining what content they allow on their platform, in much the same way a newspaper decides which articles to include. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Social media platform content moderation decisions also warrant First Amendment protection because they are inherently expressive. The decision of what content or which users to remove "conveys a particularized message" to an observer. *Spence v. State of Wash.*, 418 U.S. 405, 411 (1974).

The SPAAM Act should be subject to strict scrutiny because it is a content-based restriction of speech. The Act's explicit protection of viewpoint-based speech singles out one category of speech for preferential treatment, and the Court has held that such regulations must be analyzed under strict scrutiny. *Reed v. Town of Gilbert, Ariz*, 576 U.S. 155, 159 (2015). Additionally, legislative testimony and statements by prominent Midland politicians prior to the passage of the SPAAM Act shows the legislature's motive was to protect viewpoint-based speech more than other kinds of speech.

The Act cannot withstand any level of scrutiny analysis, whether it is strict or intermediate. The Act fails strict scrutiny because the Midland Legislature asserts no compelling interest related to speech on social media platforms, and it does not need to regulate any speech to serve anti-monopolistic goals voiced by the Act's authors. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). The Act also fails intermediate scrutiny because restricting social media content moderation is not an important interest, and the Act burdens more speech than necessary to address market consolidation. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

A. Major social media companies engage in First Amendment activity when they decide which users can access their platforms.

Private entities, whether they be newspapers, parade organizers, or indeed social media platforms, engage in First Amendment activity when they exercise judgment as to what third-party speech they choose to disseminate in their respective forums. *Hurley*, 515 U.S. at 581 ("Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message."). Social media companies engage in inherently expressive conduct when they limit a user's access to a platform due to community standards violations, because the action communicates an understandable message. *Spence*, 418 U.S. at 411. The SPAAM Act would coerce social media companies into disseminating speech they disagree with, which differentiates their platforms from neutral forums where the Court found it acceptable to require access. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980); *see also Rumsfeld v. F. for Acad. & Institutional Rts., Inc*., 547 U.S. 47, 60 (2006) ("*FAIR*").

1. Major social media companies engage in editorial judgment when they decide which users to ban temporarily or permanently, and how to prioritize content.

The Court has long been wary of government efforts to insert itself into the decision-making process of private actors that disseminate third-party speech, particularly newspapers. *Miami Herald*, 418 U.S. at 255-56. (noting Court's prior opinions expressed caution even at requiring newspapers to carry nondiscriminatory job advertisements). The Court did not limit this principle to newspapers following *Miami Herald*, extending it to a power utility's billing envelope, cable operators, and, as previously mentioned, parade organizers. *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 13 (1986); *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998).

The Court in *Miami Herald* struck down a "right of access" statute and held that such statutes restrict rather than expand First Amendment freedoms. *Miami Herald*, 218 U.S. at 254-58. The motivation underlying the statute at issue in *Miami Herald* is identical to the motivation behind the SPAAM Act. The appellee in *Miami Herald* argued that as the newspaper industry contracted, the views presented in newspapers became more homogenous and the government had to ensure that Americans had access to a wide range of opinions. *Id*. at 250-51. Respondents in this case make a similar argument except they accuse social media platforms rather than newspapers of stifling the marketplace of ideas. However, the Court held that the only way a right of access could become reality was either by the platform consensually publishing material, or the government coercing the platform to publish material. *Id*. at 255. In this case, the Midland Legislature attempts to coerce social media companies into providing a right of access for users. This governmental aggression conflicts with the heart of the Free Speech Clause and should be nipped in the bud, just as it was in *Miami Herald*.

In the decades following *Miami Herald*, the Court recognized that a variety of organizations engage in First Amendment activity when they decide whether to disseminate third-party speech. The Court held that government regulation of cable operators triggered First Amendment scrutiny because the operators' curation of channels to provide to their consumers was a "communicative act." *Arkansas Educ. Television Comm'n*, 523 U.S. at 674. The Court struck down a state agency regulation which would have required a power utility to carry third-party content in a newsletter the utility included with its monthly bill, holding it was the utility's choice to make that decision. *Pacific Gas*, 475 U.S. at 9. The Court granted parade organizers the right to exclude groups whose message they did not want associated with the parade's overall message. *Hurley*, 515 U.S. at 572-73.

If the Court holds that a social media platform's content moderation does not trigger First Amendment scrutiny, then it threatens the editorial autonomy of any outlet that disseminates third party speech, whether it be a social media platform, a radio station, or a community newsletter.

2. Social media platforms engage in inherently expressive conduct when they decide to ban a user permanently or temporarily, or deprioritize a user's content.

The First Amendment mandates that Congress and state governments "shall make no law… abridging the freedom of speech, or of the press" U.S. Const. amend. I. However, the Court has not limited the First Amendment's protections to only vocal and written speech. Governmental regulation of conduct also warrants First Amendment scrutiny if it is "sufficiently imbued with elements of communication." *Spence*, 418 U.S. at 409.

The Court has noted the First Amendment's flexibility, holding that it is "ultimately defined by the facts it is held to embrace." *Hurley*, 515 U.S. at 568. A common example of where the Court has found expressive conduct worthy of First Amendment protection is the use of a flag in a protest. *Spence*, 418 U.S. at 405; *see also Texas v. Johnson*, 491 U.S. 397, 420 (1989). Regardless of the factual situation, the *Spence* Court held that expressive conduct occurs when the speaker intends to convey a particularized message and the message is likely to be understood. *Spence*, 418 U.S. at 410-11.

Social media companies express the values of their particular online community through community standards. John Samples, *Why the Government Should Not Regulate Content Moderation of Social Media*, Cato Institute Policy Analysis, No. 865 (2020). These community standards are enforced via content moderation, which prevents the dissemination of content that is antithetical to those standards. The Eleventh Circuit found that a reasonable observer would understand that a "message" is sent when a platform removes hate speech or bans a controversial politician. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1214 (11th Cir. 2022), *cert. granted*

*in part sub nom. MOODY, ATT'Y GEN. OF FL, ET AL. v. NETCHOICE, LLC, ET AL.*, No. 22-277 (Sept. 29, 2023).

The action Headroom took against one of the aggrieved users who testified prior to the passage of the SPAAM Act illustrates how social media companies express their values through content moderation. Ava Rosewood testified that after she praised a controversial immigration documentary, Headroom banned her account for spreading disinformation and hate speech. R. at 5. Rosewood thus connected these two events in her testimony. Id. To a reasonable observer, the logical conclusion to draw from Rosewood's connection of these two events is that the values espoused by the documentary were not the sort that Headroom wanted on its online community.

The First Amendment's Free Speech Clause protects a broad range of inherently expressive conduct so long as the speaker communicates a message through their conduct and that message is understandable. Major social media companies, including Headroom, express their desire for a particular kind of community through enforcement of their community standards and this expression warrants First Amendment protection.

3. Social media companies engage in First Amendment activity and explicitly disagree with the speech they would be forced to host under the SPAAM Act, which distinguishes them from the forums in *PruneYard* and *FAIR*.

There are certain limited situations in which the government can compel a private forum to disseminate third party speech. An example of this would be a mall owner who, having no objections to any particular kind of speech, seeks to expel pamphleteers from his mall. *PruneYard*, 447 U.S. at 86-87. Another example is a law school which must host military recruiters to receive federal government funding but is otherwise free to critique military policies. *FAIR*, 547 U.S. at 70.

The mall owner in *PruneYard* wanted to ensure that his property was not used "as a forum for the speech of others." *PruneYard*, 447 U.S. at 85. In other words, the mall owner's objection

to the pamphleteers was not the message in their pamphlets, but rather that they were pamphleteering at his mall. Even if the mall owner had explicitly disagreed with the message of the pamphleteers, the Court noted that as a business open to the public, people would not associate the pamphleteers' message with the owner. *Id*. at 87. The Court held the mall owner was "free to publicly dissociate" from the message of the pamphleteers. *Id*. at 88.

A social media platform's predicament under the SPAAM Act differs from the mall owner's situation in *PruneYard* for practical reasons. Social media platforms would never wish to be free from third party speakers, the business model of a social media platform depends on hosting the speech of others. Headroom and other social media platforms are also not open to the public in the same way the mall in *PruneYard* was. On most social media platforms users must agree to abide by the platform's community standards to be able to use the platform, and in Headroom's case they must also purchase a virtual reality headset. R. at 3.

The SPAAM Act would also burden Headroom's substantive First Amendment rights, which was not the case for the mall owner in *PruneYard*. Whereas the mall owner in *PruneYard* did not have any particular stance on the pamphleteers' message, there is a strong chance that social media companies will disagree with speech they are forced to host under the SPAAM Act. For example, Headroom has community standards which forbid posting transphobic content. R. at 3. Under the SPAAM Act, if a user asserts that their "viewpoint" is transphobic, Headroom would be forced to host transphobic content anyway. R. at 6. Social media companies are also different from the mall owner in *PruneYard* because they are not "free to publicly dissociate" themselves from the speech they would have to host under the SPAAM Act. *PruneYard*, 447 U.S. at 88. The SPAAM Act severely limits social media companies from using their own forum to denote posts that risk violating community standards. R. at 6. Respondents may argue that companies can disavow these posts through public relations statements, but this is an impossible challenge for

companies with just a bare minimum of twenty-five million monthly users, let alone billions. As a result, a social media company under the SPAAM Act cannot dissociate itself from the posts it allows on its platform.

The Court in *FAIR* held that the Solomon Amendment, which conditioned certain federal funding for law schools on the schools hosting military recruiters, did not affect the schools' ability to speak. *FAIR*, 547 U.S. at 66. The Court noted that the schools remained free to dissociate from the "Don't Ask, Don't Tell" policy by organizing student protests. *Id*. The Court also held that hosting job recruiters was not inherently expressive conduct because ejecting military recruiters from campus would not communicate anything absent additional explanatory speech. *FAIR*, 547 U.S. at 69.

Unlike the law schools in *FAIR*, the SPAAM Act's enforcement would both affect social media platforms' right to speak and interfere with their inherently expressive activity. A social media platform "engages in speech activity" via the dissemination of third-party speech, and the SPAAM Act would force platforms to disseminate speech they do not wish to. *Arkansas Educ. Television Comm'n*, 523 U.S. at 674. Furthermore, social media companies' hosting of objectionable content is expressive conduct in a way that a school hosting job recruiters is not. Leaving posts up signals to social media users that the post complies with the platform's community standards. *NetChoice*, 34 F.4th at 1219. A social media platform that cannot remove a post that violates its community standards or even add commentary to such a post may as well not have any standards.

This case is distinguishable from *PruneYard* because a social media platform differs from a mall as a forum for speech. *FAIR* is also inapplicable because unlike the law schools in that case, social media companies' right to speak and to express themselves via conduct are threatened by the legislation at issue. The complaining parties in both of those cases were also free to

disagree publicly with what they were forced to host, whereas social media companies cannot escape being associated with the content they allow on their platforms.

B. The SPAAM Act's requirement that platforms not ban users or deprioritize content based on "viewpoint" is a content-based restriction of speech and thus subject to strict scrutiny.

The SPAAM Act treats viewpoint-based speech more favorably than other categories of speech and therefore is a content-based speech restriction that triggers strict scrutiny. *Reed*, 576 U.S. at 169 ("For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed."). The legislative history of the SPAAM Act also shows that the Midland Legislature sought to favor viewpoint-based speech above other kinds of speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 560 (2011) (holding that legislative history can help confirm that a statute triggers strict scrutiny).

1. The SPAAM Act is a content-based restriction of speech on its face because it treats one category of speech, viewpoint-based speech, more favorably than others.

The *Reed* decision clarified content-based speech restriction jurisprudence by holding that all laws that target speech "based on its communicative content" trigger strict scrutiny. *Reed*, 576 U.S. at 163. The municipal code regulating signs challenged in *Reed* was content-based because it gave preferential treatment to "ideological signs." *Id*. at 159. The sign code allowed such "ideological signs" to be bigger than any other kind of sign, it allowed them to be placed anywhere in the city, and it did not place any time limits on how long they could remain in place. *Id*. at 160.

The District Court's judgment that intermediate scrutiny should apply because the statute treats all social media platforms alike is flawed. It is true that the SPAAM Act regulates all social media companies under the same scheme, but it does not treat all speech posted on social media

alike. It singles out viewpoint-based speech for preferential treatment. R. at 6. The SPAAM Act treats viewpoint-based social media posts more favorably than others by protecting them and their authors from any form of content moderation. Id. The precedent that the District Court relied on to apply intermediate scrutiny, and which Respondents will likely rely on in this appeal, dealt with a time, place, and manner restriction. *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC,* 596 U.S. 61, 71 (2022). The regulation in *City of Austin* did not target the communicative content of the signs at issue. *Id*. at 69. Whether a post is protected by the SPAAM Act depends entirely on if the communicative content of the post triggers content moderation.

If a regulation favors speech or a category of speech because of its communicative content, then it is subject to strict scrutiny. *Reed*, 576 U.S. at 163. Online posts are protected by the SPAAM Act solely because of their communicative content. Therefore, this portion of the Act is content-based and should be subject to strict scrutiny.

2. The legislative history of the SPAAM Act shows the Midland Legislature specifically targeted viewpoint-based speech for preferential treatment.

Legislative history can be used to confirm a motive to regulate speech because of its content. *Sorrell*, 564 U.S. at 564-65. When a legislature's asserted interest is not separable from the statute's restriction of content-based expression, it does not matter if a statute is neutral on its face. *United States v. Eichman*, 496 U.S. 310, 318 (1990).

If the legislative history of a statute shows the lawmaking body sought to restrict certain speech because of its content, then the Court can apply strict scrutiny even if the text of the law is content-neutral. *Reed*, 576 U.S. at 166. In *Sorrell*, the Court excoriated the Vermont legislature for explicitly stating in its legislative findings that it sought to regulate speech because its content was "in conflict with the goals of the state." *Sorrell*, 564 U.S. at 560-61.

While the record in this case contains no official legislative findings, there is a common thread among the Headroom users who testified at the Midland Legislature's special session that resulted in the passage of the SPAAM Act. All the users whose testimony is described in the record were subject to content moderation actions after making controversial political statements. R. at 4-5. Nancy Thornberry, Speaker of Midland's House of Representatives, said that Midland's citizens "ability to challenge *political* orthodoxy is under siege." R. at 5 (emphasis added). It thus appears from the legislative record that favoring political speech on social media platforms was the motivation for the passage of the SPAAM Act. Therefore, even if the Court finds the statute to be content-neutral on its face, strict scrutiny should still apply because the legislature's impermissible purpose was to favor political speech.

In addition to legislative history, the asserted legislative interest can be instructive in determining if a facially content-neutral speech restriction targets specific expressive conduct because of its content. *Eichman*, 496 U.S. at 315-16. In *Eichman,* the government argued that a federal prohibition of flag burning served its interest in promoting the flag as a symbol of certain national ideals. *Id*. at 315. The Court held that interest was only implicated when someone treated the flag in a way that was inconsistent with those ideals, and that therefore the purpose could not be separated from the statute's content-based restriction of expressive conduct. *Id*. Respondent's supposed purpose of protecting civil liberties is only implicated by the SPAAM Act's elevation of political speech on social media platforms. The Court should not ignore that the only protection against alleged censorship the statute provides depends on the content of an online post. This preferential treatment of political speech triggers strict scrutiny.

Testimony by Headroom users at the Midland legislature's special session as well as statements by legislators themselves shows that the SPAAM Act's purpose was to elevate political speech over other categories of speech. The alleged neutral interest asserted by the

legislature, its desire to guard free speech, is manifested in the SPAAM Act only when it operates to protect political speech on social media.

C. The SPAAM Act's viewpoint-based access requirements on social media platforms do not satisfy strict or intermediate scrutiny.

The access requirements cannot pass strict scrutiny because they are not narrowly tailored to a compelling state interest. *Simon & Schuster*, 502 U.S. at 118. The access requirements do not satisfy intermediate scrutiny either because the state lacks any legitimate interests related to speech, and because they burden more speech than is necessary to serve any of the state's possible legitimate interests. *Ward*, 491 U.S. at 799.

1. The access requirements fail strict scrutiny because the state does not assert any compelling interest related to speech and if it has any compelling interest the requirements are overinclusive in how much speech they regulate.

Strict scrutiny requires the state to show that its speech restriction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster*, 502 U.S. at 118. Midland must therefore demonstrate that it has a compelling interest beyond disagreement with the speech being restricted which justifies its content-based regulation of speech. *Id*. at 117-18. Midland must also show that its restriction is not overinclusive in the amount of speech it regulates. *Id*. at 121.

The Midland Legislature's desire to assert control over online discourse is not a compelling state interest. One of the authors of the SPAAM Act, Representative Jonathan Barnes, cited "excessive censorship by tech behemoths" as a driving force behind the Act's passage. R. at 5. The First Amendment does not proscribe private censorship though, it proscribes government censorship. The SPAAM Act does nothing to prevent censorship, it is an attempt by the Midland Legislature to commandeer social media companies' discretion in setting their own community standards. To enforce this value judgment, the Midland Legislature seeks to "restrict the speech

of some elements of our society in order to enhance the relative voice of others." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). The Court should recognize that controlling the editorial standards of private companies is not a compelling interest and is "wholly foreign to the First Amendment." *Id*. at 49.

In its passage of the SPAAM Act the Midland Legislature asserted non-speech interests including holding social media companies accountable and curbing their power. R. at 5. Both interests implicate anti-monopolistic concerns rather than anxieties about the fairness of social media platform community standards. All fifty states and the federal government have alternate means of limiting the power of companies that threaten market competition. One way is to file antitrust lawsuits, perhaps in conjunction with the Federal Trade Commission. The speech of social media companies does not have to be restricted to reduce their power in the marketplace and, as a result, any regulation of their speech as a means to achieve this interest is "significantly overinclusive." *Simon & Schuster*, 502 U.S. at 121.

The mandatory access provisions of the SPAAM Act should not withstand a strict scrutiny test. Fixing the perceived unfairness of a social media company's community standards is not a compelling state interest because such state action is impermissible under the First Amendment. Furthermore, any anti-monopolistic policy goal the Midland Legislature has can be achieved without any restriction on speech.

2. The access requirements fail intermediate scrutiny because Respondents do not assert any legitimate interest related to speech and because their regulation of speech does not serve the state's possible legitimate interests.

First Amendment intermediate scrutiny is satisfied if the regulation does not "burden substantially more speech than is necessary." *Ward*, 491 U.S. at 799. Intermediate free speech scrutiny also requires that the regulation promote a "significant governmental interest." *City of Austin*, 596 U.S. at 76.

Respondents do not have a significant interest related to free expression in this case. The SPAAM Act's mandatory access provisions are an attempt by the Midland Legislature to hijack the editorial discretion of major social media companies. The Midland Legislature's solution to the problem of alleged excessive censorship by tech companies is to put the government in charge of what speech should be allowed on social media platforms. This is not a significant state interest because the government undertaking this role is antithetical to the First Amendment. *Buckley*, 424 U.S. at 49.

Section 528.491(b)(1) of the SPAAM Act burdens more speech than is necessary because the Midland legislature does not need to regulate speech to serve its anti-monopolistic interest. As stated previously, one of the goals of SPAAM Act author Jonathan Barnes was to shrink the power held by "tech behemoths." R. at 5. This interest in a competitive marketplace has frequently been asserted by both state legislatures and Congress since the Progressive Era and can be pursued without limiting the speech of private enterprises. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 104 (1911).

The SPAAM Act fails both strict and intermediate scrutiny because Midland's desire to remedy alleged censorship by social media companies is not a compelling or significant interest. Additionally, any interest Midland asserts in reducing the market share of tech companies can be served without any restriction on speech.

## CONCLUSION

Petitioners ask the Court to reverse the decision of the Thirteenth Circuit Court of Appeals and grant the underlying preliminary injunction. The Court should reach this conclusion because unlike common carriers social media companies regularly make individualized decisions as to which users can access their platforms and what use they can engage in. The *Zauderer* Court's decision should not extend to the SPAAM Act's disclosure requirements because they are not

aimed at commercial speech, are not justified, and are unduly burdensome. Additionally, the SPAAM Act's mandate that social media platforms allow nondiscriminatory access to all users violates the First Amendment's Free Speech Clause. In sum, the state of Midland should not be allowed to enforce the SPAAM Act because it threatens the spirit of the First Amendment at the dawn of a new informational age.