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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Regulations

Other Authorities

ARGUMENT

I. THE CASE IS NOT MOOT.

Defendants erroneously claim the case has been mooted by the issuance of new federal regulations, 27 C.F.R. §478.11, that purport to define bump stocks as machine guns and thus ban possession of bump stocks under federal law. *See* Final Rule, Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018). The State further relies on (Br. at 9 n.3) the D.C. Circuit decision sustaining this federal ban in *Guedes v. BATF*, 920 F.3d 1 (D.C. 2019).

The federal ban is simply irrelevant to the issues presented on this appeal. Unlike the plaintiffs in *Guedes*, the plaintiffs here do not challenge the right of either the federal government or of the State to ban bump stocks. Rather, this case is about the Constitutional rights of previously existing lawful owners of bump stocks to seek compensation for the destruction of plaintiffs' property rights by virtue of the ban imposed by the State. The D.C. Circuit never addressed any takings issues in *Guedes* and the district court in that case expressly acknowledged that the plaintiffs may seek compensation in the Court of Federal Claims on any takings claim, regardless of the validity of the ban. *Guedes v. BATF*, 356 F.Supp.3d 109, 137 (D.D.C. 2019). Plaintiffs in this case are likewise entitled to file such a takings suit in the Court of Federal Claims against the United States and are free to seek just compensation from Maryland for its takings as well. That the

ban has been upheld by the D.C. Circuit in *Guedes* is thus simply irrelevant to the takings issues.

Second, and in any event, the federal rule is limited to bump stocks and is thus far narrower than the types of devices banned by the State statute at issue here, Senate Bill 707. Specifically, the new federal rule defines a bump-stock-type device to be "a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." 27 C.F.R. §478.11 (defining machine gun).

In contrast, Senate Bill 707 bans not only bump stocks specifically, but also banned five **other** enumerated items, including a "trigger crank, hellfire trigger, binary trigger system, burst trigger system, or a copy or a similar device." Md. Code Ann., Crim. Law § 4-301(m)(2). The State makes no attempt to argue that any of these additional items act by "harnessing the recoil energy of the semi-automatic firearm" so as to fit the new federal definition in the Rule for a machine gun. Indeed, as the State acknowledges (Br. at 17 n.4), the ATF went to some pains to note that its new definition for machine guns does *not* encompass "binary triggers," which are banned by SB 707. 83 Fed. Reg. at 66534. Even more fundamentally, in addition to the specific enumerated devices, SB 707 also

contains a catch-all provision that bans "any device" when installed in or attached to any firearm "increases" the "rate at which a trigger is activated or the rate of fire increases." Md. Code Ann., Crim. Law § 4-301(m)(1). Nothing similar is found in the federal Rule.

II. THE STATE'S TOTAL BAN ON POSSESSION IS A TAKING UNDER THE FIFTH AMENDMENT.

A. The State's "Police Power" Does Not Trump The Takings Clause.

The State is nothing if not persistent in its belief that Maryland need only to invoke its "police powers" to obviate completely any analysis under the Takings Clause of the Fifth Amendment and the similar Takings Clause under the Maryland Constitution. According to the State, it simply does not matter under these Taking Clauses that the prior ownership and possession of the newly banned "rapid fire trigger activators" were completely legal under both federal and state law.

The State's position ignores the Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982). There, the Supreme Court specifically noted that the lower court has determined that the taking involved a "legitimate public purpose" and thus was "within the State's police power." The Court stated that it had "no reason to question that determination," but nonetheless expressly held that *"[i]t is a separate question . . .*

whether an otherwise valid regulation so frustrates property rights that compensation must be paid." *Id*. (emphasis added).

The State likewise ignores the Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992). There, the Court rejected the lower court's reliance on *Mugler v. Kansas*, 123 U.S. 623 (1887), for the proposition that no compensation is owing where the regulation "is designed 'to prevent serious public harm.'" *Id*. at 1009. The *Lucas* Court explained that *Mugler* simply was "our early formulation of the police power justification necessary to sustain (without compensation) ***any*** regulatory diminution." *Id*. at 1026 (emphasis the Court's). The *Lucas* Court then stressed that "it becomes self-evident that noxious use logic cannot serve as a touchstone to distinguish regulatory 'takings' – which require compensation – from regulatory deprivations that do not require compensation" and 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" because "[i]f it were, departure would virtually always be allowed." *Id*.

These principles were expressly applied to personal property in *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015), where the Court made clear that personal property is protected by the Takings Clause no less than real property. In that case, the Ninth Circuit, like the State's contention in this case (Br. at 21), stated that "it

is clear the holding of *Lucas* is limited to cases involving land" and that "[t]he real/personal property distinction also undergirds *Loretto*." *Horne v. Dept. of Agriculture*, 750 F.3d 1128, 1140 (9th Cir. 2014), *rev'd* 135 S. Ct. 2419 (2015).

The Supreme Court reversed and, in so holding, expressly rejected the Ninth Circuit's purported distinction between personal and real property. *Horne*, 135 S. Ct. at 2425. Looking to its decision in *Loretto*, the Court stated that "such an appropriation is a *per se* taking that requires just compensation." *Id.*, *citing Loretto*, 458 U.S. at 2426. The Court concluded that "[n]othing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property." *Id.*

That holding in *Horne* disposes of the State's contention (Br. at 21) that the Supreme Court "has not identified any such categorical rules that apply to regulations on personal property." As *Horne* states, "[t]he Government has a *categorical* duty to pay just compensation when it takes your car, just as when it takes your home." *Horne*, 135 S. Ct. at 2426 (emphasis added). By any measure, that is a "categorical" holding.

B. The Banned "Devices" Are Not Inherently Illegal.

The State's next line of defense is that there is no duty to compensate for the taking of personal property that is "intrinsically illegal." (Br. at 28). That argument fails in its premise. As the dissenting opinion by Judge Henderson in

Guedes points out, bump stock devices were specifically allowed by the ATF under multiple ATF rulings that concluded that these devices were not "machineguns" as that term is defined by federal law, 26 U.S.C. § 5845(b), and thus were completely unregulated by federal law. *See Guedes*, 920 F.3d at 37 (Henderson, J., dissenting) (referring to "ten letter rulings of the ATF between 2008 and 2017"). *See* JA 161, 163, 164, 167, 170, 172. As Judge Henderson states, it is "difficult to ignore the ATF's repeated earlier determinations that non-mechanical bump stocks do not initiate an automatic firing sequence." *Id*. at 47. And, as Judge Henderson's dissent in *Guedes* illustrates, it is far from clear that the federal Rule is correct in defining bump stocks as machine guns. The issue remains embroiled in litigation. See also *Aposhian v. Barr*, No. 19-4036 (10th Cir.) (appeal pending); *GOA v. Barr*, No. 19-1298 (6th Cir.) (appeal pending).

In any event, the State errs in contending (Br. at 18) that bump stocks "mimic" machineguns and should be banned just as machineguns are supposedly banned. Possession of *actual* machineguns by civilians is *not* banned. Under section 102 of the Firearms Owner's Protection Act of 1986, P.L. 99-308, 100 Stat. 449 (1986), codified as 18 U.S.C. § 922(o)(2)(B), Congress enacted a grandfather provision to that Act's ban on transfer and possession of actual machineguns so that the Act "*does not apply with respect to * * * any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this*

subsection takes effect." (Emphasis added). Maryland likewise permits the continued possession of machineguns, requiring only that the owners register them with the State Police upon acquisition. *See* Md. Code Ann., Crim. Law § 4-403(c)(1). Not even the State asserts that the "devices" banned by SB 707 are all *more* dangerous than actual (and perfectly legal) machine guns.

Finally, the prior ATF rulings, discussed in *Guedes*, make clear that the State is incorrect to assert (Br. at 27) that existing owners have no "legitimate expectations in the continued legality" of the devices that the ATF expressly permitted but that SB 707 now bans. Ten years of ATF rulings created precisely such an expectation. Indeed, to this day, the ATF has not banned "binary triggers" and the other non-bump stock devices that are banned by SB 707. These devices were lawfully acquired, owned and used under federal law and were valuable personal property until SB 707 was enacted. As *Lucas* holds, if the State is free to ban existing legal property with a simple legislative *ipse dixit*, then the Takings Clause would become a dead letter.

C. A Government Regulation That Completely Bans Possession and Transport Is "Tantamount" To A Direct Appropriation.

The foregoing disposes of the State's contention that it is free to exercise its "police power" without regard to the Takings Clause. Undaunted, the State, like the district court (JA 244-45, n.6), grudgingly admits that a *per se* rule might be applicable to appropriations of personal property, but asserts (Br. at 30) that

"[b]ecause the State has not physically appropriated rapid fire trigger activators for its own use, the per se rule articulated in *Horne* does not apply."

The State never comes to grips with the point, made in plaintiffs' opening brief (Br. at 36), that the Supreme Court long ago abandoned the notion that a physical "appropriation" was required in order to affect a *per se* taking. Rather, the Court has adopted a "regulatory taking" test under which "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." *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (emphasis added). Under *Lingle*, there are "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes," (1) "where government requires an owner to suffer a permanent physical invasion of her property -- however minor" or (2) where "regulations completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Id*. at 538 (emphasis the Court's).

In response, the State never even cites *Lingle*, much less its test for a "tantamount" taking. Rather, the State merely argues (Br. at 34) that the Supreme Court has "never" held that a loss of possession is "tantamount to a physical appropriation." That argument is senseless in this case. Here, the State has required owners to dispossess themselves of the "devices" and, upon failure, will

imprison the owners and seize the devices. It would be irrational to hold that there is no taking of the property rights *until* the State actually seizes the previously legal devices it has now criminalized. The focus is on the loss of property rights, not on the *means* by which the State has brought about that loss. *See Horne*, 135 S. Ct. at 2428 (holding that a taking took place **because** the owners lost "the entire 'bundle' of property rights in the appropriated raisins – 'the rights to possess, use and dispose of' them,'" *quoting Loretto*, 458 U.S. at 435).

Indeed, the most recent court of appeals decisions have all applied *Lingle*, *Lucas*, *Loretto* and *Horne* to personal property takings cases without distinction. *See Ass'n. of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General of New Jersey*, 910 F.3d 106, 124 (3d Cir. 2018) (applying the *Lingle* "tantamount" test to assess whether a New Jersey ban on certain firearm magazines was a taking); *Sierra Medical Servics Alliance v. Kent*, 883 F.3d 1216, 1224-25 (9th Cir. 2018) (applying *Lingle*, *Horne*, *Lucas* and *Loretto* to assess whether the State's regulation of personal property rights was a taking); *Duncan v. Becerra*, __ F.Supp.3d __, 2019 WL 1434588 at 38 (S.D.Cal. March 29, 2019) ("the Takings Clause prevents [the State] from compelling the physical dispossession of such lawfully-acquired private property without just compensation"). Contrary to the district court's suggestion (JA 247), the Ninth Circuit's affirmance of the preliminary injunction

previously entered in *Duncan*[1] was not an outlier, but is fully consistent with the analytical approach taken by these cases.

The only remaining inquiry is whether a complete ban imposed by SB 707 is "tantamount" to a direct appropriation and thus a *per se* taking under *Lingle*. That question answers itself. SB 707 provides that "a person may not (1) transport a rapid fire trigger activator into the State; or (2) manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator." Md. Code Ann., Crim. Law, § 4-305.1(a). It is difficult to imagine a more complete destruction of all the "sticks" in the "bundle of property rights." Such a regulation constitutes both a "physical invasion" of the property (as the State requires dispossession upon penalty of seizure) and deprives the owner of "*all* economically beneficial use" (as the State bans all use). *Lingle*, 544 U.S. at 538.

The State's attempt to minimize the importance of "possession" is irreconcilable with *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979), where the Court sustained a federal regulatory ban on the sale of eagle feathers against a takings challenge precisely because "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 supplied). In so holding, the Court stated "it is

[1] *See Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), *aff'd.*, 742 F. App'x 218 (9th Cir. 2018).

crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id*. at 66. In *Horne*, the Court stressed that there was no taking in *Andrus because* "the owners in that case retained the rights to possess, donate, and devise their property." *Horne*, 135 S. Ct. at 2429. The Court contrasted that holding to the raisin program at issue in *Horne*, where the program "requires physical surrender of the raisins and transfer of title, and the growers lose any right to control their disposition." *Id*.

In response, the State contends that "the Court in *Horne* did not suggest that a ban on possession is synonymous with physical appropriation for government use." (Br. at 32). Nonsense. That assertion simply ignores the reasoning in *Andrus* and *Horne*. *Andrus* found possession "crucial" to the takings analysis. *Andrus*, 444 U.S. at 65. And *Horne* distinguished *Andrus* on grounds that the owners of the feathers "retained the rights to possess, donate, and devise their property." *Horne*, 135 S. Ct. at 2429. This Court is not at liberty to ignore this analysis. *See, e.g., Langham-Hill Petroleum, Inc. v. Southern Fuels Co*., 813 F.2d 1327 1331 (4th Cir. 1987) ("This court is bound by the Supreme Court's reasoning…."). Tellingly, the State never even mentions the word "crucial" in its discussion of *Andrus* or *Horne*.[2]

[2] As noted in *Horne*, "a regulatory restriction on use that does not entirely deprive an owner of property rights may still be a taking under *Penn Central* [*Transp. Co. v. New York, City*, 438 U.S. 104, 124 (1978)]." *Horne*, 135 S. Ct. at 2429. But,

The State also attempts (Br. at 22) to take refuge in *Lucas'* observation that personal property is different because owners "ought to be aware of the possibility that new regulation might render his property economically worthless." *Lucas*, 505 U.S. at 1027. We have no quarrel with that principle. But, there is an obvious difference between a regulation that has rendered property "economically worthless" (but leaves the property in the owner's possession) and a law that completely bans (and criminalizes) mere possession of property. For example, in *Andrus*, the statute effectively rendered eagle feathers "economically worthless" by banning the **sale** of the feathers, but that statute did not effect a taking **because** the statute allowed the owner to continue to "possess and transport" the feathers. If SB 707 had simply banned sales this suit would have not been brought.

Indeed, in *Mugler*, on which the State places so much reliance (Br. at 20, 23-24, 26, 28, 38), the Supreme Court sustained a state's ban on the manufacture and sale of beer against a takings claim, but in so holding, the Court took pains to note that "[s]uch legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but *is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.*" *Mugler*, 123 U.S. at 669 (emphasis supplied).

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this Court need not undertake the *Penn Central* inquiry in this case, as it is applied only if there is not a *per se* taking under *Lingle*.

By contrast, SB 707 completely bans an owner from "the control or use of his property" and restricts "his right to dispose of it." SB 707 thus does far more than simply ban a particular "use" – it bans *all* uses and *all* possession in Maryland.

Similarly unavailing is the State's reliance on *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (2007), a case that pre-dates *Horne*. There, this Court sustained a ban on the gambling machines, reasoning that the destruction of the plaintiff's business was not a taking under *Lucas* because owners are on notice that "new regulation might even render his property economically worthless." *Holliday*, 493 F.3d at 410, *quoting Lucas*, 505 U.S. at 1027-28. The Court then relied on *Mugler* for the proposition that a state may abolish gambling, just as the state in *Mugler* banned the sale of alcohol. *Id*. at 411. But, in so holding, this Court never addressed the taking issues posed by a ban on possession. The Court discusses *Andrus* (*id*. at 410), but never mentions *Andrus'* discussion of the "crucial" nature of the right to "possess and transport," rights that are also highlighted in *Horne*. Indeed, it had no occasion to do so, as plaintiff's contention in that case was that the State law meant that his property "lost all market value, and his business became worthless." *Id*. at 406. *Holliday* thus cannot be read, as the State suggests, as support for the proposition that the State is

free to eliminate the "crucial" property rights of possession and transport without regard to the Takings Clause.[3]

The State's reliance (Br. at 26) on *Akins v. United States*, 82 Fed. Cl. 619 (2008), is similarly misplaced. *Akins* did not involve a ban on a person's existing lawful possession of machine guns. Rather, the ATF ruled that a particular new invention, (the "Akins accelerator") violated previously existing law on the manufacture of machine guns because it used a mechanical device to achieve a greater firing capacity. In ruling that this ATF ruling did not constitute a taking, the court held that the government may invoke its police power to enforce existing criminal law by banning the sale or possession of property that is in violation of that previously existing law. Here, it is undisputed that the devices banned by SB 707 were all lawfully purchased, owned and used prior to the enactment of SB 707 in full reliance on prior ATF rulings that confirmed the legality of the devices.

III. SB 707 VIOLATES MARYLAND'S TAKING CLAUSE.

The Maryland Court of Appeals has held that the State's Taking 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 v. Baltimore County*, 384 Md.

[3] The same point applies to the other trial level decisions cited by the State.

373, 399, 863 A.2d 952, 967 (2004). The State cannot and does not dispute that banned "devices" are "property" within the meaning of *Serio*. Nor does the State dispute that the ban imposed by SB 707 deprives the owner "the beneficial use of his property" or "affect the property's value."

Rather, the State asserts (Br. at 36) that this property may be banned without compensation simply because these devices are supposedly like machine guns and "machine guns have long been heavily regulated and their possession is generally banned." Yet, as noted above, all these devices were purchased pursuant to an ATF finding that they were **not** machine guns. And, as also noted above, possession of machine guns is perfectly legal under both federal law and Maryland law. Given that current legality of machine guns (which are now **very** valuable property), the State could not seize machine guns without just compensation. The analogy to machine guns thus fails on all counts.

In any event, Maryland's Takings Clause is read in *pari materia* with the Fifth Amendment's Takings Clause. *See, e.g.*, *Muskin v. State Dept. of Assessments and Taxation*, 422 Md. 544, 556, 30 A.3d 962, 968-9 (2011). Thus, like the federal Takings Clause, as construed in *Lucas* and *Lorretto,* a taking under the Maryland Takings Clause is a "separate question" from whether the State has exercised its valid "police powers." See *City of Annapolis v. Waterman,* 357 Md. 484, 509, 745 A.2d 1000, 1013 (2000) (following *Lucas* and holding "even if there

is a valid, connected public purpose, i.e., an essential nexus, *there still must be compensation for the taking*." (Emphasis added)).

Furthermore, Maryland's Takings Clause is *more* protective of property rights. *Id.*; *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 623, 805 A.2d 1061, 1072 (2002) ("No 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."). A "vested" right is simply a "property right under Maryland property law." *Muskin*, 422 Md. at 560, 30 A.3d at 971. Such a "property right" includes personal property. *Serio*, 384 Md. at 399-400, 863 A.2d at 967-969; *Pitsenberger v. Pitsenberger*, 287 Md. 20, 29, 410 A.2d 1052, 1057-1058 (1980) (possessory interests in personal property "are within the protection of the Fourteenth Amendment").

Indeed, unlike the Fifth Amendment, which allows the federal government to "take" first and remit owners to a damages suit as a remedy, *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 127 (1974), the Maryland Takings Clause bans a taking without compensation "*being first paid or tendered* to the party entitled to such compensation." Md. Const., Art. III, §40A (emphasis added). Maryland law thus authorizes a court to enjoin the taking *until* payment is rendered. *Department of Natural Resources v. Welsh*, 308 Md. 54, 65, 521 A.2d 313, 318 (1986). That would be the appropriate relief in this case.

The State's assertion (Br. at 35) that persons and property may be subjected to restraints and burdens is irrelevant. None of the cases cited by the State purport to hold that such regulation may proceed without regard to the State Takings Clause. Indeed, in *Sprigg v. Town of Garrett Park*, 89 Md. 406, 43 A. 813, 816 (1899), cited by the State (Br. at 38), the Court of Appeals sustained the right of a municipality to use its police powers to regulate the "maintenance and improper use of privy cesspools, sinks, or vaults" against a Due Process challenge, but noted that "[t]here is no claim made in this case that the council may destroy the structure in order to abate the unlawful use." *Sprigg*, 89 Md. at 406, 43 A. at 817.

Similarly without merit is the State's attempt (Br. at 28, 37) to distinguish *Serio* as involving an "appropriation." The Maryland Takings Clause does not turn on whether there was an appropriation; it requires compensation "*[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." *Serio*, 384 Md. at 399, 863 A.2d at 967 (emphasis added). It simply does not matter "how rational" the State's decision may be, *Dua*, 370 Md. at 623, 805 A.2d at 1072, or the means by which the owner was "deprived of the beneficial use." Compensation was thus required in *Serio* because the felon retained a constitutionally protected "ownership interest," which meant that "the County cannot just retain the firearms." *Serio*, 384 Md. at 396, 863 A.2d at 966.

Serio also demonstrates the lack of merit in the State's contention that the police power is enough. In *Serio*, it was perfectly proper for the General Assembly to use its police powers to deny the convicted felon of the right to possess firearms. Yet, as *Serio* squarely holds, the exercise of that police power was nonetheless subject to the Maryland Taking's Clause, as compensation was required for the taking of the felon's constitutionally protected "ownership interest" in his firearms. *See City of Annapolis*, 357 Md. at 509, 745 A.2d at 1013 (under *Lucas*, "there still must be compensation for the taking"). See also *Henderson v. United States*, 135 S. Ct. 1780, 1784-85 (2015) (noting that the right of "possession" is a "thick" stick in "the proverbial sticks in the bundle of property rights," but holding that a felon's ownership interest in his firearms was an independent property right).

Finally, under *Serio*, it is no answer for the State to assert (Br. at 37) that the owner "can store and use the devices out of state, sell or transfer the devices in another state, or dispose of the devices in some other way." Every one of these options deprives the owner of the "beneficial use of his property" *in Maryland* within the meaning of *Serio*. *Serio*, 384 Md. at 399, 863 A.2 at 967. That the owner may possess these devices in jurisdictions in which the Maryland General Assembly's writ does not run is obviously irrelevant to the protections afforded by the Maryland Constitution to the citizens of Maryland *while in Maryland*. The

district court thus properly rejected this out-of-state use rationale (JA 246, n.8) and this Court should as well.

IV. SB 707 IS VOID FOR VAGUENESS.

A. The State's Reading Cannot Be Accepted.

As detailed in plaintiffs' opening brief, SB 707 is void for vagueness in multiple ways. The district court, acting *sua sponte*, held that plaintiffs, all of whom actually own devices banned by SB 707, lacked standing to challenge the vagueness of SB 707. The State asserts that the district court was correct in this *sua sponte* ruling, arguing that plaintiffs' theory necessitates a finding that a "rogue prosecutor may seek to prosecute" them. (Br. at 41). On the merits, the State argues that SB 707 really only regulates devices that allow semi-automatic firearms to "mimic" a full automatic firearm and is thus not vague. These contentions are meritless.

First, the State engages in pure sophistry in asserting (Br. at 42) that "Plaintiffs have not alleged that 'a rapid fire trigger activator' is undefined and, thus subject to arbitrary enforcement." The term "rapid fire trigger activator" is defined in Md. Code Ann., Crim. Law § 4-301(m)(1), in the disjunctive 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." (Emphasis added). But that definition is hopelessly vague because the definition incorporates terms

that are, in themselves, wholly undefined and vague. There is no definition of "device" or of "rate of fire" or of "firearm" or of the term "increase." The definition does not even define "installed in or attached" so the definition facially includes any "attachment" no matter how temporary.

While the State tries to dispute the plain language, it is undeniable that the "definition" covers devices in addition to and beyond those devices that increase the rate "at which a trigger is activated," such as a bump stock. The definition uses the disjunctive "or" and that means that a device that increases "the rate at which the trigger is activated" **and** a device that increases "the rate of fire" are *both* independently banned. *See Walker v. Lindsey*, 65 Md. App. 402, 407, 500 A.2d 1061 (1985) stating that "[t]he word 'or' is a disjunctive conjunction which serves to establish a relationship of contrast or opposition"); *Charles E. Smith, Inc. v. District of Columbia Rental Housing Com'n*, 492 A.2d 875, 878 (D.C.1985) (reasoning that "[t]he use of the disjunctive conjunction 'or', to join alternatives, indicates that they are mutually exclusive"). The State never even attempts to explain the statute's use of the disjunctive conjunction.

Nor can the State reasonably dispute that the ban on any device that increases "the rate of fire" is *in addition* to the identified devices which are "included," such as a "bump stock, trigger crank, hellfire trigger, binary trigger system, burst trigger system, or a copy or a similar device." Md. Code Ann., Crim.

Law § 4-301(m)(2). Under State law, ignored by the State, the statutory term "includes" or "including" is statutorily defined to mean "includes or including by way of illustration *and not by way of limitation*." Md. Code Ann., Gen. Prov. § 1-110 (emphasis added). Thus, as a matter of law, covered "devices" cannot be limited, as the State would have it (Br. at 48), to devices that are similar to the listed items. Indeed, this list of specific items separately bans "a copy or a similar device," so "similar" devices are already independently banned.

The State's proposed limitation is at war with the text in other ways. Only semi-automatic firearms can possibly be modified to mimic an automatic firearm. Yet, this statute quite explicitly covers all "firearms," without limitation. The term "rate of fire" is not defined, yet, the statute assumes (quite wrongly) that every "firearm" has a "rate of fire" and then bans any device that increases the "rate of fire," again by any amount. That assumption is unintelligible (Br. of Appellants at 28-39), a point that the State does not dispute with respect to all firearms.[4] The only exception to the total ban on such devices is a safe harbor for a "replacement trigger that improves the performance and functionality over the stock trigger," exempted by Md. Code Ann., Crim. Law § 4-301(m)(3). That exemption is not

[4] The State argues only (Br. at 51 n.10) that "rate of fire" is used by ATF in its bump stock rule and by California in its bump stock statute, but those provisions concern only *semi-automatic* firearms, not all "firearms."

limited to semi-automatics and thus makes sense only if the statute's reach is otherwise unlimited.

In short, the "normal, plain meaning" of the statutory definition as written, (*Phillips v. State*, 451 Md. 180, 196-97, 152 A.3d 712, 721-2 (2017)), is that SB 707 bans *any* device, when "attached" to *any* firearm and increases the "rate of fire" by *any* amount. This Court should not rewrite the statute to provide limitations not in the text.[5] The trouble is that no one knows what devices are thus included. Tellingly, the State makes no attempt to argue that the statute *as actually written* is anything other than hopelessly vague.

B. Plaintiffs Have Standing.

The State defends (Br. at 41) the district court's holding that plaintiffs do not have standing because no prosecutor has actually threatened prosecution and any such prosecution would supposedly only take place by "a rogue prosecutor." The State also argues that standing must await an "as applied" challenge, which would

[5] *See Moore v. State*, 424 Md. 118, 128, 34 A.3d 513, 519 (2011) ("'[w]e will not ... judicially insert language to impose exceptions, limitations, or restrictions not set forth by the legislature'"), quoting *Henriquez v. Henriquez*, 413 Md. 287, 299, 992 A.2d 446, 454 (2010); *McGlone v. State*, 406 Md. 545, 559, 959 A.2d 1191, 1199 (2008) ("We interpret the words enacted by the Maryland General Assembly; we do not rewrite the language of a statute to add a new meaning."). Accord *Jennings v. Rodriguez*, 138 S.Ct. 830, 836 (2018) (a court "must *interpret* the statute, not rewrite it") (emphasis the Court's).

presumably be raised as a defense to an actual prosecution, or after an actual threat of prosecution. *Id*. at 54. These contentions are without merit.

First, the State ignores that vague criminal statutes violate 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, 1224-25 (2018) (Gorsuch, J., concurring) ("Today's vague laws may not be as invidious, but they can invite the exercise of arbitrary power all the same -- by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up."). Here, the ban on any "device" that "increases" the "rate of fire" of *any* firearm by *any* amount is a hopelessly indeterminate statute that leaves everyone to guess what conduct is legal and what conduct is proscribed. *See Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006) (recognizing that "[a] statute is impermissibly vague if it either (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or (2) authorizes or even encourages arbitrary and discriminatory enforcement" (internal quotations omitted)).

The definition is also so vague that it cedes to law enforcement unfettered discretion to target those groups or persons deemed to merit their displeasure. *See Giaccio v. State of Pa*., 382 U.S. 399, 402-03 (1966) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and

standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.").

With among the most restrictive gun control laws in the Nation, there is no doubt that gun owners are a disfavored class in Maryland. Gun owners thus have every reason to be concerned how this statute will be enforced in Maryland. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109, (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis"). Similarly, "if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large[,][t]his would, to some extent, substitute the judicial for the legislative department of government." *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983).

The State further ignores *Kolbe v. Hogan*, 849 F.3d 114, 148 n.19 (4th Cir. 2017) (*en banc*), where 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 v. United States*, 135 S. Ct. 2551, 2561 (2015)). It is thus utterly irrelevant that the definition would include devices that allow a semi-automatic firearm to "mimic" a full automatic

firearm. *See also Dimaya*, 138 S. Ct. at 1222 n.7 ("But one simple application does not a clear statute make.").

Plaintiffs need not wait for the proverbial sword of Damocles to fall before seeking relief. There is no *mens rea* requirement in this statute so plaintiffs are subject to arrest without regard to their intent or state of mind. Such a law is particularly open to facial attack. For example, in the *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999), the Court struck down a Chicago ordinance that banned loitering as void for vagueness, noting that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause." *Morales*, 527 U.S. at 53. The Court found highly significant that the ordinance was a "criminal law that contains no *mens rea* requirement" and concluded "[w]hen vagueness permeates the text of such a law, it is subject to facial attack." *Id*. at 55.

Similarly, as in the First Amendment context, plaintiffs should not be expected to wait for an arrest to happen, as that would mean that the statute could be "tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). As Justice Marshall once explained, the inchoate threat of prosecution is like the sword of Damocles in that the value of such a threat "is that it hangs -- not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). See also *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (same).

The *in terrorem* effect of this statute chills the exercise of plaintiffs' Second Amendment rights to add accessories or even make repairs to their fully lawful firearms, as any such accessory or repair could result in arrest and prosecution if the "rate of fire" (whatever that means) increased by any amount. Thus, as in *Morales*, the vagueness of this statute "infringes on constitutionally protected rights." *Morales*, 527 U.S. at 55. There is nothing "imaginary" about this chilling effect on plaintiffs' constitutional rights. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S 289, 302 (1979).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 3, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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