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 RESPONDENT

TEAM 16

Counsel for Respondent

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QUESTIONS PRESENTED

I. Whether the First Amendment's Free Speech Clause permits a state to require social media platforms to provide detailed explanations for censoring, shadow banning, or banning user accounts.

II. Whether a state violates the First Amendment's Free Speech Clause when it prohibits social media giants from censoring, shadow banning, or banning, opposing viewpoints.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case involves a First Amendment challenge to the State of Midland's Speech Protection and Anti-Muzzling (SPAAM) Act, brought by Headroom, Inc., one of the most popular social media companies in the nation, who is seeking to continue its censorship and de-platforming of viewpoints with whom it disagrees. R. at 2.

The SPAAM Act. Social media platforms have been abusing their abusing their power and harming the citizens for too long. They have used this power to cut off speech and control what Midlandians can say in their respective mediums of public communication. Currently these platforms' have an unfair influence and distort the public debate. Headroom, one of these platforms, is trying to uphold and continue this abuse of power.

In 2022, multiple users accused the social media platform Headroom of discriminating against them because of their views. R. at 4. Users reported having their content deprioritized and tagged with warnings that labeled his content as "bullying" or "harassment," after making posts with their political views. *Id.* Similarly, small business owners had their sale and advertisement engagement plummet after posting about who they wanted to win the next presidential election. *Id.* Feeling the frustration of having their citizens speech suppressed, Midland decided to enact the SPAAM Act to curb social media censorship of Midlandians and reign in the power of the mega corporations that control the social media platforms. R. at 5.

The SPAAM Act applies to any major social media platform, which among other things is defined as a platform that has over twenty-five million monthly users. R. at 6. The Act has two main requirements. *Id.* First, there's a modest antidiscrimination requirement (the "hosting requirement") that prevents major social media platforms from censoring users it disagrees with.

Id. Second, the Act requires major social media platforms to publish "community standards with detailed definitions and explanations for how they will be used, interpreted, and enforced" (the "disclosure provision"). R. at 6. Further, if a major social media platform does act against a user for violating its standards, the platform must provide a detailed explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action was chosen. *Id.* Users who have been suppressed by a platform can file a complaint with the Attorney General or sue on their own. *Id.* A social media platform that is found to violate the SPAAM Act may be hit with an injunction or a small daily fine. R. at 6–7.

Headroom, Inc. Founded and headquartered in Midland, Headroom has emerged as one of the most popular social media platforms in the country and the largest social media company in Midland. *Id.* It currently has over seventy-five million monthly users. R. at 3. Those users can create profiles where they can view and share people's content or create their own. *Id.* Aside from posting, users can earn income from sponsorships, monetization, and donations from other users. *Id.* This has resulted in the platform becoming a major source of revenue for individuals and businesses and being the main source of income for some. *Id.* Headroom's user experience is made possible by its algorithm that controls the content users see to garner the most engagement. *Id.*

Before joining the platform, Headroom users must agree to the Community Standards, which lay out the content that Headroom prohibits. *Id.* Users who violate the Standards risk demonetization, suspension, being shadow banned (meaning other users are blocked from seeing the user's account), or possibly even being fully banned from Headroom's platform. R. at 4. The Community Standards is how Headroom has gone about justifying its suppression of Midlandians.

II. PROCEDURAL HISTORY

The District Court. At the start of 2022, feeling the threat of no longer being able to silence viewpoints that did not align with their own, Headroom filed suit against Midland's Attorney General, Edwin Sinclair, in his official capacity, in the United States District Court for the District of Midland. R. at 7. Headroom moved for a preliminary injunction preventing Attorney General Sinclair from enforcing the SPAAM Act. *Id.* The District of Midland granted Headroom's motion for a preliminary injunction, holding that the SPAAM Act violated Headroom's First Amendment rights and that all the preliminary injunction factors favored Headroom. R. at 15.

The Appellate Court. The Thirteenth Circuit disagreed with the district court, holding that the First Amendment does not protect Headroom because it is a common carrier. R. at 16–17. Further, the Thirteenth Circuit held the SPAAM Act's disclosure requirement did not offend Headroom's First Amendment rights because it was not unduly burdensome and was related to a legitimate state interest. R. at 18. Lastly, it held that the SPAAM Act's hosting requirement did not violate Headroom's First Amendment right because Headroom had no First Amendment right to censor speech. R. at 19. Further, the court of appeals also held that even if the hosting requirement did infringe on Headroom's constitutional right, it would survive intermediate scrutiny. *Id.* As such, after deciding the other preliminary injunction factors favored Midland, the Thirteenth Circuit vacated the preliminary injunction. *Id.*

SUMMARY OF THE ARGUMENT

I.

The court of appeals correctly held that major social media platforms are common carriers, and that the *Zauderer* standard applies to the SPAAM Act's disclosure provision.

First, the First Amendment does not protect social media platforms' viewpoint-based censorship because they are common carriers. For starters, social media platforms hold themselves out to the public without individualized bargaining because they allow all users to join if they accept their boilerplate terms and conditions. Second, social media platforms are affected with a public interest as result of the central social and economic role they play due to their market power.

Second, even if social media platforms are not common carriers, the disclosures of purely factual and uncontroversial information about their services does not offend the First Amendment. The SPAAM Act's disclosure requirement is reviewed under this Court's standard set forth in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*. Further, it easily passes muster under this standard because the disclosure requirement only requires that the platforms disclose purely factual and uncontroversial information about its services. The disclosure requirement is also not unduly burdensome because it does not drown out social media platforms' speech. Lastly, Midland has a legitimate state interest in social media platforms providing a detailed explanation to its citizens when they decide to censor them.

II.

The court of appeals was correct in holding that the SPAAM Act did not implicate Headroom's First Amendment rights.

Midland is not powerless to require social media platforms to host third-party speech. The SPAAM Act's hosting requirement does not compel nor restrict the platforms' speech. Further, the requirement does not penalize social media platforms' speech, nor does it prevent the platforms from expressly disavowing any connection with its users' messages. Moreover,

editorial discretion does not protect Headroom's viewpoint-based discrimination because social media platforms are not legally responsible for third party content posted on their platforms.

Next, even if the hosting requirement infringed on Headroom's First Amendment rights, it would survive intermediate scrutiny. The hosting requirement is content neutral and furthers an important interest of Midland to ensure the widest possible dissemination of information. By requiring social media platforms to host all users equally it does so by means that are substantially related to that interest.

This Court should affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

ARGUMENT AND AUTHORITIES

Standard of Review. This appeal involves questions of law, which are reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

I. THE THIRTEENTH CIRCUIT CORRECTLY HELD THAT THE SPAAM ACT'S REQUIREMENT THAT HEADROOM PROVIDE A DETAILED EXPLANATION FOR CENSORING, SHADOW BANNING, OR BANNING AN ACCOUNT DOES NOT VIOLATE THE FIRST AMENDMENT.

The First Amendment does not protect social media platforms' viewpoint-based censorship of users because they are common carriers. Social media platforms are the "modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 136 (2017). Social media platforms "hold themselves out as organizations that focus on distributing the speech of the broader public." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). When companies or industries have possessed a certain level of market power, "our legal system" has determined they are affected with a public interest and "subjected [those] businesses . . . to special regulations." *Id.* at 1222. (Thomas, J., concurring in the judgment).

Social media platforms "hold themselves out as organizations that focus on distributing the speech of the broader public." *Id.* They allow any user to join as long as they accept the boilerplate terms and conditions. Further, social media platforms have dominant market power in America that should subject them to "special regulation." *Id.* at 1222. Most Americans use social media for their day-to-day life, whether that be by reading the news, shopping, promoting their business, or simply connecting with friends.

Moreover, the SPAAM Act's disclosure provision does not offend the constitution because it is not compelled speech and does not interfere with social media platforms' editorial judgment. This Court's *Zauderer* standard governs the review of this provision. *Zauderer* says that required disclosures must be "purely factual and uncontroversial information" and must not be "unjustified or unduly burdensome . . . by chilling protected commercial speech." *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). Further, the disclosure requirement must be reasonably related to a legitimate state interest. *Id.*

The Act's disclosure provision survives *Zauderer* review. The disclosure provision requires that major social media platforms disclose only "purely factual and uncontroversial information" about their services and reasoning for censoring users. *Id.* Next, the disclosures are not "unduly burdensome" because it does not drown out their speech as they are free to disavow third party messages they disagree with. Further, Midland possesses an important state interest in ensuring the free flow of information and protecting its citizens from undue censorship.

A. Midland Can Regulate How It Creates and Implements Its Content Moderation Enforcement Policies Because Social Media Platforms Are Common Carriers.

Major social media companies are common carriers and therefore the First Amendment does not protect their decisions to censor opposing viewpoints. "A fundamental principle of the

First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham*, 582 U.S. at 104. The United States and "its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers." *Knight*, 141 S. Ct. at 1222 (Thomas, J., concurring). At common law the doctrine meant "private enterprises providing essential public services must serve the public do so without discrimination, *NetChoice, LLC v. Paxton*, 49 F.4th 439, 469 (5th Cir. 2022), *cert. granted in part* 2023 WL 6319650 (U.S. Sept. 29, 2023) (No. 22-555). Those public services would come to include transportation companies and communication firms like the telegraph and telephone. *Id.* at 470. Social media platforms are no different.

When tackling whether to assign common carrier status to transportation or communication firms, courts have focused on two things. First, the touchstone trait of a common carrier has been whether "the carrier hold[s] itself out to serve any member of the public without individualized bargaining." *Id.* at 471. Second, the courts have considered whether the firm was "affected with a public interest." *Knight*, 141 S. Ct. at 1222–23 (Thomas, J., concurring); *see* Walton H. Hamilton, *Affectation with Public Interest*, 39 Yale L.J. 1089, 1090 (1930). This public interest test considers whether "the firm's service play[s] a central economic and social role in society." *Paxton*, 49 F.4th at 471. Typically, the labeling of communication or transportation firms as common carriers occurred around the inception of their respective industries. As social media is a new medium, it is imperative this Court label them as common carriers.

1. Social media platforms hold themselves out to serve the public without individual bargaining.

Social media platforms are communications firms that hold themselves out to serve the public without individual bargaining. The holding out test looks at whether the platform has held

"itself out to serve any member of the public without individualized bargaining." *Paxton*, 49 F.4th at 471. In other words, does the firm have a "willingness to carry on the same terms and conditions [for] any and all groups no matter who they might be." *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960). "Social-media platforms generally hold themselves open to all members of the public, they [also] require users, as preconditions of access, to accept their terms of service and abide by their community standards." *NetChoice, LLC v. Att'y Gen., Fla. (Moody)*, 34 F.4th 1196, 1220 (11th Cir. 2022), *cert. granted in part*, 2023 WL 6319654 (U.S. Sept. 29, 2023) (No. 22-277), *and cert. denied*, 2023 WL 6377782 (U.S. Oct. 2, 2023) (No. 22-393). Nonetheless, "compliance with . . . rules and regulations" has never allowed a communication firm to avoid common carrier status. *Chesapeake & Potomac Tel. Co. v. Balt. & Ohio Tel. Co.*, 7 A. 809, 811 (Md. 1887). What matters is whether the platform offers the "same terms and conditions [to] any and all groups." *Semon*, 279 F.2d at 739.

Courts have applied the holding out test to new industries before. In *State ex rel. Webster v. Nebraska Telephone Co.*, 22 N.W. 237 (Neb. 1885), a Nebraska lawyer sought a writ of mandamus to compel a telephone company to put a telephone in his office. The Nebraska Supreme Court granted the writ and held that the company had "undertaken with the public to send messages from its instruments, one of which it propose[d] to supply to each person or interest requiring it." *Id.* The court held that "[a]ll people . . . complying with the reasonable rules and demands of the . . . commodity" should reap its benefits. *Id.* The court went on to reason that because the telephone company had "so assumed and undertaken to the public" it could not deny telephone access to the lawyer. *Id.* Other courts have agreed that terms and conditions do not remove communication companies from common carrier obligations. *Chesapeake & Potomac Tel. Co.*, 7 A. at 811; *see also, e.g.*, *Walls v. Strickland*, 93 S.E. 857, 858

(N.C. 1917) (holding that is "well settled" that terms and conditions do not remove common carrier obligations from communications firms).

Social media platforms have held themselves out to the public since their inception. This is settled among the courts that have considered this issue. *See Moody*, 34 F.4th at 1220; *Paxton*, 49 F.4th at 474. Social media platforms allow anyone to join and create an account with them. There is no bar on who may join these platforms as long as the user clicks agree when given the terms and conditions. The terms and conditions that Headroom and other platforms require users to agree to do not allow them to bypass common carrier status and censor users they disagree with. Because social media platforms allow anyone to create an account and represent a willingness to carry anyone on the same terms and conditions, they have made it abundantly clear that they hold themselves out to serve the public without individual bargaining.

2. Social media platforms are affected with a public interest because they have positioned themselves to play a central social and economic role in society, largely because of their market power.

Social media platforms are affected with a public interest because they play a central social and economic role in American life[1] largely because of their market power. To determine whether a company is affected with a public interest, courts have looked at whether that company's services play "a central economic and social role in society." *Paxton*, 49 F.4th at 471. Further, courts consider a firm's market power in determining whether it is affected with a public interest. *See id.* at 472; *Knight*, 141 S. Ct. at 1223–24 (Thomas, J., concurring). As this Court once opined, social media is the "modern public square," and their standing as the public square has only become stronger. *Packingham*, 582 U.S. at 137.

[1] "The percentage of US adults who use social media increased from 5% in 2005 to 79% in 2019." Esteban Ortiz-Ospina, *The Rise of Social Media*, Our World in Data (Sept. 18, 2019), https://ourworldindata.org/rise-of-social-media.

Courts have applied the public interest test to new communications industries as they have popped up in the past. In *Hockett v. State*, the State of Indiana charged a telephone company with violating a state statute regarding telephone rates. 5 N.E. 178 (Ind. 1886). The Supreme Court of Indiana found the company to be in violation of the statute and rejected the telephone company's argument that it was not subject to legislative control. *Id.* at 182–86. The court held that the "telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well-defined relations to the general public." *Id.* at 182. The court went on, "[i]t has become as much a matter of *public convenience and of public necessity* as were the stage-coach and sailing vessel a hundred years ago, or as the steam-boat, the railroad, and the telegraph have become in later years. It has already become an important instrument of commerce." *Id.* (emphasis added). The court continued and said, "[n]o other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an *indispensable instrument of commerce*." *Id.* (emphasis added). The court concluded by holding that "[t]he relations which [the telephone industry] assumed towards the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier and impose upon it certain well-defined obligations of a public character." *Id.* Social media platforms hold the same, if not more, social and economic importance that the telephone did.

First, social media platforms play a central social role in society. Like the telephone before, major social media platforms have a strong social importance in America society. "Numerous members of the public depend on social media platforms to communicate about civic life, art, culture, religion, science, politics, school, family, and business." *Paxton*, 49 F.4th at 475. Indeed, this Court itself recently explained that for most Americans, social media platforms are "the

principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 582 U.S. at 137. Billions of people use social media every month and that number will continue to increase along with these platforms' importance.

Second, social media platforms play a central economic role in society. Millions of Americans make their living one way or another on social media.[2] Whether that be the small business owner who uses one of the platforms to promote her product, the independent journalist who posts their reporting online, or the entertainer who earns ad revenue from the videos she posts from her phone. Even large companies use social media to further grow their presence and reach new untapped customers[3]. Because of this, social media platforms "earn almost all their revenue through advertising, [and] are among the world's most valuable corporations. Thus, just like the telephone a century ago, these platforms have become a key 'factor in the commerce of the nation, and of a great portion of the civilized world.'" *Paxton*, 49 F.4th at 476 (quoting *Webster*, 22 N.W. at 239).

Third, social media platforms market power warrants consideration in the affectation test as well. Social media platforms' market power has reached levels that no other industry has seen and this warrants a strong public interest in considering them common carriers. These platforms provide "avenues for unprecedented amounts of speech." *Knight*, 141 S. Ct. at 1221 (Thomas, J.,

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[2] "There are currently over 50 million content creators on [social media platforms] . . . . Two million of them . . . earn six figure salaries." John Koetsier, *2 Million Creators Make 6-Figure Incomes on YouTube, Instagram, Twitch Globally*, Forbes (Oct. 5, 2020), https://www.forbes.com/sites/johnkoetsier/2020/10/05/2-million-creators-make-6-figure-incomes-on-youtube-instagram-twitch-globally/?sh=5ae7d2d123be.

[3] "63% of companies report they will invest in content creation for social media." Christine Moorman, *How Companies Can Capitalize on Social Media Investments*, Forbes (July 26, 2017), https://www.forbes.com/sites/christinemoorman/2017/07/26/how-companies-can-capitalize-on-social-media-investments/?sh=475ed4af7b3c.

concurring). This "concentrated control of so much speech in the hands of a few private parties" has never been seen before. *Id.* These platforms dominate their respective niches and leave little room for serious competition, "giving it an effective monopoly." *Paxton*, 49 F.4th at 476. These extremely wealthy and powerful social media corporations have had an unfair influence on public debate for far too long. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377, 389 (2021). The market power of these firms creates a strong public interest in regulating social media platforms to ensure they are not suppressing citizens voices and controlling the public disclose.

B. Alternatively, the Disclosures of Purely Factual and Uncontroversial Information About Headroom's Services Are Not Compelled Speech, nor Do They Interfere with Headroom's Editorial Judgment.

Even if social media platforms are not common carriers (which they are), Midland has a legitimate State interest in the Act's disclosure requirement that major social media platforms disclose "purely factual and uncontroversial information about" their services in a way that is unburdensome. *Zauderer*, 471 U.S. at 651. It is because of this Court's precedent that the SPAAM Act's disclosure provision is constitutional.

1. The *Zauderer* standard applies to the SPAAM Act and allows the SPAAM Act's disclosure requirements.

The SPAAM Act's disclosure requirement is subject to this Court's standard outlined in *Zauderer*. There, this Court upheld an Ohio rule that required lawyers operating on a contingency-fee basis to disclose that clients may be required to pay various fees and other costs. 471 U.S. at 650–53. Because the rule only required the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available," this Court held that the disclosure requirement should be permitted so long as it was not "unjustified

or unduly burdensome" that it would "chill protected speech." *Id.* at 651. And the disclosure requirement was reasonably related to a compelling state interest. *Id.*

a. **Zauderer** *should apply.*

The *Zauderer* standard should apply to the SPAAM Act's disclosure requirements. This standard is not limited to preventing consumer deception or only to commercial speech. This Court, when reviewing under *Zauderer* does "not question health and safety warnings *long considered permissible*" even while they have no commercial component. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2376 (2018) (emphasis added). Further, the D.C. Circuit has held that the *Zauderer* standard is not limited to "advertising and point-of-sale labeling." *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020).

Courts have previously applied the *Zauderer* standard to disclosure requirements placed on social media platforms. *Moody*, 34 F.4th at 1227 (holding that while *Zauderer* is "typically applied in the context of advertising," it is "broad enough" to cover more); *Paxton*, 49 F.4th at 485 (using *Zauderer*'s standard to address a Texas statute's required disclosure provision on social media platforms). *Zauderer* has a broader reach than just advertising and the SPAAM Act's disclosure provision is something that easily falls under its analysis.

b. The SPAAM Act requires disclosures of purely factual and uncontroversial information.

The SPAAM Act only requires "purely factual and uncontroversial" disclosures from major social media companies regarding its community standards and its enforcement of them. *NIFLA*, 138 S. Ct. at 2372 (citing *Zauderer*, 471 U.S. at 651). First, providing information and definitions regarding community standards is purely factual and uncontroversial because it plainly sets out those standards and makes them clearer to users. Second, providing more detailed information to users when social media platforms censor them for violating community

standards, gives the user more facts and information regarding the ban, suspension, or shadow banning they are faced with.

c. Midland has a legitimate interest in ensuring the free flow of information and protecting its citizens from undue censorship.

Midland has a legitimate interest in regulating major social media companies to prevent viewpoint-based discrimination against its citizens. A disclosure requirement on social media platforms "advances the State's interest in 'enabling users to make an informed choice' regarding whether to use the Platforms." *Paxton*, 49 F.4th at 485. These platforms wield enormous power and influence, and Midland has an interest in protecting its citizens from abuse.

Currently, these social media giants can suppress speakers and manipulate the information its users see in the modern public square "with a mere flick of the switch." *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 656 (1994). "[A]ssuring that the public has access to a multiplicity of information sources *is a governmental purpose of the highest order . . . .*" *Id.* at 663 (emphasis added). Prohibiting these conglomerates from having unfettered control over the dominant communications medium is "essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). These reasons create a legitimate interest for the state of Midland in protecting its own citizens from being silenced.

2. The SPAAM Act's disclosure provision is not unduly burdensome under *Zauderer*.

The argument that the SPAAM Act's disclosure provision imposes an undue burden is without merit. Midland can require companies to disclose "purely factual and uncontroversial information" about how they do business so long as the disclosure is not "unduly burdensome." *Zauderer*, 471 U.S. at 651. "*Zauderer* does not countenance a broad inquiry into whether disclosure requirements are 'unduly burdensome' in some abstract sense, but instead instructs us

to consider whether they unduly burden (or 'chill') protected speech and thereby intrude on an entity's First Amendment speech rights." *Paxton*, 49 F.4th at 486. For example, a disclosure requirement might be an undue burden if it "drowns out the [platform's] own message." *NIFLA*, 138 S. Ct. at 2373. The SPAAM Act's requirement that social media platforms provide a detailed explanation on what community standards were violated when they ban, suspend, or take other action against a user, does not rise to the level of "unduly burdensome." *Id.*

Courts have long upheld a wide variety of disclosure requirements finding them to not be unduly burdensome. Some of those, for example, involved "calorie content," *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 136 (2d Cir. 2009), and including a food product's country of origin on its packaging, *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014).

The SPAAM Act's disclosure provision is distinguishable from other times when courts have struck down such provisions. In *American Beverage Ass'n v. City & County of San Francisco*, the Ninth Circuit had to determine whether a city mandate that required health warnings on advertisements for certain sugar beverages, violated those beverage companies' First Amendment rights. 916 F.3d 749, 753 (9th Cir. 2019). Further, this mandate required that the disclosure "occupy at least 20% of the advertisement and be set off with a rectangular border." *Id.* at 754. The Ninth Circuit applied the *Zauderer* test and held that the 20% requirement was unduly burdensome in part because it drowned out the company's message. *Id.* at 757. This was seen as "chilling" the companies' speech because it took up such a substantial part of their message that was already limited by a set amount of space. The SPAAM Act's disclosure requirement does not rise to level of an undue burden because it does not chill or drown out social media platforms' speech.

First, the Act's requirement that major social media companies publish community standards with detailed definitions and explanations on how they will be enforced is no different than nutritional labels on food products. Headroom and other social media companies already publish their own community standards. R. at 3. Any additional work needed to add definitions and explanations, assuming those are not already there, will be infinitesimal. Once these have been added there is little work that the companies must do outside of updating any definitions or explanations whenever they decide to change their community standards. This is a reasonable request by Midland and is far from burdensome.

Second, requiring major social media companies to provide detailed explanations to users on how and what community standards were violated, when action is taken against those users, is not burdensome. Headroom for example, already lists what the violation was when they act against users. R. at 4–5. All that is being asked for is clarity. It is not burdensome to require these companies to provide a greater explanation when they act against a user. The companies can easily create explanations on the various standards and why the different actions are taken and cut and paste those into their various reports to users. Any increased costs from this requirement will be miniscule because it will not take much longer than it already does to simply provide more detail when acting against a user for a violation.

Third, the disclosure requirement is also not burdensome because there is no risk of social media platforms' speech being chilled or drowned out. Unlike the beverage companies in *American Beverage Ass'n*, social media platforms are not working with a fixed surface area. Rather, the internet holds an almost unlimited amount of space. Thus, there is no risk that a platform's speech will be drowned out by having to provide a more detailed explanation to their community standards nor to their users if action is taken against them for a community standards

violation. Further, social media platforms are still free to expressly disavow views they disagree with. The disclosure provision does not burden or chill the speech of social media platforms. It is for these reasons above that the SPAAM Act's disclosure requirements pass muster under the *Zauderer* standard.

II. THE THIRTEENTH CIRCUIT WAS CORRECT IN HOLDING THAT MIDLAND IS NOT POWERLESS TO REQUIRE SOCIAL MEDIA PLATFORMS TO HOST THIRD-PARTY SPEECH.

Midland does not violate the First Amendment's Free Speech Clause by prohibiting social media platforms from denying users nondiscriminatory access to its services. "A speech host must make one of two showings to mount a First Amendment challenge. It must show that the challenged law either (a) compels the host to speak or (b) restricts the host's own speech." *Paxton*, 49 F.4th at 459.

The SPAAM Act does not compel nor restrict social media platforms speech. The SPAAM Act does not compel social media platforms to speak because these platforms are an open forum for the public and thus third-party speech will not be identified with the private owner. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). Nor does not restrict speech because it does not prevent social media platforms from "expressly disavow[ing] any connection with [its users'] message[s]." *Id.* at 87–88. Finally, editorial choices are not protected expressions and even if they were social media platforms "are not 'speaking' when they host user-submitted content," because they are not legally responsible for the third-party speech on their platform. *Paxton*, 49 F.4th at 465.

Finally, even if the SPAAM Act's hosting requirement infringed on social media platforms' Constitutional rights, it should be upheld because it survives intermediate scrutiny. Intermediate scrutiny requires that a statute be "substantially related" to "an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The SPAAM Act's hosting requirement is substantially

related to Midland's important objective of preserving the free flow of information and protecting citizens' free speech from viewpoint-based censorship. As a result, the SPAAM Act's content neutral hosting requirement does not violate the First Amendment.

A. The First Amendment Is Not Implicated by the SPAAM Act's Hosting Requirement.

The SPAAM Act's hosting requirement does not implicate the First Amendment because it regulates conduct, in the form of censorship, not speech. Social media censorship of opposing viewpoints is not a form speech but rather a refusal to provide equal access to the modern public square. A "[s]tate enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). Midland enjoys this authority because denying citizens access to this modern public square is a form of "conduct, not speech." *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006). "A speech host must make one of two showings to mount a First Amendment challenge. It must show that the challenged law either (a) compels the host to speak or (b) restricts the host's own speech." *Paxton*, 49 F.4th at 459.

This Court applied this rule in its decision in *PruneYard Shopping Center v. Robins*. In *PruneYard*, a large California shopping mall had a policy that prevented visitors from "engag[ing] in any publicly expressive activity . . . that is not directly related to [the mall's] commercial purposes. 447 U.S. at 77. When high school students sought to solicit support in opposition of a United Nations resolution by passing out pamphlets and petitions in PruneYard's courtyard, PruneYard asked the students to leave and cited their policy as the reason for their removal. *Id.* The high schoolers sued and argued their "speech and petition" rights were violated. *Id.* at 78. PruneYard argued that this law violated their First Amendment rights by forcing them to host the speech of others. *Id.* at 85. This Court held the California law did not violate

PruneYard's First Amendment rights for three reasons. First, the mall was "open to the public" and because of that, the opinions and views of the high schoolers were unlikely to be associated with PruneYard. *Id.* at 87. Second, the state law was content neutral and applied equally across all speakers and did not require any "specific message" to be displayed on PruneYard's property. *Id.* Third, PruneYard was free to "expressly disavow" any message, political or otherwise, that they disagreed with. *Id.*

This Court re-affirmed and expanded on *PruneYard* in the *Rumsfeld* decision. In *Rumsfeld*, this Court held that a federal statute requiring law schools to host military recruiters to interview students at the same time non-military recruiters conducted interviews, did not violate those schools' First Amendment rights. 547 U.S. at 63–64. This Court reasoned that the statute did "not sufficiently interfere with any message of the school[s]" to trigger First Amendment scrutiny. *Id.* at 64. This was because the statute only "affect[ed] what law schools must do—afford equal access to military recruiters—not what they may or may not say." *Id.* at 60. In other words, when a law requires a platform to refrain from silencing individuals it is regulating "conduct, not speech," which does not raise a First Amendment problem. *Id.*

1. The SPAAM Act's hosting requirement does not compel Headroom to speak.

The SPAAM Act does not compel Headroom or other social media platforms to speak by requiring it to host all viewpoints equally. In *Miami Herald Publishing Co. v. Tornillo*, this Court determined the constitutionality of a Florida statute that required newspapers to give political candidates "equal space to reply to criticisms and attacks." 418 U.S. 241, 243 (1974). There, a political candidate sought injunctive relief to force a newspaper to print his reply to another politician's attack on him. *Id.* at 244. This Court held the statute violated the First Amendment and infringed on the newspaper's speech because it "intruded into the function of editors" and

controlled what the newspaper could publish. *Id.* at 251–56. This Court further reasoned that this editorial judgment protection was important because a "newspaper is more than a passive receptacle or conduit for news, comment, and advertising." *Id.* at 258.

This Court expounded on *Miami Herald* in *Pacific Gas & Electric Co. v. Public Utilities Commission of California (PG&E)*, 475 U.S. 1 (1986). In *PG&E*, this Court was faced with the issue of whether the state of California could "require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees." *Id.* at 4. Here, this Court held that the California law interfered with the utility company's speech because it required them to include speech they disagreed with, inside their monthly billing statements. *Id.* at 12. Notably, this Court distinguished the utility company in *PG&E* from the mall in *PruneYard*, explaining that unlike the utility company, the mall in *PruneYard* was unable to exclude speech it disagreed with because it was "open to the public at large." *Id.*

Unlike the newspaper in *Miami Herald*, the hosting requirement in the instant case is not compelling social media platforms to speak. Social media platforms exercise virtually no editorial control or judgment because they "hold themselves out as organizations that focus on distributing the speech of the broader public." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). Roughly "99%" of the third-party speech social media platforms broadcast "never gets reviewed" even after it is made visible to the public. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1092 (N.D. Fla. 2021), *aff'd in part, vacated in part, remanded*, 34 F.4th 1196 (11th Cir. 2022), *cert. granted in part,* 2023 WL 6319654 (U.S. Sept. 29, 2023) (No. 22-277), and *cert. denied*, 2023 WL 6377782 (U.S. Oct. 2, 2023) (No. 22-393). In other words, roughly all the content that makes its way onto any particular social media site, is "invisible to the provider." *Id.* Social media platforms, "permit any user who agrees to their boilerplate terms of service to

communicate on any topic, at any time, and for any reason. And as noted above, virtually none of this content is meaningfully reviewed or edited in any way." *Paxton*, 49 F.4th at 461. It is for these reasons that they are "conduit[s] for news, comment, and advertising." *Miami Herald*, 418 U.S. at 258. Because of this, requiring social media platforms to host users indiscriminately is not compelling them to do any speaking.

2. The SPAAM Act's hosting requirement does not restrict Headroom's speech.

The SPAAM Act also does not prohibit social media platforms from speaking. This is for two reasons. *First*, social media platforms have virtually unlimited space for speech. Unlike the newspaper in *Miami Herald*, and the utility company in *PG&E*, "space constraints on digital platforms are practically nonexistent." *Knight*, 141 S. Ct. at 1224 (Thomas, J., concurring). While a newspaper and a utility company sending a billing statement are forced to work with limited surface area that is taken up when forced to host unwanted speech, social media platforms as a digital medium do not have those same issues and instead are able to host millions, if not billions, of users and their speech each month. In *Miami Herald*, this Court opined that "a newspaper can[not] proceed to infinite expansion of its column space to accommodate" unwanted speech. Social media platforms, however, can infinitely expand their space to accommodate new speech and do daily. 418 U.S. at 257. For this reason, social media platforms can host users' speech without losing any ability to speak their own message.

Second, Headroom and other social media platforms are free to "expressly disavow" any message or view they disagree with. *PruneYard*, 447 U.S. at 87. Social media platforms are like the mall in *PruneYard* where the shopping mall owner was "free to publicly dissociate [himself] from the views of the speakers." *Id.* at 88. Similarly, in *Rumsfeld*, the law schools argued "that if they treat military and nonmilitary recruiters alike . . . they could be viewed as sending the

message that they see nothing wrong with the military's policies." 547 U.S. at 64–65. This Court rejected that argument, because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65. Nothing about a user expressing their views on social media suggests that the platform hosting that message agrees with it. The platforms can put disclaimers with their own message on user content if they so choose. Headroom, for example, already does exactly this. R. at 4. Here, social media platforms are free to expressly disavow the messages of its users. The applicable test is whether the hosting requirement compels speech or restricts speech. It does neither. Therefore, it passes constitutional muster.

3. Editorial choices are not a category of protected expression.

Even if Headroom could invoke "editorial discretion" to protect their censorship, it would not succeed. This Court has held that a key "function of editors" is that they are legally "responsible" for the "transmission" of content they put out. *Associated Press v. NLRB*, 301 U.S. 103, 127 (1937). Further, a platform exercises editorial judgment when it curates its broadcasting of a third-party's speech knowing it will be associated with the platform. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998). Nonetheless, "this Court has never recognized 'editorial discretion' as a freestanding category of First-Amendment-protected expression." *Paxton*, 49 F.4th at 465. Rather, the applicable inquiry is whether the hosting requirement compels the social media platforms "to speak or interferes with their speech." *Id.*

Even if editorial discretion was a protected category, social media platforms do not exercise editorial control when they hosts third party speech. *First*, social media platforms do not claim legal responsibility for third party speech. A platform that exercises editorial discretion accepts reputational and legal responsibility for any content it edits. For newspapers, this Court has

explained that as editors, their role includes "determin[ing] the news value of items received" and taking responsibility for the accuracy of the items transmitted. *Associated Press v. NLRB*, 301 U.S. at 127. In fact, these platforms have lobbied Congress so they may *not* be legally responsible for its users' speech. *See* 47 U.S.C. § 230. *Second*, as has already been discussed, social media platforms do not choose or select third party published on their platform. On the contrary, they allow virtually all user speech to go through and then embark in censorship after the fact. This is opposite from the substantive *ex ante* review that newspapers and other true editors partake in before publishing third party content. Social media platforms do not have legal responsibility nor have any discretion over the third-party content on their platform. This is opposite of editorial judgment's definition.

If any doubts remain regarding the hosting requirements constitutionality, 47 U.S.C. § 230 should extinguish them. Congress has set forth that social media platforms shall *not* be "treated as [a] publisher or speaker" of a user's speech. 47 U.S.C. § 230(c)(1). Under Section 230, the platforms are liable for their own speech but not for speech published by third parties. *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014). "Section 230 reflects Congress's judgment that the Platforms do not operate like traditional publishers and are not 'speaking' when they host user-submitted content." *Paxton*, 49 F.4th at 466; *see, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019) (holding that Facebook not liable for terrorist propaganda published on its site because it was a "neutral intermediary" for the content). Section 230 reinforces "the conclusion that the [platforms'] censorship is not speech under the First Amendment." *Paxton*, 49 F.4th at 466.

A finding that the SPAAM Act's hosting requirement violates social media platforms' "editorial judgment" is irreconcilable with the statutory benefits these platforms already reap as

conduits, not editors, of speech. To do so would grant Headroom and other social media platforms "maximum freedom to shape American discourse while they accept no liability for the content they host." *Paxton*, 49 F.4th at 496 (Southwick, J., concurring in part).

B. If the First Amendment Does Apply, the SPAAM Act Triggers and Satisfies Intermediate Scrutiny.

Even if the SPAAM Act's hosting requirement implicated Headroom's First Amendment rights, it would still not be entitled to relief because it's a content-and-viewpoint-neutral law and is therefore subject to intermediate scrutiny at most. Midland's interests in the hosting requirement are sufficient to satisfy that standard.

1. The SPAAM Act implicates intermediate scrutiny.

Even if the hosting requirement burdens social media's First Amendment rights, it does so in a content-neutral way. Indeed, "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" under the First Amendment. *Turner I*, 512 U.S. at 642 (quotations omitted). The "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Id.* Thus, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Id.* at 643. However, "laws that confer benefits or impose burdens on speech *without reference to the ideas or views expressed* are in most instances content neutral." *Id.* (emphasis added).

The SPAAM Act's hosting requirement is content-neutral. Even if censorship based on users' viewpoint is speech, the Act's hosting requirement does not depend on what view or message social media platforms convey through their censorship. This is because it applies equally no matter the motive of the platforms' censorship. The SPAAM Act is asking social media platforms to host all speech equally, regardless of viewpoint.

2. The SPAAM Act satisfies intermediate scrutiny.

Even if this Court found that the SPAAM Act's hosting requirement infringed on social media platform's constitutional right, it would still survive intermediate scrutiny. When a government action implicates the First Amendment applying a level of scrutiny higher than rational basis review may be necessary. Intermediate scrutiny requires a statute be "substantially related" to an "important government objective." *Clark*, 486 U.S. at 461.

In the *Turner* cases, this Court applied intermediate scrutiny to a federal regulation that required television companies to reserve over one-third of their station space for local stations to use. This Court held that the regulation interfered with the television companies' speech. *Turner I*, 512 U.S. at 637. Nonetheless, the federal regulation survived intermediate scrutiny because it advanced the government's interest in the "widest possible dissemination of information from diverse and antagonistic sources." *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 189, 192 (1997).

Just like in the *Turner* cases, the SPAAM Act's hosting requirement is substantially related to Midland's important interest and objective of ensuring the widest possible dissemination of information from diverse and antagonistic sources because it frees up the restrictions on diverse speech. If it were not for this provision, diverse speech on social media would be suppressed, weakening for all users the benefits of this modern public square. Moreover, this provision is substantially related to Midland's objective in preventing its citizens from being censored based on their viewpoint. Because of these interests, the hosting requirement survives intermediate scrutiny.

3. Alternatively, the SPAAM Act would survive even strict scrutiny.

Finally, even if this Court applies strict scrutiny to the hosting requirement, it will survive. Under strict scrutiny a state "must adopt 'the least restrictive means of achieving a compelling state interest.'" *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)).

In *Turner I*, Justice Thomas, and others opined they would have applied strict scrutiny to the television regulation because it gave special treatment to certain speakers. 512 U.S. at 683 (O'Connor, J., dissenting in part). However, they acknowledged that common carrier treatment would not give rise to as strong of a constitutional concern as the television regulation. They reasoned "if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies." *Id.* at 684. This is exactly what the SPAAM Act is asking of these major social media platforms because they satisfy the necessary historical factors of a common carrier.

Finally, the SPAAM Act adopts the narrowest and least restrictive means possible to achieve its interest of preventing the suppression of its citizens' speech. The SPAAM Act applies only to the largest social media platforms in the world. Any platform with under twenty-five million monthly users is not included in its scope. R. at 5–6. By only regulating the largest social media platforms, Midland ensures that small businesses are not being stifled with and that only those platforms that are the most powerful and influential are being reigned in. The hosting requirement employs the least restrictive means to achieve Midland's compelling state interest and thus, survives strict scrutiny.

CONCLUSION

This Court should AFFIRM the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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