No. 23-386

IN THE SUPREME COURT OF THE UNITED STATES

HEADROOM, INC., PETITIONER

V.

EDWIN SINCLAIR, ATTORNEY GENERAL FOR THE STATE OF MIDLAND, RESPONDENT

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

BRIEF FOR THE RESPONDENT

TEAM 5
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES

TABLE OF AUTHORITIES (cont'd)

TABLE OF AUTHORITIES (cont'd)

UNITED STATES COURTS OF APPEALS CASES

TABLE OF AUTHORITIES (cont'd)

UNITED STATES DISTRICT COURT CASES

UNITED STATES CONSTITUIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

QUESTIONS PRESENTED

I. Under the First Amendment, do major social media companies serve the public as common carriers, and do the SPAAM Act's disclosure requirements pass the *Zauderer* test by only requiring factual and uncontroversial information be disclosed?

II. Does a state not violate the First Amendment's Free Speech Clause when it prevents major social media companies from denying users nondiscriminatory access to its services?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

In 2022, Midland's governor called a special legislative session to address public concerns over Headroom's censorship practices. R. at 4. As a social media platform, Headroom hosts over seventy-five million monthly users and claims its mission is to "provide a space for everyone to express themselves to the world" and "promote greater inclusion, diversity and acceptance in a divided world." R. at 2-3. On Headroom, users can post content; share others' content; and run businesses by monetizing their posts, soliciting advertisers, and accepting donations. R. at 3. Many users depend on Headroom as the source of their livelihood. R. at 3.

Although Headroom presents itself as a welcoming community, it restricts user viewpoints that conflict with its "Community Standards." R. at 3. Headroom alleges that its standards facilitate the users' experience and helps suppress the dissemination of misleading information. R. at 3-4. To censor users, Headroom uses algorithms to categorize content and prioritize information with its user data tracking system. R. at 3. Posts that offend the Community Standards are flagged and deprioritized. R. at 3. Headroom punishes users who violate its Community Standards by demonetizing, suspending, and outright removing users from the platform. R. at 4. Headroom removes users based on their speech, causing them to lose their businesses and livelihoods in the process. R. at 4-5.

On February 7, 2022, in response to public outrage over Headroom's censorship, Midland legislators passed the Speech Protection and Anti-Muzzling Act ("SPAAM Act" or "Act"). R. at 4-5; Midland Code § 528.491. Midland received overwhelming support for the SPAAM Act, hoping that the Act would hold large and influential social media companies accountable and ensure the protection of Midland's democratic values. R. at 5.

The SPAAM Act clarifies that social media companies are the modern public square and common carriers of public speech. R. at 5-6. The Act applies to any "social media platform," and has two main provisions. R. at 6. First, the Act has an "access provision," which prohibits social media platforms from censoring, deplatforming, or shadow banning users based on viewpoint. R. at 6; Midland Code § 528.491(b). This requirement exempts obscene, pornographic, illegal, or patently offensive content. R. at 6. Second, the Act has a "disclosure provision" that requires social media platforms to publish a detailed and thorough explanation of its Community Standards. R. at 6; Midland Code § 528.491(c). In the event a user violates the standards, a detailed explanation must be provided, explaining which standards the user violated and the reasoning behind the choice of penalty given. R. at 6.

II. PROCEDURAL HISTORY

On March 25, 2022, a day after the Midland Legislature passed the SPAAM Act, Headroom filed a pre-enforcement challenge against Midland's Attorney General in the United States District Court for the District of Midland, alleging the Act violated the First Amendment. R. at 7. Headroom moved for a preliminary injunction, seeking to enjoin the Attorney General from enforcing the Act. R. at 7. On May 29, 2022, the district court granted Headroom's preliminary injunction, reasoning that Headroom's First Amendment challenge succeeded on the merits and the two requirements failed intermediate scrutiny. R. at 15.

In response, Midland appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 19-20. On March 30, 2023, the Thirteenth Circuit properly reversed the district court's decision, reasoning that the Act's two main requirements did not burden Headroom's First Amendment rights and that the balance of the equities favored Midland. R. at 19. The Thirteenth Circuit held that the Act's disclosure provision did not implicate Headroom's First

Amendment rights because Headroom is a common carrier, and the disclosures pertain to purely factual and uncontroversial information. R. at 17. The court also held that the access provision did not violate the First Amendment because it did not penalize Headroom's speech, compel speech, nor prevent Headroom from disavowing third-party content it disagrees with. R. at 19. This Court granted Headroom's writ of certiorari on August 14, 2023. R. at 21.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit's holding for two reasons. First, the SPAAM Act does not violate the First Amendment's Free Speech Clause because large social media companies, like Headroom, are common carriers. Headroom is a common carrier because it holds itself out to serve the public indiscriminately and controls the modern public square through its massive market share. Headroom's First Amendment rights have not been violated because the Act's disclosure provision only requires the disclosure of factual and uncontroversial information. The disclosure provision is justified, not unduly burdensome on Headroom's speech, and advances Midland's interest in protecting informed consumer decision-making.

Second, Midland does not violate the First Amendment Free Speech Clause when it prohibits large social media companies from denying users nondiscriminatory access to its services. The Act's access provision does not interfere with Headroom's speech because Headroom is not a "publisher" of its user's content and does not exercise editorial judgment. The access provision also does not compel Headroom to speak, and only regulates conduct. However, if the access provision does implicate Headroom's First Amendment rights, then the provision survives intermediate scrutiny because it is narrowly tailored and related to an important government interest.

ARGUMENT

Standard of Review. On appeal from a preliminary injunction, a court's legal rulings are reviewed by this Court *de novo* and the ultimate decision on the preliminary injunction is reviewed for abuse of discretion. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 867 (2005).

I. THE SPAAM ACT DOES NOT INFRINGE UPON HEADROOM'S FIRST AMENDMENT RIGHTS BECAUSE HEADROOM IS A COMMON CARRIER AND *ZAUDERER* APPLIES TO THE SPAAM ACT'S DISCLOSURE REQUIREMENTS.

This Court should affirm the Thirteenth Circuit's holding that the SPAAM Act does not implicate Headroom's First Amendment rights because Headroom is a common carrier and the disclosure provision only requires the disclosure of factual and uncontroversial information.

First, the First Amendment is not implicated because Headroom holds itself out to serve the public indiscriminately as a common carrier, not a private publisher. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). The First Amendment's Free Speech Clause provides that Congress shall make no law abridging the freedom of speech. U.S. CONST. amend. I. Under the First Amendment, private publishers enjoy some speech protections when selecting content before publishing it. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). However, common carriers enjoy only limited First Amendment protections. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984). Therefore, as a common carrier, Headroom cannot hide behind the protections of the First Amendment to capriciously exclude members of the public from its services.

Second, the SPAAM Act's "disclosure provision" does not infringe upon Headroom's First Amendment rights because this Court's decision in *Zauderer* applies by requiring only the disclosure of factual and uncontroversial information. *See Zauderer v. Off. of Disciplinary Couns. of Supreme Court*, 471 U.S. 626, 651 (1985). Under *Zauderer*, states may compel commercial enterprises to disclose purely factual and uncontroversial information about the

terms under which the services will be available. *Id.* The disclosure is permissible as long as it is justified, not unduly burdensome on the enterprise's protected commercial speech, and reasonably related to a legitimate state interest. *Id.* Here, the SPAAM Act does not unduly burden Headroom's commercial speech and advances Midland's interest in preventing consumer deception. *Id.* at 638; *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (holding that commercial speech may be restricted in the service of a substantial governmental interest). Accordingly, this Court should affirm the Thirteenth Circuit's holding. R. at 18.

A. Headroom Is a Common Carrier Because It Holds Itself Out To Serve the Public Indiscriminately and Possesses a Significant Market Share.

The Midland district court reasoned that Headroom is not a common carrier because it requires users to agree to its Community Standards as a precondition of using its services, but the court's reasoning is mistaken. *See* R. at 11. Headroom is a common carrier because it serves the public indiscriminately by not bargaining with users on an individual basis, and controls the modern public square through its significant market share. *See* R. at 3.

1. Headroom is a common carrier because it serves the public indiscriminately and not on an individual basis.

The district court's common carrier analysis misapplied this Court's precedent by equating uniform community standards with individual bargaining. R. at 11. In *Midwest*, this Court described common carriers as enterprises that apply the same guidelines uniformly to all users because they do not make "individualized decisions, in particular cases, whether and on what terms to deal." *Midwest*, 440 U.S. at 701. Put differently by the D.C. Circuit, the hallmark of a common carrier is "holding oneself out to serve the public indiscriminately." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). This Court's decision in *Midwest*

clarifies the distinctions between serving the public indiscriminately and individualized bargaining. *Midwest*, 440 U.S. at 699-701.

In *Midwest*, the FCC promulgated rules requiring cable broadcasters with 3,500 or more subscribers to develop more channel capacity and make these channels available to the public and local governmental users. *Midwest*, 440 U.S. at 691-93. This Court analyzed whether the FCC had exceeded its statutory authority, by effectively imposing common carrier obligations on broadcasters. *Id.* at 691. This Court held that the FCC had exceeded its mandate because the regulation forced broadcasters to act as common carriers by requiring them to hold out dedicated channels on a first-come, nondiscriminatory basis. *Id.* at 701.

Here, Headroom's basic requirement that users adhere to uniform community standards is not the individualized bargaining this Court described. *Id.* In *Midwest*, the concern was that if the government regulated broadcasters as common carriers, they would no longer be able to control their limited programming space. *Id.* at 699-700. Broadcasters bargain with users on an individual basis out of logistical necessity. *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 111 (1994) ("Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster."); *Red Lion Broad. Co. v. FCC*, 295 U.S. 367, 388 (1969) (reasoning that not every individual has the right to speak when there are scarce frequencies); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 210-14 (1943) (holding that it is essential the government be allowed to reject individual applicants when there are a limited number of available frequencies). However, where broadcasters evaluate whether a user should be granted access to their finite channel space, Headroom, which hosts over seventy-five million monthly users lacks the same bandwidth

limitation.[1] R. at 3. Headroom only restricts user access after an account has been flagged by its algorithms. R. at 3. Therefore, Headroom does not engage in individual bargaining because it lacks the bandwidth constraints of broadcasters. *See Midwest*, 440 U.S. at 699-700.

Additionally, in stark contrast with Headroom's method of bargaining with the public, broadcasters make individual decisions about who to lease their limited channel space to on a case-by-case basis. *CBS v. FCC*, 453 U.S. 367, 387-88 (1981). For example, when broadcasters are deciding whether to allot airtime to political candidates, they are required to tailor their responses to accommodate the candidate's stated purpose in seeking airtime. *Id.* at 387. They also weigh other factors like impacts on the regular programming schedule and the amount of time already given to the candidate. *Id.* But, Headroom's Community Standards function like an across-the-board policy that removes individual users at the behest of a faceless computer algorithm without clearly considering the nuances of each users' actions. R. at 3.

Moreover, Headroom's mission statement mirrors this Court's common carrier definition. *See Midwest*, 440 U.S. at 701 (defining common carriers as enterprises that provide the public with the opportunity to "communicate or transmit intelligence of their own design and choosing"). Headroom states that its mission is to "provide a space for everyone to express themselves to the world" and to "promote greater inclusion, diversity, and acceptance in a divided world." R. at 2-3; *see also Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring) (reasoning that large social media companies "hold themselves out as organizations that focus on distributing the speech of the broader

[1] There are a limited number of news media networks and primetime windows that can influence a large audience, but social media companies have essentially infinite bandwidth with millions of accounts that target much narrower audiences. Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation.

public"). Thus, Headroom has expressly invited the public to inhabit a space where they can "communicate and transmit" content of their "own design and choosing." R. at 3; *see Midwest*, 440 U.S. at 701. Accordingly, Headroom has offered itself up as a common carrier of public thought and should not be allowed to arbitrarily remove users from its platform. *See* 47 U.S.C. § 202(a) (stating that communications common carriers cannot subject the public to unjust or unreasonable discrimination).

In *Netchoice v. Paxton*, the Fifth Circuit also held that social media companies are common carriers because they offer to serve the public indiscriminately. *Netchoice, L.L.C. v. Paxton* (*Paxton*), 49 F.4th 439, 474 (5th Cir. 2022). In affirming the constitutionality of a statute reminiscent of the SPAAM Act, the Fifth Circuit analyzed how social media companies allow anyone to make an account and "transmit expression after agreeing to the same boilerplate terms of service." *Id.* The court reasoned that this business model demonstrated a "willingness to carry anyone on the same terms and conditions." *Id.* The platforms argued that their practice of censoring viewpoints demonstrated that they were not willing to serve the public indiscriminately. *Id.* However, the court countered that even common carriers are allowed to filter some obscene expression or eject disorderly passengers. *Id.*; *see e.g.*, 47 U.S.C. § 223 (stating phone companies are allowed to filter obscene and harassing calls); 49 U.S.C. § 44902 (stating air-carriers may refuse to transport a passenger the carrier decides is inimical to safety).

This Court should favor the Fifth Circuit's reasoning in *Paxton*, and affirm the Thirteenth Circuit's ruling because they accurately applied this Court's common carriage standard. R. at 17; *see Paxton*, 49 F.4th at 474. As the Fifth Circuit reasoned, the test for determining whether a social media company is a common carrier does not hinge upon whether users are made to agree with a boilerplate set of community standards. *Paxton*, 49 F.4th at 474. The test is whether the

service provider holds itself out to the public indiscriminately. *Id.* Therefore, an across-the-board set of rules and regulations, like Headroom's Community Standards, are not sufficient to avoid common carrier obligations. *See* R. at 3.

2. Headroom should be regulated as a common carrier because it would best serve the public interest by curtailing Headroom's monopoly power.

Headroom should be regulated as a common carrier because it would best serve the public interest in preserving a free marketplace of ideas. Common carriers have historically been characterized as industries that are "affected with the public interest," to justify their common carrier designation. *Munn v. Illinois*, 94 U.S. 113, 129 (1876); *see also* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 404-05 (2020). Moreover, when evaluating if a business is affected with the public interest, this Court has factored market share and market control into the analysis. *See e.g.*, *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 538-40 (1923) (reasoning that the meat packing industry is not affected with the public interest because there was little concern that the industry would be monopolized).

For example, in *Munn* this Court determined that grain elevators should be regulated as common carriers to serve an important public interest in preserving free interstate commerce. *Munn*, 94 U.S. at 134-36. In the middle-to-late nineteenth century, private enterprises started operating grain elevators which stored and distributed grain shipments. *Id.* at 130-31. This industry was quickly monopolized by a small number of firms. *Id.* at 131. In response, this Court upheld new legislation that regulated the industry as common carriers. *Id.* at 134. This Court concluded that even though the grain elevator business had only recently joined the market, these enterprises had already developed into an industry of great importance to the public. *Id.* at 133.

Just as grain elevator operators rapidly took on a pivotal role in our nation's interstate commerce, Headroom has established itself as an essential thoroughfare for our nation's intellectual commerce. R. at 3; *see Munn*, 94 U.S. at 133. The advent of social media has sparked concerns over the power and influence large social media companies possess, leading many to suggest that social media companies are the modern public square. *See Packingham v. North Carolina*, 582 U.S. 98, 107 (2017) (reasoning that social media companies "are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge"); *Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158, 1179 (9th Cir. 2022) (holding that a public official's social media page is a designated public forum); *see also* 47 U.S.C. § 230 (a)(3) ("interactive computer services offer a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.").

Midland has also voiced concerns over Headroom's market power, with Midland's Speaker of the House pleading that the public's ability to challenge political orthodoxy has been threatened by the centralization of political discourse in the hands of a few social media companies. R. at 5. These concerns touch upon a pivotal and historically significant justification for common carriage as acknowledged by this Court: the suspicion of monopoly power. *See e.g.*, *Red Lion*, 395 U.S. at 386 ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

Without intervention, it is foreseeable that these social media companies will continue to grow their market share and influence by swallowing up their competition, just as telephone companies did in the past. *See* Candeub, *supra* at 410-11. There was a time when Americans

were forced to purchase two telephones, one to connect to the larger Bell associated network and one to connect to their local network. Candeub, *supra* at 410-11. Social media users today face a similar dilemma because Headroom can arbitrarily open and close its doors to members of the public for espousing ideas they do not agree with and steer the public discourse as they see fit.[2] R. at 2-3. Users who are censored by Headroom are consequently shut out from major cultural and economic opportunities. R. at 3-4.

As Justice Thomas observed, it does not matter that large social media platforms are not the only means for distributing speech and information. *Knight*, 141 S. Ct. at 1225 (Thomas, J., concurring) ("[a] person always could choose to avoid the toll bridge or train and instead swim the Charles River or hike the Oregon Trail."). What matters is whether the alternatives are comparable. *Id.* On this point, Justice Thomas reasoned that there are no reasonable alternatives to the social media companies that dominate the public square. *Id.* If a cable news consumer wants to receive news from a different ideological perspective, they can change to a different news broadcast and obtain the same access, but this is not the case with modern social media platforms.[3] The largest social media platforms control the modern public square where people have a unique ability to express themselves to the world, engage with the world's diversity of intellectual perspectives, and seek significant economic opportunities. *See* R. at 2-3.

Accordingly, the SPAAM Act does not grant the public any new prejudicial interest in Headroom's platform, but rightfully compels them to declare their obligations to the public as a

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[2] *See* Monica Anderson, *Most Americans Say Social Media Companies Have Too Much Power, Influence in Politics*, Pew Research Center, https://www.pewresearch.org/short-reads/2020/07/22/most-americans-say-social-media-companies-have-too-much-power-influence-in-politics/ (last visited Sept. 6, 2023).

[3] Kashmir Hill, *I Tried To Live Without The Tech Giants. It Was Impossible.*, N.Y. TIMES, https://www.nytimes.com/2020/07/31/technology/blocking-the-tech-giants.html (last visited Sept. 6, 2023).

common carrier of our nation's intellectual commerce. *See Munn*, 94 U.S. at 127-28 ("[I]f he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."). Therefore, Headroom should be regulated as a common carrier because it serves the public indiscriminately, and it would best serve the public interest in preserving the free marketplace of ideas.

B. This Court's Decision in *Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio* Applies to the SPAAM Act's Disclosure Provision.

The SPAAM Act's disclosure provision passes the *Zauderer* test. *See Zauderer*, 471 U.S. at 651. The *Zauderer* test contains three essential inquiries: whether the disclosure is (1) purely factual, (2) uncontroversial, and (3) not unjustified or unduly burdensome on speech. *Id.* A compelled disclosure is constitutional when all three of these criteria are met, and the disclosure is reasonably related to a legitimate state interest. *Id.* For the following reasons, the SPAAM Act's disclosure provision is constitutional.

1. The disclosure provision requires purely factual information to be disclosed.

Under sections 528.491(c)(1) and (2) of the SPAAM Act, "the disclosure provision," Headroom is only required to publish purely factual information about its Community Standards. R. at 6. Specifically, 528.491(c)(1) requires Headroom to publish its Community Standards and detail how those standards are interpreted and enforced. R. at 6. Similarly, in *Zauderer*, a state statute required a law firm to disclose factual information about its services when advertising to the public. *Zauderer*, 471 U.S. at 633-34.

The dispute in *Zauderer* centered around a law firm's advertisement for contingent-fee rates, which selectively omitted the fact that clients would still be liable for costs even if their claims were unsuccessful. *Id.* The government sought to curtail this deceptive practice by

requiring law firms to inform clients that the client would still be liable for costs whenever they advertise contingent-fee services. *Id.* at 633. This Court upheld the statute, reasoning that a commercial enterprise's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651. Ultimately, this Court held that a commercial enterprise's rights are protected so long as the disclosure requirement is "reasonably related to the State's interest in preventing deception of consumers." *Id.*

The SPAAM Act's disclosure provision also seeks to serve the State's interest in preventing consumer deception by supplying consumers with more information. *See* R. at 6. Headroom's community standards prohibit the dissemination of "misleading information," "hate speech," and "misleading narratives" without explicitly defining the terms or how its algorithms make enforcement decisions. R. at 3-4. However, this ambiguity will be resolved by requiring Headroom to explain its Community Standards and how they are administered. R. at 6. The disclosure provision can be seen as a nutritional label, like those required by the Fair Packaging and Labeling Act. 15 U.S.C. § 1451 (stating that labels should enable consumers to obtain accurate information and facilitate value comparisons). Like in *Zauderer*, Midland is requiring Headroom to disclose facts that allow consumers to make informed decisions. R. at 5-6; *see Zauderer*, 471 U.S. at 651.

Additionally, by requiring Headroom to provide users with personalized explanations whenever a community standard is enforced, users will have more reasonable opportunities to change their behavior or consider moving to another platform. *See* R. at 5-6. Section 528.491(c)(2) is purely factual, because it only requires 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." R. at 6. Accordingly, this provision falls within a state's authority to regulate commercial standards. *Zauderer*, 471 U.S. at 651.

Furthermore, Midland can compel Headroom to provide community standard explanations even if Headroom would prefer not to. *See Zauderer*, 471 U.S. at 651. This Court has previously invalidated disclosure requirements that compel a party to make a factual statement it would rather avoid, but this was because the disclosures did not advance any substantial governmental interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (holding that authors cannot be compelled to disclose their identity, because their privacy outweighs any public interest); *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) (holding there was no legitimate interest in requiring professional fundraisers to disclose charity revenues to new donors).

Here, Headroom's preferences are outweighed by Midland's interest in protecting informed consumer decision making. R. at 6. This Court should recognize this as an important state interest, as it has consistently. *See Central Hudson*, 447 U.S. at 563 ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); *Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (holding that First Amendment coverage of commercial speech is meant to protect society's access to accurate information). Thus, the disclosure provision only requires Headroom to disclose purely factual information.

2. The disclosure provision pertains to uncontroversial information.

The SPAAM Act's disclosure provision is also constitutional because it only refers to uncontroversial information. *See* R. at 6. In *NIFLA v. Becerra*, this Court prevented California from compelling pregnancy clinics to disseminate a drafted government notice about the availability of abortion services because the disclosure pertained to controversial information.

Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2372 (2018). This Court concluded that *Zauderer* did not apply to this regulation because the notice requirement did not relate to the services provided by the clinic. *Id.* Instead, the regulation required the clinics to provide information about state-sponsored services, including abortion, which is "anything but an uncontroversial topic." *Id.*

Here, the disclosure provision's requirements are not controversial because they relate directly to facts about Headroom's services. R. at 6. The disclosures also do not draw attention to any competing enterprise, state agenda, or political controversy, unlike the disclosure requirement in *NIFLA*. R. at 6; *see NIFLA*, 138 S. Ct. at 2372. The goal of the provision is to provide consumers with more information about Headroom's platform, not dissuade them from using its servers. R. at 5. Thus, Headroom must only disclose uncontroversial information.

3. The disclosure provision is justified and not unduly burdensome.

As for the third prong of the *Zauderer* test, the disclosure provision does not unduly burden Headroom's First Amendment rights. Headroom claims that the disclosure requirement would be overly burdensome from an operational standpoint by imposing significant implementation costs and increased liability. R. at 11. But, as the D.C. District Court observed, "the question of whether a regulation is unduly burdensome looks to whether *speech* is burdened or chilled." *American Hospital Ass'n v. Azar*, 468 F.Supp.3d 372, 394 (D.D.C. 2020) (emphasis added) (internal quotation marks omitted). Therefore, concerns about operational burdens are not relevant to the *Zauderer* test's burden inquiry because the *Zauderer* test is concerned with speech alone. *Zauderer*, 471 U.S. at 651 ("disclosure requirements might offend the First Amendment by chilling protected commercial *speech*") (emphasis added).

Headroom's speech is not overly burdened because the disclosure provision does not prevent Headroom from speaking. In *NIFLA*, this Court found the statute at issue to be overly

burdensome on the targeted clinics because the clinics would have been forced to call attention to a mandatory government notice instead of their own messaging. *NIFLA*, 138 S. Ct. at 2378. For example, a billboard for one of the affected facilities would have to be surrounded by a 29-word government statement in as many as 13 languages. *Id.* This Court reasoned that such a requirement would effectively drown out the original message and chill the speakers' First Amendment rights. *Id.* Here, Headroom's ability to speak has not been drowned out because it can still endorse messages it likes, and the Act does not require Headroom to post disclosures on its official account. R. at 4-6. Thus, the SPAAM Act's disclosure provision does not unduly burden nor chill Headroom's speech.

The disclosure is also justified because social media companies have deceived their consumers. *See State v. Biden*, 80 F.4th 641, 650-51 (5th Cir. 2023). This Court stated a compelled disclosure must be justified, meaning it must remedy a "potentially real and not purely hypothetical" harm. *NIFLA*, 138 S. Ct. at 2377. In a recent decision, the Fifth Circuit affirmed a preliminary injunction against government agencies for directing major social media companies to suppress disfavored content and elevate other content that supports government objectives. *Biden*, F.4th at 650-51. The platforms altered community standards and censored users regardless of whether community standards had been violated. *Id.* at 653 ("Facebook recognized that a popular video did not qualify for removal under its policies but promised that it was being labeled and demoted anyway after the officials flagged it.") (internal quotation marks omitted). These revelations demonstrate that Midland's concerns are justified. R. at 5. Social media companies have censored users under the guise of moderation, and there is a genuine need to protect consumers from deceptive commercial practices. *See Biden*, 80 F.4th at 650-51.

For the foregoing reasons, this Court should affirm the Thirteenth Circuit's holding because Headroom is a common carrier and *Zauderer* applies to the disclosure provision.

II. MIDLAND DOES NOT VIOLATE THE FIRST AMENDMENT BY PREVENTING HEADROOM FROM DENYING USERS ACCESS AND THE ACCESS PROVISION SURVIVES INTERMEDIATE SCRUTINY.

This Court should also affirm the Thirteenth Circuit's holding that Midland Code section 528.491(b)(1), or the SPAAM Act's "access provision," does not violate Headroom's First Amendment Free Speech rights. R. at 19. The access provision restricts a social media platform's ability to deny users access through censorship, deplatforming, or shadow banning. R. at 6. Headroom alleges that the access provision violates its First Amendment Free Speech rights by interfering with its speech and compelling it to speak. R. at 7. However, Midland does not violate the First Amendment because the access provision actually upholds the First Amendment by protecting third-party speech from censorship. *See* R. at 6. First, Midland does not violate the freedom of speech because the access provision does not implicate Headroom's First Amendment Free Speech rights. *See* R. at 6. The access provision does not violate Headroom's own protected speech nor compel Headroom to speak, but it simply regulates conduct. *See* R. at 6. Second, if the access provision does implicate Headroom's First Amendment rights, then the provision survives intermediate scrutiny because the provision is narrowly tailored and related to an important government interest. *See* R. at 6.

A. <u>The Access Provision Does Not Implicate Headroom's Speech nor Compel Speech, but Only Regulates Conduct.</u>

Headroom contends that the access provision implicates its First Amendment rights by requiring it to host third-party content it disagrees with, infringing on its constitutionally protected editorial judgment and compelling it to speak. R. at 7, 19. To succeed on the merits of its First Amendment challenge, Headroom must show that the Act either interferes with its

speech or compels it to speak. *See Rumsfeld v. F. for Acad. & Inst. Rts., Inc.* (*FAIR*), 547 U.S. 47, 63 (2006); *see also Paxton*, 49 F.4th at 459. Headroom cannot show either for multiple reasons: Headroom is not a publisher that "speaks" when it simply hosts content, Headroom does not exercise editorial judgment, the provision does not compel Headroom to speak, and the provision only regulates conduct. Thus, Midland could not have violated the First Amendment, because Headroom's First Amendment challenge fails on the merits.

1. The access provision does not interfere with Headroom's speech because Headroom does not speak when it hosts content.

Headroom does not publish third-party content, nor does it speak when it censors user accounts. R. at 19. Headroom is not a "publisher" that exercises editorial judgment because Section 230(c)(1) of the Communications Act of 1934 precludes "interactive computer services" from being considered publishers. *See* 47 U.S.C. § 230(c)(1).

Section 230(c)(1) states, "[n]o provider or user of an interactive computer service *shall be treated as the publisher or speaker of any information provided by another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). Section 230(f)(2) defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Section 230(f)(4) defines "access software provider" as "a provider of software . . . or enabling tools that . . . filter, screen, allow, or disallow content; pick, choose, analyze, or digest content; or transmit, receive, display, . . . organize, reorganize, or translate content." 47 U.S.C. § 230(f)(4).

Social media platforms are interactive computer services because they allow users to pick, choose, analyze, and display content as described by section 230. *See* 47 U.S.C. § 230(f)(4). Social media platforms have also benefited from being categorized as interactive computer services, as circuit courts have consistently applied section 230 to shield them from

liability for third-party content. *See Klayman v. Zuckerberg*, 753 F.3d 1354, 1356 (D.C. Cir. 2014) (Facebook); *Force v. Facebook*, 934 F.3d 53, 68 (2d Cir. 2019) (Facebook); *Green v. Am. Online, Inc.*, 318 F.3d 465, 470 (3d Cir. 2003) (AOL); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (AOL); *Doe v. Myspace*, 528 F.3d 413, 422 (5th Cir. 2008) (Myspace); *Paxton*, 49 F.4th at 469. Like other social media platforms, Headroom does not legally qualify as a "publisher," because Headroom is an interactive computer service that allows users to pick, choose, analyze, and display content. *See* 47 U.S.C. § 230(f)(4).

The Fifth Circuit in *Paxton* reasoned that section 230 "reflects Congress's judgments that the Platforms are not acting as speakers or publishers when they host user-submitted content." 49 F.4th at 468. Due to section 230, the Fifth Circuit asserted that courts cannot legally recognize platforms as "First-Amendment-protected speakers or publishers of the content they host." *Id.* at 466. Platforms have also repeatedly and successfully told courts that section 230 applies to them because they "merely serve as 'conduits'" for other people's speech and only use "neutral tools" to filter, arrange, and process content. *Id.* at 467; *see e.g.*, *Klayman v. Zuckerberg*, 910 F. Supp. 2d 314, 317 (D.D.C. 2012) (granting Facebook's 12(b)(6) motion on the basis that section 230 shielded Facebook from liability). Therefore, not only has Congress legally recognized that social media platforms are not speakers, but also, platforms have agreed with this designation by using section 230 as a shield. *Paxton*, 49 F.4th at 468-69.

Like other social media platforms, this Court should not legally recognize Headroom as a speaker of its content because Congress has made clear with section 230 that social media platforms are not publishers nor speakers. *See* R. at 3; 47 U.S.C. § 230. Headroom qualifies as an interactive computer service because Headroom uses neutral tools like algorithms to merely transmit user-created content. R. at 3. Because Headroom is merely a conduit, Headroom "does

not 'speak' when it censors, shadow bans, or eliminates users' accounts." R. at 19. Section 230 precludes Headroom from legally being considered as a speaker of its content, and this Court should not recognize Headroom as a "First-Amendment-protected speaker[] or publisher[]." *See Paxton*, 49 F.4th at 466-67; 47 U.S.C. § 230.

2. The access provision does not interfere with Headroom's own speech because Headroom does not exercise editorial judgment.

Headroom alleges that the access provision infringes on Headroom's constitutionally protected editorial judgment by prohibiting it from censoring users. R. at 7. However, Headroom does not exercise editorial judgment because section 230 prevents Headroom from being considered a "publisher," and this Court has recognized editorial judgment in limited circumstances. *See Miami Herald Publ'g Co. v. Tornillo* (*Tornillo*), 418 U.S. 241, 258 (1974).

In *Tornillo*, this Court held a Florida statute as unconstitutional, which required a newspaper to hold space for political candidates to reply to criticisms. 418 U.S. at 244. This Court recognized that the Miami Herald, a Florida newspaper, exercised editorial judgment only because "a newspaper is more than a . . . conduit for news, comment, and advertising." *Id.* at 258. Editors exercise editorial judgment by making choices about the material before publishing the newspaper. *Id.* Editors make these decisions based on size limitations, the paper's content, and treatment of the public issues. *Id.* This Court further emphasized that newspapers must exercise editorial judgment before publishing because newspapers do not have infinite column space. *Id.* at 257. Thus, an entity exercises editorial judgment by making choices about material and considering space constraints before publishing. *Id.* at 258.

Only the Fifth and Eleventh Circuits have analyzed whether social media platforms exercise editorial judgment. *Compare Paxton*, 49 F.4th at 454 *with Netchoice, L.L.C. v. AG, Fla.*, 34 F.4th 1196, 1210 (11th Cir. 2022). The Eleventh Circuit held that a Florida law, similar

to the Texas law analyzed by the Fifth Circuit, interfered with a platform's editorial judgment. *Netchoice*, 34 F.4th at 1210. However, the Eleventh Circuit took the definition in *Tornillo* out of context, stretching this concept to *Hurley v. Irish-American Gay*, a case that does not apply "editorial judgment." *Netchoice*, 34 F. 4th at 1213 (citing *Tornillo*, 418 U.S. at 258); *see generally Hurley v. Irish-American Gay*, 515 U.S. 557, 559 (1995) (holding as unconstitutional requiring parade organizers to include a disfavored group). The Eleventh Circuit also never addressed two key features distinguished in *Tornillo*: that editors exercise editorial judgment before publishing, and consider space constraints. *See Tornillo*, 418 U.S. at 258; *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1933 (2019) (recognizing a broadcaster exercises editorial judgment by selecting channels *before* broadcasting); *PG&E v. Pub. Utils. Comm'n*, 475 U.S. 1, 11-12 (1986) (recognizing a utility exercises editorial judgment by selecting materials in its billing envelopes *before* sending them).

In contrast, the Fifth Circuit properly recognized that social media platforms do not operate in remotely the same way as newspaper editors. *See Paxton*, 49 F.4th at 454. Platforms just use algorithms, a neutral tool that screens out obscene content after a user has posted the content. *Id.* at 459. About "99% of the content that makes it onto a social media site never gets reviewed further." *Paxton*, 49 F.4th at 459 (citing *Netchoice L.L.C. v. Moody*, 546 F. Supp. 3d 1082, 1092 (N.D. Fla. 2021)). Platforms also have "virtually unlimited space for speech." *Paxton*, 49 F.4th at 462. Therefore, platforms do not exercise editorial judgment because they do not have editors that make choices about size, choice of material, and treatment of issues before the content is posted. *Paxton*, 49 F.4th at 454; *see Tornillo*, 418 U.S. at 258.

Furthermore, an entity that exercises editorial judgment takes legal responsibility for the content it edits. *Paxton*, 49 F.4th at 464. But, social media platforms explicitly claim they are

not editors,[4] and inform the public in their "Terms of Service" that they are not responsible for its content.[5] As this Court once explained, the role of editors includes determining the value of the content and taking responsibility for the items transmitted. *Associated Press v. NLRB*, 301 U.S. 103, 127 (1937). This Court also recently held in *Twitter, Inc. v. Taamneh* that social media platforms cannot be held responsible for aiding and abetting international terrorism with its content. 143 S. Ct. 1206, 1228-29 (2023). This Court reasoned that platforms do no "more than transmit information by billions of people, most of whom use the platforms for interactions that once took place via mail, on the phone, or in public areas." *Id.* Thus, social media platforms are unlike editors that "speak" and do not exercise editorial judgment. *See Paxton*, 49 F.4th at 454.

As a social media platform, Headroom does not exercise editorial judgment. Headroom does not make choices about content before users post and Headroom has infinite space for users to post content with seventy-five million monthly users. *See* R. at 3; *see also Tornillo*, 418 U.S. at 258. Thus, Headroom is merely a "conduit for news, comment, and advertising." *See Tornillo*, 418 U.S. at 258. As a conduit, Headroom allows users to design and post content, share other posts, interact in a virtual reality, and advertise and promote their businesses. R. at 3. Moreover, unlike editors, Headroom just uses algorithms to categorize and order content after a

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[4] *See* Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. TIMES (Oct. 26, 2014), https://nyti.ms/3ommZXb ("'We try to explicitly view ourselves as not editors . . . We don't want to have editorial judgment over the content that's in your feed.'").

[5] *See* FACEBOOK, *Terms of Service* § 4.3, https://www.facebook.com/terms.php (last visited Sept. 16, 2023) ("We do not control or direct what people and others do . . . we are not responsible for their actions or conduct . . . or any content they share."); TWITTER, *Terms of Service* § 3, https://twitter.com/en/tos#current (last visited Sept. 16, 2023) ("You are responsible for your use of the Services and for any Content."); YOUTUBE, *Terms of Service* (Jan. 5, 2022), https://www.youtube.com/static?template=terms ("Content is the responsibility of the person or entity that provides it to the Service."); INSTAGRAM, *Terms of Use*, https://help.instagram.com/581066165581870/?helpref=uf_share (last visited Sept. 16, 2023) ("We do not claim ownership of your content that you post on or through the Service.").

user posts. R. at 3; *see Paxton*, 49 F.4th at 459. Also, unlike editors, Headroom does not appear to explicitly take legal responsibility for user content. *See* R. at 3-4; *see Associated Press*, 301 U.S. at 127. Section 230 pointedly shields interactive computer services, like social media platforms, from taking responsibility. *See* 47 U.S.C. § 230(c)(1); *see Paxton*, 49 F.4th at 468. Therefore, this Court should not expand "editorial judgment" to include social media platforms. *See Tornillo*, 418 U.S. at 258. Because Headroom does not exercise editorial judgment, Headroom does not "speak" by censoring content, and the access provision does not interfere with Headroom's speech. *See* R. at 19.

3. The access provision does not compel Headroom to speak.

Midland does not compel Headroom to speak with the access provision by opening Headroom up to all users. *See* R. at 6, 19. This Court has limitedly held that a state violates the First Amendment by compelling speech when the state forces the entity to associate itself with views it disagrees with, or when accommodating that speech interferes with a message the host is intimately connected to. *See PG&E*, 475 U.S. at 15-16; *Hurley*, 515 U.S. at 576.

In *PG&E*, this Court held that the California Public Utilities Commissioner could not compel PG&E to include speech in its billing envelopes that PG&E disagreed with. 475 U.S. at 4. The Commissioner's order identified a favored speaker and forced PG&E to associate with that favored speaker. *Id.* at 15. This Court reasoned that a state cannot "restrict [PG&E's] speech to certain topics or views" or "force [PG&E] to respond to views that others may hold," because that would violate the First Amendment. *Id.* at 11. Therefore, a state cannot force a speaker to associate with views that the speaker disagrees with. *Id.* at 16.

In *Hurley*, this Court also limited its holding regarding compelled speech to apply only to speakers who are "intimately connected" with the message they are advancing. 515 U.S. at 576.

This Court held that a state cannot require parade organizers to include a group that conveys a message the organizers disagreed with. *Id.* at 559. However, this conclusion did not create a right for speech hosts to discriminate against disfavored messages because this holding was limited to speech hosts who are "intimately connected" with a particular message. *Id.* at 574. Just like a composer who is intimately connected with creating a symphony, parade organizers are intimately connected to the parade. *Id.* Parade organizers specifically select "expressive units of the parade from potential participants" that comport with what the organizers think "merits celebration on that day" or contributes to a "common theme." *Id.* at 574-75. Thus, a state cannot force a speaker to host a message if that speaker is "intimately connected" with a particular message. *Id.*

However, *PG&E* and *Hurley* do not apply here because Midland is not forcing Headroom to associate with any views and Headroom is not intimately connected with a particular message. *See* R. at 19; *see also PG&E*, 475 U.S. at 16; *Hurley*, 515 U.S. at 576. The access provision simply prevents Headroom from discriminating against users based on their viewpoints, as social media platforms do not have a freewheeling right to discriminate against disfavored messages. *See* R. at 6; *Paxton*, 49 F.4th at 461. Platforms do not curate users' speech the same way parade organizers and composers select "expressive units" that are "worthy of presentation." *See Hurley*, 515 U.S. at 574-75; *Paxton*, 49 F.4th at 461. Almost all of the content hosted on platforms are not meaningfully selected in any way. *See Paxton*, 49 F.4th at 461. Instead, this Court's holdings regarding compelled speech in *Pruneyard* and *FAIR* are more instructive. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980); *FAIR*, 547 U.S. at 62.

In *Pruneyard*, this Court held that a state requirement for shopping centers to accommodate students petitioning on its premises did not amount to compelled speech. 447 U.S.

at 76-77. The students petitioned in a shopping center by soliciting support for their opposition to a United Nations resolution and asking passersby to sign petitions. *Id.* at 77. The owners argued, in relying on *Wooley v. Maynard*, they could not be compelled to use its property as a speech forum. *Pruneyard*, 447 U.S. at 85 (citing *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (concluding a state cannot require an owner to display an ideological message on their private property for the purpose it be read)). However, this Court in *Pruneyard* distinguished *Wooley*, because in *Wooley*, the government prescribed the message and limited the owners' choices to cover up the message. *Pruneyard*, 447 U.S. at 87; *see also Wooley*, 430 U.S. at 717. In *Pruneyard*, the state did not command the owners to display a specific message in their shopping center. 447 U.S. at 87. Also, a shopping center is a "business establishment that is open to the public to come and go as they please" and the views expressed by the public will not be identified with the owner's views. *Id.* The shopping center owners can "expressly disavow any connection with the message," by posting signs or disclaiming sponsorship. *Id.*

Like *Pruneyard*, *FAIR* is instructive because this court held that a statute, the Solomon Amendment, requiring law schools to accommodate military recruiters did not amount to compelled speech. *FAIR*, 547 U.S. at 62. The Solomon Amendment denied federal funding to schools that did not give military recruiters equal access to the students, like other employers. *Id.* at 53. The schools' accommodation of the miliary recruiters' message did not constitute "compelled speech because the accommodation [did] not sufficiently interfere with any message of the school." *Id.* at 64. Any speech related to providing military recruiters with assistance, like sending emails and distributing flyers on their behalf, was "plainly incidental to the . . . regulation of conduct." *Id.* at 62. Thus, a state does not compel speech if the state does not force a host to speak a specific message, and accommodation of some speech is merely incidental. *Id.*

Like *Pruneyard* and *FAIR*, Midland is not compelling Headroom to associate itself with a message it disagrees with, so Headroom is not being compelled to speak. *See* R. at 7. With over seventy-five million monthly users, Headroom hosts the "modern public square" and as a host of the modern public square, the views expressed on Headroom's servers will not be identified as Headroom's personal views. *See* R. at 7, 19; *see also Packingham*, 582 U.S. at 99 (comparing social media platforms to the "modern public square"). Headroom, like the shopping center and law schools, can expressly disavow association with any of the views expressed on its platform by posting disclaimers. *See* R. at 19; *see Pruneyard*, 447 U.S. at 87. In fact, nowhere in the SPAAM Act does Midland prevent Headroom from saying anything to distance itself from the third-party users. *See* R. at 6. By requiring Headroom to accommodate all speech, such accommodation is "plainly incidental to the . . . regulation of conduct." *See* R. at 6; *FAIR*, 547 U.S. at 62. As a result, the access provision does not compel Headroom to speak.

4. The access provision only regulates conduct.

The access provision does not interfere with Headroom's speech nor compel it to speak, because it only regulates conduct. The First Amendment permits regulating the conduct of a speech host. *See Pruneyard*, 447 U.S. at 77-79; *FAIR*, 547 U.S. at 62; *see also United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that the government can regulate the defendant's conduct because defendant's expressive actions constituted conduct, not speech). As this Court distinguished in *O'Brien*, a variety of conduct cannot always be labeled as "speech" whenever the conduct intends to express an idea. 391 U.S. at 377. If a state could never regulate conduct of a speech host, then the government would not be able to impose nondiscrimination requirements like it has done so with telephone companies. *Paxton*, 49 F.4th at 455; *see also* 47

U.S.C. § 202(a) (making it unlawful for telephone companies and other common carriers to discriminate against users).

Both *Pruneyard* and *FAIR* show that the First Amendment permits regulation of conduct. *Pruneyard*, 447 U.S. at 77-79; *FAIR*, 547 U.S. at 62. In *Pruneyard*, this Court upheld a law protecting the conduct of pamphleteering in a shopping center. 447 U.S. at 77-79. This Court concluded no First Amendment rights have been infringed by recognizing a right of the students to petition. *Id.* at 88. Likewise, in *FAIR*, this Court upheld the Solomon Amendment partly because it regulated conduct by preventing law schools from giving military recruiters access. 547 U.S. at 62. As this Court reasoned, the Solomon Amendment regulated conduct because denial of access is not "inherently expressive." *Id.* at 70.

Like *Pruneyard* and *FAIR*, the access provision only regulates Headroom's conduct. *See* R. at 6; *see also Pruneyard*, 447 U.S. at 81; *FAIR*, 547 U.S. at 62. The access provision defines "censorship" as "editing, deleting, altering, or adding commentary" to a user's content. R. at 6. The provision defines "deplatforming" as "permanently or temporarily deleting or banning a user." R. at 6. The provision defines "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." R. at 6. Thus, the access provision is only regulating actions that are not "inherently expressive," such as censorship, deplatforming, and shadow banning. *See* R. at 6; *FAIR*, 547 U.S. at 70. The First Amendment permits regulation of actions. *See O'Brien*, 391 U.S. at 376. For the foregoing reasons, the access provision does not interfere with Headroom's speech nor compel Headroom to speak. Headroom's First Amendment challenge fails on the merits because the access provision only regulates Headroom's conduct.

B. If Midland Has Implicated Headroom's Rights, Then the Access Provision Satisfies Intermediate Scrutiny.

Even if the access provision interferes with Headroom's First Amendment Free Speech rights, Midland can still prevent Headroom from denying users access because intermediate scrutiny applies. R. at 19. The provision satisfies intermediate scrutiny because it is narrowly tailored and serves an important government interest. R. at 19.

1. Intermediate scrutiny applies to the access provision.

Strict scrutiny does not apply to the access provision because, as the highest standard, this Court only applies strict scrutiny to laws that explicitly regulate speech based on its content. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A law is "content-based" if it "target[s] speech based on its communicative content" and "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. When analyzing if a law is "content-based," the Court considers "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* In contrast, intermediate scrutiny applies to content-neutral laws unrelated to the content of the speech. *Turner Broad. Sys., Inc.*, 512 U.S. at 642.

The access provision is content neutral, as the Fifth and Eleventh Circuits have applied intermediate scrutiny to similar statutes. *See Paxton*, 49 F.4th at 480; *Netchoice*, 34 F.4th at 1230. The access provision does not target speech based on its communicative content, as the provision applies to any major social media platform and regulates conduct. *See* R. at 5. The SPAAM Act defines "social media platform" as essentially "*any* information service, system, search engine, or software provider." R. at 5 (emphasis added). The access provision, therefore, does not apply to particular speech and applies to platforms equally. R. at 5; *see Reed*, 576 U.S. at 163. The access provision also regulates Headroom's actions, so the provision is unrelated to

the content of Headroom's speech. *See* R. at 5; *Turner*, 512 U.S. at 642. Because the provision does not depend on what message Headroom conveys when it denies users access, the provision does not make a distinction based on the message a speaker conveys. R. at 10-11. Thus, intermediate scrutiny applies.

2. The access provision satisfies intermediate scrutiny.

The access provision satisfies intermediate scrutiny because the provision is narrowly tailored and serves a substantial government interest. R. at 19. First, this Court has held that a law must be narrowly tailored to "serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). In a public forum context, restrictions are reasonable if "they leave open ample alternative channels for communication of the government interest." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Second, this Court has held that a law must be "substantially related" to "an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Without a doubt, the access provision is narrowly tailored and is substantially related to an important government objective. R. at 19.

First, the access provision is narrowly tailored because it is the least intrusive means of accomplishing Midland's content-neutral interests, as the provision merely prevents Headroom from discriminating against users by providing access to all users. *See* R. at 6. The provision also applies to any social media platform that meets a specific set of requirements and it details the exact conduct that Headroom cannot engage in. R. at 5.

Second, the access provision is substantially related to an important government objective. R. at 19. The government has an interest in "promoting the widespread dissemination of information from a multiplicity of sources." *Turner*, 512 U.S. at 663. Midland has an interest

in promoting the free flow of information and protecting citizens' free speech rights. R. at 19. As one Midland state representative stated, "[t]his bill will hold [platforms] accountable and ensure the protection of our democratic values." R. at 5. Another representative expressed that "excessive censorship by tech behemoths is a clear violation of our fundamental rights." R. at 5. Midland's Governor even asserted that the Act will "guarantee[] the protection of civil liberties while curbing the spread of harmful content." R. at 5. Thus, the access provision clearly serves Midland's important objective of protecting speech from Headroom's suppression. *See* R. at 5.

For the foregoing reasons, Midland does not implicate Headroom's First Amendment rights with the access provision. Headroom does not legally qualify as a publisher or speaker of its content, it does not exercise editorial judgment, and the provision does not compel it to speak. The provision only regulates conduct. If the access provision does implicate Headroom's First Amendment rights, then the provision satisfies intermediate scrutiny because the provision is narrowly tailored and substantially related to an important government interest.

CONCLUSION

This Court should AFFIRM the judgment of the United States Court of Appeals for the Thirteenth Circuit in all respects.

Dated: October 9, 2023

Respectfully Submitted,

s/ Team 5
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