IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, INC., *et al.*	*	
Plaintiffs,	*	
v.	*	Civil Action No.: 1:22-cv-00865-SAG
ANNE ARUNDEL COUNTY, MD	*	
Defendant.	*	

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REPLY MEMORANDUM IN SUPPORT OF
DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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In its opening brief, the County carefully explained why its public health disclosure mandate at retail firearm stores is subject to rational basis review, and detailed how the suicide prevention and conflict resolution literature at issue satisfies each element of this deferential standard. Plaintiffs take a scattershot approach in response, throwing out essentially every argument they can think of regardless of merit, to see if any will stick. Several of these arguments rely on cherry-picked language that distorts the applicable case law, like their insistence that *Zauderer* is confined to its particular "circumstances," Pls.' Opp'n 10-11, 17-18, 23, or that a disclosure about a product must also describe a seller's "terms of service" to pass constitutional muster, *id.* at 12. Others run directly counter to the record, like Plaintiffs' claim that they do not engage in commercial speech at their retail counters, *id.* at 11-12, or that the County's "Firearms and Suicide Prevention" pamphlet is neither a "warning," *id.* at 17-19, nor "relates to" firearms, *id.* at 10-12. Still others, like their attempt to recast gun stores as "ideologically sensitive and spiritually fraught" or their overheated rhetoric comparing public health advice to Maoist propaganda, *id.* at 14, cross into the absurd.

All of the arguments in Plaintiffs' haphazard briefing share a common theme: they are all wrong. The County's public health literature is backed by a mountain of empirical evidence, is measured and uncontroversial, and relates directly to the products Plaintiffs are selling. The appropriate standard for this mandatory disclosure of commercial speech is rational basis, and under this standard the County's public health literature easily passes constitutional muster. The Plaintiffs' motion for summary judgment should be denied, and the County's motion granted.

1. ***Zauderer* applies because Bill 108-21 is a mandatory disclosure provision affecting commercial speech.**

Plaintiffs do not seriously contest that the only conduct that Bill 108-21 covers is commercial, rather than religious, political, or otherwise expressive, and that it thus fits any

definition of commercial speech. *See* County Br. 12-15 (applying tests for commercial speech). In the Fourth Circuit, *Zauderer's* rational basis framework "generally applies" in these circumstances—that is, "to the mandatory disclosure of commercial speech." *Recht v. Morrisey*, 32 F.4th 398, 416 (4th Cir. 2022); County Br. 12.[1] Instead, Plaintiffs now argue that the commercial speech doctrine is somehow inapplicable because retail firearms stores must display the County's literature when customers are merely browsing before buying, regardless of whether they consummate a purchase. *See* Pls.' Opp'n 11. This argument contradicts Plaintiffs' position in their opening brief, where they argued that only speech about a "proposed sale" counts as commercial, and thus the doctrine does not encompass "distribut[ion of] the County's literature with each sale…*viz., after* the commercial transaction has been consummated." Pls.' Br. 16. But regardless of Plaintiffs' tactical reversal, the communicative conduct leading up to a sale, like communications when the money and goods change hands, is "related solely to the economic interests" of the seller, and thus is commercial speech. *Recht*, 32 F.4th at 407.

Plaintiffs next suggest that they cannot be regulated by Bill 108-21 because they refrain from any form of "voluntarily undertaken" speech at the point of sale. Pls.' Opp'n 11-12. This is equally meritless and should be rejected. For one, it is belied by the record, as store employees plainly discuss firearms with customers at their retail counter. *See, e.g.*, Ex. 18,[2] at 66:17-21 (store employee "answer[s] whatever questions [customers] ask about the firearms" for sale in store); Ex 76, at 17:4-6 (all store employees "speak with customers about retail purchases"); *cf.*

[1] Plaintiffs agree that Bill 108-21 imposes only a mandatory disclosure, and is not a restriction on speech. *See* Pls.' Opp'n 21. But Plaintiffs are wrong to suggest that intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980) could nonetheless apply or that the County concedes that it would lose under this standard. *See* Pls.' Opp'n 21; *contra Recht*, 32 F.3th at 416. To the contrary, as the County argued in its opening brief, "Bill [108-21] would still pass constitutional muster under that heightened standard" for essentially the same reasons that it passes rational basis review. County Br. 15-16 & n. 23.

[2] Exhibits 1 through 74 are attached to the Declaration of James Miller filed on October 24, 2022 (Dkt. No. 45-2); Exhibits 75 through 79 are attached to the Declaration of James Miller filed concurrently with this reply.

Ex. 20, at 86:8-87:21; Ex. 78, at 91:8-92:11. Speaking to customers at the point of sale about the products they are considering is quite literally "speech," and is self-evidently commercial.

Even if Dealer Plaintiffs were to operate their retail stores in complete silence (which they do not), their display of products for sale is also a standalone act of commercial speech. *See, e.g., Art & Antique Dealers League of Am., Inc. v. Seggos*, 394 F. Supp. 3d 447, 459 (S.D.N.Y. 2019) ("Because the in-store display of ivory products proposes a commercial transaction, such a display constitutes commercial speech."); *Second Amend. Arms v. City of Chicago*, 135 F. Supp. 3d 743, 755 (N.D. Ill. 2015) (concluding, in context of municipal ordinance regulating firearm dealers, that "[d]isplaying a product for sale is a type of commercial speech"). By displaying firearms, ammunition, and other related products in their stores, Dealer Plaintiffs are advertising them to potential customers for sale. Indeed, every Dealer Plaintiff admits that they use "valuable counter space" to display their products, and that this is where Bill 108-21 applies. *See* Pls.' Opp'n 23; *see also* Ex. 78, at 63:1-64:6 (display of firearms at point of sale); *id.* at 71:10-21 (display of rifles and ammunition at point of sale); Ex. 75, at 48:19-51:5 (display of products on counters and wall at point of sale); Ex. 77, at 78:17-79:12 (showroom "where items for sale are on display"); Ex. 76, at 98:10-99:5 (display of firearms, ammunition, and firearms accessories in cases and on walls of retail space). In effect, each store is a gigantic, fixed advertisement for the firearms, ammunition, and other goods that Plaintiffs sell. This too is commercial speech.

2. *Zauderer* is not limited to cases involving consumer deception in advertising.

Because *Zauderer's* rational basis scrutiny applies "generally" to mandatory disclosures in commercial settings like these, *see Recht*, 32 F.4th at 416, Plaintiffs labor for any way to limit or distinguish *Zauderer*. First, Plaintiffs argue that the Supreme Court has confined *Zauderer* to cases involving consumer deception through advertising. *See, e.g.*, Pls.' Opp'n 9. This, Plaintiffs contend, is what the Supreme Court meant when it described the "circumstances" to which

Zauderer applies. *See id.* (quoting *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2368 (2018)). Indeed, Plaintiffs pin much of their legal analysis to this single word, repeating it throughout their brief in support of several subsidiary arguments. *See, e.g.*, Pls.' Opp'n 11, 17-18, 23.

Plaintiffs are mistaken. *Zauderer* is not limited to advertising or consumer deception cases, and *NIFLA* did not so limit it. The first problem with Plaintiffs' cherry-picked argument about "circumstances" is that *NIFLA* did not use this term to refer to advertising or consumer deception. Rather, the immediately preceding sentence makes clear that by "circumstances" the Court was referring to whether a mandatory disclosure is factual and uncontroversial and relates to a product or service being offered. *See NIFLA* at 2372. Elsewhere, the Court specifically avoided limiting *Zauderer* to instances involving consumer deception, stating instead that "[w]e need not decide what type of state interest is sufficient to sustain a disclosure requirement" on the facts presented in *NIFLA*. *Id.* at 2377; *see also id.* at 2372 (describing *Zauderer* as having "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" without reference to Plaintiffs' hypothesized limits).

Moreover, Plaintiffs' quote about *Zauderer's* "circumstances" comes from a parenthetical in *NIFLA* summarizing how an earlier case involving purely expressive (non-commercial) conduct distinguished *Zauderer*. *See id.* (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)). But that earlier case, *Hurley*, does not limit *Zauderer* to commercial advertising or consumer deception either. *Zauderer* was inapplicable in *Hurley* for the simple reason that Plaintiffs in that case were not engaged in commercial speech at all: they were engaged in core First Amendment expressive conduct by

organizing a parade and curating its participants. *See Hurley*, 515 U.S. 557, 569-70 (describing parade organizers' creation of "an edited compilation of speech" by selecting marchers for an "expressive parade[]"). The *Hurley* Court therefore had no occasion to decide whether *Zauderer* applies to all forms of commercial speech or merely to a subset of commercial advertising.

Similarly problematic for Plaintiffs' argument is the fact that *NIFLA* applied *Zauderer* outside the context of deceptive advertising (albeit, concluding that other elements of the *Zauderer* framework were unmet). *See NIFLA*, 138 S. Ct. 2361, 2377 (holding that "[w]e need not decide" the level of scrutiny, and applying *Zauderer* to the unlicensed clinic notice). If Plaintiffs' view of *Zauderer* were correct, the Court could have set it aside in *NIFLA* on the threshold issue that the unlicensed clinics were not engaged in deceptive advertising. Instead, the Court applied *Zauderer* but concluded that the state's justification for the disclosure was "purely hypothetical" and the mandate inadequately tailored. *See id.* at 2377-78.

The final nail in the coffin for Plaintiffs' attempt to limit *Zauderer* through *NIFLA* is *NIFLA*'s unequivocal disclaimer that it "do[es] not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." *Id.* at 2376. Here, the required literature—which warns of the dangers of firearm suicide and advises readers how to mitigate that risk—is both a "health and safety warning" and a "factual and uncontroversial disclosure about commercial products" (firearms and ammunition). *See* County Br. 27-28. It therefore falls into both categories of disclosure whose constitutionality the *NIFLA* decision "do[es] not question." *NIFLA*, 138 S. Ct. at 2376.

Seeking to avoid this result, Plaintiffs first argue that this disclaimer is inapplicable to the County's suicide prevention pamphlet because it "simply is not that type of health and safety warning." Pls.' Opp'n 18. But the pamphlet's statement that access to a firearm is associated

with a harm—death by suicide—fits any conceivable definition of a warning. *See, e.g.* Black's Law Dictionary (11th ed. 2019) (defining "warning" as "the pointing out of a danger"). In response, Plaintiffs resort to obvious distortions of the pamphlet—calling them mere "information about the County's services and policy concerns about suicide and conflict resolution." Pls.' Opp'n 18. But this ignores statements about the "risk factors" and "warning signs" for suicide, and that access to Plaintiffs' products is one "risk factor" for this harm. *See* Ex. 5 at 4-5. In doing so, Plaintiffs invite the Court to take portions of the required disclosure "in isolation" and "cleave[]" off the full context—the precise error reversed in *Recht*. *Id.* at 417.

Plaintiffs also distort *NIFLA* by arguing that its carveout for health and safety warnings was somehow narrowed by its rejection of an underlying health rationale for California's mandated notices. *See* Pls.' Opp'n 19. But Plaintiffs do not identify a health and safety rationale rejected by the *NIFLA* Court; they identify an informational one. *See id.* (citing language in *NIFLA* describing California law's purpose to "inform" women of "their rights and the health care services available to them"). And in language that Plaintiffs omit, *NIFLA* was unequivocal about the lack of health and safety rationale for the law at issue: "California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services." *NIFLA*, 138 S. Ct. at 2375. In short, Plaintiffs err in arguing that *NIFLA*'s carveout was limited to exclude health and safety rationales as justification for mandated notices.

Plaintiffs next argue that a warning is not a "warning" under *NIFLA* unless it concerns the "ordinary and expected use of the product" in question. Pls.' Opp'n 18. But *NIFLA* nowhere says this, and Plaintiffs point to no support for this proposed limitation. In any case, and tragically, suicide is plainly within the realm of expected potential uses for a firearm, even if it is not the desired or even most common use, given that there are more than 24,000 firearm suicides

annually nationwide, the majority of gun deaths are suicides, and firearms are the leading means of suicide both nationwide and in Anne Arundel County. *See* Ex. 1, ¶¶ 5-6; Ex. 2, ¶¶ 9-10.

Finally, Plaintiffs' focus on the "warning" language in *NIFLA's* carveout ignores the second category whose constitutionality the Court "do[es] not question"—namely, "factual and uncontroversial disclosure[s] about commercial products." *NIFLA*, 138 S. Ct. at 2376. Thus, even if Plaintiffs were somehow correct that the County's literature is not a "warning," it nonetheless falls comfortably within this second category.

Commercial disclosure cases both before and after *NIFLA* confirm that *Zauderer* is not limited to deceptive advertising. For example, in a post-*NIFLA* decision in the Ninth Circuit, the court noted that every other Circuit to have considered the issue has "unanimously concluded that the *Zauderer* exception for compelled speech applies even in circumstances where the disclosure does not protect against deceptive speech." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 843 (9th Cir. 2019); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20 (D.C. Cir. 2014); *N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009). Plaintiffs have no answer for these cases, which were set out in the County's opening brief (at 17), and simply ignore them. Most recently, the Eleventh Circuit joined this consensus as well, applying *Zauderer* to a provision of Florida law that compelled social media companies to disclose information about content moderation, even though the law did not regulate advertising. *See NetChoice, LLC v. Att'y Gen., Fla.*, 34 F.4th 1196, 1227 (11th Cir. 2022). And while the Fourth Circuit may not have squarely addressed this issue yet, it has nonetheless signaled that a government interest in "furthering public health and safety" can be promoted by mandatory disclosure under *Zauderer*. *Recht*, 32 F.4th at 419 (quoting *CTIA*, 928 F.3d at 844).

In any event, Plaintiffs' effort to confine *Zauderer* to advertising regulations would be a pyrrhic victory at best. This is because the Dealer Plaintiffs' display of firearms and ammunition for sale at their retail counters, and their discussions of these products with customers there, constitute advertisements that these products are for sale. *Supra*, at 2-3. Plaintiffs' contention that *Zauderer* can be distinguished as involving disclosures that piggybacked on preexisting (and voluntary) speech, *see* Pls.' Opp'n 10-11, fails for the same reason: Dealer Plaintiffs *are* unquestionably engaging in voluntary commercial speech at their retail stores independent of the disclosure requirement in Bill 108-21. And besides, decisions by other courts confirm that *Zauderer*'s framework applies in analogous retail transactions including the passive display of product for sale. *See, e.g.*, *CTIA*, 928 F.3d 832, 837-38, 845 (applying *Zauderer* to display of poster and distribution of handout at retail cell phone stores); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 551-52 (6th Cir. 2012) (opinion of Stranch, J., writing for majority, applying *Zauderer* to warnings on cigarette packaging displayed at the point of sale).

Plaintiffs attempt to add one final threshold obstacle to the application of *Zauderer*, invoking *NIFLA*'s statement that governments cannot "impose content-based restrictions on speech without 'persuasive evidence ... of a long (if heretofore unrecognized) tradition' to that effect." *See* Pls.' Opp'n 9-10, 17. But the Court made this statement to explain why it declined to recognize professional speech as a separate category entitled to lesser protection. *See NIFLA*, 138 S. Ct. at 2372. It is no obstacle where the case involves commercial speech, which *NIFLA* recognizes a few sentences latter has a long pedigree of "our precedents hav[ing] applied more deferential review" under *Zauderer*. *Id.* Indeed, as *Zauderer* and *Central Hudson* point out, commercial speech has never received the same level of protection as expressive or religious conduct under the First Amendment, and originally received no protection at all. *Cent. Hudson*,

447 U.S. at 562-63 ("The Constitution … accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *Zauderer*, 471 U.S. 629 (noting that Court first recognized protection for commercial speech in *Virginia Pharmacy Board* case).

In sum, *NIFLA* does not control the analysis of the County's suicide prevention pamphlets, or require this Court to apply strict scrutiny in lieu of *Zauderer*'s rational basis framework.

3. The Pamphlets "relate to" firearms and ammunition, the products Plaintiffs sell.

As a fallback, Plaintiffs contest the application of each of *Zauderer*'s elements to the County's literature. But none of these provide a basis to avoid judgment in the County's favor either. First, Plaintiffs contend that the County's literature—including a pamphlet titled "Firearms and Suicide Prevention"—is somehow "not remotely 'about the terms under which services will be available' from the plaintiffs [sic] dealers." Pls.' Opp'n 10; *see also id.* 11-13, 17. This argument is counterfactual, distorts and ignores the applicable case law, and is contradicted by Plaintiffs' own positions elsewhere in their brief.

Plaintiffs' argument that the pamphlets do not "relate to" the firearms and ammunition that Plaintiffs sell at retail is flatly inconsistent with other arguments throughout Plaintiffs' briefs. For example, Plaintiffs argue in their opening brief that the County's "materials unmistakably link[] the possession of firearms with an increased risk of suicide and unlawful conflict resolution using firearms." Pls.' Br. 16; *see also id.* at 17 (arguing that pamphlets convey the "premise that the firearms and ammunition purchased at the plaintiff dealers are used for illegal 'conflict resolution' and suicide"); Pls.' Opp'n at 3 (alleging that pamphlet links "the purchase and possession of firearms and ammunition" to suicide and illegal conflict resolution); Pls.' *Daubert* Opp'n at 2 (same). Plaintiffs make no attempt to reconcile how messaging that is "unmistakably" about "the firearms and ammunition purchased at the plaintiff dealers" can

simultaneously not "relate to" those products, and Plaintiffs cannot have it both ways. The Court should reject this argument out of hand.

Even if Plaintiffs' new argument was not foreclosed by their own admissions, it is plainly meritless. The applicable standard here is not stringent—asking simply whether the message "relates to" the product or service being offered—and the County's firearm suicide- and conflict-prevention literature easily clears it. *See, e.g.*, *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) (noting that "to match *Zauderer* logically, the disclosure mandated must *relate to* the good or service offered by the regulated party") (emphasis added). Plaintiffs' only example of a Court rejecting a disclosure on this basis is *NIFLA*, but that decision stakes out an outer limit where the message "in no way relates" to the product or service at issue. *NIFLA,* 138 S. Ct. 2361, 2372. Plaintiffs identify no case setting a higher bar than the "no relation" standard articulated in *NIFLA*, and the County is aware of none.

Here, the County's compulsory disclosures easily satisfy the "relates to" test: they articulate behavioral health risks that are associated with the products that Plaintiffs sell, describe ways for consumers to safely store those products, and offer other strategies to mitigate associated risks. Simply put, Plaintiffs have no answer to the straightforward argument that a pamphlet about "Firearms and Suicide Prevention" relates to "firearms" within the meaning of *Zauderer*. Instead, Plaintiffs ask the Court to ignore the pamphlet's references to firearms and focus exclusively on its preventative strategies for suicide. *See* Pls.' Opp'n 10 (arguing that while "plaintiff dealers sell firearms and ammunition[,] they do not provide suicide prevention or 'conflict resolution' services"). But this simply repeats the same mistake as Plaintiffs' argument that the pamphlets are not a "warning" under *NIFLA*, by asking the Court to "cleave[]" off portions of the County's messaging and examine pieces "in isolation." *Recht*. 32 F.4th at 417.

While Plaintiffs suggest that the conflict resolution pamphlet references only County services rather than firearms (Pls.' Opp'n at 20), it is nonetheless an integral part of the County's behavioral health messaging about risks associated with firearm access. Specifically, it contains additional resources to address suicide risk, and is sized to be inserted into and delivered as an integrated unit with the Firearms and Suicide Prevention pamphlet. *See* Ex. 5; *see also* Schaefer Tr. at 70 (describing pamphlets as "[s]imply…a package deal. It's not in two pieces"). The fact that the County's materials are integrated this way rather than stapled together or printed on a single physical page is not dispositive for purposes of this analysis. *See Recht* at 417.

Recht likewise confirms that a disclosure that relates to one party's product or services and *also references a third-party's services* is still constitutional under *Zauderer*. In *Recht*, West Virginia law required attorneys to disclose that potential clients should consult with third-party physicians, and also required the attorneys to state whether medical devices had been recalled by third-party government regulators. *See generally id.* The attorneys subject to this disclosure law were not selling the medical advice or devices described in the mandatory disclosure, nor were they operating the government agency that decided whether to initiate a recall. But these references to third-party services were "no freestanding admonition;" rather, they were addressing how patients could mitigate potential health risks associated with the attorney's legal services. *See id.; see also Loan Payment Admin. LLC v. Hubanks*, 821 F. App'x 687, 688 (9th Cir. 2020) (company soliciting homeowners for mortgage loan repayment program could be compelled to disclose in solicitation letters that it was not affiliated with or endorsed by the third-party lender and had not received borrowers' information from the third party).

Plaintiffs' final argument—that a disclosure must concern the "terms" of sale—likewise finds no support in the case law. *See* Pls.' Opp'n 10-12. To the contrary, the only court that

appears to have considered this potential limit to *Zauderer* rejected it. *See Loan Payment Admin. LLC v. Hubanks*, 821 F. App'x 687, 689-90 (9th Cir. 2020). Nor can this argument be reconciled with *Recht*, where the disclosures in no way described the "terms" of the attorney's legal advice.

4. The pamphlet's message is factual.

Plaintiffs' expert contests only the factual accuracy of the claim that access to a firearm *causes* suicide. *See* County Br. 22. Consequently, Plaintiffs spend most their brief trying to convince this Court that this claim—which does not appear in the suicide-prevention pamphlet's text—is nevertheless what the pamphlet *means*. *See* Pls.' Opp'n 2-8, 13-17.[3] Yet Plaintiffs simply repeat the same arguments they made in their opposition to the County's *Daubert* motion. *See* Pls.' *Daubert* Opp'n 2-8. The County already explained why each of these arguments were mistaken, *see* County *Daubert* Reply 2-9, and Plaintiffs have corrected none of those shortcomings here. The County therefore incorporates its earlier arguments and will restate them only briefly.

First, it is beyond dispute that nowhere in the text of the pamphlet does it say that access to a firearm "causes" suicide. In more than 66 pages of summary judgment briefing (and an additional 12 pages of *Daubert* briefing), Plaintiffs have not once pointed to the pamphlet using the word "cause" in the way they claim it does. Instead, just as they did in their *Daubert* brief, which asked the Court to find an "implicit[] effective[]" message hidden in the County's literature, *see* Pls.' *Daubert* Opp'n 1, Plaintiffs continue to hunt for "implied" messages lurking behind the pamphlet's text. *See, e.g.*, Pls.' Opp'n 2 ("this pamphlet effectively states"); *id.* at 4-5 (arguing that pamphlet "implies that risk factor is a causal factor"); *id.* at 14 ("the 'implication' of causal effect"); *id.* at 13-14 ("County's pamphlet 'implies that there would be a causal effect ….'"); *id.* at 14 (referring to pamphlet's "erroneous implications"); *id.* (referring to "literature implying an

[3] Plaintiffs make no argument contesting the contents of the conflict-resolution insert.

erroneous causal connection"); *id.* at 23 (pamphlet "erroneously asserts or implies that there is a causal connection between suicide and access to firearms").

When they aren't referring to "implied" messages, Plaintiffs transparently distort the pamphlet's text to change its meaning into one compatible with their argument. For example, they argue that the pamphlet's inclusion of "[a]ccess to lethal means including firearms and drugs" in a list of risk factors, Ex. 5, at 4, is causal because it means that "*mere* 'access' to firearms *makes* a person 'more at risk for suicide.'" Pls.' Opp'n 2 (emphasis added). Here, however, the insertion of the word *makes* is Plaintiffs' invention; it does not appear in the text of the pamphlet. Plaintiffs also add *mere*, further misstating the pamphlet's message. The pamphlet could not be clearer that the confluence of many risk factors, combined with other warning signs, are the best gauge of a person's suicide risk. *See* Ex. 5, at 4 (listing various "health factors," "environmental factors," and "historical factors"); *see also id.* at 2 ("Suicide most often occurs when several stressors and health issues converge …."). Along these same lines, Plaintiffs state that "the pamphlet's actual language flatly asserts that mere access to firearms is a *causal* risk factor for suicide." Pls.' Opp'n 6 (emphasis added). Untrue. The pamphlet's *actual language* does not say that, and Plaintiffs' decision to insert the word *causal* before "risk factor" does not make it so. No matter how strenuously Plaintiffs object, the statement that people with access to firearms "are more at risk of suicide" is just not "unambiguously an assertion about causal effects," *id.* at 4.

Second, the pamphlet makes clear that a "risk factor" is something that is "associated with" suicide, not something that causes suicide. Plaintiffs repeat their claim that the terms "*correlated or associated* with suicide … are not used in the pamphlet.'" *Id.* at 3-4; *see also* Pls.' *Daubert* Opp'n 4 (making similar claim). But this assertion is as false now as it was the last time Plaintiffs made it. The pamphlet expressly states in its opening paragraph that depression—one of the many

other "risk factors" identified on page 4 alongside access to firearms—is "the most common health condition *associated with suicide*." Ex. 5, at 2, 4 (emphasis added). The import of this language is that risk factors are conditions "associated with" suicide. For similar reasons, Plaintiffs' reliance on the statement that risk factors "increase the chance" of suicide, Pls.' Opp'n 4, is unavailing. The pamphlet states on page 2 both that "[d]epression is … associated with suicide" and that "[c]onditions like depression … increase risk for suicide." Ex. 5, at 2. It is simply not plausible that "increase the chance" on page 4 is a causal claim when "increase risk" on page 2 plainly means "associated with."

In any event, Plaintiffs do not dispute that the pamphlet's use of "risk factor" mirrors the term's usage by public-health authorities in public-facing materials. *See* Pls.' Opp'n 4. Instead they assert, without explanation, that it is "absurd" to consider the language used in public-health communications. *Id.* In doing so, Plaintiffs fail to grasp that the widespread use of "risk factor" in this context logically reflects how the public understands the term and thus how a reasonable person would interpret the pamphlet. Plaintiffs also fail to demonstrate that "risk factor" is commonly used to mean anything else.

Plaintiffs also attempt to bolster their interpretation of the pamphlet by pointing to how they themselves purportedly understand it. *See id.* at 3. Even if their subjective opinion were legally relevant, it is apparent that at best Plaintiffs are misreading the pamphlet, *see, e.g.*, Ex. 77, at 63:2-7 (testifying that pamphlet's message is "that having access to a firearm means you are more likely to use it to commit suicide than not"), and at worst are just advancing their counsel's idiosyncratic reading, *see, e.g.*, Ex. 78, at 47:9-48:7 (plaintiff unable to answer whether she agrees or disagrees that access to lethal means, including firearms and drugs, is a risk factor for suicide); Ex. 75, at 31:20-32:5 (plaintiff unable to identify what on page 4 of the pamphlet he disagreed with); *see*

also Pls.' Opp'n 3 (citing counsel-drafted interrogatory responses as evidence of how plaintiffs understand the pamphlet).

Plaintiffs contend that if risk factors were merely correlated with suicide, the pamphlet's message would be "trivial." *Id.* at 4-5. And Plaintiffs suggest that the County has conflated correlation with causation. *Id.* at 5-6. In Plaintiffs' view, the County must either definitively prove that access to firearms causes suicide or forfeit its ability to recommend suicide-prevention measures that are supported by social science. In reality, the County may act to prevent firearm suicide without asserting (or proving) that firearm access *causes* suicide. Indeed, public-health authorities often make judgment calls about how to protect public health in the absence of perfect certainty. Tellingly, the expert around whom Plaintiffs build this argument has no relevant background, qualifications, or experience in medicine or public health. *See* Ex. 23, at 2-3.

Finally, Plaintiffs mischaracterize the County's position, claiming that it has conceded that "any … implication of a causal connection" would be neither factual nor uncontroversial. Pls.' Opp'n 13; *accord id.* at 6 (stating that the County "conced[es] that such a statement of causal connection" is unsupported); *see also id.* at 16-17 ("The County makes no attempt to defend that causal connection belief in its brief in this Court."). This is simply false. As the County wrote in its prior brief, "[e]ven if the pamphlet could reasonably be read to make [a] causal statement …, it would still be factually accurate." County Br. 23 n.27 (citing expert report and example of supporting study). Accordingly, if the Plaintiffs' reading of the pamphlet prevails (and if Plaintiffs' expert is not excluded), Plaintiffs will have at most established a disputed issue of material fact.

5. The pamphlet's message is uncontroversial.

In their opening brief, Plaintiffs explained that they "would prefer to stay silent with respect to suicide prevention." Pls.' Br. 5. But that's not because Plaintiffs disagree with the County's ultimate purpose. In fact, Plaintiffs and the County broadly agree that firearm suicide should be

prevented. *See, e.g.*, Ex. 22, at 62:9-21 (plaintiff does not want customers to commit suicide with firearms or ammunition purchased there and would not sell to a suicidal customer); Ex. 75, at 59:16-60:13 (plaintiff would not sell firearms or ammunition to suicidal person); Ex. 77, at 76:1-7 (plaintiff "[a]bsolutely" does not want customers to use firearms for suicide or illegal activity); Ex. 76, at 64:17-65:6 (agreeing that "[i]t's common sense" that gun owners should secure firearms against access by suicidal persons in their household).

For that reason, Plaintiffs' analogy to *Greater Baltimore* fails. *Cf.* Pls.' Opp'n 14-15. In *Greater Baltimore*, messaging about the availability of abortion was "antithetical to the very moral, religious, and ideological reason the [plaintiffs] exist[ed]." 879 F.3d 101, 110 (4th Cir. 2018). Here, by contrast, Dealer Plaintiffs exist to sell guns—not to promote suicide. Plaintiffs attempt to cast their profit-driven commercial businesses as an "ideologically sensitive and spiritually fraught" exercise akin to operating a religious nonprofit, Pls.' Opp'n 14 (quoting *Greater Baltimore*, 879 F.3d at 113), but Dealer Plaintiffs are nothing like the plaintiffs in *Greater Baltimore*. They are not "Christian organization[s]," do not have "religious mission[s]," do not operate on church property, do not offer religious instruction and religious counseling to clients, are not nonprofit organizations, and do not give away their goods and services without charging a fee, *Greater Baltimore*, 879 F.3d at 106.

Moreover, as the Supreme Court has observed, abortion is "anything but an 'uncontroversial' topic." *NIFLA*, 138 S. Ct. at 2372. There is simply no firearm-suicide analog to the contentious and unending debate around abortion. To make out a case that the pamphlet's message is controversial, then, Plaintiffs attempt to shift the focus from suicide to "the sale and possession of firearms." Pls.' Opp'n 15. But nothing in the pamphlet—which, again, was co-authored by the firearm industry's trade association—denounces or discourages firearm

ownership. And Plaintiffs' suggestion that the National Shooting Sports Foundation-authored pamphlet conveys "ideological animus against firearms" akin to Maoist propaganda, *id.* at 14, is nothing short of absurd.[4] In reality, the pamphlet conveys to readers how to recognize the variety of risk factors and warning signs for firearm suicide, and it advises them about the range of protective steps and other resources available to mitigate that risk. *See* Ex. 5, at 4-7. There is nothing controversial about that.

6. Plaintiffs have failed to demonstrate that any customers have standing.

In its opening brief, the County explained why Plaintiffs' claims on behalf of firearm customers must fail. *See* County Br. 31-34. Plaintiffs' response fails to address meaningfully the County's arguments and instead misconstrues the applicable caselaw.

First, Plaintiffs assert that customers' rights are affected because "[c]ustomers are the very 'objects' of Bill 108-21." Pls.' Opp'n 25 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)). That's wrong. In *Lujan*, the Supreme Court was distinguishing a plaintiff who is "himself an object of the [government] action … at issue" (for whom standing is easy to prove) from the case where "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation … of *someone else*." 504 U.S. 561-62. In that latter situation, "much more is needed" to establish standing. *Id.* at 562. That is precisely the situation here: firearm customers are asserting an injury based on the County's regulation not of themselves but of firearm dealers.[5]

[4] Plaintiffs object that the NSSF "does not speak for" them. Pls.' Opp'n 15. Indeed not. *But cf.* Ex. 78, at 35:19-20 (plaintiff is an NSSF member). Nevertheless, it is self-evident that the NSSF would not publish a pamphlet expressing anti-firearm views.

[5] Plaintiffs' citation of *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 212-13 (4th Cir. 2020), *see* Pls.' Opp'n 25, is not to the contrary. In that case, the Fourth Circuit cited this same language from *Lujan* to make the point that a firearm *dealer* clearly had standing to challenge a regulation that applied, on its face, to dealers. *See* 971 F.3d at 212-13. As explained in the County's opening brief, *see* County Br. 32, the ruling that the dealers also had third-party standing on behalf of their customers was based on the notion that the "challenged statute prevent[ed dealers] from transacting business with" their customers, 971 F.3d at 216—which is not the case here.

Next, Plaintiffs double down on the captive-audience doctrine, asserting that "customers are not free to walk away from the coerced display of the County's literature if they wish to exercise their Second Amendment rights." Pls.' Opp'n 25; *see also id.* at 26 ("Customers are thus truly held captive to dealers …."). But that's not true. As Plaintiffs concede, "nothing in the Bill bars customers from throwing away the pamphlets." *Id.* at 25. Plaintiffs' position seems to be that the very act of viewing the (cover of the) pamphlet or physically receiving it (though not having to read it) somehow infringes customers' First Amendment rights. *See id.* That position finds no support in the case law. In *Hill v. Colorado*, 530 U.S. 703 (2000), Plaintiffs' primary authority, the Supreme Court expanded the captive-audience doctrine to cover "persons entering and leaving [abortion] clinics" where "demonstrations in front of abortion clinics impeded access to those clinics and were often confrontational" and "aggressive counselors … sometimes used strong and abusive language in face-to-face encounters." *Id.* at 709-10. That's a far cry from this case. As Plaintiffs' own brief states, "[t]he captive-audience doctrine applies where the listener cannot avoid being exposed to that speech." Pls.' Opp'n 26. Here, the customers can easily avoid being exposed to the pamphlets. *Cf. Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 542 (1980) ("The customer … may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket.").

Next, Plaintiffs assert that "[t]he County's coerced display and distribution requirements will also objectively affect or chill the customer's own speech." Pls.' Opp'n 28. But as the County observed in its opening brief, "Plaintiffs have failed to produce any evidence from a single customer to support these claims." County Br. 33. In response, Plaintiffs now cite only to MSI's interrogatory responses, in which MSI speculated about what its members "reasonably can be expected" to do. Pls.' Opp'n 28. This confirms that Plaintiffs lack any competent, nonhearsay

evidence for these claims. Instead, they assert that "plaintiffs need not show that the government action led them to stop speaking." *Id.* (quoting *Edgar v. Haines*, 2 F.4th 298, 310 (4th Cir. 2021)). This distorts the Fourth Circuit's message. In full, the Court wrote: "In short, while plaintiffs need not show that the government action led them to stop speaking 'altogether,' they must show that the action would be 'likely to deter a person of ordinary firmness from the exercise of First Amendment rights.'" 2 F.4th at 310 (citation omitted). Plaintiffs have failed to make this showing.

Finally, Plaintiffs argue (for the first time) that customers "have third-party standing to assert the rights of the dealers." Pls.' Opp'n 29. This argument is surprising, because dealers are already plaintiffs in this case, and their standing to raise claims on their own behalf is unchallenged, *see* County Br. 31 n.33. As Plaintiffs' own brief makes clear, the third-party-standing doctrine, when it applies, allows parties to raise claims on behalf of others *not before the court*. *See* Pls.' Opp'n 29 ("[T]he statute's very existence may cause others *not before the court* to refrain from constitutionally protected speech or expression." (emphasis added) (citation omitted)); *id.* at 30 ("[S]tanding requirements are relaxed where the challenged action 'substantially abridges the First Amendment rights of other parties *not before the court*.'" (emphasis added) (citation omitted)). Plaintiffs' argument that customers (who are not in the case) should have third-party standing on behalf of dealers (who are in the case) gets this backward.

7. Plaintiffs cannot transform "nominal" damages into a five-figure windfall.

Plaintiffs insist that they are entitled to "nominal damages" in excess of $40,000. *See* Pls.' Opp'n 33. In its opening brief, the County observed that Plaintiffs had identified "no authority" for such an award. County Br. 35. Given a second chance, Plaintiffs still have not done so.

First, Plaintiffs cite nothing for the proposition that nominal damages accrue daily (or at all). In fact, the case law is to the contrary. In *Williams v. Hobbs*, 662 F.3d 994 (8th Cir. 2011), for instance, the court of appeals vacated an award of nominal damages that was calculated based on

each day that a prisoner was wrongfully held in administrative segregation, ruling that the plaintiff could receive nominal damages for each constitutional violation he suffered, but not for each *day* that he was injured by such a violation. *See id.* at 1010-11. By the same reasoning, Plaintiffs' multiplication of their nominal damages by 25, *see* Pls.' Opp'n 31, is erroneous.

Second, Plaintiffs have no support for the idea that each of MSI's members—regardless of whether the member actually encountered the County's literature[6]—is entitled to a separate award of damages. Plaintiffs cite *Norwood v. Bain*, 143 F.3d 843 (4th Cir. 1998), *aff'd in relevant part en banc*, 166 F.3d 243 (4th Cir. 1999), but contrary to Plaintiffs' misleading implication, that case did *not* award nominal damages to each class member. *See* Pls.' Opp'n 32-33. Rather, the Fourth Circuit ruled that the plaintiff class was entitled to "an award of nominal damages not to exceed $1.00" *in total*. *Norwood*, 143 F.3d at 856. The same here: if Plaintiffs were to prevail on their claims, they would be entitled to no more than $1.00 in nominal damages. *See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the County's opening brief, Anne Arundel County's Cross-Motion for Summary Judgment should be granted, and Plaintiffs' Motion for Summary Judgment should be denied.

* * *

[6] By Plaintiffs' own admission, 1371 of the 1606 members for whom they seek to recover damages did not even live in Anne Arundel County when the literature was being distributed. *See* Pls.' Opp'n 31-32.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of December, 2022, the foregoing filing was electronically filed in the United States District Court for the District of Maryland.

Tamal A. Banton

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