IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

NETCHOICE, *Plaintiff*, v. PHILIP J. WEISER, in his official capacity as Attorney General of Colorado, *Defendant*.	Civil Action No. 1:25-cv-02538-WJM-KAS

PLAINTIFF NETCHOICE'S REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Argument

I. NetChoice is likely to prevail on the merits of its claim that the Act's compelled-speech requirements violate the First Amendment.

A. The Act's compelled-speech requirements trigger strict scrutiny.

1. Defendant does not dispute that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and thus triggers strict scrutiny. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988); *see* Mem.9-12.

The Act "clearly compels speech by requiring covered businesses to opine on potential harm to children" from use of their websites. *NetChoice, LLC v. Bonta*, 113 F.4th 1101, 1117 (9th Cir. 2024). Defendant cannot dispute that these questions are "subject to good-faith scientific or evidentiary dispute." *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 281-82 (5th Cir. 2024). Yet, the Act would force NetChoice's regulated members to opine on this debate, limited by the sources provided by the State and on pain of penalty for any alleged misstatements.

Defendant's response seems to be that websites have some latitude to choose how to word their state-mandated opinion. NetChoice already explained that this purported freedom to "speak[] freely," Opp.1, 11, does not cure the First Amendment problems. *See* Mem.10-11. The government compelling covered websites to *form* an opinion and speak that opinion on this contentious topic violates the First Amendment. In addition, Defendant does not dispute that "the developing body of research about 'social media' does not contain information about *every* social media website regulated by the Act," yet all of those websites will need to opine anyway. Mem.14-15.

Even this purported latitude websites have to author their government-compelled conclusions may be illusory. Defendant does not address NetChoice's argument "that the 'particular message' Colorado wishes these warning notifications to convey is *negative*." Mem.10-11. That is why the compelled speech would be "fundamentally at odds with the covered

websites' missions." *Contra* Opp.14. Defendant—who enforces the Act—has already formed his opinion about what these studies conclude. *E.g.*, Att'y Gen. Phil Weiser, *Bipartisan coalition of attorneys general call for Congress to require surgeon general warning on social media platforms* (Sept. 10, 2024), https://perma.cc/22EE-9KVN ("bodies of research that link these platforms to psychological harm"). So Defendant expects websites to "publicly condemn" themselves, which violates the First Amendment. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).

2. Nor does Defendant seriously dispute that the Act selects covered websites based on the content those websites disseminate. It does so by *excluding*, among others, "[n]ews, sports, entertainment," "interactive gaming," "professional networking," and "[a]cademic or scholarly research" websites, § 6-1-1601(4)(b); and *including* websites that "allow users to interact socially with each other," § 6-1-1601(4)(a)(IV); Mem.19-20.

Defendant contends the Act does not "trigger[] strict scrutiny [solely] because it targets only some internet companies." Opp.11-12. That is not NetChoice's argument. The Act triggers strict scrutiny by choosing regulated websites based on the content they disseminate. *See* Mem.19-20. For instance, the Supreme Court has held that "'news[]'" is a "'content based'" category. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (citation omitted). Whether the Act is construed as (1) content-based or (2) speaker-based and "reflect[ing] a content preference," strict scrutiny applies. *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (citation omitted). Defendant's failure to refute this point means he has "waived" it. *Estate of Strong v. Schlenker*, 2019 WL 3252159, at *3 (D. Colo. July 19, 2019) (collecting cases).

B. *Zauderer* does not apply.

Defendant incorrectly argues that *Zauderer*'s standard applies. Opp.10-14. *Zauderer* applies only to non-burdensome, "purely factual and uncontroversial" disclosures about a company's own services necessary to cure "inherently misleading" "advertisements." *Zauderer v.*

Office of Disciplinary Counsel of Supreme Ct. of Ohio, 471 U.S. 626, 629, 641, 651 (1985).

Zauderer is a narrow exception to the rule that the State cannot "compel[] individuals to speak." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) ("*NIFLA*"). The Tenth Circuit has explained that *Zauderer* applies to disclosures intended to prevent consumer deception in commercial speech: "*Zauderer* . . . eases the burden of meeting the *Central Hudson* [commercial-speech intermediate scrutiny] test. . . . *Zauderer* presumes that the government's interest in preventing consumer deception is substantial, and that where a regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored." *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005).

1. The Act does not regulate or compel commercial speech.

Defendant incorrectly contends that the Act "regulates commercial speech because the entire relationship between the regulated platforms and its users is commercial." Opp.8; *see* Opp.8-10. That is wrong, as NetChoice already explained. *See* Mem.12-15.

Simply because a publisher is a "for-profit" business, Opp.9 n.3, does not diminish that publisher's First Amendment rights, *see* Mem.15. Whatever commercial relationship exists between covered websites and their users, the compelled disclosures here "do not strike at the commercial aspect of the relationship . . . , they tackle the social speech aspect of it." *NetChoice, LLC v. Yost*, 778 F. Supp. 3d 923, 949 (S.D. Ohio 2025). The Denver Post, for instance, has a commercial relationship with its online subscribers. But a state-mandated disclosure about the effects of reading the paper's news stories would not regulate that commercial relationship. It would regulate the published speech itself—that is, the newspaper's speech service—and *not* commercial speech about a transaction to buy that service. Here, the Act requires covered websites to opine on how using these speech services *generally* affects users' health. And *general use* of a covered website necessarily entails interaction with the "distinctive expressive offering[s]" on the

service. *Moody v. NetChoice, LLC*, 603 U.S. 707, 711, 719 (2024). That is why the Act's disclosures are "inextricably intertwined with otherwise fully protected speech." *Riley*, 487 U.S. at 796; *see* Mem.15-16; *contra* Opp.7-8, 18-20.

The Fifth Circuit's ruling in *Free Speech Coalition v. Paxton*, that warning requirements for pornographic websites compel only commercial speech, is both distinguishable and wrongly decided. *See* Mem.9. That case is distinguishable because placing warnings on social media is much "closer to a paywall on a newspaper—core, protected speech." *Free Speech Coal.*, 95 F.4th at 281; *e.g.*, *Yost*, 778 F. Supp. 3d at 948 ("social media operators are" akin to "publishers of opinion work—a newspaper limited to 'Letters to the Editor' "). The websites here are thus distinct from the pornography websites that are "more like the entrance to a strip club—commercial activity with a speech element." *Free Speech Coal.*, 95 F.4th at 281. The Fifth Circuit was also wrong to conclude that "offer[ing content] in exchange for data" makes a website engaged in commercial speech. In any event, the Fifth Circuit recognized that even under this commercial-speech analysis, the government cannot compel "contentious and controversial" speech. *Id.* at 282.

2. The Act is not a means of preventing consumer deception.

Nothing in the disclosures are designed to "prevent[] consumer deception." *Wenger*, 427 F.3d at 849. Defendant cites out-of-Circuit cases suggesting *Zauderer* applies "when the government requires health and safety warnings." Opp.15 & n.4. But this Court is bound by *Wenger*, identifying *Zauderer*'s purpose as "preventing consumer deception." 427 F.3d at 849.[1]

Zauderer imposes a lenient standard for compelled speech designed to cure "misleading"

[1] Multiple other Circuits, too, have recognized *Zauderer*'s limited reach to preventing consumer deception. *See Recht v. Morrisey*, 32 F.4th 398, 416 (4th Cir. 2022); *Dwyer v. Cappell*, 762 F.3d 275, 282 (3d Cir. 2014); *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 166-68 (5th Cir. 2007); *Cent. Ill. Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987).

commercial speech because the government can *outright prohibit* misleading commercial speech. 471 U.S. at 638. So the compelled disclosure is a lesser-included power. But when the commercial speech is not misleading, the government cannot prohibit it outright, and it must satisfy heightened First Amendment scrutiny. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). It follows that commercial-speech disclosures must do the same. And *non-commercial*-speech disclosures must satisfy strict scrutiny. *See Riley*, 487 U.S. at 795.

That makes this case unlike *Wenger* (Opp.9), which analyzed a law that "makes it unlawful to publicize a stock for consideration . . . without disclosing the fact and amount of the payment." 427 F.3d at 843. The Tenth Circuit concluded that "[p]aid promoters . . . serve as the medium through which a company may promote its stock" (*i.e.*, commercial speech) and thus the promoters can be made to disclose that relationship. *Id.* at 847. Here, the Act does not compel disclosures intended to prevent deception about potential "conflicts of interest." *Id.* at 848.

3. The Act does not compel "factual" and "uncontroversial" information.

Today, there are intense and ongoing social, cultural, scholarly, and legal debates about whether and how social media affects users' well-being. Mem.16-18. So—like comic books, Rock and Roll, and video games before it—there are few more controversial issues in modern society related to speech and minors than "social media" use. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 797-98 (2011). Defendant thus incorrectly asserts that requiring websites to opine on that topic only compels disclosure of "factual, non-controversial information." Opp.1; *see* Opp.14.

Defendant suggests that the Act's compelled speech "will be evidence-based and informed by peer-reviewed scholarship" and, somehow, "will [not] be subject to such good-faith dispute." Opp.11. This argument suggests that compelling speech about what a state-cherrypicked subset of studies say cannot be controversial, because it is purportedly uncontroversial to acknowledge that these studies in fact say what they do. But NetChoice's entire point is that the findings of these

studies are part of a broader "good-faith scientific or evidentiary dispute." *Free Speech Coal.*, 95 F.4th at 281-82. So the question is whether the studies themselves recount *findings* that are hotly contested. For example, the Surgeon General's Advisory acknowledges that ongoing controversy, even as it takes one side of it. *See* Opp.13. (The Surgeon General taking this position underscores that government speech is an alternative to compelling speech from private actors. *See infra* p.7.)

Defendant thus misplaces his reliance on *CTIA-The Wireless Association v. City of Berkeley*, 928 F.3d 832 (9th Cir. 2019), for the idea that "empirical certainty is not necessary." Opp.13. The problems here go beyond a mere lack of "empirical certainty." Regardless, the existence of "a debate in the scientific community" can make compelled speech "controversial." *CTIA-Wireless Ass'n v. City & Cnty. of S.F.*, 494 Fed. App'x 752, 753-54 (9th Cir. 2012), *reasoning adopted in Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1280 (9th Cir. 2023). Here, the "current vigorous debate surrounding" the effects of social media use on minors makes the Act's compelled speech necessarily controversial. *Wheat Growers*, 85 F.4th at 1283.

Defendant also incorrectly asserts that "the topic of youth mental health and social media is not categorically 'controversial,' as NetChoice's own members acknowledge the concern." Opp.14. Private entities can choose to engage in controversial speech. The First Amendment prohibits the *government* from forcing them to do so. For instance, in *NIFLA*, the regulated clinics chose to engage in their own speech related to abortion—yet abortion remained "anything but an 'uncontroversial' topic." 585 U.S. at 769.

C. The Act fails any level of First Amendment scrutiny.

The Act's compelled disclosures fail any form of First Amendment scrutiny, including intermediate and *Zauderer* scrutiny. *See* Mem.21-23; *id.* at 20 (citing intermediate scrutiny standard from *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)). So NetChoice does not "stake[] its case on strict scrutiny" alone. Opp.20. Defendant's other arguments fail. Opp.20-21.

Colorado lacks a sufficient governmental interest in compelling controversial speech. So Defendant's asserted interest in "protect[ing] children from harm" states the governmental interest at too high a level of generality. Opp.16-18. That is why the existence of private "third-party tools" matters when assessing governmental interests, contrary to Defendant's assertion. Opp.17-18. "Even if" the government's interest could be advanced "further by increasing regulation"—here, compelling speech—"the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 564 U.S. at 803 n.9.

Regardless of the State's interest, the State has myriad alternatives to "ensur[e] that children have access to evidence-based information about the physical and mental health impacts of social media," Opp.1, "without burdening a speaker with unwanted speech," *Riley*, 487 U.S. at 800; *see* Mem.22. Defendant's opposition acknowledges this: unchallenged portions of the Act are "designed to create resources for Colorado students, parents and educators." Opp.2. Defendant responds with a conclusory sentence that "exercising government speech or requiring classes in school are not substitutes for direct disclosures at the point of use." Opp.20. But Defendant offers no authority for this bare assertion. Even if it were true that the Act's disclosures were "marginal[ly]" more effective, that slightly increased effectiveness is not enough under heightened First Amendment scrutiny. *Brown*, 564 U.S. at 803 n.9. The same is true for Defendant's other one-sentence responses to the Act's multiple tailoring flaws. *Compare* Opp.20, *with* Mem.21-23.

D. The Act's compelled-speech requirements are both facially unconstitutional and unconstitutional as applied to the extent they compel speech from NetChoice's regulated members.

1. The compelled-speech requirements should "be struck down in [their] entirety," because their "unconstitutional applications substantially outweigh [their] constitutional ones." *Moody*, 603 U.S. at 723-24. "[A]ll aspects of the" compelled-speech requirements "in every application to a covered social media company, raise the same First Amendment issues": The Act's "provisions

compel every covered social media company to reveal its [] opinion about contentious issues." *X Corp. v. Bonta*, 116 F.4th 888, 899 (9th Cir. 2024). So the Act's compelled-speech "provisions raise the same First Amendment issues for every covered social media company." *Id.*

This facial-challenge inquiry "first" asks what "actors" and "activities" are regulated. *Moody*, 603 U.S. at 724. The Act's scope is not in dispute; the parties *agree* it regulates "social media." *E.g.*, Mem.4-5; Opp.20. So there are no questions about different "kinds of" websites that might "fall on different sides of the constitutional line." *Moody*, 603 U.S. at 718, 726.

And the Act imposes the same requirement on every covered websites to opine on one of the more controversial issues today. *See* Mem.5-7; 9-12. So this Act does not regulate algorithms, content moderation, or any purportedly fact-intensive aspect of any website's operations. *Contra* Opp.6 (citing cases purportedly implicating such fact-intensive First Amendment questions). The "pertinent facts" are therefore "the same across the board." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 618 (2021) (analyzing compelled-disclosure law).

Because the Act compels speech in every application, its presumptively unconstitutional applications "substantially outweigh" its constitutional ones. *Moody*, 603 U.S. at 723-24. And that shifts the burden to Defendant to show that the Act satisfies heightened First Amendment scrutiny.

2. The Act is also unconstitutional "to the extent," *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), it compels speech from 10 websites operated by eight NetChoice members: (1) Facebook; (2) Instagram; (3) Nextdoor; (4) Pinterest; (5) Reddit; (6) Snapchat; (7) Threads; (8) Tumblr; (9) X; and (10) YouTube. Mem.2-3.

NetChoice can raise as-applied claims on behalf of its regulated members. Mem.7-8. "[B]cause only declaratory and injunctive relief . . . are sought, individual members need not be present for a court to afford relief." *New Mexico ex rel. Richardson v. Bureau of Land Mgm't*, 565

F.3d 683, 696 n.13 (10th Cir. 2009). So NetChoice has associational standing to raise as-applied claims (no less than its facial claims): "its members would otherwise have standing to sue . . . , the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members." *Id.* (citation omitted).

But Defendant contends "the broad discretion afforded to social media companies . . . leaves the Court unable to analyze any specific application" to any particular member. Opp.4-5. That misunderstands the relevant "application[s]" of the law: whether the State can force websites to opine on the highly controversial topics demanded by the Act. NetChoice's First Amendment claims do not turn on precisely *how* members could comply with the Act. Rather, NetChoice asks the court to consider whether the Act is unlawful "to the extent" it compels speech from these 10 regulated websites, and not other websites it might cover. *Reed*, 561 U.S. at 194.

In Defendant's view, regulated websites would first need to identify the precise speech they would engage in to comply with the Act before they are allowed to challenge the Act's unconstitutional compelled-speech requirement. Whatever that precise speech would be makes no difference to the First Amendment merits analysis. If anything, it would compound the First Amendment violations imposed by the Act to require these websites to identify how precisely they would opine on the Act's controversial topics. It would just compel these websites to engage in the speech this lawsuit seeks to prevent. Nothing puts covered websites to that Catch-22.

Even assuming *some* member participation were necessary, NetChoice has associational standing. The question is whether its claims require members' "*excessive* participation," which this case does not. *Borrero v. United Healthcare of N.Y., Inc.*, 610 F.3d 1296, 1306 (11th Cir. 2010) (emphasis added). That distinguishes this case from *Bonta* (Opp.5, 21 n.5), where the Ninth Circuit (incorrectly) held that evaluating California's parental-consent requirement for minors to

access personalized feeds "requires review of each member's algorithm." *NetChoice, LLC v. Bonta*, 2025 WL 2600007, at *6 (9th Cir. Sept. 9, 2025) (citation omitted), *pet. for reh'g filed* Sept. 23, 2025, *resp. requested* Sept. 30, 2025. No such analysis is required here to identify the Act's coverage or its First Amendment flaws. Defendant does not claim otherwise.

II. NetChoice is likely to prevail on the merits of its claim that the Act is unconstitutionally vague.

Multiple aspects of the Act are unconstitutionally vague. Mem.23-25. Defendant errs by arguing that NetChoice must "show that no set of circumstances exists under which the statute would be valid." Opp.21 (cleaned up). A facial vagueness challenge "is available" when a law "reaches a substantial amount of constitutionally protected conduct." *Jordan v. Pugh*, 425 F.3d 820, 828 (10th Cir. 2005) (citation omitted); *see* Mem.23-24.

The Act's coverage definition is vague because it turns on a website's "predominant or exclusive function." § 6-1-1601(4)(b). Defendant only feebly attempts to distinguish *NetChoice, LLC v. Griffin*, 2025 WL 978607 (W.D. Ark. Mar. 31, 2025), which held unconstitutionally vague a similar coverage provision. *Compare* Mem.24, *with* Opp.23 n.6.

The Act's operative requirements also are unconstitutionally vague. Defendant's opposition seemingly confirms that *both* options for the warnings compelled by the Act require covered websites to provide minor users information about "the impact of social media." § 6-1-1601(2); *see* Mem.7, 11-12, 24-25. But nothing in Defendant's opposition clarifies the Act's vague command for websites to opine on that impact to the State's satisfaction. *See* Mem.24-25.

Conclusion

Because NetChoice is likely to succeed on the merits and Defendant does not contest that the remaining equitable factors support injunctive relief, *see* Mem.25, this Court should grant NetChoice's motion for preliminary injunction before the Act takes effect on January 1, 2026.

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Respectfully submitted,

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