No. 23-386

IN THE

Supreme Court of the United States of America

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 RESPONDENT

Team 13
Counsel for Respondent
October 9, 2023

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QUESTIONS PRESENTED

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

II. 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 THE CASE

I. STATEMENT OF THE FACTS

The State of Midland has a duty to protect the fundamental rights of its citizens. In fulfillment of this duty, the State of Midland enacted the Speech Protection and Anti-Muzzling (SPAAM) Act (hereinafter "the SPAAM Act" or "the Act"), which went into effect on March 24, 2022. R. at 7. The Act protects the First Amendment free speech rights of Midland's citizens by limiting the power of major social media companies to suppress those rights. *Id*. at 5. As Midland's Governor, Michael Thompson, stated, the SPAAM Act "establish[es] a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content." *Id.*

The SPAAM Act applies to all social media platforms operating in Midland, and has two main requirements. R. at 6. First, the Act restricts social media platforms from discriminating against users' content by prohibiting social media platforms from "censoring, deplatforming, or shadow banning" any user based upon viewpoint. Midland Code § 528.491(b)(1). Second, the Act requires detailed community standards to be published by each social media platform. Midland Code § 528.491(c)(1). Further, The Act requires a "detailed and thorough explanation" to be provided whenever a platform enforces its community standards. Midland Code § 528.491(c)(2).

The Act was enacted by Midland in response to concerns raised by multiple Midland citizens regarding the discriminatory practices of Headroom, Inc. (hereinafter "Headroom"), a virtual reality social media company where users access the platform through virtual-reality headsets. R. at 3-5. Headroom is similar to other social media platforms in that it "allows users to create profiles, design and post content, and share other users' posts." *Id*. at 3. Headroom's users may also create revenue by monetizing their posts, soliciting advertisers, receiving donations, and

promoting their businesses on the platform. *Id.* Headroom employs the use of algorithms to prioritize or deprioritize information based upon users' preferences and possible violations of its Community Standards. *Id.*

Multiple citizens of Midland were directly impacted when Headroom chose to discriminate against posts which the social media platform deemed to be in violation of its Community Standards. *Id*. Headroom's Community Standards ban users from posting content deemed by Headroom to be "disinformation" and forbids content that goes against Headroom's promotion of a "welcoming community" where "all are respected and welcomed." *Id*. at 4. In fact, Headroom's stated mission is to "provide a space for everyone to express themselves to the world." *Id*. at 2. Headroom's application of the Community Standards resulted in multiple allegations that Headroom was deprioritizing or adding warnings to users' posts containing certain political viewpoints. *Id*. at 4. In response to the concerns raised by these practices, Midland enacted the SPAAM Act to "preserv[e] the free flow of information" and protect the free speech rights of its citizens. *Id*. at 19. If a social media platform violates the SPAAM Act, the court "may grant relief either in injunctions or fines totaling $10,000 a day per infraction." Midland Code § 528.491(d)(3).

II. PROCEDURAL HISTORY

In response to the enactment of the SPAAM Act, Petitioner Headroom filed a motion for preliminary injunction against Midland's Attorney General, Edwin Sinclair, on March 25, 2022. R. at 7. Petitioner contends that the Act violates the Free Speech Clause of the First Amendment for two reasons: (1) the Act's requirement to provide a detailed explanation of Headroom's Community Standard "impermissibly compels Headroom to speak" and (2) the Act's "explanation requirement imposes an undue burden on Headroom's speech." *Id*. The United States District Court for the District of Midland granted Petitioner's motion for preliminary injunction. *Id*. at 15.

Upon Respondent's appeal to the United States Court of Appeals for the Thirteenth Circuit, the court reviewed the District Court's grant of Petitioner's preliminary injunction for abuse of discretion. *Id*. at 17. The United States Court of Appeals for the Thirteenth Circuit reversed the District Court and vacated the preliminary injunction. *Id*. at 19. The Court of Appeals reasoned that the First Amendment does not protect Headroom because Headroom is a common carrier. *Id*. at 17. The Court of Appeals noted that the Act's disclosure requirements neither compel nor interfere "with Headroom's editorial judgment." *Id*. at 18. This Court granted Headroom's petition for writ of certiorari for resolution of the questions presented therein. *Id*. at 21.

SUMMARY OF THE ARGUMENT

Major social media companies are common carriers under the Free Speech Clause of the First Amendment of the United States Constitution. Major social media platforms such as Headroom, hold themselves out to the public as a service where all potential users are able to "communicate or transmit intelligence of their own design and choosing." *FCC v. Midwest Video Corp*., 440 U.S. 689, 691 (1979). Major social media companies also do not make individualized decisions about whether and on what terms to provide a service. For instance, Headroom, provides the same Community Standards to all potential and active users. Headroom also provides an avenue for users to connect and communicate with one another, allowing users to profit, advertise, and donate through their posts on the platform.

This Court's decision in Zauderer v. Disciplinary Counsel of the Supreme Court of Ohio applies to the State of Midland's Speech Protection and Anti-Muzzling (SPAAM) Act's disclosure requirements. Section 528.491(c) requires only the disclosure of "purely factual and uncontroversial information" about Headroom's services that is reasonably related to protecting Headroom users from deception and viewpoint discrimination. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Additionally, Section 528.491(c)

does not unjustifiably or unduly burden Headroom's speech by simply requiring Headroom to "provide sufficient information for users to understand how they violated the Community Standard." R. at 11. Section 528.491(c) does not chill Headroom's protected speech because it neither interferes with Headroom's editorial judgment nor does it compel Headroom to speak. Unlike the unlicensed notice requirement in *NIFLA*, Section 528.491(c) does not compel Headroom to "speak a particular message." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

The Free Speech Clause of the First Amendment is not violated when a state prohibits social media companies from denying users nondiscriminatory access to its services. As forums open to the public, social media platforms provide important forums for the sharing of information. Social media platforms hold themselves out as forums open to the public where users may establish profiles, post information or opinions, and even earn income by working with advertisers. Forums open to the public may not discriminate against users based upon viewpoint. Far from compelling social media platforms to speak, Section 528.491(b)(1) of the SPAAM Act protects the First Amendment free speech rights of users by prohibiting viewpoint discrimination by social media platforms. The Act does not require social media platforms to speak or endorse any particular viewpoint, rather, the Act ensures that social media platforms are not discriminating against some viewpoints in favor of certain other viewpoints.

Even if the SPAAM Act did infringe on the constitutional rights of social media platforms, which it does not, the Act should still be upheld as it survives intermediate scrutiny. As a regulation applying equally to all social media platforms, the Act is content-neutral and does not endorse nor censor any particular viewpoints. Content-neutral regulations are subject to intermediate scrutiny, which requires that the regulation advance important governmental interests

without burdening substantially more speech than necessary to further those interests. Section 528.491(b)(1) satisfies intermediate scrutiny, as it serves the important interest of Midland in ensuring the free speech rights of its citizens are protected from viewpoint discrimination. Further, the Act does not substantially burden more speech than necessary, as it curtails censorship of speech by social media platforms without burdening those platforms to speak a particular message. Therefore, the SPAAM Act satisfies intermediate scrutiny and should be upheld.

ARGUMENT

I. MAJOR SOCIAL MEDIA COMPANIES ARE COMMON CARRIERS UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

Major social media companies are common carriers under the Free Speech Clause of the First Amendment of the United States Constitution. The First Amendment, which is applicable to the States through the Fourteenth Amendment, states that, "Congress shall make no law [...] abridging the freedom of speech." U.S. Const. amend. I. The state action doctrine provides that "constitutional free speech protections generally apply only when a person is harmed by an action of the government, rather than a private party." Valerie C. Brannon, Congressional Research Service Report (2019). However, this Court has regulated common carriers' First Amendment protection. Although this Court has not clearly expressed the level of First Amendment protection provided for common carriers, this Court has suggested that the First Amendment Free Speech Clause offers little protection to common carriers. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) ("Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties.") Since common carriers have a lower level of First Amendment protection than other forms of communications, the State may require common carriers to supply their services without

discrimination for the protection of individuals' free speech. *See Primrose v. W. Union Tel. Co.*, 154 U.S. 1, 14 (1894).

To determine whether an entity constitutes a common carrier and their level of First Amendment protection, there are two questions: (1) whether the entity "holds himself out to serve indifferently all potential users" and (2) whether the entity allows "customers [or users] to transmit intelligence of their own design and choosing." *United States Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (2002). Major social media companies are common carriers under the First Amendment's Free Speech Clause. *See* Midland Code § 528.491(b)(1) (acknowledging that "social media companies are the public square of the twenty-first century and common carries of public speech."). Major social media companies, specifically Headroom, hold themselves to the public to serve indifferently all potential users. R. at 2. Additionally, major social media platforms allow individuals to communicate or transmit intelligence of their own design and choosing. *Id.* As common carriers, social media platforms "generally must afford neutral, nondiscriminatory access to their services, and must avoid unjust and unreasonable practices in that connection." *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 383-84 (2017). Since Headroom is a common carrier, Midland may regulate Headroom to safeguard users' free speech under the First Amendment. *See Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222-25 (2021) (Thomas, J., concurring).

A. Major Social Media Companies Hold Themselves Out To Serve Indifferently All Potential Users.

Major social media platforms hold themselves out to the public to serve indifferently all potential users. According to the District of Columbia Circuit, "[t]he basic characteristic of common carriage is the requirement to *hold oneself out to serve the public indiscriminately*." *United States Telecom Ass'n v. FCC,* 825 F.3d 674, 740 (D.C. Cir. 2016) (emphasis added).

Particularly, Headroom holds itself out to serve the public indiscriminately by "provid[ing] a space for everyone to express themselves to the world." R. at 2.

In *Biden v. Knight First Amendment Inst. at Columbia Univ*., this Court granted the Biden's petition for writ of certiorari regarding the First Amendment's role in a government official's right to control their social media account. *Knight*., 141 S. Ct. at 1220. According to Justice Thomas in his concurring opinion, there is "a fair argument that some digital platforms are sufficiently akin to common carriers[.]" *Id.* at 1224. In fact, "digital platforms that hold themselves out to the public resemble traditional common carriers." *Id.* Major social media platforms "hold themselves out as organizations that focus on distributing the speech of the broader public." *Id*. Social media companies resemble communications technologies that have been regulated as common carriers — they are simply a more advanced and modern communications technology.

Social media platforms are similar to telephone companies, which have been deemed common carriers by lower courts. *See State ex rel. Webster v. Neb. Tel. Co.*, 22 N.W. 237, 237 (1885). In *Neb. Tel. Co*, the Supreme Court of Nebraska held that the telephone company was required to furnish their services without discrimination. *Id*. The court reasoned that telephone companies, the same as telegraph companies, are common carriers of news. *Id*. at 239. Similar to telephone companies, social media platforms hold themselves out to serve all potential users.

During the nineteenth and twentieth centuries, telephones had become "a public servant, a factor in the commerce of the nation and of a great portion in the civilized world[.]" *Id.* at 239. This Court has established that social media platforms are "the modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017). As the modern public square, social media platforms embody the primary characteristic of a common carrier.

The United States District Court for the District of Midland claims that the First Amendment is not implicated by the actions of private social media companies under the state action doctrine. R. at 9. However, Petitioner is mistaken because major social media platforms such as Headroom that portray themselves as serving all potential users without discrimination are bound to special regulations as a common carrier. *Id*. at 3. In fact, the verbiage of the Community Standards demonstrates Headroom's objective of serving all potential users indifferently by using terms such as "welcoming community" and "all are respected and welcome." *Id*.

Major social media companies do not make individualized decisions on whom is allowed to use the platform. A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal." *Midwest Video Corp.*, 440 U.S. at 691. Major social media platforms permit any individual to utilize the service. For instance, the only requirement that Headroom has for its users is that they agree to the terms and conditions of the Community Standards. Under the Community Standards, Headroom prohibits

> 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. Further, the Community Standards prohibit users from posting "disinformation," which is "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups." *Id*. at 4.

Petitioner argues that Headroom makes individualized decisions by requiring all users to agree to its Community Standards. *Id*. at 11. Petitioner also claims that users are "not free to use Headroom's services as they see fit", and thus is not a common carrier. *Id*. However, Petitioner is incorrect because a social media platform may restrict users' freedom to use their services if the platform presents a willingness to restrict every user to the same terms and conditions. *See*

Netchoice, L.L.C. v. Paxton, 49 F.4th 439, 469 (5th Cir. 2022) (noting that social media companies represent a "willingness to carry [everyone] on the same terms and conditions."). A common carrier's requirement "to carry for all people indifferently" does not mean that the service need be without restriction and offered to the entire public. *Nat'l Asso. of Regulatory Util. Comm'rs v. Fed. Commc'ns Com.*, 533 F.2d 601, 608 (1976).

In *Paxton*, the Texas legislature claimed that social media platforms with more than fifty million users "function as common carriers", and thus enacted a statute to regulate those platforms. *Paxton*, 49 F.4th at 445. The Fifth Circuit held that major social media platforms are "communications firms of tremendous public importance that hold themselves out to serve the public without individualized bargaining." *Id.* at 469. The Fifth Circuit reasoned that a social media platform requiring users to follow their terms and conditions is irrelevant, instead the test is "whether [the social media platform] offers the same terms and conditions to any and all groups." *Id*. at 474.

Similar to Facebook in *Paxton*, Headroom applies the same terms and conditions to all existing and prospective users. *Id.* at 469. Every Headroom user must agree to the Community Standards before joining Headroom's service; the Community Standards are a precondition of joining Headroom's servers. R. at 3, 11. Requiring users to agree to the Community Standards does not exclude Headroom from being a common carrier because Headroom is "offered indiscriminately to anyone who does agree to use the service according to the terms." *Republican Nat'l Comm. v. Google, Inc.*, No. 2:22-cv-01904-DJC-JBP, at *26 (E.D. Cal. Aug. 24, 2023). Headroom does not change their standards for different groups or classes; instead, all users choosing to participate in Headroom's services are bound to the same level of restriction.

Therefore, major social media platforms do not make individualized decisions on whom utilizes its services.

B. Major Social Media Companies Allow Individuals To Communicate Or Transmit Intelligence Of Their Own Design And Choosing.

Major social media companies provide a platform for individuals to communicate or transmit intelligence of their own design and choosing. A common carrier in the communications context "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing[.]" *Midwest Video Corp.*, 440 U.S. at 701 (quoting *Report and Order, Industrial Radiolocation Service, Docket No. 16106*, 5 F. C. C. 2d 197, 202 (1966).

A core purpose of the First Amendment's Free Speech Clause is to promote "an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Major social media platforms off an avenue for the transmission of ideas between users. This Court has recognized that social media "allows users to gain access to information and communicate with one another about it on any subject that might come to mind." *Packingham v. North Carolina*, 582 U.S. 98, 98 (2017). In *Packingham*, this Court acknowledged that social media platforms not only allow users to post content, but they are "important places" that connect users by offering "capacity for communication of all kinds." *Id*.

In *Republican Nat'l Comm.*, the Republican National Committee claimed that Google violated the state's common carrier laws. *Republican Nat'l Comm.,* No. 2:22-cv-01904-DJC-JBP, at *7. The California Eastern District Court held that email service providers, such as Google Email ("Gmail"), are not common carriers. *Id.* at 24. The court reasoned that although Google "holds itself out to the public generally and indifferently", Google does not "transport messages from place to place [...] rather the various computers that comprise the network" transport the messages.

Id. at 25, 28. Email services "do not carry messages; they receive and store messages, and make them available for retrieval by the user after the message has been shuttled through the email protocol." *Id*.

Major social media companies such as Headroom are distinguishable from email providers because social media platforms do not have a third party service storing the communications. In *Republican Nat'l Comm.*, Google "receive[d] messages from other email platforms that [were] carried by a decentralized computer network and display[ed] those messages to users in the Gmail platform." *Id.* at 33. When utilizing Headroom, individuals actively communicate to each other without the intercession of a third party. Headroom allows "users to create profiles, design and post content, and share other users' posts." R. at 3. Also, Headroom transports and carries users' messages from place to place. *See Id*. ("Headroom's users interact in a virtual reality environment that they access through virtual reality headsets.").

Unlike in *Republican Nat'l Comm.,* where a user may send an email and not get an automatic response because there is no communication with the person on the other side of the screen, Headroom users communicate with others across the world in actual time through virtual reality. In fact, users may open a virtual business through Headroom where other users can purchase an item through the online shop. R. at 5. Further, Headroom permits "users to monetize their posts, solicit advertisers to sponsor their accounts, and receive donations from other users." *Id*. at 3. Major social media companies provide a service where everyone can communicate with each other. Since major social media companies are common carriers under the First Amendment Free Speech Clause, Midland may regulate Headroom to protect their users' right to free speech.

II. THIS COURT'S DECISION IN *ZAUDERER V. DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO* APPLIES TO THE STATE OF MIDLAND'S SPEECH PROTECTION AND ANTI-MUZZLING ACT'S DISCLOSURE REQUIREMENTS.

This Court's decision in *Zauderer* applies to the SPAAM Act's disclosure requirements because Section 528.491(c) involves purely factual and uncontroversial disclosures. Regulations of commercial speech are generally subject to intermediate scrutiny. However, a more lenient standard of scrutiny applies to commercial disclosure requirements that require "factual and uncontroversial information n" related to the services the speaker offers. *Zauderer*, 471 U.S. at 651. Under the *Zauderer* standard, states may mandate commercial enterprises to disclose "purely factual and uncontroversial information" about their services as long as they are "reasonably related to the State's interest in preventing deception of consumers. *Id*. The disclosure requirements cannot be unjustified or unduly burdensome. *Id*. The purpose of the *Zauderer* standard is to prevent "consumer confusion or deception." *Id*.

The State of Midland created the SPAAM Act to "preserv[e] the free flow of information and protecting citizens' free speech from unfair viewpoint discrimination." R. at 19. Section 528.491(c)(1) "requires social media platforms to publish 'community standards' with 'detailed definitions and explanations for how they will be used, interpreted, and enforced.'" Midland Code § 528.491(c)(1). Additionally, Section 528.491(c)(2) provides that if a social media platform user violates the platform's community standards, the platform has the responsibility of

> provid[ing] 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.

Midland Code § 528.491(c)(2). Since the Act's disclosure requirements simply mandate factual and uncontroversial information related to the services that social media platforms provide, the

Court's decision in *Zauderer* applies and is relevant to determine that the SPAAM Act's disclosure requirements are constitutional.

A. Section 528.491(c)'s Disclosure Requirements Only Require The Disclosure Of Factual And Uncontroversial Information.

The SPAAM Act's disclosure requirements mandate social media platforms to disclose purely factual and uncontroversial information. States may require commercial speakers to disclose "purely factual and uncontroversial information" about their services if the disclosure requirement is reasonably related to a legitimate interest. *Zauderer,* 471 U.S. at 651.

In *Zauderer*, this Court upheld an Ohio law mandating lawyers who advertised their "willingness to represent clients on a contingent-fee basis [...] that the client may have to bear certain expenses[.]" *Id*. at 650. This Court noted that the Ohio law did not attempt to "prevent attorneys from conveying information to the public." *Id*. Instead, the Ohio law only required lawyers "to provide somewhat more information that they might otherwise be inclined to present." *Id*. This Court emphasized that the law's disclosure requirement governed only "commercial advertising" and required the disclosure of "purely factual and uncontroversial information about the terms under which [the lawyer's] services will be available[,]" which should be upheld unless the disclosure requirement is "unjustified or unduly burdensome." *Id*. at 651.

Like *Zauderer*, where the Ohio law only required lawyers "to provide [their clients] with somewhat more information than they might otherwise be inclined to present[,]" Section 528.491(c) requires social media platforms to offer their users additional information they may "otherwise be inclined to present." *Id*. at 650. For instance, Section 528.491(c) requires transparency from social media platforms. *See* R. at 16 (noting that social media companies "must explain their content moderation decisions in detail.") Similar to the Ohio law in *Zauderer,* where the disclosure requirement related to the conditions that lawyers' services would be available to

their clients, Section 528.491(c) is reasonably related to the circumstances in which a social media company's platform is available for a user's content.

In 2018, this Court resolved the issue of whether the *Zauderer* standard applied to a state regulation mandating clinics that principally assisted pregnant women to provide specific notices to their patients. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2365. In *NIFLA*, the licensed clinics were mandated to advise women that California offers free or low-cost planning services and provide a phone number for the women to call. *Id*. The stated purpose of the regulation was to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them. *Id*. at 2639. This Court held that the *Zauderer* standard did not apply because the licensed clinic notice was "not limited to 'purely factual and uncontroversial information about the terms under which…services will be available[.]'" *Id*. at 2372. The licensed notice did not relate to the licensed clinic's services; instead, the licensed notice "disclose[d] information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic." *Id*.

Unlike the regulation in *NIFLA*, which mandated clinics to provide controversial information to their patients, the SPAAM Act's disclosure requirements require the disclosure of factual and uncontroversial information. Social media companies explaining to their users why they restrict users' content is uncontroversial information. The social media platforms' disclosure is reasonably related to Midland's legitimate interest of "ensuring the free flow of information and protecting citizen's free speech rights from undue censorship," mainly because of users' accusations that Headroom discriminates against certain political viewpoints. R. at 4, 18.

In 2022, a recognized Headroom user, Max Sterling, "who posts ten-to-fifteen minute monologues on hot-button political and social topics," affirmed that Headroom deprioritized his

content by warning Headroom users that his posts contain "bullying and harassment," "promotion of violence against protected classes," and "sexist and racist language." *Id*. at 4. Additionally, a fashion business entrepreneur claimed that her online fashion business suffered and "declined by thirty-four percent after she criticized a controversial presidential candidate" on her Headroom account. *Id*. at 5. Midland enacted the disclosure requirements of the Act to restore the free speech rights of social media users.

Lastly, the requirement that social media companies disclose accurate, factual information is rooted in Midland's interest in promoting the "efficient exchange of information or protec[t] individual liberty interests." *Safelite Grp. v. Jepsen*, 764 F.3d 258, 259 (2d Cir. 2014). The Second Circuit has ruled that disclosure requirements further, rather than hinder, "the First Amendment goal of the discovery of truth and contributes to the efficiency of the marketplace of ideas." *Id*. Section 528.491 supports the First Amendment's protection against impermissible censorship and suppression of users' speech by ensuring that users are provided with "sufficient information to make informed choices." R. at 5.

For these reasons, the Act requires the disclosure of factual and noncontroversial information that is reasonably related to protecting social media users from deception and viewpoint discrimination.

B. Section 528.491(c)'s Disclosure Requirements Do Not Unjustifiably Or Unduly Burden Headroom's Speech.

Section 528.491(c) does not unjustifiably or unduly burden Headroom's speech by merely requiring Headroom to "provide sufficient information for users to understand how they violated the Community Standard." R. at 11. This Court has established that "a disclosure requirement cannot be unjustified or unduly burdensome." *NIFLA,* 138 S. Ct. at 2365. An "unjustified or unduly

burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* at 2377.

The State of Midland's Speech Protection and Anti-Muzzling Act does not interfere with Headroom's editorial judgment. This Court has established that an act's disclosure requirement may be unduly burdensome if it "drowns out the [server's] own message." *Id.* at 2378. In *NIFLA*, unlicensed clinics that provided pregnancy-related services were required to inform women that California had not licensed the clinics as a medical facility. *Id*. at 2365. The unlicensed notice requirement provided the clinics with a drafted statement that they were required to include in all "print and digital advertising materials" in a "larger text or contrasting type of colors" to call attention to the notice. *Id*. at 2378. The only rationale that California demonstrated was guaranteeing that "pregnant women in California know when they are getting medical care from licensed professionals." *Id*. at 2377. This Court held that the unlicensed notice requirement was unduly burdensome. *Id*. This Court reasoned that the unlicensed notice requirement compelled pregnancy centers to speak by mandating a "government-drafted statement." *Id*. at 2378.

The unlicensed notice requirement in *NIFLA* is clearly distinguishable from Section 528.491(c) because social media platforms are not imposed with any additional significant implementation costs. Petitioner argues that Section 528.491(c)(2) imposes "significant implementation costs" by "require[ing] Headroom to provide a 'detailed and thorough explanation' every time it enforces its Community Standards." R. at 11 (quoting Midland Code § 528.491(c)(2)). Petitioner further claims that Section 528.491(c)(2) has a "chilling effect on Headroom's editorial judgment." *Id*. at 11. However, Petitioner is mistaken because Petitioner assumes that its "editorial judgment" is protected speech, and Section 528.491(c)(2) does not impose any significant implements costs. Headroom, one of the most popular social media

companies in the United States, has the resources and capability to simply explain their enforcement of the Community Standards. *Id*. at 1. Petitioner has "millions of users and [...] makes countless editorial judgments" daily. *Id*. at 11. Since Petitioner already uses its resources to review and regulate users' content, Section 528.491(c) does not impose any additional significant implementation costs. Section 528.491(c)'s disclosure requirements do not infringe on Headroom's "editorial judgment as they merely require Headroom to provide sufficient information for users to understand how they violated the Community Standard." *Id*. at 10-11.

Additionally, Petitioner asserts that the Act imposes "substantial liability for failure to comply" with Section 528.491(c)(2). *Id*. at 11. If a social media platform violates the Act, the court "may grant relief either in injunctions or fines totaling *$10,000 a day per infraction*." Midland Code § 528.491(d)(3) (emphasis added). However, Petitioner fails to prove the potential liability creates an unjustifiable burden. Petitioner likely argues that the Act is comparable to Fla. Stat. § 106.072 in *NetChoice, LLC v. AG, Fla*. However, the Florida Statute that prohibited social media platforms from "willfully deplatform[ing] a candidate for office who is known by the social media platform to be a candidate," permitted Florida to impose fines up to "*$250,000 per day*" for certain violations. *NetChoice, LLC v. AG, Fla.*, 34 F.4th 1196, 1207 (11th Cir. 2022) (emphasis added). Compared to the Florida Statute in *NetChoice*, the SPAAM Act only potentially imposes a relatively low penalty on social media platforms that fail to comply with its requirements.

The State of Midland's Speech Protection and Anti-Muzzling Act does not compel Headroom to speak. In *NIFLA*, California required that all unlicensed pregnancy centers include in their materials a "government-drafted statement that '[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.'" *NIFLA*, 138 S. Ct. at 2378 (quoting Cal. Health & Safety

Code § 123472). This Court held that the unlicensed notice requirement "compell[ed] individuals to speak a particular message" because the government itself was providing the pregnancy centers the statement they were mandated to publish. *NIFLA*, 138 S. Ct. at 2377. Section 528.491(c) does not "require social media platforms to host any particular message." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1717 (2022).

Petitioner claims that Midland "impermissibly compels Headroom to speak" by requiring Headroom "to provide detailed explanations of its Community Standards and its enforcement decisions." R. at 7. However, Petitioner is mistaken because Midland does not require Headroom to speak a particular message or opinion. Midland does not provide social media platforms with any statement that the platforms must disclose to their users. Instead, Midland requires Headroom to provide the rationale behind its decision to take action on a user's content. Headroom is "not exempt from laws that do not compel or prohibit them from speaking." R. at 17. Since Section 528.491(c) does not infringe on Headroom's First Amendment rights, this Court's decision in *Zauderer* applies instead of the intermediate scrutiny standard.

III. A STATE DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN IT PROHIBITS SOCIAL MEDIA COMPANIES FROM DENYING USERS NONDISCRIMINATORY ACCESS TO ITS SERVICES.

The Free Speech Clause of the First Amendment is not violated when a state prohibits social media companies from denying users nondiscriminatory access to its services. The First Amendment, applied to the states through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." *Gitlow v. New York*, 268 U.S. 652 (1925). Government action that "stifles speech on account of its message, or that requires the utterance of a particular message favored by the government, contravenes this essential right." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). However, when the government simply requires publicly

available forums to allow users to speak without discriminating against certain viewpoints or speakers, the government has not compelled speech in violation of the First Amendment. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 76 (1980).

Section 528.491(b)(1) "prohibits any social media platform from 'censoring, deplatforming, or shadow banning' any 'individual, business, or journalistic enterprise' because of 'viewpoint.'" R. at 6 (citing Midland Code § 528.491(b)(1)(i)). The Act seeks to prevent viewpoint discrimination by social media platforms because, among other reasons, social media platforms operate as "the public square of the twenty-first century." *Id.* The Act does not require social media platforms to allow all content, but rather excludes "obscene, pornographic or otherwise illegal or patently offensive" content from the viewpoint discrimination prohibition of the Act. Midland Code § 528.491(b)(2).

The SPAAM Act does not infringe upon the constitutional rights of social media platforms as it does not compel the platforms to speak or endorse any viewpoints; rather, it simply requires the platforms to allow users to speak without discriminating against particular viewpoints. However, even if the Act did implicate the constitutional rights of social media platforms, the Act is content-neutral and is subject to intermediate scrutiny review, which it satisfies.

A. The SPAAM Act Does Not Violate The Free Speech Rights Of Social Media Companies By Prohibiting Censorship Of Its Users' Messages.

The SPAAM Act does not violate the free speech rights of social media companies by prohibiting censorship of its users' messages because social media companies are forums open to the public for users to share information and opinions. Platforms which operate as forums open to the public must be cautious to not infringe upon the free speech rights of users. The SPAAM Act, enacted by Midland to protect users from discriminatory practices of social media platforms, does not compel social media platforms to speak. The Act does not require the platforms to speak any

particular message dictated by the State or endorse any particular viewpoints. Rather, the Act simply requires the social media platforms to respect the Free Speech rights of users by not discriminating against certain users or their posts based upon viewpoints expressed by users.

1. Social media companies host forums that are open to the public, and therefore, these platforms may not infringe upon the First Amendment free speech rights of their users.

Social media companies host forums that are open to the public, and therefore, these platforms may not infringe upon the free speech rights of their users. Social media companies may "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 582 U.S. at 98. This Court has noted that forums, such as shopping centers which are open to the public, are important places for people to exercise their free speech rights. *Pruneyard Shopping Ctr.*, 447 U.S. at 74. As forums open to the public, the normal business operations of shopping centers are not affected by a regulation protecting the free speech rights of persons, nor are the forums' privacy rights implicated as there has not been an invasion of a personal sanctuary. *Id.* at 94.

Social media platforms have become increasingly prominent in the dispersion of ideas and information, as they allow people to voice opinions on a wide range of subjects. *Packingham*, 582 U.S. at 98. Social media "allows users to gain access to information and communicate with one another about it on any subject that might come to mind." *Id.*, see also *Reno v. Aclu*, 521 U.S. 844 (1997). As social media platforms play such an important role in speech, it is necessary to address potential encroachments upon those free speech rights by the platforms themselves. The platforms host forums which are open to the public, with the purpose of providing a forum for users to post ideas and information. It is reasonable to deduct that the normal business operations of social media

platforms will not be affected by requiring the platforms to not discriminate against certain users, as the platforms do not review or edit users' posts before they are posted.

Social media companies, such as Headroom, are open forums for the public where users may post information and ideas without censorship by the platform itself. Social media platforms do not exercise editorial judgment over users' posts, and users are generally free to post without prior approval from the platform. Users' viewpoints are not attributed to the social media platform hosting the posts, as the platform is not involved in users' decisions on whether and what to post. Therefore, because social media platforms are open forums for the public that provide important places for the exercise of free speech rights, the platforms may not infringe upon the free speech rights of users.

2. The SPAAM Act does not compel speech, rather, it protects the free speech rights of social media users by prohibiting discrimination of certain viewpoints.

The SPAAM Act does not compel speech, rather, it protects the free speech rights of social media users by prohibiting viewpoint discrimination. Social media platforms may not discriminate against certain viewpoints expressed on their platforms because those platforms operate forums open to the public. The SPAAM Act protects users' free speech rights by prohibiting such discrimination by social media platforms operating in the State of Midland. The Act does not compel social media platforms to speak or even endorse any viewpoints, rather the Act operates to protect users' free speech rights. Further, the SPAAM Act does not affect the ability of social media platforms to clarify or emphasize that they are not connected with nor endorse any messages posted by users.

An important consideration in determining whether the government is compelling speech in a private actor is whether "the complaining speaker's own message was affected by the speech

it was forced to accommodate." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006). In *Rumsfeld*, the federal Solomon Amendment was challenged by an association of law schools alleging the Amendment infringed its members' First Amendment free speech rights. *Id.* at 55. The Amendment denied federal funding to law schools unless the schools offered "military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access." *Id.* at 55. This Court upheld the Amendment, reasoning that "nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." *Id.* at 65.

Like the military recruiters' speech in the law schools in *Rumsfeld*, nothing suggests that a social media platform agrees with every viewpoint expressed in users' posts. Social media platforms, like Headroom, hold themselves out as forums open to the public to establish profiles, post information, and even earn income through advertisements. Similar to the military recruitment at law schools in *Rumsfeld*, under the SPAAM Act social media platforms are simply required to host users' posts with discriminating based upon viewpoints the platform may not agree with. The messages or viewpoints of the social media platforms themselves are not affected by the Act, as the platforms are free to dissociate from any users' viewpoints which the platform may disagree with. The Act simply requires social media platforms to restrain from viewpoint discrimination, it does not require support of any viewpoints.

In contrast with the law schools in *Rumsfeld*, which provided forums open to the public, the billing envelopes of utility companies do not provide a forum open to the public. In *Pacific Gas*, this Court struck down a law requiring utility companies to include third-party pamphlets in their billing envelopes. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986). This Court

reasoned the requirement that the utility companies include a third-party pamphlet multiple times a year in the same envelope as the company's billing statement interferes with the company's ability to communicate its own message. *Id.* Thus, the viewpoints expressed in the pamphlet could be directly attributed to the utility company as it is included in the same envelope with their bill.

The social media platforms affected by the SPAAM Act are far different from the billing envelopes of utility companies. The billing envelopes were mailed directly from the utility company, had the return address of the company, and contained the customers' utility bill statement. In contrast, users' posts on social media platforms are posted directly by the users into a public forum containing countless posts from other users. Each users' post is directly attributed to the user, and the platforms themselves are not associated with each individual post. The social media platforms do not edit or review the posts which users make before they are posted, and the social media platforms are free to dissociate from any post which they may disagree with.

In *PruneYard*, a privately owned shopping mall, which was open to the public for business, maintained a policy that prohibited any visitor or tenant from engaging in "any publicly expressive activity, including the circulation of petitions, that is not directly related to its commercial purposes." *PruneYard Shopping Ctr.*, 447 U.S. at 77. Acting under this policy, the mall asked a group of students seeking to distribute pamphlets and collect signatures for petitions to leave the shopping center as the activity violated the mall's policy. *Id.* This Court upheld the state's law protecting pamphleteers' right to disseminate pamphlets in privately owned shopping malls. *Id.* at 88. The Court reasoned that "no specific message is dictated by the State to be displayed on appellants' property," and further, that the shopping malls were "free to publicly dissociate themselves from the views of the speakers or handbillers." *Id.* at 87. The Court further reasoned that a shopping mall is "a business establishment that is open to the public to come and go as they

please. The views expressed by members of the public…thus will not likely be identified with those of the owner." *Id.* at 87.

Similar to the state law at issue in *Pruneyard*, the SPAAM Act prohibits social media companies from censoring or otherwise limiting what users can post on their social media accounts. R. at 6. Social media platforms are analogous to the private shopping mall in *PruneYard*, where tenants operated private specialty shops within the mall. In addition to the standard features of a social media platform, including allowing users to create profiles and post content, Headroom's users may also "monetize their posts, solicit advertisers to sponsor their accounts, and receive donations from other users." *Id.* at 3. Social media platform users are thus able to post content with the goal of profit, similar to the tenants operating business for profit in a private shopping mall.

Headroom and other social media platforms do not exercise editorial discretion, like newspapers do, rather they simply act as neutral transmitters of information posted by users. Like the handbillers passing out pamphlets in *Pruneyard*, social media platforms can easily disavow any connection with a particular user's message. The Act does not compel social media platforms to endorse or affirm any certain viewpoint, rather, the platforms are free to publicly dissociate from any views or beliefs posted by users. Thus, rather than undermining Headroom's expressive message that "all are respected and welcome," the SPAAM Act actually helps to promote Headroom's policy by ensuring that all viewpoints are respected and allowed on the platform.

The First Amendment freedom of the press guarantee "does not sanction repression of that freedom by private interests." *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc v. Tornillo*, 418 U.S. 241, 252 (1974). In *Miami Herald*, a Florida statute required newspapers to print any reply from a candidate whose personal character or official record had been assailed by a

newspaper. *Id.* at 244. This Court held that the statute violated the Free Speech rights of newspapers, reasoning that regulation of the content which may go into a newspaper directly impacts "the exercise of editorial control and judgment." *Id.* at 258. Of importance in this Court's reasoning was the fact that "a newspaper is more than a passive receptacle or conduit for news, comment, and advertising." *Id.*

In contrast with the restriction upon newspaper publishers' ability to control the content of its papers in *Miami Herald*, the SPAAM Act ensures that social media companies do not unreasonably restrict what users may post on social media platforms. Social media companies are fundamentally different from newspapers as they do not actually publish information, but rather allow users the freedom to post information. In contrast with newspapers, social media companies actually operate as "passive receptacle(s) or conduit(s) for news, comment, and advertising." *Id.* Headroom and other social media companies act as forums enabling users to post news and other information, interact with other users' posts, and even to earn money through their posts. R. at 3. Under the Act, social media platforms are not required to endorse or support any particular user's profile or posts, and may disaffirm any connection or endorsement of a user's post to clarify its position as simply a host platform.

Therefore, the SPAAM Act does not compel Headroom or other social media platforms to speak. Rather, the Act protects the First Amendment free speech rights of social media users, without intruding upon the constitutional rights of the social media platforms themselves.

B. Even If The SPAAM Act Did Infringe On Social Media Companies' Constitutional Rights, Which It Does Not, The Act Should Still Be Upheld As It Survives Intermediate Scrutiny.

Section 528.491(b)(1)-(2) of the SPAAM Act does not infringe upon Headroom's constitutional rights, and thus it is not necessary to examine the Act under intermediate scrutiny.

However, even if this Court does determine that Headroom's constitutional rights have been infringed upon, the Act satisfies intermediate scrutiny analysis. The mere fact that a law has implications upon speech falling under the First Amendment's protections does not necessarily result in the conclusion that the law is unconstitutional. The SPAAM Act is a content neutral regulation, thus its provisions apply equally to all social media companies. R. at 14. Therefore, intermediate scrutiny is the proper level of scrutiny to be applied to the SPAAM Act. Under intermediate scrutiny, a content-neutral regulation is upheld if the regulation advances an important government interest and does not substantially burden more speech than necessary. *Turner Broad. Sys.*, 512 U.S. at 622. The SPAAM Act advances Midland's important interest in protecting its citizens' free speech rights, and does not substantially burden the speech of social media platforms. Therefore, the SPAAM Act satisfies intermediate scrutiny analysis and should be upheld.

1. The SPAAM Act is a content neutral regulation and should thus be subject to intermediate scrutiny.

The SPAAM Act is a content neutral regulation and should be subject to intermediate scrutiny. When a course of conduct combines "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedom." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Content-neutral regulations are subject to the less rigorous analysis of intermediate scrutiny, as "in most cases such regulations pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys.*, 512 U.S. at 622. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). In contrast with content-neutral

regulations, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Turner Broad. Sys.*, 512 U.S. at 643.

The SPAAM Act is a content-neutral regulation as it applies equally to all social media platforms, and requires those platforms to not censor or ban any user based upon viewpoint. R. at 6. This restraint upon viewpoint discrimination is neutral, as it applies to any user's posts regardless of the viewpoints being expressed and does not favor or disfavor certain speakers or messages. *Id.* at 6. The Act "requires social media platforms to respect free speech by not censoring or banning user content based on the user's viewpoint." *Id.* at 16. The Act thus ensures that social media platform users' may exercise their First Amendment free speech rights without a platform discriminating against certain viewpoints expressed by users. Further, the Act does not favor any viewpoints by requiring social media platforms to neutrally host all viewpoints. Therefore, the Act is content-neutral as no particular viewpoint will benefit from the Act's enforcement.

2. The SPAAM Act satisfies the requirements of intermediate scrutiny analysis.

The SPAAM Act is a content-neutral regulation, and intermediate scrutiny is thus the proper level of scrutiny to be applied. Under the intermediate scrutiny standard, a content-neutral regulation will be upheld under the First Amendment if the regulation "advances important governmental interests that are unrelated to the suppression of free speech, and does not burden substantially more speech than is necessary to further those interests." *Turner v. Fcc*, 520 U.S. 180, 189 (1997); see also *United States v. O'Brien*, 391 U.S. 367 (1968), *Turner Broad. Sys. v. FCC*, 512 U.S. at 622.

In *Paxton*, the Fifth Circuit upheld a Texas statute prohibiting large social media platforms from censoring users based upon viewpoint. *Paxton*, 49 F.4th at 445. In upholding the statute, the Fifth Circuit reasoned that the statute satisfied intermediate scrutiny analysis as it "serves Texas's

important interest in protecting the widespread dissemination of information, is unrelated to the suppression of free expression, and does not burden substantially more speech than necessary to advance Texas's interest." *Id.* at 485. The Fifth Circuit further reasoned that the statute "is plainly unrelated to the suppression of free speech because at most it curtails the Platforms' censorship – which they call speech." *Id.* at 483.

To satisfy the intermediate scrutiny requirements, Midland must demonstrate that the SPAAM Act is "substantially related to an important governmental objective. It need not be perfect, or even the least restrictive alternative" to achieve Midland's goal. *Id.* at 503. Midland has not only an important, but a fundamental, governmental objective in enacting the SPAAM Act. The Act operates to ensure the First Amendment free speech rights of Midland's citizens are protected from viewpoint discrimination by major social media platforms. Examples of such discrimination have been evident through Headroom's discrimination against certain viewpoints on its platform, there have been multiple cases where Headroom deprioritized, added warnings, or even outright banned accounts due to posts containing certain viewpoints. R. at 5. Such actions by Headroom directly suppress free speech. Rather than suppressing free expression, the Act operates to protect such free expression of ideas from the discrimination of powerful social media platforms.

Further, the SPAAM Act does not substantially burden more speech than is necessary to advance the interests of Midland in protecting the free speech rights of its citizens. The Act does require social media platforms to allow users to post regardless of the platform's disagreement with the messages expressed in the posts. In this way, the Act operates to curtail censorship of speech by preventing social media platforms from discriminating against certain viewpoints they might disagree with. However, the Act does not require the social media platforms to endorse any

viewpoints, and the platforms are at liberty to clarify that they do not endorse or support certain viewpoints or messages expressed by users. Such restrictions upon the ability of social media platforms to control the viewpoints expressed on their platforms are necessary to ensure the protection of the free speech rights of Midland's citizens. Therefore, the SPAAM Act does satisfy the requirements of intermediate scrutiny analysis, and should be upheld.

CONCLUSION

Major social media companies such as Headroom are common carriers under the First Amendment Free Speech Clause. This Court's decision in *Zauderer* applies to the SPAAM Act's disclosure requirements because the Act requires only the disclosure of factual, uncontroversial information reasonably related to the services that social media platforms provide. The SPAAM Act neither unduly burdens nor compels Headroom's speech. Additionally, the SPAAM Act does not violate Petitioner's constitutional rights as a state may require social media companies to provide users nondiscriminatory access without violating the Free Speech Clause. The Act protects the free speech rights of social media platform users by prohibiting the platforms from discriminating against certain viewpoints. However, even if this Court finds the Act does infringe on social media platform's constitutional rights, the Act should still be upheld as it is a content-neutral regulation and satisfies intermediate scrutiny analysis.

For these reasons, we respectfully request this Court to affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold the State of Midland's Speech Protection and Anti-Muzzling Act is constitutional.

Respectfully submitted,

Team 13
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