



President
Mark W. Pennak

February 25, 2025

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MARYLAND SHALL ISSUE, IN OPPOSITION TO HB 875

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is a Section 501(c)(4), all-volunteer, non-partisan, non-profit organization dedicated to the preservation and advancement of gun owners’ rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of the District of Columbia and the Bar of Maryland. I retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland Firearms Law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License (“HQL”) and a certified NRA instructor in rifle, pistol and personal protection in the home and outside the home and muzzle loading. I appear today as President of MSI in OPPOSITION To HB 875

The Bill: The Bill adds new Section 5-901 and Section 5-902 in the Public Safety Article of the Maryland Code to provide that the Maryland Dept. of Health prepare and distribute to all County health departments in the State literature regarding firearm safety, firearm training, suicide prevention, mental health awareness and conflict resolution. The Bill then directs that each county health department to distribute this literature “to all establishments that sell firearms or ammunition within the county.” The Bill then states that each such establishment “shall” make the literature “visible and available at the point of sale” and “distribute the literature to each person who purchases a firearm or ammunition.” The Bill authorizes representatives from the county health department to issue citations to the establishment for any violation and imposes civil fines of \$500 for the first violation and a fine of \$1000 for any subsequent violation.

The Bill Is A Violation Of the First Amendment

There is no dispute in this Bill requiring dealers to display and distribute this literature created by the State is content-based, compelled speech and is thus “presumptively unconstitutional.” *Nat’l Inst. Of Fam. & Life Advoc. v. Becerra*, 585 U.S. 755, 766 (2018) (“*NIFLA*”). Generally, the government may not compel a person to speak the government’s preferred message. *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). “A speaker’s right to ‘decide what not to say’ is ‘enjoyed by business corporations generally.’” *Moody v. NetChoice, LLC*, 603 U.S. 707, 746 (2024) (Barnett, J., concurring), quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995). Such speech may be compelled under *Zauderer v. Off. of Disciplinary Counsel of Supreme Court of Ohio*,

471 U.S. 626, 628 (1985), **only** if the literature is merely “purely factual and uncontroversial” “commercial speech.” Under *NIFLA*, *Zauderer* is limited to “purely factual and uncontroversial information about the terms under which . . . services will be available.” *NIFLA*, 585 U.S. at 768-69, quoting *Zauderer*, 471 U.S. at 651. See, e.g. *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196, 1227 (11th Cir. 2022), *remanded on other grounds*, *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (holding that that compelled speech under *Zauderer* must be “about their conduct toward their users and the ‘terms under which [their] services will be available’”) (citation omitted).

There are several constitutional aspects to this subject. In *MSI v. Anne Arundel Co.*, 91 F.4th 238 (4th Cir. 2024), *cert. denied*, 145 S.Ct. 152 (2024), the compelled speech of dealers was sustained with respect to two particular pieces of literature that focused on suicide prevention. No “training” literature was presented and the “firearm safety” page of the literature was limited to safe storage. The Fourth Circuit did not dispute that this literature was not about “the terms under which . . . services will be available” but held that the literature was justified as a label or “safety warning.” The Fourth Circuit also adopted an extremely expansive view of “commercial speech” which is contrary to controlling precedent. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980) (holding that commercial speech means an “expression related solely to the economic interests of the speaker and its audience”).

The Supreme Court denied review undoubtedly to allow the issue to “percolate” in the lower courts. That is standard practice by the Court. MSI believes strongly that the *Anne Arundel County* case misapplied *NIFLA*, *Zauderer*, *Central Hudson* and *303 Creative*. We are committed to pursuing this issue further in an appropriate case. Indeed, the Fourth Circuit’s related First Amendment jurisprudence was rejected by the Supreme Court just this last Term in *Mahmoud v. McKnight*, 606 U.S. 522 (2025), in a case involving Montgomery County’s compelled literature imposed on children in the County’s schools over the objections of parents. Similarly, Maryland’s recently enacted “Kids Code” is currently being challenged on “compelled speech” grounds in *NetChoice v. Brown*, 2025 WL 3267786 (D.Md Nov 24, 2025). In that case, the federal district court recently denied the State’s motion to dismiss, holding that the complaint “sufficiently alleged” requiree covered entities “to opine on their products in a manner that triggers First Amendment Scrutiny as applied to members and their users” and “such assessments constitute compelled speech and deputize covered entities to act as censors for the State.” *Id.* at *16-*18. This Bill would likewise illegitimately “deputize” dealers to act on behalf of the State.

More generally, the Supreme Court is likely to address this issue soon. The federal circuit courts of appeals are in conflict over the scope of *Zauderer*. That conflict is squarely presented in a petition for certiorari currently pending in the Supreme Court in *Foothills Christian Ministries, Journey Community Church, Grove Church v. Jones*, No. 25-802. *petition filed*, Jan, 5, 2026 (noting that the Ninth, the First, Second, Fourth, Fifth, Sixth, and District of Columbia have adopted an expansive reading of *Zauderer* that required disclosures go beyond the prevention of deceptive and misleading advertising, while five circuits (the Third, Seventh, Eighth, Tenth,

and Eleventh) have not expanded *Zauderer* beyond the prevention of deception or curing consumer confusion). On Feb. 4, 2026, the Supreme Court ordered a response to this petition and that response is due March 6, 2026. That order indicates that one or more Justices has taken an interest in the case. See also Erin Murphy, *The Impossibility of Corporate Political Ideology: Upholding SEC Climate Disclosures Against Compelled Commercial Speech Challenges*, 118 NW.U. L. REV. 1703, 1722 (2024) (noting circuit splits). Given the multiple conflicts, plenary review by the Supreme Court seems likely. If the Court grants review and restricts the scope of *Zauderer*, then a First Amendment challenge to the compelled speech imposed by this Bill is virtually guaranteed. In short, any reliance on the *Anne Arundel* case would be ill-advised.

But even under the Fourth Circuit’s wrong-headed approach, the constitutionality of the compelled speech authorized by this Bill will turn on a case-by-case examination of the content of the literature that is compelled. If the literature is not “purely factual and uncontroversial” it will be challenged and struck down. That test is strict. “Purely factual” and “uncontroversial” are distinctly different terms and cannot be collapsed into a single inquiry. The test for “controversial” speech focuses on the topic of the speech, not on whether individual statements in the literature are factually accurate. See *National Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1277-78 (9th Cir. 2023); *X Corp. v. Bonta*, 116 F.4th 888 (9th Cir. 2024). *Wheat Growers*, for example, 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. Similarly, in *NIFLA*, the Supreme Court struck down the compelled notices and rejected *Zauderer* not only because the notices pertained to third-party services (not services rendered by the seller) but also because the notices concerned abortion which, the Court held, was “anything but an ‘uncontroversial’ topic.” 585 U.S. at 769. There was no dispute that the “content” of the compelled notices in *NIFLA* was factually accurate but that did not matter. “Gun control” is a highly controversial topic that cannot be advanced through compelled speech. Compelled speech motivated by anti-gun ideology will not pass muster.

“Factually accurate” is likewise a strict standard. Technically true, but misleading speech is impermissible. As the Ninth Circuit explained in *Wheat Growers*, “a statement may be literally true but nonetheless misleading and, in that sense, untrue.” 85 F.4th at 1276. Thus, even “literally true” speech cannot be compelled where it is “nonetheless misleading.” 85 F.4th at 1279. For example, statements that are supported only by correlation are not “factually accurate.” See, e.g., *United States v. Valencia*, 600 F.3d 389, 425 (5th Cir.), *cert. denied*, 562 U.S. 893 (2010) (“Evidence of mere correlation, even a strong correlation, is often spurious and misleading when masqueraded as causal evidence.”). See also *Free Speech Coalition, Inc. v. Paxton*, 95 F.4th 263, 282 (5th Cir. 2024), *affirmed on other grounds*, 606 U.S. 461 (2025) (dismissing the State’s evidence of a “correlative relationship” as insufficient).

Before subjecting the State and the counties to the costs imposed by this Bill (including potential litigation costs), the Committee should wait for these issues to shake out in the federal courts. Such subsequent decisions, such as in *Foothills Christian Ministries* currently pending in the Supreme Court, can easily provide a

basis for a direct challenge to the Fourth Circuit's decision in the *Anne Arundel* case in a new lawsuit. Similarly, if the compelled literature created and distributed by the Department of Health is not "purely factual and uncontroversial" it will be challenged.

Coerced Speech Is Counter Productive.

Whatever the constitutional merits of this Bill, the practical reality is that dealers will object to being commandeered as mouthpieces for what will be seen as the State's anti-gun political agenda. The Bill compels the dealers to display and distribute this speech, but the Bill does not (and cannot constitutionally) prohibit the dealers from engaging in First Amendment protected speech about the compelled literature. The dealers are thus free to put a trash bin next to the counter and invite their customers to toss the literature upon receipt. Many (if not most) customers will do exactly that, especially after the dealers inform them that the literature is being forced on them by the State. The compelled literature will be widely regarded as a new front in the cultural war and thus will spectacularly backfire. Compelled receipt will be rejected simply because it is compelled.

In short, the literature will be thrown away unread, and the State Department of Health will be stuck with the costs of printing and distributing this material to the counties to no point at all. The time and effort the counties will expend in redistributing this literature and enforcing the Bill's requirements will likewise be wasted. Such costs are a misallocation of scarce resources, especially now given the State's need to cut costs to reach a balanced budget. If the State truly wishes to communicate with the dealers' customers (rather than virtue-signal), then the display and distribution of literature must be purely voluntary. The State should try to persuade the dealers rather than threatening them with large fines and harassment. Customers buying firearms tend to trust dealers. If the literature is supported by the dealers, the State's message is much more likely to be heard. But no dealer wants to be seen as a puppet for the State or likes being threatened with heavy fines. The overwhelming majority of dealers will not willingly cooperate with the State's compelled speech program being imposed on them against their will. Compliance, if any, will be *pro forma*. Rural counties in this State are unlikely to assign priority to the distribution of the State's compelled speech or enforcing the display and distribution requirements.

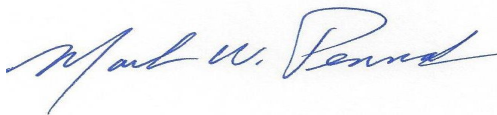
The State Should Preempt Localities

If the State wishes to go ahead with this compelled speech program, then the State should preempt localities from imposing their own compelled speech on top of the State's compelled speech. Currently, both Anne Arundel County and Montgomery County have passed local legislation that requires dealers to display and distribute this sort of literature, and those counties are widely seen as vehemently "anti-gun." See Anne Arundel County Code, § 12-6-108, Montgomery County Code, § 57-11A. Other urban counties, equally "anti-gun," will likely follow suit. Without preemption, dealers will be subject to multiple sets of literature that may well conflict or be inconsistent with the State's literature. There is no need to coerce

dealers from both the State and the localities. Doing so just invites conflicting requirements and more lawsuits.

We urge an unfavorable report.

Sincerely,

A handwritten signature in blue ink, reading "Mark W. Pennak". The signature is fluid and cursive, with the first name "Mark" being the most prominent.

Mark W. Pennak
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