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 20
Counsel for Respondent

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QUESTIONS PRESENTED

I. Whether a state can (1) regulate the speech of a social media platform as a common carrier under the First Amendment when the platform provides a necessary service to the public generally and (2) require a social media platform to supply factual disclosures to its users under *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) in order to prevent user deception?

II. Whether, under the Free Speech Clause of the First Amendment, a state can prohibit a social media platform from discriminating against its users based on viewpoint in order to protect civil liberties like the freedom of speech and further democracy?

STATEMENT OF THE CASE

Headroom's Censorship

Headroom, Inc. ("Headroom") is the largest social media platform in Midland with over seventy-five million monthly users and a specific mission to create an inclusive and diverse environment by allowing "everyone to express themselves to the world." R. at 2–3, 16. Users create profiles and content like other social media companies, but Headroom is unique in that it is the only platform with a virtual reality environment. R. at 3. Even more than just providing a means of communication, Headroom gives its users the ability to monetize posts, receive sponsorships from advertisers, accept donations, and promote online businesses like fashion companies. R. at 3, 5. As a result, Headroom is a "hub of business." R. at 3.

Due to its large size, Headroom utilizes algorithms to categorize and organize content created by its users. R. at 3. The algorithms prioritize content based on user preferences and data gathered by a tracking system while also deprioritizing user content identified by artificial intelligence as potential violations of Headroom's community standards. R. at 3. To use Headroom, users are required to first agree to these community standards that describe the prohibited categories of content. R. at 3. The prohibited content includes anything that explicitly or implicitly supports hate speech, violence, child abuse, bullying, harassment, self-injury, discriminatory ideas related to protected classes, and "disinformation." R. 3–4. Disinformation is "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups." R. at 4. Moreover, "disinformation can take the form of fabricated stories, manipulated facts, manipulated images or videos, and misleading narratives." R. at 4. The penalties for violating the community standards include being demonetized, deplatformed, shadow banned, and removed completely. R. at 4.

Due to Headroom's enforcement of its community standards, top users of Headroom shared the detrimental effects of their censorship with the Midland legislature and accused Headroom of discriminating against them for their viewpoints. R. at 4. For example, users had disclaimers and warnings added to their content alleging it contained bullying, harassment, racist language, and more when it related to politics. R. at 4. Similarly, their content was deprioritized after they posted content relating to current events in politics. R. at 4. Others experienced decreased engagement with business advertisements after they commented on a presidential candidate and subsequently lost profits. R. at 4–5. Accounts were even completely banned from the platform after users spoke about topics like an immigration documentary. R. at 4–5.

Overall, Headroom's actions caused the users to lose views, sales, customer engagement, and/or complete access to their accounts over their choice to discuss political and social topics. R. at 4–5.

Midland's Response

As a result of Midland citizens sharing their experiences with Headroom censoring their accounts based on their viewpoints, Midland created the SPAAM Act ("SPAAM"). R. at 5. Midland's legislature desired to protect its citizens' livelihoods and liberties through SPAAM by ensuring the dissemination of information, promotion of democratic values and restriction of a large social media platform's ability to censor speech based on viewpoints. R. at 5.

SPAAM applies to any social media platform doing business in Midland with over twenty-five million monthly users globally. R. at 5; Midland Code § 528.491(a). Under the censorship restriction section of SPAAM, social media platforms are prohibited from "censoring, deplatforming, or shadow banning" any "individual, business or journalistic enterprise" because of a "viewpoint" with an exemption for obscene and illegal content not protected by the First

Amendment. R. at 5–6; Midland Code § 528.491(c). Further, the disclosure requirement section of SPAAM requires social media platforms to supply community standards with "detailed definitions and explanations for how they will be used, interpreted, and enforced." R. at 6; Midland Code § 528.491(b). When the community standards are enforced, the social media platforms must "provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action was chosen." R. at 6; Midland Code § 528.491(b). For violations of SPAAM, individuals can pursue relief in the form of injunctions or fines totaling $10,000 a day per violation. R. at 6–7.

Nature of the Proceedings

After Midland enacted SPAAM, Headroom sought a preliminary injunction in the United States District Court of Midland ("District Court") on the grounds that SPAAM violates the First Amendment. R. at 7. The District Court ruled in favor of Headroom but on Midland's appeal, the United States Court of Appeals for the Thirteenth Circuit ("Thirteenth Circuit") reversed the District Court's judgement by ruling that SPAAM did not violate the First Amendment. R. at 15–17. The Thirteenth Circuit reasoned that SPAAM does not violate the First Amendment because social media companies like Headroom are common carriers and SPAAM's disclosure requirements are lawful under *Zauderer*. R. at 16–19. It also held that SPAAM's censorship requirements do not violate the First Amendment because they do even not implicate Headroom's speech rights but even if they do, they pass intermediate scrutiny. R. at 16–19.

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit appropriately determined that Headroom is a common carrier and that SPAAM's disclosure requirements are lawful under *Zauderer*. The First Amendment's Free Speech Clause generally prevents a state from restricting or compelling the speech of a private party. However, exceptions established by the Court include the regulation of common carriers and required disclosures.

A common carrier is a company that holds itself out to the public generally, is affected with public interest, dominates the market, and is rooted in commerce. First, Headroom holds itself out to the public generally by expressing its mission to support an open and inclusive environment for all. Next, Headroom is affected with public interest because it carries a necessary service that the public depends on throughout its infrastructure. By consequence, Headroom dominates the market with over seventy-five million monthly users and as the only social media platform with a virtual reality environment. Lastly, Headroom facilitates commerce because it provides a platform for its users to run businesses, monetize their content, and receive sponsorships while Headroom makes profits from advertisements.

Under *Zauderer*, a state may require a company to provide factual disclosures to consumers as long as the disclosures are reasonably related to the state's interest in preventing potential consumer deception. As it follows, the disclosure requirements cannot be unjustified or unduly burdensome. SPAAM's disclosure requirements are justified by the value of the information they provide consumers, not unduly burdensome because they do not contradict or prohibit Headroom's speech, and reasonably related to Midland's interest in preventing

consumer deception. As such, the Thirteenth Circuit did not err by finding that SPAAM's disclosure requirements fit under and pass the *Zauderer* test.

Nevertheless, even if *Zauderer* does not apply, the disclosure requirements are constitutional because they survive intermediate scrutiny. Content-neutral speech regulations target the outside factors other than the content of the speech and are subject to intermediate scrutiny. Content-based speech regulations focus on the specific beliefs and ideas contained within the speech and are subject to strict scrutiny. Yet, content-based speech regulations can be treated as content-neutral and subjected to intermediate scrutiny when the government's regulation primarily concerns the side effects of the speech.

Intermediate scrutiny considers whether a speech regulation furthers an important government interest and that it does so by means substantially related to the interest. SPAAM's disclosure requirements are content-neutral because they concern the effects of the speech, not a specific message within the speech. When applying intermediate scrutiny, it is shown that the disclosure requirements further Midland's important interests in preventing consumer deception and protecting free speech because they prevent Headroom from censoring its users based on their viewpoints without explanation. Accordingly, SPAAM's disclosure requirements are constitutional because they are content-neutral, or otherwise primarily target the consequences of speech, and survive intermediate scrutiny.

II.

The Thirteenth Circuit properly found that SPAAM does not violate the First Amendment Free Speech Clause through its censorship regulation.

The Free Speech Clause protects a private actor's right to refrain from speaking. Therefore, a state may only compel a private actor to host speech when the third-party speech is

not imputed to the host. Headroom does not speak by hosting third-party speech because the speech is posted on the users' private accounts, Headroom makes itself available to the public for the purpose of sharing speech, and Headroom has the opportunity to deny any third-party speech it does not agree with through its own speech.

Even if Headroom does speak by hosting third-party content, Midland can still require Headroom to host the speech because the requirement survives intermediate scrutiny. SPAAM's limitation on Headroom's censorship ability is content-neutral because it focuses on requiring Headroom to host all third-party speech in the interest of preventing discrimination, rather than requiring Headroom to host a particular category of speech based on its content. Thus, SPAAM is subject to and survives intermediate scrutiny because the requirement reasonably furthers Midland's important interests in protecting democracy and preventing violations of civil liberties.

ARGUMENT

On appeal, a district court's decision to grant a preliminary injunction is reviewed for abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). Abuse of discretion occurs when a preliminary injunction is granted based on erroneous conclusions of fact and law. *Id.* at 665. A *de novo* standard of review applies. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 867 (2005).

I. The Thirteenth Circuit correctly found that social media platforms like Headroom are common carriers and that the SPAAM Act's disclosure requirements are constitutional under *Zauderer*.

The First Amendment protects an individual's freedom of speech from oppression by the government. U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Actions by private actors, on the other hand, are generally not regulated by the First Amendment. U.S. Const. amend. I; *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). However, the government can regulate the speech of private actors that are common carriers in order to prevent discrimination. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701–02 (1979). A state can also require a private company to provide factual disclosures, a form of commercial speech, in the interest of preventing consumer deception. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). As the Thirteenth Circuit correctly determined, Midland can regulate Headroom through SPAAM because Headroom is a common carrier and the required disclosures are lawful under this Court's holding in *Zauderer*. *Id.*; *Midwest Video Corp.*, 440 U.S. at 701–02.

A. Headroom is a common carrier because it facilitates commerce, carries communication throughout its infrastructure, and holds itself out to the public.

A state can regulate the speech of a common carrier without violating the First Amendment. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984). Common

carriers are companies that provide a necessary service to the public like transportation and communication. *W. Union Tel. Co. v. Call Publ'g Co.*, 181 U.S. 92, 99–100 (1901); *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). Market dominance, an absence of individualized bargaining, and benefits received from government regulation may be indicators of common carrier status. *Midwest Video Corp.*, 440 U.S. at 701; *Knight First Amend. Inst.*, 141 S. Ct. at 1222–24; *NetChoice, LLC v. Paxton*, 49 F.4th 439, 469 476–77 (5th Cir. 2022).

Communication companies resemble traditional common carriers like railroads because they have an infrastructure that enables them to carry communications between parties. *See W. Union Tel. Co.*, 181 U.S. at 99–100; *Knight First Amend. Inst.*, 141 S. Ct. at 1224. Common carriers are "indispensable instrument[s] of commerce" that are "affected with public interest." *Hockett v. Indiana*, 5 N.E. 178, 182 (Ind. 1886); *Paxton*, 49 F.4th at 469–70, 472; *see W. Union Tel. Co.*, 181 U.S. at 95, 99–100. A company is affected with public interest when it dominates the market and provides a necessary service to the public indiscriminately. *Knight First Amend. Inst.*, 141 S. Ct. at 1223; *Paxton*, 49 F.4th at 469–70, 472. Even if it imposes rules for usage upon the public, a company still holds itself out to the public generally if the rules apply to all users equally. *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641–42 (D.C. Cir. 1976); *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739–40 (5th Cir. 1960). Therefore, communication companies like social media platforms are common carriers if they carry third-party communications throughout their infrastructure, hold themselves out to provide a necessary service to the public equally, and facilitate commerce. *W. Union Tel. Co.*, 181 U.S. at 99–100; *Knight First Amend. Inst.*, 141 S. Ct. at 1223–24; *Paxton*, 49 F.4th at 469–70, 472, 475; *Hockett*, 5 N.E. at 182.

Communication companies provide a necessary service to the public and carry information between users on an infrastructure under their control. *W. Union Tel. Co.*, 181 U.S. at 99–100; *Knight First Amend. Inst.*, 141 S. Ct. at 1224. In *Western Union,* a telegraph company was a common carrier because its services were necessary to the public and it facilitated commerce. *W. Union Tel. Co.*, 181 U.S. at 95, 99–100; *see also Hockett*, 5 N.E. at 182 (stating that communications providers are "a matter of public convenience and of public necessity" and are therefore "an indispensable instrument of commerce"). For these reasons, common carriers usually dominate the market. *Knight First Amend. Inst.*, 141 S. Ct. at 1224; s*ee Nebraska ex rel. Webster v. Neb. Tel. Co.*, 22 N.W. 237, 238–39 (Neb. 1885) (reasoning that a company's status as the only provider of a service in a region heavily suggested public dependence on the service, market dominance, and therefore common carriage obligations). As it follows, a communication company that facilitates its necessary communication service throughout its infrastructure, fosters commerce, and dominates the market is a common carrier. *W. Union Tel. Co.*, 181 U.S. at 99–100; *Knight First Amend. Inst.*, 141 S. Ct. at 1224.

Headroom carries a necessary communication service throughout its infrastructure, dominates the market, and facilitates commerce. Just like the telegraph company in *Western Union* that carried messages between its users, Headroom enables its users to communicate with each other throughout an infrastructure that supports over seventy-five million monthly users. Headroom's services are a necessary public service exactly like the telegraph services in *Western Union* because society depends on these services to communicate with each other and conduct business. Headroom further facilitates commerce by selling business advertisements and allowing users to profit from their activities on the platform through monetization, sponsorships, donations, and online businesses. Coupled with its large number of monthly users, Headroom

dominates the market as the only social media company with a virtual reality environment. In consequence, the Thirteenth Circuit correctly held that Headroom is a common carrier.

Social media platforms are affected with public interest. *Packingham v. North Carolina*, 582 U.S. 98, 107–08 (2017); *Paxton*, 49 F.4th at 475. In *Packingham*, the Court established that social media platforms are a primary source of communication and information for the public. *Packingham*, 582 U.S. at 107–08. The public relies on social media to find employment, access news on current events, conduct business, and explore "vast realms of human thought and knowledge" as the "modern public square." *Id.* This public reliance establishes common carrier obligations, which a company cannot avoid by virtue of requiring its users to accept certain rules in order to use its service. *Midwest Video Corp.*, *440 U.S. at 701*; *Nat'l Ass'n of Regul. Util. Comm'rs*, 525 F.2d at 641–42 and *Semon*, 279 F.2d at 739–40 (ruling that a requirement for consumers to accept rules before using a service does not void common carrier obligations as it is only relevant whether the same rules apply to all groups equally). Owing to the public's dependence on social media platforms, the government does not hold the platforms legally responsible for the third-party speech they carry. 47 U.S.C. § 230; *see also Paxton*, 49 F.4th at 476–77 (explaining that social media platforms are common carriers because they receive a benefit from government regulation, such as limited legal culpability for the third-party speech they host under 47 U.S.C. § 230). Due to this, social media platforms are common carriers because they are affected with public interest and receive a benefit from government regulation. *See Packingham*, 582 U.S. at 107–08; *Midwest Video Corp.*, *440 U.S. at 701; Paxton*, 49 F.4th at 476–77.

Social media companies like Headroom are affected with public interest. Akin to *Packingham*, where the Court found that social media platforms were the "modern public

square" because the public depended on them for news and communication, users rely on Headroom for news and communication. For instance, users go to Headroom for information about political issues, current events, and more. In light of this, users have established businesses like movie review sites that specialize in and profit from sharing information. Headroom users also conduct other types of online businesses through the platform, such as clothing stores, in which the users rely on Headroom to make sales. Amplifying this public dependence on the platform, Headroom holds itself out to the public by expressing its mission to support an inclusive and diverse environment for everyone. However, Headroom argues that it does not actually hold itself out to the public and instead practices individualized bargaining by requiring users to accept its community standards before using the platform. In spite of this, Headroom does not actually practice individualized bargaining because the community standards apply to all users equally and do not discriminate against or in favor of particular groups of users. Plus, Headroom receives a benefit from government regulation as they are a digital platform that is not legally responsible for the third-party speech they host. It is for these reasons that the Thirteenth Circuit appropriately ruled that social media companies like Headroom are common carriers.

Even if the Court decides that social media companies like Headroom are not common carriers, SPAAM is still constitutional because common carrier regulations of private businesses can be justifiable out of public concern for discrimination. *See German All. Ins. Co. v. Lewis*, 233 U.S. 389, 411–12 (1914) (holding that a state's common carrier regulation of fire insurance rates was lawful purely out of public concern). So, the Thirteenth Circuit's judgement correctly reflected that Midland can regulate social media platforms like Headroom through SPAAM.

B. The SPAAM Act's disclosure requirements are constitutional under *Zauderer* because they are commercial speech with a purpose of preventing consumer deception.

Commercial speech does not always involve a sale or advertisement; it is sufficient if it indirectly promotes a product or service proving that it promotes the public's interest in the flow of consumer information. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67, 69 (1983). The Court has held that commercial speech is generally protected under the First Amendment. *Va. Pharmacy Bd. v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748, 770–71 (1976). Despite this, a state may regulate commercial speech that is unlawful, misleading, or potentially deceptive. *Zauderer*, 471 U.S. at 638, 668. A state's regulation can also extend to commercial speech that is not unlawful or misleading, so long as the regulation advances a substantial government interest and does so by means directly related to the interest. *Id.* at 638; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

Required disclosures, a form of commercial speech, may be implemented by a state to prevent consumer deception as long as the requirements are constitutional under *Zauderer*. *Zauderer*, 471 U.S. at 651. *Zauderer* holds that required disclosures must be reasonably related to a government interest like preventing potential consumer deception. *Id.*; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). However, the disclosure requirements cannot be unjustified or unduly burdensome. *Zauderer*, 471 U.S. at 651. Justification considers whether the value of the information provided to consumers in the disclosures outweighs the company's interest in not providing the information. *Id.* The unduly burdensome factor is evaluated by reference to whether the required disclosures might "chill" protected commercial speech. *Id.* at 651, 670. This is not abstract regarding just any burden, but requires the consideration of only whether the disclosure requirements unduly burden protected speech and

violate a company's First Amendment speech rights. *Id.*; *Paxton*, 49 F.4th at 486. Finally, the disclosures must address a harm that is possible and not purely hypothetical, be purely factual, and relate to a topic that is not controversial. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018). Hence, SPAAM's disclosure requirements are constitutional if they qualify for and meet the *Zauderer* requirements. *Id.*; *Zauderer*, 471 U.S. at 651.

In *Zauderer*, disclosure requirements regarding an attorney's advertisements were commercial speech because the advertisements enabled the attorney to gain business. *Id.* at 631, 637. The disclosure requirements were purely factual and uncontroversial because the attorney only had to provide information about the terms under which his services were available. *Id.* at 651; *see also Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2372 (concluding that required disclosures passed *Zauderer* if they related to an actual harm that was not just hypothetical, were purely factual, and did not pertain to a controversial topic like abortion). The disclosure requirements were justified by the value of the information to the attorney's potential clients because the Court found the advertisement misleading given an average person could likely not differentiate between "fees" and "costs." *Zauderer*, 471 U.S. at 651–53. Furthermore, the attorney's speech rights were not chilled because the disclosure requirements did not prevent him from speaking and only required him to provide information he might otherwise be inclined to share. *Id.* at 650. The Court consequently decided that the disclosure requirements did not violate the First Amendment. *Id.* at 651.

SPAAM's disclosure requirements are commercial speech that reasonably target consumer deception. SPAAM's required disclosures concern the relationship between Headroom and its users as Headroom must inform its users how they could be and, if applicable, were actually censored. These disclosure requirements are just like the requirements in

Zauderer, where the attorney's growth in business depended on the information in the advertisements, because they closely relate to a user's voluntary or involuntary choice to keep using Headroom which is significant because Headroom's business value is influenced by its usage. *See Paxton*, 49 F.4th at 477 (detailing that a social media platform's success in the market is dependent on having a large number or users). Along with this, SPAAM's disclosure requirements are intended to address misinformation about what qualifies for censorship, which is parallel to disclosures in *Zauderer* that were to support the flow of consumer information and prevent confusion about the payments required for the attorney's services. It follows that SPAAM's disclosure requirements can be analyzed under *Zauderer*.

SPAAM's disclosure requirements meet the *Zauderer* standards in preventing consumer deception. Exactly like *Zauderer*, where the disclosure requirements were justified and factual because they dealt with deceptive business terms, SPAAM's required disclosures are justified and factual because they concern the actual harm of deception from Headroom's current community standards. Headroom represents itself as a diverse platform open to all viewpoints, which is an impression that likely causes users to believe they can share their personal beliefs on the platform without consequence. If Headroom censors the user, the user is left with potentially harmful consequences such as losing access to communication, information, and income. Without the disclosure requirements, Headroom will continue to censor its users without explanation and users would be left uninformed about what they did to be censored or how to prevent being censored in the first place. SPAAM's required disclosures are therefore reasonably related to the state's interest of preventing consumer deception because it requires Headroom to fully inform their users in order to prevent the deception.

Under SPAAM's disclosure requirements, Headroom's speech is not unduly burdened. Headroom is only mandated to release information they might otherwise say themselves which is information not wholly inconsistent with their current community standards, just like the requirements in *Zauderer* that were not unduly burdensome because the attorney might say the information on this own. To this extent, SPAAM's disclosure requirements do not pertain to a controversial topic, like abortion, because they relate to information already established by Headroom in its community standards and concern consumer deception which is a proper topic of disclosure requirements as established by the Court in *Zauderer*. For the reasons above, the Thirteenth Circuit did not err in finding that SPAAM's required disclosures pass *Zauderer*.

C. Even if the SPAAM Act's disclosure requirements are not applicable under *Zauderer*, they are constitutional because they pass intermediate scrutiny.

If a speech regulation does not fall into an exception to First amendment protected speech, it can still be constitutional if it passes the proper form of scrutiny depending on its category of speech regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994). Content-based speech regulations concern the specific message, viewpoint, or subject of speech while content-neutral regulations focus on the incidental effects of the speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95–96 (1972). Generally, content-neutral regulations are subject to intermediate scrutiny whereas content-based regulations are subject to strict scrutiny. *Id.* Notwithstanding, intermediate scrutiny may apply to a content-based speech regulation if the regulation was intended to address the "secondary effects" of the speech. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51–52 (1986). As such, SPAAM's required disclosures are constitutional if they are content-neutral, or alternatively consider the "secondary effects" of speech, and survive intermediate scrutiny. *Id.*; *Turner Broad. Sys., Inc.*, 512 U.S. at 641–43.

A law that regulates speech equally without consideration to a specific message is content-neutral. *Turner Broad. Sys., Inc.*, 512 U.S. at 641–43. In *Turner*, a law requiring cable companies to include all local broadcast stations was content-neutral because all stations were required regardless of their specific messages. *Id.* at 646–47; *but see Reed v. Town of Gilbert*, 576 U.S. 155, 169–70 (2015) (clarifying that a speech regulation was to be treated as content-based because it did not apply equally to all speech, as some yard signs were permitted and others were prohibited). As a result, intermediate scrutiny was applicable. *Turner Broad. Sys., Inc.*, 512 U.S. at 661–62; *see also City of Renton*, 475 U.S. at 47–48 (elucidating that intermediate scrutiny also applies to a facially content-based regulation if the government's motive for the regulation is to address the effects of the speech rather than the specific message of the speech). The Court determined that the regulation would pass intermediate scrutiny if it furthered an important or substantial government interest unrelated to censorship and was no greater than what was necessary to further the interest. *Turner Broad. Sys., Inc.*, 512 U.S. at 662. Particularly, public access to information was held to be a "governmental purpose of the highest order, for it promotes values central to the First Amendment." *Id.* at 663.

SPAAM's disclosure requirements are content-neutral because their purpose concerns the effects of the disclosures, not a specific message. Under SPAAM, the required disclosures are meant to supply Headroom's users with an explanation of how they could be or were actually censored. This is an effort by Midland's legislature to prevent consumer deception and violations of free speech rights in which Headroom must present information that is consistent with its own speech within its current community standards. The disclosure requirements apply equally to all who violate the community standards rather than to only a particular group, similar to the regulation in *Turner* that required all stations to be included in cable programming despite

their specific messages. Accordingly, SPAAM's disclosure requirements are content-neutral and subject to intermediate scrutiny. Nevertheless, even if the disclosure requirements are content-based, intermediate scrutiny still applies because the regulation's primary purpose is to address the effects of the speech. Specifically, Midland's primary motivation behind SPAAM's disclosure requirements regards the secondary effects of the speech like preventing consumer deception and free speech violations. Either way, intermediate scrutiny applies.

SPAAM's disclosure requirements survive intermediate scrutiny. After prominent Headroom users shared the harm they experienced from the unexplained censorship of their accounts, Midland created SPAAM to address deception and violations of free speech. The disclosure requirements further this important governmental interest because the disclosures are to inform users how and when they might be censored, why they were actually censored, and keeps Headroom accountable by requiring an explanation of its censorship actions. These requirements are no greater than necessary to further Midland's interest in preventing deception and free speech violations because Headroom already has community standards and looks for violations the standards. As it follows, requiring more detailed censorship descriptions in an already existing community standards and the disclosure of how a user violated the standards is not excessive. Headroom has the facilities to filter through the content of over seventy-five million monthly users, so it is not excessive or burdensome to require the platform to provide disclosures to the portion of its users that violate the community standards. In the absence of this requirement, Headroom users risk violating the community standards without knowing it and might not be able to avoid posting content that could result in censorship. In fact, the requirements are beneficial to Headroom because users would be informed enough to regulate

their own conduct and prevent violations of the community standards. Therefore, the disclosure requirements pass intermediate scrutiny.

For the foregoing reasons, the Thirteenth Circuit correctly ruled that SPAAM's disclosure requirements are constitutional.

II. The Thirteenth Circuit appropriately held that the SPAAM Act's censorship regulation is constitutional because it does not require Headroom to speak and it survives intermediate scrutiny.

The First Amendment's Free Speech Clause includes the right to refrain from speaking. U.S. Const. amend. I; *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thereby, a state generally cannot require a private actor to speak. *Wooley*, 430 U.S. at 714. For this reason, a state may only compel a private actor to host third-party speech if the speech is not attributed to the host. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87–88 (1980). Third-party speech is not attributed to the host of the speech when the host is open for public use, can disclaim any third-party speech it disagrees with, and lacks editorial judgement. *Id.*; *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 244 (1974); *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006). With this reasoning, Headroom does not speak by hosting its users' speech if it is open for public use, can disavow the third-party speech, and lacks editorial judgement. *PruneYard Shopping Ctr.*, 447 U.S. at 87–88; *Miami Herald Pub. Co.*, 418 U.S. at 244.

However, even if third-party speech is imputed to a host of the speech, the government can still enforce a regulation preventing the host from unreasonably censoring third-party speech if the regulation survives the proper form of scrutiny. *Turner Broad. Sys., Inc.*, 512 U.S. at 641–43.

A. Midland can limit Headroom's censorship ability without violating the First Amendment because Headroom does not speak by hosting or censoring third-party speech.

The First Amendment protects a person's right to decide which of their beliefs are "deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. The government cannot suppress, limit, or favor a speaker's chosen message without violating the First Amendment. *Id.*; U.S. Const. amend. I. Headroom claims that by requiring it to host third-party speech it might otherwise censor, SPAAM's censorship restriction violates the First Amendment as it requires Headroom to speak. R. at 7. To the contrary, states are permitted to require private entities, such as social media companies, "to host, transmit, or otherwise facilitate speech" because the third-party speech is not their own. *Paxton*, 49 F.4th at 455; 47 U.S.C. § 230.

The Court has established that a company is not speaking when they host third-party speech when the company can speak out against the speech they disagree with, lacks editorial judgement, and the speech does not directly contradict with the company's views. *Pac. Gas & Elec. Co. v. Pub. Util. Com.*, 475 U.S. 1, 15–16 (1985); *PruneYard Shopping Ctr.*, 447 U.S. at 87–88; *Rumsfeld v.*, 547 U.S. at 64; *Miami Herald Pub. Co.*, 418 U.S. at 244; 47 U.S.C. § 230. Thus, there is no First Amendment speech violation when a state requires social media companies, "to host, transmit, or otherwise facilitate speech." *Paxton*, 49 F.4th at 455; 47 U.S.C. § 230; *see PruneYard Shopping Ctr.*, 447 U.S. at 87–88.

Third-party speech published in a newspaper is imputed to the newspaper company through editorial discretion only when it directly controls all of the third-party speech. *Miami Herald Pub. Co.*, 418 U.S. at 244. In *Miami Hearld,* a newspaper was required to publish the message of a political candidate if the newspaper attacked the candidate's character or political

agenda. *Id.* The Court held that a newspaper cannot be required to include speech that is contrary to its view because a newspaper possesses an inherent power to "advance its own political, social and economic views" due to the acceptance of readers, support of advertisers, and "journalistic integrity of its editors and publishers." *Id.* at 255. Such a requirement might result in chilling the newspaper editor's speech because it implicates the speech of the editors given their editorial discretion. *Id.* at 257–58 (newspapers are "more than a passive receptacle or conduit for news, comments and advertising" because they exercise "editorial control and judgement"). The editors have editorial discretion because a newspaper can only fit a limited collection of materials intentionally selected by the editors, which imputes all third-party speech published by a newspaper to the newspaper and its editors. *Id.*; *see Pac. Gas & Elec. Co.*, 475 U.S. at 5 (finding that an electric company could not be required to provide space in its newsletter for parties in opposition to their views because billing envelops, like newspapers, have limited space and are a curated collection of messages selected by the company); *but see* 47 U.S.C. § 230(c)(1) (establishing that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider").

SPAAM does not require Headroom to speak because Headroom does not have editorial judgement. Unlike *Miami Hearld*, where the newspapers had editorial judgement because of their limited space to publish curated articles, Headroom's platform does not suffer from a lack of space. Instead, Headroom is able to include the content of over seventy-five million monthly users without being forced to forgo other content like advertisements. Additionally, unlike the newspapers discussed in *Miami Herald*, where the editors exercise editorial judgment in the choice of content to include, Headroom does not exercise any editorial judgment with its users'

posts. The only judgment Headroom exercises occurs after a user has posted from their personal account, where the content will only be removed if Headroom's algorithms flag it as a potential violation of the community standards. Further, Headroom's algorithms are distinctly different from the decision making of a human editor because algorithms are controlled by a computer, thereby making decisions automatically without human direction. To qualify as editorial judgement, Headroom would have to consider all speech published on the platform when they curate feeds for an individual like the editors in *Miami Herald* do when curating a newspaper. Lastly, Headroom is not curating the feeds of its users based on its own preferences, unlike the newspapers in *Miami Herald* that curated their newspaper editions based on the company's beliefs. Headroom uses the stated preferences in a user's account and data from its tracking system to curate a feed that the user might like, which does not consider Headroom's preferences at all. Therefore, Headroom is unlike the newspapers in *Miami Herald* because it is not a curator of particular message and its users' speech is not imputed to them through editorial judgement.

Third-party speech is not attributable to a host when the host is open for public use and maintains the ability to refute any speech it disagrees with. *PruneYard Shopping Ctr.*, 447 U.S. at 77, 80. In *Pruneyard*, a private company was required to allow to the public to access its property for the purpose of sharing speech. *Id.* The speech regulation was lawful because the company was open for public use and therefore no illusion that the speech was that of the company. *Id.* Moreover, the third-party speech was even less likely to be attributed to the company because the company could disavow the speech. *Id.* at 87–88. By consequence, the state was not compelling the company to speak by requiring it to host third-party speech. *Id.*

Headroom does not speak by hosting its users' speech. Parallel to *PruneYard*, which discusses private companies open for public use, Headroom is a private company that is open to

the entire public for the purpose of sharing their speech. So, just like the Court found there was no illusion that the third-party speech was the company's speech in *PruneYard*, it is unlikely that a user would impute a message generated by another user to be Headroom's speech. In fact, the user would identify the message as belonging to the specific speaker. Further like *PruneYard*, where the third-party speech was not considered the company's speech because the company could renounce the speech that it disagreed with, SPAAM does not prohibit Headroom from sharing its beliefs and disagreements with any third-party speech it hosts.

The Thirteenth Circuit subsequently did not err by finding no First Amendment violation in SPAAM's censorship restriction because Headroom does not speak by hosting the speech of its users.

B. If Headroom does speak by hosting third-party speech, the SPAAM Act can still limit Headroom's censorship ability because the regulation is content-neutral.

Content-based speech regulations are triggered by the idea or message behind the speech while content-neutral regulations do not target a specific message but instead focus on the effects of speech. *Reed*, 576 U.S. at 163–64. Intermediate scrutiny generally applies to content-neutral regulations and strict scrutiny applies to content-based regulations. *Turner Broad. Sys., Inc.*, 512 U.S. at 641–43. The Court has further explained that intermediate scrutiny may apply to content-based regulations when their purpose concerns the "secondary effects" of speech rather than regulating a specific message. *City of Renton*, 475 U.S. at 47–48. Along the same lines, a facially content-neutral regulation requiring a company to host third-party speech could have content-based penalties if the host has editorial judgment and the third-party speech contradicts its specific viewpoint. *Miami Herald Pub. Co.*, 418 U.S. at 244. With these speech regulations, intermediate scrutiny analyzes whether the regulation furthers an important or substantial

government interest unrelated to the suppression of free speech in a way that is no more restrictive than necessary to further the government's interest. *Turner Broad. Sys.*, 512 U.S. at 662; *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Subsequently, SPAAM's censorship restriction is constitutional if it is content-neutral, lacks content-based penalties, or otherwise addresses the secondary effects of speech, and survives intermediate scrutiny. *Turner Broad. Sys.*, 512 U.S. at 643; *City of Renton*, 475 U.S. at 51–52; *Miami Herald Pub. Co.*, 418 U.S. at 244.

A speech regulation is content-neutral if it applies to all speech equally. *Paxton*, 49 F.4th at 481. In *Paxton*, social media platforms were prohibited from censoring a user's speech based on their viewpoint *Paxton*, 49 F.4th at 444. The regulation was content-neutral because the regulation applied equally to all lawful speech without targeting a specific message, despite exceptions for unlawful speech given unlawful speech is not protected by the First Amendment. *Id.* at 481; *see Turner Broad. Sys., Inc.*, 512 U.S. at 641–43 (showing that a requirement for cable companies to carry all local broadcast stations was content-neutral because all stations were to be carried regardless of their specific programming). Therefore, the regulation was subject to intermediate scrutiny. *Paxton*, 49 F.4th at 444; *but see Carey v. Brown*, 447 U.S. 455, 459–60 (1980) (finding that a picketing regulation which prohibited all picketing unless it was related to employment was not content-neutral because it targeted speech based on specific messages and did not apply to all speech equally).

SPAAM's censorship restrictions do not target specific beliefs or viewpoints. Like *Paxton*, where the state regulation required social media platforms to host third-party content with the exception of unlawful speech, SPAAM's censorship restrictions apply to all lawful speech equally rather than to particular messages. It is irrelevant that Headroom would still

retain the ability to censor unlawful speech under SPAAM as this speech is not protected under the First Amendment on its own. Therefore, just like in *Paxton* where the regulation was content-neutral and subject to intermediate scrutiny, SPAAM's censorship regulation is content-neutral and subject to intermediate scrutiny.

When the host of third-party speech has editorial judgement, a facially content-neutral regulation might have content-based penalties. *Miami Herald*, 418 U.S. at 256. In *Miami Herald*, a speech regulation required a newspaper to include the speech of a political candidate if the newspaper attacked the candidate. *Id.* at 244. The regulation was ruled unconstitutional because it required the newspaper to include third-party speech that specifically contradicted its editorial judgement. *Id.* at 258. The editorial judgement imputed the third-party speech to the newspaper, which consequently subjected the newspaper to content-based penalties. *Id.* at 257–58; *Paxton*, 49 F.4th at 455 (explaining that *Miami Herald* had content-based penalties because the regulation imposed no consequence on the newspaper unless a third-party provided a particular message, causing the newspaper to be penalized with printing costs, time, and lost space for other material); *see also Pac. Gas & Elec. Co.*, 475 U.S. at 14–15 (finding content-based penalties with a regulation that required a company to publish third-party speech in its billing envelope with limited space because publication was "awarded only to those who disagree[d]" with the company); *but see PruneYard Shopping Ctr.*, 447 U.S. at 87–88 (finding that a speech regulation did not have content-based penalties because the shopping mall did not speak by hosting third-party speech, could disavow any third-party speech it disagreed with, and the regulation did not require it to specifically host speech that contradicted its views).

SPAAM's censorship regulation does not impose content-based penalties onto social media platforms like Headroom. Contrasting *Miami Herald*, where the third-party speech was

only published if it contradicted the newspaper's message, SPAAM's censorship regulation requires all lawful speech to be hosted regardless of whether Headroom disagrees or agrees with the speech. Following the reasoning in *Miami Herald*, SPAAM's censorship regulation does not have content-based penalties because it does not solely regard speech Headroom disagrees with. Further, Headroom would not experience any space limitations or burdensome extra costs in hosting the speech because Headroom already has an established infrastructure that supports over seventy-five million monthly users. Accordingly, SPAAM's censorship regulation should be analyzed under intermediate scrutiny.

Even if a speech regulation has content-based implications, intermediate scrutiny may still apply if the government's motivation behind the regulation was to address the side effects of the speech. *City of Renton*, 475 U.S. at 47–48. In *City of Renton*, a city ordinance prohibited adult movie theaters from locating near residential areas, schools, parks, or schools. *Id.* While the regulation only applied to adult movies and therefore appeared to be content-based, the Court treated it as content-neutral because the government's primary motivation behind enforcing the regulation was to control the harmful secondary effects of the speech. *Id.* at 48 ("[T]he Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that are justified without reference to the content of the regulated speech."). As a result, the ordinance was subject to intermediate scrutiny. *Id.*

The purpose of SPAAM's censorship restrictions is to address the incidental effects of the speech. Much like *City of Renton*, where the speech regulation was subject to intermediate scrutiny because it was justified by its purpose of addressing harmful secondary effects of speech, SPAAM's censorship restriction is justified by Midland's desire to prevent violations of civil liberties. After Headroom users came forward with their experiences of unexplained

censorship, Midland legislators specifically created SPAAM in response in order to prevent large social media companies from censoring the free speech rights of Midland citizens. Violations of civil liberties are harmful effects of speech, just like the ones *City of Renton* explained justified a content-based regulation being analyzed under intermediate scrutiny.

For these reasons, SPAAM's censorship restrictions would be subject to intermediate scrutiny.

C. The SPAAM Act's censorship regulation survives intermediate scrutiny because it reasonably furthers Midland's interests in ensuring access to information, protecting democracy, and preventing discrimination.

Intermediate scrutiny evaluates whether a speech regulation furthers an important or substantial governmental interest unrelated to the suppression of free speech without being greater than necessary to further the interest. *O'Brien*, 391 U.S. at 377. A governmental interest in guaranteeing access to a "multiplicity of information sources" is of central value to the First Amendment and is one of the highest government purposes. *Paxton*, 49 F.4th at 482; *see Turner Broad. Sys.*, 512 U.S. at 657 (explaining that a government may protect the "free flow of information" by regulating the speech of private entities). Specifically, this interest includes the dissemination of "diverse and antagonistic" information to the public. *Paxton*, 49 F.4th at 482. Democracy is threatened when citizens lack "civic awareness and political knowledge" while adopting "epistemic vices, such as impatience, inconsistency, confirmation bias, chronic groupthink and ego defensive mechanisms." R. George Wright, *Political Discrimination by Private Employers*, 87 U. Cin. L. Rev. 761, 780 (2019). A democracy thrives not on the censorship of ideas but on the open debate of ideas, so the government has an indispensable interest in protecting the dissemination of ideas. *Id.*

A speech regulation passes intermediate scrutiny when it is furthers a reasonable government interest in a way that is not too restrictive. *Paxton*, 49 F.4th at 485. In *Paxton*, a regulation of the censorship ability of social media companies served the government's interest in protecting the dissemination of information and preventing free speech violations. *Id.* The law regulated only the largest platforms with over twenty-five million monthly users because these entities have the most influence on the dissemination of information. *Id.* at 484–85. It was determined that the regulation was not excessive because the government's interest was strong and it only regulated just enough to achieve this goal, as all social media platforms were not targeted and the platforms that were targeted could still speak. *Id.* at 484 (a social media platform's speech is not suppressed when a regulation limits its censorship power only to the extent necessary to afford social media users the ability "to speak without suffering viewpoint discrimination."). The regulation was crucial because it was impossible to replicate the reach of the large and popular social media platforms in order to furnish an adequate alternative platform. *Id.* at 484–85. So, the regulation passed intermediate scrutiny. *Id.* at 483.

SPAAM's censorship restriction furthers Midland's important interests without being excessive. When censored by Headroom, users suffered real harm from financial losses due to a decrease in engagement with their online businesses after sharing political opinions, lost viewership after Headroom added disclaimers to their posts about current issues in politics, and were even completely banned after discussing topics such as an immigration documentary. In each situation, users were trying to spread their ideas that would permit all users to participate in discussion and formulate opinions based available information. Yet, Headroom restricted their speech even though the speech was not unlawful or within any of categories of prohibited speech in Headroom's community policies. As a result, Midland sought to prevent social media

platforms like Headroom from violating civil liberties and censoring free speech which are reasonable government interests just like in *Paxton*. SPAAM's censorship regulation is not excessive because it provides oversight only to large social media platforms while still permitting them to speak their own messages or remove speech that is not protected under the First Amendment. Thus, the Thirteenth Circuit rightfully determined that SPAAM's censorship regulation passes intermediate scrutiny

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court AFFIRM the judgment of the Thirteenth Circuit.

Respectfully submitted,

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