No. 25-1456

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NETCHOICE,
Plaintiff-Appellee,

v.

PHILIP J. WEISER, in his official capacity
as Attorney General of the State of Colorado,
Defendant-Appellant.

On Appeal from the U.S. District Court for the District of Colorado
Hon. William J. Martinez – Case No. 25-2538

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE AND AFFIRMANCE

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, it often appears as amicus curiae in important First Amendment cases to oppose government efforts to compel speech. *E.g.*, *Moody v. NetChoice*, 603 U.S. 707 (2024).

INTRODUCTION AND SUMMARY OF ARGUMENT

Even when it comes to safeguarding our kids, adult lawmakers must follow the First Amendment. Yet Colorado claims the power to compel a private actor to spout—repeatedly and regularly—the State's preferred spin of its hand-picked research. Colo. Rev. Stat. § 6-1-1601(1–3). What's more, the State says it can hijack private speech without paying the price of any constitutional scrutiny at all—Colorado contends its law can survive review merely because it has a rational basis.

That's quite the ask. Let's see if the statute justifies it.

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* No party's counsel authored any part of this brief. No one, apart from Amicus and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to WLF's filing of this brief.

Colorado directly targets social media platforms—defined as any sufficiently popular "internet-based service, website, or application that" allows people to "create or post content that can be viewed by other users" and "allow[s] users to interact socially with each other within the service or application." Colo. Rev. Stat. § 6-1-1601(4)(a). Under the law, those companies are given a choice. Either regularly harass underage users to get off the platform every half-hour at a time and place of the State's choosing, *id*. § 6-1-1601(3), or develop a capacity to—at times and places of the State's choosing, *id*. § 6-1-1601(5)—give minor "users . . . 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." *Id*. § 6-1-1601(2).

Companies aren't really allowed much leeway to script that message themselves, either. While they can use "data from peer-reviewed scholarly articles" to create the interruption, a company is obviously more safe-harbored if the company uses "sources included in the [government's] mental health and technology resource bank," *id*., and follows the State's "sample messaging for the content of the notification." *Id*. § 6-1-1601(5).

It's a clever incentive structure. No company will want to repeatedly harangue a user off the platform on the State's command, so the rational play is to accept Colorado's educational tasking. And while Colorado pretends to let companies draft that interruption themselves, the safest course is to parrot the State's sociological orthodoxies exactly as the State writes them—especially given the significant penalties on deck if a company doesn't walk the line. *Id.* §§ 6-1-110; 112.

Give Colorado credit—it's not bashful. It insists that it can curate a suite of state-backed research and "suggested" messaging, force a platform to harass a slice of its own audience with those results, and never have to prove that this takeover of private speech for public purposes is narrowly tailored. Why? Because it's acting out of an altruistic motive—shielding the State's most vulnerable from alleged harm—and because its mandatory interruptions touch only commercial speech.

That's wrong on both counts. The State doesn't get to avoid the rigors of judicial review by asserting it's doing a good thing. Otherwise, every government could juke strict scrutiny by gesturing vaguely in the direction of the welfare of children. *Cf. Yellowbear v. Lampert*, 741 F.3d

48, 57 (10th Cir. 2014) (Gorsuch, J.) ("At some great height, after all, almost any state action might be said to touch on one or another of the fundamental concerns of government") (internal quotation marks and citation omitted).

And Colorado isn't really regulating the conduct of children anyway. It's directing the speech of corporations. Not just any corporate actors either, but those social media platforms that are "essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire . . . to engage in a wide array of First Amendment activity on topics as diverse as human thought." *Packingham v. North Carolina*, 582 U.S. 98, 104–05 (2017) (internal quotation marks and citation omitted). Interfering with those "expressive products," *Moody*, 603 U.S. at 716, is hardly equivalent to regulating truthful, but less constitutionally privileged speech, *Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y.*, 447 U.S. 557, 564–65 (1980), that "pertain[s] to a commercial transaction," *Citizens United v. FEC*, 558 U.S. 310, 369 (2010)—let alone the government's anodyne correction of self-evidently fraudulent commercial advertising. *Zauderer v. Off. of Disciplinary*

Counsel, 471 U.S. 626, 651 (1985); *cf. United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005).

In sum, Colorado's request is audacious because the Constitution is pellucid—the State's content-based regulation of speech must be subject to strict scrutiny, which it cannot survive. Colorado has a bevy of less-restrictive options at hand to encourage young people to have a healthier relationship with social media: public-education campaigns, carefully constructed age-verification rules, more robustly funded social programs targeted at kids' mental and physical well-being. Since Colorado could take any of these options, the Constitution compels cashiering the State's hijacking of social media to promote its own views.

ARGUMENT

COLORADO'S EXTRAORDINARY LAW CAN'T SURVIVE ORDINARY FIRST AMENDMENT REVIEW.

A. A laudable concern for the welfare of children, standing alone, is no shortcut around strict scrutiny.

Colorado doesn't like kids being on social media. Fair enough. It has a warehouse of inherent police powers and the bully pulpit to address that concern. U.S. Const. amend. X. But rather than select from any of the vast array of tools available to the States for legislating the welfare of children, Colorado chose to compel speech—not by the kids it claims to act for (and who have somewhat diminished First Amendment protections due to their age), but by social media platforms with unquestioned First Amendment rights.

Boldly, Colorado insists that this demand is "subject to a deferential, rational-basis review," Weiser Br. 13, "the minimum constitutional standard that *all* legislation"—even that which risks no constitutional injury—"must satisfy." *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 471 (2025) (emphasis supplied). That's quite the ask, and one the district court rightly spurned. The "internet [is not] somehow exempt from the full sweep of the First Amendment." *TikTok Inc. v. Garland*, 604 U.S. 56, 82 (2025) (Gorsuch, J., concurring).

True, Colorado invokes the protection of children, and there's no argument that's a state interest of the highest order. But the Constitution forbids courts from carrying a natural empathy for children into deference to state power. "'[I]llegitimate and unconstitutional practices get their first footing in that way.'" *Smith v. California*, 361 U.S. 147, 160 (1959) (Black, J., concurring) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). While the sake of the children is "before us today, the experience of mankind—both ancient and modern" is that "censorship" that is "considered by many to be 'the obnoxious thing in its mildest and least repulsive form' . . . can, and most likely will," metastasize until it reaches the bone of the body politic. *Id*. That's why "[e]ven where the protection of children is the object, the constitutional limits on governmental action apply." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 804–05 (2011).

In short, "[i]t is not the State's ends, but its means, to which we object." *Texas v. Johnson*, 491 U.S. 397, 418 (1989). Go back to the statute. Taken down to the studs, Colorado claims it can force, on pain of significant civil penalties, companies to either (1) aggressively encourage an underage user to stop speaking and associating with others or (2) use the company's platform to spout government-curated research to that same end. Colo. Rev. Stat. § 6-1-1601(1–3).

That's plainly of First Amendment moment. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (First Amendment protects "both the right to speak freely and the right to refrain from speaking at all"); *WLF v. Henney*, 56 F. Supp. 2d 81, 85–86 (D.D.C. 1999) (First Amendment forbids restrictions designed to "balance" a company's opinion and understanding of its own product), *judgment vacated in part due to lack of Article III controversy*, 202 F.3d 331 (D.C. Cir. 2000). If Colorado can do that, there's no real limit on what any government can force a private company to say—at any time, not just in an ad or at the point-of-sale—so long as it can point to a sensible sounding reason to justify itself.

Yes, the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (emphasis supplied). But Colorado isn't controlling the actions of children—it's controlling the speech of corporations. *Moody*, 603 U.S. at 746–47 (Barrett, J., concurring) ("Corporations, which are composed of human beings with First Amendment rights, possess First Amendment rights themselves").

And the State doesn't seek control via bog-standard economic regulation, corporate governance, or taxation—tools with modest or nonexistent First Amendment impact—but by mandating that its targets say things they don't believe. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and must be "consider[ed] . . . as a content-based regulation of speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). And any "law that is content based on its face"—flat ban or regulatory burden—"is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

B. No exception to strict scrutiny applies.

Colorado wants to opt out of that normal First Amendment rigor, and instead partake in "a deferential, rational-basis review" of its compelled-speech regime. Weiser Br. 13. Unsurprisingly, governments often seek rational-basis review because it's easier for them to win. Of course, that's precisely why the laugh test doesn't apply when the First Amendment is at stake. Colorado could step over the bar of rational basis with sheer conjecture, but "mere conjecture" is never "adequate to carry a First Amendment burden." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000). Undaunted, the State claims it gets rational-basis review through *Zauderer v. Office of Disciplinary Counsel.* Weiser Br. at 14–21. Colorado's wrong.

Let's go back to the original case—*Zauderer* "did not appear *ex nihilo*, nor can its analysis be read *in vacuo*." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 38 (D.C. Cir. 2014) (Brown, J., dissenting). Recall that Philip Q. Zauderer was a deceiver. A lawyer working on contingency, Mr. Zauderer wished to distribute ads that promised "'[i]f there is no recovery, no legal fees are owed by our clients.'" *Zauderer*, 471 U.S. at 631. But Zauderer didn't wish to inform his audience "that the client may have to bear certain expenses"—namely, costs. *Id.* at 650. So his commercial advertisements courted a "self-evident" risk of fraud. *Id.* at 652. A lay consumer might consider a "no fees" ad as a pitch for genuinely free-if-you-lose-your-case legal services—then be suckered into signing a pay-costs-no-matter-what contract. The Supreme Court ruled that if Ohio wasn't going to ban Zauderer's deceptive speech (which it probably could), the State could certainly redline it to make it truthful and clarify that clients might carry costs.

As this Court has observed, in this way *Zauderer* merely "eases the burden of meeting the *Central Hudson* test['s]" exacting scrutiny for commercial speech, because it "presumes that the government's interest in preventing consumer deception is substantial, and that where a" deception-or-fraud-correcting "regulation requires disclosure only of factual and uncontroversial information and is not unduly burdensome, it is narrowly tailored." *Wenger*, 427 F.3d at 849; *Cent. Hudson*, 447 U.S. at 564–65.

So despite what the State says, *Zauderer* isn't a rational-basis review—but the application of *Central Hudson* with fewer steps in a closed set of circumstances. And so the *Zauderer* shortcut can't be had outside that narrowly defined set of cases where a commercial pitch is—at minimum—misleadingly incomplete and only compelled disclosure can finish the thought. *Wenger*, 427 F.3d at 850 ("[T]o the extent Section 17(b) requires stock publicists to disclose that they are receiving consideration from the companies they are promoting, it is tailored to prevent fraud and does not offend the First Amendment"); *id.* at 851 (invoking *Zauderer* to vindicate "the government's interest in . . . achieving more open securities markets," which fight credible risks of fraud).

That makes sense. Unlike rational basis, where "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data," *FCC v. Beach*

Commu'cns, Inc., 508 U.S. 307, 315 (1993), *Zauderer*'s presumption can be defeated when a law has an improper fit. For example, applying *Zauderer*, the Ninth Circuit rejected a commercial disclaimer that took up 20 percent of an ad, when the government's own evidence suggested it didn't need to go beyond 10 percent to get the job done. *Am. Bev. Ass'n v. City & County of San Francisco*, 916 F.3d 749, 757 (9th Cir. 2019). That outcome looks a lot like *Central Hudson*, which demands that a commercial regulation be "narrowly drawn" to "directly advance" a sufficiently vital state concern—and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U.S. at 564–65 (internal quotation marks and citation omitted); *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling) ("Even when the Court is not applying strict scrutiny," the First Amendment "require[s] 'a fit that . . . represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means[,] but a means narrowly tailored to achieve the desired objective'") (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal ellipses omitted)).

But that's all beside the point. *Zauderer*, and even the exacting scrutiny of *Central Hudson*, are inapt. Those standards of review apply when the government regulates speech that "only pertain[s] to a commercial transaction," *Citizens United*, 558 U.S. at 369, not the "ever-growing number of apps, services, functionalities, and methods for communication and connection," *Moody*, 603 U.S. at 725, that comprise social media. Colorado insists that it could place a "quintessential health and safety product warning" on garden-variety "commercial speech" and receive some looser form of judicial review. Weiser Br. 15. Perhaps. *Cf. Cent. Hudson*, 447 U.S. at 564–65. But Colorado isn't regulating commercial ads—or even commercial speech *qua* commercial speech. It's engaged in the content-based regulation of *social media itself*, this young century's "essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire . . . to engage in a wide array of protected First Amendment activity on topics as diverse as human thought." *Packingham*, 582 U.S. at 104–05 (internal quotation marks and citation omitted). Just by deeming its effort to hijack those expressive platforms a rote regulation of "commercial speech," Colorado can't make it so. "The First Amendment is no word game. And the rights it protects cannot be renamed away or their protections nullified by "'mere labels.'" *Chiles v. Salazar*, 607 U.S. __; 146 S. Ct. 1010, 1023 (2026) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963)).

At the last refuge, Colorado's theory boils down to this: It's targeting for-profit corporations and so it *must* be merely regulating commercial speech. But core speech—like social media—doesn't lose its First Amendment shield because of profit motive or corporate control. A foundational compelled-speech case is *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). The plaintiff's full name? The Miami Herald Publishing *Company*. Indeed, just this Term, the Supreme Court rejected Colorado's effort to compel talk therapists to recite state preferences—and the fact that Kaley Chiles came to practice therapy as a paid vocation rather than a volunteer avocation didn't stop eight justices from holding that the State couldn't "command [her] tongue" any more than it could "silence [her] voice." *Chiles*, 146 S. Ct. at 1021 (pluralization altered).

Strict scrutiny applies.

C. The State's regime can't survive strict scrutiny.

In every "First Amendment context, fit matters." *McCutcheon*, 572 U.S. at 218 (Roberts, C.J., controlling), and strict scrutiny demands more than a good-enough-for-government-work fit between ends and means. Because strict scrutiny safeguards civil society from "the direct targeting of fully protected speech," *Free Speech Coal.*, 606 U.S. at 484, Colorado must "*demonstrate* . . . [that reasonably available] alternatives are ineffective to achieve the government's stated goals." *Yellowbear*, 741 F.3d at 63 (emphasis in original).

Colorado can't do that here. The Constitution leaves untouched a veritable avalanche of tools for the State to encourage children to have a healthy relationship with social media. Colorado could engage in public-education campaigns to raise awareness of the alleged harms of social media overuse, ban the use of smartphones and social media at schools (reducing a minor's total exposure), impose modest age-verification rules, or provide more funding for mental and physical health services directed at children. All those means are less-restrictive than compelling speech. And their ready availability means that Colorado's compelled-speech measure flunks judicial review.

No doubt, these alternatives might be politically difficult to accomplish. But hard work for the government is no excuse for softening liberty. Besides, Colorado's failure to wrestle with difficult solutions is just another cost of mandatory disclosure. Because disclaimers are assumed to work and are cheap for the government to impose, they "undermine other regulation and ease pressure on lawmakers to enact better but more controversial regulation. Thus bad law drives out better." Omri Ben-Shahar & Carl Schenider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 170 (Kindle ed. 2014). Our children deserve the benefit of the best laws, not those that are simply the most convenient to pass—and most dangerous to a Constitution designed for us *and* our posterity.

CONCLUSION

Colorado holds no hall pass from strict scrutiny and can't carry its burden under that unforgiving standard. The district court got this one right. This Court should affirm.

Respectfully submitted,

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July 16, 2026

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,103 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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July 16, 2026

CERTIFICATE OF DIGITAL SUBMISSION

I certify that:

(a) All required privacy redactions have been made under Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5;

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July 16, 2026

CERTIFICATE OF SERVICE

I certify that on July 16, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the CM/ECF system, which will send notice to the attorneys of record here who are registered with the Court's CM/ECF system.

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