No. 23-1225

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,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 9 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

It's not often that three important issues all come together in a single case. But this petition implicates three subjects that the States see as critical: freedom of speech, the right to bear arms, and the scope of the States' traditional police powers.

The petition addresses disclosure requirements and compelled speech. States compel disclosures under their broad "inherent police powers." *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 588 U.S. 504, 527 (2019). That "traditional police power" includes "authority to provide for the public health, safety, and morals." *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 560 (1991). And courts have long recognized the "historic primacy of state regulation of matters of health and safety." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). So in the last several decades, state governments have been "frequently" using that primacy and power to require commercial entities to disclose various sorts of information to the public. Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 ARIZ. L. REV. 421, 424 (2016).

Disclosure requirements now exist in just about every industry—from "nutrition labels" to "efficiency disclosures for motor vehicles and appliances" and "debt-relief advisors" to cellphone radiation. Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & POL'Y 289, 293 (2016). State legislatures "increasingly" see compelled disclosures as a good way "to regulate

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[*] Under Supreme Court Rule 37, *amici* timely notified counsel of record of their intent to file this brief.

information." Mary Christine Brady, *Enforcing an Unenforceable Law: The National Bioengineered Food Disclosure Standard*, 67 EMORY L.J. 771, 784 (2018). Last year, for example, Texas passed SB 664, which requires cell-cultured meat to be labelled. Likewise, in 2023, California adopted in October 2023, requiring car manufacturers to disclose in-vehicle cameras. Earlier this year, Connecticut introduced SB 15, calling for fee disclosures for a wide range of consumer goods and services. And around the same time, Utah passed and signed SB 149, which requires companies to disclose when a customer is interacting with a machine and not a human. These and other examples show how compelled-disclosure laws may continue becoming "more common." See Jonas J. Monast, *Editing Nature: Reconceptualizing Biotechnology Governance*, 59 B.C. L. REV. 2377, 2433 (2018).

As state compelled-disclosure laws spread, a "growing number of circuit court[s]" will be forced to decide their constitutionality. Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 868 (2015). Indeed, courts have already seen a "wave" of these cases. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1277 (2014). But the volume isn't leading to easy answers. And sometimes, our compelled-disclosure jurisprudence is less than clear. Yet the States need clarity on this issue to use their traditional police powers lawfully and effectively. Ultimately, "[t]here is a great deal" of potential "governmental" regulation "riding on" how these standards shake out. Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech Under the First Amendment*, 101 NEB. L. REV. 876, 901 (2023). This case offers a chance to draw some important lines in the First Amendment disclosure context.

What's more, the analysis might (and really, should) play out differently when other fundamental constitutional rights are involved. The ordinance here compels speech in a sacrosanct Second Amendment context—gun buyers transacting with gun sellers. A danger lurks that the compelled speech here is really just a county-constructed obstacle to exercising the Second Amendment right. That unique context confirms that this ordinance deserves an extra measure of attention.

The Court should therefore grant the petition.

SUMMARY OF ARGUMENT

I. America's compelled-disclosure jurisprudence could use some help from this Court. Under *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), the Court doesn't apply strict scrutiny to compelled disclosures of commercial speech when the disclosures are "purely factual and uncontroversial," among other things. But in the 40 years since *Zauderer*, courts and scholars have offered different interpretations of what it means to be "uncontroversial." By 2018, courts had applied at least six interpretations of the term. The Court took a step in the right direction in *National Institute of Family & Life Advocates* v. *Becerra* ("*NIFLA*"), 585 U.S. 768, 769 (2018), when it affirmed that statements can't be "uncontroversial" when they engage with decidedly controversial subjects. But the Court did not have the chance to explain whether the lower courts' many other views of "uncontroversial" were valid, too.

Left with that opening, some courts seem to have defaulted to an unduly narrow conception of when a compelled statement might cross the line into "controversial"—in fact, that's what the Fourth Circuit did here. The Fourth Circuit's reading would have been

flawed even before *NIFLA*. But it undeniably disregards the controversial-topic test that *NIFLA* endorsed. Had the Fourth Circuit applied that test here, this case would have been a relatively easy one; firearm violence and safety is a hotly debated topic, after all.

The Court should thus grant the petition to clarify these aspects of *Zauderer*'s test.

II. Petitioners' claim also implicates the Second Amendment, doubly confirming that the law deserves strict scrutiny. Time and again, the Court has used a cumulative-rights approach to inform its constitutional analysis. In other words, when rights overlap, the Court will consider them interdependently and synergistically to produce a fuller understanding of the real interests at stake. The approach is more faithful to the Court's longstanding sliding-scale approach to rights, takes better account of real-world nuances, and allows the Court to decide cases more precisely. And at bottom, pairing the First Amendment and Second Amendment concerns here would be the better route given how the Court has been recently emphasizing renewed respect for the Second Amendment right. A county shouldn't be permitted to impair the right to bear arms by crafting constraints and obstacles in a roundabout way.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to clarify *Zauderer*'s "uncontroversial" requirement.

A. The First Amendment's "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld* v. *Forum for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 61 (2006). Normally, because compelled disclosures are content-based regulations, they receive

strict scrutiny. But "some laws that require professionals to disclose factual, uncontroversial information in their commercial speech" receive a less exacting standard. *NIFLA*, 585 U.S. at 768 (cleaned up) (citing *Zauderer*, 471 U.S. at 651). The Fourth Circuit applied that lesser *Zauderer* standard to the county law at issue here, finding that it satisfied the less demanding test. But its *Zauderer* analysis was fatally flawed—and those errors highlight how the States and others need the Court to clarify *Zauderer*.

Zauderer tried to place some guardrails on compelled disclosures in the commercial context. The Court applied *Central Hudson*'s commercial-speech principles to a compelled-disclosure statute that required attorneys to explain in advertisements how they calculated contingency fees. *Zauderer*, 471 U.S. at 651. The statute there was constitutional because the disclosure forced the attorney to include only "purely factual and uncontroversial information about the terms under which his services will be available." *Id.* And Ohio had also shown that the disclosure was "reasonably related to the State's interest in preventing deception of consumers." *Id.*

But after *Zauderer*, courts struggled to consistently implement its "doctrine" and "scope." Erin Murphy, *The Impossibility of Corporate Political Ideology: Upholding SEC Climate Disclosures Against Compelled Commercial Speech Challenges*, 118 NW. U. L. REV. 1703, 1722 (2024). Indeed, "*Zauderer*'s treatment in various circuits most closely resembles a fractured, frequently contradictory mosaic." *Repackaging Zauderer*, 130 HARV. L. REV. 972, 979 (2017). Courts have wrestled with questions like whether a given communication must be affirmatively (or only potentially) deceptive before a

disclosure is required, whether actors can be required to disclose otherwise private information, and whether state interests far afield from deception can still justify a speech mandate.

But the biggest hangup in applying *Zauderer* has been the "uncontroversial" element. The term is "naturally open to interpretation," and the Court has offered few guiding "definitions or qualifications." Rakelle Shapiro, *Competing Free Speech Rights: Evaluating Compelled Disclosures on Food Packaging in a Way That Reflects Scientific Realities-or a Lack Thereof*, 41 CARDOZO L. REV. 2681, 2689 (2020). *Zauderer*—and especially "uncontroversial"—has therefore been a fertile source of circuit splits. Mark Chenoweth, Expressions Hair Design*: Detangling the Commercial-Free-Speech Knot*, 2017 CATO SUP. CT. REV. 227, 250 (2016-2017); see also *CTIA-The Wireless Ass'n* v. *City of Berkeley*, 873 F.3d 774, 776 (9th Cir. 2017) (Wardlaw, J., dissenting from denial of rehearing en banc) (noting great "discord among" "circuits about" when "*Zauderer* applies"); Murphy, *supra*, at 1722 (noting circuit splits). These circuit splits have only grown more entrenched, as some courts have offered more protection for even commercial speech in recent years. Mark Conrad, *Betting on Addiction Money: Can Sports Betting Advertising Be Restricted on Broadcast Media in an Age of Heightened Commercial Speech Protection?*, 15 HARV. J. SPORTS & ENT. L. 127, 169 (2024).

Lower courts cannot figure out how to define uncontroversial "precisely." See *Nat'l Ass'n of Mfrs.* v. *SEC*, 800 F.3d 518, 528 (D.C. Cir. 2015) ("*NAM*"). And this hesitancy means courts routinely misapply *Zauderer*. *Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18, 34 n.2 (D.C. Cir. 2014) ("*AMI*"). As then-Judge Kavanaugh

noted, "it is unclear how [the Court] should assess and what we should examine to determine whether a mandatory disclosure is controversial." *Id.* at 34 (Kavanaugh, J., concurring). "So what does it mean for a disclosure to be … uncontroversial?" one court asked, answering: "Nobody knows exactly." *Kimberly-Clark Corp.* v. *District of Columbia*, 286 F. Supp. 3d 128, 140 (D.D.C. 2017) (cleaned up); accord *Nat'l Ass'n of Wheat Growers* v. *Becerra*, 468 F. Supp. 3d 1247, 1258 (E.D. Cal. 2020).

By 2018, in fact, courts had interpreted "controversial" in at least six different ways. See, e.g., *AMI*, 760 F.3d at 27 (ticking through several ways to satisfy "uncontroversial").

1. Several cases held or implied that the phrase "factual and uncontroversial" means just "factual"—that "uncontroversial" isn't an independent, standalone requirement. *Disc. Tobacco City & Lottery, Inc.* v. *United States*, 674 F.3d 509, 569 (6th Cir. 2012) (holding that *Zauderer*'s applicability "turns on whether the disclosure conveys factual information," "not on whether the disclosure emotionally affects its audience or incites controversy"). Only opinion and rhetoric would fail this kind of test. This Court gestured towards that interpretation in *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010), where it held that *Zauderer*'s "essential features" are that the disclosure be "intended to combat" potential customer confusion and that it requires "an accurate statement." Accord *Grocery Mfrs. Ass'n* v. *Sorrell*, 102 F. Supp. 3d 583, 630 (D. Vt. 2015); Shapiro, *supra*, at 2689. But plenty of other cases decried that interpretation from the beginning. See, e.g., *NAM*, 800 F.3d at 528 (saying "uncontroversial" "must mean something different than 'purely factual'").

2. Others said a disclosure was "controversial" when it required the speaker to make a highly subjective assessment. In *Entertainment Software Ass'n* v. *Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006), for example, the court held controversial a requirement that game sellers place identifying stickers on video games that the seller determined met a "statute's definition of 'sexually explicit.'" The case was later read to reach disclosures that were "necessarily subjective and exclusively nonfactual." *R.J. Reynolds Tobacco Co.* v. *FDA*, 696 F.3d 1205, 1231 n.9 (D.C. Cir. 2012) (Rogers, J., dissenting), overruled on other grounds by *AMI*, 760 F.3d at 22.

3. Many courts have said a disclosure is "controversial" when its factual accuracy is genuinely contested. See *AMI*, 760 F.3d at 27 (noting this theory). In *Kimberly-Clark*, 286 F. Supp. 3d at 140-41, the court found a disclosure about wipes' flushability controversial because "whether the wipes can be flushed—and the harms they might cause to sewers—is subject to serious debate." In *NAM*, 800 F.3d at 528, the court recognized that settling the veracity of some facts will be notoriously intractable, especially when a disclosure incorporates facts whose validity and controversiality naturally shift over time through additional learning. See also *id.* at 537-38 (Srinsivan, J., dissenting) (saying "controversiality" extends to those "disclosures whose accuracy is contestable"). At least one First Amendment scholar said the "best" interpretation of "uncontroversial" is "as a description of the epistemological status of the information." Post, *supra*, at 910.

4. Some other courts have said a mandated disclosure is controversial when it *misleads* the consumer. In *AMI*, 760 F.3d at 27, the court kept open "the possibility that some required factual disclosures could be so one-sided or

incomplete" that they become controversial. And in *Associated Bldrs. and Contractors of Se. Texas* v. *Rung*, No. 1:16-cv-425, 2016 WL 8188655, *10 (E.D. Tex. Oct. 24, 2016), requiring entities to count and disclose pending investigations as labor-law "violations" was controversial because it was misleading. Similar cases abound. See, e.g., *Milavetz*, 559 U.S. at 231 (saying *Zauderer* applied because disclosure was "inherently misleading"); accord *Masonry Bldg. Owners of Or.* v. *Wheeler*, 394 F. Supp. 3d 1279, 1302 (D. Or. 2019); Justin Pearson, *Censorship and Sensibility: Does the First Amendment Allow the FDA to Change the Meanings of Words?*, 17 GEO. J.L. & PUB. POL'Y 521, 535-36 n.97 (2019) (noting a "circuit split" as to whether "*Zauderer's* application could be extended beyond corrections of inherently misleading speech").

5. The most popular interpretation has been a holistic, context-sensitive analysis of how the disclosure *portrays* the facts. In that view, "uncontroversial information" means "factual information, uncontroversially described." Seana Valentine Shiffrin, *Compelled Speech and the Irrelevance of Controversy*, 47 PEPP. L. REV. 731, 755 (2020). In *AMI*, 760 F.3d at 27, for instance, the D.C. Circuit was sensitive to the idea that forcing meat processors to use the term "slaughter" instead of "harvest[]" "might convey a certain innuendo." And in *NAM*, 800 F.3d at 530 546, the court found that labeling products "not [DRC] conflict free" was "a metaphor that conveys moral responsibility for the Congo war" and required "an issuer to tell consumers that its products are ethically tainted, even if … only indirectly." Effectively requiring a speaker to admit it had "blood on its hands" and "publicly condemn itself" was controversial. *Id.* See also *R.J. Reynolds*, 696 F.3d at 1216-17 (saying a disclosure is "controversial" when it is "inflammatory," like a proposed FDA cigarette-package warning designed

to "evoke emotion … and browbeat consumers into quitting"); *Kimberly-Clark*, 286 F. Supp. 3d at 141 (holding wipes'-flushability disclosure controversial because "the term 'flushable' carries its own baggage" and was "a lightning rod for those in the know").

6. Finally, some courts had held that "uncontroversial" referenced the disclosure *topic*. In *Evergreen Ass'n, Inc.* v. *City of New York*, 740 F.3d 233, 238 (2d Cir. 2014), the court considered requirements that prolife pregnancy centers encourage women to consult with licensed providers and disclose whether "they provide or provide referrals for abortion, emergency contraception, or prenatal care." The court found controversiality because the centers had "to state the City's preferred message" and mention "controversial services" they "oppose." *Id.* at 245 n.6. See also *SEC* v. *City of Rochester,* No. 6:22-cv-6273, 2024 WL 1621541, at *11 (W.D.N.Y. Apr. 15, 2024) (reaffirming that *Evergreen* considered the statements controversial because they "arose in the 'context [of] a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated … provide alternatives'" (cleaned up)). And *NAM*, 800 F.3d at 529, opined that *AMI* should be read to support this view, too.

B. In *NIFLA*, this Court offered another hint—but only a hint—about the meaning of "uncontroversial." California had ordered crisis pregnancy centers to tell patients that California provided certain "free or low-cost services, including abortions," "give them a phone number to call," and say that "California ha[d] not licensed the clinics to provide medical services." *NIFLA*, 585 U.S. at 7661. The Court held that this requirement fell outside *Zauderer* for two reasons. First, it "in no way relate[d] to the services that licensed clinics provide." *Id.* at 7669.

And second, it wasn't uncontroversial because it required "information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic." *Id.*

Unfortunately, though, *NIFLA* still didn't clarify *Zauderer*'s "controversial" element. Murphy, *supra*, at 1719 (saying *NIFLA* didn't foster a "clear" compelled-disclosure doctrine); Griffith, *supra*, at 901. The case didn't explain, for instance, how to measure whether a topic is sufficiently controversial. Klein, *supra*, at 204; accord Danielle Zoellner, *Criminalizing the Doctor-Patient Relationship*, 65 B.C. L. REV. 1143, 1163-64 (2024). Nor did it explain whether its interpretation of "controversial" forecloses all other interpretations, what other ways to show "controversiality" are still valid, or if its interpretation must be considered in every case. Compare *First Amendment-Freedom of Speech-Compelled Speech*-National Institute of Family & Life Advocates v. Becerra, 132 HARV. L. REV. 347, 352-53 (2018) (assuming the first, but noting that *NIFLA* didn't "clarify"), with Andra Lim, *Limiting* NIFLA, 72 STAN. L. REV. 127, 186 (2020) (saying that "at a minimum" *NIFLA* applies); cf. Catherine L. Fisk, *Compelled Disclosure and the Workplace Rights It Enables*, 97 IND. L.J. 1025, 1043 (2022) (*NIFLA* "may" have been transformative). Because *NIFLA* "left open the question of … what makes speech controversial," Murphy, *supra*, at 1719, there continues to be significant "uncertainty regarding the interpretation and application of the conditions in *Zauderer*, leading to circuit splits and varying approaches to regulations of compelled commercial speech," Shapiro, *supra*, at 2689. *NIFLA* might have endorsed *Evergreen*'s broader "controversial *topic*" approach to controversialness. But even that's just conjecture because *NIFLA* "expressly declined to address" the contours of

"controversial," thus "leaving in place the circuit split" on that point. Pearson, *supra*, at 553 n.97.

And some courts refuse to accept *NIFLA*'s hints. The Ninth Circuit, for instance, insists that *NIFLA* can't be "saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial." *CTIA–The Wireless Ass'n* v. *City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019). *CTIA* instead thinks *NIFLA*'s real problem was that the disclosure "took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission." *Id.*; see also *id.* at 848 (holding the cellphone-radiation disclosure uncontroversial because it did "not force … retailers to take sides in a heated political controversy"). But that spin can't really be found in any straightforward reading of *NIFLA*. Other courts, perhaps wary of the implications of a tougher test, have simply kept their pre-*NIFLA* interpretations of "controversial." The Fifth Circuit, for example, still applies a provable-fact standard, dubbing a statement controversial when "the truth of the statement is not settled." *R.J. Reynolds Tobacco Co.* v. *FDA*, 96 F.4th 863, 881 (5th Cir. 2024) see also *Free Speech Coal., Inc.* v. *Paxton*, 95 F.4th 263, 282 (5th Cir. 2024) (finding that a disclosure is noncontroversial when it "is not subject to good-faith scientific or evidentiary dispute" (pre-*NIFLA* standard) and where it "is not an integral part of a live, contentious political or moral debate" (*NIFLA* standard)). But that's hard to square with *NIFLA*, too; for instance, the "truth" of the phone number that had to be disclosed in *NIFLA* is not readily debatable.

So in many places, it seems, "[w]hat constitutes … uncontroversial information under *Zauderer*" is just as "open to interpretation" as before. Nora Klein, *Tiktok Is*

Not Your Doctor: Reprioritizing Consumer Protection in Pharmaceutical Advertisement Regulation, 11 BELMONT L. REV. 166, 203 (2023). And courts aren't alone; scholars are just as confused. See, e.g., George A. Kimbrell, *Cutting Edge Issues in 21st Century Animal Food Product Labeling*, 27 DRAKE J. AGRIC. L. 179, 251 (2022) (saying *Zauderer*'s "scope" and the "rigor of its application" are "currently an open question"); Shiffrin, *supra*, at 751 (saying "uncontroversial" after *NIFLA* "isn't at all clear" and is, in fact, "perplexing"); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1380 (2019) ("What makes a disclosure controversial? The circuits disagree."); Carl Wiersum, *No Longer Business As Usual: FDA Exceptionalism, Commercial Speech, and the First Amendment*, 73 FOOD & DRUG L.J. 486, 569 n.410 (2018) ("The meaning of … 'uncontroversial' … has never been made entirely clear.").

In short, what counts as "controversial" right now is an open question. Chen, *supra*, at 901. Courts are "no closer" post-*NIFLA* to "articulating exactly what the 'uncontroversial' element requires." Griffith, *supra*, at 901. Even with six possible spins on the doctrine already in play, other theories abound. Some say it involves the "suspect nature of ideological content" or "political bias" of the speech. Rebecca Krumholz Gottesdiener, *Reimagining* NIFLA v. Becerra*: Abortion-Protective Implications for First Amendment Challenges to Informed Consent Requirements*, 100 B.U. L. REV. 723, 764 (2020); Wiersum, *supra*, at n.410 (saying "uncontroversial" targets "ideological speech"). Others say only speech that "implicate an individual's 'most deeply held' ethical or religious beliefs." Fowler, *supra*, at 1684; but see Shiffrin, *supra*, at 754 (disagreeing). Or perhaps it's a discrete list of "controversial subjects" like "climate change," "sexual orientation and gender

identity." Haan, *supra*, at 1387 (quoting *Janus* v. *AFSCME, Council 31*, 585 U.S. 878, 914 (2018)). Ultimately, *NIFLA* has left us with a solid circuit "split" over "when commercial speech is" controversial. Anne E. Kettler, *The Promise and Peril of State Corporate Climate Disclosure Laws*, 54 ENVTL. L. REP. 10293, 10299-300 (2024).

C. The opinion below exemplifies this confusion—and the poor results that flow from it. Articulating a version of the narrowest pre-*NIFLA* interpretation of "controversial," the court collapsed "factual" and "controversial," treating them as "part of the same argument" and analysis. App.20a. After reciting the pamphlet's fact statements—there's no single cause for suicide, 50% of suicides are committed with firearms, persons can call a suicide hotline for help, and related comments and pictures—it held that these statements were technically factual and so were "also uncontroversial." App.20a-21a. *NIFLA* was "inapplicable," and *Zauderer* allowed the disclosure. App.21a.

The Fourth Circuit's gloss on *Zauderer* was flawed for several reasons.

First, the court's interpretation of "controversial" was decried as unworkable both before and after *NIFLA*. Shiffrin, *supra*, at 756 (2020) (saying it is "plain that" the chosen interpretation "cannot be squared with … *NIFLA*"). *Zauderer* itself spoke of "factual" and "uncontroversial" as distinct concepts, suggesting that the words should not be treated as synonymous. See *NAM*, 800 F.3d at 528 (saying "uncontroversial" "must mean something different than 'purely factual'"). For good reason. "Factual" just means "restricted to or based on fact." *Factual*, MERRIAM WEBSTER.COM DICTIONARY

(2024), https://bit.ly/4bWFnh7. Uncontroversial, on the other hand, means "not likely to be disputed or to cause strife or quarrel: not relating to or arousing controversy." *Uncontroversial*, MERRIAM WEBSTER.COM DICTIONARY (2024), https://bit.ly/4bXS9Mh. And as anyone who has sat around a Thanksgiving table with extended family might attest, even statements limited to "fact" can "cause strife or quarrel" in the right circumstances.

Second, the court failed to consider the various other interpretations of controversial. For example, there's a strong argument that the pamphlet's *portrayal* of factual information is controversial. Forcing gun shops to distribute materials linking guns and suicides implies in context that the gun shops have "blood on [their] hands." *NAM*, 800 F.3d at 530. The pamphlet also says nothing about the potential benefits of the firearm being sold, such as its usefulness in fending off an attacker. At the very least, that's misleading. Remember that a statement that might be thought "factual" in isolation might in fact carry with it a lot of controversial meaning when placed in context. The information selected for inclusion or exclusion from a compelled message can be telling. A compelled statement that a bagel contains "no antibiotics," for example, might reasonably imply that antibiotics are something to worry about in food—a position with which not everyone would agree. Even the way that the disclosure is communicated might send a message; a disclosure saying "Contains ingredients that have not been shown to be safe in a laboratory" could be factually true while still misleadingly (and controversially) implying that something dangerous lies within.

The Fourth Circuit just took the statements in the gun pamphlet on their own terms. Once it found the statements to be supportable—a debatable proposition in

its own right—then the test ended nearly as soon as it began. That's a paper-thin form of analysis.

Third, the court failed to apply *NIFLA*'s controversial-topics test. But that test is a slam dunk here: Firearm safety and violence are white-hot political topics. A recent Pew Research study found the country split right down the middle on whether they think guns "increase or decrease safety" with 49% on both sides. Katherine Schaeffer, *Key facts about Americans and guns*, PEW RESEARCH CENTER (Sept. 13, 2023), https://pewrsr.ch/4aUIxkc. The partisan split on gun policy is 57%—more than almost anything else. *Id.* The only issues Americans rank as a bigger deal appear to be illegal immigration and climate change. Pew Research Center, *Inflation, Health Costs, Partisan Cooperation Among the Nation's Top Problems* (June 21, 2023), https://pewrsr.ch/3wPrfqI. These divides extend to policies aimed at preventing firearm suicides. See Domenico Montanaro & Eric Westervelt, *Most gun owners favor modest restrictions but deeply distrust government, poll finds*, NATIONAL PUBLIC RADIO (July 8, 2022, 5:00 a.m.), https://n.pr/3wRAEhr. If firearm violence and safety isn't controversial, nothing is. See, e.g., *Junior Sports Magazines Inc.* v. *Bonta*, 80 F.4th 1109, 1121 (9th Cir. 2023) (VanDyke, J., concurring) ("Firearms are controversial products.").

Altogether, *Zauderer* does no good if no one knows what it means. And many are struggling to define many of the test's most important terms. The Court should step in.

II. This case's Second Amendment implications reinforce and magnify the First Amendment concerns.

A. If the First Amendment problems here were not enough reason to ring the alarm bell, there's another reason to do so here: the Second Amendment concerns raised by this ordinance support strict scrutiny, too.

Make no mistake: the Second Amendment is not a second-class right. The Second Amendment's preservation of our "ancient right" to keep and bear arms is crucial to natural rights like self-defense or hunting. *District of Columbia* v. *Heller*, 554 U.S. 570, 599 (2008). Indeed, there's no more "acute" need than the "defense of self, family, and property." *McDonald* v. *City of Chicago*, 561 U.S. 742, 767 (2010). This fundamental, "central component of the Second Amendment" is "deeply rooted in this Nation's history and tradition." *Id.* at 767 (cleaned up).

This case may not include a "straight up" Second Amendment claim, but the facts implicate a Second Amendment space. The ordinance compels speech "to gun purchasers through gun dealers." App.7a-8a. That is, the ordinance applies explicitly when and where people are exercising their Second Amendment rights. And this focus on guns isn't just some incidental effect; the ordinance calls for government-directed language that could be reasonably construed to imply that the purchase of a handgun necessarily increases the risk of the purchaser committing suicide or potentially producing other violent results. And this over-the-counter admonition exists within a zone of commercial conduct lying at the heart of—and, thus, is zealously protected by—the Second Amendment. An ordinance mandating

content-based speech exclusively in a Second Amendment-protected space deserves strict scrutiny.

The Second Amendment's historical context also counsels for a little extra care in First Amendment cases implicating Second Amendment rights. At least until *Heller*, the Second Amendment was a protection living in exile, and it maintained its status as a "constitutional orphan" for many years even after *Heller*. *Silvester* v. *Becerra*, 583 U.S. 1139 (2018) (Thomas, J., dissenting from denial of certiorari). The Court has been trying to effectively reconstruct the right in the years since. But when States find new and constitutionally questionable pathways to burden this still rather vulnerable right, the Court should not be shy about stepping in to it. Forthrightly acknowledging that a First Amendment case implicating the right to bear arms presents a different set of considerations than the usual commercial-speech case is one way to do just that—especially when these two rights serve complementary interests. Darrell A.H. Miller, *Guns, Inc.:* Citizens United*,* McDonald*, and the Future of Corporate Constitutional Rights*, 86 N.Y.U. L. REV. 887, 904 (2011).

And reading one right to reinforce another isn't novel. The Court often uses cumulative or hybrid rights to inform its constitutional analysis—"deriving an overall conclusion of constitutional validity (or invalidity) from … two or more constitutional provisions." Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1070 (2016). And sometimes, "multiple rights-based provisions of the Constitution might" invalidate a "government action that would be permitted if each provision were considered in isolation." *Id.*

The paradigmatic example of this approach is *Employment Division* v. *Smith*, 494 U.S. 872 (1990). See

Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1328 (2017). But *Smith* isn't the whole show. This Court has long "experimented" with approaches to constitutional interpretation "that traverse[]" provisions' "boundary lines." Coenen, *supra*, at 1070. A "number of the most commonly litigated constitutional theories involve cumulative theories." Abrams, *supra*, at 1354; see also *id.* at 1309 ("Cumulative constitutional rights are ubiquitous."); *id.* at 1353 ("Aggregation of constitutional rights is a pervasive feature of constitutional litigation.").

Take a few examples. In *Bearden* v. *Georgia*, 461 U.S. 660, 665 (1983), for instance, the Court said indigent prisoners were owed certain access to post-trial proceedings because "[d]ue process and equal protection principles converge[d]." In *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978), the Court observed that the First Amendment issues demanded "scrupulous exactitude" in its Fourth Amendment inquiry. Scholars note that holdings in landmark cases like *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Batson* v. *Kentucky*, 476 U.S. 79 (1986), are "[g]rounded in an intersection of the Sixth Amendment" and Fourteenth Amendment. Abrams, *supra*, at 1344. And *Plyler* v. *Doe*, 457 U.S. 202 (1982), reached combined equal protection rights with federal supremacy and federalism. These are just some of many, but the point is always the same: rights can build on one another, and it's wrong to focus myopically on one over another.

B. The freedom of speech is "already" often "paired with" various "constitutional provisions" "to give rise to clause-combining protections." Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1600 (2017). In *R.A.V.* v. *City of St. Paul*, 505 U.S. 377,

385 n.2 (1992), the Court noted that it "has occasionally fused the First Amendment into the Equal Protection Clause." Viewing rights together allows the central First Amendment claim to "take[] on an added dimension." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969) (reading the rights to privacy and speech synergistically).

The Second Amendment could be paired effectively with the First Amendment, too. See Brannon P. Denning, *Have Gun-Will Travel?*, 83 L. & CONTEMP. PROBS. 97, 116 (2020) (proposing to "combin[e] the right to travel and the Second Amendment"). This isn't to say that the two separate analytical frameworks should be blended; *Bruen* reminded us that approach is a mistake. But as Professor Josh Blackman has explained, the Court could interpret First and Second Amendments as "working in tandem" to "protect speaking and expressing ideas about" guns. Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 506 (2014). "To use the language of *Smith*, the Second Amendment claim is 'reinforced' by the First Amendment." *Id.* *Green* v. *City of Philadelphia* appeared to do basically that, reasoning that *Smith*'s hybrid-rights analysis could incorporate a Second Amendment right to bear arms. No. 03-cv-1476, 2004 WL 1170531, at *7 (E.D. Pa. May 26, 2004) (ultimately ruling against the plaintiff under pre-*Heller* caselaw). Because First and Second Amendment issues here involve "closely related harms," the Court would be right to view them "as mutually reinforcing" here, too. Abrams, *supra*, at 1354.

Good philosophical reasons justify using a cumulative- or hybrid-rights framework here. Underlying "much of the Court's constitutional work" is "a sliding scale conception" of rights. Coenen, *supra*, at 1095. So "the key underlying premises of" reviewing the First and Second

amendment issues together would "enjoy strong doctrinal support." *Id.* Further, real-world regulations often don't fit into neat textbook boxes. So when a government action falls into the middle of a "kind of constitutional Venn diagram," Michael E. Lechliter, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2221 (2005), and two provisions each "partially" speak to it, it's intelligible and logical to consider whether "the two provisions might together prohibit" the action, Coenen, *supra*, at 1073. Combination analyses use more thorough analogical reasoning, "avoid anomalous outcomes," "enhance jurisprudential transparency," and "narrow judicial holdings." *Id.* at 1103, 1120. "[C]onstitutional combinations" often yield helpful answers to tough cases for just those reasons. Denning, *supra*, at 116. The Court shouldn't "be reluctant to consider the" Second Amendment's "impact … on the analysis" and use it to "magnify" the First Amendment concerns. Abrams, *supra*, at 1315, 1353.

Because the ordinance here operates solely within a Second Amendment context, it "demands a greater degree of specificity than in other [First Amendment] contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974). Again: the First and Second Amendment "interests … overlap and inform each other," so they should "sensibly" be considered "interdependently" and "together." *Parker* v. *Hurley*, 514 F.3d 87, 98 & 99 n.13 (1st Cir. 2008). As in *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943), where the anti-soliciting rule burdened Jehovah's Witnesses freedoms of speech and religion, "[i]t is more than [just the Second Amendment context]; it is more than distribution of [compelled] literature. It is a combination of both" that demands strict scrutiny. *Id.* at 109.

Unfortunately, the Fourth Circuit never gave any thought to that idea at all.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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