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Research Over Regulation: What Must be Done to Mandate Warning Labels on Social Media

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RESEARCH OVER REGULATION: WHAT MUST BE DONE TO MANDATE WARNING LABELS ON SOCIAL MEDIA

*John L. Markel**

Abstract

Recently, outcry for social media regulation has risen after leaks, whistleblowers, and new research suggest that youth social media use has negative impacts on mental health. These claimed negative impacts can range from a variety of symptoms and diagnoses such as depression, anxiety, eating disorders, body image issues, envy, sleep loss, addiction, and even ADHD. Of course, technology companies adamantly deny such accusations and instead point to the benefits social media has for the youth and our society overall. Additionally, they make clear that this research is far from conclusive. This situation is simply a modernization of the previous situation the United States dealt with less than a decade ago, in the battle against “big tobacco.” For decades, tobacco companies claimed that their products were not only safe, but beneficial. However, it wasn’t until decades of research established the risks of tobacco use and a 1964 report from the Surgeon General’s Advisory Committee on Smoking and Health that tobacco products were finally regulated, with regulations such as age verification, warning labels, and advertisement restrictions. Now facing the battle against technology companies, many are advocating for similar regulations against social media to protect the youth and make them aware of the potential negative impacts of social media use. Yet, the research available supporting these claims is not yet at the level of what was available when tobacco products were finally regulated. Because of this, an attempt to mandate warning labels on social media is currently unlikely to withstand a constitutional challenge. Premature regulation of social media may create legal precedent through the inevitable litigation that will only make it more difficult to regulate social media in the future. For now, advocates must push for additional research before regulation.

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INTRODUCTION

If the government had attempted to force tobacco companies to disclose the risks of using their tobacco products 100 years ago, before enough causative research existed establishing their harm, an interesting dilemma would’ve occurred. On the one hand, informing the public about the unknown risks of tobacco use would’ve saved countless lives had the government forced tobacco companies to disclose the potential for these risks. On the other hand, this premature regulation against a risk not yet fully established by research would directly go against the core of the First Amendment. Put simply, what can legally be done to warn the public during a possible health emergency when the health risk does not yet have enough evidence to establish its existence? In this dilemma, the government would have to answer the First Amendment’s question of what compelling interest the government has in forcing the tobacco companies to disclose the risk of their products. Yet, as frustrating as it seems, a risk not fully established by research is no risk at all in the eyes of the First Amendment. The freedom to speak, or not to speak, is held higher than a good intentioned premature disclosure of a possible risk. Thus, in this dilemma the government can provide no answer, as the government cannot have a compelling interest in preventing a risk that

has yet to be proven. As a result, this dilemma concludes with tobacco products continuing to enter commerce without any disclosure of their newly discovered possible health risks, and Americans continue to consume these products without any warning of what it may be doing to their body. Unfortunately, this dilemma must be faced again with renewed urgency due to the prevalence of social media.¹

The high usage of social media in American youth has led to many calls for concern and accusations that social media use is a cause of the youth mental health crisis.² Former Surgeon General Vivek Murthy recently claimed that “[t]he mental health crisis among young people is an emergency—and social media has emerged as an important contributor.”³ In 2023, former Surgeon General Murthy issued *Social Media and Youth Mental Health: The U.S. Surgeon General’s Advisory*, which emphasized that the brain undergoes a highly sensitive period of development between ages ten and nineteen, and frequent social media use can have a significant impact on how regions of the brain develop.⁴ This has led to forty-two state attorneys general to rally support behind the Surgeon General in urging Congress to mandate warning labels on social media.⁵ In response, Congress introduced the Stop the Scroll Act, which would “require the Federal Trade Commission, with the concurrence of the Secretary of Health and Human Services acting through the Surgeon General, to implement a mental health warning label on social media platforms.”⁶ Additionally, the Biden-Harris Administration created the Kids Online Health and Safety Task Force in

1. For the purposes of this Note, social media will be defined as “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content,” with Web 2.0 being described as a period beginning in 2004 that introduced platforms being continuously modified by all users in a collaborative fashion, rather than an individual. Andreas M. Kaplan & Micheal Haelein, *Users of the world, unite! The challenges and opportunities of Social Media*, 53 BUS. HORIZONS 59, 60–61 (2010).

2. Kathy Katella, *How Social Media Affects Your Teen’s Mental Health: A Parent’s Guide*, YALE MED. (June 17, 2024), <https://www.yalemedicine.org/news/social-media-teen-mental-health-a-parents-guide> [https://perma.cc/JSP9-QQXN].

3. Vivek H. Murthy, *Surgeon General: Why I’m Calling for a Warning Label on Social Media Platforms*, NY TIMES (June 17, 2024), <https://www.nytimes.com/2024/06/17/opinion/social-media-health-warning.html> (last visited May 12, 2025) [hereinafter *Warning Label*].

4. VIVEK H. MURTHY, SOCIAL MEDIA AND YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL’S ADVISORY 5 (2023) [hereinafter *Surgeon General’s Advisory*].

5. *42 State AGs Endorse Warning Labels on Social Media*, AM. BAR ASS’N (Sept. 27, 2024), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/september-24-wl/stage-ags-endorse-warning-labels-0924wl/ (last visited May 12, 2025).

6. Stop the Scroll Act, S. 5150, 118th Cong. (2024).

2023 to “protect youth mental health, safety, and privacy online,”⁷ with hopes of developing guidelines by 2024.⁸ Furthermore, multiple organizations have been created to bring awareness to the dangers of youth social media use. Yet, the Surgeon General admitted in the 2023 Advisory that we currently lack enough evidence to determine if social media is safe for youth, regardless of the growing amount of research regarding harms.⁹

For a mandated warning label on social media to withstand an inevitable First Amendment challenge by technology companies, advocates must first conduct high-quality research that will pass the existing legal tests before attempting to enact any regulation. When warning labels were mandated on tobacco products, a 1964 report by the Surgeon General’s Advisory Committee on Smoking and Health showed decades of extensive research establishing all of the health-related risks tobacco products cause.¹⁰ Yet, even with that level of research, litigation over the constitutionality of those warning labels has continued for over a decade and created two high-standard tests for warning labels to be upheld.¹¹ Mandating a warning label for social media would be premature and result in similar extensive litigation. The only way to overcome these constitutional hurdles is through causative longitudinal research that provides concrete evidence of the negative impact of social media usage on youth mental health. Once this research is available, the acting Surgeon General can generate a report establishing the validity of the risk which would likely allow for the government to successfully claim a

7. *Online Health and Safety for Children and Youth: Best Practices for Families and Guidance for Industry*, SAMHSA 1, 68 (2023), <https://www.samhsa.gov/kids-online-health-safety-task-force> [<https://perma.cc/E9XV-JPKP>].

8. *See It’s Time To Log Off*, LOG OFF MOVEMENT, <https://www.logoffmovement.org/> [<https://perma.cc/3PPT-97Q6>] (committing to helping youth “build healthy relationships with social media and online platforms”); *Childhood is Not For Sale*, WIRED HUMAN, <https://wiredhuman.org/> [<https://perma.cc/MHS3-EBRJ>] (advocating for protecting children from online exploitation and abuse); *Making Social Media Safe for Everyone*, ORG. FOR SOC. MEDIA SAFETY, <https://www.socialmediasafety.org/> [<https://perma.cc/2HHY-49C2>] (protecting against cyberbullying, hate speech, sexual harassment, propaganda, and depression/suicide).

9. Surgeon General’s Advisory, *supra* note 4, at 4 (“At this time, we do not yet have enough evidence to determine if social media is sufficiently safe for children and adolescents. We must acknowledge the growing body of research about potential harms, increase our collective understanding of the risks associated with social media use, and urgently take action[.]”).

10. *See Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, U.S. DEP’T OF HEALTH, EDUC., AND WELFARE (1964), <https://www.govinfo.gov/content/pkg/GPO-SMOKINGANDHEALTH/pdf/GPO-SMOKINGANDHEALTH.pdf> [<https://perma.cc/565R-4D7S>].

11. Dorothy Atkins, *Tobacco Cos. Ask Justices To Review FDA’s New Warnings*, LAW360 (Aug. 21, 2024, 9:22 PM), <https://www.law360.com/healthcare-authority/articles/1872339/tobacco-cos-ask-justices-to-review-fda-s-new-warnings> [<https://perma.cc/744D-8V4R>]. *See infra* Section II.B.2.

compelling interest in regulating social media. Until then, those calling for regulation must instead shift their call to action towards research.

This Note will examine the legal hurdles that a mandated warning label on social media, such as proposed in the Stop the Scroll Act, would have to overcome, and what advocates need to do to clear those hurdles. Part I will provide an analysis on the current state of research regarding social media usage's impact on youth and the current pitfalls of such research. This Part will also argue the current research does not yet fully support the claim that social media usage has a negative impact on youth mental health, and that evolutions of social media platforms may invalidate the existing research. Part II will explain the two possible First Amendment doctrines that could be applied to a mandated warning label on social media in determining whether they are constitutional. The compelled speech doctrine will be applied first, ultimately proposing the government cannot currently claim the compelling interest of warning youth about the risk of using social media because not enough evidence exists proving that the risk is real. Next, the compelled commercial speech doctrine will be applied to the mandated warning labels on social media, ultimately proposing it would fail for the previous reason in addition to limiting where the warning label could appear on a social media platform. Finally, Part III will advocate for what must be done in order to satisfy the strict demands of either doctrine, thus allowing mandated warning labels on social media to be held as constitutional. First, the Surgeon General's 2023 Advisory must be followed to quickly accumulate the research necessary for the acting Surgeon General to claim that social media usage has a negative effect on youth mental health. Lastly, depending on which First Amendment doctrine applies to warning labels on social media, it may be required that the research is conducted in a specific manner and by a specific agency.

I. THE CURRENT STATE OF RESEARCH REGARDING SOCIAL MEDIA'S IMPACT ON YOUTH

Currently, the research regarding social media usage's impact on youth mental health is in its infancy and contains several flaws.¹² While data is clear on the usage rate of social media in American youth, the impacts social media usage has is primarily correlative and only somewhat causative.¹³ Further, technology companies failing to be

12. For the purposes of this Note, "youth" will be defined as ages 0-17. While some of the research and case law in this Note use the terms "children" and "minors," they are used interchangeably and each refer to those under 18 years of age. If research refers to a specific age range within the youth, it will be explicitly stated.

13. See, e.g., Kira E. Riehm et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, JAMA PSYCHIATRY 1266, 1266

transparent with data and research leaves critical questions about these impacts unanswered. Finally, social media presents a unique problem where past research can become invalidated as social media platforms rapidly evolve in their designs and functions.

Social media use in American youth has become so prevalent that the percentage of youth who use social media is almost double the percentage who participate in sports.¹⁴ In a 2020 study, over one-third of parents said their child began interacting with smartphones before they were five years old.¹⁵ By the time children are fourteen, 92% have access to a smartphone, increasing to 97% by the time they reach seventeen.¹⁶ Social media use in children aged thirteen to seventeen is high, with some children going as far as describing their social media usage as “almost constant.”¹⁷ Regarding specific social media applications, children in this age group use YouTube the most at 93%, TikTok at 63%, Snapchat at 60%, and Instagram at 59%.¹⁸ Of these children who use those social media applications, 54% of them claim they would be hard to give up.¹⁹

The current research on social media usage’s impact on youth mental health shows some correlation to negative mental impacts.²⁰ Children who spend three or more hours a day on social media face double the risk

(2019) (“... spending more than 30 minutes of time on social media, compared with no use, was associated with increased risk of internalizing problems alone”).

14. *Compare State of Play 2024: Participation Trends*, PROJECT PLAY: ASPEN INST., <https://projectplay.org/state-of-play-2024-participation-trends> [https://perma.cc/2E45-QMXQ] (showing that 54% of youth aged 6-17 played sports in 2022), with *Social Media and Teens*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Mar. 2018), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Social-Media-and-Teens-100.aspx#:~:text=Social%20media%20plays%20a%20big,not%20including%20time%20for%20homework [https://perma.cc/BF39-CR24] (showing that 90% of teens ages 13-17 have used social media).

15. Brooke Auxier et al., *I. Children’s Engagement with Digital Devices, Screen Time*, PEW RSCH. CTR. (July 28, 2020), <https://www.pewresearch.org/internet/2020/07/28/childrens-engagement-with-digital-devices-screen-time/> [https://perma.cc/259J-4CAX].

16. Ani Petrosyan, *Percentage of Teenagers in the United States Who Have Access to a Smartphone at Home as of October 2023, by Age Group*, STATISTA (Feb. 28, 2024), <https://www.statista.com/statistics/476050/usage-of-smartphone-teens-age/#:~:text=Share%20of%20U.S.%20teenagers%20with%20smartphone%20access%202023%2C%20by%20age&text=According%20to%20a%202023%20survey, stated%20owning%20a%20smartphone%20device> [https://perma.cc/A6VN-PLBY].

17. Monica Anderson et al., *Teens, Social Media and Technology 2023*, PEW RSCH. CTR. (Dec. 11, 2023), <https://www.pewresearch.org/internet/2023/12/11/teens-social-media-and-technology-2023/> [https://perma.cc/55GQ-4C43].

18. *Id.*

19. Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), <https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/> [https://perma.cc/F82C-BYU6].

20. *See infra* note 21.

for depression and anxiety.²¹ The average teen spends 4.8 hours on social media per day.²² This excessive social media use has been shown in small studies to change brain structure in a similar nature that occurs in gambling addicts.²³ Additionally, about half of adolescents self-reported that social media makes them feel worse about their body, lonely or isolated, and that their life is worse than others.²⁴ Continually, social media promotes upward social comparison, comparing yourself to someone who is “better off,” which has been linked to increased body dissatisfaction and eating disorders in adolescent girls.²⁵ This has also led to body shame in adolescents going through puberty, as social media promotes impossible cultural body standards such as muscularity for boys and thinness for girls.²⁶ The reasoning for these findings has been shown through neuroscience research, which established three risk characteristics for adolescents having a negative reaction to social media: “(1) the heightened sensitivity to social cues; (2) increased emotional responses as a product of underdeveloped judgment regions and more mature emotion processing regions; and (3) social media’s ability to activate reward processing regions in the brain to motivate continued engagement.”²⁷ Furthermore, social media algorithms have been found to promote self-harm, suicide, hate content, and cyberbullying that creates a constant and influential impact on adolescent brains.²⁸ Finally, a

21. Kira E. Riehm et al., *Associations Between Time Spent Using Social Media and Internalizing and Externalizing Problems Among US Youth*, JAMA PSYCHIATRY (Sept. 11, 2019), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2749480> [https://perma.cc/G3LS-KEAV].

22. Jonathan Rothwell, *Teens Spend Average of 4.8 Hours on Social Media Per Day*, GALLUP (Oct. 13, 2023), <https://news.gallup.com/poll/512576/teens-spend-average-hours-social-media-per-day.aspx> [https://perma.cc/X99U-XZQ8].

23. Qinghua He et al., *Brain anatomy alterations associated with Social Networking Site (SNS) addiction*, 7 SCI. REP., Mar. 23, 2017, at 1, <https://www.nature.com/articles/srep45064> [https://perma.cc/CYG5-HWYP]; Holly Shannon et al., *Problematic Social Media Use in Adolescents and Young Adults: Systematic Review and Meta-analysis*, 9 JMIR MENTAL HEALTH, Apr. 14, 2022, at 2, <https://mental.jmir.org/2022/4/e33450> [https://perma.cc/C6GM-XYZQ].

24. David Brickham et al., *Adolescent Media Use: Attitudes, Effects, and Online Experiences*, DIGIT. WELLNESS LAB, Aug. 2022, at 14, https://digitalwellnesslab.org/wp-content/uploads/Pulse-Survey_Adolescent-Attitudes-Effects-and-Experiences.pdf [https://perma.cc/BQ6J-Z5KS].

25. Federica Pedalino & Anne-Linda Camerini, *Instagram Use and Body Dissatisfaction: The Mediating Role of Upward Social Comparison with Peers and Influencers Among Young Females*, 19 INT’L J. ENV’T RSCH. PUB. HEALTH 1, 3, 7–9 (Jan. 29, 2022).

26. Illyssa Salomon & Christia Spears Brown, *The Selfie Generation: Examining the Relationship Between Social Media Use and Early Adolescent Body Image*, 39 J. EARLY ADOLESCENCE 539, 548–52 (2022).

27. Nancy Costello et al., *Algorithms, Addiction, and Adolescent Mental Health: An Interdisciplinary Study to Inform State-Level Policy Action to Protect Youth from the Dangers of Social Media*, 49 AM. J.L. & MED. 135, 146–47 (2023).

28. Surgeon General’s Advisory, *supra* note 4, at 8.

systematic review of multiple studies from the past several years established an association between social media use and negative mental health problems, however some complexities exist.²⁹

The two primary issues with the current research on social media's impact on youth is the low amount of causative longitudinal research showing its impact and the rapid elusiveness of the social media platforms nullifying previous research. First, the Surgeon General has stated in the 2023 Advisory that several critical questions remain unanswered due to the lack of transparency and data from technology companies about the impact social media has on users, including questions that would establish possible benefits.³⁰ Second, the rapid changes in the models and functions of social media can invalidate previous studies and research as their insight is limited to outdated models.³¹ While the first issue can be remedied over time with additional research, the second issue will pose a constant challenge as social media platforms will continue to evolve and research based on outdated models may be considered inapplicable to arguments about its risks to youth mental health.

Overall, while some causative research is beginning to emerge about social media usage's impact on youth mental health, not enough exists yet for the Surgeon General to conclusively state that a risk exists. As the correlative research discussed above clearly shows the theory of the risk is valid, more longitudinal and causative research will need to be done to support the claim that social media has a negative impact on youth mental health.

II. MANDATING WARNING LABELS ON SOCIAL MEDIA IS LIKELY UNCONSTITUTIONAL

When a mandated warning label on social media, such as proposed in the Stop the Scroll Act, is inevitably challenged as the mandated warning labels on tobacco products were,³² courts will likely apply the First Amendment to analyze their constitutionality. This is because the First

29. Betül Keles et al., *A systematic review: the influence of social media on depression, anxiety and psychological distress in adolescents*, 25 INT'L J. OF ADOLESCENCE & YOUTH 79, 90 (Mar. 21, 2019).

30. Surgeon General's Advisory, *supra* note 4, at 11–12.

31. Costello et al., *supra* note 27, at 143–44.

32. *See* R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014); Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (holding that *Zauderer* now applies to problems beyond deception, where the *R.J. Reynolds* Court held *Zauderer* could only be applied to deception); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012). *See generally* Ian McKay, *Up in Smoke: Why Regulating Social Media Like Big Tobacco Won't Work (Yet!)*, 97 NOTRE DAME L. REV. 1669 (2022) (providing in part a historical analysis of big tobacco litigation against mandated warning labels).

Amendment protects a speaker's right to not speak (whether an individual or a corporation) just as much as it protects the speaker's right to speak.³³ Therefore, anytime the government compels a speaker to say something against their will it is subject to strict scrutiny.³⁴ This is known as the compelled speech doctrine,³⁵ and this level of scrutiny can only be survived if the compulsion is "narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."³⁶ However, courts have recognized that some types of speech are afforded less constitutional protection, and thus are subject to a lower level of scrutiny.³⁷ Among these lesser protected types of speech is commercial speech, which is generally defined as speech that proposes an economic transaction, like an advertisement.³⁸ Thus, when the government compels speech in a commercial context, it will only be subject to intermediate scrutiny, or sometimes even rational basis.³⁹ Based on these two doctrines, and their varying levels of scrutiny, a mandated warning label on social media has two separate ways it could navigate a First Amendment challenge, and the likelihood for a mandated warning label on social media to be upheld depends on which doctrine is applied.

In addition to which doctrine is applied to mandated warning labels on social media, the likelihood of a court upholding their constitutionality is dependent on the text and actual location of the warning label on a social media platform. For the purposes of this analysis, it will be assumed that the warning label would appear inside the social media

33. See *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986).

34. VICTORIA L. KILLION, CONG. RSCH. SERV., R47986, *FREEDOM OF SPEECH: AN OVERVIEW* 4 (2024) (explaining that strict scrutiny is generally applied to laws regulating speech based on its content or message, barring an exception such as commercial speech).

35. See William M. Howard, *Constitutional Challenges to Compelled Speech—Particular Situations or Circumstances*, 73 A.L.R. 6th 281 (2012) (explaining the compelled speech doctrine and surveying jurisdiction-specific caselaw).

36. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 804 (2000).

37. KILLION, *supra* note 34, at 4–8 (explaining the levels of scrutiny applied to different types of speech, noting that commercial speech and content-neutral laws receive lesser constitutional protection).

38. Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 207, 213 (2011).

39. See *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (holding that compelled commercial speech was subject to intermediate scrutiny via the *Central Hudson* test); see *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 (6th Cir. 2012) (holding that compelled commercial speech was subject to rational basis via the *Zauderer* test). Additionally, this Note will not discuss the complex relationship of commercial speech and compelled speech and will provide later analysis using the current understanding of the hybrid compelled commercial speech doctrine. For a more in-depth explanation of the doctrine and the debate over the doctrine, See Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867 (2015).

platform, as the proposed Stop the Scroll Act would require.⁴⁰ More specifically, the warning label would appear each time a user accesses the social media platform within the United States, and would only disappear when either the user exited the platform or acknowledged the potential harm and chose to continue despite the risk.⁴¹ The text of the warning label would provide a warning of the “potential negative mental health impacts of accessing the social media platform[]” and provide access to resources to assist with the negative impacts, such as the number and website for the national suicide prevention hotline.⁴² These specifics of the mandated warning label on social media will not have an impact when applying the compelled speech doctrine, yet it will demonstrate why the compelled commercial speech doctrine limits where and how the warning label may be applied.

First, the compelled speech doctrine will be applied to the mandated warning labels on social media proposed in the Stop the Scroll Act. By applying strict scrutiny to the warning label, it will be shown that it likely fails to survive that standard because of the current lack of research supporting the claim that social media is harmful to youth mental health. Second, the compelled commercial speech doctrine will be applied. While having the lower scrutiny standards, this doctrine is also likely to fail because of the lack of research along with the complex argument of determining which part of a social media platform is considered commercial speech. Although both doctrines provide a path for regulation to be upheld, it is unlikely that either doctrine will prevent a mandated warning label on social media being held as unconstitutional because of the lack of research establishing that a risk currently exists.

A. Applying the Compelled Speech Doctrine to Mandated Warning Labels on Social Media

Under the compelled speech doctrine, strict scrutiny would be employed to assess the constitutionality of the mandated warning labels on social media.⁴³ These mandated warning labels would have to be “narrowly tailored to promote a compelling Government interest.”⁴⁴ The mandated warning label would only be narrowly tailored “if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.”⁴⁵ Therefore, if “a less restrictive alternative would serve the

40. Stop the Scroll Act, S. 5150, 118th Cong. (2024).

41. *Id.*

42. *Id.*

43. *See* United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000); FCC v. Pacifica, 438 U.S. 726, 751 (1978).

44. *Playboy*, 529 U.S. at 811.

45. *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989).

Government’s purpose” the mandated warning labels would not be narrowly tailored.⁴⁶

Starting with the requirement for a compelling government interest, this is unlikely to be satisfied because the government cannot have an interest in a risk that hasn’t been established. In the Stop the Scroll Act, the government interest claimed is to “warn the user of potential negative mental health impacts of accessing the social media platform.”⁴⁷ Although the Supreme Court has repeatedly held that protecting the psychological and physical well-being of youth is a compelling interest,⁴⁸ this cannot be applied here until causative research shows that social media use is harmful to youth mental health.⁴⁹ Between the Surgeon General’s 2023 Advisory conceding that “at this time we currently do not yet have enough evidence to determine if social media is sufficiently safe for children and adolescents,”⁵⁰ and technology companies claiming that their products are actually beneficial,⁵¹ it is unlikely a court would yet agree with the claim that the psychological well-being of the youth is at risk because of social media usage. Thus, it is unlikely that a compelling government interest can be established until the Surgeon General has enough evidence to report that youth social media use is a risk to their psychological and physical well-being.

Next, even if the compelling government interest was established, it is still required that the mandated warning labels are narrowly tailored to achieve the interest of “warn[ing] the user of potential negative mental health impacts of accessing the social media platform.”⁵² However, this language causes concern over whether these warning labels are narrowly tailored. Proponents of mandated warning labels on social media use youth and user interchangeably. The Act proposing the mandated warning labels on social media is not specifically targeted to protect youth psychological well-being, but rather is directed at protecting users.⁵³ Yet, former Surgeon General Murthy, whose 2023 Advisory

46. *Playboy*, 529 U.S. at 813.

47. Stop the Scroll Act, S. 5150, 118th Cong. (2024).

48. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); see *Ashcroft v. ACLU*, 542 U.S. 656, 675 (2004).

49. See *generally Warning Label*, *supra* note 3; Costello et al., *supra* note 27, at 143; Michaeleen Doucleff, *The truth about teens, social media and the mental health crisis*, NPR (Apr. 25, 2023, 9:28 AM), <https://www.npr.org/sections/health-shots/2023/04/25/1171773181/social-media-teens-mental-health> [<https://perma.cc/6UDK-9RZ8>].

50. Surgeon General’s Advisory, *supra* note 4, at 4.

51. Zach Rausch et al., *Social-Media Companies’ Worst Argument*, THE ATLANTIC (Sept. 12, 2024), <https://www.theatlantic.com/ideas/archive/2024/09/social-media-lgbtq-teens-harms/679798/> [<https://perma.cc/5FKU-4MJF>].

52. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000); Stop the Scroll Act, S. 5150, 118th Cong. (2024).

53. See Stop the Scroll Act, S. 5150, 118th Cong. (2024).

sparked the forty-two state attorneys general to advocate for these mandated warning labels,⁵⁴ called for the mandated warning labels specifically because of the mental health crisis in young people.⁵⁵ This contradiction may not be deemed narrowly tailored, as the Supreme Court has struck down First Amendment restrictions that are targeted for youth but end up impacting adults.⁵⁶ However, this discrepancy could be fixed in two ways. First, legislators and advocates for this mandate would have to commit to the language of protecting all users, not just the youth, and focus research on all age ranges. Second, the proposed Act would need to be rephrased to specifically target youth, and the mandated warning labels would only be placed on users who self-identify as seventeen years old or younger. Regardless, until this discrepancy is fixed, a court may find that the warning labels proposed in the Stop the Scroll Act are not narrowly tailored.

Overall, for mandated warning labels on social media to survive strict scrutiny through the compelled speech doctrine, more research is needed to establish that there is a risk to have a substantial interest in as well as clarifying who this mandate is really trying to protect.

B. *Applying the Compelled Commercial Speech Doctrine to Mandated Warning Labels on Social Media*

Under the compelled commercial speech doctrine, the law that would be applied to mandated warning labels on social media would likely come from litigation by tobacco companies that challenged mandated warning labels on cigarettes. This is because the existing mandated warning labels for cigarettes and the mandated warning labels for social media proposed in the Stop the Scroll Act are both created and regulated by an agency that Congress empowers through an act. In 2009, the Food and Drug Administration (FDA) was given the authority through the Family Smoking Prevention and Tobacco Control Act (TCA) to mandate warning labels for tobacco products, including cigarettes.⁵⁷ The Stop the Scroll Act is functionally identical, with the Stop the Scroll Act giving the Federal Trade Commission (FTC) the authority to create and mandate warning labels on social media.⁵⁸ Although the mandated warning labels that were litigated following the TCA came from the inclusion of

54. *42 State AGs Endorse Warning Labels on Social Media*, *supra* note 5.

55. *Warning Label*, *supra* note 3.

56. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that an attempt to filter out youth callers on obscene telephone messages unintentionally restricted some adult access to the telephone messages, and thus far exceeded what was necessary to serve the compelling interest of restricting minor access to the telephone messages).

57. Family Smoking Prevention and Tobacco Control and Federal Retirement Form, Pub. L. No. 111–31, 123 Stat. 1776 (2009) (codified in scattered sections of 15 U.S.C. and 21 U.S.C.).

58. Stop the Scroll Act, S. 5150, 118th Cong. (2024).

graphics, and not the existing textual part of the warning label,⁵⁹ the law from this litigation is still applicable to textual warning labels on social media because, like the graphics, it is unlikely that they are yet purely factual, uncontroversial, or effective.⁶⁰ Thus, the litigation that came from the TCA regarding the constitutionality of the mandated warning labels on cigarettes would likely be applied to mandated warning labels on social media, and applying the legal standards used in those cases show that mandated warning labels on social media is also likely to be held as unconstitutional under the compelled commercial speech doctrine.

The litigation resulting from tobacco companies' challenges to the mandatory warning labels on cigarettes was based on First Amendment grounds, yet a circuit split occurred over how to apply the First Amendment to the mandated warning labels.⁶¹ Both the D.C. and Sixth Circuits, in determining which level of scrutiny applies to the mandates, applied the commercial speech doctrine to the mandates as the cigarette's packaging was considered an advertisement of the cigarettes themselves.⁶² The application of this doctrine is important because it lowers the scrutiny level that a required mandate on speech has to survive, thus making it easier to regulate the speech compared to the compelled speech doctrine.⁶³ By classifying the warning labels in these cases as commercial speech, instead of compelled speech, the government had a higher chance to have the mandated warning labels upheld due to the lower burden it had to prove. The commercial speech doctrine is applied if a regulation mandates additional information within a commercial speech context, with commercial speech being generally defined as speech that proposes an economic transaction like an advertisement.⁶⁴ While the commercial speech doctrine is traditionally a separate doctrine from the compelled speech doctrine, the two have recently been blurred together in cases regarding commercial speech contexts, resulting in the

59. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 525–26 (6th Cir. 2012); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1211 (D.C. Cir. 2012) *overruled by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *see Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014) (holding that *Zauderer* now applies to problems beyond deception, where the *R.J. Reynolds* court held *Zauderer* could only be applied to deception).

60. *See infra* Section II.B.2.

61. *See R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012); *see Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

62. *See R.J. Reynolds*, 696 F.3d; *see Disc. Tobacco City & Lottery, Inc.*, 647 F.3d.

63. KILLION, *supra* note 34, at 4–8.

64. Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 207, 213 (2011).

hybrid compelled commercial speech doctrine.⁶⁵ This new hybrid doctrine is what resulted in the circuit split here, as both circuits understood the doctrine differently and applied a different level of scrutiny to the mandated warning labels on cigarettes when deciding the cases.⁶⁶ Thus, a compelled commercial speech application will require applying the legal standard from both circuits to determine whether a court would uphold a mandated warning label on social media.

First, an analysis will discuss how far the compelled commercial speech doctrine could be applied to a social media platform. As the doctrine is limited to speech that generally proposes an economic transaction, it is likely that a warning label could not be placed within a social media platform, but only on its download page or signup page. Next, after establishing which parts of a social media platform can be considered commercial speech, the two approaches from the D.C. Circuit and Sixth Circuit will be applied. This application will show that, again, because of a lack of research establishing the psychological risk of social media usage on the youth, it is likely a mandated warning label on social media would currently be held unconstitutional.

1. What Part of a Social Media Platform Is Commercial Speech?

The Supreme Court stated that commercial speech is “usually defined as speech that does no more than purpose a commercial transaction[.]”⁶⁷ Yet, “speech that does not propose a commercial transaction on its face can still be commercial speech.”⁶⁸ In *Bolger v. Youngs Drug Products Corp.*,⁶⁹ the Court laid out a three-part test,⁷⁰ which has later been characterized by several circuits⁷¹ as asking “1. [w]hether the communication is an advertisement; 2. [w]hether it refers to a specific product or service; and 3. [w]hether the speaker has an economic

65. Anderson Chang, *The Family Smoking Prevention and Tobacco Control Act, Graphic Warning Labels, and the Future of Compelled Commercial Speech*, 11 FIRST AMEND. L. REV. 441, 447 (2013). See Royal, *supra* note 64; see Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 FORDHAM URB. L.J. 1201, 1205 (2013).

66. See *R.J. Reynolds*, 696 F.3d at 1211; see *Disc. Tobacco*, 647 F.3d at 554.

67. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (defining “commercial speech” as expression related solely to the economic interests of the speaker and its audience).

68. *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (holding that speech need not explicitly propose a commercial transaction to qualify as commercial speech).

69. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (establishing a three-part test for determining what constitutes commercial speech).

70. *Id.* at 66–67 (outlining the three-part test).

71. See, e.g., *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990) (applying the *Bolger* test to assess commercial speech); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999); *Ass’n of Nat. Advertisers, Inc. v. Lungren*, 44 F.3d 726, 728 (9th Cir. 1994); see generally GOVDISCRIM § 11:10. Freedom of expression—Commercial speech (providing extensive case law by Circuit regarding commercial speech and its application).

motivation for the speech.”⁷² While one of these factors alone cannot establish commercial speech,⁷³ all three are not required.⁷⁴ The Supreme Court later clarified that the third factor requires the speaker to primarily act out of economic motivation, and not just some economic motivation.⁷⁵

Applying this test to a social media platform shows the limitation this classification would have for mandated warning labels on social media. While the Stop the Scroll Act requires the warning labels to appear inside the social media platform, this is likely unobtainable under this doctrine.⁷⁶ If this doctrine is applied, it is likely that the warning label could only appear in a few specific places.

Applying the first *Bolger* factor, what part of a social media platform is an advertisement? As the tobacco cases from the D.C. Circuit and Sixth Circuit explained, the cigarette packages were considered to be communicating an advertisement to purchase and use the cigarettes themselves.⁷⁷ Thus, the question becomes: which part of a social media platform is communicating an advertisement to use the platform itself? Starting broadly, a social media platform’s download page on the Google Play or Apple Store could easily be considered an advertisement to use the platform itself because the features and promotions of the page are solely for marketing purposes.⁷⁸ Additionally, this logic could possibly be applied to the desktop version of social media platforms.⁷⁹ For example, on Facebook’s desktop version, the home page offers the ability

72. 20A2 MNPRAC § 20:26. *Commercial advertising or promotion—Commercial speech* (discussing factors courts consider in determining whether speech is commercial).

73. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66–67 (1983) (discussing when advertising speech is considered commercial and noting that an ad with a product focus and economic motive is commercial speech despite also addressing public issues).

74. *Id.* at 68.

75. *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115–17 (9th Cir. 2021) (applying *Bolger*’s three-factor test as “guideposts” for commercial speech and holding that a purportedly independent product review guide can be treated as commercial promotion if secretly paid-for).

76. *See* Stop the Scroll Act, S. 5150, 118th Cong. (2024).

77. *See* *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1214 (D.C. Cir. 2012) (holding that the FDA’s required graphic warnings on cigarette packages violated the First Amendment); *see also* *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 525 (6th Cir. 2012).

78. *See* Meghana M. & Chris C., *Get started with app discovery and marketing*, APPLE DEVELOPER, <https://developer.apple.com/videos/play/tech-talks/110358/#:~:text=Below%20your%20app%20icon%2C%20name,new%20version%20to%20App%20Review> [<https://perma.cc/8T3A-KK9N>] (explaining how the Apple App Store functions, how to advertise your app, and different marketing mechanisms you can use to advertise your app); *see also* *Promoting your apps and games*, APPLE DEVELOPER, <https://developer.apple.com/app-store/promote/#:~:text=App%20Store%20marketing%20tools,apps%20in%20your%20advertising%20efforts> [<https://perma.cc/2YGD-HH8C>] (last visited May 9, 2025).

79. For the purposes of this argument, “desktop version” is defined as the version of a social media that is accessed via the internet through a web browser, rather than the version that is accessed through an app on a smart phone.

to create a new account and includes language such as “[c]onnect with friends and the world around you on Facebook” and “[c]reate a [p]age for a celebrity, brand, or business.”⁸⁰ Thus, a mandated warning label that only appeared on these specific parts of a social media platform would likely satisfy the first *Bolger* factor in establishing that the social media platform is commercial speech. However, it is very unlikely that this reasoning would extend to allow a warning label inside of a social media platform itself, which is what the Stop the Scroll Act would require.⁸¹ Going back to the tobacco cases, the arguments up to this point have been analogous: the cigarette packaging is communicating an advertisement to buy and use the cigarettes themselves, and a social media platform’s download page or home page is communicating an advertisement to use the platform itself. But by requiring the warning label to appear inside the platform, for example on your Facebook feed as you scroll, it must be established that the functionality of the Facebook feed is communicating an advertisement to keep using Facebook.⁸² Again, as an analogy, this is making the argument that by smoking the individual cigarette, the cigarette itself is communicating an advertisement to the user to continue smoking cigarettes. While insiders and early research have suggested that social media platforms are as addictive as cigarettes,⁸³ it has never been held by a court that a product’s addictiveness alone constitutes an advertisement for continued use in the First Amendment sense. Thus, the first *Bolger* factor would likely limit a mandated warning label on social media to only appear on a social media platform’s download page or home page.

The second *Bolger* factor is much easier to establish for a social media platform. The communication, from the platform’s download page or home page, is clearly referencing a specific product in its communication, the social media platform itself. Thus, the second factor should easily be satisfied.

The third and final *Bolger* factor would not be as easy to establish as the second but is still likely to be proven. Initially, it appears that a social

80. *Facebook*, FACEBOOK, <https://www.facebook.com/?rdr> (last visited May 9, 2025).

81. *See* Stop the Scroll Act, S. 5150, 118th Cong. (2024) (proposing to require health or safety warning labels on social media platforms to address excessive usage and associated harms).

82. This analysis is assuming that the Facebook feed is an empty and contentless algorithm, with no other First Amendment protections implicated by the inclusion of posts and expressions from Facebook’s users. However, if the Facebook feed is being looked at in conjunction with the content produced from Facebook users, then the Facebook feed would lose its commercial speech classification (if at all possible it could obtain that classification) as it would be “inextricably intertwined with otherwise fully protected speech.” *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 (1988).

83. Juan Flores, *Ex-Facebook Executive Says Company Made Its Products as Addictive as Cigarettes*, CBS NEWS (Oct. 2, 2020, 7:22 AM), <https://www.cbsnews.com/news/facebook-addictive-as-cigarettes-former-executive-says> [<https://perma.cc/GEN6-FY2K>].

media platform has no economic motivation for its communication on its download page or home page because they are typically free to download or to sign up for an account.⁸⁴ However, this is because the user is the product.⁸⁵ First, social media platforms make their money through advertising.⁸⁶ Additionally, they make money by selling user data to advertisers.⁸⁷ This business model incentivizes one thing over anything else, maximizing retention time on the social media to maximize revenue.⁸⁸ This is measured through the average revenue per user (ARPU).⁸⁹ ARPU gives the profitability of the social media product based on how much money each user generates, and it is calculated by dividing the total revenue by the number of users.⁹⁰ Thus, a social media platform's download page or home page is likely to be considered commercial speech. Because of this, a mandated warning label would be restricted to appearing only on these areas of a social media platform under the compelled commercial speech doctrine. While less invasive than the Stop the Scroll Act calls for,⁹¹ it is still an alternate method that can be pursued if the mandated warning labels on social media fail under or are not applied to the compelled speech doctrine.

2. The Current Circuit Split for Determining Whether Mandated Warning Labels Are Constitutional Under the Compelled Commercial Speech Doctrine

After establishing which part of a social media platform is commercial speech, the mandated warning label would still have to pass the lessened constitutional requirements. It is important to note that while the following two cases disputed the inclusion of graphics on the warning labels for cigarettes, and not the textual element, they are still applicable because the same reasons the graphics failed are likely to be the same reasons a textual warning label on social media would fail. To determine whether a mandated warning label on social media would pass

84. Greg McFarlane, *How Facebook (Meta), X Corp (Twitter), Social Media Make Money From You*, INVESTOPEDIA (Dec. 2, 2022), <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx> [https://perma.cc/A5H2-E9M4].

85. *Id.*

86. *Id.*

87. Tom Muha, *Social Media Prioritizes Profit Over People*, THE MICHIGAN DAILY (Oct. 9, 2022), <https://www.michigandaily.com/opinion/social-media-prioritizes-profit-over-people> [https://perma.cc/JTV2-3VEC].

88. *Id.*

89. McFarlane, *supra* note 84.

90. Will Kenton, *Average Revenue Per Unit (ARPU): Definition and How To Calculate*, INVESTOPEDIA (Oct. 1, 2024), <https://www.investopedia.com/terms/a/arpu.asp> [https://perma.cc/84LK-ST9S].

91. *See* Stop the Scroll Act, S. 5150, 118th Cong. (2024).

constitutional muster, it must first be determined the level of scrutiny to be applied.⁹² By applying the different scrutiny tests from the D.C. Circuit and the Sixth Circuit,⁹³ it is unlikely that either Circuit's level of scrutiny could be met if warning labels were mandated onto social media.⁹⁴

a. The Sixth Circuit's Test

Starting in the Sixth Circuit, in *Discount Tobacco City & Lottery, Inc. v. United States*,⁹⁵ tobacco manufacturers and sellers claimed that the TCA⁹⁶ mandating graphic warnings on tobacco products violated their First Amendment rights.⁹⁷ The analysis by the Sixth Circuit started with determining whether the regulation was a mandatory disclosure requirement or a restriction on speech.⁹⁸ The Sixth Circuit determined that because the regulation included a mandatory disclosure requirement, the test that the Supreme Court applied in *Zauderer v. Office of Disciplinary Counsel*⁹⁹ would be applied to determine the constitutionality of the regulation.¹⁰⁰ Under the *Zauderer* test, a regulation receives a rational basis review if the required disclosure is “reasonably related to the State’s interest in preventing deception of consumers[]” and includes “purely factual and uncontroversial information[.]”¹⁰¹ However, a failure to establish these requirements would subject the mandatory disclosures to strict scrutiny.¹⁰² For the first requirement of the *Zauderer* test, the Sixth Circuit found the graphic warnings to be reasonably related to the State’s interest of preventing consumer deception because there was “more than substantial evidence” to support that graphic warning labels were effective in making

92. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522 (6th Cir. 2012).

93. *See* R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205 (D.C. Cir. 2012); *see Disc. Tobacco*, 674 F.3d at 509.

94. These cases, in applying different levels of scrutiny, may be compromised in the future as some argue that after the Supreme Court’s recent ruling in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022), most scrutiny classifications are up for reconsideration or elimination based on the Court moving towards a historical analysis. *See* GOVDISCRIM § 11:10. Freedom of expression—Commercial speech.

95. *Disc. Tobacco*, 674 F.3d at 521.

96. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 15 U.S.C. and 21 U.S.C.).

97. *Disc. Tobacco*, 674 at 518.

98. *Id.* at 522–23.

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

100. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 523 (6th Cir. 2012).

101. *Zauderer*, 471 U.S. at 651; *but see* Chang, *supra* note 65, at 460 (explaining a contradicting view of the *Zauderer* rule based on the separate opinion); *see Repackaging Zauderer*, 130 HARV. L. REV. 972, 979 (2017) (explaining the variety of interpretation the *Zauderer* test has received).

102. *Disc. Tobacco*, 674 F.3d at 554.

adolescents process cigarette warnings after being deceived about the risks for decades.¹⁰³ For the second requirement of the *Zauderer* test, the Sixth Circuit found that the textual element of the graphic warning labels satisfied the factual and uncontroversial requirement, however the Sixth Circuit split on whether the graphics were neutral.¹⁰⁴

b. The D.C. Circuit's Test

The D.C. Circuit required a stricter level of scrutiny in *R.J. Reynolds Tobacco v. FDA*.¹⁰⁵ *R.J. Reynolds* had an analogous First Amendment claim as *Discount Tobacco*, where the FDA's mandated graphic warnings were again challenged.¹⁰⁶ The D.C. Circuit first noted the flaws with how the FDA selected and justified the nine graphic warnings it mandated.¹⁰⁷ The FDA received thousands of public comments, including criticism from cancer researchers and academics, that there was a lack of longitudinal research showing that these warning labels would have any impact on smoking rates.¹⁰⁸ The FDA itself even admitted that it lacked long-term support that the warning labels would be effective.¹⁰⁹ Despite these critiques and other noted flaws with the research,¹¹⁰ the FDA concluded that the existing scientific research would be effective in achieving its substantial interest of reducing the number of Americans who smoke to prevent health consequences.¹¹¹

Next, the D.C. Circuit viewed the regulation as compelled commercial speech,¹¹² and therefore subject to strict scrutiny absent two exceptions: the rational-basis test under *Zauderer* or the intermediate-level scrutiny test set out by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹¹³ The D.C. Circuit first applied *Zauderer*, holding that the test was not met because the images were inflammatory, didn't convey any warning information, and didn't convey any accurate statements regarding cigarettes.¹¹⁴ However, while the D.C.

103. *Id.* at 566.

104. *Id.* at 525–26.

105. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205 (D.C. Cir. 2012).

106. *Id.* at 1208–09.

107. *Id.* at 1210–11.

108. *Id.* at 1210.

109. *Id.*

110. *Id.* at 1210–11 (criticizing the FDA's flawed studies used to support warning label effectiveness, the FDA's claims contradicting studies that showed warning labels had no significant impact on smoking rates, and the overall lack of evidence).

111. *Id.* at 1209–11.

112. *Id.* at 1211.

113. *Id.* at 1212; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 573 (1980). The reason for the difference in levels of scrutiny is because the Supreme Court has found that factual disclosures and speech restrictions are not the same, as factual disclosures only require providing information and do not prevent speech. *See Chang, supra* note 65, at 454.

114. *R.J. Reynolds*, 696 F.3d at 1216–17.

Circuit in *R.J. Reynolds* reasoned that *Zauderer* established that a disclosure requirement was only valid if the government showed at least a potentially real danger that consumers would be misled absent a warning label,¹¹⁵ the D.C. Circuit later rejected this reasoning. In *American Meat Institute v. United States Department of Agriculture*,¹¹⁶ the D.C. Circuit held that the broad language of *Zauderer* allows the test to be applied to problems beyond deception and overruled *R.J. Reynolds* in part for that reasoning.¹¹⁷ However, the D.C. Circuit has made it clear that this extension only applies to commercial speech, and does not extend *Zauderer* to non-advertising compelled speech.¹¹⁸ While the D.C. Circuit has revisited and reanalyzed one case relying on this new *Zauderer* interpretation,¹¹⁹ the *Zauderer* test is still met with confusion and it is still unclear to what it now extends to.¹²⁰ Regardless, because the D.C. Circuit found that the graphic warnings were not factual disclosures subject to *Zauderer*'s rational basis review, it applied the stricter *Central Hudson* intermediate-scrutiny test for compelled commercial speech.¹²¹

While the Sixth Circuit took the narrow approach that *Central Hudson* only applies to speech restrictions and not disclosure requirements,¹²² the D.C. Circuit adopted a broader analysis in *R.J. Reynolds*. The Supreme Court in *Central Hudson* created a four-part test for commercial speech cases to determine whether First Amendment protections apply to the expression.¹²³ First, the speech at issue must not be misleading and concern lawful activity.¹²⁴ Second, it must be asked whether there is substantial government interest.¹²⁵ If the previous two prongs are both satisfied, the third prong asks whether “the regulation directly advances the government interest asserted.”¹²⁶ The fourth prong asks “whether it is

115. *Id.* at 1214.

116. *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18 (D.C. Cir. 2014).

117. *Id.* at 22–23.

118. *Nat’l Ass’n of Manufacturers v. S.E.C.*, 800 F.3d 518, 522 (D.C. Cir. 2015).

119. *Id.* at 520–21.

120. *See id.* Additionally, the Author would like to note that clarification may be coming. Now Justice Kavanaugh was a Judge on the D.C. Circuit and contributed to this opinion, expressing his frustrations in the *Zauderer* test and the compelled speech doctrine as a whole. In August 2024, *R.J. Reynolds Tobacco Co.* is “urging the U.S. Supreme Court to review a Fifth Circuit decision” which affirmed the FDA’s new warning labels, on the grounds that the second round of warning labels still fail the *Zauderer* test. *Atkins*, *supra* note 11.

121. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1217 (D.C. Cir. 2012).

122. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 552 (6th Cir. 2012).

123. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

124. *Id.*

125. *Id.*

126. *Id.*

not more extensive than is necessary to serve that interest.”¹²⁷ The Supreme Court has clarified that the fourth prong does not require the government to use the least restrictive means, rather a reasonable fit between the means used to accomplish the asserted ends.¹²⁸

In *R.J. Reynolds*, the D.C. Circuit first acknowledged that, as the case was a constitutional challenge to an agency’s action, the D.C. Circuit was required to set aside and hold unlawful agency findings, actions, and conclusions that were held to be unsupported by substantial evidence.¹²⁹ Next, applying the *Central Hudson* test, the D.C. Circuit first assumed that the FDA’s claimed interest of reducing smoking rates, specifically in children and adolescents, was substantial.¹³⁰ Moving to the third prong, after noting that the government had the burden to justify its speech restriction,¹³¹ the D.C. Circuit concluded that the FDA did not present “a shred of evidence—much less the ‘substantial evidence’ required” that their graphic warnings would be effective in reducing smoking rates.¹³² The D.C. Circuit emphasized that research showing warning labels made people think more about quitting smoking and attempt to quit smoking didn’t advance the government interest, as the evidence must show that the warning labels “actually led to a reduction in smoking rates.”¹³³ Finally, the D.C. Circuit noted that *Central Hudson* requires an agency to present supporting data before imposing a burden onto commercial speech.¹³⁴ Thus, the graphic warnings were struck down.¹³⁵ The issue of *R.J. Reynolds* continues to be litigated after the FDA conducted more studies and created new graphic labels, and the tobacco companies are currently trying to bring the issue under Supreme Court review.¹³⁶

127. *Id.*

128. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)).

129. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1217–18 (D.C. Cir. 2012); 5 U.S.C.A. § 706(2) (West); *see* 5 U.S.C.A. § 706(2)(B).

130. *R.J. Reynolds*, 696 F.3d at 1218.

131. *Id.* (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

132. *Id.* at 1219.

133. *Id.*

134. *Id.* at 1221; *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980).

135. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012).

136. *Cigarette Labeling and Health Warning Requirements*, FDA (Jan. 15, 2025), <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/cigarette-labeling-and-health-warning-requirements> [<https://perma.cc/NX33-KL99>].

c. Under Either Test, Mandated Warning Labels on Social Media Are Likely Unconstitutional

By applying either the rational-basis *Zauderer* test adopted by the Sixth Circuit or the intermediate-scrutiny *Central Hudson* test adopted by the D.C. Circuit, a mandated warning label on social media would likely fail to withstand a constitutional challenge. While the warning label on social media proposed in the Stop the Scroll Act is purely textual, it is still likely to fail both Circuit's requirements because there is currently not enough evidence establishing social media usage's negative impact on youth mental health and the effectiveness of a warning label on social media.

Under the Sixth Circuit's rational basis analysis, a mandated warning label on social media would likely fail to meet both prongs. First, the disclosure would have to be "reasonably related to the State's interest in preventing deception of consumers."¹³⁷ In *Discount Tobacco*, this prong was established because the Sixth Circuit found substantial evidence that a warning label on tobacco products was reasonably related to the State's interest of preventing consumer deception regarding the true health risks of tobacco use.¹³⁸ Here, however, it is unlikely a state interest can be claimed as not enough causative evidence exists that social media use is harmful for youth for the acting Surgeon General to endorse the existence of the risk.¹³⁹ Until the State interest that social media use is harmful to youth mental health can be established by enough causative and longitudinal research, it is unlikely any deception exists that would allow for a restriction on social media companies' commercial speech.

The second *Zauderer* prong would likely fail to be established for the same reasons as the first prong. The current state of research on social media usage's impact on youth mental health is far from the "purely factual and uncontroversial information"¹⁴⁰ that is necessary for a mandated warning label on social media to be constitutional. When the TCA was enacted in 2009, the landmark 1964 report from the Surgeon General's Advisory Committee on Smoking and Health that established substantial evidence regarding the risks of smoking¹⁴¹ had existed for forty-five years. In 2014, the Surgeon General released a fifty-year

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

138. *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 566 (6th Cir. 2012).

139. See generally *Warning Label*, *supra* note 3; Costello et al., *supra* note 27; Michaeleen Doucleff, *The truth about teens, social media and the mental health crisis*, NPR (Apr. 25, 2023, 9:28 AM), <https://www.npr.org/sections/health-shots/2023/04/25/1171773181/social-media-teens-mental-health> [<https://perma.cc/NC3W-NFT5>].

140. *Zauderer*, 471 U.S. at 651.

141. *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the United States*, *supra* note 10.

progress report, continuing to provide new and substantial research about the risks of smoking, trends, and new developments.¹⁴² The research regarding the harms of social media use to youth, in comparison, cannot rely on decades of data collection. The Surgeon General has addressed the impacts of social media use on youth mental health in the 2023 Advisory, but admitted that “at this time we do not have enough evidence to determine if social media is sufficiently safe for children and adolescents.”¹⁴³ With a mandated warning label on social media unable to contain enough “factual” information, it would also be far from uncontroversial. In copying the playbook on tobacco companies’ response to risk accusations, technology companies not only claim their products are mostly harmless but also that their products actually benefit youth.¹⁴⁴ With the combination of a lack of factual support and technology companies claiming their products are beneficial, the second prong of the *Zauderer* test is likely to fail.

Moving to the D.C. Circuit’s intermediate scrutiny test under *Central Hudson*, it is unlikely that mandated warning labels on social media could establish the test’s second or third prong due to the lack of research on the negative impacts of social media use and whether textual warning labels on social media are effective. First, the speech at issue is not misleading and concerns lawful activity, however what component of a social media platform is speech remains to be unclear.¹⁴⁵ Next, the substantial government interest claimed here would be to “warn the user of potential negative mental health impacts of accessing the social media platform.”¹⁴⁶ This is unlikely to satisfy the second prong, even though the government’s substantial health interest in *R.J. Reynolds* was upheld,¹⁴⁷ because again the lack of research establishing social media usage having a negative impact on youth mental health means no substantial interest can exist. For the sake of analysis, even if these two prongs were established, it now must be asked whether a mandated warning label on social media products would “directly advance the government interest asserted.”¹⁴⁸ Here, the mandated warning labels on social media would be struck down without having to change the verbiage from the *R.J. Reynolds* opinion at all, as not “a shred of evidence—much less the

142. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 1 (2014).

143. Surgeon General’s Advisory, *supra* note 4, at 4.

144. Rausch et al., *supra* note 51.

145. *See supra* Section II.B.1.

146. Stop the Scroll Act, S. 5150, 118th Cong. (2024).

147. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1218 (D.C. Cir. 2012).

148. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

‘substantial evidence’ required”¹⁴⁹ exists or can be provided to show that a textual warning label on social media would be effective in warning the user of the potential negative mental health impacts. While the government cannot rely on “speculation or conjecture,”¹⁵⁰ the task of establishing substantial evidence to satisfy this prong is not as difficult as it was in *R.J. Reynolds*. In *R.J. Reynolds*, the government was required to show that the warning labels *actually* caused a decline in smoking rates,¹⁵¹ while here all that would need to be established by longitudinal research is that a textual warning label on social media actually communicates that a potential risk exists to the user’s mental health. Regardless, while the third prong of the *Central Hudson* test could be established in due time, the current lack of research establishing the negative impacts of social media use makes a mandated warning label on social media unlikely to survive a constitutional challenge.

Thus, under the current law relating to mandated warning labels under compelled commercial speech, the current lack of research establishing substantial evidence of social media usage’s negative impact on youth mental health is likely to result in any attempted social media warning label mandate to be struck down under either rational basis or intermediate scrutiny review.

III. WHAT MUST BE DONE TO MAKE MANDATED WARNING LABELS ON SOCIAL MEDIA CONSTITUTIONAL

For mandated warning labels on social media to be held constitutional under either doctrine, advocates need to conduct enough longitudinal and causative research that allows for the Surgeon General to conclusively report that social media usage is harmful to youth mental health. This is because a court would likely give great deference to the Surgeon General’s medical opinion, as the courts in the tobacco cases did when analyzing the government’s interest in regulating cigarettes.¹⁵² While tobacco products were not regulated until after the 1964 Smoking and Health Report was published, which contained decades of supporting research and studies for the claim that tobacco use was harmful,¹⁵³ former Surgeon General Murthy has stated that the youth mental health crisis is an emergency which doesn’t have the luxury to wait for this level of

149. *R.J. Reynolds*, 696 F.3d at 1219.

150. *Nat’l Ass’n of Manufacturers v. S.E.C.*, 800 F.3d 518, 526 (D.C. Cir. 2015) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)).

151. *R.J. Reynolds*, 696 F.3d at 1219.

152. See *R.J. Reynolds*, 696 F.3d; see *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012).

153. *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, *supra* note 10.

research.¹⁵⁴ Yet, it is clear that both the compelled speech doctrine and the compelled commercial speech doctrine will not allow for mandatory warning labels on a risk that has not been confidently established.¹⁵⁵ Until then, a premature mandate risks being struck down on First Amendment grounds, only wasting taxpayer dollars through litigation and creating legal precedent that further protects technology companies from future regulation attempts on social media. Thus, until the acting Surgeon General provides a report claiming that social media usage puts youth mental health at risk, as was required to regulate tobacco products, the substantial interest required by the First Amendment is unlikely to be proven.

First, advocates of mandating warning labels on social media should focus on following and implementing the Surgeon General's 2023 Advisory to achieve the level of research required for the warning labels to be constitutional. Second, the methodology of how the research is conducted must be adjusted depending on which First Amendment doctrine is applied.

A. The Surgeon General's 2023 Advisory Must Be Followed to Achieve the Level of Research Required

For the 1964 Smoking and Health Report, the Surgeon General at the time created an advisory committee of ten medical experts who reviewed all available research over the course of two years.¹⁵⁶ While the Surgeon General today could form an advisory committee on the impact of social media use, have them review and summarize all available research, and then generate a report like 1964, this would be futile because the research on the impacts of social media use is not as strong as it was when the 1964 advisory committee was formed. However, the Surgeon General has issued the 2023 Advisory on social media usage's impact on youth mental health, and can issue new advisories in response to further research on social media use in the future.¹⁵⁷ In the 2023 Advisory, after noting that “[o]ur children and adolescents don’t have the luxury of waiting years until social media’s impact[,]” the Surgeon General claimed that the burden of taking action towards protecting the youth from social media

154. *Warning Label*, *supra* note 3.

155. *See supra* Part II.

156. *See Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, *supra* note 10, at 7–10.

157. *About the Office of the Surgeon General*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/surgeongeneral/about/index.html#:~:text=The%20Surgeon%20General%20brings%20the,a%20number%20of%20communication%20channels> [https://perma.cc/M3EG-T42Y]. Surgeon General’s Advisory, *supra* note 4.

must be a collaborative effort by children, parents, technology makers, and law makers.¹⁵⁸

The 2023 Advisory's first call to action was directed at policymakers.¹⁵⁹ The most important of the suggestions within this call to action is "[s]upport[ing] increased funding for future research" on the impact of social media use on children.¹⁶⁰ If advocates of warning labels want them to survive the guaranteed constitutional challenge, funding must be allocated by policymakers at levels that allow for extensive and advanced research showing not only that social media use has a negative impact on children, but also that textual warning labels bringing awareness of these risks are effective in creating knowledge of social media risk in child users. The next crucial suggestion of the 2023 Advisory was ensuring the sharing of data regarding the health impacts of social media use by technology companies to independent researchers.¹⁶¹ This can decrease the amount of time needed to get causative research as it provides insider data and a foundation for researchers to build off. However, constitutional concerns are raised by the suggestion of the 2023 Advisory to pursue policies that limit access to social media for all children in order to minimize risk.¹⁶² This suggestion should be approached with caution, as similar suggested regulations, such as age verification and an outright ban for child social media access, all come with equally complex flaws and First Amendment complications.¹⁶³ Regardless, pursuing funding for research and advocating for data sharing and transparency from technology companies should be the priority for policymakers if they want to mandate warning labels on social media in the future.

The 2023 Advisory's second call to action is directed at the technology companies who develop these social media products.¹⁶⁴ The primary suggestions here are data transparency with researchers, risk assessment, and prioritization of user health.¹⁶⁵ To further ensure these requested actions are actually conducted by technology companies, policymakers can create laws that require risk audits for certain aspects of technology, such as algorithm risk audits.¹⁶⁶ Technology companies that develop social media products have data and research on the impacts of their products, as the leaks from the Kentucky Attorney General's

158. Surgeon General's Advisory, *supra* note 4, at 13.

159. *Id.* at 15.

160. *Id.*

161. *Id.*

162. *Id.*

163. *See* McKay, *supra* note 32.

164. Surgeon General's Advisory, *supra* note 4, at 16.

165. *Id.*

166. *See* Costello et al., *supra* note 27.

Office in 2024 have shown.¹⁶⁷ Thus, if the technology companies don't comply with this call to action, which would speed up research significantly, policymakers should consider legal alternatives to compel data transparency.

The 2023 Advisory's last call to action is directed at researchers.¹⁶⁸ The primary suggestion is for researchers to develop a shared agenda that prioritizes collaborative research establishing the impact of youth social media use.¹⁶⁹ This collaborative research would focus on "establish[ing] standardized definitions and measures" that can be applied broadly to a variety of different social media research areas.¹⁷⁰ The research would involve longitudinal and experimental studies that would focus on social media usage's impact on sleep, depression, anxiety, body image, and attention across a variety of populations and different types of social medias.¹⁷¹ Finally, the research must be "publicly accessible and digestible" to ensure the productivity and development of research in this area.¹⁷² Following the 2023 Advisory's final call to action will ensure that research is focused on the issues that can produce hard data needed to mandate a warning label on social media, along with the necessity of collaboration and publicization of research to ensure a more swift and communal research development.

Overall, advocates for mandated warning labels on social media must follow these actions by developing longitudinal research regarding the impact of social media use on youth mental health. The Stop the Scroll Act, the Surgeon General's 2023 Advisory, and other lawmakers' calls for action to regulate social media through mandated warning labels or other restrictions will implicate First Amendment challenges that are unlikely to survive without adequate research. Even after over 100 years of research,¹⁷³ tobacco companies have successfully drawn-out litigation

167. Bobby Allyn et al., *TikTok executives know about app's effect on teens, lawsuit documents allege*, NPR (Oct. 11, 2024, 5:30 AM), <https://www.npr.org/2024/10/11/g-s1-27676/tiktok-redacted-documents-in-teen-safety-lawsuit-revealed> [https://perma.cc/F6WY-E68T].

168. Surgeon General's Advisory, *supra* note 4, at 19.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, *supra* note 10; U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 142; Robert N. Proctor, *The history of the discovery of the cigarette-lung cancer link: evidentiary traditions, corporate denial, global toll*, 21 TOBACCO CONTROL, Feb. 16, 2012 at 87; *Achievements in Public Health, 1900-1999: Tobacco Use – United States, 1900-1999*, CDC (Nov. 5, 1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4843a2.htm#:~:text=Smoking%2D%2Donce%20a%20socially,cigarette%20smoking%20and%20lung%20cancer> [https://perma.cc/NB67-WW3B].

over mandatory warning labels for over a decade.¹⁷⁴ With the current research establishing social media usage's negative impact on the youth being a grain of sand in comparison, a similar result would likely occur if warning labels were mandated on social media. Thus, until the Surgeon General reports that enough causative research is present to conclude that social media use is a risk to the youth, mandatory warning labels on social media will likely fail under the First Amendment until a risk can be established for the government to have an interest in regulating.

B. *How This Research Must Be Conducted*

Depending on the doctrine that is pursued, how the research is conducted will vary greatly. Under the compelled speech doctrine, there are no established requirements for who and how the research can be conducted, thus this section is largely irrelevant under that approach. However, the compelled commercial speech doctrine has specific requirements for who, how, and when the research is conducted that would support the claim that social media use has a negative impact on youth mental health. By following the requirements of the Stop the Scroll Act, under the compelled commercial speech doctrine, the FTC must conduct this research prior to any attempted regulation.

While the previous section explained the need for the research on social media usage's impact on youth mental health to be collaborative and publicized, legal precedent regarding warning labels on compelled commercial speech will require the government agency assigned to mandate warning labels on social media to conduct the research prior to any proposed mandate. As the FTC would be the federal agency mandating warning labels on social media through the Stop the Scroll Act,¹⁷⁵ it is required under the *Central Hudson* test that the FTC would need to "find and present data supporting its claims *prior to* imposing a burden on commercial speech."¹⁷⁶ This supporting data must be "substantial evidence" that social media use has a negative mental impact on youth mental health and that warning labels on social media are effective at "warn[ing] the user of potential negative mental health impacts of accessing the social media platform."¹⁷⁷ While the FTC currently creates reports, studies, and research, it is primarily limited to business and consumer areas and has not delved into any research in or

174. See Atkins, *supra* note 11.

175. Stop the Scroll Act, S. 5150, 118th Cong. (2024).

176. R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1221 (D.C. Cir. 2012).

177. 5 U.S.C.A. § 706(2)(E) (West). Stop the Scroll Act, S. 5150, 118th Cong. (2024).

around this area.¹⁷⁸ Thus, unless a new agency was created or assigned to mandate warning labels on social media, under the current proposals the FTC will have to embark on completely unrelated research on a quest to establish the negative impacts social media use has on youth mental health.

CONCLUSION

A premature mandated warning label on social media could create legal precedent that gives technology companies a future stronghold against any further regulation attempts on social media. Until evidence of social media usage's negative impact on youth mental health is established through research that is endorsed by the Surgeon General, mandated warning labels on social media will likely not survive a First Amendment challenge. However, once this risk is established, the two avenues explained in this Note will provide the considerations and arguments needed to show that the government's interest in regulating social media is both compelling and substantial as social media usage is harmful to youth mental health. By following the Surgeon General's 2023 Advisory, regulations on social media could finally be a possibility.

178. See *Reports*, FTC, <https://www.ftc.gov/policy/reports#:~:text=Policy,-Advocacy%20and%20Research&text=The%20FTC%20produces%20a%20number,reports%20about%20the%20agency's%20activities> [https://perma.cc/3BCJ-FRUG]; *Studies*, FTC, <https://www.ftc.gov/policy/studies#:~:text=As%20part%20of%20its%20policy,on%20competition%20and%20consumer%20protection> [https://perma.cc/T96J-K2J3].