DOCKET No. 23-386 Team 28

Supreme Court of the United States

IN THE

OCTOBER TERM 2023

HEADROOM, INC.,

Petitioner

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF .

Respondent

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether Headroom, a virtual reality social media platform, is subject to government regulation because it qualifies as a common carrier or alternatively, serves as a public forum.

II. Alternatively, if Headroom is not a common carrier, do their actions constitute commercial speech, and does this Court's holding *in Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* upholding a state law's disclosure requirements apply to Midland's SPAAM Act's disclosure requirements.

III. Does a state violate the First Amendment's Free Speech Clause when it prohibits major social media companies from denying users nondiscriminatory access to its services?

Table of Contents

Table Of Authorities

U.S. Supreme Court Cases

Federal Court of Appeals Cases

Federal Disrict Court Cases

State Court of Appeals

Constitutional Provisions

Federal Laws

Treatises

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

After the Midland SPAAM Act went into effect, Petitioner, Headroom, Inc., claimed its provisions were in violation of the First Amendment and requested a permanent injunction to enjoin the Attorney General from enforcing it. R. at 7. Headroom additionally moved for a preliminary injunction. R. at 7. The United States District Court for the District of Maryland held that Headroom was likely to succeed on the merits of its case, as the SPAAM Act violates the First Amendment by burdening the platform's editorial judgment (with regards to its disclosure requirements) and by requiring Headroom to host content that is misaligned with its values. R. at 9. The Court added that both these restrictions fail the test of intermediate scrutiny, as public interest is served through the protection of free speech. R. at 15. For these reasons and due to the determination that the remaining preliminary injunction factors also favor Headroom, the Court granted Headroom's motion for a preliminary injunction. R. at 15. Respondent, Edwin Sinclair, Attorney General for the State of Midland, then requested an appeal with the United States Cort of Appeals for the Thirteenth Circuit based upon abuse of discretion. *See* R. at 16. The Circuit Court reversed the decision of the lower court and vacated the preliminary injunction. R. at 19. The petition for Writ of Certiorari was then granted and now comes before the Supreme Court of the United States. R. at 21.

STATEMENT OF THE FACTS

A. Background of Case

Petitioner is an up-and-coming social media platform in the United States. R. at 1. Petitioner is unique from other forms of social media because they operate in a virtual reality experience, while still allowing users to perform typical social media activities: creation of

individual profiles, creation and sharing of content, and facilitation of online marketplaces. R. at 2-3. The platform currently hosts over seventy-five million monthly users, many of which utilize the platform for a variety of commercial transactions including: solicitation of advertisements, donation reception, monetization of content, sponsorship deals, as well as promoting their own businesses. R. at 3. The users rely on the proceeds of these activities to support themselves and their families. R. at 3. Headroom utilizes algorithms to analyze and curate content catering to an individuals' specific interests. R. at 3. These same algorithms also interact with artificial intelligence to flag and "deprioritize" content Headspace deems inappropriate. R. at 3.

Prior to joining the platform, users must accept Petitioner's Community Standards. R. at 3. These standards prohibit: "users from creating, posting, or sharing content that either explicitly or implicitly promotes or communicates hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R. at 3. The standards also prohibit any content that is intentionally deceptive, untruthful, or "manipulat[ive] [to] individuals or groups." R. at 4. In addition to deprioritization, this content when flagged by AI may be demonetized, commented upon as violating the Community Standards of the platform, or lead to the banning or suspension of one's account. R. at 4.

In 2022, after several Midlanians suffered harms such as severe decline in viewership, dramatic decreases sales, and banning of their accounts, the Midlandian government stepped in to protect the interests of their citizens and held a hearing to discuss Headroom's practices. R. at 4-5. Among those who testified was Mia Everly, a Midlandian who runs a start-up company, WhimsiWear, and relies on the cite for her livelihood. R. at 4-5. After hearing the impact these restrictions were having on their citizens, several representatives proposed the Speech Protection

and Anti-Muzzling (SPAAM) Act to combat the harms suffered by Midland's citizens and consumers. R. at 5. The governor of Midland reassured the bill would "protect civil liberties while curbing the spread of harmful content." R. at 5.

B. Provisions of the SPAAM Act

Midland's Legislature passed the SPAAM Act on February 7, 2022, and the act was effective on March 24, 2022. R. at 7. The SPAAM Act regulates "social media platform[s]." Midland Code § 528.491(a)(1). Social media platforms are applications which: (1) provide users access to their servers; (2) operate as a business association or legal entity; (3) "does business and/or is headquartered in Midland; and (4) maintains twenty-five million users globally on a monthly basis. *Id.* § 528.491(a)(2)(i)-(iv). The Act has two parts: one relates to the ability of social media platforms to edit or delete users' content and the other requires social media platforms to publish community guidelines. The second part entails disclosure requirements.

The first part of the Act prohibits social media platforms form viewpoint-based discrimination through "censoring, deplatforming, or shadow banning." Midland Code § 528.491(b)(1). "Censoring" includes any alteration to a user's content. *Id.* § 528.491(b)(1)(I). "Deplatforming" constitutes any removal or ban placed on users. *Id.* § 528.491(b)(1)(ii). "Shadow banning" is defined as deprioritization of a user's content or "limiting or eliminating" the user or their content. *Id.* § 528.491(b)(1)(iii). However, there is an exception for lewd, illegal, or "patently offensive" content. *Id*. § 528.491(b)(2).

The second part of the Act requires detailed community guidelines including how they will be "used, interpreted, and enforced." *Id.* § 528.491(c). In addition, when there is an infraction of these guidelines, the Act requires platforms to describe the nature of the offense and the reason for the

remedial measures taken. *Id.* § 528.491(c)(2). Authority over the Act rests with Midland's Attorney General, and those wishing to enact its provisions must file a complaint with the Attorney General or sue *sua sponte. Id.* § 528.491(d)(1)-(2). Courts may enjoin offenders or administer a $10,000 per day fine for each infraction. *Id.* § 528.491(d)(3).

STANDARD OF REVIEW

Preliminary injunctions are reviewed for abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). Constitutional issues of law are given de novo review. *McCreary Cnty. V. ACLU*, 545 U.S. 844, 867 (2005).

SUMMARY OF THE ARGUMENT

This Court should uphold the decision of Thirteenth Circuit, reversing the district court's preliminary injunction against Midland's Attorney General from enforcing the SPAAM Act.

Headroom, a non-editorial communications platform, is a public carrier because it holds itself out to the public on an indiscriminate basis and also affects public interest. Like traditional common carriers such as railways and telegraph companies, the platform acts as a conduit for users to share and receive various forms of raw, unaltered intelligence. Accordingly, because government entities are authorized to regulate common carriers, the SPAAM Act applies to Headroom. Furthermore, even if the court determined Headroom is not a common carrier, SPAAM would still apply to the platform, as it exists as a modern public forum, which may be regulated by the government.

In the alternative that Headroom is not a common carrier, its speech is commercial speech for First Amendment purposes. The characteristics of speech and commonsense both indicate the

speech is entitled to lower constitutional protections under the commercial speech doctrine. Further the disclosure requirements under Midland Code section 528.491(c) survive intermediate scrutiny under the Central Hudson Test because consumer protection and dissemination of information are *substantial government interests*, and the disclosure requirements are not unduly burdensome on social media platforms. Further, this Court's holding in *Zauderer* says that disclosure requirements are permissible and non-burdensome if they are used to protect consumers. *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 646,651 (1985).

Lastly, lays denying nondiscriminatory access to the platform do not violate the First Amendment because they regulate conduct. For a private entity to be "speaking" via access to its services, access itself must be inherently expressive. Because SPAAM relates to generic media platforms, where all are welcome, access onto a platform cannot be expressive. Platforms do not speak when they alter the amount of service in a discriminatory manner either. As much, the law fully regulates conduct and done not abridge free speech under the First Amendment. If the court were to consider the actions to be expressive conduct, the law is still a content-neutral law that is properly tailored in furtherance of the compelling interest to protect modern day speech as it moves into online forums.

ARGUMENT

I. AS A VIRTUAL REALITY SOCIAL MEDIAPLATFORM, HEADROOM IS SUBJECT TO GOVERNMENT REGULATION BEACUASE IT QUALIFIES AS BOTH A COMMON CARRIER AND A PUBLIC FORUM.

Section 528.491(c) of the SPAAM Act can regulate Headroom Inc.'s content moderation enforcement policies because the social media platform is a "common carrier" that embodies the "modern public square" and is therefore answerable to certain government regulations. Though no singular legal definition of "common carrier" exists, both the Supreme Court and various Circuit

Courts have authorized government regulation over communications services that (1) serve the public in an indiscriminate manner and (2) promote social interest. Respondent argues that social media platforms both fulfill these elements and also resemble the traditional common carrier utilities services (such as railways, telegraph companies, and phone companies), which provide neutral platforms upon which individuals may add or receive the original content of users. Because Headroom, a free, non-editorial social media platform can be (1) used by virtually any member of the public and also (2) provides significant artistic, cultural, and intellectual materials to the public, it satisfies the conditions required by a common carrier. Even if this court determines Headroom is not a common carrier, however, the SPAAM Act will still apply, as social media platforms are modern public forums, which are subject to certain government regulations.

A. As a Major Social Media Company, Headroom Is a Common Carrier Amenable to Certain Government Regulations Because It Holds Itself out to the Public and Promotes Social Interest.

The common carrier doctrine can be traced back long before the founding of the United States. *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 453-54 (5th Cir. 2022). Historically, the doctrine applied to "persons engaged in 'common callings' . . . [who hold] a 'duty to serve.'" *Id.* at 469. Though Common Carrier laws at first prevented discrimination within the "common callings" held by innkeepers, stagecoaches, boat captains, and barge masters (for example, "a ferry operator is "required to maintain the ferry and to operate it and repair it for the convenience of the common people."), the advent of the industrial age required a transferral of the doctrine to the new "impenetrable monopolies," such as the railroad, telegraph, and telephone utility services. *Id.* at 469-70.

Early on, Congress resolved to protect citizens from the mammoth powers of these utility corporations by passing laws such as the Telegraph Lines Act, which required telegraph companies

to "operate . . . as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever." *Id.* at 471 (*citing* Telegraph Lines Act, ch. 772, § 2, 25 Stat. 382, 383 (1888)). In order to enforce these laws, courts utilized a two-pronged approach to determine whether or not the "novel communications [enterprises]" could be considered a common carrier. *Id.* First, the court had to establish that the carrier held itself out "to serve any member of the public without individualized bargaining." *Id.* Second, the court had to determine whether the carrier was "affected with a public interest." *Id.*

Courts have repeatedly applied this test–or some variation thereof–in the ongoing quest to once and for all define the "common carrier." In 1994, the D.C. Circuit Court utilized a novel, yet similar approach to determine whether a service could be considered a common carrier in *See Southwestern Bell Tel. Co.* v. *FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994). First, the court held that the service offered by the provider must be standardized and made available to all members of the public, as established by the Communications Act of 1934. *Id.* at 1475, 1480. Second, the provider must "transmit intelligence of [the user's] own design and choosing" without altering the form or content of such "intelligence." *Id.* at 1480. In the case at hand, the first prong of the *Southwestern Bell Tel. Co.* test is met, as Headroom offers its services in a standardized manner to all members of the public, as "all are respected and welcome." R.3. The second prong of the test is also established, as users of the platform may transmit whatever "intelligence" they see fit, without the influence of external authorities or editorial controls. Accordingly, Headroom may be considered a "common carrier" pursuant to the reasoning of the D.C. Circuit Court.

While no universally accepted legal definition for what does and does not qualify as a "common carrier" exists, the Fifth Circuit recently held that online platforms–such as Facebook and Twitter–are common carriers that are subject to certain government regulations, because the

services fulfill both the "holding out" and "public service" elements. *See Paxton*, 49 F.4th at 473-74. Social media platforms are virtually available to every member of society–as is reflected in the sheer number of users accounts on such sites. *See id.* at 445. First, the court reasoned that although most online platforms require the user's acceptance of various conditions in order to gain access to the service, the "holding element" remains intact because such terms are applied evenly to all potential users. *See id.* at 473-74. Requiring all individuals to accept reasonable, boilerplate terms and conditions in order to use a platform does not waive the common carrier obligations of a communications firm. *See id.* at 474. Common carriers as services that "[make] a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Common carriers do not "make individualized decisions, in particular cases, whether and on what terms to deal." *Id.*

As a social media platform that allows over seventy-five million individuals to communicate within a virtual reality environment, Headroom holds itself out to provide a service to all members of the public wherein they may share any content of their choosing. While Headroom requires all potential users to agree to certain Community Standards, these guidelines apply to all individuals in a uniform, indiscriminate manner. Though a barrier to entry, Headroom's terms and conditions make no "individualized decisions" regarding certain users or forms of content on the site. Pursuant to the reasoning of the Fifth Circuit, although users must accept Headroom's terms and conditions within the Community Standards, this standard agreement does not invalidate the platform's status as a common carrier.

Second, the Fifth Circuit held that the online platforms indeed maintain a "public interest," as they are oftentimes used as "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." *NetChoice*, 49 F.4th at 475. Within modern society, social media platforms have become integral to our daily lives, as they provide a space akin to the "public forum," wherein users may interact with others, stay informed, and engage with commerce. *See id.* Similar to the railway and telegraph services at the turn of the twentieth century, online platforms have emerged as the next frontier of the common carrier. *See id.* at 476. Headroom undeniably fulfills the element of public interest, as the platform enables communication between tens of millions of users, allows users to monetize their content, and preserves a seemingly infinite supply of knowledge for the public.

Because social media platforms, such as Headroom, exist as common carriers, they do not enjoy the same First Amendment protections that are held by journalistic sources, nor do they maintain the "constitutionally protected editorial judgment." R.7. Justice Thomas' concurrence in *Biden v. Knight First Amend. Inst. At Columbia U.,* effectively distinguishes social media platforms, noting, "[u]nlike newspapers . . . [these platforms] hold themselves out as organizations that focus on distributing the speech of the broader public." 141 S. Ct. 1220, 1224 (2021). *Miami Herald Pub. Co. v. Tornillo* provides a clear delineation between journalistic sources and social media platforms, stating: "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations of the size and content . . . and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment." 418 U.S. 241, 258 (1974). The content on Headroom's platform is not intended to undergo the same scrutiny or editorial process as the new sources described in *Miami Herald*. Instead, communications on the site consist of the raw, unverified statements that can be made by any and all of the site's 75 million users. Accordingly,

Headroom's platform fits the mold of the distributive social media organizations described by Thomas.

Thomas attests that these social media platforms instead exist within the same realm as "traditional common carriers," such as telephone providers, reasoning, "[t]raditional telephone compan[ies] laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way . . . Federal law dictates that companies cannot "be treated as the publisher or speaker" of information that they merely distribute." *Knight First Amend. Inst.*, 141 S. Ct. at 1224. *See also Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring) ("[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of cable companies . . ."). *See also* L*unney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999) (likening the role of e-mail servers to that of telephone companies when deciding to apply government regulations to a carrier).

Thomas further strengthens his analogy by noting that social media platforms that hold dominant market share (which "derive much of their value from network size") and maintain "enormous control over speech," mirror traditional common carrier utility services, and ought to be regulated in a similar manner. *See Knight First Amend. Inst.*, 141 S. Ct. at 1224 . Companies with substantial market power and few comparable competitors, "known as common carriers, [have long been subjected] to special regulations" in American law. *Id.* at 1222. Like other common carrier platforms, Headroom's dominant market share in both Midland and the nation at large presents the significant danger that, if left unchecked, the organization may arbitrarily exclude speech and shape public discourse.

B. Even If the Court Rules that Headroom Is Not a Common Carrier, the Social Media Platform Can Still Be Regulated by Section 528.491(c) of the SPAAM Act Because It Qualifies as a Public Forum.

Even if the court declines to extend the category of common carrier to social media platforms, SPAAM still applies the Headroom due to the nature as the modern "public forum." Stemming from the doctrine of public accommodation, public forms are considered "government-controlled spaces" that are subject to regulation and have been defined as "property that the State has opened for expressive activity by part or all of the public." *Id.* at 1221-22. Today, publicly available social media sites embody the public forum of the twenty-first century and such platforms have been labeled the "modern public square." *See Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). While Headroom is itself a private corporation, it exists as an open platform within the greater world-wide-web, which is regulated by various government entities.

This is analogous to the "public forum" debate explored in *PruneYard Shopping Ctr.*, wherein the Supreme Court determined that individuals who "pass through" privately owned shopping centers that are made open to the public retain their government-protected rights of expression. *See* 447 U.S. 74, 76-77, 88 (1980). The court further distinguished the communications of patrons in the shopping center to those published in journalistic sources, wherein regulatory states would amount to "an 'intrusion into the function of editors.'" *Id.* at 88. Pursuant to *PruneYard*, while the private owners of public forums maintain rights to their own speech, they do not maintain the unlimited right to restrict or alter the speech of those using the space. *See id.* Similarly to the shopping center in *Pruneyard*, though Headroom is privately owned, it remains a platform that is open to the public and it provides a space for users to post unedited, independently created content. Because of this, even if this court finds that Headroom fails to satisfy the elements

of a common carrier, the platform is still subject to government regulation such as the SPAAM Act because it embodies the modern day public forum.

II. HEADROOM'S SPEECH CONSTITUTES COMMERCIAL SPEECH AND THE SPAAM ACT IS NOT UNCONSTITUTIONAL BECAUSE IT PASSES INTERMEDIATE SCRUTINY UNDER THE HUDSON TEST AND ITS CONTENT-NEUTRAL REQUIREMENTS ARE NOT UNDULY BURDENSOME

In the alternative that this Court finds that Headroom is not a common carrier, the SPAAM Act's disclosure requirements would still survive intermediate scrutiny. The First Amendment protects freedom of speech and allows one "to petition the Government for a redress" if a party violates this right. U.S. CONST. AMEND. I. Firstly, the activity by Headroom is commercial speech. Secondly, section 528.491(c)'s regulations pass the criteria of the Hudson Test. Thirdly, the Supreme Court's Decision in *Zauderer* supports Midland's disclosure requirements under section 528.491(c) because they are not unduly burdensome.

A. The Characteristics of the Content and Commonsense Illustrate the Content on Headroom's Platform Is Commercial Speech.

The characteristics of the content including its advertisements, references specific products, and economic motivations make the content on Headroom commercial speech. The Fourteenth Amendment provides the vehicle for the First Amendment to apply to the States and prevents the government from inappropriate regulation of commercial speech. U.S. CONST. AMEND. XIV; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Commercial speech is entitled to First Amendment protections, although to a lesser extent than other forms of speech. *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 637 (1985); *Central Hudson*, 447 U.S. 557 at 563. Although initially only covering speech

that "propose[s] a commercial transaction," commercial speech has been expanded to cover other items. *Id.* (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)); *see Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 67 (1983). One can use commonsense to distinguish commercial from non-commercial speech, and economic motivation alone is not enough to establish an activity as commercial speech. *Bolger*, 463 U.S. at 67. However, courts look to the characteristics of the speech to determine its status as commercial speech. *Id.* at 67.

The concept of commercial speech is a new phenomenon created in the last five decades. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 748 (1976). Commercial speech came about when the Supreme Court held that a state law banning advertisements of drug prescriptions' prices violated the First Amendment because it stopped the free flow of information. *Id.* at 770-72. There, the Court found the advertisements were commercial speech, because they proposed "no more than a commercial transaction," but they were still entitled to some First Amendment protections. *Id.* at 762. The Court expanded the definition of commercial speech when considering an informational packet on contraceptives as commercial speech even though it did not directly propose a commercial transaction. *Bolger*, 463 U.S. at 66-67. In *Bolger*, the Court noted that since the pamphlets (1) contained advertisements, (2) referenced a specific product, and (3) possessed an economic motivation, its characteristics made the pamphlets commercial speech. *Id.*

Headroom differs from typical social media because it utilizes virtual reality as a means of communication/expression. R. at 3. Also, many utilize the platform to "promote their businesses and create revenue streams." R. at 3. Further, Headroom targets and distributes content to users by tracking their data via algorithms. R. at 3. However, commonsense would lead one to see this type

of targeted tracking and content distribution is a form of commercial solicitation. The virtual reality aspect of this platform makes the commercial nature more relevant and personal to a greater degree than scrolling or walking by advertisements. This resembles seeing a product with your own eyes while people promote them to you.

Respondent concedes the content on Headroom is not solely commercial proposals, like the advertisements in *Virginia State Board*. Further, more than economic motivation is needed to consider their speech as commercial speech under *Bolger*. However, like *Bolger*, the characteristics of Headroom's content make it commercial speech. Firstly, the algorithms track users' interests and participate in targeted advertising, just as the pamphlets contained advertisements in *Bolger*. Secondly, like the condoms referenced in *Bolger*, Headroom utilizes algorithms to distribute content and promote products. Even vague or generic references would not remove the content from commercial speech because Headroom has sufficient "control of the market" and can "promote the product [even] without reference to its brand names," much like the condoms marketed in the *Bolger* pamphlets. *Bolger*, 463 at 66 n.13. Thirdly, the posts clearly have an economic motivation, although not quantified, because Headroom is a "hub of business in cyberspace," utilized to support its users' businesses and livelihoods. Therefore, even though it is economically motivated, the characteristics of the speech make it commercial speech within the Supreme Court's framework.

B. The SPAAM Act Does Not Violate the First Amendment Because It Serves a Legitimate State Interest and Is Not Unduly Burdensome.

Section 528.491(c) of the Midland Code is constitutional because it passes intermediate scrutiny under the Central Hudson Test. The government bears the burden of proving that a state regulation does not infringe on commercial speech. *Bolger*, 463 U.S. at 71 n.20. This Court has

instituted a four-part test when analyzing state restrictions on commercial speech: (1) is the expression protected by the First Amendment; (2) is the activity in question unlawful or deceptive; (3) does the government have a "substantial" interest in regulating the activity; and (4) if substantial, is the regulation "not more extensive than necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. If the speech passes the first two prongs, it goes under intermediate scrutiny in the third and fourth prongs. *Id.* at 573 (Blackmun, J., concurring). When analyzing the fourth prong, this Court does not require the state's action to be the least restrictive measure, but it requires a proportional measure to achieve the desired interest. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989). These steps protecting commercial speech intend to preserve a speaker's economic interest and protect consumers and society by promoting the "fullest possible dissemination of information." *Central Hudson*, 447 U.S. at 561-62. When examining a statute's intent, courts examine the proceedings surrounding the statute and actions by governors. 82 C.J.S. Statutes § 434.

In *Central Hudson*, the New York Public Service Commission made a regulation banning promotional advertising by a New York utility company, and the utility challenged the regulation on First Amendment grounds. *Central Hudson*, 447 U.S. at 558-59. The Commission did not claim the commercial speech in question was unlawful or not entitled to First Amendment protections. *Id.* at 567. The Court found the reasons of energy conservation and rate efficiencies were *substantial government interests*. *Id.* at 568-69. However, the Court found that the relationship between the rates and the advertising ban was too attenuated to justify complete silencing of speech. *Id.* at 569. Although the directive advanced a substantial interest in energy conservation, the complete suppression of speech was too extensive to accomplish the state's goals. *Id.* at 569-70.

If Headroom's content is deemed commercial speech, Respondent concedes the First Amendment protects the speech and the speech is not deceptive or unlawful like the advertisements in *Central Hudson*. Much like the substantial interest in regulating energy conservation in *Central Hudson*, the state has a similar interest in commercial transactions, especially when the speech proposes a transaction. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996). Further, there is a substantial interest in the "free flow of commercial information," according to this Court. *Virginia State Board*, 425 U.S. at 764. Many small business owners and content creators have experienced serious declines in viewership and profits because of Headroom's speech. R. at 3. Under *Central Hudson*, their economic interests are relevant and warrant explanations for flagging of content that may hurt their businesses. Here, multiple state representatives make clear the purpose of the statute is to facilitate the flow of commercial information and protect the businesses of Midlandian citizens. R. at 5. The governor of Midland even stated the purpose was to stop the dissemination of harmful content. R. at 5. Hence, the legislative discussions and the purpose of preserving the dissemination of information make section 528.491(c) of the SPAAM Act serve a *substantial state interest*.

Here, unlike *Central Hudson*, the ban is not silencing speech, but rather, it is requiring disclosure. Respondent does not contend there are no costs, but these costs facilitate the purpose of the commercial speech doctrine as dictated in *Virginia Board of Pharmacy*. Additionally, as noted in *Fox*, the measure does not have to be the least restive means possible; the measure only needs to be reasonable to achieve the government's interest. Headroom has the capability to profile users and their content. R. at 3. It does this for seventy-five million users individually and its artificial intelligence flags content as suspicious. R. at 3. In that case, Headroom programs the artificial intelligence to analyze the content in line with their community standards. *See* R. at 3. It is not unreasonable for these same programs to list the specific conduct violations for which they flag the content; this information is essential to the

consumers as well as the speakers. *See Central Hudson*, 447 U.S. at 561-62. Further, the artificial intelligence can learn and will be able to give more thorough explanations as time goes on. American Health Lawyers Association, *§ 50.1. What is artificial intelligence?*, 3 Health L. Prac. Guide § 50:1 (2023). Therefore, under the Central Hudson Test, Section 528.491(c) passes intermediate scrutiny because it relates to a substantial government interest in consumer protection and dissemination of information and is reasonable considering Headroom's technological capabilities.

C. Even If This Court Does Not Apply the Central Hudson Test, This Court's Holding in *Zauderer* Supports Midlands Disclosure Requirements Under Section 528.491(c) of the SPAAM ACT.

This Court's holding is *Zauderer* supports the disclosure requirements under the SPAAM Act because it protects consumers and is not unduly burdensome to Headroom. When fully protected speech and commercial speech are intertwined, they may lose their commercial status. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988). A state may regulate commercial messages through disclosure requirements if the disclosure provides "beneficial consumer information." *44 Liquormart*, 517 U.S. at 501, 516 (1996) (holding a complete state ban on liquor price advertising violated the First Amendment).

Alarmingly, in this Court's most recent case on commercial speech, *Sorrell v. IMS Health Inc.*, this Court did not use the Central Hudson Test and banned a state law forbidding pharmacies from selling information from prescribers for marking purposes. 564 U.S. 552, 563-64 (2011); *but see Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841-42, 849-50 (9th Cir. 2017) (using the Central Hudson Test in 2017 and noting the Second, Fourth, Sixth, and Eighth Circuits use the test as well post *IMS*). There, the Court stated that the combination of content and speaker-based restrictions was invalid; additionally, the Court held that fear that people would make bad decisions based on truthful information was not sufficient to uphold the state ban. *IMS*, 564 U.S. at 2670-71.

Another case fell outside the traditional analyses of commercial speech when it required disclosures rather than silencing restrictions.

In *Zauderer*, this Court held that the government may restrict commercial speech if the restrictions impose disclosure requirements related to deception prevention. *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985). There, the Court found many restrictions on attorney advertising were invalid; however, a disclosure requirement was justifiable because the value of information it provided to consumers was at the heart of commercial speech doctrine. *Id.* at 651. The Court noted in "all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable, less restrictive alternatives to actual suppression of speech." *Id.* at 651 n.14 (1985); *see Friedman v. Rogers*, 440 U.S. 1, 12 n.11 (1979) (permitting a state to require disclosures to cure lapses in information). However, this Court also noted that state-required disclosures of donor percentages by fundraisers were not allowable because the commercial speech in question was so intertwined with non-commercial speech that it would not warrant treating the commercial speech to a lower degree of scrutiny. *Riley*, 487 U.S. at 796-97.

Zauderer better implicates this case than *IMS* and *Riley*. The lower court noted that the disclosure requirement in question is "content-neutral" because it applies to all social media platforms regardless of politics or ideology. R. at 12; *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 70-72 (2022); *see City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 428 (1993) (noting that regulations on the time, place, and manner of protected speech are justified if they do not reference the content of the speech). Midland's law is unlike the law in IMS because Midland's law is content-neutral. Respondent concedes the act may have some speaker-based restrictions because it only regulates one industry, like the law in *IMS*.

Notwithstanding this, the Court in *IMS* acknowledges some regulation is allowable for commercial speech when used to protect consumers. *See IMS*, 564 U.S. at 579. Consumers who may potentially buy products or see content that is flagged on Headroom will benefit from disclosures because the explanations distinguish the "harmless from the harmful" under *IMS* and *Zauderer*'s rationales. *Zauderer*, 471 U.S. at 646. *Friedman* and *Zauderer* also note of all restrictions on speech, disclosure requirements, like those under Midland Code section 528.491(c), are one of the least burdensome to enforce.

This Court has allowed for required disclosures and distinguished them from silencing speech in *44 Liquormart*, *Zauderer*, and *Firedman*. Here, although the speech by the users and Headroom are intertwined like *Riley*, they are not "inextricable." *See Riley*, 487 U.S. at 797. The posts by the users are easily distinguishable from the flagging of the content. Requiring disclosure of these materials strikes at the heart of commercial speech doctrine originally articulated in *Virginia State Board of Pharmacy* because it seeks to "open the channels of communication, rather than closing them." 425 U.S. at 748. The SPAAM Act's disclosure requirement, like the requirement is *Zauderer*, is not unduly burdensome for the reasons discussed above; additionally, as this Court has repeatedly noted, this dissemination of information is important enough to justify costs on "would-be regulators" to distinguish the "harmless from the harmful." *Zauderer*, 471 U.S. at 646; *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (quoting *Zauderer*, 471 U.S. at 646); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988) (quoting *Zauderer*, 471 U.S. at 646). Midland Code section 528.491(c) does not require a ban constraining the ability to speak or silencing an entity; the law requires additional information in pursuit of a "more coherent policy" to protect consumers, which was deemed acceptable by this Court in *IMS* and *Zauderer*. *IMS*, 564 U.S. at 573. Therefore, this Court should uphold Midland's disclosure

requirements even when not applying the Central Hudson Test under the holding and accompanying rationale in *Zauderer*.

III. PROHIBITING MAJOR SOCIAL MEDIA COMPANIES FROM DENYING USERS NONDISCRIMINATORY ACCESS TO ITS SERVICES DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE THIS REGULATES ONLT CONDUCT, AND NOT SPEECH.

Social media companies deny users nondiscriminatory access to its services by offering their services on discriminatory basis. To do this, the person seeking to access the platform must first indicate that they have the specific trait or characteristic as a precondition to accessing the platform. For example, consider Vegan Forum. Vegan Forum allows non-vegans access but hypothesize that the platform wanted to *only* serve vegans, it could request people affirm their vegan status as a requisite step in creating their account. This practice intents to create discriminatory access to service based on one's veganism. For Headroom or any platform to claim a law requiring them offer nondiscriminatory access has violated their First Amendment right, it first has to be "speaking" through its denial of access onto the platform.

A. Dying users access to a media platform is conduct, which is not protected by the First Amendment because it fails to be inherently expressive conduct.

In *Rumsfeld,* the Court found a law school was not "speaking" through its denial of access. In this case, a law school sought to deny campus recruiting to the military to express disapproval over the "don't ask don't tell" policy preventing homosexuals in the military. *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 61-63 (2006). The Solomon Amendment compelled the school give the military equal access to campus. The action regulated by this nondiscriminatory access law is hosting recruiters. Schools are not usually considered to be inherently 'sending a message' when they host recruiters. Because hosting recruiters is *not inherently expressive,* the

Court concluded the Solomon Amendment regulated the school's conduct, not the school's speech. Hosting recruiters wholly related to what the schools must *do*, and not what they may say or express. Integral to the argument, is that the underlying activity regulated by the statute is not inherently expressive.

Conversely, if the law requiring nondiscriminatory access regulates something that *is inherently expressive,* then it regulates the speech of the host. Consider *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, here it was critical to the Court that activity being regulated, parade participation, *is* inherently expressive. 515 U.S. 557, 572,(1995). Unlike recruiting events, parades are often oriented around a message of the organizers. For example, a parade for recognizing a specific kind of cultural heritage, if forced to give nondiscriminatory access, there could be significantly more unrelated groups marching in the parade such that the message of the speaker is lost, the culture would be too diluted to be recognized. Therefore, parade organizers are "speaking" through its denial of access. Thus the analysis will turn upon the thing regulated by the law, and it is inherently expressive or not.

For laws like SPAAM, activity getting regulated is making and operating a general forum for hosting other people's speech. This is not inherently expressive. One does not "speak" by simply hosting the general speech of others. If a local grocery sets up message board for public posting, the store has not made any speech itself. The store has not expressed any clear idea or communicated its own thoughts. Likewise, media platforms are not expressing something inherently by similarly serving as a mere host to the general postings of others.

It is critical though to note the difference between *general media platforms* and *specific media platforms*. Hosting a generic speech platform, like the grocery store message board, is not inherently expressive. However, hosting a specifically vegan platform is inherently expressive.

By just creating a *vegan* specific forum, the platform itself expresses that it is pro-vegan. Because major media companies like Headroom host *general* speech, laws requiring nondiscriminatory access to these forums do not regulate the platforms speech at all.[1] Like in *Rumsfeld*, the underlying activity regulated by the statute is *not inherently expressive*, and the act is about what they must do, and not what they say. Therefore it only regulates conduct, and a state can regulate private conduct without raising free speech concerns. *See generally, United States v. O'Brien,* 391 U.S. 367 (1968). In *Paxton*, the 5th Circuit Court of Appeals correctly recognized that law's like SPAAM "[do] not regulate the platforms' speech at all; it protects other people's speech and regulates the platform's conduct*."* 49 F.4th at *488*.

B. Laws that prohibit discriminatory shadow banning are also conduct because the actions regulated in deprioritizing content are not likely to be understood as the platforms "expressive conduct" and therefore are not protected under the First Amendment.

These laws also bar major platforms from removing, censoring, and shadow banning in a discriminatory manner.[2] Actions like censoring and deprioritizing are also conduct. A platform like Headroom does not "speak" when it deprioritizes content it disagrees with because the conduct does not make it clear that headroom disagreed.

[1] While community standards include refusing the expression of homophobic, or transphobic ideas, this does not make headroom the "pro-LGBTQ" specific forum. In fact, the same "community standards" state that it is a platform where all are welcome. By inviting all people to be users on the platform, Headroom is a general forum, that hosts speech generally.

[2] Media companies can also practice discriminatory access to its services by users different service based on some trait of the user. If the service the forum provides is viewership, then tailoring the degree of exposure on the platform can be a way to offer more or less access to these services. Media platforms can do this though shadow banning, as it is "limiting or eliminating either the user's or their content's exposure on the platform or deprioritizing their content to a less prominent position on the platform." With shadow banning, the platform changes *how much* service a specific user will have access too.

The 11th circuit *NetChoice v. Attorney General of Florida* came out differently on this. The 11th circuit found the platforms "speaks" through prioritization, reasoning that prioritizing some posts and deprioritizing others was the way in which the platform expresses its own viewpoint. 34 F.4th 1196, 1204-1205 (11th Cir. 2022). However, the 11th circuit made errors, first it wholly overlooked the fact that these algorithms, that operate chiefly to maximize a user's engagement.

For the conduct to be "expressive conduct" the actor must have both "an intent to convey a particularized message" and "*the likelihood [is] great that the message would be understood by those who viewed it." Texas v. Johnson*, 491 U.S. 397, 404 (1989) (emphasis added).

In applying this test in *Rumsfeld,* the court concluded the law schools denial of equal access failed to satisfy the clarity prong because there could be other, non-expressive reasons for the *same conduct*. *Rumsfeld,* 547 U.S. 47, 64. The court noted; "[a]n observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* at 66.

So too will Headroom's shadow banning actions this fail to be "expressive conduct" because losing exposure on a platform can occur for many reasons. Part of the algorithms purpose is to promulgate content that the user will engage in. This means users can produce content the algorithm predicts will be less popular or interesting for reasons unrelated to expressing values. An influencer may age out of relevancy, a company may launch an advertisement on the platform that is visually uninteresting, resulting in less interaction and less prioritization by the AI. Receiving less exposure could have nothing to do with the values Midland seeks to "speak." Posts

and tags about an awareness month, say breast cancer, decline when the month concludes. The platform might to the trends decline and start deprioritizing breast cancer content, but that does not mean the platform is taking a position against combating breast cancer.

This prioritizing or deprioritizing as a means of being "expressive" is indistinguishable from instances where it is not. Therefore, the 11th circuit erred, and prioritization of content fails to be *inherently expressive*. [3]

Another possible way for platforms to "speak" is if the hosted speech would be mistaken for the platform's speech. In *PruneYard*, because the mall was open to the public, any "views expressed by members of the public in passing out pamphlets or seeking signatures . . . will not likely be identified with those of the owner." 447 U.S. 74, 76-77, 87. Similarly, as major media platforms are held to the public at large, individual posts are not likely be identified with those of the owner, and therefore not the platform's speech.

C. Even if the court finds that platforms are speaking as private actors, SPAAM is a content-neutral, time, place, and manner restriction that does not violate the First Amendment.

In some instances, the government may lawfully restrict the speech of a private party. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). In determining whether a restriction is constitutional, a court must determine whether the restriction is content-based or content-neutral. *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 295 (1984). A law that restricts all speech regardless of content, such as the time, place, or manner in which the speech may

[3] Other actions covered by SPAAM and similar laws include means like adding warnings to posts and removing posts, these other means are also not expressive. At best, removing a post expresses that the content it contained *isn't appropriate*. For example, consider a user who makes a post in favor of combating sex-trafficking, and that post included sexually explicit narratives or even images. In removing the post, a platform is not attempting to say it does not agree with the expression, instead, it is putting controls on how the expression can be communicated

occur are content neutral laws. Time, place, and manner restrictions are valid if they are (1) justified without reference to the content of the regulated speech (content-neutral), (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *Id.* At 293.

Applying this analysis in turn, SPAAM is a content-neutral law because it does not cut in favor of or against any particular viewpoint a platform. It only requires the platforms do not discriminate access based on viewpoint. This in no way implicates what the viewpoint may be. At best this regulates the platforms' ability to censor, as an expressive activity. The government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

To the second prong, SPAAM is narrowly tailored because it only prohibits speech censored on the basis of viewpoint. It is tailored to a compelling government interest of protecting civil discourse where speech is met with counter-speech. *Whitney v. California* 274 U.S. 357, 362 (1927) (emphasizing the importance of counter-speech in our collective discourse.) SPAAM makes exceptions for content that leaving out unprotected speech. Thus, any speech that gets protected from platform censorship under SPAAM, is content that is being erased because of viewpoint discrimination.

Plus, when a content-neutral regulation does not entirely exclude any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal. *Hill v. Colorado*, 530 U.S. 703, 726 (2000). Headroom can simply state what their views values and beliefs are. They can disseminate it on their website, or even have their own account repost or generate content on the platform to that effect. Therefore, this policy satisfies the second and third prongs.

CONCLUSION

The First Amendment right to free and uninterrupted speech is an integral part of our nation that is all too taken for granted. Social media platforms, including Headroom, play a critical role in our current cultural landscape by indiscriminately allowing all persons to communicate across cyber space. Because of the nature of the platform as a "common carrier," Headroom is therefore subject to the scrutiny of government regulation and cannot evade the SPAAM Act. Furthermore, as social media platforms exist as modern public forums, government entities maintain the right to regulate the conduct of private owners through laws such as SPAAM.

Alternatively, if Headroom is not a common carrier, they are a commercial speaker. The SPAAM Act's disclosure requirements would survive intermediate scrutiny under this Court's framework, and this Court's holding in *Zauderer* permits States to enact disclosure requirements because they are minimally burdensome and facilitate State interests in consumer protection and the dissemination of information.

Lastly, laws that force platforms to host speech, even speech the platform may not agree with do not violate the First Amendment because they regulate the platforms *conduct*. For a private entity to be "speaking" through access to its services, access itself must be inherently expressive. Because SPAAM relates to generic media platforms, where all are welcome, access onto a platform cannot be expressive. Platforms also do not speak when they alter the *amount* of service in a discriminatory manner. Platforms deprioritizing conduct, for example, is also not expressive because it can occur without intending to carry any particular message. As much, the law fully regulates conduct and done not abridge free speech under the First Amendment. If the court were to consider the actions to be expressive conduct, the law is still a content-neutral law that is

properly tailored in furtherance of the compelling interest to protect modern day speech as it moves into online forums.

Team 28
Counsel for Respondents
November 12, 2022