TEAM 2

No. 23-386

IN THE

Supreme Court of the United States

OCTOBER TERM 2023

❖

HEADROOM, INC.,
Petitioner,

v.

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

❖

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

BRIEF FOR RESPONDENT

TEAM NUMBER 2
Counsel for Respondent

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II. Does *Zauderer*'s rational basis standard apply to a provision requiring social media companies to make factual disclosures that inform consumers of the terms under which a social media product is available and are intended to protect consumers?

III. Under the First Amendment, may states prohibit major social media companies from restricting access to their services based on users' viewpoints when the companies are not compelled to speak, nor are restricted to speak, and states have an important interest in promoting the exchange of free speech and information?

STATEMENT OF THE CASE

Midland is a state committed to protecting and encouraging the free speech of its citizens. R. at 5-6. Headroom, Inc., ("Headroom") on the other hand, is a "social media giant[]," accused of gatekeeping the speech of its seventy-five million monthly users on its vastly popular online platform. R. at 3-5. Despite claiming to provide a platform for "everyone," prominent users of Headroom contend the corporation has silenced them due to their political and social viewpoints. R. at 2-5. These accusations stemmed from the banning and demonetization of a wide range of users' accounts who depend on the social network "to support their businesses and livelihoods." R. at 3. Some citizens affected by Headroom's censorship include a political commentator, a fashion start-up entrepreneur, and a movie critic. R. at 4-5. The livelihood of those individuals and the free exchange of ideas and opinions of millions more are at stake in this case.

Similar to other social media companies, Headroom offers a service for individuals to create profiles, post content, and interact with other users. R. at 3. Beyond posting content, users can monetize their posts, solicit advertisers to sponsor their accounts, and otherwise financially benefit from their following and engagement on the platform. *Id.* Consequently, Headroom has become a hub for tech savvy individuals with an entrepreneurial spirit. *Id.* For example, Miz Everly—the owner of fashion company WhimsiWear—relies on Headroom to direct online users to her virtual store through posts and advertisements. R. at 4-5. Another user, Max Sterling, has built a large following on the platform by posting ten-to-fifteen minute monologues on political and social topics. R. at 4. If an individual has an idea, or an opinion, Headroom claims to "provide a space for [them] to express themselves to the world." R. at 2.

Headroom relies on an algorithm to decide what posts a user sees and deprioritizes posts it does not want users to view. R. at 3. Primarily, the algorithm will deprioritize information deemed

to violate Headroom's Community Standards—which all users must agree to before joining the platform. R. at 3-4. The Community Standards further the platform's "mission" of "ensur[ing] a welcoming community" where "all are respected and welcome." R. at 2-3. Generally, the standards ban illegal content and a wide range of information that Headroom claims is "disinformation." R. at 3-4.[1]

When Headroom decides a user has violated its Standards, they can demonetize the users' accounts or ban the individual from accessing the network. R. at 4. While many users depend on the platform for income, the Record does not indicate that they can appeal any ban or demonetization. *See* R. at 1-6. One example of this process involves Ava Rosewood, a wildly popular user of Headroom who runs a successful move site. R. at 5. Ava contends Headroom banned her account after she spoke out in favor of a controversial documentary about immigration to Europe. *Id.* In 2022, Ava testified to Midland lawmakers alongside other prominent Headroom users all alleging they were discriminated against for their viewpoints by the platform. R. at 4-5.

Reacting to this testimony, Midland's state representatives introduced legislation to curb censorship by Headroom and other "tech behemoths" and prevent Headroom from "ruining hardworking Midlandians' livelihoods." R. at 5. To "establish a system of oversight that guarantees the protection of civil liberties," Midland Governor Michael Thompson signed the Speech Protection and Anti-Muzzling Act ("Act") into law. *Id.* The Act places a much-needed check on "unaccountable companies that threaten individuals' livelihoods." *Id.*

[1] Headroom's Standards forbid users from creating, posting, or sharing content that either explicitly or implicitly 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. Additionally, the Community Standards ban a range of information that Headroom deems to be "disinformation."

The Act restricts market dominant social media platforms with over twenty-five million monthly users from "alter[ing] or remov[ing] users' content." R. 5-6. It also requires platforms to publish their "community standards" and make factual disclosures of their enforcement decisions. R. at 6. Legislators championed these measures as a way to hold social media companies accountable and "ensure the protection of our democratic values." R. at 5. Platforms that violate a user's rights under this Act are held accountable through injunctions or fines totaling $10,000 a day per infraction. R. at 6-7.

On March 25, 2022, Headroom wrongly filed a pre-enforcement challenge against Midland in the United States District Court for the District of Midland which erroneously granted a preliminary injunction. R. at 7, 15. In response, Midland appealed, and the Thirteenth Circuit Court of Appeals reversed and vacated the district court's erroneous injunction. R. at 19. Headroom appealed to the Supreme Court who Midland, now, respectfully asks to affirm the Circuit Court's reversal. R. 21.

SUMMARY OF THE ARGUMENT

The judgment of the Court of Appeals should be affirmed on all three grounds. The Court of Appeals held that: (1) social media companies are common carriers; (2) *Zauderer v. Off. of Disciplinary Counse of Supreme Court of Ohio* applies; and (3) Midland is not powerless to require social media companies to host third party speech. 471 U.S. 626 (1985). This holding supports Midland's decision to protect its citizens from overly restrictive censorship. Accordingly, this Court should affirm.

First, this Court should classify major social media companies as common carriers subject to fewer First Amendment protections. Social media platforms are largely analogous to private entities like, telephone companies, email providers, and transportation companies that are firmly

designated as common carriers by the courts. Similar to these entities, major social media companies, like Headroom, hold themselves out to serve all members of the public indiscriminately—usually with no bar to entry, provided users agree to a boilerplate term of service.

Additionally, with over seventy-five million monthly users, Headroom holds a dominant position in the market creating a monopoly effect in which users have come to rely on the company's services. Finally, social media companies like Headroom play a pivotal economic and social role in society. Like other common carriers, this means Headroom is affected with a public interest because people rely on the platform to connect with others, access news, build their businesses, and otherwise express themselves in the modern-day public square. Consequently, Headroom and other major social media companies should be classified as common carriers.

Second, the Act's disclosure requirements are commercial speech because they are intended to inform consumers about social media companies' services. Because these requirements are uncontroversial, factual disclosures about the terms of a platform's community standards and enforcement decisions, the rational basis standard in *Zauderer* applies. Under *Zauderer*, the Act's factual disclosure requirements are a rationally-related regulation that furthers Midland's legitimate interest in protecting consumers and safeguarding civil liberties.

Finally, requiring Headroom to provide users nondiscriminatory access to its services does not infringe on its freedom of speech because it is neither compelled to speak nor prohibited. The Act does not compel speech because it does not affect Headroom's alleged speech since hosting millions of users' disconnected views is not expressing a coherent and cohesive message. Even assuming Headroom communicates a message, requiring it to host all users regardless of their viewpoint aligns with the platform's message, not interferes with it. Additionally, the hosted users'

speech is not imputed on Headroom because it can expressly disavow any endorsement of their messages. Furthermore, Headroom is not restricted from speaking because its forum has infinite space to host all protected users' speech alongside its own. Additionally, given its unconstrained forum and algorithm flagging users, Headroom is not speaking when it censors users. Thus, prohibiting Headroom from censoring protected users is not restricting its speech.

Moreover, even if Headroom's right to freedom of speech is infringed, the Act is nonetheless constitutional because it satisfies intermediate scrutiny. Protecting its citizens' civil liberties and livelihoods is an important government interest, as countless Midlandians depend on social media to engage in national discourse and support their businesses. Additionally, the provision is tailored to protect all users, except those expressing illegal or patently offensive messages—regardless of their viewpoint—and to regulate only market dominant social media companies. Therefore, the Act does not burden substantially more alleged speech than necessary. For these reasons, the Court should affirm the Thirteenth Circuit.

ARGUMENT

"*Without freedom of thought, there can be no such thing as wisdom; and no such thing as public liberty; without freedom of speech.*"[2]

Before this Court, social media goliath, Headroom, attempts to "argue that buried somewhere in the person's enumerated right to free speech lies a corporation's *unenumerated* right to *muzzle* speech." *NetChoice v. LLC v. Paxton*, 49 F.4th 439, 445 (5th Cir. 2022) [hereinafter *Paxton*]. This argument presents chilling implications where a single corporation can control the views and opinions that over seventy-five million Americans can receive and express. *Id.* To

[2] Benjamin Franklin, The New-England Courant, July 9, 1722.

protect against such implications and adhere to the wisdom and public liberty envisioned by the drafters of the First Amendment, this Court should affirm the Court of Appeals decision.

"A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). The judicial system has sought to protect the right to speak in this spatial context since the amendment's inception. *Id. "*While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular. *Id.* (citation omitted).

With seven in ten American adults using at least one Internet social networking service to communicate, exchange ideas, and express opinions, social media platforms have become the modern public square. *Id*. Social media companies now have the capacity to exert just as much—if not more—influence over the expressions and opinions of individual citizens than any government ever has. Consequently, when a power yielding corporation seeks to infringe upon the free speech of citizens, it is imperative that the legislative and judicial branches react accordingly. The SPAAM Act represents such an appropriate reaction in response to a social media company's repressive censorship policies.

This Court should affirm the Thirteenth Circuit's opinion to prevent other social media goliaths from repressing the voices of all American citizens for three reasons. *First*, major social media companies are common carriers that are subject to fewer First Amendment protections. *Second*, Midland can require commercial actors, like Headroom, to disclose factual information that is reasonably related to a legitimate state interest under *Zauderer v. Off. of Disciplinary Counsel.* 471 U.S. at 651. *Third*, Midland can prohibit major social media companies from

discriminating against users' viewpoints because social media companies' free speech is not infringed, as they are not compelled nor prohibited to speak, and the SPAAM Act nonetheless satisfies intermediate scrutiny for any alleged infringement.

I. Major social media companies that: (A) hold themselves out to the public indiscriminately; (B) possess substantial market power; (C) and are "affected with a public interest" should be recognized as common carriers by this Court.

Common carriers "receive a lower level of First Amendment protection than other forms of communication." *See, e.g., NetChoice v. AG, Fla*, 34 F. 4th 1196, 1220 n. 17; *U.S. Telecom Ass'n v. FCC,* 825 F.3d 674, 740 (D.C. Cir. 2016) ("[c]ommon carriers have long been subject to nondiscrimination and equal access obligations akin to those imposed by the rules without raising any First Amendment question"); *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 378 (1984) ("[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties").

At its core, the common carrier doctrine vests "[S]tates with the power to impose nondiscrimination obligations on … communication providers that hold themselves out to the public. *Paxton*, 49 F. 4th at 469. Historically, a common carrier was an entity that held itself out to transport goods and services for the public at large. *Id.* at 469-70. This definition has evolved to include entities that "make a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *NetChoice, LLC v. AG, Fla*, 34 F.4th 1196 (11th Cir. 2022) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979)). Importantly, these entities don't "make individualized decisions, in particular cases, whether and on what terms to deal." *Id.* This Court has also noted the definition may apply to "business[es], [that] by

circumstances and its nature ... rise from private to be of public concern." *See German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411 (1914).

When the common carrier doctrine was established over a 100 years ago, the premise of social media would have seemed fanciful. Yet, this Court was still cognizant of the dangers private entities could cause to the public without adequate government regulation. *Id.* Social media companies, like Headroom, that restrict free speech rights of its users have now become the public concern contemplated by *German Alliance*. The Fifth Circuit recognized this danger and recently held that major social media companies can be regulated as common carriers due to their size and ability to suppress speech. *See Paxton*, 49 F.4th at 445. The Eleventh Circuit, however, disregarded this reasoning, holding that States cannot regulate social media companies as common carriers because they are not already common carriers. *NetChoice*, 34 F.4th at 1221 (explaining that would give the "government authority to strip an entity of First Amendment rights merely by labeling it a common carrier."). This holding, however, is entirely inconsistent with the evolving nature of the common carrier definition. *See Paxton*, 49 F.4th at 495 (noting over time "common carrier nondiscrimination obligations were extended from ferries, to railroads, to telegraphy, to telephony, and so on.").

To prevent other circuits from making the same mistake, this Court should join the Fifth Circuit and label major social media companies, like Headroom, as common carriers. The Court should do so for three reasons: *First*, Headroom holds itself out to serve the public indiscriminately by advertising themselves as "a space for everyone to express themselves to the world." *See e.g, Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976); *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014) (reaffirming the "'requirement of holding oneself out to serve the public indiscriminately'" as the "basic characteristic" of common carriage). *Second*,

Headroom exerts substantial market power with over 75 million users. *See Biden v. Knight First Amendment Inst.,* 141 S. Ct. at 1222, 1224 (2021) (Thomas, J., concurring) ("the analogy to common carriers is even clearer for digital platforms that have dominant market share"). *Third*, Headroom plays a central and economic role in society so is "affected with a public interest." *Paxton*, 49 F.4th at 471. Collectively, these characteristics support the conclusion that Headroom is a common carrier.

A. Headroom is a common carrier because it serves the public indiscriminately by offering its services to anyone that agrees to its Community Standards.

This Court should conclude that Headroom holds itself out to serve the public indiscriminately because it offers its services to *anyone* that agrees to its Community Standards. *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016) (quoting *Verizon*, 740 F. 3d at 651) (The basic characteristic of common carriage is the "requirement [to] hold oneself out to serve the public indiscriminately"). This requirement prevents common carriers from making individualized decisions, in particular cases, whether and on what terms to deal. *U.S. Telecom Ass'n.*, 825 F.3d 740.

In *Paxton*, the Fifth Circuit reviewed a Texas statute that generally prohibited large social media platforms from censoring speech based on the viewpoint of its speaker. 49 F.4th at 439. In concluding that social media companies are common carriers, the Court held that social media platforms hold themselves out to serve the public because "they permit any adult to make an account and transmit expression after agreeing to the same boilerplate terms of service." *Id.* at 474. By doing so, they've represented a "willingness to carry [anyone] on the same terms and conditions." *Id.* (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960).

Headroom's stated mission is to "provide a space for *everyone* to express themselves to the world." R. at 2 (emphasis added). To join the platform, users must agree to Headroom's

Community Standards, which "ensure a welcoming community" where "*all* are respected and welcome." R. at 3 (emphasis added). This language highlights Headroom's openness to serving *all* members of the public. Once a user has agreed to Headroom's boilerplate terms of service, there are no other requirements they must meet to create an account, nor are there different terms of service for different users. R. at 3-6; *see also Paxton*, 49 F.4th 474 ("the relevant inquiry isn't whether a company *has* terms and conditions; it's whether it offers the "*same* terms and conditions [to] any and all groups.") (quoting *Semon*, 279 F.2d at 739). Consequently, because Headroom offers the same terms and conditions to everyone, and there is no other bar to entry, provided they agree to the Community Standards, Headroom represents a willingness to carry anyone.

To the extent Headroom argues that they are not open to the public because they censor and otherwise discriminate against certain users and expression, that argument also carries little weight.[3] Entities that are regulated as common carriers have historically discriminated against certain users while still keeping the common carriage designation. *See Id.*; *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987) (phone companies are privileged by law to filter obscene or harassing expression); *William v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975) (Transportation providers may eject vulgar or disorderly passengers, yet States may nonetheless impose common carrier regulations prohibiting discrimination).

As such, Headroom holds itself indiscriminately out to serve the public—arguably the most weighted historical characteristic of common carriage. *See* Ingate v. Christie, 3 Car. & K. 61, 63,

[3] Headroom's Standards forbid users from creating, posting, or sharing content that either explicitly or implicitly 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. Additionally, the Community Standards ban a range of information that Headroom deems to be "disinformation."

175 Eng. Rep. 463, 464 (N. P. 1850) ("[A] person [who] holds himself out to carry goods for everyone as a business . . . *is a common carrier*") (emphasis added).

B. Headroom is a common carrier because it possesses substantial market power.

With over 75 million monthly users, and unique financial possibilities for those users, Headroom has established itself as a monopoly power in the social media space. "One of the most frequently asserted definitions of common carriers turns on the presence of monopoly power." Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality Digital Platforms, and Privacy*, 1 J. Free Speech L. 463, 466 (2021); *See also Biden,* 141 S. Ct. at 1222, 1224 (Thomas, J., concurring) ("the analogy to common carriers is even clearer for digital platforms that have dominant market share"); *U.S Telecom Ass'n*, 855 F.3d at 426 ("Absent a demonstration that an Internet service provider possesses market power in a relevant geographic market … imposing common-carrier regulations on Internet service providers violates the First Amendment.").

While early common carriers, like telephone companies, may not have had "legal monopolies, they were still able to monopolize geographic areas due to the nature of the telephone business. *Paxton*, 49 F.4th at 476. Similarly, no law gives social media companies monopoly power, yet "network effects entrench these companies" because it's practically impossible for a competitor to reproduce the network that makes an established Platform useful to its users. *Id.* (quoting *Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring)). And in assessing whether a company exerts substantial market power, what matters is whether the alternatives are comparable. *Biden*, 141 S. Ct. at 1225 (Thomas, J., concurring).

In this case, Headroom has established its value by providing users options beyond simply posting content. Users can monetize their posts, solicit advertisers to sponsor their accounts, and

receive donations from other users. R. at 3. Consequently, users like Mia Everly and Max Sterling have come to rely on the platform to make a living. R. at 4-5. These individuals have spent years building their brands on the platform and cannot simply transfer to a different platform and maintain their success. The Fifth Circuit provided an apt example of this issue. "To effectively monetize, say, carpet cleaning instructional videos (a real niche), one needs access to YouTube. Alternatively, sports "influencers" need access to Instagram. And political pundits need access to Twitter. It's thus no answer to tell the censored athlete, as the Platforms do, that she can just post from a different platform." *See Paxton*, 49 F.4th at 476. That analogy carries weight here. Headroom users rely on the platform for its niche offerings and alternative platforms are not a viable option; thus, highlighting Headroom's entrenched market power.

When a social media company possesses "substantial market power," they also possess a dangerous ability to exclude and filter speech. *See Biden*, 141 S. Ct. at 1224-25. With over 75 million users, Headroom has the capacity to regulate the speech of more individuals than the California and Texas legislature combined.[4] Few entities beside the United States government have such power—and the United States government is subject to First Amendment restrictions for that reason.

Here, Headroom has both an astronomical user base and an entrenched market power by way of its unique financial offerings. Both of which point to a common carriage definition label for the platform.

[4] *Population of the US States and Principal US Territories*, Nations Online Project, https://www.nationsonline.org/oneworld/US-states-population.htm (last visited Sep. 26, 2023) (recording the California population as 39,029,000, and the Texas population as 30,029,000).

C. Headroom is "affected with public interest" because it plays a central social and economic role in the lives of Midland citizens.

Because users rely on Headroom to stay connected with one another and support their livelihoods, the platform is affected with public interest. One factor courts focus on in the common carriage determination is whether the communication firm is "affected with a public interest." *Paxton*, 49 F. 4th at 471. The primary consideration in this test is whether a company's service plays a central *social* and *economic* role in society. *See id.* (emphasis added)*; Hockett v. Indiana*, 5 N.E. 178, 182 (1886). With seventy-five million users worldwide, Headroom plays a pivotal role in both; helping individuals stay connected while also providing a platform to monetize content.

First, Headroom plays a pivotal social role in society by connecting millions of people and providing a platform for those users to express themselves. The Supreme Court has noted that social media platforms "for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham*, 582 U.S. at 107. In fact, a recent survey indicated that approximately half of Americans get their news from social media companies.[5]

Consequently, a social media company like Headroom—with over seventy-five million users relying on the platform for news, connecting with friends, and expressing themselves—plays a central social role in society. *See Paxton*, 49 F.4th at 476 (holding social media platforms play a central social role in society when "numerous members of the public depend on social media platforms to communicate about civic life, art, culture, religion, science, politics, school, family, and business.")

[5] Mason Walker, *News Consumption Across Social Media in 2021*, Pew Research Center (Sept. 20, 2021), https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/.

Second, Headroom plays a central economic role in society because many users rely on the monetization benefits offered on the platform to support their livelihoods. Social media companies can affect the economy in a variety of ways. For journalists and news outlets that make their living through the distribution of information, "access to [p]latforms can be indispensable to vocational success." *Id.* at 476. Primarily because Platforms offer the most effective way to disseminate information to the masses. *Id.* (noting the same is true for all sorts of cultural figures that rely for much or all of their income on monetizing content on platforms). Furthermore, companies and individuals that do not directly profit from their posts on social media platforms, still use the sites to direct traffic to their company pages. *Id.*

Here, as noted by the district court, Headroom offers users the ability to "monetize their posts, solicit advertisers to sponsor their accounts, and receive donations from other users." R. 2. Many users have taken advantage of these opportunities to build their brands and support their families. *See* R. 4-5. Additionally, users that don't directly monetize their content on the platform still use it to "support their business," by directing traffic to their company pages.[6] Thus, users are monetarily benefiting from the platform in the exact way described by the court in *NetChoice*, which highlights the pivotal economic role Headroom plays in society.

In sum, Headroom meets the primary characteristics courts have used to treat private entities as a common carrier. First, the Platform holds itself indiscriminately out to all members of the public, provided they agree to its terms and conditions. Second, Headroom holds significant monopoly power with 75 million monthly users—many of which rely on the platform for financial support they could not easily obtain elsewhere. Finally, the platform plays a pivotal social and

[6] Mia Everly—an entrepreneur and Headroom user who runs the start-up fashion company WhimsiWear— testified that purchases from her virtual store and engagement with her ads declined by thirty-four percent after she criticized a controversial presidential candidate. R. 4–5.

economic role in society by connecting millions of users and creating a space for users to monetize their content and promote their businesses. Consequently, this Court should find that the SPAM Act does not violate Headroom's First Amendment rights because they are common carriers subject to fewer First Amendment rights.

II. *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* applies to the SPAAM Act's disclosure requirements because they are non-burdensome, factual disclosures of commercial speech and rationally related to Midland's legitimate interest in protecting consumers.

This Court should apply *Zauderer* to the SPAAM Act's disclosure provision because the Act governs only commercial speech. Commercial speech is speech "related solely to the economic interests of the speakers and its audience*." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980); *see also Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (stating free flow of information about prescription drug prices is protected by the First Amendment). The court of appeals upheld a limit on the number of vendors permitted on a city's boardwalk as a constitutional restriction on commercial speech since the vendors' activity was directed to informing consumers about their product. *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011). Conversely, the Yellow Pages were deemed not commercial speech because they did not refer to a specific product. *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952 (9th Cir. 2012). Here, Headroom's disclosure requirements under the Act are directly related to its social media product and its community standards. Like in *Hunt*, the Act's disclosure requirements are designed to inform consumers about a company's social media product. Under the Act, social media companies are required to publish their "community standards" and explain enforcement decisions so consumers have a better understanding of their product. Because the disclosure requirements inform consumers about a product, this Court should find that the disclosure provision regulates only commercial speech.

This Court should affirm the circuit court's application of *Zauderer* to the Act's disclosure requirements because the disclosure requirements are uncontroversial, factual explanations of social media companies' community standards. Factual disclosures in commercial speech designed to safeguard consumers do not violate the First Amendment because constitutionally protected interests in not providing factual disclosures are "minimal." *Compare Zauderer*, 471 U.S. at 651; *with Wooley v. Maynard*, 430 U.S. 705, 712 (1977) (determining that the defendant could not be required to display the non-factual motto "live free or die" on his license plate contrary to his religious beliefs). In *Zauderer*, a lawyer advertising his services on a contingent-fee basis was required to disclose that a client may have to bear certain legal expenses even if he loses. 471 U.S. at 2281. This "purely factual and uncontroversial information" provided consumers with the "terms under which [the lawyer's] services will be available." *Id*. at 2281-82. Similarly, in *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, the government argued, and this Court agreed, that a law requiring debt relief agencies to disclose to consumers the nature and terms of their services were factual disclosures governed by *Zauderer*. 559 U.S. 229, 234 (2010). Like in *Zauderer*, the Act here is requiring social media companies to include "purely factual and uncontroversial information about the terms under which [its] services will be available." *Zauderer*, 471 U.S. at 2281-82. And unlike in *Wooley*, the Act does not require citizens to espouse any particular type of belief. Since the Act's disclosure requirements are purely factual and uncontroversial, *Zauderer* applies.

This Court should affirm the circuit court's finding that the Act's disclosure requirements are constitutional because these requirements are rationally related to Midland's legitimate interest in protecting the livelihoods of consumers who rely on Headroom's services. Under *Zauderer*, factual disclosure requirements need only be reasonably related to a legitimate state interest.

Zauderer, 471 U.S. at 2282; *see also Nat'l Electric Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal."). In *Zauderer*, this Court noted that disclosure requirements would likely only implicate First Amendment rights if the requirements were unduly burdensome. *Zauderer*, 471 U.S. at 2282. The Court reasoned the requirement was not burdensome because a person's "rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id*. at 2265. Therefore, the State's disclosure requirements advanced a legitimate interest in protecting consumers from deceptive advertising. *Id*. at 2283. This Court has similarly decided that making consumers aware that debt relief may come at the cost of filing for bankruptcy is a legitimate state interest in. *Milavetz*, 559 U.S. at 250. There, the Court noted that the law governed "only professionals who offer bankruptcy-related services to consumer debtors." *Id*. at 252. Even customer curiosity can be a legitimate state interest when disclosure enhances consumer decision-making. *See Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 647 (D. Vt. 2015).

Here, Midland's factual disclosure requirements are designed to curb "excessive censorship by tech behemoths" and protect "democratic values." R. at 5. It governs only social media companies, and these companies need only to make factual disclosures to explain their own community standards decisions. These disclosures hold companies like Headroom accountable and protect consumers by providing truthful information about why a site where "all are welcome" would ban a user who may depend on the site for her livelihood. R. at 3. Because the Act's factual disclosures are rationally related to its legitimate interest in protecting Midlandian consumers, this Court should apply its reasoning from *Zauderer* to uphold the Act.

III. Midland can constitutionally require Headroom to provide users nondiscriminatory access to its services because Headroom is not compelled nor prohibited from speaking, and the SPAAM Act nonetheless passes intermediate scrutiny for any alleged First Amendment infringement.

This Court established that when an individual opens their private property to the public, they have no "First Amendment right not to be forced by the [s]tate to use [their] property as a forum for the speech of others." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 86-87 (1980); *see Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 70 (2006). Thus, states can require private individuals to host the public's speech if the host is not compelled nor is restricted to speak. *PruneYard*, 447 U.S. at 74; *Rumsfeld*, 547 U.S. at 63; *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 10-12 (1986).

A. The SPAAM Act is constitutional because it does not compel Headroom to speak.

This Court should determine that the Act does not compel speech because prohibiting Headroom from censoring legal, non-patently offensive speech does not interfere with Headroom's message. Courts are likelier to hold that hosting mandates impermissibly compel a host to speak where "the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld*, 547 U.S. at 63; *Pacific Gas*, 475 U.S. at 12 (highlighting the importance that in *PruneYard,* there was no "concern that access . . . might affect the shopping center owner's exercise of his own right to speak"). Additionally, courts frequently determine that compelled access mandates do not interfere with a host's speech unless the host's platform communicates a collective and coherent message. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 576 (1995); *see also Rumsfeld*, 547 U.S. at 64.

For example, in *Hurley*, the South Boston Allied War Veterans Council ("Council") refused to permit GLIB, an organization of gay, lesbian, and bisexual Irish descendants, to march in its St. Patrick's Day Parade in Boston because GLIBs exclusion comported with the Council's

expression of "traditional religious and social values." 515 U.S. at 562 (citation omitted). After the Supreme Judicial Court of Massachusetts ruled that the Council must include GLIB in the parade, the Council appealed, contending that its First Amendment rights were violated because admitting GLIB affected its own message. *Id.* at 563.

This Court stressed that although the parade consisted of individual participants representing various views, the participants were nonetheless "intimately connected" to the parade's "common theme." *Id.* at 576. It also noted the stark differences to *Turner Broadcasting System, Inc. v. FCC*, which involved compelling cable operators to host specific broadcast stations, because the parade, unlike cable networks, "does not consist of individual, unrelated segments that happen to be transmitted together." *Hurley*, 515 U.S. at 576; *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 632 (1994). Thus, the Council's free speech rights were violated because "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 576, 581. Likewise, this Court concluded that a state law requiring anti-abortion clinics to inform women about state-subsidized abortions "plainly alters" the clinics' speech because they are clearly "devoted to opposing abortions" and trying to "dissuade women from choosing that option." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2368, 2371 (2018).

Conversely, in *Rumsfeld*, an association of law schools challenged an amendment that prevented the federal government from providing funds to higher education institutions that did not provide military recruiters equal access to students on campus as other recruiters. 547 U.S. at 52. The association argued that the amendment violated its freedom of speech rights because, in refusing to host military recruiters, the law schools were expressing their objections to Congress's

policy regarding homosexuals in the military. *Id.* This Court, however, underscored that the law schools' actions "were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* at 66. Thus, it unanimously held that the amendment did not interfere with the law schools' speech because the aggregation of hosting individual recruiters "lack[ed] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Id.* at 65; *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (concluding that the city newspaper expresses a message through its selection of news stories and opinions it publishes).

The Fifth Circuit found that *Rumsfeld's* reasoning applies in the social media censorship context since "the expressive quality of that censorship arises only from the [p]latform's speech. . . stating that the [p]latform chose to censor the speech and explain how the censorship expresses the [p]latform's views." *Paxton*, 49 F.4th at 461. Additionally, the court state that *Hurley* is inapplicable because in hosting and censorings users, social media platforms are not selecting "content to 'make some sort of collective point.'" *Id.* at 461 (quoting *Hurley*, 515 U.S. at 568)). Accordingly, the Fifth Circuit concluded that Texas's law restricting social media platforms from censoring users based on viewpoint does not compel the platforms to speak. *Paxton*, 49 F.4th 445, 461-62.

Here, the SPAAM Act does not interfere with Headroom's speech because Headroom lacks a coherent and collective message. Headroom's platform hosting over seventy-five million monthly users is unlike the local St. Patrick's Day parade in *Hurley,* which consisted of intimately connected parade participants that all supported a common theme. R. at 3. Nor is Headroom's goal to serve "everyone" and its status as "one of the most popular social media companies in America" comparable to the city newspaper in *Tornillo*. R. at 2. Rather, Headroom and other "social media giants" are akin to the market-dominating cable operators in *Turner I*, given that they host millions

of individual users all expressing disconnected views, with the platforms as their only commonality. R. at 3, 5. Additionally, like in *Rumsfeld*, without a detailed explanation accompanying Headroom's suppressing actions, it is unclear whether a user was censored to further Headroom's alleged expression, as observers may attribute a user's absence to the user taking a break or deleting their account. Moreover, even assuming Headroom's conduct sufficiently expresses a message, the SPAAM Act's goal to protect "citizens' free speech from unfair viewpoint discrimination" directly aligns, not interferes, with Headroom's "mission" to establish a "welcoming community" where "everyone" can "express themselves to the world." R. at 5, 2-3. This is further evident in the Act permitting censorship of "obscene, pornographic or otherwise illegal or patently offensive content" to ensure that Headroom can still uphold its Community Standards. R. at 3, 6. Accordingly, this Court should affirm the Thirteenth Circuit.

Furthermore, the Act does not affect Headroom's alleged message because it can disavow any connection to its users' views in its Community Standards. Courts emphasize that compelled hosting regulations do not interfere with a host's message when a host can "disavow any connection with a [third-party's] message." *See, e.g., PruneYard*, 447 U.S. at 88 (explaining that the mall owner can "expressly disavow any connection with the [handbiller's] message by simply posting signs" in the mall); *Rumsfeld*, 547 U.S. at 65 (concluding that compelling military recruiters access did not affect the law schools' message in part because "nothing…restricts what the law schools may say about the military's policies"). Conversely, in *Hurley*, the Council could not disclaim a connection to GLIB because it was not a "customary practice" in parades, and parade participants were "perceived by spectators as part of the whole." *Compare* 515 U.S. at 576-77; *with Turner I*, 512 U.S. at 655 (explaining that the cable operator's message is not altered partly because "it is a common practice for broadcasters to disclaim identity of viewpoint between

the management and the speakers who use the broadcast facility"). Additionally, the *Rumsfeld* Court indicated that misperception concerns may be irrelevant partly because even high school students can perceive the difference between sponsored speech and speech a host is legally required to provide. *Rumsfeld*, 547 U.S. at 65.

Here, reasonable users on Headroom are unlikely to believe that Headroom endorses every one of its "seventy-five million monthly" users' posts. R. at 3. Additionally, Headroom can post on its platform or provide in its Community Standards, which all users must agree to before joining, that Headroom does not endorse any user content. R. at 3. Unlike in *Hurley*, that disclaimer does not impact Headroom's message and is the virtual world equivalent of the mall posting a sign in *PruneYard*. Therefore, the Court should vacate the preliminary injunction because Headroom is not compelled to speak under the SPAAM Act.

B. The SPAAM Act is constitutional because it does not prohibit Headroom from speaking.

This Court should determine that Headroom's speech is not restricted because its platform can host all speech, and Headroom is not speaking when it censors users. Courts are unlikely to conclude that compelled hosting impinges a host's speech unless a host's forum has time or space constraints. *See Biden*, 141 S. Ct. at 1226 (Thomas J., concurring); *see also Tornillo*, 418 U.S. at 255-56. In *Pacific Gas*, this Court determined that compelling access on a forum with finite space interferes with a host's speech because it apportions "space" that a host "would otherwise use for its own speech." 418 U.S. at 24 (Marshall, J., concurring). Additionally, where a forum is constrained, "[t]he choice of material and the decisions made as to limitations on the size and content . . . constitute the exercise of editorial control and judgment," which is a form of speech. *Hurley*, 515 U.S. at 575; *Tornillo*, 418 U.S. at 258.

This Court, however, has consistently dictated that exercising editorial judgment requires a host to make "customary determinations" in addition to the presence of forum constraints. *See Hurley*, 515 U.S. at 575; *see also Tornillo*, 418 U.S. at 258. For example, in *Tornillo*, a newspaper company challenged Florida's "right of reply" statute that required newspapers to provide space for politicians to respond to any criticism by the newspaper. 418 U.S. at 244. The *Tornillo* Court held that given the newspaper's finite space and the newspaper being more than a "passive receptacle or conduit" for the speech of others, the newspaper exercised "editorial control and judgment." *Id.* at 258. Similarly, in *Hurley*, this Court determined that the Council exercised editorial discretion over its parade. 515 U.S. at 575. Reasoning that the parade, like a newspaper, "is more than a passive receptacle or conduit" because an admitted parade participant was the result of a "customary determination" that the participant's message was "worthy of presentation." *Id.*

Conversely, in *U.S. Telecom*, the court rejected the broadband providers' contention that they exercised editorial discretion because "[u]nlike with the printed page and cable technology, broadband providers face no such constraints limiting the range of potential content they can make available to subscribers." 825 F.3d at 743. Additionally, even absent space limitations, the broadband providers are not exercising editorial discretion because there is no attempt to offer a "curated" experience since they offer services to "substantially all" internet users. *Id*.

Notably, this Court recently stated that "[s]ocial media offers 'relatively unlimited, low-cost capacity for communication of all kinds.'" *Packingham*, 582 U.S. at 104 (citation omitted). Thus, for these digital platforms, the space constraints are "practically nonexistent . . . so a regulation restricting a digital platform's right to exclude might not appreciably impede the platform from speaking." *Biden*, 141 S. Ct. at 1226 (Thomas, J., concurring). Based on this case

law, the Fifth Circuit rejected the Eleventh Circuit's conclusion that social media companies exercise editorial discretion when they censor users to create a "welcoming community" or to "ensure all people can participate in the public conversation freely and safely." *Paxton*, 49 F.4th at 483 (explaining further that social media companies also do not exercise editorial discretion because their algorithms screen out users' posts); *NetChoice*, 34 F.4th at 1213. The Fifth Circuit pointedly remarked that the Eleventh Circuit's reasoning contravenes Supreme Court precedent and will lead to entities receiving a "First Amendment license to censor disfavored viewpoints by merely gesturing towards 'safety' or 'dignity.'" *Paxton*, 49 F.4th at 483.

Here, Headroom and other social media companies are not prohibited from speaking because, as this Court recognized, their forums have unlimited capacity for third parties' speech and its own. Moreover, given its unlimited capacity, the district court erroneously overlooked this Court's express requirements for forum limitations and customary determinations when it concluded that Headroom exercises editorial judgment. R. at 13-14. Unlike newspapers and the parade in *Hurley*, Headroom admittedly is a platform for "all" and thus is not forced to transmit or exclude specific users' posts due to size and content limitations. R. at 3.

Moreover, cultivating a defined theme or experience with customary determinations, the second requirement for editorial judgment is notably absent for two reasons. First, it is undisputed that Headroom's artificial intelligence censors users to ensure a "welcoming community." R. at 3. The same justification and conduct the Fifth Circuit expressly rejected constituted editorial judgment. Second, Headroom's artificial intelligence censoring users that violate its Community Standards is hardly making customary determinations to curate a specific theme like the Council voting and selecting participants for its St. Patrick's Day parade in *Hurley*. *Id.* Instead, Headroom, based on its own admission for providing its services to "all," like the broadband providers

servicing substantially all users in *U.S. Telecom*, is nothing more than a passive conduit for the speech of others. *Id.* Therefore, this Court should determine that the Thirteenth and Fifth Circuit correctly concluded that social media companies are not prohibited from speaking because they do not "speak" when censoring users.

Furthermore, this Court should uphold the Act because its restrictions apply regardless of Headroom's or its user's speech. Courts are unlikely to conclude that a statute restricts a host's speech when it "does not impose a content-based penalty on a [host's] speech." *Paxton*, 49 F.4th at 462; *see also Turner I*, 512 U.S. at 653-54 (noting that the "content-based access regulation[s]" in *Pacific Gas* and *Tornillo* led the Supreme Court to strike the regulations in both cases). In *PruneYard*, this Court provided that there was "no danger of governmental discrimination for or against a particular message" because the California constitutional provision indiscriminately protected all "speech and petitioning" on private property. 447 U.S. at 78, 87. Accordingly, it held that the state constitutional provision did not infringe on the mall owner's free speech. *Id.* at 88. Unlike in *Pacific Gas*, where California's commission awarded space in the utility company's billing envelopes to an interest group that opposed the company's political views. 418 U.S. at 14-15. In awarding access "only to those who disagreed with the [utility company's] views[,]" the order "impermissibly burdens" the utility company's expression, as they may refrain from speaking "to avoid controversy." *Id.* at 13-15.

Here, unlike in *Pacific Gas* and *Tornillo*, Headroom's obligations under the Act are not manifested because of Headroom's or its users' speech. Instead, the Act prohibits Headroom from censoring any users' protected speech because of their "viewpoint." R. at 12. Thus, even though users with conservative views are more likely to benefit under the Act, those users are not receiving preferential treatment because all users receive the same protections, not just the ones opposing

Headroom's viewpoints. Therefore, this Court should determine that Headroom is not prohibited from speaking because the Act does not impose a content-based penalty.

C. Even if the SPAAM Act infringes on Headroom's speech, it is still constitutional because it satisfies intermediate scrutiny.

This Court should affirm the Thirteenth Circuit because the Act promotes public discourse and is tailored to limit any burden on Headroom's alleged speech. This Court established that "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Turner I*, 512 U.S. at 642. Under intermediate scrutiny, a statute must be "substantially related" to "an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Specifically, a content-neutral regulation "will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

It is well settled that a content-neutral regulation can prevail under intermediate scrutiny even if it burdens editorial judgment. *See, e.g,. Turner II*, 520 U.S. at 214, 224-25. (upholding the must-carry regulation despite it interfering with the cable operators' editorial discretion); *Paxton*, 49 F.4th at 483. In *Paxton*, the Fifth Circuit held that the compelled hosting regulation for social media companies was constitutional even if the companies exercised editorial judgment. 49 F.4th at 489. Although a contrary conclusion to *NetChoice*, the *Paxton* court explained that the difference partly stemmed from the Texas law prohibiting "some censorship of all speakers." *Id.* at 489. In contrast, Florida's law in *NetChoice* only prohibits censoring political candidates' and journalists' speech, as well as speech concerning political candidates. *Id.* at 489; *NetChoice*, 34 F.4th at 1229. The Fifth Circuit stressed that this distinction is "highly relevant" in determining whether the laws satisfy intermediate scrutiny. *Paxton*, 49 F.4th at 489.

Additionally, this Court has recognized that a government's interest in "assuring that the public has access to a multiplicity of information sources" satisfies intermediate scrutiny. *Turner I*, 512 U.S. at 664; *see also NetChoice*, 49 F.4th at 483 (accepting the government's reliance on "protecting the free exchange of ideas and information" in upholding Texas's content moderation regulation on social media companies). That interest, the *Turner* Court emphasized, is of the "highest order" and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner I*, 512 U.S. at 663 (citation omitted). Moreover, this Court has provided that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen," and it is "clear" that "social media" platforms are the "most important places . . . for the exchange of views." *Packingham*, 582 U.S. at 104.

Thus, in recognition of ensuring access to multiple information sources, the *Turner* Court upheld the regulation that required cable operators to carry specific television channels. *Turner II*, 520 U.S. at 214, 224. Although television was "one of many means for communication," it was "an essential part of the national discourse on subjects across the whole broad spectrum of speech." *Id.* at 194, 216 (highlighting that "content-neutral regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech"). Additionally, the regulation did not burden substantially more speech than necessary because Congress exempted smaller cable operators to "confine[] the breadth and burden of the regulatory scheme." *Id.*

Here, Midland enacted the SPAAM Act to "preserve the free flow of information and protect citizen's free speech rights from undue censorship." R. at 18. The same objective this Court, the Fifth, and Thirteenth Circuit have held is an important government interest. *Id.* This interest, however, is even greater than in *Turner* since social media companies like Headroom are

the most important places for the exchange of views, and currently, "speech is increasingly being centralized in [these] unaccountable companies." R. at 5. Additionally, because Headroom is one of "the most popular social media companies in America," there is no real alternative that allows individuals to engage in the national discourse. R. at 18. Moreover, aside from protecting the most important place for exchanging views and encouraging the free flow of information, Midland also has an important interest in preventing Headroom from "ruining hardworking Midlandians' livelihoods." R. at 5. Headroom hosts over seventy-five million monthly users, and "many of its users depend on Headroom's services to support their businesses." R. at 3. The Record lists several, specific examples of the costly impacts on individuals' livelihoods merely because those individuals were censored for expressing a viewpoint. R. at 4-5.

Furthermore, Midland does not burden substantially more speech than necessary because it confined the Act to only apply to social media platforms with at least twenty-five million monthly users. R. at 5-6. Additionally, contrary to the district court's conclusion, Midland does not require Headroom to host racist speech because Headroom is still authorized to censor illegal and patently offensive speech. R. at 6. Finally, as in *Turner*, any burden on Headroom's alleged exercise of editorial discretion is insufficient to invalidate the Act under intermediate scrutiny, given its content neutrality, Midland's important interests, and attempt to confine any burdens on speech. Therefore, this Court should vacate the preliminary injunction because the Act satisfies intermediate scrutiny.

CONCLUSION

For the foregoing reasons, appellees respectfully request that this Court affirm the court of appeals judgement.

Respectfully submitted.

Team Two

October 9th, 2023.