No. 23-386

IN THE SUPREME COURT OF THE UNITED STATES

HEADROOM, INC.,
PETITIONER,

V.

EDWIN SINCLAIR, ATTORNEY GENERAL FOR THE STATE OF MIDLAND,
RESPONDENT.

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

BRIEF FOR THE PETITIONER

Oral Argument Requested

Attorney for Petitioner
Team #17

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QUESTIONS PRESENTED

I. Whether (1) major social media companies can be classified as common carriers with limited Free Speech rights even though they do not serve the public indiscriminately and are not affected with a public interest, and (2) whether the *Zauderer* standard applies to a State commercial disclosure requirement involving subjective and controversial content.

II. Whether a State violates the First Amendment's Free Speech Clause when it prohibits major social media companies from moderating third-party content that runs afoul of their Community Standards.

STATEMENT OF THE CASE

Statement of Facts

Headroom, Inc. ("Headroom") is a popular social media company founded and headquartered in Bartlett, Midland. R. at 3. Headroom provides users with a virtual reality experience to create profiles, design and post content, and share other users' posts. R. at 3. The platform allows users to monetize posts, solicit advertisers to sponsor accounts, and receive donations from other users. R. at 3. Every user must agree to Headroom's Community Standards before joining Headroom's servers, which are in place to "ensure a welcoming community" where "all are respected and welcome." R. at 3.

Headroom's Community Standards prohibit users from creating, posting, or sharing content that either explicitly or implicitly involves: "hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism towards protected classes." R. at 3. Headroom's Community Standards also ban 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.

Headroom curates a unique experience for its users by categorizing and ordering content on users' feeds through algorithms. R. at 3. Headroom uses algorithms that "prioritize information based on users' stated preferences while incorporating insights into users' interests derived by Headroom's data tracking systems." R. at 3. Algorithms are also used as a tool to hold users accountable by deprioritizing content that artificial intelligence flags as potentially violating the Community Standards. R. at 3.

In addition to the algorithms, Headroom also enforces its Community Standards through other content moderation measures. R. at 4. For example, Headroom may add commentary to users' posts indicating when a "post runs risk of violating Community Standards and warning about possibly upsetting content." R. at 4. Further, Headroom can demonetize or suspend a user's account, block other users from accessing the user's account, or remove the account and ban the user from Headroom. R. at 4. For example, Headroom banned user, Ava Rosewood's account "for spreading 'disinformation' and 'hate speech,'" after she spoke in favor of a controversial documentary regarding immigration. R. at 5.

On February 7, 2022, the State of Midland passed the Speech Protection and Anti-Muzzling (SPAAM) Act ("the Act"). R. at 4–7. The Midland Legislature introduced the Act after prominent users of the platform "accused Headroom of discriminating against their viewpoints." R. at 4. The Act's applies to any social media platform. R. at 5.

The Act has two main components. R. at. 6. First, the Act restricts social media platforms' ability to alter or remove users' content by prohibiting any social media platform from "censoring, deplatforming, or shadow banning" an "individual, business, or journalistic enterprise" because of "viewpoint." R. at 6 (citing Midland Code § 528.491(b)(1)). Pursuant to the Act, "censorship" is defined as "editing, deleting, altering, or adding commentary" to a user's content. R. at 6 (citing Midland Code § 528.491(b)(1)(i)). Further, "deplatforming" is defined as "permanently or temporarily deleting or banning a user." R. at 6 (citing Midland Code §528.491(b)(1)(ii)). The Act defines "shadow banning" as "any action limiting or eliminating either the user's or their content exposure on the platform or deprioritizing their content to a less prominent position on the platform." R. at 6 (citing Midland Code § 528.491(b)(2)).

Second, the Act requires social media platforms "to publish 'Community Standards' with 'detailed definitions and explanations for how they will be used, interpreted, or enforced.'" R. at 6 (citing Midland Code § 528.491(c)(1)). When enforcing their Community Standards, social media platforms are required to "provide a detailed and thorough explanation of what standards were violated, how the users' content violated the platform's Community Standards, and why the specific action…was chosen." R. at 6 (citing Midland Code § 528.491(c)(2)).

Procedural History

The District Court. The Act went into effect on March 24, 2022. R. at 7. The next day, Headroom filed a pre-enforcement challenge seeking a permanent injunction against Midland's Attorney General in the United States District Court for the District of Midland. R. at 7. Headroom alleged the Act violated its First Amendment rights and sought a preliminary injunction. R. at 7. On May 29, 2022, the district court granted Headroom's motion for a preliminary injunction prohibiting enforcement of the Act. R. at 15. The district court rejected Midland's argument that Headroom is a common carrier because Headroom makes individualized decisions regarding users. R. at 11. Additionally, the court found the Act's commercial disclosure requirements unduly burden Headroom's First Amendment rights. R. at 11. Further, the district court held that social media companies' content moderation decisions are protected speech under the First Amendment. R. at 14. The district court also held that the Act fails intermediate scrutiny. R. at 14.

The Court of Appeals. Midland's Attorney General appealed the district court's decision. R. at 16. On March 30, 2023, the Thirteenth Circuit reversed the district court's decision and vacated the preliminary injunction. R. at 19–20. The Thirteenth Circuit held that Headroom is a common carrier and that the Act does not violate the *Zauderer* standard because it "does not

‘unjustifi[ably] or unduly burden[]’ Headroom’s speech.” R. at 18. Additionally, the court held that the Act does not violate the First Amendment because Midland “is not powerless to require social media companies to host third-party speech.” R. at 19. Additionally, the court determined the Act may still be upheld under intermediate scrutiny. R. at 19.

Headroom filed a petition for writ of certiorari, which this Court granted on August 14, 2023.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Thirteenth Circuit on Headroom’s First Amendment Claims.

I.

Headroom is not a common carrier and is entitled to protections under the Free Speech Clause of the First Amendment. For a private entity to be a common carrier they must hold themselves out to the public indiscriminately and be affected with a public interest. Headroom does not hold itself out to the public indiscriminately because it requires all members to agree to its Community Standards before joining the platform. The Community Standards allow Headroom to remove content, ban users, and provide an individualized experience for each user. Additionally, Headroom is not affected with a public interest because they are not essential to individual’s daily lives. There are adequate alternatives that allow for individuals to disseminate and consume information. Given that Headroom does not fulfill either of the essential quality of common carrier classification, Headroom must be provided protection under the First Amendment.

Moreover, the *Zauderer* standard for required commercial disclosures does not apply to this case because the Act’s disclosure requirements are not purely factual or uncontroversial. The

Act requires Headroom to provide detailed information regarding enforcement its Community Standards which involves viewpoint-based and controversial topics such as hate speech and immigration issues. Additionally, the *Zauderer* standard requires compelled commercial speech be justified and unduly burdensome. The Act inhibits Headroom's ability to exercise editorial judgement which unduly burden's Headroom's First Amendment right. Therefore, the *Zauderer* standard for compelled speech cannot be applied to the Act's disclosure requirements.

II.

The Act violates the Free Speech Clause of the First Amendment because Headroom speaks when it censors, shadow-bans, or deprioritizes content that violates the Community Standards. Headroom exercises editorial judgment when it decides whether to publish content on its platform and when it curates and organizes speech. These content moderation decisions are also inherently expressive conduct because Headroom seeks to convey a message by upholding its Community Standards. By preventing Headroom from moderating content, the Act both restricts and compels Headroom to speak. Thus, the Act triggers First Amendment scrutiny. Furthermore, the Act fails intermediate scrutiny because the State of Midland cannot demonstrate that the Act is substantially related to further an important governmental interest. Therefore, the Act violates the Free Speech Clause.

ARGUMENT

I. HEADROOM IS NOT A COMMON CARRIER AND THE COURT'S DECISION IN *ZAUDERER V. DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO* DOES NOT APPLY TO THE SPAAM ACT'S DISCLOSURE REQUIREMENTS.

The Free Speech Clause of the First Amendment guarantees that "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. The Free Speech Clause was made applicable to the States through the Fourteenth Amendment. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019). Essential to the First Amendment is that

individuals should be permitted to decide for themselves which "ideas and beliefs [are] deserving of expression, consideration, and adherence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Government action that restricts speech due to its message or that requires an individual to convey a certain message violates the First Amendment. *Id.*

The government is allowed to limit First Amendment freedoms of common carriers — private entities that have power over a platform available to the public. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring). Restrictions prohibiting discrimination by common carriers are permitted to ensure that the entities serve all customers. *Id.* The state of Midland incorrectly claims that social media companies are common carriers subject to government restrictions limiting social media companies' First Amendment rights. R. at 8. To the contrary, social media platforms do not possess the necessary qualities to be common carriers because they do not hold themselves out to the public indiscriminately and are not affected with a public interest.

Additionally, the government may sometimes regulate commercial speech without violating the First Amendment. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Couns.*, 425 U.S. 748, 770 (1976). While commercial speech is provided First Amendment protection, some "commercial speech regulation[s] are surely permissible." *Id.* This Court has held that compelled commercial speech requirements are permissible if they are "reasonably related to [a] [s]tate's interests." *Zauderer v. Ofc. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985). The "great objectivity and hardiness of commercial speech," may allow for governments to require commercial speech to "appear in such a form, or include . . . additional information, warnings and disclaimers." *Va. State Bd. of Pharmacy*, 425 U.S. 748 at 772 n.4. However, a commercial disclosure may violate the First Amendment if the requirements are "unjustified or

unduly burdensome." *Id.* The *Zauderer* standard does not apply to the Act's disclosure requirements because the compelled speech is not purely factual and unduly burdens Headroom's speech.

A. Headroom Is Not a Common Carrier Because Headroom Does Not Hold Itself Out to the Public Indiscriminately and Is Not Affected with a Public Interest.

Headroom, like other social media companies, does not possess necessary qualities to be a common carrier and is therefore entitled to First Amendment protections. While "justifications for [common carrier] regulations have varied" throughout history, there are two essential qualities courts have consistently considered for common carrier regulation. *Knight First Amend. Inst.*, 141 S. Ct. at 1222 (Thomas, J., concurring). First, the entity must "hold[] oneself out to serve the public indiscriminately." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). Second, courts consider whether the entity is "affected with a public interest," meaning the entity plays an important "economic and social role in society." *NetChoice, LLC v. Paxton*, 59 F.4th 439, 471 (5th Cir. 2022).

1. Headroom does not hold itself out to the public indiscriminately because it requires members to agree to Community Standards prior to joining the platform and Headroom provides individualized experiences to users.

It is a "basic characteristic" of a common carrier to "serve the public indiscriminately." *U.S. Telecom Ass'n v. FCC*, 825 F.3d at 740. To serve the public indiscriminately, a business cannot make "individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). In the context of communication, common carriers must provide "communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *Id.*

Headroom does not hold itself out to the public indiscriminately because Headroom has Community Standards which all users must agree to before joining its servers. R. at 3. While social media companies "hold themselves out as organizations that focus on distributing the speech of the broader public," the companies are not indiscriminately serving the public since users must agree to their Community Standards. *Knight First Amend. Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). R. at 11. Headroom's platform is not open to "all members of the public who choose to employ," the platform, Headroom is only available to those who agree to abide by its standards. *Midwest Video Corp.*, 440 U.S. at 701.

Additionally, Headroom does not allow users to freely "communicate or transmit intelligence of their own design," because Headroom regulates content posted on its platform to ensure content complies with its Community Standards. *Id.* R. at 4. Headroom's Community Standards prohibit users from "creating, posting, or sharing content that . . . promotes or communicates hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticisms toward protected classes." R. at 3. If a user's content violates the Community Standards, Headroom adds warnings to and deprioritizes content the content. R. at 4. Users may even be suspended or banned from the platform for posting content that runs afoul to the Community Standards. R. at 4. By restricting content and users based on the substance, Headroom is clearly engaging in individualized business dealings and is not indiscriminately allowing all users to communicate their own messages.

Respondent will likely argue that social media companies do not provide individualized experiences because like traditional common carriers, the social media platforms solely "'carry' information from one user to another.'" *Knight First Amend. Inst.*, 141 S. Ct. at 1224 (Thomas,

J., concurring). Respondents may also claim that social media companies are not akin to newspaper publishers or speakers because they focus on disseminating speech of the public. *Id.* R. at 17. This argument is incorrect because social media companies go beyond simply disseminating information by curating their users' experience through algorithms which categorize and order the content users see. R. at 3.

Traditional telecommunication companies are common carriers because they distribute third-party speech and they do not edit or restrict the messages users transfer through their services. *Knight First Amend. Inst.*, 141 S. Ct. at 1224 (Thomas, J., concurring). In contrast, social media companies routinely scrutinize and regulate users' speech through their algorithms. R. at 3. Headroom's algorithms "prioritize information based on users' stated preferences while incorporating insights into user's interest derived from Headroom's data tracking system." R. at 3. The content moderation and curated user experience are an integral part of social media companies that differentiate social media platforms from telecommunications common carriers. Social media companies' content restrictions and curated user experiences exemplify social media platforms' individualized experiences, which is inconsistent with the fundamental quality of traditional common carriers.

2. Headroom is not affected with a public interest because it is not an essential service to the public.

To determine if an entity is a common carrier, courts have consistently considered whether a business is "affected with a public interest." *NetChoice, LLC v. Paxton*, 49 F.4th at 471. A member of this Court has suggested that regulations "placed on common carriers may be justified, even for industries not historically recognized as common carriers, when a 'business by circumstances and its nature,… rise[s] from private to be of public concern.'" *Knight First Amend. Inst.*, 141 S. Ct. at 1223 (Thomas, J., concurring) citing *German All. Isn. Co. v. Lewis*,

233 U.S. 389, 411 (1914). When applying this test, courts often consider whether a business's "service play[s] a central economic and social role in society." *NetChoice, LLC v. Paxton*, 49 F.4th at 471. For example, the telephone was found to be a common carrier because it had become a matter of public convenience and public necessity, just as the stagecoach was in the past. *Id.* at 472 (citing *Hockett v. Indiana*, 105 Ind. 250, 257 (Ind. 1886)).

Here, Headroom is not affected with the public interest because it, along with other social media companies, has not amounted to the same level of public convenience and public necessity as common carriers. While social media companies have become increasingly popular and play a social role in society, they are not essential for individuals to access or discuss news, politics, art, and culture. Many people choose not to engage with social media companies and are still capable of accessing, discussing, and enjoying politics, art, or culture. Additionally, there are many adequate alternative options individuals may utilize to achieve the same objectives as social media platforms. For example, users can visit political candidates' campaign websites to educate themselves on the candidates' political stances. Individuals can also join political groups or organizations to discuss politics, candidates, and public issues. Thus, the growing popularity of social media platforms does not make them of such economic and social interest to be considered affected with a public interest.

Headroom does not possess the essential qualities necessary to be classified as a common carrier. Moreover, Headroom does not serve the public indiscriminately and is not affected with a public interest. Therefore, Headroom cannot be classified as a common carrier and is entitled to Free Speech Clause protections.

B. The *Zauderer* Standard Does Not Apply to the SPAAM Act Because the Disclosure Requirements of the SPAAM Act Force Companies to Publish Controversial Viewpoint-Based Content and the Disclosure Requirements are Unjustified and Unduly Burdensome.

Under certain circumstances, compulsory speech may violate the First Amendment. *See Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publ'g Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241 (1974). In *Zauderer*, this Court held that compelled commercial speech may be permissible if the speech is "reasonably related to the [s]tate's interest." 471 U.S. 626, 651 (1985). The *Zauderer* standard only applies to "purely factual and uncontroversial information." *Id.* Additionally, compelled speech might violate the First Amendment if it is "unjustified or unduly burdensome." *Id.* The burden is on the state to prove that the compelled commercial speech "is neither unjustified nor unduly burdensome." *Nat'l Isnt. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

The Act's forced disclosures are not within the scope of the *Zauderer* standard because the disclosure requirements compel Headroom to publish subjective and controversial content. Even if the disclosure requirements are found to be purely factual and uncontroversial, they violate the *Zauderer* standard because the requirements are unjustified and unduly burdensome.

1. The decision in *Zauderer* does not apply to the SPAAM Act because Midland is compelling private companies to disclose viewpoint-based and controversial information.

The *Zauderer* standard does not apply to the SPAAM Act because the Act requires social media companies to publish subjective content on controversial topics such as political and social issues. In *Zauderer*, this Court upheld a state regulation compelling commercial speech because the disclosure requirement was "reasonably related to the [s]tate's interest in preventing deception of consumers." 471 U.S. 626 at 651. There, the state regulation required attorneys to include disclosures in contingency-based advertisements indicating that a client may still bear

expenses if their case was unsuccessful. *Id.* at 631-633. Because the required speech was "purely factual and uncontroversial information," the state only needed to prove it was "reasonably related" to a state interest. *Id.* at 650–651. The Court held the disclosure requirement did not violate the First Amendment because the state did "not attempt to 'prescribe to be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* at 651. Rather, the state only "prescribe[d] what shall be orthodox in commercial advertising," and solely compelled "information about the terms under which… services will be available." *Id.*

The *Zauderer* standard does not apply to compelled commercial regulation regarding controversial issues. *Nat'l Isnt. of Fam. & Life Advoc.*, 138 S. Ct. at 2372. In *National Institute of Family & Life Advocates*, this Court struck down a state law requiring pregnancy-related clinics to post notices regarding public programs, including access to contraceptives and abortions. *Id.* at 2361. This Court held that the *Zauderer* standard was not applicable to the government notices for the pregnancy clinics because a notice regarding state provided abortion services was "anything but an 'uncontroversial' topic." *Id.* at 2372. Unlike the disclosure requirements in *Zauderer,* the state forced the clinics to disclose information highly controversial information. *Id.* Thus, the disclosure requirements were not provided lesser First Amendment protections established in *Zauderer*. *Id.*

Here, Midland is forcing private companies to publish viewpoint-based and controversial information in violation of the First Amendment. The Act requires social media companies 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 … was chosen," when the company enforces their Community Standards R. at 6. This "detailed and thorough" forced speech differs from the disclosure requirement in *Zauderer* because it involves

viewpoint-based issues rather than "purely factual" information. R. at 6.; 471 U.S. 626 at 631. Headroom's Community Standards forbid users from posting content related to subjective matters such as hate speech, racism, sexism, and disinformation. R. at 3. While Headroom does its best to define viewpoint-based issues like what content they consider disinformation, Headroom acts subjectively when it decides to remove a user or their content for violating the Community Standards. R. at 3–4. Thus, requiring Headroom to publish a "detailed and thorough explanation" about how a user violated the Community Standards will undoubtedly include viewpoint-based, not purely factual, information.

Additionally, the Act compels Headroom to publish speech on highly controversial issues. Social media platforms are required to publish "detailed definitions and explanations" regarding how they will interpret and enforce their Community Standards. R. at 6. Complying with this provision of the Act will require social media platforms to define their interpretation of incredibly controversial and subjective matters such as hate speech, racism, and transphobic ideas. R. at 6. A social media company's definition of hate speech is not factual and rather that company's own opinion. While many social media platforms already publish their Community Standards and try to provide definitions, the government should not compel them to provide detailed definitions and interpretations of subjective and controversial topics. *Facebook Community Standards*, Meta, https://transparency.fb.com/policies/community-standards/ (last visited Oct. 8, 2023).

Posting thorough explanations detailing users' violations of Community Standards will also require social media platforms to speak on controversial issues. For example, Headroom banned a user's account "for spreading 'disinformation' and 'hate speech' after she spoke out in favor of a controversial documentary about immigration." R. at 5. The Act would require

Headroom to speak on the documentary, described as controversial, and how the user's comments regarding immigration amount to hate speech. Like the compelled speech in *National Institute of Family & Life Advocates*, speech on immigration is "anything but an 'uncontroversial' topic." 138 S.Ct. 2361 at 2371.

2. Even if the disclosure requirements are found to be purely factual and uncontroversial, the compelled speech still fails the *Zauderer* standard because the speech is unduly burdensome.

The Act's disclosure requirements are not within the scope of the *Zauderer* standard because compelling Headroom to provide detailed explanations when enforcing Community Standards unduly burdens the company's editorial judgement. As established in *Zauderer*, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." 471 U.S. at 651. Disclosure requirements can be unduly burdensome when the disclosure is so lengthy or detailed it "effectively rules out" the intended message. *Dwyer v. Cappell*, 762 F.3d 275, 283 (3d Cir. 2014) (*citing Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136, 146 (2014)).

In *National Institute of Family & Life Advocates*, part of California's compelled disclosure requirement for unlicensed pregnancy-related clinics were held to violate the First Amendment for being unduly burdensome. 138 S.Ct. at 2378. There, the disclosure requirement forced unlicensed clinics to disclose that they were not a licensed facility and list services provided on all advertising materials. *Id.* at 2370. The disclosure requirement was long, about 29-words, and included details regarding font size. *Id.* 2378. This Court held the forced disclosure was unduly burdensome because the detailed and cumbersome disclosure requirement called attention to a government message "instead of [the clinic's] own message." *Id.*

Here, the Act's disclosure requirement is unjustified and unduly burdensome because it detracts from Headroom's own message. As discussed in Issue II of this brief, social media companies communicate a message to their users by moderating content on their platforms to ensure their Community Standards are enforced. The Act compels social media companies to "provide a detailed and thorough explanation of what standards were violated" when enforcing its Community Standards. R. at 6. Subject to the Act, Headroom's ability to exercise editorial judgment will be unduly burdened because complying with the disclosure requirement may be extremely cumbersome. Headroom has over seventy-five million monthly users, thus, Headroom enforces their Community Standards innumerably. R. at 11. Ensuring that *every* enforcement has a detailed and thorough explanation would be extremely costly to implement. R. at 11. The disclosure requirement "effectively rules out," Headroom's ability to moderate content and ultimately inhibits Headroom's ability to communicate a message. *Dwyer*, 62 F.3d at 283 (*citing Ibanez*, 512 U.S. at 146).

Just as in *National Institute of Family & Life Advocates*, the Act calls attention to the required disclosure rather than to Headroom's message. In *National Institute of Family & Life Advocates*, the clinic was required to include a 29-word disclosure in every advertisement it would make – which detracted from the clinic's message. 138 S.Ct. at 2378. As a result, the detailed requirement made it almost impossible for the clinic to engage in certain types of advertising. *Id.* Similarly, the Act here essentially makes it impossible for Headroom to engage in editorial judgment because of the "detailed and thorough" explanations required. R. at 11. Headroom's inability to moderate content detracts from Headroom's message of fostering a welcoming community where all members are respected. R. at 3. The Act is not within the *Zauderer* standard because it unduly burden's Headroom's ability to convey a message through

editorial judgment and "offend[s] the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651.

The holding in *Zauderer* is not applicable to this case because the Act compels social media companies to publish subjective and controversial content. Even if this Court finds the compelled disclosure to be purely factual and uncontroversial, the *Zauderer* standard still does not apply because the disclosure requirement unduly burden's Headroom First Amendment right to free speech.

II. THE SPAAM ACT VIOLATES THE FIRST AMENDMENT BECAUSE HEADROOM ENGAGES IN CONSTITUTIONALLY PROTECTED SPEECH THROUGH ITS CONTENT MODERATION DECISIONS.

The Free Speech Clause of the First Amendment "constrains" government actors and "protects private actors." *Manhattan Cmty. Access Corp.*, 139 S.Ct. at 1926. The First Amendment safeguards an individual or company's right to speak regardless of whether the government considers that speech "sensible and well intentioned or deeply 'misguided.'" *303 Creative LLC v. Elenis*, 143 S. Ct. 2998, 2312 (2023); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos. Inc.*, 515 U.S. 557, 574 (1995). The dissemination of speech is itself speech protected by the First Amendment. See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011); see also *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.").

The Act violates the First Amendment's Free Speech Clause because it prevents social media companies from exercising editorial judgment regarding what content to disseminate on their platform. Social media companies speak when they shadow-ban, censor, or deplatform content to determine what information they want to convey on their platforms. By prohibiting content moderation, the Act restricts social media companies' ability to speak because the

company cannot express disapproval with content that violates their Community Standards. Moreover, social media companies' content moderation decisions are inherently expressive conduct. The Act also compels social media companies to speak because social media companies are forced to include speech on their platforms that they disagree with and as a result, convey a message to their users that the company identifies with speech on its platform. Thus, social media companies' content moderation decisions are subject to First Amendment scrutiny.

A. Headroom Exercises Editorial Judgment Through Content Moderation, Which Is Speech Protected by the First Amendment.

Headroom exercises editorial judgment, speech protected by the First Amendment, through content moderation decisions to choose which content appears on its platforms. This Court has recognized "[t]he presentation of an edited compilation of speech generated by other persons…fall[s] squarely within the core of First Amendment security." *Hurley*, 515 U.S. at 570. Private entities exercise editorial judgment when they decide "whether to, and to what extent, and in what manner [they] will disseminate speech – even speech created by others." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2022).

Editorial judgment, which has been traditionally applied to publication companies, has routinely been upheld as speech entitled to First Amendment protection. In *Miami Herald*, this Court struck down a statute that required newspapers to publish any political candidates' response to criticism if they were assailed by the paper. 418 U.S. at 244. This Court recognized a newspaper is "more than a passive receptacle or conduit for news." *Id.* at 258. Rather, "[t]he choice of material to go into a newspaper," which may include the size of content or treatment of public officials "constitute[s] the exercise of editorial control and judgment." *Id.* Thus, by compelling the newspaper to publish information "which reason tells them not to be published,"

the statute infringed on the "function of editors" and violated the First Amendment. *Id.* at 256–258.

Private companies may also exercise editorial judgment through the decision to refrain from speaking on certain matters. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, this Court held it was unconstitutional for a state agency order to require a utility company to include third-party speech contrary to the utility company's viewpoints in their monthly billing envelopes. 475 U.S. 1, 5 (1984). This Court struck down the order because it "impermissibly require[d]" the utility company to associate with speech it may disagree with. *Id.* at 15. As the Court observed, "for corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Id.* at 16. Because the order required the company to use its own property as a vehicle for spreading a message it disagreed with, the order infringed on the utility company's protected speech under the First Amendment. *Id.* at 21.

Social media companies similarly exercise editorial judgment through content moderation because they are making conscious decisions regarding what information to convey to their users. Social media companies are not a "passive receptacle" for information. *Miami Herald*, 418 U.S. at 258. Instead, like a newspaper, social media companies curate speech by blending a careful selection of information presented to others. R. at 3. Here, Headroom uses its algorithm to make decisions to organize and deprioritize content to uphold their Community Standards. R. at 3. When Headroom's algorithm deprioritizes content that runs afoul of the Community Standards, it is engaging in the conscious decision to arrange information in a manner that aligns with the company's values. Just like a newspaper editor makes decisions regarding the placement of paragraphs or the sizing of fonts, Headroom makes decisions regarding the content it prioritizes and deprioritizes in accordance with its Community

Standards. R. at 3. Thus, because Headroom makes decisions regarding the arrangement of content through its content moderation decisions, Headroom is exercising constitutionally protected editorial judgment.

Curation of speech to communicate a message seemingly reflecting an entity's belief is protected by editorial judgment. In *Hurley*, this Court determined a private parade organizer exercised editorial judgment by group of marchers that conflicted the parade's message. 515 U.S. at 559. There, a state public accommodation law required a privately operated parade to allow a group of gay, lesbian, and bisexual descendants of Irish heritage to participate in a St. Patrick's Day parade. *Id.* at 568. This Court concluded the public accommodations law infringed on the parade organizer's editorial judgment to select participants they wanted to include in their parade. *Id.* at 576. In so holding, the Court explained, "in the context of an expressive parade…the parade's overall message is distilled from the individual presentations along the way and each unit's expression is perceived by spectators as part of the whole." *Id.* at 577. As a result, the law required the parade to alter its expression to include viewpoints that it disagreed with and therefore viewers assumed the viewpoints of their own. *Id.*

Additionally, this Court has held that cable providers exercised editorial judgment when deciding which programming stations to provide to users. *Turner*, 512 U.S. at 636. The action of selecting certain programming stations was the cable provider's way of "communicating messages on a variety of topics" *Id.*

When social media companies include content on their platforms, they make judgments regarding whether the information is worthy of dissemination. Here, like a parade organizer or cable operator, Headroom makes a particular decision to include speech on its platform to uphold its message that "everyone is respected and welcome." R. at 3. When Headroom removes a user

for posting content that may be harmful, it is utilizing its editorial judgment to refrain from including content that may indicate the company endorses those viewpoints. However, the Act prevents Headroom from deprioritizing and removing content. R. at 4. As a result, Headroom is forced to include third-party speech on its platform that contradicts its values. As a result, users may believe that Headroom believed that content was worthy of dissemination. Because the Act prohibits major social media companies' ability to disseminate and curate content on their platforms, the Act infringes on social media companies' exercise of editorial judgment.

B. The SPAAM Act Restricts Headroom's Ability to Speak by Making Headroom Powerless to Disavow Any Connection With Messages Contrary to its Beliefs.

The SPAAM Act restricts social media companies' ability to speak through content moderation because companies are powerless to disavow connection with communication that they disagree with. This Court has held, in certain contexts, that hosting third-party speech on an individual's property does not implicate First Amendment concerns. For example, in *PruneYard Shopping Center v. Robbins*, this Court determined a private mall owner was not entitled to First Amendment protection to exclude protestors from demonstrating on his property. 447 U.S. 74, 76 (1980). Because the mall was a business establishment open to the public, the Court recognized that the views identified by the petitioners would not be identified with the owner. *Id.* at 87. Additionally, the Court recognized that the mall could disavow any connection with the opposing message by, for example, posting signs disclaiming the message of the protestors to explain that the protestors were communicating their own messages by virtue of state law. *Id.*

Respondent is likely to argue that *PruneYard* is applicable here because Headroom is a social media company available to the public and therefore the views of its users will not be identified with the company itself. Additionally, respondents may likely claim that the Act does not restrict Headroom's ability to disavow connection with the speakers. Under respondents'

theory, Headroom is still able to distinguish itself from users who violate the Community Standards without engaging in content moderation.

This argument is flawed for two reasons. First, Headroom is not a business establishment "open to the public" where users are free to "come and go as they please." *Id.* Unlike a mall, users who join Headroom are subject to following the company's Community Standards. R. at 3. While an individual may go to a mall and leave whenever they like without being subject to rules and regulations, Headroom's platform requires compliance with its Community Standards to participate. R. at 3. By requiring Headroom to host speech that runs afoul of its Community Standards, the Act forces Headroom to alter its message that all are "respected and welcome." R. at 3.

Second, the Act leaves Headroom powerless to disavow any connection with content that runs afoul with its Community Standards by prohibiting shadow-banning, deplatforming, and censorship. Here, Headroom expresses disapproval with content that runs afoul of the Community Standards by adding warnings to content, deprioritizing content, or banning users from their feeds. R. at 4. This is merely equivalent to the company posting virtual signs on their virtual property to distance their views from the message of the speaker. When Headroom adds addenda to a user's post, it is signaling that they disagree with the content and the ideas expressed are not their own. R. at 4. However, the Act expressly prohibits social media companies from "editing, deleting, altering, or adding commentary" to content. R. at 6. The Act's prohibition of censorship leaves Headroom now powerless to voice its disapproval with content it finds objectionable on its platform. While the law upheld in *PruneYard* still allowed the mall owner to express disagreement with the views of the protestors, the Act here does

exactly the opposite. The Act restricts Headroom's ability to speak because the it cannot disavow connection with speech that is not its own.

C. Headroom's Content Moderation Decisions are Inherently Expressive Conduct Deserving First Amendment Protections.

The freedom of speech extends to protect conduct that is inherently expressive. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc*., 547 U.S. 47, 66 (2006). Inherently expressive conduct is conduct that "intends to express an idea" that is "sufficiently imbued with elements of communication." *Texas v. Johnson*, 491 U.S. 497, 401 (1974). (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).) For example, flag burning as a political demonstration constitutes inherently expressive conduct because the communicative nature is "both intentional and overwhelmingly apparent." *Id.* at 406. This Court also recognized a parade constituted expressive conduct in *Hurley*, because every participating contingent came together to represent a "common theme." 515 U.S. at 576.

Here, like *Hurley*, social media companies' content moderation decisions are expressive conduct that convey a message about the company's beliefs. When Headroom shadow-bans, deprioritizes, or removes content from the platform, it ultimately conveys a message to its users that it does not approve of that post. However, because the Act prohibits Headroom from engaging in these content moderation decisions, may believe that Headroom endorses those messages by including it on the platform. Just like the spectators in *Hurley* would likely believe that the parade organizer approved of LGBTQ+ rights simply through their participation in the parade, users may believe that Headroom approves of content that used to be prohibited and is now included on their feeds. 515 U.S. at 577.

Occasionally, this Court has declined to recognize conduct as inherently expressive when the message is not apparent without further explanation. In *Rumsfeld*, this Court determined a

law school's refusal to host military recruiters on campus did not constitute inherently expressive conduct. 547 U.S. at 66. As the Court observed, a spectator who saw a military recruiter conducting an interview away from a law school's campus would not perceive the interview location to be a result of the law school's disapproval of the military. *Id.* at 66. Rather, a spectator could assume that there were no available rooms on campus, or the recruiter made the decision to conduct the interview elsewhere. *Id.* Thus, the law school's disapproval with the military was not "overwhelmingly apparent" to be construed as inherently expressive conduct. *Id.*

Here, however, social media companies' content moderation decisions convey an "overwhelmingly apparent" message that the user's content is removed for violating the Community Standards. For example, Ava Rosewood was banned from Headroom for spreading "disinformation" and "hate speech" after she spoke out in favor of a controversial documentary about immigration to Europe. R. at 5. When Headroom removed Ava's profile from the platform, it conveyed a message that it disagreed with her posts. Unlike the military recruiters in *Rumsfeld*, a reasonable observer would be able to conclude that Headroom removed Ava's profile because it disagreed with the messages contained in her post. More importantly, Ava could understand that her account was banned because it did not align with Headroom's values. Thus, Headroom's content moderation decisions are inherently expressive because Headroom removes content to communicate a message that "all users are respected and welcome," and to further communicate that Headroom finds the content objectionable or harmful.

The Act burdens Headroom's exercise of inherently expressive conduct by prohibiting content moderation. By forcing Headroom to host content it would typically remove, the company is compelled to speak. While requiring law schools to host military recruiters was not

seen as a First Amendment violation in *Rumsfeld*, forcing Headroom to host third-party content that runs afoul of the Community Standards is significantly different. In *Rumsfeld*, the Court held that the law schools were not speaking by hosting military recruiters because the law schools were not seeking to uphold their message through recruitment matters. 547 U.S. at 64. Rather, law schools used recruitment services to provide jobs to their students. *Id.* Whereas here, Headroom specifically hosts content that amplifies its message that "all are respected and welcome." R. at 3. When Headroom hosts content, it is doing so for the very purpose of amplifying that mission.

When the Act requires Headroom to host content that would normally be removed by the Community Standards, users will no longer understand the difference between content that Headroom finds acceptable and content that is not. As a result, Headroom's users may observe content violating the Community Standards as acceptable behavior, may encourage similar speech, and may transform Headroom's platform into a method of expressing views that violate their mission. Headroom's standards are enacted to protect their users, not discriminate against them. Because the Act restricts social media companies from exercising editorial judgment and subsequently compels social media companies to speak by including content on their platform that violates their Community Standards, the Act triggers First Amendment scrutiny.

D. The SPAAM Act Fails Intermediate Scrutiny.

Furthermore, the Act's content moderation restrictions fail intermediate scrutiny. To survive intermediate scrutiny, a statute must be "substantially related" to "an important government objective." *Clark v. Jeter*, 468 U.S. 456, 461 (1988). Accordingly, the law must "not burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

The State of Midland will not be able to demonstrate that the Act is substantially related to an important government objective. The Thirteenth Circuit held that the Act's restriction of Headroom's censorship is substantially related to Midland's "important objective of preserving the free flow of information and protecting citizens' free speech from unfair viewpoint discrimination." R. at 19. However, there is no important governmental interest in regulating speech on a private company's platform, which is a forum only open to users who agree to and comply with its Community Standards. R. at 3.

Respondent may argue that the Act is substantially related to the government objective of providing all citizens an outlet to speak their views without fear of discrimination. However, there is no governmental interest in providing individuals the right to post harmful content on a platform where they are not even entitled to membership. See *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th at 1128 ("Nor is there a substantial governmental interest in enabling users – who remember have no vested right to a social media account – to say whatever they want on privately owned platforms that would prefer to remove their posts.").

Here, Headroom does not specifically remove content due to unfair viewpoint. Rather, Headroom's Community Standards prohibit content that is harmful to others, such as hate speech, transphobic messages, or disinformation. R. at 3. By forcing Headroom to use its platform to post content that does not align with their Community Standards, the Act is not furthering the free flow of information or protecting unfair viewpoint discrimination. Instead, the Act requires private companies to use their platforms to spread messages that may be harmful to others, or information that may not be factually true. Thus, instead of furthering a government objective, the Act actually makes social media a more dangerous place for its members, and for society in general.

Moreover, the Act burdens more speech at the expense of carrying out the government's interest in providing access to free speech. Here, the Act burdens social media companies' freedom of speech as it seeks to further the government's interest of expanding speech. By attempting to provide non-discriminatory access to social media platforms, the Act compels social media companies to speak by requiring the companies to publish content that runs afoul of their Community Standards. Additionally, the Act restricts social media companies the ability to speak by preventing content moderation decisions to disavow connection with the content violating their Community Standards. As a result, the Act "[r]estricts the speech of some elements of our society in order to enhance the relative voices of others" – a concept "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

Because Respondent cannot prove that the Act is not substantially related to further an important governmental interest, the Act fails intermediate scrutiny. Therefore, the Act violates the First Amendment.

CONCLUSION

For the forgoing reasons, Petitioner respectfully requests that this Court reverse the Thirteenth Circuit's decision on both issues.

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Respectfully Submitted,

s/ *Team 17*
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