



Proposed Social Media Warning Labels Raise First Amendment Concerns

by Jeremy Broggi, Boyd Garriott, and Stephanie Rigizadeh

Cigarette cartons have long borne the “surgeon general’s warning.” Now, the eponymous head of the U.S. Public Health Service Commissioned Corps has a new target, arguing “it is time to require a surgeon general’s warning label on social media platforms, stating social media is associated with significant health harms for adolescents.”¹ The proposal has garnered support from officials in 42 states² and would, if enacted, require social media companies to convey the surgeon general’s view that their products are harmful—even if the companies (and other experts) strongly disagree.

That raises free speech concerns. The Supreme Court has said many times that it “offends the First Amendment” for a government to “force an individual to include other ideas with his own speech that he would prefer not to include.”³ In general, the Supreme Court reviews such compulsions under “strict scrutiny” because, by telling a person what to say, the government necessarily regulates the content of that person’s speech.⁴ But the Supreme Court has sometimes applied a more deferential standard to laws that require persons to disclose factual, noncontroversial information in their “commercial speech.” Under that standard, the government must prove that its disclosure requirement advances a sufficiently important interest and is “purely factual,” “uncontroversial,” and “not unjustified or unduly burdensome.”⁵

The Supreme Court’s tests recognize a legitimate role for governments to ensure an honest commercial marketplace, including through compelled disclosure of certain noncontroversial information like honest weights and measures. But its tests guard against government efforts to use purported disclosures to advance one side of a policy debate. A key issue in many commercial-speech cases, therefore, is whether a proposed mandate states purely factual and uncontroversial information necessary to mitigate a real harm, or whether it simply endorses the government’s preferred point of view in a contested policy debate.

Here, even the surgeon general does not present his proposal as conveying only information that is free from reasonable dispute. Despite invoking an analogy to cigarettes, the surgeon general

¹ Vivek H. Murthy, [Surgeon General: Why I’m Calling for a Warning Label on Social Media Platforms](#), NEW YORK TIMES (June 17, 2024).

² [Letter from Attorney General Rob Bonta et al. to the Honorable Mike Johnson et al.](#) (Sept. 9, 2024).

³ *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023).

⁴ See, e.g., *Natl. Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

⁵ *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 651 (1985).

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acknowledges that unlike tobacco, the data about the effects of social media use on kids and teens are mixed.⁶ That was the message of a report his office published last year, which concluded that “social media presents a meaningful risk of harm to youth, while also providing benefits.”⁷ Some other experts believe these correlations are weak, or that there is insufficient data to justify broadly discouraging youth social media use.⁸ Yet none of this nuance is captured in the surgeon general’s proposed warning, which would convey only that there is risk of harm.

Courts are generally skeptical of compelled warnings that force companies to repeat as fact the government’s view on an unsettled issue. For example, the Ninth Circuit recently enjoined California’s cancer warnings as applied to glyphosate-based herbicides in one case and to acrylamide in foods in another case, concluding in each that a vigorous debate surrounding the scientific validity of California’s warnings meant they could not stand.⁹ The Fifth Circuit similarly enjoined a Texas statute that would have required certain websites to display health warnings describing the contents of those sites as “potentially biologically addictive,” observing that “similarly credentialed and persuasive experts” disagreed about whether that was true.¹⁰

This does not mean the First Amendment bars government officials from taking a position on the desirability of social media use by kids and teens, or on any other topic. After all, as Justice Scalia once quipped, “It is the very business of government to favor and disfavor points of view on innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary.”¹¹ But the First Amendment *does* stop the government from forcing private parties to convey its views on contested topics, and courts are vigilant about enforcing that limitation to protect debate on important public issues.

Because the surgeon general’s proposed warning label would require social media companies to convey the surgeon general’s view that their products are harmful despite what appears to be at least reasonable disagreement on that topic, it may not satisfy the First Amendment.

⁶ See Murthy, *supra* (“[I]n an emergency, you don’t have the luxury to wait for perfect information. You assess the available facts, you use your best judgment, and you act quickly.”).

⁷ Office of the Surgeon General, *Social Media and Youth Mental Health*; see *Social Media and Youth Mental Health: the U.S. Surgeon General’s Advisory*, U.S. Public Health Service at 5 (2023).

⁸ See, e.g., Annalisa Merelli, *What’s the evidence for the surgeon general’s proposed social media warning?*, Stat (June 17, 2024).

⁹ See *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1266 (2023); *California Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 478 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 1749 (2023).

¹⁰ *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 268 n.5, 282 (5th Cir.), *cert. granted on other grounds*, 144 S. Ct. 2714 (2024).

¹¹ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (parenthetical omitted).