REGENT UNIVERSITY SCHOOL OF LAW

23rd ANNUAL LEROY R. HASSELL, SR. NATIONAL CONSTITUTIONAL LAW MOOT COURT COMPETITION

No. 23-386

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

HEADROOM, INC.,

Petitioner,

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Respondent.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MIDLAND

HEADROOM, INC., *Plaintiff* v. EDWIN SINCLAIR, ATTORNEY GENERAL FOR THE STATE OF MIDLAND, *Defendant.*	**Case No. 22-cv-137**

MEMORANDUM OPINION AND ORDER

Before Roy Ashland, District Judge:

This case comes before the Court on a motion for a preliminary injunction arising out of plaintiff Headroom, Inc.'s First Amendment challenge to the State of Midland's Speech Protection and Anti-Muzzling (SPAAM) Act. For the reasons set forth below, Headroom's motion is GRANTED.

I. The Parties and Background[1]

A. *Headroom, Inc.*

Headroom, Inc., founded and headquartered in Bartlett, Midland, has emerged as one of the most popular social media companies in America. Its mission is to "provide a space for everyone to express themselves to the world" and to "promote greater inclusion, diversity, and

[1] The parties concede that the following facts are undisputed.

acceptance in a divided world." Headroom, like other social media companies, allows users to create profiles, design and post content, and share other users' posts. But unlike other social media companies, Headroom's users interact in a virtual reality environment that they access through virtual-reality headsets.

Further, Headroom provides its users options beyond simply posting content. It allows users to monetize their posts, solicit advertisers to sponsor their accounts, and receive donations from other users. Because of this, many people use Headroom to promote their businesses and create new revenue streams. And with over seventy-five million monthly users, Headroom has become a hub of business in cyber space. Many of its users depend on Headroom's services to support their businesses and livelihoods.

To curate this experience, Headroom uses algorithms to categorize and order content that users see. The algorithms prioritize information based on users' stated preferences while incorporating insights into users' interests derived from Headroom's data tracking systems. The algorithms also deprioritize information that Headroom's artificial intelligence has flagged as potentially violating Headroom's Community Standards.

Headroom's Community Standards—which users must agree to before joining Headroom's servers—lay out what conduct Headroom prohibits. Its Community Standards "ensure a welcoming community" where "all are respected and welcome." The Standards forbid 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.

Additionally, the Community Standards ban a range of information that Headroom

deems to be "disinformation." The Community Standards define disinformation as "intentionally false or misleading information that is spread for the purpose of deceiving or manipulating individuals or groups." It further specifies that "disinformation can take the form of fabricated stories, manipulated facts, manipulated images or videos, and misleading narratives. Any such content is prohibited."

Users who violate the Community Standards can face a variety of penalties. At the most basic level, Headroom will append commentary to a user's post stating that the post runs a risk of violating the Community Standards and warning about possibly upsetting content. Content that Headroom believes violates its Community Standards will also be deprioritized by its algorithms. Additionally, Headroom may choose to demonetize the user's account, suspend the account for a certain period, block others from accessing the user's account, or outright remove the account and ban the user from Headroom.

B. *Midland Passes the SPAAM Act*

In 2022, prominent users of Headroom accused Headroom of discriminating against them for their viewpoints. In response to the accusations, Midland's governor called a special session of the Midland Legislature to hold hearings on Headroom's practices. The legislature heard testimony from multiple individuals who accused Headroom of censorship. Max Sterling, a popular Headroom user who posts ten-to-fifteen-minute monologues on hot-button political and social topics, accused Headroom of deprioritizing his content. He alleged that his viewership declined dramatically after his viral "They're Coming for You" monologue. He also alleged that Headroom frequently adds warnings to his posts that say his posts contain "bullying and harassment," "promotion of violence against protected classes," and "sexist and racist language." Similarly, Mia Everly—an entrepreneur who runs the start-up fashion company

WhimsiWear— testified that purchases from her virtual store and engagement with her ads declined by thirty-four percent after she criticized a controversial presidential candidate. Finally, Ava Rosewood, who runs the wildly popular movie review site Flick Folly, alleged that Headroom banned her account for spreading "disinformation" and "hate speech" after she spoke out in favor of a controversial documentary about immigration to Europe.

Based on this testimony, Midland State Representatives Margaret Caldwell and Jonathan Barnes introduced the SPAAM Act. Representative Caldwell stated that "social media giants like Headroom have become virtual dictators, suppressing free speech and ruining hardworking Midlandians' livelihoods under the guise of moderation. This bill will hold them accountable and ensure the protection of our democratic values." Similarly, Representative Barnes stated that "excessive censorship by tech behemoths is a clear violation of our fundamental rights. We need robust legislation to curb their power and restore the voice of the people." Midland's Governor, Michael Thompson, also weighed in, stating that the Act "will establish a system of oversight that guarantees the protection of civil liberties while curbing the spread of harmful content." The Speaker of Midland's House of Representatives, Nancy Thornberry, concluded that "speech is increasingly being centralized in unaccountable companies that threaten individuals' livelihoods. Our very ability to challenge political orthodoxy is under siege."

The SPAAM Act applies to any "social media platform." Midland Code § 528.491(a)(1). The Act defines a "social media platform" as "any information service, system, search engine, or software provider that: (i) provides or enables computer access by multiple users to its servers and site; (ii) operates as a corporation, association, or other legal entity; (iii) does business and/or is headquartered in Midland; and (iv) has at least twenty-five

million monthly individual platform users globally." *Id.* § 528.491(a)(2)(i)–(iv).

The Act has two main requirements. First, the Act restricts social media platforms' ability to alter or remove users' content. Noting that "social media platforms are the public square of the twenty-first century and common carriers of public speech," the Act prohibits any social media platform from "censoring, deplatforming, or shadow banning" any "individual, business, or journalistic enterprise" because of "viewpoint." *Id.* § 528.491(b)(1). The Act defines "censorship" or "censoring" as "editing, deleting, altering, or adding any commentary" to a user's content. *Id.* § 528.491(b)(1)(i). The Act further defines "deplatforming" as "permanently or temporarily deleting or banning a user." *Id.* § 528.491(b)(1)(ii). Finally, "shadow banning" is defined as "any action limiting or eliminating either the user's or their content's exposure on the platform or deprioritizing their content to a less prominent position on the platform." *Id.* § 528.491(b)(1)(iii). The Act exempts "obscene, pornographic or otherwise illegal or patently offensive" content from the section's requirement. *Id.* § 528.491(b)(2).

Second, and in tandem with its first requirement, the Act requires social media platforms to publish "community standards" with "detailed definitions and explanations for how they will be used, interpreted, and enforced." *Id.* § 528.491(c)(1). Further, when a social media platform enforces its community standards, the Act requires the platform to "provide a detailed and thorough explanation of what standards were violated, how the user's content violated the platform's community standards, and why the specific action (e.g., suspension, banning, etc.) was chosen." *Id.* § 528.491(c)(2).

Enforcement of the Act is vested in Midland's Attorney General. *Id.* § 528.491(d)(1). Users who have been harmed by a platform's violation of the Act may either file a complaint with the Attorney General or sue on their own. *Id.* § 528.491(d)(2). Courts may grant relief

either in the form of injunctions or fines totaling $10,000 a day per infraction. *Id.* § 528.491(d)(3).

C. *Procedural History*

The Midland Legislature passed the SPAAM Act on February 7, 2022. The Act went into effect on March 24, 2022.

In response, Headroom filed a pre-enforcement challenge against Midland's Attorney General, Edwin Sinclair, in the United States District Court for the District of Midland on March 25, 2022. Headroom alleged that the Act's provisions violate the First Amendment and requested a permanent injunction enjoining Attorney General Sinclair from enforcing the Act. *See Ex Parte Young*, 209 U.S. 123, 155–56 (1908) (holding that courts may enjoin state actors vested with enforcement powers from enforcing an unconstitutional law). Headroom also moved for a preliminary injunction.

Headroom makes two primary arguments for why this Court should grant a preliminary injunction. First, Headroom argues that it is likely to succeed on the merits because the SPAAM Act violates its First Amendment rights by requiring it to provide detailed explanations of its Community Standards and its enforcement decisions. In doing so, Midland impermissibly compels Headroom to speak. Further, Headroom argues that the explanation requirement imposes an undue burden on Headroom's speech. Second, Headroom argues that the SPAAM Act violates Headroom's First Amendment rights by requiring it to host third-party content that violates its Community Standards. As a result, Headroom argues, the Act infringes on Headroom's constitutionally protected editorial judgment.

Headroom further argues that it satisfies the rest of the preliminary injunction criteria. It argues that it faces irreparable injury, as even a single infraction can cost $10,000 a day. Moreover,

it argues that the balance of the equities favors its position as Midland will suffer no injury while the litigation is pending. Finally, Headroom argues that a preliminary injunction would serve the public interest by protecting companies' free speech rights from the Act's speech-chilling provisions.

Midland argues that a preliminary injunction is inappropriate. First, Midland argues that Headroom is unlikely to succeed on the merits because the Act does not violate the First Amendment. Midland argues that the Act's enforcement explanation provisions do not implicate the First Amendment because Headroom is a common carrier. And even if Headroom is not a common carrier, Midland argues that the enforcement explanation requirement does not violate the First Amendment as it involves purely factual disclosures that do not affect Headroom's speech. Next, Midland argues that the First Amendment does not apply because Headroom does not exercise any form of protected editorial judgment. Thus, Midland reasons that it can prevent Headroom from discriminating against disfavored viewpoints.

Additionally, Midland argues that the other preliminary injunction factors also favor the State. Midland argues that Headroom does not face irreparable injury because the SPAAM Act does not impair Headroom's right to speak its own message. Moreover, Midland argues that the balance of the equities favors the State as a preliminary injunction would frustrate the legislature's carefully considered public policy choices. Finally, Midland argues that a preliminary injunction would harm the public interest because it would allow Headroom to continue to silence free speech on its platform.

II. Discussion

A. *Standard of Review*

A preliminary injunction is appropriate when four factors are met. First, a plaintiff must show that she is likely to succeed on the merits. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S.

7, 20 (2008). Second, the plaintiff must show that she will suffer irreparable injury without preliminary relief. *Id.* Third, the plaintiff must show that the balance of equities favors her. *Id.* And finally, the plaintiff must show that a preliminary injunction would serve the public interest. *Id.*

B. *Analysis*

For the following reasons, this Court rejects Midland's arguments and holds that Headroom satisfies the requirements for a preliminary injunction. Most importantly, Headroom is likely to succeed on the merits as the SPAAM Act violates the First Amendment.

The Free Speech Clause of the First Amendment of the United States Constitution "constrains governmental actors and protects private actors." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019). Known as "state action doctrine," the First Amendment only applies to censorship by the government. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Even where First Amendment interests are implicated, social media platforms are not state actors and thus are not subject to the Amendment's restrictions. *See, e.g.*, *Green v. Am. Online*, 318 F.3d 465, 472 (3d Cir. 2003).

As a result, the First Amendment protects an individual's (or a company's) right to speak irrespective of whether the government thinks the speech sensible or misguided. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974). That protection extends to government actions that would "chill" free expression, thereby preventing "threat[s] to censure comments on matters of public concern." *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Such "overbreadth" challenges allow "law[s] [to] be invalidated as overbroad if a substantial number of [their] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021).

Overbreadth challenges, then, empower private property owners—even those in cyber space—to exercise editorial control over speech within the bounds of their property without fear of government intervention. *See Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1931.

It is undisputed that social media platforms, like any other individual or company, are protected by the First Amendment. The question is does the SPAAM Act trigger First Amendment protections and, if so, does it survive intermediate scrutiny.

Enforcement Explanation Requirement

This Court first considers Headroom's challenge to Section 528.491(c). Headroom argues that 528.491(c) burdens its editorial judgment by requiring Headroom to "provide a detailed and thorough explanation" every time it acts against content that violates its Community Standards. Headroom argues that the requirement impermissibly burdens its exercise of editorial judgment.

Midland counters by arguing that Headroom is a common carrier. Midland argues that Headroom is a common carrier because it holds itself out to the public as willing to serve "everyone." As a result, Midland reasons, Headroom meets "[t]he basic characteristic of common carriage [which] is the requirement to hold oneself out to serve the public indiscriminately." *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016). Further, Midland points to the legislature's findings that Headroom is "a common carrier" and the "modern public square." Because Headroom is a common carrier, Midland concludes, it can regulate how Headroom creates and implements its content moderation enforcement policies.

Midland further argues that even if Headroom is not a common carrier, Midland can still require commercial speakers to disclose factually true information. *See Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). Here, Midland argues that Section 528.491(c)'s disclosure requirements do not infringe Headroom's editorial judgment as they merely require

Headroom to provide sufficient information for users to understand how they violated the Community Standard.

Midland's arguments are unavailing. First, even if common carriers receive fewer First Amendment protections than other communicators, the First Amendment still applies. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984). Moreover, Headroom is not a common carrier. A common carrier holds itself out to the public without making "individualized decisions" about whom it serves or restricting users' freedom to use its services. *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979). Headroom, by contrast, requires all users—as a precondition of joining its servers—to agree to its Community Standards. Users, then, are not free to use Headroom's services as they see fit. Hence, Headroom is not a common carrier.

Section § 528.491(c)'s "detailed explanation" requirement imposes an "undu[e] burden[]" that "chills . . . [Headroom's] protected speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018). Headroom has millions of users, and it makes countless editorial judgments to remove and restrict content. But the Act requires Headroom to provide a "detailed and thorough explanation" every time it enforces its Community Standards. Midland Code § 528.491(c)(3). This imposes both significant implementation costs and substantial liability for failure to comply. This requirement's chilling effect on Headroom's editorial judgments is an "unjustified or unduly burdensome" commercial disclosure requirement. *Cf. Zauderer*, 471 U.S. at 651–52 (holding that government regulations of commercial speech are valid when they impose non-burdensome, factual disclosure requirements to cure otherwise misleading advertisements). Thus, the Act infringes on Headroom's First Amendment rights, and Section 528.491(c) must survive intermediate scrutiny.

Section 528.491(c) fails intermediate scrutiny. Intermediate scrutiny applies because the

Act is content-neutral and its provisions apply equally to social media companies irrespective of ideological or political viewpoint. *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022). To survive intermediate scrutiny, Midland must show that the Act is narrowly tailored to forward an important state interest. *Id.* at 1475. Midland has failed to articulate what important state interest justifies the Act's burdensome explanation requirement. Even if Midland had an important state interest, 528.491(c) is not narrowly tailored as it exposes Headroom to untold liability if its enforcement explanations are not detailed enough. As Section 528.491(c) violates the First Amendment, Headroom is likely to succeed on the merits.

Restrictions on Content Moderation

Next, this Court addresses the Act's restrictions on "censoring, deplatforming, or shadow banning" users because of their "viewpoint." Midland Code § 528.491(b)(1)–(2).

Three main cases guide this Court's analysis. First, in *Miami Herald Publishing Co. v. Tornillo*, a state law required newspapers that criticized a political candidate to provide equal space in the paper for the candidate's reply criticism. *Miami Herald*, 418 U.S. at 244. The Court held that the law violated the First Amendment. *Id.* at 258. The Court recognized that "[t]he choice of material to go into a newspaper, and the decisions made as to . . . [the] content of the paper, and treatment of public issues and public officials . . . constitute the exercise of editorial control and judgment." *Id.* By interfering with the newspaper's ability to control its product's content, the law impermissibly infringed the newspaper's speech by intruding "into the function of editors" and compelling it to "publish that which reason tells them should not be published." *Id.* at 250–51, 256. In effect, *Miami Herald* recognized that the government violates the First Amendment when it interferes with a private company's editorial judgment.

The Court expounded upon *Miami Herald* in *Pacific Gas & Electric Co. v. Public*

Utilities. Pacific Gas included a monthly newsletter in its billing envelopes. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 5 (1986). The newsletter included editorials and stories on political issues, energy conservation, and utility services. *Id.* State law required Pacific Gas to include a third-party group's opposing messages in the billing envelopes. *Id.* at 5–6. The Supreme Court struck down the law, a plurality holding that the regulation impermissibly required the company "to use its property as a vehicle for spreading a message with which it disagree[d]" and to "associate with speech with which [it] may disagree." *Id.* at 15, 17–21. The law thus forced Pacific Gas to "either to appear to agree . . . or to respond." *Id.* at 15. Because of that, the Court held that the law impermissibly interfered with Pacific Gas's speech by requiring it to include speech that it objected to in its billing envelopes. *Id.* at 12.

On the other hand, the Supreme Court has recognized situations when the government may require private companies to host third-party speech. For example, *PruneYard Shopping Center v. Robins* upheld a state law that required a mall to allow high school students to solicit anti-war signatures and distribute pamphlets on the mall's property. 447 U.S. 74, 86–88 (1980). The Court reasoned that even though the mall had a policy against pamphleteering, the law did not penalize the mall's speech nor did it prevent the mall from "expressly disavow[ing] any connection with the [students'] message." *Id.* at 87–88. Further, because the mall was open to the public, any "views expressed by members of the public in passing out pamphlets or seeking signatures . . . will not likely be identified with those of the owner." *Id.* at 87.

Here, Headroom's content moderation policies are expressive speech within the meaning of the First Amendment. Like the editorial judgments in *Miami Herald* and *Pacific Gas*, Headroom delivers curated compilations of speech created by others to its users. Such activity is inherently expressive, as it involves blending others' speech to present a unified whole that reflects

Headroom's values. This is no different than a newspaper that exercises editorial judgment to refuse to include messages with which it disagrees. Thus, when Headroom chooses to remove users' posts, deprioritize their content, or ban their accounts, it is engaging in First Amendment protected activity. And Midland cannot infringe on that activity.

Midland's argument that *PruneYard* dictates a different outcome is unpersuasive. *Pacific Gas* cabined *PruneYard*, noting that the mall did not object to the pamphleteers' message, *Pacific Gas*, 475 U.S. at 12. And unlike the laws in *PruneYard*, Section 528.491(b) forces Headroom to host speech that undermines its expressive message that "all are respected and welcome." In short, Headroom's speech will be altered by speech it is forced to accommodate.

Section 528.491(b) also fails intermediate scrutiny. As noted, intermediate scrutiny applies because the Act is content-neutral, its provisions applying equally to social media companies irrespective of ideological or political viewpoint. *Reagan Nat'l Advert*, 142 S. Ct. at 1472. To survive intermediate scrutiny, Midland must show that the Act is narrowly tailored to forward an important government interest. *Id.* at 1475. Midland has identified no important state interest that justifies coercing a private company to host speech it finds repulsive. Correcting allegedly unfair moderation policies is insufficient. And even if Midland had an important state interest, Section 528.491(b) is not narrowly tailored as it forces Headroom to host speech by racist hate groups or risk violating Section 528.491(b). Thus, Headroom is likely to succeed on the merits because Section 528.491(b) violates the First Amendment.

Finally, the other preliminary injunction factors support Headroom. Headroom faces irreparable injury as the risk of incurring numerous, $10,000 per day fines would ruin its business. More importantly, loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Further, the balance of

the equities and the public interest merit a preliminary injunction as allowing the Act to go into effect would have a chilling effect on private parties' free speech rights.

In sum, Headroom is likely to succeed on the merits as the SPAAM Act violates the First Amendment by burdening Headroom's editorial judgment with disclosure requirements and by forcing Headroom to host content that contradicts its values. Further, both restrictions fail intermediate scrutiny. The public interest is clearly served when First Amendment freedoms are safeguarded. And as the remaining preliminary injunction factors also favor Headroom, Headroom's motion for a preliminary injunction is GRANTED.

Filed: May 29, 2022.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

No. 22-19042

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Appellant,

v.

HEADROOM, INC.,

Appellee.

Appeal from the United States District
Court for the District of Midland
Roy Ashland, District Judge, Presiding

Argued and Submitted December 14, 2022
Before Robert Mendoza, Chief Judge, and Edward James, and Joseph Crouch, Judges

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OPINION

Mendoza, Chief Circuit Judge:

In response to Headroom, Inc.'s controversial content moderation decisions, the Midland Legislature passed the Speech Protection and Anti-Muzzling (SPAAM) Act. The Act requires two main things of social media platforms. First, it requires social media platforms to respect free speech by not censoring or banning user content based on the user's viewpoint. Second, it requires transparency. Social media platforms must explain their content moderation decisions in detail. Headroom—the largest social media company in Midland—sued, arguing that the SPAAM Act violates the First Amendment. The district court preliminarily enjoined Midland Attorney General Edwin Sinclair from enforcing the Act. The Attorney General appealed, and we reverse.

I. STANDARD OF REVIEW

We review the grant of a preliminary injunction for abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). A district court abuses its discretion if it grants an injunction based on clearly erroneous factual findings or erroneous conclusions of law. *Id*.

II. DISCUSSION

The district court held that Headroom is likely to succeed on the merits because the SPAAM Act's various provisions violate the First Amendment. The court held that the SPAAM Act's detailed explanation requirement violates the First Amendment. It also held that the Act's requirement that social media companies apply their policies in a neutral manner violates the First Amendment as it infringes on Headroom's "editorial judgment." It further found that Headroom faces irreparable injury, that the balance of the equities favors it, and that a preliminary injunction would serve the public interest.

We disagree on all counts. First, the SPAAM's Act's requirement that Headroom provide a detailed explanation for censoring, shadow banning, or banning an account does not violate the First Amendment. For one thing, the First Amendment does not protect Headroom's decisions to censor, shadow ban, and ban users because Headroom is a common carrier. Social media platforms are "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). "Unlike newspapers," they "hold themselves out as organizations that focus on distributing the speech of the broader public." *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring). And when companies—including social media platforms—possess substantial market power, "our legal system" has "long subjected [those] businesses . . . to special regulations." *Id.* at 1222. Although social media platforms enjoy First Amendment protections, they are not exempt from regulations that do not compel or prohibit them from speaking. *Id.* at 1224.

Just as a traditional telephone company creates networks of wires to connect people,

Headroom creates "information infrastructure" that connects people from across the world. *Id.* And unlike newspapers, social media platforms like Headroom "hold themselves out as organizations that focus on distributing speech of the broader public." *Id.* Moreover, Headroom's dominant market share in Midland and across the nation gives it "substantial market share[s]" with almost uninhibited power to exclude disfavored speech. *See id* at 1225. Faced with such a challenge, Midland took the only option it had for protecting its citizens' speech and livelihoods from Headroom's vice-grip on speech: a law "restrict[ing] the platform's right to exclude." *Id.* Perhaps most importantly, Headroom holds itself out to the public as providing a platform for "everyone to express themselves to the world." As with any common carrier, Midland can regulate Headroom to protect users' free speech.

Moreover, these disclosures of "purely factual and uncontroversial information" about Headroom's services are not compelled speech, nor do they interfere with Headroom's editorial judgment. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985). To be sure, "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* And the disclosure requirement must be reasonably related to a legitimate state interest. *Id.* But as we noted before, Midland possesses an important interest in ensuring the free flow of information and protecting citizen's free speech rights from undue censorship. Moreover, like any other form of consumer disclosure law, the SPAAM Act's disclosure requirement furthers Midland's legitimate interest in providing users with sufficient information to make informed choices. The Act's disclosure requirement also does not "unjustifi[ably] or unduly burden[]" Headroom's speech. *Id.*

Second, Midland is not powerless to require social media companies to host third-party speech. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (upholding a state law protecting pamphleteers' right to disseminate pamphlets in privately owned shopping malls).

The SPAAM Act does not penalize Headroom's speech nor does it prevent Headroom from "expressly disavow[ing] any connection with [its users'] message[s]." *Id.* at 87–88. Nor does the SPAAM Act compel Headroom to speak. As an open forum for the public, public views expressed therein will not be identified with the private owner. *Id.* at 87; *see also Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 61–62, 64 (2006) (holding that protecting military recruiters' speech incidentally burdened the law schools' speech and did not violate the First Amendment "because the schools [were] not speaking when they host[ed] interviews and recruiting receptions"). Headroom likewise does not "speak" when it censors, shadow bans, or eliminates users' accounts. Instead, it *suppresses* speech, which it has no First Amendment right to do.

Even if the SPAAM Act's prohibition on censorship infringes Headroom's constitutional rights, it may still be upheld as it survives intermediate scrutiny. Intermediate scrutiny requires that a statute be "substantially related" to "an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The SPAAM Act's restriction of Headroom's censorship is substantially related to Midland's important objective of preserving the free flow information and protecting citizens' free speech from unfair viewpoint discrimination. As a result, the SPAAM Act's requirement that Headroom treat third-party speech in a consistent, neutral manner does not violate the First Amendment.

Finally, the remaining preliminary injunction factors favor Midland. First, Headroom does not face irreparable injury. No lawsuits have been commenced or threatened. Additionally, the balance of the equities favors Midland as Headroom wishes to simultaneously wrap itself in the First Amendment while strangling others' speech. Finally, a preliminary injunction would harm the public interest by allowing a powerful social media company to continue to throttle free discourse.

For the foregoing reasons, we REVERSE the District Court and VACATE the preliminary injunction.

Filed: March 30, 2023.

IN THE
SUPREME COURT
OF THE UNITED STATES

No. 23-386

OCTOBER TERM 2023

HEADROOM, INC.,

Petitioner,

v.

EDWIN SINCLAIR,
ATTORNEY GENERAL FOR THE STATE OF MIDLAND,

Respondent.

ORDER GRANTING WRIT OF CERTIORARI

The Petition for Writ of Certiorari is hereby GRANTED.

IT IS ORDERED that the above captioned cause be set down for argument in the October Term of 2023, limited to the following issues:

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?

Dated: August 14, 2023.