No. 22-386

In The

SUPREME COURT OF THE UNITED STATES

October Term 2023

HEADROOM, INC.

Petitioner,

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR THE PETITIONER

Team 04
Counsel for the Petitioner
October 9, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. QUESTIONS PRESENTED

1. Under the First Amendment's Free Speech Clause, (1) are major social media companies common carriers, and (2) does this Court's decision in Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio apply to the SPAAM Act's disclosure requirements?

2. 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?

II. STATEMENT OF THE CASE

A. Statement of facts.

Headroom, Inc. (hereinafter "Headroom" or "Petitioner"), an emerging social media company, provides a unique and multifaceted platform where users can create profiles, design, post, and share original content, interact in virtual reality as well as monetize content through advertising, sponsorships, and donations. R. at 2-3. Headroom's mission is to provide its over 75 million monthly users with "a space for everyone to express themselves to the world" and "to promote greater inclusion, diversity, and acceptance in a divided world." *Id*.

To realize this mission Headroom curates the user experience through an algorithm linked both to user data and Headroom's Community Standards. R. at 3. All users agree to Headroom's Community Standards upon joining the platform, which expressly prohibit two categories of content. *Id*. First, users may not "creat[e], post[], or shar[e] content that either explicitly or implicitly promotes or communications 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*. Second, users may not disseminate "disinformation," which the Community Standards define as "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups,"

which "can take the form of fabricated stories, manipulated facts, manipulated images or videos, and misleading narratives." R. at 3-4.

Headroom enforces its Community Standards through penalties. R. at 4. Potentially violative content will be appended with a statement that it "runs the risk of violating the Community Standards" and contains "possibly upsetting content." *Id*. Alternately, content that is deemed to violate the Community Standards is deprioritized, and user's accounts may be demonetized, temporarily suspended, blocked from other users, or removed/banned. *Id*.

In 2022, after several user accusations of discrimination, a special session of the Midland legislature heard testimony from three users who claimed that the penalties Headroom applied amounted to censorship. *Id*. These users included Max Sterling, a political commentator whose viewership declined after his content was appended with warnings; Mia Everly, a start-up fashion designer who engagement declined after she criticized a political candidate; and, Ava Rosewood, a movie reviewer who was banned for spreading disinformation and hate speech after reviewing a controversial documentary on immigration. R. at 4-5. In response to these users testimony, Midland State Representatives introduced the SPAAM Act (hereinafter the "SPAAM Act" or the "Act") with the stated purpose of "curb[ing]" the "excessive censorship by tech behemoths." R. at 5.

Subsection (a) of the Act designates the Act's application to any social media platform, defined 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." R. at 5-6. Subsection (b) then prohibits any social media platform from "censoring, deplatforming, or shadow banning"

any "individual, business, or journalistic enterprise" because of "viewpoint." R. at 6. The Act defines "censorship" or "censoring" as "editing, deleting, altering, or adding any commentary" to a users content; "deplatforming" as "permanently or temporarily deleting or banning a user"; and, "shadow banning" 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," allowing an exemption for "obscene, pornographic or otherwise illegal or patently offensive" content. *Id*.

Subsection (c) imposes a requirement that social media platforms publish community standards with "detailed definitions and explanations for how they will be used, interpreted, and enforced" and further requires social media platforms to "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" whenever enforcement action is taken. *Id*. The provisions of the SPAAM Act may be enforced by filing a complaint with Midland's Attorney General or by the filing of a civil action, in which case courts may grant injunctive relief or impose fines in the amount of $10 thousand per day per infraction. R. at 6-7.

B. Procedural history.

Petitioner, Headroom, Inc., filed a pre-enforcement challenge and moved for a preliminary injunction against Edwin Sinclair, the State of Midland's Attorney General. Headroom alleged its First Amendment rights were violated by the restrictions set forth in the SPAAM Act. R. at 7.

The district court held "the First Amendment protects an individual's (or a company's) right to speak irrespective of whether the government thinks the speech sensible or misguided." R. at 9 (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974)). The court applied

intermediate scrutiny because the SPAAM Act is content neutral and applies equally to all social media platforms. R. at 12. The district court held that Midland failed to provide an "important state interest" and the SPAAM Act was not narrowly tailored enough to protect companies like Headroom from "untold liabilities." R. at 12; citing *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1475 (2022). Therefore, by banning, deprioritizing, removing, or affecting posts on its platform in any way, Headroom is engaging in protected activity under the First Amendment. R. at 14. The court granted Headroom's preliminary injunction. R. at 15.

The Court of Appeals for the Thirteenth Circuit reversed the decision of the lower court. R. at 16. It held that Headroom is a common carrier of speech and that any censoring, banning, or other modifications on speech were not protected. R. at 17. Headroom "'hold[s] [itself] out as [an] organization[] that focus[es] on distributing the speech of the broader public.'" *Id*. (citing *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring)). The State's required disclosures of "'purely factual and uncontroversial information'" did not compel Headroom to speak. R. at 18 (citing *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)). The court held Headroom would not face irreparable injury as a result of the SPAAM Act, but the public would be harmed as a result of Headroom's continued censorship policies. R. at 19. Thus, it reversed the lower court's decision and vacated the preliminary injunction. R. at 19.

III. SUMMARY OF THE ARGUMENT

Under the First Amendment's Free Speech Clause, major social media companies, like Headroom, are not common carriers. This Court's line of cases addressing the exercise of editorial judgement supports a finding that when social media companies, like Headroom, curate user-generated content that curation is "speech," triggering First Amendment protections. Furthermore, most recently, the Eleventh Circuit's reasoning in its recent *NetChoice, LLC v. AG,*

Fla. decision correctly interprets this Court's editorial judgement jurisprudence in light of the unique issues presented in the context of social media platforms.

This Court's decision in Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio does not apply to the SPAAM Act's disclosure requirements. As a threshold matter, the disclosure requirements under the SPAAM act are not commercial speech, and accordingly *Zauderer* has no application. However, even if this Court were to find that the disclosure requirements are commercial speech, the detailed explanations required to be disclosed to users under the SPAAM Act require the unduly burdensome disclosure of much more than the factual, noncontroversial information contemplated in *Zauderer*.

The State of Midland violates Headroom's First Amendment rights by compelling Headroom to associate with messages it does not want to speak. Because Headroom is a private organization, it is afforded First Amendment protections. Headroom has the right to exercise editorial judgment over the content posted on its platform.

The SPAAM Act burdens Headroom's speech by restricting its right to censor content and by requiring Headroom to publish community standards in accordance with the Act. The SPAAM Act does not allow Headroom to censor content it disagrees with, regardless of the message portrayed. Thus, Headroom is forced to associate with all third-party messages posted on its platform. Headroom is also required to post community standards that align with the SPAAM Act and explain how those standards will affect each user. In doing so, Midland is compelling Headroom to speak a message it otherwise would not speak.

The SPAAM Act is a content neutral restriction that fails intermediate scrutiny. Because the SPAAM Act does not regulate a particular viewpoint or subject matter, the Act is content neutral. Content neutral restrictions trigger intermediate scrutiny. Because Midland does not have

an important government interest, and because the Act is not narrowly tailored to achieve its interests, the SPAAM Act fails intermediate scrutiny.

IV. ARGUMENT

A. UNDER THE FIRST AMENDMENT'S FREE SPEECH CLAUSE, MAJOR SOCIAL MEDIA COMPANIES ARE NOT COMMON CARRIERS, AND THIS COURT'S DECISION IN *ZAUDERER V. DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO* OES NOT APPLY TO THE SPAAM ACT'S DISCLOSURE REQUIREMENTS.

1. Under The First Amendment's Free Speech Clause, Major Social Media Companies Are Not Common Carriers.

As noted by the Midland District Court, the essential characteristic of common carriage is a lack of restrictions to access or curation of services. Generally speaking, a common carrier is "one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . .'" *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-701, 99 S. Ct. 1435 (1979) (quoting *Report and Order, Industrial Radiolocation Service*, Docket No. 16106, 5 F. C. C. 2d 197, 202 (1966)). "A common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'" *Id*. (quoting *National Association of Regulatory Utility Comm'rs v. FCC*, 173 U. S. App. D. C. 413, 424, 525 F.2d 630, 641, 425 U.S. 992 (1976)). However, where service providers "[select] which speech to transmit…[they] engage in editorial discretion." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). This Court has never approved a "general right of access to the media." *CBS v. FCC*, 453 U.S. 367, 396, 101 S. Ct. 2813 (1981) (citing *Midwest Video Corp*., 440 U.S. at 689; *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973)). Rather, the exercise of editorial discretion "lies at the heart of

First Amendment protection." *FCC v. League of Women Voters*, 468 U.S. 364, 104 S. Ct. 3106 (1984).

In the communications context, the Telecommunications Act is instructive. The Telecommunications Act differentiates between "interactive computer services" and common carriers or telecommunications services, giving explicit protections to interactive computer services' ability to restrict access to content the service finds "objectionable." *See*, 47 U.S.C. § 230(c)(2)(A). In fact, 47 U.S.C. § 223(e)(6) directly states that "[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers."

In *FCC v. Midwest Video Corp*, this Court reviewed regulations promulgated by the FCC requiring cable television systems with a certain number of subscribers and channels to make available certain channels for third-party access. *Id*. at 691. This court found that by promulgating the open-access rules "[e]ffectively, the Commission ha[d] relegated cable systems, *pro tanto*, to common-carrier status," *Id.* at 700. In concluding that the cable televisions were not common carriers, this Court looked to Congress's refusal to impose common carrier status on radio broadcasters in order to advance objectives of journalistic freedom, and analogized the two mediums specifically based on the fact that both radio broadcasters and cable operators exercise a significant amount of editorial discretion concerning programming. By virtue of this exercise of significant degree of editorial discretion, this Court held that the Commission could not create a broad right of public access on a common carrier basis.

Interactive computer services, like social media platforms share commonality with cable television systems and radio broadcasting in that they are not common carriers, however, it is clear that Congress has intended for interactive computer services to have even broader discretion to

select or deselect content. Accordingly, this Court's consistent refusal to impose common carrier status on communications mediums that involve the exercise of editorial discretion aligns with congressional intent to preserve the speech rights of private speakers, corporate or otherwise.

i. This Court's line of cases addressing the exercise of editorial judgement support a finding that when social media companies, like Headroom, curate user-generated content that curation is "speech," triggering First Amendment protections.

Because a common carrier does not make individualized decisions concerning the offering of services, it is improper to promulgate open-access requirements that effectively impose common carrier status upon private companies whose offering of services involves the exercise of editorial judgement. This Court's editorial discretion jurisprudence thus guides the analysis here. Initially, this Court addressed the issue in *Miami Herald Publishing Co. v. Tornillo*, which stands for the premise that wide editorial discretion is afforded to private media companies, irrespective of whether a "level playing field" is provided for consumer speech. *Pacific Gas & Electric Co. v. Public Utilities Commission of California* relied on this general principle, emphasizing the fact that private companies' freedom of speech encompasses the freedom to choose not to associate with particular messages. *Tuner* and *Hurley* then applied these rules in the context of user-generated content. Collectively, this body of case law supports a finding that when social media companies, like Headroom, curate use generated content, reflecting an implicit choice of the messages with which they wish to associate, that exercise of discretion is a form of speech, protected by the First Amendment.

In *Miami Herald*, this Court addressed whether a statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the First Amendment. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974). When the publishing company declined to print the candidate's replies, he challenged

the denial on the basis of a Florida "right of reply" statute. *Id*. In response, the publishing company challenged the constitutionality of the statute. *Id*. at 245. The court addressed the issues attendant to large market share of powerful media companies, but ultimately found the desire for a "responsible press" subordinate to the First Amendment rights of the media companies. *Id*. at 256. In so holding, the court stated that:

> "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."

Id. at 258.

Next, in *Pacific Gas*, this Court considered whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 4, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986). Appellant electric company distributed a newsletter in its monthly billing envelope, and appellee obtained the permission of California's Public Utilities Commission to include its materials in the billing envelope. *Id*. at 5-6. Appellant challenged the Commission's decision, asserting a First Amendment right "not to help spread a message with which it disagrees." *Id*. at 7. This Court first clarified that "[t]he identity of the speaker is not decisive in determining whether speech is protected." *Id*. at 8. Rather, "[c]orporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." *Id*. (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). As such, this Court found the newsletter to be comparable to a newspaper, "includ[ing] the kind of discussion

of ‘matters of public concern’ that the First Amendment both fully protects and implicitly encourages.” *Id*. at 8-9.

This Court stated that “[c]ompelled access…both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.” *Id*. at 9. In so stating, this Court looked to its previous holding in *Miami Herald*, finding that the required access here violated the principles set forth in that case and impermissibly burdened the electric company’s speech in part because it impermissibly required the electric company to associate with speech with which it disagreed. *Id*. at 14-15. At its core, “[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say.” *Id*. at 16. Furthermore, “[t]he danger that appellant will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude.” *Id*. at 16.

In *Turner Broadcasting Systems, Inc. v. FCC*, this Court considered whether a statute requiring cable television systems to devote a portion of their channels to the transmission of local broadcast television stations violated the First Amendment. *Id*. at 626. This Court quickly concluded that cable programmers engage in speech for First Amendment purposes “[t]hrough ‘original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,’” in which they "seek to communicate messages on a wide variety of topics and in a wide variety of formats." *Id*. at 636 (quoting *Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488, 494, 90 L. Ed. 2d 480, 106 S. Ct. 2034 (1986)). Consequently, the court stated that the must-carry rule impermissibly interferes with editorial discretion in two ways: (1) by “reduc[ing] the number of channels over which cable operators exercise unfettered

control," and (2) by "render[ing] it more difficult for cable programmers to compete for carriage on the limited channels remaining." *Id*. at 637.

Lastly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, this Court considered the issue of whether the state may require private citizens who organize a parade to include among the marchers a group conveying a message the organizers did not wish to convey. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 559, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). Respondent organization, a group of gay, lesbian, and bisexual individuals of Irish descent, applied to participate to participate in the state St. Patrick's Day parade. *Id*. at 561. This Court began by stating that parades are a form of expression, implicating First Amendment protections. *Id*. at 569 ("a narrow, succinctly articulable message is not a condition of constitutional protection," likewise "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message"). This Court also made the important caveat that, under this Court's precedents, the First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication," specifically citing cable programmers and newspapers as an example. *Id*. at 570. This Court declined to apply a *Zauderer* analysis since, outside the context of commercial advertising, a speaker's right to tailor his or her speech applies equally to statements of fact that he or she would rather not make. *Id*. at 573. Rather, the Court stated that:

> "[L]ike a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."

Id. at 574.

Here, Headroom's algorithm prioritizes content based on consumer preferences and data tracking and deprioritizes content flagged for potential violation of Headroom's community standards. R. at 3. This is the precise type of discretionary choice that this Court deemed protected speech in *Miami Herald* and its subsequent decisions. Like the electric company in *Pacific Gas*, Headroom is contributing to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" by making discretionary choices about the content that its users see, and likewise, as this Court stated in *Pacific Gas*, Headroom's corporate identity or significant market share cannot dictate the outcome here. *Pacific Gas*, 475 U.S. at 8. To the extent that the Court of Appeals here relied on the fact that Headroom is not a "speaker" for First Amendment purposes because they curate the speech of third-party users, it did so in error in light of this Court's holdings in *Turner* and *Hurley*. Much like the cable programs in *Turner* and the groups in the parade in *Hurley*, the user-generated content shared on Headroom's platform need not amount to a cohesive message in order for the act of curation by Headroom to be protected speech.

ii. The Eleventh Circuit's reasoning in its recent *NetChoice, LLC v. AG, Fla.* decision correctly interprets this Court's editorial judgement jurisprudence to support its holding that major social media companies are not common carriers.

While the Supreme Court has yet to issue a decision that squarely addresses whether First social media companies are common carriers, the Eleventh and Fifth Circuits have addressed this issue. The Fifth Circuit upheld a similar statute to the SPAAM Act in *Netchoice, L.L.C. v. Paxton*, however, the Fifth Circuit bypassed an analysis of whether curation of content could constitute protected speech, and assumed in conclusory fashion that the statute at issue was banning

"censorship" writ large, relying on factors explicitly disclaimed by this Court's prior decision. The statutes' label of "censorship," however, cannot be taken at face value without examining its statutory definition. In the SPAAM Act, "censorship" is defined as "editing, deleting, altering, or adding any commentary," i.e. quintessential editorial decision-making. Rather, the Eleventh Circuit correctly interprets this Court's decisions in *Miami Herald*, *Pacific Gas*, *Turner Broadcasting*, and *Hurley* in the context of the unique features social media presents for analysis.

In *NetChoice, LLC v. AG, Fla*., the Eleventh Circuit held that "it is substantially likely that social-media companies…are 'private actors' whose rights the First Amendment protects, that their so-called 'content-moderation' decisions constitute protected exercises of editorial judgement." *NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022). The court began by making several relevant points about the nature of social media platforms, (1) social media platforms are private entities, and as such, "no one has a vested right to force a platform to allow [him or] her to contribute to or consume social-media content," (2) a social media platform does not create most of the content but does engage in speech by, for example, "publish terms of service or community standards specifying the type of content that it will (and won't) allow on its site, add addenda or disclaimers to certain posts (say, warning of misinformation or mature content), or publish its own posts," and (3) platforms exercise editorial judgement by removing violative content and prioritizing available content rather than "reflexively transmitting data from point A to point B." *Id*.

The court stated that:

> Accordingly, a social-media platform serves as an intermediary between users who have chosen to partake of the service the platform provides and thereby participate in the community it has created. In that way, the platform creates a virtual space in which every user—private individuals, politicians, news organizations, corporations, and advocacy groups—can be both speaker and

> listener. In playing this role, the platforms invest significant time and resources into editing and organizing—the best word, we think, is curating—users' posts into collections of content that they then disseminate to others. By engaging in this content moderation, the platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints.

The statute applied to all social media platforms meeting a certain size and revenue threshold, and contained content-moderation restrictions, disclosure obligations, and a user-data requirement. *Id*. The Eleventh Circuit stated that "when a platform removes or deprioritizes a user or post, it makes a judgment about whether and to what extent it will publish information to its users—a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination on its site," thereby engaging in speech for First Amendment purposes. *Id*. at 1210. The Eleventh Circuit pointed to the Supreme Court's line of editorial judgement cases, which collectively "establish that a private entity's decisions about whether, to what extent, and in what manner to disseminate third-party-created content to the public are editorial judgments protected by the First Amendment," pointing to examples of the types of communities that different social media platforms seek to create by making these judgements in order to appeal to different audiences. *Id*. at 1212-1213.

With respect to the state's common carrier argument, the court delineated three reasons why social media platforms are not common carriers: (1) social media platforms have never acted like common carriers, (2) Supreme Court precedent strongly supports that internet companies like social medial platforms are not common carriers, and (3) Congress has distinguished internet companies from common carriers. *Id*. at 1220-1221. While the court conceded that social media platforms generally offer accounts to all members of the public, the precondition of adherence to community standards squarely remove them from the category of common carrier. *Id*. at 1220 Additionally, the Telecommunications Act explicitly differentiates between interactive computer

services and common carriers or telecommunications services, giving explicit protections to interactive computer services' ability to restrict access to "objectionable" content. *Id*. (citing 47 U.S.C. § 223(e)(6)).

The Eleventh Circuit's reasoning is helpful in the instant case to emphasize the fact that the well-established speech rights of private companies necessitate the ability to make editorial judgements about the message it speaks, and furthermore, that users consent to these judgements by virtue of their acceptance of the platform's community standards. Like the users in the Eleventh Circuit, Headroom users agree to their Community Standards before joining the platform. R. at 3. These Community Standards clearly outline for users Headroom's system of prioritization/deprioritization as well as the penalties associated with violations, which judgements are designed overall to create a "welcoming community." *Id*. This type of preconditioned use brings the platform squarely outside the realm of common carriage where no "individualized decisions [are made], in particular cases,…on what terms to deal.'" *Midwest Video Corp.*, 440 U.S. at 700-701 (quoting *National Association of Regulatory Utility Comm'rs*, 173 U. S. App. D. C. at 424). The exercise of editorial judgement in effectuating a system of priority and penalty for user-generated content is a means of effectuating Headroom's corporate purpose of creating and marketing a welcoming community to users. Without the discretion to effectuate corporate purpose that would inevitably result from imposing common carrier status on social media companies, the ability to differentiate and market a variety of type of communities to users would essentially evaporate. This Court should adopt the Eleventh Circuit's reasoning in holding that social media companies are not common carriers because it marries this Court's consistent holdings concerning the exercise of editorial judgement with the unique considerations raised by social media platforms.

2. This Court's Decision In *Zauderer v. Disciplinary Counsel Of The Supreme Court Of Ohio* Does Not Apply To The SPAAM Act's Disclosure Requirements.

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court,* the appellant was a practicing attorney who ran advertisements for legal services, deemed to violate several state disciplinary rules. *Zauderer v. Office of Disciplinary Counsel of Supreme Court,* 471 U.S. 626, 629-634, 105 S. Ct. 2265, 2270 (1985). The appellant challenged the ruling of the disciplinary board restricting the content of his advertisements as a violation of his First Amendment rights. *Id*. This Court stated that "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities [] may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Id*. at 638 (citing *Central Hudson*, 447 U.S. at 566). With respect to the disclosure requirements relating to terms of the attorney's contingent fees, the court pointed to a "material difference[] between disclosure requirements and outright prohibitions on speech," since the state "has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." *Id*. at 650. This Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id*. at 653.

i. The disclosure requirements under the SPAAM act are not commercial speech.

In *Zauderer,* this Court began its analysis by pointing to the fact that "'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech,'" and stating that appellant's advertisements fell squarely within the bounds of commercial speech. Id. at 637 (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); In re *R. M. J.,* 455 U.S. 191 (1982); *Central Hudson Gas &*

Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980)). Under this Court's precedents, commercial speech is defined narrowly as "speech that does no more than propose a commercial transaction." *United States v. United Foods*, 533 U.S. 405, 409, 121 S. Ct. 2334 (2001). Mere connection to a particular product or service is not in and of itself sufficient to render speech commercial in nature. *Bolger*, 463 U.S. at 66.

Here, the disclosure requirements do not in any way propose a commercial transaction. Rather, the disclosure requirements under § 528.491(c)(1) are more akin to general terms of use or descriptive product information. The disclosures here are remarkably different from those in *Zauderer*, as they are not part of an advertisement for services. The connection between the information provided in the disclosure and the use of the platform's services, is not intrinsically sufficient to transform the speech into commercial speech, particularly since there is no evidence in the record to suggest that the disclosures only apply when users pay for accounts on social media platforms. While users certainly would want to have a clear understanding of a platform's community standards before using a particular platform, there is no indication that Headroom's Community Standards, which users agree to upon creating an account, are in any way confusing or misleading without the requirement of these additional, detailed disclosures. As such, it would be inappropriate to apply the lessened protections afforded to commercial speech under *Zauderer*, which does not apply to the category of speech here and whose underlying policy rationale is not served by the SPAAM Act's disclosures.

ii. Even if this Court were to find that the disclosure requirements are commercial speech, the information required to be disclosed under the SPAAM Act requires the unduly burdensome disclosure of more than factual, noncontroversial information.

The disclosure requirements here far exceed the bounds of factual, noncontroversial information. Section 528.491(c)(1) of the SPAAM Act requires "*detailed* definitions and

explanations for how [the Community Standards] will be used, interpreted, and enforced." R. at 5 (emphasis added). Similarly, when enforcing community standards under § 528.491(c)(2), social media companies are required to "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*. (emphasis added). It is not Petitioner's position that requiring generally the disclosure of terms of use would be not be a factual and noncontroversial disclosure. Rather, as the Eleventh Circuit pointed out, the requirement of a *detailed* explanation for use mechanisms and enforcement decisions imposes an undue burden on social media companies as it would be "practically impossible to satisfy," and is "likely to chill platforms' protected speech." *AG, Fla*., 34 F.4th at 1230. A *rationale*, such as the one required by §§ 528.491(c)(1) and (2) is by definition nonfactual, as they reflect the subjective exercise of editorial judgement by Headroom. Furthermore, the categories of content that the Community Standards prohibits, e.g. hate speech, homophobic ideas, and disinformation, may hardly be characterized as noncontroversial, and will necessarily be discussed in a "detailed" fashion in the mandated disclosures. Not only are the administrative burdens imposed by this voluminous disclosure requirements unworkable, they expose Headroom to overwhelming liability for disclosures that users do not consider "detailed" enough. *Id*. Accordingly, even if this Court were to find the disclosure requirements were commercial speech, the disclosures cannot be subject to *Zauderer's* lesser scrutiny because they require the unduly burdensome disclosure of nonfactual, controversial information.

B. THE STATE OF MIDLAND VIOLATES HEADROOM'S FIRST AMENDMENT RIGHT TO FREE SPEECH BY FORCING HEADROOM TO ASSOCIATE WITH MESSAGES IT DISAGREES WITH.

Midland's SPAAM Act unconstitutionally restricts Headroom's speech by compelling the social media platform to associate with messages it disagrees with. Although Headroom is a corporation, it still enjoys the First Amendment protections of a natural person. *Citizens United v. FEC*, 558 U.S. 310, 343 (2010); citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). Midland's SPAAM Act denies Headroom the right to exercise its editorial judgment in censoring speech it does not want to associate with. R. at 7. The Act also compels Headroom to publish community standards that abide by the SPAAM Act's requirements. R. at 6.

Because the SPAAM Act is content-neutral, the Act triggers intermediate scrutiny. *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994). The SPAAM Act fails the intermediate scrutiny standard because Midland fails to provide an important governmental interest sufficient to justify burdening Headroom's speech. R. at 4-5. Midland also fails to prove that the SPAAM Act's broad ban on Headroom's editorial judgment is narrowly tailored to achieve the state's interests. *Id*.

1. The State of Midland Burdened Headroom's Speech When it Passed the SPAAM Act.

The SPAAM Act burdens Headroom's speech because the Act prevents Headroom, and other similar companies, from censoring or banning speech it disagrees with. Like individuals, private corporations enjoy the full breadth of First Amendment protections. *Citizens United*, 558 U.S. at 342. By preventing Headroom from censoring speech it does not want to be associated with, and by requiring Headroom to post detailed explanations of its policies and their effects, Midland's SPAAM Act unconstitutionally burdens Headroom's speech. R. at 6.

i. The First Amendment Free Speech Clause applies to speech by corporations, not just private citizens.

"First Amendment protection extends to corporations." *Citizens United*, 558 U.S. at 342. Speech expressed by corporations and other associations are not treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id*. at 343; citing *Bellotti*, 435 U.S. at 776. Therefore, "burdening the speech of one party in order to enhance the speech of another -- that the First Amendment disallows." *Pacific Gas*, 475 U.S. at 25 (Justice Marshall concurring).

Headroom is a private social media company that allows users to make profiles for posting content and share posts of other users. R. at 2. Headroom provides virtual reality simulations that can be accessed with proper electronic devices. R. at 3. Users also have the opportunity to profit off their posts – they may receive donations and "solicit advertisers to sponsor their accounts." *Id*. Headroom has instituted algorithms to enhance its users' experiences and to protect Headroom's own community standards. *Id*. However, no user may access Headroom's platform, post content, monetize posts, or share posts from other users without agreeing to Headroom's community standards. *Id*. With these standards, Headroom maintains control over the content posted on its platform and restricts content it finds disagreeable. *Id*.

ii. The SPAAM Act compels Headroom to speak messages it disagrees with by removing Headroom's editorial judgment.

Headroom's speech is compelled by the SPAAM Act because the Act forces Headroom to provide a forum for users to post messages Headroom disagrees with. This Court has upheld that, because private corporations are protected under the First Amendment, compelling those organizations to create a forum for others to express opposing viewpoints violates the First Amendment. *Pacific Gas*, 475 U.S. at 9. Compelled speech need not be a physical message the

government requires Headroom to display, but rather the mere association with a message that the government prevents Headroom from censoring. Headroom's ability to exercise its editorial judgment in removing messages it does not want to associate with is infringed by the SPAAM Act. See *AG, Fla.*, 34 F.4th at 1210.

In *Pacific Gas*, the Court held that the government's decision to allow TURN, a rate normalization organization, use a portion of the company's billing envelopes four times a year, constituted compelled speech. *Pacific Gas*, 475 U.S. at 5-6. Pacific Gas & Electric Co. dispersed a newsletter with every monthly billing envelope sent to its customers. TURN, Toward Utility Rate Normalization, petitioned the Commission to ban this practice on the grounds that the company's customers were funding its political speech. *Id*. at 5. The Commission found that the space used for the newsletter was "'extra space'" that the customers owned. *Id*. Therefore, it required that Pacific Gas give up its "'extra space'" to TURN four times per year for a period of two years. *Id*. at 6. The Commission did not restrict the messages TURN was allowed to advertise, so long as a disclaimer was included that the message was not Pacific Gas's. *Id*. at 7.

The Court held that this intrusion on Pacific Gas's right to display its own messages violated the company's First Amendment protections. *Pacific Gas*, 475 U.S. at 18. The Commission forced Pacific Gas to bear TURN's message within its own envelopes, thus taking away Pacific Gas's authority to edit the content. The Court found that "[s]uch forced association with potentially hostile views burdens the expression of views different from TURN's and risks forcing appellant to speak where it would prefer to remain silent. *Id*.

In *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, the Court held that a Florida statute, which required newspapers who slandered political candidates to provide space for the candidate to respond free of charge, unconstitutionally burdened the newspaper's speech.

Miami Herald, 418 U.S. at 258. This "right of reply" statute passed in Florida allowed political candidates to draft their own messages responding to the newspaper's attack and required the newspaper to post those responses "in as conspicuous a place and in the same kind of type as the charges which prompted the reply." *Id*. at 244. If the newspaper failed to display the candidate's message, it would face first-degree misdemeanor penalties. *Id*.

The Court disagreed that the right of reply statute enhanced rather than inhibited free speech. *Miami Herald*, 418 U.S. at 245. "'Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.'" *Id*. at 252; citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Therefore, the state's attempt to prevent the newspaper from publishing political content by requiring free ad space be given for candidate replies "[intrudes] into the function of editors" and unconstitutionally burdens Miami Herald's right to free speech. *Id*. at 258.

Even on platforms that are not physical newspapers or newsletters, the Court has still upheld the right to exercise editorial discretion. *AG, Fla.*, 34 F.4th at 1219. "*Hurley* held that 'a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.'" *Id*.; citing *Hurley*, 515 U.S. at 569-70. Even when messages are expressed in the form of temporarily displayed parade banners, a speaker's autonomy in its own message is compromised when it is forced to display a message contrary to its own. *Hurley*, 515 U.S. at 576.

Like the regulations in *Pacific Gas* and *Miami Herald*, Midland's SPAAM Act unconstitutionally burdens Headroom's speech. *Pacific Gas*, 475 U.S. at 18; *Miami Herald*, 418 U.S. at 258. The SPAAM Act "restricts social media platforms' ability to alter or remove users' content." R. at 6. Under the Act, social media platforms are not allowed to censor, deplatform, or

shadow ban messages regardless of whether the messages conform with Headroom's community standards. *Id*. The Act effectively removes Headroom's ability to edit its own platform and deprioritize speech it does not want to be associated with. *Id*.; citing *Miami Herald*, 418 U.S. at 258. As a result of the SPAAM Act, Headroom must now allow all third-party content to be displayed on its platform regardless of whether it violates Headroom's community standards. R. at 7. This forces Headroom to display messages it disagrees with, without regard for any of Headroom's own messages. See *Hurley v. Irish-American Gay*, 515 U.S. 557 (1995).

iii. The SPAAM Act compels Headroom to speak by requiring it to display community standards that do not align with the company's views.

Midland has compelled Headroom to speak through the SPAAM Act because it requires Headroom to publish detailed descriptions of the company's community standards and their effects that Headroom otherwise would not choose to speak. Generally, the requirement to display factual, noncontroversial information is constitutional when it does not substantially burden speech. *Nat'l Inst. of Family Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). However, when the information displayed contradicts or inhibits the speaker's own message, the requirement to display such information compels speech. *Id*.

In *NIFLA*, the Court struck down a statute requiring crisis pregnancy centers to display factual information about abortion that contradicted the crisis pregnancy centers' views. *NIFLA*, 138 S. Ct. at 2378. The *NIFLA* statute mandated that non-abortion providing facilities, who desired to discourage abortion, were required to display factual information about where patients could get abortions if they so desired. *Id*. at 2368. The Court held that because the message was so contradictory to the crisis pregnancy centers' messages, the government's mandate compelled speech. *Id*. at 2373-74.

The SPAAM Act requires Headroom and other social media platforms to "publish 'community standards' with 'detailed definitions and explanations for how they will be used, interpreted, and enforced.'" R. at 6. This compels Headroom to speak a message it otherwise would not speak. Headroom's community standards protected against users posting or sharing content that promoted "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. However, the SPAAM Act inhibits Headroom from censoring any speech on the basis of viewpoint. R. at 6.

Because Headroom's ability to censor speech through its community standards was effectively removed by the SPAAM Act, the description of Headroom's community standards and how those standards will be enforced has been altered. Headroom must now provide detailed community standards that adhere to the SPAAM Act's requirements, not Headroom's own message preferences. This requires Headroom to speak a message it otherwise would not and, therefore, compels Headroom's speech. R. at 7.

2. The State of Midland's SPAAM Act is a Content Neutral Regulation, Thus Triggering Intermediate Scrutiny.

The SPAAM Act is content neutral because it does not target any particular viewpoint in the messages Headroom deprioritizes or bans from its platform. R. at 7. Content neutral regulations are regulations that place limits on speech without targeting particular viewpoints or subject matters. *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 U.S. 1464 (2022). Unless a regulation is considered facially content based, or it has a content based purpose or justification, the regulation is considered content neutral and does not trigger strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 166 (2015).

In *Turner Broad. Sys. v. FCC*, the Consumer Protection and Competition Act of 1992 required cable television providers to transmit local broadcasting services. *Turner*, 512 U.S. at 626. This "must-carry" provision was challenged on First Amendment grounds. The Court held that the "must-carry" provision was content neutral because it did not specify a particular message the broadcasting services had to promote. *Id*. at 643. But "the must-carry provisions impose[d] special obligations upon cable operators and special burdens upon cable programmers," thus triggering "some measure of heightened First Amendment scrutiny." *Id*. at 641; citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583 (1983).

The SPAAM Act does not target any particular viewpoint when it restricts social media platforms from deprioritizing, banning, or otherwise suppressing certain messages. R. at 5. The Act bans the conduct of suppressing messages Headroom disagrees with, regardless of the subject matter itself, or the viewpoint expressed. *Id*. Although this broad ban prohibits Headroom from exercising its right to speak, the Act itself is content neutral. As in *Turner*, the SPAAM Act's restrictions still trigger a heightened level of scrutiny because of the burden it places on Headroom's editorial discretion. See *Turner*, 512 U.S. at 641. Therefore, intermediate scrutiny applies to the SPAAM Act. *Id*.

3. The SPAAM Act Fails Intermediate Scrutiny.

"[T]o survive intermediate scrutiny, a restriction on speech or expression must be '"narrowly tailored to serve a significant governmental interest."' *Reagan*, 142 U.S. at 1475; citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The SPAAM Act fails the test of intermediate scrutiny. Midland has not alleged that its interests in promoting citizens to speak is so important that it warrants the suppression of Headroom's free speech. As a result, the SPAAM Act's broad ban on censorship is not narrowly tailored to achieve its interests.

i. Midland has not alleged important governmental interests sufficient to support the suppression of private speech.

Midland fails to provide important government interests to justify restricting Headroom's First Amendment protections in order to bolster the protections of its private citizens. In *NetChoice, LLC v. AG, Fla.*, the court examined whether social media platforms "engaged in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms." *AG, Fla.*, 34 F.4th at 1203. The court examined several Florida statutes that attempted to limit social media corporations from censoring speech those platforms disagreed with. The court held that it was substantially likely that neither the content-moderation restrictions nor the mandatory disclosure provisions would pass intermediate scrutiny. *Id*. at 1227.

The SPAAM Act was passed to protect private citizens from having their speech censored on social media platforms, including Headroom and other similar interfaces. R. at 5. The purpose of the act is to protect the citizens of Midland from censorship by "tech behemoths." *Id*. The record states that Midland's SPAAM Act aims to protect hardworking Midlandians whose livelihoods have been "ruined" by social media censorship. R. at 5.

There is no evidence in the record that citizens' lives have been ruined by the censorship of certain social media content posted to Headroom's platform. R. at 5. Although Headroom is a very popular social media platform, providing citizens with the opportunity to make money, grow businesses, and engage in virtual reality interaction, it is not the only social media platform available. R. at 2. Headroom does not prevent any individual's freedom to associate with any particular group. Nor does it police any users' activity on other social media platforms. It merely censors content that it disagrees with on its own platform. R. at 3-4. Like *AG, Fla.*, Midland fails to assert why its interest is so important that it may restrict Headroom's free speech protections

under the First Amendment in order to promote the speech rights of its citizens. See generally *NetChoice, LLC v. AG, Fla.*, 4 F.4th 1196 (2022).

ii. The SPAAM Act is not narrowly tailored to achieve Midland's interests.

The SPAAM Act's ban on Headroom's ability to regulate speech on its platform and its demand to post detailed community standards is not narrowly tailored to achieve the government's interest. "Narrow tailoring . . . means that the regulation must be 'no greater than is essential to the furtherance of [the government's] interest.'" *AG, Fla.*, 34 F.4th at 1219; citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

A broad prohibition on the free speech right to exercise editorial judgment on one's own platform is not a narrowly tailored means to achieve the state's interest. Headroom aims to protect its platform by censoring false, misleading, or manipulating information. R. at 4. Headroom reserves the right to deprioritize, demonetize, or remove accounts that violate its community standards. *Id*. Midland fails to demonstrate that Headroom's own community standards had such a chilling effect on the Midland community that its editorial discretion should be limited. R. at 12. Based on the facts presented in the record, Midland cannot show that restricting Headroom's ability to censor speech, thus preventing censorship of false or misleading information, will benefit Midland's citizens in any way. Because there is no evidence to suggest Midland's regulation furthers its interest, the SPAAM Act is not narrowly tailored to any interest the State has attempted to achieve.

V. CONCLUSION

Social media companies, like Headroom are not common carriers; consequently, the curation of user content is speech, triggering First Amendment protections. That notwithstanding this Court's analysis in *Zauderer* is inapplicable to the SPAAM Act's disclosure requirements

because they are not commercial speech and compel the unduly burdensome disclosure of information that is not factual and noncontroversial. Furthermore, the State of Midland's SPAAM Act violates Headroom's First Amendment free speech protections because it compels Headroom to speak and associate with messages it otherwise would not. As a result, the Act fails intermediate scrutiny.

For the foregoing reasons, Petitioner requests that this Court reverse the decision of the Court of Appeals for the Thirteenth Circuit and reinstate the holding of the United States District Court for the District of Midland.

RESPECTFULLY SUBMITTED

Headroom, Inc.
Petitioner
Team 04

CERTIFICATE OF COMPLIANCE

This is to certify that this brief is 8,465 words and is in compliance with Supreme Court Rule 33.1(1)(g)(vi).

Team 04
Counsel for the Petitioner