No. 23-1225

IN THE
Supreme Court of the United States

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

Petitioners,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that an Ordinance imposing a commercial disclosure requirement on sellers of guns and ammunition is subject to review under *Zauderer*.
2. Whether the court of appeals correctly held that the Ordinance satisfies *Zauderer* because it is "factual and uncontroversial," reasonably tailored, and not unduly burdensome.
3. Whether the court of appeals correctly held that the district court did not abuse its discretion in excluding Petitioners' expert report.

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BRIEF IN OPPOSITION

INTRODUCTION

In a unanimous decision authored by Judge Niemeyer, the Fourth Circuit upheld an Ordinance enacted by Anne Arundel County, Maryland, requiring sellers of guns and ammunition to disclose product safety information addressing the risks of guns and suicide. To minimize the possibility that the Ordinance would be misperceived as anti-gun, the County chose to implement it using a pamphlet coauthored and promoted by the National Shooting Sports Foundation ("NSSF"), the gun industry's own trade association. Unsurprisingly, NSSF's pamphlet does not discourage the use or purchase of firearms.

As Judge Niemeyer explained, "the pamphlet is simply, and no more, a public health and safety advisory that does not discourage the purchase or ownership of guns." Pet. App. 25a. While "such an advisory surely does not discourage gun ownership or undermine Second Amendment rights, it does encourage generous responses to a serious public health issue." *Id.*

The Fourth Circuit accordingly subjected the Ordinance to the First Amendment scrutiny applicable to factual and uncontroversial commercial disclosure requirements. *See Zauderer* v. *Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626 (1985). Applying that standard, the court easily upheld the Ordinance on the facts of this case, noting that the pamphlet is reasonably tailored to the County's interest in preventing suicide, the pamphlet was "prepared and provided by the County at no cost to the gun dealers," and "[c]omplying is as simple as having the literature at the checkout counter and including it in the bag with the purchased goods." Pet. App. 23a. No member of the Fourth Circuit voted to grant rehearing en banc or even called for a response to the en banc petition.

This Court should deny certiorari. The panel's decision comports with this Court's precedent in every respect and does not create or contribute to any split among the circuits. Federal and state law impose myriad disclosure requirements "to ensure consumer health or safety," and these interests "justify the compelled commercial disclosures that are common and familiar to American consumers." *Am. Meat Inst.* v. *U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in the

judgment). The Ordinance, which requires commercial actors to warn about the risks posed by a potentially dangerous product they sell, is no different than other disclosures ubiquitous in American life.

Petitioners' argument that the Ordinance is subject to strict scrutiny because it does not regulate commercial speech is self-evidently wrong. As Judge Niemeyer explained, it is "facially apparent that the required disclosures are a safety advisory linked to the sales of guns and ammunition, which are commercial transactions." Pet. App. 16a-17a. While Petitioners rely heavily on this Court's decision in *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), *NIFLA* did not question the lawfulness of "purely factual and uncontroversial disclosures about commercial products," *id.* at 775—exactly what the Ordinance imposes. And while Petitioners assert that the pamphlet is controversial because it suggests that guns cause suicide, the pamphlet instead merely states that "access" to firearms is a "risk factor" for suicide, which is a factually accurate statement confirmed by every major public health authority and not subject to reasonable dispute.

Petitioners claim that the panel's decision creates or deepens three circuit splits about commercial disclosure requirements, but even the cases Petitioners cite—not to mention cases Petitioners ignore—refute the alleged splits. And this case would be an especially bad vehicle to address the questions presented given that Petitioners below made binding concessions that are irreconcilable with the arguments they

press in their petition. Those concessions would substantially complicate this Court's review and are an independent reason to deny certiorari.

The petition should be denied.

STATEMENT

A. Factual Background

In 2020—the most recent year for which data was available when this lawsuit began—firearm-related deaths reached the highest level ever recorded by the Centers for Disease Control and Prevention ("CDC"). JA734. That number has only increased in recent years. More than 48,000 people died by firearm in the United States in 2022—on average, more than 130 firearm deaths per day.[1]

Guns are the most common means of both homicide and suicide in the United States. JA734. Nearly 80% of nationwide homicides in 2020 involved firearms. *Id.* Most firearm-related deaths, however, are deaths by suicide. *Id.* In 2020, 24,292 suicides—53% of total suicides nationwide—involved the use of a firearm, nearly double the second most common method of suicide. JA774.

Access to guns poses such a significant suicide risk for two related reasons. First, guns are generally more lethal than other means of suicide. JA735. Suicidal acts involving firearms are lethal approximately 90% of the time. *Id.* By contrast, suicidal acts involving poisoning, for example, are lethal approximately 5% of the time. *Id.* A person who attempts suicide

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[1] *See Fast Facts: Firearm Injury and Death*, CDC, https://www.cdc.gov/firearm-violence/data-research/facts-stats/ (July 5, 2024).

using a gun is much more likely to die from the attempt than a person who attempts suicide using a different method. *Id.* The disparity in lethality is so substantial that guns are by far the most common method of death by suicide even though guns are used in less than 10% of suicide attempts. *Id.*

Second, suicide attempts tend to be impulsive acts in moments of acute crisis. *Id.*; JA875. More than half of the people who make near-lethal suicide attempts do so within an hour of their decision to attempt suicide. JA735. As a result, the lethality of the immediately available means of suicide plays a significant role in determining whether the act will be fatal. People who have a gun readily available when they make the impulsive decision to attempt suicide are more likely to die than those who do not. *Id.* And the overwhelming majority of people who survive a suicide attempt do not subsequently die by suicide. JA777.

These facts have led public-health authorities to focus on a strategy known as "lethal means reduction." *Id.* As the CDC explains, because "the interval between deciding to act and attempting suicide can be as short as 5 or 10 minutes," and because "people tend *not* to substitute a different method when a highly lethal method is unavailable or difficult to access," efforts to make it "more difficult to access lethal means" during a crisis "can be lifesaving." JA875. The CDC therefore recommends "education and counseling around storing firearms locked in a secure place," which "can reduce the risk for suicide by separating vulnerable individuals from easy access to lethal means." *Id.*

Anne Arundel County has been particularly affected by gun violence. In 2018, a mass shooting at Annapolis's *Capital Gazette* newspaper killed five people and wounded two others.[2] From 2013 to 2017 "there were 209 deaths in Anne Arundel County caused by guns and, of those 209 deaths, 141 (67%) were deaths by suicide." Pet. App. 7a (alteration omitted). During the same period, "of all suicides in the County, guns were the most common means used." *Id.*

Following the *Capital Gazette* shooting, "which was deeply traumatic to the Anne Arundel County community and widely publicized, the Anne Arundel County Executive issued an executive order creating a task force to address how the County could use its public health system to reduce gun violence." *Id.* As part of its approach to combatting this "public health crisis," the County in 2022 enacted an Ordinance "that required the Department of Health to prepare literature for distribution to gun purchasers through gun dealers in the County." Pet. App. 7a-8a; *see* Pet. App. 83a (requiring Department of Health to "prepare literature relating to gun safety, gun training, suicide prevention, mental health, and conflict resolution" and to distribute this literature to stores in the County that "sell guns or ammunition" (capitalization altered)).

The County Department of Health implemented the Ordinance by distributing to sellers of guns and ammunition in the County two documents, which sellers must display and provide to purchasers.

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[2] *See* Sabrina Tavernise *et al*., *5 People Dead in Shooting at Maryland's Capital Gazette Newsroom*, N.Y. Times (June 28, 2018), https://www.nytimes.com/2018/06/28/us/capital-gazette-annapolis-shooting.html.

Suicide Prevention Pamphlet: The first document is a pamphlet entitled "Firearms and Suicide Prevention." JA792-799. The County did not author this pamphlet. Instead, it "used a pamphlet created by a collaboration of the American Foundation for Suicide Prevention, a leading national nonprofit suicide-prevention organization, and the National Shooting Sports Foundation, 'the firearm industry trade association.'" Pet. App. 8a. "These two organizations developed the pamphlet as a resource 'to help firearms retailers, shooting range operators and customers understand risk factors and warning signs related to suicide, know where to find help and encourage secure firearm storage options.'" *Id.* The organizations ask retailers and ranges to distribute the material to customers, "because doing so would help save lives." *Id.* (alteration omitted).

The pamphlet is six-by-six inches and contains six pages of content. One page contains the heading "What Leads to Suicide?" and "explains that there is *no single cause*." Pet. App. 13a. "It does not mention firearms or in any way suggest that they are a cause." *Id.* Other pages identify suicide warning signs; offer guidance about how to protect someone at risk of suicide; provide options, like cable locks, for safely storing firearms; and list national suicide-prevention resources. Pet. App. 13a-14a.

One page of the pamphlet states that "Some People are More at Risk for Suicide than Others," and then lists more than a dozen "risk factors" for suicide across three categories—"health factors," "environmental factors," and "historical factors." At the bottom of the page "is a boxed summary message reading, 'Risk factors are characteristics or conditions that increase the

chance that a person may try to take their life.'" Pet. App. 13a. The listed risk factors include: a range of mental health conditions such as depression and bipolar disorder; serious or chronic health conditions or pain; stressful life events; prolonged stress; exposure to another person's suicide; access to lethal means including firearms and drugs; previous suicide attempts; family history of suicide; and childhood abuse, neglect, or trauma. Pet. App. 88a.

The pamphlet's characterization of access to lethal means like firearms as a "risk factor" for suicide reflects an overwhelming public-health consensus. The National Institutes of Health ("NIH") includes among the "main risk factors for suicide" the "[p]resence of guns or other firearms in the home." JA915. The CDC states that "Societal Risk Factors" for suicide include "[e]asy access to lethal means of suicide among people at risk." JA937. The Department of Veterans Affairs agrees that "[o]ne of the keys" to suicide prevention is "reducing risk factors, like easy access to firearms or certain medications."[3]

By using a pamphlet coauthored by NSSF, the County sought to ensure that the material distributed to customers would not be misperceived as anti-gun. NSSF describes itself as "lead[ing] the way in advocating for the [firearm] industry," and "relentlessly advocat[ing] for measures on behalf of" and "in defense of the firearm and ammunition industry at all levels and before all branches of government." JA803; JA806.

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[3] *Suicide Prevention: Prevention - Mental Health*, Dep't of Veterans Affairs, https://www.mentalhealth.va.gov/suicide_prevention/prevention/index.asp (last updated Jan. 19, 2024).

Conflict-Resolution Insert: The second document is a six-by-six-inch, one-page insert produced by the County "providing County resources for conflict resolution." Pet. App. 8a. The insert states: "Conflict Resolution is a process to help you find the best way to resolve conflicts and disagreements peacefully." *Id.* The insert then provides contact information for a County conflict resolution center, a "Warmline" for County residents in crisis, a Veteran's Crisis Line, as well as a link to the County's online suicide-prevention toolkit. *See id.*

B. Procedural Background

Petitioners brought this lawsuit alleging that the Ordinance violates the First Amendment. During discovery, the County commissioned expert reports describing the connection between firearms and suicide and contextualizing the Ordinance within the County's broader gun-violence-prevention efforts. The County also identified 44 peer-reviewed studies published in some of the nation's premier social-science journals supporting the conclusion that access to firearms is a suicide risk factor. JA1155-1611.

Petitioners retained one expert, Dr. Gary Kleck, a retired professor of criminology who has offered expert testimony in at least 20 prior cases challenging gun safety laws but has never testified in support of such laws. Professor Kleck's report began by assuming that the pamphlet's description of access to firearms as a suicide "risk factor" conveyed the message "that guns *cause* suicide." Pet. App. 24a. Professor Kleck disputed what he understood to be the pamphlet's causal claim. Professor Kleck conceded, how-

ever, that if the pamphlet asserted a "noncausal correlation or association" between guns and suicide, the pamphlet was accurate. Pet. App. 98a-99a.

The district court rejected Petitioners' First Amendment challenge and granted summary judgment for the County. The court concluded that the Ordinance mandates a quintessential health-and-safety warning about commercial products and complies with the First Amendment. As the court explained, under *Zauderer*, a law requiring disclosure "of purely factual and uncontroversial information about a commercial product" comports with the First Amendment if the disclosure requirement is "reasonably related" to a sufficiently weighty state interest. Pet. App. 46a. The court explained that the pamphlet's characterization of access to firearms as a "risk factor" for suicide is "purely factual information" that is "well-documented." Pet. App. 57a-58a. And although "firearm regulation in the United States is a highly controversial topic," the "pamphlets themselves only speak to the uncontroversial topics of suicide prevention and nonviolent conflict resolution." Pet. App. 58a. That "the firearm industry's trade association" coauthored the suicide-prevention pamphlet "strongly demonstrates" the uncontroversial nature of the information conveyed. *Id.*

In granting summary judgment, the district court excluded Professor Kleck's report, reasoning that his conclusions were not relevant. As the court explained, the report was premised on the assumption that the pamphlet asserts a causal connection between guns and suicide. But the pamphlet merely "identifies access to firearms and other lethal means as a 'risk factor,' and nothing more." Pet. App. 54a. The district

court thus reasoned that the expert report "is not 'sufficiently tied to the facts of the case such that it will aid the jury in resolving a factual dispute.'" Pet. App. 56a (quoting *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993)) (alteration omitted).

The Fourth Circuit affirmed in a unanimous opinion authored by Judge Niemeyer. The panel explained that "it is facially apparent that the required disclosures are a safety advisory linked to the sales of guns and ammunition, which are commercial transactions," and that the Ordinance is therefore subject to the First Amendment scrutiny applicable to commercial disclosure requirements. Pet. App. 16a-18a. Applying *Zauderer*, the panel concluded that the pamphlet was factual and uncontroversial. The suicide-prevention pamphlet "taken as a whole, addresses suicide as a public health and safety concern and advises gun owners on how they can help." Pet. App. 14a (citation omitted). While the pamphlet "points out that 'access' to firearms is a 'risk factor,'" the pamphlet does not suggest that consumers "should not purchase a firearm," nor does it suggest "that firearms should not be purchased because doing so *causes* suicide." *Id.* "Rather, the pamphlet is more in line with other similar safety warnings—widely applicable and accepted—that gun owners should store guns safely, especially to prevent misuse and child access." *Id.*

The panel accordingly rejected Petitioners' reliance on *NIFLA*. As Judge Niemeyer explained, "*NIFLA* confirms that *Zauderer* is the appropriate lens through which we are to analyze the compelled speech in these circumstances," because the *NIFLA* Court did "not question the legality of * * * purely factual and

uncontroversial disclosures about commercial products." Pet. App. 21a (quoting *NIFLA*, 585 U.S. at 775).

After concluding that *Zauderer* review applies, the panel had "no trouble concluding that the mandated literature satisfies" the requirements of *Zauderer* given the County's "elemental" "interest in the health and safety of its citizens." Pet. App. 21a-22a. The panel explained that "the pamphlet and flyer * * * were prepared and provided by the County at no cost to the gun dealers" and "do not commandeer or overwhelm any message that the gun dealers would wish to make to gun purchasers." Pet. App. 23a. "Complying is as simple as having the literature at the checkout counter and including it in the bag with the purchased goods." *Id.* Judge Niemeyer ended his opinion with the following observation:

> We conclude that the pamphlet is simply, and no more, a public health and safety advisory that does not discourage the purchase or ownership of guns. And we are confident that gun purchasers in Anne Arundel County will recognize it as such. While such an advisory surely does not discourage gun ownership or undermine Second Amendment rights, it does encourage generous responses to a serious public health issue, and gun dealers might well find it admirable to join the effort.

Pet. App. 25a. Petitioners sought rehearing en banc, which the Fourth Circuit denied without any judge calling for a response or requesting a vote on the petition.

REASONS FOR DENYING THE PETITION

The panel's unanimous decision is correct and does not conflict with the decision of any other court of appeals. No judge on the Fourth Circuit deemed Petitioners' request for rehearing en banc even to warrant a response. While Petitioners ask this Court to address four questions generally pertaining to the scope of this Court's precedent addressing commercial disclosure laws, the Fourth Circuit's proper resolution of these questions does not warrant review. This case is a particularly bad vehicle for addressing the questions presented because Petitioners made concessions below that conflict irreconcilably with their arguments in this Court. The Court should deny the petition.

I. THE PANEL'S DECISION IS CORRECT.

The Ordinance mandates a health and safety disclosure about commercial products of the kind this Court has repeatedly endorsed. As the Fourth Circuit concluded, because the Ordinance imposes a disclosure requirement in the context of commercial transactions, it is subject to review under *Zauderer*. And the Ordinance easily satisfies *Zauderer* because it requires disclosure of factual and uncontroversial information with respect to the exceptionally weighty governmental interest of preventing gun suicides and violence, is reasonably tailored, and is not burdensome.

A. The Ordinance Imposes A Commercial Disclosure Requirement And Is Therefore Subject To Review Under *Zauderer*.

The First Amendment as originally understood did not protect commercial speech. *See Va. State Bd. of Pharm.* v. *Va. Citizens Consumer Council, Inc.*, 425

U.S. 748, 758 (1976). Commercial speech is now understood to be constitutionally protected, with the recognition that the First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980). This Court has emphasized commercial speech's "subordinate position in the scale of First Amendment values" and the government's "ample scope of regulatory authority" in the commercial speech realm. *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 477 (1989) (quotation marks omitted).

This Court evaluates regulations that impose *prohibitions* on commercial speech differently than regulations that impose commercial *disclosure* requirements. There are "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer*, 471 U.S. at 650. The "extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Id*. at 651. For that reason, commercial "disclosure requirements trench much more narrowly" on First Amendment interests "than do flat prohibitions on speech." *Id*. Laws that prohibit commercial speech are subject to scrutiny under this Court's decision in *Central Hudson*, 447 U.S. at 563, while laws that impose commercial disclosure requirements are subject to review under the standard set forth in *Zauderer*.

Because the Ordinance undisputedly imposes a disclosure requirement, whether *Zauderer* applies turns as a threshold matter on whether the Ordinance mandates the disclosure of commercial speech. As the

Fourth Circuit concluded, "it is facially apparent that the required disclosures are a safety advisory linked to the sales of guns and ammunition, which are commercial transactions." Pet. App. 16a-17a. The Ordinance requires sellers to display pamphlets "*at the point of sale*." Pet. App. 83a (emphasis added and capitalization altered). And the Ordinance requires sellers to distribute the pamphlets to "*purchasers* of guns or ammunition." *Id.* (emphasis added and capitalization altered). The Ordinance thus regulates retailers who "propose a commercial transaction," the hallmark of commercial speech. *Fox*, 492 U.S. at 473 (quotation marks omitted). And the speech at issue is "related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. As the panel explained, "speech connected with the sale of a good or a service—promoting the product or service, explaining it, or giving warnings about it—is commercial." Pet. App. 17a.

Petitioners falsely claim (at 18, 27) that the panel "expressly declined to apply the definition" of commercial speech "established by *Central Hudson*." But, as Petitioners concede (at 18), *Central Hudson* "holds that commercial speech means an 'expression related solely to the economic interests of the speaker and its audience.'" The panel applied this definition word-for-word. *See* Pet. App. 17a. The panel then concluded that "the mandated disclosure in this case falls squarely in the scope of what is understood to be commercial speech" under *Central Hudson* because "retailers in Anne Arundel County are required to provide the specified literature in connection with" commercial transactions. Pet. App. 18a.

Petitioners claim (at 13-15) that the decision below violates this Court's decisions applying strict scrutiny to laws that compel speech. But none of Petitioners' cited cases involved commercial disclosure requirements. For example, *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), invalidated "a noncommercial speech restriction." *Id.* at 579. This Court in *Janus* v. *American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018), similarly made clear that the speech at issue "is not commercial speech." *Id.* at 894 (quotation marks omitted); *see also Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (speech at issue lacked "commercial character"). Petitioners rely on *Brown* v. *Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), but that case involved an outright ban on the sale of certain protected expression (violent video games) to minors. *Id.* at 789-790. And *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023), invalidated a law that forced a plaintiff to create art expressing a message she disagreed with. *Id.* at 588. None of these cases involved commercial disclosure requirements, and none calls into question precedent holding that "*Zauderer* generally applies to the mandatory disclosure of commercial speech." *Recht* v. *Morrisey*, 32 F.4th 398, 416 (4th Cir. 2022) (Wilkinson, J.).

Petitioners claim that the decision below conflicts with this Court's decision in *NIFLA*, which they maintain (at 13-17) limited *Zauderer* to disclosures of purely factual and uncontroversial information "*about the terms under which * * * services will be available*." But this Court in *NIFLA* reaffirmed the lawfulness of "health and safety warnings long considered permissible" as well as "purely factual and uncontroversial

disclosures *about commercial products*." 585 U.S. at 775 (emphasis added). *NIFLA* therefore accepted that laws requiring health and safety disclosures "about commercial products" involve commercial speech, and did "not question" precedent upholding such laws if they satisfy *Zauderer*—that is, if they are "purely factual and uncontroversial," reasonably tailored, and not unduly burdensome. *Id.* For that reason, as Judge Niemeyer explained, "*NIFLA* confirms that *Zauderer* is the appropriate lens through which we are to analyze the compelled speech in these circumstances." Pet. App. 21a.

The Ordinance bears no resemblance to the law invalidated in *NIFLA*. That law regulated "crisis pregnancy centers" that offered certain "free" services for pregnant women, requiring clinics to inform patients that the state provided free or low-cost access to abortion. 585 U.S. at 760-761. The Court held that the law did not regulate commercial speech and that *Zauderer* did not apply because the disclosure "in no way relates to the services that licensed clinics provide" and instead "requires these clinics to disclose information about *state*-sponsored services." *Id.* at 768-769.

Unlike the law in *NIFLA*, the Ordinance regulates stores that "sell" commercial products rather than providing free services, Pet. App. 83a (capitalization altered), and the Ordinance requires disclosure about safe use and storage of the very products being sold. The Court in *NIFLA* had every reason to focus on the terms under which services would be available, because the case involved a service provider. But nothing about *NIFLA*'s reference to terms of service limits

the commercial-speech doctrine to businesses that offer services rather than selling products, as *NIFLA* itself made clear in holding that disclosures "about commercial products" remain subject to *Zauderer*. *NIFLA*, 585 U.S. at 775.

Petitioners claim that *Zauderer* does not apply because the disclosures required by the Ordinance are unrelated to the transactions at issue. According to Petitioners (at 17), the pamphlets convey information that "'relates to the services' provided by *third parties*." But the pamphlets relate to the safe use and storage of guns and ammunition—the very products Petitioners sell. They convey information that is directly connected to the subject of the commercial transactions the Ordinance regulates, and the Ordinance is therefore no different than other laws mandating safety warnings about consumer products that can be dangerous if misused.

B. The Ordinance Satisfies *Zauderer*.

In the context of commercial disclosures, the government may compel "purely factual and uncontroversial information" if the disclosure advances a sufficiently weighty state interest, is reasonably tailored, and is not "unduly burdensome." *Zauderer*, 471 U.S. at 651. The Ordinance easily satisfies this standard.

Governmental Interest: The Ordinance advances the County's paramount interest in protecting public health and safety. Gun violence is a leading cause of death in both the nation and in the County. Most deaths involving firearms—nationally and in the County—are suicides. And firearms are by far the most common means of suicide both nationally and in the County. The Ordinance, as implemented through

the literature, seeks to combat the "public health crisis" in the County by equipping firearm purchasers with information to foster safe firearm use and storage. Pet. App. 7a. Promoting "public health" and "safety" is a "substantial" government interest. *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 625 (1995) (quotation marks omitted). The County "has an interest in the health and safety of its citizens and, in particular, an 'interest in preventing suicide, and in studying, identifying, and treating its causes.'" Pet. App. 21a-22a (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 730 (1997)).

Petitioners do not dispute the importance of reducing gun suicide and other gun violence. But they argue that this interest cannot satisfy *Zauderer*, which they claim (at 13-14) permits disclosures only to "prevent the commercial entity from misleading or deceiving the public through speech otherwise voluntarily undertaken by the speaker." While correcting deceptive advertising was the interest at issue in *Zauderer*, this Court has never suggested that it is the only interest that can justify commercial disclosure requirements. To the contrary, *NIFLA* did not question "health and safety warnings"—including warnings "about commercial products"—that promote public health but do not involve advertising or speech voluntarily undertaken by the speaker. 585 U.S. at 775.

In *Zauderer*, "it was natural for the Court to express the rule" in terms of consumer deception given that this was the interest at issue in that case, but *Zauderer*'s justification "sweeps far more broadly." *Am. Meat Inst.*, 760 F.3d at 22. Other courts of appeals therefore "unanimously have broadened the scope of the State's interest to other governmental interests,"

including health and safety. Pet. App. 15a; *see also CTIA - The Wireless Ass'n* v. *City of Berkeley*, 928 F.3d 832, 843 (9th Cir. 2019) (circuits "have unanimously concluded" that *Zauderer* applies "even * * * where the disclosure does not protect against deceptive speech"); *Am. Meat Inst.*, 760 F.3d at 24; *id.* at 31 (Kavanaugh, J. concurring in the judgment) ("traditional" governmental "health[] or safety interest" can support application of *Zauderer*). Petitioners' argument that compelled disclosures are permissible only in connection with "speech otherwise voluntarily undertaken by the speaker" would call into question commercial disclosures "that are common and familiar to American consumers, such as nutrition labels and health warnings." *Am. Meat Inst.*, 760 F.3d at 31 (Kavanaugh, J., concurring in the judgment).

Factual and Uncontroversial: Petitioners do not dispute the accuracy of the conflict-resolution insert, and they have no objection to the overwhelming majority of the suicide-prevention pamphlet. Instead, Petitioners focus on one phrase on one page of the suicide-prevention pamphlet describing access to "lethal means," including "drugs and firearms," as a "risk factor" for suicide.

Describing access to firearms and other lethal means as a suicide risk factor is factually accurate and uncontroversial. Every major public health authority agrees that access to firearms is a risk factor for suicide. NIH describes the "[p]resence of guns or other firearms in the home" as one of the "main risk factors for suicide." JA915. The CDC recommends "reducing access to lethal means for persons at risk of suicide" and encourages "education and counseling around storing firearms locked in a secure place." JA875. The

VA does the same. Underlying these pronouncements is a massive body of public-health literature confirming "that access to and familiarity with firearms serves as a robust risk factor for suicide." JA1166.

Petitioners proceed from the premise (at 5) that the pamphlet "unambiguously" claims that guns "cause" suicide, which they dispute based on their expert's opinion that access to guns has not been conclusively proven to cause suicide. But, as Judge Niemeyer explained, the "pamphlet does not suggest that firearms *cause* suicide; indeed, as to the cause, the pamphlet identifies other causes such as mental conditions, but not firearms." Pet. App. 20a. The pamphlet "does state that *access* to guns increases the *risk* of suicide," but this is factual and uncontroversial. Pet. App. 20a-21a. "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." Pet. App. 21a; *see also Planned Parenthood Minn., N. Dakota, S. Dakota* v. *Rounds*, 686 F.3d 889, 892-896 (8th Cir. 2012) (en banc) (rejecting a similar challenge to statute requiring physicians to inform patients about "risk factors" associated with abortion). And Petitioners' expert *conceded* that if the pamphlet referred to correlation rather than causation, it is accurate. *See* Pet. App. 98a-99a; JA245.

The best evidence that the pamphlet is uncontroversial is that it was coauthored by NSSF—*the gun industry's trade association*. Unlike the law in *NIFLA*, which forced clinics to take sides in a political debate by effectively voicing support for abortion, the pamphlet here does not convey an anti-gun message, discourage the purchase of firearms, or take sides in the

American debate about gun control. And while various states have filed an amicus brief urging the Court to "clarify" *Zauderer*'s "uncontroversial" requirement, *see* W. Va. et al. Amicus Br. at 4, the States' brief conspicuously stops short of arguing that the Ordinance violates the First Amendment, making this a poor vehicle for any such clarification.

Petitioners' argument that the disclosure is controversial boils down to the claim (at 10) that they object to the disclosure and would prefer "to remain silent." But "any time there is litigation over a disclosure requirement, there is, by definition, a case or controversy concerning that requirement." *Recht*, 32 F.4th at 418 (quotation marks omitted). *Zauderer* asks not whether a regulated party objects to a disclosure, but instead "whether the *content* of a required disclosure is controversial." *Id.* And while Petitioners cite their own misinterpretation of the pamphlet as a basis to argue that it is controversial, this Court has rejected a similar gambit. *See Meese* v. *Keene*, 481 U.S. 465, 478-480 (1987) (rejecting First Amendment theory that depended on a "potential misunderstanding" of a statutory term).

Not Unjustified or Unduly Burdensome: The Ordinance is reasonably tailored to advance the County's health and safety interest. Judge Niemeyer noted that Petitioners failed to "mount a serious challenge with respect to these requirements," and he had "no trouble concluding that the mandated literature satisfies them." Pet. App. 21a.

The mandated disclosure is "reasonably related" to the County's interest in suicide prevention. Pet. App. 22a. "The pamphlet explains the suicide crisis and the role that firearms play in it, suggesting at bottom that

gun purchasers can assist in preventing suicide by (1) recognizing warning signs, (2) referring those suffering to helpful resources, and (3) safely storing their guns to remove the principal means." *Id.* This message "is in direct support of the County's interests." *Id.*

Petitioners claim (at 16-17) that the Ordinance is "underinclusive" because "[s]uicide prevention is a concern shared by society, not just by gun owners." Petitioners thus argue that the County must take action regarding every method of suicide if it seeks to prevent gun suicides. But this Court rejected the same argument in *Zauderer*, stating: "we are unpersuaded" by the argument that a disclosure is impermissible "if it is 'under-inclusive'" and "does not get at all facets of the problem it is designed to ameliorate." 471 U.S. at 651 n.14. Petitioners' argument is especially untenable here, as guns are, by far, the most common means of suicide both nationally and in the County. The County can hardly be faulted for prioritizing its limited public-health resources by addressing the most common and most lethal means of suicide first.

Petitioners cite (at 17) *Brown* for the proposition that "underinclusivity" raises First Amendment concerns. But *Brown* involved an outright ban on sales to minors—not merely "warnings on the sales of video games" as Petitioners erroneously claim (at 15). The law in *Brown* was therefore subject to "strict scrutiny" rather than *Zauderer* review, and this Court in *Brown* contrasted these circumstances to an "*intermediate scrutiny*" case where the legislature was entitled to make "predictive judgment[s]" based on public-health research. 564 U.S. at 789, 799.

Nor is the Ordinance unduly burdensome. As Judge Niemeyer explained, there "is no threat that the pamphlet and the flyer will 'drown out the gun dealers' own message.'" Pet. App. 23a (alterations omitted) (quoting *NIFLA*, 585 U.S. at 778). The "pamphlet and flyer do not commandeer or overwhelm any message that the gun dealers would wish to make to gun purchasers." *Id.* The materials "were prepared and provided by the County at no cost to the gun dealers," and "[c]omplying is as simple as having the literature at the checkout counter and including it in the bag with the purchased goods," which "need only take seconds." *Id.*

C. Exclusion Of The Expert Report Was Appropriate And Does Not Warrant This Court's Review.

Petitioners claim the district court abused its discretion by excluding the report of their proffered expert, Dr. Kleck. The Fourth Circuit correctly rejected that argument, explaining that "Dr. Kleck's opinion that the pamphlet was not factual and therefore was controversial was predicated on his reading of the pamphlet as asserting that firearms cause suicide." Pet. App. 24a. "Because we conclude that the pamphlet does not make that claim, we also conclude that the district court did not abuse its discretion in excluding Dr. Kleck's report." *Id.* While Petitioners claim (at 31) that the district court excluded "otherwise admissible expert evidence just because it disagreed with the expert's opinion," the district court in fact merely concluded that the report is not "sufficiently tied to the facts of the case such that it will aid the jury in resolving a factual dispute." Pet. App. 56a (alterations omitted) (quoting *Daubert*, 509 U.S. at 591).

In any event, this question plainly does not warrant this Court's review. Petitioners do not allege that the circuits are split on the application of *Daubert* in this context, and the fact-bound application of *Daubert*'s gatekeeping requirement to the expert report in this case, under an abuse-of-discretion standard, does not warrant certiorari.

II. PETITIONERS ARE WRONG THAT THE CIRCUITS ARE SPLIT.

Petitioners claim that the circuits are split in three respects over how to apply *Zauderer*. The cases Petitioners cite in support of these supposed splits, as well as other cases Petitioners fail to mention, refute Petitioners' claims.

A. There Is No Split On Whether *Zauderer* Is Limited To Terms Of Service.

Petitioners claim (at 24) that the D.C. Circuit and Eleventh Circuit split from the Fourth, Fifth, and Ninth Circuits over whether *Zauderer* applies exclusively to disclosures about "terms of service." This asserted split is refuted by the very cases Petitioners cite to support it.

Petitioners cite *American Hospital Ass'n* v. *Azar*, 983 F.3d 528 (D.C. Cir. 2020), in which the D.C. Circuit rejected a First Amendment challenge to a regulation requiring the disclosure of certain charges by hospitals. *Id.* at 540. While *Azar* dealt with a regulation compelling speech relating to terms of service, nothing in the opinion limits *Zauderer* to that context. To the contrary, *Azar* reaffirmed that *Zauderer* applies where "the government uses a disclosure mandate to achieve a goal of informing consumers *about a*

particular product trait." *Id.* at 540-541 (emphasis added) (quotation marks omitted).

The D.C. Circuit's decision in *American Meat Institute* squarely refutes Petitioners' characterization of D.C. Circuit law. There, the en banc D.C. Circuit rejected a First Amendment challenge to a rule requiring meat producers to disclose country-of-origin information about meat *products*. Even though the case had nothing to do with terms of service, the court concluded that *Zauderer* applied where the government sought to "inform[] consumers about *a particular product trait*." 760 F.3d at 26 (emphasis added); *see also id.* at 32 (Kavanaugh, J., concurring in the judgment) (*Zauderer* applies to disclosure requirements regarding "products").

Petitioners' characterization of Eleventh Circuit law is just as untenable. Petitioners cite (at 26) *NetChoice, LLC* v. *Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022), *vacated and remanded sub nom. Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383 (2024), for the proposition that the Eleventh Circuit applies *Zauderer* exclusively to disclosures about terms of service. But the Eleventh Circuit in *NetChoice* reaffirmed that "[l]aws that compel commercial disclosures and thereby indirectly burden protected speech trigger" *Zauderer* review, without distinguishing disclosures about terms of service from disclosures about commercial products. 34 F.4th at 1223. And this Court vacated the Eleventh Circuit's decision in *NetChoice*, leaving no Eleventh Circuit precedent addressing the scope of *Zauderer*.

Because the D.C. and Eleventh Circuits do not limit *Zauderer* to disclosures about terms of service, these courts are in accord with the Fourth, Fifth, and Ninth

Circuits, which, as Petitioners concede (at 26), hold that "compelled speech need not be about the *terms* on which services are available." While Petitioners rely on an opinion by Judge Ikuta dissenting in part in *American Beverage Ass'n* v. *City & County of San Francisco*, 916 F.3d 749, 762 (9th Cir. 2019) (Ikuta, J., dissenting in part), the en banc Ninth Circuit rejected Judge Ikuta's view and held that *Zauderer* applies to "compelled disclosure accompanying a *related product* or service," *id.* at 756 (majority op.) (emphasis added).

B. There Is No Split On The Meaning Of Commercial Speech.

Petitioners erroneously argue that the Fifth Circuit splits from the decision below over how to define "commercial speech."

Petitioners cite (at 27) *Book People, Inc.* v. *Wong*, 91 F.4th 318, 339 (5th Cir. 2024), but that case contains no holding about the meaning of commercial speech. *Book People* involved a challenge to a Texas statute requiring book vendors doing business with Texas public schools "to issue sexual-content ratings for all library materials they have ever sold." *Id.* at 324. The Fifth Circuit merely "assum[ed] the ratings are commercial speech," without resolving the question. *Id.* at 339. The court then refused to apply *Zauderer* because the "myriad of factors" that inform the state's judgment about how to rate particular books "is anything but the mere disclosure of factual information." *Id.* at 340. Nothing about that decision conflicts with the decision below over the meaning of commercial speech or in any other respect. Indeed, *Book People* defined commercial speech as "expression related solely to the economic interests of the speaker and its audience," *id.* at 339 (quotation marks and alterations

omitted), which matches exactly Judge Niemeyer's articulation of the relevant standard. *See* Pet. App. 17a.

Petitioners cite (at 27) *Free Speech Coalition, Inc*. v. *Paxton*, 95 F.4th 263 (5th Cir. 2024), but that case likewise underscores the absence of a split. *Free Speech Coalition* involved a challenge to a Texas law mandating age verification and certain health warnings on landing pages and advertisements of pornographic websites. *Id.* at 266. Consistent with the decision below, the Fifth Circuit held that the statute governed "commercial speech"—both as to paid and free websites. Warnings on paid websites involved commercial speech because the websites "are proposing 'no more than' a commercial transaction." *Id.* at 280. And free websites also involve commercial speech because they "offer pornography in exchange for data; then, they monetize that data, primarily through advertisements." *Id.* at 280-281. Nothing about either conclusion conflicts with the standard for commercial speech Judge Niemeyer applied.[4]

The absence of a split is confirmed by the Fifth Circuit's recent decision in *R J Reynolds Tobacco Co.* v. *Food & Drug Administration*, 96 F.4th 863 (5th Cir. 2024), which involved a First Amendment challenge to an FDA rule implementing a law requiring cigarette packages to include certain warnings on cigarette labels. *Id.* at 867. Writing for the Fifth Circuit, Judge Smith easily concluded that the warnings fell within the "commercial speech exception[] of *Zauderer*" given that the warnings accompanied the sale

[4] This Court has granted review in *Free Speech Coalition* to address a distinct question about burdening adults' access to sexually explicit material. *See Free Speech Coal., Inc.* v. *Paxton*, No. 23-1122 (U.S.).

of a commercial product. *Id.* at 876. If Petitioners were correct (at 28) that commercial speech does not encompass warnings where a commercial entity "merely desires to remain silent," *R J Reynolds* would have been decided the other way.

C. There Is No Split On The Test For "Purely Factual and Uncontroversial Information."

Petitioners likewise err in arguing (at 28) that the Ninth and D.C. Circuits split from the decision below over the test for "purely factual and uncontroversial information." Neither court of appeals has applied a different legal test than the panel below, nor has either come to a different conclusion regarding a disclosure remotely similar to the one here.

The Ninth Circuit's decision in *National Association of Wheat Growers* v. *Bonta*, 85 F.4th 1263 (9th Cir. 2023), is a straightforward application of the same standard the panel below applied. *Wheat Growers* invalidated an implementation of California's Proposition 65 requiring product warnings stating that "[glyphosate] is *known* to the state to cause cancer." *Id.* at 1268 (emphasis added) (quotation marks omitted). The court noted the disagreement between scientists over whether glyphosate is a carcinogen, and explained that "a robust disagreement by reputable scientific sources," or the presence of a "scientific debate" supports a conclusion that a warning is controversial. *Id.* at 1268-69, 1277-78 (quotation marks omitted). That holding is entirely consistent with the decision below, given the overwhelming scientific consensus that access to firearms is a risk factor for suicide.

The D.C. Circuit's decision in *National Association of Manufacturers* v. *SEC*, 800 F.3d 518 (D.C. Cir.

2015) ("*NAM*"), likewise applied the same standard the Fourth Circuit applied below. In *NAM*, the D.C. Circuit declined to define "purely factual and uncontroversial" information, instead concluding that the SEC could not force mineral issuers to describe their products as not "DRC conflict free." The court explained that whether a product is conflict free was "hardly factual" given that "[p]roducts and minerals do not fight conflicts." *Id.* at 530 (quotation marks omitted). And the law further "require[d] an issuer to tell consumers that its products are ethically tainted," while the literature here--coauthored by the gun industry—does no such thing. Nothing about the D.C. Circuit's application of *Zauderer* to a warning about conflict minerals splits from the decision below.

Petitioners' claimed split merely recasts their merits arguments about whether the pamphlet in fact conveys factual and uncontroversial information. And while amici claim that *Zauderer*'s "uncontroversial" requirement has "been a fertile source of circuit splits," W. Va. et al. Amicus Br. at 6, they do not claim that the decision below actually contributes to any such split.

III. THIS PETITION IS A BAD VEHICLE.

Petitioners' litigation concessions make this an especially poor vehicle for addressing the questions presented.

Petitioners ask this Court (at 10, 13-14, 24) to hold that *Zauderer* is limited to disclosures "about the terms under which * * * services will be available." Petitioners also assert (at 13-14) that *Zauderer* is limited to preventing commercial entities "from misleading or deceiving the public through speech otherwise voluntarily undertaken by the speaker."

Petitioners below, however, conceded that "safety warnings" for products "being advertised or sold" are permissible. Petrs.' Fourth Circuit Br. 30. The Ordinance provides for a safety warning about a product being sold, making it precisely the sort of disclosure that Petitioners below conceded was permissible. Petitioners nowhere reconcile their view that *Zauderer* is limited to terms of service with their concession below that safety warnings in connection with products being sold comply with the First Amendment.

Petitioners below also conceded the lawfulness of firearm disclosure requirements that they cannot distinguish from the Ordinance. Federal law has for nearly two decades required federally licensed dealers to display and distribute to handgun buyers a "written notification" warning about certain risks associated with handguns. 27 C.F.R. § 478.103. In response to questioning at oral argument, Petitioners' counsel conceded that this disclosure requirement was permissible, noting "we haven't challenged that, and we won't challenge that," and it is "absolutely" lawful. Fourth Circuit Oral Arg. at 33:30-33:38. Petitioners now claim (at 19) that this federal law "merely require[s] the distribution or posting of a statute, such as legal restrictions on the sales of firearms to minors." But that is false. While the law mandates a disclosure of the terms of federal law, the law *additionally* requires handgun sellers to disclose that "[t]he misuse of handguns is a leading contributor to juvenile violence and fatalities," and that "[s]afely storing and securing firearms away from children will help prevent the unlawful possession of handguns by juveniles, stop accidents, and save lives." 27 C.F.R. § 478.103(b)(1)-(2).

Virtually all of Petitioners' objections to the Ordinance would apply equally to this federal disclosure requirement. Like the Ordinance, this federal requirement does not pertain to terms of service, does not correct for deceptive advertising, does not involve speech "voluntarily undertaken" by gun stores, and involves the very same subject matter—guns—that Petitioners claim is inherently controversial. Were this Court to grant review, Petitioners would be held to their concession below that the federal disclosure requirement is permissible. *See N. Ins. Co. of New York* v. *Chatham County*, 547 U.S. 189, 195 (2006) (party's concession below was "dispositive"). But that concession would make it difficult, if not impossible, for this Court to accept Petitioners' First Amendment theories as applied to the Ordinance.

Petitioners, moreover, have failed to offer a viable theory that would distinguish the Ordinance from other disclosure requirements whose constitutionality has long been settled. Federal law alone imposes innumerable disclosure requirements to ensure consumer health or safety, and these requirements are especially common in warning consumers that a product could be dangerous if misused. To take just a few examples, Congress (or federal agencies exercising delegated authority) require warnings regarding batteries, 15 U.S.C. § 2056e(a)(2); alcoholic beverages, 27 U.S.C. § 215; household substances hazardous to children, 15 U.S.C. § 1472; prescription drugs, 21 C.F.R. § 201.100(d); children's toys, 16 C.F.R. § 1500.19(b); pesticides, 40 C.F.R. pt. 156; sunlamps, 21 C.F.R. § 1040.20(d)(1); and many others. States impose myriad similar requirements. *See, e.g.*, Va. Code Ann. § 18.2-320 (dry cleaning bags);

N.C. Gen. Stat. § 143-443(a)(3) (pesticides); S.C. Code Ann. § 23-39-20 (hazardous substances); 12 Va. Admin. Code § 421-930 (raw or undercooked foods). These requirements would suddenly be in doubt under Petitioners' theory that strict scrutiny applies unless a mandated disclosure relates to terms of service or that commercial entities have a categorical "right to remain silent" with respect to the potential dangers of the products they sell. The dramatic implications of Petitioners' First Amendment theory provide yet another reason to deny review.[5]

[5] Petitioners ask this Court to hold the petition pending *NetChoice*, but the Court's decision in *NetChoice*, which vacated and remanded the Fifth and Eleventh Circuit decisions because "neither Court of Appeals properly considered the facial nature of NetChoice's challenge," *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2394 (2024), has no bearing on the Court's consideration of this petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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