

No. 23-____

IN THE
Supreme Court of the United States

MARYLAND SHALL ISSUE, INC.; CINDY'S HOT SHOTS, INC.;
FIELD TRADERS LLC; PASADENA ARMS LLC; AND
WORTH-A-SHOT, INC.,

Petitioners,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At issue in this case is a local ordinance, Bill 108-21 (“the Ordinance”) enacted by Anne Arundel County, Maryland (“the County”). That Ordinance compelled sellers of firearms and/or ammunition in the County to display in their retail establishments and distribute, with each such sale of a firearm or ammunition, literature created or adopted by the County concerning, *inter alia*, “suicide prevention” and “conflict resolution.” There is no dispute in this case that the County’s forced display and distribution requirement is content-based, compelled speech and is thus “presumptively unconstitutional.” *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 766 (2018) (“*NIFLA*”). Yet, the court of appeals held that the compelled speech mandated by the County’s Ordinance was nonetheless constitutional under *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 628 (1985), because, in the court’s view, the literature is merely “purely factual and uncontroversial” “commercial speech” and thus could be compelled under *Zauderer*. The court of appeals likewise affirmed the district court’s exclusion of Petitioners’ expert testimony that demonstrated that the compelled speech was not “purely factual and uncontroversial” information, holding that this exclusion was within the district court’s discretion. The issues presented are:

1. Whether the court of appeals impermissibly allowed the County to violate Petitioners’ First Amendment right “to remain silent,” as reaffirmed in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), by holding that the County’s Ordinance compelling retail establishments to display and distribute the County’s literature

was constitutional under *Zauderer*, as construed and limited by *NIFLA*, where there is no dispute that nothing in the compelled literature is “about the terms under which ... services will be available” within the meaning of *Zauderer* and *NIFLA*.

2. Whether the court of appeals failed to apply the correct legal standard in holding that the County’s “suicide prevention” and “conflict resolution” literature was “commercial speech,” merely because the Ordinance applied to sales at retail establishments and thus could be compelled under *Zauderer*’s relaxed scrutiny test without regard to the standard for “commercial speech” set forth in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).
3. Whether the court of appeals erred in holding that the County’s suicide prevention and conflict resolution literature was “purely factual and uncontroversial” under *Zauderer*, where it is undisputed that the supposed link between suicide and access to firearms set forth in the literature is supported only by a correlation and was disputed by Petitioners’ expert witness as “probably false.”
4. Whether the court of appeals erred under *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in holding that a district court may exclude otherwise admissible expert witness testimony purely because the trial court disagreed with the expert’s reading of the County’s literature.

PARTIES TO THE PROCEEDINGS

Petitioner Maryland Shall Issue, Inc., is a not-for-profit, all-volunteer, non-partisan, Section 501(c)(4) Maryland corporation dedicated to the preservation and advancement of gun owners' rights in Maryland. The other Petitioners are Cindy's Hot Shots, Inc.; Field Traders, LLC; Pasadena Arms, LLC; and Worth-A-Shot, Inc., all of which are or were federal firearms licensees ("FFLs") located in Anne Arundel County, Maryland. They were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

The Respondent is Anne Arundel County, Maryland, which was the defendant in the district court and defendant-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state that Petitioner Maryland Shall Issue, Inc., has no parent corporation and no publicly held company owns 10 percent or more of its stock. The remaining Petitioners are privately held Maryland corporations. Each of these corporations has no parent corporation and no publicly held corporation owns 10 percent or more of their stock.

LIST OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(a)(iii), Petitioners state that there are no "directly related" proceedings pending in this Court or in other state or federal court, as the term is defined by that Rule. The same or similar First Amendment issues are pending before this Court in *Moody v. NetChoice, LLC*, No. 22-277, *cert. granted*, 144 S.Ct. 478 (Sept. 29, 2023), and *NetChoice, LLC v. Paxton*, No. 22-555, *cert. granted*,

144 S.Ct. 477 (Sept. 29, 2023), which were argued to this Court on February 26, 2024.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS.....	iii
CORPORATE DISCLOSURE STATEMENT.....	iii
LIST OF RELATED PROCEEDINGS.....	iii
TABLE OF AUTHORITIES.....	vii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE	2
A. Statutory Background and Procedural History.....	2
B. The District Court’s Decision	5
C. The Fourth Circuit’s Decision	7
REASONS FOR GRANTING THE PETITION..	9
I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT’S FIRST AMENDMENT PRECEDENTS...	12
A. The Fourth Circuit’s Decision Conflicts With <i>NIFLA</i> , <i>Hurley</i> , <i>303 Creative</i> and Other Decisions Of This Court	13
B. The Fourth Circuit’s Decision Conflicts With <i>Central Hudson</i> On The Limits Of The “Commercial Speech” Doctrine.....	18

TABLE OF CONTENTS—Continued

	Page
C. The Fourth Circuit’s Decision Conflicts With <i>Zauderer</i> and <i>Brown</i> On What Constitutes “Purely Factual and Uncontroversial” Speech	21
II. THE LOWER COURTS ARE IN CONFLICT ON THE SCOPE OF <i>ZAUDERER</i>	24
A. The Circuits Are In Conflict Concerning Whether <i>Zauderer</i> Is Limited To The Terms of Services	24
B. The Circuits Are In Conflict Over the Meaning of “Commercial Speech”	27
C. The Fourth Circuit Is In Conflict With The Ninth Circuit And The D.C. Circuit Over The Test For “Purely Factual and Uncontroversial Information”	28
III. THIS CASE IS THE IDEAL VEHICLE...	29
IV. THE EXCLUSION OF PETITIONERS’ EXPERT VIOLATES <i>DAUBERT</i> AND <i>JOINER</i>	30
V. ALTERNATIVELY, THE COURT SHOULD HOLD THIS PETITION PENDING A DECISION IN THE <i>NETCHOICE</i> LITIGATION	33
CONCLUSION	34
APPENDIX	

TABLE OF AUTHORITIES

CASES	Page(s)
<i>303 Creative LLC v. Elenis</i> , 600 U.S. 570 (2023).....	9-16, 33
<i>American Beverage Ass’n v. City and County of San Francisco</i> , 916 F.3d 749 (9th Cir. 2019).....	24, 25
<i>American Hospital Ass’n v. Azar</i> , 983 F.3d 528 (D.C. Cir. 2020).....	16, 26, 29
<i>American Meat Institute v. Dept. of Agriculture</i> , 760 F.3d 18 (D.C. Cir. 2014).....	16, 19, 27
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	32
<i>Bolger v. Youngs Drug Products Corp.</i> , 463 U.S. 60 (1983).....	20-21, 26, 28
<i>Book People, Inc. v. Wong</i> , 91 F.4th 318 (5th Cir. 2024)	27
<i>Bresler v. Wilmington Trust Co.</i> , 855 F.3d 178 (4th Cir. 2017)	32
<i>Brown v. Entertainment Merchants Ass’n</i> , 564 U.S. 786 (2011).....	10, 11, 14, 15, 17, 22, 23
<i>Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.</i> , 447 U.S. 557 (1980).....	10, 18, 27, 28
<i>Chamber of Commerce of United States v. SEC</i> , 85 F.4th 760 (5th Cir. 2023)	25
<i>Cooter & Gell v. Hartmarx Corp.</i> , 496 U.S. 384 (1990)	31

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>CTIA - The Wireless Ass’n v. City of Berkeley</i> , 928 F.3d 832 (9th Cir.), <i>cert. denied</i> , 140 S.Ct. 658 (2019).....	25
<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579 (1993).....	11, 12, 31, 32
<i>Free Speech Coalition, Inc. v. Paxton</i> , 95 F.4th 263 (5th Cir. 2024), <i>petition for</i> <i>cert. pending</i> , No. 23-1122 (filed, April 12, 2024).....	22, 23, 27
<i>General Electric Co. v. Joiner</i> , 522 U.S. 136 (1997).....	11, 12, 31, 32
<i>Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore</i> , 721 F.3d 264 (4th Cir. 2013).....	27-28
<i>Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston</i> , 515 U.S. 557 (1995).....	9, 13, 14, 16, 24, 26
<i>Janus v. AFSCME</i> , 585 U.S. 878 (2018).....	13
<i>Milavetz, Gallop & Milavetz, P.A. v. United States</i> , 559 U.S. 229 (2010).....	9, 14, 20, 26, 33
<i>Moody v. NetChoice, LLC</i> , No. 22-277, <i>cert. granted</i> , 144 S.Ct. 478 (Sept. 29, 2023)	12, 30, 33, 34

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>MSI v. Anne Arundel Co.</i> , 91 F.4th 238 (4th Cir. 2024) 1, 4, 7, 8, 10, 16-23, 26, 27, 31, 34	
<i>Nat’l Ass’n of Manufacturers v. SEC</i> , 800 F.3d 518 (D.C. Cir. 2015).....	16, 29, 30
<i>Nat’l Ass’n of Wheat Growers v. Bonta</i> , 85 F.4th 1263 (9th Cir. 2023)	23, 28, 29, 31
<i>Nat’l Inst. of Fam. & Life Advoc. v. Becerra</i> , 585 U.S. 755 (2018).....	6, 9, 10, 13, 14, 17, 19, 24, 26, 29
<i>NetChoice, LLC v. Attorney General, Florida</i> , 34 F.4th 1196 (11th Cir. 2022), <i>cert.</i> <i>granted</i> , 144 S.Ct. 478 (2023).....	26, 33
<i>NetChoice, LLC v. Paxton</i> , 49 F.4th 439 (5th Cir. 2022), <i>cert.</i> <i>granted</i> , 144 S.Ct. 477 (2023).....	25
<i>NetChoice, LLC v. Paxton</i> , No. 22-555, <i>cert. granted</i> , 144 S.Ct. 477 (Sept. 29, 2023)	12, 30, 33, 34
<i>Ohralik v. Ohio State Bar Ass’n</i> , 436 U.S. 447 (1978).....	28
<i>Pacific Gas and Elec. Co. v. Public Utilities Com’n of California</i> , 475 U.S. 1 (1986).....	13
<i>R J Reynolds Tobacco Co. v. FDA</i> , 96 F.4th 863 (5th Cir. 2024)	14, 33
<i>Riley v. Nat’l Fed’n of the Blind of N.C., Inc.</i> , 487 U.S. 781 (1988).....	9

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Rodríguez v. Hospital San Cristobal, Inc.</i> , 91 F.4th 59 (1st Cir. 2024).....	32
<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995).....	20, 26
<i>Rumsfeld v. Forum for Academic & Institutional Rights, Inc.</i> , 547 U. S. 47 (2006).....	13
<i>Sorrell v. IMS Health</i> , 564 U.S. 552 (2011).....	17, 23
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014).....	32
<i>Turner Broadcasting System, Inc. v. FCC</i> , 512 U.S. 622 (1994).....	12
<i>United States v. United Foods</i> , 533 U.S. 405 (2001).....	14, 19, 20, 26
<i>United States v. Valencia</i> , 600 F.3d 389 (5th Cir.), <i>cert. denied</i> , 562 U.S. 893 (2010).....	22
<i>Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976).....	18, 27
<i>Williams-Yulee v. Florida Bar</i> , 575 U.S. 433 (2015).....	17
<i>Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio</i> , 471 U.S. 626 (1985)...	6-17, 19, 20, 23-29, 33, 34

TABLE OF AUTHORITIES—Continued

CONSTITUTION	Page(s)
U.S. Const. amend. I	1, 2, 4, 7, 11, 12, 15, 16, 20, 30
U.S. Const. amend. II.....	30
STATUTES AND REGULATIONS	
27 U.S.C. § 205(e)(2).....	20
28 U.S.C. § 1254(l).....	1
Fla. Stat. § 790.175	7
N.C. Gen. Stat. § 14-315.2.....	7
Tex. Penal Code Ann. § 46.13(g).....	7
Anne Arundel County, Bill 108-21 (Jan. 10, 2022)... 1-4, 6, 10, 15-17, 24, 27, 30, 31	
Anne Arundel County Code, § 9-2-101	2
Anne Arundel County Code, § 12-6-108	1
Montgomery County Code, § 57-11A (effective March 24, 2024)	30
27 C.F.R. § 478.103	7
RULES	
Sup. Ct. R. 10.....	12
COURT FILINGS	
Appellee’s Response Brief, <i>MSI v. Anne Arundel Co.</i> , No. 23-1351, ECF # 26 (4th Cir. July 10, 2023).....	16
Brief For Petitioners, <i>NetChoice, LLC v. Paxton</i> , No. 22-555 (Nov. 30, 2023).....	33, 34

TABLE OF AUTHORITIES—Continued

	Page(s)
Brief For Respondents, <i>Moody v. NetChoice, LLC</i> , No. 22-277 (Nov. 30, 2023)	34
 OTHER AUTHORITIES	
S. Shapiro, <i>et al.</i> , <i>Supreme Court Practice</i> (11th ed. 2019)	12, 13

PETITION FOR WRIT OF CERTIORARI

Petitioners Maryland Shall Issue, Inc., Field Traders LLC, Cindy's Hot Shots, Inc., Pasadena Arms, LLC, and Worth-A-Shot, Inc., respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 91 F.4th 238 and reproduced at Pet.App. 3a. The order denying rehearing and rehearing en banc is reprinted at Pet.App. 62a. The district court's opinion is reported at 662 F.Supp.3d 557 and is reproduced at Pet.App. 26a-62a.

JURISDICTION

The Fourth Circuit issued its opinion on January 23, 2024. Pet.App. 3a. Petitioners filed a timely petition for rehearing, which the court denied on February 21, 2024. Pet.App. 62a. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Free Speech Clause of the First Amendment, U.S. Const. Amend. 1, provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press." Bill 108-21 amended Anne Arundel County Code, Article 12, Title 6, § 12-6-108, to provide:

(A) Duties of Health Department. The Anne Arundel County Health Department shall prepare literature relating to gun safety, gun training, suicide prevention, mental health, and conflict

resolution and distribute the literature to all establishments that sell guns or ammunition.

(B) Requirements. Establishments that sell guns or ammunition shall make the literature distributed by the Health Department visible and available at the point of sale. These establishments shall also distribute the literature to all purchasers of guns or ammunition.

(C) Enforcement. An authorized representative of the Anne Arundel County Health Department may issue a citation to an owner of an establishment that sells guns or ammunition for a violation of subsection 8(b). Pet.App. 83a.

Bill 108-21 also provided that “a violation of this section is a Class C civil offense pursuant to § 9-2-101 of this code.” *Id.* A Class C civil offense under Section 9-2-101 of the Anne Arundel County Code is punishable by a fine of “\$500 for the first violation and \$1,000 for the second or any subsequent violation.”

STATEMENT OF THE CASE

A. Statutory Background and Procedural History

In their Complaint filed April 11, 2022 (Pet.App. 65a), Petitioners challenged the constitutionality of Anne Arundel County Bill 108-21 (“the Ordinance”), on First Amendment grounds. Bill 108-21 was enacted into law by Respondent, Anne Arundel County, Maryland (“the County”), on January 10, 2022, with an effective date of April 10, 2022. Complaint ¶ 1. Pet.App. 66a. The Ordinance requires the County to “prepare literature relating to gun safety, gun training, suicide prevention, mental health, and conflict resolution and distribute the literature to all

establishments that sell guns or ammunition.” It further requires “[e]stablishments that sell guns or ammunition” to make the County’s literature “visible and available at the point of sale” and to “distribute the literature to all purchasers of guns or ammunition.”

Petitioner Maryland Shall Issue, Inc. (“MSI”) is a Section 501(c)(4), non-partisan, all-volunteer, membership advocacy organization devoted to the protection of gun owners’ rights in Maryland. Pet.App. 69a-70a. The other Petitioners are federally and State licensed firearms dealers located in Anne Arundel County, Maryland (“the dealers”). Pet.App. 71a-74a. Each of the dealers is a member of MSI. The Respondent is Anne Arundel County and is one of 23 counties in Maryland. Pet.App. 75a.

The County implemented the Ordinance by requiring firearms dealers in the County to distribute two pieces of literature. The first is a pamphlet entitled “Firearms and Suicide Prevention” published jointly by the National Shooting Sports Foundation and the American Foundation for Suicide Prevention (“the suicide pamphlet”). Pet.App. 85a. This pamphlet states that “Some People are More at Risk for Suicide than Others” and includes within that category people who have “Access to lethal means, including firearms and drugs.” Pet.App. 88a. On the same page, the pamphlet states that “Risk factors are characteristics or conditions that increase the chance that a person may try to take their life.” *Id.* The “conflict resolution” pamphlet (Pet.App. 93a) consists of a list of County and other third-party resources available for peaceful “conflict resolution.” Under the Ordinance, only firearms dealers and ammunition vendors are required

to display and distribute the County's literature. Pet.App. 83a.

Petitioners objected to being forced to distribute the County's literature, asserting in the Complaint that "Bill 108-21 constitutes 'compelled speech' in violation of the dealers' First Amendment rights." Pet.App. 67a. Petitioners specifically disagreed with the statement set forth in the suicide pamphlet that asserts that mere "access" to firearms is a "risk factor" for suicide. Pet.App. 88a. Petitioners also disagreed with the implied messages sent by the County's literature, including the implicit suggestion that "the public should not buy guns because they cause suicides." Pet.App. 11a. See also 55a-56a n.8.

Petitioners' expert, Prof. Gary Kleck, is a renowned expert in suicide and firearms. Pet.App. 115a. Prof. Kleck focused on "the suicide pamphlet" in his expert report, stating:

[T]he County, via this pamphlet, is claiming that access to firearms causes an increased chance of a person committing suicide. This assertion will be hereafter referred to as 'the suicide claim.' It is my expert opinion that the suicide claim is not supported by the most credible available scientific evidence and is probably false. Pet.App. 118a.

He further states in his expert report that "[t]he suicide claim is contradicted by much of the available scientific evidence and is indisputably *not* purely factual and uncontroversial information." *Id.*

Prof. Kleck elaborated on these points in his videotaped deposition,¹ testifying: "The point that it

¹ A copy of the video was made available to the district court and court of appeals via a Dropbox link, <https://bit.ly/3K6gOSF>.

[the suicide pamphlet] conveyed that was relevant to my expert witness report was that guns -- this pamphlet effectively states that possession of a gun or ownership of a gun increases the likelihood one will commit suicide.” Pet.App. 101a. At a later point in the deposition, Prof. Kleck explained:

Q. Okay. Where on this page is the statement that you evaluated for purposes of your report?

A. First of all, the title of the page as a whole, as you said, Some People Are More At Risk For Suicide Than Others, that introduces the topic of risk factors, which is reinforced in the lower right text, which reads, “Risk factors are characteristics or conditions that increase the chance that a person may try to take their life.” That’s unambiguously an assertion about causal effects.

Pet.App. 105a.

As Prof. Kleck further noted, “implicit in the notion that owning a gun is a risk factor for suicide, and any reader would think suicide is a bad thing, then the implication is – the recommendation implied is don’t own a gun.” Pet.App. 95a.

B. The District Court’s Decision

Petitioners and the County submitted cross-motions for summary judgment. Petitioners’ motion was supported by the verification declarations of each of the Petitioners, the expert witness report of Prof. Kleck (Pet.App. 116a), the interrogatories answers submitted by each Petitioner, portions of the deposition transcriptions of each Petitioner and the

Excerpts from the deposition transcript are in the Appendix. Pet.App. 94a.

videotape and transcript of Prof. Kleck's deposition. Pet.App. 55a n.8. The County's cross-motion was supported by the reports of two purported experts and numerous exhibits.

In their motion, Petitioners contended that the Ordinance imposed content-based, compelled speech on the dealers, and was thus presumptively unconstitutional under *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), and other controlling case law. Petitioners also contended that the County's literature was not "commercial speech" and that the literature was not "purely factual and uncontroversial" within the meaning of *NIFLA* and *Zauderer*. In response, the County made no attempt to carry the burdens demanded by strict scrutiny, arguing in their motion for summary judgment that the County need only satisfy what it characterized as the "rational basis" test of *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 628 (1985). DCT Dkt. # 43-1 at 11,15-16.

In assessing this record, the district court agreed with Petitioners that the County's literature was content-based compelled speech and thus presumptively unconstitutional. Pet.App. 45a. But rather than apply that presumption, the district court held that the literature was commercial speech that could be compelled under *Zauderer*. Pet.App. 45a-46a, 50a-51a. The district court also held that the County's literature asserted only a correlative effect between suicide and firearms, rather than a causal effect, and that assertion of a "correlative relationship" was both "purely factual" and "uncontroversial" under *Zauderer*. Pet.App. 56a-57a. On that sole basis, the district court excluded the expert witness testimony and report of Prof. Kleck, which the court found

would have been otherwise “admissible.” Pet.App. 54a. Having excluded Prof. Kleck’s testimony, the district court granted summary judgment to the County and denied plaintiffs’ motion for summary judgment. Pet.App. 62a-63a.

C. The Fourth Circuit’s Decision

The court of appeals affirmed. The court likened the suicide pamphlet to warnings that “gun owners should store guns safely, especially to prevent misuse and child access.” Pet.App. 14a, citing 27 C.F.R. § 478.103; N.C. Gen. Stat. § 14-315.2; Fla. Stat. § 790.175; Tex. Penal Code Ann. § 46.13(g). In so holding, the court construed *Zauderer* to hold that “compelled commercial speech is constitutional under the First Amendment so long as (1) it is ‘purely factual and uncontroversial’; (2) it is ‘reasonably related to the State’s interest in preventing deception of consumers’; and (3) it is not ‘unjustified or unduly burdensome.’” Pet.App. 15a, quoting *Zauderer*, 471 U.S. at 651. In the court’s view, *Zauderer* was not limited to preventing deception, but also encompassed compelled speech relating to “other government interests” such as protecting “human health” and “labelling requirements.” *Id.* at 15a-16a. The court thus rejected Petitioners’ argument that the relaxed scrutiny permitted by *Zauderer* is limited to compelled speech “about the terms under which ... services will be available” by the speaker.

The court of appeals then turned to the meaning of “commercial speech,” holding that while the County’s literature did not “propose a commercial transaction” the suicide pamphlet was nonetheless commercial speech solely because the literature required Petitioner dealers “to provide the specified literature in connection with the sales of firearms and ammunition to purchasers, which are commercial transactions.”

Pet.App. 18a. The court acknowledged that *Zauderer* required that the speech be purely factual and uncontroversial but held that these requirements were satisfied because the suicide pamphlet did not assert a causal relationship but only that access to firearms was “a ‘risk factor’ that increases ‘the chance’ of suicide.” *Id.* at 20a. The court also acknowledged that the suicide pamphlet “does state that access to guns increases the risk of suicide because guns are the primary means for committing suicide.” *Id.* at 20a-21a. The court ruled that “[t]his, however, is merely a logical syllogism: If guns are the primary means of suicide and if guns are not accessible to persons with suicidal ideation, then the number of suicides would likely decline.” *Id.* at 21a.

Finally, the court of appeals sustained the district court’s decision to exclude the testimony of Petitioners’ expert, reasoning that “[w]e agree with the district court that Dr. Kleck’s opinion that the pamphlet was not factual and was controversial was predicated on his reading of the pamphlet as asserting that firearms cause suicide.” *Id.* at 24a. In the court’s view, the suicide pamphlet was good policy because it informed “purchasers of the nature, causes, and risks of suicides and the role that guns play in them.” *Id.* at 25a. The court believed that the pamphlet was merely “a public health and safety advisory that does not discourage the purchase or ownership of guns,” and that “gun dealers might well find it admirable to join the effort.” *Id.*

REASONS FOR GRANTING THE PETITION

1. *NIFLA* held that *Zauderer* is expressly limited to commercial speech that is “purely factual and uncontroversial information about the terms under which ... services will be available” and “does not apply outside of these circumstances.” *NIFLA*, 585 U.S. at 768-69, quoting *Zauderer*, 471 U.S. at 651. In so holding, *NIFLA* relied on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995), where the Court stated “[a]lthough the State may at times ‘prescribe what shall be orthodox in commercial advertising’ by requiring the dissemination of ‘purely factual and uncontroversial information,’ outside that context it may not compel affirmance of a belief with which the speaker disagrees.” (Citation omitted).

These limitations are consistent with this Court’s holding in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010), that an “essential feature[]” of *Zauderer* is that the “required disclosures” were “intended to combat the problem of inherently misleading commercial advertisements.” As *NIFLA* and *Hurley* make clear, *Zauderer* does not permit the government to compel speech where, as here, the regulated person merely seeks to remain silent. It is well established that the right not to speak is constitutionally protected. *303 Creative*, 600 U.S. at 586 (“Nor does it matter whether the government seeks to compel a person to speak its message when he would prefer to remain silent or to force an individual to include other ideas with his own speech that he would prefer not to include.”), citing *Hurley*, 515 U.S. at 568-570. See also *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988).

Here, there is no dispute that nothing in the compelled literature is “about the terms under which ... services will be available” within the meaning of *Zauderer* and *NIFLA*. Petitioners do not provide “suicide prevention” or “conflict resolution” services. Such services are provided by third parties, including those listed in the suicide pamphlet (Pet.App. 92a) and the “conflict resolution” pamphlet (Pet.App. 93a).

2. The literature likewise does not relate to “commercial advertisements,” or any speech otherwise undertaken by the dealers. The Ordinance’s display and distribution requirements apply regardless of whether the dealers advertise or even speak. Rather, the court of appeals held that the County’s literature was “commercial speech” *solely* because it provided “warnings of risks and proposed safety steps with respect to firearms sold by gun dealers in commercial establishments.” Pet.App. 18a.

In the court of appeals’ view, it was irrelevant that the literature did not propose a commercial transaction or relate to the economic interests of the dealers or their customers, the hallmarks of “commercial speech” as defined in *Central Hudson*. *Id.* at 17a. That the dealers merely desired to remain silent about suicide prevention and conflict resolution was similarly irrelevant to the court. These holdings conflict with *Central Hudson*, *Zauderer*, *NIFLA*, *303 Creative* and *Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 800-02 (2011). *NIFLA* expressly held that *Zauderer* cannot be applied to compel disclosure of third-party services, such as those listed in both the suicide pamphlet and the conflict resolution pamphlet. *NIFLA*, 585 U.S. at 769. *303 Creative* and *Brown* both struck down compelled speech in a commercial context and *303 Creative* expressly

ruled that a commercial context does not “make[] a difference” in the scope of First Amendment protection against compelled speech. 600 U.S. at 594.

3. A second “essential feature” of *Zauderer* is that the compelled speech must be “purely factual and uncontroversial.” The Fourth Circuit failed to apply the correct legal standard and, under correct test, the literature compelled by the County is neither. The suicide pamphlet factually asserts that persons with mere “access” to a firearm “are more at risk for suicide than others” and is a “risk factor” that “increase[s] the chance that a person may try to take their life.” Pet.App. 88a (emphasis added). Yet, it is undisputed that factual assertion is supported by no more than correlative evidence. That factual assertion was disputed by Petitioners’ expert as “probably false” and highly controversial. *Id.* at 118a-120a. At a minimum, the statement is highly misleading to any reasonably objective reader. Such reliance on correlative evidence was expressly rejected as insufficient in the First Amendment context by this Court in *Brown*. The court of appeals simply ignored *Brown*.

4. The Fourth Circuit’s affirmance of the district court’s exclusion of Petitioners’ expert is also at war with the limited scope of the district court’s discretion recognized in *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993). The issue is whether a reasonable person could read the suicide pamphlet as asserting such a causal connection, a test that neither the district court nor the court of appeals ever purported to apply. That is a matter for the fact finder, and the expert’s reading of the literature is admissible for consideration by the fact finder. That evidence cannot be excluded under *Daubert*’s “gate-

keeping” function merely because the district court disagreed with the expert. The holdings of the court of appeals and the district court conflict with *Daubert* and *Joiner* and otherwise warrant the exercise of this Court’s supervisory power under Rule 10 of this Court’s Rules.

5. The First Amendment issues presented by this Petition have split the courts of appeals in multiple ways and are obviously far reaching and important. In particular, the Fourth Circuit’s decision is so erroneous and is so rife with potential for abuse that summary reversal is warranted. At a minimum, this Court should hold this petition pending a decision in *Moody v. NetChoice, LLC*, No. 22-277, and *NetChoice, LLC v. Paxton*, No. 22-555, both of which were argued February 26, 2024. The scope of *Zauderer* and *303 Creative* is squarely presented in both cases, and it is likely that the Court will provide controlling guidance in its decision and thus warrant either summary reversal or a GVR in this case. The Court should thus either grant plenary review or summarily reverse. Alternatively, the Court should hold this petition pending a decision in the *NetChoice* litigation. See S. Shapiro, *et al.*, *Supreme Court Practice*, §4.16 at 4-49-4-50, §6.31(e) at 6-126 (11th ed. 2019).

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT’S FIRST AMENDMENT PRECEDENTS

“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). As this Court recently stated, “our ‘leading First Amendment precedents ... have established the principle that

freedom of speech prohibits the government from telling people what they must say.” *303 Creative*, 600 U.S. at 596, quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 61-62 (2006). See also *Pacific Gas and Elec. Co. v. Public Utilities Com’n of California*, 475 U.S. 1, 10-11 (1986); *Janus v. AFSCME*, 585 U.S. 878, 891-92 (2018). “[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” *Hurley*, 515 U.S. at 573.

A. The Fourth Circuit’s Decision Conflicts With *NIFLA*, *Hurley*, *303 Creative* and Other Decisions Of This Court

The Fourth Circuit’s application of *Zauderer* directly conflicts with express limitations imposed on *Zauderer* by this Court in *NIFLA*, limitations that the court ignored. Under *NIFLA*, *Zauderer* is limited to “purely factual and uncontroversial information *about the terms under which . . . services will be available.*” *NIFLA*, 585 U.S. at 768-69, quoting *Zauderer*, 471 U.S. at 651 (emphasis added). *NIFLA* reiterated the Court’s prior holding in *Hurley* that “*Zauderer does not apply* outside of these circumstances.” *Id.* at 769 (emphasis added). It is undisputed that nothing in the County’s literature is “about the terms under which services will be available” by the dealers. If the Court meant what it said in *NIFLA* and *Hurley* about the limits of *Zauderer*, then summary reversal would be appropriate for that reason alone. See Shapiro, ch.5.12(a) at 5-36. That holding would resolve this case.

Zauderer is premised on the notion that the government may compel speech relating to “the terms

of service” to prevent the commercial entity from misleading or deceiving the public through speech otherwise voluntarily undertaken by the speaker. Thus, in *United States v. United Foods*, 533 U.S. 405, 416 (2001), the Court noted that the compelled speech in *Zauderer* applied to attorneys “who advertised by their own choice” and thus involved “voluntary advertisements.” In *Milavetz*, the Court stated that “required disclosures are intended to combat the problem of inherently misleading commercial advertisements.” 559 U.S. at 250. *Zauderer*’s holding and rationale cannot possibly apply where, as here, the commercial entity is not otherwise voluntarily speaking about the matters on which the County has compelled speech. In such circumstances, *303 Creative* is controlling, not *Zauderer*.

In ignoring the limits placed on *Zauderer* by *NIFLA* and *Hurley* and holding that the government may compel speech that is completely unrelated to any speech otherwise being undertaken by the dealers, the court of appeals impermissibly expanded *Zauderer* far beyond its bounds. Under the court’s ruling, the government may compel, as commercial speech, the display and distribution of the government’s literature by any commercial entity that sells a product related to a policy that the government wishes to promote. This Court has never applied *Zauderer* in such a manner.

Indeed, in both *303 Creative* and *Brown* the compelled speech at issue directly applied to products or services being sold commercially, and yet in both cases, the Court found that the compelled speech was unconstitutional under strict scrutiny without applying *Zauderer*. As the Fifth Circuit recently explained, *Zauderer* was not applied in *303 Creative* “because

that case [*303 Creative*] dealt not with disclosures about the terms under which the service was available, *but instead with compelling those services.*” *R J Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 875 n.33 (5th Cir. 2024) (emphasis added). That distinction also explains the result in *Brown*, which likewise never cited *Zauderer* in holding that the commercial speech there at issue (warnings on the sales of video games) could not be compelled under strict scrutiny. That the compelled speech takes place in a commercial context does not “make[] a difference.” *303 Creative*, 600 U.S. at 594.

In this case, as in *303 Creative* and *Brown*, the County is not compelling disclosures about the “terms of service.” It is instead “compelling those services” by requiring Petitioners to display and distribute the County’s pamphlets, both of which endorse the services of third parties (Pet.App. 92a, 93a) and are intended to promote governmental policies (suicide prevention and peaceful conflict resolution). Those policies have nothing to do with any services rendered by the dealers. If allowed to stand, the court of appeals’ decision will eviscerate the First Amendment protections recognized in *303 Creative* and *Brown* by abrogating the right of commercial entities not to speak on matters having nothing to do with their terms of services. Remarkably, the Fourth Circuit ignored *303 Creative* and *Brown*, even though both cases were extensively briefed to the court.

Effectively, the County has hijacked the dealers and expropriated the goodwill the dealers enjoy with their customers. In its brief filed with the court of appeals, the County argued that “the Ordinance is just one feature of an extensive gun-violence-prevention campaign” and that the dealers’ customers are “more

likely to credit the information as coming from a trusted messenger.” *MSI v. Anne Arundel Co.*, No. 23-1351, ECF # 26 at 40 (4th Cir. July 10, 2023). The County is thus enjoying “a free pass to spread their preferred messages on the backs of others.” *American Meat Institute v. Dept. of Agriculture*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring).

According to the court of appeals, Petitioners should find this governmental theft of dealer goodwill “admirable.” Pet.App. 25a. It is not. It is Orwellian. See *303 Creative*, 600 U.S. at 602 (noting “an unfortunate tendency by some to defend First Amendment values only when they find the speaker’s message sympathetic”). “While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” *Hurley*, 515 U.S. at 579.

While denied by the court of appeals (Pet.App. 14a, 20a), the ideological message conveyed to a reasonable person is, as Prof. Kleck stated, “don’t own a gun” because doing so increases the risk of suicide. Pet.App. 95a. That message stigmatizes and thus seeks to discourage legitimate and constitutionally protected firearm ownership. See *National Ass’n of Manufacturers v. SEC*, 800 F.3d 518, 523, 530 (D.C. Cir. 2015) (“NAM”) (declining to apply *Zauderer* where the rule required speakers to “express certain views” that their products were “ethically tainted”); *American Hospital Ass’n v. Azar*, 983 F.3d 528, 541 (D.C.Cir. 2020) (reaffirming that “such expressive content” could not be compelled).

The Ordinance is also facially underinclusive. Suicide prevention is a concern shared by society, not

just by gun owners. That underinclusivity “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Brown*, 546 U.S. at 802. See also *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 449 (2015) (“a law’s underinclusivity raises a red flag”). As stated in *NIFLA*, statutes that discriminate among speakers “run the risk that the State has left unburdened those speakers whose messages are in accord with its own views.” 585 U.S. at 778. Here, as in *NIFLA*, the County’s law “targets speakers, not speech.” *Id.* See *Sorrell v. IMS Health*, 564 U.S. 552, 578-79 (2011) (“The State may not burden the speech of others in order to tilt public debate in a preferred direction.”).

A similar ideological message is sent by the Ordinance with respect to “conflict resolution,” *viz.*, that purchasers of firearms and ammunition are in special need of information concerning third party services on peaceful “conflict resolution.” Contrary to the Fourth Circuit’s belief (Pet.App. 16a), there is nothing “sarcastic” about that observation; it flows inexorably from the exclusive focus of the Ordinance on such purchasers. The universe of people who might find peaceful conflict resolution services useful obviously extends far beyond gun owners.

Finally, *NIFLA* squarely holds that *Zauderer* cannot justify compelled speech that “relates to the services” provided by *third parties*. *NIFLA*, 585 U.S. at 769. Both the suicide pamphlet (Pet.App. 92a) and the conflict resolution pamphlet (Pet.App. 93a), convey information about third party services. Indeed, the conflict resolution pamphlet is *completely* about the services of third parties. The County’s literature fails under *NIFLA* for that reason alone.

**B. The Fourth Circuit’s Decision Conflicts
With *Central Hudson* On The Limits Of
The “Commercial Speech” Doctrine**

The court of appeals also held that the County’s suicide pamphlet was “commercial speech.” The court reasoned that the pamphlet was “commercial” merely because it “provide[s] warnings of risks and proposed safety steps with respect to firearms sold by gun dealers in commercial establishments.” Pet.App. 18a. That construction of the commercial speech doctrine is so open to abuse and so obviously wrong as to warrant summary reversal.

Central Hudson holds that commercial speech means an “expression related *solely* to the economic interests of the speaker and its audience.” *Central Hudson*, 447 U.S. at 561 (emphasis added). See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). It is undisputed here that nothing in the compelled pamphlets relate to “economic interests” of the dealers or their customers. The Fourth Circuit refused to apply the *Central Hudson* test, holding the suicide pamphlet was commercial speech merely because Petitioners sell firearms. Pet.App. 17a-18a.

The core error of the Fourth Circuit’s decision is that it conflates *where* speech is compelled with the *content* of the speech itself. Nothing in the *content* of the County’s compelled speech is remotely commercial. The court’s holding thus eliminates the requirement that compelled speech *itself* relate “solely” to the economic interest of the speaker. Under the court’s test, there is no practical or principled limit on the speech the government could compel as “commercial speech.” The commercial speech inquiry would be bounded only by the government’s imagination in

claiming a relationship between the compelled speech and the product. The potential for abuse is apparent.

Zauderer's underlying rationale is that the speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." 471 U.S. at 651. In other words, purely factual and uncontroversial commercial speech may be compelled where the commercial entity *is already voluntarily speaking* on the matter. See *United Foods*, 533 U.S. at 416. That rationale is lost if *Zauderer* is construed, as the court of appeals did here, to permit compelled speech on any product sold at retail, regardless of the content of the speech and regardless of whether the speaker merely wishes to exercise the constitutional right to remain silent.

NIFLA states that "we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." 585 U.S. at 775. Seizing on this dictum, the Fourth Circuit likened the County's compelled speech to posting requirements imposed on dealers by a federal regulation and by three State laws. Pet.App. 14a. Yet, such provisions have never been challenged as they merely require the distribution or posting of a *statute*, such as legal restrictions on the sales of firearms to minors. Such restrictions may well relate to "terms of services" (e.g., no sales to minors). Nothing in those minimal requirements remotely compares to compelled speech on government policies like "suicide prevention" and "conflict resolution."

To be sure, the government may compel "commercial disclosures that are common and familiar to American consumers, such as nutrition labels and health warnings." *American Meat*, 760 F.3d at 31 (Kavanaugh, J.,

concurring). But such labels and health warnings necessarily accompany *other* speech voluntarily made by manufacturers in marketing the very product on which the labels or warnings are attached. The labels and warnings are thus intended to ensure full disclosure to prevent consumer confusion or deception about the product being sold, a goal consistent with *Zauderer*. The suicide and conflict resolution pamphlets at issue here are not labels or health warnings. Rather, as noted above, they are “just one feature” of the County’s “gun-violence-prevention campaign.” That campaign is not “commercial” and cannot be justified by any need to avoid confusion or deception on the sale of a particular product.

The Fourth Circuit plainly misread Justice Stevens’ concurrence in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (Stevens, J. concurring), as supporting its ruling. Pet.App. 17a-18a. There, Justice Stevens concurred in the Court’s judgment that the beer label restrictions imposed by the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2), were unconstitutional. But Justice Stevens wrote separately because, in his view, “[a]s a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s potential to mislead.” *Rubin*, 514 U.S. at 494 (Stevens, J., concurring). Justice Stevens’ reference to specific disclosure requirements in a footnote, cited by the court of appeals (Pet.App. 17a-18a), must thus be understood as examples of *this* type of speech.

That same rationale forms the basis of *Milavetz*, 559 U.S. at 250, *United Foods*, 533 U.S. at 416, and *Zauderer* itself. See also *Bolger v. Youngs*

Drug Products Corp., 463 U.S. 60, 64-65 (1983) (“regulation of commercial speech based on content is less problematic” because of “the greater potential for deception or confusion in the context of certain advertising messages”). Those considerations are absent where, as here, the compelled speech is not intended to prevent deception or confusion and the compelled speaker merely wishes to remain silent. The County has never contended (nor could it) that dealer silence about the County’s “gun-violence-prevention campaign” could mislead any purchaser.

C. The Fourth Circuit’s Decision Conflicts With *Zauderer* and *Brown* On What Constitutes “Purely Factual and Uncontroversial” Speech

The Fourth Circuit held that the suicide pamphlet’s statement that “access to firearms is a ‘risk factor’ that increases ‘the chance’ of suicide” was “purely factual” and “uncontroversial” *solely* by reference to what it called a “logical syllogism,” *viz.*, “[i]f guns are the primary means of suicide and if guns are not accessible to persons with suicidal ideation, then the number of suicides would likely decline.” Pet.App. 21a. But the court’s “logic” assumes its conclusion and amounts to nothing more than *post hoc ergo propter hoc*, or *cum hoc ergo propter hoc* reasoning. That is not a “logical syllogism,” it is a logical fallacy.

The district court ruled, and the County conceded, that the supposed link between firearms access and suicide is supported only by a “correlation” or a “correlational relationship.” Pet.App. 56a,59a. The Fourth Circuit agreed. *Id.* at 9a,20a. But if access is not a causal factor for suicide, then the court’s “logical syllogism” falls apart. As Petitioners’ expert explained, “you can’t prevent suicide by eliminating

something that's merely coincidentally associated with suicide. It's got to be a factor that has some causal effect." Pet.App. 97a. That point is too self-evident to admit of rational dispute. Thus, in insisting that the pamphlet did not assert a causal connection (Pet.App. 20a), the court of appeals refuted the very premise of its "logical syllogism" that supposedly made the pamphlet "purely factual and uncontroversial." The Fourth Circuit cannot have it both ways.

At a minimum, the suicide pamphlet is seriously misleading in factually asserting that persons with access to firearms "are more at risk of suicide than others" (Pet.App. 88a) where it is undisputed that access and suicide are merely correlated. See, e.g., *United States v. Valencia*, 600 F.3d 389, 425 (5th Cir.), *cert. denied*, 562 U.S. 893 (2010) ("Evidence of mere correlation, even a strong correlation, is often spurious and misleading when masqueraded as causal evidence."). In *Brown*, this Court rejected correlation evidence as insufficient to justify content-based compelled speech. *Brown*, 564 U.S. at 800-01 ("ambiguous proof will not suffice"). See also *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 282 (5th Cir. 2024), *petition for cert. pending*, No. 23-1122 (filed, April 12, 2024) (dismissing the State's evidence of a "correlative relationship" as insufficient). Inexplicably, the court of appeals never addressed *Brown*.

As Petitioners' expert explained, restricting access to firearms could reduce suicide only if guns were the only means or the most lethal means of committing suicide. Pet.App. 119a. Yet, the second most common means of suicide (hanging) is readily available (e.g., a bed sheet) and is just as likely to result in death. Pet.App. 109a-110a, 119a. And, of course, there are many other means of committing suicide that are

100% effective. *Id.* Not surprisingly, “[t]he technically strongest macro-level studies find no significant association between gun ownership rates and total suicide rates.” Pet.App. 129a.

At a minimum, the supposed connection between access and suicide is open to legitimate debate and thus cannot be “purely factual and uncontroversial.” See *Free Speech Coalition*, 95 F.4th at 281-82 (“a compelled statement is ‘uncontroversial’ for purposes of *Zauderer* where the truth of the statement is not subject to good-faith scientific or evidentiary dispute and where the statement is not an integral part of a live, contentious political or moral debate”); *National Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1278 (9th Cir. 2023) (same). See also *Sorrell*, 564 U.S. at 578 (“resolution” of “divergent views” “must result from free and uninhibited speech”).

Instead of faithfully applying *Brown* the court of appeals disposed of the issue with an *ipse dixit*, stating that “any reasonable reader would understand from the pamphlet that it only gives the message that *because firearms are the leading means by which suicide is committed, firearms should be stored safely to reduce suicides by firearms.*” Pet.App. 13a. That statement makes the same error as the pamphlet because it assumes that safe storage would, in fact, cause a reduction in suicide, a point disputed by Petitioners’ expert. Pet.App. 100a. And the suicide pamphlet’s assertions are not remotely “only” so limited. No observant reader would fail to note the pamphlet’s misleading and “probably false” factual assertion (Pet.App. 106a, 118a) that persons who have mere “access” to firearms “*are* more at risk for suicide than others.” Pet.App. 88a (emphasis added). The court’s assertion ignores all the other statements in

the eight-page pamphlet concerning suicide warnings, causes of suicide, the importance of reaching out and the availability of third-party resources (Pet.App. 89a-92a), all of which are directed exclusively at purchasers of firearms or ammunition. There is nothing “purely factual and uncontroversial” about the implicit message sent by the Ordinance that gun owners are uniquely in need of suicide prevention information.

II. THE LOWER COURTS ARE IN CONFLICT ON THE SCOPE OF *ZAUDERER*

A. The Circuits Are In Conflict Concerning Whether *Zauderer* Is Limited To The Terms of Services

NIFLA holds that *Zauderer* is limited to “purely factual and uncontroversial information *about the terms under which . . . services will be available*” and “does not apply outside of these circumstances.” *NIFLA*, 585 U.S. at 768-69 (emphasis added). The Ninth, Fifth and Fourth Circuits have refused to adhere to that “terms-of-services” limitation. Two other circuits, the Eleventh Circuit, and the D.C. Circuit, have been faithful to *NIFLA* and hold that the compelled speech must about the “terms” of such “services.” This circuit split has developed post-*NIFLA* and warrants plenary review or summary reversal to remind the lower courts, including the Fourth Circuit in this case, that the limits placed on *Zauderer* in *NIFLA* and *Hurley* may not be ignored.

Specifically, the Ninth Circuit, sitting en banc, has held that “[t]he *Zauderer* test, as applied in *NIFLA*, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.” *American Beverage Ass’n v. City and County of San Francisco*, 916

F.3d 749, 756 (9th Cir. 2019) (en banc). That statement of the test drew a sharp dissent from Judge Ikutu, who stated that “[t]o determine whether the *Zauderer* exception applies, a court must consider whether the compelled speech governs only [1] ‘commercial advertising’ and requires the disclosure of [2] ‘purely factual and [3] uncontroversial information about [4] *the terms under which . . . services will be available.*’” *Id.*, 916 F.3d at 759 (Ikutu, J., dissenting from the reasoning) (emphasis added) (brackets in original). Judge Ikutu would have held that the “compelled speech” there at issue did not pass muster because it did not relate to “the terms on which that product is provided.” *Id.* at 761. Thus, in the Ninth Circuit, the government need only show that “the compelled disclosure . . . *relates to the service or product provided.*” *CTIA - The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 842 (9th Cir.), *cert. denied*, 140 S.Ct. 658 (2019) (emphasis added).

Similarly, in the Fifth Circuit, the rule is that “[s]tates may require commercial enterprises to disclose ‘purely factual and uncontroversial information’ about their services.” *Chamber of Commerce of United States v. SEC*, 85 F.4th 760, 768 (5th Cir. 2023), quoting *NetChoice, LLC v. Paxton*, 49 F.4th 439, 485 (5th Cir. 2022), *cert. granted*, 144 S.Ct. 477 (2023) (emphasis added). That test was key to the Fifth Circuit’s ruling in *NetChoice* that the Texas law regulating social media platforms was constitutional. *NetChoice*, 49 F.4th at 485. The Ninth Circuit and the Fifth Circuit have thus effectively abrogated the *Zauderer* requirement that compelled commercial speech be “*about the terms under which [the speaker’s] services will be available.*” *Zauderer*, 471 U.S. at 651 (emphasis added).

In this case, the Fourth Circuit likewise has held that compelled speech need not be about the *terms* on which services are available, holding that compelled speech need only be “linked” to a product sold commercially. Pet.App. 17a. The Fourth Circuit, the Ninth Circuit and the Fifth Circuit thus allow governments to compel speech that merely “relates to” or is “about” or is “linked” to a product or service. The standard employed by these courts is thus unmoored from the full disclosure rationale of *Zauderer* emphasized in *NIFLA*, *Hurley*, *Milavetz*, *United Foods*, *Bolger*, and by Justice Stevens in *Rubin*. By divorcing *Zauderer* from its rationale, the standard adopted by these courts allows governments to inflict compelled speech on businesses who merely wish not to speak.

In contrast, the Eleventh Circuit and the D.C. Circuit have been faithful to *Zauderer* as limited by *NIFLA*. Thus, in *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1227 (11th Cir. 2022), *cert. granted*, 144 S.Ct. 478 (2023), the Eleventh Circuit held that compelled speech under *Zauderer* must be “about their conduct toward their users *and* the ‘terms under which [their] services will be available.’” (Citation omitted) (emphasis added) (brackets in original). Similarly, the D.C. Circuit has stated, post-*NIFLA*, that “[c]ritical to the Court’s decision, the disciplinary ruling required disclosure [in *Zauderer*] of only ‘purely factual and uncontroversial information about the terms under which [the attorney’s] services will be available.’” *American Hospital Ass’n.*, 983 F.3d at 540, quoting *Zauderer*, 471 U.S. at 651 (emphasis added). The D.C. Circuit applied that test to hold that a federal rule requiring disclosure of hospital rates was “directly relevant to ‘the terms under which [hospitals’] services will be available’ to consumers.” *Id.* These splits warrant review.

B. The Circuits Are In Conflict Over the Meaning of “Commercial Speech”

The courts of appeals are also divided on what constitutes “commercial speech.” The Fourth Circuit held the requirement of commercial speech was satisfied in this case merely because the County’s Ordinance compelled speech was “linked” (by the County) to a product sold at retail. Pet.App. 17a-18a. The court expressly declined to apply the definition established by *Central Hudson*. *Id.*

In contrast, the Fifth Circuit, in *Book People, Inc. v. Wong*, 91 F.4th 318, 339 (5th Cir. 2024), held that commercial speech under *Zauderer* is limited to “[e]xpression related solely to the economic interests of the speaker and its audience,” quoting *Central Hudson*, 447 U.S. at 561, or “speech which does ‘no more than propose a commercial transaction,’” quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 762. The Fifth Circuit quoted with approval then-Judge Kavanaugh’s view that “*Zauderer* is best read simply as an application of *Central Hudson*, not a different test altogether.” *Book People*, 91 F.4th at 339 n.124, quoting *Am. Meat Inst.*, 760 F.3d at 33 (Kavanaugh, J., concurring). See also *Free Speech Coalition*, 95 F.4th at 279-80 (holding that the compelled speech was “commercial” because it was explicitly tied to speech that “propose commercial transactions”).

If *Zauderer* is tied to *Central Hudson*, then “commercial speech” under *Zauderer* cannot be given a broader meaning than the term has under *Central Hudson*. That is particularly so given that *Central Hudson* requires the government to satisfy intermediate scrutiny and *Zauderer*, at least in the Fourth Circuit, merely requires “rational basis” review. *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City*

Council of Baltimore, 721 F.3d 264, 283 (4th Cir. 2013) (en banc).

This Court stated in *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56 (1978), “[w]e have not discarded the ‘common-sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” That distinction is at the heart of both *Central Hudson* and *Zauderer*. See also *Bolger*, 463 U.S. at 64-65. Under the Fourth Circuit’s test, the government may compel, as “commercial speech,” any speech “linked” to the sale of any product by any commercial entity, regardless of the content of the speech and regardless of whether the speaker merely desires to remain silent. No court has gone that far.

**C. The Fourth Circuit Is In Conflict With
The Ninth Circuit And The D.C. Circuit
Over The Test For “Purely Factual and
Uncontroversial Information”**

There is also a conflict between the Fourth Circuit’s decision in this case and the Ninth Circuit’s decision in *Wheat Growers* with respect to what constitutes “purely factual and uncontroversial information.” *Wheat Growers* holds that “[i]nformation that is purely factual is necessarily ‘factually accurate,’ but that alone is not enough to qualify for the *Zauderer* exception.” 85 F.4th at 1276. Rather, the Ninth Circuit warned that “a statement may be literally true but nonetheless misleading and, in that sense, untrue.” *Id.* (citation omitted). The court thus ruled that, under *Zauderer*, “the topic of the disclosure and its effect on the speaker is probative of determining whether something is subjectively controversial.” *Id.* at 1277. The court applied that test to reject the safety

warnings in that case because they could be materially misleading to a “reasonable person.” *Id.* at 1280-81.

Similarly, the D.C. Circuit has held that “purely factual and uncontroversial” speech cannot include speech that implies that the speaker’s product is “ethnically tainted” or otherwise puts the speaker in a bad light. *NAM*, 800 F.3d at 530. Post-*NIFLA*, the D.C. Circuit reaffirmed *NAM* as involving the type of “expressive content” that could not be compelled under *Zauderer*. *American Hospital Ass’n.*, 983 F.3d at 541.

Here, neither the district court nor the Fourth Circuit employed the *Wheat Growers* test in ruling that the County’s literature was “purely factual and uncontroversial.” In a footnote (Pet.App. 55a-56a n.8), the district court dismissed Petitioners’ objections about the misleading “messages” sent by the pamphlets and refused to consider whether such messages were the type of adverse “expressive content” that could not be compelled under *Zauderer*. That decision by the district court, affirmed by the Fourth Circuit, is incompatible with *Wheat Growers*, which holds that even “literally true” speech cannot be compelled where it is “nonetheless misleading.” 85 F.4th at 1279 (citation omitted).

III. THIS CASE IS THE IDEAL VEHICLE

This case is an excellent vehicle to address all of these issues. The Fourth Circuit reviewed a final judgment entered after full discovery on cross motions for summary judgment. There are no procedural obstacles or factual issues that would preclude reaching the merits. The legal issues are unquestionably important and squarely presented. Resolution of these issues is especially appropriate in this case because the compelled speech at issue here implicates the right

to keep and bear arms protected by the Second Amendment. If governments may compel speech stigmatizing the exercise of a fundamental constitutional right, then “there would be no end to the government’s ability to skew public debate” about such rights. *NAM*, 800 F.3d at 530. Skewing the debate is precisely what the County’s Ordinance does here.

Allowing these issues to fester will result in more jurisdictions enacting such laws.² But such issues are hardly limited to the Second Amendment. People in the United States are sharply divided on a host of other cultural issues, as the *NetChoice* litigation illustrates. If the approach to compelled speech adopted by the Fourth, Fifth and Ninth Circuits is allowed to stand, “red states” will feel entitled to compel speech on their preferred policies and way of thinking while “blue states” will feel entitled to do likewise and in opposite ways. That result is made all the more likely by the Fourth Circuit’s extraordinary and expansive view of “commercial speech.” Allowing further “percolation” of these issues invites such laws, and a corresponding destruction of First Amendment values in the Fourth Circuit and around the country.

IV. THE EXCLUSION OF PETITIONERS’ EXPERT VIOLATES *DAUBERT* AND *JOINER*

The district court excluded the otherwise admissible testimony (Pet.App. 54a) of Petitioners’ expert because the court disagreed with Prof. Kleck’s reading of

² Another Maryland county has already followed Respondent’s lead. See Montgomery County Code, § 57-11A (effective March 24, 2024) (requiring a “gun shop” to “make conspicuous and available” county literature on, *inter alia*, “suicide prevention,” “mental health,” and “conflict resolution.”

the suicide pamphlet as asserting a causal connection between access to a firearm and suicide. The court reasoned that because, in the court's view, the pamphlet asserted only a correlation and not a causal connection, Prof. Kleck's testimony was not "sufficiently tied to the facts of the case." Pet.App. 56a, quoting *Daubert*, 509 U.S. at 591. The Fourth Circuit sustained that ruling as a permissible exercise of discretion. Pet.App. 24a. These result-driven holdings conflict with *Daubert* and *Joiner*, present important questions concerning the admissibility of expert testimony, and otherwise so far depart from the accepted and usual course of judicial proceedings that the exercise of this Court's supervisory power is warranted.³

The district court did not have discretion to exclude otherwise admissible expert evidence just because it disagreed with the expert's opinion. First, the district court imposed its reading without applying the 'reasonable reader' legal standard of *Wheat Growers*, 85 F.4th at 1281-82. The court thus willfully blinded itself to misleading messages sent by the County's Ordinance. Pet.App.55a-56a n.8. That failure to employ the correct test is a *per se* abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law").

Second, and more fundamentally, the district court far exceeded its gatekeeping powers by excluding otherwise admissible expert evidence that the factfinder was entitled to consider. In *Daubert*, 509 U.S.

³ This *Daubert* issue relates solely to expert evidence on whether the County's compelled speech is "purely factual and uncontroversial."

at 595, and *Joiner*, 522 U.S. at 146, this Court ruled that in performing the district court’s gatekeeping function with respect to experts, “the focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.” The court of appeals ignored that holding. The Fourth Circuit even ignored its own circuit case law which makes clear that “[t]o determine whether an opinion of an expert witness satisfies *Daubert* scrutiny, courts *may not evaluate the expert witness’ conclusion* itself, but only the opinion’s underlying methodology.” *Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 195 (4th Cir. 2017) (citation omitted) (emphasis added).

The district court did not fault Prof. Kleck’s “methodology,” it merely disagreed with his conclusions about the suicide pamphlet. But the credibility and weight of an expert’s opinion are for the fact finder. *Rodríguez v. Hospital San Cristobal, Inc.*, 91 F.4th 59, 71-72 (1st Cir. 2024) (“questions about the strength of ‘the factual underpinning of an expert’s opinion’ are ‘matter[s] affecting the weight and credibility of the testimony’ and therefore ‘a question to be resolved by the jury’”) (citation omitted). The district court does not sit as a fact finder on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (summarily reversing). By stepping outside its gatekeeping role, the district court excluded the very expert evidence that demonstrated that the County’s literature was neither purely factual nor uncontroversial.

**V. ALTERNATIVELY, THE COURT SHOULD
HOLD THIS PETITION PENDING A
DECISION IN THE *NETCHOICE* LITIGATION**

The scope of *Zauderer* and the right not to speak reaffirmed in *303 Creative* are squarely before this Court in the *NetChoice* litigation. In deciding those cases, the Court may make clear that the right not to speak bars governments from compelling speech where the speaker wishes to remain silent, at least with respect to services that the speaker does not otherwise provide. See, e.g., Brief of the *Paxton* Petitioners at 19 (“The freedom to disseminate speech necessarily includes the right to choose *whether* and *how* to do so.”). Petitioners here prevail under such a holding.

Similarly, both the Eleventh and Fifth Circuits limited *Zauderer* to speech intended to ensure full disclosure with respect to commercial speech *otherwise* voluntarily undertaken by a commercial entity. Affirmance of that approach would compel reversal here. The Court will likely make clear that *303 Creative* is controlling, not *Zauderer*, with respect to laws compelling speech on services not otherwise voluntarily provided. See *R J Reynolds*, 96 F.4th at 875 n.33.

Other issues in this case are also presented in *NetChoice*. The Eleventh Circuit ruled that, under *Zauderer*, “[a] commercial disclosure requirement must be ‘reasonably related to the State’s interest in preventing deception of consumers.’” *NetChoice, LLC*, 34 F.4th at 1230, quoting *Milavetz*, 559 U.S. at 250 (emphasis added). Here, the Fourth Circuit held that *Zauderer* allows the government to compel a commercial entity to display and distribute any

“safety” message the government wishes to convey about a product without regard to whether such speech was intended to prevent deception or consumer confusion. Pet.App. 16a-17a. If the Eleventh Circuit is correct (and it is), then summary reversal or a GVR is appropriate on that ground alone.

Similarly, the private media parties in both cases contend that *Zauderer* is limited to compelled speech in *advertising*. See Brief of Petitioner in *Paxton*, at 16; Brief of Respondent in *Moody* at 39 n.6. Acceptance of that argument would compel reversal here. The decision in the *NetChoice* litigation may well also provide additional guidance on the other issues posed by this Petition, including what constitutes “commercial speech” or the meaning of “purely factual and uncontroversial.”

CONCLUSION

The petition for certiorari should be granted. The Court should either grant plenary review or summarily reverse the Fourth Circuit. Alternatively, the Petition should be held pending a decision in the *NetChoice* litigation.

Respectfully submitted,

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May 17, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: MANDATE, Court of Appeals for the Fourth Circuit (February 29, 2024)	1a
APPENDIX B: OPINION, Court of Appeals for the Fourth Circuit (January 23, 2024).....	3a
APPENDIX C: MEMORANDUM OPINION, District Court for the District of Maryland (March 21, 2023).....	26a
APPENDIX D: ORDER, Court of Appeals for the Fourth Circuit (February 21, 2024).....	62a
APPENDIX E: ORDER, District Court for the District of Maryland (March 21, 2023)	64a
APPENDIX F: COMPLAINT, District Court for the District of Maryland (April 11, 2022)	65a
APPENDIX G: GARY KLECK DEPOSITION TRANSCRIPT EXCERPTS, District Court for the District of Maryland (September 29, 2022)..	94a
APPENDIX H: EXPERT REPORT (August 25, 2022).....	116a

1a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[FILED: February 29, 2024]

No. 23-1351
(1:22-cv-00865-SAG)

MARYLAND SHALL ISSUE, INC.; FIELD TRADERS LLC;
CINDY'S HOT SHOTS, INC.; PASADENA ARMS, LLC;
WORTH-A-SHOT, INC.

Plaintiffs - Appellants

v.

ANNE ARUNDEL COUNTY MARYLAND

Defendant - Appellee

STATE OF MARYLAND; MATTHEW MILLER; DEBORAH
AZRAEL; BRADY CENTER TO PREVENT GUN VIOLENCE;
MARYLANDERS TO PREVENT GUN VIOLENCE,
INCORPORATED; TIM CAREY; KELLY ROSKAM;
CONSTITUTIONAL ACCOUNTABILITY CENTER; AMERICAN
MEDICAL ASSOCIATION; MEDCHI; MARYLAND STATE
MEDICAL SOCIETY; AMERICAN ACADEMY OF
PEDIATRICS; AMERICAN ACADEMY OF PEDIATRICS,
MARYLAND CHAPTER; MARYLAND PSYCHIATRIC
SOCIETY; WASHINGTON PYSCHIATRIC SOCIETY;
DOROTHY PAUGH; GWENDOLYN LA CROIX; CHERYL
BROOKS; PATTI BROCKINGTON; GUN OWNERS FOR
SAFETY; DON BAUGHAN

Amici Supporting Appellee

2a

MANDATE

The judgment of this court, entered January 23, 2024, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Nwamaka Anowi, Clerk

3a

APPENDIX B

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1351

MARYLAND SHALL ISSUE, INC.; FIELD TRADERS LLC;
CINDY’S HOT SHOTS, INC.; PASADENA ARMS, LLC;
WORTH-A-SHOT, INC.,

Plaintiffs - Appellants,

v.

ANNE ARUNDEL COUNTY MARYLAND,

Defendant - Appellee.

STATE OF MARYLAND; MATTHEW MILLER; DEBORAH
AZRAEL; BRADY CENTER TO PREVENT GUN VIOLENCE;
MARYLANDERS TO PREVENT GUN VIOLENCE,
INCORPORATED; TIM CAREY; KELLY ROSKAM;
CONSTITUTIONAL ACCOUNTABILITY CENTER; AMERICAN
MEDICAL ASSOCIATION; MEDCHI; MARYLAND STATE
MEDICAL SOCIETY; AMERICAN ACADEMY OF
PEDIATRICS; AMERICAN ACADEMY OF PEDIATRICS,
MARYLAND CHAPTER; MARYLAND PSYCHIATRIC
SOCIETY; WASHINGTON PYSCHIATRIC SOCIETY;
DOROTHY PAUGH; GWENDOLYN LA CROIX; CHERYL
BROOKS; PATTI BROCKINGTON; GUN OWNERS FOR
SAFETY; DON BAUGHAN,

Amici Supporting Appellee.

Appeal from the United States District Court for the
District of Maryland, at Baltimore. Stephanie A.
Gallagher, District Judge. (1:22-cv-00865-SAG)

Argued: December 8, 2023 Decided: January 23, 2024

Before NIEMEYER, GREGORY, and HEYTENS,
Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote
the opinion, in which Judge Gregory and Judge
Heytens joined.

ARGUED: Mark William Pennak, LAW OFFICES OF
MARK W. PENNAK, Chevy Chase, Maryland, for
Appellants. William Ernest Havemann, HOGAN
LOVELLS US LLP, Washington, D.C., for Appellee. ON
BRIEF: Gregory J. Swain, County Attorney, Hamilton
F. Tyler, Deputy County Attorney, Tamal A. Banton,
Senior Assistant County Attorney, ANNE ARUNDEL
COUNTY OFFICE OF LAW, Annapolis, Maryland;
Neal Kumar Katyal, Simon Chin, HOGAN LOVELLS
US LLP, Washington, D.C.; Eric Tirschwell, James
Miller, Nina Sudarsan, EVERYTOWN LAW, New
York, New York, for Appellee. Elizabeth B. Wydra,
Brienne J. Gorod, J. Alexandra Rowell,
CONSTITUTIONAL CENTER, Washington, D.C., for
Amicus Constitutional Accountability Center. Anthony
G. Brown, Attorney General, Robert A. Scott, Assistant
Attorney General, Ryan R. Dietrich, Assistant
Attorney General, OFFICE OF THE ATTORNEY
GENERAL OF MARYLAND, Baltimore, Maryland, for
Amicus State of Maryland. Jim Davy, ALL RISE

TRIAL & APPELLATE, Philadelphia, Pennsylvania, for Amicus Gun Owners for Safety. Paul Brzyski, Washington, D.C., Michael J. Dell, Aaron M. Jacobs, KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, New York, for Amici American Medical Association; MedChi; The Maryland State Medical Society; American Academy of Pediatrics, Maryland Chapter; American Academy of Pediatrics; The Maryland Psychiatric Society; and Washington Psychiatric Society. Bradley S. Lui, Kerry C. Jones, MORRISON & FOERSTER LLP, Washington, D.C., for Amici Matthew Miller and Deborah Azrael. Arthur Luk, Roberta L. Horton, Hannah R. Leibson, ARNOLD PORTER KAYE SCHOLER LLP, Washington, D.C., for Amici The Brady Center to Prevent Gun Violence, Marylanders to Prevent Gun Violence, Tim Carey, and Kelly Roskam. Andrew R. Dunlap, Vivek V. Tata, T. Liam Murphy, Emma C. Holland, SELENDY GAY ELSBERG PLLC, New York, New York, for Amici Dorothy Paugh, Gwendolyn La Croix, Cheryl Brooks, Don Baughan, and Patti Brockington.

NIEMEYER, Circuit Judge:

Deaths by suicide have increased nationally over recent years, and now roughly 48,000 people die annually from suicide. And over 50% of those suicides were committed with firearms, roughly twice the number committed with the second most common means used, according to the Centers for Disease Control and Prevention.

Similar statistics are reflected in Anne Arundel County, Maryland, and the County accordingly declared “suicide a public health crisis.” In response to that crisis, it enacted an ordinance entitled “Public Safety — Distribution of Literature to Purchasers of Guns or Ammunition,” which requires the Anne Arundel

County Department of Health to “prepare literature relating to gun safety, gun training, suicide prevention, mental health, and conflict resolution” and to distribute this literature to “all establishments that sell guns or ammunition” in Anne Arundel County. The ordinance also requires those establishments to make the literature “visible and available at the point of sale” and to distribute it “to all purchasers of guns or ammunition.” An initial violation of the ordinance carries a \$500 civil fine, and each subsequent violation carries a \$1,000 civil fine.

As required by the ordinance, the Department of Health distributed two pieces of literature to gun dealers in Anne Arundel County for distribution to purchasers of guns or ammunition — an eight-page pamphlet entitled “Firearms and Suicide Prevention” and a single page flyer providing information about Anne Arundel County’s resources for “conflict resolution,” including where to obtain a suicide-prevention toolkit.

Four gun dealers in Anne Arundel County, as well as Maryland Shall Issue, Inc., a Maryland corporation dedicated to the preservation and advancement of gun owners’ rights, commenced this action against Anne Arundel County, contending that the ordinance compels gun dealers to convey the County’s message “relating to gun safety, gun training, suicide prevention, mental health, and conflict resolution” to their customers, in violation of their “First Amendment right ‘not to speak’ on such subjects.” They sought declaratory and injunctive relief, as well as compensatory damages.

On the parties’ cross-motions for summary judgment, the district court granted summary judgment to Anne Arundel County, concluding that the literature distributed pursuant to the ordinance was constitutionally permissible because it compelled commercial

speech that was factual and uncontroversial and furthered a government interest, complying with the test established by *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). In the course of its ruling, the court also excluded the plaintiffs' expert witness's report because the expert based his opinions on an interpretation that the distributed literature conveyed the message that access to firearms *causes* suicide and therefore discouraged the purchase of firearms. Because the court read the literature not to convey that message, it ruled that the expert's opinions were irrelevant.

From the district court's order dated March 21, 2023, the plaintiffs filed this appeal, challenging both of the district court's rulings. We affirm.

I

Following the 2018 mass shooting at the *Capital Gazette* newspaper in Annapolis, which was deeply traumatic to the Anne Arundel County community and widely publicized, the Anne Arundel County Executive issued an executive order creating a task force to address how the County could use its public health system to reduce gun violence. As part of that ongoing effort, the County, by resolution, also declared suicide "a public health crisis," recognizing that, "according to the Task Force, from 2013 to 2017 there were 209 deaths in Anne Arundel [County] caused by guns and, of those 209 deaths, 141 (67%) were deaths by suicide." Moreover, it found that "suicide deaths have increased." It recognized that of all suicides in the County, guns were the most common means used.

To address that public health crisis, the County enacted the 2022 ordinance that required the Department of Health to prepare literature for distribution to gun

purchasers through gun dealers in the County. In fulfilling this obligation, the Department used a pamphlet created by a collaboration of the American Foundation for Suicide Prevention, a leading national nonprofit suicide-prevention organization, and the National Shooting Sports Foundation, “the firearm industry trade association.” These two organizations developed the pamphlet as a resource “to help firearms retailers, shooting range operators and customers understand risk factors and warning signs related to suicide, know where to find help and encourage secure firearm storage options.” And they asked retailers and ranges to distribute the material to customers “because doing so [would] help save lives.”

While the County did not itself prepare the pamphlet, it did prepare a one-page flyer providing County resources for conflict resolution. That flyer stated, “Conflict Resolution is a process to help you find the best way to resolve conflicts and disagreements peacefully.” The flyer provided contact information for County resources, including a County suicide-prevention toolkit.

As required by the 2022 ordinance, the Department of Health distributed the pamphlet and flyer to gun dealers in Anne Arundel County and directed them to display the literature in their stores and provide copies to customers purchasing guns or ammunition.

Plaintiffs commenced this action shortly after the effective date of the ordinance, seeking relief from the ordinance on the ground that it compels speech that is contrary to their interests. Relying on the proffered report of their expert witness, they contended that the literature — the pamphlet in particular — conveyed the message that guns *cause* suicide and that therefore the real purpose of the literature was to discourage the purchase and possession of firearms by linking their

possession to suicide. Thus, they contended that the literature was controversial speech impermissibly compelled by the County, in violation of the First Amendment.

On cross-motions for summary judgment, the district court, in a 31-page opinion, granted judgment to Anne Arundel County. The court concluded that the ordinance compelled *commercial* speech mandating a quintessential health-and-safety warning about commercial products and therefore was constitutional under the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). It explained that the pamphlet conveyed factual and uncontroversial information in stating that access to firearms was a "risk factor" for suicide, noting that such information was "purely factual" and "well-documented." The court recognized that "firearm regulation in the United States is a highly controversial topic" but noted that the "pamphlets themselves only speak to the uncontroversial topics of suicide prevention and nonviolent conflict resolution." Finally, the court found that the message of the pamphlet and flyer was "reasonably related" to Anne Arundel County's interest in preventing suicide and violence and that the distribution of the pamphlet and flyer was not "unduly burdensome."

In its opinion, the court also excluded the plaintiffs' expert report because the opinions given there were premised on the assumption that the County's pamphlet asserted a *causal* connection between access to guns and suicide. The court, however, concluded that the pamphlet, rather than stating a causal link between firearm access and suicide, merely "identifie[d] access to firearms and other lethal means as a 'risk factor,'

and nothing more.” Accordingly, it found the testimony of the expert irrelevant and therefore excluded it.

From the district court’s order dated March 21, 2023, the plaintiffs filed this appeal, challenging both the district court’s First Amendment ruling and its ruling excluding their expert witness’s report.

II

The district court held that the Anne Arundel County ordinance and the disclosures required by it were constitutional, finding that the disclosures satisfied the constitutional limitations on compelled commercial speech, as set forth in *Zauderer*. The plaintiffs contend, however, that the district court erred in finding that the *Zauderer* standard was satisfied and that the court should have applied the Supreme Court’s holding in *National Institute of Family and Life Advocates v. Becerra* (“*NIFLA*”), 138 S. Ct. 2361 (2018), and found that the ordinance and compelled disclosures violated their First Amendment rights. In particular, they challenge the district court’s findings (1) that the ordinance amounted to “commercial speech” and (2) that the speech was “factual and uncontroversial,” both of which are required to be constitutional under *Zauderer*. They note that the Anne Arundel County ordinance requires them to distribute literature, maintaining that this effectively compels them to speak in support of views that are not factual and that they find objectionable. They argue that the ordinance is an instrument for Anne Arundel County to publish an ideological point of view, to tell gun dealers what they must say, and to infringe on the right “not to speak,” all in violation of the First Amendment.

While the plaintiffs acknowledge that product safety warnings “are of a type ‘long considered permissible’”

under the *Zauderer* jurisprudence, they reject the notion that the County's ordinance amounts to such a safety warning. They note, "Every purchaser of firearms from a licensed dealer already knows that a firearm can be dangerous if misused." Therefore, they argue, the County's ordinance has a different purpose. They reason that if health and safety relating to suicide were the real purpose, the pamphlet is "under-inclusive" and should also have warned about the use of rope because "hanging is an equally lethal form of suicide and the second most common mode of suicide." Yet, the County's literature made no mention of suicide by rope. Thus, they conclude that the literature's "focus on firearms and only firearms (and ammunition for firearms) makes plain that the real purpose of the literature [was] to discourage the purchase and possession of firearms and ammunition by linking possession of firearms to suicide and illegal conflict resolution." They add, "[t]he County ha[d] no legitimate interest in discouraging or demonizing the exercise of Second Amendment rights." The plaintiffs thus "strongly take issue with the County's attempt to link firearms to suicides and illegal conflict resolutions," maintaining in essence that the County was sponsoring literature conveying the message that the public should not buy guns because they cause suicides. And in these circumstances, they argue, *NIFLA*, not *Zauderer*, applies to render the ordinance unconstitutional.

These positions taken by the plaintiffs present the issues (1) whether the district court's interpretation of the pamphlet's language is correct as a matter of law; (2) whether the literature was *commercial* speech; and (3) whether the compelled speech was *factual and uncontroversial*. We address them in order.

The pamphlet, which is the central object of this appeal, must be taken for what its plain language says. And its meaning is a question of law for a court to resolve. *See, e.g., Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1278 (9th Cir. 2023); *CTIA-The Wireless Ass’n v. City of Berkeley*, 928 F.3d 832, 846–47 (9th Cir. 2019).

In this case, the district court read the pamphlet and held, as a matter of law, that its message was as follows:

The pamphlet limits itself to identifying the risk that a firearm, like other items, could be used by a person contemplating suicide, and it focuses its message on informing gun owners how to safely store their firearms. . . . The pamphlet only identifies access to firearms as a risk factor.

The plaintiffs, however, read the pamphlet to link firearms and suicides *causally*. They argue that by indicating that *access to firearms increases the risk of suicide*, the pamphlet’s message is that firearms *cause* suicide. And this message, they contend, “discourage[s] the purchase and possession of firearms and ammunition by linking possession of firearms to suicide.” They essentially maintain that the thrust of the message conveyed is, “Don’t buy guns because they cause suicides,” which is in conflict with their interests in selling firearms and protecting gun owners’ rights.

On appeal, we review the district court’s interpretation of the pamphlet *de novo*, and on that basis we also determine its meaning as a matter of law. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 894, 906 (8th Cir. 2012) (en banc). In that posture, we

conclude that the pamphlet does not reach as far as the plaintiffs maintain and that any reasonable reader would understand from the pamphlet that it only gives the message that *because firearms are the leading means by which suicide is committed, firearms should be stored safely to reduce suicides by firearms*. That conclusion, we believe, is supported by the text of the pamphlet.

The pamphlet, which is 6 x 6 inches, contains eight pages. *Page one* contains the title of the pamphlet, “Firearms and Suicide Prevention,” in front of a picture of a smiling man and includes at the bottom the pamphlet’s cocreators — the National Shooting Sports Foundation and the American Foundation for Suicide Prevention. *Page two* is entitled “What Leads to Suicide?” and explains that there is *no single cause*. Rather, it explains, numerous mental health circumstances and conditions have been found to be causative, including “depression, anxiety and substance use problems.” It does not mention firearms or in any way suggest that they are a cause. *Page three* is simply a picture. *Page four* is entitled “Some People are More at Risk for Suicide than Others” and identifies three categories of risk factors, including “health factors,” “environmental factors,” and “historical factors.” Under the “environmental factors,” it lists four categories, including “[a]ccess to lethal means including firearms and drugs.” Finally, at the bottom corner of the entire page is a boxed summary message reading, “Risk factors are characteristics or conditions that increase the chance that a person may try to take their life.” *Page five* is entitled “Take Suicide Warning Signs Seriously” and lists three generalized categories of signs, including “talk,” “behavior,” and “mood.” Under each category are numerous examples. Again at the bottom of the page is a boxed summary message

stating, “Most people who take their lives exhibit one or more warning signs, either through what they say or what they do.” *Page six* is entitled “Reaching Out Can Help Save a Life” and lists five different methods by which a person can help prevent a suicide. Another boxed message in the bottom corner states, “Firearms are used in 50% of all suicides in the United States.” *Page seven* is entitled “Firearms Storage For Your Lifestyle” and suggests four different ways by which firearms may be stored safely. And *page eight* is entitled “Resources” and provides the contact information for six different suicide intervention organizations. At the bottom of the page are the logo-signatures of the National Shooting Sports Foundation and the American Foundation for Suicide Prevention.

We conclude that this pamphlet, taken as a whole, *see Recht v. Morrissey*, 32 F.4th 398, 417 (4th Cir. 2022), addresses suicide as a public health and safety concern and advises gun owners on how they can help. In particular, because firearms are the leading means for committing suicide, the pamphlet provides information on (1) recognizing the signs of suicide to spread awareness and (2) storing guns safely to take away the leading means of suicide. While, in conveying that message, it points out that “access” to firearms is a “risk factor,” we do not read the pamphlet to suggest to the reader that he or she should not purchase a firearm. More particularly, we do not read it to suggest to firearm purchasers that firearms should not be purchased because doing so *causes* suicide. Rather, the pamphlet is more in line with other similar safety warnings — widely applicable and accepted — that gun owners should store guns safely, especially to prevent misuse and child access. *See, e.g.*, 27 C.F.R. § 478.103; *see also* N.C. Gen. Stat. § 14-315.2; Fla. Stat. § 790.175; Tex. Penal Code Ann. § 46.13(g).

Accordingly, we affirm the district court’s reading of the pamphlet and thus, with that understanding of the pamphlet’s message, address the First Amendment issues.

B

Traditionally, commercial speech was found not to implicate the First Amendment. *See Recht*, 32 F.4th at 407; *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). This changed, however, with the Supreme Court’s decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), where the Court established that restrictions on commercial speech are subject to First Amendment scrutiny. The current jurisprudence relevant to this appeal was established in *Zauderer*, the seminal First Amendment case on compelled commercial disclosure requirements. In *Zauderer*, the Court held that compelled commercial speech is constitutional under the First Amendment so long as (1) it is “purely factual and uncontroversial”; (2) it is “reasonably related to the State’s interest in preventing deception of consumers”; and (3) it is not “unjustified or unduly burdensome.” 471 U.S. at 651. And since *Zauderer*, courts unanimously have broadened the scope of the State’s interest to other governmental interests, including “protecting human health.” *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *see also Am. Beverage Ass’n v. City & Cnty. of San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019) (en banc) (reaffirming that “*Zauderer* provides the appropriate framework to analyze a First Amendment claim involving compelled commercial speech — even when the government requires health and safety warnings, rather than warnings to prevent the deception of consumers” and noting that the circuits have “unanimously” held as

much); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 34 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) (noting a “country-of-origin labelling requirement” satisfies *Zauderer* because it “is reasonably related to the Government’s longstanding interest in supporting American farmers and ranchers”).

In challenging the applicability of *Zauderer*, the plaintiffs contend first that the pamphlet does not amount to *commercial* speech of the type addressed in *Zauderer* because it does not “propose a commercial transaction.” They argue that the literature was not “an advertisement,” which is often recognized as commercial, and that the gun dealers have no “economic motivation for the speech,” explaining somewhat sarcastically that “[a]pparently, in the County’s view, people who go into gun stores or buy ammunition or firearms are uniquely in need of education about suicide and ‘conflict resolution.’” In addition, they claim that the literature “does not apply to any specific product or service or purport to warn consumers that the product has hidden dangers that justify a warning.” In short, they maintain the pamphlet is not confined to economic matters but extends to political or ideological preferences of the government and therefore the compelled distribution of the pamphlet is unconstitutional by virtue of *NIFLA*.

On this issue — whether the speech here is commercial — we note first that the Anne Arundel County ordinance requires the distribution of literature by gun dealers, who are commercial entities, that advises purchasers of guns to store them safely and thereby reduce their misuse for suicide. Moreover, it requires that the literature be displayed “at the point of sale,” *i.e.*, in the gun dealer’s retail store. Thus, it is facially apparent that the required disclosures are a safety

advisory linked to the sales of guns and ammunition, which are commercial transactions. *See Am. Meat Inst.*, 760 F.3d at 26 (“Of course to match *Zauderer*, logically, the disclosure mandated must relate to the good or service offered by the regulated party”).

In arguing nonetheless that the speech is not commercial, the plaintiffs focus primarily on the fact that it does not “propose a commercial transaction,” one Supreme Court definition of “commercial.” This argument, however, understands “commercial” far too narrowly.

By its plain meaning, commercial speech is speech specifically related to commercial transactions. Thus, to be sure, speech that “propos[es] a commercial transaction” is commercial. *Zauderer*, 471 U.S. at 637 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)). But speech is also commercial if it is “related solely to the *economic* interests of the speaker and its audience.” *Cent. Hudson Gas and Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 561 (1980) (emphasis added). And speech connected with the sale of a good or a service — promoting the product or service, explaining it, or giving warnings about it — is commercial; it serves either the interests of the seller or “assists consumers and furthers the societal interest.” *Id.* Thus, while commercial speech includes speech proposing a commercial transaction, it also includes the advertising and promotion of products and services, assembly or user instructions, information about the product or service, disclaimers, and warnings on health and safety. As Justice Stevens observed in *Rubin v. Coors Brewing Co.*, commercial speech includes “‘Surgeon General’s Warning’ labels on cigarettes,” “labeling requirements for food products,” “labeling requirements for drug products,”

and “registration statement[s]” for securities. 514 U.S. 476, 492 & n.1 (1995) (Stevens, J., concurring).

With this more complete understanding of commercial speech, we readily conclude that the compelled speech at issue is commercial. While the literature does not propose a commercial transaction, as the plaintiffs correctly observe, it nonetheless does provide warnings of risks and proposed safety steps with respect to firearms sold by gun dealers in commercial establishments. Firearm retailers in Anne Arundel County are required to provide the specified literature in connection with the sales of firearms and ammunition to purchasers, which are commercial transactions. We conclude therefore that the mandated disclosure in this case falls squarely in the scope of what is understood to be commercial speech, and it is readily distinct from governmental attempts to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” *Zauderer*, 471 U.S. at 651 (internal quotations omitted).

We thus affirm the district court’s conclusion that the speech at issue in this case constitutes commercial speech.

C

The plaintiffs also contend that the compelled speech is “neither factual nor uncontroversial,” as required by *Zauderer*, because (1) it suggests that firearms cause suicide, which they contend is *not factual*, and (2) its “real purpose . . . is to discourage the purchase and possession of firearms and ammunition,” which they contend is *controversial*. As their expert witness testified, they maintain that “any reader would think suicide is a bad thing, [and] then the implication is — the recommendation implied is

don't own a gun." They conclude, accordingly, that the criteria for *Zauderer* are not fulfilled, and that the outcome of this case is governed by *NIFLA*, which held that a mandatory, *controversial* disclosure was unconstitutional.

In *NIFLA*, the Supreme Court had before it a California statute requiring licensed clinics that primarily served pregnant women to give specified notices, including a notice that California provides free or low-cost services for abortion and a notice of the telephone number to obtain the service. 138 S. Ct. at 2368. A licensed pregnancy center opposed to abortions and others challenged the statute, arguing that the notice requirements violated their First Amendment rights. The Supreme Court agreed and struck them down. In doing so, it emphasized that the notices concerned government-drafted speech about the availability of state-sponsored abortions — “the very practice that petitioners are devoted to opposing,” *id.* at 2371 — and that the notices thus were hardly uncontroversial. While the State urged that the Court uphold the statute under *Zauderer*, the Court held that *Zauderer* “does not apply here,” *id.* at 2372, explaining:

Most obviously, the licensed notice is not limited to “purely factual and uncontroversial information about the terms under which . . . services will be available.” *Zauderer*, 471 U.S. at 651; *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (explaining that *Zauderer* does not apply outside of these circumstances). The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about [S]tate-sponsored services —

including abortion, anything but an “uncontroversial” topic. Accordingly, *Zauderer* has no application here.

Id. (cleaned up).

Thus, the *NIFLA* holding would apply if the plaintiffs could show, as they try, either that the pamphlet is not factual or that it is controversial. In this case, however, the two are part of the same argument, as they rely on the plaintiffs’ interpretation of the pamphlet that it communicates a causal relationship between firearms and suicide. The plaintiffs’ factual claim is that there is no study that demonstrates that guns cause suicide. And based on that claim, they conclude that the pamphlet is controversial, arguing that its real purpose is to discourage the purchase of firearms despite the fact that such purchases are protected by the Second Amendment. This argument thus reduces to whether the pamphlet does indeed say that firearms cause suicides because the plaintiffs’ “controversial” argument follows only from their “factual inaccuracy” argument.

As we have noted above, we do not read the pamphlet to suggest that firearms cause suicide. Rather, the pamphlet conveys (1) that there is “no single cause” for suicide but that it occurs most often “when several stressors and health issues converge to create an experience of hopelessness and despair”; (2) that 50% of all suicides are committed with firearms; (3) that *access* to firearms is a “risk factor” that increases “the chance” of suicide; and (4) that the risk can be reduced by the safe storage of firearms. These statements are factual and not controversial. The pamphlet does not suggest that firearms *cause* suicide; indeed, as to the cause, the pamphlet identifies other causes such as mental conditions, but not firearms. It does state that *access* to guns increases the *risk* of suicide because

guns are the primary means for committing suicide. This, however, is merely a logical syllogism: If guns are the primary means of suicide and if guns are not accessible to persons with suicidal ideation, then the number of suicides would likely decline. The pamphlet is thus factual and therefore, in this case, also uncontroversial.

As such, the *NIFLA* holding is inapplicable. Indeed, *NIFLA* confirms that *Zauderer* is the appropriate lens through which we are to analyze the compelled speech in these circumstances. As the *NIFLA* Court explained, it did “not question the legality of . . . purely factual and uncontroversial disclosures about commercial products.” *NIFLA*, 138 S. Ct. at 2376. And the reference to “purely factual and uncontroversial disclosures” is a reference to the *Zauderer* test. *See* 471 U.S. at 651 (approving compelled commercial disclosures that contain “purely factual and uncontroversial information”).

In short, based on our reading of the pamphlet, which affirms the district court’s reading, we conclude that its contents are factual and uncontroversial, and *Zauderer* thus controls the outcome here.

D

While we conclude that the speech at issue here is commercial speech and that it is factual and uncontroversial, *Zauderer* also requires, for such speech to be constitutional, that it be “reasonably related” to the County’s interests and not be “unjustified or unduly burdensome.” 471 U.S. at 651.

The plaintiffs do not mount a serious challenge with respect to these requirements, and we have no trouble concluding that the mandated literature satisfies them. It is elemental that government — here, Anne Arundel County — has an interest in the health and

safety of its citizens and, in particular, an “interest in preventing suicide, and in studying, identifying, and treating its causes.” *Washington v. Glucksberg*, 521 U.S. 702, 730 (1997). And, as the statistics demonstrate, this interest is not “purely hypothetical.” *Recht*, 32 F.4th at 419 (quoting *NIFLA*, 138 S. Ct. at 2377); see also *id.* (finding a disclosure justified when compelled “[i]n response to concrete concerns supported by empirical evidence”). The leading method for committing suicide in Anne Arundel County is with a firearm. And the Anne Arundel County Council passed its 2022 ordinance in the wake of a resolution that declared “suicide a public health crisis” after finding that suicides in the County had increased in the preceding five years. While the plaintiffs argue briefly that the County “has no legitimate interest in discouraging or demonizing the exercise of Second Amendment rights,” this argument is based on a reading of the literature that we reject, as explained above.

Further, the mandated disclosure is reasonably related to these interests. The pamphlet explains the suicide crisis and the role that firearms play in it, suggesting at bottom that gun purchasers can assist in preventing suicide by (1) recognizing warning signs, (2) referring those suffering to helpful resources, and (3) safely storing their guns to remove the principal means. This is in direct support of the County’s interests.

We also conclude that the compelled display and distribution of the pamphlet and flyer in this case are not “unjustified or unduly burdensome.” *Zauderer*, 471 U.S. at 651. First, the pamphlet and flyer are not “unjustified,” as the crisis to which they respond was genuine and backed up by uncontroverted empirical data — that two-thirds of all firearm deaths in the County were by suicide; that firearms were the main

means by which suicides were committed in the County; and that suicides in the County were increasing.

Second, the mandated disclosures — the pamphlet and the flyer — are not “unduly burdensome.” There is no threat that the pamphlet and the flyer will “drown[] out the [gun dealers’] own message.” *NIFLA*, 138 S. Ct. at 2378. Moreover, the County ordinance does not burdensomely require firearms and ammunitions retailers to include on “all ‘print and digital advertising materials’” a “government-drafted statement,” *id.*, or cover 20% of their products’ advertising and logo with a warning, *Am. Beverage Ass’n*, 916 F.3d at 753, 757. Thus, the pamphlet and flyer do not commandeer or overwhelm any message that the gun dealers would wish to make to gun purchasers. Rather, the gun dealers are required only to make the pamphlet and flyer — which were prepared and provided by the County at no cost to the gun dealers — “visible and available at the point of sale” and “distribute [them] to all purchasers of guns or ammunition.” Complying is as simple as having the literature at the checkout counter and including it in the bag with the purchased goods. This need only take seconds.

* * *

At bottom, we conclude that the district court properly applied *Zauderer* to address the plaintiffs’ First Amendment challenge to the County’s mandatory disclosure and that, under *Zauderer*, the literature mandated by the County for distribution to gun dealers and in turn to their customers is not unconstitutional. Accordingly, we affirm the district court’s First Amendment ruling.

III

The plaintiffs also contend on appeal that the district court abused its discretion in excluding the report of the plaintiffs' expert witness, Dr. Gary Kleck. As noted above, Dr. Kleck read the pamphlet mandated for distribution to communicate, in essence, that guns *cause* suicide. Based on that understanding of the pamphlet, he concluded, in his expert opinion, that the pamphlet was not factual and therefore was controversial because "[t]here is at present no reliable body of scientific evidence to support the County's claims." He reasoned that in the absence of such scientific evidence, the County's claim that guns cause suicide is "at best highly questionable; at worst, it is false."

Because the district court read the same pamphlet to assert not a "causal" relationship between firearms and suicide, but a "correlative" one, it found that Dr. Kleck's opinion, based on a misreading of the pamphlet, was irrelevant to the issues in the case and therefore excluded his report.

We agree with the district court that Dr. Kleck's opinion that the pamphlet was not factual and therefore was controversial was predicated on his reading of the pamphlet as asserting that firearms cause suicide. Because we conclude that the pamphlet does not make that claim, we also conclude that the district court did not abuse its discretion in excluding Dr. Kleck's report. See *United States v. Iskander*, 407 F.3d 232, 238 (4th Cir. 2005) (noting that district courts are given "considerable discretion to determine whether to admit expert testimony"); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993) ("An additional consideration under [Federal Rule of Evidence] 702 — and another aspect of relevancy — is whether expert testimony proffered in the case is sufficiently tied to the

facts of the case that it will aid the jury in resolving a factual dispute” (cleaned up)).

IV

This case is about a pamphlet that Anne Arundel County requires be provided to purchasers of guns in the County as a health and safety advisory, informing purchasers of the nature, causes, and risks of suicides and the role that guns play in them. It ultimately encourages purchasers to store their guns safely to help reduce suicides in the County.

The plaintiffs, however, are attempting to make the pamphlet about something more. Fearing that linking this disclosure with gun sales in the County would somehow undermine gun purchasers’ and owners’ Second Amendment rights, the gun dealers and Maryland Shall Issue mounted this First Amendment challenge, arguing that the pamphlet is not compelled commercial speech of the limited kind authorized by *Zauderer*. The plaintiffs’ fear, however, is unfounded. We conclude that the pamphlet is simply, and no more, a public health and safety advisory that does not discourage the purchase or ownership of guns. And we are confident that gun purchasers in Anne Arundel County will recognize it as such. While such an advisory surely does not discourage gun ownership or undermine Second Amendment rights, it does encourage generous responses to a serious public health issue, and gun dealers might well find it admirable to join the effort.

The judgment of the district court is

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Case No.: SAG-22-00865

MARYLAND SHALL ISSUE, INC., *et al.*

Plaintiffs,

v.

ANNE ARUNDEL COUNTY

Defendant.

MEMORANDUM OPINION

In 2022, Anne Arundel County, Maryland (“the County” or “Defendant”) enacted an ordinance requiring gun shop owners to provide literature to firearms customers regarding suicide prevention and nonviolent conflict resolution. Plaintiffs—four gun retailers and a non-profit organization dedicated to preserving gun owners’ rights—filed a single-count complaint challenging the ordinance as unlawful compelled speech under the First Amendment of the United States Constitution. ECF 1.

Three motions are pending before this Court. Plaintiffs filed a motion for summary judgment, ECF 39, and the County filed a cross-motion for summary judgment, ECF 45. Plaintiffs submitted their opposition, ECF 50, and the County filed its reply, ECF 53. The County also filed a motion to exclude the testimony of Plaintiffs’ expert witness, ECF 44, which Plaintiffs opposed, ECF

46, and the County replied, ECF 49. This Court has reviewed the filings and finds that no hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2021). For the reasons explained below, Defendant’s Motion to Exclude, ECF 44, will be GRANTED; Plaintiffs’ Motion for Summary Judgment, ECF 39, will be DENIED; and Defendant’s Cross-Motion for Summary Judgment, ECF 45, will be GRANTED.

I. BACKGROUND

Anne Arundel County’s Ordinance

On April 5, 2019, Anne Arundel County Executive Steuart Pittman signed Executive Order No. 9, creating the Anne Arundel County Gun Violence Prevention Task Force. *See County Executive Orders*, ANNE ARUNDEL CNTY. MD. (2019).¹ The Order instructed the Task Force to investigate gun-related violence in the County and recommend mitigative actions. *Id.* On June 5, 2020, the Task Force released its final report, finding that 63% of firearm-related deaths in the County between 2014 and 2018 were suicides. ANNE ARUNDEL COUNTY, REPORT OF THE GUN VIOLENCE PREVENTION TASK FORCE 21 (2020).² The Task Force recommended promoting awareness of risk factors of gun-related violence throughout the community. *Id.* at 46.

On January 2, 2022, the County Council of Anne Arundel County passed Bill 108-21, entitled “An Ordinance concerning: Public Safety – Distribution of Literature to Purchasers of Guns or Ammunition.” ECF 45-6 at 2 (hereinafter “the Ordinance”). The

¹ Available at <https://www.aacounty.org/departments/county-executive/executive-orders/index.html>.

² Available at <https://www.aacounty.org/boards-and-commissions/gun-violence-task-force/reports/fina-report-20200605.pdf>.

Ordinance directed the County's Health Department to prepare literature "relating to gun safety, gun training, suicide prevention, mental health, and conflict resolution" and to distribute this literature to "all establishments that sell guns or ammunition." *Id.* The Ordinance further required all such retailers to "make the literature distributed by the health department visible and available at the point of sale" and to "distribute the literature to all purchasers of guns or ammunition." *Id.* at 3. The Ordinance granted enforcement authority to an Anne Arundel County Health Department representative to issue citations for failure to comply. *Id.* Initial violation of the Ordinance would result in a \$500 civil fine, and subsequent violations would result in a \$1,000 civil fine. *Id.*; see also ANNE ARUNDEL CNTY. CODE § 9-2-101(f)(3).

Suicide Prevention Pamphlet

The National Shooting Sports Foundation ("NSSF") is the firearm industry's trade association that "leads the way in advocating for the industry and its business and jobs, keeping guns out of the wrong hands, encouraging enjoyment of recreational shooting and hunting and helping people better understand the industry's lawful products." ECF 45-8 at 3. The American Foundation for Suicide Prevention ("AFSP") is a voluntary health organization that "supports strategic investments in suicide prevention, education, and research" to reduce the national rate of suicide. ECF 45-10 at 3; ECF 45-11 at 2. NSSF partnered with AFSP to develop educational materials for firearms retailers to provide to their customers. ECF 45-12 at 2. These materials included a 6"x6" pamphlet entitled "Firearms and Suicide Prevention." *Id.*; see also ECF 45-7 ("Suicide Prevention Pamphlet"). The County's

Health Department selected this pamphlet as the primary source of literature for firearms retailers to distribute pursuant to the Ordinance.

The front cover of the Suicide Prevention Pamphlet depicts a smiling Caucasian middle-aged man in a jean jacket and baseball hat. ECF 45-7 at 2. The words “Firearms and Suicide Prevention” lay across his photo, as do the logos of NSSF and AFSP. *Id.* The first inside page of the pamphlet asks the reader “What Leads to Suicide?” and answers, “There’s no single cause.” *Id.* at 3. It explains that multiple stressors and health issues converge to create conditions that increase the risk of suicide. *Id.*

The next textual page of the pamphlet explains, “Some People are More at Risk for Suicide than Others.” *Id.* at 5. Below this heading, there are three columns of risk factors—health, environmental, and historical—with examples of each. *Id.* The “Health Factors” column lists mental health conditions, chronic health conditions, and traumatic brain injuries. *Id.* “Historical Factors” includes previous suicide attempts, family history of suicide, and childhood abuse. *Id.* Finally, “Environmental Factors” includes stressful life events, prolonged stress, exposure to another person’s suicide, and, relevant to this case, “Access to lethal means[,] including firearms and drugs.” *Id.* In the bottom right corner, the pamphlet explains, “Risk factors are characteristics or conditions that increase the chance that a person may try to take their life.” *Id.*

The next two pages inform the reader how to recognize warning signs of suicide and how to take appropriate action. *Id.* at 6–7. On the page entitled “Reaching Out Can Help Save a Life,” the pamphlet notes that firearms are used in 50% of all suicides in the United States and explains that “by keeping

secure firearm storage in mind, you can help reduce the number of suicides involving firearms.” *Id.* at 7. The penultimate page of the pamphlet provides options for safely storing and protecting firearms, including a cable lock (starting at \$10), a gun case (starting at \$20), a lock box (starting at \$25), or a full size gun case (starting at \$200). *Id.* at 8. The back page lists available resources, including a URL to find a mental health provider, the National Suicide Prevention Lifeline, and 911. *Id.* at 9. The logos of NSSF and AFSP adorn the back page.

Conflict Resolution Pamphlet

The County developed its own one-page 6”x6” pamphlet to inform firearm owners about available resources for conflict resolution. ECF 45-7 at 10 (“Conflict Resolution Pamphlet”). The flyer reads: “Do you have unresolved conflicts? Are you looking for peaceful solutions? Want to know what mediation can do for you? Conflict Resolution is a process to help you find the best way to resolve conflicts and disagreements peacefully.” *Id.* It then lists resources, such as the Anne Arundel County Conflict Resolution Center, the Veteran’s Crisis Line, and 911. *Id.* It includes the logo of Anne Arundel County’s Department of Health and a QR Code linking to the County’s suicide prevention toolkit. *Id.*

The Present Litigation

The Ordinance went into effect on April 10, 2022. ECF 45-6 at 3. On or around that date, the County’s Health Department distributed the pamphlets to firearms dealers in the County. ECF 1 ¶ 1. On April 11, 2022, four gun retailers (Pasadena Arms, LLC; Cindy’s Hot Shots, Inc.; Field Traders, LLC; Worth-A-Shot, Inc.) (collectively “Gun Retailer Plaintiffs”) and Maryland

Shall Issue, Inc. (“MSI”), a non-profit “dedicated to the preservation and advancement of gun owners’ rights in Maryland,” filed suit in this Court. ECF 1. The Ordinance remained in effect for twenty-five days, during which the Gun Retailer Plaintiffs displayed and distributed the pamphlets. ECF 45-1 at 11.

On April 20, 2022, Plaintiffs moved for a preliminary injunction and temporary restraining order, and, in the alternative, summary judgment. ECF 6. The Parties conferred and the County agreed to not enforce the Ordinance against any gun retailer until this Court reached a decision on the merits. ECF 16 at 1–2; ECF 17 at 2; ECF 19. However, the Parties disputed whether discovery was appropriate prior to summary judgment. ECF 16 at 2. After reviewing the briefing and conferring with the Parties, this Court set a scheduling order for discovery. ECF 21. After an opportunity for discovery, the Parties’ dispositive motions are now ripe.

II. LEGAL STANDARDS

A. Summary Judgment

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate only “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The moving party bears the burden of showing that there is no genuine dispute of material fact. *See Casey v. Geek Squad Subsidiary Best Buy Stores, L.P.*, 823 F. Supp. 2d 334, 348 (D. Md. 2011) (citing *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987)). If the moving party establishes that there is no evidence to support the non-moving party’s case, the burden then shifts to the non-moving party to proffer specific facts to show a

genuine issue exists for trial. *Id.* The non-moving party must provide enough admissible evidence to “carry the burden of proof in [its] claim at trial.” *Id.* at 349 (quoting *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315–16 (4th Cir. 1993)). The mere existence of a scintilla of evidence in support of the non-moving party’s position will be insufficient; there must be evidence on which the jury could reasonably find in its favor. *Id.* at 348 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). Moreover, a genuine issue of material fact cannot rest on “mere speculation, or building one inference upon another.” *Id.* at 349 (quoting *Miskin v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 669, 671 (D. Md. 1999)).

Additionally, summary judgment shall be warranted if the non-moving party fails to provide evidence that establishes an essential element of the case. *Id.* at 352. The non-moving party “must produce competent evidence on each element of [its] claim.” *Id.* at 348–49 (quoting *Miskin*, 107 F. Supp. 2d at 671). If the non-moving party fails to do so, “there can be no genuine issue as to any material fact,” because the failure to prove an essential element of the case “necessarily renders all other facts immaterial.” *Id.* at 352 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Coleman v. United States*, 369 F. App’x 459, 461 (4th Cir. 2010) (unpublished)). In ruling on a motion for summary judgment, a court must view all the facts, including reasonable inferences to be drawn from them, “in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. Expert Admissibility

Federal Rule of Evidence 702 governs the admissibility of expert witness testimony. A qualified expert may give testimony if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. In essence, the trial court must ensure the proposed expert testimony “both rests on a reliable foundation and is relevant to the task at hand.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). In *Daubert*, the Supreme Court provides five non-exhaustive factors a court may weigh in making this assessment: (1) “whether a theory or technique . . . can be (and has been) tested,” (2) “whether the theory or technique has been subjected to peer review and publication,” (3) “the known or potential rate of error,” (4) “the existence and maintenance of standards controlling the technique’s operation,” and (5) whether the technique or theory has gained “general acceptance.” 509 U.S. at 592–94; *Pugh v. Louisville Ladder, Inc.*, 361 F. App’x 448, 452 (4th Cir. 2010). However, ultimately, the inquiry is “a flexible one” and relevant factors can vary with the needs of each case. *Daubert*, 509 U.S. at 594.

For the proffered evidence to be sufficiently reliable it “must be derived using scientific or other valid methods” and not be based on mere “belief or speculation.” *Casey v. Geek Squad Subsidiary Best Buy Stores, L.P.*, 823 F. Supp. 2d 334, 340 (D. Md. 2011) (first quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999); then quoting *Bryte ex rel. Bryte v. Am. Household, Inc.*, 429 F.3d 469, 477 (4th Cir. 2005)). The court’s analysis focuses on experts’ methods, not their conclusions, but an expert opinion that relies on “assumptions which are speculative and not supported by the record,” is inadmissible. *Tyger Const. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137, 142 (4th Cir. 1994); see also *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (“[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”).

For the proffered opinion to be relevant, it “must be ‘sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.’” *Casey*, 823 F. Supp. 2d at 340 (quoting *Daubert*, 509 U.S. at 591). Expert testimony “is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror.” *Anderson v. Home Depot U.S.A., Inc.*, No. 2615, 2017 WL 2189508, at *4 (D. Md. May 16, 2017) (quoting *Kopf v. Skyrms*, 993 F.2d 374, 377 (4th Cir. 1993)).

The proponent of the expert testimony bears the burden of establishing admissibility, or “coming forward with evidence from which the trial court could determine that the evidence is admissible under *Daubert*.” *Anderson*, 2017 WL 2189508, at *3 (quoting *Main St.*

Am. Grp. v. Sears, Roebuck, & Co., No. 08-CV-3292, 2010 WL 956178, at *3 (D. Md. Mar. 11, 2010)); *see also Casey*, 823 F. Supp. 2d at 340; *Daubert*, 509 U.S. at 592 n.10 (explaining admissibility must be established by a “preponderance of proof”).

In determining the admissibility of expert testimony, the court considers two “guiding, and sometimes competing, principles.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999). On the one hand, Rule 702 was “intended to liberalize the introduction of relevant expert evidence,” and the court need not ensure the expert’s proposed testimony is “irrefutable or certainly correct.” *Id.* (explaining that admissible expert testimony can still be vigorously tested before the jury by “cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” (citing *Daubert*, 509 U.S. at 596)). On the other hand, “due to the difficulty of evaluating their testimony, expert witnesses have the potential to ‘be both powerful and quite misleading.’” *Id.* (quoting *Daubert*, 509 U.S. at 595). The court must determine whether the disputed expert testimony “has greater potential to mislead than to enlighten.” *Id.* If so, the testimony should be excluded. *Id.*; *see also Casey*, 823 F. Supp. 2d at 340 (noting such testimony would be barred by Federal Rule of Evidence 403).

III. ARTICLE III STANDING ANALYSIS

Article III of the U.S. Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies.” U.S. CONST. art. III, § 2. “One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 408 (2013) (internal citations and quotation marks omitted). To prove Article III standing, a plaintiff must establish the

three “irreducible” minimum requirements: (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). At issue here is the first element—*injury-in-fact*. “To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560).

No litigant disputes the justiciability of the Gun Retailer Plaintiffs’ claims. See ECF 45-1 at 33 n.33. The Ordinance plainly imposes compelled speech on the retailers, providing them an alleged constitutional injury-in-fact.³ However, an issue of standing arises with MSI, which seeks monetary damages on behalf of its members who purchase guns and will receive the pamphlets.⁴

An association can establish standing “on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it

³ The Gun Retailer Plaintiffs also alleged standing on behalf of their customers. ECF 1 ¶ 14. However, this Court need not analyze this alternative basis for standing since the Gun Retailer Plaintiffs plainly have standing on their own accord.

⁴ In its Complaint, MSI also brings a First Amendment claim “on behalf of its members who are firearms dealers in Anne Arundel County, and who are required to display and distribute County literature by Bill 108-21, and who are thus directly regulated by Bill 108-21.” ECF 1 ¶ 9. Four of these retailer members are named plaintiffs in the lawsuit. See ECF 39-6 at 2. Thus, MSI has viable associational standing through these retailer members. However, MSI also seeks nominal damages on behalf of its customer members. ECF 1 ¶ 25; ECF 39-12 at 36. Thus, this Court analyzes MSI’s ability to assert standing on behalf of these customer members.

seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); see *Lujan*, 504 U.S. at 563. "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Evidence of concrete harm by one of its members is "an Article III necessity for an association's representative suit." *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996). The United States Supreme Court has repeatedly denied associational standing where an organization fails "to make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); see, e.g., *Lujan*, (holding that the organization lacked standing because it failed to "submit affidavits . . . showing, through specific facts . . . that one or more of [its] members would . . . be 'directly' affected"); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 235 (1990) (concluding the affidavit provided by the city was insufficient because it did not name individuals harmed by the challenged program).

MSI presents four theories of how its customer members have standing. First, MSI argues that receipt of information about suicide prevention and nonviolent conflict resolution infringes its customer members' Second Amendment rights. Specifically, it asserts that the Ordinance affects the "First Amendment rights of MSI members to exercise their Second Amendment rights to acquire firearms and ammunition without

being held captive to the forced distribution of the County's offensive message." ECF 39-12 at 33; ECF 39-5 at 9.

To be clear, MSI and its members have not brought a Second Amendment challenge; they only allege this harm for the purpose of standing. MSI points to no case law suggesting the receipt of information can infringe a customer's Second Amendment right. Even if MSI customer members had such a right, the harm remains speculative. Not a single MSI member presents an affidavit or testimony suggesting their receipt of these pamphlets will affect their ability to purchase a firearm. The Gun Retailer Plaintiffs likewise do not present any such customer. ECF 45-20 at 103:3–11 ("Q: Have any customers told you that they will not be able to purchase firearms or ammunition from you because of the display and distribution of the pamphlet? A: No. Q: Have any customers or did any customers refuse to purchase firearms or ammunition from you because of the display of the pamphlets? A: No."); ECF 45-21 at 120:1–14 (same question-and-answer for Plaintiff Cindy's Hot Shots); ECF 45-22 at 96:10–13 (same for Plaintiff Field Traders). This lack of an impact is unsurprising given that the receipt of the information occurs after the customer decides to make the purchase.

At this motion for summary judgment stage, MSI asks this Court to confer associational standing based purely on MSI's allegation that its unidentified members will suffer harm. If speculation were the threshold for Article III standing, many more organizational plaintiffs could access federal court without an actual controversy. "This novel approach to the law of organizational standing would make a mockery of [] prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified

member had suffered or would suffer harm.” *Summers*, 555 U.S. at 498. Without a single member actually alleging harm to their ability to purchase a firearm, MSI’s alleged Second Amendment injury-in-fact remains conjectural and insufficient to confer standing.

Second, Plaintiff MSI alleges that the pamphlets have a “chilling effect” on its customer members’ speech. ECF 1 ¶ 22. Specifically, MSI speculates that its members “will be inhibited or will refrain from arguing or contesting that County message in the dealer’s store where the dealer is displaying and distributing the County’s literature . . . [the customer members] reasonably can be expected to avoid expressing their own opinions regarding the County’ [sic] messages and will reasonably seek to avoid potential disagreements with dealers and their employees over the County’s messages while on the dealers’ premises.” ECF 39-5 at 8 (MSI’s Response to Interrogatories).

In First Amendment cases alleging chilled speech, the Fourth Circuit has recognized that the constitutional standing requirements are “somewhat relaxed.” *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). Consequently, “the injury-in-fact element is commonly satisfied by a sufficient showing of ‘self-censorship, which occurs when a claimant is chilled from exercising his right to free expression.’” *Id.* (citing *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)). The chilling effect must nonetheless be “objectively reasonable,” and the government’s action must be “likely to deter a person of ordinary firmness from the exercise of First Amendment rights.” *Id.* at 236 (quoting *Benham*, 635 F.3d at 135) (internal quotation marks omitted).

Thus, MSI would have standing if it demonstrated that at least one of its customer members feared or

experienced a chilling effect on his or her speech. However, MSI has presented no such evidence. Instead, MSI presents the name of a single member under seal, whom MSI claims “has personal knowledge of how [their⁵] constitutional rights have been infringed.” ECF 41-2 at 3 (MSI’s Response to Interrogatories). This one sentence is the extent of the description of this member’s alleged First Amendment harm. MSI does not present any affidavit or testimony of this member directly and does not specify how exactly this member’s speech would be chilled.

The only other evidence presented regarding this member’s alleged First Amendment injury is the deposition of another MSI member, Katherine Novotny. In Ms. Novotny’s deposition, she alleges that the first MSI member stated that they are now less willing to articulate their views as a result of the pamphlets’ presence. ECF 41-1 at 78: 9–14. Again, the description of the alleged chilling effect goes into no greater detail. Ms. Novotny was unaware of what specific views the first member would restrain from stating, and was unaware when or how they informed MSI that they were less willing to articulate these views. *Id.* at 79:7–80:5; 82:19–83:1.

Although case law lowers the bar for what constitutes cognizable harm in chilled speech cases, it does not jettison the constitutional requirement of plaintiffs demonstrating how they are actually suffering (or will suffer) this harm. “Subjective or speculative accounts of such a chilling effect . . . are not sufficient.” *Id.* In other words, “[a]llegations of a subjective ‘chill’ are not

⁵ The Court uses singular “they” in this portion of the analysis to protect the confidentiality of the MSI member who remains undisclosed.

an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]” *Laird v. Tatum*, 408 U.S. 1, 14 (1972). With no first-hand evidence, this Court must speculate how these pamphlets affect this member’s speech.

Upon review of this evidence, MSI only hypothesizes that its customer members’ speech would be chilled; it does not allege a specific existing or imminent example of such harm. It fails to present the affidavit or testimony of a single member whose speech will be chilled by the County’s Ordinance. In cases where the Fourth Circuit has recognized chilled speech as providing injury-in-fact, individual plaintiffs have actually alleged such an impact. *E.g.*, *Edgar v. Haines*, 2 F.4th 298, 310 (4th Cir. 2021), *cert. denied*, 212 L. Ed. 2d 796, 142 S. Ct. 2737 (2022) (noting that “some plaintiffs alleged that they have decided not to write about certain topics because of the prepublication review policies”); *Cooksey*, 721 F.3d at 236 (noting that but-for the government’s regulation, the plaintiff would have resumed his advice column). Here, even if accepted as true, Ms. Novotny’s hearsay evidence presents only the conclusory statement that this member is now less willing to express their views. Without a specific example of the chilling impact experienced or threatened, or without any evidence from this member directly, the member’s alleged harm remains speculative and not credible.

Third, Plaintiff MSI alleges the forced receipt of the pamphlets amounts to a concrete harm itself, citing the captive-audience doctrine. ECF 50 at 28 (citing *Hill v. Colorado*, 530 U.S. 703, 717–18 (2000)). In *Hill*, a state statute effectively limited how anti-abortion protestors could protest outside abortion clinics. *Id.* at 715. The U.S. Supreme Court ultimately upheld the

state statute as a constitutional content-neutral time, place, and manner regulation. *Id.* at 730. Relevant to MSI's argument, the U.S. Supreme Court recognized in its First Amendment analysis that the right to free speech includes the right to persuade others, but it "does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." 530 U.S. at 716. MSI argues that the County's pamphlets are likewise offensive and that its customers cannot avoid the message. However, the U.S. Supreme Court narrowed this exception to situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Id.* at 718; *see also Snyder v. Phelps*, 562 U.S. 443, 459 (2011) ("In most circumstances, 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting his eyes.'" (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211 (1975))). Here, MSI's customer can simply ignore the County's speech. It would be extremely easy for customers to toss out the pamphlets and never read them. For this reason, the captive-audience doctrine does not apply, and receipt of the pamphlets does not amount to a concrete injury-in-fact.

Finally, Plaintiff MSI argues that its customer members have third-party standing on behalf of the affected gun retailers. "Courts have long adhered to the rule that a 'plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 214 (4th Cir. 2020), as amended (Aug. 31, 2020) (quoting

Warth, 422 U.S. at 499); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991). “Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation.” *Singleton v. Wulff*, 428 U.S. 106, 113 (1976). The U.S. Supreme Court has “recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an ‘injury in fact,’ thus giving him or her a ‘sufficiently concrete interest’ in the outcome of the issue in dispute . . . ; the litigant must have a close relation to the third party . . . ; and there must exist some hindrance to the third party’s ability to protect his or her own interests.” *Powers*, 499 U.S. at 411 (citing *Wulff*, 428 U.S. at 115–16). Courts look for a close relationship to ensure the litigant is “as effective a proponent of the right” as the third party, and they look for “some genuine obstacle to such assertion,” suggesting the third party would otherwise bring the lawsuit. *Wulff*, 428 U.S. at 114–16.

In its reply, Plaintiff MSI proffers that there are over thirty businesses licensed to sell firearms in Anne Arundel County.⁶ ECF 50 at 32 n.3. In *MSI v. Hogan*, the Fourth Circuit considered the reverse scenario—whether a gun retailer, Atlantic Guns, had third-party standing to represent its firearm customers’ rights to purchase firearms. 971 F.3d at 214. Of note, Atlantic Guns had standing on its own accord to challenge

⁶ Third-party standing on behalf of the four Gun Retailer Plaintiffs would be inapposite given they are successfully asserting their own legal rights. *See Wulff*, 428 U.S. at 115–16. Thus, this Court assumes that MSI, through its customer members, seeks to assert third-party standing for the other gun retailers not represented in this litigation.

Maryland’s handgun licensing law. *Id.* at 206, 214. The Fourth Circuit noted that courts have uniformly permitted vendors to “resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market,” regardless of the ability of customers to bring their own claims. *Id.* at 216 (quoting *Craig v. Boren*, 429 U.S. 190, 195 (1976)) (internal quotation marks omitted). For this reason, the Fourth Circuit concluded Atlantic Guns had third-party standing on behalf of its customers, even though there was no hindrance to the customers bringing their own claim. *Id.*

A dispositive difference between *MSI v. Hogan* and the present case is that Atlantic Guns had suffered its own injury-in-fact. The Supreme Court requires a litigant to independently have a concrete injury-in-fact to bring third-party claims. *See Powers*, 499 U.S. at 411 (citing *Wulff*, 428 U.S. at 115–16). As discussed above, MSI’s customer members have not alleged they will suffer a concrete harm, and so they cannot rely on the harm of others to procure standing.

In short, MSI’s customer members lack standing to challenge the County’s Ordinance; therefore, MSI lacks associational standing on behalf of its customer members. The resolution of that issue is immaterial, however, in light of this Court’s holding on the constitutional issue below.

IV. FIRST AMENDMENT ANALYSIS

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that “abridg[e] the freedom of speech.” U.S. CONST. amend. I; *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (“*NIFLA*”). This constitutional protection “includes both the right to speak

freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Its protection is broad, and the U.S. Supreme Court has “been reluctant to mark off new categories of speech for diminished constitutional protection.” *NIFLA*, 138 S. Ct. at 2372 (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996)) (internal quotation marks omitted).

Content-based laws—those that regulate speech based on its message—are presumptively unconstitutional. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); see also *City of Austin, Texas v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (explaining that regulation of speech is content-based if it “‘applies to particular speech because of the topic discussed or the idea or message expressed’”) (quoting *Reed*, 576 U.S. at 163)). This includes laws that “compel[] individuals to speak a particular message,” because “such notices ‘alter the content of their speech.’” *NIFLA*, 138 S. Ct. at 2371 (alterations adopted) (quoting *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)). Generally, for content-based laws, the government must show the law is narrowly tailored to serve compelling state interests. *Id.* “This stringent standard reflects the fundamental principle that governments have ‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’” *NIFLA*, 138 S. Ct. at 2371 (internal quotation marks and citations omitted).

Nonetheless, the U.S. Supreme Court applies “a lower level of scrutiny to laws that compel disclosures in certain contexts,” including cases analyzing the required disclosure of “factual, noncontroversial infor-

mation in . . . ‘commercial speech.’”⁷ *NIFLA*, 138 S. Ct. at 2372. As the U.S. Supreme Court recently explained, “we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.” *Id.* at 2376. For this latter category—required disclosure of purely factual and uncontroversial information about a commercial product—the individual’s First Amendment rights “are adequately protected as long as disclosure requirements are reasonably related to the State’s interest.” See *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 628 (1985).

Thus, to qualify as permissible under *Zauderer*, as affirmed in *NIFLA*, the County’s pamphlets must be (1) commercial speech, (2) purely factual and uncontroversial information, and (3) reasonably related to the County’s interest.

A. Commercial Speech

The U.S. Supreme Court has recognized “the ‘commonsense’ distinction between speech proposing a

⁷ Until relatively recently, governments routinely regulated commercial speech without infringement upon the First Amendment. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (upholding as constitutional a New York City law that prohibited street distribution of commercial advertising). By 1975, the U.S. Supreme Court made clear that the First Amendment protects commercial speech, although to a lesser degree. See *Bigelow v. Virginia*, 421 U.S. 809, 821 (1975) (reaffirming the “principle that commercial advertising enjoys a degree of First Amendment protection”); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (noting the settled proposition “that speech does not lose its First Amendment protection because money is spent to project it”). See also *Recht v. Morrissey*, 32 F.4th 398, 407 (4th Cir.), *cert. denied*, 143 S. Ct. 527 (2022) (“For almost two centuries, commercial speech . . . was understood to fall outside of the First Amendment’s ambit.”).

commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 64 (1983) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–56 (1978)) (internal quotation marks omitted). “However, because ‘application of this definition is not always a simple matter,’ . . . some speech outside this ‘core notion’ may also be deemed commercial.” *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101, 108 (4th Cir. 2018) (“*Greater Baltimore II*”) (quoting *Adventure Commc’ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999); *Bolger*, 463 U.S. at 66). Beyond this “core notion” of commercial speech, courts have looked to other factors, including: “‘(1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech.’” *Id.* (quoting *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 285 (4th Cir. 2013) (“*Greater Baltimore I*”) (in turn quoting *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933 (3d Cir. 1990))). “While ‘the combination of all these characteristics . . . provides strong support for the . . . conclusion that speech is properly characterized as commercial speech,’ . . . it is not necessary that each of the characteristics ‘be present in order for speech to be commercial,’” *Greater Baltimore I*, 721 F.3d at 285 (quoting *Bolger*, 463 U.S. at 67 n.14) (internal quotation marks omitted). “Because of the ‘difficulty of drawing bright lines that will clearly cabin commercial speech,’ the inquiry is fact-intensive.” *Greater Baltimore II*, 879 F.3d at 108 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)). “It is

also one in which ‘context matters.’” *Id.* (quoting *Greater Baltimore I*, 721 F.3d at 286).

Upon review of the Ordinance’s terms and the proposed literature, this Court concludes that the Ordinance plainly encompasses commercial speech. First, the Ordinance regulates commercial retailers, *i.e.*, “establishments that sell guns or ammunition.” ECF 45-6 at 3. Next, the literature is available at the “point of sale” and is provided to “all purchasers of guns or ammunition.” *Id.* And finally, the speech relates to the safe handling of the purchased product, *i.e.*, information “relating to gun safety, gun training, suicide prevention, mental health, and conflict resolution.” *Id.* The Suicide Prevention Pamphlet informs firearm owners how to identify warning signs of suicide and how to safely store their firearms. The penultimate page offers firearm storage options with cost estimates. The Conflict Resolution Pamphlet provides information regarding mediation services available to the firearm owner, such as the Anne Arundel County Conflict Resolution Center and the Veteran’s Crisis Line. All information provided in the proposed literature relates to the responsible and safe use of the product at the heart of the commercial transaction.

Providing information to promote the responsible use of a firearm is akin to commonplace laws requiring information regarding the safe use of other products, such as toys, cell phones, and pharmaceutical drugs. *See, e.g.*, 16 C.F.R. § 1500.19(b) (requiring “any article that is a toy or game intended for use by children” with small parts to include a choking hazard warning); 21 C.F.R. § 201.100(d) (requiring prescription labels to include adequate directions for the product’s safe use, including “any relevant warnings, hazards, contraindications, side effects, and precautions”); *see also United*

States v. Gen. Nutrition, Inc., 638 F. Supp. 556, 562 (W.D.N.Y. 1986) (holding drug labeling requirements are “clearly commercial speech”).

In such cases, courts assessing the constitutionality of labeling and disclosure requirements have applied *Zauderer*’s commercial speech analysis. *See, e.g., Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 309–10 (1st Cir. 2005) (Maine’s requirement that pharmacy benefit managers disclose conflicts of interest is commercial speech and analyzed under *Zauderer*); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) (Vermont law requiring packages to disclose the presence of mercury and provide instructions about the product’s safe disposal was subject to the rational basis test of *Zauderer*); *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014) (applying *Zauderer* to the USDA’s country-of-origin labeling requirements for meat packaging); *CTIA – The Wireless Ass’n v. City of Berkeley, California*, 928 F.3d 832, 841 (9th Cir. 2019) (Berkeley’s disclosure requirement—that all cell phone retailers provide cell phone customers with notice that cell phones carried “in a pants or shirt pocket or tucked into a bra” may exceed federal guidelines for radiation exposure—was agreed by all parties to be commercial speech). The County’s Ordinance is no different than these disclosure laws—it likewise informs the consumer about the product’s potential risks and how to mitigate them.

The County’s Ordinance is distinguishable from laws that require disclosures outside the context of the commercial transaction, such as mandatory disclosures on a manufacturer’s website, *cf. Nat’l Ass’n of Manufacturers v. S.E.C.*, 800 F.3d 518, 522 (D.C. Cir. 2015) (concluding the SEC’s disclosure requirement of conflict minerals on manufacturers’ websites was not

a “point of sale disclosure” and therefore not commercial speech), or in the waiting rooms of pregnancy centers, *cf. NIFLA*, 138 S. Ct. at 2369. Here, the Ordinance requires the disclosure to take place during the economic transaction. Also, the County’s Ordinance is distinguishable from disclosure laws that do not relate to an economic purchase or economic service. *Cf. id.* at 2372 (explaining *Zauderer* does not apply in part because the notice requirement “in no way relates to the services that licensed clinics provide”); *Greater Baltimore II*, 879 F.3d at 108 (“A morally and religiously motivated offering of free services cannot be described as a bare ‘commercial transaction.’”). Here, the County does not seek to reroute the customers to its own competing services. Rather, it informs the customers of its own resources as a means to safely use the purchased firearm.

Nonetheless, Plaintiffs argue that the pamphlets are not commercial speech because they do not “propose a commercial transaction.” ECF 39-12 at 18. Plaintiffs’ narrowed focus on this specific language, derived from *Bolger*, overlooks the language’s context. In *Bolger*, a contraceptives company challenged a federal law prohibiting the mailing of unsolicited advertisements for contraceptives. 436 U.S. at 61. The U.S. Supreme Court concluded that most of the company’s mailings, such as a pamphlet listing the company’s various condoms and contraceptive products, fell “within the core notion of commercial speech—‘speech which does no more than propose a commercial transaction.’” *Id.* at 66 (internal quotation omitted). However, the U.S. Supreme Court noted that some pamphlets “present[ed] a closer question.” *Id.* at 61. For example, the “Plain Talk about Venereal Disease” pamphlet discussed the public health issue and only generically referenced contraceptive products on the last page. *Id.* at 61 n.13.

When considering whether these venereal disease pamphlets constituted commercial speech, the U.S. Supreme Court highlighted three relevant facts: (1) the parties conceded that these pamphlets were advertisements, even if the company's name was not prevalent; (2) the pamphlets referred to products, even if they did not mention the company's specific products; and (3) the company had an economic motivation for producing and disbursing the pamphlets. *Id.* at 66–67. The combination of all of these characteristics supported the conclusion that all of the pamphlets—even the informational pamphlet about the risks of venereal disease—were commercial speech. *Id.* at 68.

Even if the pamphlets fell outside the “core notion” of commercial speech, they would be commercial under *Bolger*. There are striking similarities between the venereal disease prevention pamphlet in *Bolger*—which the U.S. Supreme Court held to constitute commercial speech—and the suicide prevention pamphlet in the present case. The *Bolger* pamphlet was “an eight-page pamphlet discussing at length the problem of venereal disease and the use and advantages of condoms in aiding the prevention of venereal disease.” *Id.* at 62 n.4. Similarly, the suicide prevention pamphlet is an eight-page pamphlet discussing the problem and signs of suicide and how proper storage of a firearm can help reduce risks of suicide by firearm. Both pamphlets discuss the relationship of the economic product to an important public health issue. *Compare id.* at 62 n.4 (discussing “the use and advantages of condoms in aiding the prevention of venereal disease”), *with* ECF 45-7 at 7, 8 (noting that “[b]y keeping secure firearm storage in mind, you can help reduce the number of suicides involving firearms,” suggesting “options for safely storing and protecting your firearms when they’re not in use,” such as a lock box and gun case).

Plaintiffs highlight various differences between the County's pamphlets and traditional examples of commercial speech. ECF 39-12 at 18. But many of these differences are inherent in the distinction between laws that *prohibit* speech versus laws that *compel* speech. The County's pamphlets are not advertisements (the first *Bolger* factor), and the County has no economic motivation (the third *Bolger* factor). But "it is not necessary that each of the characteristics 'be present in order for speech to be commercial.'" *Greater Baltimore I*, 721 F.3d at 285. And these distinctions hold true for any instance where the government compels safety disclosures of products. The choking hazard labels on toys' packaging and the long list of drugs' side effects provided to a consumer at the pharmacy are not advertisements. The disclosures required by the FDA and the U.S. Consumer Product Safety Commission seek to promote public health and consumer awareness, not promote the products' sales. Nonetheless, these examples of compelled information plainly fall within the realm of commercial speech. The County's aim to reduce rates of suicide by firearms and violent conflict resolution by providing information to gun owners about how to safely store their firearms is no different.

Plaintiffs argue the content of the pamphlets inappropriately focus on public health crises linked to firearms, rather than the firearms themselves. ECF 39-12 at 17; ECF 50 at 12. *Bolger* makes clear, however, that much of commercial speech "links a product to a current public debate." *Bolger*, 463 U.S. at 68 (quoting *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563, n.5 (1980)) (internal quotation marks omitted); see also *Central Hudson Gas*, 447 U.S. at 563 (noting that a contrary conclusion "would grant broad constitutional protection to any

advertising that links a product to a current public debate. But many, if not most, products may relate to public concerns with the environment, energy, economic policy, or individual health and safety.”). From suicide to venereal disease, speech discussing public issues can still be commercial.

Finally, Plaintiffs argue that *Zauderer* does not apply because the speech does not limit consumer deception. ECF 50 at 13. However, multiple appellate courts have rejected this interpretation of *Zauderer*. *Am. Meat Inst.*, 760 F.3d at 22 (“To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.”); *Sorrell*, 272 F.3d at 115 (concluding that *Zauderer*’s holding was broad enough to encompass non-misleading disclosure requirements); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556–58 (6th Cir. 2012) (upholding federally required health warnings on cigarette packaging, relying on *Sorrell*); *CTIA – The Wireless Ass’n*, 928 F.3d at 843–44. As discussed above, consumer deception is not the only recognized government interest in compelled disclosure laws. Many laws aim to ensure the product’s proper and safe use, ranging from instructing consumers how to properly dispose mercury-containing products to safely ingesting pharmaceutical drugs. The County’s Ordinance achieves the same goal.

In short, these informational pamphlets are compelled disclosures related to a product purchased during an economic transaction. Such disclosures have been long understood as “commercial speech” and analyzed under such a standard. This Court does the same.

B. Factual and Uncontroverted Information

This Court will next examine whether the pamphlets' content is factual and uncontroversial, after first considering the County's Motion to Exclude.

i. Defendant's Motion to Exclude

Plaintiffs' expert witness, Gary Kleck, opines on one specific statement in the pamphlets: that "[a]ccess to lethal means[,] including firearms" is a "risk factor[]" for suicide. *See* ECF 39-7 at 3; ECF 45-5 at 41:3–5 (identifying this statement as the only one for which he provides an expert opinion); *id.* at 39:13–16, 40:10–12, 41:10–12 49:11–13, 50:2–3, 51:20–25, 53:3–9 (confirming he does not provide an opinion on information anywhere else in the pamphlets). In his expert report, Mr. Kleck concludes that listing access to firearms as a "risk factor" infers that it is a *causal* factor. Specifically, he writes that "the County, via this pamphlet, is claiming that access to firearms causes an increased chance of a person committing suicide." ECF 39-7 at 3. He entitles this inference "the suicide claim" and concludes that it "is probably false." *Id.* He then uses the remainder of his report to dispute that "suicide claim," *i.e.*, that access to firearms *cause* suicide.

Mr. Kleck's report would be relevant, and therefore admissible, if the pamphlet indeed asserted a causal link between firearm access and suicide. However, it does no such thing. The pamphlet identifies access to firearms and other lethal means as a "risk factor," and nothing more. This distinction is supported by the fact that the pamphlet informs the firearm owner that "[b]y keeping secure firearm storage in mind, you can help reduce the number of suicides *involving firearms*," not the number of suicides generally. ECF 45-7 at 7 (emphasis added). The pamphlet limits itself to

identifying the risk that a firearm, like other items, could be used by a person contemplating suicide, and it focuses its message on informing gun owners how to safely store their firearms. By using the language of “risk factor” rather than “cause,” the pamphlet specifically avoids making any causal accusation. By definition, “risk factors” need not have a causal connection. Like the pamphlet, Black’s Law Dictionary defines “risk factor” as “[a]nything that increases the possibility of harm or any other undesirable result.” *Risk Factor*, BLACK’S LAW DICTIONARY (11th ed. 2019). It does not require a causal relationship, and mere “correlation does not prove causation.” *MSI v. Hogan*, 971 F.3d at 213. For Mr. Kleck’s expert report to be relevant, this Court must read words into the pamphlet that are not there.⁸ The pamphlet only identifies access to firearms

⁸ Aside from Mr. Kleck’s proposed inference from the pamphlet, Plaintiffs argue a reasonable reader would interpret the pamphlet to propose a causal link. ECF 46 at 3. For evidence of this, Plaintiffs cite depositions and answers to interrogatories with statements made by themselves regarding their understanding of the pamphlet’s message. *Id.* However, these statements do not address the statement at issue in Mr. Kleck’s testimony. Some of these criticisms take issue with “feelings” the gun shop owners and other Plaintiffs get by distributing the pamphlets, they do not take issue with the actual messages or text written in the pamphlet. *E.g.*, ECF 39-10 at 29: 12–19 (“Q: Can you describe what you don’t like about this pamphlet? A: Firearms don’t cause suicide. Suicide is the problem, not the firearms. Q: Can you show me where in the pamphlet it says firearms cause suicide? A: That’s what I was getting off the cover. That’s what it means to me.”); *Id.* at 42:6–21 (“Both pamphlets together give me that feeling. Q: What feeling? A: That this message is against firearms. Q: But the document itself doesn’t mention firearms, correct? . . . A: I said I couldn’t find it. I said putting them together and it tells me that this is all one package that firearms are causing the issue.”).

Further, in Plaintiffs’ answers to interrogatories, when asked to “identify with particularity each statement within [the

as a risk factor, and Mr. Kleck's expert opinion does not dispute the correlation between access to firearms and risks of suicide. ECF 45-5 at 200:20–201:2. Consequently, Mr. Kleck's report is not "sufficiently tied to the facts of the case [such] that it will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591.

For this reason, Mr. Kleck's expert report is excluded.

ii. Factual

Given the pamphlet's restrictive scope, this Court need only assess whether access to firearms is a risk factor for an increased risk of suicide, *i.e.*, whether there is a correlation between access to firearms and risk of suicide. No party disputes this correlation; Plaintiffs only dispute research finding a causal link. ECF 50 at 4–10. In his deposition, Mr. Kleck agreed

pamphlets] that you contend" of which they disagree, Plaintiffs referenced the message sent by the act of displaying and providing the pamphlets generally; they did not point to any particular statement in the pamphlet of which they disagreed. ECF 39-1 at 3–4 (Plaintiff Field Traders); 39-2 at 3–4 (Plaintiff Cindy's Hot Shots); ECF 39-1 at 3–4 (Plaintiff Pasadena Arms); ECF 39-4 at 3–4 (Plaintiff Worth-A-Shot); ECF 39-5 at 4 (Plaintiff MSI) (all repeating that "Requiring firearms deals to display the County's publications on suicide and conflict resolution sends the message that the purchase and possession of firearms and ammunition is causally related to increased risk of suicide and/or an illegal use of firearms and ammunition in conflict resolution"). Thus, Plaintiffs' answers to interrogatories take issue with the message displaying the pamphlets "sends"—not the message actually written in the pamphlets.

Mr. Kleck's opinion is limited to a line of text on page 4 of the Suicide Prevention Pamphlet. Thus, for the purposes of the motion to exclude, this Court limits its review to the statement for which Mr. Kleck provides expert testimony, not other statements or messages Plaintiffs assert can be inferred from the pamphlet as a whole.

with the correlative relationship between access to firearms and an increased risk of suicide. ECF 45-5 at 200:20–201:11 (“Q: So you – you agree with the proposition that firearms ownership and firearms access is a risk factor for suicide if risk factor is used to mean a correlate? A: Yes. If it means nothing more than a correlate and not a causal assertion about causality, then yes.”).

The County provides expert reports and numerous studies demonstrating this well-documented correlation. ECF 45-3 at 7 (Expert Report of Alexander McCourt) (reporting that the description of access to firearms as an environmental risk factor for suicide “is consistent with a large body of research evidence”); ECF 45-4 at 5–6 (Expert Report of Niles Kalyanaraman) (summarizing sources documenting “a strong correlation” between firearm access and risk of suicide); ECF 45-15 (NIH FAQ webpage listing the “[p]resence of guns or other firearms in the home” as a risk factor for suicide, with the caveat that “[m]ost people who have risk factors for suicide will not attempt suicide”); ECF 45-18 (CDC webpage listing “[e]asy access to lethal means of suicide among people at risk” as a societal risk factor for suicide); ECF 45-33 at 2 (2010 American Journal of Public Health published study finding that laws requiring firearm licensing were “associated with fewer suicide attempts overall”); ECF 45-34 at 2–7 (2017 American Association of Suicidology published study summarizing the “extensive body of research” that has “demonstrated an association between gun ownership and suicide” and noting that that “[n]either theory nor data contend that gun ownership causes suicidal ideation,” *id.* at 3); ECF 45-35 at 2 (2014 Annals Internal Medicine published study concluding “[a]ccess to firearms is associated with risk for completed suicide”); ECF 45-36 (1997 study concluding

“keeping a gun in the home is associated with increased risk of both suicide and homicide of women”); ECF 45-37 (1988 study reporting access to firearms in the home as a risk factor for adolescent suicide); ECF 45-38 (1991 study reporting that “guns were twice as likely to be found in the homes of suicide victims as in the homes of attempters”). In short, the statement that access to firearms is a risk factor for suicide is factual.

The Conflict Resolution Pamphlet is likewise purely factual. Aside from listing available resources, it simply states that “Conflict Resolution is a process to help you find the best way to resolve conflicts and disagreements peacefully.” ECF 45-7 at 10. This statement is a straightforward definition of conflict resolution.

Thus, the County’s pamphlets present purely factual information.

iii. Uncontroversial

This Court next addresses whether the information contained in the pamphlets “communicates a message that is controversial for some reason other than dispute about simple factual accuracy.” *Am. Meat Inst.*, 760 F.3d at 27. Undoubtedly, firearm regulation in the United States is a highly controversial topic. However, the pamphlets themselves only speak to the uncontroversial topics of suicide prevention and nonviolent conflict resolution. The fact that the NSSF—the firearm industry’s trade association—wrote and produced the “Firearms and Suicide Prevention” pamphlet strongly demonstrates the nonpartisan nature of the included information. *See* ECF 45-5 at 20:11–22. Plaintiffs do not, and plainly cannot, take issue with the County’s goal of reducing the number of suicides and violent

conflict resolutions. And Plaintiffs do not contest the correlational relationship between firearm access and suicide. Plaintiffs' arguments focus on the alleged controversial nature of the causal relationship. But as explained, the pamphlets do not suggest a causal relationship.

This contrasts with cases where the disclosed information was itself controversial. In past cases, courts have struck down laws requiring pregnancy centers to disclose the fact that they do not offer abortions and to provide information about state-sponsored abortion services—a controversial service in itself. For example, in *NIFLA*, the U.S. Supreme Court concluded that *Zauderer* did not apply in part because the mandatory disclosed information was about access to abortions, “anything but an ‘uncontroversial’ topic.” *NIFLA*, 138 S. Ct. at 2372. The same issue arose in *Greater Baltimore*, where the Fourth Circuit noted that “[t]he message conveyed is antithetical to the very moral, religious, and ideological reasons the Center exists.” *Greater Baltimore II*, 879 F.3d at 110. Here, information about how to safely store a firearm, information about the warning signs of suicide, and resources for individuals contemplating suicide or violent conflict resolution, are not antithetical to gun retailers' mission of selling firearms, nor are they controversial.

C. Reasonably Related to the County's Interest
and Not Unduly Burdensome

Finally, the pamphlets are “reasonably related to the State's interest” and are not “unduly burdensome.” *Zauderer*, 471 U.S. at 628, 651. The physical ask of the Ordinance is minimal. The County prints and provides the pamphlets, which take up 6x6 inches of space each, at no cost to the gun retailers. The Ordinance simply requires gun retailers to display the pamphlets at the

point of sale and to provide them to any purchaser of a firearm or ammunition. Similarly, the burden on gun shop owners' freedom of speech is minimal. Customers can easily recognize that gun retailers did not produce the pamphlets themselves because the pamphlets include the logos of the County, the NSSF, and AFSP. Further, the gun retailer could lawfully explain to the customer that the County requires distribution of the pamphlets.

The pamphlets are reasonably related to the County's interest in preventing suicide and violence. The proven correlation between gun access and suicide risk presents the County an opportunity to target its informational outreach more accurately. *See* ECF 45-4 at 8–9 (Expert Report of Nilesh Kalyanaraman) (“Since higher rates of gun ownership are associated with increased rates of gun suicide, it is sound public health practice to develop materials tailored to gun owners and deliver it in a setting with a high number of gun owners to best reach a high-risk population.”). Similarly, the County's interest in reducing gun violence is reasonably related to its requirements that the Conflict Resolution pamphlet be distributed.

Ultimately, this case is not about limiting gun ownership or stigmatizing firearms. This case is about the correlative link between access to firearms and the risk of suicide or violent conflict resolution, and about the County's ability to take reasonable steps to mitigate that risk. Because the County's actions do not infringe Plaintiffs' First Amendment rights, summary judgment in the County's favor is warranted.

V. CONCLUSION

For the reasons stated above, Defendant's Motion to Exclude, ECF 44, is GRANTED; Plaintiffs' Motion for

61a

Summary Judgment, ECF 39, is DENIED; and Defendant's Cross-Motion for Summary Judgment, ECF 45, is GRANTED.

A separate Order follows.

Dated: March 21, 2023

/s/
Stephanie A. Gallagher
United States District Judge

62a

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[FILED: February 21, 2024]

No. 23-1351
(1:22-cv-00865-SAG)

MARYLAND SHALL ISSUE, INC.; FIELD TRADERS LLC;
CINDY'S HOT SHOTS, INC.; PASADENA ARMS, LLC;
WORTH-A-SHOT, INC.

Plaintiffs - Appellants

v.

ANNE ARUNDEL COUNTY MARYLAND

Defendant - Appellee

STATE OF MARYLAND; MATTHEW MILLER; DEBORAH
AZRAEL; BRADY CENTER TO PREVENT GUN VIOLENCE;
MARYLANDERS TO PREVENT GUN VIOLENCE,
INCORPORATED; TIM CAREY; KELLY ROSKAM;
CONSTITUTIONAL ACCOUNTABILITY CENTER; AMERICAN
MEDICAL ASSOCIATION; MEDCHI; MARYLAND STATE
MEDICAL SOCIETY; AMERICAN ACADEMY OF
PEDIATRICS; AMERICAN ACADEMY OF PEDIATRICS,
MARYLAND CHAPTER; MARYLAND PSYCHIATRIC
SOCIETY; WASHINGTON PYSCHIATRIC SOCIETY;
DOROTHY PAUGH; GWENDOLYN LA CROIX; CHERYL
BROOKS; PATTI BROCKINGTON; GUN OWNERS FOR
SAFETY; DON BAUGHAN

Amici Supporting Appellee

63a

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Gregory, and Judge Heytens.

For the Court

/s/ Nwamaka Anowi, Clerk

64a

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Case No.: SAG-22-00865

MARYLAND SHALL ISSUE, INC., *et al.*

Plaintiffs,

v.

ANNE ARUNDEL COUNTY

Defendant.

ORDER

For the reasons stated in the accompanying memorandum opinion, it is this 21st day of March, 2023, ORDERED that Defendant's Motion to Exclude, ECF 44, is GRANTED; Plaintiffs' Motion for Summary Judgment, ECF 39, is DENIED; and Defendant's Cross-Motion for Summary Judgment, ECF 45, is GRANTED.

Judgment is entered in favor of Defendant. The Clerk is directed to CLOSE the case.

/s/
Stephanie A. Gallagher
United States District Judge

65a

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No.: 1:22-cv-865

MARYLAND SHALL ISSUE, INC.
9613 Harford Rd., Ste C #1015
Baltimore, Maryland 21234-2150,

FIELD TRADERS, LLC
2400 Mountain Rd
Pasadena, MD 21122,

CINDY'S HOT SHOTS, INC.
Unit C

115 Holsum Way
Glen Burnie MD 21060,

PASADENA ARMS, LLC
2441A Mountain Rd
Pasadena, MD 21122,

WORTH-A-SHOT, INC.
8424 Veterans Hwy #10-12
Millersville, MD 21108,

Plaintiffs,

v.

ANNE ARUNDEL COUNTY, MARYLAND
44 Calvert Street
Annapolis, MD 21401,

Defendant.

SERVE:

Gregory J. Swain, Esq.
County Attorney
2660 Riva Road
Annapolis, MD 21401

Service Agent for Defendant.

COMPLAINT FOR DECLARATORY AND
EQUITABLE RELIEF, FOR COMPENSATORY
DAMAGES AND FOR OTHER RELIEF

COME NOW, the Plaintiffs, through counsel, sue
the Defendant, and for cause state as follows:

INTRODUCTION

1. On January 10, 2022, the Defendant, Anne Arundel County, Maryland (“the County”) signed into law Bill 108-21 (“the Bill”), a copy of which is attached to this complaint as Exhibit A and is incorporated herein in its entirety by reference. Bill 108-21 became effective on April 10, 2022. Through the enactment of County Bill 108-21, the County undertakes to prepare or sponsor literature concerning gun safety, gun training, suicide prevention, mental health and conflict resolution. As distributed to dealers by a County representative on or about April 8, 2022, that literature takes the form of two pieces of literature. The first is a pamphlet entitled “Firearms and Suicide Prevention” published jointly by the National Shooting Sports Foundation (“NSSF”) and the American Foundation for Suicide Prevention. A copy of that pamphlet, as downloaded from the NSSF website at <https://bit.ly/3rgLt6r>, is attached as Exhibit B and is incorporated herein in its entirety by reference. The text and layout of this

downloaded copy is identical to the printed copy distributed by the County

2. The second piece of literature distributed by the County on or about April 8, 2022, is single page measuring 6" by 6," setting forth information concerning County "resources" for "conflict resolution." A copy of that piece of literature is attached as Exhibit C and is incorporated herein in its entirety by reference. The County has distributed both pieces of this literature to Anne Arundel County dealers. Bill 108-21 requires that licensed firearms dealers in the County make this literature "visible and available" at the business establishments of licensed firearms dealers and to "distribute the literature" to "all purchasers of guns or ammunition" at such locations. Other than Maryland Shall Issue, Inc., each plaintiff to this action is a licensed firearms dealer subject to Bill 108-21, and each plaintiff objects to being commandeered as a distributor for the County's literature. Bill 108-21 constitutes "compelled speech" in violation of the plaintiff dealers' First Amendment rights. Bill 108 21 also violates the First Amendment rights of persons who visit or do business with a dealer in Anne Arundel County by effectively chilling the speech of customers who may disagree with the County's preferred message.

JURISDICTION AND VENUE

3. This action arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343.

4. Venue is properly in this Court under 28 U.S.C. 1391(b), as the defendant resides, carries on a regular business and maintains its principal offices in Anne Arundel County, Maryland in this District, and a substantial part of the events or omissions giving rise to this suit occurred in this District.

5. Plaintiffs' claims for declaratory relief are authorized by 28 U.S.C. §§ 2201 and 2202, by 42 U.S.C. § 1983, and by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court. Plaintiffs' claims for damages and equitable relief are authorized by 42 U.S.C. § 1983.

ANNE ARUNDEL COUNTY BILL 108-21

6. Bill 108-21 amends the Anne Arundel County Code, Article 12, Title 6, Section 12-6-108, to provide in subsection (A) through (C):

(A) Duties of Health Department. THE ANNE ARUNDEL COUNTY HEALTH DEPARTMENT SHALL PREPARE LITERATURE RELATING TO GUN SAFETY, GUN TRAINING, SUICIDE PREVENTION, MENTAL HEALTH, AND CONFLICT RESOLUTION AND DISTRIBUTE THE LITERATURE TO ALL ESTABLISHMENTS THAT SELL GUNS OR AMMUNITION

(B) Requirements. ESTABLISHMENTS THAT SELL GUNS OR AMMUNITION SHALL MAKE THE LITERATURE DISTRIBUTED BY THE HEALTH DEPARTMENT VISIBLE AND AVAILABLE AT

THE POINT OF SALE. THESE ESTABLISHMENTS SHALL ALSO DISTRIBUTE THE LITERATURE TO ALL PURCHASERS OF GUNS OR AMMUNITION.

C) Enforcement. AN AUTHORIZED REPRESENTATIVE OF THE ANNE ARUNDEL COUNTY HEALTH DEPARTMENT MAY ISSUE A CITATION TO AN OWNER OF AN ESTABLISHMENT THAT SELLS GUNS OR AMMUNITION FOR A VIOLATION OF SUBSECTION 8 (B).

7. Bill 108-21 amends the Anne Arundel County Code, Article 12, Title 6, Section 12-6-108(D), to impose a penalty for any violation of Bill 108-21, stating:

(D) Violations. A VIOLATION OF THIS SECTION IS A CLASS C CIVIL OFFENSE PURSUANT TO § 9-2-101 OF THIS CODE.

A Class C civil offense under Section 9-2-101 of the County Code is punishable by a fine of “\$500 for the first violation and \$1,000 for the second or any subsequent violation.”

PARTIES

Plaintiffs:

8. Plaintiff Maryland Shall Issue, Inc. (“MSI”) is a Maryland corporation, located at 9613 Harford Rd., Ste C #1015, Baltimore, MD 21234-2150. MSI is an Internal Revenue Service certified, Section 501(c)(4), non-profit, non-partisan membership organization with approximately 2000 members statewide. MSI is dedicated to the preservation and advancement of gun owners’ rights in Maryland. It seeks to

educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. The purposes of MSI include promoting the exercise of the Second Amendment right to purchase arms. MSI engages in education, research, and legal action focusing on the constitutional right to privately own, possess and carry firearms. MSI has members who live in Anne Arundel County and purchase firearms and/or ammunition from firearms dealers in Anne Arundel County. Each of the other plaintiffs in this matter is a corporate member of MSI.

9. MSI brings this suit on behalf of its members who are firearms dealers in Anne Arundel County, and who are required to display and distribute County literature by Bill 108-21, and who are thus directly regulated by Bill 108-21. MSI also brings this suit in its representational capacity on behalf of its individual members who visit or do business with Anne Arundel County dealers and sellers of ammunition and who are thus subject to the forced receipt or display of literature required by Bill 108-21. MSI has one or more individual members who live in Anne Arundel County and/or have purchased or intend to purchase firearms and/or ammunition from dealers in Anne Arundel County. MSI has standing to sue on behalf of its members under *Hunt v. Washington State Apple Advert. Com'n*, 432 U.S. 333, 342 (1977). Each of MSI's members who do business at Anne Arundel County firearms dealers are injured by the forced display and receipt of County literature when they exercise their Second Amendment right to purchase firearms

or ammunition from Anne Arundel County dealers. The interests that MSI seeks to protect are germane to MSI's purpose and neither the claims asserted herein nor the relief requested require the participation of MSI's individual members.

10. Plaintiff FIELD TRADERS, LLC ("FIELD TRADERS") is a Maryland corporation located on private property within Anne Arundel County, Maryland, at 2400 Mountain Rd, Pasadena, MD 21122. Pursuant to 18 U.S.C. § 923, FIELD TRADERS is a Federally licensed firearms dealer at its current location. See 27 C.F.R. § 478.41 *et seq.* Pursuant to MD Code, Public Safety, § 5-106, FIELD TRADERS is also a Maryland State licensed firearms dealer and is thus authorized by State law to engage "in the business of selling, renting or transferring regulated firearms." As part of its business, FIELD TRADERS regularly sells firearms, including regulated firearms, as well as ammunition for firearms. FIELD TRADERS objects to Bill 108-21 because the Bill commandeers plaintiff FIELD TRADERS to act as a mouthpiece and conduit for County communications mandated by Bill 108-21. Bill 108-21 requires plaintiff FIELD TRADERS to involuntarily display and distribute County literature with which plaintiff disagrees. Plaintiff FIELD TRADERS does not wish to be a party to these communications or to be seen by its customers and potential customers as endorsing implicitly or otherwise the County's messages and opinions set out in the literature which FIELD TRADERS is required to display and distribute by Bill 108-21. Plaintiff FIELD TRADERS is a corporate member of MSI.

11. CINDY'S HOT SHOTS, INC., ("CINDY'S HOT SHOTS") is a Maryland corporation located on private property within Anne Arundel County, Maryland, at 115 Holsum Way, Unit C, Glen Burnie, MD 21060. Pursuant to 18 U.S.C. § 923, CINDY'S HOT SHOTS is a Federally licensed firearms dealer at its current location. See 27 C.F.R. § 478.41 et seq. Pursuant to MD Code, Public Safety, § 5-106, CINDY'S HOT SHOTS is also a Maryland State licensed firearms dealer and is thus authorized by State law to engage "in the business of selling, renting or transferring regulated firearms." As part of its business, CINDY'S HOT SHOTS regularly sells firearms, including regulated firearms, as well as ammunition for firearms. Plaintiff CINDY'S HOT SHOTS objects to Bill 108-21 because the Bill commandeers it to act as a mouthpiece and conduit for County communications mandated by Bill 108-21. Bill 108-21 requires plaintiff CINDY'S HOT SHOTS to involuntarily display and distribute County literature with which plaintiff disagrees. Plaintiff CINDY'S HOT SHOTS does not wish to be a party to these communications or to be seen by its customers and potential customers as endorsing implicitly or otherwise the County's messages set out in the literature which Bill 108-21 requires it to display and distribute. Plaintiff CINDY'S HOT SHOTS is a corporate member of MSI.

12. PASADENA ARMS, LLC, ("PASADENA ARMS") is a Maryland corporation located on private property within Anne Arundel County, Maryland, at 2441A Mountain Rd., Pasadena, MD 21122. Pursuant to 18 U.S.C. § 923, PASADENA ARMS is Federally licensed dealer at its current

location. See 27 C.F.R. § 478.41 et seq. Pursuant to MD Code, Public Safety, § 5-106, PASADENA ARMS is also a Maryland State licensed firearms dealer and is thus authorized by State law to engage “in the business of selling, renting or transferring regulated firearms.” As part of its business, PASADENA ARMS regularly sells firearms, including regulated firearms, as well as ammunition for firearms. PASADENA ARMS objects to Bill 108-21 because the Bill commandeers it to act as a mouthpiece and conduit for County communications mandated by Bill 108-21. Bill 108-21 requires plaintiff PASADENA ARMS to involuntarily display and distribute County literature with which plaintiff disagrees. Plaintiff PASADENA ARMS does not wish to be a party to these communications or to be seen by its customers and potential customers as endorsing implicitly or otherwise the County’s messages set out in the literature which Bill 108-21 requires it to display and distribute. Plaintiff PASADENA ARMS is a corporate member of MSI.

13. WORTH-A-SHOT, INC. (“WORTH-A-SHOT”) is a Maryland Corporation located on private property within Anne Arundel County, Maryland, at 8424 Veterans Hwy #10-12, Millersville, MD 21108. Pursuant to 18 U.S.C. § 923, WORTH-A-SHOT is a Federally licensed dealer at its current location. See 27 C.F.R. § 478.41 et seq. Pursuant to MD Code, Public Safety, § 5-106, WORTH-A-SHOT is also a Maryland State licensed firearms dealer and is thus authorized by State law to engage “in the business of selling, renting or transferring regulated firearms.” As part of its business, WORTH-A-SHOT regularly sells firearms,

including regulated firearms, as well as ammunition for firearms. WORTH-A-SHOT objects to Bill 108-21 because the Bill commandeers it to act as a mouthpiece and conduit for County communications mandated by Bill 108-21. Bill 108-21 requires plaintiff WORTH-A-SHOT to involuntarily display and distribute County literature with which plaintiff disagrees. Plaintiff WORTH-A-SHOT does not wish to be a party to these communications or to be seen by its customers and potential customers as endorsing implicitly or otherwise the County's messages set out in the literature which Bill 108-21 requires it to display and distribute at its business location. Plaintiff WORTH-A-SHOT is a corporate member of MSI.

14. Plaintiffs FIELD TRADERS, CINDY'S HOT SHOTS, PASADENA ARMS, and WORTH-A-SHOT (hereinafter "plaintiff dealers"), are each directly regulated by Bill 108-21, and thus each has Article III standing to sue on its own behalf. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) ("Where 'the plaintiff is himself an object of the action . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'"). Each plaintiff dealer also has standing to sue on behalf of its customers and "other similarly situated persons" for injuries inflicted by Bill 108-21. *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 216 (4th Cir. 2020). If one plaintiff has standing, it is unnecessary to determine the standing of other plaintiffs. (*Id.*, 971 F.3d at 214 & n.5). *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (same).

Defendant:

15. The Defendant is Anne Arundel County, Maryland. Anne Arundel County (“the County”) is a chartered home rule county within the meaning of Article XI-A of the Maryland Constitution. Bill 108-21, challenged herein, is a County ordinance and thus an official policy of the County. The County may be named and sued *eo nomine* under 42 U.S.C. § 1983. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Starbuck v. Williamsburg James City County School Board*, 28 F.4th 529, 533-34 (4th Cir. 2022); *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003).

BILL 108-21 VIOLATES THE FIRST AMENDMENT RIGHTS OF PLAINTIFFS

16. The Plaintiffs reallege and incorporate herein by reference all the foregoing allegations of this complaint.

17. The Supreme Court’s “leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). Any state action “which forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view” is unacceptable under the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

18. Persons have a First Amendment “right not to utter political and philosophical beliefs that the state wishes to have said.” *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council Of Baltimore*, 879 F.3d 101, 111 (4th Cir.), *cert. denied*, 138 S.Ct. 2710 (2018). There is a First Amendment right “not to speak” because “the right to refrain from speaking is concerned with preventing the government from “[c]ompelling individuals to mouth support for views they find objectionable.” *Overbey v. Mayor of Baltimore*, 930 F.3d 215, 222 (4th Cir. 2019) (quoting *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council*, 138 S.Ct. 2448, 2463 (2018)). Under the First Amendment, the government may not command a person to serve as a “conduit” for government speech, and may not be “forced either to appear to agree with [the intruding leaflet] or to respond.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm’n.*, 475 U.S. 1, 15 (1986) (plurality opinion) (brackets the Court’s)).

19. Bill 108-21 compels a dealer to display and distribute County-sponsored literature directed at “gun safety, gun training, suicide prevention, mental health, and conflict resolution.” This literature and requirement is “content-based” because “[b]y compelling individuals to speak a particular message, such notices “alte[r] the content of [their] speech.” *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018) (“NIFLA”) (quoting *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988)). “The Supreme

Court has emphasized that there is no constitutional difference between ‘compelled statements of opinion’ and ‘compelled statements of fact’ because ‘either form of compulsion burdens protected speech.’” *Washington Post v. McManus*, 944 F.3d 506, 518 (4th Cir. 2019) (quoting *Riley*, 487 U.S. 797-98).

20. Bill 108-21 does not purport to regulate commercial speech of the plaintiff dealers because the County’s literature “is not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’” *NIFLA*, 138 S.Ct. at 2372 (quoting and distinguishing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 651 (1985)). Opinions vary widely concerning “gun safety, gun training, suicide prevention, mental health, and conflict resolution.” Nothing in the County’s literature concerns or purports to regulate any conduct of the dealers. *NIFLA*, 138 S.Ct. at 2372. The display and distribution requirements of Bill 108-21 have no purpose other than to commandeer dealers and other sellers of ammunition into acting as conduits for the opinions and messages adopted by the County.

21. Plaintiff Dealers: Bill 108-21 violates the First Amendment’s prohibition on compelled speech by compelling the plaintiff dealers to display and distribute the County literature and thus act as involuntary conduits for the County’s message “relating to gun safety, gun training suicide prevention, mental health, and conflict resolution.” Bill 108-21 also violates plaintiff dealers’ First Amendment right “not to speak” on such subjects, as the plaintiff dealers are compelled by Bill 108-21

to display and distribute the County's literature. By compelling the plaintiff dealers to display and distribute the County's literature, Bill 108-21 violates the First Amendment by forcing the plaintiff dealers either to appear to agree with the County's literature or respond to the County's literature by affirmatively speaking where the plaintiff dealers might well prefer to remain silent.

22. Customers of Dealers: Bill 108-21 also violates the First Amendment rights of customers of dealers, including MSI members, because customers are chilled in the exercise of their own First Amendment rights by the forced distribution of the County's literature to such customers. Specifically, recipients of such official communications from the County will objectively be less willing to articulate their own views "relating to gun safety, gun training, suicide prevention, mental health, and conflict resolution," especially where, as here, the dealer is the distributor and thus may be reasonably understood to endorse the views of the literature that Bill 108-21 compels the dealer to distribute and display. This chilling effect is sufficient injury to confer standing on customers, including MSI members, who purchase or who intend to purchase, firearms or ammunition from Anne Arundel County dealers. *Secretary of State of Md. v. Joseph H. Munson Co., Inc.* 467 U.S. 947, 956- 57 (1984) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or

expression.”) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

23. “[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech.” *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (quoted in *Munson*, 467 U.S. at 957 n.7). *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (“The Supreme Court of the United States has explained that standing requirements are somewhat relaxed in First Amendment cases.”); *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) (noting that a “cognizable injury under the First Amendment is self-censorship, which occurs when a claimant is chilled from exercising her right to free expression”) (internal quotation marks omitted). Customers and persons intending to purchase firearms and/or ammunition in the County, including MSI members, have standing under these principles.

24. Bill 108-21 went into effect on April 10, 2022, and there is no indication that the County will not fully enforce its provisions. The plaintiff dealers have received the County’s literature and are expected to comply with Bill 108-21. With each passing day, the plaintiffs suffer irreparable harm to their rights because of Bill 108-21. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”). “An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or there

is a ‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). See also *Davidson v. Randall*, 912 F.3d 666, 678 (4th Cir. 2019).

25. Pursuant to 42 U.S.C. § 1983, plaintiffs are entitled to injunctive and declaratory relief and compensatory damages, including nominal damages, for the foregoing violations of their rights. *Uzuegbunam v. Preczewski*, 141 S.Ct. 792 (2021).

26. Plaintiffs are entitled to an award of attorneys’ fees and costs pursuant to 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request:

A. That this Court issue a declaratory judgment that Bill 108-21 violates the First Amendment because it compels the speech of plaintiff dealers and may chill the speech of the customers of dealers, including MSI members, as more fully set forth above;

B. That this Court find that plaintiffs are threatened with imminent and irreparable harm by Bill 108-21, and enter a preliminary and permanent injunction barring the County from enforcing Bill 108-21 against the plaintiff dealers and members of MSI;

C. That this Court award plaintiffs compensatory damages for the County’s violations of the plaintiffs’ constitutional rights, including without limitation, nominal damages, as authorized by 42 U.S.C. § 1983;

81a

D. That this Court award to plaintiffs their attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

E. That this Court award the plaintiffs such other and further relief as in law and justice they may be entitled to receive.

Respectfully submitted,

/s/ Mark W. Pennak

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Counsel for Plaintiffs

82a

COUNTY COUNCIL OF ANNE ARUNDEL
COUNTY, MARYLAND

Legislative Session 2021, Legislative Day No. 23
Bill No. 108-21

Introduced by Ms. Rodvien

By the County Council, December 6, 2021

Introduced and first read on December 6, 2021

Public Hearing set for and held on January 3, 2022

Bill Expires on March 11, 2022

By Order: Laura Corby, Administrative Officer

A BILL ENTITLED

AN ORDINANCE concerning: Public Safety –
Distribution of Literature to Purchasers of Guns or
Ammunition

FOR the purpose of requiring the Health
Department to prepare and distribute certain
literature to establishments that sell guns or
ammunition; adding certain display and
distribution requirements for sellers; authorizing
enforcement by the Health Department; making a
violation a Class C civil offense; providing for an
abnormal effective date; and generally relating to
public safety.

BY adding: § 12-6-108

Anne Arundel County Code (2005, as amended)

SECTION 1. *Be it enacted by the County Council
of Anne Arundel County, Maryland, That Section(s)
of the Anne Arundel County Code (2005, as
amended) read as follows:*

ARTICLE 12. PUBLIC SAFETY
TITLE 6. MISCELLANEOUS PROVISIONS

12-6-108. Distribution of literature to purchasers of guns or ammunition.

(A) Duties of Health Department. THE ANNE ARUNDEL COUNTY HEALTH DEPARTMENT SHALL PREPARE LITERATURE RELATING TO GUN SAFETY, GUN TRAINING, SUICIDE PREVENTION, MENTAL HEALTH, AND CONFLICT RESOLUTION AND DISTRIBUTE THE LITERATURE TO ALL ESTABLISHMENTS THAT SELL GUNS OR AMMUNITION.

(B) Requirements. ESTABLISHMENTS THAT SELL GUNS OR AMMUNITION SHALL MAKE THE LITERATURE DISTRIBUTED BY THE HEALTH DEPARTMENT VISIBLE AND AVAILABLE AT THE POINT OF SALE. THESE ESTABLISHMENTS SHALL ALSO DISTRIBUTE THE LITERATURE TO ALL PURCHASERS OF GUNS OR AMMUNITION.

(C) Enforcement. AN AUTHORIZED REPRESENTATIVE OF THE ANNE ARUNDEL COUNTY HEALTH DEPARTMENT MAY ISSUE A CITATION TO AN OWNER OF AN ESTABLISHMENT THAT SELLS GUNS OR AMMUNITION FOR A VIOLATION OF SUBSECTION (B).

(B) Violations. A VIOLATION OF THIS SECTION IS A CLASS C CIVIL OFFENSE PURSUANT TO § 9-2-101 OF THIS CODE.

SECTION 2. *And be it further enacted*, That this Ordinance shall take effect 90 days from the date it becomes law.

84a

READ AND PASSED this 3rd day of January, 2022

By Order:

/s/ Laura Corby

Laura Corby

Administrative Officer

PRESENTED to the County Executive for his
approval this 4th day of January, 2022

/s/ Laura Corby

Laura Corby

Administrative Officer

APPROVED AND ENACTED this 10th day of
January, 2022

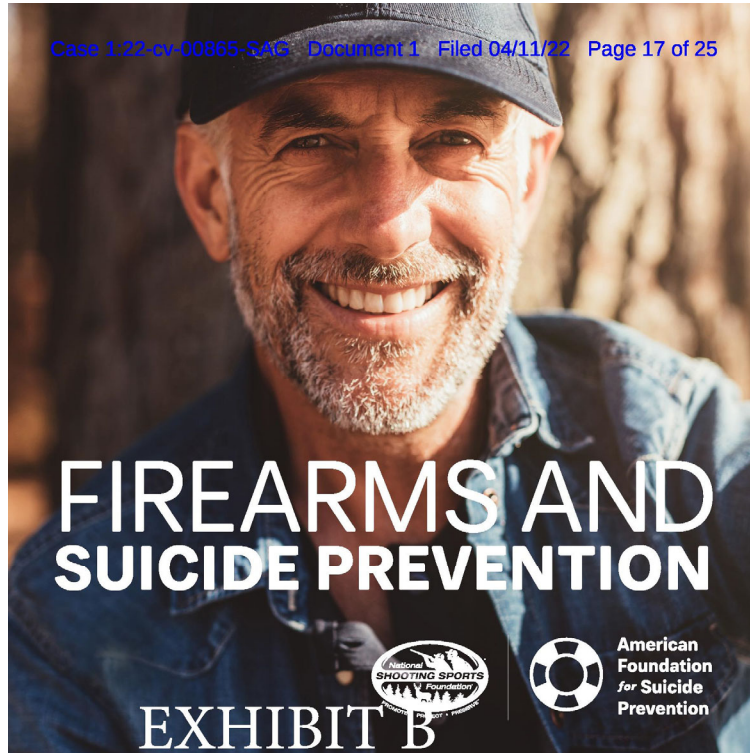
/s/ Steuart Pittman

Steuart Pittman

County Executive

EFFECTIVE DATE: April 10, 2022

85a



WHAT LEADS TO SUICIDE?

There's no single cause. Suicide most often occurs when several stressors and health issues converge to create an experience of hopelessness and despair. Depression is the most common health condition associated with suicide, and is often undiagnosed or untreated. Most people who actively manage their mental health conditions lead fulfilling lives. Conditions like depression, anxiety and substance use problems, especially when unaddressed, increase risk for suicide.

87a



Some People are More at Risk for Suicide than Others



HEALTH FACTORS

Mental health conditions

- Depression
- Substance use problems
- Bipolar disorder
- Schizophrenia and psychosis
- Personality traits of aggression, mood changes and poor relationships
- Conduct disorder
- Anxiety disorders (PTSD)

Serious or chronic health conditions and/or pain

Traumatic brain injury

+



ENVIRONMENTAL FACTORS

Stressful life events, like rejection, divorce, financial crisis, or other life transition or loss

Prolonged stress, such as harassment, bullying, relationship problems or unemployment

Exposure to another person's suicide, or to graphic or sensationalized accounts of suicide

Access to lethal means including firearms and drugs

+



HISTORICAL FACTORS

Previous suicide attempts

Family history of suicide

Childhood abuse, neglect or trauma

Risk factors are characteristics or conditions that increase the chance that a person may try to take their life.

Take Suicide Warning Signs Seriously



TALK

If a person talks about:

- Killing themselves
- Feeling hopeless
- Having no reason to live
- Being a burden to others
- Feeling trapped
- Unbearable pain



BEHAVIOR

Behaviors that may signal risk, especially if during a time of transition, stress or loss:

- Increased use of alcohol or drugs
- Looking for a way to end their lives, such as searching online for materials or means
- Withdrawing from activities
- Isolating from family and friends
- Sleeping too little or too much
- Visiting or calling people to say goodbye
- Giving away prized possessions
- Aggression
- Fatigue



MOOD

People who are considering suicide often display one or more of the following moods:

- Depression
- Anxiety
- Loss of interest
- Irritability
- Humiliation
- Agitation/Anger
- Relief/Sudden Improvement

Most people who take their lives exhibit one or more warning signs, either through what they say or what they do.

Reaching Out Can Help Save a Life

SUICIDE IS A LEADING CAUSE OF DEATH, AND IT'S PREVENTABLE

By keeping secure firearm storage in mind, you can help reduce the number of suicides involving firearms.

LEARN THE RISK FACTORS AND WARNING SIGNS OF SUICIDE

If you are worried about a friend or family member, trust your gut and don't wait for them to reach out.

LET THEM KNOW YOU CARE

Ask them directly about suicide and encourage them to seek help. Talking about suicidal thoughts and showing concern will not put someone at greater risk.

IF YOU ARE CONCERNED ABOUT A LOVED ONE

Always store firearms securely and consider temporary off-site storage for firearms when not in use.

IF YOU'RE GOING THROUGH A DIFFICULT TIME

If lawful where you live, consider giving the firearms and gun lock keys to a trusted family member or friend.

DID YOU KNOW?

Firearms are used
in 50% of all
suicides in the
United States.



Firearms Storage For Your Lifestyle

As a gun owner, you can choose from multiple options for safely storing and protecting your firearms when they're not in use.

CABLE LOCK

Starting at \$10

Requiring either a key or combination to unlock, an inexpensive cable lock runs through the barrel or action of most firearms to prevent it from being loaded and fired.

LOCK BOX

Starting at \$25

With an integrated lock, storage boxes provide reliable protection for firearms. Electronic boxes can be accessed only by using a special code or biometrics.

GUN CASE

Starting at \$20

A gun case is an affordable storage solution for those looking to secure, conceal, protect or legally transport a firearm. Be sure to lock the case with an external device for added security.

FULL SIZE GUN SAFE

Starting at \$200

A gun safe allows you to safely store multiple firearms in one place.

Additional firearm safety resources are available at ProjectChildSafe.org.

RESOURCES

**Visit**

Your Primary Care Provider
Mental Health Professional
Walk-in Clinic
Emergency Department
Urgent Care Center

**Find a mental health provider**

findtreatment.samhsa.gov
mentalhealthamerica.net/finding-help

**National Suicide Prevention Lifeline**

1-800-273-TALK (8255)
Veterans: Press 1

**Text TALK to 741741**

Text with a trained crisis counselor
from the Crisis Text Line for free, 24/7

**CrisisChat.org****Call 911 for emergencies**

**American
Foundation
for Suicide
Prevention**

93a

Case 1:22-cv-00095-SAG Document 1 Filed 04/10/22 Page 25 of 25

DO YOU HAVE UNRESOLVED CONFLICTS?

**ARE YOU LOOKING FOR
PEACEFUL SOLUTIONS?**

**WANT TO KNOW WHAT
MEDIATION CAN DO FOR YOU?**



Conflict Resolution is a process to help you find the best way to resolve conflicts and disagreements peacefully.

RESOURCES

Anne Arundel County Conflict Resolution Center
410-266-9033 - programs@aacrc.info - www.aacrc.info

Anne Arundel County Warmline
410-768-5522

Anne Arundel County Police
911

Veteran's Crisis Line
1-800-273-8255, Press 1,
or text to 838255

Suicide Prevention Toolkit
aahealth.civilspace.io/en/projects/suicide-prevention-toolkit



The services and facilities of the Anne Arundel County Department of Health are available to all without regard to race, color, religion, political affiliation or opinion, national origin, age, gender identity, sexual orientation or disability. 3/2022

EXHIBIT C

APPENDIX G

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No.: 1:22-cv-00865-SAG

MARYLAND SHALL ISSUE, INC., et al.,
9613 Harford Rd., Ste C #1015
Baltimore, Maryland 21234-2150,

Plaintiffs,

-against-

ANNE ARUNDEL COUNTY, MARYLAND
44 Calvert Street
Annapolis, Maryland 21401,

Defendant.

(Via Zoom Videoconference)
September 29, 2022
9:39 a.m. Eastern

Video-recorded Videoconference Deposition of GARY
KLECK, before Kristi Cruz, a Stenographic Reporter
and Notary Public of the State of New York.

* * *

[18] owning a gun is a risk factor for suicide, you can't
recall what the pamphlet -- what else the pamphlet
conveys to readers?

A. Not that I addressed as an expert witness, no.

Q. Does the pamphlet convey any advice to readers?

MR. PENNAK: The document speaks for itself.

Q. You can answer.

A. You could say that implicit in the notion that owning a gun is a risk factor for suicide, and any reader would think suicide is a bad thing, then the implication is – the recommendation implied is don't own a gun.

Q. You say "implied" there. Is that because the pamphlet does not, in fact, make any statement about whether or not a reader should own a firearm?

A. No, it does not explicitly say any such thing.

Q. Does it make any recommendations about the behavior or activities of gun owners vis-a-vis their firearms in light of the risk

* * *

[33] industry alike?

MR. PENNAK: Argumentative.

A. When they align; but they don't always align.

Q. As is relevant to firearm suicide, do they align or not align?

A. They don't necessarily align, because if you're going to discourage people from having guns who otherwise would have wanted to have one, then that's not in the interest of the gun owners or prospective gun owners. But it would be in the interest of manufacturers in avoiding or at least minimizing the risk of lawsuits over suicides.

Q. In your view, does the NSSF's pamphlet discourage the ownership of firearms?

A. Yeah, I think it has that implication because, you know, how many people want to have a higher risk of a suicide occurring in their household.

Q. And specifically, your view is that the NSSF is publishing this pamphlet to discourage people from buying firearms from the firearms industry. Is that what you're

* * *

[43] stress, such as the examples or types listed, are a risk factor for suicide?

A. No.

Q. Do you dispute whether exposure to another person's suicide or to graphic or sensationalized objects of suicide is also a risk factor for suicide?

A. No.

Q. Do you dispute that access to lethal means, including firearms and drugs, are a risk factor for suicide?

A. Yes.

Q. Do you dispute that drugs are a lethal means that is a risk factor for suicide?

A. Yes.

Q. Drugs are not, in your view, a lethal means that is a risk factor for suicide?

A. I have no opinion on that.

Q. Your opinion is confined to whether firearms – excuse me, whether access to lethal means, including firearms, is a risk factor for suicide; is that correct?

[44] A. Access to firearms specifically, that's what I would dispute.

Q. But not access to drugs?

A. No, I don't have an expert opinion on that.

Q. The third column lists Historical Factors, such as previous suicide attempts, family histories of suicide, and childhood abuse, among other historical factors.

Do you dispute any of those historical factors as risk factors for suicide?

A. No.

Q. When we say risk factor, what is your understanding of that phrase?

A. Unfortunately, it's ambiguous as it's used in the public health literature. Sometimes it seems to mean nothing more a correlate, which is trivial. It could be cause, it could be consequence, it could be simply's coincidental association. But in context, it usually means it's a causal factor; that is, it actually has a causal effect on the likelihood of the behavior [45] occurring.

Q. So you – strike that.

The phrase “risk factor” in public health literature can refer simply to a correlation. Is that what you're saying?

A. Yes. Often in the public health literature, an author will say it's a risk factor and imply that it's a causal factor, because they then draw a conclusion about how you might, in this case, prevent suicide. Well, of course, you can't prevent suicide by eliminating something that's merely coincidentally associated with suicide. It's got to be a factor that has some causal effect.

And so putting those facts together, it implies that risk factor is a causal factor. Otherwise, it wouldn't make any sense to say, well, you can affect people's likelihood of committing suicide by removing this risk factor.

98a

Q. Wouldn't it make sense to make readers aware of risk factors not so that they can be eliminated – one can't obviously

* * *

[47] historical factors listed here cause suicide or that they're correlates?

A. I'm not an expert on it, but I think there's some foundation for believing they have a causal effect, influence. For example, family history of suicide may imply a genetic factor, and there's strong evidence that there are genetic factors underlying depression and suicide. And so in that sense, yeah, there's reason to believe that those historical factors have a causal effect on suicide.

Q. Can those historical factors be mitigated or eliminated?

A. No.

Q. And so what is the purpose – what is the public health purpose of informing people about historical factors for suicide if they can't be eliminated or even mitigated, in your view?

A. I wouldn't be able to infer what the underlying motives of the authors of the pamphlet would have, so I really couldn't say.

Q. Is it your opinion that access to a firearm is only coincidentally linked to [48] suicide?

A. Yes, probably, although no scientific conclusion is ever absolutely final and definitive. There always might be better evidence that comes along in future. But based on our present knowledge, I think there is no convincing evidence that having a firearm has a

causal effect on suicide rate. So it's a noncausal correlation or association with suicide.

I shouldn't say coincidental, by the way. That sort of implies it's just random or there's no particular reason. Rather, I believe there are confounding factors that have an influence on both firearms acquisition and ownership and on suicide. And so it's not coincidental, but it's also not causal in nature.

Q. What is the nature of the relationship, then?

A. A spurious association is what a statistician would say about it. That is to say, there are antecedent factors that create an association between having guns and [49] suicide. Even though firearms don't have a causal effect of their own, both firearms ownership and suicide are consequences of other factors.

Q. Let me direct you to the next page of the pamphlet. In is the page that reads Take Warning Signs Seriously. Do you see that page?

A. Yes.

Q. Does your opinion concern any of the information on this page?

A. No.

Q. Do you dispute any of the information on this page?

A. No.

Q. To your knowledge, is the information on this page factually accurate and noncontroversial?

A. That I wouldn't be qualified to say.

Q. Let me direct your attention to the following page, Reaching Out Can Help Save a Life. Do you see that page?

A. Yes.

Q. Does your opinion concern anything [50] on this page?

A. No.

Q. Do you dispute any of the information on this page?

A. Well, by – that assertion, “By keeping secure firearm storage in mind, you can help reduce the number of suicides involving firearms,” it’s an ambiguous statement, but if it implies that there would be a causal effect on the likelihood of somebody committing suicide through their manner of firearm storage, if that’s what was intended, then I would dispute it.

Q. You do not believe that secure firearm storage can help reduce firearm suicide?

A. Well, it might reduce firearm suicide, but of course, that’s not really the issue. The issue is, could it reduce suicide; that is, suicide by any means. And no, I don’t believe that manners of storage of firearms would affect whether or not somebody commits suicide, period, by any and all means.

Q. Do you dispute the statement in the

* * *

[77] conceivably might be revised in future as better evidence comes along.

Q. Do you believe that the question of whether or not access to firearms increases the risk of death by suicide is a factual question or not a factual question?

A. Yes, it’s a factual question.

Q. It’s not a question of opinion?

A. That's correct.

Q. It's not a philosophical or political or religious question?

A. That's correct. While those factors may influence people's assessment of the evidence, the evidence itself concerns a factual matter. Suicide is – either is or is not affected by gun ownership.

Q. How do you answer a question like whether or not access to firearms increases the risk of death by suicide as a social scientist?

A. How do I answer it?

Q. What are the steps involved in answering that question?

A. Well, it's a hypothesis. The [78] hypothesis is that gun ownership increases the likelihood that a person will kill themselves. And so you devise tests of that proposition, and the more definitive and decisive the tests that the hypothesis passes, the more likely you are to conclude that the hypothesis is correct.

On the other hand, unfortunately a lot of the research in the area doesn't do that. There's no serious effort to falsify the hypothesis; that is, no real serious effort to test it. An example being most public health researchers simply establish there's a correlation between gun ownership and suicide, and then they stop and, you know, they draw their conclusion solely on the basis of what should be only the beginning of an exploration and investigation. In other words, there's no serious attempt to falsify the hypothesis, and because there's no serious attempt, the support for the hypothesis is weak.

Q. Is there a correlation between firearms access and death by suicide?

[85] want to make sure you've covered all your bases, that you considered the full array of relevant evidence, rather than just what coincidentally happened to come to your attention.

Q. If a social scientist doesn't consider the full set of publications on a given topic, is it possible their conclusions would be erroneous?

MR. PENNAK: Calls for speculation.

A. Yeah, there's no way to know. I mean, if what you omitted was a far more authoritative and critical test of a hypothesis than what had preceded it, in other words, for example, it was technically quite superior to anything that had gone before, then that might affect your conclusions. But again, that's pure speculation. In this case, I was not made aware, and as I sit here, I'm still not aware of any such additional study.

Q. What opinions have you reached in this matter?

A. I've concluded that there is no sound scientific foundation for the [86] proposition that owning a gun causes an increase in the likelihood you will commit suicide.

Q. And when you say "commit suicide," do you mean die by suicide or attempt suicide?

A. I would say that's an important distinction, but the proposition would be correct in any case, whether we were talking about suicide attempts or completed suicides.

Q. What is your opinion? How do you resolve that ambiguity in your opinion? Is your opinion about the link between firearms ownership and attempted

suicide or the link between firearms ownership and death by suicide?

A. Well, it was the latter, since that's what was asserted in the pamphlet and that's what I was disputing. It didn't refer to suicide attempts; it referred to suicide, period.

Q. And as you understood that and as you evaluated it, that is a reference to death by suicide?

A. Yes.

* * *

[88] A. Yes. I mean, if it's relevant at all.

Q. For example, children in a home in which there are firearms, the risk of suicide to those children is a significant public health concern even if those children are not the owners themselves of the firearms. Would you agree with that?

A. No.

Q. Sorry. You don't believe that children's access to firearms and the ensuing risk of suicide is a public health concern?

MR. PENNAK: Mischaracterizes his testimony, and asked and answered.

A. No. To repeat what I said, I don't believe that there's any scientific foundation for the proposition that either gun ownership or access to firearms with regard to either children or adults, whether it has any causal effect, and if it has no causal effect, then of course it's not public health concern.

Q. Do children use firearms to commit suicide?

A. Yes.

[92] whether or not there's a causal effect.

Q. Help me understand what you mean by that.

A. To take a random variable X and a random other variable Y, X might be correlated with Y, and yet X does not have any causal effect on Y, and one common reason for that would be there are other factors that affect both X and Y, even though X does not affect Y.

Q. And in this instance, did you consider or evaluate whether or not firearms access affects the chance that someone will die by suicide?

A. Yes.

Q. And what was your opinion on that question?

A. My opinion is that there's no scientific foundation for the assertion that access to firearms affects whether or not a person commits suicide.

Q. Turning your attention back to the pamphlet, which was Exhibit 2, and we'll show it back on the screen there. But if you would turn to it in your binder, where in the [93] pamphlet does the pamphlet make the statements you evaluated for your opinion? If you can direct me to the page, then I'll have it displayed.

A. In the upper right of the page, it reads page 20 of 25.

Q. Okay. I'm displaying a page in Exhibit 2 that has the header Some People Are More At Risk For Suicide Than Others. Is that the page you're referring to?

A. Yes.

Q. Any other page bear on this question, or just this page?

A. Just this page.

Q. Okay. Where on this page is the statement that you evaluated for purposes of your report?

A. First of all, the title of the page as a whole, as you said, Some People Are More At Risk For Suicide Than Others, that introduces the topic of risk factors, which is reinforced in the lower right text, which reads, "Risk factors are characteristics or conditions that increase the chance that a [94] person may try to take their life." That's unambiguously an assertion about causal effects.

Then you go to the middle column, the last item listed under Environmental Factors, we see, "Access to lethal firearms [sic], including firearms and drugs." That means the authors of this pamphlet were asserting that access to firearms causes an increase in the likelihood a person will commit suicide.

Q. I want to show you your report. It's tab 3. And I want to – we'll pull up on the screen here.

(Exhibit 3, Expert Report of Gary Kleck, marked for identification, as of this date.)

Q. So I'm showing you the document that's been pre-marked Exhibit 3. Do you recognize that document?

A. Yes.

Q. And is that the report you submitted in this case?

A. Yes.

[95] Q. If we can turn to page 3, and you can follow along in your binder or on the screen. You state in this report that what you call the suicide claim, quote, “is not supported by the most credible scientific evidence and is probably false.”

How did you arrive at this conclusion – excuse me, at this opinion?

A. I reviewed the relevant evidence as seen in two articles that I have published, one in Social Science Quarterly and a chapter in a volume called Gun Studies.

Q. What do you mean in that sentence by the phrase “scientific evidence”?

A. I mean evidence that uses logic and empirical evidence to evaluate an idea.

Q. What makes such evidence credible or not credible, in your view?

A. To the extent that the research that generated the evidence follows the textbook rules of how to do the relevant kind of research, it's credible.

Q. And what are those rules?

A. There are dozens of rules, hundreds [96] of rules. But the one that's probably most relevant in this case is the rule that you test for the possibility of confounding factors, which means you would do thorough literature reviews to find out not only what affects suicide, but what is a correlate of gun ownership, so you can measure and control for those factors in hopes of isolating better the effect of gun ownership or access on suicide.

Q. For scientific evidence to be credible, does it need to be peer reviewed?

A. Not necessarily. It can stand on its own. I mean, it can meet the criteria that I just discussed; that is, it can satisfy the rules of research methodology without having been reviewed and anyone confirming that that those were obeyed. What matters is that it follows the research for how – the rules for how to do competent research.

Q. For scientific evidence to be credible, does it need to be capable of replication?

A. It's certainly helpful.

* * *

[137] AFTERNOON SESSION

(Time noted: 1:48 p.m.)

THE VIDEOGRAPHER: The time is 1:48 and we're now back on the record.

GARY KLECK,

resumed and testified as follows:

CONTINUED EXAMINATION

BY MR. MILLER:

Q. Professor Kleck, I want to go back to the brochure for a minute that was Exhibit 2. We can pull that back up on the screen. I'm trying to understand your earlier testimony.

What, in your opinion, is the main message of the brochure that's marked Exhibit 2?

A. I don't know if it's the main message, but certainly a message is that owning firearms and in particular keeping them unlocked increases the likelihood that someone will commit suicide.

Q. And that is – that result is a bad result; is that right?

A. It's making a claim that can't be sustained by any serious scientific evidence.

* * *

[151] did you attempt to identify or analyze any more contemporary research on whether suicidal intent –

A. No.

Q. – was a confounder?

A. No.

Q. I want to turn to your report, page 3. And specifically – actually, 3 and 4 if it's possible. I don't know if it's possible. The statement you make from 3 going on to 4 – we may not be able to display both pages at once on this screen, but I'm referring to the sentence that reads, "The suicide claim," by which you're referring, I believe, to your read of the pamphlet, "is contradicted by much of the available scientific evidence."

Do you see that statement?

A. Yes.

Q. How did you arrive at that opinion, that a statement in the pamphlet is contradicted by much of the available scientific evidence?

A. I arrived at the conclusion, first [152] of all, by examining the macro-level research, research concerning large areas or populations, most of which indicate that there's no relationship between the prevalence of firearms ownership and suicide rates, which there would be if this claim was correct.

Q. When you use the term “contradict” here, what do you mean by that?

A. I mean it’s inconsistent with the hypothesis.

Q. Is there any other scientific evidence for the basis of your statement that the suicide claim is contradicted – let me rephrase that.

You’ve mentioned macro-level research, which we’ll get to in a minute, as scientific evidence that contradicts the suicide claim. Is there any other scientific evidence, that you’re aware of, that contradicts the suicide claim?

A. Yes.

Q. What is that?

A. Well, there’s another way of testing the hypothesis about gun ownership somehow [153] leading to suicide, which is to examine the mechanism that intervenes or the reason for why there might be an effect. And invariably, the reason offered, when any reason at all is offered by scholars supporting that conclusion, is that having a gun and using it in the suicide attempt makes it more likely the attempt will have a deadly outcome; that is, it will be a completed suicide rather than an attempted suicide.

There is no supportive evidence for the claim that having a gun makes it more likely people will attempt a suicide, but the argument was, once it’s attempted, it’s more likely to result in a completed suicide if a firearm was used. And the evidence doesn’t support that proposition because – certainly the public opinion on this is – is that – I guess you could call the common wisdom is that, well, people will just substitute another method if they’re really determined to kill themselves. And the evidence more recently has

supported the proposition that the people who use guns in a suicide attempt [154] really do want to kill themselves. That is to say, their suicidal intent is far higher than the people who use other methods of suicide.

And the suicide data at the macro-level indicates that there's no significant difference in the fatality rates or case fatality rates of suicide attempts by hanging and suicide attempts by firearms, which is crucial to the hypothesis that that is the way by which having access to a gun would increase your risk of suicide. If there's no intervening mechanism that's supported by the evidence, then there's no reason for believing there's a causal effect of gun ownership on suicide. And so basically, the likeliest substitute method of suicide is indistinguishable in terms of its lethality. That is, hanging is just as likely to result in a victim as shooting is.

Q. So let me see if I can sum that up in a way that's a little bit more succinct. In addition to the macro-level research, you believe that research – you believe there is research showing that [155] firearms – firearm suicide is not a uniquely lethal method of suicide, and that individuals who attempt to commit suicide by firearm would simply substitute a different equally lethal method if a firearm was unavailable?

A. Yes.

Q. Is there any other scientific evidence that you believe contradicts the suicide claim, besides what we've just covered?

A. Yes, there's also some of the individual case control research, which I stress is not very strong evidence. I mean, regardless of the findings of the study and the conclusions, none of it is very strong. But

there's also a handful of studies of case character, using the case control design, which also drew the conclusion there was no association between access to guns and suicide.

But I stress, that's not what I would emphasize, because so far, nobody has really used the case control methodology very well because, as I've pointed out, they made

* * *

[187] is, does scholarly evidence support public opinion that people would just substitute another lethal method.

And so what scholarly evidence indicates is that people who use guns are more seriously intent on killing themselves, according to a variety of indicators, and they're more likely, therefore, to make another effort or an alternative effort to kill themselves if a gun were not available.

Q. What is the basis for your opinion in your report that if a firearm is unavailable, a suicidal person will simply die by an alternative method?

A. Well, I'm not sure if it's in the report or if it's in the studies on which the report is based. But in one of those two locations, I point out that the suicidal intent, or lethality of intent, is very strongly related to whether or not people used guns. And there's direct tests of that proposition in studies where they created an index of the lethality or seriousness of intent to kill themselves among people. So, [188] you know, it's indicators like, did they manage – did they make efforts to isolate themselves from any possible interveners, or had they been planning it for a while. And so they create these numerical indexes of suicidal intent of how seriously people wanted to die, and the

suicidal intent and scores are just off the charts for people who use firearms compared to other methods. So there's a very strong intent to kill among people who use guns. And so that's a strong foundation for the proposition that those individuals, not suicide attempters in general, but suicide attempters with guns, would adopt another method and still make an attempt to kill themselves.

Q. Do you cite that research in your report?

A. I'd have to look at it again, but I can tell you pretty quickly.

Q. Yeah, if you can turn back to page 3 of your report – sorry, Exhibit 3, which is your report, and we can put up the bibliography.

* * *

[195] Q. Not at all?

A. No. Or if I had any biases, it would be, to be sympathetic to the proposition that more guns leads to more violence. It was the view I started with when I began my career and first researched this topic. But I'm certainly not biased against that proposition.

Q. So you think your bias, if any, on the issue of firearms, would be to think that they are connected to violence?

A. Yeah. As a personal bias, it's the one I began with. But soon I set aside my personal biases in the face of credible evidence that indicated the opposite, including my own research.

Q. This study lists – I'm not even sure how many – more than half a dozen authors. Do you recognize any of those authors?

A. Yes, I recognize Warren – Garen J. Wintemute, and Matthew Miller.

Q. What about Studdert?

A. I think prior to reading his studies, I had never heard of the guy.

* * *

[199] it's evading the issue of whether or not it's more likely people will kill themselves, period, regardless of how they do it, if that's related to gun ownership.

Q. Do you agree with or disagree with the first sentence in this study, "Research has consistently identified firearm availability as a risk factor for suicide"?

A. Again, only if you assume that what they mean by risk factor is correlate. But when you read assertions about gun ownership as a risk factor in context, in medical journals like this one, what they're clearly hinting at, if not explicitly saying, is they think it's a causal factor. So they kind of evade having to do what is necessary to establish causality by simply saying, well, it's a correlate. Well, I don't dispute that it's a correlate. Of course you'd have to have a gun in order to commit a gun suicide. It's certainly a correlate. And, in fact, that's what all the research indicates. Where there's more guns, there are more gun suicides; there just aren't more total

* * *

[204] purchase.

A. On the contrary. Suicidal intent could be closely related to it. But suicidal intent is not a constant; it varies over time.

Q. And sometimes, I believe you used this phrase, it can be transitory.

A. Could be.

Q. When suicidal intent is transitory, do the lethal means that are readily at hand affect the person's risk of suicide?

A. Not if the methods available are equally lethal.

Q. I am – I am asking you, when somebody has a transitory suicidal intent, isn't it true that their risk of suicide is dependent on the lethal means that are readily available to them?

A. And I'm answering your question that yes, it would, but there are invariably and without exception, lethal means available to everybody who have such a lethal motivation. I mean, we are, in effect, surrounded by alternative methods of suicide which are highly lethal, most of which are more widely [205] available than firearms.

Q. So is it your opinion that someone who has a transitory suicidal intent and has access to a firearm is no more likely to die by suicide than somebody who has transitory suicidal intent and yet no access to a firearm? Is that your testimony?

A. They're more likely to kill themselves with a gun, certainly, than a person who doesn't have a gun. But are they more likely to kill themselves at all? No. And, of course, the issue that's significant from a public health standpoint is not whether they immediately kill themselves, but whether they kill themselves, period. We want to save lives. We don't just want to delay when they kill themselves.

115a

Q. You criticized this study a moment ago for failing to control for suicidal intent, I believe. Is that accurate?

A. Well, that would be one flaw.

Q. Do you have any others?

A. Yeah. The fact that most other known – or likely confounders are controlled.

* * *

APPENDIX H

Expert Report, Maryland Shall Issue v. Anne Arundel County

Gary Kleck
College of Criminology and Criminal Justice
Florida State University
Tallahassee, Florida 32306-1273

August 25, 2022

My Qualifications

I am an Emeritus Professor of Criminology and Criminal Justice at Florida State University. I received my doctorate in Sociology from the University of Illinois in 1979, where I received the University of Illinois Foundation Fellowship in Sociology. I was the David J. Bordua Professor of Criminology at Florida State University from 1978 to 2016. My research has focused on the impact of firearms and gun control on violence, and I have been called “the dominant social scientist in the field of guns and crime” (Vizzard, 2000, p. 183).

I have published the most comprehensive reviews of evidence concerning guns and violence in the scholarly literature, which informs and serves as part of the basis of my opinions. I am the author of Point Blank: Guns and Violence in America, which won the 1993 Michael J. Hindelang Award of the American Society of Criminology, awarded to the book of the previous several years which “made the most outstanding contribution to criminology.” Subsequently, I authored Targeting Guns (1997) and, with Don B. Kates, Jr., The Great American Gun Debate (1997) and Armed (2001).

I have published scholarly research in all of the leading professional journals in my field. Specifically, my articles have been published in the American

Sociological Review, American Journal of Sociology, Social Forces, Social Problems, Criminology, Journal of Criminal Law and Criminology, Law & Society Review, Journal of Research in Crime and Delinquency, Journal of Quantitative Criminology, Law & Contemporary Problems, Law and Human Behavior, Law & Policy Quarterly, Violence and Victims, Journal of the American Medical Association, and other scholarly journals.

More specifically, I have published seven scholarly articles and chapters on the relationship between firearms and suicide.

I have testified before Congress and state legislatures on gun control issues, and worked as a consultant to the National Research Council, National Academy of Sciences Panel on the Understanding and Prevention of Violence, as a member of the U.S. Sentencing Commission's Drugs-Violence Task Force, and, most recently, as a member of the Institute of Medicine and National Research Council Committee on Priorities for a Public Health Research Agenda to Reduce the Threat of Firearm-Related Violence. I am a referee for over a dozen professional journals, and serve as a grants consultant to the National Science Foundation.

Finally, for over 30 years I taught doctoral students how to do research and evaluate the quality of research evidence. I taught graduate courses on research design and causal inference, statistical techniques, and survey research methodology. My current curriculum vitae is attached as Appendix A..

I am being compensated for my work at the rate of \$400 per hour.

My Expert Opinions

Anne Arundel County (hereinafter “the County”) compels firearms dealers to distribute a pamphlet (“Firearms and Suicide Prevention”) that asserts that “Access to lethal means including firearms and drugs” is a “risk factor” for suicide, further explaining that “risk factors are characteristics or conditions that increase the chance that a person may try to take their life.” That is, the County, via this pamphlet, is claiming that access to firearms causes an increased chance of a person committing suicide. This assertion will be hereafter referred to as “the suicide claim.”

It is my expert opinion that the suicide claim is not supported by the most credible available scientific evidence and is probably false. The suicide claim is contradicted by much of the available scientific evidence, and is indisputably *not* purely factual and uncontroversial information.

Further, as a logical point, the County’s mandate to require only firearms dealers to distribute this pamphlet is under-inclusive as to who might be distributing materials whose availability might affect suicide. The ordinance does not require pharmacies to distribute the pamphlet, even though it explicitly identifies access to drugs as a risk factor for suicide. Further, the pamphlet cited “firearms and drugs” in a non-comprehensive way, as merely as examples of “lethal means,” using the wording “Access to lethal means *including* firearms and drugs” (emphasis added). The ordinance, however, does not require hardware stores and other suppliers of rope to distribute the pamphlet, even though rope can be used to fashion a noose for use in a suicide. This is especially noteworthy in light of the fact that hanging is the second-most common method of suicide in the United States (Kleck 2019a).

Likewise, the ordinance does not require the owners of tall apartment buildings and hotels to distribute the pamphlet, even though jumping from high places is also a common method of suicide. The narrow, indeed exclusive, focus of the ordinance on firearms dealers is arbitrary and inconsistent with accepted information on the many and varied ways that people commit suicide.

The exclusive focus on firearms dealers could conceivably be justified if shooting was a uniquely lethal method of suicide, but it is not. The best available national data indicates that there is no significant difference in the percent of suicide attempters who die between those who attempt suicide by hanging (the second-most common suicide method) and those who do so by shooting (Kleck 2019a, pp. 317-320). Indeed, there are subtypes of most other suicide methods that are almost certainly 100% fatal, such as jumping from a 20th story window or a similarly high bridge or cliff, or swallowing 30 barbiturate tablets in combination with a pint of alcohol. Thus, there is no justification for the County's ordinance to require only firearms dealers to distribute suicide prevention materials.

The Evidence on the Potential Effect of Gun Access on Suicide

Popular Opinion.

Leaving aside scientific evidence for the moment, the County's suicide claim is highly controversial in the sense that it is contrary to the views held by the vast majority of Americans. The issue of whether gun access makes suicide more likely was posed in the following way to a representative sample of U.S. adults in a national survey conducted for the Pew Research Center in April of 2017. Respondents were asked:

“Thinking about people who commit suicide using a gun, which comes closer to your view, even if neither is exactly right?...

- They would find a way to do it whether they had access to a gun or not.
- They would be less likely to do it if they didn't have access to a gun.”

75% endorsed the first view, that those attempting suicide with gun would, if denied a gun, still have committed suicide (Roper Center, 2022 - iPoll Database). In short, three out of four Americans would disagree with the County's claim the access to firearms causes an increase in the chance that a person will commit suicide.

The Purported Scientific basis for the Suicide Claim – Case-control Studies.

The purported scientific basis for the suicide claim consists almost entirely of poor quality “case-control” studies. These are studies that compare persons who committed suicide with people who did not – either persons still living or persons who had died of some non-suicide cause. As nonexperimental studies, the validity of their findings is critically dependent on the extent to which researchers statistically control or adjust for confounding factors. In this context, a confounding factor would be an attribute that affects suicide but that also happens to be correlated with access to firearms. For example, gender is a confounder since being male increases the likelihood of committing suicide but also makes it more likely a person will own guns. If a researcher measured the association between guns and suicide but failed to control for gender, they would attribute a higher likelihood of

committing suicide to gun access that was actually due to being male.

To illustrate how important controlling for confounders is, consider one of the confounders, suicidal intent (SI). No one disputes that having a stronger desire or motivation to kill one's self makes it more likely that the person will actually do so. A stronger SI, however, is also likely to induce some people to acquire a gun for the purpose of carrying out the suicide attempt. Even if possessing or using a gun did not actually influence whether a person attempted suicide or whether an attempt was fatal, one could still find higher gun ownership among those who killed themselves because people *believed* that shooting was more lethal than other methods. That is, one would find a positive guns/suicide association. But this would be a non-causal "spurious" association between guns and suicide. Having a gun does not necessarily cause a higher risk of suicide; rather, having a stronger SI caused the higher risk of suicide, and also caused a higher likelihood of gun ownership (to provide the means for committing suicide), creating a non-causal association between gun ownership and suicide.

One need not speculate what happens to the guns/suicide association once suicidal intent is controlled, because Brent and his colleagues (1988) measured SI and controlled for it while estimating the suicide/guns association. Before controlling for SI, there was a strong, significant association between gun access and suicide. Once the researchers introduced a control for SI, the association was no longer significant. The finding was later replicated in another analysis of a somewhat larger overlapping sample by the same group of researchers. When they introduced the

control for SI, the guns/suicide association was halved (Brent et al. 1991).

What makes case-control studies so hard to execute in a competent fashion likely to yield credible findings about the effect of gun access is that there are so many confounders. That is, many suicide risk factors happen to be correlated with gun ownership, and the confounders' effects are easily confused with any possible effects of gun access on suicide.

The following are partial lists of some of the likely confounders that should be controlled in case-control studies, but almost never are. We can start with a list of some variables that are *known* to be associated with both gun ownership and suicide, and then consider variables known to be related to gun ownership, for which there also are strong theoretical reasons to expect that they affect suicide, but no empirical evidence testing the proposition.

a. Known Confounders of the Guns/Suicide Association

The first set of variables are those that have empirically documented associations with both gun ownership/possession and suicide:

(1) Strength of suicidal intent (in studies that compared completed suicides vs. attempts). No one disputes that persons more determined to kill themselves are more likely to do so - the proposition is virtually a tautology. It is also true, however, that people more intent on committing suicide are more likely to choose more lethal suicide methods such as shooting or hanging to attempt suicide, and some will acquire guns specifically for the purpose of using them to commit suicide. Supporting these ideas, Brent et al. (1988) initially found a significant positive guns/suicide association,

but once they controlled for strength of suicidal intent, no significant association remained.

(2) Age. Middle-aged persons are more likely to own guns (Kleck 1997, p. 101) and more likely to commit suicide (Wiebe 2003, p. 777).

(3) Sex. Males are more likely to own guns (Kleck 1997, p. 101) and more likely to commit suicide (Wiebe 2003, p. 777) .

(4) Race. African-Americans are less likely to own guns than whites (Kleck 1997, p. 101), and less likely to commit suicide (Centers for Disease Control and Prevention 2016).

(5) Region. People living in the Northeast part of the U.S. are less likely to own guns than people in other regions (Kleck 1997, p.101), and less likely to commit suicide (Wiebe 2003, p. 779).

(6) Marital status. Married people are more likely to own guns than unmarried people (Kleck 1997, p.101), and are less likely to commit suicide (Wiebe 2003, p. 779).

(7) Income. Poor people are less likely to own guns than middle- or upper-income people (Kleck 1997, p. 101), but more likely to commit suicide (Wiebe 2003, p. 777).

(8) Living alone. People who live alone are less likely to own guns than persons who live with others (Kleck 1997), and (surprisingly) are also less likely to commit suicide (Wiebe 2003, p. 779).

(9) Education. College graduates are less likely to own guns (Kleck 1997, p.102), and less likely to commit suicide (Wiebe 2003, p. 777).

- (10) Population size of place of residence. People who live in places with larger populations are less likely to own guns (Kleck 1997, p. 102), and less likely to commit suicide than people who live in places with smaller populations (Wiebe 2003, p. 779).
- (11) Alcoholism or heavy drinking. Alcohol abuse and heavy drinking are positively associated with gun ownership (Brent 2001; Hemenway and Miller 2002) and positively associated with suicide (Brent, Perper, and Allman 1987; Kellermann 1992; Rivara, Mueller, Somes, Mendoza, and Kellermann 1997; Brent 2001).
- (12) Illicit drug use. Illicit drug use is positively associated with firearm ownership (Carter, Walton, Newton, Cleary, Whiteside, Zimmerman and Cunningham 2013; Rivara et al. 1997), and positively associated with suicide (Kellermann 1992; Brent 2001).
- (13) Gang membership. Gang members are more likely to own guns than other youth (Callahan and Rivara 1992, p. 3042) and are more likely to commit suicide (Knox and Tromanhauser 1999).
- (14) Experience as a victim of violent crime, especially sexual assault. Experience as a victim of violent crime is positive associated with gun ownership (Kleck 1997) and positively associated with suicide (Bryan, Mcnaughton-Cassill, Osman, and Hernandez 2013).
- (15) Sociability. Diener and Kerber (1979) found that gun owners are less sociable than nonowners. Those who are more socially isolated and who have less social support are more likely to commit suicide (Trout 1980).

b. *Likely Confounders of the Guns/Suicide Association*

The following are variables known to be related to gun ownership, and for which there is sound theoretical reasons to believe that they would affect suicide, but as yet no empirical evidence testing such effects.

(16) Self-reliance/self-blame. Gun owners are known to be more self-reliant (Feagin 1970), and there are sound reasons to believe this makes people more prone to suicide. A person possessing a personality that emphasizes self-reliance and a belief that they are in charge of their own fate is also more likely to believe that they are to blame for their own problems when things go wrong. A person who blames themselves for their problems is more likely to commit suicide.

(17) Residence in a high-crime area. Living in high-crime places makes people more likely to acquire guns for self-protection, especially handguns (Kleck 2015, p. 44), and the many life stresses common to such places are likely to make suicide more likely.

(18) Perception of the world as a hostile place. People who believe they are surrounded by threats of victimization are more likely to own guns for self-protection (Kleck 1997), but also more likely to believe there are few people around them who would be willing to help them with their problems. This lack of felt social support is likely to raise the risk of suicide.

(19) Drug dealing. Drug dealing is positively associated by possession of firearms (Sheley and Wright 1992), and is likely to be positively correlated with suicide due to both the misery produced by the drug addiction that commonly accompanies drug dealing and the intense emotional stress produced by the ongoing risk

of arrest, imprisonment, or death at the hands of one's customers and competitors.

This list is by no means comprehensive. One could no doubt add still more variables to the list. Controlling for these 19 variables can nevertheless be seen as the start of a serious effort to estimate the causal effect of gun ownership on suicide. One distinct pattern evident among these confounders should be stressed: almost all are factors that are positively correlated with both gun ownership and suicide. The effect of failing to control for such a variable is to bias the estimate guns/suicide association upward, i.e. to make it larger and more positive, and thus more supportive of the suicide claim than it should be. Analysts failing to control for a variable like this will wrongly attribute to gun ownership the suicide-elevating effects of the confounder. The more confounders of this type the researcher fails to control, the worse the distortion.

How well have case-control researchers studying the gun/suicide association done in controlling for confounders? Based on my systematic 2019 review of the case-control literature (Kleck 2019a, Gun Studies chapter 17), the short answer is “very poorly.” *Not a single study has controlled for even half of the aforementioned confounders.* Most researchers controlled for fewer than four confounders and many controlled for none at all!

Further, it is evident that most of the researchers in this field have not even made an earnest effort to identify confounders. Doing so would necessarily require reviewing research on the correlates of gun ownership, not just the determinants of suicide. Yet none of the authors of case-control studies cite even a single review of gun ownership patterns (e.g. Wright and Rossi 1986; Sheley and Wright 1995; Kleck 1997),

and usually do not even discuss whether their control variables are correlated with gun ownership. Variables uncorrelated with gun ownership do not have any effect on the guns/suicide association, so only controls for variables that *are* correlated with gun access, as well as suicide, help produce less biased estimates of the effect of gun access on suicide. Unless authors in this area have been unusually modest about their scholarly efforts, and failed to report reviews of gun correlates that they did conduct, they could not have made a systematic search for confounders since this necessarily would have required knowing the correlates of gun ownership. Instead, the common practice appears to be to include in the analysis whatever correlates of suicide have been identified by prior suicide researchers, no matter how poorly chosen, and regardless of whether they are correlated with gun ownership.

Summary of the Case-control Research: Until researchers make a serious effort to measure and control for confounding variables, case-control studies will have little to say about the causal effect of gun access on suicide. Thus, the case-control literature does not offer a credible scientific basis for the County's suicide claim.

A Contrary Body of Evidence: Macro-level Studies of the Association of Gun Rates and Suicide Rates

Macro-level studies examine the association of gun rates with suicide rates among aggregates like the populations of cities, states, regions, or nations. For example, some researchers have studied whether nations with higher gun ownership rates have higher suicide rates (e.g. Kleck, 2021). Since committing suicide with a gun requires, as a matter of definition, access to a gun, it is no surprise that places with higher gun ownership rates have higher rates of *gun*

suicide. This, however, does not imply that more people commit suicide in places with more gun ownership, since it may only mean that a higher fraction of people who kill themselves do so with guns. The critical issue, then, is whether higher gun rates cause higher *total* suicide rates.

Of 29 macro-level studies, 15 found no significant association between gun rates and total suicide rates (Kleck 2019b, Table 1). The full body of research, however, is even less supportive of the suicide-elevating effect of guns than this distribution of findings suggests, since the supportive studies are far more technically flawed than the studies yielding unsupportive findings. Much of this body of research is plagued by the same methodological problems afflicting case-control studies. For example, this review found that in 26 of 32 analyses, the researchers did not control for a single variable that was shown to be significantly related to suicide rates, and only two of the remaining six controlled for more than three such variables.

This problem makes a huge difference in the results. For example, Miller, Lippman, Azrael and Hemenway (2007) reported a significant suicide/guns association controlling for six variables, but my reanalysis of their data found that none of their six control variables were confounders. Five of the six were not significantly related to suicide rates, and the remaining one was not correlated with gun ownership. When I reestimated their model including six genuine confounders, 84% of the suicide/guns association disappeared, and the remaining association was not significantly different from zero (Kleck 2019b, Table 2).

Many macro-level studies are also flawed because they use invalid or “contaminated” measures of gun

ownership levels. A gun measure can be contaminated in the sense that it includes counts of suicide. Some researchers used the percent of suicides committed with guns (PSG) as a measure of gun levels, i.e. gun suicides/total suicides. This is problematic because the number of gun suicides is also part of the suicide rate, (gun suicides + nongun suicides)/population. Thus, an analyst who uses PSG as a gun measure and finds it related to the suicide rate is to some extent finding that the number of gun suicides is correlated with itself – a meaningless finding. Of 32 macro-level analyses, 12 used contaminated or invalid measures of gun levels.

Excluding the most flawed studies, the findings of macro-level studies are overwhelmingly contrary to the proposition that more access to firearms causes more suicides. The technically strongest macro-level studies find no significant association between gun ownership rates and total suicide rates. All studies that reported controlling for more than two significant confounders and that used an uncontaminated measure of gun levels found that higher rates of gun ownership are not significantly associated with higher rates of *total* suicide rates (Kleck 2019b, Table 1).

More access to guns appears to affect how many people *use guns* to commit suicide, but not how many kill themselves (Kleck 2019b). There is no public health benefit to merely getting people to kill themselves with non-firearms methods but without reducing the total number of people who kill themselves. Thus, a gun control measure that appeared to reduce firearms suicide but not total suicides would be a failure from the standpoint of public health. This is why the County's experts' citation of the association of gun availability (or gun control laws) with *firearms* suicide, but without addressing its association with

total suicide is so misleading (for examples, see Kalyanaraman 2022, p. 4, Point 16, citation of Siegel study; p. 5, Point 16, concluding sentence).

Claims by the County's Experts

Anne Arundel County (hereafter “the County”) offers reports from two individuals, Alexander McCourt (hereafter AM) and Nilesh Kalyanaraman (hereafter NK). The latter is not in any meaningful sense an expert on the effects of firearms or gun control measures on suicide, so his expert report can carry no weight regarding the accuracy of the claims in the “Firearms and Suicide Prevention” pamphlet that access to firearms increases “the chance that a person may try to take their life.” NK has never published a single scholarly article on this issue, and does not claim to have ever conducted any relevant research. His second-hand knowledge of the research of others is highly selective, primitive, and wholly uncritical. His report makes no effort to distinguish technically stronger studies from weaker ones, and uncritically accepts the conclusions stated even in the most seriously flawed studies. The report shows no evidence that NK was even aware of the critical flaws afflicting the research he cites, or that he ever received any training that would allow him to identify methodological flaws or know what research procedures are available to avoid or ameliorate those problems.

More specifically, NK never once addresses the principal flaw in the research in this area – the failure to control for confounding variables. Without statistically controlling for confounding variables, it is impossible to reliably assess the impact of firearms access or separate its impact from that of suicide-affecting factors with which gun access happens to be correlated. Like Dr. McCourt, NK shows no sign of even being

aware of this problem, never mind applying such knowledge to assessing the scientific reliability of the studies on which he relies.

The report of Dr. McCourt (AM) requires more detailed consideration because AM has more serious credentials bearing on whether firearms access is a risk factor for suicide. Nevertheless, his Expert Report is seriously misleading regarding what the scientific literature has to say about this question.

AM's summary of what he believes research has shown on this question is compromised by his complete failure to apply any critical standards to the studies on which he relies. As far as one can tell from his Report, he considers all research equally valid, and believes that one can always take researchers' conclusions at face value. This is not an accepted scientific stance and is especially unhelpful when one is assessing a body of research as seriously flawed as the research on the impact of firearms on suicide. Each of the studies on which AM relies have their own serious problems, but one that characterizes all of them is the aforementioned failure to control for confounding variables. Studies such as those cited in AM's Point 7 (p. 2, fn. 3-7) made no serious effort to do this, instead only performing irrelevant controls for variables that either had no significant effect on suicide or had no known correlation with gun ownership. Controlling for such variables is worthless in an effort to isolate the effect of gun access.

AM's characterization of the macro-level research on the effect of gun access on suicide is inaccurate. Macro-level research studies can examine any large units or populations such as states, counties, cities, regions, or nations. AM's carefully worded claim is that "*State-level analyses* have found that states with higher rates

of gun ownership generally have higher levels of overall suicide and firearm suicide” (p. 2, Point 7, emphasis added). This claim is misleading because most macro-level studies other than those examining states have *not* found that areas with higher rates of gun ownership have higher levels of overall suicide. If one does not cherry-pick state-level studies and comprehensively reviews the entire body of macro-level studies, one finds that there is generally no relationship between firearm rates and overall suicide rates (Kleck 2019a, Table 1, pp. 939-941. I found that 15 of 29 macro-level analyses found no significant association between these variables.

More significantly, only the most methodologically flawed macro-level studies find support for this claim. These poor quality studies all have at least one, and usually most of the following flaws:

- (1) they fail to control for confounders, i.e. other factors that both affect suicide rates and are correlated with gun ownership rates,
- (2) they use an invalid measure of gun ownership levels,
- (3) they study extremely small samples of areas (as few as six), yielding high unstable results, and
- (4) they study unduly large, heterogeneous areas, with the result that researchers fail to discover that it is not the subareas with higher gun rates that have the higher suicide rates.

Making distinctions between stronger studies and weaker ones is highly consequential with this body of research. For example, if one separately considers studies that controlled for more than two confounders (surely a minimal effort) and used valid measures of

gun levels, *not a single one* supports AM's claim that higher gun levels cause higher overall suicide rates (Kleck 2019a, pp. 939-941, 948). In sum, AM's characterization of this body of research relies on (1) a cherry-picked subset of the relevant research that is unrepresentative of the full set of studies, and (2) an unscientific reliance on the methodologically weakest studies.

At only one point in his report, AM does allude to "controlling for other factors" (p. 2, point 7), but fails to note that the variables controlled in most of the studies in this area were *not* known confounders, either because they were not shown to be significantly related to suicide or they were uncorrelated with access to firearms. Since such controls are worthless for isolating the effect of gun access on suicide, it was irrelevant at best, misleading at worst for AM to state (p. 2) that "research has consistently shown that suicide deaths are more likely to occur in homes with firearms than homes without firearms, *even after controlling for other factors.*" (p. 2, emphasis added). Public health researchers like AM typically do not document that even a single one of the "other factors" that they control for are actually confounders.

There are at least 19 confounders of the guns/suicide relationship, i.e. factors that both affect suicide and are correlated with gun ownership (Kleck 2019b, pp. 310-312), yet no study has ever controlled for even half of them. Indeed, only three studies controlled for more than four of them (p. 316). This body of research therefore does not provide a scientifically sound basis for the assertion that access to firearms increases the risk of suicide.

AM presents a similarly distorted view of the scholarly research on the issue of the relative lethality of different suicide methods. The underlying issue in

this area is whether firearms provide a uniquely lethal method of suicide and whether other methods likely be substituted for shooting if guns were unavailable would be equally likely to have fatal outcomes. AM distorts the issue (p. 3, point 8) by comparing the case fatality rate (CFR) of shooting suicide attempts with the CFR of poisoning attempts. This comparison is misleading and irrelevant because it is implausible that people with sufficiently lethal intentions to shoot themselves in the head would, if a gun were not available, substitute one of the *least* lethal methods of suicide. A more meaningful comparison is between shooting and an alternate method of sufficient lethality that it is actually likely to be substituted for shooting if a gun were not available.

AM fails to note that the CFR of the second-most common method of suicide, hanging, is not significantly different from that of shooting attempts – national data indicate that both are about 80% (Kleck 2019b, p. 319). Thus, if people who otherwise would have attempted suicide by shooting did not have guns and substituted hanging as their method, the best available evidence indicates that just as many attempters would die.

This brings up another of AM's misleading claims. He states (p. 3, Point 8) that "Multiple studies have estimated the case fatality rate for firearms at approximately 90%." What he omits is that nearly all *other* studies, besides the handful he cites (see his fn. 8-10), do *not* find CFRs this high for firearms attempts. A more comprehensive review of studies comparing the CFRs of shooting attempts with those of hanging attempts reveals CFRs as low as 75% for shooting attempts and as high as 90% for hanging attempts. Two studies even found higher CFRs for hanging

attempts than for shooting attempts (Kleck 2019b, pp. 318-319). In sum, there is no scientific consensus that shooting is a more lethal method of suicide than hanging, the method most likely to be substituted for shooting if a firearm were not available.

AM also ignores a large body of research indicating that much of the higher CFR of shooting attempts is attributable to the greater lethality of suicidal intentions of attempters using firearms, rather than the lethality of the method itself. Most suicide attempters do not want to die, but rather are making “a cry for help,” communicating the depth of their suffering to those around them. That is, they have less-than-lethal suicidal intentions. They consequently are more likely to use less lethal methods, such as swallowing a small number of pills or cutting a few superficial scratches on their wrists. In contrast, people with strong intentions to die are more likely to use methods like shooting or hanging (see evidence reviewed in Kleck 2019b, pp. 321-323).

The difference in lethality of intentions between shooting attempters and other attempters is huge. Denning and his colleagues (2000) measured suicidal intent among persons who had committed suicide, and found that suicidal intent was 6.3 times higher among those who had used firearms than among those using other methods. Thus the differences in CFRs of suicide attempts by shooting and attempts by other methods could easily be entirely attributable to the far stronger suicidal intentions of those who chose to use firearms, rather than the lethality of the method itself. In sum, AM’s uncritical belief that firearms provide a uniquely lethal method of suicide is unsupported by a fuller review of the relevant scientific research. As far as one currently tell, on the basis of the existing body of

evidence, the absence of a firearm in the home of a lethally minded suicide attempter would merely result in the substitution of other methods with equally frequent fatal outcomes – just as most Americans believe.

AM inserted a discussion of the impact of gun control laws on suicide in his report (p. 4, Point 13), but it is unclear why since the current case does not concern any gun control laws of the sort addressed in AM's discussion. Certainly the County's challenged ordinance did not introduce a license or permit for gun ownership or acquisition, and neither of the required pamphlets made any claims about the effectiveness of gun control laws. In any case, AM's claims on this topic are inaccurate. He asserts that "laws requiring a permit or license to purchase a gun have consistently been found to have a relationship with reductions in homicide and suicide" (p. 4, Point 13). The results of these studies, however, appear consistent to AM only because he cherry-picked only poor quality public health studies to consider, and ignored the more technically sound social science studies that did *not* find that licensing and permit laws reduce suicide (e.g., Kleck and Patterson 1993, p. 271; Cook and Ludwig 2000). The studies on which AM relied (see his footnotes 27 and 30) used a nonscientific research design in which the researchers selectively identified isolated episodes in which introduction of new state gun laws happened to be followed by declines in suicide – without establishing whether there were even more instances of changes in gun laws in which suicide rates remained unchanged or even increased. These "studies" amount to little more than statistical anecdotes, and have no scientific value for assessing the impact of gun laws on suicide.

In sum, neither of the County's experts provide any scientifically sound basis for the claim that access to firearms causes an increased risk of suicide.

Overall Summary of Scientific Evidence:

There is at present no reliable body of scientific evidence to support the County's claim, via its mandated "Firearms and Suicide Prevention" pamphlet, that access to firearms causes an increase in the risk that a person will kill themselves. The claim is at best highly questionable; at worst, it is false.

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