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

Team 11
Counsel for Petitioner

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QUESTIONS PRESENTED

I. Whether (1) a social media company is a common carrier under the First Amendment's Free Speech Clause when it only serves users who first accept a code of conduct, and (2) the SPAAM Act's disclosure requirements are unduly burdensome under this Court's decision in *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio* when a social media company must publish a disclosure each time it moderates one of its seventy-five million monthly users or else risk fines of $10,000 a day per infraction.

II. Whether a state violates the First Amendment's Free Speech Clause when it prohibits a social media company from removing user content that the company deems objectionable and in violation of the company's own code of conduct.

STATEMENT OF THE CASE

Under the guise of protecting democracy, Midland's state government has legislatively stripped social media companies of their free-speech rights under the First Amendment. Midland legislators both cast social media companies as "virtual dictators" and codified the very evil against which the First Amendment protects: government abridgement of the freedom of speech. R. at 5. Just like individuals, private companies enjoy the constitutional right to speak freely. Midland's veiled goal of maintaining a "system of oversight" enables the state to control how private companies exercise their civil liberties under the United States Constitution. *See id.* "Maintaining oversight" in this manner is not only outside the role of the government, it is also unconstitutional.

Factual History. Headroom, a Midland-based social media company, created a virtual reality space governed by the values of inclusion, diversity, and acceptance. *Id.* at 2-3. Over seventy-five million monthly users enjoy Headroom's space, making Headroom a hub for social and commercial activity. *Id.* Headroom users can create personal accounts, post their own content, and share other users' content. *Id.* at 3. Users can also monetize their accounts, become sponsored by advertisers, and receive donations from other users. *Id.* Headroom delivers a unique and personalized experience for each of its users using algorithms powered by artificial intelligence. *Id.* These algorithms prioritize the visibility of content if that content matches a user's stated preferences or the preferences derived from Headroom's data analytics. *Id.*

With all these features, Headroom aims to provide a space for everyone to express themselves. *Id.* at 2. However, users may not use this license in a manner contrary to Headroom's guiding values. *Id.* at 2–3. Any new user must therefore accept Headroom's code of conduct, known as its "Community Standards" ("Standards") before the user can access Headroom's virtual reality space. *Id.* at 3. The Standards put all users on notice as to what content Headroom deems intolerable. *Id.* Specifically, Headroom prohibits content promoting or communicating hate

speech, violence, child sexual exploitation or abuse, bullying, harassment, suicide or self-injury, racism, sexism, homophobia, transphobia, or negativity or criticism towards protected classes. *Id.*

Headroom employs several different tools to enforce its Standards and preserve its welcoming, respectful community. *Id.* at 3–4. Headroom may attach commentary to a user's post to alert others that the post potentially violates the Standards or that the post may contain upsetting content. *Id.* at 4. Headroom's algorithms may also deprioritize content suspected of violating the Standards so that this content receives decreased exposure to others. *Id.* at 3–4. Users who violate the Standards may have their accounts demonetized, temporarily suspended, or made inaccessible to others. *Id.* at 4. Finally, Headroom reserves the right to remove or ban a user. *Id.*

In 2022, Headroom took varying degrees of punitive action against several users for different Standards violations. *Id.* at 4–5. These users accused Headroom of viewpoint discrimination. *Id.* at 4. Responding to this outcry, Midland legislators enacted the SPAAM Act ("Act"). *Id.* at 5, 7. Under the Act, if a user on a social media platform is engaged in the expression of a "viewpoint," a social media company may not: temporarily delete or permanently ban that user; edit, delete, alter, or add any commentary to that user's content; or take any action that would limit or eliminate that user's or their content's exposure on the social media platform. Midland Code § 528.491(b)(1). If a social media company does act against a user for violating community standards, then the company must individually curate 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." *Id.* § 528.491(c)(2). This is on top of the Act's requirement that a company publish its community standards alongside a guide containing "detailed definitions and explanations" for how the standards will be "used, interpreted, and enforced." *Id.* § 528.491(c)(1).

A company that fails to follow the Act faces injunctions or fines of $10,000 per day per infraction. R. at 6–7. The Act generally applies only to social media companies headquartered in or doing business with Midland, and that have at least twenty-five million monthly users on their social media platform. *See* Midland Code § 528.491(a)(2)(i)–(iv). The Act defines a "social media platform" as "any information service, system, search engine, or software provider that…provides or enables computer access by multiple users to its servers and site." *Id.* § 528.491(a)(1).

Procedural History. After the SPAAM Act's enactment, Headroom filed a pre-enforcement challenge against Midland Attorney General Edwin Sinclair in the United States District Court for the District of Midland. R. at 7. Headroom alleged that the Act violated the First Amendment and requested a permanent injunction to prevent enforcement of the Act by the Attorney General. *Id.* Headroom also moved for a preliminary injunction. *Id.* The district court granted Headroom's motion for a preliminary injunction, holding that under the First Amendment's Free Speech Clause: (1) social media companies are not common carriers; (2) the SPAAM Act's disclosure requirements are unduly burdensome, thus chilling Headroom's speech in violation of the First Amendment; and (3) the Act's restrictions on content moderation impermissibly infringe upon Headroom's editorial discretion and expressive conduct. *Id.* at 11, 14–15.

Attorney General Sinclair appealed to the United States Court of Appeals for the Thirteenth Circuit. *Id.* at 16. The appellate court reversed the district court's decision in its entirety and vacated the preliminary injunction. *Id.* at 19. In doing so, the appellate court held that: (1) social media companies are common carriers; (2) the Act's disclosure requirements do not unjustifiably or unduly burden social media companies, making them permissible regulations of commercial speech under this Court's decision in *Zauderer*; and (3) the Act's restrictions on content moderation

do not suppress social media companies' speech. *Id.* at 17–19. This Court granted Headroom's petition for writ of certiorari. *Id.* at 21.

SUMMARY OF THE ARGUMENT

The SPAAM Act implicates the First Amendment's Free Speech Clause. The Act is a governmental constraint on the private company Headroom's constitutionally-protected activity. Midland cannot avoid this implication by arguing that Headroom is a common carrier. Headroom is not a common carrier, but even if it is a common carrier, Headroom still has free speech protections under the First Amendment.

Courts employ different tests to determine when a private company warrants regulation as a common carrier. One test evaluates whether the company possesses substantial market power. Another test analyzes whether the company holds itself out to serve the public indiscriminately. Headroom flunks both tests. First, Headroom lacks substantial market power in the social media industry. Substantial market power means near monopoly status. While Headroom has over seventy-five million monthly users, other social media companies like Facebook dwarf Headroom's size. Recent metrics show that Facebook's monthly user count is over three billion. Without near monopoly status to establish substantial market share, the first test fails to characterize Headroom as a common carrier.

Courts employing the second test classify a company as a common carrier if the company holds itself out to serve the public indiscriminately. Headroom fails this test as well. Before members of the public can enter Headroom's space, they must accept Headroom's Standards. Through its Standards, Headroom explains to users under what conditions they may enjoy Headroom's services, and the reasons why Headroom may later restrict or deny user access to its services. At no point does Headroom hold itself out as a company serving the public

indiscriminately. Thus, Headroom lacks the characteristics featured among private companies historically deemed common carriers.

Even if Headroom is a common carrier, no precedent from this Court holds that a private company forfeits all First Amendment protections once treated as a common carrier. At most, this Court has suggested that common carriers may receive less First Amendment protections. Thus, even if Headroom is a common carrier, this Court should still subject the SPAAM Act to an appropriate level of scrutiny and consider the merits of Headroom's First Amendment claims.

The SPAAM Act goes beyond implicating the First Amendment's Free Speech Clause. The Act violates the Free Speech Clause with its disclosure requirements. The lower court relied on this Court's holding in *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio* to justify the disclosure requirements. However, that holding is inapplicable to this case for several reasons.

First, the disclosures in *Zauderer* involved only factual and uncontroversial information, and the amount of information required for disclosure in *Zauderer* was minimal. In contrast, the SPAAM Act orders social media companies to publish a litany of information beyond what these companies would ordinarily make public. Companies must also define and explain every aspect of their codes of conduct and publicly justify every disciplinary action they take. These extensive requirements amount to compelled speech. A company's choice on whether to penalize a user, and to what extent, is inherently discretionary and not wholly factual. As well, this information is not uncontroversial because users only risk disciplinary action by posting content that is, by its very nature, controversial.

Zauderer also does not apply because, unlike the disclosures in *Zauderer*, the SPAAM Act's disclosures are unjustified and unduly burdensome. Headroom has over seventy-five million monthly users that it must monitor for Standards violations. If Headroom violates the disclosure

requirements for just one user, Headroom can face either an injunction or fines of up to $10,000 per day per infraction. Such harsh penalties would financially overwhelm Headroom and chill it from engaging in any future content curation or moderation. Because the Act's disclosure requirements are so burdensome, the Act must survive intermediate scrutiny. Midland has no legitimate governmental interest in burdening private companies' lawful, everyday interactions with their users. The disclosure requirements are also not narrowly tailored. If Midland is concerned about keeping its citizens well-informed on social media companies' practices, it should devise a solution that does not involve conscripting private companies under threat of overwhelming penalties.

Moreover, *Zauderer* applied to a specific context not found in this case. In holding that the *Zauderer* disclosures did not violate the First Amendment, this Court specifically balanced the rights of advertisers against a state's commercial interest in preventing consumer deception. This Court also justified the *Zauderer* holding using precedent relevant to advertiser disclosures. Because the SPAAM Act does not involve advertisers, Midland cannot avail itself of the legitimate state interest of preventing consumer deception. An out-of-context reading of the *Zauderer* holding is inappropriate because *Zauderer* did not establish a universal rule that disclosure requirements are always constitutionally sound.

Finally, if this Court does follow the *Zauderer* holding, then it should apply the same standard of review: whether the SPAAM Act's disclosure requirements are reasonably related to a state interest. No reasonable or rational interest exists for Midland to force private social media companies to divulge how they govern their own sites according to already available site rules.

The SPAAM Act also violates the First Amendment by preventing social media companies from exercising editorial discretion and engaging in expressive conduct. At its core, editorial

discretion means choosing what to say, and what to leave unsaid. From newspapers to utility companies, a private entity's right to editorial discretion is not limited by its identity or the form in which it presents editorialized content.

Headroom exercises editorial discretion when it curates and moderates the content appearing on its platform. Headroom's size or popularity does not transform it into a public forum at the expense of its editorial discretion. Headroom's identity as a social media company also does not make it any less deserving of this constitutional right. Nor does exercising editorial discretion in a virtual space alter this right because the form of editorialized content is immaterial to the merits of its protections. Although Headroom relies on algorithms to prioritize or deprioritize user content on its platform, Headroom ultimately decides whether it will allow or remove content. Thus, Headroom still actively editorializes content, even if aided by machine learning technology.

The lower court has mischaracterized Headroom, a private entity, as a public forum to circumvent its right to editorial discretion. Yet, Headroom is not a public forum. While Headroom does provide a space for speech, this fact alone does not transform a private entity into a public forum. Headroom is distinguishable from other private businesses that this Court previously deemed public forums. To subject Headroom to public forum status would raise far greater First Amendment concerns than in prior cases before this Court.

The First Amendment protects more than the spoken and written word. It also protects expressive conduct. Expressive conduct is conduct that (1) is intended to be communicative and (2) would reasonably be understood by a viewer to be communicative. When Headroom engages in content curation and moderation, Headroom engages in expressive conduct. Because the SPAAM Act restricts content curation and moderation by social media companies, the Act is an unconstitutional infringement on those companies' expressive conduct.

Headroom has the right to choose which messages it wishes to convey, and which messages it wishes not to convey. This is no different from a speaker's constitutional right to choose what to say, and what to leave unsaid. Each piece of content that Headroom allows on its platform constitutes expressive conduct. Each piece of content that Headroom removes equally constitutes expressive conduct. While algorithms do aid in content prioritization, Headroom retains control over selective content approval. By effectively eliminating any outlet for Headroom's expressive conduct, the SPAAM Act impermissibly forces Headroom to alter the message it wishes to convey.

Furthermore, Headroom's expressive conduct merits constitutional protection even though it may not convey a particularized, narrow, or articulable message. So long as Headroom's conduct allows a reasonable person to interpret *some* sort of message, that conduct is expressive. Headroom's expressive conduct also remains protected even though its message is the product of many users' contributions.

Headroom's curation and moderation meet the standard required of expressive conduct. Headroom's actions reflect a conscious decision to convey an objectively perceivable message easily found in Headroom's Standards. Headroom clearly articulates in these Standards the message it intends to convey: a welcoming message of inclusion, diversity, and respect. Furthermore, the reasonable person could not read Headroom's Standards, see the types of prohibited content painstakingly listed out, and fail to understand Headroom's message.

The SPAAM Act's restrictions on content moderation and curation also fail intermediate scrutiny. A restriction on First Amendment rights survives intermediate scrutiny if it is narrowly tailored to serve a significant governmental interest. This Court has already dismissed the idea that a significant governmental interest exists in ensuring that private news media companies adequately represent all viewpoints of the public. There is no reason social media companies

should receive different treatment from their news media counterparts. The Act is also not narrowly tailored due to its broad and undefined language, resulting in all but unlimited enforcement powers for Midland's Attorney General. The Attorney General can personally decide what content is "viewpoint" and what content is "patently offensive" because neither of these terms are defined. Thus, Headroom can never anticipate when its content moderation will incur legal liability because of the broad interpretative powers of the Attorney General.

To forestall the attack on its First Amendment rights, Headroom seeks a preliminary injunction against the SPAAM Act's enforcement. Headroom has proven the likelihood that it will succeed on the merits of its constitutional claims. The other preliminary injunction factors also favor Headroom. Headroom will suffer irreparable injury because of the Act's oppressive penalty scheme and imprecise language. Furthermore, the balance of equities and public interest favor a preliminary injunction. Through their virtual platforms, social media companies facilitate modern civil discourse. However, these companies cannot perform this vital role if deprived of their free-speech rights under the First Amendment. There is no public interest in state control of the media. The SPAAM Act's chilling effect on speech will quickly spread across the Internet and social media companies like Headroom will number among the first victims.

ARGUMENT

I. The Free Speech Clause is implicated in this case because Headroom is not a common carrier and the SPAAM Act's disclosure requirements abridge Headroom's speech by placing an undue burden on its editorial judgment.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The First Amendment applies to state law through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Importantly, the Free Speech Clause "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). This is primarily because the First Amendment "rests on the premise that it is government power, rather than private power, that is the main threat to free expression." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 685 (1994) (O'Connor, J. concurring). The First Amendment protects Headroom because it is a private entity.

The court below, however, held that Headroom is not protected by the First Amendment in this case. First, the court held that Headroom is a common carrier and thus not subject to First Amendment protection. This conclusion is wrong for two reasons. First, Headroom is not a common carrier. And second, even if it was, the First Amendment still protects its speech. Additionally, the court erroneously held that the *Zauderer* analysis applied to the SPAAM Act's disclosure requirements and that, as a result, they were subject to a lowered level of scrutiny. However, *Zauderer* is inapplicable here, as the SPAAM Act's disclosure requirements are unduly burdensome and chill Headroom's speech.

A. The Free Speech Clause protects Headroom because Headroom is not a common carrier.

Common law has long controlled the common carrier doctrine. At least in the communications sphere, common carriers generally "make[] a public offering to provide . . . members of the public who choose to employ such facilities" the ability to "communicate or

transmit intelligence of their own design and choosing . . . ." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). However, common carriers typically take on at least two distinct characteristics. First, regulation of private companies as common carriers is justified when a business becomes of public concern, typically shown by having substantial market power. *See Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). Second, common carriers hold themselves out as serving the public indiscriminately and do not "make individualized decisions . . . whether and on what terms to deal." *Id.* (quoting *Nat'l Ass'n of Reg. Util. Comm'rs v. F.C.C.*, 525 F.2d 630, 641 (1976)). Because Headroom features neither of these characteristics, it is not a common carrier. But even if Headroom was a common carrier, the First Amendment still protects its speech.

1. Headroom is not a common carrier because it does not have substantial market power, nor does it hold itself out to serve the public indiscriminately.

Regulation as a common carrier is only justified when a company has substantial market power—simply holding the company open to the public is insufficient. This Court has suggested that "regulations like those placed on common carriers may be justified, even for industries not historically recognized as common carriers, when a business, by circumstances and its nature, rises from private to be of public concern." *Biden*, 141 S. Ct. at 1223 (Thomas, J., concurring) (cleaned up). The D.C. Circuit Court has described this criterion as the company having "near monopoly power." *Nat'l Ass'n of Reg. Util. Comm'rs*, 525 F.2d at 640.

Headroom's market share pales in comparison to "near monopoly power" that justifies regulating it as a common carrier. Headroom only has over seventy-five million monthly users. R. at 3. Compare that to Facebook, which has over three billion monthly users.[1] Headroom does not

[1] Meta Second Quarter 2023 Report, https://investor.fb.com/investor-news/press-release-details/2023/Meta-Reports-Second-Quarter-2023-Results/default.aspx (Last visited Sept. 24, 2023).

occupy nearly enough market space to constitute anything close to "monopoly power." Thus, Headroom does not have the substantial market power that justifies its classification and regulation as a common carrier.

Not only does a common carrier need substantial market power, but a company must also take on a "quasi-public character" to qualify as a common carrier. *Nat'l Ass'n of Reg. Util. Comm'rs*, 525 F.2d at 641. The D.C. Circuit Court explains that a company simply holding itself open to the public is insufficient to meet this criterion. *Id.* Instead, the company must "undertake[] to carry for all people indifferently." *Id.* (quotation omitted). Put another way, it cannot be the company's practice "to make individualized decisions . . . whether and on what terms to deal," but instead the company must make a practice of "serv[ing] all indiscriminately . . . ." *Id.*

Here, Headroom does not hold itself out to serve the public indiscriminately. Before a member of the public can use Headroom's services, the person must agree to Headroom's curated Community Standards policy. R. at 3. This policy requires users to agree to refrain from creating, posting, or sharing certain content. *Id.* Users also agree that they will face potential penalties for violating the Standards. *Id.* at 4. Such penalties include removal of the person's account and banning the user from Headroom. *Id.* The Standards reflect Headroom's values and ideals, and if people wish to use its services, they must agree to abide by Headroom's views. By setting Standards and requiring its users to agree to that policy, Headroom discriminately sets the terms by which to deal with its users. Thus, Headroom does not satisfy the common carrier criterion of holding itself out to the public as serving all indiscriminately.

Even if this Court finds that Headroom has substantial market power or holds itself out to serve the public indiscriminately, Headroom is still not a common carrier. These criteria alone are not sufficient to deem Headroom a common carrier—they are merely *features* of common carriers.

See U.S. Telecom Ass'n v. F.C.C., 825 F.3d 674, 740 (D.C. Cir. 2016) (labeling the holding itself out indiscriminately criterion as simply a "characteristic" of a common carrier). Unlike traditional common carriers such as telegraph and cable companies, Headroom engages in its own protected speech. Headroom does not simply transmit others' speech as a conduit, but exercises its own editorial discretion. Headroom does not fit with the other types of private entities historically deemed to be common carriers. Therefore, Headroom is not a common carrier.

2. Even if Headroom qualifies as a common carrier, its speech is still subject to First Amendment protection.

Even though this Court has previously suggested that common carriers receive less First Amendment protection, this Court has not declared that common carriers receive no protection whatsoever. In *F.C.C. v. League of Women Voters*, this Court noted that "[u]nlike common carriers, broadcasters are entitled under the First Amendment to exercise the *widest* journalistic freedom consistent with their public duties." 468 U.S. 364, 378 (1984) (cleaned up) (emphasis added). This suggests that, while common carriers may not be able to exercise the "*widest* journalistic freedom," they may be able to exercise *some*. *See id.* And if common carriers can exercise *some* journalistic freedom, that speech is subject to First Amendment protection. Thus, this Court should investigate further into the merits of how Midland's regulations burden Headroom's free speech and subject that burden to the appropriate level of scrutiny.

B. This Court's decision in *Zauderer* does not apply to the SPAAM Act's disclosure requirements because its requirements, unlike those in *Zauderer*, unduly burden Headroom's protected speech.

The lower court erroneously relied on *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio* to hold that the SPAAM Act's disclosure requirements do not compel Headroom to speak in violation of the First Amendment. In *Zauderer*, the Office of Disciplinary Counsel of the Supreme Court of Ohio reprimanded an attorney for, among other things, failing to disclose certain

information in an advertisement he placed in the newspaper. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 630–34 (1985). There, the Court held that the required disclosures were consistent with the First Amendment, emphasizing that the Court was not suggesting that "disclosure requirements do not implicate the advertiser's First Amendment rights at all." *Id.* at 651. The Court recognized that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* However, the Court held that because the disclosures at issue were "purely factual and uncontroversial," the disclosure requirements must only be "reasonably related to the State's interest in preventing deception of consumers." *Id.*

This Court's holding in *Zauderer* as it related to disclosure requirements does not control in this case. First, the disclosure requirements here are less like *Zauderer* and more akin to this Court's precedent in compelled speech cases. Further, the disclosure requirements presented here are unjustified and unduly burdensome, unlike those in *Zauderer*. As a result, the disclosure requirements in this case should be subject to a heightened level of scrutiny. Additionally, the holding in *Zauderer* as it related to disclosure requirements is explicitly limited to advertisers and thus does not apply here. And finally, even if *Zauderer* does apply, the State's disclosure requirements must satisfy rational basis review, which they do not.

1. The SPAAM Act's disclosure requirements unlike those in *Zauderer*, impermissibly compel Headroom to speak, are costly to implement, and impose substantial liability for failure to comply.

In *Zauderer*, this Court concluded that the disclosure requirements at issue did not constitute compelled speech. *Id.* There, the Office of Disciplinary Counsel reprimanded the attorney for failing to include in his advertisement information that clients might be liable for litigation costs even if their lawsuits were unsuccessful. *Id.* at 650. The Court described those

disclosure requirements as only requiring the attorney to provide "somewhat more information than [he] might otherwise be inclined to present." *Id.* Further, the Court described the required disclosures as "purely factual and uncontroversial information about the terms under which his services will be available." *Id.* The Court made a point to distinguish that case from its precedent in compelled speech cases, such as *Miami Herald Publ'g Co. v. Tornillo* and *W. Va. State Bd. of Ed. v. Barnette*, because the disclosure requirements did not compel the attorney to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)).

Here, the State is doing much more than requiring Headroom to disclose "purely factual and uncontroversial information." First, the State attempts to force Headroom to publish "community standards" with "detailed definitions and explanations for how they will be used, interpreted, and enforced." Midland Code § 528.491(c)(1). This goes much further than a simple, factual statement. In fact, it compels Headroom to adopt and express an opinion that could be controversial. Second, the State is attempting to compel 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" every time Headroom enforces its Standards. *Id.* § 528.491(c)(2). Requiring Headroom to individually address each infraction and tailor its explanation to each individual user is much more than a simple, factual, uncontroversial statement like that in *Zauderer*. Again, the State is attempting to force Headroom to express its opinion. And especially chilling is that if Headroom chooses not to speak in these instances, it faces hefty fines for remaining silent—up to $10,000 per day per infraction. R. at 7.

Furthermore, these disclosures, unlike those in *Zauderer*, are "unjustified or unduly burdensome" and "chill[] [Headroom's] protected commercial speech." *Zauderer*, 471 U.S. at 651. If enforced, Midland's disclosure requirements would impose substantial implementation costs on Headroom. *See* R. at 6-7. The individually tailored "detailed and thorough explanation" of each community standards infraction would likely require Headroom to hire an entire team to monitor, analyze, and explain issues to users constantly. *Id.* at 6. And again, Midland could also impose up to $10,000 per day per infraction if Headroom fails to comply. *Id.* at 7. Courts could also grant injunctions if Headroom fails to comply. *Id.* This statute substantially increases Headroom's liability risk, adding to the unjustified burden Midland imposes with these disclosure requirements.

Because the SPAAM Act's disclosure requirements compel Headroom to speak and impose undue burdens on Headroom to comply, the disclosure requirements should be subject to intermediate scrutiny. Midland fails to meet such a burden. No legitimate government interest is served by compelling Headroom, a private company, to interact with its users in the overly burdensome manner the statute prescribes. Furthermore, the regulation must be narrowly tailored to achieve the governmental interest. Even if Midland had a legitimate interest in "providing users with sufficient information to make informed choices," like the lower court opined, the SPAAM Act's disclosure requirement is not narrowly tailed to that end. *Id.* at 18. Midland can inform its citizenry with information in whatever manner it likes to ensure Headroom users make "informed choices." It just cannot do this by compelling Headroom to speak for it.

2. Zauderer narrowly applied to advertisers and thus does not apply here.

In its holding in *Zauderer*, this Court specifically relied on several cases that dealt with advertising when dealing with the constitutionality of the State's disclosure requirements. *Zauderer*, 471 U.S. at 651. Further, the Court framed its discussion around the justification of the

disclosure requirements referring to the "value to *consumers* of the information such speech provides." *Id.* (emphasis added). The Court additionally referred to the justification being "in order to dissipate the possibility of *consumer* confusion or deception." *Id.* (quoting *In re R.M.J.* 455 U.S. 191, 201 (1982) (emphasis added). Finally, the Court specifically stated its holding "that an *advertiser's* rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in *preventing deception of consumers*." *Id.* (emphasis added). The fact that Headroom is not an advertiser renders the justification of preventing consumer deception as inapplicable. Therefore, *Zauderer*'s holding is limited to the advertising context, which is not the situation presented today.

3. Even if Zauderer does apply, the SPAAM Act's disclosure requirements must survive rational basis review, which they do not.

Disclosure requirements subject to *Zauderer* must be "reasonably related to the State's interest . . . ." *Id.* Here, no such reasonable relationship exists. Midland has no reasonable or rational interest in compelling Headroom, a private entity, to interact with its users in a State-prescribed manner. Further, Midland has no reasonable interest in requiring Headroom to "provide a detailed and thorough explanation" of when users violate Headroom's standards. No reasonable or rational state interest is served by requiring Headroom to enforce its own policies in a particular way. Therefore, the SPAAM Act's disclosure requirements do not survive the requisite standard of scrutiny in *Zauderer*.

II. Subsection (b) violates Headroom's First Amendment rights by infringing on Headroom's constitutionally-protected activity and failing intermediate scrutiny.

Subsection (b) violates Headroom's First Amendment rights. First, the Subsection triggers the First Amendment by impeding on two of Headroom's constitutionally-protected rights: exercising editorial judgment and conveying expressive conduct. Second, the Subsection fails

intermediary scrutiny because Midland's legislature did not narrowly tailor it to serve a substantial governmental interest. This Court should remand the case with instruction to reinstate the preliminary injunction because the remaining preliminary injunction factors also favor Headroom.

A. Subsection (b) triggers First Amendment protection by impermissibly interfering with Headroom's exercise of editorial discretion.

The First Amendment protects the exercise of editorial discretion by a private organization. As a private platform, Headroom engages in editorial discretion through its acts of content curation and moderation. Thus, Headroom partakes in First Amendment-protected activity. By effectively banning Headroom's ability to curate and moderate user content, Subsection (b) unconstitutionally impairs Headroom's protected right to exercise editorial judgment. Moreover, hosting the speech of others does not forfeit Headroom's rights by transforming it into a public forum.

1. The First Amendment protects private entities exercising editorial judgment.

The First Amendment protects the editorial discretion of private companies. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1930 ("The private entity may thus exercise editorial discretion over the speech and speakers in the forum."); *NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022) (holding that social-media companies' "'content-moderation' decisions constitute protected exercises of editorial judgment").

In *Miami Herald Publ'g Co. v. Tornillo*, a private newspaper organization sought a declaration that Florida Statute § 104.38 (1973) violated its First Amendment protections. 418 U.S. 241, 245 (1974). Under the Statute, if a newspaper assailed the character or official record of a political candidate for nomination, the candidate had a "right of reply," meaning that the candidate could demand the newspaper to print any reply that the candidate desired, at the cost of the newspaper. *Id.* at 244. The newspaper had to place the reply conspicuously and "in the same kind of type" as the charges against the candidate. *Id.*

The candidate who sought enforcement of the statute argued that it did not violate the Free Speech Clause because Miami Herald could still "say[] anything it wished." *Id.* at 256. This Court disagreed, holding that the candidate's proposition "beg[ged] the question." *Id.* Rather, the statute unconstitutionally "operated as a command in the same sense as a statute or regulation forbidding [Miami Herald] to publish specified matter." *Id.* at 256. Thus, the statute violated the First Amendment because of its "intrusion into the function of editors." *Id.* at 258. This Court defended the protection of editorial discretion because "a newspaper is more than a passive receptacle or conduit for news, comment, and advertising." *Id.* Just like when publishing their own speech, news organizations also speak through their editorial decisions. *Id.* Moreover, "[e]ven 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," such a law contravenes the right to editorialize. *Id.* While the physical limitation on a newspaper's print space factored into the *Tornillo* analysis, this Court stated that the lack of such a limiting factor would not have affected its holding. *Id.* Thus, even if Miami Herald had the print space to accommodate the disgruntled candidate's reply without excluding other content, the statute would still unconstitutionally infringe on the newspaper's editorial discretion. *Id.* This Court's disregard of any physical space limitation as a prerequisite for constitutional protection of editorial discretion ensured that the First Amendment would evolve with technological advancements, like the growth of digital media. *See id.* Headroom's Internet servers, unlike the newspaper columns in *Tornillo*, may have the digital space to accommodate all user-submitted content. Yet the mere fact that Headroom could host objectionable user content without taking space from the content it wishes to promote does not forfeit Headroom's right to editorialize. *See id.*

This Court expanded *Tornillo*'s protection of editorial discretion in *Pac. Gas & Elec. Co. v. Pub. Utils. Com.* 475 U.S. 1 (1986). There, the Public Utilities Commission of California required the utility company Pacific Gas to apportion space in its billing envelopes four times a year for inserts by a public consumer group. *Id.* at 6. Pacific Gas's billing envelopes typically included the company's newsletter, *Progress*, which contained political editorials, stories on matters of public interest, energy conservation tips, information about utility service bills, and other stories. *Id.* at 5. *Progress* was "no different from a small newspaper," with its multiplicity of contents "extend[ing] well beyond speech that propose[d] a business transaction" by "includ[ing] the kind of discussion of 'matters of public concern' that the First Amendment both fully protects and implicitly encourages." *Id.* at 8–9. Thus, the Free Speech Clause protected Pacific Gas's editorial control and judgment even though Pacific Gas was not a traditional news outlet. *Id.*

In holding that the Commission's requirement violated Pacific Gas's First Amendment rights, this Court posited that "the identity of the speaker is not decisive in determining whether speech is protected." *Id.* Rather, *Progress*'s contribution to "discussion, debate, and the dissemination of information and ideas" triggered the constitutional protection to editorialize that this Court afforded to the traditional newspaper in *Tornillo*. *Id.* at 8, 11 ("[T]he concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to [Pacific Gas] as well as to the institutional press.") By extending editorial protection to Pacific Gas, this Court expanded the protection beyond just traditional news outlets. *Id.* Thus, the precedent in *Tornillo* and *Pacific Gas* furnishes private companies with the First Amendment right to exercise editorial judgment. *Id.*

2. Editorial judgment encompasses content curation and moderation.

Content curation and moderation is a form of editorial discretion. *Hurley v. Irish-American Gay*, 515 U.S. 557, 570 (1995) (holding that "the presentation of an edited compilation of speech generated by other persons . . . fall squarely within the core of First Amendment security"). A

private company's "treatment of public issues and public officials—whether fair or unfair—[constitutes] the exercise of editorial control and judgment." *Pac. Gas & Elec. Co.*, 475 U.S. at 10 (quoting *Tornillo* 418 U.S. at 249). This Court considers "treatment" as what a media outlet says and what it leaves unsaid through its editorial process. *Id.* at 11. While technological advancements may transform modern communication, they fail to alter the constitutionally-protected right to editorialize. *Tornillo*, 418 U.S. at 248–49. The First Amendment thus protects social media platforms' right to present curated compilations of others' speech. *See id.*

Because Headroom's content curation and moderation is the process by which it reviews and prioritizes user-generated content, it falls within this Court's definition of "editorial judgment." *See id.*; R. at 3-4. Headroom engages in content curation by categorizing and ordering content for users. R. at 3. Headroom's artificial intelligence algorithms prioritize information based on users' preferences and deprioritizes information that the algorithms flag as potentially violating Headroom's Standards. *Id.* Headroom engages in content moderation every time it decides whether content will be allowed to remain on its site or whether it will be removed pursuant to its Standards. *See id.* at 4. At each step of this process, Headroom exercises editorial discretion. *Id.* at 3-4.

Headroom's protected right to exercise editorial judgment naturally flows from *Tornillo* and *Pacific Gas*. As aforementioned, in *Pacific Gas*, this Court held that the newsletter *Progress* was "no different" from a newspaper because of its variety of contents, including energy-saving tips, wildlife conservation stories, cooking recipes, public debate, and billing information. *Pac. Gas & Elec. Co.*, 475 U.S. at 8. *Progress*'s "discussion of 'matters of public concern'" along with its array of contents led this Court to extend the right to editorialize to private companies. *Id.* at 9. The multiplicity of content on Headroom's platform is no different than that of *Progress*'s. R. at 3. While considered a hub for business, content on Headroom's platform functions as a typical

social media site. *Id.* at 3-4. Users may create an online profile to post content and interact with other users over any topic they desire. *Id.* This includes matters of public concern like "hot-button political and social topics." *Id.* at 4. Thus, Headroom's right to exercise editorial judgment should benefit from the same protections expounded in *Tornillo* and *Pacific Gas*.

Moreover, Headroom's content moderation constitutes editorial judgment even though every post may not be monitored. *NetChoice*, 34 F.4th at 1214. Subsection (b) aims to effectively eradicate any form of content curation or moderation. R. at 5-6. The conduct that Subsection (b) regulates is the actual review, prioritization, or removal of users' posts. *Id.* That conduct, the actual review, is precisely how courts define editorial judgment. *NetChoice*, 34 F.4th at 1214. Thus, Subsection (b) impermissibly infringes on Headroom's protected right of editorial discretion.

3. A private entity does not transform into a public forum merely by hosting the speech of others.

The First Amendment protects private entities from state actions intruding on one's right to free speech. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1926. Even so, a private entity may qualify as a state actor in limited circumstances. *Id.* at 1928. Notably, "when the private entity performs a traditional, exclusive public function;" "when the government compels the private entity to take a particular action;" or, "when the government acts jointly with the private entity." *Id.* Courts apply the "state-action doctrine" when determining the line between private and state entities. *Id.* at 1926. Under this doctrine, "a private entity may be considered a state actor when it exercises a function 'traditionally exclusively reserved to the State.'" *Id.*

In *Manhattan Cmty. Access Corp v. Halleck*, film producers sued Manhattan Neighborhood Network (MNN), a private nonprofit corporation, claiming that MNN violated their free-speech rights under the First Amendment by restricting their use of public access channels because of their film's content. *Id.* at 1927. The producers argued that MNN performed a traditional, exclusive

public function by characterizing the operation of public access channels on a cable system as the operation of a public forum for speech. *Id.* at 1930. This Court disagreed with that characterization, holding that "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor." *Id.* Moreover, "a private entity… who opens its property for speech by others is not transformed by that fact alone into a state actor." *Id.* at 1926. Therefore, a private media company is not deemed a public forum by merely opening its platform to host the speech of others. *See id.*

Manhattan Cmty. illuminates the distinction between precedent regarding the free speech of media platforms versus that of other private businesses. *Id.* Private entities like law schools and shopping malls do not speak by merely hosting patrons or visitors. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (distinguishing the protected right to editorialize from mall pamphleteering because the concern of "intrusion into the function of editors" is "obviously not present"); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006) (holding that "schools are not speaking when they host interviews and recruiting receptions" because "a law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper"). However, private platforms "in the business of disseminating curated collections of speech," like newspapers and social media companies, speak through their editorial judgment and content moderation practices. *NetChoice*, 34 F.4th at 1213.[2] Thus, compelling a social media company to host speech that it otherwise would not infringes on the platform's freedom of speech. *Id.*; *see also Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1926.

[2]Headroom exercises editorial judgment even though its users interact through a virtual reality environment. R. at 3. The form in which Headroom operates does not change the underlying fact that Headroom is in the business of disseminating curated collections of speech. *See NetChoice*, 34 F.4th at 1213. As a result, the element of virtual reality does not forfeit Headroom's constitutional right to editorialize.

Additionally, a platform's popularity has no impact on the platform's status as a private organization or the platform's level of First Amendment protections. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). For instance, the "communications revolution" transformed newspaper companies into "big business," where certain papers are now "noncompetitive and enormously powerful and influential in [their] capacity to manipulate popular opinion and change the course of events." *Tornillo*, 418 U.S. at 249. Yet this Court maintained that for these newspapers, "compulsion to publish that which 'reason tells them should not be published' is unconstitutional," regardless of the newspapers' audience size. *Id.* at 256 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945). While "a responsible press is an undoubtedly desirable goal, [] press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* A modern corollary is that while twenty-first-century governments in America may desire social media companies to speak "responsibly," they cannot legislate this responsibility without running afoul of the Constitution. *See id.* The First Amendment thus protects Headroom's editorial acts regardless of Headroom's popularity.

B. Subsection (b) also triggers First Amendment protection by suppressing Headroom's inherently expressive conduct.

In addition to editorial discretion, the First Amendment safeguards inherently expressive conduct within the Free Speech Clause. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018) ("Constitutional protection for freedom of speech 'does not end at the spoken or written word.'"). Expressive conduct includes content curation and moderation by a private organization so long as some message may be reasonably understood from the curation. *See Hurley*, 515 U.S. at 573–74. Because one can reasonably understand a message from Headroom's moderation acts, Headroom engages in constitutionally-protected expressive conduct when moderating users' content.

1. Constitutionally-protected expressive conduct includes content curation and moderation.

First Amendment protection encompasses expressive conduct if the "conduct is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984). The First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication." *Hurley*, 515 U.S. at 570 (holding that the curation of speech generated by others "fall[s] squarely within the core of First Amendment security"). This Court maintains that the private "speaker has the right to tailor the speech" as it "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.* at 573. The "point" of this rule "is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id.* at 574. Thus, this Court acknowledges, accepts, and promulgates that content curation and moderation is speech itself through the expressive conduct doctrine. *See id.* at 572-73.

The Freedom of Speech Clause protects the right to speak as much as the right to not speak. *Hurley*, 515 U.S. at 573 ("one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'"); *Pac. Gas & Elec. Co.*, 475 U.S. at 11 ("*all* speech inherently involves choices of what to say and what to leave unsaid"); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796-97, 108 S. Ct. 2667, 2677 (1988) (holding that differences exist "between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say").

The right to refrain from conveying a particular message is not limited to the act of speech, but also extends more broadly to expressive conduct. *Id.* at 572-73. In *Hurley v. Irish-American*

Gay, the South Boston Allied War Veterans Council, the Council, refused to include GLIB (gay, lesbian, and bisexual descendants of Irish immigrants) when selecting units to walk in its parade. *Id.* at 561. GLIB and some of its members sued the Council, alleging violations of the State and Federal Constitutions and the state public accommodations law. *Id.* The public accommodations law prohibited "'any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement.'" *Id.* (quoting Mass. Gen. Laws § 272:98 (1992)).

However, this Court held that the inclusion and exclusion of units in the parade equally constituted expressive conduct. *Id.* at 572–73. The units walking in the parade "affect[ed] the message conveyed by the private organizers." *Id.* Mandating the Council to include groups that the Council would otherwise exclude thus "essentially requir[ed] [the Council] to alter the expressive content of their parade." *Id.* For that reason, this Court afforded First Amendment protection to the Council's curation of the parade's content. *Id.*

As *Hurley* upholds, the right to refrain from speaking through content curation may be "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers." *Id.* As a private platform in the business of curating collections of speech, Headroom's expressive conduct arises from what its algorithms prioritize and deprioritize. R. at 3. Deprioritizing certain content conveys that it conflicts with Headroom's stated purpose in its Standards. *Id.* Preventing Headroom from excluding specific posts through its prioritization methods has two effects: not only does it force Headroom to express things that it would rather not, but it also dilutes the messages that Headroom wants to promote.

2. The First Amendment does not require the intent to convey a particularized message for expressive conduct to be protected.

To be constitutionally protected, expressive conduct must "be understood by the viewer to be communicative." *Clark*, 468 U.S. at 294. This Court interprets that standard to mean, "a narrow, succinctly articulable message is not a condition of constitutional protection."[3] *Hurley*, 515 U.S. at 569; *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1742 (2018) (Kagan, J., concurring) ("a 'particularized message' is not required, or else the freedom of speech 'would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.'" (citing *Hurley*, 515 U.S. at 569)). Thus, the freedom to curate and moderate content does not require an individual's conduct to communicate a cohesive message. *Hurley*, 515 U.S. at 569. Rather, the actor's conduct must be of the nature that "the reasonable person would interpret [it] as *some* sort of message, not . . . necessarily . . . a specific message." *Zinman v. Nova Se. Univ., Inc.*, No. 21-13476, 2023 U.S. App. LEXIS 7402, at *15 (11th Cir. 2023) (emphasis in original) (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004)).

In *Hurley*, this Court noted that "like a composer, the Council select[ed] the expressive units of the parade from potential participants, and though the score may not [have] produce[d] a particularized message, each contingent's expression in the Council's eyes comport[ed] with" the theme of the parade. *Hurley*, 515 U.S. at 574. Private speakers thus "do[] not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an *exact* message as the exclusive subject matter of the speech." *Id.* at 569-70 (emphasis added). Thus,

[3]In *Texas v. Johnson*, this Court stated that the "intent to convey a particularized message" was required for the First Amendment to protect expressive conduct. 491 U.S. 397, 404 (1989). However, the *Hurley* decision walked back the "particularized message" standard. *Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995).

content curation and moderation practices need not convey an exact message to benefit from First Amendment protection. *See id.*

3. Headroom conveys an objectively perceivable message through the decisions made in curating and moderating content on its platform.

Headroom's content curation and moderation practices communicate the precise message contained within its Standards. R. at 3-4. The Standards "ensure a welcoming community" by prohibiting certain offensive content from the platform. *Id.* Because each potential user must agree to the Standards before creating an account, each user knows the exact message that Headroom seeks to convey through its moderation practices. *Id.* Therefore, Headroom objectively intends to and does convey the message outlined in its Standards.

Even if the published Standards fail to state an exact message for the purpose of expressive conduct, it is "implausible that platforms would engage in the laborious process of defining detailed community standards, identifying offending content, and removing or deprioritizing that content if they *didn't* intend to convey 'some sort of message.'" *NetChoice*, 34 F.4th at 1214 n.14 (emphasis in the original). Thus, Headroom's content curation and moderation practices can be reasonably understood by viewers to communicate some sort of message based on the stated Standards and through deprioritizing certain content.

C. Section 528.491(b) fails intermediate scrutiny and the remaining preliminary injunction factors favor Headroom.

Subsection (b) fails intermediate scrutiny. Intermediate scrutiny applies because Subsection (b) is content-neutral, applying to all social media companies regardless of ideological or political viewpoint. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022). Midland must show that Subsection (b) is "narrowly tailored to serve a significant governmental interest." *Id.* at 1475 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). However, Midland failed to narrowly tailor Subsection (b) to further a substantial

governmental interest. Additionally, if this Court rules on the preliminary injunction, the remaining preliminary injunction factors favor Headroom.

1. Subsection (b) lacks specificity, rendering the Section overly broad, and it fails to further any substantial governmental interest unrelated to the suppression of free speech.

This Court's precedent holds "ensur[ing] [] a wide variety of views reach the public" as insufficient to qualify as a substantial governmental interest to stifle the free speech of private companies. *Tornillo* 418 U.S. at 248. Midland's attempt to bypass this precedent by labeling the governmental interest as "ensuring the protection of [Midland's] democratic values" fails to articulate a different interest than the one already dismissed by this Court. R. at 5.

Additionally, Midland's legislature constructed Subsection (b) very broadly. *Id.* at 5-6. For example, the legislature neglected to define "viewpoint" or "patently offensive" in the Act. *Id.* at 6. Through its imprecision, the Midland Legislature vests the power of interpretation in Midland's Attorney General. *Id.* Therefore, when Headroom engages in content moderation of a post that it considers "patently offensive," Midland's Attorney General may subjectively determine whether it is "patently offensive" or if Headroom modified the content because of "viewpoint." *Id.* Thus, if Subsection (b) applies, any user could repeatedly share content that promotes harassment, bullying, hate speech, suicide or self-injury, racism, sexism, homophobia, or transphobia so long as the Attorney General deems the content as following the Act's vague terminology. *Id.* This Court consistently holds that the State cannot "burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011). Nor may the State "advance some points of view by burdening the expression of others." *Pac. Gas & Elec. Co.*., 106 S. Ct. at 914. Yet Subsection (b)'s ambiguity enables the State, through the Attorney General, to do just that. *Id.* The ability to subjectively define the terms in the Act grants the Attorney General with the power to unilaterally shape public debate. R. at 6.

2. Headroom will suffer irreparable injury and the balance of equities and public interest favor a preliminary injunction to ensure the protection of free speech.

The enforcement provisions, coupled with Subsection (b)'s imprecision, will inevitably subject Headroom to suffer irreparable injury. R. at 6-7. Headroom will accrue fines totaling $10,000 a day per infraction. *Id.* at 7. Headroom has over seventy-five million monthly users. *Id.* at 3. With no understanding of what will constitute an infraction because of Subsection (b)'s ambiguity, Headroom likely will unknowingly accumulate a large fortune in fines just by exercising its editorial judgment and engaging in expressive conduct. *Id.*

Moreover, the balance of equities and public interest favor a preliminary injunction. The injury that Headroom will face and the phraseology of Subsection (b) will chill many online media platforms from any form of content regulation. The Act's definition of "social media platform" is so broad that it includes other platforms outside of "social media" like Pinterest and WhatsApp. *Id.* at 5-6. Thus, not only will the speech of traditional social media platforms be stifled, but also non-traditional social media platforms will fear state censorship. *Id.* This fear, along with the broad delegation of power to Midland's Attorney General, shifts the equities to favor Headroom.

CONCLUSION

This Court should reverse the judgement of the court of appeals on both questions presented and hold that Headroom is likely to succeed on the merits of its claim. Additionally, all other factors favor a preliminary injunction against enforcement of the SPAAM Act.

Respectfully submitted on this 2nd day of October 2023.

Team 11

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