Docket No. 23-386

In The

Supreme Court of the United States

October Term, 2023

HEADROOM, INC.,

Petitioner,

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

Team 21
Attorneys for Respondent

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QUESTIONS PRESENTED

I. Whether social media companies should be considered common carriers to permit the State of Midland to regulate the platform in the state's interest of protecting their citizen's free speech on these social media platforms?

II. Whether the state violated the First Amendment Free Speech Clause by enacting the SPAAM Act which prevents social media companies from altering or removing users' content and requiring social media platforms to disclose community standards explaining their practices?

STATEMENT OF THE CASE

Factual Background

Headroom's role on social media platforms. Headroom, Incorporation ("Headroom") is a social media giant controlling the public debate with over seventy-five million monthly users who maintain profiles and interact on other's posts via a virtual reality environment. R. at 2-3. Headroom maintains an advertising feature whereby users can profit on the platform by monetizing posts, soliciting advertisers to sponsor their accounts, and receiving donations. R. at 3. Thus, many people rely on the platform to promote their businesses and create revenue streams that contribute to their livelihood. R. at 3. Headroom accomplishes the advertising aspect of the business by developing algorithms through its data tracking system to categorize and order the content that users see on their feeds at any given time. R. at 3. One of the primary incentives for Headroom in developing an automated algorithm is to deprioritize information that artificial intelligence flags as potentially violating Headroom's Community Standards. R. at 3.

Community Standards. The only barrier that exists in joining Headroom as a user is agreeing to Headroom's Community Standards prior to joining the platform. R. at 3. The policy behind adhering to Headroom's express standards is to "ensure a welcoming community" where "all are respected and welcome." R. at 3. Users can overstay their welcome if the algorithm detects a negative comment towards a protected class or "disinformation" exists—i.e., that a comment is "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups." R. at 3-4.

Penalties for violating Headroom's policies. If user's do not strictly comply with Headroom's Community Standards, the platform is permitted to employ harsh measures such as deprioritizing a user's content, blocking others from accessing the user's account, or even

suspending the account altogether. R. at 4. Headroom developed its own "warnings" for a potential violation by adding a comment to the user's post, viewable to all of the user's followers indicating that the post runs a risk of violating the standards along with a warning about potential upsetting content on the post. R. at 4.

Midland takes initiative and passes the SPAAM Act. Citizens of Midland began growing concerned that Headroom was discriminating against them for their viewpoints. R. at. 4. Several prominent social media users found their viewership declining at a rapid pace with warnings placed on their content for expressing disfavor on a particular controversial topic. R. at 4. To make matters worse, businesses on the platforms echoed their frustrations as they were suffering from ads declining following perceived criticism of a presidential candidate on the platform. R. at 4-5. In response to growing concern from citizens, the governor of Midland called a special session to hold hearings on Headroom's discriminatory practices. R. at 4. As a result of the hearings, two Midland state representatives introduced the SPAAM Act seeking to hold social media giants such as Headroom accountable for excessive censorship on their platform. R. at 5.

The effect of the SPAAM Act. The SPAAM Act includes two basic requirements. R. at 5. The first requirement forbids social media platforms from altering or removing user's content– effectively getting rid of censorship. R. at 6. The second requirement requires social media platforms to publish their community standards with "detailed definitions and explanations for how they will be used, interpreted, and enforced." R. at 6. When a social media platform enforces its community standards, it is required to be transparent by providing the alleged violating user a "detailed and thorough explanation of what standard was violated, how the user's content violated the platform's community standards, and why the specific action was

chosen." R. at 6. Enforcement of the SPAAM Act is vested to Midland's Attorney General Edwin Sinclair. R. at 6. Users who have suffered from viewpoint discrimination can file a complaint with Attorney General Sinclair or file a lawsuit against a social media platform. R. at 6. Headroom is actively opposing the SPAAM Act as a means to continue controlling free speech. R. at 7.

Procedural Background

District of Midland. Prominent social media users accused Headroom of viewpoint discrimination including censoring, blocking, or shadow banning their accounts. R. at 4. In response, the Midland Legislature held a special session and introduced the SPAAM Act to protect their citizens from censorship practices on social media. R. at 4. The SPAAM Act allows social media users to utilize the power of Midland's attorney general (hereinafter referred to as the "Respondent") to enforce the act by either filing a complaint or filing a lawsuit against the social media company. R. at 6. In response to the legislation, Petitioners filed a pre-enforcement challenge against the Respondent alleging that the act violates the First Amendment and requested a permanent injunction enjoining Attorney General Sinclair from enforcing the act. R. at 7.

The District Court of Maryland rejected Midland's argument and denied a preliminary injunction. R. at 15. In denying the preliminary injunction, the court found that the Petitioners are likely to succeed on the merits. R. at 15. Specifically, the court stated that the SPAAM Act violated the First Amendment by burdening Headroom's editorial judgment with disclosure requirements and by forcing Headroom to host content that contradicts its values. R. at 15. The court incorrectly held that the restrictions fail intermediate scrutiny and granted a preliminary injunction. R. at 15.

Thirteenth Circuit. On appeal, the Thirteenth Circuit Court of Appeals reversed the decision from the District Court of Maryland and vacated the preliminary injunction. R. at 16. The Thirteenth Circuit Court of Appeals held that the SPAAM's Act's requirement that Headroom provide an explanation for censoring, shadow banning, or banning an account does not violate the First Amendment as Headroom is a common carrier. R. at 17. Thus, the court found that Midland can effectively regulate Headroom to protect user's free speech. R. at 17. Additionally, the court held that the SPAAM Act survives intermediate scrutiny as regulating Headroom's censorship is substantially related to Midland's goal of protecting their own citizens' free speech from viewpoint discrimination. R. at 19.

SUMMARY OF THE ARGUMENT

We respectfully ask this Court to affirm the Thirteenth Circuit's holding that the SPAAM Act is enforceable. To preserve the right of free speech and prevent a private entity from dominating the public speech forum, the State of Midland must have the ability to regulate a massive social media giant from censoring their own users. First, the Respondent has the ability to regulate social media platforms because these platforms are considered common carriers, subject to nondiscriminatory practices. Common carriers facilitate speech instead of creating messages of their own – similar to the role of social media platforms. Second, the disclosure requirement of the SPAAM Act requiring petitioners to explain its business practices does not violate the First Amendment because the government is not compelling Headroom to speak. Petitioners have the means to disclose their policies and procedures at any given moment and must be transparent about those practices. Furthermore, implementation of the SPAAM Act does not violate Petitioner's First Amendment Free Speech rights. Petitioners cannot invoke editorial discretion when choosing who to silence on their platform. And even so, the SPAAM Act

survives intermediate scrutiny as the act is substantially related to Midland's goals of protecting its citizen's free speech from viewpoint discrimination.

Moreover, Headroom does not meet the threshold for issuing a preliminary injunction as it does not face an irreparable injury while litigation is pending. The platform has over seventy-five million monthly users, some of which are businesses who enjoy the platform for advertising purposes. Petitioners will not be harmed by following regulations that all common carriers must adhere to. Public interest strongly favors enforcement of the act as private social media companies regulating speech on important topics such as news, business, and politics is detrimental to the free speech rights of the citizens of Midland. The district court's holding that Headroom is likely to succeed on the merits as the SPAAM Act violates the First Amendment by burdening Headroom's editorial judgment is flawed as it confuses the function of social media platform's role in society. These platforms carry the messages of others and do not incur any liability in allowing views that are contradictory to Petitioner's values. Even if the platform does not agree with the view, the platform is still a common carrier who maintains a vast space for the free exchange of ideas. The State of Midland cannot afford to allow this powerful private company to regulate the free exchange of ideas merely because the viewpoint is not one that the platform agrees with.

STANDARD OF REVIEW

Whether the SPAAM Act violates Headroom's First Amendment protection is a question of law that this Court reviews de novo. *Brackeen v. Haaland*, 994 F.3d 249, 368 (5th Cir. 2021) (listing the legal standard as de novo when evaluating whether a federal statute is constitutional). Additionally, constitutional questions as well as statutory interpretation of a law are reviewed de novo. *United States v. Perez-Macias*, 335 F.3d 421, 425 (5th Cir. 2003). Therefore, the de novo

standard applies when reviewing if the SPAAM Act violates the Petitioner's First Amendment rights. *See id.* When issues of law are under review, a court applies de novo review which allows the court to reach a different outcome than the trial court based on the entire record by employing its own independent conclusions. *See Davis v. United States*, 564 A.2d 31, 35-36 (D.C. 1989); *see also State v. Madison*, 163 Vt. 390, 392 (Vt. 1995).

ARGUMENT

I. This Court should uphold the Thirteenth Circuit's decision because the State of Midland maintains the ability to regulate social media platforms to protect users' free speech rights as social media platforms are considered common carriers.

Social media platforms are considered common carriers as they 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 v. North Carolina*, 137 U.S. 1730, 1732 (2017). For many people, social media has become an essential part of their livelihoods. *See id.* at 1737. For a user to reach the maximum audience, social media platforms remain the best source to make his or her voice heard. *See id.* Thus, limiting access to one of the largest realms of public expression—i.e., social media, infringes on a user's First Amendment rights. *Packingham*, 137 U.S. at 1732. In the same way that the public square did not limit access to those who wanted to freely express their ideas in public, social media platforms cannot limit users online who want similar equal access. *Id.*

The common carrier doctrine originated "to impose a greater standard of care upon carriers who held themselves out as offering to serve the public in general." *Nat'l Ass'n of Regul. Util. Comm'r v. FCC*, 525 F.2d 630, 640 (D.C. Cir. 1976). The doctrine has maintained a long history in the legal system subjecting various businesses to special regulations, including a

"general requirement to serve all comers." *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 U.S. 1220, 1222 (2021) (Thomas, J., concurring).

As a general rule, common carriers "must afford neutral, nondiscriminatory access to their services, and must avoid unjust and unreasonable practices in that connection." *U.S. Telecomm. Ass'n v. FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017). Even though social media platforms are private companies, which are not typically considered a traditional common carrier, this Court has "suggested that regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers when a business, by circumstances and its nature, rise from private to be of public concern." *Biden*, 141 U.S. at 1223. (Thomas, J., concurring). Social media platforms have risen to the level of common carrier due to the vast reach and impact the platforms maintain. *See id.* Therefore, Respondents urge this Court to uphold the decision of the Thirteenth Circuit in finding that these social media giants should be categorized as common carriers subject to regulations limiting viewpoint discrimination to ensure that public debate flows freely even in the everchanging world of technology.

A. Social media companies distribute others speech rather than their own.

Social media platforms should be considered common carriers because the platforms hold themselves out as organizations that focus on distributing the speech of the broader public. *Biden*, 141 U.S. at 1224. (Thomas, J., concurring). This type of product differs from newspapers who develop their own speech and organize content based on their role as a "publisher or speaker." *Id.* The law treats a publisher or speaker as one who creates their own messages, not merely distributes other's messages. *Id.* Social media platforms only "carry" information from one user to another and are primarily used to communicate messages to the public at large

through the use of their "hosting function." *Id.* As Justice Kennedy predicted in *Packingham,* "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 . . . and social media in particular." *Packingham*, 137 U.S. at 1735.

Common carriers are regulated to maintain status as nondiscriminatory to serve the public at large. *Biden*, 141 U.S. at 1223. (Thomas, J., concurring). Whether or not a private company is considered a common carrier depends on the type of service it is offering. *See generally Biden*, 141 U.S. at 1223; *Hockett v. State*, 5 N.E. 178, 182 (Ind. 1886). For instance, it has long been established that telephone and shipping service companies are common carriers subject to regulation as each holds itself out to the public and offers indiscriminate services. *Hockett*, 5 N.E. at 182. In contrast, email systems and newspapers have not been recognized as common carriers as those industries elicit their own speech and make editorial decisions when it comes to organizing the content. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers*?, 1 J. Free Speech L. 377, 28 (2021).

Various courts have also found that additional industries amount to common carriers due to the services the company provides. *See generally, U.S. Telecomm. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994). Illustrated in *U.S. Telecomm. Ass'n.*, the court held that broadband service providers must not discriminate as common carriers and must provide open internet access and treat all internet traffic equally despite the company itself disagreeing with certain views that are transmitted on the platform. *U.S. Telecomm. Ass'n,* 825 F.3d at 689. On the other hand, the court in *Turner Broadcasting* held that "a cable operator's choices about which programming to carry on its channels implicate the First Amendment's protections . . . because a cable operator engages in protected First

Amendment activity when it exercises editorial discretion." *U.S. Telecomm. Ass'n.*, 855 F.2d at 742 (quoting *Turner Broadcasting* on the editorial discretion of cable operators). Therefore, determination of whether a provider is a common carrier hinges on if that provider is merely carrying the messages of others in a public-type of forum or explicitly choosing its users and exercising editorial discretion in curating content on their platforms. *Id.* at 743.

Headroom falls in the former category as a common carrier as it allows all members of the public to access its platform and it distributes speech of others, rather than providing its own speech. R. at 2-3. Headroom will likely argue the "Community Standards" required to be accepted prior to a user being allowed access to the platform creates a platform that is not truly accessible to all members of the public. R. at 3. That argument, however, fails as any person can join despite the requirement to "agree" to the Community Standards before gaining access. This "agreement" requirement is distinguishable from the agreement requirement in *Turner Broadcasting* where the platform maintained the ability to accept or reject users even after the user agreed to the services. In this case, after the user accepts the services, Headroom does not go in and select which users to prioritize on the platform.

Moreover, Headroom's advertising component creates a "hub of business in cyber space" by distributing ads to their seventy-five million monthly users without independent selection of the ads. R. at 3-4. Businesses who enjoy the benefits of the platform exercise their own editorial function by selecting which ads to promote and the method in which to do so.

B. Section 230 gives social media companies immunity for third party content they distribute.

One argument social media platforms maintain in arguing that censorship of certain posts is needed is that it needs to censor potential violent or offensive posts that could surface on the platform which may create civil liability for the platform. *See generally*, *Biden*, 141 U.S. at

1226. That argument, however, is not persuasive as Congress has given digital platforms immunity from certain types of lawsuits with respect to liability arising from content they distribute. 47 U.S.C.A. § 230 (2018). This great immunity is rewarded to social media platforms with no strings attached. *See Biden*, 141 U.S. at 1226. (Thomas, J., concurring). Section 230 provides internet platforms protection to freely distribute information, even that which may be offensive, without fear of legal consequences. *Chic. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist*, Inc., 519 F.3d 666, 670 (7th Cir. 2008).

Various courts have determined whether a private company amounts to a common carrier for purposes of Free Speech implications. *See, e.g. Chi. Lawyers*, 519 F.3d 666; *PruneYard*, 447 U.S. 74; *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47 (2006); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S 376 (1973). For example, in *Chi. Lawyers*, a housing advertisement with discriminatory language was listed on the platform Craigslist. *Id.* at 671. Pursuant to 47 U.S.C., Section 230, the court found that Craigslist was immune from civil liability as it was not the publisher of the content, but rather the distributor of third-party content. *Id.* Likewise, over the years, the Supreme Court has determined whether a private company or person was a common carrier for purposes of the First Amendment in several different contexts. *See, e.g.*, *PruneYard*, 447 U.S. 74; *Rumsfeld,* 547 U.S. 47; *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Pittsburgh Press Co.,* 413 U.S 376. The Supreme Court has determined that a private property owner distributing pamphlets on his property is not liable for the viewpoints contained within the pamphlet as he was merely distributing the information. *Pruneyard Shopping Ctr v. Robins*, 447 U.S. 74, 100 (1980). The Supreme Court has also rejected the argument that a law school endorses military policies when it allows military and non-military recruiters access to its campus. *Rumsfeld v. F.*

for Acad. & Inst. Rts., Inc., 547 U.S. 47, 65 (2006) (stating that a law school allowing recruiting on campus does not amount to agreement on the viewpoints of the recruiters). *Id.* The Supreme Court has also analyzed the question in the newspaper context. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rels.*, 413 U.S. 376, 386 (1973); *Associated Press v. NLRB,* 301 U.S. 103, 127 (1937). The Court has determined in those instances that "the role of editors and editorial employees generally includes determining the news value of items received and taking responsibility for the accuracy of the items transmitted." *NLRB,* 301 U.S. at 127. Editorial judgment is key to the analysis—if a newspaper makes an editorial judgment, it may be liable for the content that is published. *See Pittsburgh Press Co.*, 413 U.S. at 386 (finding a newspaper liable with actual malice when it employed editorial judgment by publishing a falsely defamatory statement in an advertisement).

Since Headroom is not subject to liability for the content that is distributed on its platform under Section 230, the Community Standards do not have to be strictly enforced by demonetizing a user's account, suspending the account, or outright removing the account. R. at 3-4. Headroom's Community Standards seek to prevent users from "creating, posting, or sharing content that either explicitly or implicitly promotes or communicates hate speech; violence, etc. . . ." R. at 3. Headroom is not the dictator of right and wrong speech, and they will not be penalized for inaction in these circumstances of violent or offensive free speech similar to *Rumsfeld* and *Pruneyard*. Therefore, Headroom does not have a reason to censor users on their platform for legal consequences that they would endure.

C. Social media platforms possess substantial market power that is subject to nondiscrimination requirements and restrictions.

Today's social media platforms control the market with no comparable competitors. *Biden*, 141 U.S. at 1224. (Thomas, J., concurring). Ultimately, the dominant platforms create

"substantial barriers to entry" which gives them "enormous control over speech." *Id.* Well known platforms such as Facebook, Twitter, Instagram, Snapchat, etc., develop algorithms that "greatly narrow a person's information flow" without the user even knowing. *Id.* at 1224-25. In today's modern world, these powerful social media giants are responsible for the distribution of information to millions of people. *Id.* This is especially concerning for small businesses who use social media platforms in order to grow their businesses—those users can't afford to be de-platformed, as there is not another avenue for them to reach as many people. Joseph C. Best, *Signposts Turn to Twitter Posts: Modernizing the Public Forum Doctrine and Preserving Free Speech in the era of New Media*, 53. Tex. Tech L. Rev. 273, 294 (2021). It's important for our society to maintain the ability for "all people to access places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham*, 137 U.S. at 1735.

Courts consider the market share and the market dynamics when evaluating whether a service is a common carrier. *Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 472 (5th Cir. 2022). In *Webster*, the court found that a phone company was a common carrier as its territory covered the plant of the company, creating a monopoly of the business. *State Ex Rel. Webster v. Nebraska Tel. Co.,* 22 N.W. 237, 238 (Neb. 1885). Therefore, whether or not a company is the only provider in a region is a significant consideration in determining whether the company amounts to a common carrier. *Paxton*, 49 F.4th at 472. Another consideration in determining whether the company amounts to a common carrier is if other comparable alternatives exist. *Biden*, 141 U.S. at 1224. (Thomas, J., concurring). Most of the current social media platforms do not have comparable alternatives and therefore dominate their respective markets. *Id.* When social media platforms have the ability to instill this kind of influence among the public with no competition, even small changes in what the public sees and interacts with on a daily basis have a significant

impact. *Id.* For instance, millions of users tune into social media when elections are closely divided to gain more information about candidates. Eugene Volokh, *Treating Social Media Platforms Like Common Carriers*?, 1 J. Free Speech L. 377, 379-80 (2021). As we've seen, "even small interferences with various groups' ability to affect public opinion can make a big difference in outcomes." *Supra*, p. 380. Social media platforms refusing to carry certain views should not dictate who the President of the United States will be. *Id.* By giving private social media companies this kind of power, the government may "give corporations unfair influence" and "distort public debate." *Citizens United v. FEC*, 558 U.S. 310, 469 (2010) (Stevens, J., dissenting).

Headroom's dominant market share across the nation creates a monopoly that gives the platform the power to suppress speech of those whom they disagree with. As one of the most popular social media companies in the state with over seventy-five million monthly users, Headroom has a profound impact on what information gets distributed. R. at 3. Similar to the phone company in *Webster,* Headroom maintains "territory" over the entire state and has risen to the level of a monopoly in Midland with no real competitors. Thus, the state has the ability to regulate one of its most prominent social media platforms as it rises to the level of public interest to ensure the exchange of free-flowing ideas.

II. The SPAAM Act's disclosure requirement mandating that a social media platform explain the reasons for censorship, shadow banning, or account banning does not violate the First Amendment as it is not compelled speech.

SPAAM Act's disclosure requirement does not require Headroom to "speak." Instead, it "requires private entities to host, transmit, or otherwise facilitate speech. Were it otherwise, no government could impose nondiscrimination requirements on, say, telephone companies or shipping services." *Paxton*, 49 F.4th at 455. The First Amendment provides protection in cases

where a regulation is requiring the host to speak, but not when the host is merely hosting speech. *Id.* For example, in *NIFLA*, the court held that requiring unlicensed clinics serving pregnant women to provide notices outside the facility would interfere with the clinic's own speech. *NIFLA v. Becerra*, 138 S.Ct. 2361, 2365 (2018). However, the court has deemed "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." *In re R.M.J.*, 455 U.S. at 201. Here, it is appropriate to require a social media giant to disclose their policies to dissatisfied citizens of Midland who are expressing their concerns over censorship.

A. Requiring Headroom to convey their Community Standards when users post content that is in violation of their own policies is not disclosing any controversial information—only allowing for full transparency.

Under the Texas Business & Commerce Code, there are three types of disclosure requirements: (1) "one-and done' disclosures, (2) biannual transparency-report requirements, and (3) the complaint-and-appeal process requirement." *See* Tex. Bus. & Com. Code § 120.051-52. Midland has suggested one of the easiest to comply disclosure requirements, which is the complaint-and-appeal process requirement. One of the most prominent CEOs of one of the largest social media platforms, Jack Dorsey of Twitter, agreed with us when he said, "we believe that all companies should be required to provide a straightforward process to appeal decisions made by humans or algorithms." *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior? Hearing Before the S.Comm. on Com., Sci, & Transp.*, 116th Cong. 2 (2020) (statement of Jack Dorsey, CEO, Twitter, Inc.).

This Court has favored factual and uncontroversial information in disclosure requirements. *Zauderer v. Off. Of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). In *Zauderer*, an attorney advertised in a local newspaper that upon representing his clients, if an unfavorable

conviction were rendered, they would be refunded. *Id.* There, the court required a disclaimer for the contingent fee advertisements on the premise that "states may require commercial enterprises to disclose 'purely factual and uncontroversial information' about their services." *Id.* If the disclosure requirements relate to the purely factual and uncontroversial information explaining the services that will be provided, then it is traditional of commercial advertising. *Id.*

The State of Midland's disclosure requirements likely pass the *Zauderer* test. As the government is not asking for any creative editorial functions to be published, only the factual policies of the platform to educate users on the policies and procedures of how Headroom operates. R. at 6. Largely, Headroom already does this when it flags or removes posts from user's content. R. at 3. Respondents are only asking for Petitioner to publish the Community Standards that they already have in place. R. at 6. In addition to publishing their own policies, Respondent is asking Headroom to publish explanations for how the policies will be used to evaluate if a user violates those standards. R. at 6. This is similar to *Zauderer* in explaining how the services will be provided. This type of disclosure is purely factual and uncontroversial, aligning with the contingent fee disclosure requirement in *Zauderer*.

B. Headroom is not unduly burdened by the requirement to disclose their own policies that they have implemented and enforced on their users.

The court in *Zauderer* warned of requirements that "threaten to chill protected commercial speech." *Zauderer,* 471 U.S. at 651. The courts have recognized that "unjustified or unduly burdensome" disclosure requirements can interfere with First Amendment rights, but those rights can still be protected if the disclosure requirements are "reasonably related to the State's interest in preventing deception of consumers." *Id.*

Courts evaluate disclosure requirements by examining if the requirement creates an unnecessary burden on the private company in order to comply. *Id.* In *NetChoice*, Texas was

requiring a biannual transparency report and the court of appeals held that is not burdensome because the platform already "track[ed] many of the statistics required by this report." *Paxton*, 49 F.4th at 486. In contrast, in *Miami Herald*, the Court found that a newspaper was required to publish a response column if they were critiquing a candidate in their article, which created access to those who disagreed with the newspaper's view. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974).

Requiring Headroom to disclose their policies behind censoring a user does not amount to government compelling speech. Additionally, the SPAAM Act's disclosure requirement is not analogous to *Miami Herald* where the requirement focuses on a particular group. R. at 6. The SPAAM Act's disclosure requirement applies to all social media platforms—not any specific platform with a certain viewpoint. R. at 6. When a user violates Headroom's policy, the State of Midland is merely asking for Headroom to notify a user of their existing policies to provide the user an avenue to understand how they violated the rules. R. at 6. Similar to the policy set forth in *Netchoice*, this is not an unduly burdensome policy and should be readily available to the user. Unlike the case of *Miami Herald*, the State of Midland is not imposing this disclosure requirement on a certain group of people—it would be imposed on any user who violated Headroom's policies.

C. The State of Midland has an interest in making sure their citizens are notified and aware of the terms they are violating when their content is censored by social media platforms.

"Disclosure requirements must be reasonably related to a legitimate state interest, like preventing deception of consumers." *Zauderer,* 471 U.S. at 485. Therefore, to regulate disclosure requirements on an entity, there must be a legitimate reason to justify the disclosure. *Id.* State

interests can include preventing users from deception or allowing users to make informed choices based on the information in the disclosure requirement. *See id.*

To enforce restrictions on commercial speech, the state must assert a substantial interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980). Courts evaluate whether this requirement has been met by two criteria: (1) "the restriction must directly advance the state interest involved, and (2) if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.* For example, in *Cent. Hudson Gas*, the court held that an advertisement was properly prohibited because "the state of New York had a substantial interest in the regulation due to its scarcity of fuel resources and the inability to meet public demand." *Id.* at 569. Therefore, the court reasoned the regulation prohibiting the advertisement of additional electricity sales directly advanced the state's interest. *Id.*

The State of Midland not only has an interest in protecting its citizens, but also in protecting a large public forum consisting of a marketplace of ideas and debate. Similar to the newspaper readers in *Zauderer*, those consumers were susceptible to deception without a disclaimer in the advertisement. *Zauderer,* 471 U.S. at 652. There are no other alternatives that exist like the case of *Central Hudson Gas*. The regulation placed on petitioners is tailored to the goals of the state to ensure the free exchange of ideas of its citizens like the advertisement regulation in *Central Hudson Gas*. Therefore, Midland serves its legitimate interest in "protecting the widespread dissemination of information . . . and does not burden substantially more speech than necessary to advance [the state's] interest." *Paxton*, 49 F.4th at 484-85.

III. The implementation of the SPAAM Act to regulate social media platforms' ability to censor citizens in the State of Midland does not violate the First Amendment Free Speech Clause.

"The First Amendment prevents the government from enacting laws abridging the freedom of speech, or of the press." *Paxton*, 49 F.4th at 453. Even if editorial discretion is protected under the First Amendment, the ability to censor or deprioritize content is not. *Id.* at 465. Additionally, editorial discretion does not stand on its own as a First Amendment protected activity. *Id.*

A. Headroom cannot invoke editorial discretion when choosing who to censor.

Unlike newspapers, social media platforms exercise no independent editorial control, but rather rely on algorithms to discover and flag obscenity and spam-related content. *Id.* at 459. Otherwise, social media platforms have zero editorial control over the content. *Id.* "Something well north of 99% of this content . . . never gets reviewed further. The content on a site is, to that extent, invisible to the provider." *Netchoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1092 (N.D. Fla. 2021). The platform does not identify itself as an editor. R. at 2 (indicating that the social media platform's mission is to "provide a space for everyone to express themselves to the world" and not to "provide a space for everyone to express themselves to a world unless that expression contradicts our values.") Additionally, editorial discretion is just one factor courts review in determining if a regulation restricts speech—it is not conclusive. *Paxton*, 49 F.4th at 463.

Censorship falls outside of the protected editorial discretion. *Paxton*, 49 F.4th at 453. Editorial discretion entails stylist choices and content presentation—not whose voices to suppress. For example, in *Turner Broadcasting*, the court concluded that a cable operator "exercises editorial discretion over which stations or programs to include in its repertoire." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("Turner I"). The court in *Netchoice*

fixated on the so called "editorial judgment" of social media platforms when it explained "they simply assert that they exercise protected editorial discretion because they censor some of the content posted to their Platforms and use sophisticated algorithms to arrange and present the rest of it." *Paxton*, 49 F.4th at 464.

Headroom does not choose or select material before transmitting it; rather, it chooses whether to censor the information only after the fact. R. at 3-4. Headroom developed algorithms to prioritize content derived from a tracking system. R. at 3. Similar to the platform used in *Netchoice*, there is no editorial judgment that goes into an automated calculation to spew out information and deprioritize content. Users getting "tagged" by Headroom's artificial intelligence is not a result of an employee exercising editorial discretion by viewing and making decisions to move the content after it has been posted—it's a result of an automated calculation created at the outset of the origination of the platform. R. at 3.

B. The SPAAM Act survives intermediate scrutiny as the act is substantially related to the State of Midland's goals in protecting its citizens' free speech rights from viewpoint discrimination.

Even if this Court determines that the SPAAM Act violates the platform's First Amendment rights, it still satisfies intermediate scrutiny. *Paxton*, 49 F.4th at 448. As the Court indicated in *Turner II*, "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) ("Turner II"). Content-neutral "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny" under the First Amendment. *Turner I*, 512 U.S. at 642. "The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of agreement or

disagreement with the message it conveys." *Turner I,* 512 U.S. at 642. Basically, the inquiry boils down to whether the regulation is in response to the "message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Social media companies are removing content that "condones" violence, this power has been reserved to the States pursuant to their constitutional police power, a power traditionally and exclusively held by the government. Joseph C. Best, *Signposts Turn to Twitter Posts: Modernizing the Public Forum Doctrine and Preserving Free Speech in the Era of New Media*, 53. Tex. Tech L. Rev. 273 (2021).

In *Turner II*, the Court upheld an interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner II*, 520 U.S at 189. Additionally in *Turner I*, the Court held that the "widespread dissemination of information from a multiplicity of sources is a governmental purpose of the highest order." *Turner I,* 512 U.S. at 663. In *Hurley*, the Court held "provisions are well within a legislature's power to enact when it has reason to believe that a given group is being discriminated against. And the statute does not, on its face, target speech or discriminate on the basis of its content." *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 558 (1995).

The SPAAM Act is content neutral and subject to an intermediate level of scrutiny under the First Amendment. The act does not favor or disfavor any particular category of speech that the Platform is attempting to distribute. R. at 5-6. It simply allows for all kinds of speech regardless of the user's or platform's views. By implementing the SPAAM Act, the State of Midland is advancing an important governmental interest in protecting the free exchange of ideas and information in the state and encouraging public debate. R. at 19. The State of Midland exercising its policing power by regulating social media platforms which have a huge effect on

its citizens' ability to learn, educate, and invoke new ideas is a proper delegation of power to the state.

C. Headroom does not meet the threshold for a preliminary injunction because it does not face an irreparable injury and the platform will not suffer by continuing to silence free speech while litigation is pending.

Public interest strongly favors putting an end to social media companies getting involved in the free exchange of ideas and curating content that was developed through an algorithm to our daily feeds to send certain messages. *See* Joseph C. Best, *supra* p. 21. Courts view a preliminary injunction as an extraordinary remedy. *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 129, 376 (2008). This remedy is not an automatic right, the plaintiff must show they are entitled to such extraordinary relief. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co., v. Vill. of Gambell,* 480 U.S. 531, 542 (1987). The elements a plaintiff must prove are: (1) likelihood of succeeding on the merits; (2) likelihood of suffering irreparable harm in absence of preliminary relief; (3) the balance of equities tips in plaintiff's favor; and (4) an injunction serves the public interest. *Winter*, 555 U.S. at 374.

To suffer an irreversible injury, the "applicant must demonstrate that in the absence of a preliminary injunction, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 375. Therefore, a preliminary injunction will not be rewarded by a court for "some remote future injury." *Id.* For example, in *Winter*, environmental organizations requested a preliminary injunction for the Navy's use of mid-frequency active sonar due to the possibility of causing harm to marine mammals in the waters. *Winter,* 555 U.S. at 366. The court held, "[f]or the plaintiffs, the most serious possible injury would be harm to an

unknown number of the marine mammals that they study and observe." *Winter*, 555 U.S. at 378. Therefore, even environmental harm was not sufficient enough to satisfy an irreparable injury. *Winter*, 555 U.S. at 378-79.

Headroom does not face irreparable injury. First, there has been no legal action that has arose since this litigation ensued. R. at 19. Therefore, the consequences Headroom claims will happen if this act is applied to the platform are "remote" and speculative at best. Second, Headroom alleges that a single infraction costs $10,000 a day without providing any evidence on how that amount was calculated and whether this amount would impair Headroom's bottom line. R. at 7. With over seventy-five million monthly users, including businesses who make money off the platform, it is hard to imagine Headroom would be seriously impaired by following the state's regulations. R. at 7.

1. Headroom is not likely to succeed in its argument that the SPAAM Act violates the First Amendment.

The First Amendment prevents the government from enacting laws "abridging the freedom of speech, or of the press." U.S. Const. amend. I. Therefore, the First Amendment protects the freedom of speech—not the freedom to censor. *Paxton*, 49 F.4th at 455. On the other hand, the First Amendment also protects "the right to refrain from speaking at all." *Wooley v. Maynard*, 420 U.S. 705, 714 (1977). Thus, a state may not force a private company to convey a certain message, but it can require private companies to facilitate others' speech. *Paxton*, 49 F.4th at 455. Moreover, the First Amendment "permits regulating the conduct of an entity that hosts speech, but it generally forbids forcing the host itself to speak or interfere with the host's own message." *Id.*

Courts have been reluctant to uphold a First Amendment violation on the premise that a state is infringing on a platform's right to "speak." *Paxton*, 49 F.4th at 448. This is illustrated in

Miami Herald when a Florida law required a newspaper to have an equal area in the paper to reply to political criticism. *Miami Herald Publ'g Co.,* 418 U.S. at 256. This state interference is an example of requiring the newspaper to speak because a newspaper prints and organizes the material in the paper, utilizing their editorial discretion. *Id.* Additionally in *Hurley*, an Irish American gay, lesbian, and bisexual organization wanted to march in a St. Patrick's Day parade organized by the South Boston Allied War Veterans Council ("War Veterans Council"). *Hurley,* 515 U.S. at 560. The War Veterans Council denied the organization the right to walk in the parade because of religious beliefs. *Hurley,* 515 U.S. at 562. There, the court held that the "parade was a form of expression that receives First Amendment protection . . . because the Council selects the expressive units of the parade from potential participants and . . . each contingent's expression in the Council's eyes comports with what merits celebration on that day." *Hurley,* 515 U.S. at 564, 648, and 574. In contrast, the court in *Pruneyard* held a California law that allowed members of the public to pass out pamphlets on the shopping mall property did not compel the mall itself to speak, and thus did not violate the First Amendment. *Pruneyard*, 447 U.S. at 87. The court's reasoning boils down to whether or not a law is requiring a platform or service to speak or merely allows others to speak. *See id.*

Headroom is not likely to succeed on the merits because the SPAAM Act does not compel the platform to "speak." R. at 19. The SPAAM Act only chills Headroom's ability to censor other users' speech on the platform rather than Headroom's entire ability to speak as a whole. R. at 19. The State of Midland is only interfering in Headroom's hosting capacity to censor user's speech. R. at 19. Thus, the SPAAM Act can be distinguished by the Court's holding in *Hurley* as Headroom does not "select" the users it hosts, it merely distributes the

user's content onto feeds. The SPAAM Act aligns with *Pruneyard* in not requiring the platform itself to speak but allowing others to speak on the platform.

2. Even if this Court determines Headroom will suffer irreparable injury, the balance of equities favors the State of Midland.

Another factor to evaluate in granting a preliminary injunction should be whether or not the balance of equities favors the movants. *Amoco Prod. Co.,* 480 U.S. at 540. The balance of equities involves an inquisition of the competing interests between the two parties and balancing the irreparable harm with the benefits. *See id.* at 541. In other words, "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 542.

In *Winter*, the court held "the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. at 26. On the contrary, in *Amoco Prod. Co.*, the court held the balance of equities did not favor Alaskan native villages when they sought an injunction to prevent the Secretary of Interior from allowing drilling under oil and gas leases in Alaska. *Amoco Prod. Co.*, 480 U.S. at 531. In that case, the Court held that had the preliminary injunction been granted the $70 million set aside by the oil company for exploration would have been lost. *Id.* at 532. Therefore, the court must balance what would be equitable in light of the parties' circumstances and the effect an injunction would have. *See id.*

The balance of equities favors Midland as Headroom tries to protect itself under the First Amendment while hindering their own users' First Amendment rights. This Court should weigh the competing interests of both Headroom and the State of Midland similar to the balancing done by the Court in *Amoco*. Using the same guidelines, it is clear that a preliminary injunction would cause the citizens of Midland to continue to suffer and ultimately not have a place in public

debate. R. at 4. While Headroom argues the opposite, without a preliminary injunction, the SPAAM Act would have a "chilling effect on private parties' free speech rights"— there is no speech that the act prevents Headroom from speaking. R. at 15. Instead, it prevents the platform from disarming others to speak. R. at 6. Therefore, the balance of equities favors Headroom because the effect of granting the injunction would be over seventy-five million monthly users continually being subjected to Headroom's discriminatory censoring practices. Wherein denying the injunction gives users the opportunity to participate in the free exchange of ideas without fear of retaliation from a private company, who may not agree with their views.

3. Public interest favors the State of Midland since the ideas, thoughts, and expressions of members of the public are being censored by private social media giants.

This Court has been cautious stating an injunction has "never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff," and that "where an injunction is asked which will adversely affect a public interest . . . the court may . . . withhold relief until a final determination of the rights of the parties [is made], though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982) (quoting *Yakus v. United States*, 321 U.S. 414, 440 (1944)). Courts regard an injunction as an "extraordinary remedy" and should "pay particular regard for [its] public consequences." *Romero-Barcelo*, 456 U.S. at 312 (quoting *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941)).

As the court indicated in *Yakus*, with any balancing test the public interest factor is amongst the most valuable. *Yakus*, 321 U.S at 440. For example, in *Winters*, the court relied on the public interest factor heavily when determining whether or not to enforce a preliminary injunction because it would "impose on the Navy's ability to conduct realistic training exercises

and [had] consequent adverse impact on the public interest in national defense." *Winter*, 55. U.S. at 377. The Navy's senior officers expressed the "need for extensive sonar training to counter the national security threats." *Id.* Therefore, "the public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interest advanced by the plaintiff." *Id.* at 378. In the social media world, public interest is extremely important as, "the rise of massively influential social media platforms—and their growing willingness to exclude certain material that can be central to political debates—raises, more powerfully than ever, the concerns about economic power being leveraged into political power." Eugene Volokh, *Treating Social Media Platforms Like Common Carrier*s?, 1 J. Free Speech L. 377, 1 (2021).

A preliminary injunction would harm the public interest by allowing a powerful social media company to continue to be the dictator of free speech for the citizens of Midland. Public interest including allowing citizens to exercise their First Amendment rights without fear of retaliation, outweighs Headroom's interest of being able to censor views that are different than their own. R. at 4. Similar to the Navy in *Winter,* the government has a need to allow for the free flow exchange of ideas in its state. Differing opinions, perspectives, and voices are what this country was founded on, and the government operates for the people. *See Paxton*, 49 F.4th at 453.

CONCLUSION

The State of Midland has demonstrated the need to regulate Headroom in order to protect their citizens from a private social media platform becoming the dictator of right and wrong speech and censoring views that do not align with their platform's viewpoint. The social media industry has long been unregulated and as a result our society is becoming less and less open minded and expressive when it comes to sharing their views in fear of being prioritized by an

algorithm—not even another human being. Headroom is a dominant social media platform in the State of Midland with no real competitors and no regulations. This monopoly has primary control over what information the citizens of Midland are receiving and spreading.

In today's modern world, social media platforms are common carriers, subject to nondiscriminatory practice to provide equal access to all. Furthermore, the disclosure requirement does not compel Headroom to speak, nor does it violate the First Amendment. Last, the implementation of the SPAAM Act to regulate social media companies' ability to censor citizens does not violate the First Amendment as Headroom cannot invoke editorial discretion when choosing who to censor. Even if this Court determines Headroom is using its editorial discretion, the SPAAM Act survives intermediate scrutiny. Overall, Headroom does not meet the threshold for a preliminary injunction, as the social media giant maintains a monopoly in the state and will not suffer an irreparable injury.

For these reasons, this Court should affirm the decision of the Thirteenth Circuit Court of Appeals.

Respectfully submitted,

Team 71

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