RECORD No. 18-2474

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Appellants,

v.

LAWRENCE HOGAN, *et al.*

Appellees,

Appeal from the United States District Court
For the District of Maryland at Baltimore

BRIEF OF APPELLANTS

Cary J. Hansel
Erienne A. Sutherell
Hansel Law, P.C.
2514 North Charles Street
Baltimore, MD 21218
P 301-461-1040
F 443-451-8606
cary@hansellaw.com
esutherell@hansellaw.com

Mark W. Pennak
President, Maryland Shall Issue, Inc.
332 Cape St. Claire Road, Suite 342
Annapolis, MD 21409
P 301-873-3671
F 301-718-9315
mpennak@marylandshallissue.org

Attorneys for Appellant

Jennifer L. Katz, Esquire
Office of the Attorney General
Civil Division
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
P 410-576-7005
F 410-576-6955
jkatz@oag.state.md.us

Attorney for Appellee

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

v. * **Case No.** 1:18-cv-01700

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

☒ I certify, as party/counsel in this case that Maryland Shall Issue, Inc.
(name of party)

is not an affiliate or parent of any corporation, and no corporation, unincorporated association, partnership or other business entity, not a party to the case, has a financial interest in the outcome of this litigation as defined in Local Rule 103.3 (D. Md.).

☐ The following corporate affiliations exist with _____:
(name of party)

_____.
(names of affiliates)

☐ The following corporations, unincorporated associations, partnerships or other business entities which are not parties may have a financial interest in the outcome of this litigation:

_____.
(names of entities with possible financial interests)

☐ In a case based on diversity jurisdiction, the following is a list of all members of

_____ and their states of citizenship:
(name of LLC party)

_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)

Note: If there are additional LLC members, please provide their names and states of citizenship on a separate sheet of paper.

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

Erienne A. Sutherell (Bar No. 20095)
Printed name and bar number

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

443-451-8606
Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

v. * **Case No.** 1:18-cv-01700

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

☒ I certify, as party/counsel in this case that Paul Mark Brockman
(name of party)
is not an affiliate or parent of any corporation, and no corporation, unincorporated association, partnership or other business entity, not a party to the case, has a financial interest in the outcome of this litigation as defined in Local Rule 103.3 (D. Md.).

☐ The following corporate affiliations exist with _____:
(name of party)

_____.
(names of affiliates)

☐ The following corporations, unincorporated associations, partnerships or other business entities which are not parties may have a financial interest in the outcome of this litigation:

_____.
(names of entities with possible financial interests)

☐ In a case based on diversity jurisdiction, the following is a list of all members of

_____ and their states of citizenship:
(name of LLC party)

_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)

Note: If there are additional LLC members, please provide their names and states of citizenship on a separate sheet of paper.

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

Erienne A. Sutherell (Bar No. 20095)
Printed name and bar number

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

443-451-8606
Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

v. * **Case No.** 1:18-cv-01700

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

☒ I certify, as party/counsel in this case that Robert Brunger
(name of party)
is not an affiliate or parent of any corporation, and no corporation, unincorporated association, partnership or other business entity, not a party to the case, has a financial interest in the outcome of this litigation as defined in Local Rule 103.3 (D. Md.).

☐ The following corporate affiliations exist with _____:
(name of party)

_____.
(names of affiliates)

☐ The following corporations, unincorporated associations, partnerships or other business entities which are not parties may have a financial interest in the outcome of this litigation:

_____.
(names of entities with possible financial interests)

☐ In a case based on diversity jurisdiction, the following is a list of all members of

_____ and their states of citizenship:
(name of LLC party)

_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)

Note: If there are additional LLC members, please provide their names and states of citizenship on a separate sheet of paper.

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

Erienne A. Sutherell (Bar No. 20095)
Printed name and bar number

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

443-451-8606
Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

v. * **Case No.** 1:18-cv-01700

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

☒ I certify, as party/counsel in this case that Caroline Brunger
(name of party)
is not an affiliate or parent of any corporation, and no corporation, unincorporated association, partnership or other business entity, not a party to the case, has a financial interest in the outcome of this litigation as defined in Local Rule 103.3 (D. Md.).

☐ The following corporate affiliations exist with _____:
(name of party)

_____.
(names of affiliates)

☐ The following corporations, unincorporated associations, partnerships or other business entities which are not parties may have a financial interest in the outcome of this litigation:

_____.
(names of entities with possible financial interests)

☐ In a case based on diversity jurisdiction, the following is a list of all members of

_____ and their states of citizenship:
(name of LLC party)

_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)

Note: If there are additional LLC members, please provide their names and states of citizenship on a separate sheet of paper.

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

Erienne A. Sutherell (Bar No. 20095)
Printed name and bar number

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

443-451-8606
Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

v. * **Case No.** 1:18-cv-01700

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

☒ I certify, as party/counsel in this case that David Orlin
(name of party)
is not an affiliate or parent of any corporation, and no corporation, unincorporated association, partnership or other business entity, not a party to the case, has a financial interest in the outcome of this litigation as defined in Local Rule 103.3 (D. Md.).

☐ The following corporate affiliations exist with _____:
(name of party)

_____.
(names of affiliates)

☐ The following corporations, unincorporated associations, partnerships or other business entities which are not parties may have a financial interest in the outcome of this litigation:

_____.
(names of entities with possible financial interests)

☐ In a case based on diversity jurisdiction, the following is a list of all members of

_____ and their states of citizenship:
(name of LLC party)

_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)
_____ (name of member)	_____ (state of citizenship)

Note: If there are additional LLC members, please provide their names and states of citizenship on a separate sheet of paper.

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

Erienne A. Sutherell (Bar No. 20095)
Printed name and bar number

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

443-451-8606
Fax number

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of a United States District Court. As a result, this Court has jurisdiction pursuant to 28 U.S.C. § 1291. As plaintiffs brought claims for violations of 42 U.S.C. § 1983, the District Court had jurisdiction under 28 U.S.C. §§ 1331 & 1343. Plaintiffs' claims for declaratory and injunctive relief were authorized by 28 U.S.C. §§ 2201 & 2202. The District Court's final order, disposing of all claims in the case, was entered on November 16, 2018. The Plaintiffs timely filed this appeal under 28 U.S.C. § 2107.

STATEMENT OF THE ISSUES

1) Do owners of banned devices and devices which may be banned under a vague statute, who are forced to surrender their property or risk criminal prosecution have standing to challenge the vagueness of the ban?

2) Is a ban on firearms "devices" that "increase the rate of fire" void where the ban does not provide reasonable notice of what is prohibited, appearing to apply to any accessory which increases the rate of fire *by any small amount*, without further definition or limitation?

3) Is the Takings Clause violated by a statute which bans previously legal firearms accessories with heretofore lawful purposes where the statute fails to provide just compensation to the owners of the newly prohibited devices?

4) Does Maryland Shall Issue, Inc. have standing where the issues raised in this case directly impact its mission and its members?

5) Does the Maryland Constitution, Articles 40 and 24 of the Maryland Declaration of Rights, protect personal property from government takings?

STATEMENT OF THE CASE

Maryland passed a firearm accessory ban in 2018 outlawing, among other things, "any device… constructed so that, when installed in or attached to a firearm…the rate of fire increases." JA 91. The word "device" is neither defined nor limited in any way. Nor is there any minimum amount by which the rate of fire must increase to trigger the ban. Anything which increases the rate of fire of *any* firearm– *by any means and by any small amount* – is outlawed. The law is not restricted to semi-automatic firearms.

The language of the firearm accessory ban is impermissibly vague and appears to include many traditional devices with legitimate benefits for the safety and controllability of the firearm. Indeed, anything that permits a better grip on the firearm, that protects the shooter from heat or gasses produced, or that increases the speed with which the gun can be aimed all allow the muzzle to be brought back on target faster after each shot, thereby very minimally increasing the rate of fire.

This includes common and longstanding accessories like aftermarket buttstocks, improved grips, aftermarket sights and muzzle devices designed to more safely channel burning gases away from the shooter's field of vision. Each of these devices *very marginally* increases the rate a firearm can be fired by allowing greater control of the gun and a better reacquisition of the target with the muzzle and the shooter's eyes.

After expressing concerns about the vagueness of the statute, the trial court held that current owners of banned and potentially-banned devices have no standing to assert this claim even though they are forced to divest themselves of their lawfully-owned property or risk prosecution. JA 250. The trial court announced its surprise standing ruling for the first time via written order, after having arrived at it *sua sponte* and without first given the plaintiffs notice, an opportunity to be heard, or any other due process considerations. *Id*.

The statute's infirmities do not end with its vagueness. The firearm accessory ban violates the Takings Clause by failing to provide owners with compensation for the newly-outlawed accessories, all of which were previously and unequivocally legal. The accessories prohibited by the statute at issue all served lawful purposes prior to passage of the ban. Even "bump stocks" were lawfully sold, owned and used in Maryland for years prior to the passage of the accessory ban. Those sales were expressly sanctioned by the Federal Bureau of Alcohol, Tobacco and Firearms (ATF), which had ruled for years that bump stocks do not convert a semi-automatic firearm into a machine gun.

The appellants filed a putative class action on June 11, 2018 raising these issues. Plaintiff Maryland Shall Issue, Inc. (MSI), a non-profit membership organization "dedicated to the preservation and advancement of gun owners' rights in Maryland," asserted claims on its own behalf, and on behalf of its members and

others similarly situated. JA 11. Four individual MSI members who currently own banned and potentially banned devices were also named as individual plaintiffs. JA 12.

The plaintiffs sued Governor Larry Hogan in his official capacity, alleging that SB-707 violated their constitutional rights under the Federal and State Constitutions. JA 7. The Complaint included five counts: a violation of the Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states via the Fourteenth Amendment (Count I); a violation of the Takings Clause of the Maryland Constitution, Article III, § 40 (Count II); a violation of the federal Due Process Clause, because of the imposition of an impossible condition (Count III); a violation of the federal Due Process Clause, because of vagueness (Count IV); and a violation of Article 24 of the Maryland Constitution, because of the abrogation of vested property rights (Count V). *Id*. The defendant below filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. JA 56. The case was dismissed on November 15, 2018. JA 257.

In dismissing the case, the trial court *sua sponte* converted the 12(b)(6) motion for failure to state a claim to a 12(b)(1) motion for lack of standing without any notice or an opportunity to be heard. JA 250. Then, the trial court dismissed all of MSI's organization claims on standing grounds, as well as the vagueness claims of all four individual plaintiffs. JA 250. All other claims were purportedly dismissed on the

merits pursuant to Rule 12 (b)(6). JA 226. Thereafter, all plaintiffs timely appealed. JA 259.

This appeal is limited to the standing issues and the challenged statute's violations of both the Takings Clause of the Fifth Amendment of the United States Constitution and the vagueness doctrine of the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as well as the similar state constitutional claims.

STATEMENT OF THE FACTS

I. The Statute

On April 24, 2018, Maryland Governor Larry Hogan signed Senate Bill 707 ("SB-707") into law. *See* JA 91. SB-707 made the manufacture, sale, transport, or possession of "rapid fire trigger activators," unlawful in Maryland. 2018 Md. Laws ch. 252, codified as amended at Md. Code Ann., Crim. Law §§ 4-301, 4-305.1, and 4-306. *Id*. Violation of the act is a criminal misdemeanor subject to a term of imprisonment up to three years, a fine of up to $5,000, or both. SB-707, sec. 1, § 4-306(a). *Id*.

SB-707 was described by its sponsors, both publicly and in the legislature, as banning, "bump stocks." JA 82. However, the statute sweeps within its reach a wide variety of innocuous accessories in longstanding and customary use. SB-707, as enacted into law, purports to impose a total ban on any "rapid fire trigger activator."

See MD Code Criminal Law § 4-305.1 as amended by SB-707. That term "rapid fire trigger activator" is defined separately, in MD Code Criminal Law § 4-301(m)(1), to mean "any device" that when installed in or attached to a firearm "increases" the "rate at which a trigger is activated" "OR" "the rate of fire increases." *See* JA 91 (capitalization provided). Thus, banned devices include devices that increase the "rate of fire" in addition to those that impact the firearm's trigger.

In the separate definitions subsection set forth in MD Code Criminal Law § 4-301, the term "rapid fire trigger activator" is defined as set forth above (subsection 4-301(m)(1)). *Id*. SB-707 then separately states, in a different subsection (subsection 4-301(m)(2)), that the term "includes" specific types of devices such as "a bump stock, trigger crank, hellfire trigger, binary trigger system, burst trigger system, or a copy or a similar device." *Id*. Those specific devices are then defined in Sections 4-301 (E), (F), (G), (N) & (K).[1] *Id*. Under Maryland law, the statutory term "include" does not mean "limited to." *See* MD Code, General Provisions, § 1-110 ("'Includes' or 'including' means includes or including by way of illustration and not by way of limitation."). Thus, the scope of "rapid fire trigger activators" is not limited by the listed "included" devices. As explained in more detail below, SB-707's plain text

[1] SB-707 exempts from the definition of a "rapid fire trigger activator" any "semiautomatic replacement trigger that improves the performance and functionality over the stock trigger." § 4-301(m)(3).

thus includes dozens of categories of innocuous firearms accessories designed primarily for safety and controllability.

In apparent recognition of the Takings Clause problem, the legislature included a "grandfather" provision permitting Marylanders to continue to possess the otherwise prohibited devices in the State, provided they:

> (1) possessed the rapid fire trigger activator before October 1, 2018;
>
> (2) applied to the [ATF] before October 1, 2018, for authorization to possess a rapid fire trigger activator;
>
> (3) received authorization to possess a rapid fire trigger activator from the [ATF] before October 1, 2019; and
>
> (4) is in compliance with all federal requirements for possession of a rapid fire trigger activator.

Id. (SB-707, sec. 2, § 4-305.1(b); SB-707, sec. 3).

However, there is no federal basis for registering these devices with the ATF and, not surprisingly, the ATF has no legal mandate or authority to provide such services. The day the law became effect, the ATF publicly announced its refusal to receive or consider requests for this authorization, publicly stating that:

> Maryland residents who intend to file applications with ATF for "authorization" to possess devices covered by the referenced Maryland statute should be aware that ATF is without legal authority to accept and process such an application. Consequently, ATF respectfully requests that Maryland residents not file applications or other requests for "authorization" from ATF to possess rapid fire trigger activators as defined in the State statute. Any such applications or requests will be returned to the applicant without action. ATF regrets any confusion and

> inconvenience caused by the provisions of the Maryland statute that mistakenly indicate ATF has the authority to approve possession of devices covered by the statute.

JA 13.

It is legally and factually impossible to comply with the ATF authorization requirement of the statute. What the legislature intended as, in effect, a registration statute became an outright ban on the mere possession of these devices throughout Maryland. The statute provides no compensation to those whose property has now been rendered completely illegal to possess within their home state.

II. The Parties

Plaintiff MSI is a non-profit organization that works 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." JA 11. Its purpose is to "promot[e] the exercise of the right to keep and bear arms," and to conduct activities including "education, research, and legal action focusing on the Constitutional right to privately own, possess and carry firearms and firearms accessories." *Id*. MSI sued on its own behalf, alleging that SB-707 "undermin[es] its message and act[s] as an obstacle to the organization's objectives and purposes," and sues on behalf of its members, who "currently possess 'rapid fire trigger activators' which are effectively and totally banned by" the Act. *Id*.

The individual Plaintiffs, Paul Brockman, Robert Brunger, Caroline Brunger, and David Orlin, are all Maryland residents and MSI members, each of whom lawfully owned one or more of the devices prior to the Act's effective date. JA 12. Plaintiffs sought compensatory damages for the loss of their banned devices, as well as declaratory and permanent injunctive relief to bar enforcement of the Act. JA 10.

SUMMARY OF ARGUMENT

This is not a case about "bump stocks." In fact, the only portion of the statute which the plaintiffs seek to strike down is the unconstitutionally vague ban on "any device…constructed so that, when installed in or attached to a firearm…the rate of fire increases." JA 91. This is the language that covers everything ***but*** "bump stocks" and the other specifically enumerated banned devices listed elsewhere.[2] As demonstrated below, this language is grossly over-broad, entirely unworkable and evidences all of the worst traits of statutory vagueness.

The specifically enumerated list of banned accessories, including bump stocks, is only implicated in the appellant's separate Takings Clause argument. As it relates to the items specifically banned by enumeration, the appellants hope only to obtain just compensation under the Takings Clause of the Fifth Amendment and under Article 40 of the State Constitution for the loss of their property. So, *no argument*

[2] There is no void for vagueness argument directed at the specifically enumerated list of banned accessories including bump stocks.

asserted here seeks to maintain the legality of bump stocks or of any of the other specifically enumerated devices.

The plaintiffs' requests are far more reasonable than the defense or the trial court's opinion may suggest. There is no place in this case for the inappropriate efforts by the defense to tug at the court's heartstrings with references to the tragedy in Las Vegas or the strong language in the District Court's opinion which resulted. JA 226-28 (the very first sentence opens with a reference to the Las Vegas tragedy and this irrelevant discussion stretches until the third page where the statute actually at issue here is cited *for the first time*).

In addition to the "takings" and "vagueness" arguments, this case also raises important questions of due process, fundamental fairness and standing. The defense moved to dismiss under rule 12(b)(6) and made no standing argument. JA 56. The parties attended a lengthy court hearing during which the court expressed serious concerns about the vagueness of SB-707, but made no mention of standing. JA 173. Yet, the trial court subsequently dismissed the vagueness claims for an alleged lack of standing with no prior notice to the appellants, no opportunity to he heard, no opportunity to amend the Complaint, nor any other due process protections. JA 250. The first notice that the parties had of the trial court's intent to even consider standing at all was when the court issued its order dismissing the vagueness count on standing grounds. *Id*. This raises obvious due process concerns.

The trial court held that the plaintiffs lacked standing to raise the statute's vagueness despite the fact that the plaintiffs included four individuals who owned multiple devices covered and potentially covered by the statute and a membership organization with the stated purpose of protecting and asserting its members rights to such devices. *Id*. The trial court improperly held that MSI lacked standing to raise any claims here. *Id*. This Court should reverse the district court's dismissal of plaintiffs' federal and state constitutional claims.

ARGUMENT

I. The Vagueness Claim Should Not have Been Dismissed for Lack of Standing.

A. The Vagueness Claim was Dismissed without Due Process of Law.

There was only one hearing in this matter in the trial court. It occurred on September 14, 2018 and it involved *only* the plaintiffs' application for a Temporary Restraining Order. JA 173. While denying the application on grounds other than the merits of the case, the court addressed the question of vagueness with defense counsel as follows:

> **We have a long road ahead of us in this case**, I suspect. Ms. Katz, **it would be a mistake for the State to leave here today thinking that the Court is unconcerned about the vagueness argument raised by plaintiffs**. **The sweep of the statute, the fact that it does not contain some of the qualifiers like "necessary," that you employed in your argument, are of concern to the Court**. These are not issues that I have to reach today, because the ruling is grounded elsewhere. But -- and ultimately, I may well be persuaded

> that applying the precedents that I'm bound to follow, there at the end of the day is not a vagueness problem with the language as it is presently composed. But **maybe I will have a problem with it. And that's a message I hope will be heard**.

JA 202. Two months later, the same judge issued an order dismissing the vagueness claim on the grounds that all five plaintiffs lacked standing. JA 250.

In the interim, a Motion to Dismiss had been filed and fully briefed, *but that motion did not raise a standing defense*. JA 55. Standing was not mentioned by anyone during the sole hearing in the case. JA 173. Instead, the trial court simply issued a ruling and noted (for the first time) at page 25 of his Memorandum Opinion, that "[a]lthough Defendant's motion was filed as a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court may construe the motion as one filed under Rule 12(b)(1) when the court's subject matter jurisdiction is implicated." JA 250. The trial judge then went on to raise standing *sua sponte* and dismissed the vagueness claims on this ground. *Id*.

In addressing plaintiffs' claim in this fashion, the trial court failed to afford the plaintiffs due process of law. The plaintiffs were entitled, at a minimum, to notice of the court's standing concerns, the opportunity to amend their complaint, if necessary, and an opportunity to be heard prior to dismissal.

As the Supreme Court has held:

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the

> complaining party. *E.g., Jenkins v. McKeithen*, 395 U.S. 411, 421—422, 89 S.Ct. 1843, 1848—1849, 23 L.Ed.2d 404 (1969). At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, *after this opportunity*, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

Warth v. Seldin, 422 U.S. 490, 501–02 (1975) (emphasis added); *see also Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 657 (4th Cir. 2006) (in "an ordinary civil case…the district court should have refrained from raising and considering the statute of limitations defense *sua sponte*. Its failure to do so constitutes an error of law."); *Hill v. Braxton*, 277 F.3d 701, 706 (4th Cir. 2002) (in a case involving a habeas petition filed after the one-year statute of limitations, the court reversed a *sua sponte* dismissal, holding, "In a case like this one, the district court should afford an opportunity for the habeas petitioner to respond before the case is dismissed."); *U.S. Dev. Corp. v. Peoples Fed. Sav. & Loan Ass'n*, 873 F.2d 731, 736 (4th Cir.1989) (requiring notice and an opportunity to respond before a court may *sua sponte* grant summary judgment).

As the Eighth Circuit has explained, "[w]hen unaccompanied by notice to the plaintiffs and an opportunity to respond, *sua sponte* dismissals deprive plaintiffs of the chance to develop legal arguments or clarify factual allegations, undercut the adversarial process, and render the appellate record less complete for review." *Murphy v. Lancaster*, 960 F.2d 746, 748 (8th Cir.1992) (*per curiam*).

Indeed, a majority of the circuits that have addressed the question of *sua sponte* Rule 12(b)(6) dismissals have adopted *per se* rules prohibiting such dismissals. *See Thomas v. Scully*, 943 F.2d 259, 260 (2d Cir.1991) (*per curiam*); *Street v. Fair*, 918 F.2d 269, 272 (1st Cir.1990) (*per curiam*); *Roman v. Jeffes*, 904 F.2d 192, 196 (3d Cir.1990); *Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1183–85 (7th Cir.1989); *Tingler v. Marshall*, 716 F.2d 1109, 1110–12 (6th Cir.1983); *Jefferson Fourteenth Assocs. v. Wometco de Puerto Rico, Inc.*, 695 F.2d 524, 526–27 (11th Cir.1983).

In addition to these authorities providing for notice, in the context of this case, an opportunity to amend the complaint would also have been appropriate. Under Rule 12(b), a motion asserting a standing defense "must be made before pleading if a responsive pleading is allowed." Had a "standing" motion been made under Rule 12(b)(1), Rule 15(a)(1) would have allowed the plaintiffs to amend the complaint without leave of court within 21 days after service of the motion. Under this rule, given that no prior amendments had been made, the plaintiffs would have been entitled to an amendment "as a matter of course" and without leave of court.

Read together, and considered against the backdrop of this court's due process jurisprudence, these rules are designed to allow plaintiffs notice and a 21-day opportunity to cure any issues raised pursuant to Rule 12(b), including any standing argument under Rule 12(b)(1). While, admittedly, these rules do not specifically anticipate that the court might issue a standing ruling with no notice or opportunity to

be heard, simple fairness would suggest, by analogy, that an opportunity to amend should have been permitted. The plaintiffs should not have any *fewer* due process rights when the court raises a matter *sua sponte* than when the same issue is raised by a party.

Although the discussion below demonstrates that the current record includes ample grounds for standing, if this Court should disagree, then the case should be remanded on the vagueness question with instructions to permit reasonable notice, an opportunity to amend, and a hearing. Counsel proffers that additional facts related to the specific devices owned by the plaintiffs and the risks presented to them by the statute can be pleaded if necessary. Indeed, the procedure followed by the trial court denied the plaintiff even the opportunity to make a proffer on the record.

B. Plaintiffs Have Standing to Assert the Vagueness Issue.

Given the recent jurisprudence of this Court which is directly on point, the plaintiff's standing to raise the vagueness claim is easy to demonstrate. In *Kolbe v. Hogan*, the plaintiffs challenged a Maryland firearms ban under the void for vagueness doctrine. 849 F.3d 114, 123–24 (4th Cir.), *cert. denied*, 138 S. Ct. 469, 199 L. Ed. 2d 374 (2017). The statute at issue in *Kolbe* outlawed "copies" of certain enumerated rifles and shotguns. *Id*. The plaintiffs challenged the "copy" ban on vagueness grounds. *Id*.

The *Kolbe* court affirmed the holding that the plaintiffs had standing to bring a vagueness challenge based on the fact that "The plaintiffs include…two Maryland residents who have asserted that they would purchase assault weapons and large-capacity magazines but for the FSA." *Kolbe v. Hogan*, 849 F.3d 114, 123–24 (4th Cir.), *cert. denied*, 138 S. Ct. 469, 199 L. Ed. 2d 374 (2017).

The analysis cited by this Court comes from the *Kolbe* trial court's opinion, and reads as follows:

> The defendants do not challenge the plaintiffs' standing to bring this lawsuit. Exercising its independent duty to ensure that jurisdiction is proper, the court is satisfied that individual plaintiffs Kolbe and Turner face a credible threat of prosecution under the Firearm Safety Act. *See Susan B. Anthony List v. Driehaus*, —– U.S. ——–, 134 S.Ct. 2334, 2342, 189 L.Ed.2d 246 (2014). Kolbe currently owns a semi-automatic handgun that comes with detachable magazines holding more than ten rounds. (Kolbe Decl., ECF No. 55–2, ¶ 3.) **Although he does not own a long gun banned by the Firearm Safety Act, he indicates that, but for the Act, he would purchase one** along with detachable magazines holding more than ten rounds. (Id. ¶¶ 4–5.) Turner currently owns three long guns classified as assault weapons, all of which come with detachable magazines holding in excess of ten rounds. (Turner Decl., ECF No. 55–3, ¶ 3.) **He claims that, but for the Act, he would purchase other banned firearms** and large capacity magazines. (Id. ¶¶ 4–5.) *Cf. New York State Rifle and Pistol Ass'n, Inc. v. Cuomo* (NYSRPA), 990 F.Supp.2d 349, 358–59 (W.D.N.Y.2013) (concluding that individual plaintiffs had standing to challenge a New York gun control statute, as they owned rifles, pistols, and large capacity magazines regulated by the statute and desired to acquire weapons that the statute rendered illegal); *see also Ezell v. City of Chicago*, 651 F.3d 684, 695–96 (7th Cir.2011) (deciding that plaintiffs, who wished to engage in range training, had standing to bring a Second Amendment challenge to a Chicago ordinance banning firing ranges, reasoning that **the very existence of the ordinance implied a threat to prosecute**). As Kolbe and Turner have standing, jurisdiction is secure, and the court

> may adjudicate this dispute whether or not the additional plaintiffs have standing.

Kolbe v. O'Malley, 42 F. Supp. 3d 768, 775 (D. Md. 2014), *aff'd in part*, *vacated in part, remanded sub nom. Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), *on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017), *and aff'd sub nom*. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017).

In other words, the mere allegation of a *future intent to purchase otherwise banned items* was sufficient to confer standing in *Kolbe*, a case otherwise indistinguishable on the standing point. Yet, the plaintiffs' standing argument here is significantly *stronger*.

The Firearms Safety Act at issue in *Kolbe* had a grandfather provision which allowed individuals to keep firearms owned at the time of the act's passage. *Id*. Therefore, nothing the *Kolbe* plaintiffs currently owned at the time of the lawsuit was going to be rendered illegal once the statute became effective. *Id*. Thus, the claims of the *Kolbe* plaintiffs turned on a future intent to purchase banned items and were *far more speculative* than any claims here.

In the present case, all four of the individual plaintiffs are *current owners* of "one or more of the 'rapid fire trigger activators' newly banned by SB-707." JA 12, 24, 27-28 (containing detailed allegations related to the vagueness claims). Therefore, as of the statute's effective date, the plaintiffs here will be in violation unless they choose to divest themselves of these devices.

If they divest themselves of these devices, then the plaintiffs will have standing due to the undesired loss of their property. If they keep their property, they will be at much greater risk for prosecution than the *Kolbe* plaintiffs (whose property would be grandfathered).

Either way, the harm to the plaintiffs in this case is more tangible and direct and far less speculative than the "future desire to purchase" which satisfied the standing requirements in *Kolbe*. As *Kolbe* is otherwise direct authority from this Court and squarely on point, it is dispositive of the standing issue.

The district court disregarded *Kolbe*, holding instead that the plaintiffs lacked standing because they "do not allege any facts suggesting a 'credible threat' that the Act will be enforced in accordance with Plaintiffs' broad reading." JA 251. That holding fails to account for the nature of the vagueness claim. Standing "turns on the nature and source of the claim asserted." *Warth v. Seldin,* 422 U.S. 490, 500 (1975). A vague criminal statute violates the Due Process Clause because the very vagueness makes it impossible for persons to predict whether or how the statute applies to them. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) ("'the prohibition of vagueness in criminal statutes…is 'essential' of due process required by both 'ordinary notions of fair play and the settled rules of law.'") *quoting Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

Thus, in *Kolbe*, this Court specifically held that "[i]n *Johnson*, the Court rejected the notion that 'a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.'" *Kolbe*, 849 F.3d at 148 n.19, *quoting Johnson*, 135 S. Ct. 2551, 2561 (2015). As this Court has since recognized, "[a]fter *Johnson*, at least, we know that a statute that doesn't raise First Amendment problems may nevertheless be impermissibly vague on due process grounds." *United States v. Larson*, 2018 WL 4203470 *2 (4th Cir. 2018). Indeed, in *Dimaya* the Court applied *Johnson* to reject the dissent's suggestion that such challenges "must be limited to cases in which the statute is unconstitutionally vague as applied to the person challenging it." *Dimaya*, 138 S. Ct. at 1242 (Thomas, J., dissenting). A facial vagueness challenge is thus cognizable and fully appropriate. In any event, each of the individual plaintiffs are also bringing "as applied" challenges to SB-707.

Here, plaintiffs actually own banned and potentially banned devices. Contrary to the district court's holding (JA 251), the issue is not whether plaintiffs' "broad reading" of SB-707 is correct. The issue is whether the statute on its face is so vague that plaintiffs, law enforcement and judges simply have no way of knowing whether that broad reading is correct. Under *Dimaya* and *Johnson*, plaintiffs have standing to make that claim. *See White Tail Park v. Stroubl*e, 413 F.3d 451, 460 (4th Cir. 2005) ("The standing doctrine, of course, depends not upon the merits").

For these reasons, the Supreme Court has repeatedly instructed that standing does "not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat – for example, the constitutionality of a law threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128–29 (2007). The case law cited by the district court is not to the contrary. Particularly misplaced is the district court's reliance (JA 251) on *Babbitt v. United Farm Workers Nat. Union*, 442 U.S 289 (1979), as *Babbitt* actually *supports* plaintiffs here.

There the Supreme Court *sustained* plaintiffs' standing to challenge a vague state criminal law where the plaintiff had an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute." *Babbitt*, 442 U.S. at 298. In such circumstances, the Court held, "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" 442 U.S. at 302, *quoting Steffel v. Thompson*, 415 U.S. 452, 459 (1974).[3]

[3] The district court erred (JA 253) in its reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983), where the Court held that a plaintiff did not have standing to sue on the claim that police routinely enforce the law unconstitutionally and on the "speculation" of the possibility that the plaintiff would be part of a traffic stop that would lead to an arrest and provoke the use of a chokehold. The issue was plaintiff's standing to seek prospective *equitable* relief against this unlawful practice under traditional principles of equity, not plaintiff's Article III standing to challenge an unconstitutional statute. *Lyons* did not involve a vagueness challenge.

This Court has faithfully followed *Babbitt* and recently applied it to a vagueness challenge in *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018). There, this Court relied on *Babbitt* to hold that the plaintiffs had standing to challenge a vague statute under the Due Process Clause where plaintiffs alleged that they did not know "which of their actions could lead to a criminal conviction, which deprives them of notice of prohibited conduct and 'may authorize and even encourage arbitrary and discriminatory enforcement' in violation of their right to due process.'" 885 F.3d at 288, quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Holding that the plaintiffs engaged in conduct that was "arguably" impacted by the challenged statute, this Court in *Kenny* then turned "to the second part of the *Babbitt* standard," holding that "there is a credible threat of future enforcement so long as the threat is not 'imaginary or wholly speculative.'" *Id*., quoting *Babbitt*, 442 U.S. at 302; *accord Davison v. Randall,* 912 F.3d 666, 677-79 (4th Cir. 2019) (sustaining standing where the plaintiff "intends to engage in a course of conduct 'arguably' impacted by the challenged conduct," quoting *Babbitt*, 442 U.S. at 298); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (holding that there is a presumption that a "non-moribund statute that facially restricts expressive activity by the class to which the plaintiff belongs presents such a credible threat.").

The district court's opinion is inexplicable under these principles. Here, the district court rejected standing on grounds that plaintiffs have "not been threatened with prosecution" and no state enforcement official "has made statements" or "taken actions" from which an intent to enforce could be "inferred." JA 251. Indeed, the court expressly held that "in order" for plaintiffs to have the requisite level of injury, plaintiffs would have to show that "an enforcement agent" would "actually attempt to enforce the Act accordingly, without any superseding authority intervening." JA 251-252. That is simply wrong.

Under *Babbitt,* as applied in *Kenny*, plaintiffs need only show that that they intend to engage in a course of protected conduct that is "arguably" covered by the statute and that the fear of enforcement is "not imaginary." Under the Due Process Clause, as construed in *Johnson* and *Dimaya*, plaintiffs have a constitutional right to own and acquire firearm accessories without fear of "arbitrary and discriminatory enforcement" of the statute's vague provisions. *Kenny*, 885 F.3d at 288, quoting *City of Chicago*, 527 U.S. at 56.

Indeed, the right to own and acquire firearms and common firearms accessories is a fundamental constitutional right under the Second Amendment as construed by Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). At the very least, under *Heller* and *McDonald*, a gun owner would have every right to replace worn parts of his or

her firearms, including parts that might increase the "rate of fire" by some marginal amount. Given that SB-707 facially applies to include *all* firearms of *any* type and the vagueness associated with SB-707's ban on any "device" that may "increase the rate of fire" by any amount, that fundamental right is immeasurably chilled by the prospect of arbitrary enforcement of SB-707 posed here. Emphatically, the district court is wrong in holding that plaintiffs are required to show that the state will "actually attempt to enforce" SB-707 in the manner feared by plaintiffs.

The Attorney General belittled plaintiffs' fears, arguing that the legislature had no intention to ban all devices, only devices like bump stocks, or alternatively, only those devices that "necessarily" increased the rate of fire. JA 199-200. As the district court expressly recognized during the hearing, nothing in the statute actually limits the scope of the statute in that manner. *Id*. Indeed, the statute's plain ban on all "devices" that "increase the rate of fire" is quite to the contrary, especially given that bump stocks and similar devices are expressly defined and separately banned.

In any event, there are 23 counties in Maryland and, including the City of Baltimore, there are 24 independent State's Attorneys. *See Murphy v. Yates,* 348 A.2d 837 (Md. 1975) (noting that the power to prosecute belongs to the State's Attorneys and holding unconstitutional a statute that created the office of state prosecutor as an independent unit in the executive branch). There are countless law enforcement agencies throughout the State of Maryland. The Maryland Attorney

General is the civil lawyer for the State, and his opinions and assertions here do not bind Maryland's 24 independent prosecutors, any of the hundreds of assistant prosecutors, or thousands of police officers in Maryland. *See* Maryland Constitution Art. V, § 7 (State's Attorneys are independent of the Attorney General). As a result, Maryland citizens remain subject to arrest and prosecution under a law so vague, not even the Maryland legislature and the State's Attorney General can agree as to what is banned.

II. SB-707 is Void for Vagueness.

The Due Process Clause of the Fourteenth Amendment prohibits the enactment of vague legislation. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1212 (2018) ("'the prohibition of vagueness in criminal statutes…is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'"); *see also Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). A penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972).

SB-707 fails the vagueness test on all counts. In addition to certain enumerated devices, SB-707 bans "any device" such that when installed in or attached to a

firearm, "the rate of fire increases." JA 91. There is nothing in the statute which limits this definition in any other way. It applies to devices that do not result in any impact to the trigger as well as devices that do (like a bump stock). The ban applies to devices which are on the specifically enumerated banned list (which includes bump stocks), as well as devices not specifically enumerated. The ban applies to devices used with single-shot, double-action, bolt-action, and semi-automatic guns. The ban applies to devices like bump stocks that modify a firearm's rate of fire to mimic that of an automatic firearm, as well as any device that increases the rate of fire by any marginal amount, *no matter how minimally*.

The overly-broad applicability of the statute creates serious vagueness concerns. For instance, the statute's sweeping application to any device which increases the rate of fire *by any small amount* potentially bans dozens of completely benign firearm accessories that have been in common use for decades.

Devices that aid in managing recoil or hot gases discharged from the muzzle, as well as devices that render a firearm more controllable, allow the gun to be brought back on target more quickly.

Increasing the speed with which the muzzle can be brought back on target is important in many types of hunting and other shooting sports. Ethically stopping certain game, for instance, can sometimes require a follow-up shot before an injured animal departs from view. Likewise, many shooting sports, from club competitions

to those held at the college and Olympic levels, are timed events where the need to bring a firearm back on target quickly is paramount. Finally, many devices are designed to make guns more controllable for safety reasons and more comfortable to shoot, and in doing so have the side effect of also allowing the muzzle to be brought back on target more quickly.

Obviously, the less time the muzzle is off target or the shooter's vision is obstructed, the faster follow-up shots can be accurately placed. By increasing the rate at which the muzzle can be brought back on target, or the overall stability and controllability of the gun, such devices increase the rate of fire (*to a very small degree but nowhere near the rate of an automatic weapon*), in violation of the statute as written.

Examples of after-market accessories that marginally increase the "rate of fire" by *some small amount* and fall prey to this ban include bipods and monopods to steady a rifle for shooting (particularly useful in hunting and target practice), rifle slings (which many shooters wrap around their arms to help steady a rifle), barrel weights like those used in Olympic competition to reduce muzzle rise due to recoil, muzzle devices designed to direct burning gases safely out of the line of sight of shooters, heatshields to protect the shooter's hand from barrel heat during repeated fire, devices designed to reduce recoil, including certain stocks (*other than bump-stocks*), internal springs used to reduce recoil, as well as a wide variety of

replacement (*non-bump*) stocks, grips and fore grips designed to allow a shooter to more firmly hold the gun. Even replacing a worn-out return spring on a semi-automatic firearm could increase the "rate of fire" of that firearm by some small amount.

Similarly, devices which might slightly increase the rate of fire of a single-shot or single-action gun include replacement springs to lighten the trigger pull, enlarged bolt handles for easier operation in cold temperatures during hunting season with cold or gloved hands, improved feed ramps to avoid jams (which obviously slow the rate of fire), an improved fore grip on a pump-action shotgun to avoid a hand slipping under competition or other stressful conditions and the like.

Many such accessories have been in common use for decades and only very marginally increase the rate of fire, but not to the semi-automatic level, let alone the rate possible with a bump stock. They are devices designed to increase safety, comfort, controllability and accuracy, and to keep the firearm functioning.

None of these devices have any connection whatsoever to recent tragic events. None of these devices are "bump stocks," nor do they increase the rate of fire to anything approaching that of a bump stock.

There is no conceivable public interest or justification for the vagueness of this statute. SB-707 comprehensively defines and bans six categories of devices that actually increase the rate of fire, including bump stocks. JA 91. By their design,

"bump stocks" and similar devices can only work with semi-automatic firearms. This is because single-shot and single-action guns have built-in limitations in the form of the need to manually manipulate the firearm in between shots which preclude the use of any device to increase the rate of fire to anything approaching what is accomplished with a bump stock on a semi-automatic gun. The fact that the statute is not limited to semi-automatic gun accessories demonstrates that its reach is far greater than "bump stocks" and similar devices.

Moreover, the very term "rate of fire" as applied to a semi-automatic firearm is unintelligible. Unlike actual machine guns which do have a mechanically determinable "rate of fire" (how fast mechanically the firearm can fire while cycling rounds through the chamber while the trigger is held down, a.k.a, "cyclic rate"),[4] the "rate of fire" for a semi-auto firearm is as fast as the trigger can be pulled for each shot and that potential "rate of fire" obviously may vary substantially from person to person. That reality necessarily means that the application of SB-707 varies from person to person, as a device that helps one person fire faster than normal *for that person* may not make a bit of difference *for another person*. A statute whose meaning may vary from person to person is the very epitome of vagueness. Again, SB-707 makes no attempt to define "rate of fire" at all, much less by reference to any

[4] *See* Merriam-Webster On Line Dictionary where "cyclic rate" is defined as "the rate of fire of an *automatic* weapon usually expressed as number of rounds fired per minute." https://www.merriam-webster.com/dictionary/cyclic%20rate (last assessed 2/10/2019) (emphasis added).

objective standard. Because "rate of fire" is wholly undefined by reference to any intelligible standard, citizens and law enforcement are left to guess as to what devices are covered and what devices are not.

The concept of a "rate of fire" is even more nonsensical when applied to firearms which are not semi-automatic, as the "rate of fire" for these guns varies not only from person to person but also by reference to the method of operation of such firearms. A bolt action rifle requires that the bolt be pulled back and then forward. A single shot firearm requires that a new round be manually inserted into the chamber for each shot. A pump action shotgun requires that that slide be manually operated. The "rate of fire" of a single action revolver involves manually cocking the hammer for each shot. A single-shot hunting rifle which includes a bolt which must be manually opened after each shot so the spent shell can be ejected and a new bullet loaded before the bolt is manually closed again for firing. The possible "rate of fire" of such a rifle is very marginally increased when the action is modified or replaced so that the bolt opens and closes more smoothly. A change in the firing pin spring in a bolt action rifle would be encompassed as such a new spring could increase the rate at which the owner could fire the rifle by some small amount. Yet, all these firearms are covered by SB-707 and all are unintelligibly assumed to have a "rate of fire." Therefore, any device that increases the speed with which any of these firearms are operated might be encompassed by this ban.

These disparities are not cured, as suggested by the defense below, in looking to the legislative history. While the legislature was concerned about devices with rates of fire approaching those of machine guns, the language that it actually chose is far broader. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.,* 138 S. Ct. 617, 634 (2018) ("Even for those of us who make use of legislative history, ambiguous legislative history cannot trump clear statutory language.").

In any event, the legislative history of this statute includes repeated complaints from gun owners that the statute is void in precisely the ways argued in this lawsuit. Thus, far from saving the statute, the legislative history suggests that the General Assembly passed this bill quite intentionally to make its language as broad and all-encompassing as possible so as to ensnare all gun owners possessing these "devices."

III. SB-707 Violates the Takings Clause

In *Loretto v. Teleprompter Manhattan CATV Corp*., the Supreme Court dealt with a New York law which provided that a landlord must permit a cable television company to install its cable facilities upon his property. The Supreme Court described the issue as "whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). The Court held that, "[t]he New York Court of Appeals ruled that this

appropriation does not amount to a taking.…Because we conclude that such a physical occupation of property is a taking, we reverse." *Id*. As the Court explained, "[w]e conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 425-26. *Loretto* did not involve the government ever actually taking possession of any part of the plaintiff's property. Instead, a statute provided for a "minor but permanent physical occupation of an owner's property" by a small cable box owned and installed by a private cable television company so that the building's tenants could receive cable television. *Id*.

Loretto was followed by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In that case, the Supreme Court made clear that the Takings Clause may bar an uncompensated taking regardless of whether such a taking was justified under the State's police power. Specifically, the Court rejected the notion that its prior decision in *Mugler v. Kansas*, 123 U.S. 623 (1887), meant that the government may use its police powers to ban possession and sale of certain types of property to protect public health and safety even where the regulation curtails personal property rights. The Supreme Court reversed a lower court's reading of *Mugler* as allowing a state to ban harmful or noxious private property without regard to the Takings Clause, stating that "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be

compensated. If it were, departure would virtually always be allowed." *Lucas*, 505 U.S. at 1026.

While *Loretto* and *Lucas* involved real property and the present case involves personal property, that distinction was erased for *per se* takings by the Supreme Court in *Horne v. Department of Agriculture*:

> In *Loretto*, the Court held that requiring an owner of an apartment building to allow installation of a cable box on her rooftop was a physical taking of real property, for which compensation was required. That was true without regard to the claimed public benefit or the economic impact on the owner. The Court explained that such protection was justified not only by history, but also because "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests," depriving the owner of the "the rights to possess, use and dispose of" the property. 458 U.S., at 435, 102 S.Ct. 3164 (internal quotation marks omitted). **That reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal property**.

Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427 (2015) (emphasis supplied). In this language, the Supreme Court explicitly extended the holding in *Loretto* to cases involving personal property, where *Loretto* is now "equally applicable."

Indeed, the holding in *Loretto* which is most directly incorporated by *Horne* into the Supreme Court's real property Takings jurisprudence is that a compensable taking occurs when the owner is deprived of the "the rights to possess, use and dispose of" the property. While this language has long been used in the context of the Takings Clause, (*see, e.g., United States v. General Motors Corp*., 323 U.S. 373, 378 (1945)), its clear extension to personal property rights was accomplished in

Horne. *Horne* further expanded protections against the Taking of personal property by explicitly adopting *Loretto*'s holding that the "rights to possess, use and dispose of" property may not be denied simply to achieve some "claimed public benefit." *Horne v. Dep't of Agric*., 135 S. Ct. 2419, 2427 (2015). Under *Horne*, it is clear that the government may not deny "the rights to possess, use and dispose of" personal property even where the denial "serves [a] legitimate public purpose…and thus is within the State's police power." *Loretto,* 458 U.S. at 425–26, *Horne,* 135 S. Ct. at 2427.

The district court rejected the application of *Horne* here under the theory that the present case purportedly involves a regulatory taking and not a physical taking. JA 243. Seizing on the statement in *Horne* that "[t]he different treatment of real and personal property in a regulatory case . . . [does] not alter the established rule of treating direct appropriations of real and personal property alike," (quoting *Horne*, 135 S. Ct. at 2427-28), the district court held that the protection of personal property as recognized in *Horne* applies only to cases where the government has directly appropriated the personal property, rather than regulating it. JA 243. Thus, according to the district court, the state is free to ban possession of any personal property as long as the state does not actually take physical possession of the property. That construction of *Horne* is wrong.

Horne explicitly incorporates the *Loretto* holding into the personal property context, finding that *Loretto*'s "reasoning…is equally applicable to a physical appropriation of personal property." *Horne,* 135 S. Ct. at 2427. Yet, in *Loretto*, the Supreme Court found a physical taking by the government despite the fact that the government never directly took title to, seized, entered onto, possessed, used or disposed of the real property at issue. Instead, the government only passed a law requiring the building owner to surrender a small portion of his property to the control of a third-party. In *Loretto*, this was sufficient to constitute a physical taking of real property by the government, for which compensation was required. *Horne*, 135 S. Ct. at 2427. When applying the *Loretto* holding in the personal property context, the *Horne* court was careful to quote the passage from *Loretto* to the effect that the use of a small portion of the owner's building "'is perhaps the most serious form of invasion of an owner's property interests,' depriving the owner of the 'the rights to possess, use and dispose of'" the property. *Id*.

Therefore, the touchstone of *Loretto*, which was adopted in the personal property context by *Horne*, was *not* whether the government itself actually took title or possession of the property, but, instead, whether "the rights to possess, use and dispose of" the property were lost. It is the deprivation of these specific interests which *Loretto* and *Horne* both deemed "perhaps the most serious form of invasion of an owner's property interests." *Horne,* 135 S. Ct. at 2427. Indeed, that is confirmed

by the *Horne* Court's discussion of its prior holding in *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979). In *Andrus*, the Court sustained a complete regulatory ban on the "sale of eagle feathers" against a Takings Clause claim. But, in so holding, the Court was also careful to note that the "regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them." *Andrus*, 444 U.S. at 65 (emphasis added). The Court stated that "a denial of one traditional property right does not always amount to a taking," noting further that "[i]n this case, *it is crucial* that appellees *retain the rights to possess and transport their property, and to donate or devise the protected birds*." *Id*., emphasis added. In short, the rights "to possess and transport" and to donate personal property was "crucial" to the Takings analysis in *Andrus*.

This point in *Andrus* was picked up and stressed in *Horne*, where the Supreme Court held that there is a fundamental difference between a regulation that restricts only the use of private property and one that requires "physical surrender … and transfer of title." *Horne*, 135 S. Ct. at 2429. As the Court explained in *Horne*, in finding no taking in *Andrus*, "the Court emphasized that the Government did not 'compel the surrender of the artifacts, and there [was] no physical invasion or restraint upon them.'" *Horne*, 135 S. Ct. at 2429, quoting *Andrus*, 444 U.S. at 65-66. In thus endorsing these statements in *Andrus*, *Horne* makes clear such circumstances are dispositive of the Takings inquiry.

When appropriately viewed in this light, *Horne* stands for the proposition that if "the rights to possess, use and dispose of" personal property are denied by a statute, then there has been a direct governmental appropriation of that personal property. Such a denial of these rights is so fundamental as to be "tantamount" to a physical taking or appropriation. Further, such a direct appropriation of personal property without compensation is not justified by a "claimed public benefit" (*Horne*, 135 S. Ct. at 2427), or even a "legitimate public purpose…within the State's police power." *Loretto*, 458 U.S. at 425–26. *Lingle v. Chevron, U.S.A., Inc*., 544 U.S. 528, 538 (2005) ("Beginning with [*Pennsylvania Coal Co. v.] Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster-and that such 'regulatory takings' may be compensable under the Fifth Amendment."); *Lucas*, 505 U.S. at 1014 ("These considerations gave birth in that case to the oft-cited maxim that, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'") (citation omitted).

In short, the "ouster of possession" has always been a *per se* "regulatory taking," regardless of whether the State transferred the property to itself. Such a regulatory deprivation of possession "goes too far." *Horne* makes plain that principle also applies to personal property. A complete ban on possession of private property

is "tantamount" to a direct appropriation, regardless of whether it is personal property or real property. The district court erred in holding to the contrary.

In rejecting this principle, even the trial court admitted in a footnote that, "the *Horne* majority implies that *Loretto*, which involved a law requiring a landowner to permit permanent physical occupation of its rooftop by a private third party, could be understood as a physical taking case….If so, *Horne* might suggest that *Loretto*'s rationale—in which a private third party is granted possession, rather than the government—could apply equally to personal property. At most, this might mean that a regulation mandating that title or possession of personal property be permanently transferred to a private third party would also qualify as a *per se* physical taking." *See* JA 244, n. 6. Then, the trial court quickly dismisses the conclusion it had correctly drawn from *Horne* on the theory that, "SB-707 does not purport to allocate permanent possession of Plaintiffs' rapid fire trigger activators to private third parties…." *Id*. But this theory ignores the reality that *Horne* looks not to the fact that private third parties received the relevant property, but to the fact that the benefit of the property was denied to its owner by statute.

Indeed, the district court's reasoning is utterly incompatible with *Andrus* as construed in *Horne*, where the Court explained that the ban on the sale of eagle feathers at issue in *Andrus* was not a Taking because the statute did not "'compel the surrender of the artifacts'" and the owners could still possess, transport and donate

the feathers. *Horne*, 135 at 2429, quoting *Andrus*, 444 U.S. at 65-66. The district court acknowledged the *Horne* Court's treatment of *Andrus*, but then, an *ipse dixit*, declares that neither *Horne* nor *Andrus* purports to hold that a ban on possession is a *per se* Taking. JA 246. But that is exactly the reasoning of *Horne* in holding "[t]he different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike." *Horne,* 135 S. Ct. at 2427-28. As *Horne* makes quite clear, the result in *Andrus* would have been different if the statute in question had banned possession of the feathers, in addition to banning the sale. There is simply no getting around that reality. Banning possession of personal property is "tantamount" to a "direct appropriation" no less than it is for real property because both circumstances involve the "physical surrender … and transfer of title." *Horne*, 135 S. Ct. at 2429. The "tantamount" test does not mean one thing for real property and something different for personal property. That the government does not take physical possession is irrelevant because the owner is deprived of all "beneficial uses" of the property in both instances. *Lucas*, 505 U.S. at 1019.

After *Horne*, this Court's decision in *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 492 F.3d 404 (4th Cir. 2007), is no longer good law. In that case, this Court sustained South Carolina's ban on video gambling machines, but it did so on the premise that such a ban affected only personal property, not real

property, and was therefore not a taking. *See Holliday*, 492 F.3d at 410 (noting that in the case of "personal property" the "new regulation might even render his property economically worthless."). Yet, the asserted distinction between personal property and real property relied upon in *Holliday* was the very distinction that was expressly rejected in *Horne*. As the Supreme Court explained, "[w]hatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 135 S. Ct. at 2427. *Holliday*'s holding that the government is free to take personal property without compensation simply does not survive that holding.

In the present case, SB-707 indisputably requires the owners of banned devices permanently to "surrender" the devices to the government, irretrievably destroy the devices, permanently store them out of state, or permanently sell them out of state. As of October 1, 2018, the effective date of SB-707, "the rights to possess, use and dispose of" these devices in the State of Maryland have been completely and permanently destroyed by operation of a statute purportedly passed for public benefit. Therefore, compensation is required.

The only remaining argument against the clear implications of *Lorretto* and *Horne* is the fact that, as the trial court states in a footnote, "Plaintiffs undisputedly retain rights to possess, transfer or use [the banned devices] outside of Maryland." JA 246, n. 8. However, even in ruling against the plaintiffs, the trial court was quick

to note that, "the Court's conclusion that no taking has occurred does not depend on these out-of-state uses." *Id*. That ruling was correct because "out-of-state uses" can never be allowed to avoid a Takings Clause challenge to State law. If such an argument were permitted, then states would always be free to engage in regulatory takings of personal property, even when they otherwise violated the Takings Clause. Indeed, a similar argument was rejected in *Ezell v. Chicago*, 651 F.3d 684, 697 (7th Cir. 2011), where the Seventh Circuit reversed the district court's holding that the ban on gun ranges in Chicago was constitutional because gun owners could access ranges outside of Chicago. The court stated "[t]his reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction." *Id*. That, the court ruled, was "a profoundly mistaken assumption." *See also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) ("one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place"); *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939) (same).

Adopting the profoundly mistaken "out-of-jurisdiction use" exception to the Takings Clause even only when state laws are challenged would still wreak havoc. If this premise was correct then the federal government would be free to seize any personal property in the United States without paying just compensation under the Fifth Amendment on the theory that owners could escape confiscation of their

property by transporting it across the border to Canada or Mexico. Similarly, if every state banned these devices under state law, then there would be no state to which owners might finally retreat with their property. Would every state have to finally provide just compensation or only the last state to pass a ban where all of the last legally-owned devices had been stockpiled? Would all of the laws be struck down or only one of them? If only one of them, which state must yield? These rhetorical questions are meant only to illustrate the utter absurdity of any suggestion that "out-of-state uses" might save the statute here.

Finally, before a court could reasonably dismiss the claims of the current plaintiffs based on potential out-of-state storage and use of their devices, the State would, at a minimum, be required to present sufficient facts to show that the plaintiffs have an ability to take such action and make such accommodations for storing, use or selling their devices out of state. Such option is not available to every owner and the proposition that this is a viable alternative would assume certain facts for which there is no evidence in the record.

The Ninth Circuit recently held that a ban on certain firearm magazines violated the Takings Clause. In *Duncan v. Becerra*, the court held that the same options available to the plaintiffs here, "surrender, removal [from the state], or sale…fundamentally 'deprive Plaintiffs not just of the use of their property, but of possession, one of the most essential sticks in the bundle of property rights.'" 742 F.

App'x 218, 222 (9th Cir. 2018) (citation omitted). The court went on to hold, in reliance on *Loretto*, that "California could not use the police power to avoid compensation." *Id*.

In so holding, the Court of Appeals affirmed the District Court's opinion in its entirety. In the opinion affirmed, the District Court noted that the "costs of removal and storage and retrieval [of banned magazines out-of-state] may render the process more costly than the fair market value (if there is any) of the magazine itself. Whatever stick of ownership is left in the magazine-owner's "bundle of sticks," it is the short stick." *Duncan*, 265 F. Supp. 3d at 1136–39. The District Court went on to hold that:

> Here, California will deprive Plaintiffs not just of the use of their property, but of possession, one of the most essential sticks in the bundle of property rights.…whatever expectations people may have regarding property regulations, they "do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 135 S.Ct. at 2427. Thus, whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical dispossession of such lawfully-acquired private property without just compensation.

Duncan, 265 F. Supp. 3d at 1136–39.

In principle, *Duncan* is indistinguishable from this case. Both this case and *Duncan* involved bans on the possession of personal property. The district court, however, was unpersuaded. The court acknowledged that *Duncan* provided "support for Plaintiffs' theory that possession bans are per se takings," but held that *Duncan*

did not apply because the Ninth Circuit's affirmance was on an appeal form a preliminary injunction and the court affirmed the district court's holding on grounds it was not an abuse of discretion. JA 247. That distinction does not exist. It is *always* an abuse of discretion to make an error of law, even on a preliminary injunction. *See*, *e.g.*, *Valencia v. Springfield*, 883 F.3d 959, 966 (7th Cir. 2018) ("In other words, '[a] district court abuses its discretion when, in conducting its preliminary injunction analysis, it commits a clear error of fact or an error of law.'") (citations omitted). Indeed, the Ninth Circuit in *Duncan* recognized that principle in holding that affirmance was required because the district court "outlined the correct legal principles" in its application of *Loretto* and *Lucas* and other Takings cases. JA 228. The district court also refused to follow *Duncan* because the district court also applied the Second Amendment to preliminarily enjoin the state law at issue. JA 247. Yet, *Duncan's* Second Amendment holding is utterly independent of the Takings analysis and neither the district court nor the Ninth Circuit remotely purported to apply the Second Amendment in ruling on the Takings Clause claims.

IV. Maryland Shall Issue, Inc. Has Standing to Assert All Claims.

MSI has standing to bring this suit under two independent principles: (1) organizational standing and (2) representative standing. As explained in *Equal Rights Center v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510 (D. MD. 2010), "organizational standing[] permits a group to allege standing on its own behalf for

injuries directly inflicted upon the organization. *Id*. at 518 (*citing Warth*, 422 U.S. 511). An organization has standing to sue on its own behalf where it satisfies the three elements of Article III standing: (1) "the plaintiff . . . suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there [is] a causal connection between the injury and the conduct complained of"; and (3) "it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations and internal quotation marks omitted).

The district court properly acknowledged that MSI has representative standing to sue on behalf of its members because its members would individually have standing to sue on all the claims brought in this case. JA 234 ("the Court will only consider MSI's allegations as to harms suffered by its individual members."). MSI's membership includes each of the individual plaintiffs in this case as well as numerous other individuals who are burdened by SB-707. MSI has standing to bring claims on behalf of its members, including the individual plaintiffs, as all that is required is that "at least one member of the association have standing to sue in his or her own right." *NRA v. BATF*, 700 F.3d 185, 191 (5th Cir. 2012), *cert. denied*, 134 S. Ct. 1364 (2014).

However, the district court erred in holding (JA 234) that MSI did not have organizational standing to sue on its own behalf. An organization is injured where the challenged actions have worked to "frustrate" achievement of the organization's purposes and objectives. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (explaining that a "concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests"). Under this test, "[a]n organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission." *Lane v. Holder*, 703 F.3d 668, 674 (4th Cir. 2012).

MSI easily satisfies this test, as demonstrated in Paragraph 8 of the Complaint:

> Class Plaintiff Maryland Shall Issue, Inc. ("MSI") is a non-profit membership organization incorporated under the laws of Maryland with its principal place of business in Annapolis, Maryland. MSI has approximately 1,100 members statewide. MSI is an all-volunteer, non-partisan 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. The purposes of MSI include promoting the exercise of the right to keep and bear arms; and education, research, and legal action focusing on the Constitutional right to privately own, possess and carry firearms and firearms accessories. MSI brings this action on behalf of itself and its members. SB 707 requirements directly harm MSI as an organization by undermining its message and acting as an obstacle to the organization's objectives and purposes. The membership of MSI includes individuals who currently possess "rapid fire trigger activators" which are effectively and totally banned by SB 707 as of October 1, 2018. Neither the claims asserted nor the relief requested requires the participation of individual MSI members in this lawsuit. MSI is an appropriate class representative in this class action. MSI's membership include persons

> who, individually or collectively, currently possess "devices" banned by SB 707, who are thus directly injured by SB 707 and who would have standing to bring each of the class' legal claims set forth herein.

JA 11.

All of these allegations must be taken as true for purposes of this appeal. The taking, without just compensation, of the firearm devices at issue in this case, as well as the vagueness of the statute, seriously impact MSI's ability to complete its missions 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," as well as to "promot[e] the exercise of the right to keep and bear arms; and education, research, and legal action focusing on the Constitutional right to privately own, possess and carry firearms and firearms accessories." JA 11. MSI cannot complete any of these missions as to obviously banned devices like a "bump stock." But, more importantly, MSI is unable to determine what is banned in the vague portions of the statute, and therefore, unable to advise the public or its members what is lawful, unable to determine what accessories are permissible to maintain for use, training and outreach in Maryland, and unable to determine what accessories it is still safe to promote. MSI would not know what devices were legal for the purposes of firearm safety and controllability as it relates to potentially-banned grips, muzzle devices, loading devices and the other innocuous accessories swept within this very

poorly-worded and vague statute. At the very least, MSI is entitled to an opportunity to amend the complaint.

The causal connection and redressability between this injury to MSI and matters "complained of" in this suit are also direct and immediate. The burdens imposed by the ban and vagueness of the statute would be redressed by the declaratory and injunctive relief requested. This relief would affect MSI directly because MSI's membership grows and prospers by the exercise of these rights by law abiding citizens. MSI also has standing to assert the vagueness claim because MSI's mission includes education and instruction concerning firearms and MSI has many members who actually performs instruction in furtherance of MSI's mission.

V. SB-707 Violates Articles 40 and 24 of the Maryland Declaration of Rights.

The district court also erred in dismissing all of plaintiffs' state law claims based on Article 40, the State constitutional counterpart to the Fifth Amendment's Takings Clause. Under Maryland law, "[r]etrospective statutes that abrogate vested rights are unconstitutional generally in Maryland." *Muskin v. State Dept. of Assessments and Taxation,* 422 Md. 544, 556, 30 A.3d 962, 969 (2011). The Maryland Court of Appeals has thus held that "Article 24 of the Maryland Declaration of Rights, guaranteeing due process of law, and Article III, § 40 of the Maryland Constitution, prohibiting governmental taking of property without just compensation, have been shown, through a long line of Maryland cases, to prohibit

the retrospective reach of statutes that would result in the taking of vested property rights." *Id*. Existing lawful owners of banned items indisputably have "vested" rights in the continued possession of this lawfully acquired personal property. SB-707 indisputably abrogates those rights by banning continued possession.

The district court's holding that personal property is unprotected by Article 40 is directly contrary to *Serio v. Baltimore County,* 384 Md. 373, 399, 863 A.2d 952, 967 (2004), where the Maryland Court of Appeals held that Article 40 protected the property rights of a convicted felon in the value of his firearms that he could no longer possess. The district court refused to apply *Serio* here because the State in that case physically took possession of the firearms. JA 244-45, n.6. The court thus made the same error it made in holding that the Fifth Amendment applies only to cases in which the personal property is physically appropriated.

The district court also incorrectly held that plaintiffs have no vested rights in their personal property that was legally purchased and legally owned prior to the enactment of SB-707. *Id*. The Maryland Court of Appeals has held that the State's Takings Clause is violated "[w]henever a property owner is deprived of the beneficial use of his property or restraints are imposed that materially affect the property's value, without legal process or compensation." *Serio*, 384 Md. at 399. As stated in *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 623, 805 A.2d 1061, 1072 (2002), under the Maryland Constitution, "[n]o matter how 'rational' under particular

circumstances, the State is constitutionally precluded from abolishing a vested property right or taking one person's property and giving it to someone else." Banning possession indisputably deprives the owner of "beneficial use of his property."

Under Maryland law, these state claims for declaratory relief should not be dismissed without reaching the merits. *See, e.g*, *Christ by Christ v. Maryland Dep't of Nat. Res*., 644 A.2d 34, 37-38 (Md. 1994). Indeed, under Maryland law, a court may enjoin a statute that violates Article 40 until compensation is provided. *Department of Natural Resources v. Welsh*, 308 Md. 54, 65 (1986). That is the appropriate remedy here.

REQUEST FOR ORAL ARGUMENT

Plaintiffs/Appellants respectfully request oral argument.

CONCLUSION

For the forgoing reasons, the appellants respectfully request that this Honorable Court reverse the dismissal of the state and federal Takings Clause and Due Process claims and remand this matter for trial.

Respectfully submitted,

HANSEL LAW, PC

/s/ Cary J. Hansel
Cary J. Hansel (Bar No. 14722)
Erienne A. Sutherell (Bar No. 20095)
2514 N. Charles Street

Baltimore, Maryland 212118
Telephone: 301-461-1040
Facsimile: 443-451-8606
cary@hansellaw.com

and

/s/ Mark W. Pennak
Mark W. Pennak
President, Maryland Shall Issue, Inc.
332 Cape St. Claire Rd #342
Annapolis, MD 21409
Telephone: (301) 873 3671
Facsimile: (301) 718 9315
mpennak@marylandshallissue.org

Counsel for Appellants

CERTIFICATE OF SERVICE

I certify that on February 12, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Cary J. Hansel
Cary J. Hansel (Bar No. 14722)

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQURUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,772 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(5)&(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word Version 8.1 in 14 point font, Times New Roman.

/s/ Cary J. Hansel
Cary J. Hansel (Bar No. 14722)