IN THE
SUPREME COURT
OF THE UNITED STATES

No. 23-386

OCTOBER TERM 2023

HEADROOM, INC.,

Petitioner,

v.

EDWIN SINCLAIR,

ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Respondent.

On Appeal from the United States Court of Appeals for
the Thirteenth Circuit

Brief for Petitioner

Team No. 29
Counsel for the Petitioner

Table of Contents

Table of Authorities

STATUTES

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Questions Presented

1. Common carriers must not discriminate against serving any members of the public. Headroom limits users based on whether they accept the Community Standards before joining. Did the Thirteenth Circuit err in determining that Headroom is a common carrier?

2. *Zauderer* dictates that disclosure requirements must not be unduly burdensome. The SPAAM Act's disclosure requirements force Headroom to give a detailed explanation every time one of its 75 million users violates one of the many Community Standards. Did the Thirteenth Circuit err in determining that *Zauderer* applies to the SPAAM Act's disclosure requirements?

3. The Free Speech Clause of the First Amendment prohibits the State from compelling private companies to speak a specific message. The SPAAM Act requires Headroom to allow posts that endorse offensive political views contrary to its Community Standards. Did the Thirteenth Circuit err in finding that the SPAAM Act did not violate the Free Speech Clause?

Statement of the Case

This is a case about how a state overstepped its constitutional authority by implementing a statute that restricted a company's First Amendment rights to discriminate against certain viewpoints and endorse its own political view.

Headroom is a leading social media company in the United States with over seventy-five million monthly users. R. at 3. Headroom seeks to provide an inclusive, accepting platform for its users to express their beliefs. R. at 2-3. Users may create profiles, post and monetize content, share messages, and collect donations; furthermore, they can "interact in a virtual reality environment that they access through virtual-reality headsets." R. at 3.

Headroom uses an algorithm to prioritize posts specific to each user's interests, as well as limit material that violates its Community Standards. *Id*. Headroom is only open to individuals who are willing to accept these standards, which 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." *Id*. Furthermore, misinformation, including "fabricated stories, manipulated facts, manipulated images or videos, and misleading narratives," is banned. R. at 4. Apart from deprioritizing posts, Headroom may flag posts as potentially violating the Community Standards, demonetize the user's account, restrict the account or its viewership, or ban the user from Headroom if his post violates the Community Standards. *Id*.

In 2022, the Midland Legislature held special hearings due to accusations made by Headroom's users that Headroom was engaging in viewpoint-based discrimination. R. at 4. At these hearings, various users, such as Max Sterling, Mia Everly, and Ava Rosewood, testified

that Headroom deprioritized their content, added warnings to their posts regarding possible violations of Community Standards, reduced user engagement and purchases, and banned their accounts after they made posts about controversial views. R. at 4-5. Due to the special hearings, the Midland Legislature passed the SPAAM Act on February 7, 2022, which went into effect on March 24, 2022. R. at 7. The purpose of the Act was to stop large social media companies from "excessive censorship" and the suppression of free speech at the expense of "hardworking Midlandians' livelihoods" and "the voice of the people." R. at 5.

The SPAAM Act applies to all social media platforms, which qualify as "any information service, system, search engine, or software provider 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." Midland Code § 528.491(a)(2)(i)–(iv). The Act prohibits social media companies from "censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" based on opinion. *Id.* § 528.491(b)(1). "Censoring" qualifies as "editing, deleting, altering, or adding any commentary"; "deplatforming" qualifies as "permanently or temporarily deleting or banning a user"; and "shadow banning" qualifies as "any action 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." *Id.* § 528.491(b)(1). Obscenity, pornography, and "illegal or patently offensive" posts are exempted. *Id.* § 528.491(b)(2).

The SPAAM Act also contains strict disclosure requirements, forcing social media companies to publicize "community standards" that have "detailed definitions and explanations for how they will be used, interpreted, and enforced." *Id.* § 528.491(c)(1). If a post violates a

platform's community standards, the platform must "provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen." *Id.* § 528.491(c)(2). If a social media company violates the Act, a user can sue the company or file a complaint with the Attorney General of Midland, and the company may be fined or enjoined from conduct violating the Act. *Id.* § 528.491(d)(2-3).

Headroom sought to enjoin the Attorney General of Midland, Edwin Sinclair, from enforcing the Act. R. at 7. The district court ruled in favor of Headroom because the restrictions failed intermediate constitutional scrutiny. R. at 15. On appeal, the Court of Appeals for the Thirteenth Circuit reversed, finding for Sinclair. R. at 19. This conclusion of law is on appeal by Headroom in the action before this Court. R. at 21.

Summary of the Argument

Private companies have the right to discriminate based on viewpoint because the First Amendment protects commercial speech and editorial judgment from excessive state overreach. This Court should overturn the Thirteenth Circuit's decision that the SPAAM Act is constitutional because Headroom is not a common carrier and this Court's decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* does not apply to the Act's disclosure requirements. Furthermore, Midland violated the First Amendment's Free Speech Clause by prohibiting Headroom from denying users nondiscriminatory access to its services.

The Thirteenth Circuit erred in finding that Headroom qualified as a common carrier. Common carriers regulate public access indiscriminately and do not use editorial judgment to do so. Headroom's Community Standards require individuals to agree to conform to its terms and conditions upon joining. Additionally, the Telecommunications Act of 1996 already

distinguishes interactive online services, such as social media platforms, from common carriers. Unlike a common carrier, Headroom exercises editorial judgment to determine which posts reflect its Community Standards. When a post does not coincide with such values, Headroom chooses to deprioritize or remove it. By determining what information to display, Headroom exercises editorial discretion and is thus not a common carrier.

The Thirteenth Circuit also erred in finding that *Zauderer* applied to the SPAAM Act's disclosure requirements. *Zauderer* applies when commercial speakers are required to disclose purely factual and uncontroversial information. The disclosure requirements must not be unjustified or unduly burdensome and must also be reasonably related to the State's interest in preventing deception of consumers. Midland requires Headroom to disclose opinions about controversial topics, such as political issues, rather than purely factual and uncontroversial information. Furthermore, the SPAAM Act's disclosure requirements are unduly burdensome because they force Headroom to provide detailed explanations every time a post violates its Community Standards, which compels an unreasonable amount of speech. Finally, the disclosure requirements are not reasonably related to the State's interest in preventing deception of consumers because Midland's purpose does not concern user deception. Rather, the State seeks to level the playing field between opinions, many of political nature, posted on a private social media platform.

Finally, the Thirteenth Circuit erred in finding that Midland did not violate the First Amendment's Free Speech Clause. Expressive conduct, qualifying as speech, is protected by the First Amendment when the person engaged in the conduct intends to convey a particularized message which is likely to be understood by her audience without accompanying explanatory speech. Headroom's act of removing content in violation of its community standards is

expressive conduct, qualifying as speech, because the conduct expresses the platform's welcoming and inclusive ideals which are demonstrably understood by users without explanation. A law regulating speech violates the First Amendment when it forces a speaker to affirm a governmental message or interferes with her editorial judgment; a law may permissibly compel an individual merely to host or accommodate a third party's message if the regulation does not alter her own expressive message. The SPAAM Act compels Headroom's to affirm the government's understanding of democracy and interferes with its editorial judgment by prohibiting it from removing content and users it disagrees with, occupying space that could have otherwise been used to promote content reflective of its Community Standards. This prohibition alters Headroom's message of respect and inclusion in violation of the First Amendment. A law is reviewed under strict scrutiny when it is facially neutral, yet cannot be justified without reference to the content it seeks to regulate. Although the SPAAM Act is entitled to strict scrutiny review because it is content-based, it fails to survive even intermediate scrutiny because Midland's governmental interest is not substantial nor narrowly tailored.

For these reasons, this Court should rule that Headroom is not a common carrier, that *Zauderer* does not apply to the SPAAM Act's disclosure requirements, and that Midland violated the Free Speech Clause, thus overturning the Thirteenth Circuit's decision that the SPAAM Act is constitutional.

Argument

I. THE THIRTEENTH CIRCUIT INCORRECTLY HELD THAT HEADROOM WAS A COMMON CARRIER BECAUSE WHILE HEADROOM HAS A SUBSTANTIAL MARKET SHARE, IT LIMITS WHO CAN USE ITS SERVICE AND EXERCISES EDITORIAL JUDGMENT.

Common carrier status is a designation that applies to transportation and communication companies that serve the public without individualized bargaining and thus are obligated not to

discriminate. *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 468 (5th Cir. 2022). While some common carriers have a substantial market share, this Court has rejected the idea that "a private company engaging in speech within the meaning of the First Amendment loses its constitutional rights just because it succeeds in the marketplace…." *NetChoice, LLC v. Att'y Gen., Fla.,* 34 F.4th 1196, 1222 (11th Cir. 2022). A company qualifies as a common carrier if (1) it does not regulate public access and (2) does not exercise editorial judgment. *Att'y Gen., Fla.*, 34 F.4th at 1222; *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

Regulating public access and limiting viewpoint-based content is indicative that a platform does not hold common carrier status. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). In *Hurley,* a veterans organization organized a public parade for Evacuation-St. Patrick's Day. 515 U.S. at 557. An organization of gay, lesbian, and bisexual (LGB) individuals wanting to show their Irish pride applied to the organization to march, but their application was denied. *Id*. at 560-61. This Court found that even though the parade was open to the public, the veteran's organization was not required to display a message with which it did not agree, so it was not a common carrier. *Id.* at 569. In *Tornillo*, a Florida state statute giving a right-of-reply allowed a state House candidate to sue a newspaper for prohibiting him from publishing his reply to their criticism of his candidacy. *Mia. Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 244 (1974). The political candidate argued that the "government has an obligation to ensure that a wide variety of views reach the public." *Tornillo*, 418 at 248. This Court ruled that forcing the newspaper to publish the response was a violation of the First Amendment by compelling the newspaper to speak. *Id.* at 255-256. Although anyone could read the newspaper, it was not a common carrier because it declined to host views with which it disagreed. *Id*. at 258. In *Att'y Gen., Fla*., Florida passed a law which

attempted to regulate social media companies' content-moderation practices and force them to be common carriers. 34 F.4th. at 1205. The Eleventh Circuit rejected this argument, citing that the Telecommunications Act of 1996 already differentiated interactive computer services, like social media companies, from common carriers. *Id.* at 1221. Because users must consent to abide by the platform's terms before creating an account, social media platforms regulate public access and discriminate against those who do not agree to their terms. *Id*. at 1220.

Expressive editorial judgment is indicative that a provider is not a common carrier. *Att'y Gen. Fla.*, 34 F.4th at 1222. In *Midwest Video*, the FCC attempted to brand cable operators as common carriers and force them to accept channels on a non-discriminatory basis. 440 U.S. at 691. This Court ruled that broadcasting was already statutorily exempted from common carrier status. 440 U.S. at 709. Because cable operators choose the channels to include in their packages and do not carry all channels, they express editorial judgment. *Id*. Although Congress later passed a bill mandating cable operators to set aside some channels for the public, the common carrier doctrine regarding editorial judgment remains unchanged. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (U.S. 2019). Contrarily, the Fifth Circuit ruled that a Texas law which regulated social media companies' ability to censor was constitutional in *Paxton*. 49 F.4th at 490. The court argued that expressive editorial judgment was not "a freestanding category of First Amendment-protected expression[,]" but even if it was, social media platforms fall outside of it because they engage in "ex post censorship" rather than editorial judgment. *Id.* at 463-64. The Court concluded that social media platforms are common carriers because they are open to the public as facilitators, rather than hosts, of communication. *Id*. at 479. However, *Paxton* is persuasive authority and contradicts the Telecommunications Act of 1996, as discussed below.

Headroom regulates public access. Like the veteran's group who denied an LGB group's parade application in *Hurley*, Headroom does not allow individuals who refuse to comply with its terms to participate in its community. R. at 3. This conduct contradicts actions indicative of a common carrier that simply operates as an indiscriminate delivery system. While one might argue that Headroom is open to any member of the public, regardless of its terms and conditions, accepting the terms, which regulate what users may post, is a condition of service; thus, the public does not automatically obtain Headroom user status merely from being a member of the public. R. at 3. However, the SPAAM Act would convert Headroom into a common carrier because it would force Headroom to not discriminate against the posts it orders and filters based on viewpoint, which is a characteristic of a common carrier. R. at 6. Just as the veteran's group in *Hurley* retained private status while operating a public parade, Headroom is a private platform operating in the public sphere and should retain their private status because it seeks to promote specific messages of inclusion and welcoming. R. at 2. A designation of common carrier status would force Headroom to allow public posts of transphobic, racist, sexist, or homophobic content, which are antithetical to Headroom's beliefs. R. at 3, 6.

Headroom limits the content that it shows based on viewpoint. Just as the newspaper in *Tornillo* did not have an obligation to publish the candidate's response in their paper, Headroom is under no obligation to tolerate users or display posts that violate its Community Standards. Just like the newspaper sought to present a specific message, Headroom censors content that violates its user agreement and Community Standards. R. at 4. Headroom does not have to cater to the opinion of those with whom it disagrees. Because it is a private company, it has the right to determine which content to remove according to its Community Standards. Forcing Headroom to allow posts that violate its values would compel speech, which this Court spurned in *Tornillo*.

Headroom limits the content that it posts and thus is not a common carrier. Just as the statute in *Att'y Gen., Fla.* attempted to apply common carrier status to social media platforms, the SPAAM Act attempts to turn a private platform into a public common carrier. The SPAAM Act explicitly describes social media platforms as "common carriers of public speech." R. at 6. However, the Act, like the statute in *Att'y Gen., Fla*., is inconsistent with the Telecommunications Act of 1996 because Congress has distinguished interactive services from common carriers. Because any law inconsistent with congressional statute is expressly preempted, the SPAAM Act, which contradicts the purpose and explicit exception to the Telecommunications Act, is thus preempted. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 593 (2001). Additionally, because individuals consent to abide by the platform's terms before becoming users, Headroom only censors those who have agreed to its terms and thus have consented to be censored. R. at 3. Individuals who do not wish to comply need not use the platform, but by agreeing to the terms, they have notice of Headroom's standards and consequences of violative posts.

Headroom engages in expressive editorial judgment. Like the cable operators in *Midwest Video* who engaged in editorial judgment by choosing which channels to offer and exclude, Headroom discriminates by shadow banning, censoring, and deplatforming certain posts and users that convey a message that does not represent Headroom's views. R. at 12. By engaging in these measures, Headroom curates a package of ideas that it conveys to the marketplace similarly to how a cable company chooses its channels. Although the Fifth Circuit declared the Texas speech protection law constitutional in *Paxton*, the SPAAM Act is unconstitutional. The Fifth Circuit erred in determining that states can classify interactive sites as common carriers because of the Telecommunications Act of 1996. Furthermore, the court argues that social media companies do not exercise editorial judgment because they merely transport information and

engage in ex post censorship. However, these arguments contradict *Midwest Video*. Cable operators transport information by choosing the channels to add to its packages, thus exercising editorial judgment. Furthermore, cable operators do not censor the content of television channels; instead, they evaluate the messages of various channels and select those that produce content that aligns with their corporate goals. Likewise, Headroom does not censor users while they are creating posts; rather, the platform identifies posts after the fact that contradict its guidelines and removes it from the package of ideas that Headroom conveys to the public. R. at 4.

Because Headroom does not indiscriminately offer its services to the public by prohibiting individuals who do not accept its terms from joining the platform and exercises expressive editorial judgment by removing individuals and posts that violate its Community Standards, Headroom does not qualify as a common carrier.

II. THE THIRTEENTH CIRCUIT ERRED IN HOLDING THAT THE COURT'S DECISION IN ZAUDERER V. DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO APPLIES TO THE SPAAM ACT'S DISCLOSURE REQUIREMENTS BECAUSE THE SPEECH IS NOT PURELY FACTUAL AND UNCONTROVERSIAL. EVEN IF ZAUDERER APPLIED, THE REQUIREMENTS UNDULY BURDEN HEADROOM, AND MIDLAND'S INTEREST IN LEVELING THE PLAYING FIELD IS NOT A LEGITIMATE GOVERNMENT INTEREST.

This Court ruled in *Zauderer* that government regulations can require commercial speakers to disclose (1) "purely factual and uncontroversial information" but are enjoined from doing so when such regulation is (2) "unjustified or unduly burdensome…and [chills] protected commercial speech" and (3) "are [not] reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 628, 651 (1985).

A. The Thirteenth Circuit erred in finding that Zauderer applies because the SPAAM Act's disclosure requirements are not "purely factual and uncontroversial."

Speech is purely factual and uncontroversial when it "clearly implies a [true] factual statement," *CTIA – The Wireless Assoc. v. Cty. of Berkeley, Calif.*, 928 F.3d 832, 847 (9th Cir. 2019), that is well known. See *Recht v. Morrisey*, 32 F.4th 398, 407 (4th Cir. 2022). In *Recht*, a West Virginia provision contained disclosure requirements constraining medical malpractice legal advertisements to inform patients that they should not discontinue medication without first consulting their doctor and that the drug, which was the subject of the advertisement, remains FDA-approved. *Recht*, 32 F.4th at 406. The Fourth Circuit found that these requirements were purely factual and uncontroversial rather than an opinion because it was "well known…that suddenly discontinuing certain medications can cause injury or death" and that the "advice of a physician mitigates this risk…." *Id*. at 417. In *Zauderer*, an attorney advertised legal services and stated that clients taken on contingency would not have to pay legal fees if the attorney did not win their case. *Zauderer*, 471 U.S. at 626. The Ohio Bar's disclosure requirements requested attorneys to clarify that such clients would still have to pay legal *fees*, rather than *costs*, if the attorney lost their case. *Id*. These conditions were uncontroversial because it was a widely accepted and recognized fact that fees and costs had a different meaning in the legal context. *Id*.

Speech is not purely factual and uncontroversial when it relates to a salient and divisive political topic. *Nat'l Institute of Fam. and Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2366 (U.S. 2018). In *Becerra*, this Court found that *Zauderer* did not apply to California's disclosure requirements because the requirements would force clinics to disclose information about state-sponsored abortion, which the Court recognized was a controversial issue. *Becerra*, 138 S. Ct. at 2366. *Recht* demonstrated that because of its ruling in *Becerra*, this Court has "cautioned against applying *Zauderer* to disclosures…that compel speech on hotly contested topics." *Recht*, 32 F.4th at 416, see *Becerra*, 138 S. Ct. at 2372.

The SPAAM Act's disclosure requirements do not clearly imply true, well-known factual statements. Unlike the disclosure requirements in *Recht* that required attorney advertising to make factual statements about the risks of stopping prescription drug use, the SPAAM Act's disclosure requirements force Headroom to publish detailed Community Standards and give thorough explanations why a user's content violated the Standards and why the prescribed action (e.g., suspension, banning) was chosen. R. at 6. The Community Standards differ from the disclosure requirements in *Recht* because they do not clearly imply well-known statements. Rather, the State seeks to compel Headroom to disseminate its own opinion as to what constitutes "community standards," which is not already well-known among the public because these standards contain a company's opinion rather than a publicly accepted fact. Thus, this disclosure requirement drastically contrasts from the requirement in *Recht* for attorneys to state a well-known risk about stopping drug use without consulting a doctor. Because Midland seeks to force Headroom to craft detailed Community Standards rather than to disseminate commonly known information, the State infringes on Headroom's First Amendment rights by compelling speech. The disclosure requirement forcing Headroom to disclose how a user's content violated the platform's Community Standards also differs from the disclosure requirements in *Recht.* While Headroom's reasons for banning someone's content may be based in fact, the disclosure requirements compel Headroom's opinions on why the content violated its Standards and why a specific punishment was necessary. R. at 6. Such opinions are neither clear nor widely known and accepted, which is why Midland seeks to compel Headroom's speech in the first place. Furthermore, the SPAAM Act's disclosure requirements differ from the requirements in *Zauderer* because the difference between legal fees and costs is already widely known, but Headroom's opinions are not, so Midland seeks to compel Headroom to make its opinion public.

The SPAAM Act's disclosure requirements relate to a salient and divisive political topic. Like the disclosure requirements in *Becerra* which related to abortion, a hotly contested topic, the Act's requirements relate to the divisive political debate regarding various social issues. This is because Midland requires Headroom to publish Community Standards and explain how they will be enforced. R. at 6. Headroom's Community Standards condemn "racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R. at 3. Racial, gender, and LGBTQ+ issues are hotly debated topics, and Midland forces Headroom not only to publish standards related to these issues, but also requires the platform to provide thorough explanations every time it alters content that violates the Standards and explain why the specific action was used. R. at 6. Thus, the State compels Headroom to discuss whether its users were banned due to racist, sexist, homophobic, or transphobic posts. Whether the posts were racist, sexist, homophobic, or transphobic and whether those ideas should be disseminated are debated topics. Thus, Midland compels Headroom to speak regarding political topics, which *Zauderer* prohibits.

Because the SPAAM Act's disclosure requirements are not widely known and factual, yet they relate to a salient and divisive political topic, *Zauderer* does not apply to the SPAAM Act's disclosure requirements because they are not purely factual and uncontroversial.

B. Even if Zauderer applies, the SPAAM Act's disclosure requirements do not survive under Zauderer because the disclosure requirements unduly burden Headroom and thus offend the First Amendment.

Disclosure requirements are unjustified or unduly burdensome and chill protected commercial speech when they force companies "to use their own property to convey an antagonistic ideological message" or "be publicly identified or associated with another's message." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471 (1997). In *Zauderer*, this Court stated that Ohio's disclosure requirement did not attempt to "prescribe what shall be

orthodox in politics, nationalism, religion, or other matters of opinion[,]" so they did not chill protected speech. *Zauderer*, 471 U.S. at 651, citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). This Court states that a statute offends the First Amendment when it "require[s] corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n*, 475 U.S. 1, 15 n.12 (1986).

Disclosure requirements are not unduly burdensome when their demands are realistic. In *Dwyer*, the New Jersey Bar required that attorneys who quote judicial opinions in their advertisements must include the full opinion from which they quoted. *Dwyer v. Cappell*, 762 F.3d 275, 283-85 (3d Cir. 2014). The Third Circuit ruled that this disclosure requirement was unduly burdensome because it prevented attorneys from quoting judicial opinions because it was unrealistic to expect them to also include the full opinion. *Id*. In *Att'y Gen., Fla.*, Florida's disclosure requirements forced social media companies to give a "precise explanation" for how the site found the removed posts and comments as well as a "thorough rationale" for their deletion. 34 F.4th at 1230. The Eleventh Circuit ruled that these requirements were unduly burdensome because the sites "remove millions of posts per day," and the statute forced the companies to meet the strict requirements for each post, which is nearly impossible. *Id*. Because "a platform could be slapped with millions, or even billions, of dollars in statutory damages if a Florida court were to determine that it didn't provide sufficiently 'thorough' explanations when removing posts," the disclosure requirements were unduly burdensome. *Id*. at 1230-31.

The SPAAM Act's disclosure requirements force Headroom to use its own property to convey antagonistic ideological messages and be publicly identified or associated with another's message. Unlike the requirements in *Zauderer*, Midland's disclosure requirements prescribe

what is orthodox for Headroom in matters of opinion by imposing strict requirements whenever the company acts to regulate posts that communicate opinions that violate the Community Standards. R. at 6. The requirements force Headroom to adhere to the idea that all perspectives, even ones that are racist, sexist, or transphobic, should be displayed on a private social media site because if Headroom decides to limit a post or account based on content, Midland requires it to explain its reasoning. *Id*. Moreover, a Midland legislator explicitly stated her desire to limit Headroom's right to declare what is orthodox in politics. R. at 5. By implementing the SPAAM Act, Midland forces Headroom to adopt its ideology on this point. Because Midland intends to regulate how Headroom disseminates ideas through the Act's stringent disclosure requirements, it effectively prohibits Headroom from using its property–the social media platform and virtual reality system–to convey its own messages by limiting ideologies that antagonize its purpose.

Headroom cannot realistically meet the SPAAM Act's disclosure requirements. Like the requirements in *Dwyer*, it is unrealistic to expect Headroom to include thorough explanations behind its decision to ban, limit, or delete user posts and accounts. Just as the requirement to include an entire judicial opinion made it unreasonable for attorneys to quote opinions in their advertising in *Dwyer*, so too would the requirement that compels Headroom to explain its actions every time it orders and filters posts is unrealistic. R. at 6. Enforcing these requirements would dissuade Headroom from suspending and banning users at all, which is essential to creating its community of inclusivity and respect. Like the requirements in *Att'y Gen., Fla.*, the SPAAM Act's "detailed explanation" requirement is nearly impossible for Headroom to meet. R. at 6. Headroom has over seventy-five million monthly users and thus makes numerous editorial judgments to limit content. R. at 3. Furthermore, violation of the SPAAM Act may cost Headroom $10,000 a day per instance. R. at 7. Thus, if Headroom is not thorough enough in its

explanation of each post it limits, which is an unreasonable requirement in the first place, the platform could rack up massive liability. Furthermore, it may have to hire more employees to meet the demands of the statute. These inconveniences would unduly burden the platform.

Because the SPAAM Act's unrealistic disclosure requirements force Headroom to promote antagonistic ideological messages, the Act's requirements are unduly burdensome, and Midland's actions thus exceed the authority that *Zauderer* grants under the Constitution.

C. Even if Zauderer applied to the SPAAM Act's disclosure requirements, Midland's interest in holding social media platforms accountable for suppressing free speech is wholly unrelated to the interest in avoiding misleading advertisements and is not a legitimate government interest.

Disclosure requirements are reasonably related to a state interest when the requirements "directly advance [the state's] interest," *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 466 (1988), in "preventing deception of consumers." *Zauderer*, 471 U.S. at 651. In *Zauderer*, the Court ruled that Ohio's disclosure requirement was reasonably related to the state purpose of preventing consumer deception because it was reasonable to assume that members of the public would not know the difference between the legal fees and costs, so the possibility of deception was "self-evident." 471 U.S. at 652. Here, the disclosure requirements prevented this possibility, thus directly advancing the state's interest, so there was no need for the State to obtain evidence to determine that the disclosure requirement was reasonably related to the state interest of preventing deception in customers. *Id*. at 652-53. This Court has stated that *Zauderer* allows the government to "prescribe what is orthodox in commercial advertising," *Zauderer*, 471 U.S. at 651, but "*outside that context* it may not compel affirmance of a belief with which the speaker disagrees." *Hurley*, 515 U.S. at 573 (emphasis added). Thus, *Zauderer* "carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages." *Glickman*, 521 U.S. at 491 (J. Souter, dissenting).

Disclosure requirements do not meet rational basis scrutiny when the government interest is "'unrelated to the suppression of free speech.'" *Att'y. Gen., Fla.*, 34 F.4th at 1227, quoting *Fort Lauderdale Food Not Bombs v. Cty. of Fort Lauderdale*, 11 F.4th 1266, 1291 (11th Cir. 2021). In *Att'y Gen, Fla.*., the Eleventh Circuit ruled that disclosure requirements similar to those imposed on Headroom did not meet rational basis scrutiny because the government did not have a "legitimate interest" in "leveling the expressive playing field…[or] enabling users…to say whatever they want on privately owned platforms that would prefer to remove their posts…." *Id*. at 1228. Thus, it is not a government interest to prevent unfairness because "private actors have a right to be unfair." *Id*., citing *Tornillo*, 418 U.S. at 258.

The SPAAM Act's disclosure requirements do not directly advance the state interest of preventing consumer deception. Unlike the disclosure requirement in *Zauderer*, the possibility of free speech suppression due to Headroom's filtering is not self-evident in opposing consumer deception. Just because some views are deprioritized does not mean that the disclosure requirements, which limit deprioritization, will directly cause a lack of consumer deception. In fact, Headroom seeks to ban posts that promulgate misinformation. R. at 3-4. Prohibiting the platform from doing so will promote deception because false information will have free reign on the site. In any case, a statute with the purpose of opposing "virtual dictators" is not self-evident in its advancement of commercial advertising and the prevention of consumer deception. R. at 5. Midland's purpose does not fall within the context of commercial advertising; the context is broader, as not all Headroom users seek to monetize their social media presence. R. at 3. Even if all users did use Headroom for advertising purposes, many of the posts with content that violates the Community Standards are not in themselves monetizable. Rather, many users who allege to be harmed by Headroom's content moderation practices advertise their products as well as post

content that violates the Community Standards. R. at 4-5. Even if the statute fell within the context of commercial advertising, it does not directly relate to preventing consumer detection, as the *Glickman* dissent affirms. Its purpose is to stop social media companies from "suppressing free speech and ruining…Midlandians' livelihoods under the guise of moderation." R. at 5. Because the disclosure requirements do not fall within that context, they compel Headroom to affirm beliefs with which it disagrees, which the Court in *Hurley* cautions against.

Midland's interest in passing the SPAAM Act is not unrelated to the suppression of free speech. Like the government interest in *Att'y. Gen., Fla.*, which was to prohibit free speech suppression, Midland's purpose is to stop censorship on the part of social media sites. R. at 5. While Midland would argue that its goal is to advance, rather than suppress free speech, this purpose still relates to the suppression of free speech as Midland seeks to do the opposite. *Id*. Private actors have the constitutional right to promote different perspectives. As stated by the Eleventh Circuit, the government does not have an interest in leveling the playing field due to this private right. Thus, each disclosure requirement does not relate to a legitimate government interest because they exist solely in relation to an objective related to suppressing free speech. R. at 6. Furthermore, one of the SPAAM Act's purposes is to assert Midland's "ability to challenge political orthodoxy" by limiting Headroom's right to do so, which limits Headroom's free speech and is exactly what this Court sought to avoid in *Zauderer*. R. at 5. A substantial reason that the disclosure requirements in *Zauderer* passed scrutiny under the Free Speech Clause was because they did not declare what political views were orthodox. Thus, by doing exactly what this Court in *Zauderer* and the Constitution spurn, Midland suppresses Headroom's freedom to discriminate as a private company, which is not a legitimate government interest.

Because the SPAAM Act's disclosure requirements do not directly advance the state interest of preventing consumer deception and relate to the suppression of free speech, Midland's state interest does not coincide with that of the state in *Zauderer*.

III. THE THIRTEENTH CIRCUIT ERRED IN HOLDING THAT THE SPAAM ACT WAS CONSTITUTIONAL UNDER THE FIRST AMENDMENT BECAUSE THE ACT IMPERMISSIBLY RESTRICTS SPEECH.

Although the First Amendment "forbids the abridgment only of 'speech,'" the Court has "long recognized that its protection does not end at the spoken or written word." *Tex. v. Johnson*, 491 U.S. 397, 404 (1989). Conduct "sufficiently imbued with elements of communication" also implicates First Amendment protection. *Spence v. Wash.*, 418 U.S. 405, 409 (1974).

A. The Thirteenth Circuit erred in finding that Headroom's act of removing content and users that violate its Community Standards is not "speech" entitled to First Amendment protection because the act of content moderation is expressive conduct.

Conduct is expressive and thus qualifies for First Amendment protection if (1) the person engaged in the conduct "inten[ded] to convey a particularized message" that "would [likely] be understood by those who viewed it" and (2) the message is "created by the conduct itself," as opposed to additional explanatory speech. *Spence,* 418 U.S. at 410; *Johnson*, 491 U.S. at 404; see *Rumsfeld v. F. of Acad. & Institutional Rts.*, 547 U.S. 47, 66 (2006).

First, conduct is expressive if the person engaged in the conduct intended to convey a specific message that is likely to be understood by its audience. *Spence,* 418 U.S. at 410-11. In *Hurley,* a council of veterans, authorized to organize a St. Patrick's Day parade, prohibited a group of Irish-American gay, lesbian, and bisexual (LGB) individuals from marching at the event. *Hurley*, 515 U.S. at 560. The council did not articulate rules for admission; rather, they admitted groups portraying a wide variety of messages. *Id.* at 558. However, despite the lack of a common theme, the council's overt exclusion of the LGB group conveyed its traditional view of "what merit[ed] celebration on that day." *Id*. at 574. Furthermore, prohibiting the LGB group

from marching would likely be understood by onlookers because in the context of a parade, "each unit's expression is perceived by spectators as part of the whole[,]" thus contributing to a collective message. *Id.* at 577. Therefore, by excluding the LGB group from participating, spectators could easily discern the council's disfavor. *Id.* at 575.

On the other hand, a speaker's conduct is not expressive if he does not intend to convey a message, or if his audience would not understand his message in context. *Spence,* 418 U.S. at 410-11. In *Pruneyard,* this Court found that a mall owner's act of prohibiting protestors on his property was not expressive conduct. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980). The owner failed to even allege that he disagreed with the protestors' pamphlets, thus he failed to convey a message by forcing them to leave his property. See *PruneYard*, 447 U.S. at 88. Similarly, in *Rumsfeld,* a law school restricted military recruiters' use of campus facilities because it disagreed with the military's homophobic policies. *Rumsfeld*, 547 U.S. at 51. This Court found that the school's conduct was not expressive because observers would have "no way of knowing" the law school's opinion just by seeing recruiters conduct interviews off-campus. *Id*. at 66.

Second, conduct is expressive if the speaker's intended message is "created by the conduct itself" without explanatory speech. *Rumsfeld,* 547 U.S. at 66. In *Hurley*, a council did not accompany its decision to exclude a LGB group from the city's parade with explanatory speech. The Court found that the act of exclusion sufficiently expressed the council's viewpoint because it was not necessary to disavow or disclaim that the LGB group opposed its traditional views; the message could be discerned from noting the group's absence. *Id*. at 576-77.

Conversely, conduct is not expressive if additional speech is needed to explain the intended message. *Rumsfeld,* 547 U.S. at 66. In *Rumsfeld,* this Court held that a law school's act

of excluding military recruiters from using campus facilities was not likely to convey the school's disagreement with discriminatory military policies. Rather, "[t]he expressive component of [the] law school's actions [was] . . . created by . . . the speech that accompanie[d] it." *Id.* Because the purpose of prohibiting the recruiters from interviewing at the school could be explained by reasons other than the school's disagreement with military policies, the need for additional speech was "strong evidence" that the school's conduct was not expressive. *Id*. at 66.

Headroom's content moderation conveys a specific message which is understood by its users. Like the council in *Hurley* which conveyed its traditional values by excluding a LGB group from marching in a parade, so too does Headroom convey its intent to foster a safe and tolerant community by specifically removing harmful and offensive content. R. at 3. Like the multifarious groups included in the parade in *Hurley,* Headroom users' posts lack a singular common theme. However, this Court concluded that the choice to specifically exclude a particular group was sufficient to convey the parade organizers' particularized viewpoint because doing so shaped the parade's collective message. Furthermore, the council's decision to exclude the LGB group was likely to be understood by viewers because in the context of a parade, each group is perceived as part of the whole. Thus, by excluding the LGB group, spectators could understand that the council did not endorse the group's progressive message. Similarly, Headroom's decision to remove content that violates its Community Standards communicates its goal of safety and respect because it shapes the type of content users can post and engage with in its online community. Like individual groups marching in a parade in *Hurley,* individual users' posts are viewed as part of a greater online community or feed. Thus, each post contributes to, and shapes the platform's collective message. Users can understand Headroom's message of

tolerance and safety because it specifically targets and removes content that is harmful, offensive, or misleading.

Unlike the mall owner in *PruneYard* who did not convey any message when he prohibited protestors from using his property, Headroom conveys a message that it does not tolerate intolerance when it engages in content moderation. R. at 3-4. While the owner disfavored the protestors' presence, he did not even allege that he disagreed with the content of their pamphlets, thus he failed to convey a specific message through his actions. Dissimilarly, Headroom clearly articulates that it opposes harmful and misleading content; *Id*. thus, by excluding posts that violate its Community Standards it conveys a message that hate speech and intolerance will not be condoned, protecting historically marginalized groups from hate speech and intolerance. Unlike the law school in *Rumsfeld* whose opposition to homophobic military policies was not understood by people who observed military recruiters conducting interviews off-campus, Headroom's content moderation is understood by its users. Because the purpose of prohibiting military recruiters from interviewing at the school could be explained by reasons other than the school's disagreement with military policies—such as interview rooms being full or the recruiters voluntarily selecting a different venue—observers would not understand the school's message. Dissimilarly, Headroom only removes content that conveys harmful or misleading information in violation of its Community Standards. Thus, Headroom's act of removing content is clearly understood by its users because it cannot be explained by an alternative reason.

Headroom conveys its message of promoting an inclusive community without additional explanatory speech. Like in *Hurley*, where a council's decision to exclude a LGB group from a parade conveyed its traditional values without explanation, Headroom's act of limiting harmful,

misleading, and offensive content sufficiently conveys its message of tolerance and welcoming without explanatory speech. R. at 2-4. In *Hurley,* the council did not have to explain why it excluded the LGB group because reasonable observers could infer its disapproval from noting the group's absence. Similarly, additional speech is not necessary to explain Headroom's act of removing harmful, offensive, or misleading content because a reasonable user would infer that the targeted removal of specific posts on a platform designed to disseminate speech, conveys the platform's disapproval of the message expressed therein. Although Headroom regularly attaches commentary to posts explaining that the content "runs [the] risk of violating the Community Standards[,]" R. at 4. this speech is not *necessary* to explain why it removes posts. Unlike in *Rumsfeld,* where a law school had to explain that it prohibited military recruiters from using campus facilities because it disagreed with the military's homophobic policies, Headroom's content moderation alone communicates its message because specifically targeting and removing posts readily conveys Headroom's disapproval of the content expressed therein.

While Headroom uses an algorithm to remove content that violates its Community Standards, it is incorrect to determine that Headroom does not intend to convey a specific message simply because humans are not intimately involved in every step of content moderation. Headroom's algorithm was programmed to curate content based on user preferences, interests, and adherence to Community Standards. R. at 3. The use of an algorithm is thus an extension of the programmer's particularized message rather than the mere output of code. Since the algorithm is a means by which Headroom achieves its intended message, the ordering and filtering of content is thus expressive speech. Unlike in *Rumsfeld,* where a law school's attempts to convey its disagreement with discriminatory military policies was not likely to be understood by onlookers, Headroom's content moderation practices are likely to be understood by users, as

shown by Midland's legislative hearings. R. at 4-5. Max Sterling, Mia Everly, and Ava Rosewood, three recipients of Headroom's disciplinary action, were all able to identify what posts triggered Headroom's content moderation. *Id*. Thus, because Headroom's content moderation practices are intended to convey its particularized message of safety, respect, and tolerance, which users can understand without additional explanatory speech, Headroom's actions qualify as expressive conduct protected by the First Amendment.

B. The SPAAM Act's content moderation provision impermissibly compels speech in violation of the Free Speech Clause because it forces Headroom to affirm the State's political viewpoint by providing service to users that violate its Community Standards.

A law impermissibly compels speech when it forces a speaker to affirm a governmental message, contradict his own view, or otherwise alter his own expression. *Rumsfeld*, 547 U.S. at 63-64. In *Wooley*, a state law required motorists to display a license plate bearing the words "Live Free or Die" on their vehicle; it was illegal to cover the slogan. *Wooley v. Maynard*, 430 U.S. 705, 709 (1977). While the law was intended to promote "state pride," a group of Jehovah's Witnesses asserted that the statute contradicted their religious and political beliefs. *Wooley*, 430 U.S. at 707, 716. This Court ruled that the law violated the First Amendment because it forced motorists to affirm the state's specific ideological expression, which contradicted some citizens' own viewpoint. *Id*. at 715.

A statute also impermissibly compels speech when it interferes with a speaker's editorial judgment, which is the act of curating third-party speech and content in order to convey the editor's own message. *Tornillo,* 418 U.S. at 258. In *Tornillo,* a newspaper refused to print a political candidate's reply to its editorials criticizing his campaign platform. *Id.* at 244. The candidate demanded that the newspaper publish his reply verbatim under the state's right-of-reply statute. *Id*. The Court struck down the statute because it precluded the paper from refusing to print the candidate's message it expressly disagreed with. The statute punished the newspaper

by forcing it to give up column space in order to print the reply where it otherwise would have preferred to publish information that comported with its viewpoint. *Id.* at 256.

Conversely, a statute does not impermissibly compel speech when it forces individuals to host, accommodate, or facilitate a third party's message without requiring the host herself to speak. *Rumsfeld,* 547, U.S. at 61-62. In *PruneYard*, a mall owner prohibited students from protesting at his privately owned shopping center in violation of a state provision granting citizens the right of free expression on private property where the public was invited. 447 U.S. at 79. The Court ruled that the statute was constitutional because although it required the mall owner to host the protestors' speech, it did not force him to display a specific message, nor prohibit him from disassociating with the protestors. *Id*. at 87. No evidence suggested that the owner even attempted to convey his disagreement. *Id*. at 101 (Powell, J., concurring).

The SPAAM Act's content moderation provision forces Headroom to affirm Midland's ideological viewpoint in opposition with its own message, thus altering its expression. Like the statute in *Wooley* which compelled motorists to display "Live Free or Die" license plates on their vehicles, the SPAAM Act compels Headroom to affirm Midland's specific viewpoint that content moderation burdens democratic values; this opposes Headroom's own view that content moderation stops the dissemination of harmful and misleading content. R. at 3, 5. Just as the statute forced motorists to be instruments in advertising the state's message each time they drove their cars, the SPAAM Act forces Headroom to disseminate speech it disagrees with each time a user uploads an offensive post by forbidding the platform from removing it. R. at 6. Thus, the SPAAM Act violates the First Amendment because it impermissibly compels Headroom to affirm Midland's ideological viewpoint in direct conflict with the safe, inclusive, and tolerant community Headroom seeks to foster through removing harmful posts. R. at 3, 5.

The SPAAM Act's content moderation provision infringes on Headroom's editorial judgment. Like the statute in *Tornillo* that compelled a newspaper to print a candidate's reply to its editorial, the SPAAM Act similarly requires Headroom to publish content that it disagrees with. Although editorial judgment might be traditionally understood in the context of mediums which are constrained by time or space, such as radio broadcasting or newspaper columns, editorial judgment extends to social media platforms as well. Though Headroom has potentially limitless bandwidth to publish users' content, there is limited space at the top of each user's feed, which they engage with most. R. at 3. Headroom uses an algorithm to prioritize content based on user preferences *Id.* and thus exercises editorial judgment in the same way that an editor or broadcaster must choose which content to prioritize in a limited space. Thus, because the SPAAM Act prohibits Headroom from removing harmful content, it infringes its editorial judgment by forcing such content to occupy space that Headroom's algorithm could have otherwise devoted to content that reflects and furthers its values. R. at 2-3.

The SPAAM Act's content moderation provision compels Headroom to speak rather than merely host, accommodate, or facilitate a third party's message. Unlike the law in *Pruneyard* which did not force the mall owner to affirm a specific viewpoint, nor interfere with his ability to speak his own message, the SPAAM Act forces Headroom to disseminate harmful and misleading content, thus interfering with its message of respect and inclusion. Unlike the mall owner in *PruneYard* who did not attempt to convey his disagreement with the protestors' message, Headroom expressly conveys its disagreement with racist, sexist, homophobic, and transphobic posts by removing them. R. at 3-4. By doing so, the platform shapes its welcoming and respectful community by limiting users' exposure to harmful content. Thus, the SPAAM

Act's prohibition on content moderation compels Headroom to speak, rather than merely host or facilitate a third-party message because it forces Headroom to convey a specific message.

Because the SPAAM Act's content moderation provision forces Headroom to affirm Midland's viewpoint, infringes on its editorial judgment, and compels the platform to speak rather than to host speech, the Act's provision violates the Free Speech Clause.

IV. THE THIRTEENTH CIRCUIT ERRED IN FINDING THAT THE SPAAM ACT DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE, ALTHOUGH IT IS ENTITLED TO STRICT SCRUTINY REVIEW, THE ACT FAILS TO WITHSTAND EVEN INTERMEDIATE SCRUTINY.

"[A] content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand…strict scrutiny." *Fort Lauderdale Food Not Bombs*, 11 F.4th at 1266.

A. The Thirteenth Circuit erred in applying intermediate scrutiny review to the SPAAM Act's content moderation provision because the Act cannot be explained without reference to the viewpoint expressed in the posts that it regulates, and the Act is motivated by Midland's disagreement with Headroom's message.

A law that restricts speech is content based if, even though it is facially neutral, it cannot be explained without referencing "the content of the regulated speech." *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015). In *Tornillo,* a state statute provided that when a newspaper criticizes a political candidate, the newspaper must publish the candidate's reply in response. 481 U.S. at 455. The Court ruled that the law was content based because it distinguished speech based on the content or viewpoint it expressed. *Id.* at 256. The negative viewpoint expressed by the newspaper's criticism triggered the law, compelling it to publish the candidate's response. *Id*. Consequently, the statute penalized the newspaper because it expressed a particular view. *Id*.

A law that restricts speech is content based if its purpose is motivated by the state's disagreement with the speaker's position. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In *Ward,* a city required individuals hosting events in public parks to use a professional

sound technician in order to maintain noise levels. *Id.* at 792. The law did not disparately burden speakers expressing certain viewpoints; rather, it applied evenly to all hosts, regardless of their message. *Id.* at 782, 791. Because of its even-handed application, the guideline did not "run the risk that the State ha[d] left unburdened those speakers whose messages [were] in accord with its own views," *Becerra*, 138 S. Ct. at 2378. Thus, the law was not content based because the purpose of enacting it was not motivated by the state's disagreement with a specific viewpoint.

The SPAAM Act's content moderation provision is content based because though facially neutral, it cannot be justified without reference to the content of posts it regulates. The Act prohibits any social media platform from censoring individuals or businesses based on viewpoint. R. at 6. Like the statute in *Tornillo* which penalized a newspaper when it expressed a particular view about a candidate, the SPAAM Act punishes Headroom because it refuses to disseminate content expressing a particular viewpoint. Headroom allows users to post content expressing a variety of messages. R. at 3. The Act is only triggered when a user expresses a viewpoint that violates Headroom's Community Standards. Thus, the Act's enforcement depends entirely on a post's content. Though Headroom has potentially unlimited bandwidth to disseminate user content, unlike the newspaper in *Tornillo*, the SPAAM Act still burdens the platform's ability to prioritize content that furthers its message of inclusion and respect.

Midland's purpose in enacting the SPAAM Act is motivated by its disagreement with Headroom's position. During legislative hearings, the Act's sponsors referred to social media platforms as "virtual dictators" who suppress speech "under the guise of moderation." R. at 5. Others asserted that the SPAAM Act would protect Midland's "democratic values" by restoring the "voice of the people." *Id*. Thus, Midland disagrees with Headroom's position that harmful content should be removed in order to foster a respectful community. Unlike the city ordinance

in *Ward* that applied to all event hosts, the SPAAM Act only applies to social media platforms with over twenty-five million monthly users throughout the world. R. at 5-6. This distinction disparately burdens large platforms by compelling them to offer services to all users, regardless of whether their content violates the platforms' Community Standards. Like this Court states in *Becerra*, the fact that the SPAAM Act only applies to a certain category of speakers is evidence that Midland seeks to burden those it disagrees with, like Headroom.

Because the SPAAM Act refers to the content of the regulated posts and seeks and is motivated by Midland's disagreement with Headroom's message, the Act is content-based.

B. The Thirteenth Circuit erred in finding that the SPAAM Act survives even intermediate scrutiny review because "leveling the expressive playing field" is not a significant governmental interest, and the Act is not narrowly tailored.

A regulation survives intermediate scrutiny if it furthers a "substantial governmental interest…unrelated to the suppression of free expression" and is narrowly tailored. *U.S. v. O'Brien,* 391 U.S. 367, 377 (1968). In *Pacific Gas,* this Court invalidated the order of a public utilities commission that required a private company to convey a group's opposing viewpoint in its newsletters. 475 U.S. at 20. Though the order attempted to advance a substantial governmental interest in improving access to a variety of views, the method chosen to advance that interest inhibited the company's ability to promote its own message. *Id.* at 908. According to *Turner*, a law is narrowly tailored if it "does not burden substantially more speech than necessary to further a legitimate interest." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 624 (1994).

The SPAAM Act does not further a substantial governmental interest that is unrelated to the suppression of free expression. Its purpose is not to promote a variety of viewpoints, like the order in *Pacific Gas.* Rather, Midland seeks to "level[] the playing field" by ensuring content expressing all messages, harmful and not, is promoted equally on social media platforms. *Att'y Gen., Fla.*, at 1208. This governmental interest is not compelling. Furthermore, just as the utility

company wished not to distribute material that opposed its own message, Headroom wishes to protect the community it has created from transphobia, homophobia, sexism, and other destructive viewpoints. R. at 3. Just as this Court ruled that the order promoting exposure to alternative viewpoints in *Pacific Gas* was not narrowly tailored because it could not be advanced without inhibiting the company's own view, so too should this Court rule that the SPAAM Act is not narrowly tailored because it inhibits Headroom's ability to foster a community of tolerance and respect.

Because the SPAAM Act does not further a substantial governmental interest that is unrelated to the suppression of free expression and is not narrowly tailored, it fails to survive intermediate scrutiny and thus violates the First Amendment.

Conclusion

For the preceding reasons, this Court should reverse the Thirteenth Circuit's ruling and hold that the SPAAM Act violates constitution. Because Headroom fails to meet the requirements of common carrier status, *Zauderer* does not apply to this case, and Headroom's content moderation is expressive conduct deserving of robust First Amendment Protection, the Act offends the Free Speech Clause and should thus be overturned.

Signature Block

Respectfully Submitted,

By: */s/* Team No. 29
Team No. 29, Attorney for Headroom, Inc.

Dated: Oct. 9, 2023