No. 23-386

IN THE

Supreme Court of the United States

HEADROOM, INC.,

Petitioner,

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM 6

Counsel for Respondent

QUESTIONS PRESENTED

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

(2) Does a state violate the First Amendment's Free Speech Clause when it prohibits major social media companies from denying users nondiscriminatory access to its services?

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STATEMENT OF THE CASE

The Founders Establish the Common Carrier Doctrine to Promote Free Speech

The Constitution prevents Congress from making law that "abridg[es] the freedom of speech." U.S. Const., amend. I. This Court has repeatedly cited the First Amendment to strike down laws that suppress political speech. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971) (declaring unconstitutional a California statute that criminalized the display of offensive messages.) Flag burning, too, is a protected form of expression, despite the American flag's "mystical reverence" and "cherished place in our community." *Texas v. Johnson*, 491 U.S. 397, 419 (1989). Indeed, "we must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988).

Yet not all speech is equally deserving of constitutional shelter. From the Founding, the Court has recognized many exceptions to First Amendment protections—each of which safeguards other important values. *See, e.g.*, *Whitney v. California*, 274 U.S. 357 (1927) (restricting speech that could lead to imminent lawless action); *Roth v. United States*, 354 U.S. 476 (1957) (restricting mailings of obscene pamphlets); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding a law that restrained vulgarity on broadcast radio); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (applying different First Amendment protections to speech about public and private figures). In each of these cases, the Court found that imposing restrictions on certain types of speech best balanced the *individual* right to speech with the Nation's *collective* right to peace, privacy, and participation in political discourse.

The Court has used a similar balancing test to allow states to regulate "common carriers"—companies that "hold [themselves] out to carry goods for everyone as a business." *Biden v. Knight*

First Amendment Inst. at Columbia Univ., 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). Because common carriers—which include internet service providers, telephone companies, and other communications networks—are essential to public discourse, the Nation has a special interest in ensuring that they do not discriminate by implementing content-based restrictions against users. *Id.* Through the common-carrier doctrine, the Court strikes a constitutional balance between the carriers' right to free speech and the Nation's constitutionally protected interest in the free flow of information.

Headroom Joins the Ranks of Social Media Giants

Headroom is a communications-based social media platform that aims to "provide a space for everyone to express themselves . . . in a divided world." R. at 2. One of the "most popular social media companies in America," Headroom distinguishes itself from other internet juggernauts by allowing its users to interact using virtual reality headsets. R. at 3. Users can post content, monetize their posts, and solicit account sponsors to promote their messages. *Id.* Headroom's success as a business and communication hub has attracted over 75 million monthly users—some of which rely on Headroom to support themselves. *Id.*

To "curate th[e online] experience," Headroom uses algorithms to prioritize (and deprioritize) certain content. *Id.* For example, Headroom's artificial intelligence deprioritizes content that "explicitly or implicitly promotes hate speech; violence; child sexual exploitation or abuse; bullying; harassment; suicide or self-injury; racist, sexist, homophobic, or transphobic ideas; or negative comments or criticism toward protected classes." *Id.* Headroom also deprioritizes "disinformation" and reserves the right to demonetize, suspend, or remove offending accounts and ban users from further use of the platform for misconduct. R. at 4.

Users Challenge Headroom's Controversial Content-Moderation Decisions

In 2022, Headroom received numerous complaints that the company was abusing its discretion to deprioritize certain messages. *Id.* Many prominent users accused Headroom of discriminating against them for their viewpoints. *Id.* In response to the numerous complaints, Midland's governor called a special legislative session to hold hearings on Headroom's controversial censorship practices. *Id.*

Several prominent Headroom users participated in the hearings. Max Sterling, a user who posts about "hot-button political and social topics," testified first. *Id.* After his "They're Coming for You" monologue went viral, his viewership declined dramatically. Headroom began inaccurately tagging his posts with warnings of "bullying and harassment," "promotion of violence against protected classes," and "sexist and racist language." *Id.*

Mia Everly and Ava Rosewood shared similar stories of viewpoint discrimination. Everly testified that, after criticizing a controversial presidential candidate, purchases on her storefront decreased; engagement with her advertisements declined 34%; and the overall revenue for her start-up fashion company decreased. *See* R. at 5. Soon after, Headroom shut down Rosewood's "wildly popular movie review site Flick Folly" after she spoke out in favor of a controversial documentary about immigration to Europe, claiming that she was spreading "disinformation" and using "hate speech." *Id.*

The Midland Legislature Combats Viewpoint Discrimination with the SPAAM Act

The Midland Legislature found the evidence startling: Headroom had become a "virtual dictator," "threatening individuals' livelihoods . . . under the guise of moderation;" Headroom was abusing its policies to support content-based discrimination. *See* R. at 5. With support from many

representatives, the Governor of Midland, and the Speaker of the House, the Legislature enacted the State of Midland's Speech Protection and Anti-Muzzling (SPAAM) Act to "establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content." *Id.*

The SPAAM Act has two requirements. First, the Act requires social media platforms to respect its users by not censoring content based on users' viewpoints. Midland Code § 528.491(b)(1). Platforms may not "censor[], deplatform[], or shadow ban[]" any "individual, business, or journalistic enterprise" simply because they disagree with that user's message. *Id.* § 528.491(b)(1)(i). Recognizing social media platforms' right to properly censor misconduct and disinformation, the Act exempts "obscene, pornographic, or otherwise illegal or patently offensive" content from the Section's requirement. *Id.* § 528.491(b)(2). It also limits its application to "social media platform[s]." *Id.* § 528.491(a)(1).

Second, the Act requires transparency in content-moderation decisions. Social media companies must publish "community standards" with "detailed definitions and explanations for how they will be used, interpreted, and enforced." *Id.* § 528.491(c)(1). And where social media platforms choose to punish users' speech, they must "provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen." *Id.* § 528.491(c)(2).

Headroom filed a pre-enforcement challenge under § 528.491(d)(3) of the Act, claiming that the Act compels speech and burdens the platform's editorial judgment.

The District Court Rules for Headroom

The district court granted Headroom's injunction, finding that Headroom "is not a common carrier" because it requires users to agree to its Community Standards before joining its servers. R. at 11. The court reasoned that Headroom's Community Standards act as a shield to the broader community: because users must agree to Headroom's terms before joining, users are not "free to use Headroom's services as they see fit." *Id.* And because access to Headroom is not open to *everyone* who wishes to join, Headroom is not a common carrier. *Id.*

The court then addressed the Act's constitutionality. First, the court found the Act's transparency requirement imposes an undue burden on Headroom's protected speech. *Id.* If Headroom was required to explain its censorship decisions, it would undergo "significant implementation costs and substantial liability for failure to comply" in violation of Headroom's First Amendment rights. *Id.* Second, the court found that the Act's content-moderation requirements infringe on Headroom's editorial judgment in "deliver[ing] curated compilations of speech created by others to its users." R. at 13.

Because the Act's provisions "apply equally to social media companies irrespective of ideological or political viewpoint," the court determined that the Act is subject to intermediate scrutiny, rather than strict scrutiny. R. at 12. Both provisions failed. Under the court's analysis, the transparency requirement was "not narrowly tailored" because it "exposes Headroom to untold liability if its enforcement explanations are not detailed enough." *Id.* And the state had "no important government interest" to justify the Act's content-moderation requirement; Midland's stated purpose of "[c]orrecting . . . unfair moderation policies" was insufficient. R. at 14.

The Thirteenth Circuit Reverses, Holding that Headroom is a Common Carrier

The Thirteenth Circuit reversed, disagreeing with the district court "on all counts." R. at 17. First, the panel found that Headroom is a common carrier because "social media platforms are the modern public square." *Id.* Indeed, companies like Headroom "hold themselves out as organizations that focus on distributing the speech of the broader public." *Id.* Like the communications companies that first motivated the Court to recognize the common carrier exception, Headroom "possess[es] substantial market power;" "creates networks . . . to connect people;" and aims to provide a platform for "*everyone* to express themselves to the world." R. at 18 (emphasis added). As with other common carriers, then, "Midland [had authority to] regulate Headroom to protect users' free speech." *Id.*

Second, the Thirteenth Circuit panel found that the SPAAM Act does not penalize speech. R. at 19. Like other social media companies, Headroom "does not 'speak' when it censors . . . users' accounts," but rather "*suppresses* speech, which it has no First Amendment right to do." *Id.* And because Headroom is "an open forum for the public, public views expressed therein [would] not be identified" with Headroom. *Id.*

Finally, the panel stated that *even if* the Act's provisions infringe on Headroom's First Amendment rights, it would uphold the Act because the Act survives intermediate scrutiny. *Id.* The Act's content-moderation requirement was substantially related and tailored to Midland's important objective of "preserving the free flow [of] information and protecting citizens' free speech from unfair viewpoint discrimination." *Id.* And contrary to Headroom's claims that the Act *suppressed* speech, the provisions *promoted* speech by encouraging public discourse. *Id.*

SUMMARY OF ARGUMENT

More than 70% of American adults now use social media every day. SOCIAL MEDIA AND NEWS FACT SHEET, PEW RESEARCH CENTER (2021). Social media has become an all-in-one hub for communication and commerce: users connect with friends, network professionally, and promote their businesses. They shop, sell, and socialize. And today, approximately half of adults use social media as a primary news source. *Id.*

This case asks whether states have a constitutional right to regulate social media platforms. To answer that question "no" would be unprecedented. The right to regulate "common carriers"—companies that "hold[themselves] out to carry goods for everyone as a business"—predates the Founding. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222–24 (2021) (Thomas, J., concurring). And because common carriers are essential to public discourse, states have a special interest in ensuring that they do not engage in content-based restrictions against users. *See id*. This aligns with the Nation's "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Social media juggernauts such as Headroom fall squarely within the common carrier doctrine. They are open to the public; they hold dominant market power; and they provide a service that is important to the public interest. *Biden*, 141 S. Ct. at 1222 (Thomas, J., concurring). This aligns with a centuries-old pattern: as technology progresses, new common carriers emerge. *See, e.g.*, DAVID HOCHFELDER, THE TELEGRAPH IN AMERICA, 1832–1920, 44 (2013) (recognizing Congress's right to regulate the telegraph industry under the common carrier doctrine); *Hockett v. Indiana*, 5 N.E. 178, 182 (Ind. 1886) (applying the common carrier doctrine to the newly invented telephone industry). As social media platforms assume their role as "the modern public square,"

that pattern must continue; without it, the marketplace of ideas suffers from unconstitutional viewpoint discrimination. *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

Casting aside history and precedent, Headroom argues that it is not a common carrier. But even if the Court agrees, the SPAAM Act's narrow transparency requirements do not invoke the First Amendment because they regulate only factual disclosures. Such regulations implicate the First Amendment only when they are "unjustified or unduly burdensome." *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 n.14 (1985). The SPAAM Act is neither. First, its enactment was justified by Headroom's discriminatory practices. And second, its requirements are not unduly burdensome: they simply address the problem head-on by preventing viewpoint discrimination. Likewise, the SPAAM Act's provision requiring non-discriminatory access for all users does not invoke the First Amendment because it neither compels speech nor interferes with Headroom's expression. Headroom's censorship is not protected "editorial control" because social media platforms do not create their own content. As the industry name implies, these companies are "platforms" for others' speech—and not "speakers" in their own right.

Even if this Court were to find that the SPAAM Act's regulation of conduct burdens Headroom's "speech," the Act is subject only to intermediate scrutiny. The Act easily passes muster. Midland's asserted interest in preserving the free flow of information and safeguarding citizens from unfair viewpoint discrimination is an important government interest. It advances First Amendment ideals by preserving the marketplace of ideas, promoting public discourse, and protecting citizen speech. Further, the Act's anti-censorship and transparency requirements are substantially related to Midland's efforts to protect speech. § 528.491(b)(1) protects users from viewpoint discrimination, while § 528.491(b)(1) ensures that social media platforms follow § 528.491(b)(1).

The SPAAM Act promotes speech that Headroom has wrongly suppressed. This Court should affirm the Thirteenth Circuit's holding.

ARGUMENT

I. THE SPAAM ACT DOES NOT IMPLICATE THE FIRST AMENDMENT BECAUSE SOCIAL MEDIA COMPANIES ARE COMMON CARRIERS.

Certain businesses have always been recognized by this Court—and, before that, by English common law—as common carriers subject to special regulations. *Biden v. Knight First Amendment Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1222–24 (2021) (Thomas, J., concurring). Common carriers have long been required to serve all comers, even though such regulations might violate First Amendment rights if applied to other businesses. *Id.* at 1222–24 (discussing that regulations that affect the speech of common carriers are still valid because they "would have been permissible at the time of the founding"). Common carriers' constitutional protections are narrower than other entities', both because they play such important roles for the public interest, and because they dominate the market. Thus, to preserve the rights of many, some regulation is often required. Headroom cleanly fits within this thread. Because social media platforms are core to so many individuals' speech rights, traditional common carrier regulations, such as the SPAAM Act, are integral to the public welfare.

A. Common Carriers Have Long Been Subject to Special Regulations, including a Requirement to Serve All Members of the Public

Laws and regulations requiring businesses to serve the entire public predate the American Founding by centuries. *See* BRUCE WYMAN, THE SPECIAL LAW GOVERNING PUBLIC SERVICE

CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT 17 (1911) (discussing that in the Middle Ages British Parliament passed statutes mandating that tradesmen serve the public generally within reason). As the common law developed, such regulations persisted, but came to focus on "common callings"—a narrower set of professions dealing mostly with certain industries like transportation and shipping. *See* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 255 (2002) (citing *Munn v. Illinois*, 94 U.S. 113, 125 (1876)). While there is some debate over why some industries and not others are considered "common carriers," scholars generally agree that businesses which are "open to the public," possess "substantial market power," and provide services of "public interest" are common carriers. *Biden*, 141 S. Ct. at 1222 (Thomas, J., concurring). However, it is undisputed that there is "clear historical precedent" for special regulation in the transportation and communications industries. *Id.* (noting that communications networks—such as telegraphs—became regulated like transportation common carriers *because* of their clear resemblance); *see also Netchoice, L.L.C. v. Paxton*, 49 F.4th 439, 470 (2022) (discussing that while the railroad empires of the late nineteenth century were the first big test of common carrier law, telegraphs soon after became the first communications industry subject to these special regulations).

As common carrier regulations continued to emerge, they were linked together by a shared government mandate "to afford equal facilities to *all*, without discrimination in favor of or against any person, company, or corporation whatever." Telegraph Lines Act, ch. 772, § 2, 25 Stat. 382, 383 (1888) (requiring telegraph companies to transmit the messages of all members of the public, without discrimination) (emphasis added); *see also Paxton*, 49 F.4th at 471 (noting that the first common carrier regulation on telegraph messages came from New York and required companies to receive dispatches from *any individual with impartiality* (emphasis added)). This is the same

requirement at the heart of the SPAAM Act—to serve all comers equally. Such regulations have overwhelmingly been upheld by this Court. *Id.* at 473 (citing *Chicago, B. & Q. R. Co. v. Iowa*, 94 U.S. 155, 161 (1876) (upholding railroad regulations) and *W. Union Tel. Co. v. James*, 162 U.S. 650, 651 (1896) (upholding telegraph regulations)).

As technology has progressed, new industries have become regulated as common carriers. Railroads were the first large American industry to become regulated as common carriers as state after state passed and upheld anti-discrimination laws. *See, e.g.*, *Messenger v. Pa. R.R. Co.*, 37 N.J.L. 531, 534 (1874) (refusing to enforce discriminatory rate differentials); *New England Express Co. v. Me. Cent. R.R. Co.*, 57 Me. 188, 196 (1869) (rejecting a common carrier railroad's ability to sign an exclusive contract). As telegraphs became a new, dominant industry, they too became regulated as the first *communications* common carriers. *See Primrose v. Western Union Tel. Co.*, 154 U.S. 1, 14 (1894) ("[t]elegraph companies resemble railroad companies and other common carriers . . . and therefore are bound to serve all customers alike."). Later, as telephones emerged as a new, superseding medium of communication, they also were regulated as common carriers. *See, e.g.*, *Central Union Tel. Co. v. Bradbury*, 106 Ind. 1, 8 (1886) (holding that as common carriers, telephone companies were required to "serve all so far as [they are] able to do so" with "substantial impartiality"). And in more modern times, some Justices have written that the Constitution may grant Congress authority to regulate cable television as a common carrier. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 684 (1994) (O'Connor, J., concurring in part and dissenting in part) (stating that Congress might "conceivably obligate cable providers to act as common carriers"); *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 700–01 (1979) (noting that the FCC has effectively relegated certain aspects of the cable system to common carrier status).

As their industries become subject to common carrier regulations, businesses have been unsuccessful in challenging these laws in court when "the service they provide is 'affected with a public interest.'" *Paxton*, 49 F.4th at 472 (citing *Munn*, 94 U.S. at 125 as upholding a statute preventing rate discrimination among common carriers and reasoning that the government had been able to regulate industries in the common interest "in England since time immemorial" and in the United States "from its first colonization."). As new technologies emerge, *new* industries grow to serve the public interest as common carriers. The SPAAM Act's anti-discrimination and transparency requirements are in line with these historic common carrier practices. Just as legislatures could prevent railroad, telegram, and telephone companies from picking and choosing disparate prices or whom to do business with, the Midland Legislature prevented social media platforms from engaging in similar discriminatory practices.

B. Headroom is a Common Carrier

Headroom can legally be regulated as a common carrier by the Midland Legislature. Like other traditional common carriers, Headroom is a communications business open to the public; it holds dominant market power; and it provides an important service in the public interest. *See Biden*, 141 S. Ct. at 1222 (Thomas, J., concurring) (discussing the theories behind what makes a common carrier). Just like the telegraph, and later the telephone industries, social media platforms provide an important service that enables citizens to communicate with one another. Yet a select few companies have grown to control the entire digital social universe—a universe that has *de facto* become "the modern public square." *Packingham*, 137 S. Ct. at 1737.

Like other common carrier industries, the social media platforms to which the SPAAM Act applies are engaged in the business of communication. Meta, Facebook's parent company, aims to "[g]ive people the power to build community and bring the world closer together." *Facebook*

About Page, FACEBOOK, (Oct. 7, 2023 4:10 PM), https://about.fb.com/company--info/. YouTube strives "to give everyone a voice and show them the world." *YouTube About Page*, YOUTUBE, (Oct. 7, 2023 4:10 PM), https://about.youtube/. Similarly, Headroom proudly proclaims its mission to "provide a space for everyone to express themselves to the world." R. at 1. These social media platforms exist to connect individuals through language and communication. And while the medium differs, the underlying purpose is the same as the specially regulated Post Office, telegraph, and telephone companies: to provide a way for individuals to speak and express themselves through language.

Further, like other historical common carriers, social media companies have opened themselves to the public. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 495 (9th ed. 1878) (to be a common carrier, one must "undertake to carry goods for persons generally"). Social media companies do not conduct individualized contract negotiations for each new user; rather, they allow the public to sign up with just seconds of effort. Petitioner's argument that Headroom's Community Standards demonstrate that the platform is not open to everyone falls flat: the test is not whether a platform has standards or required terms—modern telephone and transportation companies have those as well—but whether the company makes "'individualized decisions, in particular cases, whether and on what terms to deal.'" *Midwest Video Corp.*, 440 U.S. at 701 (quoting *Nat'l Ass'n of Regul. Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976)). Social media platforms do not individually bargain with users; all who accept their terms can join. Petitioner argues that Headroom does make individualized decisions about its users' access precisely *because* it engages in pervasive censorship. But Headroom cannot have it both ways: it cannot open itself to the public and simultaneously engage in illegal activity to escape regulation.

The SPAAM Act regulates only those social media platforms that share a core attribute with historical common carriers: significant market power. The Act applies to social media platforms that have "at least 25 million monthly users." Midland Code § 528.491(a)(2)(i)–(iv). Popular social media companies that have dominant market share—a share that gives them "enormous control over speech." *Biden*, 141 S. Ct. at 1224 (Thomas, J., concurring). Further, they are concentrated in the hands of a select few individuals—individuals who could restrict individual access to the marketplace of ideas without providing notice. *Id.* (discussing how Google's search engine is the gatekeeper for 90% of internet users and can easily suppress content in its results and explaining how Facebook, Twitter, and other social media companies can greatly narrow or shape the flow of information going to any one individual).

These are the same fears that led the telegraph industry to be regulated as a common carrier in the first place. *See e.g.*, DAVID HOCHFELDER, THE TELEGRAPH IN AMERICA, 1832–1920, 44 (2013) (discussing how in 1867, Western Union Telegraph forced its allied company, the Associated Press, to stop supplying valuable dispatches to a Nebraska newspaper that had called Western Union a "grievous, onerous, and "gigantic monopoly" in an editorial). Because these select few companies possess a dangerous ability over the flow of information, Midland is promoting an important public interest in speech for its citizens by preserving non-discriminatory access to the platforms. The SPAAM Act protects speech and expression be keeping the modern town square open for all.

Social media platforms don't just maintain significant market control; the market they control is vital to the "public interest." The common carrier doctrine has evolved closely intertwined with this principle: businesses providing a vital economic and social role must be open to the public. The Supreme Court of Indiana explained this concept when it held that the newly

invented telephone could be regulated as a common carrier industry. *Hockett v. Indiana*, 5 N.E. 178, 182 (Ind. 1886). It reasoned that the telephone was now a matter of "public necessity" and that "[n]o other known device can supply the extraordinary facilities which it affords," making it an "indispensable instrument of commerce." *Id.* Through innovation, social media platforms have come to occupy a similar indispensable role in the nation's commercial and social landscape.

A vast amount of commerce now occurs over social media. Social media messaging apps have largely supplanted telephone service in large parts of the globe. And perhaps most importantly, social discourse is now concentrated online. Elon Musk's X is the new public square; Facebook is the birthing ground for new political protests and movements across the globe; and YouTube is now the dominant platform for pundits and influencers alike to shape the national zeitgeist. *See, e.g.*, Heather Brown, Emily Guskin, and Amy Mitchell, *The Role of Social Media in the Arab Uprisings*, PEW RESEARCH CENTER (Oct. 7, 2023 4:07 PM), https://www.pewresearch.org/journalism/2012/11/28/role-social-media-arab-uprisings/; *YouTube – Statistics & Facts*, STATISTA (Oct. 7, 2023 4:07 PM), https://www.statista.com/topics/2019/youtube/#topicOverview (showing that YouTube is now the largest video platform in the world). Social media platforms establish trends, shape political discourse, influence the future of commerce, and host daily communication with friends and strangers alike—principles that fall well within in the "public interest." It's undisputed that for certain key industries—including journalism and social influencing—social media is vital.

In the world of communications, social media platforms are now king. Like past industries recognized as common carriers, they rule a market vital to the public's economic, social, and political interests. Headroom matches all the characteristics of historical common carrier

industries. Just as railroads, telegraphs, and then telephones were open to all comers without implicating the constitution, social media companies must be too.

II. THE SPAAM ACT'S REQUIREMENTS DO NOT INVOKE THE FIRST AMENDMENT

Even if this Court finds that Headroom is not a common carrier, the SPAAM Act must be upheld because its transparency and anti-censorship requirements do not violate the First Amendment. These provisions simply require Headroom to (1) provide factual disclosures of its standards and actions taken on those standards, and (2) avoid unlawful content-based discrimination. Both provisions regulate speech not typically protected under this Court's precedents. Indeed, regulations requiring a factual disclosure only implicate the First Amendment when they are "unjustified or unduly burdensome" or are not "reasonably related to the state's interest." *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 n.14 (1985) ("The right of a commercial speaker *not* to divulge accurate information regarding his services is not such a fundamental right.") (emphasis added). Midland Code § 528.491(c) only requires the divulging of justified factual information. Further, legislatures have power to regulate hosts of speech as long as they do not compel the hosts to speak or interfere in their expressive message. *See Paxton*, 49 F.4th at 459 (discussing compelled speech caselaw in the social media context). Headroom is neither compelled to speak a government message, nor is its own expression inhibited.

A. The SPAAM Act's Disclosure Requirements are Both Subject to and Satisfy *Zauderer*'s Relaxed Standard

In *Zauderer*, this Court highlighted the stark difference between regulations which restrict commercial speech and those which simply require the disclosure of factual information.

Zauderer, 471 U.S. at 651. While the first category of regulations may trigger intermediate scrutiny, the second is subject to the "less exacting" test laid out in *Zauderer*. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (applying the *Zauderer* test to a requirement to disclose that debt relief may require bankruptcy and its associated costs). Because the First Amendment protection for commercial speech is justified by that speech's informational value to consumers, requiring factual, informative disclosures only furthers that interest. *Id.* at 250. Factual disclosure requirements only prevent misleading advertising and representations, and thus do not burden companies' speech. Subsection (c)(1) simply requires Headroom to publish community standards—which the company already does—and to provide notice of how those standards will be enforced. Midland Code § 528.491(c)(1). This serves to prevent Headroom from misleading users on how it makes censorship decisions. Similarly, Subection (c)(2) requires Headroom to explain actions they have already taken, which prevents the misleading of users through refusal to explain a moderation decision. Because both provisions only require factual explanations of company policies and serve to inform users, Headroom's constitutionally protected interest is "minimal" and intermediate scrutiny is not triggered. *Milavetz, Gallop & Milavetz, P.A*, 559 U.S. at 249. Thus, the regulations must only adhere to the *Zauderer* test: that is, they need only be (1) reasonably related to a legitimate state interest and (2) not "unjustified or unduly burdensome." *Zauderer*, 471 U.S. at 651.

The Act's first provision, requiring Headroom to publish "community standards" with "detailed definitions and explanations for how they will be used, interpreted, and enforced," is not unjustified or unduly burdensome. Midland Code § 528.491(c)(1). This Court has repeatedly permitted these types of disclosures because they are "reasonably related to the State's interest in preventing deception of customers." *Zauderer*, 471 U.S. at 651. It is perfectly reasonable to require

Headroom to give fair notice to its customers of the standards that can lead to their censoring or banning from the platform. This allows more information to enter the marketplace and gives customers more information about if they would like to sign up for the service. Not only is there a clear government interest in preventing obfuscation of social media platform standards, *see infra* Part III, but there is also a clear interest in preserving vibrant public conversation online. And there is no additional burden created for Headroom: the platform *already has* community standards and policies for their enforcement. This statute simply requires those already existing procedures to be factually disclosed.

The Act's second provision, requiring 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," also passes the *Zauderer* test. Midland Code § 528.491(c)(2). Again, this requirement is simply a *factual disclosure* of uncontroversial information—still the same type of disclosure at play in *Zauderer*. 471 U.S. at 651. This required explanation furthers the important state interest in preventing social media platforms from misleading users on why their accounts suffered censorship. The regulation is not forcing Headroom to speak; rather, it asks Headroom to say out loud what it is *already* choosing to do.

Petitioner wrongly equates these disclosures to those in *Nat'l Inst. of Family & Life Advocates v. Becerra*. 138 S. Ct. 2361, 2377–78 (2018) (holding that requiring crisis pregnancy centers to prominently display a notice that they were unlicensed on the facilities and in advertising was illegally burdensome). But there are key differences between these cases: the California law required the centers to physically display *government* speech—that they were unlicensed—while the SPAAM Act only requires Headroom to disclose *its own* policies and decisions. *Id.* at 2377;

Midland Code § 528.491(c). The Court also held that California's law was speaker-based discrimination as it arbitrarily targeted only certain pregnancy-related services. *Id.* at 2378. While Petitioner argues that because the SPAAM Act only regulates a few large social media companies it too is speaker based, this falls flat. The regulation is narrowly tailored to its purpose—to protect access to online communication—by targeting only those handful of companies who control nearly the entire marketplace for online speech. Finally, the California law required the government message that the centers were unlicensed in *every* piece of print and digital advertising used by the centers, which created an unrealistic logistical burden for the regulated businesses. *Id.* This same burden is not present on Headroom. The SPAAM Act requires disclosures only of Headroom's own speech; it does not require the company to carry the government of Midland's speech or message. And there is no comparable requirement that Headroom send out its standards in every piece of print and digital advertising—a simple publication on their website will fulfill the statute. Midland Code § 528.491(c)(1). Subsection (c)(2), while requiring more individualization, is still not approaching the California law; Headroom is only required to explain its own actions that it is already taking. If Headroom finds the requirement of explaining all their censorship too onerous, perhaps the appropriate remedy is for them to censor less. Any "burden" on Headroom to explain their actions is marginal compared to the silencing of users through "platform moderation."

B. The SPAAM Act's All Comers Requirement Does Not Implicate the First Amendment

The SPAAM Act's non-discrimination provision does not violate the First Amendment. Midland Code § 528.491(b). This Court's precedents clarify that legislatures are permitted by the Constitution to regulate the conduct of an entity that hosts speech as long as those regulations neither compel speech nor interfere with the host's own message. *Paxton*, 49 F.4th at 459

(discussing recent Supreme Court decisions that dealt with entities that host speech). Midland has simply required Headroom to preserve speech rights for all users—not to speak any government message. And because Headroom's attempts at content moderation are not expressive conduct under the First Amendment—the only "speech" implicated by the SPAMM Act is the speech of users—Headroom's own speech is not affected. Midland's actions are simply the latest in a long line of constitutionally appropriate government regulations passed to protect all citizens' access to speech. *See, e.g.*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (upholding a Congressional act requiring law schools to give equal access to military recruiters); *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980) (upholding a California state regulation requiring a mall to accommodate the speech of members of the public).

a. The Act is in Accord with Supreme Court Precedent Allowing Regulations on Speech Hosts' Conduct

Governments have never been powerless under the United States Constitution to protect access to society for all their citizens. Indeed, Congress has frequently imposed restrictions on entities open to the public to prevent discrimination based on race, disability, gender, or other protected characteristics. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 1971 et seq. (2006)) (prohibiting discrimination in places of public accommodation); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 328 (1991) (requiring accommodation for those with disabilities and prohibiting discrimination). Yet Petitioner argues that because Headroom is a speech-based platform, the SPAAM Act's protections go too far and infringe on Headroom's First Amendment right to "speak." This reasoning cannot withstand scrutiny.

Of course, Petitioner is correct that the "freedom of speech prohibits the government from telling people what they must say." *FAIR*, 547 U.S. at 61 (citing *West Virginia Bd. of Ed. v.*

Barnette, 319 U.S. 624, 642 (1943) and *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)). But accommodation statutes like the SPAAM Act do not implicate this protection. Indeed, protecting users' speech does not force Headroom to speak a government message. Nor does it prevent the company from speaking. The SPAAM Act is perfectly in line with this Court's own decisions in *Pruneyard* and *FAIR*, which provide a template for when organizations can be required to host speech without implicating the First Amendment. *Pruneyard*, 447 U.S. 74; *FAIR*, 547 U.S. 47.

In *Pruneyard*, the California Supreme Court found that California law protected the public's right to reasonable speech and petitioning—even in privately owned shopping centers. *Pruneyard*, 447 U.S. at 78. A shopping mall sought to overturn that decision in this Court, reasoning that they had a First Amendment right to prevent others from using their property as a platform for speech. *Id.* at 85. This Court rejected that argument for several reasons. *Id.* at 87. First, the accommodation statute did not dictate that any specific messages had to be shown on the property. *Id.* The lack of a specific message meant that the shopping was not compelled to speak any government message. *Id.* Second, the shopping center was open to the public; thus, the owner had forfeited the right to exclude, diminishing their First Amendment interests. *Id.* Lastly and most importantly, there was little danger that the speech would be associated with the shopping center, and even if speech was associated with the center, it could easily and effectively disavow any connection to the speech. *Id.* Thus the shopping center's own speech was unaffected. *Id.* If the center wanted to make clear it disagreed with or did not endorse the messages it hosted, it could easily post a sign alerting all passersby. *Id.*

Each of these determinative aspects are also present in the SPAAM Act's non-discriminatory access provision. Like the California regulation, the Act's all-comers' policy does not require or protect a certain government message; it asks only that all viewpoints be hosted.

This is not a case of compelled speech. And like the shopping center, Headroom has opened its business to the public—any individual can join within seconds. Online speech forums like Headroom are likely the *most* publicly accessible of all. Further, there is little risk of attributing users' posts and profiles to Headroom as the platform's own speech. Social media users' activity and words are their own. It is not endorsed by the platform. Social media platforms are infamous for abounding with conflicting and arguing speech—differing and contrasting opinions making it ridiculous to claim that these posts reflect some actual position of the company. Further, just as the Court in *Pruneyard* found it relevant that the center could easily post signs near the speakers to disaffirm any message, the logistics and costs are even simpler for an online platform to post messages on their platform which make it clear that all posts do not reflect their views. Headroom is free to go even a step further and express exactly what its positions are on any issue throughout its website—as long as all users can still access the platform.

In *FAIR,* certain law schools attempted to restrict military recruiters' access to the schools' students in protest of the military's "Don't Ask, Don't Tell" policy. 547 U.S. at 51. Congress responded by passing the Solomon Amendment, which conditioned federal funds on schools granting military recruiters the campus access enjoyed by all other recruiters. *Id.* The law schools sued in this Court, arguing that the requirement to host recruiters whom they disagreed with both impermissibly forced them to "speak" and interfered with the messages they sought to express. *Id.* at 62–64. The schools argued that the law required them to send "e-mails or post notices on bulletin boards" and that these requirements forced them to "speak" on the military recruiter's behalf. *Id.* at 62–63. This Court dismissed that argument quickly, explaining that the alleged compelled "speech" was only incidental to the Amendment's regulation of conduct. *Id.* at 62. The law's effect was to require the hosting of the recruiters and requiring the schools to "speak" in posting notices,

emailing students, and providing the same advertising available to other recruiters was only tangential to that. *Id.* While discussing its dismissal of the schools' argument that the regulation violated their own ability to "speak", this Court explained that being required to host another's speech only implicates the First Amendment if the host's message was actually affected by the accommodation. *Id.* at 63. The forced accommodation of military recruiters did not actually alter any message the law school was expressing. *Id.* at 64. The Court explained that this was because the schools were not "speaking" in the First Amendment sense when they host recruiters and interviews. *Id.* The decision not to host the recruiters was not expressive because any meaning behind such a decision could not be conveyed without some *additional*, explanatory speech. *Id.* at 65. This was "strong evidence" that the conduct was itself not inherently expressive for the purposes of the First Amendment. *Id.* at 66 (explaining that the First Amendment protections for flag burning in *United States v. O'Brien*, 391 U.S. 367 (1968) extend only to "inherently expressive" conduct). Thus, the hosting required of the law schools was not expressive speech, nor was it compulsion to speak a government message.

The SPAAM Act's requirement that Headroom accommodate all users regardless of viewpoint parallels the Solomon Amendment discussed in *Fair*. Just as requiring support and advertising to law school recruiters is not "speech" in the First Amendment sense, neither is Headroom's required hosting of all user profiles and posts. The fact that Headroom's code populates users' speech on the platform doesn't mean that the platform is "speaking" those words for First Amendment purposes. And although petitioner attempts to argue that the required hosting of viewpoints they disagree with interferes with their own expressive message, this argument fails for the same reason the law schools' argument failed in *FAIR*. The censoring of user accounts with views Headroom opposes is certainly not expressive conduct on its own, because there is no

meaning conveyed until Headroom explains *why the content was taken down*. If Headroom does explain its censorship decisions, no one will know if the account was taken down or simply deleted by the user. Additionally, just as the law schools were still free to speak out against military policies, Headroom is still free to state which viewpoints it disagrees with—either to the general public or to specific users. Because Midland Code § 528.491(b) neither compels a specific government message to be spoken nor does it interfere with Headroom's own expressive message it does not implicate the First Amendment.

b. Headroom's Censorship Decisions are Not Editorial Judgment or Any Other Type of Expression Protected by the First Amendment

Petitioners argue that the virtual pages of a social media platform are different in kind than a shopping center and recruiting at a law school. Relying on *Hurley v. Irish-American Gay*, *Pacific Gas & Electric Co. v. Public Utilities Com.* (*PG&E*), and *Miami Herald Pub. Co., of Knight News, Inc. v. Tornillo* (*Miami Herald*), Headroom argues that its platform and its censorship decisions are forms of protected expression—a type of editorial judgment that falls under the First Amendment. 515 U.S. 557 (1995); 475 U.S. 1 (1986); 418 U.S. 241 (1974). While this doctrine originated in and is largely limited to newspaper publishing, this Court has applied it to the selection of floats in a private parade. *See Hurley*, 515 U.S. at 575. This argument fails here because user content on social media is not Headroom's expression: it is not Headroom's speech, and Headroom does not exercise editorial control over it.

Newspapers and their contents are considered First Amendment speech. Newspapers play a vital role in politics, culture, and overall dissemination of important information. *See, e.g*, *Sullivan*, 376 U.S. at 270 (speaking of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" in the context of

newspapers). Perhaps that is why the founding generation included "the press" explicitly in the First Amendment. U.S. Const. amend. I. But what newspapers choose to publish is not only "speech" simply because it is important, but also because newspapers have "editorial control" over what they publish. *Miami Herald*, 418 U.S. at 258. Newspapers' stories are written by their employees, or those they invite to contribute. And as this Court has explained, "[a] newspaper is more than a passive receptacle or conduit for news, comment and advertising." *Id.* (discussing that in addition to the choice of how to cover public issues, even the choice of materials going into a newspaper reflect editorial control). What a newspaper chooses to say—and how it chooses to express its views—is protected speech.

Newspapers and other publications are also "speech" because they are assumed to speak with one voice, due to their editorial control over what they publish. This was the same rationale used in this Court's *Hurley* decision—that parades too were expressive activity assumed to be speaking with one voice. 515 U.S. at 576–77 ("Although each parade unit generally identifies itself, each is understood to contribute something to a common theme"). Because there is an expectation that these entities speak with one voice, any included viewpoints are perceived as the entity's own. *Id.* at 577 ("each [parade] unit's expression is perceived by spectators as part of the whole"); *but cf.*, *Pruneyard*, 447 U.S. at 85 (holding that there was little risk that the hosted speech would be associated with a shopping center, and it could be easily disavowed). When speech-hosting entities are perceived as speaking with one voice, any regulation of their editorial control infringes their speech because any state-required speech or accommodations is at great risk of being attributed to the host.

Headroom does not exercise this type of control over its platform. It is not a newspaper. And social media is different from a themed parade—the only expansion of the editorial control

doctrine beyond print media. *See Hurley*, 515 U.S. at 575. The conglomeration of user generated content on Headroom is not part of some coherent whole. *Id.* Nor does Headroom try to make it so. Headroom does not make decisions over what posts are written, what videos are made, and how users will interact with one another—content is entirely user generated. And there is no risk that user content is perceived as endorsed by or originating with Headroom. Spectators understand that social media content is produced by users, not the platforms.

Petitioner responds by highlighting that some users monetize their content and receive payment from Headroom. R. at 2. This, Petitioner claims, is evidence that Headroom plays some role in the production of content. *Id.* However, this misses the point. Allowing users to monetize their content is more like a mall hosting a farmers' market than hiring opinion journalists to express a message. Indeed, users sharing in some advertising revenue does not lead the public to think they speak for Headroom. And even if it did, Headroom could easily disavow agreement with those users.

Additionally, Petitioner argues that Headroom exercises editorial control through its algorithms because it deprioritizes content violating its standards. Thus, Headroom claims, the SPAAM Act's prohibition on "shadow banning" infringes on this editorial control. R. at 2. But this issue is not on appeal: only the Act's non-discriminatory *access* provision is challenged. And even if it was, the shadow banning provision does not implicate the First Amendment; a computer-generated AI algorithm deprioritizing content that violates community standards is not the individualized editorial control of newspapers. Further, even if the "shadow banning" provision is constitutionally unenforceable, the rest of the statute still stands. R. at 2.

Thirty years ago, Congress definitively declared that social media platforms are not publishers or speakers of user generated content. *See Paxton*, 49 F.4th at 465–66 47 (discussing

how 47 U.S.C. § 230 declared that internet platforms "shall [not] be treated as the publisher or speaker" of user content). Under Section 230, any user generated content, along with platform algorithms, cannot create liability for social media platforms specifically because they are not the platforms' *speech*. And while Congress cannot legislate what is and is not First Amendment protected speech, it is instructive that such an oft cited and discussed statute has declared that social media companies are not "speaking" when they create algorithms, moderate content, or censor users during Headroom's entire existence. Indeed, a decision in Headroom's favor would upend decades of internet law—under Headroom's logic, Section 230 itself would likely now be unenforceable as its central premise would be refuted. Social media platforms have used Section 230's protection to become dominant forces economically, socially, and politically precisely by shielding themselves from the consequences of speech on their platforms. Headroom cannot have it both ways. It cannot claim that all its decisions are speech protected by the First Amendment while also eschewing all liability for that speech. Social media companies have never been treated as publishers or having editorial control, and to do so now would require this Court to upend the very laws supporting the modern internet.

III. EVEN IF THE SPAAM ACT RESTRICTS HEADROOM'S "SPEECH," IT SURVIVES INTERMEDIATE SCRUTINY

The SPAAM Act's free speech and transparency clauses do not implicate the First Amendment because they apply only to social media platforms, *see* Midland Code § 528.491(a)(1), which are common carriers. *See infra* Part I. Further, the transparency regulations satisfy the test set forth in *Zauderer*. *See infra* Part II(A). And finally, Headroom's content is not its own speech, but rather—as its industry name implies—a "platform" for others' speech. *See infra* Part II(B). But even if the Court finds that (1) social media platforms are not common carriers, (2) the SPAAM

Act fails under *Zauderer*, and (3) social media platforms are "speakers," the SPAAM Act's narrow content-moderation and transparency requirements should be upheld because they survive intermediate scrutiny.

A. At Most, This Court Should Review the SPAAM Act under Intermediate Scrutiny

Both courts agreed that *even if* the SPAAM Act infringes on Headroom's constitutional rights, the Act is subject only to intermediate scrutiny. R. at 11–12; R. at 19. This is correct for at least two reasons. First, the SPAAM Act is content-neutral. It applies equally to all social media platforms, irrespective of their political viewpoint. Midland Code § 528.491(a)(1); *see City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022) (holding that content-neutral regulations are subject to intermediate, not strict, scrutiny). And second, any burden the SPAAM Act imposes on social media platforms' speech is incidental to its regulation of their conduct. *See United States v. O'Brien*, 391 U.S. 367 (1968) (finding that purely incidental regulations of speech are subject only to intermediate scrutiny). To survive intermediate scrutiny, Midland need only show that both provisions of the SPAAM Act are substantially related to an important state interest. *Id.* at 1475; *Clark v. Jeter*, 486 U.S. 456, 461 (1988). It does so with ease.

B. Midland's Interest in Protecting Citizen Speech is Important under This Court's Precedents

The Court has often identified "important state interests" based on important historical values, such as protecting citizens' well-being and natural rights. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976) (holding that the protection of public health and safety is "clearly . . . an important function of state and local governments"); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (holding that "assuring equal access . . . to tangible goods and services" is a

"compelling interest"). This category also extends to interests of significant cultural importance. *See, e.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (holding that "maintaining the parks in the heart of our Capital in an attractive and intact condition" is an important governmental interest). Conversely, the Court has found that legislatures may not rely on overly broad principles—such as "preventing offense"—to restrict speech. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("[P]ublic expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("One man's vulgarity is another's lyric.").

Midland's asserted interest in "preserving the free flow of information and protecting citizens' free speech from unfair viewpoint discrimination" is surely an important government interest. R. at 19. Just as citizens have equal access to tangible goods and services, they must also have equal access to express their political opinions—regardless of viewpoint—on social media platforms. Further, Midland's interest in protecting citizens' First Amendment right to free speech exceeds the Court-sanctioned important interest of "maintaining parks" because it concerns a longstanding constitutional value, rather than a cultural artifact. And unlike the vague principle of "preventing offense to others," protections against unfair viewpoint discrimination *promote* public discourse. Thus, Midland's asserted interest falls well within the Court's wide range of recognized important state interests.

C. The SPAAM Act is Substantially Related to Midland's Important State Interest

Regulations that are "substantially related" to an important government interest satisfy intermediate scrutiny. *Jeter*, 486 U.S. at 461. A regulation is "substantially related" to an interest if there is a clear connection between the regulation and the interest. *See O'Brien*, 391 U.S. at 367 (upholding a law that criminalized the destruction of Selective Service registration certificates

because there was a clear connection between the law and the Nation's interest in raising armies with maximum efficiency); *Clark*, 468 U.S. at 296 (upholding a Park Service regulation that prevented protesters from camping in LaFayette Park because permitting camping "would be totally inimical" to the government's purpose of maintaining the Capital's parks). Conversely, the Court has invalidated statutes with requirements that are far removed from the asserted governmental interest. *See, e.g.*, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (striking down laws that burden illegitimate children for the sake of punishing the illicit relations of their parents)

The SPAAM Act's anti-censorship and transparency requirements are substantially related to Midland's interest in safeguarding its citizens' speech. The requirements are simple: first, social media platforms must respect free speech by not censoring content based on viewpoint. Midland Code § 528.491(b)(1). And second, when platforms choose to censor speech, they must explain their decision. *Id.* § 528.491(c)(1). Just as there is a clear connection between preventing the destruction of Selective Service cards and Congress's interest in effectively raising armies, the SPAAM Act's prohibition viewpoint discrimination is directly related to its interest in protecting speech. Similarly, the Act would be ineffective without the transparency requirement. Midland's legislature cannot be required to blindly trust the judgment of platforms who are being accused of discrimination.

CONCLUSION

For the foregoing reasons, the Court should affirm the Thirteenth Circuit.

Respectfully

Submitted, /S/ TEAM 6