TEAM 24

No. 23-386

In The Supreme Court Of The United States

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

COUNSEL FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Under the First Amendment Freedom of Speech Clause, is a major social media platform a common carrier when it makes individualized decisions about the content posted on its server, and is a disclosure requirement constitutional when the state has no legitimate interest for imposing the requirement and it is unduly burdensome?

2. Under the First Amendment, does a state violate the Freedom of Speech Clause when it creates a law that compels a social media platform to speak through disclosure requirements, to remain silent when users violate their community standards, to adopt governmental speech by creating community standards that must meet state law's criteria, and alters a social media company's editorial judgment?

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Headroom, Inc. ("Headroom") has emerged as one of the most popular social media companies in America. R. at 2. Headroom allows users to create profiles, design and post content, and share other user's posts via a virtual reality environment. R. at 3. Headroom has over seventy-five million monthly users, many of whom depend on its services to support their businesses and livelihoods through monetization. R. at 3. Headroom uses an algorithm to prioritize content based on its user's preferences, while also deprioritizing content through its artificial intelligence that is potentially violative of Headroom's Community Standards, which users must agree to prior to joining. R. at 3.

While Headroom strives to be a company where "all are respected and welcome," Headroom's Community Standards prohibit conduct that is explicitly or implicitly offensive. R. at 3. These restrictions generally forbid conduct such as hate speech, harassment, and criticism toward protected classes. R. at 3. Additionally, the Community Standards ban information that is deemed to be intentionally false or misleading, which is spread for the purpose of deceiving or manipulating individuals or groups. R. at 4. If certain content is deemed to be violative of the Community Standards, a user's account may be demonetized, suspended, blocked, and/or banned. R. at 4.

In 2022, the State of Midland ("Midland") passed the Speech Protection and Anti-Muzzling Act ("SPAAM Act") after hearing testimony from users claiming discrimination. R. at 4. One user alleged their content was deprioritized after they posted a monologue on a "hot-button" socio-political topic; another for criticizing a controversial presidential candidate; and a third for spreading "disinformation" and "hate speech" on a controversial documentary. R. at 4-

5. After hearing testimony, Midland representatives also made comments condemning Headroom's Community Standards. R. at 5.

The SPAAM Act, enforced by Midland's Attorney General, Edwin Sinclair ("Sinclair"), applies to any "social media platform" that "(i) provides or enables computer access by multiple users to its servers and site; (ii) operates as a corporation, association, or other legal entity; (iii) does business and/or is headquartered in Midland; and (iv) has at least twenty-five million monthly individual platform users globally." R. at 5-6. This Act has two main requirements. R. at 6. First, the Act restricts a social media platform's ability to alter or remove user's content with the exception of "obscene, pornographic, or otherwise patently offensive content." R. at 6. Second, the SPAAM Act requires social media platforms to publish "community standards" with "detailed definitions and explanations for how their community standards will be used, interpreted, and enforced." R. at 6. Upon enforcement of these standards, social media companies must provide users with a "detailed" explanation of the standards that were violated, how the user violated those standards, and the reasoning behind the specific disciplinary action that was chosen. R. at 6. If social media companies do not adhere to the SPAAM Act's requirements, the Attorney General may impose an injunction or a fine of $10,000 for each day the company is in violation of the SPAAM Act. R. at 7.

B. PROCEDURAL HISTORY

The Midland Legislature passed the SPAAM Act on February 7, 2022, which went into effect on March 24, 2022. R. at 7. Headroom timely filed a pre-enforcement challenge enjoining Sinclair and preventing him from enforcing the SPAAM Act in the United States District Court for the District of Midland on March 25, 2022. R. at 7. Headroom also filed a motion for preliminary injunction, alleging the SPAAM Act's provisions violate the First Amendment. R. at

7. The District Court had proper subject matter jurisdiction pursuant to 18 U.S.C. § 1964. The District Court granted Headroom's motion for a preliminary injunction on May 29, 2022. R. at 15. Sinclair timely filed an appeal pursuant to 28 U.S.C. § 2107. The United States Court of Appeals for the Thirteenth Circuit had proper subject matter jurisdiction pursuant to 28 U.S.C. § 1291. The appeal was argued and submitted on December 14, 2022. R. at 16. The Thirteenth Circuit reversed the District Court's decision and vacated the preliminary injunction on March 30, 2023. R. at 19-20. Headroom timely petitioned to the Supreme Court of the United States for a Writ of Certiorari. R. at 21. The Supreme Court granted the Petition for Writ of Certiorari on August 14, 2023. R. at 21.

C. STANDARD OF REVIEW

The questions presented before this Court are questions of law that are subject to a de novo standard of review. *United States v. First Nat'l Bank*, 386 U.S. 361, 368 (1967). As such, this Court need not give any deference to the legal conclusions made by the lower court. *Salve Regina Coll. v. Russell*, 449 U.S. 225, 231 (1991).

SUMMARY OF THE ARGUMENT

Headroom is not a common carrier. Under the First Amendment's Freedom of Speech Clause, a common carrier is an entity that provides communication facilities to all members of the public where each member is freely able to convey intelligence or information of their own design and choosing. However, a carrier is not considered a common carrier if it makes individualized decisions on who and what terms to serve. Headroom cannot be classified as a common carrier because it makes individualized decisions on who can access its platform and the type of content that can be posted. Headroom implemented Standards which inform prospective users of the content they are prohibited from posting, thus engaging in individualized decision-making about the terms on which it will serve. Each user is also required to consent to Headroom's Standards before joining, so Headroom engages in individualized decision-making about who it will serve as well. Thus, because Headroom makes individualized decisions about the content that is posted on its platform and who it will serve, users are unable to freely convey intelligence or information of their own design and choosing, which does not classify Headroom as a common carrier.

The SPAAM Act's disclosure requirements fail under Zauderer. This Court's holding in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* applies to the SPAAM Act's disclosure requirements because it is broad enough to encompass non-commercial speech disclosure requirements. Disclosure requirements are constitutional under *Zauderer* if the state has a legitimate interest for imposing the requirements and they are not unduly burdensome. The SPAAM Act's disclosure requirements are unconstitutional because Midland does not have a legitimate interest since Headroom has not inherently misled its users, and the disclosure requirements are unduly burdensome.

The SPAAM Act violates Headroom's First Amendment. Under the First Amendment, the SPAAM Act violates Headroom's freedom of speech because it compels Headroom to speak by implementing disclosure requirements. The SPAAM Act also violates Headroom's First Amendment right because it compels Headroom to remain silent when they otherwise would have censored speech. Therefore, because of these impositions, the SPAAM Act is a content-based regulation that fails exacting scrutiny. Midland also seeks to regulate Headroom's speech by dictating what their Community Standards should be, which should be assessed under the more heightened standard of strict scrutiny. Under this level of scrutiny, Midland fails to provide a compelling interest that is also narrowly tailored. Additionally, there is a First Amendment violation when Midland tries to mandate a regulation that alters Headroom's editorial judgment. Some courts use the two factors from *NetChoice, LLC, v. Attorney General, Florida* to determine if a media company exercised editorial judgment. These factors include a social media company editing or changing content along with arranging or prioritizing users' posts. Headroom exercised its editorial judgment by altering and arranging content. Thus, if Midland tries to implement standards affecting that editorial judgment, it will be considered unduly burdensome and therefore unconstitutional. If it is undisputed that Headroom is a private actor, Headroom cannot violate its user's First Amendment rights. For these reasons the Court should reverse the Thirteenth Circuit's ruling and grant Headroom's motion for preliminary injunction.

ARGUMENT

I. HEADROOM IS NOT CONSIDERED A COMMON CARRIER UNDER THE FIRST AMENDMENT'S FREEDOM OF SPEECH CLAUSE BECAUSE HEADROOM DOES NOT HOLD ITSELF OUT TO BE A COMMON CARRIER.

The First Amendment of the United States Constitution prohibits the government from making any law "abridging the freedom of speech." U.S. Const. Amend. I. In part, the First Amendment's Freedom of Speech Clause was enacted to protect the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 520 U.S. 640, 660-61 (2000). The Freedom of Speech Clause—while subject to limitations—protects a wide variety of speech made by private actors. *NetChoice, LLC, v. Attorney General, Florida*, 34 F.4th 1196, 1203 (11 Cir. 2022). A social media platform … is a private entity with First Amendment protections. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781-84 (1978). Accordingly, a social media company may invoke their First Amendment protection when it engages in "speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

A. Headroom's Users Are Unable To Transmit Anything Of Their Own Design And Choosing Because Headroom Makes Individualized Decisions.

This case hinges on a social media platform invoking its right to refrain from speaking under the First Amendment, to which "the basic principles of freedom of speech and the press … do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011). Congress, through the Communications Act of 1996, defines a common carrier as "any person engaged as a common carrier for hire." 47 U.S.C. § 153(11). Attempting to define "common carrier" more narrowly, the Federal Communications Commission looked at the legislative intent of the Communications Act, finding that Congress did not intend for a common carrier to be anyone who is not a common carrier in the "ordinary

sense of the term." Frontier Broad. Co., et al., Complainants, 24 F.C.C. 251 (1958). Furthermore, in Section 223(e)(6) of the Communications Act, Congress implies that a common carrier and an interactive computer service—such as a social media company—are distinguishable by stating "nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers." 47 U.S.C. § 223(e)(6).

Subsequent case law has further defined common carrier as having a "distinctive characteristic … to carry for all people indefinitely." *Semon v. Royal Indem. Co.*, 729 F.2d 737, 739 (5th Cir. 1960). "A second prerequisite to common carrier status … [is] that customers transmit intelligence of their own design and choosing." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 609 (D.C. Cir. 1976). However, a carrier will not be a common carrier if it makes individualized decisions regarding what content and people it decides to serve. *Id.* at 608-09.

Headroom holds itself open to "provide a space for everyone to express themselves to the world," while also striving to "promote greater inclusion, diversity, and acceptance in a divided world." R. at 2-3. This is similar to the social media platform at issue in *NetChoice*. In that case, the Eleventh Circuit addressed the constitutional validity of a state law that imposed regulations on social media platforms. 34 F.4th at 1209. In part, the law prevented companies from deplatforming or deprioritizing content about a political candidate, or removing content posted by a journalistic enterprise. *Id.* at 1206. To circumvent First Amendment scrutiny, the state eluded that social media platforms were common carriers and therefore have less protections under the First Amendment. *Id.* at 1219. Conversely, the social media platforms claimed that because they are private actors under the First Amendment, they are allowed to "moderate and curate" the content that is posted to their platforms as a protected form of expressive speech. *Id.*

The Eleventh Circuit held that social media platforms are not common carriers because they "have never acted like common carriers." *Id.* at 1220. While social media platforms typically hold themselves open to all members of the public, those users are typically required to accept the platform's community standards as a precondition to access its servers, thereby limiting what they can post. *Id.*

Similar to the social media platforms in *NetChoice*, Headroom created Community Standards which users must agree to as a precondition to join and therefore access its platform. R. at 3. The Community Standards expressly state the various forms of content that is prohibited along with what may happen to a user's post and/or account if any form of prohibited content is posted in violation of the Community Standards, such as shadow banning, blocking, or demonetizing accounts. R. at 4.

By its very nature, Headroom is not a common carrier. The Court in *FCC* defined a common carrier as an entity that "make[s] a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing …" *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). It is presumed that when a user agrees to a social media platform's community standards, they agree with what it says. Therefore, the users who agreed to Headroom's Community Standards were aware of the content that is prohibited along with the penalties that can ensue if the Community Standards are violated. Because of this agreement, Headroom's users are limited on what they can post and are unable to freely "communicate or transmit intelligence of their own design and choosing." *Id.*

Additionally, users are bound to these Community Standards anytime they use Headroom's servers and are therefore subject to Headroom's individualized decision-making.

The District of Columbia Circuit in *National Association of Regulatory Utility Commissioners* stated that a common carrier does not "make individualized decisions … whether and on what terms to serve." 533 F.2d at 608-09. To implement their Community Standards, Headroom—through the use of an algorithm—is able to "categorize and order content … based on users' stated preferences" and "interests derived from Headroom's data tracking systems." R. at 3. Headroom's artificial intelligence will also flag any content that it deems has potentially violated the Community Standards, which is then deprioritized by the algorithm. R. at 4. This further alleges that Headroom makes individualized decisions about the content that is posted on its server.

Therefore, because each user is subject to Headroom's Community Standards which prohibits certain content and because the algorithm filters content based on user's preferences, Headroom makes individualized decisions about whether to post its users' content, making them not a common carrier.

II. UNDER THIS COURT'S DECISION IN *ZAUDERER*, THE DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL BECAUSE MIDLAND DOES NOT HAVE A LEGITIMATE STATE INTEREST AND THEY ARE UNDULY BURDENSOME.

Subject to limitations, the Freedom of Speech Clause protects a wide variety of speech, including compelled speech. *Bigelow v. Virginia*, 421 U.S. 809, 821 (1975). The type of speech the government seeks to compel through disclosure requirements will determine which level of scrutiny should apply. *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 249 (2010). When the government imposes a disclosure requirement rather than a limitation on speech, the "less exacting scrutiny" in *Zauderer* will govern. *Id.* Under *Zauderer's* standard, disclosure requirements must not be unjustified or unduly burdensome, and must be rationally related to a

legitimate state interest. *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). While this standard typically applies to commercial advertising to prevent consumer deception, it is broad enough to encompass disclosure requirements. *NetChoice*, 34 F.4th at 1228. However, disclosure requirements do not overshadow First Amendment protections, as "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651.

In *Zauderer*, an attorney advertised his legal services to prospective clients on a contingent-fee basis. *Id.* at 626. The attorney, however, failed to disclose that clients would have to pay "costs" regardless of the outcome of their case, and essentially deceived prospective clients into thinking they would not have to pay at all. *Id.* at 633-34. The state of Ohio found the attorney in violation of a law which made it illegal for commercial advertisements to include false or deceptive words. *Id.* at 635-36. The attorney challenged the constitutionality of the law, claiming he did not intend to deceive or mislead prospective clients because he never stated they would not have to pay *costs*, only fees on a contingent-fee basis. *Id.* The Court upheld the law's constitutionality and applied the same reasoning as the State of Ohio: "it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs … [which] is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed." *Id.* at 653.

State regulations are therefore permissible when the advertisement is "inherently likely to deceive" or when "a particular form or method of advertising has in fact been deceptive." *In re R.M.J.*, 455 U.S. 191, 202 (1982). To remedy potentially misleading speech in this context, a state may impose disclosure requirements or explanations. *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977).

A. Midland Does Not Have A Legitimate Interest For Imposing The Disclosure Requirements.

The state in *Zauderer* had a legitimate interest in preventing consumer deception, and the imposed disclosure requirements were rationally-related to eliminating "inherently misleading commercial advertisements." *Milavetz,* 559 U.S. at 250. Here, the Thirteenth Circuit relies on *Zauderer* as the applicable standard to govern the constitutionality of the disclosure requirements, claiming Midland has a legitimate interest in providing users with sufficient information to make informed decisions. R. at 18.

However, unlike the government in *Zauderer*, Midland does not have a legitimate interest for imposing the SPAAM Act's disclosure requirements. Respondent will likely argue that Midland's legitimate interest is to provide Headroom's users with sufficient information to avoid being deceived, but this reasoning is futile because Headroom has not inherently misled its users. Headroom created Community Standards, which set forth the expected conduct of each user. R. at 3. Expressly stated in the Community Standards are forms of prohibited content, such as hate speech; violence; bullying; and negative comments or criticism toward protected classes, along with applicable penalties for posting prohibited content. R. at 3-4. As a prerequisite to join its platform and post content, every user must consent to Headroom's Community Standards. R. at 3. This implies that each user who joined Headroom's platform is not only aware of the pertinent information contained within the Community Standards, but has objectively agreed to them as well.

In conjunction with inherently misleading prospective clients, the attorney in *Zauderer* did not distinguish between the meaning of certain words contained in his advertisement that have similar meanings, such as "costs" and "fees." *Id.* at 652. The attorney contended that "costs" and "fees" do not mean the same thing, so the State must prove the advertisement was

false or deceptive or that it serves a substantial government interest. *Id.* at 650. In response to his unavailing argument, the Court found this misleading as it was likely to deceive an average layperson who is unfamiliar with the technical definition of those terms. *Id.* at 652.

Unlike the attorney in *Zauderer*, Headroom included definitions in its Community Standards to define some of the broader forms of prohibited content. R. at 4. For example, Headroom classified "disinformation" as a form of prohibited conduct, defining it as "intentionally false or misleading" and "spread for the purpose of deceiving or manipulating individuals or groups." R. at 4. An average layperson—such as a user of Headroom—may be familiar with the term "disinformation" in the ordinary sense of the word; nevertheless, Headroom still provided a definition to avoid any potential confusion on what that particular word means in the context of its Community Standards.

Because Headroom's Community Standards explicitly mention the expectations regarding a user's conduct and content—which each user must accept prior to joining the platform—Headroom has not inherently misled any of its users. Therefore, there is no reasonable relationship between the SPAAM Act's disclosure requirements and Midland's interest in providing Headroom's users with sufficient information.

B. Even If Midland Did Have A Legitimate Interest, The Disclosure Requirements Are Unconstitutional Because They Are Unduly Burdensome.

The Eleventh Circuit in *NetChoice* held that disclosure requirements are unconstitutional when they are nearly impossible to comply with. 34 F.4th at 1230. In that case, the state law compelled targeted platforms to give a "thorough rationale" explaining why they removed a post along with a "precise and thorough explanation" of how the platform became aware of that post. *Id.* The court noted these laws apply to platforms that "remove millions of posts per day," so it

would be unduly burdensome—and virtually impossible—to require a platform to give a thorough rationale and explanation for every post it removed. *Id.*

Similar to the disclosure requirements in *NetChoice*, the SPAAM Act's disclosure requirements are unduly burdensome. Section 528.491(c)(1) of the SPAAM Act states that social media platforms are required to publish their community standards with "detailed definitions and explanations for how they will be used, interpreted, and enforced." R. at 6. Additionally, Section 528.491(c)(2) requires social media platforms to "'provide a detailed and thorough explanation of what standards are violated, how the user's content violated the platform's community standards, and why the specific action … was chosen.'" R. at 6. These compelled disclosures require Headroom to give detailed and thorough explanations to every user that violates its Community Standards. However, Headroom has over seventy-five million monthly users, so it would be nearly impossible for Headroom to provide each user with a detailed and thorough explanation about why their content was removed. Conversely, even assuming that only a small fraction of its total number of monthly users' content gets removed, the disclosure requirements would still impose an undue burden on Headroom.

The Eleventh Circuit in *NetChoice* also found that a state law can be unduly burdensome—and thus unconstitutional—when it purports to impose significant implementation costs while exposing platforms to an immense amount of liability. *Id.* In *NetChoice*, the law stated that if a platform did not properly adhere to the state's disclosure requirement and a user filed a claim against that platform, it could be liable for up to 100,000 dollars in statutory damages. *Id.* at 1231. Furthermore, this liability hinges solely on the state's interpretation of otherwise vague words, such as "thorough." *Id.*

As in *NetChoice* where a significant fine is imposed if the state believes a disclosure requirement is not "thorough" enough, here, Headroom is also subject to getting fined. If Headroom fails to provide detailed-enough explanations to every individual user whose content is removed, a fine of 10,000 dollars will be imposed for each day that Headroom is in violation of the Act. R. at 7. Furthermore, the SPAAM Act's requirement that each explanation must be "thorough" is completely subjective to Midland's interpretation of the word, which means Headroom could potentially get fined thousands of dollars solely because Midland wants it to.

Not only is the fine itself a significant implementation cost which creates an unjustified financial burden on Headroom, but the requirement that each explanation be "thorough" is completely subjective to Midland's interpretation of the word. Therefore, because it would be virtually impossible for Headroom to provide detailed and thorough explanations to all of its users who violate the Community Standards and because of the SPAAM Act's significant implementation cost, the disclosure requirements are unduly burdensome and are thus unconstitutional under *Zauderer's* standard.

III. MIDLAND VIOLATES HEADROOM'S FIRST AMENDMENT RIGHT TO FREE SPEECH WHEN IT PROHIBITS HEADROOM FROM DENYING USERS NONDISCRIMINATORY ACCESS TO ITS SERVICES.

Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech; thus, such a regulation is a content-based regulation of speech. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). Similarly, "compulsion to speak may be as violative of the First Amendment as prohibitions on speech." *Zauderer*, 471 U.S. at 651.

A. Requiring Headroom To Create User Policies And Provide Detailed Explanations To Those Users Who Violate Those Policies Infringes On Headroom's First Amendment Right Because They Are Compelled To Speak.

In *Riley*, North Carolina lawmakers passed the North Carolina Charitable Solicitations Act ("Solicitations Act") which governed the solicitation of charitable contributions by professional fundraisers. *Id.* at 784. More precisely, in addition to other provisions of the Solicitations Act, the act required professional fundraisers to *disclose* to potential donors the gross percentage of revenues retained in prior charitable solicitations. *Id.* The rationale for the Solicitations Act was to prevent professional fundraisers from retaining an unreasonable percentage of donations from charitable solicitation drives. *Id.* Plaintiffs, including a collation of professional fundraisers and organizations, brought suit seeking injunctive and declaratory relief. *Id.* at 787. In regard to the disclosure provision of the Solicitations Act, the plaintiffs argued that the Solicitations Act violated their First Amendment right to free speech. *Id.* When assessing the plaintiff's argument, the Court determined that a mandate compelling disclosure that alters the content of speech should be viewed as a content-based regulation and must be assessed under exacting scrutiny. *Id.* at 782. Moreover, the Court looked at the difference between compelled silence and compelled speech finding they were without constitutional significance and warranted the same level of scrutiny. *Id.* at 796. The Court ultimately held that requiring professional fundraisers to inform donors of how donations are dispelled is not a "weighty" interest and not narrowly tailored. *Id.* at 782-83.

Similar to *Riley*, the SPAAM Act's detailed explanation requirement is violative of Headroom's First Amendment right because it compels Headroom to speak when it otherwise would not. The Court in *Riley* determined that mandating *or compelling* speech that would not otherwise be made is considered a content-based regulation. *Id.* at 782. Thus, the professional

fundraisers' First Amendment rights were violated when the government mandated they disclose information they otherwise would not have. *Id.* at 782-83.

The same set of circumstances is present in the instant case. Here, the SPAAM Act is mandating that social media companies such as Headroom provide detailed explanations they otherwise would not have made. *See* R. at 11. This mandate compels Headroom to speak in situations it would otherwise have not. Till the passage of the SPAAM Act, Headroom's common policy was to flag content they viewed as violative of their Community Standards without providing explanations. R. at 4. This method put users on notice that they violated the Community Standards. The SPAAM Act now wants to compel Headroom to offer explanations requiring that they participate in speech which qualifies as a content-based regulation. Midland Code § 528.491(c)(2). Thus, in order for any regulation of this kind, the government must provide a compelling interest with ends that are narrowly tailored under an "exacting scrutiny" standard. In *Riley*, the government's interest was to provide clarity to donors on how their donations were being used, and this did not pass exacting scrutiny. *Id.* at 184. Similarly, the SPAAM Act also seeks to provide clarity to users on how they violated Headroom's standards. Due to the similarities in the interests of providing *clarity,* the SPAAM Act should not survive exacting scrutiny just as the Solicitations Act did not.

The SPAAM Act also violates Headroom's First Amendment right as it compels silence by not allowing Headroom to act on content that violates their Community Standards. In *Riley*, the Court reasoned that the difference in compelled silence when compared to compelled speech in the context of protected speech is without constitutional significance. *Id.* at 896. Therefore, a government that compels silence can be viewed as the functional equivalent of compelling speech and should be reviewed under exacting scrutiny.

The SPAAM Act seeks to prevent social media companies from "censoring, deplatforming, or shadow banning" any business, individual, or journalistic enterprise because of a viewpoint. Midland Code § 528.491(b)(1). Pursuant to the statutory language, even if the viewpoint was directly in conflict with Headroom's Community Standards, Headroom is still prevented from marking the content as violating their Community Standards. Through this prevention, Headroom is put in a position where they are required to remain silent when they otherwise would have enforced their Community Standards by censoring content. Due to this, a content-based regulation is happening and the government must once again pass exacting scrutiny for this regulation to be a valid exercise of authority. As analyzed above, when comparing governmental interests in *Riley* to Midland's rationale for the SPAAM Act, Midland's arguments will not pass exacting scrutiny. Therefore, this is an impermissible violation of Headroom's First Amendment.

B. Changing The Content Of Headroom's Community Standards Is A Content-Based Regulation Which Violates Headroom's First Amendment Right.

In *Volokh v. James,* No. 22-cv-10195, 2023 U.S. Dist. LEXIS 25196, at *1 (S.D. New York, February 14, 2023), the New York legislature passed the Hateful Conduct Law in response to the racially motivated Buffalo Mass Shooting. *Id.* The Buffalo Mass Shooting occurred at a grocery store and left ten dead; the whole shooting was live-streamed on Twitch, a social media network. *Id.* at *3-4. The Hateful Conduct Law had two main requirements: (1) a mechanism for social media users to file complaints about instances of "hateful conduct" and (2) disclosure of the social media network's policy for how it will respond to any such complaints. *Id.* at *5-6. The plaintiffs, who operated online platforms that would be subject to the Hateful Conduct Law, filed suit and moved for a preliminary injunction. *Id.* at *7. The plaintiff's argued they were likely to

prevail on the merits because the law burdens and *compels speech*, is overbroad, and is void for vagueness. *Id.* The court determined the plaintiffs, in addition to their current policies on hateful content, were required to create a new policy for responding to hateful user conduct i.e., speech. *Id.* at *12-15. The court reasoned that content-based laws are those that target speech based on its communicative content and are presumptively unconstitutional and can only be justified if the government proves the laws are narrowly tailored to serve compelling state interests. *Id.* at *10. Further, when a state compels an individual to speak a particular message, the state alters the content of their speech, and engages in content-based regulation. *Id.* Due to the government compelling speech from the plaintiffs, the court held the Hateful Conduct Law does not survive strict scrutiny as limiting free expression because it was not narrowly tailored, even if a compelling governmental interest was provided to prevent mass shootings. *Id.* at *21.

Similar to *Volokh,* Headroom's First Amendment right is violated because they are compelled to create community standards that endorse Midlands viewpoints. In *Volokh*, the Hateful Conduct Law was passed, requiring social media companies to create a policy that provided users with a mechanism to file complaints of hateful conduct *and* how social media companies would respond to said complaints. *Id.* at *5-6. This law was determined to warrant strict scrutiny because it compelled social media companies to speak a particular message, thus altering the content of their speech. *Id.* at *21.

Similarly, the SPAAM Act should warrant strict scrutiny because it compels social media companies—such as Headroom—to create community standards, i.e., policy, to address how they will be used, interpreted, and enforced, thereby compelling Headroom to speak in conformity with the SPAAM Act just as the social media companies were in *Volokh*. Headroom's preexisting policy forbids users from posting or sharing any content that explicitly

communicates hate speech; child sexual exploitation or abuse; bullying; harassment; suicide; or self-injury, as well as other reasonably offensive content. R. at 3. The SPAAM Act seeks to change this by compelling Headroom to create new community standards that align with the SPAAM Act's provisions. R. at 6. Thus, because of this forced alteration of Headroom's Community Standards, it is clear that Midland has created a content-based regulation by compelling Headroom to speak a particular message, thus warranting strict scrutiny.

Moreover, the *Volokh* court also applied strict scrutiny to content-based laws that target speech based on its communicative content. *Id.* at *21. Under strict scrutiny, these types of laws are presumptively unconstitutional and can only be upheld if the government proves they are narrowly tailored to serve a compelling state interest. *Id.* at *10. Upon application of strict scrutiny in *Volokh,* the court determined the government's Hateful Conduct Law was to serve a compelling state interest as it was enacted to combat the threat of mass shootings, such as the Buffalo mass shooting which claimed ten lives; however, the Hateful Conduct Law was not narrowly tailored and failed strict scrutiny. *Id.* at *21.

Here, the SPAAM Act fails strict scrutiny for similar reasons. Midland enacted the SPAAM Act in response to a number of individual citizen complaints that were filed because of Headroom's censorship. R. at 4-5. When comparing this to the compelling purpose set forth in *Volokh*, it is clear that preventing public harm—such as mass shootings—is more compelling than Midland's purpose. A government has an objectively compelling interest in saving lives by preventing mass shootings, whereas preventing censorship only serves individuals who choose to intentionally violate Headroom's policy.

The SPAAM Act is also not narrowly tailored. The court in *Volokh* held the Hateful Conduct Law was not narrowly tailored as it limited free expression. *Id.* at *21. The SPAAM Act

fails for the same reason. The SPAAM Act sets limits on Headroom's ability to express what they deem to be violative of their community standards. Further, it hinders Headroom's ability to freely create community standards that work best with its platform, thus making the SPAAM Act not narrowly tailored.

Therefore, because the SPAAM Act is not narrowly tailored and does not objectively serve a compelling governmental interest, it fails strict scrutiny and should be deemed unconstitutional.

C. The SPAAM Act's Requirements Unduly Burden Headroom's Editorial Judgment.

There is a First Amendment violation when a state exercises control by altering a social media company's editorial judgment. *NetChoice*, 34 F.4th at 1204. An editorial judgment is exercised when two key factors have been proven. *Id.* First, the platform will have removed posts that violate its terms of service or community standards – for instance, those containing hate speech, pornography, or violent content *Id.* Second, the company will have arranged available content by choosing how to prioritize and display posts – effectively selecting which users' speech the view will see, and in what order, during any given visit to the site. *Id.*

In relation, the courts will determine if the media platform is a state actor or if the putative forum is susceptible to forum analysis at all. *Scarborough v. Frederick County Sch. Bd.,* No. 5:20-cv-00069, 2021 U.S. Dist. LEXIS 2297, at *577 (W.D. Virginia, February 8, 2021). To determine state actors, the courts look to see if the private entity performs a traditional exclusive public function or when the government compels the private entity to take a particular action or when the government acts jointly with the private entity. *Brock v. Zuckerberg*, 20-cv-7513, 2021 U.S. Dist. LEXIS 119021, at *11 (S.D. New York, June 25, 2021). Media platforms can be held

liable for a First Amendment violation if there is a "close nexus" that characterizes the relationship between a state and private entity. *Atkinson v. Facebook, Inc.*, No. 20-cv-05546-RS, 2020 U.S. Dist. LEXIS 263319, at *8 (N.D. California, December 7, 2022). If a media platform does not have a causal nexus with the government or is not a state actor, then there is no First Amendment violation to begin with. *Id.*

Additionally, the Ninth Circuit in *Berenson* ruled that if a social media platform inputs community standards, no user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provided user violates. *Berenson v. Twitter, Inc.*, No. C 21-09818 WHA, 2022 U.S. Dist. LEXIS 78255, at *4 (N.D. California, April 29, 2022). Thus, even if such material is constitutionally protected, if the social media platform acted in good faith they will not be liable for complying with their community standards. *Id.*

For example, in *NetChoice*, social media companies were entitled to preliminary injunctive relief because social media companies are "private actors" whose First Amendment rights are protected. 34 F.4th at 1203. States are not allowed to moderate content of the companies and, "the so-called "content-moderation" decisions constitute protected exercises of editorial judgment. *Id.* The court in *NetChoice* reasoned that content moderation restrictions are substantially likely to violate the First Amendment if the rights of a company's editorial judgment are restricted by the States. *Id.*

Applying the factors in *NetChoice* to our present case, Headroom exercises editorial judgment when it censors, bans, and alters users' content. R. at 4. Additionally, Headroom also meets the second factor of the test applied in *NetChoice* when it arranges available content using algorithms to categorize and order content that users see. *Id.* Section 528.491(c)(2) the SPAAM

Act requires a thorough explanation of what standards were violated, how the user's content violated the platform's Community Standards, and why the specific acts were chosen. R. at 6. Headroom currently has over seven-five million users and it has become a hub of business in cyberspace; thus, the SPAAM Act would substantially burden Headroom's editorial judgment by allowing Midland to exercise its control to mandate such a regulation. With over seventy-five million users, Headroom would be required to "provide a detailed and thorough explanation" for any user who violates their Community Standards. Not only would Headroom be burdened by such a requirement, but it would also suffer an irrevocable injury by having to pay a fine of ten-thousand dollars a day for a single infraction. R. at 14. Therefore, it is likely the SPAAM Act will violate Headroom's First Amendment right by enforcing such strict regulations.

In *Scarborough*, a social media user alleged that a social media company engaged in an unconstitutional viewpoint of discrimination by deleting her comments and blocking her from public platforms. 2021 U.S. Dist. LEXIS 2297 at 572. The court held that the social media platform was a limited public forum, which triggers a different level of First Amendment protection. *Id.* at 577. Therefore, there was no First Amendment violation, and it was "unnecessary to analyze whether the government's conduct was permissible based on the type of public forum at issue." *Id.*

In *Scarborough*, the court determined if the putative forum is susceptible to forum analysis at all whether it's a state actor or a private entity. *Id.* at 576. Since the creation of Headroom, there is no material fact that Headroom was under the influence or control of the government. Instead, it is a cyberspace hub that allows users to create, design, and post content while also creating businesses and generating revenue. R. at 3. There is no causal nexus of government influence that underlies Headroom's function as a social media company. Prior to

the creation of the SPAAM Act, Headroom had no engagement with the State; thus, the only interaction Headroom currently has with Midland is because of the SPAAM Act's enforcement.

Similarly, in *Brock*, a media platform user sued a social media company claiming that his First Amendment right was violated because his post was censored and removed by the company. U.S. Dist. LEXIS 119021 at *2. The plaintiff's posts were flagged and removed for spam, hate speech, and being "abusive." *Id.* The plaintiff's continued to misappropriate the platform for six months and his conduct was in violation of the community rules mandated by the company. *Id.* The court held in favor of the social media platform because there was no performance of a public function. *Id.* at 7. Furthermore, the plaintiff's claim regarding a First Amendment violation failed because the company was not a state actor and was therefore immune to such allegations. *Id.* at 10.

In *Atkinson*, the court declined to find that a media company violated the First Amendment because there was no causal link to find the platform a state actor if it provided a platform for speech. U.S. Dist. LEXIS 263319 at *8. Furthermore, based on the entity's behavior, there is no close nexus that characterizes the relationship between a state and private entity. *Id.* The court referred to some factors that could bear a nexus determination of a First amendment violation if (1) the organization is mostly comprised of state institutions; (2) state officials dominate the decision making of the organization; (3) the organization funds are largely generated by the state institution; and (4) the organization is acting in lieu of the state. *Id.*

The court in *Atkinson* declined to find that the media company violated its user's First Amendment right because there was no inference that the social media company was a state actor; instead, it was a platform that provided speech. *Id.* Similarly, Headroom allows its platform to be used as a place to promote business and livelihoods. R. at 3. Since there is no

finding of a connection between a media platform and a state actor, then it is unlikely that Headroom would be able to violate its users First Amendment right. However, even if Headroom is deemed a state actor, Midland still does not have the authority to implement regulations that are unduly burdensome on a social media company like Headroom.

In *Berenson*, the plaintiff, a social media user, claimed that his First Amendment right to free speech was violated because his account was permanently suspended for violating community standards. 2022 U.S. Dist. LEXIS 78255, at *2. However, the plaintiff was disseminating false information regarding COVID-19, so the court held that the social media company was acting in good faith by precluding misleading information to spread during the pandemic. *Id.* at 5. The court recognized that a provision may be constitutionally protected within a media platforms community policy. *Id.* The court referred to U.S.C. Section 230(c)(2)(a) which states that "... no provided user of an interactive computer service shall be held liable on account of – any action voluntarily taken in good faith to restrict access to or availability of material that the provided users consider to be inappropriate, whether or not such material is constitutionally protected." *Id.* at 5. Thus, the court held there was no First Amendment violation because the social media company had good faith to suspend the users account. *Id.* at 5.

Similar to *Berenson*, Headroom also requires its users to agree to its Community Standards prior to joining Headroom's servers. R. at 3. Each user is required to agree to the Community Standards which restricts a range of content that Headroom deemed to be "disinformation." R. at 3. In doing so, Headroom has not misled its users because it laid out parameters in its Community Standards for them to comply with.

Therefore, Headroom acted in good faith when exercising their editorial judgment to ban, add warnings, and demonetize users who acted outside the scope of appropriate conduct, and this Court should find the SPAAM Act is unconstitutional as it would impose an undue burden on that editorial judgment.

CONCLUSION

For the foregoing reasons, Headroom, the Petitioner, respectfully requests that this Court reverse the Thirteenth Circuit's decision and grant Headroom's motion for preliminary injunction. Headroom is not a common carrier because it makes individualized decisions by implementing Community Standards that each prospective user must agree to before accessing and using its servers. Additionally, the SPAAM Act is unconstitutional under this Court's decision in *Zauderer* because Midland does not have a legitimate interest for imposing the disclosure requirements and they are unduly burdensome. Furthermore, Midland cannot prohibit Headroom from getting rid of nondiscriminatory content posted on its platform nor can Midland compel Headroom to incorporate the SPAAM Act's criteria into its preexisting Community Standards. Finally, because Headroom is a private actor and is thus entitled to exercise its editorial judgment, the SPAAM Act cannot infringe on that First Amendment right.

By: /s Team 24
Attorney for Petitioner