IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:25-cv-02538-WJM-KAS

NETCHOICE,

Plaintiff,

v.

PHILIP J. WEISER, in his official capacity as Attorney General of Colorado,

Defendant.

THE ATTORNEY GENERAL'S OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

In 2024, the Colorado General Assembly passed House Bill 24-1136, exercising its police power to protect children's health and safety by ensuring that children have access to evidence-based information about the physical and mental health impacts of social media. In Section 4, codified as § 6-1-1601 ("Section 1601"), the General Assembly directed that social media platforms establish a function of their own choosing to provide young users with evidence-based information about the impacts of social media on their health, drawn from either peer-reviewed sources or from a resource bank established by the same law. The intent of this law was to give social media companies bounded discretion in effectuating its requirements: although the platforms must provide factually accurate and scientifically supported information to young users, they have a range of options regarding what to say and in what form.

In this action, Plaintiff NetChoice challenges these flexible requirements as interfering with the speech of its members. But nothing in Section 1601 prevents those corporations, which encompass some of the most ubiquitous and sophisticated technology companies in the world, Compl. (ECF No. 1) ¶¶ 12, 15, from speaking freely. All the law requires is that these commercial entities also provide users under 18 with factual, non-controversial information.

The Motion for Preliminary Injunction ("Mot.") (ECF No. 15-1) should be denied.

BACKGROUND

I. Statutory background

The General Assembly passed HB24-1136 to provide "research-based education and interventions" on the effects of social media on youth brain development. HB24-

1136 (ECF No. 15-2) § 1(2). Consistent with this purpose, most of the law is designed to create resources for Colorado students, parents and educators. *Id.* §§ 2, 3.

First, the law required the Colorado Department of Education ("CDE") to convene a stakeholder group consisting of educators, school mental health professionals, parents, youths, technology experts, and "a representative from a technology industry association, or a technology engineer." § 22-2-127.8(1)(c). This stakeholder group was to build a "resource bank," consisting of "evidence-based, research-based scholarly articles and promising program materials and curricula pertaining to the mental and physical health impacts of social media use by youth, internet safety, and cybersecurity." § 22-2-127.8(1)(a). At present, the resource bank[1] has over 40 resources related to social media, ranging from the American Academy of Pediatrics's "Social Media and Youth Mental Health Research Corner," to studies noting the potential positive effects of social media on some young users, like HopeLab's "Without it I Wouldn't Be Here Today, LGBTQ+ Young People's Experiences in Online Spaces."

Section 1601 also requires social media platforms to establish a "function" that provides underage users with certain information. The companies have broad discretion over the content of this function, so long as it meets two criteria:

(1) It must "provide users who are under the age of eighteen with information about their engagement in social media that helps the user understand the

[1] *See* Media Literacy Resource Bank, Colorado Department of Education, https://tinyurl.com/4bkv25yy (last visited Sep. 17, 2025).

impact of social media on the developing brain and the mental and physical health of youth users."

(2) It must "be supported by data from peer-reviewed scholarly articles" or, if the social media company prefers, be drawn from "the sources included in the mental health and technology resource bank established" by the law.

See § 6-1-1601(2).

To provide companies "flexibility," *see* Excerpt from Colorado Senate floor debate, Apr. 17, 2024, at 6:10-14, attached as Ex. A., platforms have two options for complying. First, a company may develop its own function so long as it meets the criteria above. § 6-1-1601(1)(a). If it chooses this route, the function must be "informed" by standards established by the state's chief information officer. *Id.*; *see also* § 6-1-1601(5). These standards, which have not yet been published, will (a) "recommend intervals for notification frequency," (b) "provide sample messaging for the content of the notification," (c) "be informed by data and research on the efficacy of notifications;" and (d) "recommend the age range of users who would most benefit from notifications." *Id.*

Second, if they prefer to, social media platforms may opt to use a function that must display "a pop-up or full-screen notification to a user who attests to being under the age of eighteen when the user: (I) Has spent one cumulative hour on the social media platform during a twenty-four-hour period; or (II) Is on a social media platform between the hours of ten p.m. and six a.m." § 6-1-1601(1)(b). If a company elects this option, "the function must repeat at least every thirty minutes after the initial notification." § 6-1-1601(3).

LEGAL STANDARD

To obtain a preliminary injunction, NetChoice must establish (1) a substantial likelihood of success on the merits, (2) that it will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs the injury caused by the injunction, and (4) that an injunction is not adverse to the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where, as here, the government is the party opposing the motion, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiff bears the burden of proving that each factor tips in its favor. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188–89 (10th Cir. 2003).

ARGUMENT

I. The Court should treat NetChoice's claim as seeking facial relief.

A. An as-applied challenge is inapplicable in this pre-enforcement context.

In this lawsuit, NetChoice seeks pre-enforcement relief from a statute that has never been applied. Although pre-enforcement as-applied relief is available under some circumstances, s*ee, e.g.*, *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1242 (10th Cir. 2023), it is unavailable to NetChoice here for two reasons.

First, the broad discretion afforded to social media companies by Section 1601 leaves the Court unable to analyze any specific application of the law's requirements. In an as-applied challenge, a court "tests the application of [a law] to the facts of a plaintiff's concrete case." *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1248 (10th Cir. 2023) (quotations omitted). But here, there is no concrete language, circumstances, or burdens against which the Court can apply the applicable constitutional test.

In cases considering the constitutionality of health and safety warnings, courts normally can apply the law to actual text. *See, e.g.*, *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 268 n.5 (5th Cir. 2024); *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1268 (9th Cir. 2023). By contrast, Section 1601 provides countless ways for companies to comply, meaning NetChoice's members could adopt dramatically different, but all compliant, approaches. That alone precludes as-applied relief.

Second, this indeterminacy is exacerbated by the associational nature of NetChoice's claims. To establish standing on behalf of its members, NetChoice must show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). But NetChoice's members are necessary parties if the Court needs to assess the burden of the disclosure requirements as applied to any individual platform. *See NetChoice, LLC v. Bonta*, -- F.4th --, 2025 WL 2600007, at *6 (9th Cir. Sept. 9, 2025) ("*Bonta II*") (holding that NetChoice lacked associational standing to bring as-applied challenge where "First Amendment analysis is fact intensive and will surely vary from platform to platform" (quotations omitted)). For these reasons, the Court should assess NetChoice's claim as one for facial relief.

B. On its face, Section 1601 is likely to pass constitutional scrutiny.

NetChoice faces a heavy burden to succeed on its facial claim. "For a host of good reasons, courts usually handle constitutional claims case by case, not en masse," and "facial challenges [are] hard to win." *Moody v. NetChoice*, 603 U.S. 707, 723 (2024). To prevail on its facial challenge, NetChoice must show that "a substantial

number of [Section 1601's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (quotations omitted).

Conducting this analysis requires the "'daunting, if not impossible' task of canvassing how [Section 1601] applies to an 'ever-growing number of apps, services, . . . and methods for communication and connection.'" *Bonta II*, 2025 WL 2600007 at *13 (quoting *Moody*, 603 U.S. at 745 (Barrett, J., concurring) and 725 (majority op.)). In the social media context, a facial challenge "likely forces a court to bite off more than it can chew." *Moody*, 603 U.S. at 747 (Barrett, J., concurring). For this reason, "if NetChoice's members are concerned about [Section 1601] they would be better served by bringing a First Amendment challenge as applied to" their platform and conduct. *Id.* at 745 (Barrett, J., concurring). Then the Court could "answer platform- and function-specific questions that might bear on the First Amendment analysis." *Id.* at 747-48 (Barrett., J., concurring); *see also id.* at 748 ("While the governing constitutional principles are straightforward, applying them in one fell swoop to the entire social-media universe is not.").

In this pre-enforcement context, NetChoice's facial challenge is "a challenge to the terms of the statute." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (2012). This means that the Court must assume that the required functions *satisfy* the statute. Therefore, the question before the Court is whether Colorado may constitutionally require social media companies to (1) "provide users who are under the age of eighteen with information about their engagement in social media that helps the user understand the impact of social media on the developing brain and the mental and physical health

of youth users," where that information is (2) "supported by data from peer-reviewed scholarly articles or the sources included in the mental health and technology resource bank," and "informed by" the time, place, and manner standards established by OIT. § 6-1-1601(1), (2).[2] Or, more accurately, whether that requirement is unconstitutional in a "substantial number" of its applications, compared to its "plainly legitimate sweep." *Moody*, 603 U.S. at 723. NetChoice cannot carry that heavy burden.

II. Section 1601 regulates commercial speech.

A. The relevant speech for NetChoice's First Amendment claim is the speech of its member companies.

NetChoice repeatedly invokes the speech of users and content-creators. *See, e.g.*, Compl. ¶ 22; Mot. at 5. But to the extent Section 1601 imposes an injury on those third parties—and it does not—NetChoice lacks standing to maintain that claim.

Instead, NetChoice's First Amendment claim is that Section 1601 infringes on its members' speech rights. Compl. ¶ 76. It is Section 1601's effect on NetChoice's members, not their users or content-creators, that the Court must consider.

NetChoice tries to avoid this conclusion by claiming that its members' speech is "inextricably intertwined" with the speech of its users under *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988). Mot. at 8. But *Riley* applied heightened constitutional scrutiny where a *single* person's commercial speech was "inextricably intertwined with" *that same person's* fully protected speech. 487 U.S.

[2] To the extent the Court's analysis depends on the content of the "standards" that must inform the disclosures under Section 1601(1)(a), and which have not yet been published, this challenge is unripe. *See, e.g.*, *Travelers Cas. Ins. Co. of Am. v. A-Quality Auto Sales, Inc.*, 98 F.4th 1307, 1314 (10th Cir. 2024).

at 796. *Riley* is inapplicable to regulations that affect a commercial entity's purely commercial speech, even if those regulations also affect the speech of non-parties.

B. The required function is commercial speech because it arises out of social media platforms' base economic transaction with their users.

The "core notion of commercial speech" is speech that "propose[s] a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). But that core notion is just a starting point. Ultimately, courts must "draw common sense distinctions" between commercial and non-commercial speech, looking to "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *United States v. Wenger*, 427 F.3d 840, 847 (10th Cir. 2005) (quotations omitted). This can encompass expression that occurs outside "the expectation of a direct commercial transaction," including where speech involves "general exposure of a product." *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1117 (9th Cir. 2021) (cleaned up).

Ultimately, "the difference between commercial speech and noncommercial speech is a matter of degree." *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1274 (10th Cir. 2000) (quotation omitted). The central question is whether the speech is primarily economic and transactional in nature or whether "a significant theological, political, or other noncommercial purpose underlay the subject message" such that it should "be accorded the substantially greater First Amendment protections enjoyed by 'core' religious speech and the other varieties of noncommercial First Amendment speech such as political speech." *Id.* at 1275.

Section 1601 regulates commercial speech because the entire relationship between the regulated platforms and its users is commercial. Discovery will show that

the relationship between a social media company, its users, and its advertisers is simple: the company provides a service to the user in exchange for capturing that user's attention and data, which it then monetizes—often to third-party advertisers.[3]

NetChoice argues that there is an "expressive" element to the choices its members make regarding the content their users see. Mot. at 13 (quoting *Moody*, 603 U.S. at 711). Even taking this as true, that there is an "expressive" element to the exchange of service-for-data between the company and the user does not negate that this "series of transactions is explicitly commercial." *Free Speech Coal.*, 95 F.4th at 281; *see also id.* at 280-81 ("[The law] regulates commercial speech on free websites because they too propose a commercial transaction: They offer pornography in exchange for data; then they monetize that data, primarily through advertisements."). Where expression occurs in the context of a purely commercial transaction, it is entitled to "less protection than purely information-based speech." *Wenger*, 427 F.3d at 847 (applying commercial speech standard to disclosure of compensation requirements in newsletters and radio programs).

NetChoice, LLC v. Bonta, 113 F.4th 1101, 1117 (9th Cir. 2024) ("*Bonta I*"), on which NetChoice relies, Mot. at 18, is not to the contrary. In *Bonta I*, the Ninth Circuit considered the commercial speech doctrine as applied to reports that social media companies were required to file with the state. *Id.* In that context, those reports were

[3] NetChoice's members are for-profit commercial "businesses." *See* Cleland Decl. (ECF No. 15-3) ¶ 3. To the extent the analysis changes in the context of a not-for-profit entity, NetChoice lacks standing to maintain that challenge. *See generally Friends of the Earth*, 528 U.S. at 181.

noncommercial speech because they were "disconnected from any economic transaction." *Id.* at 1119-20. By contrast, Section 1601's required disclosures occur with the core economic transaction between the company and its users.

III. Section 1601 is subject to *Zauderer* scrutiny.

A. The disclosures are not subject to strict scrutiny.

NetChoice argues that Section 1601 is subject to strict scrutiny because it compels speech and because it is a content-based restriction. Mot. at 8. But NetChoice itself cites numerous cases that establish otherwise.

First, it is well established that, under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, the government can compel commercial speech in some contexts without triggering strict scrutiny. 471 U.S. 626, 651 (1985). Distinguishing its non-commercial compelled speech cases, the *Zauderer* Court concluded that a requirement to disclose "purely factual and uncontroversial information" in the context of a commercial transaction satisfies constitutional scrutiny so long as it is "reasonably related to the State's interest." *Id.* The *Zauderer* Court further distinguished commercial speech requirements from commercial speech prohibitions, reasoning that the former do not prevent commercial entities from conveying any information to the public. *Id*. at 650. Numerous courts since, including in this district, have applied *Zauderer* to compelled commercial disclosures. *See, e.g.*, *Wenger*, 427 F.3d at 846; *Rocky Mountain Ass'n of Recruiters v. Moss*, 541 F. Supp. 3d 1247, 1258 (D. Colo. 2021).

The cases *NetChoice* cites are not to the contrary. In *Riley*, the Court applied heightened scrutiny because the relevant speech was not purely commercial. 487 U.S.

at 796 (but noting that "[p]urely commercial speech is more susceptible to compelled disclosure requirements" *Id*. at 796 n.9 (citing *Zauderer*, 471 U.S. at 626)). Similarly, in *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023) and *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755, 769 (2018) ("*NIFLA*"), the Court applied heightened scrutiny because requirements compelled the plaintiffs in those cases to speak on topics *unrelated* to the services they provided. But here, Section 1601 requires platforms to provide factual, non-controversial information *about their products*.

Finally, NetChoice invokes *Free Speech Coalition*. Mot. at 18. There, the court held that *Zauderer* did not apply because the specific text of those warnings at issue was subject to "widespread, good-faith dispute." 95 F.4th at 282. Here, the platforms themselves have broad latitude to craft their own functions and messages. And on this bare record, NetChoice cannot establish that these messages—which by definition will be evidence-based and informed by peer-reviewed scholarship—will be subject to such good-faith dispute.

Next, NetChoice argues that Section 1601 triggers strict scrutiny because it targets only some internet companies. *See* Mot. at 19. But in the context of commercial regulations, that alone is insufficient to trigger heightened scrutiny. Almost by definition, commercial speech regulations regulate specific conduct. *See generally Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 982 (10th Cir. 2020) (holding that commercial speech regulation was content-based). But that does not mean they are reviewed under strict scrutiny. *Id.* at 986. To the contrary, the fact that the regulation is

commercial is sufficient to trigger a lesser scrutiny. *See, e.g.*, *Zauderer*, 471 U.S. at 651 (applying lesser scrutiny to content-based regulation of attorney advertisements).

B. *Zauderer* scrutiny applies to factual, noncontroversial disclosures.

The disclosures at issue here are thus subject to review under *Zauderer* unless NetChoice can show, in this pre-enforcement facial challenge, that a "substantial number" of the disclosures that satisfy the statutory standard are nonfactual or controversial. *Moody*, 603 U.S. at 723. On this bare record, particularly before OIT has published the "standards" required by subsection (5), NetChoice cannot make that showing. *See, e.g.*, *Uber Techs., Inc. v. Moss*, 25-cv-00096-DDD-KAS, 2025 WL 1420940, at *4 (D. Colo. Jan. 31, 2025) (denying preliminary injunction where evidentiary record was insufficient to show that disclosure requirements substantially burdened the plaintiff's speech).

A disclosure is "purely factual" if it only requires "the disclosure of accurate, factual information." *Nat'l Ass'n of Wheat Growers*, 85 F.4th at 1276. On this record, NetChoice cannot show that material drawn from "peer-reviewed" scholarly articles is necessarily inaccurate. To the contrary, countless disclosures that would satisfy Section 1601's evidence-based standards would also meet this test.

For similar reasons, the required disclosures are "uncontroversial." A statement "is 'uncontroversial' for purposes of *Zauderer* where the truth of the statement is not subject to good-faith scientific or evidentiary dispute and where the statement is not an integral part of a live, contentious political or moral debate." *Free Speech Coal.*, 95

F.4th at 281-82 (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) and *NIFLA*, 585 U.S. at 769). Neither is the case here.

As for the "good-faith dispute" consideration, empirical certainty is not necessary to justify a product safety warning. *See CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 846-47 (9th Cir. 2019) (holding cell phone radiation warning was factual and uncontroversial even though radiation "has not been proven dangerous"). Here, the General Assembly responded to a growing body of scientific evidence uncontroversially suggesting a connection between social media use and youth health issues, including findings from the U.S. Surgeon General. HB24-1136 (ECF No. 15-2) § 1(1). NetChoice tries to undermine the Surgeon General's findings. But despite quoting the Surgeon General's advisory as saying that "more research is needed to fully understand the impact of social media," Mot. at 17 (quoting Surgeon General Advisory), NetChoice omits the full quote. The advisory immediately continues: "however, the current body of evidence indicates that while social media may have benefits for some children and adolescents, there are ample indicators that social media can also have a profound risk of harm to the mental health and well-being of children and adolescents." U.S. Surgeon General Advisory, *Social Media and Youth Mental Health*, at 4, *available at* https://perma.cc/D2TM-KHRH.

And even if there are good-faith scientific debates on topics within the broad field of social media and youth mental health, the sparse record in this pre-enforcement facial challenge precludes finding that the disclosures, in a "substantial number" of their applications, are controversial. Discovery will show—and the Court can draw from the

social media resource bank should it need to—countless evidence-based, noncontroversial statements that satisfy the statutory standards.

On the "contentious political or moral debate" element, Section 1601 "does not force [social media platforms] to take sides in a heated political controversy." *CTIA*, 928 F.3d at 848. This alone distinguishes it from *NIFLA*, in which California required clinics to provide information about "abortion, anything but an 'uncontroversial' topic." 585 U.S. at 769. Here, the topic of youth mental health and social media is not categorically "controversial," as NetChoice's own members acknowledge the concern. *See, e.g.*, Blumenfeld Decl. (ECF No. 15-4) ¶ 27 (noting YouTube "offers a suite of digital wellbeing tools that encourage children and teens to be mindful of their screentime); Geary Decl. (ECF No. 15-5) ¶ 6; Murphy Decl. (ECF No. 15-6) ¶ 55.

And although NetChoice asserts that the function required by Section 1601 is controversial because it is "fundamentally at odds with the covered websites' missions," Mot. at 17 (quotations omitted), its own declarations describe the similar notifications its covered members are already providing. Blumenfeld Decl. (ECF No. 15-4) ¶ 27.c, d (describing in-app "take a break" and "bedtime" reminders); Geary Decl. (ECF No. 15-5) ¶ 6 (describing "in-app warnings"); Murphy Decl. (ECF No. 15-6) ¶ 34 (describing "time limit reminders").

Given the discretion afforded platforms, the required disclosures—on topics these companies already discuss on their platforms—are uncontroversial.

IV. The required "function" satisfies *Zauderer*, or indeed any level of constitutional scrutiny.

Under *Zauderer*, purely factual and noncontroversial compelled commercial disclosures are permissible if they are (1) not unjustified or unduly burdensome, and (2) reasonably related to the government's interest. *NIFLA*, 585 U.S. at 768–69. This interest need not be limited to countering deception. In *NIFLA*, the Court clarified that it did "not question the legality of health and safety warnings long considered permissible," *id*. at 775, and each circuit to have addressed the question has held that "*Zauderer* provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech—even when the government requires health and safety warnings, rather than warnings to prevent the deception of consumers." *Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 756 (9th Cir. 2019).[4]

Here, Colorado has a compelling interest in protecting the health and well-being of children, which satisfies any level of scrutiny. Its social media notification scheme is

[4] *See also CTIA*, 928 F.3d at 843 (noting sister circuits "have unanimously concluded that the *Zauderer* exception for compelled speech applies even in circumstances where the disclosure does not protect against deceptive speech")*; Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) ("The language with which *Zauderer* justified its approach ... sweeps far more broadly than the interest in remedying deception."); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012) (upholding health warnings on cigarette packaging); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) ("*Zauderer*'s holding was broad enough to encompass nonmisleading disclosure requirements."); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (upholding disclosure despite fact it did not "prevent consumer confusion or deception."); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) (noting that the court found no cases limiting *Zauderer* to deceptive advertising).

not unduly burdensome and is directly related to the product being offered. Accordingly, the law satisfies *Zauderer* and meets even strict or intermediate scrutiny.

A. Colorado's notification requirement serves its compelling government interest in the health and welfare of children.

As NetChoice concedes, "a State possesses legitimate power to protect children from harm." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011) (citing *Ginsberg v. New York*, 390 U.S. 629, 640–41(1968)); *see* Mot. at 20 (quoting same). Indeed, a "democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). The government's compelling interest in the health and welfare of children has been long recognized. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (quoting *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.,* 457 U.S. 596, 607 (1982)). And that interest is sufficient under any level of constitutional scrutiny. *See, e.g.*, *Ferber*, 458 U.S. at 757 (1982) ("Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.").

The legislative declaration substantiates this compelling interest. "A study of youth in the United States ages 12 to 15 found that youth who spend three or more hours a day on social media had double the risk of experiencing poor mental health outcomes, including experiencing symptoms of depression and anxiety." HB24-1136 (ECF No. 15-2) § 1(1)(d). And, among other justifications, a "systematic review of 42

studies on the effects of excessive social media use found a consistent relationship between social media use and poor sleep quality, reduced sleep duration, sleep difficulties, and depression among youth." *Id*. at 1(1)(e). The General Assembly's ensuing declaration that providing "research-based education and interventions" is a matter of "statewide concern," *id.* at 1(2), "easily passes muster under the First Amendment," *Ferber*, 458 U.S. at 758.

NetChoice's arguments to the contrary are unavailing. First, it argues that the state may not "protect the young from ideas or images that a legislative body thinks unsuitable." Mot. at 20 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975)). But Colorado does no such thing. Section 1601 is aimed at neither content moderation nor age-gating access to websites and their content. NetChoice also objects that the state cannot compel websites to adopt its preferred message "in supposed pursuit of better expressive balance." *Id*. at 21 (quoting *Moody*, 603 U.S. at 734). But again, Colorado's disclosure requirement does no such thing and indeed looks nothing like the content moderation regulations at issue in *Moody*.

Finally, NetChoice contends that because parents have third-party tools available to them to ensure their children's responsible use of the internet, the government lacks an interest in requiring informational disclosures. *See* Mot. at 21 (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 826 (2000)). But *Playboy* does not support the proposition. There, the Court reasoned that wholesale blocking of obscene television broadcasts from children was not the least restrictive means of protecting children, but nonetheless assumed the government's interest in doing so was compelling. *Id.* at 809,

825–26. Regardless, unlike the law at issue in *Playboy*, Colorado's mandated social media disclosure is not an outright restriction on access to protected speech. Finally, the Government's interest and parents' authority are mutually beneficial, not mutually exclusive. Parents "are entitled to the support of laws designed to aid discharge of [the parental] responsibility." *Ginsburg*, 390 U.S. at 639–40.

B. Colorado's mandated disclosures are not unduly burdensome.

Factual disclosures are routinely upheld by courts as not burdensome. *See, e.g.*, *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 530 (6th Cir. 2012) (cigarette warning labels); *CTIA*, 928 F.3d at 843 (cell phone radiation disclosures). Where disclosures have been struck down as unduly burdensome, it is because they are so large as to "drown out" a company's own speech. For example, in *NIFLA*, unlicensed crisis pregnancy centers were required to notify patients about their unlicensed status. 585 U.S. at 764. The Court concluded that the notice was unduly burdensome because it (1) applied to all print and digital ads, (2) was posted in multiple languages of California's choosing, (3) and consisted of a 29-word script. *Id*. at 778. Based on this, the Court reasoned that a two-word billboard would be "effectively rule[d] out" by the requirement to add a 29-word notice in multiple languages and would therefore "drown[] out" the entity's own message. *Id*. Here, NetChoice does not allege that the function required by Section 1601 will stop platforms from advertising to users or speaking to users. There is no concern of "drowning out" platforms' speech.

The most NetChoice can muster is two claims about burden from Snap and Meta. First, Snap claims that disclosures will "unreasonably impede or interfere with

users' access to Snap's services and their ability to communicate with friends and family, and make Snap's services less user friendly." Geary Decl. (ECF No. 15-5) ¶ 10. But that goes to alleged interference with *users*' speech, not with the platform's. Next, Meta claims that "the Act's timing, size, and formatting requirements will further detract from and interfere with Meta's presentation of third-party speech content on its Facebook, Instagram, and Threads services." Murphy Decl. (ECF No. 15-6) ¶ 65. But Section 1601 does not have specific timing, size, and formatting requirements. And in any event, a brief interference is not a substantial burden—as shown by Meta itself providing "time limit reminders, which notify teens to leave the app after 60 minutes each day." *Id.* ¶ 34.

Another relevant factor in the "unduly burdensome" analysis is whether a regulated entity has other ways to speak. For example, in *CTIA*, the Ninth Circuit upheld a required disclosure about cell phone safety in part because it required posting a physical notice "to which the retailer may add additional information." 928 F.3d at 849. Here, not only may a platform "add additional information," it has discretion about the message it delivers. And nothing stops a platform from speaking to users in other ways.

A disclosure is a minor intrusion compared to the countless ways social media platforms speak. Platforms have myriad opportunities to speak to users, including about the safety of social media, on their own platforms, in the media, and through trade groups like NetChoice (subject to existing consumer protection laws). Brief messages, delivered only to a subset of (child) users, hardly interrupt this speech. NetChoice's claims that the disclosures will "drown out" the platform's speech and "substantially

interfere" with the platform's dissemination of curated feeds are thus unsubstantiated and belied by the record NetChoice itself compiled. Like countless other forms of health and safety warnings, Colorado's disclaimer requirement is not burdensome.

C. Section 1601 is narrowly tailored to advance the state's interest.

Section 1601's disclosures are rationally related to Colorado's interest in informing minors of the potential health impacts of excessive social media use. Section 1601 thus satisfies *Zauderer* scrutiny, and because NetChoice does not argue otherwise, the Court can consider the point conceded. *E.g.*, *ProKASRO Servs. USA, Inc. v. DHL Express (USA), Inc.*, No. 23-cv-02651-NYW-SBP, 2025 WL 446138, at *10 n.10 (D. Colo. Feb. 10, 2025) ("Defendant cannot raise new arguments in a reply brief that could have been raised in its affirmative motion." (citation omitted)).

NetChoice instead stakes its case on strict scrutiny. But even if strict scrutiny applied, Colorado's law still passes muster. First, there is a fit between ends and means; the function directly addresses the states' interest in informing youth about the risks of excessive social media use. Second, the function is the best and least restrictive way to reach minor social media users; exercising government speech or requiring classes in school are not substitutes for direct disclosures at the point of use. Third, the law is not overinclusive; the selection criteria—that platforms must have over 100,000 users in Colorado, for example—limit the applicability of the disclosure to the most-used social media platforms. Fourth, the law is not underinclusive by leaving out different types of websites like video game platforms or streaming services; Colorado's interest is in protecting children from the harms of social media specifically. Finally, disclosures

are likely effective. *See, e.g.*, Dr. Vivek H. Murthy, *Surgeon General: Why I'm Calling for a Warning Label on Social Media Platforms*, New York Times, (June 17, 2024), https://tinyurl.com/4whyya4r.

V. The law is not vague.

NetChoice next argues that § 6-1-1601 is unconstitutionally vague. A statute is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Fabrizius v. Dep't of Agric.*, 129 F.4th 1226, 1237 (10th Cir. 2025) (quotation omitted). This standard "does not . . . impose impossible standards of specificity." *Wyo. Gun Owners*, 83 F.4th at 1233. Rather, a statute is not vague if "it is clear what the [statute] as a whole prohibits." *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (quotation omitted). Where the law being challenged is civil rather than criminal, "the Supreme Court has 'expressed greater tolerance . . . because the consequences of imprecision are qualitatively less severe.'" *Fabrizius*, 129 F.4th at 1238 (quotation omitted).

NetChoice brings a facial vagueness challenge, which requires it to show that "no set of circumstances exists under which the statute would be valid."[5] *Wyo. Gun Owners*, 83 F.4th at 1234 (explaining this standard in the context of a First Amendment vagueness challenge) (quotation omitted). A law is "not vague facially if it has a plainly

[5] As noted above, NetChoice's claims are properly construed as facial challenges. *See supra* Part I. If the Court were to treat the vagueness challenge as as-applied, NetChoice would lack associational standing. *See, e.g., Bonta II*, 2025 WL 2600007, at *6 (holding NetChoice lacked associational standing for an as-applied challenge to California's social media personalized-feeds provisions).

legitimate sweep, . . . or if it delineates its reach in words of common understanding." *Fabrizius*,129 F.4th at 1238 (cleaned up). Measured against these standards, § 6-1-1601 is not vague.

A. The law makes clear what companies are subject to it.

First, the statute is clear as to its reach, defining "social media platform" with multiple objective inclusion criteria including user thresholds, account creation, user-generated content, and social interaction. *See* § 6-1-1601(4)(a). The statute then lists applications that are excluded from this definition, stating that the term "social media platform" does not include internet-based services or applications in which the "predominant or exclusive function" falls within sixteen specifically enumerated categories like providing email or interactive gaming. *See* § 6-1-1601(4)(b).

NetChoice contends that § 6-1-1601(4) is unconstitutionally vague because it does not define "predominant or exclusive function," and because one inclusion criterion—allowing users to create an account "for the purpose of allowing users to create, share, and view user-generated content," § 6-1-1601(4)(a)(II)—does not specify whose "purpose" is at issue. See Mot. at 24. Both arguments fail.

The terms "predominant" and "exclusive" have plain, readily understood meanings. *See Fabrizius*, 129 F.4th at 1237 (statutes are vague only if they fail to give "a person of ordinary intelligence fair notice"). "Predominant" means the "most frequent or common," while "exclusive" means single or sole. These are words of common

understanding. *See id.* at 1238; *see also 511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1296 (6th Cir. 1986) (rejecting argument that "predominant" is vague).[6]

The Colorado statute is also clear about whose purpose is at issue. A social media platform is one that "[p]ermits a person to become a registered user, establish an account, or create a public or semipublic profile for the purpose of allowing users to create, share, and view user-generated content through the account or profile." § 6-1-1601(4)(a)(II). While NetChoice questions whether the "purpose" is the platform's or the user's, the full text of the provision shows it is the platform's purpose, since only the platform "allow[s] users to create, share, and view user-generated content." *Id*.

A person of ordinary intelligence would understand what companies and services are subject to § 6-1-1601. To the extent any uncertainties exist around the margins, those hypotheticals do not render the statute unconstitutional. *See Fabrizius*, 129 F.4th

[6] NetChoice's citation to *NetChoice, LLC v. Griffin*, 23-cv-5105, 2025 WL 978607, (W.D. Ark. Mar. 31, 2025)—an out-of-circuit, non-precedential case—is not to the contrary. There, the district court enjoined an Arkansas law requiring social media companies to implement "reasonable age verification" measures. *Id*. at *1. The court applied a "more stringent vagueness test" than applies here, as the Arkansas law conditioned access to speech on age-verification processes (versus here, where the law does not limit users' access to speech) and imposed criminal penalties for noncompliance (versus the Colorado law, which does not). *See id.* at *15. Applying these more stringent standards, the Arkansas court found that the law's core definition of a "social media company" was vague, and that this vagueness was compounded by other undefined terms like "predominant . . . function." *See id.* at *16. Here, by contrast, § 6-1-1601's core definition of "social media platform" is not vague; the phrase "predominant or exclusive function" appears only in the definitional carve-outs that narrow the statute's coverage; and this term is further narrowed by sixteen itemized categories that themselves contain measurable quantifiers. *See generally* § 6-1-1601(4)(b). Read together, these provisions provide ample notice of what services fall within, or without, the statute's scope.

at 1238 ("That there may be some borderline questions to decide is [thus] not fatal" to a law being challenged.) (citation omitted). § 6-1-1601(4) is not vague.

B. The law offers companies bounded discretion in how to comply.

Finally, § 6-1-1601's operative warning provisions are equally straightforward. As discussed above, the statute sets forth two options for compliance, and what NetChoice characterizes as vagueness is actually a form a discretion. To the extent questions remain about the required function, the statute provides for additional administrative guidance that is not yet in place, making NetChoice's vagueness claims unripe. Courts have repeatedly observed that agency guidance can clarify statutory language and reduce vagueness concerns. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989) ("[I]n evaluating a facial challenge . . . a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.") (citation omitted).

This principle is particularly applicable in the context of economic regulations, where a less strict vagueness test is applied because regulated entities can seek clarification through administrative processes or inquiries. *Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 504 (1982). In this case, for example, NetChoice has the option of suggesting resources for the state's Media Literacy Resource Bank (one of the resources from which a regulated company's disclosure may be drawn, *see* § 6-1-1601(2)),[7] or engaging directly with the Chief Information Officer or the director of the

[7] *See supra* note 1.

center for health and environmental data division, both of whom will play a role in establishing the standards, § 6-1-1601(5).

Thus, to the extent NetChoice claims that § 6-1-1601 is vague even considering the anticipated guidance, those claims are not yet ripe and lack the factual record necessary for adjudication. *See, e.g.*, *Bonta II*, 2025 WL 2600007, at *10 (rejecting NetChoice's challenge to California's age verification law on ripeness grounds because "the state attorney general has not yet issued regulations defining what NetChoice members must do to verify users' age. Nor is there any indication what those regulations will require.").

In sum, facial invalidation is "strong medicine," reserved only for statutes that are vague "in the vast majority of [their] applications" or "impermissibly vague in all of [their] applications." *Dr. John's, Inc. v. City of Roy*, 465 F.3d 1150, 1157 (10th Cir. 2006); *Dias v. City & Cnty. of Denv.*, 567 F.3d 1169, 1179–80 (10th Cir. 2009). NetChoice cannot meet that burden here. The statute provides clear guidance and bounded discretion for how companies may comply, and promises additional clarity in the form of forthcoming standards. That "plainly legitimate sweep" forecloses NetChoice's challenge. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008).[8]

CONCLUSION

The Court should deny the Motion for a Preliminary Injunction.

[8] If the Court determines that NetChoice is likely to succeed on the merits of its claims, the Attorney General concedes that the remaining preliminary injunction factors weigh in favor of an injunction.

Respectfully submitted this 19th day of September, 2025.

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