

No. 23-1351

IN THE
United States Court of Appeals
for the Fourth Circuit

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

Plaintiffs-Appellants,

v.

ANNE ARUNDEL COUNTY, MARYLAND,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland, No. 1:22-cv-00865

**APPELLEE'S RESPONSE IN PARTIAL OPPOSITION TO
APPELLANTS' MOTION TO EXPEDITE**

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April 28, 2023

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Appellee Anne Arundel County, Maryland (“the County”) respectfully files this response in partial opposition to Appellants’ motion to expedite this appeal.

The County does not oppose Appellants’ request insofar as Appellants propose reducing the time allotted for their opening and reply briefs. Nor does the County oppose Appellants’ request insofar as Appellants ask this Court to hear oral argument at the first opportunity after briefing has been completed. The County, however, opposes a briefing schedule that would shorten the 28 days allotted for the County to file its answering brief, or that would preclude the County from seeking a reasonable extension of time to file its answering brief if appropriate. Appellants have failed to justify shortening the time allotted for the County to file its answering brief. Appellants’ challenge lacks merit, as the district court correctly held, and Appellants will suffer no irreparable harm by distributing two small flyers conveying factually accurate public-safety information about the products they sell while this appeal proceeds. An expedited briefing schedule is particularly unwarranted given that it would be unlikely to result in a faster disposition of this appeal in light of this Court’s summer recess.

1. To combat a crisis of suicides and homicides involving firearms, the County in January 2022 passed a bill requiring gun stores to display and distribute two pieces of public-safety information to purchasers of firearms and ammunition. Op. 2-3. The first, a suicide-prevention pamphlet, lists suicide risk factors,

including access to lethal means such as firearms; identifies suicide warning signs; encourages gun owners to store their firearms safely when not in use; and provides suicide-prevention resources. Op. 3-4. This pamphlet was jointly created by the American Foundation for Suicide Prevention and the National Shooting Sports Foundation—the gun industry’s own trade group. Op. 3. The second, a conflict-resolution insert, lists conflict-resolution resources available within the County. Op. 4-5. Both are six-by-six inches and are provided to gun stores in the County at no cost. Op. 30.

Appellants, a Maryland gun-rights group and four Maryland gun stores, brought suit alleging that the ordinance violates the First Amendment. In a thorough opinion, the district court (Gallagher, J.) rejected the challenge and granted summary judgment to the County. Op. 31. The district court held that the ordinance “plainly” regulates commercial speech given that it regulates only “commercial retailers” at the “point of sale” and “relates to the responsible and safe use of the product at the heart of the commercial transaction.” Op. 20. Because the pamphlets convey factual and uncontroversial information about suicide risk and conflict resolution in the context of commercial transactions, the district court evaluated the ordinance under the deferential standard set forth in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). The district court concluded that the ordinance easily satisfies that standard because it is

reasonably related to the County's powerful interest in preventing gun suicides and violence, and is not unduly burdensome. Op. 30.

2. Appellants filed a notice of appeal in this Court and moved to expedite the appeal. Appellants' motion to expedite does not propose a briefing schedule, nor does it state whether oral argument is necessary or, if so, on what timetable. *But see* Local Rule 12(c) ("Any motion to expedite should state clearly . . . the need for oral argument."). To the extent Appellants propose filing their opening and reply briefs early, the County does not object. Nor does the County object to scheduling oral argument for the first available scheduled sitting should the Court conclude argument is warranted.

3. The County opposes Appellants' motion insofar as it seeks to shorten the time allotted for the County to file its answering brief or preclude the County from seeking a reasonable extension of time to file its answering brief if necessary. This Court has allotted 28 days for the County to file its answering brief. *See* Briefing Order, ECF #3. At minimum, this briefing window will be essential to ensure the County has time to prepare a brief that will respond to Appellants' novel First Amendment arguments and best assist the Court in its resolution of this case. The full briefing window is particularly important given the voluminous summary-judgment record and given that the County has retained appellate counsel new to the case to assist with the appeal.

4. Appellants argue that expedition is warranted principally by recapitulating the same merits arguments the district court rejected. These arguments are wrong, foreclosed by precedent, and provide no basis for Appellants' request that this case receive expedited treatment.

Appellants suffer no irreparable harm by distributing to their customers factually accurate public-safety information to prevent suicides and violence in connection with the very products they sell. Their motion does not attempt to allege that displaying and distributing a small flyer and insert at the point of sale dissuades the sale of guns or ammunition. While Appellants rely heavily (at 5-7) on the Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), that case, unlike this one, involved a compelled disclosure that "in no way relate[d]" to the transaction at issue, *id.* at 2372, and the Court went out of its way to note that "we do not question the legality of health and safety warnings long considered permissible," *id.* at 2376. While Appellants assert (at 4-5) that the suicide-prevention pamphlet conveys an implied anti-gun message, that is emphatically incorrect, as evidenced by the fact that it was coauthored by the gun industry's own trade group. The pamphlet simply provides information about risks associated with access to firearms and about how to store firearms safely. Requirements to convey information about

how to use or store products safely are commonplace and are precisely the type of public-safety warnings the Supreme Court endorsed in *NIFLA* itself. *Id.*

5. Appellants' motion does not address the need for oral argument except to state (at 2) that Appellants are prepared to "conduct argument on an expedited basis." If this Court concludes that oral argument is indeed warranted, an expedited briefing schedule would be particularly inappropriate because it would not result in a faster disposition of this appeal. According to this Court's public calendar, the Court's final full oral argument sitting for the 2022-2023 term is scheduled for May 3-5, five days after the filing of this response and before briefing could possibly be completed in this case. The Court has one final argument scheduled for June 6, but, absent a severely truncated briefing schedule, briefing would not be complete in time for that argument date (and the argument for that date has already been assigned). This Court's summer recess then begins, and the Court's next argument sitting does not start until September 19, which appears to be the first plausible sitting on which oral argument could be held even if this appeal were expedited. Appellants have offered no reason for this Court to rush the parties' briefing only to wait months to hear oral argument.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with Federal Rule of Appellate Procedure 27(d)(1) because it has been prepared in Times New Roman 14-point font using Microsoft Word for Office 365. I further certify that it complies with Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,166 words.

April 28, 2023

/s/ Neal Kumar Katyal
Neal Kumar Katyal

CERTIFICATE OF SERVICE

I certify that on April 28, 2023, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

April 28, 2023

/s/ Neal Kumar Katyal
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