Docket 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

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BRIEF FOR RESPONDENT

Team 18
Counsel for Respondent

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QUESTIONS PRESENTED

I. Whether, under the free speech clause of the First Amendment, (1) major social media companies are common carriers where the companies hold themselves out to the public; and (2) this Court's decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* applies to the SPAAM Act's disclosure requirements, where the required disclosures are factual and uncontroversial.

II. Whether a State may ensure equal, nondiscriminatory access to the most ubiquitous platforms on the internet by prohibiting social media corporations from censoring speech.

STATEMENT OF THE CASE

I. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

This case also involves the State of Midland's Speech Protection and Anti-Muzzling (SPAAM) Act, which is reprinted in the Appendix. App., *infra*, a.

II. STATEMENT OF THE FACTS

This case involves a First Amendment challenge to the State of Midland's Speech Protection and Anti-Muzzling ("SPAAM") Act[1] brought by Headroom, Inc. ("Headroom"). Founded and headquartered in Midland, Headroom is a social media platform that "allows users to create profiles, design and post content, and share other users' posts." R. at 2–3. Differentiating itself from other popular social media platforms, Headroom offers users a unique service that allows users to interact with one another in a virtual reality environment. R. at 3. To enhance user experience, Headroom uses algorithms to curate and organize content within the user's feed. R. at 3. These algorithms "prioritize information based on users' stated preferences" and other relevant user data. R. at 3. Additionally, Headroom's algorithms will deprioritize information that its artificial intelligence has flagged as potentially violating its Community Standards. R. at 3.

Headroom touts its mission as "provid[ing] a space for everyone to express themselves to the world," and simultaneously "promot[ing] greater inclusion, diversity, and acceptance in a

[1] The SPAAM Act is reproduced in the Appendix.

divided world." R. at 2–3. Having promulgated itself as a platform that is readily available to the general public, Headroom has become one of the most prominent social media platforms in America. R. at 2–3. With over 75 million monthly users, the platform has become a "hub of business in cyber space" and many users' livelihoods depend on access to Headroom's services. R. at 3.

Headroom's Services. All Headroom users must agree to Headroom's Community Standards, which "ensure a welcoming community" where "all are respected and welcome." R. at 3. These standards prohibit certain behavior including "hate speech; violence; child sexual exploitation and abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R. at 3. The standards also ban what Headroom calls "disinformation."

Violating the Community Standards could exact several penalties on the user. These penalties range from Headroom appending commentary to a user's post and content being deprioritized via Headroom's algorithms, to demonetizing the user's account, suspending the account, or banning the user from Headroom entirely. R. at 4.

SPAAM Act. The Midland Legislature passed the SPAAM Act on February 7, 2022, and it went into effect on March 24, 2022. R. at 7. Midland State Representative Margaret Caldwell stated that "social media giants like Headroom have become virtual dictators, suppressing free speech and ruining hardworking Midlandians' livelihoods under the guise of moderation. This bill will hold them accountable and ensure the protection of our democratic values." R. at 5. The SPAAM Act prohibits social media platforms from censoring users because of viewpoint and requires platforms to publish their "community standards" and detailed explanations of their actions when they enforce those standards. R. at 6. When a platform has harmed a user in violation

of the Act, the user may sue on their own or file a complaint with the Attorney General, who has authority to enforce the Act. R. at 6. To grant relief, courts may either issue injunctions or fines totaling $10,000 per day per infraction. R. at 6–7.

III. PROCEDURAL HISTORY

Headroom brought suit in the United States District Court for the District of Midland seeking preliminary injunctive relief to enjoin the State of Midland from enforcing the SPAAM Act. R. at 2. On May 29, 2022, the district court granted Headroom's motion for a preliminary injunction, holding that the SPAAM Act likely violated the First Amendment. R. at 15.

On appeal, the Thirteenth Circuit disagreed with the district court on all counts. R. at 17, 19. On March 30, 2023, the Thirteenth Circuit reversed the district court's decision and vacated the preliminary injunction. R. at 19. First, the Thirteenth Circuit reasoned that Headroom is likely a common carrier, and thus subject to government regulation, because it possesses substantial market power and holds itself out to the general public. R. at 17. Second, the SPAAM Act's disclosure requirements pass muster under *Zauderer* because they are "purely factual and uncontroversial," and do not unjustifiably burden Headroom's speech. R. at 18. Finally, the Thirteenth Circuit found that censorship is not speech under the First Amendment. R. at 17.

On August 14, 2023, this Court granted petitioner's writ of certiorari. R. at 21.

IV. STANDARD OF REVIEW

Because this case involves purely legal issues as to the interpretation of the First Amendment, the standard of review is de novo. *Doherty v. Merck & Co., Inc.*, 892 F.3d 493, 497 (1st Cir. 2018).

SUMMARY OF THE ARGUMENT

The State of Midland respectfully asks this Court to affirm the Thirteenth Circuit's holding that the SPAAM Act does not violate the First Amendment. Major social media companies are common carriers under the First Amendment. These companies hold themselves out to the public, are communications firms, control their markets, and enjoy benefits from the government in exchange for the benefits that they give to the citizenry. All of these factors support common carrier status. Further, because withholding access to social media platforms would jeopardize Americans' free speech, these two reasons strongly indicate that major social media companies are common carriers. This Court's decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* governs review of the SPAAM Act's disclosure requirements because the disclosures mandated by the Act are factual, uncontroversial, and about the terms under which social media platforms offer their services. The disclosure requirements pass muster under *Zauderer* because they do not unduly burden Headroom's protected speech and they are reasonably related to Midland's interest in ensuring that consumers have sufficient information to make informed decisions.

The First Amendment not only protects the right to speak freely, but the right to refrain from speaking at all. As such, it is impermissible for the government to require a private entity to speak, host, or accommodate another's message so long as doing so will not interfere with the private entity's own message. However, the First Amendment is not infinite, and as such, a plethora of conduct lies beyond the boundaries of First Amendment coverage. Ergo, it is constitutional for the government to require a private speaker to host, facilitate, or accommodate another's speech. In light of this Court's precedent, the government may regulate the *conduct* of an entity that hosts speech, so long as it does not compel or restrict the entity's own *speech*.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT AND HOLD THAT MAJOR SOCIAL MEDIA PLATFORMS ARE COMMON CARRIERS AND THAT THE SPAAM ACT'S DISCLOSURE REQUIREMENTS ARE CONSTITUTIONAL UNDER *ZAUDERER V. DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO* BECAUSE THE PUBLIC'S INTERESTS IN ACCESSING THE PLATFORMS' SERVICES AND HAVING SUFFICIENT INFORMATION TO MAKE INFORMED DECISIONS OUTWEIGHS PLATFORMS' INTEREST IN CENSORING USERS AND IN WITHHOLDING PERTINENT INFORMATION.

Ratified in 1791 as part of the Bill of Rights, the First Amendment forbids the government from "abridging the freedom of speech, or of the press." U.S. CONST. amend. I; *see Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the freedom of speech and freedom of the press into the Fourteenth Amendment). Although the First Amendment is powerful, its protection is not limitless. The public interest may outweigh a speaker's First Amendment rights. Courts have developed lower standards to evaluate regulations of speech where the speaker is a common carrier or where a regulation concerning commercial speech imposes a disclosure requirement rather than an affirmative limitation on speech. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *cert. granted in part*, No. 22-555, 2023 WL 6319650 (U.S. Sept. 29, 2023); *Zauderer v. Off. of Disc. Couns. of S. Ct. of Ohio*, 471 U.S. 626 (1985). Powerful private entities may exercise their "power to manipulate the flow of information to the public when doing so serve[s] their economic or political self-interest." Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2321 (2021). To prevent the loss and abuse of services that are essential to the function of modern society, common carriers in control of such services receive lesser First Amendment protections. *See Paxton*, 49 F.4th at 469–73. Disclosure requirements, which compel speech, may be permissible under the First Amendment when the public's interest in receiving the information is greater than the speaker's interest in not providing it. *See Zauderer*,

471 U.S. at 651. This Court created a test to evaluate certain disclosure requirements in 1985, *see id.*, which governs this Court's review of the SPAAM Act's disclosure requirements. This Court should affirm the Thirteenth Circuit because, as explained below, major social media companies are common carriers and because *Zauderer* governs this Court's review of the SPAAM Act.

A. MAJOR SOCIAL MEDIA COMPANIES ARE COMMON CARRIERS BECAUSE THE FACTORS OF COMMON CARRIER STATUS ARE STRONGLY SUPPORTED AND DENIAL OF ACCESS TO THEIR SERVICES WOULD INFRINGE ON THE FIRST AMENDMENT RIGHTS OF AMERICANS.

The heart of the common carrier analysis fundamentally revolves around whether the regulation of a service has "rise[n] from private to be of public concern." *See German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914). This central principle stands on a history of law and policy that spans the life of our Nation. *See, e.g.*, *Munn v. Illinois*, 94 U.S. 113 (1876); *Biden v. Knight First Amend. Inst. At Columbia U.*, 141 S. Ct. 1220 (2021) (Thomas, J., concurring); *see generally* Thomas B. Nachbar, *The Public Network*, 17 CommLaw Conspectus 67, 75–79 (2008) (providing a general history of the application of common carriage law in the United States). When services meet certain criteria, our country has determined that they have a duty to serve the general public.

In determining whether a developing technology is a common carrier, the courts of this nation have considered four factors: whether it is held out to the public, the nature of the business, the strength of the market share, and whether a quid pro quo relationship exists between the government and the entity. See *Paxton*, 49 F.4th at 473–74; *State v. Neb. Tel. Co.*, 22 N.W. 237, 237–38 (Neb. 1885); *U.S. Telecom Assn. v. FCC*, 855 F.3d 381, 418 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring); *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960); Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. Free Speech L. 463, 469 (2021). When these factors raise the regulation of the industry into the public concern,

the service is a common carrier. *See German*, 233 U.S. at 411; *see also Paxton*, 49 F.4th at 475. Here, social media companies are common carriers because each individual factor weighs strongly in favor of common carrier status and these qualities implicate the constitutional rights of the citizenry.

1. The factors of common carrier analysis weigh in favor of common carrier consideration.

Held out to the Public. Social media companies hold themselves out to the public. Common carriers hold themselves out to "serve all indiscriminately." *Natl. Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*Utility Commissioners*"). Companies hold themselves out to the public when they offer the same terms to all customers and portray their services as available to all. *Semon*, 279 F.2d at 739; *see Woolsey v. Natl. Transp. Safety Bd.*, 993 F.2d 516, 524 (5th Cir. 1993). Major social media companies hold themselves out to the public because they offer the same terms to all prospective customers and portray themselves as being willing to serve everyone.

Uniformity of terms of service is necessary to establish common carrier status. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979); *Semon*, 279 F.2d at 739. When companies offer the same terms to all customers, the company is not engaged in individual dealings. *See Semon*, 279 F.2d at 739. Individual dealings imply that customers are unique, requiring a product that is catered to them. *Id.* Unlike companies that engage in individual dealings, common carriers provide the same product on the same terms to all customers. *Id.*

This principle, first developed by the 5th Circuit in *Semon*, was adopted by the D.C. Circuit when applying the common carrier doctrine to developing technologies and issues arising in the telecommunications industry. *See Utility Commissioners,* 525 F.2d at 641 (holding that special mobile radio systems were not common carriers because of the highly individualized terms of

dealing); *Cellco P'ship v. FCC,* 700 F.3d 534, 548 (D.C. Cir. 2012) (holding that the leeway in dealings with customers prevented a data roaming service from being a common carrier). These circuits have found the key factor in this application to be that the carrier serve "all indiscriminately." *Utility Commissioners,* 525 F.2d at 641. In *Semon*, the Fifth Circuit found that common carriers must be imbued with a "willingness to carry on the same terms and conditions any and all groups no matter who they might be." 279 F.2d at 739. There, a charter boat that selectively served passengers on a case-by-case basis was not a common carrier. *Id.* at 739–40. The service, based on need, party, and time made specialized arrangements for its customers. *Id.* Because the service was specialized and required variance in the terms that the service provided, it could not be a common carrier.[2] *Id.*

Major social media companies offer the same terms to all customers.[3] Unlike the presence of individual dealings in the charter in *Semon*, the lack of individual dealings between major social media companies with their customers strongly supports that companies hold themselves out to the public. Each customer is presented with the same terms of service and uses the product for the same cost. Importantly, there is no evidence in the Record regarding Headroom or other social media companies that supports the notion that there is any leeway in the terms of dealing—instead, the companies provide the same standards to all. R. at 3. Just as the Fifth Circuit found boilerplate terms to be indicative of indiscriminate dealings, social media's identical standards indicate the

[2] The Fifth Circuit noted that when a common carrier is willing to serve all parties, any violations of the duty through "refusals" or "reservations—secret or disclosed" did not allow the service to shed its common carrier duties. *Semon*, 279 F.2d at 739-40.

[3] The mere presence of terms and conditions does not preclude common carrier designation. *See Chesapeake & P. Tel. Co. v. Baltimore & Ohio Tel. Co.*, 7 A. 809, 811 (Md. 1887) (stating that a telephone company has a duty "to serve all alike, upon compliance with their reasonable rules and regulations").

same. Since major social media companies do not engage in individual dealings, there is strong support for common carrier classification.

Social media companies portray themselves as indiscriminately serving the public. Through their terms, standards, and regular behavior, major social media companies indicate that they indiscriminately serve the public. Headroom's standards state that their service is intended for "everyone." R. at 2. Major social media services are "generally available to the internet-using public with little to no front-end screening." *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 497 (2023). Even ISIS, a dangerous terrorist organization, can access social media "just like everyone else." *Id.* Further, the large number of users that use Headroom's service (75 million) indicates that the company not only shows that they claim to cater to all, but that they do so in practice, further supporting their status as a common carrier. R. at 3. Further support for indiscriminate public access can be shown through advertising and practice. *See Woolsey*, 993 F.2d at 524; *Utility Commissioners*, 525 F.2d at 641. How the company portrays themselves to their customers can implicate public access, solidifying the company's intention of reaching all members of the public. Because major social media companies like Headroom hold their services out to all, common carrier status is strongly supported.

Communications Firms. Major social media companies are communications firms. Communications firms are conduits for speech. Services that directly facilitate communication between individuals can be common carriers. *See Neb. Tel. Co.*, 22 N.W. at 237–38. Courts have found that these conduits have a duty to serve because of the nature of their services, i.e., empowering the public to connect. *See id.*; *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896). Courts have found that social media companies are communications firms. *Paxton*, 49 F.4th at

473; *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring).[4] Social media companies, because they are conduits for communication, are heavily favored for common carrier status.

Market control. Major social media companies maintain dominant market control. Recently, market control as a factor in the common carrier setting has been given significant weight. Justices Thomas and Kavanaugh have discussed the strength of this factor in the common carrier analysis. *See Knight*, 141 S. Ct. at 1222–24 (Thomas, J., concurring); *Telecom*, 855 F.3d at 418 (Kavanaugh, J., dissenting). *Accord Mozilla Corp. v. F.C.C.*, 940 F.3d 1, 57–58 (D.C. Cir. 2019) (holding that the absence of market power prohibits common carrier status). Justice Thomas suggests social media companies have met this factor due to the size of their networks and the uniqueness of their services. *Knight*, 141 S. Ct. at 1222–24 (Thomas, J., concurring). Large services with incomparable alternatives can have a duty to serve imposed on them. Consider Headroom, hosting a unique service centered around virtual reality headsets, with 75 million users. R. at 3. Users who might look elsewhere for a comparable service would find themselves optionless in their efforts to find a service with similar features and size. Social media companies, therefore, maintain tight control over their markets, weighing strongly in favor of common carrier status.

Quid pro quo. Social media companies also enjoy government support. The existence of a quid pro quo relationship can further support the justification of common carrier status. *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring); *Paxton*, 49 F.4th at 477. The implementation of

[4] Social media companies, in fact, hold themselves out as communications firms. Facebook, *Terms of Service*, § 1, https://www.facebook.com/legal/terms?paipv=0&eav=AfZly-Kmm5BdxVHvABe5UpFhSOhl3ivZrxB1lfpolgh3fa76QDZjDFaUlH14qOlfj7U&_rdr (last visited Oct. 9, 2023); X (formerly known as "Twitter"), *Terms of Service*, § 3, https://twitter.com/en/tos (last visited Oct. 9, 2023).

governmental support can impose a duty to serve the citizenry on a corporation. *Knight*, 141 S. Ct. at 1223 (Thomas, J., concurring).

Major social media companies are shielded by § 230. 47 U.S.C. § 230. Congress enacted § 230 because of the "true diversity" that benefits "all Americans" that comes with unfettered access to the internet. *Id.* To protect this benefit, § 230 excuses internet companies from liability for what users say on their platforms. This statute has facilitated the market dominance that major social media companies enjoy. *Paxton*, 49 F.4th at 477. This quid pro quo arrangement strongly supports common carrier status.

2. Denying access to social media would infringe on the Constitutional rights of the citizenry.

The history of common carriage law is rich and indicative of the key role the doctrine serves in our nation. Common carrier doctrine originated to prevent unaccountable corporations from exerting arbitrary exclusions to important services privately offered to the public. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2317 (2021). As fundamental services revolutionized the way our Nation functioned, states quickly identified the danger inherent in discrimination regarding who had access to these services and who did not. *See New Eng. Exp. Co. v. Me. Cent. R. Co.*, 57 Me. 188, 196 (1869) (holding that a railroad had a special duty to each citizen); *State v. Neb. Tel. Co.*, 22 N.W. 237, 237–38 (Neb. 1885) (finding that telephone companies had a duty to serve all indiscriminately). Common carrier doctrine checked these private actors.

The public must be allowed indiscriminate access to social media. As it stands, unaccountable private actors have unprecedented control of the speech of the citizenry. Twitter has blatantly stated that if they desired to "ban all pro-LGBT speech," they could, for no other reason than "its employees wanting to pick on members of that community." *Id.* at 445. The blatant

discrimination that they admit to does not and should never allow them to continue discrimination into the future. Social media, at its heart, is "the modern public square." *See Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). By censoring users based on their ideas, the First Amendment rights of citizens are dangerously infringed. This power could shape the point of view of not only the common person, but the politics of our leaders, the principles of our society, and the belief and integrity of the Constitution. As this Court so clearly stated: "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.*

Protecting the constitutional rights of the people, of the majority of America that take to social media to have their voices heard, is a worthy cause to limit the right of the private corporation to silence Americans who are exercising the rights promised to them in the words of the living document that forms the backbone for this Court, and all the Nation. Technology may change, but the Constitution does not. Constitutional principles are inalienable and guaranteed to all citizens. These principles demand now that Americans hold indiscriminate access to social media platforms. Because the factors of common carriage weigh in favor of social media companies being common carriers, and because the constitutional rights of the people may be threatened if they are not, major social media companies are common carriers under the Free Speech Clause of the First Amendment.

B. THE THIRTEENTH CIRCUIT CORRECTLY EVALUATED THE SPAAM ACT'S DISCLOSURE REQUIREMENTS USING THE TEST ARTICULATED IN *ZAUDERER* AND CORRECTLY RULED THAT THE DISCLOSURE REQUIREMENTS DO NOT VIOLATE HEADROOM'S FIRST AMENDMENT RIGHTS.

Because major social media platforms, as the "modern public square," are common carriers, they are entitled to lesser First Amendment protections. *Packingham*, 582 U.S. at 107. States' interests in protecting their citizens' free speech rights justify the imposition of certain

regulations on platforms' conduct. Yet even if major social media platforms are not common carriers, states' interests in preventing companies from misleading or deceiving consumers are more than sufficient to support lesser First Amendment protections for these companies.

In *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio*, this Court recognized that the government's interest in preventing deception of consumers outweighs companies' First Amendment free speech rights in certain circumstances. 471 U.S. at 626. The Court established a less stringent test to evaluate regulations that require speakers to disclose "purely factual and uncontroversial information about the terms under which [their] services will be available." *Id.* at 651. Since 1985, several circuits have interpreted and expanded upon *Zauderer*'s holding, rendering it even more directly applicable to the present case.

1. The *Zauderer* standard and its progeny

Prior to *Zauderer*, courts evaluated whether a regulation of commercial speech violated the First Amendment using the test established by this Court in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.* Under *Central Hudson*, non-deceptive commercial speech that does not concern unlawful activity may only be restricted if the restriction is no more extensive than necessary to directly advance a substantial government interest. 447 U.S. 557, 566 (1980).

In *Zauderer*, this Court recognized a distinction between "disclosure requirements and outright prohibitions on speech," holding that a state may require speakers to disclose "purely factual and uncontroversial information about the terms under which [their] services will be available… as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 650–51. In *Zauderer*, an attorney argued that an Ohio Code of Professional Responsibility rule requiring certain disclosures in advertising violated his First Amendment rights. *Id.* at 650. This Court held:

> Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal... unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Id. at 651 (citation omitted).

This Court later clarified that *Central Hudson* provides the appropriate standard for evaluating restrictions on non-misleading commercial speech, while *Zauderer* provides the standard for evaluating regulations governing misleading commercial speech or imposing disclosure requirements. *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 249 (2010).

Both *Zauderer* and *Milavetz* involved government interests in preventing deception of consumers. *See Zauderer*, 471 U.S. at 651; *Milavetz,* 559 U.S. at 252. However, this does not limit *Zauderer*'s application to disclosure requirements imposed for that purpose, because "[t]he language with which *Zauderer* justified its approach … sweeps far more broadly than the interest in remedying deception." *Am. Meat. Inst. v. U.S. Dept. of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014). The D.C. Circuit held "that *Zauderer* in fact does reach beyond problems of deception," and explicitly overruled all prior cases in the circuit that had held otherwise. *Id.* at 20. The First, Second, Fourth, and Ninth Circuits have also applied *Zauderer* to state interests other than preventing deception. *See Pharm. Care Mgmt. Ass'n. v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (state's "interest in ensuring that its citizens receive the best and most cost-effective health care possible"); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) (state's interest in reducing "consumer confusion" and protecting public health); *Recht v. Morrisey*, 32 F.4th 398, 412 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 527 (2022) (state's interest in "protecting

public health and preventing deception"); *CTIA – The Wireless Ass'n v. City of Berkeley, Cal.*, 928 F.3d 832, 844 (9th Cir. 2019) (state's interest in "furthering public health and safety").

2. *Zauderer* is the correct standard to evaluate the SPAAM Act.

The test articulated by this Court in *Zauderer* applies when a government regulation of commercial speech imposes a disclosure requirement, rather than an affirmative limitation on speech, which requires a commercial speaker to disclose "purely factual and uncontroversial information about the terms under which … services will be available." *Zauderer*, 471 U.S. at 651. *Zauderer* provides the appropriate standard to evaluate the SPAAM Act's disclosure requirements because they are disclosure requirements, not affirmative limitations on speech, and because they require disclosure of "purely factual and uncontroversial information." *Id.* [5]

Sections 528.491(c)(1)-(2) of the SPAAM Act require social media platforms to publish their community standards and detailed explanations of their moderation actions. Midland Code §§ 528.491(c)(1)–(2). These provisions are not "flat prohibitions on speech"; they simply require platforms "to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. Since disclosure requirements "trench much more narrowly on a [speaker's] interests than do flat prohibitions on speech," *id.* at 651, when "the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech,"

[5] As a preliminary matter, the SPAAM Act is a regulation of commercial speech. The *Zauderer* standard is not "limited to restrictions on advertising and point-of-sale labeling." *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020). Social media platform users are "consumers who engage in commercial transactions with platforms by providing them with a user and data for advertising in exchange for access to a forum." *NetChoice, LLC v. Atty. Gen., Fla.,* 34 F.4th 1196, 1230 (11th Cir. 2022), *cert. granted in part sub nom. Moody v. Netchoice, LLC*, No. 22-277, 2023 WL 6319654 (U.S. Sept. 29, 2023), and *cert. denied sub nom. NETCHOICE, LLC, ET AL. v. MOODY, ATT'Y GEN. OF FL, ET AL.*, No. 22-393, 2023 WL 6377782 (U.S. Oct. 2, 2023). The SPAAM Act requires disclosure of information relevant to the terms of these commercial transactions.

Zauderer governs courts' review of the provisions, *Milavetz*, 559 U.S. at 249; *accord Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 93 (2d Cir. 2010) ("[B]ecause the regulations compel disclosure without suppressing speech, *Zauderer*, not *Central Hudson*, provides the standard of review.").

Zauderer governs review of the SPAAM Act because it requires disclosure of "purely factual and uncontroversial information about the terms under which [platforms'] services will be available." *Zauderer*, 471 U.S. at 651. *Cf. Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (holding that *Zauderer* did not apply to a law requiring disclosure of information about abortion because it is a highly controversial subject and the required information was about services that the speaker did not even provide). Platforms' community standards are, by definition, the terms by which users must abide in order to use platforms' services. Community standards are factual, as they are written and implemented by the platforms themselves, and they are uncontroversial because, unlike abortion, they are not a matter of heated public debate. Explanations of platforms' enforcement actions are factual and uncontroversial for the same reasons, and they are a logical extension of the terms under which platforms' services will—or, if a platform has banned or deleted a user's account, will *not*—be available.

Because §§ 528.491(c)(1)–(2) of the SPAAM Act are not affirmative limitations on speech and they require disclosure of "purely factual and uncontroversial information about the terms under which [social media platforms'] services will be available," *Zauderer*, 471 U.S. at 651, *Zauderer* governs this Court's review of these provisions.

3. The SPAAM Act passes muster under *Zauderer* because its disclosure requirements do not unduly burden protected speech and they are reasonably related to a state interest.

A disclosure requirement survives scrutiny under *Zauderer* if it does not unduly burden protected speech and is reasonably related to a state interest. *Id.* Since the SPAAM Act is not

unduly burdensome and is reasonably related to the state interests of preventing consumers from being misled and allowing them to make informed choices, it passes muster under *Zauderer* and therefore does not violate the First Amendment.

Not unduly burdensome. The SPAAM Act's requirement that social media platforms disclose their community standards does not unduly burden protected speech. Headroom already publishes its Community Standards, which include "what conduct Headroom prohibits" and the "variety of penalties" users in violation will face. R. at 3–4. This provision merely requires the platform to continue a practice it already engages in voluntarily. It imposes no burden on Headroom's protected speech. *See, e.g., Paxton*, 49 F.4th at 486 (upholding a requirement that social media platforms disclose their community standards as not unduly burdensome); *NetChoice*[6], 34 F.4th at 1230 (holding the same). Headroom has also demonstrated that it is capable of complying with the "detailed explanation" requirement: as an enforcement action, it may "append commentary to a user's post stating that the post runs a risk of violating the Community Standards." R. at 4. The SPAAM Act simply requires greater detail in Headroom's explanations of its enforcement actions. Although this creates some additional work for Headroom, "*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… protected speech." *Paxton*, 49 F.4th at 486.

The SPAAM Act also does not unduly burden any exercise of editorial judgment because Headroom does not exercise editorial judgment. This distinguishes the present case from *Herbert v. Lando*, in which this Court explained in dicta that a state may not force a publisher to disclose

[6] To avoid confusion, this brief refers to *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022) as "*Paxton*," and *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022) as "*NetChoice*."

their editorial process "merely to… serve some general end such as the public interest." 441 U.S. 153, 174 (1979). But Headroom does not have an "editorial process"; it has an algorithm. R. at 3. (*See infra* Part II.A.1 for further discussion). Social media platforms like Headroom "neither select, compose, nor edit (except in rare instances after dissemination) the speech they host," so there is no "newspaper-like editorial process" to protect here. *Paxton*, 49 F.4th at 488.

The possibility of "significant implementation costs and substantial liability for failure to comply," R. at 11, do not "unduly burden… protected speech," *Paxton*, 49 F.4th at 486. The concern that Midland might sue because Headroom's explanations are noncompliant is insufficient to invalidate disclosure requirements. The is "no authority suggesting the fear of litigation can render disclosure requirements unconstitutional—let alone that the fear of hypothetical litigation can do so in a pre-enforcement posture." *Id*. The SPAAM Act's penalties of "injunctions or fines totaling $10,000 a day per infraction," R. at 7, which are insignificant relative to the wealth of "one of the most popular social media companies in America" with "over seventy-five million monthly users," R. at 2–3, are unlikely to chill any of Headroom's protected speech. *See, e.g., Paxton*, 49 F.4th at 487 (holding that a substantially similar disclosure requirement was not unduly burdensome); *but see NetChoice*, 34 F.4th at 1230–31 (holding that a similar disclosure requirement was unduly burdensome).

Third, even if the SPAAM Act creates enough of a burden to chill Headroom's censorship, this does not violate the First Amendment because censorship is not speech. (*See infra* Part II.A for further discussion). Even if censorship is speech, Headroom's overbreadth challenge still fails because Headroom cannot show that "a substantial number of [the SPAAM Act's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity*

Found. v. Bonta, 141 S. Ct. 2373, 2387 (2021). Because the SPAAM Act does not unduly burden any protected speech, it is valid under *Zauderer*.

Reasonably related to a state interest. *Zauderer* held that a speaker's "rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest." 471 U.S. at 651. The Eleventh Circuit used the *Zauderer* standard to evaluate disclosure requirements similar to those in the SPAAM Act and held that they were reasonably related to the state's interest in preventing consumers "from being misled about platforms' policies." *NetChoice*, 34 F.4th at 1227. Shortly after, the Fifth Circuit similarly applied *Zauderer* to the state interest in "'enabl[ing] users to make an informed choice' regarding whether to use the Platforms." *Paxton*, 49 F.4th at 485 (alteration in original). While some circuits do not prescribe what level of state interest is required, the Second Circuit characterized *Zauderer* as providing a "rational basis test," *Conn. Bar Ass'n*, 620 F.3d at 95, and the Ninth Circuit required the state interest to be "substantial," *CTIA*, 928 F.3d at 842.

Midland passed the SPAAM Act to further its interests in "ensuring the free flow of information and protecting citizen's free speech rights from undue censorship," and in "providing users with sufficient information to make informed choices." R. at 18. These state interests are not only legitimate but substantial. Midland, like all states, must serve its citizens, preserve their First Amendment rights, and protect consumers. The SPAAM Act is more than reasonably related to these substantial interests. Requiring companies to disclose their community standards and explain their enforcement actions provides users with information that is directly relevant to their choice of whether to use the platform.

Because the SPAAM Act does not chill any protected speech and it is reasonably related to Midland's substantial state interest in protecting citizens' rights and allowing users to make

informed decisions, its disclosure requirements pass muster under *Zauderer* and do not violate Headroom's First Amendment rights.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT AND HOLD THAT THE SPAAM ACT DOES NOT IMPLICATE THE FIRST AMENDMENT BECAUSE CONTENT MODERATION IS NOT SPEECH.

It is true, or perhaps even an understatement, to say that "[n]ot in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok." *NetChoice*, 34 F.4th at 1203. Functioning as a true marketplace of ideas, these platforms "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). Today, however, a perilous dichotomy exists between the "historically unprecedented amounts of speech" these platforms provide, and the unprecedent amount of control these platforms wield, where "so much speech [is] in the hands of few private parties." *Knight*, 141 S. Ct. at 1221 (Thomas, J., concurring). As several circuits have split regarding how the First Amendment should apply to social media platforms,[7] the time has come for this Court to "address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms." *Id.*

"If there is any fixed star in our constitutional constellation," *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), it is that the First Amendment protects not only the right to speak freely, but "the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As shaped by this Court's precedent, freedom of thought means that the government cannot

[7] The Ninth and Sixth Circuit have split over whether a public official's social media activity constitutes state action subject to the First Amendment. *Compare Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022), *cert. granted*, No. 22-324, 143 S. Ct. 1779 (2023), *with Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022), *cert. granted*, No. 22-611, 143 S. Ct. 1780 (2023). Additionally, the Fifth and Ninth Circuit have split on the extent federal officials can communicate with social media companies regarding their content moderation polices. *Compare O'Handley v. Weber*, 62 F.4th 1145 (9th Cir. 2023), *with Missouri v. Biden*, 80 F.4th 641 (5th Cir. 2023).

mandate a private individual to speak, host, or accommodate another's message if doing so will interfere with the complaining speaker's own message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 576 (1995); *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 18 (1986) (plurality opinion). However, the First Amendment is not "infinitely applicable." Fredrick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1769 (2004). Certain acts or behaviors are "simply not covered by the First Amendment," and consequently do "not present a First Amendment issue at all." *Id.* Ergo, it is constitutional for the government to regulate a private speaker's conduct in a manner that requires the private speaker to host, facilitate, or accommodate another's speech. *Rumsfeld v. F. for Acad. & Institutional Rts, Inc.*, 547 U.S. 47, 60 (2006); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 88 (1980). If the government did not have such power, it would be unable to enforce nondiscrimination laws. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.2 (1968) (*per curiam*) (lambasting the respondents' argument that requiring a restaurant owner to serve Black Americans violated his First Amendment right as "patently frivolous."); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (holding that private elementary schools did not have a First Amendment right to exclude Black children because "the Constitution places no value on discrimination."). In light of this Court's precedent, the rule is simple: The government may regulate the *conduct* of an entity that hosts speech, so long as it does not compel or restrict the entity's own *speech*.

The SPAAM Act, like the First Amendment, protects the freedom of speech. It is an affront to the Constitution to argue that the "Goliaths of internet communications" have a First Amendment right to deny the "Davids who use their platforms" indiscriminate access to its

services. *Paxton*, 49 F.4th at 494–95 (Jones, J., concurring). This Court should affirm the Thirteenth Circuit's decision and hold that the SPAAM Act is a permissible conduct regulation under *Rumsfeld* and *PruneYard* because censorship lies well beyond the boundaries of First Amendment coverage. However, even if this Court were to assume that the SPAAM Act does implicate the First Amendment, it should find that it passes intermediate scrutiny.

A. THE SPAAM ACT DOES NOT REGULATE SPEECH; IT REGULATES CONDUCT.

The SPAAM Act ensures equal, nondiscriminatory access to the "modern public square," *Packingham*, 582 U.S. at 107, by prohibiting social media corporations from exercising viewpoint-based censorship. R. at 5. The Fifth and Thirteenth Circuits correctly reasoned that the SPAAM Act permissibly regulates platforms' *conduct*, not their *speech*. *Paxton*, 49 F.4th at 459–65; R. at 19. In addressing whether states have the ability to prevent such censorship, the Fifth and Thirteenth Circuit answered in the affirmative for two reasons.

First, unlike newspapers or parade organizers, the Fifth and Thirteenth Circuit correctly recognized that social media platforms do not exercise editorial discretion when they moderate or deprioritize content because, in actuality, they are not doing *anything*. It is the algorithms—which are written by software engineers, not the social media entity itself—that recommend or amplify content within the platform. *Paxton*, 49 F.4th at 459–65 ("The Platforms use algorithms to screen out certain obscene and spam-related content."); *Taamneh*, 598 U.S. at 480–81 ("[T]he algorithms here match any content with any user who is more likely to view that content, and the platforms perform little to no front-end screening on any content before it is uploaded."). This proposition is further supported by this Court's recent decision in *Taamneh*. This Court unanimously held that in light of how social media platforms utilize algorithms and implement their content-moderation policies, the platforms could not be held liable for failing to remove ISIS-related content and

allowing ISIS to benefit from the platforms' algorithms. *Taamneh*, 598 U.S. at 506. Second, the SPAAM Act "regulates conduct, not speech." *Rumsfeld*, 547 U.S. at 60. That is to say, it regulates what the platforms must *do*—provide indiscriminate access to its services—not what they may or may not *say*. *Id.* A compelled-speech violation occurs when a private speaker's message will be affected by the speech it is required to accommodate. *See Hurley*, 515 U.S. at 576. A private speaker's speech is restricted if the speaker cannot distance themselves from the speech, do not have unlimited space for speech, or the regulation exalts some sort of content-based penalty. *Mia. Herald Publ'g Co.*, 418 U.S. at 256; *Pac. Gas & Elec. Co.*, 475 U.S. at 18.

1. Neither content moderation nor content curation constitute "editorial discretion."

By the Eleventh Circuit's logic, social media platforms exercise editorial discretion in two ways: first, when a platform removes or deprioritizes users' content "it makes a judgment about whether and to what extent it will publish information to the users." *NetChoice*, 34 F.4th at 1210. Second, by arranging and prioritizing content within the user's "feed," the platform is "effectively selecting which users' speech the viewer will see, and in what order, during any given visit to the site." *Id.* at 1204. To say that social media platforms "speak" via their ranking or removal processes is to fundamentally misunderstand not only how social media platforms operate, but the role that algorithms have in that process. This begs the question: how *do* social media platforms work? In *Taamneh*, Justice Thomas articulated the basic functionalities of these platforms:

> People from around the world can sign up for the platforms and start posting content on them, free of charge and without much (if any) advance screening by defendants. Once on the platforms, users can upload messages, videos, and other types of content, which others on the platform can then view, respond to, and share. As noted above, billions of people have done just that … To organize and present all those advertisements and pieces of content, defendants have developed "recommendation" algorithms that automatically match advertisements and content with each user; the algorithms generate those outputs based on a wide range of information about the user, the advertisement, and the content being viewed.

Taamneh, 598 U.S. at 480–81. Broadly speaking, algorithms can be defined as "encoded procedures for transforming input data into a desired output, based on specified calculations." Tarleton Gillespie, *The Relevance of Algorithms, Media Technologies: Essays on Communication, Materiality, and Society* 167 (2014). Headroom's processes are similar to those described by Justice Thomas; to enhance user experience, Headroom "uses algorithms to categorize and order content that users see." R. at 3. Just as the platforms in *Taamneh*, Headroom's algorithm prioritizes information based on information about the user. R. at 3. However, Headroom's infrastructure is unique in an important regard—Headroom's algorithms will deprioritize information that its *artificial intelligence* has flagged as potentially violating its Community Standards. R. at 3.

Social media platforms do not exercise editorial discretion when they moderate or deprioritize content because, in actuality, they are not doing *anything*. It is the algorithms—which are written by software engineers, not the social media entity itself—that recommend or amplify content within the platform. This proposition is further supported by this Court's recent decision in *Taamneh*, where this Court unanimously held that Facebook, Twitter, and Google could not be held liable for aiding and abetting ISIS in a terrorist attack. *Taamneh*, 598 U.S. at 477. The plaintiffs alleged that the platforms helped ISIS by (1) allowing the terrorist group to upload content to their platforms and (2) by promoting ISIS-related content via their recommendation algorithms, which enabled the terrorist group "to connect with the broader public, fundraise, and radicalize new recruits." *Id.* at 481–82. However, merely creating the platforms and implementing recommendation algorithms to display user content did not suggest that the platforms culpably associated with or participated in the attack. *Id.* at 498. The platforms' relationship with ISIS was the same as their relationship "with their billion-plus other users: arm's length, passive, and largely indifferent." *Id.* at 500. The platforms are available to the "internet-using public with little to no

front-end screening" and "transmit *most* content without inspecting it." *Id.* at 499 (emphasis added). Moreover, the platforms' recommendation algorithms are "agnostic to the nature of the content, matching any content (including ISIS' content) with any user who is more likely to view that content." *Id.*

Central to this Court's reasoning was the nature of the services provided by the platforms. Social media platforms, like internet and cell service providers, offer their services "to the public writ large." *Id.* For this reason, "we do not think that such providers would normally be described as aiding and abetting, for example, illegal drugs brokered over cell phones—even if the provider's conference-call or video-call features made the sale easier." *Id.* at 502 (citing *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003)). In contrast, Justice Thomas differentiated the nature of services social media platforms provide as opposed to the nature of services newspapers provide: Unlike a newspaper publishing discriminatory advertisements, the platforms did not "consciously and selectively chose to promote content provided by a particular terrorist group." *Id.* (citing *Passaic Daily News v. Blair*, 63 N.J. 474, 487 (N.J. 1973)).

It is true that social media platforms, like newspapers or cable operators, disseminate curated speech created by others. Sacrificing nuance for literalism, the Eleventh Circuit assumes social media corporations and parade organizers are one and the same. Algorithmic content moderation is "not an object of discussion or debate," but rather, it is an imperceptible tool shaping the users' experience. Pauline Trouillard, *Social Media Platforms Are Not Speakers. Why Are Facebook and Twitter Devoid of First Amendment Rights?*, 19 Ohio St. Tech. L. J. 257, 297 (2023). While using platforms, users do not "reflect systematically" on how the algorithm is curating their feed or shaping their interactions with other users. Lauren Willis, *Deception by Design*, 34 Harv. J. of L. & Tech. 116, 132 (2020). Given the Record before this Court, Headroom's interface is

entirely dependent on algorithms and artificial intelligence for not just curating content, but policing user content. R. at 3. The concept of "editorial discretion" loses all meaning when it is stretched to encompass machine learning algorithms, parade organizers, newspapers, and newsletters.

2. The SPAAM Act is a permissible conduct regulation, as it does not restrict or compel speech.

The SPAAM Act ensures equal, nondiscriminatory access to the "modern public square," *Packingham*, 582 U.S. at 107, by prohibiting social media corporations from exercising viewpoint-based censorship. R. at 5. As both the Fifth and Thirteenth Circuit correctly found, this type of conduct-regulation does not violate the First Amendment. *Paxton*, 49 F.4th at 455; R. at 19. That is because the SPAAM Act "regulates conduct, not speech." *Rumsfeld*, 547 U.S. at 60. That is to say, it regulates what the platforms must *do*—provide indiscriminate access to its services—not what they may or may not *say*. *Id.* Citing to this Court's decisions in *PruneYard* and *Rumsfeld*, Justice Breyer wrote that "[r]equiring someone to host another person's speech is often a perfectly legitimate thing for the Government to do." *Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2098 (2020) (Breyer, J., dissenting).[8] In light of this Court's precedent, the government may regulate the *conduct* of an entity that hosts speech, so long as it does not compel or restrict the entity's own *speech*. As discussed below, the SPAAM Act does neither restricts nor compels Headroom to speak.

[8] The majority did not disagree with Justice Breyer on this point. Rather, the disagreement between the majority and dissent concerned the proper scope of the question presented before the Court. *Agency for Int'l Dev.*, 140 S. Ct. at 2089 ("The dissent emphasizes that this case concerns 'the First Amendment rights of American organizations.' We respectfully disagree with that characterization of the question presented."); *id.* at 2090 (Breyer, J., dissenting) ("The Court, in my view, asks the wrong question and gives the wrong answer.").

Starting with compelled speech, Headroom argues that by hosting third-party content that violates their Community Standards, it is being forced to host a message it does not agree with. This argument, however, is misguided for several reasons. First, a social media platform hosting third-party content "lacks the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Rumsfeld*, 547 U.S. at 60. Given the "inherent expressiveness of marching to make a point," this Court concluded that "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." *Hurley*, 515 U.S. at 568, 577. Unlike *Turner Broadcasting System, Inc. v. FCC*, where this Court held that cable operators serve as a "conduit for broadcast signals," 512 U.S. 622, 655 (1994), parade organizers are "intimately connected with the communication advanced," and as such, "dissemination of a view contrary to one's own" interferes with the "speaker's right to autonomy over the message." *Hurley*, 515 U.S. at 576. Analogous to cable operators, social media platforms *expressly* disavow any connection to the content or communication advanced on their platforms in their terms of service. *Terms of Service: Content on the Services*, Twitter (Sept. 29, 2023), https://twitter.com/en/tos ("We do not endorse, support, represent or guarantee the completeness, truthfulness, accuracy, or reliability of any of the Content or communications posted via the services or *endorse any opinions* expressed via the Services."). More specifically, this Court held that social media platforms "do nothing more than transmit information by billions of people." *Taamneh*, 598 U.S. at 477. This Court has also stated that the function of editors is to "determine the news value of items received" and accept responsibility for the accuracy of such items. *Associated Press v. Nat'l Lab. Relations Bd.*, 301 U.S. 103, 127–130 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws."); *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376, 386 (1973) (holding that a

newspaper may be held liable for defamation due to its editorial judgment in connection with the advertisement).

Further, the concerns that were present in *Miami Herald* and *Pacific Gas* are missing from this case. *Miami Herald* involved a Florida "right of reply" statute, which provided that if a newspaper published a piece criticizing a political candidate, then the paper must also provide the candidate an equal amount of space in the paper to reply to said criticism. 418 U.S. at 244. Despite these valid concerns, this Court ultimately held that the statute was unconstitutional. *Id.* at 258. Because a newspaper is subject to the spatial limitations of its own four corners, the "compelled printing of a reply … tak[es] up space that could have been devoted to other material the newspaper may have preferred to print." *Id.* at 256. By exalting a content-based penalty on the newspaper's speech, the statute operated as a command from the government "to publish specified material." *Id.* at 256; *see also Pac. Gas & Elec. Co*, 475 U.S. at 10. Social media platforms, on the other hand "have virtually unlimited space for speech." *Paxton*, 49 F.4th at 462.

Similar to the regulation the Eleventh Circuit discussed, the SPAAM Act defines "censorship" as "editing, deleting, altering, or adding any commentary." Midland Code § 528.491(b)(1)(i). The Eleventh Circuit found that this provision "explicitly prohibits the very speech by which a platform might dissociate itself" from the user's message. *Moody*, 34 F.4th at 1218. But, once again, the Eleventh Circuit's reasoning is predicated on a fundamental misunderstanding as to how the platform operates—specifically, the Eleventh Circuit misunderstands how the "commentary" function works within these platforms.[9] Twitter, similar to

[9] The Record does not detail the how Headroom's "commentary" function works with any level of specificity beyond the fact that, as a potential penalty for violating the Community Standards, Headroom may "append commentary to a user's post stating that the post runs a risk of violating the Community Standards and warning about possibly upsetting content." R. at 4. As mentioned *supra* Part I.A.1, Headroom's ranking and removal processes are entirely dependent on

Headroom, has a commentary feature known as "Community Notes." *About Community Notes on X*, Twitter, https://help.twitter.com/en/using-x/community-notes. Aiming to "add context to potentially misleading posts," Contributors can "leave notes on *any* post" and after enough contributors consider the note to be helpful, "the note will be publicly shown on a post." *Id.* Importantly, "contributors" are not employees of Twitter acting on behalf of Twitter—they are *other users* on the platform. *Id.* Any Twitter user can sign up to be a contributor so long as they meet the minimal eligibility requirements. *Eligibility, Community Notes,* Twitter, https://communitynotes.twitter.com/guide/en/contributing/signing-up ("To become a Community Notes contributor, account must have no recent violation's of X's rules, joined X at least 6 months ago, and a verified phone number."). Fatal to the Eleventh Circuit's reasoning is the fact Twitter explicitly states: "X does not write, rate or moderate notes … Community Notes do not represent X's viewpoint and cannot be edited or modified by our teams." *Id.* It is incontrovertible that Twitter is *not* speaking when an addendum is added to a user's post. The same is true for social media platforms with similar "commentary" features. Prohibiting social media platforms utilizing a "commentary" feature is a sheep in wolf's clothing—it "purporte[s] to advance free discussion, but its effect [is] to deter" individuals "from speaking out in the first instance." *Pac. Gas & Elec. Co*, 475 U.S. at 10; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578–79 (2011) ("The State may not burden the speech of others in order to tilt public debate in a preferred direction."); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (holding that restricting the "speech of some elements of our society in order to enhance the relative voice of others" is antithetical to the First Amendment).

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algorithms and artificial intelligence. As the line between algorithm and entity is blurry, it is unclear who or what is appending user commentary—i.e., it is unclear who is speaking: Do Headroom employees, on behalf of Headroom, write the commentary, or does Headroom utilize artificial intelligence to generate the written commentary?

B. EVEN IF THE SPAAM ACT DOES REGULATE SPEECH, IT SURVIVES INTERMEDIATE SCRUTINY

Though it has readily been established that social media platforms do not exercise editorial discretion when they moderate or deprioritize content, and that the SPAAM Act "regulates conduct, not speech," even if this Court were to find that censorship is speech the SPAAM Act still would not violate the First Amendment.

First, even if the SPAAM Act does burden Headroom's speech, it does so in a content-neutral way. As described by this Court in *Turner Broadcasting System,* "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," as they "pose a less substantial risk of excising certain ideas or viewpoints." *Turner*, 512 U.S. at 642. This, in turn, depends on "whether the government has adopted a regulation because of [agreement or] disagreement with the message it conveys." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The SPAAM Act is content-neutral—it protects *all* speech. Second, intermediate scrutiny requires that a government regulation be "substantially related" to an "important government objective." *Clark v. Jeter*, 468 U.S. 456, 461 (1988). As Midland State Representative Margaret Caldwell stated, "social media giants like Headroom have become virtual dictators, suppressing free speech and ruining hardworking Midlandians' livelihoods under the guise of moderation. This bill will hold them accountable and ensure the protection of our democratic values." R. at 5. The SPAAM Act's prohibition on corporate censorship is substantially related to Midland's important objective of protecting the freedom of thought and debate. As this Court has explicitly recognized, the Constitution protects access to social media platforms: Social media platforms, as the "modern public square," are one of the most important places to exchange views and to "foreclose access to social media is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Packingham*, 582 U.S. at 108.

CONCLUSION

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

Respectfully submitted this 9th of October, 2023.

Respectfully submitted,

/s/ Team 18

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TEAM #18
COUNSEL FOR RESPONDENT

APPENDIX

State of Midland's Speech Protection and Anti-Muzzling (SPAAM) Act

Midland Code § 528.491.

(a)(1) This Act applies to any "social media platform."

(a)(2) This Act defines a "social media platform" as any information service, system, search engine, or software provider that:

i. provides or enables computer access by multiple users to its services and site;
ii. operates as a corporation, association, or other legal entity;
iii. does business and/or is headquartered in Midland; and
iv. has at least twenty-five million monthly individual platform users globally.

(b)(1) As social media platforms are the public square of the twenty-first century and common carriers of public speech, this Act prohibits any social media platform from "censoring," "deplatforming," or "shadow banning" any individual, business, or journalistic enterprise because of viewpoint.

i. "Censorship" or "censoring" is defined as editing, deleting, altering, or adding any commentary to a user's content.
ii. "Deplatform" is defined as permanently deleting or temporarily deleting or banning a user.
iii. "Shadow ban" is defined as an action limiting or eliminating either the user's or their content's exposure on the platform or deprioritizing their content to a less prominent position on the platform.

(b)(2) This Act exempts obscene, pornographic, or otherwise illegal or patently offensive conduct from this section's requirement.

(c)(1) A social media platform must publish community standards with detailed definitions and explanations for how they will be used, interpreted, and enforced.

(c)(2) When a social media platform enforces its community standards, the social media platform must provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen.

(d)(1) Enforcement of the Act is vested in Midland's Attorney General

(d)(2) Users who have been harmed by a platform's violation of this Act may either file a complaint with the Attorney General or may sue on their own.

(d)(3) Courts may grant relief either in the form of injunctions or fines totaling $10,000 a day per infraction.