**No. 23-386**

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In The

# Supreme Court of the United States

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**HEADROOM, INC.**,

*Petitioner*,

v.

**EDWIN SINCLAIR, ATTORNEY GENERAL FOR THE STATE OF MIDLAND,**

*Respondent*.

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*ON WRIT OF CERTIORARI TO THE*

*UNITED STATES COURT OF APPEALS*

*FOR THE THIRTEENTH CIRCUIT*

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**BRIEF FOR RESPONDENT**

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**Team 25**

***Counsel for Respondent***

**October 9, 2023**

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## QUESTIONS PRESENTED

I. Under the First Amendment's Free Speech Clause, (1) are major social media companies common carriers, and (2) does this Court's decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* apply to the SPAAM Act's disclosure requirements?

II. Does a state violate the First Amendment's Free Speech Clause when it prohibits major social media companies from denying users nondiscriminatory access to its services?

## STATEMENT OF THE CASE

### A. Headroom, Inc. Background Information

One of the most popular social media companies in America, Headroom, Inc. is founded and headquartered in Barlett, Midland. R. at 2. With over seventy-five million monthly users, it has become a nationwide digital market center used to promote businesses and create revenue. *Id.* at 3. Headroom's goal is to "provide a space for everyone to express themselves to the world and to promote greater inclusion, diversity, and acceptance in a divided world." *Id.* at 2. Akin to other social media platforms, Headroom allows its users to craft and publish content, generate profiles, and share users' posts. *Id*. at 3. However, what sets it apart is that its users can engage in a virtual reality simulation, accessed through virtual-reality headsets. *Id*. Headroom allows users to monetize posts, ask for sponsorships from advertisers, and receive donations from fellow users. *Id*.

Headroom uses algorithms to curate what content users are exposed to. *Id*. The algorithms select and present information to users. *Id*. Additionally, Headroom uses artificial intelligence to deprioritize content that violates its Community Standard guidelines. Headroom uses boilerplate Community Standard guidelines to allow access to its platform. *Id*. The Community Standards "ensure a welcoming community where all are respected and welcome." *Id*. Once accepted, users are allowed access unless they violate the standards by generating, posting, or distributing content that promotes "hate speech, violence, child exploitation or abuse, bullying, harassment, suicide or self-injury, racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." *Id*. Furthermore, all deliberately false information that intentionally deceives others will be flagged as disinformation and will be banned. *Id*. at 4. Algorithms will deprioritize those who violate the guidelines which can then

lead to the user's suspension, restrict the user's account from others, or remove the account and censor them altogether. *Id*.

### B. The SPAAM Act

After several complaints from users, Midland took action and passed the SPAAM Act on February 7, 2022, and it went into effect on March 24, 2022. This law applies to all social media platforms. Midland Code § 528.491(a)(1). A "social media platform" is defined as "any information service, system, search engine, or software provider that: (i) provides or enables computer access by multiple users to its servers 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." *Id*. § 528.491(a)(2)(i)–(iv).

Replacing traditional public forums, the Act categorizes social media platforms as the new public square of the twenty-first century and thus classifies them as common carriers of public speech. R. at 6. The SPAAM Act outlines two primary requisites:

First, it limits social media platforms' authority to modify or delete user-produced content. *Id*. It prevents social media companies from censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" because of "viewpoint." Midland Code § 528.491(b)(1). Censoring is defined as "editing, deleting, altering, or adding any commentary" to a user's content. Id. § 528.491(b)(1)(i). Moreover, "deplatforming" is defined as "permanently or temporarily deleting or banning a user." *Id*. § 528.491(b)(1)(ii). Lastly, "shadow banning" is "any 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." *Id*. §

528.491(b)(1)(iii). The Act provides an exception for content that is "obscene, pornographic or otherwise illegal or patently offensive" from the provisions detailed above. *Id*. § 528.491(b)(2).

Second, in conjunction with the first requisite, the Act mandates social media platforms to disclose their community standard guidelines with "detailed definitions and explanations for how they will be used, interpreted, and enforced." *Id*. § 528.491(c)(1). Moreover, if these community standard guidelines are imposed on users, the 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." *Id*. § 528.491(c)(2).

The Act's implementation is overseen by the Attorney General of Midland. Id. § 528.491(d)(1). Users who have been adversely affected by the platform's breach of the Act have the option to either file a complaint with the Attorney General or sue on their own. *Id*. § 528.491(d)(2). Courts can provide remedy either in the form of injunctions or fines totaling $10,000 a day per infraction. *Id*. § 528.491(d)(3).

**C. Procedural History**

In reaction to the SPAAM Act, Headroom initiated legal action against Edwin Sinclair, Midland's Attorney General, claiming that the Act violated its First Amendment rights and asked for a permanent injunction to stop him from implementing the Act. R. at 7. In addition, Headroom requested a preliminary injunction. *Id*. Eventually overturned by the Court of Appeals, the United States District Court for the District of Midland found in favor of Headroom, determining the Act did not pass intermediate scrutiny and that the preliminary injunction should be granted. *Id*. at 15. Midland appealed to the United States Court of Appeals for the Thirteenth Circuit, where they found in favor of Midland's SPAAM Act and vacated the

preliminary injunction. The court found that Headroom is classified as a common carrier and has no First Amendment right to censor. *Id.* at 17. Moreover, the SPAAM Act did not prevent Headroom from disagreeing with any messages communicated by its users, nor did it punish Headroom if they chose to speak. *Id*. There is a strong state goal to protect the speech of the citizens of Midland and ensure that all information is disseminated and free from viewpoint discrimination. *Id*. Headroom filed a petition for a writ of certiorari and the Supreme Court of the United States granted it. *Id*. at 21. This writ of certiorari is now before the Court.

## SUMMARY OF THE ARGUMENT

I. While the First Amendment primarily applies to government prohibition of speech, the Court has long subjected certain private entities, known as common carriers, to free speech regulation. The defining feature of a common carrier is one that holds itself out to service the public indiscriminately, which traditionally encompassed public communication networks like telegraphs and telephones.

Today, major social media platforms constitute the modern "public square," providing a significant source of democratic exchange. More communication occurs every day on social media platforms than ever could have taken place in traditional common carrier contexts. Accordingly, the Court has noted that to foreclose an individual's access to social media is to effectively prevent that user from engaging in the legitimate exercise of First Amendment rights. Due to these significant constitutional concerns, Headroom and other major social media platforms must be regulated as common carriers.

Furthermore, the Court's decision in *Zauderer* justifies the SPAAM Act's disclosure requirements because they do not prohibit private actors from speaking. In *Zauderer*, the Court held that there is a material distinction between speech prohibition and disclosure requirements, as disclosure requirements trench much more narrowly on private interests than do flat prohibitions on speech. Under the Court's two-part test, private actors' rights are adequately protected if the disclosure requirements are (1) not unduly burdensome, and (2) reasonably related to the State's interest in preventing deception of consumers. Here, the SPAAM Act does not prohibit social media platforms from speaking, but merely requires them to provide factual disclosures regarding community standards. Furthermore, the requirements are reasonable and strongly related to the State's interest in preventing censorship and consumer deception.

II. Next, the Court of Appeals correctly determined that the SPAAM Act, which prohibited major social media companies from denying users nondiscriminatory access to its platform, did not violate the First Amendment's Free Speech Clause and the preliminary injunction against Midland should not be granted. When looking to the statutory text of the First Amendment, it protects the freedom of speech, however, there is no constitutional right to censor. The SPAAM Act does not force Headroom to speak not does it prevent Headroom from disagreeing with any messages put forth by users on their platform. Additionally, since Headroom does not use any material editorial judgment when choosing who can access its platform, readers will not think that users' messages are associated with the platform itself.

Furthermore, even if the SPAAM Act is found to infringe on constitutional rights, this Court can still use the intermediate scrutiny standard when deciding to uphold the law. The SPAAM act is content neutral and therefore applies to everyone equally. It does not burden any more speech than necessary, since it is not infringing on anyone's right to speak, but instead censoring. Moreover, it is necessary to achieve the state's goal of ensuring the dissemination of information, free from viewpoint discrimination.

Finally, the remaining preliminary factors favor Midland. First, Headroom is a common carrier that does not employ any type of editorial discretion. Second, there have not been any threats of litigation nor have any lawsuits been initiated. Third, Headroom wants to enforce the First Amendment Free Speech Clause, while suppressing viewpoints of those they don't agree with. Lastly, protecting citizens' viewpoints while cultivating a democracy that thrives off the exchange of different ideas is the essence of the First Amendment. To disregard the SPAAM Act would be a clear violation of the Constitution. Therefore, Midland's SPAAM Act is

constitutionally valid. Accordingly, the Court of Appeals was correct in vacating the preliminary injunction.

## ARGUMENT

### I. UNDER THE FIRST AMENDMENT'S FREE SPEECH CLAUSE, MAJOR SOCIAL MEDIA COMPANIES ARE COMMON CARRIERS BECAUSE THEY REPRESENT THE MODERN PUBLIC SQUARE; THE SPAAM ACT'S FACTUAL DISCLOSURE REQUIREMENTS DO NOT OFFEND PRIVATE ACTORS' FIRST AMENDMENT RIGHTS BECAUSE THERE IS A MATERIAL DIFFERENCE BETWEEN SPEECH PROHIBITION AND DISCLOSURE REQUIREMENTS

The Free Speech Clause of the First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. Amend. I. While a central purpose of the First Amendment is to constrain government actions, the Court has acknowledged that the American legal system has "long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers." *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1220 (2021) (Thomas, J., concurring).

Because major social media companies represent the modern "public square" and strongly resemble traditional common carriers by providing a significant space for public communication, it is imperative that they be regulated as common carriers. Specifically, Headroom holds itself out to the public indiscriminately, and occupies the largest share of America's social media space. R. at 2. Given the State's strong interest in protecting citizens' First Amendment rights and requiring censorship transparency, it is crucial that such companies fall within the modern conception of a common carrier.

#### A. Major Social Media Companies Qualify As Common Carriers Because They Satisfy The Central Characteristic Of Holding Themselves Out To The Public Indiscriminately

A defining feature of a common carrier arises out of an organization's undertaking "to carry for all people indifferently . . . ." *National Ass'n of Regulatory Utility Com'rs v. F.C.C.*, 533 F.2d 601, 608 (D.C. Cir. 1976). The Court has specifically defined a common carrier service in the communications context as "one that 'makes a public offering to provide [communications

facilities] whereby all members of the public who choose to employ such facilities may communicate . . . of their own design and choosing . . . .'" *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Simply put, common carriers are those that hold themselves out to service the public indiscriminately. *Id.*

Along with the common carrier status comes special obligations and a higher standard of care. One such obligation is the requirement to remain open on a "nonselective basis to all persons wishing to talk about public issues." *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 105 (1973). The rationale for this higher standard of care first developed as a sort of quid pro quo, whereby a "carrier was made to bear a special burden of care, in exchange for the privilege of soliciting the public's business." *National Ass'n of Regulatory Utility Com'rs*, 525 F.2d at 641. Because common carriers have a stricter duty of care and an obligation to service the public indiscriminately, it becomes imperative to effectively distinguish between common and private carriers. As such, the Court has held that "the characteristic of holding oneself out to serve indiscriminately appears to be an essential element" of drawing a sensible line between common and private carriers. *Id.*

Because major social media companies comprise a substantial portion of the nation's open communication channels and hold themselves out as serving the public indiscriminately, it is imperative that they be treated as common carriers under the First Amendment. *National's* quid pro quo rationale directly applies to social media companies today: such companies benefit from indiscriminately soliciting the public's business, and as a result, it is reasonable that such social media carriers accordingly bear a special burden of care.

Specifically, Headroom holds itself out to service the public indiscriminately on several levels. First, Headroom states that its mission is to "provide a space for everyone to express

themselves to the world" and to promote "acceptance in a divided world." R. at 2-3. Furthermore, Headroom's Community Standards assert that its platform will "ensure a welcoming community" where "all are respected and welcome." R. at 3. Finally, Headroom is one of the most popular social media companies in America, and it is indiscriminately open for anyone to create a profile and immediately begin posting and sharing content about public issues. R. at 2-3. Such open and indiscriminate public solicitation is precisely what the *National* Court held to be an essential element of what distinguishes common carriers from private carriers.

### B. Because Social Media Platforms Constitute The Modern "Public Square" And Comprise Central Platforms Of Democratic Exchange, They Should Be Regulated As Common Carriers

A fundamental principle of the First Amendment is that "all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). The Court has tied this fundamental right to certain spatial contexts, holding, for example, that a street or a park is a quintessential location for the exercise of First Amendment rights. *Id.* While the common gathering spaces of society have changed over the centuries since the First Amendment's establishment, the underlying principles have not. In 2017, the *Packingham* Court noted that in the past, there may have been some difficulty in identifying the most important places for the exchange of views; however, "today the answer is clear[:] [i]t is cyberspace—the 'vast democratic forums of the Internet' . . . and social media in particular." *Id.* The Court has further noted that there is clear historical precedent for regulating communication networks in a similar manner as traditional common carriers. *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). For example, telegraph companies were bound to serve all customers

indiscriminately because they resembled railroad companies and other existing common carriers. *Id.*

Furthermore, the Court has emphasized that not only are social media platforms essential spaces for the exercise of free speech, but they are also crucial sources of information. *Packingham*, 582 U.S. at 105. For example, the Court in *Packingham* pointed out that Governors in all fifty States and nearly every Member of Congress had active social media accounts, establishing such platforms as notable modes of communication between politician and constituent. *Id*. Such social media platforms can "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 107. Even more powerful than a mere town square or open street, such websites "allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" *Id.* The Court compellingly summarized the seriousness of social media's control over modern First Amendment exercise: "[i]n sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* at 108.

Because major social media carriers are the gathering place of the twenty-first century and constitute a significant source of democratic exchange, they should be regulated as common carriers in a similar manner as traditional common carriers. Just as the Court noted the sacredness of the public street or park as a forum of First Amendment expression, social media networks today comprise an even greater platform of expression. Far beyond the confines of a mere street corner or simplistic telegraph wire, social media platforms are ever-present and without bounds. As the Court explained in *Packingham*, there is essentially no limit to one's audience on social media websites. Conversely, a depravation of one's First Amendment rights

on such a platform would effectively strip a citizen of a significant form of their freedom of speech. Just as telegraph companies were regulated as common carriers due to their significant impact on public communication, major social media platforms should all the more be so regulated due to their monumental influence on modern communication.

Here, Headroom is not only a player within the network of social media companies that so dominate modern communication, but it is one of the largest in the country. R. at 2. Headroom has moved far beyond acting as a mere "virtual town square"–it is effectively the town itself: allowing users to post content, monetize their posts, solicit advertisers, receive donations, and even interact in a virtual reality environment. R. at 3. Applying the Court's rationale in regulating railroad companies and telegraph providers as common carriers, Headroom more than satisfies the Court's criteria. Just as the Court in *Packingham* emphasized the need to apply common carrier principles to the developing digital landscape, Headspace should be regulated here in a similar vein. Furthermore, it is likely that Headspace will only expand its already dominant market share in the future, as it is the first major social media company to utilize a virtual reality environment. R. at 3.

### C. Given The Notable Market Concentration Of Social Media Platforms Such As Headroom, Regulation As Common Carriers Is Increasingly Imperative

The analogy to common carriers is even more obvious for digital platforms that have a dominant market share. *Biden*, 141 S. Ct. at 1224 (2021) (Thomas, J., concurring). The Court noted that because tech giants like Facebook and Google have effectively no comparable competition, their market concentration gives them enormous control over free speech. *Id.* Constitutional concerns are further heightened when such digital platforms have the power to not only restrict individual speech expression, but also impose significant business and economic consequences. *Id.* For example, the Court observed that because Amazon is a distributor of the

majority of ebooks and nearly half of physical books, it wields an unparalleled power to impose "cataclysmic consequences on authors by . . . blocking a listing." *Id.* at 1225. Furthermore, even if a digital platform is not the sole means of distributing speech or information, it is immaterial to argue that consumers have alternatives. *Id.* Analogizing to other common carriers, the Court reasoned that a consumer could always choose to avoid the train or toll bridge and instead "swim the Charles River or hike the Oregon Trail." *Id.* The more appropriate analysis when assessing whether a company exercises substantial market share is to ask whether the available alternatives are "comparable." *Id.* For many of today's digital platforms, the Court added, "there is not." *Id.*

Today, the social media space is highly centralized, being dominated by only a few key players. This high concentration of market share leads to enormous control over free speech, and accordingly, under Justice Thomas' reasoning, strengthens the argument for regulating such companies as common carriers. Headroom is not only one of the largest social media companies in America, but also holds effectively an exclusive market share in the space of virtual reality-based social media. R. at 2-3. Per Justice Thomas' reasoning in *Biden*, this dominant market share raises significant First Amendment expression concerns, and is yet another compelling reason to regulate such companies as common carriers.

Furthermore, similar to Amazon's economic control over individuals' lives, Headroom wields a similar type of authority over its users, with many Headroom users depending on the platform to support their businesses and livelihoods. R. at 3. Because of Headroom's unrivaled technology and use of virtual reality, many of the platform's 75 million users likely have no reasonable alternative. R. at 3. All of these reasons compellingly support extending common carrier treatment to major social media platforms like Headspace.

### D. Given The Material Distinction Between Speech Prohibition And Disclosure Requirements, The Zauderer Decision Justifies The SPAAM Act's Disclosure Requirements

The relevant facts in *Zauderer* centered around an attorney who placed an advertisement in a newspaper offering to represent clients on a contingent fee basis. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 630 (1985). However, in violation of the Ohio Code of Professional Responsibility, the attorney did not include a required disclaimer that informs prospective clients that they may still be liable for court costs incurred in the lawsuit. *Id.* The relevant question before the Court was "whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements." *Id.* at 629.

In addressing the obvious First Amendment concerns of a State regulating private speech, the Court held that there is a material difference between disclosure requirements and outright prohibitions on speech. *Id.* at 650. The Court reasoned that Ohio was not attempting to prevent attorneys from conveying information to the public; rather, it merely "required them to provide somewhat more information than they might otherwise be inclined to present." *Id.*
In conclusion, the Court noted that in nearly all its commercial speech decisions to date, it has "emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 651.

The Court further explained the rationale for the different treatment between disclosure and prohibition: "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." *Id.*; *see also Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Bates v. State Bar of Arizona* 433 U.S. 350, 375 (1977) (reasoning that with respect to potentially deceptive commercial speech, the preferred remedy is more disclosure, rather than less).

Finally, this crucial exception for State disclosure requirements is exemplified in many other areas of government regulation that provide safety and security to consumers on a daily basis. For example, the FDA requires extensive disclosures for food and drug manufacturers; the Environmental Protection Agency requires disclosures regarding chemical use; and even certain political campaign contributions must be disclosed to the Federal Election Commission. *See* Code of Federal Regulations Title 21 (2023), https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfcfr/CFRSearch.cfm?fr=101.13; Federal Election Commission, *Contribution Limits* (2023), https://www.epa.gov/chemical-data-reporting/basic-information-about-chemical-data-reporting#:~:text=Manufacturers%20(including%20importers)%20are%20required,substance%20at%20any%20single%20site.; Environmental Protection Agency, *Basic Information about Chemical Data Reporting* (July 5, 2023), https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/. However, none of these disclosure requirements are seen as impermissibly compelled speech as Petitioner asserts. Rather, as the Court held in *Zauderer*, because the State's disclosure requirements called for purely factual information regarding the cost arrangement terms, the private actors' First Amendment rights were not offended. *Zauderer*, 471 U.S. at 651.

Here, because the State of Midland's SPAAM Act does not prohibit social media platforms from speaking, but merely requires them to provide factual disclosures regarding community standards, the Court's decision in *Zauderer* applies and accordingly justifies this requirement. Under the SPAAM Act's guidelines, when a social media provider enforces its community standards, it is required to provide a detailed explanation of "what standards were violated, how the user's content violated the platform's community standards, and why the specific action was chosen." Midland Code § 528.491(c)(2). These disclosure requirements perfectly exemplify the material difference between disclosure and outright prohibition that this Court firmly established in *Zauderer*. Just as the State of Ohio validly required attorneys to disclose advertising information to prevent public confusion and promote transparency, the State of Midland is similarly preventing public confusion and promoting transparency by requiring social media providers to explain their community standards enforcement. Here, as in *Zauderer*, Midland is not attempting to prevent a private actor from conveying information to the public. Rather, it is merely requiring social media companies to provide somewhat more information than they might otherwise be inclined to present. R. at 6.

Before passing the SPAAM Act, the Midland legislature heard from multiple individuals who had been on the receiving end of Headroom's censorship. R at 4-5. Notably, when Headroom censored its users, it would not disclose any of the specific ways in which they had violated the platform's guidelines. *Id.* Similar to the State of Ohio's legitimate interest in promoting transparency and preventing deception, Midland's SPAAM Act's disclosure requirements would have the same legitimate effect.

Furthermore, as the Court reasoned in *Zauderer*, disclosure requirements such as the SPAAM Act's trench much more narrowly on private interests than do flat prohibitions on

speech. As such, Headroom's constitutionally protected interest in not providing such factual information to users is minimal. Similar to the imperative disclosure requirements of the FDA, EPA, and FEC, the SPAAM Act's disclosure requirements seek to provide similarly needful information and transparency to consumers in the digital realm.

### E. Because The SPAAM Act's Disclosure Requirements Are Not Unduly Burdensome And Are Reasonably Related To Midland's Interest In Preventing Consumer Deception, They Do Not Violate Social Media Platforms' First Amendment Rights

Notwithstanding the material difference between disclosure and prohibition, the Court in *Zauderer* made clear that disclosure requirements may still implicate private actors' First Amendment rights. *Zauderer*, 471 U.S. at 651. The Court effectively set out a two-part test to determine the validity of such disclosure requirements. *Id.* The Court held that private actors' rights are adequately protected if (1) the disclosure requirements are not unjustified or unduly burdensome; and (2) the disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. *Id.* In *Zauderer*, the Court held that Ohio's requirement that attorneys disclose the details of their contingent-fee arrangement easily satisfied this test. *Id.* at 652. The Court reasoned that without such fee disclosures, substantial numbers of the public would be misled, given they are unaware of the technical distinctions between lawyers' "costs" and "legal fees." *Id.* Therefore, Ohio's disclosure requirements were reasonably related to the State's interest in preventing consumer deception. *Id.* at 651-52.

Here, because the SPAAM Act's disclosure requirements are reasonable, not unduly burdensome, and strongly related to Midland's interest in preventing deception of social media users and promoting transparency, Headroom's First Amendment rights are adequately protected. First, the SPAAM Act's disclosure requirements are materially justified given the significant concerns of Headroom users' free speech suppression. Petitioner argues that the

requirements are unduly burdensome because they require thorough explanations of community standard enforcement and impose fines of up to $10,000 per day if violated. Midland Code § 528.491(d)(2). However, Petitioner fails to realize that the SPAAM Act's requirements are only burdensome when Petitioner is engaged in excessive and unconstitutional censorship. Admittedly, the requirement to disclose thorough explanations for each censorship action would be demanding when a platform is engaged in pervasive censorship. However, as the Midland legislature clearly stated, this is the exact type of behavior the Act is intended to discourage. R. at 5.

Second, because of the significant First Amendment concerns, the SPAAM Act's disclosure requirements are reasonably related to Midland's interest in preventing consumer deception. Similar to Ohio's interest in preventing consumer deception in areas of unfamiliar pricing agreements, Midland has a substantial interest in preventing user deception and promoting transparency in areas of covert social media censorship. R. at 5. As Representative Barnes stated, "excessive censorship by tech behemoths is a clear violation of our fundamental rights." R. at 5. Midland's governor further clarified the State's interest by explaining that the Act "will establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content." R. at 5. Therefore, the SPAAM Act reasonably satisfies both prongs of the *Zauderer* test, and accordingly establishes a valid disclosure system while adequately protecting private actors' First Amendment rights.

## II. A STATE DOES NOT VIOLATE THE FIRST AMENDMENT'S FREE SPEECH CLAUSE WHEN IT PROHIBITS MAJOR SOCIAL MEDIA COMPANIES FROM DENYING USERS NONDISCRIMINATORY ACCESS TO ITS SERVICES BECAUSE IT IS CONSTITUTIONALLY PERMISSIBLE AND RELATED TO A LEGITIMATE GOVERNMENT INTEREST AND THEREFORE THE PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

Midland argues that Headroom does not have a First Amendment right to censor and that they do not have editorial discretion over the speech that consumers submit on their websites. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. The SPAAM Act prohibits any social media platform from "censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" because of "viewpoint." Midland Code § 528.491(b)(1). Censoring is defined as "editing, deleting, altering, or adding any commentary" to a users' content. *Id.* Midland Code § 528.491(b)(1)(i). Additionally, the Act defines "deplatforming" as "permanently or temporarily deleting or banning a user." *Id.* Midland Code § 528.491(b)(1)(ii). Lastly, "shadow banning" is defined as "any 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." *Id.* Midland Code § 528.491(b)(1)(iii). The act clears "obscene, pornographic, or otherwise illegal or patently offensive" content from the section's requirement. *Id.* Midland Code § 528.491(b)(2). State laws that require owners of private property to host third party speech are constitutionally permissible, even if they don't agree with the content, as long as the owner is not compelled to speak, the owner is not barred from speaking on their own views, and the message from the consumer would not be associated to the owner. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 75 (1980); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 48-49 (2006). Thus, when looking at what constitutes a Free Speech violation, The SPAAM Act does not compel Headroom to speak, Headroom can disavow any content they disagree with, and

since the platform is open to the public, the views of the consumers won't be associated to the private owner. Therefore, Headroom's argument is unsuccessful and does not rise to the level of speech in which a private owner has a constitutionally protected editorial discretion over.

### A. It Is Permissible for Midland To Pass The SPAAM Act Which Prevents A Social Media Platform From Altering or Removing Speech They Disagree With Because There is Not A First Amendment Protection Of Censorship

The First Amendment's Free Speech Clause allows for the regulation of conduct concerning private entities hosting speech, however, it prohibits the forcing of an owner to speak or interfering with their ability to communicate their personal message. *PruneYard*, 447 U.S. at 86-87. As held by the California Supreme Court, the "shopping center is not limited to the personal use of the [owners]. . . and the views won't be identified with those of the owner." *Id.* at 76. Additionally, California's government never "dictated a specific message to be displayed on the owner's property, therefore allowing them to publicly disavow with anything they disagree with." *Id*. Furthermore, because the law was viewpoint neutral, "there was no danger of governmental discrimination for or against the particular message." *Id*. at 87. Similarly, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court held that "although recruiters were found to associate with law schools, they were outsiders who came onto the campus, and found not to be seen as part of the school's expressive association, regardless of how repugnant the law school found the speech." 547 U.S. at 50. The law schools were not speaking when they were required to host the recruiters and as a result, the law school's overall speech was not impacted. *Id*. at 49. Under these precedent cases, to claim a First Amendment violation, the law at issue must limit the owner's personal speech and force them to speak. *Id*. at 48-49; *PruneYard Shopping Ctr.*, 447 U.S. at 75. However, even if this court is apprehensive to categorize the law as constitutional, some courts have adopted Section 230 of

the Communication Decency Act, which states that social media platforms "will not be treated as the publisher or speaker" of messages put forth by their users. 47 U.S.C. § 230(c)(1); *See also Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 138 (S.D.N.Y. 1991) (concluding that a social media platform wouldn't be liable for defamatory statements they were unaware of because they were solely distributors that did not use significant editorial discretion).

The SPAAM Act does not prevent Headroom from disavowing messages put forth by their users nor does it force Headroom to speak, so therefore, it does not violate the First Amendment's Free Speech Clause. Similar to the privately owned mall in the *Pruneyard* case, here, we have a privately owned social media platform, Headroom, in which the court should find that the First Amendment would allow for a state law to force them to host third party speech. Parallel to *Pruneyard*, the mall is open to the public and thus allows anyone to enter, and Headroom is an open social media forum that allows for public access which "provides a space for everyone to express themselves in the world." R. at 2. Due to this, the messages and content that are posted by users will likely not be associated with that of Headroom because it can be inferred that the posts are from its users.

Accordingly, Headroom is not compelled to speak and their speech has not been restricted. When looking at the text of the First Amendment, there is not a constitutionally protected right to censor. It is apparent that Headroom's goal is aimed at removing speech rather than protecting it. Under the First Amendment, this right to censor would not be protected. Headroom has the ability to say, or choose not say anything, about the messages that are put out by users. The SPAM Act is applied to all social media companies and like *Pruneyard*, the State is not ordering certain messages to be allowed on the platform, and thus there is no concern about state bias for or against certain speech. Once again, as seen in *Rumsfeld*, it is not a

violation of the First Amendment Free Speech Clause to force an entity to host speech they disagree with. Headroom's overall mission to "provide a space for everyone to express themselves to the world and to promote greater inclusion, diversity, and acceptance in a divided world" would not be impacted by the passing of the SPAAM Act, rather it reinforces it. R. at 2. The SPAAM Act does not regulate the owner's speech, but instead protects the speech of its users and regulates the conduct of the owners. Furthermore, if this Court so chooses to adopt Section 230 of the Communications Decency Act, the argument that an online platform's choice to censor its users constitutes protected speech under the First Amendment is undermined because no platform owner would be treated as a publisher or speaker of any messages put forth by their users. This would only further reiterate that the SPAAM Act's prohibition of denying users nondiscriminatory access to its services is not speech and thus permissible under the First Amendment.

#### 1. Headroom Does Not Use A Sufficient Amount Of Editorial Discretion When Censoring Content And Consequently Do Not Rise To The Level Of Protection Embedded In The First Amendment

When forcing a property owner to publish specific content that would ultimately affect and change the owner's intended message, their right to editorial discretion is protected and a First Amendment violation arises. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). In the *Miami Herald* case, a right of reply statute was struck down as unconstitutional because a newspaper is more than a "conduit for news." *Id*. A newspaper chooses what content goes inside it and as a result, exercises editorial control over the content. *Id*. *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (concluding that editorial discretion means the owner is selecting and presenting the content that is hosted). A newspaper itself is the total of everything that it chooses to print, making it a cohesive speech product, and by forcing a

newspaper to include messages that it would otherwise choose to leave out, it changes the overall content. *Miami Herald Pub. Co.*, 418 U.S. at 256-57. Furthermore, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the court found that “every unit in the parade conveyed the message of the private owner and the state statute altered the expressive content of the parade.” 515 U.S. 557, 558 (1995). The court noted that the “speech host was intimately connected with the hosted speech.” *Id*. at 576.

Since Headroom’s owners do not personally choose the content that gets published or select the messages that get disseminated on their site, they do not use sufficient editorial discretion and thus not afforded protection under the First Amendment. Our case is distinguishable from the *Miami Herald* case because newspapers, unlike social media platforms, are limited in what they can publish and therefore have to exercise their editorial discretion as to what gets included. Readers of a newspaper rely more heavily on the information that is presented and think of it as a byproduct of the newspaper itself. Whereas, a social media platform, such as Headroom, has the ability to host all messages, without any limitations to content. They are not prevented from putting forth their own message. Additionally, Headroom uses “algorithms to categorize and order content that users see.” R. at 3. This requires virtually no editorial discretion. Headroom uses boilerplate community standard guidelines to allow any user who accepts them access to their platform. None of this would equate to a sufficient or material amount of editorial discretion over the content posted because the host is not personally selecting or presenting what speech gets posted.

Moreover, these social media platforms essentially serve as “conduits” for information and the messages posted by the users aren’t perceived as cohesive speech. Unlike newspapers, the users of social media platforms don’t rely on the editorial judgment of the social media

platform's hosts to receive this cohesive speech. When a newspaper selects information to be included in their content, they essentially affirm the message that is being put forth. By forcing speech inside a newspaper, the overall content would change and would amount to a form of forced speech. However, the SPAAM Act restricts social media platforms from altering or removing users' content which does not change the message or consistency given the number of users and content submissions that are posted. Furthermore, distinguishable from newspapers, here, the social media platform, Headroom, carries themselves as "providing a space for everyone to express themselves in the world" and thus present themselves as having a goal to disseminate speech to the public. R. at 2. This only further reiterates that they are conduits of speech. Distinguishable from the *Hurley* case, where the parade would not be able to disassociate with the message because it was all connected, here, the speech hosted by Headroom is not cohesive and it's very likely users would not associate that speech with the host. Even then, the platform has the ability to disavow any speech they host on their platform. Unlike the case here, the parade was seen to be inherently expressive because each participant was carefully selected. Headroom, on the other hand, does not specifically select the content that is presented on their platform and thus not inherently expressive in its nature.

**2. Social Media Platforms, Such As Headroom, Have A Virtually Unlimited Amount Of Space And Therefore Hosting Speech Does Not Prevent Their Personal Message From Being Communicated**

If hosting third party speech interferes with the hosts' ability to put forth their own message within their platform due to its inherently limited space, it will constitute an unconstitutional infringement on First Amendment Free Speech rights. Pacific Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 14-17 (1986). The order requiring the utility company to include a third-party newsletter in their monthly bills was seen as unconstitutional because it

would force the organization to reply, which ultimately hindered the company's ability to disseminate their own message in their newsletter. *Id*. at 15-16. The forced speech takes up space that could have been used for the host to express their own message. *Id*. "Appellant has no right to be free from vigorous debate. But it does have a right to be free from government restrictions that abridge its own rights in order to enhance the relative voice of its opponents." *Id*. at 14. Because the order identified a viewpoint and required the company's opponent to spread views they disagreed with, access to these messages in the envelopes were not content-neutral" and the organization would feel compelled to respond and disassociate themselves from that particular speech. *Id*. *But see PruneYard*, (finding that hosting third party content-neutral speech was permissible) 447 U.S. at 75. Furthermore, feeling the pressure to disagree or respond does not appear to serve as a sufficient foundation to invalidate speech restrictions if the speech is not content based. *See PruneYard*, 447 U.S. at 99-101; *Rumsfeld*, 547 U.S. at 64-65.

Since a Headroom has a nearly limitless amount of space, there is nothing that would inhibit them from putting forth their own message on their platform. Unlike *Pacific Gas*, where the newsletter has substantial space constraints, here, a social media platform can communicate anything they want. They are free to disassociate themselves from any messages that their users put forth and thus their own speech is not curtailed. Moreover, the order imposed in *Pacific Gas* was unfair, because the space was given to only those that opposed the company's views, whereas, here, the SPAMM Act gives the same criteria to all Headroom users despite their viewpoints.

### B. A Law Prohibiting Censorship Would Still Survive Intermediate Scrutiny And Be Found Constitutional Because Of Its Substantial Government Interest In The Dissemination Of Different Viewpoints and Ideas

If a law is found to infringe on constitutional rights, courts can still use the intermediate scrutiny standard when deciding to uphold a law. *See Turner Broadcasting System v. FCC*, 520 U.S. 180, 622 (1994) (finding that the "appropriate standard in evaluating the constitutionality of must-carry provisions is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden of speech."). To survive intermediate scrutiny, the law in question must not burden substantially more speech than necessary to further the legitimate interest of the government. *Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989). The court in *Turner Broadcasting*, found that making sure the public has great access to a diversity of information is of the highest order because it reiterates the values that are foundational within the First Amendment. 520 U.S. at 662-63. *See also Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, (where the court upheld a law requiring hosting speech that did not focus on the content, but instead focused on the results achieved by the policy because it furthered an important government interest and only incidentally burdened speech). 547 U.S. at 48 (2006).

Even if the SPAAM Act's nondiscriminatory constraint on censoring is seen as unconstitutional, it still would prevail because it survives intermediate scrutiny. Intermediate scrutiny applies here because the SPAAM Act is content neutral, enforced equally to all, and does not discriminate based on the underlying message communicated from its users. Midland is able to show that the SPAAM ACT is narrowly tailored, and the government has a legitimate interest in enforcing the law and therefore would be permissible. Midland has reiterated that the SPAMM Act is meant to help "preserve the free flow of information and protecting citizens. . .

from unfair viewpoint discrimination." R. at 19. Parallel to the *Turner Broadcasting System* case, the government's main interest in the content moderation restrictions and the enforcement explanation requirements, contained in the SPAAM ACT, is the dissemination of information and ensuring that everyone has access to this information in a transparent manner. This objective would clearly be enforced by implementing the SPAAM Act because it allows for everyone to have access and post regardless of the views they side with. Furthermore, the SPAAM Act does not burden more speech than is necessary and thus is narrowly tailored to achieve the state's goal. Censorship is not considered speech, and therefore doesn't infringe on speech within the First Amendment. Without this law being passed, the state's goal would not be achieved as efficiently, given the amount of complaints that have surfaced. Even so, the SPAAM Act is content neutral and is only meant to regulate how speech gets disseminated. It does not prevent Headroom from communicating on their platform and disagreeing with anything their users say. Their enforcement explanation requires them to be upfront about content they moderate and does not coerce any particular content moderation procedures. Furthermore, the SPAM ACT focuses on the end results achieved by the law, which is to get different viewpoints across, to ensure the foundation of the First Amendment is preserved.

### C. The Preliminary Injunction Factors Favor Midland And Therefore Should Not Be Granted

A Preliminary Injunction is a form of relief that is used to temporarily enjoin an opposing party from taking action and ultimately meant to preserve the status quo until the courts come up with a final decision. How to File A Preliminary Injunction, Bloomberg Law, (Feb. 23, 2023), https://pro.bloomberglaw.com/brief/how-to-file-a-preliminary-injunction/#:~:text=A%20preliminary%20injunction%20is%20temporary,a%20current%20course%20of%20action. When looking at preliminary injunctions, the court looks to four factors in

determining whether it will prevail. A plaintiff has to show (1) a strong likelihood of success on the merits, (2) that they will likely suffer from irreparable harm if the preliminary injunction is not granted, (3) the balance of equities favors them, and (4) an advancement of the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Courts will look to these factors as a balancing test to decide whether an injunction is warranted.

The preliminary injunction factors weigh in favor of Midland and thus the preliminary injunction should not be granted to Headroom. When looking at the first factor, the SPAAM Act does not violate the First Amendment because Headroom is a common carrier, their enforcement explanation requirement involves purely factual disclosures, and Headroom does not employ any type of editorial judgment. Overall, their censorship, is not speech and thus shouldn't be treated as such. Midland would likely win based on this factor. Moving on to the second factor, there have not been any lawsuits initiated or threatened, therefore Headroom does not face any irreparable injury. Since the law is content-neutral, if they do not discriminate based on viewpoints, then they will never suffer any monetary injury. Third, the balance of equities would favor Midland. Headroom contradicts their goals by claiming they prioritize First Amendment speech while suppressing the speech of others. Lastly, Headroom argues that this law would have a chilling effect on free speech rights for private entities, but if anything this would chill censorship, and when looking to the First Amendment language, there is no protection afforded with censoring. From a public policy standpoint, it would be detrimental to allow private companies this much power in who has access to their platform. Furthermore, we want to ensure a functioning democracy by allowing the dissemination of all ideas, free from viewpoint discrimination. If we allowed this preliminary injunction to pass, the public interest would be

harmed and we would be going against the one thing the government is constantly fighting for, Free Speech jurisprudence.

Accordingly, with respect to the First Amendment's Free Speech Clause, the SPAAM Act would be constitutional. A state does not violate the First Amendment's Free Speech Clause when it prohibits major social media companies from denying users nondiscriminatory access to its services because they are not afforded the First Amendment right to censor, the speech on their platform would not be attributed to them, and they can still communicate their own messages. Additionally, the preliminary injunction should not be granted. Therefore, the Court should affirm the Court of Appeal's judgment in favor of Midland.

## CONCLUSION

For the foregoing reasons, this Court should affirm the Thirteenth Circuit's judgment in favor of the Respondent.

Respectfully submitted,

Date: October 9, 2023

By: **Team 25**
Counsel for Respondent

## CERTIFICATION

By signing this form, each signatory certifies that the attached brief has been prepared in accordance with the Rules of the Competition, and the brief represents the work product solely of the team's members.