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 Advocs. 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.

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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

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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 under-inclusivity 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 Ikatu, 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 (Ikuta, J., dissenting from the reasoning) (emphasis added) (brackets in original). Judge Ikatu 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 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

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[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.

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[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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