No. 23-386

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2023

HEADROOM, INC.,

Petitioner,

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team 14

COUNSEL FOR PETITIONER

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QUESTIONS PRESENTED

I. Does Headroom qualify as a common carrier under the First Amendment's Free Speech Clause when Headroom retains journalistic control of its content and requires users to accept and abide by their terms and conditions before using their platform, and does this Court's decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* apply to the SPAAM Act when the explanation requirement is not set forth to regulate misleading advertising and prevent consumer deception and is unduly burdensome.

II. Does Midland's SPAAM Act violate the First Amendment's Free Speech Clause when it prohibits Headroom from exercising its constitutionally protected right to editorial judgment, triggers First Amendment protection under strict scrutiny, and fails strict scrutiny because the Midland's state interest is not compelling and the SPAAM Act is not narrowly tailored to fit the alleged compelling state interest.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner, Headroom, Inc. ("Headroom"), has become one of the most popular social media companies in America with over seventy-five million monthly users. R. at 2–3. Based in Midland, Headroom hopes to provide a platform of inclusion and acceptance for everyone to express themselves. R. at 2. While it allows users to create profiles, design, and post content, and interact with other users like other social media platforms, Headroom also offers the unique experience of a virtual reality environment that users access through virtual-reality headsets. R. at 3. Further, Headroom has become a vital source of business for its users by providing opportunities to monetize posts, solicit advertisers to sponsor posts, and receive donations from other users. R. at 3.

To provide the most beneficial experience, Headroom utilizes algorithms which tailor information to each user based on their stated preferences and provide insights into their interest based on Headroom's data tracking systems. R. at 3. Further, to ensure the platform is a "welcoming community" that respects and welcomes all users, Headroom requires each user to agree to its Community Standards prior to joining. R. at 3. The Standards forbid creating, posting, or sharing content that explicitly or implicitly promotes or communicates hate speech, violence, child sexual exploitation or abuse, bullying, and so on. R. at 3. These Standards also forbid "disinformation" which Headroom defines as "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups." R. at 3–4. If a user violates the Community Standards, the user can face a penalty, ranging from a warning to suspending the users account for a certain period of time. R. at 4.

In 2022, prominent users of the platform accused Headroom of discriminating against them for their viewpoints. R. at 4. In response, Midland's governor called a special session of the Midland Legislature where members heard testimony from multiple individuals who accused the platform of censorship. R. at 4. One user testified that Headroom deprioritized his content while another testified that her virtual store and engagement with her ads declined after she criticized a controversial presidential candidate. R. at 4–5.

After hearing this testimony, Midland State Representatives introduced the SPAAM Act. R. at 5. This Act applies to any social media platform and has two main requirements. R. at 5–6; Midland Code § 528.491(a)(1). First, it restricts social media platforms' ability to alter or remove users' content by prohibiting "censoring, deplatforming, or shadow banning" individuals, businesses, or journalistic enterprises because of their views. R. at 6; Midland Code § 528.491(b)(1). Second, the Act requires social media platforms to publish "community standards" with "detailed definitions and explanations for how they will be used, interpreted, and enforced." R. at 6; Midland Code § 528.491(c)(1). Further, upon enforcement of the platform's community standards, the Act requires the platform to "provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen." R. at 6; Midland Code § 528.491(c)(2).

Midland's Attorney General is charged with enforcing this Act. Midland Code § 528.491(d)(1). If harmed by a platform's violation of the Act, a user may either file a complaint with the Attorney General or sue on their own. *Id.* § 528.491(d)(2). Courts may either grant injunctive relief or issue a fine up to $10,000 a day per infraction. *Id.* § 528.491(d)(3).

II. PROCEDURAL HISTORY

The SPAAM Act was enacted by the Midland Legislature on February 7, 2022 and went into effect on March 24, 2022. R. at 7.

Headroom then filed a pre-enforcement challenge against Midland's Attorney General, Edwin Sinclair, in the United States District Court for the District of Midland on March 25, 2022. R. at 7. Headroom claimed that provisions of the SPAAM Act violated the First Amendment, requesting a permanent injunction and moved for a preliminary injunction. R. at 7. The district court granted Headroom's motion for a preliminary injunction, finding that the Headroom is likely to succeed on the merits as the provisions in the SPAAM Act violated Headroom's First Amendment Rights. R. at 15. Further, the Court found that Headroom is not classified as a common carrier and that the Act's infringement on Headroom's First Amendment rights failed under intermediate scrutiny, as the Enforced Explanation Requirement is compelled speech and unduly burdensome. R. at 11. The Court also found that Act's restrictions on content inhibited Headroom's expressive speech under the First Amendment and found that Section 528.491 (b) failed under intermediate scrutiny.

The United States Court of Appeals for the Thirteenth Judicial Circuit reversed the district court's judgment and vacated the preliminary injunction. R. at 15. The Thirteenth Circuit denied the district court's holding on all counts, finding that Headroom is a common carrier and that the Enforced Explanation Requirement does not violate Headroom's freedom of speech, as they are disclosing "purely fact and uncontroversial information," that is neither compelled speech or affect Headroom's editorial judgment. R. at 18. The Thirteenth Circuit further found that the SPAAM act does not infringe on Headroom's speech or affects its freedom of expression and promoted Midland's government interest in protecting citizens' free speech and preserving the

"free flow of information." R at 19. On August 14, 2023 this Court granted certiorari, and directed that briefing and argument to the issues noted above.

SUMMARY OF THE ARGUMENT

This case involves a state regulation that violates a social media company's ability to exercise editorial judgment by prohibiting the publication of content that violates the company's community guidelines and does not support company values. The district court below correctly found that the state regulation violated the social media company's First Amendment Free Speech rights, and its judgment should be affirmed.

The district court correctly concluded that the SPAAM Act's Enforcement Explanation Requirement violates the First Amendment Free Speech Clause. The Enforcement Explanation Requirement does not apply to Headroom because it is not a common carrier, as it retains journalistic control of its content. Further, Headroom maintains and regularly enforces community guidelines which require users to accept and abide by in order to use their platform. Headroom maintains the right to decide which content remains active on their platform and which content violates community guidelines and thus merits shadow banning, deprioritizing, or various content warnings.

Further, the *Zauderer's* rational basis scrutiny does not apply because the SPAAM Act's disclosure requirement was not implemented to protect consumers from deception. *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). Even if the *Zauderer* rational basis review applies, the SPAAM Act still fails rational basis review because it is unduly burdensome to require Headroom to provide detailed explanation for potentially millions of posts that could violate community guidelines. This Court, therefore, should affirm the district court and hold that the SPAAM Act Enforcement Explanation Requirement violates

the First Amendment Free Speech Clause because Headroom is not a common carrier, and the *Zauderer* rational basis review does not apply because the SPAAM Act was not intended to protect consumers from deception and the requirements are unduly burdensome.

This Court should also affirm the district court's holding that the SPAAM Act's hosting requirement violates the First Amendment Free Speech Clause. Headroom maintains editorial judgment over content that is published on their platform and, therefore, cannot be forced to publish content that is hostile to its community guidelines and company values. Social media companies' ability to regulate what speech they publish, prioritize, or deprioritize, fall within editorial-judgment precedents. Thus, this Court should find that because Headroom maintains editorial judgment over the content it publishes, the SPAAM Act's hosting requirement violates the First Amendment Free Speech Clause.

Midland's SPAAM Act triggers First Amendment protection and fails strict scrutiny. The SPAAM Act triggers strict scrutiny because, although it is facially content-neutral, it cannot be justified without reference to the content of the speech that Midland is trying to prevent from being regulated. Additionally, Midland's actual motivation for enacting the SPAAM Act is to protect posts promoting views that violate Headroom's community guidelines and are contrary to its company values. This kind of viewpoint-based regulation triggers strict scrutiny. The SPAAM Act fails strict scrutiny because Midland does not offer a compelling state interest and the act is not narrowly tailored to fit Midland's alleged interest. This Court, therefore, should affirm the district court's ruling that the SPAAM Act violates the First Amendment Free Speech Clause.

ARGUMENT AND AUTHORITIES

Standard of Review. While the standard at the trial court level for a preliminary junction is stringent, the standard followed by this Court is for abuse of discretion. *Brown v. Chore*, 411

U.S. 452, 457 (1973). If the underlying constitutional question is close, this Court should uphold the injunction and remand for trial on the merits. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). An application for an interlocutory injunction is addressed to the sound discretion of the trial court, and an order either granting or denying an injunction will not be disturbed unless this Court finds an "improvident exercise of judicial discretion." *Nat'l Fire Ins. Co. of Hartford v. Thompson*, 281 U.S. 331, 338 (1930); *see also Alabama v. United States*, 279 U.S. 229, 231 (1929).

Under this standard of review, this Court should reverse the court of appeals' decision and remand for a preliminary injunction on the merits because the appellate court's decision, especially regarding the constitutional principles, represents an improvident exercise of judicial discretion. The district court properly enjoined Midland's unprecedented effort to strip online service providers of their constitutionally protected editorial judgment and replace it with the state's own judgments and preferences. The district court correctly found Headroom satisfied the substantial requirements for a preliminary injunction. Further, the district court properly found that the SPAAM Act violated Headroom's First Amendment free speech protection. A preliminary injunction was properly granted when the plaintiff established it was likely to succeed on the merits, likely to suffer irreparable harm without preliminary relief, favored by the balance of equities, and in the public interest to provide relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. PETITIONER WILL SUCCEED ON ITS FIRST AMENDMENT CLAIMS BECAUSE THE SPAAM ACT'S ENFORCEMENT EXPLANATION REQUIREMENT IS UNCONSTITUTIONAL.

The First Amendment implicitly protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In regard to the enforcement of "community standards," Midland Code § 528.491(c) of the SPAAM Act requires

Headroom to "provide a detailed and thorough explanation" upon enforcing "how the user's content violated the platform's community standard, and why the specific action was chosen." *Id.* § 528.491(c)(2).

The Enforcement Explanation disclosure provision of the SPAAM Act is unconstitutional, since the provision cannot apply to Headroom as it does not identify as a common carrier within the public. The Enforcement Explanation Requirement also violates Headroom's freedom to refrain from speaking protected by the First Amendment, mandating the platform to explain the inner workings of its journalistic discretion, thereby allowing the State to chill Headroom's free expression.

A. Headroom Does Not Qualify as a Common Carrier Because Headroom Retains Journalistic Control of Its Content.

A common carrier offers the public a communication platform in which "all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Therefore, a common carrier holds itself out to public as serving each member of the public equally without choosing who may use its platform or restricting how they use its platform. *See id.*

In *Hurley*, a group of gay, lesbian, and bisexual descendants of Irish immigrants formed an organization called GLIB to march in an annual St. Patrick's Day Parade in Boston. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 561 (1995). However, the organizers of the parade, a private group, denied the organization's application. *Id.* In response, GLIB filed a lawsuit claiming this denial violated the state public accommodations law which prohibited discrimination on the basis of sexual orientation by places of public accommodation. *Id.* The United States Supreme Court reasoned that although the actual participants of the St.

Patrick's Day parade were third parties rather than the actual organizers, the selection process of which third parties could display their messages in the parade was a First Amendment protected activity. *Id.* at 575. In doing so, the Court analogized the organizers' choice to exclude GLIB to newspaper editors' First Amendment right to choose the material to publicize and the breadth given to certain topics. *Id.*

Although *Hurley* was decided in the dawn of the internet and long before the existence of social media platforms, the parade organizers are analogous to social media platforms. Like the parade organizers in *Hurley* who decided which third-party messages could be displayed in the parade, social media platforms, like Headroom, control the type of content users can publish through the terms and conditions users must agree to prior to gaining access to the services. *Id.* at 561. Therefore, as the Court analogized in *Hurley*, social media platforms' choice to exclude certain content from their platforms is analogous to newspaper editors' and cable news operators' choice to air specific channels, publicize certain material, and give various breadth to different topics. Accordingly, as newspapers are not common carriers because they decide which content to publish, social media platforms like Headroom are not common carriers because they decide which content is allowed to remain active.

Further, while social media platforms offer their services to all members of the public, these platforms require every user to accept and abide by their terms and conditions as a precondition of using their platforms. *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1220 (11th Cir. 2022). Therefore, users of social media platforms are not free to use the platform as they wish because the platforms only publish content that abides by certain criteria. *Id.*

Here, Headroom requires each user to agree to Headroom's Community Standards before joining the platform. The Standards forbid users from creating, posting, or sharing content such

as hate speech, violence, or child sexual exploitation. Users who violate the Community Standards can face a variety of penalties, ranging from warnings to demonetizing the user's account. Therefore, Headroom's Community Standards restricts how users may engage on its platform by delineating types of content that will be removed from the platform if a user publishes it. Accordingly, Headroom is not a common carrier because it does not offer its platform to every member of the public equally by requiring its users to conform to the Community Standards.

B. The Enforcement Explanation Requirement of the SPAAM Act Violates Headroom's First Amendment Rights, Which Promotes a Chilling Effect on Headroom's Protected Editorial Judgment.

The government's infringement of one's right to refrain from speaking is generally subject to strict scrutiny. However, there are two possible exceptions to the strict standard of review.

One exception states that the court should apply an intermediate level of scrutiny when reviewing a content-neutral statute that restricts commercial speech; however, it requires that the government show that the statute is narrowly drawn to directly and materially advance a substantial government interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). The other exception states that if the government seeks to regulate misleading advertising by requiring the disclosure of purely factual and uncontroversial information, the government must show that the statute rationally relates to the State's interest in preventing consumer deception and requires that the disclosure is not unduly burdensome. *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). *Zauderer* set forth the rational basis standard of scrutiny when reviewing statutes that restrict commercial speech in an attempt to regulate misleading advertising.

In this case, the Explanation Requirement of the SPAAM Act is content-neutral, which triggers an intermediate standard of review. The Explanation Requirement fails under the intermediate scrutiny, as the statute is not narrowly tailored to advance a substantial government interest. *Id.* In addition, the exception set forth by *Zauderer* would be inappropriate to use in determining the validity of the Explanation Requirement, since the *Zauderer* exception applies to regulating misleading advertisements and requires that commercial disclosures be "unduly burdensome." *Id.* at 651–52.

1. The Enforcement Explanation Requirement of the SPAAM Act triggers First Amendment protections and fails under intermediate scrutiny, as the Explanation Requirement lacks a narrow-tailored government interest.

The Court usually reviews content-neutral statutes that restrict commercial speech under an intermediate level of scrutiny. *E.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561–62 (2001) (applying intermediate scrutiny to tobacco advertising restrictions). According to *NetChoice, LLC v. Moody*, in order for a restrictive statute to survive intermediate scrutiny, a restriction on speech must further an important or substantial governmental interest unrelated to the suppression of free expression, and the restriction must be no greater than essential to further that interest. The narrow-tailoring requirement is satisfied so long as the governmental interest would be achieved less effectively absent the restriction." *See NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1093 (N.D. Fla. 2021); *see also Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 622 (1994).

In this case, the ultimate motivation in legislating the disclosure provision of the SPAAM Act, specifically the Enforced Explanation Requirement does not explicitly highlight a narrowly-tailored government interest. Rather, the Enforcement Explanation Requirement is written to

push a heavy burden onto social media platforms in forcing them to vocalize their reasoning as how they manage content as a platform with journalistic discretion.

In conclusion, since the Enforced Explanation Requirement does not contain a narrowly-tailored government interest, it fails under the standards of intermediate security.

2. *Zauderer*'s rational basis scrutiny is not applicable because the Explanation Requirement of the SPAAM Act is not set forth to regulate misleading advertising and prevent consumer deception.

In regard to the Court's interpretation of disclosure requirements, an exception to the intermediate scrutiny standard of review set forth in *Central Hudson* is ruled in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, which states that to adequately protect commercial speech, the disclosure requirement must reasonably relate to a state interest in preventing deception of consumers. 471 U.S. at 651. *Zauderer*'s holding was to promote the regulation of misleading advertisements.

Eventually, the Court found that the *Zauderer* Standard did not apply to cases where the required disclosure was put in place to serve purposes other than preventing consumer deception. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) The disclosure requirements observed in *R.J. Reynolds* were labeled on cigarette packs. *Id.* at 1215. The court specifically states how the disclosures themselves did not warn consumers of deception, but rather were put in place to convince cigarette consumers to quit smoking. *Id.* at 1217. The court found that the disclosure statements strayed from the government's original interest of preventing consumer deception and found that *Zauderer*'s rational basis review was not applicable.

Before the test is even applied, this Court continues to hold the *Zauderer* test is primarily applicable in situations where commercial disclosures represent advertising. *Nat'l Inst. of Fam.*

& Life Advocs. v. Becerra, 138 S. Ct. 2361, 2376–77 (2018). In *Becerra*, This Court reiterated the speech in *Zauderer* would have been fully protected had it not been an advertisement. *Id.*

This Court, like it has done many times before, should reiterate that *Zauderer* only applies to commercial speech as advertising. The D.C. Circuit, even before the opinion in *Becerra*, observed this Court "emphatically and, one may infer, intentionally" restricted the *Zauderer* standard to advertising. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015). Judge Rudolf emphasizes this point by noting in *Zauderer* "the Court explicitly identified advertising as the reach of its holding no less than thirteen times." *Id.* at 522.

In this case, the commercial disclosures required by Midland's SPAAM Act are not considered advertisements. Similar to the Court's holding in *R.J. Reynolds*, the Court should find that the *Zauderer* exception does not apply, as the required disclosures force Headroom to provide information as to how a user may suffer restrictions on their accounts, rather than prioritizing the prevention of consumer deception. R. at 6. In addition, the SPAAM Act's Explanation Requirement forces Headroom to explain and justify the exercise of its constitutionally protected editorial judgment, thereby inherently chilling Headroom's speech promoted by the First Amendment. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 14 (1986). This Court should reiterate through Headroom that for *Zauderer* to ever apply the required disclosures must be aimed at specifically correcting misleading and uncontroversial advertisements.

3. Even if the Court finds that *Zauderer*'s rational basis standard applies, the Explanation Requirement of the SPAAM Act would likely still fail, as the requirement is unduly burdensome.

The Court may find *Zauderer* Standard applies, as Headroom acts as a hub to many business make up a significant portion of its user population and the Explanation Requirement

displays misleading information in advertisements curated by business users. However, the Explanation Requirement forced Headroom to provide a detailed explanation as to which Community Standards were violated, how they Standards were violated, and an explanation of Headroom's enforcement of policy by punishing the user. In *National Institute of Family & Life Advocates v. Becerra*, this Court explained that "even under *Zauderer*, a disclosure requirement cannot be 'unjustified or unduly burdensome.'" 138 S. Ct. at 2377 (holding that a notice requirement for unlicensed pregnancy centers represented content-based regulation of speech).

Even if the Court were to apply the *Zauderer* test, the SPAAM Act could not survive this Court's prohibition on unduly burdensome required disclosures. Midland attempted to require Headroom to provide detailed explanations anytime content was moderated for a community of over seventy-five million monthly users. R. at 3. It is unduly burdensome to require Headroom to provide detailed explanations regarding millions of possible posts daily. For each failed disclosure, Headroom faced $10,000 each day it failed to satisfy Midland. R. at 7. In addition, the State provides a framework vague enough to make achieving Midland's requirements uncertain. The State provided no clarification as to what level of detail was required. Such vague requirements by the Stately unduly burdened Headroom. The added daily $10,000 fines for each failed disclosure only support the severity of such a burden. R. at 7. Yet, it was Midland's infringement on Headroom's right to editorial judgment and its likely chilling impact on Headroom's free speech which made this burden insurmountable. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

II. MIDLAND VIOLATED THE FIRST AMENDMENT'S FREE SPEECH CLAUSE WHEN IT PROHIBITED HEADROOM FROM EXERCISING EDITORIAL JUDGMENT UNDER THE SPAAM ACT.

Midland commandeers Headroom's speech and replaces it with the State's preferred editorial choices. By imposing the SPAAM Act regulatory burdens, Midland commits a flagrant violation of the First Amendment. Under the SPAAM Act, Midland forces Headroom to publish content that it would typically deprioritize or shadow ban. Headroom has found success under its current content standards and business model. With over seventy-five million users, Headroom's platforms are a positive communal environment, in large part created by Headroom's exercise of sound editorial judgment. Yet the SPAAM Act punishes Headroom for exercising its editorial judgment, imposing onerous restrictions which would destroy this valuable business model. This Court should follow the ruling of the district court and find that Midland's SPAAM Act violates Headroom's constitutionally protected editorial judgment.

A. The First Amendment Applies to Headroom's Editorial Judgment.

The First Amendment "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). It provides safeguards to protect speech from government censorship. However, the "state action doctrine" ensures those protections do not apply when a private actor censors speech. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Social media platforms, like Headroom, are private enterprises, not governmental entities. *NetChoice v. Att'y Gen.*, 34 F.4th at 1204. Thus, the First Amendment's protections extend to a private enterprise's ability to censor or edit the speech that it publishes. *Hurley*, 515 U.S. at 573. "*[A]ll* speech inherently involves choices of what to say and what to leave unsaid." *Id.* at 569–70 (emphasis added). This protection does not just apply to the traditional press, but also "business corporations generally." *Id.* While the Constitution protects

citizens from governmental efforts to restrict social media access and usage, it does not give the right to citizens to force social media platforms like Headroom to allow citizens' participation in or contribution to social media platforms. *NetChoice v. Att'y Gen.*, 34 F.4th at 1204. For instance, when Headroom deprioritizes certain posts that violate community guidelines, it makes editorial judgments that are protected by the First Amendment. *Id.* at 1213.

This Court established the right to editorial judgment when Florida passed legislation, similar to the SPAAM Act at issue here, which required newspapers to publish speech contrary to their beliefs. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248–49 (1974). In *Miami Herald*, Florida state law required newspapers that criticized political candidates to provide equal space for responses to the criticism. *Id.* at 258. The Court held that the law violated the newspaper's constitutionally protected editorial judgment and infringed upon its right to free speech by forcing it to publish material contrary to its judgment. *Id.* at 250. Florida's law in *Miami Herald* is similar to Midland's SPAAM Act requiring Headroom to host third-party speech that violates its community guidelines and represents values fundamentally different than those Headroom attempts to promote. *Id.*

The Court in *Miami Herald* held that "the choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258. The Court reasoned that any law controlling editorial judgment "runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor." *Id.* at 261 (Brennan, J., concurring).

Headroom is entitled, as publisher of material, to exercise its own judgment, using the same editorial protections provided to newspapers. Using Justice Brennen's analogy, Headroom has the right to place hate speech, violent speech, or visual reality conduct which may lead to human trafficking on the proverbial newsroom floor. *Id.* This is Headroom's "elementary right" under the First Amendment. *Id.*

Since *Miami Herald*, this Court expanded the protections of editorial judgment beyond the publishing of newspapers to include a utility company's publication of newsletters. *See Pac. Gas*, 475 U.S. 1. In *Pacific Gas*, this Court extended the right of editorial control to non-news media private actors. *Id.* This Court reasoned that the First Amendment protects a utility company's ability to exercise its editorial judgment, stating that the utility company has a "right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id.* at 910 (citing *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976)).

Midland's SPAAM Act requirements mandating the protection of third-party speech on Headroom's internet platform is similar to the utility regulation in *Pacific Gas*. *Id.* The Court's conclusions in *Pacific Gas* are applicable here. *Id.* "Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Id.* at 912. The SPAAM Act applied to Headroom's speech, as defined by *Pacific Gas* and *Miami Herald*, necessarily involves "forcing it to speak where it would prefer to remain silent." *Pac. Gas*, 475 U.S. at 913; *Miami Herald*, 418 U.S. at 258. So, under this Court's standard in *Pacific Gas* and *Miami Herald*, the SPAAM Act's forced speech requirement is a direct violation of Headroom's First Amendment protections.

Headroom, like *Pacific Gas*, cannot be forced to publish hostile speech that is contrary to its views. 475 U.S. at 913. Currently, Headroom does not publish speech that violates community guidelines, which users must agree to before joining Headroom's platform. R. at 3. Headroom's community guidelines are derived from principles that support notions of community and respect. R. at 3. Headroom does not permit users to create, post, or share content that, either implicitly or explicitly, promotes hate speech, violence, and, among others, negative comments or criticism toward protected classes. R. at 3. Midland's SPAAM Act would force Headroom to publish such content or be fined $10,000 daily. R. at 7. Following the Eleventh Circuit's ruling in *NetChoice v. Attorney General, Florida*, a social media company's ability to decide what speech to permit, prohibit, or deprioritize—taking into account the social media company's particular values and views—falls within this Court's editorial-judgment precedents. 34 F.4th at 1214. This Court should follow the precedent established in prior editorial-judgment cases and find that Midland's SPAAM Act violates Headroom's constitutionally protected editorial judgment.

B. Midland's SPAAM Act Triggers and Fails Strict Scrutiny Because the SPAAM Act Is a Viewpoint- and Content-Based Restriction That Is Not Supported by a Substantial State Interest and Is Not Narrowly Tailored to Fit the State Interest.

This Court should hold that the SPAAM Act triggers and fails strict scrutiny because Midland does not have a substantial interest to support the act's content-based regulations and it is not narrowly tailored to support the state's interests. The First Amendment imposes tight constraints upon legislative efforts to restrict speech such as core political speech, while imposing looser constraints when the government seeks to restrict commercial speech. The primary question when determining content neutrality of legislation is "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it

conveys." *Turner*, 512 U.S. at 642; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992).

Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). A law is content-based if it "suppress[es], disadvantage[s], or impose[s] differential burdens upon speech because of its content." *Turner*, 512 U.S. at 642. Here, the SPAAM Act appears to be facially content-neutral, but the Act cannot be justified without reference to the content of the regulated speech. *NetChoice v. Moody*, 546 F. Supp. 3d at 1093.

In *NetChoice v. Moody*, Florida enacted a statute restricting big social media companies' ability to deplatform or shadow ban political candidates content and prohibited the same companies from adding warnings to the content. *Id.* at 1089–90. The Court found that this legislation was facially content-neutral, but because it could not be justified without reference to the specific content regulated by social media companies, then this kind of restriction must also face strict scrutiny. *Id.* at 1093. The court's reasoning applies here with Midland's SPAAM Act. The supporters of the SPAAM Act justify the need for government regulation by pointing to instances where Headroom has regulated content about political candidates and immigration. The Act itself is facially content-neutral, but it cannot be justified without reference to the content of the speech that Headroom regulates.

Further, Midland's SPAAM Act and its supporters claim that the act's purpose is to hold social media companies like Headroom accountable for "excessive censorship" of third-party speech and prevent the centralization of speech in the hands of social media companies. R. at 5. However, the SPAAM Act's actual motivation is to protect speech that clearly violates

Headroom's community standards, such as one popular user's content that frequently has Headroom warnings for "bullying and harassment," "promotion of violence against protected classes," and "sexist and racist language." R. at 4. The SPAAM Act is directed at preserving and protecting posts that trigger Headroom's warnings based on their particular views expressed within the content. Viewpoint-based laws—which arise where "the government targets not subject matter, but particular views taken by speakers on a subject"—constitute "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). As such, the SPAAM Act engages in viewpoint-based restrictions, forcing Headroom to treat posts with a particular viewpoint that violates community guidelines, as equal to every other post on the platform. By controlling the content of this speech, the law is subject to strict scrutiny under the First Amendment. Under both viewpoint and content-based regulation, the SPAAM Act is subject to strict scrutiny.

This strict scrutiny standard, a longstanding bastion of First Amendment framework, cannot be abandoned for the sake of a State's professed public interest. This Court should apply the strict scrutiny standard, requiring the state to demonstrate a compelling state interest for the law. Midland's law forces Headroom to suppress and impose different burdens on speech. This is content control and therefore Midland must demonstrate a compelling state interest in regulating Headroom's speech.

To survive strict scrutiny, the SPAAM Act must further a compelling state interest and must be narrowly tailored to achieve that interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015); *see also Bernal v. Fainter*, 467 U.S. 216, 220 (1984); *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Nothing in the record supports finding a compelling interest. In fact, the record proves the opposite. The public's interest is best served by allowing Headroom to protect

its users from hate speech and violence. Midland's announced legislative intent was to preserve individual users' content posted on the Headroom platform. The sponsoring author of the law admits that the purpose of the Act was to prevent "excessive censorship by tech behemoths." R. at 5. The Act was clearly aimed at tech behemoths and their discretionary content driven decisions, no different from the journalistic giants protected by *Miami Herald*. 418 U.S. at 258. There is no compelling state interest under these facts to justify Midland's act to strip Headroom of its journalistic discretion guaranteed by the First Amendment.

Further, the SPAAM Act is not narrowly tailored to fit the state's interest. The SPAAM Act is overly broad, and not tailored to fit Midland's interest. The Act restricts Headroom's ability to alter or remove user's content because of viewpoint, with no explanation or restrictions on the viewpoints Headroom is not allowed to ban. This is not narrowly tailored to fit the state's interest. Like the regulation in *NetChoice v. Moody*, the state tried to restrict social media companies' ability to remove user's content in general. The court found that this was overly broad and an instance of "burning the house to roast a pig." 546 F. Supp. 3d at 1095; *see, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 882 (1997); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

In the alternative, even if this Court were to apply the intermediate scrutiny standard by holding that the speech involves some form of commercial regulation, the Act cannot pass scrutiny. To prove that a regulation is narrowly tailored, the government must show that it "is narrowly drawn to further a substantial governmental interest . . . unrelated to the suppression of free speech." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021). Narrow tailoring in this context means that the regulation must be "no greater than is essential to the furtherance of [the government's] interest." *United States* ***v.*** *O'Brien*, 391

U.S. 367, 377 (1968) (holding that destroying draft cards was not protected by the First Amendment). A shown above, the SPAAM Act fails the narrow tailoring requirement. This Court should follow the reasoning of the district court and find that the SPAAM Act triggers and fails strict scrutiny because Midland failed to provide a substantial interest and the Act was not narrowly tailored to fit that state's interest.

CONCLUSION

The district court correctly held that the SPAAM Act violates the First Amendment by restricting Headroom's editorial judgment with inapplicable disclosure requirements because Headroom is not a common carrier, and with unduly burdensome explanation requirements. The district court also correctly concluded that the SPAAM Act violates the First Amendment by restricting Headroom's editorial judgment with hosting requirements that force headroom to host third-party content that contradicts its values. Finally, the district court correctly determined that both the disclosure requirement and the hosting requirement trigger First Amendment protections. The disclosure requirement fails intermediate scrutiny because it is not narrowly tailored to Midland's alleged interest. Additionally, the hosting requirement fails strict scrutiny because it is not supported by a compelling state interest and is not narrowly tailored to fit Midland's interest. This Court, accordingly, should affirm the judgment of the district court.

Respectfully submitted,

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COUNSEL FOR PETITIONER

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APPENDIX "A"

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.