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 Unites States
Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

Counsel for Petitioner
Team 1

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QUESTIONS PRESENTED

I. Do major social media companies constitute as common carriers under the Free Speech Clause of the First Amendment, and do the SPAAM Act's disclosure requirements fall within the scope of this Court's holding in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*?

II. Does a state violate a private actor's First Amendment protections under the Free Speech clause by restricting major social media companies from being able to moderate content posted on their forums?

STATEMENT OF THE CASE

Factual Background

The State of Midland passes the SPAAM Act. On February 7, 2022, the Midland State Legislature passed the SPAAM Act, which went into effect on March 24, 2022. R. at 7. The state introduced the SPAAM Act with the intent of preventing the suppression of free speech by major social media companies, calling them "virtual dictators," and imposing numerous provisions that they are required to abide by. R. at 5–7. The legislature drafted the bill in response to accusations by users of a prominent social media company, Headroom, which stated that their Community Standards were too extreme and constituted censorship. R. at 4–5. Per Headroom's Community Standards, users are prohibited from sharing content that goes against Headroom's standards, including hate speech; violence; child sexual exploitation; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; negative comments toward protected classes; as well as disinformation. R. at 3–4. Headroom moderates these types of content by adding commentary to some content, while also reserving the right to deprioritize and demonetize users' accounts, as well as suspend, block access to, or remove accounts entirely. R. at 4.

Specific Provisions from the SPAAM Act. The legislature introduced the SPAAM Act to restrict social media companies from moderating content through community standards. R. at 5–7. First, per § 528.491(b)(1), social media companies are prohibited "from 'censoring, deplatforming, or shadow banning' any 'individual, business, or journalistic enterprise' because of 'viewpoint.'" R. at 6. Additionally, per § 528.491(c), social media companies are required "to publish detailed 'community standards,'" and provide "detailed and thorough" explanations of what standards are violated when they decide to take action on users' content, such as suspending their account or adding commentary. R. at 6. The Midland Attorney General (A.G.) provides

enforcement of the SPAAM Act under § 528.491(d), and individuals are able to either bring a claim to the A.G. or sue on their own. R. at 6. In terms of relief, courts may grant either injunctive relief or fines totaling $10,000 a day per infraction. R. at 6–7. Headroom filed suit against Midland Attorney General Sinclair on March 25, 2022, requesting a permanent injunction to enjoin enforcement of the act, and arguing the SPAAM Act violated the First Amendment. R. at 7.

Procedural History

The District Court. The District Court for the District of Midland found that the SPAAM Act violated the First Amendment for two reasons. R. at 9–10 First, it found that the disclosure requirements imposed an "undue burden" on social media companies that effectively "chilled [their] protected speech", and thus violated social media companies' First Amendment protections. R. at 11. Second, the court found that the SPAAM Act's prohibitions of social media companies infringed on their "editorial judgment" as a private actor, and as such also violated the First Amendment. R. at 14. Accordingly, the District Court found that the SPAAM Act failed intermediate scrutiny and granted Headroom's motion for preliminary injunction. R. at 15.

The Court of Appeals. The Thirteenth Circuit Court of Appeals reversed the holding of the district court and vacated the preliminary injunction. R. at 19. The court held that social media companies constitute as common carriers and can be regulated by the state as such. R. at 17–18. Furthermore, it held that the disclosure requirements did not "unjustifi[ably] or unduly burden[]" Headroom's speech because Midland has an "important interest in ensuring the free flow of information and protecting citizen's free speech rights from undue censorship". R. at 18. The court also held that Headroom may disavow any connection to users' content but cannot censor or suppress it. R. at 19. Lastly, the court found that because the SPAAM Act is "substantially related" to "an important government objective," it survived intermediate scrutiny. R. at 19.

SUMMARY OF THE ARGUMENT

Common Carriers and Disclosure Requirements under the Zauderer Standard. In accordance with past holdings by this Court, major social media companies do not behave like common carriers and thus should not be regulated accordingly. Social media companies do not "hold themselves out to the public" as outlined in *FCC v. Midwest Video Corp.*, and also cannot be regulated like state actors solely because they provide a service that the public can interact with. Additionally, the disclosure requirements under the SPAAM Act are not within the scope of this Court's holding in *Zauderer v. Off. of Disciplinary Couns.*, and effectively compel major social media companies to provide controversial information without a reasonable justification. This interferes with their editorial judgment as a private company, is unjustified and unduly burdensome, and has the effect of chilling major social media companies' protected speech under the First Amendment. Lastly, because the SPAAM Act disclosure requirements are not narrowly tailored to forward an important state interest, they fail intermediate scrutiny.

Prohibitions of Content Moderation by Private Actors. States violate the First Amendment rights of major social media companies by drafting laws that overly them from moderating content posted on their forums. In prohibiting major social media companies from being able to effectively moderate content pursuant to their own standards, states unconstitutionally constrain their editorial discretion as private actors. In addition, major social media platforms are distinguishable from other public forums where the government could compel their speech and impose constraints, and consequently can enforce community guidelines to the fullest extent of their own discretion. Lastly, the SPAAM Act must be enjoined because Headroom has met all four factors of a preliminary injunction under *Winter v. Nat. Res. Def. Council, Inc.*, and the State of Midland has failed to show that the SPAAM Act would pass intermediate scrutiny.

STANDARD OF REVIEW

The legal standard applicable in discussing if a state has created a law that infringes on the First Amendment protections of a private actor is a question of law reviewed de novo. *See New York Times Co. v. Sullivan,* 376 U.S. 254, 285 (1964) (holding that the de novo standard is applicable when reviewing an infringement on rights guaranteed by the First Amendment's Free Speech Clause). Furthermore, the legal standard for reviewing issues regarding preliminary injunctions is abuse of discretion. *Ashcroft v. ACLU,* 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." (citing *Walters v. Nat'l. Ass'n of Radiation Survivors*, 473 U.S. 305, 336, (1985)).

ARGUMENT

I. In accordance with the Free Speech Clause of the First Amendment, major social media companies should not be considered common carriers, and the SPAAM Act disclosure requirements fall outside the scope of the Supreme Court's holding in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.

Gitlow v. New York held that the freedom of speech under the First Amendment is one of the "fundamental personal rights and 'liberties' protected" from infringement by states under the Fourteenth Amendment. 268 U.S. 652, 666 (1925). While not an absolute right, it is commonly known to constrain the speech of governmental actors, while protecting the speech of private actors. *See id.*; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Thus, many courts have ruled that digital internet platforms, including major social media companies, do not become state actors by providing a service open to the public. *Prager Univ. v. Google LLC*, 951 F.3d 991, 997 (9th Cir. 2020); *See Green v. Am. Online*, 318 F.3d 465, 472 (3d. Cir. 2003).

Additionally, when First Amendment restrictions do apply to private actors, they must not fall outside of the doctrine of overbreadth and cause "the chilling of protected expression." *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989). In essence, a government "chills" speech when it establishes regulations that come close to directly prohibiting the exercise of First Amendment rights. *See Laird v. Tatum,* 408 U.S. 1, 11 (1972). In order to have standing to challenge a governmental regulation, a plaintiff must demonstrate "harm or a threat of specific future harm" because that regulation violates their First Amendment rights. *Id.* at 14. Following *Laird,* this Court held that such regulations can cause injury, and can be remedied by enjoining their application. *See Meese v. Keene*, 481 U.S. 465, 476–77 (1987). Furthermore, if an overly broad law has a relatively large number of unconstitutional applications related to the First Amendment, it may be invalidated. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

In *Manhattan Cmty. Access Corp. v. Halleck*, this Court rooted its decision in past precedent regarding private actors' speech protections and how they relate to editorial judgement. 139 S. Ct. 1921, 1926 (2019); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974). As held in *Pittsburgh Press Co. v. Pittsburgh Comm'n. on Hum. Rel.*, editorial judgment is a protection afforded "unequivocally," regardless of how controversial the free expression of views may be. 413 U.S. 376, 391 (1973). In *Miami Herald Publ'g Co.*, the Executive Director of the Classroom Teachers Association brought suit against a newspaper because it would not print opposing viewpoints alongside its critical editorials, which violated Florida's "right of reply" statute. 418 U.S. 241, 243–44 (1974). There, this Court held that the statute violated the First Amendment when it required the printing of reply criticisms if political candidates requested them. *Id.* at 244, 258. This Court reasoned that the choices of what material goes into a newspaper is left up to the newspaper because the state cannot interfere with their "exercise of editorial control and judgment." *Id.* at 258. This Court further expanded on this in *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, where a similar law was struck down, which required Pacific Gas to include opposing messages in a monthly newsletter sent out with billing envelopes. 475 U.S. 1, 5–6, 20–21 (1986). Significantly, *Pacific Gas* held that the statute was "not a narrowly tailored means of furthering a compelling state interest." *Id.* at 21.

As stated in *FCC v. Midwest Video Corp.,* common carrier services that deal within the realm of communications make "a public offering to provide [communication facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing…" 440 U.S. 689, 701 (1979) (citing 5 F.C.C.2d 197, 201 (F.C.C. October 5, 1966)). Additionally, common carriers do not make "individualized decisions" on how to deal out their services and who to deal them out to; their services must be

provided in a nondiscriminatory way. *Id.* at 701–02 (citing *Nat'l. Ass'n. of Regul. Util. Comm'rs v. FCC*, 173 U.S. App. D.C. 413, 424 (1976). Ultimately, this Court held that like television broadcasters, cable systems are not common carriers, as they both retain significant "editorial discretion" in what they choose to broadcast. *Id.* at 707–08.

However, even if a company is not a common carrier, they may be subject to disclosure requirements in some circumstances. *See Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 651 (1985). In *Zauderer*, this Court reviewed a deceptive advertisement by an attorney, and held that certain disclosure requirements may be statutorily required if they are reasonably related to the legitimate state interest of preventing deception to customers in advertising. *Id*. This Court reasoned that because of this state interest, the state may require that purely factual and uncontroversial information be disclosed regarding advertising specifically. *Id.* Additionally, this Court recognized that disclosure requirements may violate the First Amendment by chilling protected commercial speech if they are found to be "unjustified or unduly burdensome." *Id.*

A. Because they do not "hold themselves out to the public" or act as a public forum, major social media companies such as Headroom should not be considered common carriers.

Under *FCC v. Midwest Video Corp.*, common carriers are required to "hold out" their services to the public in a nondiscriminatory manner and are prohibited from determining or influencing the content within their services. *See Midwest Video Corp.*, 440 U.S. at 701–02. Because Headroom users must agree to their community standards before joining their servers, which forbid users from creating any speech that violates their standards, Headroom is legally justified in determining the content that its platform promotes. R. at 3. Accordingly, because Headroom is allowed editorial discretion to determine what content it permits on its platform, it should not be considered a common carrier.

The DC Circuit Court of Appeals further discussed the "hold out" requirement of common carriers in *U.S. Telecom Ass'n v. FCC*, where it stated that a "basic characteristic" of common carriers is the requirement to hold themself "out to serve the public indiscriminately." 825 F.3d 674, 740 (DC. Cir. 2016) (citing *Verizon v. FCC*, 740 F.3d 623, 651 (DC Cir. 2014)). There, the court held that broadband internet providers are common carriers, analogizing them to "telephone companies, railroads, and postal services." *See id.* at 740. First Amendment issues were not generally raised because these types of providers had relatively fewer speech interests compared to television broadcasters and newspapers. *See id.* at 740–41 (citing *Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996)). The Court of Appeals also reiterated the Supreme Court's holding in *FCC v. League of Women Voters*, where this Court stated that broadcasters have greater First Amendment protections than common carriers because of their "journalistic freedoms." 468 U.S. 364, 378 (1984). Overall, the main difference this court recognized between providers that are considered common carriers and those that are not, is that common carriers "merely facilitate the transmission of the speech of others rather than engage in speech in their own right." *U.S. Telecom Ass'n*, 825 F.3d at 741.

Here, Headroom provides a service that falls closer in line with television broadcasters than broadband internet providers. Because it acts as a voluntary platform whose mission is to "provide a space for everyone to express themselves to the world," while still requiring users to conform to their Community Standards, Headroom acts like a digital service that users can subscribe to. R. at 2–3. This differs significantly from basic services like those provided by telephone or broadband internet companies for several reasons. First, Headroom positively allows users to actively create posts and interact with other users on its site, as well as allowing users to monetize posts and promote businesses. R. at 3. Furthermore, Headroom "curates" users' experiences with algorithms

to prioritize information and posts that best suit their preferences. *Id.* This differs significantly from other typical common carriers, which only provide the transmission of speech as defined in *U.S. Telecom Ass'n v. FCC*, and not like service providers that engage actively in their own speech. *See* 825 F.3d at 741.; R. at 3.

Next, as held in *FCC v. League of Women Voters*, Headroom behaves more like a broadcaster because of its "journalistic freedom" in its ability to decide what content it allows on its platform. 468 U.S. at 378. In addition to their positive ability, Headroom also has the negative ability to restrict speech that violates its community standards, unlike common carriers that merely transmit speech. R. at 3. According to *Midwest Video Corp.*, this distinguishes Headroom from common carriers, as they are not allowed to make "individualized decisions." 440 U.S. at 701. For a common carrier to moderate content, they would have to effectively provide limited or deny complete transmission of services to users. By contrast, broadcasters have substantially more choice in what programs they choose to air, which more closely aligns with Headroom's policies to restrict content. While Headroom can suspend or completely remove a user's account as a common carrier could, Headroom also retains the ability to append commentary to users' posts, remove specific posts, and deprioritize users' content. R. at 4. Thus, this wider array of control more closely resembles "individualized decisions." *See Midwest Video Corp.*, 440 U.S. at 701.

Finally, in deciding what speech it allows on its platform, Headroom actively engages in its own speech, which it is generally allowed to do as a private actor. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). As stated in *FCC v. League of Women Voters*, broadcasters have more "journalistic freedoms" under the First Amendment compared to common carriers. 468 U.S. at 378. Although Headroom does not expressly share its viewpoint on content, its Community Standards actively constitute as a form of speech, and while not absolute,

Headroom has a strong right as a private actor to have this speech be unconstrained. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974). By contrast, common carriers must be neutral because they only transmit speech, and do not engage in their own speech. *See FCC v. Midwest Video Corp.*, 440 U.S. at 701.

B. The disclosure requirements under the SPAAM Act fall outside the scope of the Supreme Court's holding in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, and as such, fail intermediate scrutiny.

In *Zauderer*, the Supreme Court held that in specific situations where a legitimate state interest of preventing deception to customers in commercial speech exists, companies may be required to disclose information. 471 U.S. at 651. Such advertising disclosures must contain purely factual and uncontroversial information, and are not permitted if they chill protected commercial speech or are found to be "unjustified or unduly burdensome." *Id.* Because the SPAAM Act's disclosure requirements compel speech that interferes with editorial judgment, are controversial, and constitute as unjustly and unduly burdensome, they fall outside the scope of this Court's holding in *Zauderer*. Additionally, the disclosure requirements under the SPAAM Act fail intermediate scrutiny because they are not narrowly tailored and do not forward an important state interest. *City of Austin v. Reagan Nat'l. Advert. of Austin*, *LLC*, 142 S. Ct. 1464, 1470 (2022).

1. The disclosure requirements under the SPAAM Act unnecessarily compel major social media companies to provide controversial information that interferes with editorial judgment for a reason other than preventing deception in commercial speech.

In *Zauderer*, this Court held that state advertisement disclosure requirements can only be upheld if they are for the state's important interest in preventing deception and seek purely factual and uncontroversial information. 471 U.S. at 651. Regarding the issue of disclosure requirements, this holding has been narrowly construed by this Court to relate to "commercial speech" and advertisements that risk deception. *See Nat'l. Inst. of Family & Life Advocates v. Becerra*, 138 S.

Ct. 2361, 2377–78 (2018). As held by this Court in *Pittsburgh Press Co. v. Pittsburgh Comm'n. on Hum. Rel.*, "commercial speech" is typically regarded as relating to commercial advertising. 413 U.S. 376, 384 (1973). For example, in *Milavetz, Gallop & Milavetz, P.A. v. United States,* this Court upheld similar advertisements for bankruptcy attorneys and reinforced the notion that such disclosure requirements exist for the purpose of preventing the risk of deception. 559 U.S. 229, 250–51 (2010). Similarly, when an attorney's advertising was contested by a Board of Accountancy in *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, this Court discussed *Zauderer* only in the light of misleading advertising. *See* 512 U.S. 136 (1994). Lastly, in *Hurley v. Irish-American Gay*, this Court noted that *Zauderer* does not apply outside the context of commercial advertising. 515 U.S. 557, 573 (1995).

In *Nat'l. Inst. of Family & Life Advocates v. Becerra*, this Court held that *Zauderer* did not apply in a case regarding state-imposed disclosure requirements for pregnancy centers which provided abortions. 138 S. Ct. 2361, 2372 (2018). First, this Court noted that because *Zauderer* only applied to commercial services, the disclosure requirement was inapplicable because it related to state-sponsored services, and not the services the clinics themselves provided. *Id.* Furthermore, it found that *Zauderer* did not apply because the disclosure requirements related to abortion, which Justice Thomas referred to in the majority opinion as "anything but an 'uncontroversial' topic." *Id.*

Here, the requirements under the SPAAM Act fall outside the scope of *Zauderer* for multiple reasons. First, the disclosure requirements do not relate to preventing deception in commercial speech. In *Zauderer* and subsequent cases, commercial speech has traditionally only been regulated to the extent it relates to misleading advertising. *See* Zauderer, 471 U.S. at 651; *Milavetz, Gallop & Milavetz, P.A.* 559 U.S. at 250–51; *Ibanez*, 512 U.S. at 146; *Hurley*, 515 U.S. at 573. Here, per § 528.491(c)(2) of the SPAAM Act, the disclosure requirements relate to

explanations of which community standards have been violated and the reasoning for taking a specific action. R. at 6. As these explanations have nothing to do with advertising, they have no connection to commercial speech whatsoever, and as such do not fall within the standard under *Zauderer*. *See Pittsburgh Press Co. v. Pittsburgh Comm'n. on Hum. Rel.*, 413 U.S. 376, 384 (1973); *Zauderer*, 471 U.S. at 651.

Additionally, even if the disclosure requirements did have a connection to commercial speech, they are not for the purpose of preventing deception. As noted in *Zauderer*, disclosure requirements affect advertisers much more narrowly than flat prohibitions, and thus may be required to prevent confusion and misinformation by advertisers. *Zauderer*, 471 U.S at 651 (citing *In re R. M. J.*, 455 U.S. 191, 201 (1982)). While the aims of *Zauderer* were to prevent misinformation, the aims of § 528.491(c)(2) of the SPAAM Act are to actively gain information. *See id.*; R. at 6. Under *Zauderer*, a private actor may be compelled to provide factual information to try to dispel misinformation that the actor presents in an advertisement. *Zauderer*, 471 U.S. at 651. This differs significantly from the aims of the SPAAM Act, which are to provide factual information about community guidelines solely for the sake of providing it, and not dispelling misinformation by social media companies.

Lastly, the explanations that the SPAAM Act would require would likely not contain uncontroversial information. As § 528.491(c)(2) of the SPAAM Act requires social media companies to provide detailed explanations of why content violates community standards and why a specific action was chosen, controversial information could likely arise. R. at 6. Regarding the explanations, social media companies would have to effectively state why certain content violated their guidelines, which could be acceptable in theory, but largely unfeasible in practicality. Headroom's guidelines forbid users from posting content that "promotes or communicates hate

speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R. at 3. If Headroom was required to post explanations of every action taken, it would effectively be compelled to state its positions, which it generally has no requirement to do as a private actor. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Furthermore, in detailing why certain actions were taken in some circumstances as opposed to others, social media companies could be opening themselves up to mountains of controversy.

Overall, because the disclosure requirements under the SPAAM Act essentially compel major social media companies to provide explanations of how community standards were violated, they would compel controversial information for purposes outside of preventing deception in commercial speech as discussed in *Zauderer. Zauderer*, 471 U.S. at 651.

2. The disclosure requirements under the SPAAM Act are unjustified, unduly burdensome, and offend the First Amendment by chilling major social media companies' protected speech.

Under *Zauderer*, this Court recognized that disclosure requirements could violate the First Amendment if they were so "unjustified or unduly burdensome" that they chilled "protected commercial speech." *Id.* As this Court expanded on in *Becerra*, disclosures cannot "extend broader than reasonably necessary," or else they risk "'chilling' protected speech." 138 S. Ct. 2361, 2377 (2018). In *Becerra*, this Court found that a "speaker-based" disclosure requirement imposed by the government was "wholly disconnected" from the state's "informational interest," and thus unduly burdened protected speech. *Id.* This Court noted that the disclosure was additionally burdensome for several other reasons, including that the disclosure had to be in "print and digital advertising materials," "call attention to the notice [. . .] by some method such as larger text or contrasting type or color," and be "in as many as 13 different languages." *Id.* at 2377–78.

Here, the SPAAM Act's extensive disclosure requirements are unduly burdensome. Under the SPAAM Act, the disclosure requirements require social media companies to "provide a detailed and thorough explanation" for every instance where they took action for a violation of a platform's community standards. R. at 6. Like many social media companies, Headroom has over seventy-five million monthly users. R. at 3. While companies can likely create algorithms that provide brief explanations for how content violates their standards, creating "detailed and thorough" explanations for every instance would likely not be a simple task. *Id.* Because the SPAAM Act does not define "detailed and thorough," social media companies could be required to draft extensive explanations to fit within what is acceptable by the legislature. As a result, this language could be unconstitutionally overbroad and chill speech because the interpretation of the phrase could differ drastically between the Midland Legislature's intent and what social media companies would be willing to provide. *See Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989). Furthermore, these differences could create large consequences for social media companies, who could be subject to massive fines for not providing "detailed and thorough" enough explanations. R. at 6.

The SPAAM Act also states that violations of § 528.491(d)(3) may result in preliminary injunctions or fines of $10,000 a day per infraction against social media companies. R. at 6–7. As previously stated, Headroom has over seventy-five million monthly users, and could easily owe millions of dollars in fines for only a few hundred infractions. R. at 3. Because Headroom uses algorithms daily to automatically detect and either alter or remove content that violates their guidelines, they could be found to be constantly violating the SPAAM Act if they are not providing adequate disclosures for each instance. *Id.* at 6–7. As such, these requirements are unduly burdensome as defined in *Zauderer*. *Zauderer*, 471 U.S. at 651.

Additionally, the state has the burden of proving that the disclosure is justified and not unduly burdensome. *Becerra*, 138 S. Ct. at 2377; *See Ibanez,* 512 U.S. at 146. Here, the legislature introduced the SPAAM Act in response to "'a clear violation of our fundamental rights'" and with the intent to "'hold [social media companies] accountable and ensure the protection of democratic values.'" R. at 5. However, in passing the SPAAM Act, the legislature actively violated the fundamental First Amendment rights of social media companies, which is inherently unjustified. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, the State of Midland has not met its burden in showing the disclosure requirements are justified and not unduly burdensome.

3. The SPAAM Act disclosure requirements fail intermediate scrutiny per *City of Austin v. Reagan Nat'l. Advert. of Austin* because they are not narrowly tailored, nor do they forward an important state interest.

The disclosure requirements under the SPAAM Act also fail intermediate scrutiny, which is applicable when acts are content neutral and apply to all social media companies equally. *City of Austin v. Reagan Nat'l. Adver. of Austin, LLC*, 142 S. Ct. 1464, 1470 (2022). An act must be "narrowly tailored to serve a significant governmental interest" to pass intermediate scrutiny. *Id.* at 1475; *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Like all private actors, social media companies do not have absolute First Amendment protections, however, obligating these companies to disclose reasons for taking action related to community standards does not further an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). As held in *Halleck*, private entities that provide forums for speech are not ordinarily subject to First Amendment constraints because they are not state actors, and thus may exercise editorial discretion over their forum. *Halleck*, 139 S. Ct. 1930. Additionally, a private actor does not automatically become a state actor if it functions to serve the public in the same way a public actor does, and is

only treated as such if it performs an act "traditionally and exclusively" performed by a public actor. *Id.* at 1928–29. Applied to public forums specifically, this Court held that hosting a forum for speech of others is not a "traditionally and exclusively" government function. *Id.* at 1930. Here, social media companies are private and not state actors, and thus generally have large protections under the First Amendment. *See Id* at 1930. Furthermore, because social media companies are private actors and are not subject to the same constraints under the First Amendment as state actors, the SPAAM Act's disclosure requirements do not further an important government objective.

Additionally, because the SPAAM Act's disclosure requirements are largely over-encompassing and intrude on social media companies' editorial judgment, they are not narrowly tailored. *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, 475 U.S. 1, 21; *See NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1227 (11th Cir. 2022). As previously stated in *Pacific Gas*, a statute that interferes with editorial discretion and does "not a narrowly tailored means of furthering a compelling state interest" cannot be upheld. *Pac. Gas & Elec. Co.*, 475 U.S. at 21. Thus, social media companies could potentially have to provide extensive and unnecessarily detailed disclosures to the state for their actions. Additionally, failure to provide these disclosures could result in insurmountable fines, which would do irreparable harm to social media companies. Because the disclosure requirements and penalties for violating the SPAAM Act far exceed what would constitute as reasonable enforcement mechanisms, they are not narrowly tailored.

II. A state violates the First Amendment rights of major social media companies when it restricts their ability to moderate content posted on their forums.

In 2019, the Fourth Circuit Court of Appeals decided *Washington Post v. McManus*, which expanded on the rulings from *Miami Herald* and *Pacific Gas* to apply to online platforms. 944 F.3d 506 (4th Cir. 2019). There, the Fourth Circuit held that a Maryland statute requiring online platforms and newspapers to post information about purchasers of political advertisements violated

the protections of their "editorial perspective" under the First Amendment. *Id.* at 511–12, 518. Essentially, because the statute required online platforms and newspapers to post certain material about purchasers of political advertisements, it had the effect of altering "the content of their speech." *Id.* at 518 (citing *Nat'l. Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, (2018)). Similarly, in *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.,* the Eleventh Circuit Court of Appeals held that online platforms have the right to selectively exclude what content will be allowed on their platforms because it constitutes as "expressive conduct." 6 F.4th 1247, 1254–55 (11th Cir. 2022).

A. A state effectively and unconstitutionally restricts the editorial judgment of major social media companies by prohibiting denials of nondiscriminatory access to their platforms.

Following *Coral Ridge*, the Eleventh Circuit expanded on their holding in *NetChoice, LLC v. AG, Fla.*, finding that social media platforms have a First Amendment protection in deciding what content is allowed on their platforms. 34 F.4th 1196, 1214 (11th Cir. 2022). There, the Eleventh Circuit found that social media platforms are private companies, and as such, have protections under the First Amendment in how they wish to "'disclos[e],' 'publish[]', or 'disseminate' information." *Id.* at 1210 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570, (2011)). This is because content moderation by social media companies falls within editorial judgment, which is inherently expressive. *Id.* at 1213. Thus, social media companies should be allowed the liberties to prohibit spam, inauthentic posts, misinformation, hate speech, and any other type of content that goes against their guidelines. *Id.*

In *NetChoice, LLC v. Paxton*, the Fifth Circuit Court of Appeals held contrarily to the Eleventh Circuit, finding that social media platforms do not have the right to "censor" speech under the First Amendment. 49 F.4th 439, 447–48 (5th Cir. 2022). Specifically, the Court in *Paxton*

upheld a law restricting social media platforms' rights to create speech guidelines, stating that it did "not chill speech", but instead chilled censorship, and rejected a claim that censorship is speech. *Id.* at 447–48, 454. However, this holding is misguided as this bill did chill speech because content moderation, or "censorship," as it is referred to in *Paxton* is speech. *Id.* at 454. As held by this Court in *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, "all speech inherently involves choices of what to say and what to leave unsaid." 475 U.S. 1, 11 (1986). This Court further expanded on this holding in *Hurley v. Irish-American Gay*, emphasizing that the principle of free speech also extends to what an individual may decide "not to say." 515 U.S. 557, 571 (1995). Extending this principle to the matter at hand, social media companies have just as equal of a right to say something as they do to not say something, and this is clear by interpreting *Hurley* in light of *Coral Ridge* and *NetChoice*. *Hurley*, 515 U.S. at 571; *Coral Ridge*, 6 F.4th at 1254–55; *NetChoice*, 34 F.4th at 1213. Thus, as private actors, social media platforms should have First Amendment protections to create guidelines and moderate what content is posted on their pages.

Therefore, the State of Midland cannot prohibit Headroom's specific practices that deny users nondiscriminatory access to their services because they fall within Headroom's editorial judgment, and § 528.491(b)(1) of the SPAAM Act should accordingly be struck down. R. at 6. As this section expressly prohibits social media companies from moderating content "because of viewpoint," it follows that any decision to moderate content would be based on the companies' editorial judgment as discussed in *Pittsburgh Press Co*.. 413 U.S. 376, 391 (1973). Likewise, by following the holdings of *Laird* in conjunction with *Coral Ridge* and *NetChoice*, the SPAAM Act has the clear effect of "chilling" social media companies' speech. *Laird v. Tatum,* 408 U.S. 1, 11 (1972); *Coral Ridge*, 6 F.4th 1254–55; *NetChoice*, 34 F.4th at 1213. Under *Coral Ridge* and *NetChoice,* moderating the content on social media pages constitutes as speech, and the restrictions

under the SPAAM Act effectively "chill" this speech by interfering with social media companies' right to moderate content. *Coral Ridge*, 6 F.4th at 1254–55; *NetChoice*, 34 F.4th at 1213.

Furthermore, the specific language in the definitions in § 528.491(b)(1) of the SPAAM Act likely also violates the First Amendment. § 528.491(b)(1)(i) defines "'Censorship' or 'censoring […] as 'editing, deleting, altering, or adding any commentary' to a user's content." R. at 6. The Seventh Circuit reviewed private guidelines in *Coe v. Cook Cnty.*, holding that states may not "censor nor forbid private 'censorship,'" as in cases of editorial judgment. 162 F.3d 491, 495 (7th Cir. 1998). Following *Coe*, major social media companies should be given the ability to "censor" whatever content they wish because they are private actors. The Seventh Circuit also found that recorded events which are edited down for broadcast per policy guidelines are done so with editorial discretion, which does not amount to censorship. *Wis. Interscholastic Ath. Ass'n v. Gannett Co.*, 658 F.3d 614, 625 (7th Cir. 2011). This case is analogous because it shows that private companies are completely in their right to alter or edit a user's content, which stems from the company's editorial discretion. *Id.*

In § 528.491(b)(1)(ii) of the SPAAM Act, "'deplatforming' is defined as permanently or temporarily deleting or banning a user." R. at 6. Additionally, "'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." R. at 6. As held in *NetChoice*, provisions that prohibit "deplatforming" or "shadow-banning" interfere with private companies' editorial judgment by compelling their speech in restricting what their guidelines allow them to remove. 34 F.4th 1196, 1222 (11th Cir. 2022). In essence, social media companies are compelled to speak in being prohibited from removing content that they disagree with and that violates their guidelines. *Id.*

B. Major social media platforms are distinguishable from other public forums, and unlike these forums, may enforce community guidelines to the fullest extent of their own discretion.

In *PruneYard Shopping Center v. Robins*, this Court held that there are situations when a private actor must permit speech on their property. 447 U.S. 74, 88 (1980). In *PruneYard*, this Court held that anti-war protestors were permitted to pass around petitions in a mall despite the mall having a policy that prohibited all public expressive activity. *Id.* at 77, 87–88. This Court's reasoning was based on the notion that the protestors' speech could not be attributed to the mall, which was reinforced by several factors. *Id.* at 87. Namely, this Court found that the mall was an area that the public could freely visit, and the protestor's speech did not reflect that of the mall's owners who could have posted signs near the protestors that disavowed their message. *Id.*

While there are some analogous comparisons to *PruneYard* and the case at hand, it is generally distinguishable. Namely, the mall in *PruneYard* is not analogous to social media platforms. The primary purpose of malls is for commercial activity, whereas the primary purpose of a social media platform is to provide a place of discussion. While speech and discussion can occur at malls, that is not their primary function, just as shopping and commercial activity is not the primary purpose of social media platforms. Thus, although the public can visit a mall whenever they want, their purpose of visiting is not the same as interacting with the public on social media.

However, many malls are also private actors, and receive protections under the First Amendment. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). If malls are considered to be analogous to social media platforms, the last factor in *Pruneyard* supports appending commentary, which § 528.491(b)(1)(i) of the SPAAM Act seeks to prohibit. *Id.* at 87, R. at 6. Putting up a sign directly within the proximity of a petitioner to disavow their message in stating their own is the functional equivalent "adding a commentary." *Pruneyard* 447 U.S. at 87;

R. at 6. Essentially, in relying on the last factor in *PruneYard*, social media companies should be able to add their own commentary to messages that they disagree with. *Pruneyard*, 447 U.S. at 87.

This Court expanded on *Pruneyard* in *Rumsfeld v. F. for Acad. & Inst. Rts., Inc*., where it held that law schools' First Amendment rights were not violated when they were given the choice to allow military recruiters on their campuses or lose certain federal funds. 547 U.S. 47, 64 (2006). This Court reasoned that because the schools did not actively speak by hosting interviews and recruiting receptions, having recruiters come to campus is not "inherently expressive." *Id.* Additionally, this Court reinforced the holding from *PruneYard*, and stated that nothing about having the military recruiters come to the law schools suggested that the schools agreed with the recruiters' speech. *Id.* at 65. Like *PruneYard,* this case is also partially analogous regarding how social media platforms function, but is also more distinguishable overall. For example, as social media platforms and some law schools are private actors, they receive First Amendment protections. *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Like the law schools in *Rumsfeld* could choose which recruiters they allowed to access their campus, social media companies should have the ability to decide to what extent users are allowed access to their platforms. *Rumsfeld*, 547 U.S. at 58.

Like the mall in *PruneYard* however, law schools are not very analogous to social media platforms either. Law schools function first and foremost for the purpose of legal education, which differs from social media platforms which are generally to provide a forum for communication. While discussion often occurs at law schools, they exist primarily to teach individuals the law, and not to provide a forum for social discussion. Furthermore, law schools and universities in general receive federal funds to support them in providing a quality education, and it follows that certain governmental funds should be premised on allowing certain governmental officials to recruit on

their campuses. In the case at hand, social media companies are not just being denied government funds to disavow their views, they are prohibited from disavowing their views almost completely. R. at 6–7. In essence, *Pruneyard* and *Rumsfeld provided* a choice for an actor to disavow views it disagreed with, whereas the SPAAM Act virtually takes away all of the power of social media companies to disavow views it disagrees with. *PruneYard*, 447 U.S. at 87–88; *Rumsfeld*, 547 U.S. at 58; R. at 6–7.

C. Because the four factors for a preliminary injunction under *Winter v. Nat. Res. Def. Council, Inc.* are met and the SPAAM Act fails intermediate scrutiny, it must be enjoined.

As held in *Winter v. Nat. Res. Def. Council Inc.*, four factors must be met in order for a preliminary injunction to be a proper remedy: 1) a plaintiff must show that she is likely to succeed on the merits; 2) a plaintiff must show that she will suffer irreparable injury without preliminary relief; 3) a plaintiff must show that the balance of equities favors her; and 4) a plaintiff must show that a preliminary injunction would serve the public interest. 555 U.S. 7, 20 (2008).

1. Headroom has shown that it is likely to succeed on the merits.

As demonstrated above, Headroom is likely to succeed on the merits of this case because it can establish that the SPAAM Act violates Headroom's First Amendment protections as a private actor by interfering with its ability to moderate content on its platform.

2. Headroom can show that it will suffer irreparable injury without preliminary relief.

As held by this Court in *Elrod v. Burns*, any loss of First Amendment freedoms constitutes as an irreparable injury, no matter how long the deprivation existed. 427 U.S. 347, 373 (1976). There, this Court held in *New York Times Co. v. United States* that any restraints on expression by the government must be imposed with sufficient justification. 403 U.S. 713, 714 (1971). Furthermore, if a state creates statute that leads to a risk of injury for a private actor based on First

Amendment grounds, the statute may be enjoined. *Meese v. Keene*, 481 U.S. 465, 476–77 (1987). Here, § 528.491(d)(3) of the SPAAM Act requires that violations be remedied by injunctions or fines of up to $10,000 per infraction. R. at 6–7. Because Headroom has over seventy-five million monthly users, the fines from infractions will easily cause irreparable injury to Headroom. R. at 3. Headroom's use of their algorithms would only increase these fines because they automatically detect content that violates their guidelines and alters or removes it regularly. *Id.* at 6–7. Without direct human control, the algorithms could detect and remove large amounts of content that goes against community standards, which could thereby drastically violate the SPAAM Act and lead to many fines.

3. Headroom can show that the balance of equities favors it.

As stated in *Amoco Prod. Co. v. Vill. of Gambell*, courts must consider claims of injury for each side and determine the effect the injury will have on the other side. 480 U.S. 531, 542 (1987). Here, the State of Midland's injury will be allowing social media platforms to "suppress free speech" and ruin the "hardworking Midlandians' livelihoods under the guise of moderation." R. at 5. While these claims for injury are not completely without merit, the injury for social media companies is more concrete. Social media platforms risk being subjected to violations of First Amendment freedoms, as well as potential fines of $10,000 per infraction. R. at 6–7. As such, it is likely that the balance of equities will favor Headroom.

4. Headroom can show that a preliminary injunction would serve the public interest.

This Court in *Weinberger v. Romero-Barcelo* held that courts should consider what public consequences would arise if a preliminary injunction was to go into effect. 456 U.S. 305, 312 (1982). Here, if a preliminary injunction went into effect, not much would change. Social media platforms would likely continue to make minimal commentaries on posts that contained

misinformation or went against their community guidelines. Additionally, anyone who posted content that egregiously violated community guidelines would not be allowed to make further posts. As the government has an interest in making sure that speech is being regulated equitably, a preliminary injunction will serve the interest of the public.

5. The SPAAM Act fails intermediate scrutiny because it is not narrowly tailored, nor does it forward an important state interest.

In addition to meeting the four factors for a preliminary injunction under *Winter v. Nat. Res. Def. Council Inc.*, the SPAAM Act also fails intermediate scrutiny, which is applicable because the Act is content neutral and applies to all social media companies equally. *City of Austin v. Reagan Nat'l. Adver. of Austin, LLC*, 142 S. Ct. 1464, 1470 (2022). To pass intermediate scrutiny, the act must be "narrowly tailored to serve a significant governmental interest." *Id.* at 1475; *Clark v. Jeter*, 486 U.S. 456, 461 (1988). While social media companies are not given absolute First Amendment protections like all private actors, the extent to which they are allowed to regulate speech is not an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). As held in *Hurley*, the law is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." 515 U.S. 557, 579 (1995). Here, the SPAAM Act has no important governmental objective to disallow social media companies from moderating content on their platforms.

Likewise, the provisions under the SPAAM Act are not narrowly tailored due to overbreadth in the types of restrictions of social media companies' editorial judgment and speech as a whole. *See NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1227 (11th Cir. 2022). In *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n*, this Court held that including opposing messages in a monthly newsletter sent out with billing envelopes was not a narrowly tailored means of furthering a

compelling state interest because it forced association with beliefs they disagreed with. 475 U.S. 1, 5–6, 20–21 (1986). Because the regulations in the SPAAM Act effectively force Headroom and other social media companies to allow speech that they disagree with to remain on their platforms, the regulations are not narrowly tailored. R. at 4.

CONCLUSION

While some circumstances exist where private actors' speech may be constrained by the government, they are far outnumbered by the circumstances where private actors' speech and expression are protected. The circumstances in which private actors' speech may be restricted include common carriers, such as telephone and broadband internet providers, who must provide nondiscriminatory access to their services. Other circumstances include commercial speech intending to deceive customers. So long as the speech restrictions forward an important state interest, they can be found to be permissible and in accordance with the First Amendment.

Here, the restrictions under the SPAAM Act do not fall in line with these circumstances described. Major social media companies are not common carriers and retain "editorial discretion," which states cannot infringe upon. Additionally, social media companies cannot be compelled to disclose information that would be controversial and unduly burdensome, or if it is not commercial speech intended to deceive customers. Lastly, the SPAAM Act unconstitutionally prohibits social media companies from moderating content in a way that it is completely free to do as a private actor. It effectively compels social media companies to speak by prohibiting them from exercising their right to take action in response to violations of their community standards. The enforcement of the SPAAM Act is not narrowly tailored to further an important governmental objective, and thus does not pass intermediate scrutiny. Because the SPAAM Act seeks to overly regulate the liberties of social media companies as private actors, it must be enjoined.

It is for these reasons that this Court should reverse the holding of the Court of Appeals, grant a permanent injunction of the SPAAM Act, and remand for further proceedings not inconsistent with this opinion.

Respectfully submitted,

/s/ _____

Attorney for Petitioner

CERTIFICATE OF SERVICE

On October 9, 2023, I filed this brief this through the Court's ECF system. Opposing Counsel has therefore been served. I will also send a paper copy to Mr. Sinclair at the following address:

*/s/*_____

Attorney for Petitioner