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,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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September 6, 2024

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CORPORATE DISCLOSURE STATEMENT

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

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I. *Zauderer* Does Not Apply

Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 768-69 (2018) ("*NIFLA*"), held that *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio,* 471 U.S. 626, 651 (1985), is limited to commercial speech that is "'purely factual and uncontroversial information about the terms under which . . . services will be available'" and "does not apply outside of these circumstances." An "essential feature[]" of *Zauderer* is that the "required disclosures" were "intended to combat the problem of inherently misleading commercial advertisements." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). It applies only where the regulated party is otherwise *voluntarily* engaging in *commercial* speech that might otherwise be deceptive. *United States v. United Foods*, 533 U.S. 405, 416 (2001).

Compelled speech about services or products offered by *third* parties cannot possibly address the "problem" of misleading speech of the regulated party, *especially* where that party wishes to remain silent on the subject matter on which speech is being compelled. *Zauderer* did "not apply" in *NIFLA* because the notice there at issue "no way relates to the *services* that licensed clinics provide" but "[i]nstead it requires these clinics to disclose information about *state*-sponsored services." 585 U.S. at 768-69 (emphasis the Court's). Here, both the suicide pamphlet and the conflict resolution pamphlet require the dealers "disclose information" about *county*-sponsored services as well as services provided by *third* parties. Pet.App.92,93. The dealers do not provide suicide prevention or conflict resolution services or voluntarily engage in speech about such services. Here, as in

NIFLA, the rationale of *Zauderer* is completely absent. The County does not dispute it.

The County argues that *NIFLA* is inapplicable because the clinics there were not selling commercial products. *Id*. That point is irrelevant because the commercial context for compelled speech does not "make[] a difference." *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023). Both *303 Creative* and *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), involved compelled speech in a commercial context and neither even cited *Zauderer*. "A speaker's right to 'decide what not to say' is 'enjoyed by business corporations generally.'" *Moody v. NetChoice, LLC*, 144 S.Ct. 2383, 2410 (2024), quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995). "The government may not, in supposed pursuit of better expressive balance, alter a private speaker's own editorial choices about the mix of speech it wants to convey." *NetChoice*, 144 S.Ct. at 2403.

The County argues that *303 Creative* involved "a law that forced a plaintiff to create art expressing a message she disagreed with." BIO 16. The dealers likewise disagree with the County's message. The compelled speech at issue in *303 Creative* and the compelled dissemination of the County's pamphlets at issue here both involve the same "inherently expressive choice 'to exclude a message [they] did not like from' their speech compilation." *NetChoice*, 144 S.Ct. 2410, quoting *Hurley*, 515 U.S. at 574. The web designer at least had the option of not creating *wedding* websites and could thus avoid communicating the State-mandated message. The dealers here have no such choice.

The County also argues that *303 Creative* and *Brown* did not "involve[] commercial disclosure requirements." BIO 16. But *303 Creative* involved compelled speech in the commercial production of professional websites, a fact the Court rejected as irrelevant. 600 U.S. at 594. *Brown* involved labeling requirements on the sale of commercial products, violent video games. 564 U.S. at 789. The Court applied strict scrutiny because the law "imposes a restriction on the content of protected speech," not because it banned sales to minors. 564 U.S. at 799. The Court ruled that "predictive judgments," touted by the County (BIO 23), are permissible only as "to content-neutral regulation." 564 U.S. at 799. The County's pamphlets are not "content-neutral."

The County relies on this Court's observation in *NIFLA* that the Court does "not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." BIO 16-17, quoting *NIFLA*, 585 U.S. at 775. But "health and safety warnings" or "product disclosures" are no more presented in this case than they were in *NIFLA*. The County does not dispute that the Ordinance is just one "feature" of an "extensive gun-violence-prevention campaign" that intentionally expropriates the "trust" and goodwill that dealers have with their customers. Pet.15-16. "Misattribution" is not merely a "risk," it is an integral part of the County's "campaign." See *NetChoice*, 144 S.Ct. at 2432 & n.18; *Hurley*, 515 U.S. at 574. The campaign is not the type of "warnings" or "disclosures" referenced in *NIFLA*. To hold otherwise would overrule the limits on *Zauderer* identified in *NIFLA*.

The County's "campaign" is intended to "promot[e] an approved message" and that is impermissible no matter how "enlightened" the compelled speech "may strike the government." *Hurley*, 515 U.S. at 579. See *NIFLA*, 585 U.S. at 768-69 (incorporating *Hurley*'s rejection of *Zauderer*); *NetChoice*, 144 S.Ct. at 2431 ("If a compilation is inherently expressive, then the compiler may have the right to refuse to accommodate a particular speaker or message"), citing *Hurley*, 515 U.S. at 573. "[T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. See *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790-91 (1988) ("the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.").

II. Suicide Prevention and Conflict Resolution Is Not Commercial Speech

The County's opposition hinges on its assertion that the Ordinance merely "imposes a commercial disclosure requirement and is therefore subject to review under *Zauderer*." BIO 13. The County argues that the Ordinance is commercial speech because it regulates "retailers" and requires display and distribution "at the point of sale" to "purchasers" and "thus regulates retailers who 'propose a commercial transaction'" and therefore relate solely "'to the economic interests of the speaker and its audience.'" *Id*. 15, quoting *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)

(emphasis added). That view eviscerates the First Amendment rights of businesses.

The commercial speech inquiry under *Central Hudson* is not controlled *by whom* the law regulates or by *where* the speech takes place, but rather by the *content* of the speech being regulated, a point stressed in the Petition (Pet.18-19) but ignored by the County. The First Amendment protects "expression." *NetChoice*, 144 S.Ct. at 2399-2400. *Central Hudson* thus held that "we must determine whether *the expression* is protected by the First Amendment." 447 U.S. at 566. (Emphasis added). Whether the "expression" is commercial is, in turn, controlled by whether the "*speech* does … 'no more than propose a commercial transaction'" or relates solely to the "economic motivation" of the speaker. *Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60, 66-67 (1983), quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). (Emphasis added). See *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 473-34 (1989); *City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 423 (1993).

Bolger is instructive. There, manufacturers and distributors of contraceptives challenged a federal statute banning the mailing of contraceptive advertisements. This Court held that "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial." 463 U.S. at 67. The Court further held that "the reference to a specific product does not by itself render the pamphlets commercial speech" and nor was it sufficient that the regulated party had "an economic motivation for mailing the pamphlets." *Id.* Rather the Court found that the pamphlets were

commercial speech only because of "[t]he combination of *all* these characteristics." *Id*. (Emphasis the Court's). None of that analysis would have been necessary if all that mattered was that the pamphlets were distributed by a commercial entity, the test adopted by the Fourth Circuit here. Pet.App.16a-17a.

The County's pamphlets are not "advertisements," do not "propose a commercial transaction," and are not limited to a "specific product." Neither the dealers nor their customers have any "economic motivation" or economic interest in the suicide prevention and conflict resolution "speech" contained in the pamphlets. See *X Corp. v. Bonta*, --- F.4th ----, 2024 WL 4033063 at *8 (9th Cir. Sept. 4, 2024) (applying *Bolger* and holding that commercial speech is limited to speech that "communicates the terms of an actual or potential transaction"); *NetChoice, LLC v. Bonta*, --- F.4th ----, 2024 WL 3838423 at *12 (9th Cir. Aug. 16, 2024) (applying the "*Bolger* factors"). The pamphlets are not commercial speech.

III. The Literature Is Not "Purely Factual And Uncontroversial"

The second "essential feature" of *Zauderer* is that the compelled speech must be "purely factual and uncontroversial" and the County's literature is neither. Pet.21-24. In response, the County concedes that the suicide pamphlet's factual assertions are supported only by a correlation but asserts that is enough. BIO 21. The County thus ignores *Brown*'s holding that correlation evidence is insufficient to justify content-based restrictions on speech. *Brown*, 564 U.S. at 800-01. See also *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 281-82 (5th Cir. 2024), *cert. granted*, No. 23-1122 --- S.Ct. ----, 2024 WL 3259690 (July 2, 2024). The Fourth Circuit's flawed "logical

syllogism" was the sole basis for its holding on this point, Pet. 21-22, as the County admits. BIO 21.

The County argues that Petitioners and their expert "misinterpret" the literature. BIO 22. Not so. The pamphlet *factually* asserts that persons with access to firearms "are More at Risk for Suicide than Others" (Pet.App.88a), and that statement goes far beyond any assertion of correlation. "Correlation" is not even mentioned in this literature. The pamphlets use correlation to imply causation and that is "junk science." JA0278-JA0279. See Pet.21-22. Such misleading speech can never be "purely factual." *National Ass'n of Wheat Growers v. Bonta,* 85 F.4th 1263, 1278 (9th Cir. 2023).

"Purely factual" and "uncontroversial" are distinctly different terms and cannot be collapsed into a single inquiry as the Fourth Circuit did here. Pet.App.20a; Amici Br.14. The test for "controversial" speech focuses on the *topic* of the speech, not whether individual statements in the literature are factually accurate. See *Wheat Growers*, 85 F.4th at 1277; *X Corp.*, 2024 WL 4033063 at *8. For example, the compelled notices in *NIFLA* failed under *Zauderer* not only because they pertained to third-party services but *also* because the notices concerned abortion which, the Court held, was "anything but an 'uncontroversial' *topic*." 585 U.S. at 769. (Emphasis added). There was no dispute that the "content" of the compelled notices in *NIFLA* was factually accurate but that did not matter. "Firearm safety and violence are white-hot political topics." Amici Br.16.

IV. The Circuits Are In Conflict

The County discounts the Eleventh Circuit's application of *Zauderer* in *NetChoice, LLC v. Attorney*

General, Florida, 34 F.4th 1196, 1227 (11th Cir. 2022), arguing the conflict with that decision disappeared when the case was vacated and remanded in *NetChoice*. BIO 26. But this Court *endorsed* the Eleventh Circuit's approach, 144 S.Ct. at 2399, while rejecting the Fifth Circuit's analysis. 144 S.Ct. at 2399-2404. See Pet. 24-26. Those holdings support Petitioners. Pet.25-26. The cases were remanded so that the lower courts could evaluate the "full range of activities" covered by the statutes, an issue not presented here. 144 S.Ct. at 2397-98.

The County acknowledges that *American Hospital Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020), focused on the *terms* of services, but argues that "nothing" in that decision limited *Zauderer* to terms of services. BIO 25. *Azar* held that a focus on the terms of services was "critical" to *Zauderer*. 983 F.3d at 540. A "critical" element is not a "nothing." The County cites *Azar*'s reference to a "particular product trait" (BIO 25-26) but that discussion concerned the *separate Zauderer* requirement that the compelled speech must be "'reasonably related' to the State's interest in preventing deception of consumers." *Azar,* at 540-41, quoting *Zauderer*, 471 U.S. at 650-51. The Fourth Circuit expressly rejected that limitation on *Zauderer*. Pet.App.15a. The Fourth Circuit's decision thus conflicts with *Azar* twice over.

Nothing in *American Meat Institute v. Dept. of Agriculture,* 760 F.3d 18 (D.C. Cir. 2014) (en banc), allows the government to compel speech about any "product trait," as the County asserts. BIO 26. See 760 F.3d at 31-32 (Kavanaugh J., concurring) ("it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information"). "Suicide prevention" and

"conflict resolution" are not "product traits" and the "national origin" product information at issue in *American Meat* is nothing like the County's "gun-violence-prevention campaign." Id. 760 F.3d at 30.[1]

Book People, Inc. v. Wong, 91 F.4th 318, 339 (5th Cir. 2024), holds that commercial speech is limited to "'[e]xpression related solely to the economic interests of the speaker and its audience.'" (Citation omitted). *Free Speech Coalition* ruled that the speech must "propose commercial transactions." 95 F.4th at 279-80. The County asserts (BIO 27-28) that "nothing" in these holdings conflicts with the Fourth Circuit's test. But the Fourth Court held that the "economic interests" inquiry "understands 'commercial' far too narrowly," ruling that "commercial" includes any "safety advisory" about a product sold commercially. Pet.App.16a-17a. That holding is irreconcilable with the test applied in *Book People* and *Free Speech Coalition*. It is also at odds with the Ninth Circuit's recent holdings in *X Corp*., 2024 WL 4033063 at *8-*9, and *NetChoice*, 2024 WL 3838423 at *12, both of which applied *Bolger* to reject compelled speech.

The County argues (BIO 29) that *Wheat Growers* is consistent with the Fourth Circuit's test for "uncontroversial" speech, but *Wheat Growers* looked to "*the topic* of the disclosure and *its effect on the speaker*" to determine "whether something is *subjectively* controversial." 85 F.4th at 1277. (Emphasis added). The Fourth Circuit never considered *any* of those factors. Pet. 21-22. As Amici suggest, the court's

[1] To the extent the majority opinion in *American Meat* divorced *Zauderer* from its deception-prevention rationale for "expressive content," that reasoning has been superseded by *NIFLA*. *Azar,* 983 F.3d at 541; Pet.25.

"paper thin" analysis on this point conflicts with the approaches followed by other circuits. Amici Br.14-16. Those conflicts are ignored by the County.

V. The Exclusion of Petitioners' Expert Cannot Stand

The exclusion of Petitioners' expert was not "fact-bound," as the County asserts. BIO 25. It was result-driven. See *Free Speech Coalition*, 95 F.4th 281-82 (a "good-faith scientific or evidentiary dispute" precludes application of *Zauderer*); *Wheat Growers*, 95 F.4th at 1281-82 (same). The district court's exclusion was not based on the expert's "principles and methodology." *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997), and *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 595 (1993). Pet.32. The court improperly assessed the weight or credibility of the expert's testimony. Pet.31-32; *Doucette v. Jacobs*, 106 F.4th 156, 169 (1st Cir. 2024); *Quiet Tech. DC–8, Inc. v. Hurel–Dubois UK Ltd.,* 326 F.3d 1333, 1345 (11th Cir. 2003).

VI. This Case Is An Excellent Vehicle

The Court has already plowed this ground in *NIFLA*, *303 Creative*, *Hurley*, *Milavetz*, *United Foods, Central Hudson, Bolger* and now *NetChoice*. Summary disposition is therefore appropriate. Pet.13; *Caetano v. Massachusetts*, 577 U.S. 411, 412 (2016). At a minimum, the Court should grant plenary review or, alternatively, GVR this case with instructions to reconsider the application of *Zauderer* in light of *NetChoice,* just as the Court did with respect to the *Zauderer* issues in *NetChoice*. 144 S.Ct. at 2399 n.3. This case is particularly important because of the Second Amendment concerns raised by the Ordinance. Pet.29-30, Amici Br.17-22.

The County faults Petitioners for supposedly failing to "reconcile" the legal issues posed by the compelled speech at issue here with the issues associated with disclosures required by a myriad of *other* regulatory schemes not before this Court. BIO 31. But cases are decided "one at a time." *United States v. Hillary*, 106 F.3d 1170, 1173 (4th Cir. 1997). This Court will have ample opportunity to address *Zauderer* issues raised by the County's "parade of horribles" should the occasion arise. See *Simmons v. Himmelreich*, 578 U.S. 621, 629 (2016).

Review is urgently needed because the type of compelled speech at issue here is rapidly becoming more and more Orwellian. The New York Legislature has just passed Senate Bill 6649, which will impose a $1,000 fine and 15 days of imprisonment for each day the firearms dealer fails to post or distribute to each customer dire warnings about firearms access. See https://bit.ly/4gbkDVs (last viewed Sept. 5, 2024). These requirements and punishments are in addition to any imposed by local jurisdictions, such as by Westchester County, New York. Westchester County Code of Ordinances, § 529.21.

The law enacted by Montgomery County, Maryland (Pet.30 n.2) provides that any failure by the dealer to display and distribute the County's speech is a "Class A" misdemeanor punishable, at the County's "discretion," either by a civil fine of $500 for a first offense or by a criminal fine of $1,000 and up to *six months* of imprisonment. Montgomery County Code, §§ 57-11A(d), 1-19. More State and local jurisdictions can be expected to follow suit. See, e.g, City of Boulder, Colorado Ordinances, § 5-8-40(b). As *NetChoice*, and the Ninth Circuit's decisions in *X Corp.* and *NetChoice v. Bonta* illustrate, compelled speech is fast becoming the norm in other areas as well. See Amici Br.1-2.

CONCLUSION

The petition for certiorari should be granted. The Court should summarily reverse, grant plenary review, or GVR this case for reconsideration in light of *NetChoice*.

Respectfully submitted,

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