No. 23-386

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 ON THE MERITS

TEAM 9
COUNSEL FOR PETITIONER

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QUESTIONS PRESENTED

1. Under the First Amendment's Free Speech Clause, (1) are major 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?

STATEMENT OF CASE

I. Headroom, Inc. provides a curated, respectful, and welcoming experience to its users.

Headroom, Inc. is one of the most widely used social media services in the United States, boasting more than seventy-five million monthly users. R. at 2-3. Headroom allows users to interact with each other and express themselves in a virtual reality world. R. at 2-3. The company's mission is to foster diversity, inclusion, and acceptance of others. R. at 2-3. Users of Headroom can make profiles, post and share content, as well as monetize their accounts to turn their activities on Headroom into real revenues. R. at 3. As a condition of using Headroom, users must agree to abide by Headroom's Community Standards. R. at 3.

Headroom carefully determines what content is seen by its users. Using algorithms, information is prioritized for a user's view based on one's stated preferences and activity on the platform. R. at 3. Information that has been automatically flagged as potentially violative of Headroom's Community Standards is deprioritized from being shown to users. R. at 2-3. The Community Standards forbid communications that promote values antithetical Headroom's values, including "hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R. at 3. The Community Standards also forbid the posting of disinformation: intentionally false information disseminated for the purpose of deceiving others. R. at 4. Users who violate Community Standards can have their accounts demonetized, suspended, or outright banned from Headroom. R. at 4.

II. The State of Midland passes the SPAAM Act.

Midland State Representatives introduced the State of Midland's Speech Protection and Anti-Muzzling (SPAAM) Act after hearing the testimony of several individuals who violated

Headroom's Community Standards. R. at 4-5. The SPAAM Act applies to "social media platforms," 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." Midland Code § 528.491(a)(1), (a)(2)(i)–(iv).

The Act has two main requirements. First, it prohibits social media platforms from "censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" due to their "viewpoint." *Id.* § 528.491(b)(1). The Act defines "censoring" as "editing, deleting, altering, or adding any commentary" to a user's content. *Id.* § 528.491(b)(1)(i). "Deplatforming" is defined as "permanently or temporarily deleting or banning a user." *Id.* § 528.491(b)(1)(ii). "Shadow banning" is defined as "any action limiting or eliminating either the user's or their content's exposure on the platform or deprioritizing their content to a less prominent position on the platform." *Id.* § 528.491(b)(1)(iii). Content that is "obscene, pornographic or otherwise illegal or patently offensive" is exempted from the section's requirement. *Id.* § 528.491(b)(2).

The Act's second requirement would require Headroom to publish "detailed definitions and explanations for how [its community standards] will be used, interpreted, and enforced." *Id.* § 528.491(c)(1). When the community standards are enforced, the Act would require Headroom 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.* § 528.491(c)(2).

Midland's Attorney General is vested with the authority to enforce SPAAM. *Id.* § 528.491(d)(1). Users who believe they have been harmed by a violation of the Act may file a complaint with the Attorney General or sue the responsible social media company. *Id.* § 528.491(d)(2). If the social media company is found liable, courts may grant injunctive relief or impose fines totaling $10,000 per day per infraction. *Id.* § 528.491(d)(3).

III. Headroom brings a pre-enforcement challenge against Attorney General Sinclair.

The SPAAM Act was passed into law on February 7, 2022, and went into effect on March 24, 2022. R. at 7. Headroom filed this pre-enforcement action in the United States District Court for the District of Midland the day after the Act came into effect, complaining that the Act violates the First Amendment of the United States Constitution and requesting a permanent injunction preventing Midland form enforcing the Act and for a preliminary injunction. *Id.*

A preliminary injunction will be granted when four factions are met: (1) a plaintiff must show it is likely to succeed on the merits of the case; (2) the plaintiff must show that it will suffer irreparable harm without the preliminary relief; (3) the plaintiff must show that the balance of equities are in its favor; and (4) the plaintiff must show that a preliminary injunction would serve the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); R. at 8-9.

Headroom relied on two main arguments before the District Court. First, Headroom argued that the SPAAM Act violates the First Amendment by requiring detailed explanations for the application of its Community Standards, thereby impermissibly compelling Headroom to speak and imposing an undue burden on it to do so. R. at 7. Second, Headroom argues that the SPAAM Act violates the First Amendment by requiring it to host content that violates its Community Standards, thus impermissibly infringing on its editorial judgment. R. at 7. Headroom also argues that the other three requirements for a preliminary injunction were met.

The District Court agreed with Headroom and granted the preliminary injunction. R. at 9. Regarding Headroom's claim of likelihood to succeed on the merits, the court began by recognizing that the First Amendment only binds state actors, not social media companies. R. at 9 (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)). Laws that limit free expression and are overbroad can be invalidated "if a substantial number of [their] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." R. at 9 (citing *Ams. For Prosperity Found. V. Bonta*, 141 S. Ct. 2373, 2387 (2021)). The availability of such challenges allows private social media companies to exercise editorial judgment. R. at 10.

Regarding section (c) of the SPAAM Act—the section that requires a detailed explanation in every instance of application of Headroom's Community Standards—the District Court found this requirement violative of the First Amendment. R. at 11. As Headroom is constantly applying its Community Standards, this requirement creates a chilling effect on Headroom's editorial judgment and constitutes a "substantial" burden. R. at 11. Accordingly, intermediate scrutiny was applied. R. at 11. To survive intermediate scrutiny, the government must show that the Act is narrowly tailored to achieving an important state interest. R. at 12 (citation omitted). The Act failed. R. at 12.

The District Court next considered section (b) of the SPAAM Act, which contains the provision barring Headroom from "censoring, deplatforming, or shadow banning" users based on "viewpoint." R. at 12 (citing Midland Code § 528.491(b)(1)–(2)). The court considered several cases of similar laws in the context of newspapers, newsletters, and a mall, where the relevant private business was compelled to host third party speech. R. at 12-13. Because the curation Headroom engages in constitutes expressive speech, the court concluded that Headroom is

protected by the First Amendment and the SPAAM Act once again does not satisfy intermediate scrutiny. R. at 13-14.

Turning to the remaining three factors for a preliminary injunction, the court found that all three favored headroom. R. at 14. The imposition of $10,000 fines per day and loss of First Amendment freedoms constituted irreparable injury. R. at 14-15. The balance of equities and public interest were also found to favor the injunction. R. at 14-15.

IV. The Thirteenth Circuit Court reverses the District Court's decision.

The Midland Attorney General appealed the District Court's decision to the Court of Appeals for the Thirteenth Circuit, which subsequently reversed the District Court. R. at 16. The Circuit Court first discussed the likelihood of Headroom winning on the merits, turning first to the disclosure requirement aspect of the SPAAM Act. R. at 17. The Circuit Court began by observing that "the First Amendment does not protect Headroom's decisions to censor, shadow ban, and ban users because Headroom is a common carrier. Social media platforms are 'the modern public square.'" R. at 17 (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017)). This is so, according to the court, because Headroom holds itself out as "an organization[] that focus[es] on distributing speech of the broader public." R. at 18 (quoting *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring)). The court found that the Act disclosure requirement did not unduly burden Headroom's speech, and thus was not necessary to conduct an intermediate scrutiny analysis. R. at 18.

Second, the Circuit Court considered the section of the Act that prohibits Headroom from "censoring, deplatforming, or shadow banning" users due to their "viewpoint." Midland Code § 528.491(b)(1). The court favored the analogy of Headroom as a public forum rather than a newspaper and concluded that the removal of user's posts was not speech by the plaintiff, nor was

requiring Headroom to leave such posts unmolested compelled speech. R. at 18-19. Even in the case that the prohibition on "censoring" is in violation of the First Amendment, the Circuit Court concluded it would survive intermediate scrutiny as it was "substantially related" to "an important government objective." R. at 19 (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). Finally, the Circuit Court determined that the remaining preliminary injunction factors—irreparable injury, balance of equities, and public interest—favored Midland, and accordingly reversed the District Court's judgment. R. at 19. Headroom timely appealed and on August 14, 2023, the Supreme Court of the United States granted certiorari. R. at 21.

SUMMARY OF THE ARGUMENT

The SPAAM Act violates Headroom's First Amendment rights, and therefore Headroom is likely to succeed on the merits. The SPAAM Act violates the First Amendment because (1) social media companies are not common carriers; (2) the *Zauderer* exception does not apply to the SPAAM Act's disclosure requirements; and (3) Midland violates the First Amendment's Free Speech Clause when it prohibits social media companies from denying users nondiscriminatory access to its services.

Social media companies are not common carriers. There is not a canonical test for common carrier status, but courts have traditionally considered three factors, all of which favor Headroom. First, social media companies do not sufficiently resemble traditional common carriers like railroad companies to warrant treatment as such. Second, social media companies have historically not held themselves out to the public as willing to serve everyone without discrimination or individualized decisions. Third, the presence of market power, to the extent that it is a relevant consideration in a First Amendment context, cannot alone give rise to common carrier status.

Next, this Court's decision in *Zauderer* does not apply to the SPAAM Act's disclosure requirements. The First Amendment protects against prohibitions on speech as well as compelled speech. The SPAAM Act violates these protections by unduly burdening Headroom's editorial judgment with disclosure requirements and by compelling Headroom to speak. Section 528.491(c) does not survive intermediate scrutiny because the State of Midland has not proven a compelling state interest for the law, and it is not narrowly tailored. For these reasons, Section 528.491(c) violates Headroom's First Amendment Free Speech protections.

Finally, the State of Midland violated the First Amendment's Free Speech Clause when it set out to impede Headroom's editorial judgment with Section 528.491(b) of the SPAAM Act. The First Amendment allows companies editorial control over the content they publish. The First Amendment's Free Speech Clause prevents the government from forcing businesses to carry speech with which they disagree. Headroom delivers curated content to its users; therefore, if the State of Midland forced Headroom to publish speech Headroom would otherwise choose not to, people would assume that Headroom was endorsing the viewpoints of users' speech. Section 528.491(b) of the SPAAM Act does not survive intermediate scrutiny since there is no compelling state interest and it is not narrowly tailored. For these reasons, Section 528.491(b) violates Headroom's First Amendment Free Speech protections.

ARGUMENT

I. UNDER THE FIRST AMENDMENT'S FREE SPEECH CLAUSE, (1) MAJOR SOCIAL MEDIA COMPANIES ARE NOT COMMON CARRIERS, AND (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.

1. The Circuit Court erred in finding that social media companies like Headroom are common carriers.

A common carrier is a service provider like a telephone company, railroad company, or postal service, that serves the general public by transporting people or goods without discriminating among its customers. *Common Carriers*, I Bouvier's Law Dictionary and Concise Encyclopedia (3d rev. 8th ed. 1914). A common carrier stands in contrast to a private carrier, which only holds itself out to individual clients, not the general public. *Private Carrier*, II Bouvier's Law Dictionary and Concise Encyclopedia (3d rev. 8th ed. 1914).

Common carriers are usually more constrained in their ability to exercise "journalistic freedom" under the First Amendment, meaning they can less easily refuse to host third-party speech. *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984). Although there is no precise test for common carrier status, three factors have historically been considered when courts decide whether to recognize business in a given industry as common carriers. The first factor is whether the regulated industry sufficiently resembles traditional common carriers: railroad companies and other companies whose business is the transportation of packages. *See Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 (1894). The second consideration is whether said companies hold themselves out to the public as willing to serve all comers without discrimination. *Verizon v. FCC*, 740 F.3d 623, 651 (D.C. Cir. 2014). The third is whether the regulated businesses possess "substantial market power" as to give rise to a "public concern." *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222-23 (2021) (Thomas, J., concurring).

A. Social media companies do not sufficiently resemble traditional common carriers to warrant treatment as such.

Social media companies, such as Headroom, do not sufficiently resemble traditional common carriers to warrant being treated as such. A brief recitation of the legal history of common carriage helps to elucidate the concept. The dichotomy between private and common carriers did not properly arise until the nineteenth century; prior to this time, to be a "common carrier" (or to

have a "common calling") simply meant to practice a vocation as one's primary source of income rather than intermittently. Jurgen Basedow, *Common Carriers Continuity and Disintegration in U.S. Transportation Law*, 13 TRANSP. L. J. 1, 4 (1983).

Companies engaged in the transport of goods and people represent the quintessential common carriers under the traditional paradigm. *Id.* "[T]hey are instruments of commerce . . . they exercise a public employment [function], and are therefore bound to serve customers alike, without discrimination." *Primrose*, 154 U.S. 14. But in *Primrose* the Court ultimately rejected the argument that telegraph companies were common carriers *per se* or subject to the liabilities of common carriers, because, unlike railroad companies, telegraphs do not transport items with some intrinsic value—with telegraphs, there are no opportunities for embezzlement or collaboration with thieves. *Id.* at 14-15. Telegraph and telephone companies were commonly regulated as common carriers by states, however. *See, e.g.*, *Walls v. Strickland*, 93 S.E. 857 (N.C. 1917). It was only with the passage of the Communications Act of 1934 that telegraph and telephone companies began to be regulated as common carriers by the federal government and by the Supreme Court. Communications Act of 1934, 47 U.S.C. § 153(11) (2023) ("The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, [noting exceptions].") Under the traditional common carrier analysis, bailor status and liability for lost goods are two of the touchstones of common carrier status. *See Primrose*, 154 U.S. at 14; *see also Tel. Co. v. Texas*, 105 U.S. 460, 464 (1881); *Express Co. v. Caldwell*, 88 U.S 264, 266 (1874). Social media companies only transport information of no intrinsic value, and therefore cannot be common carriers under the traditional paradigm, as none of the concerns that gave rise to common carriage status are relevant here.

B. Social media companies make individualized decisions about their users through terms and conditions requirements and based on the user's identity.

Though the law must suit an ever-changing world, social media companies are not encompassed by the development of the term "common carrier" since the 1930's. The Telecommunications Act of 1996 distinguishes "interactive computer services" from "common carriers." *See* 47 U.S.C. § 223(e)(6). Nor are social media platforms common carriers under the common law development of the term. This is because social media companies routinely engage in individualized decision-making regarding their users. The Eleventh Circuit explains, "[S]ocial-media platforms have never acted like common carriers." *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1220 (11th Cir. 2022), *cert. granted sub nom.*, *Moody v. NetChoice, LLC,* No. 22-277 (Sep. 29, 2023). Common carriers do not "make individualized decisions, in particular cases, whether and on what terms to deal." *FCC v. Midwest Video Corp,*, 440 U.S. 689, 701 (1979) (cleaned up). "A carrier will not be a common carrier … where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." *Verizon*, 740 F.3d at 651. (internal quotation marks omitted). Social media platforms routinely engage in individualized decision-making in two ways. First, they subject all users to requirements to abide by terms and conditions. Second, social media companies have long had the tendency to discriminate among users on the basis of public notability.

1) Social Media Companies make individualized decisions through terms and conditions.

The requirement of non-discrimination derives from the ancient common law duties of innkeepers, ferrymen, and others, which, throughout the nineteenth century, were applied in the transportation and communication industries. *Cellco P'Ship v. FCC*, 700 F.3d 534, 545 (D.C. Cir. 2012). Yet, social media platforms such as Headroom generally require users to agree to abide by

certain community standards—if a user refuses to agree, they cannot use the platform. R. at 3. Such requirements constitute individualized decisions one whether the social media company wishes to deal with any given user, negating one of the key aspects of common carriage. *Midwest Video Corp.*, 440 U.S. at 701.

Respondents may dispute the precise meaning of the word "decision" in this context. Respondents may also, leaning on a Fifth Circuit decision, reply that the relevant standard for common carriers is instead the absence of "individualized *bargaining*." *NetChoice LLC v. Paxton*, 49 F.4th 439, 469 (5th Cir. 2022), *cert. granted*, No. 22-555 (Sept. 29, 2022) (emphasis added). The distinction between "decisions" and "bargaining" is important: the former suggests a unilateral choice by the company, while the latter suggests a bilateral negotiation. It is unclear where the Fifth Circuit derives its "bargaining" language from. Justice Story never uses the term in his lengthy treatise on the law of bailments in the sections describing common carriers, which the Fifth Circuit relied upon in part. *See Paxton*, 49 F.4th at 471; JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS §§ 495-589 (9th ed. 1878). Such a formulation is ahistorical and can be safely rejected; "decision" is the proper standard, not "bargaining."

The Fifth Circuit further characterized the lack of "individualized decisions" among common carriers as excluding terms and conditions requirements, claiming, "requiring 'compliance with their reasonable rules and regulations' has never permitted a communications firm to avoid common carrier obligations." *Paxton*, 49 F.4th at 474 (citing *Ches. & Pot. Tel. Co. v. Balt. & Ohio Tel. Co*., 66 Md. 399, 414 (1887)). Yet in support of this position, the Fifth Circuit cited only one nearly-150-year-old case from a Maryland state court. *Id.* The Supreme Court has never made such a broad pronouncement. Given such little precedent, "decision" should be interpreted in the most literal sense: when Headroom refuses to allow an individual to use its

platform after he does not agree to its terms and conditions, Headroom is deciding to not serve that individual. Such individualized decision-making marks Headroom and similar social media companies as non-common carriers. *Midwest Video Corp.*, 440 U.S. at 701.

2) Social Media Companies engage in individualized decision-making among users based on public notability.

But even if requiring users to agree to terms and conditions is not the sort of individualized decision-making that contradicts common carrier status, social media companies have historically engaged individual users based on who those users are. Fifth Circuit precedent holds that a common carrier is distinguished by a "willingness to carry on the same terms and conditions any and all groups *no matter who they might be*." *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960) (emphasis added). When "individualized decisions" is qualified this way, the non-common carrier status of social media companies becomes clearer.

Social media companies have historically subjected users to disparate treatment, based on individualized decisions, even where no rule violation has occurred and where all parties have agreed to the same terms and conditions. Consider the case of Twitter (now X), which has long made individualized decisions regarding its users based on their real-life identities and celebrity status. In 2009, Twitter introduced "Twitter verification badges"—small blue checkmarks next to user's names indicating that the account was genuinely operated by some notable person. *See* Peter Cashmore, *Twitter Launches Verified Accounts*, MASHABLE (June 11, 2009), https://mashable.com/archive/twitter-verified-accounts-2 [https://perma.cc/5GYE-GUXJ]. Verified accounts receive other benefits and tools besides the badge indicating authenticity. TWITTER, *FAQs about verified accounts* (July 19, 2016), https://web.archive.org/web/20160719090643/https://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts.

From 2009 until 2016, such verification badges were granted only on the initiative of Twitter staff, and it was not possible for users to request verification. *Id.* Twitter was also known to remove verification badges based on an individual's real-life conduct—perhaps the best example is the de-verification (but not banning) of far-right political activist Richard Spencer for his role in the 2017 "Unite the Right" Rally in Charlottesville, Virginia. Julia Carrie Wong, *Richard Spencer and others lose Twitter verified status under new guidelines*, THE GUARDIAN (Nov. 15, 2017, 7:33 P.M.), https://www.theguardian.com/technology/2017/nov/15/twitter-verified-blue-checkmarks-richard-spencer [https://perma.cc/7DPD-XJTY].

Twitter (now X) continues to use verification badges to unilaterally mark certain users and give them benefits as official business accounts (who receive golden checkmarks) or government officials (who receive grey ones). Patrick Traughber, *Twitter Blue is back. And gold checkmarks are here!*, TWITTER BLOG (Dec. 12, 2022), https://web.archive.org/web/20230404002303/https://blog.twitter.com/en_us/topics/product/2022/twitter-blue-update. Grey and golden checkmarks are granted by X for free to applicable persons and organizations. Twitter thus demonstrates a case of one of the most well-known social media companies routinely engaging in individualized decisions with regard to its users, due wholly to *who that individual is*, notwithstanding agreement with community standards or terms of service. Similar individualized decisions are commonplace among other social media platforms. For these reasons, social media platforms cannot be common carriers because they have never made a habit of "carry[ing] for all people indifferently." *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) (internal quotation marks omitted).

C. Social media company market power cannot give rise to a public need to regulate as a common carrier.

A third consideration that has been advanced in the common carrier context is whether the regulated businesses possess "substantial market power" as to give rise to a "public concern." *Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. at 1222-23 (2021) (Thomas, J., concurring). This criterion for common carriage is disputed by judges and scholars. *See Att'y Gen., Fla.*, 34 F.4th at 1220. Social media platforms do not lose the ability to exercise First Amendment rights merely for enjoying significant market power. *See Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974). But even supposing such a factor is a valid consideration, a finding of great market power is not sufficient to justify treatment as a common carrier. *See U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016).

In *Miami Herald*, the Court considered a case where a local politician—Tornillo—seeking to exercise a Florida law, wished to compel the Miami Herald (owned by the news conglomerate Knight Newspapers, Inc.) to host a reply to an article attacking the politician's candidacy. *Tornillo*, 418 U.S. at 243-44. Tornillo argued that this law was in fact necessary for the exercise of the First Amendment because the "marketplace" for print media was concentrated in so few hands, whereas the barriers to entry were high. *Id.* at 251. Ultimately the Court rejected this argument because the Florida statute compelled newspapers to host speech with which they disagree in violation of the First Amendment's protections of the press—market conditions do not alter fundamental rights. *See id.* at 256-58. Like newspapers, social media companies host varying and conflicting points of view. Here, as in *Miami Herald*, businesses do not lose First Amendment protections or acquire common carrier status when they merely command sufficient market power. *Id.* Even if there is a finding of great market power, the "basic characteristic of common carriage is the requirement to hold oneself out to serve the public indiscriminately," which is not present here. *U.S. Telecom*

Ass'n, 825 F.3d at 740. For the foregoing reasons, this Court should reverse the Circuit Court and find that social media companies are not common carriers.

2. The State of Midland's SPAAM Act violates the First Amendment by posing an undue burden on Headroom's protected speech, and the *Zauderer* exception does not apply to the SPAAM Act's disclosure requirements.

This Court has held that the compulsion to speak may be as violative of the First Amendment as prohibitions on speech. See, *e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); *Tornillo*, 418 U.S. at 256 ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."). In fact, in *West Virginia State Bd. of Ed. v. Barnette*, this Court stated that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." 319 U.S. 624, 633 (1943). In *Zauderer*, the Court continued to recognize that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). The *Zauderer* test establishes guidelines for regulating misleading or potentially misleading commercial speech, establishing 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," and not "unjustified or unduly burdensome." 471 U.S. at 651. Midland's SPAAM Act does not meet these elements of the *Zauderer* test, and the *Zauderer* exception therefore does not apply to the SPAAM Act's disclosure requirements. First, the SPAAM Act imposes an undue burden on Headroom's protected speech. Second, the SPAAM Act fails to satisfy intermediate scrutiny.

A. The SPAAM Act violates the First Amendment by burdening Headroom's editorial judgment with disclosure requirements and by compelling Headroom to speak.

Under *Zauderer*, a commercial disclosure requirement must be "reasonably related to the State's interest in preventing deception of consumers" and must not be "unjustified or unduly burdensome" such that it would "chill" protected speech. 471 U.S. at 626, 651. Therefore, "even under *Zauderer*, a disclosure requirement cannot be 'unjustified or unduly burdensome.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2367 (2018).

1) *Editorial control and judgment, including content moderation, constitutes protected speech under the First Amendment.*

This Court has historically held in a variety of contexts that "the presentation of an edited compilation of speech generated by other[s]" is protected by the First Amendment. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 570 (1995). Such curative activity "is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security." *Id.* at 570. This Court has also held that an entity "does not forfeit constitutional protection simply by combining multifarious voices in a single communication." *303 Creative LLC v. Elenis*, 600 U.S. 570, 588 (2023). "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply," a statute compelling editors to publish certain content would "fail[] to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Tornillo*, 418 U.S. at 258.

In a case that closely parallels this one, the Eleventh Circuit held that major social media platforms engage in constitutionally protected expressive activity when they moderate and curate the content that they disseminate. *Att'y Gen., Fla.*, 34 F.4th 1196. This Court has further noted that a newspaper's "treatment of public issues and public officials—whether fair or unfair—

constitute[s] the exercise of editorial control and judgment." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 10 (1986). Likewise, a social media company's curation of its content constitutes the exercise of editorial control and judgment. "Just as the State is not free to tell a newspaper in advance what it can print and what it cannot," the state may not infringe upon a social media company's ability to execute editorial judgment. *Pac. Gas & Elec. Co.*, 475 U.S. at 11.

2) The First Amendment gives private businesses editorial control over the content they publish and prevents the government from compelling speech.

The content-moderation and detailed-explanation requirements of Midland's SPAAM Act impermissibly burden Headroom's protected speech. In *NetChoice, LLC v. Att'y Gen., Fla.*, the Eleventh Circuit held that a Florida law's "particularly onerous disclosure provisions" aimed at large social media platforms "unconstitutionally burden" the protected exercise of editorial judgment." *Att'y Gen., Fla.*, 34 F.4th at 1203. Specifically, the Florida law "would require covered platforms to provide a 'thorough rationale' for each and every content-moderation decision they make." *Id.* at 1203. The Eleventh Circuit held that social media companies' "'content-moderation' decisions constitute protected exercises of editorial judgment," and a law that restricts this ability to engage in content moderation "unconstitutionally burden[s] that prerogative." *Id.* at 1203.

Here, as in *NetChoice*, the SPAAM Act requires social media companies 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 . . . was chosen." R. at 6. This means that Headroom would be required to provide a thorough rationale for each content-moderation decision that it makes in accordance with its Community Standards. Headroom has more than 75 million monthly users, and it makes countless editorial judgments to remove and restrict content, even employing artificial intelligence to flag information that potentially violates

the Community Standards. R. at 3. Just as the Florida law's disclosure provisions were "particularly onerous," the SPAAM Act's requirement for Headroom to provide a "detailed and thorough explanation" each time it enforces its community standards imposes both significant implementation costs and substantial liability for failure to comply, culminating in an unconstitutional burden on Headroom's First Amendment rights. *Att'y Gen., Fla.*, 34 F.4th at 1203.

Midland's argument that Headroom's content-moderation activities are unprotected conduct analogous to that of the shopping center that sought to exclude pamphleteers in *PruneYard Shopping Center v. Robins* relies on a faulty analogy. *See generally* 447 U.S. 74 (1980). In direct contrast to Headroom, the party in *PruneYard* was not presenting speech to an audience; rather, the shopping center in *PruneYard* was providing a space for retail transactions, meaning that the activities of pamphleteers would not affect the "owner's exercise of his own right to speak." *Hurley*, 515 U.S. at 580 (internal citations omitted). Further, while Headroom explicitly aims to curate its content so as to exclude hateful content, "the [*PruneYard*] owner did not even allege that he objected to the content of the pamphlets," so "[t]he principle of speaker's autonomy was simply not threatened in that case." *Hurley*, 515 U.S. at 580 (internal citations omitted). In contrast, the SPAAM Act forces Headroom to host speech that undermines its explicit message that "all are respected and welcome." In short, as the District Court explained, "Headroom's speech will be altered by speech it is forced to accommodate." R. at 14. Thus, the SPAAM Act infringes on Headroom's First Amendment rights, and Section 528.491(c) must survive intermediate scrutiny.

B. The SPAAM Act fails to satisfy intermediate scrutiny.

Section 528.491(c) of the SPAAM Act is subject to intermediate scrutiny because it is content-neutral and its provisions apply equally to all social media companies. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022). Notwithstanding that it

burdens protected speech, the SPAAM Act could be valid if it were a narrowly tailored means of serving a compelling state interest. *Pac. Gas & Elec. Co.* 475 U.S. 1. Notably, the state bears the burden of proving that a law is neither unjustified nor unduly burdensome. *Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Acct.*, 512 U.S. 136 (1994). To show an interest in preventing the deception of consumers, the state must demonstrate "with sufficient specificity that any member of the public could have been misled by [the] constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." *Ibanez*, 512 U.S. at 139. "The State's burden is not slight; the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer*, 471 U.S. at 646 (internal citations omitted).

1) The state has failed to articulate a compelling governmental interest that justifies the SPAAM Act's burdensome content-moderation and detailed-explanation requirements.

In *Zauderer*, this Court maintained that "commercial speech that was not false or deceptive and did not concern unlawful activities could be restricted *only* in the service of a substantial governmental interest, and *only* through means that directly advanced that interest." 164 A.L.R. Fed. 1 (Originally published in 2000) (emphasis added). "Laws that require the disclosure of purely factual and uncontroversial information meet First Amendment scrutiny *if they are reasonably related to the state's interest in preventing deception of consumers*." Free Speech Limitations on Government Regulation: Overview, Practical Law Practice Note Overview w-015-3053 (emphasis added).

As discussed in Section A, content moderation is a foundational element of a social media company's function. In essence, Headroom "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." *Att'y Gen., Fla.*, 34 F.4th at 1204. As such, it "invest[s] 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." *Id.* at 1204–05. This is not without value to the users and the community at large. "By engaging in this content moderation, the platforms develop particular market niches, foster different sorts of online communities, and promote various values and viewpoints." *Id.* at 1205. In itself, this activity promotes state interests. Further, the Community Standards that Headroom specifically seeks to enforce include ensuring a "welcoming community" and "forbid[ding] users from creating, posting, or sharing content that either explicitly or implicitly promotes or communicates hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." R. at 3. These Community Standards themselves uphold the compelling state interest acknowledged by this court of "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992). This Court has further acknowledged a compelling state interest in "ensuring equal access to publicly available goods and services," which also aligns with Headroom's Community Standards. *303 Creative LLC*, 600 U.S. at 583 (internal citations omitted). In fact, the State of Midland has not only failed to articulate an important state interest that justifies the SPAAM Act's burdensome explanation requirement, but in enacting the SPAAM Act, it actively undermines the established compelling state interests that Headroom's policies further.

"By preventing platforms from conducting content moderation—which . . . is itself expressive First-Amendment-protected activity—" the SPAAM Act would restrict "the speech of some elements of our society in order to enhance the relative voice of others—a concept wholly

foreign to the First Amendment." *Att'y Gen., Fla.*, 34 F.4th at 1228 (citing *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)). "At the end of the day, preventing 'unfair[ness]' to certain users or points of view isn't a substantial governmental interest; rather, private actors have a First Amendment right to be 'unfair'—which is to say, a right to have and express their own points of view." *Att'y Gen., Fla.*, 34 F.4th at 1228 (citing *Miami Herald*, 418 U.S. at 258). "Nor is there a substantial governmental interest in enabling users—who, remember, have no vested right to a social-media account—to say whatever they want on privately owned platforms that would prefer to remove their posts." *Att'y Gen., Fla.*, 34 F.4th at 1228. In sum, this Court has held again and again that the First Amendment protects a private entity's right to exclude certain messages.

2) Even if Midland had articulated a compelling state interest, the SPAAM Act fails to meet the narrowly tailored requirement.

This Court has consistently upheld the principle that "[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—[b]ecause First Amendment freedoms need breathing space to survive." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (internal citations omitted). "The government may regulate in the First Amendment area only with narrow specificity, and compelled disclosure regimes are no exception." Essentially, the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989).

Because the State of Midland has failed to articulate a compelling state interest at all, the SPAAM Act cannot be practically tailored to serve such an interest. However, even if a state interest were articulated, the SPAAM Act, like the *NetChoice* law, would not survive review because its provisions fail to meet the narrow-tailoring requirement and instead "seem designed

not to achieve any governmental interest but to impose the maximum available burden on the social media platforms." *Att'y Gen., Fla.*, 34 F.4th at 1208.

The SPAAM Act restricts social media platforms' ability to alter or remove users' content and prohibits any social media platform from "censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" because of "viewpoint." R. at 6. Where the effect of the Act is to eliminate Headroom's ability to censor offensive or discriminatory speech in accordance with its Community Standards, the only conceivable justification becomes equalizing speech. R. at 6. However, as the Eleventh Circuit stated in *NetChoice*, "there is no legitimate state interest in equalizing speech." *Att'y Gen., Fla.*, 34 F.4th at 1208. Further, the SPAAM Act "exempts 'obscene, pornographic or otherwise illegal or patently offensive' content from the section's requirement." R. at 6. Therefore, even if the state were to argue that it intends to allow equal representation of all ideas, the argument would fail because the state is still permitting the censoring of some content. R. at 6. Laws that attempt to regulate speech based on its content "are presumptively unconstitutional." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018). "This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* Therefore, Headroom's content-moderation activities are protected speech under the First Amendment, and the content-moderation and detailed-explanation requirements of Midland's SPAAM Act impermissibly burden those protected activities without being narrowly tailored to serve a compelling state interest.

Under *Zauderer*, a commercial disclosure requirement must not unduly burden protected speech and must be "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 626 (1985). Under the First Amendment's Free Speech Clause, this

Court's decision in *Zauderer* does not apply to change the fact that the State of Midland's SPAAM Act violates the First Amendment by posing an undue burden that "chills" Headroom's protected speech. The SPAAM Act violates the First Amendment by burdening Headroom's editorial judgment with disclosure requirements and by compelling Headroom to speak. Further, both restrictions fail intermediate scrutiny.

II. THE CIRCUIT COURT ERRED IN FINDING THAT THE STATE OF MIDLAND COULD INTERFERE WITH HEADROOM'S EXERCISE OF EDITORIAL CONTROL AND JUDGMENT.

Private businesses have a constitutionally protected First Amendment right to exercise editorial judgment. Under the First Amendment, the government may not interfere with this right. Additionally, the government cannot compel a company to carry third party speech without violating the company's First Amendment Free Speech rights. When the government does pass a law that violates a person or company's First Amendment Free Speech protections, the law must pass intermediate scrutiny to survive.

A. The First Amendment allows private businesses editorial control over what they publish.

In *Tornillo*, Pat Tornillo was a candidate for the Florida House of Representatives in 1972. 418 U.S. at 243. During the election, the Miami Herald published two editorials that were critical of Tornillo's candidacy. *Id.* In response, Tornillo insisted that the Miami Herald publish responses, written by him, defending his career history. *Id.* at 244. The Miami Herald declined to print Tornillo's responses and Tornillo brought suit in the Dade County Circuit Court. *Id.* His suit was based on Florida Statute § 104.38 (1973), a "right of reply" statute which allowed a candidate to demand that a newspaper, which had been critical of the candidate, to print that candidate's response to the newspaper's assertions free of cost. *Id.* The Supreme Court held that Florida's

statute violated the newspaper's First Amendment rights by "its intrusion into the function of editors." *Id.* at 258.

Headroom makes editorial decisions when its algorithm decides what content to show its users. It makes editorial decisions when it decides whether or not a post has violated the Headroom Community Standards. *Tornillo* makes it clear that editorial decisions are a First Amendment right that the government cannot interfere with. 418 U.S. at 258. This unconstitutional interference includes forcing Headroom to host content which violates the Headroom Community Standards. Because of this, enforcement of the SPAAM Act would violate Headroom's First Amendment Free Speech rights.

B. The First Amendment prevents the government from compelling businesses to carry messages and viewpoints with which they disagree.

Private businesses have a constitutionally protected right to exercise editorial control over what they publish. Under the First Amendment, a business cannot be forced to carry speech which it would not make otherwise. First Amendment Free Speech rights include the right not to speak.

In *Pacific Gas & Electric Co. v. Public Utilities*, for sixty-two years, the Pacific Gas and Electric Company distributed its newsletter *Progress* in its monthly billing envelopes. 475 U.S. at 5. The newsletter included stories of public interest, tips on energy conservation, political editorials, and information on utility services and bills. *Id.* In 1980, the advocacy group Toward Utility Rate Normalization (TURN) urged the California Public Utilities Commission to forbid Pacific Gas from distributing political editorials in its billing envelopes. *Id.* Instead, the Commission decided that the space not taken up by the actual utility bill or required legal notices was extra space that was the property of the utility customers, i.e., ratepayers. *Id.* at 5-6. The Commission decided that TURN, rather than Pacific Gas, should be able to use this extra space four times a year. *Id.* at 6. Pacific Gas was able to use any space not taken up by TURN's content

or could pay an additional fee for the extra postage required if the *Progress* newsletter exceeded the extra space. *Id.* The Commission based its decision on the idea that Pacific Gas did not own the extra space and therefore could not have a compelling interest in it. *Pacific Gas*, 475 U.S. at 6. The Commission put no restrictions on what TURN could say, other than a required disclosure that the messages were not those of Pacific Gas. *Id.* After deliberating through a strict scrutiny analysis of the Commission's decision, the Supreme Court held that it impermissibly burdened Pacific Gas's First Amendment rights because it forced Pacific Gas to associate with views of other speakers, particularly because those speakers were selected because of their viewpoints. *Id.* at 20-21.

Through the SPAAM Act, the State of Midland is attempting to force Headroom and other social media companies to carry third party speech that Headroom and other companies would not choose to share on their own. This is similar to California's Public Utilities Commission in *Pacific Gas*. 475 U.S. at 6. Headroom has Community Standards and does not want to associate itself with speech which violates those guidelines. As a company, Headroom has First Amendment Free Speech rights and based on *Pacific Gas*, can choose what speech it is or is not willing to carry. *See id.* at 20-21.

C. Because Headroom delivers curated content to its users, it would be seen as responsible for the viewpoints of users' speech if Headroom was compelled to carry it on its service.

Requiring a social media company to host speech with which it disagrees would be an undue burden on the company because people would view those viewpoints as being endorsed by Headroom. Because Headroom has community standards as well as an algorithm that curates the content its users interact with, speech that is hosted on the site appears to have been endorsed by Headroom.

In *PruneYard*, a group of teenagers set up a table in a central courtyard of the PruneYard Shopping Center in California. 447 U.S. at 77. The mall was widely open to the public and contained seventy-six commercial establishments, including stores, restaurants, and a movie theater. *Id.* PruneYard Shopping Center is located over twenty-one acres, sixteen of which are made up of stores, sidewalks, and courtyards. *Id.* A group of high school students set up a table in one of the courtyards in order to pass out pamphlets and acquire signatures for a petition protesting a recent United Nations resolution against Zionism. *Id.* The mall kicked the students out and the students sued for a violation of their First Amendment rights. *Id.* One of the issues was whether PruneYard Shopping Center would be seen as endorsing the ideology of people who protested within its property. *PruneYard*, 447 U.S. at 86. The Supreme Court held that this was unlikely to be the case since PruneYard Shopping Center was open to the public and was not limited to personal use. *Id.* Because PruneYard Shopping Center was so open to public activity, the Court believed that the ideology expressed by individuals of the public while in the mall would not be associated with the mall itself. *Id.*

The Circuit Court relied on *PruneYard* in its examination of whether the viewpoints of individuals speaking within a private business would be seen as being endorsed by Headroom. *See id.* This analysis is flawed given the disparate nature of the businesses. PruneYard Shopping Center's primary purpose was as a shopping center, whereas Headroom is a social media provider. The Supreme Court held that so long as the actual business purpose (shopping) of PruneYard Shopping Center was not interfered with, members of the public could make use of the courtyards to express ideology the mall may or may not agree with. *See id.* at 83. Headroom is a social media company that provides its users with a curated social media experience, showing them content which they are more likely to enjoy and interact with. Headroom's curation algorithm is an inherent

and expected part of its service. Anything that appears on a user's feed is reasonably seen as Headroom endorsing it, particularly given Headroom's agreed upon Community Standards.

Because content curation is an inherent part of Headroom's service, the Thirteenth Circuit Court of Appeals erred when it relied on *PruneYard* in its analysis. Users expect to have a curated feed, with content that is aligned with the Headroom Community Standards. Forcing Headroom to display content that is in violation of those standards, would make users of the company believe that Headroom endorsed those views.

D. The SPAAM Act does not survive Intermediate Scrutiny.

Section 528.491(b) of the SPAAM Act is subject to intermediate scrutiny because it is content-neutral, with its rules applying equally to social media companies regardless of the companies' ideology or views. *Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. at 1472. For Section 528.491(b) of the SPAAM Act to survive intermediate scrutiny, the State of Midland had to show that the Act was narrowly tailored to support an important government interest. The State of Midland did not articulate what the important state interest was that inspired Section 528.491(b) the SPAAM Act. The Thirteenth Circuit Court of Appeals erred when it held that Headroom had successfully articulated an important government interest.

Regardless, of whether or not an important state interest was demonstrated, the SPAAM Act is not narrowly tailored because it contains vague exemptions for "obscene, pornographic or otherwise illegal or patently offensive" content. Midland Code § 528.491(b)(2). If the State of Midland truly cared about protecting all free speech, these exceptions, particularly the exceptions that include conduct that is not inherently illegal would not exist. The SPAAM Act does not clearly show what the parameters are for these vague exceptions. "Patently offensive" content could mean anything from someone posting a video of themselves singing along to a song with a lyric that includes a racial slur to someone making a post bragging about the physically of their children. If

Headroom were to ban a user for posting content that Headroom viewed as being obscene, the State of Midland could disagree and find that Headroom violated the SPAAM Act and must pay $10,000 a day. Because Section 528.491(b) of the SPAAM Act is not narrowly tailored, and it does not further a compelling government interest, this section of the SPAAM Act does not survive intermediate scrutiny.

The State of Midland violated the First Amendment's Free Speech Clause when it set out to interfere with Headroom's editorial judgment with Section 528.491(b) of the SPAAM Act. The First Amendment allows companies editorial control over what they publish. The First Amendment's Free Speech clause prevents the government from compelling businesses to carry messages and viewpoints with which they disagree. Because Headroom delivers curated content to its users, it would be seen as endorsing the viewpoints of users' speech if forced to carry that speech on its service. Additionally, Section 528.491(b) of the SPAAM Act does not survive intermediate scrutiny. For these reasons, Section 528.491(b) violates Headroom's First Amendment Free Speech protections.

CONCLUSION

The State of Midland's SPAAM Act violates the First Amendment's Free Speech Clause for several reasons. Under the Free Speech Clause, Headroom is not a common carrier, and even if it were, the First Amendment would still apply. Midland's impositions on Headroom through the SPAAM Act are a violation of *Zauderer* which held that government regulations of commercial speech are valid when the regulations are non-burdensome. Additionally, the State of Midland violated the First Amendment's Free Speech Clause when it prohibited Headroom from making decisions regarding users' access to its services. Petitioner respectfully requests that this Court reverse the ruling of the Thirteenth Circuit and hold that the SPAAM Act violates the First Amendment's Free Speech Clause.

Accordingly, Headroom prays that this Court reverse the Circuit Court and grant petitioner's preliminary injunction because the four requisite conditions are met. *See Winter*, 555 U.S. at 20. First, Headroom shows its likelihood to succeed on the merits because the SPAAM Act violates the First Amendment. Second, Headroom will suffer irreparable harm without relief because a SPAAM infraction would cost $10,000 per infraction per day. R. at 7 (internal citation omitted). Third, the balance of equities favors Headroom because Midland will not be injured while litigation is pending. Finally, a preliminary injunction will serve the public interest by rescuing social media companies' First Amendment rights.

Respectfully Submitted,

_____/s/_____

Team 9

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