IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT OF MARYLAND

MARYLAND SHALL ISSUE, INC., *et al.*,	*	
Plaintiffs,	*	
v.	*	Civil Case No. 18-cv-1700-JKB
LAWRENCE HOGAN	*	
Defendant.	*	

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DEFENDANT'S MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS COMPLAINT

Defendant Governor Lawrence J. Hogan, Jr., sued in his official capacity, moves to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). All five counts of the complaint challenge Maryland's ban on rapid fire trigger activators, a type of which was used by a mass shooter in Las Vegas in October 2017 to murder nearly 60 people and injure hundreds more in mere minutes.[1]

In Counts I and II, the plaintiffs allege that the prohibition on rapid fire trigger activators violates the Takings Clause of the Fifth Amendment and the Maryland constitution. Counts I and II fail to state a claim because Maryland's prohibition on these dangerous devices to further the State's compelling interest in public safety does not

[1] *See* https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/?utm_term=.18dfe7dff207

constitute a taking under federal or State law. In Counts III and IV, the plaintiffs allege that the prohibition violates the Due Process Clause of the Fourteenth Amendment because (1) they cannot take advantage of an exception in the law, and (2) the definition of what constitutes a "rapid fire trigger activator" is unconstitutionally vague. Counts III and IV fail because the plaintiffs have failed to identify any actual requirement of the law with which it is impossible to comply, and because the terms at issue are not vague, especially in context and in light of controlling law. In Count V, the plaintiffs allege that the statute violates Article 24 of the Maryland Constitution because it works retrospectively to deprive them of vested property rights. Count V fails because the statute does not abrogate any vested rights of the plaintiffs, but rather is a proper exercise of the State's broad police powers to protect public safety.

FACTUAL BACKGROUND

Maryland's Ban on Rapid Fire Trigger Activators Enacted in the Wake of Deadly Las Vegas Mass Shooting

On October 1, 2017, a gunman in Las Vegas, Nevada killed 58 people and injured hundreds more using semi-automatic rifles modified with bump stocks to fire like automatic weapons. In response to the Las Vegas shooting, "the deadliest mass shooting in modern U.S. history," Maryland took action to ban bump stocks and similar devices that, as the sponsor of Senate Bill 707 explained, "modif[y a] firearm's rate of fire to mimic that of an automatic firearm." Testimony of Sen. Victor R. Ramirez in Support of S.B. 707 (Senate Judicial Proceedings Committee), attached as Exhibit 1. The Senate Floor Report that accompanied the legislation explained that the legislation was intended to ban devices

that "allow semi-automatic firearms to mimic the firing speed of fully automatic firearms and can achieve rates of fire between 400 to 800 rounds per minute." Senate Judicial Proceedings Committee, Floor Report, S.B. 707 (2018), attached as Exhibit 2.

On April 24, 2018, Governor Hogan signed Senate Bill 707 into law, Chapter 252 of the 2018 Laws of Maryland (the "Law"), which is reproduced as Exhibit 3, *available at* http://mgaleg.maryland.gov/2018RS/Chapters_noln/CH_252_sb0707t.pdf. The Law defines a "rapid fire trigger activator" as "any device, including a removable manual or power-driven activating device, constructed so that, when installed in or attached to a firearm: (i) the rate at which the trigger is activated increases; or (ii) the rate of fire increases." 2018 Maryland Laws ch. 252, to be codified at Md. Code Ann., Crim. Law § 4-301(m)(1).

The General Assembly provided a non-exhaustive list of rapid fire trigger activators that "includes a bump stock, trigger crank, hellfire trigger, binary trigger system, burst trigger system, or a copy or a similar device, regardless of the producer or manufacturer." *Id.*, to be codified at Crim. Law § 4-301(m)(2). Each of the specifically-enumerated devices is defined in the law. A "bump stock" is defined as "a device that, when installed in or attached to a firearm, increases the rate of fire of the firearm by using energy from the recoil of the firearm to generate a reciprocating action that facilitates repeated activation of the trigger." *Id.*, to be codified at Crim. Law § 4-301(f). A "trigger crank" is defined as "a device that, when installed in or attached to a firearm, repeatedly activates the trigger of the firearm through the use of a crank, a lever, or any other part that is turned in a circular motion." *Id.*, to be codified at Crim. Law § 4-301(n). A "hellfire trigger" is defined as "a

device that, when installed in or attached to a firearm, disengages the trigger return spring when the trigger is pulled." *Id.*, to be codified at Crim. Law § 4-301(k). A "binary trigger system" is defined as "a device that, when installed in or attached to a firearm, fires both when the trigger is pulled and on release of the trigger." *Id.*, to be codified at Crim. Law § 4-301(e). And a "burst trigger system" is defined as "a device that, when installed in or attached to a firearm, allows the firearm to discharge two or more shots with a single pull of the trigger by altering the trigger reset." *Id.*, to be codified at Crim. Law § 4-301(g). The law expressly exempts from the definition of a rapid fire trigger activator "a semiautomatic replacement trigger that improves the performance and functionality over the stock trigger." *Id.*, to be codified at Crim. Law § 4-301(m)(3).

The Law makes it unlawful for an individual to "transport a rapid fire trigger activator in the State; or . . . manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator." *Id.*, to be codified at Crim. Law § 4-305.1(a). The Law contains an exception such that the ban

> does not apply to the possession of a rapid fire trigger activator by a person who: (1) possessed the rapid fire trigger activator before October 1, 2018; (2) applied to the Bureau of Alcohol, Tobacco, Firearms and Explosives ["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;[2] and (4) is in compliance with all federal requirements for possession of a rapid fire trigger activator.

Id., to be codified at Crim. Law § 4-305.1(b).

[2] The provision establishing that a person must have received authorization from ATF in order to be able to continue to possess a rapid fire trigger activator takes effect October 1, 2019. 2018 Maryland Laws ch. 252, § 3.

A person who violates the Law "is guilty of a misdemeanor and subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both." *Id.*, to be codified at Crim. Law § 4-306.

The Plaintiffs' Allegations

Plaintiff Maryland Shall Issue, Inc. ("MSI"), is an organization of "approximately 1,100 members" that is "dedicated to the preservation and advancement of gun owners' rights in Maryland." ECF 1, Compl. ¶ 8. MSI contends that the prohibition on rapid fire trigger activators causes it direct harm "by undermining its message and acting as an obstacle to [its] objectives and purposes." *Id.* MSI also contends that its membership includes "individuals who currently possess 'rapid fire trigger activators'" and "MSI brings this action on behalf of itself and, separately, on behalf of its members." *Id.* The remaining named plaintiffs all allege that they currently lawfully own one or more rapid fire trigger activators that are banned by the Law. *Id.* ¶¶ 9-11.

The complaint alleges that after the enactment of the Law, members of MSI have applied to ATF for authorization to possess a rapid fire trigger activator, and the ATF "refused to accept or process the application for authorization" stating that "ATF is without legal authority to accept and process such an application" and, thus, "applications or requests will be returned to the applicant without action." *Id.* ¶ 31. On April 24, 2018, the ATF issued an advisory reiterating that position. *Id.* ¶ 32.

On June 11, 2018, the plaintiffs filed the complaint in this Court, seeking damages and declaratory and injunctive relief.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations "must be enough to raise a right to relief above the speculative level." *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 71 (4th Cir. 2016) (quoting *Twombly*, 550 U.S. at 555). Although the Court is required to "'take the facts in the light most favorable to the plaintiff,'" the Court "need not accept legal conclusions couched as facts or 'unwarranted inferences, unreasonable conclusions, or arguments.'" *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (citations omitted). Nor may the Court credit "'naked assertions devoid of further factual enhancement.'" *United States ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

This Court is "not confined to the four corners of the complaint" and "may properly take judicial notice of matters of public record." *Oberg*, 745 F.3d at 136. Courts may consider legislative history materials, which are "not a matter beyond the pleadings but . . . an adjunct to the [statute] which may be considered by the court as a matter of law." *Anheuser–Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *judgment vacated on other grounds*, 517 U.S. 1206 (1996), *readopted*, 101 F.3d 325 (4th Cir. 1996).

ARGUMENT

I. MARYLAND'S PROHIBITION OF RAPID FIRE TRIGGER ACTIVATORS TO FURTHER THE STATE'S COMPELLING INTEREST IN THE PROTECTION OF PUBLIC SAFETY DOES NOT CONSTITUTE A TAKING.

Counts I and II of the Complaint purport to assert claims that Maryland's ban on the possession and sale of rapid-fire trigger activators constitutes a taking of property without just compensation in violation of the United States and Maryland constitutions. These claims fail as a matter of law because the trigger-activator ban is not a "taking" but rather a proper exercise of the state's police power to protect public safety, a substantial and compelling state interest. *See Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017) ("Maryland's interest in the protection of its citizenry and the public safety is not only substantial, but compelling.").

As a general matter, both the United States and Maryland constitutions prohibit taking property from citizens for government or public use without paying just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005); *Raynor v. DHMH*, 110 Md. App. 165, 195 (1996).[3] Takings claims fall into two categories: "physical" takings and "regulatory" takings. *Lingle*, 544 U.S. at 537-38. A physical taking occurs where the

[3] Although plaintiffs assert that the Law constitutes an unconstitutional taking under both the Fifth Amendment to the United States Constitution and the Maryland Constitution, Article III, § 40, this Court need not review the Law separately against each. Maryland courts have made clear that these constitutional provisions are substantially similar, so much so that in interpreting the Maryland Constitution, Article III, § 40, Maryland courts consider the Supreme Court's decisions interpreting the Fifth Amendment to be direct authority. *Dep't of Trans., Motor Vehicle Admin. and Dep't of Health and Mental Hygiene v. Armacost*, 299 Md. 392, 420 (1984); *see also e.g. Mossburg v. Montgomery County*, 107 Md. App. 1 (1995) (applying the Supreme Court's holding in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

government physically invades or takes title to property either directly or by authorizing someone else to do so, while a regulatory taking occurs where a regulation of private property is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *see also Lingle*, 544 U.S. at 537-38. Maryland's ban on rapid-fire trigger activators constitutes neither a physical taking nor a regulatory taking. Thus, Counts I and II of the Complaint should be dismissed.

A. The Trigger Activator Ban Is Not a Physical Taking.

Maryland's ban on the possession and sale of trigger activators within the State does not constitute a physical taking. As alleged in the complaint, the Law does not require that citizens who already own trigger activators turn them over to the State. Rather, it merely bans continued possession within the State. ECF 1, Compl. ¶¶ 1-3. Owners can comply with the Law by storing their rapid fire trigger activators outside of Maryland or by selling them outside of the State. As such, the plaintiffs have not plausibly alleged facts showing that the Law operates as a physical taking of private property for government or public use. *See Wiese v. Becerra*, 306 F. Supp. 3d 1190, 2018 WL 746398, at *5 (E.D. Cal. Feb. 7, 2018) (holding that a California ban on possession of large capacity gun magazines did not constitute a physical taking under the federal constitution).

B. The Trigger Activator Ban Is Not a Regulatory Taking.

Nor does Maryland's ban on trigger activators amount to a regulatory taking. In the context of real property, the Supreme Court has made clear that a law or regulation does

not constitute a compensable regulatory taking unless the law "completely deprive[s] an owner of all economically beneficial use" of the property.[4] *Lingle*, 544 U.S. at 528 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)) (internal punctuation omitted). That is not the case here. Under the Law, Maryland owners may still store their rapid fire trigger activators outside Maryland and sell them outside the State. Thus, the plaintiffs have not plausibly alleged facts establishing that the ban on possession of rapid fire trigger activators deprives the plaintiffs of all economically beneficial use of their property. *See Wiese*, 2018 WL 746398, at *5 (holding that California ban on possession of large capacity magazines did not operate as a regulatory taking because owners could sell the magazines, store them out of state or modify them to comply with the law); *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1184 (N.D. Ill. 1981) (holding that ordinance that banned possession of certain firearms within a city was not a taking because gun owners could sell their guns outside of the city); *Fesjian v. Jefferson*, 299 A.2d 861, 865-66 (D.C. 1979) (holding that ordinance that banned registration (and thus possession) of machine guns in the District of Columbia did not amount to a taking because owners could comply with law

[4] The plaintiffs incorrectly assert in their complaint that "a statute that bans continued possession of personal property in which the owner has a vested interest" is a "*per se*" taking "regardless of whether physical possession of property is actually assumed by the government." ECF 1, Compl. ¶ 29. This is a misstatement of the law, and neither of the cases cited by the plaintiffs supports the assertion. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) involved real property and an alleged regulatory taking. *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992) involved presidential papers of which the government had taken possession and control. Neither case involved a statute that banned continued possession of personal property.

by, *inter alia*, removing the firearm from the city or selling it); *but see Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), *aff'd*, ___F. App'x___, 2018 WL 3433828 (9th Cir. July 17, 2018).[5] Accordingly, the plaintiffs have not sufficiently alleged facts establishing that Maryland's ban on trigger activators operates as a regulatory taking.[6]

C. The Ban Is a Proper Exercise of the State's Police Power to Protect the Public.

Moreover, courts have long recognized the authority of government to 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. In *Mulger v. Kansas*, 123 U.S. 623 (1887), the Supreme Court upheld a state constitutional amendment barring the manufacture and sale of alcoholic beverages in Kansas. A beer manufacturer claimed the law deprived it of its property without compensation. The Supreme Court disagreed, ruling that a "prohibition simply on the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot,

[5] The court's ruling in *Duncan* that California's ban on large-capacity magazines constituted a taking was based primarily on its conclusion that large-capacity magazines are protected under the Second Amendment. 265 F. Supp. 3d at 1116-17, 1137-38. That is not the law in this circuit. *See Kolbe*, 849 F.3d at 135-37. Further, there is no allegation in this case that rapid fire trigger activators constitute "arms" protected by the Second Amendment. Accordingly, the rationale employed by the court in *Duncan* does not apply here.

[6] The plaintiffs also have not plausibly alleged that the ban on rapid fire trigger activators operates as a partial regulatory taking under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), given the alternatives of storage or sale outside the State, the State's substantial and compelling interest in public safety, and the complaint's lack of any plausible facts that the ban interferes with the plaintiffs' distinct investment-backed expectations.

in any sense, be deemed a taking or an appropriation of property for the public benefit." 123 U.S. at 668-69; *see also Samuels v. McCurdy*, 267 U.S. 188, 198 (1925) (applying rule in *Mugler* and holding no compensation due for liquor rendered valueless where prohibition fell "within the police power of the states").

Similarly, in *Akins v. United States*, 82 Fed. Cl. 619, 622 (Fed. Cl. 2008), the United States Court of Federal Claims ruled that a determination by the ATF classifying a particular device as a "machine gun" and thereby making it illegal did not constitute an unconstitutional taking. The court explained that "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." 82 Fed. Cl. at 622 (quoting *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008)). The court went on to cite several other cases where courts have held that the government's use of police power to protect public health and safety did not constitute compensable takings. 82 Fed. Cl. at 623 (citing *AmeriSource Corp.*, 525 F.3d at 1150-51 (seizing pharmaceuticals to enforce criminal laws against a third party); *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332 (Fed. Cir. 2006) (seizing goods suspected of bearing counterfeit marks); *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) (revoking a mining permit to prevent harmful runoff to surrounding communities)).

Other courts have reached similar conclusions. In *Fesjian*, the District of Columbia Court of Appeals ruled that an ordinance resulting in a ban on possession of machine guns within the district was a proper exercise of police power and therefore not a taking. 299 A.2d at 866. In *Raynor*, the Could of Special Appeals of Maryland held that the state's taking possession of a potentially rabid pet ferret to conduct a rabies test that resulted in

destruction of the animal was a valid exercise of police power to protect public safety and did not constitute a compensable taking. 110 Md. App. at 193. In *Garcia v. Village of Tijeras*, the Court of Appeals of New Mexico held that a law banning possession of pit bulls did not constitute taking of property but was an appropriate use of police power to protect public health and safety. 767 P.2d 355, 362-63 (N.M. Ct. App. 1988). *See also Hunter v. Adams*, 180 Cal. App. 2d 511, 523 (1960) ("If the injury is the result of legitimate governmental action reasonably taken for the public good and for no other purpose, and is reasonably necessary to serve a public purpose for the general welfare, it is a proper exercise of the police power to permit the taking or damaging of private property without compensation.").

The plaintiffs ask this Court to ignore over a century of jurisprudence and hold that Maryland cannot use its police power to ban possession of equipment that the Maryland legislature has determined is dangerous and a threat to public safety unless the State pays compensation to every owner of a rapid fire trigger activator. Taken to its logical conclusion, the plaintiffs' theory would require the state to pay compensation to the owners of any existing item—no matter how dangerous—that the State decided to prohibit, including yet-to-be developed drugs, poisons, toxic materials, explosives and the like. This would severely limit the State's ability to protect citizens from harm and be inconsistent with the Fourth Circuit's determination that Maryland has a "compelling" interest in the protection of its citizenry and public safety. *Kolbe*, 849 F.3d at 139.

Maryland's ban on rapid fire trigger activators does do not involve a physical or regulatory taking of trigger activators for government use, but is instead an appropriate use

of police power designed to protect public health and safety, a compelling state interest. As a result, the law cannot constitute an unconstitutional taking and Counts I and II of the complaint should be dismissed. *Mulger*, 123 U.S. at 668-69; *Akins*, 82 Fed. Cl. at 622; *AmeriSource Corp.*, 525 F.3d at 1152; *Fesjian*, 299 A.2d at 866; *Village of Tijeras*, 767 P.2d at 362-63.

II. MARYLAND'S PROHIBITION OF RAPID FIRE TRIGGER ACTIVATORS DOES NOT VIOLATE DUE PROCESS.

A. The Prohibition of Rapid Fire Trigger Activators Does Not Deprive the Plaintiffs of Due Process of Law.

In Count III, the plaintiffs contend that the State has violated their procedural due process rights because they are unable to take advantage of an exception contemplated by the Law. The plaintiffs erroneously assert that because the ATF has stated that it is not able to authorize the continued possession of rapid fire trigger activators that were possessed prior to October 1, 2018, they cannot comply with the Law's requirements.[7] In support, the plaintiffs rely on cases in which courts refused to enforce statutory *requirements* with which compliance was impossible. Here, in contrast, the statute does

[7] The plaintiffs do not advance any claim that the ban on possession of rapid fire trigger activators violates due process; indeed, any such claim would be unavailing. As the Fourth Circuit has recognized, the Supreme Court, in *Mugler v. Kanses*, "noted no incompatibility between the requirements of due process and 'the principle, equally vital . . . ., that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" *Georgia Outdoor Advert., Inc. v. City of Waynesville*, 833 F.2d 43, 46 (4th Cir. 1987) (quoting *Mugler*, 123 U.S. at 665). As in *Mugler* and *Georgia Outdoor Advertising*, "[s]ince there is no contention that the law in this case is or will be arbitrarily applied, the fact that" Maryland's ban on rapid fire trigger activators may "eventually destroy [the value of plaintiffs' property] does not make it constitutionally invalid." *Georgia Outdoor Advert.*, 833 F.2d at 46-47.

not require that the plaintiffs submit applications to ATF in order to avoid violating the prohibition on possessing rapid fire trigger activators. Rather, current owners of these devices can store and possess them where legal to do so outside the State, sell them in a state where possession of the devices is not banned, or dispose of them in some other way. Thus, although the Law contemplated that current owners of the now banned devices may apply for an exception to the statutory ban by seeking authorization from the ATF, the unavailability of that exception does not *require* that the plaintiffs violate the Law and, thus, does not violate due process. None of the cases on which the plaintiffs rely holds to the contrary.[8]

B. The Statute's Terms Provide Fair Notice of What Is Prohibited and, Thus, Are Not Unconstitutionally Vague.

The plaintiffs have similarly failed to state a claim upon which relief may be granted that any of the Law's terms are unconstitutionally vague. "It is a basic principle of due

[8] *Broadrick v. Rosner*, 294 US. 629 (1935) involved a state statute that made it essentially impossible to join all of the necessary parties to a lawsuit, which the Court found violated the Constitution's Full Faith and Credit Clause. In *Ezell v. City of Chicago*, 651 F.3d 684, 710-11 (7th Cir. 2011), the Seventh Circuit enjoined city ordinances that made it impossible to operate a firing range within the city's limits, in part, because it prevented individuals from qualifying for a firearm permit and, thus, implicated the Second Amendment. In *Hughey v. JMS Development Corporation*, 78 F.3d 1523, 1530 (11th Cir. 1996), the Eleventh Circuit refused to apply a provision of the Clean Water Act when compliance was factually impossible. And in *United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992), the Tenth Circuit reversed the defendant's conviction for failing to register his machinegun under federal law, where the federal government had made it impossible to register his particular firearm. Notably, in that case, the Tenth Circuit made clear that the conduct that underlay the conviction was the failure to register the firearm, not the possession of the firearm. The defendant in that case had conceded that he could have been convicted of unlawful possession, but the government had not charged him with that crime.

process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 107 (1972). However, a statute is unconstitutionally vague only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Courts "do not hold legislators to an unattainable standard when evaluating enactments in the face of vagueness challenges." *Wag More Dogs*, 680 F.3d at 371. "'A statute need not spell out every possible factual scenario with 'celestial precision' to avoid being struck down on vagueness grounds.'" *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (citation omitted). A statute "'must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.'" *Id.* at 183 (citation omitted). Thus, before finding a statute vague, a "federal court must 'consider any limiting construction that a state court or enforcement agency has proffered.'" *Martin v. Lloyd*, 700 F.3d 132, 136 (4th Cir. 2012) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1983)).

1. The Definition of a "Rapid Fire Trigger Activator" Is Clearly Defined by the Law and Is Not Unconstitutionally Vague.

The plaintiffs allege that when taken out of context a single phrase of the definition of a rapid fire trigger activator is unconstitutionally vague because it would sweep up various firearms accessories that may have the effect of enabling a shooter to fire faster follow-up shots or more rapidly reload a firearm but are not "in any way akin to, or function

like" the specifically enumerated banned devices, ECF 1, Compl. ¶ 64. For the reasons that follow, this argument fails.

At the outset, the plaintiffs' argument "misapprehends the vagueness inquiry, which focuses on the intractability of identifying the applicable legal standard, not on the difficulty of ascertaining the relevant facts in close cases," *Kolbe*, 849 F.3d at 149. As the Supreme Court has explained, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306-07. Here, the "incriminating fact" is not characterized by "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.* On the contrary, the Law provides a definition of rapid fire trigger activators, the terms of which are capable of objective fact-finding, and also provides an illustrative list of banned devices and their definitions, providing context to what the statute prohibits.

The phrase that is challenged here—"any device . . . that is constructed so that, when installed in or attached to a firearm . . . the rate of fire increases"—is capable of consistent application and provides a person of ordinary intelligence fair notice as to what is prohibited. Moreover, even if "it may be difficult in some cases to determine whether these clear requirements have been met," there is no "indeterminacy" as to what those requirements are. *See Williams*, 553 U.S. at 306-07 (holding that a statute's requirement "that the defendant hold, and make a statement that reflects, the belief that . . . material is child pornography; or that he communicate in a manner intended to cause another so to believe" are "clear questions of fact" that require a "true-or-false determination, not a

subjective judgment"). Thus, whether a "typical" owner of firearms accessories would know whether a particular accessory meets the statutory definition of a rapid fire trigger activator does not render the statute vague. *See Kolbe*, 849 F.3d at 149 (rejecting the plaintiffs' argument that the term "copy" was vague because "the typical gun owner would not know whether the internal components of one firearm are interchangeable with the internal components of some other firearm").

Moreover, the phrase challenged as vague by the plaintiffs establishes sufficient guidelines for regulated parties and law enforcement. The plaintiffs allege that the Law is vague because it could be interpreted to prohibit "muzzle weights, a variety of muzzle devices which reduce or redirect flash, certain fore grips, certain sights, certain stocks (recoil reducing stocks) and a variety of recoil-reducing devices," which the plaintiffs allege "are designed to and do increase, by some small measure, the effective 'rate of fire' in the sense that they allow for faster, controlled follow-up shots." ECF 1, Compl. ¶ 62. The plaintiffs further allege that the definition could also be read to include "revolver speed loaders, revolver speed strips and revolver moon clips," which the plaintiffs allege "permit a user to more rapidly reload a revolver and thus potentially increase the 'rate of fire' of the revolver." *Id.* ¶ 63.

The plaintiffs acknowledge, however, that "[n]one of these . . . devices are attached to or serve to operate the trigger at any increased rate. None of these devices are in anyway akin to, or function like," the specifically enumerated banned devices. *Id.* ¶ 64. Indeed, none of these devices is constructed to impact a firearm's *trigger*; rather, as the plaintiffs acknowledge, they may serve to allow a *user* to make "faster, controlled follow-up shots"

or "more rapidly reload a revolver," *id.* ¶¶ 62-63. Thus, the plaintiffs' own allegations demonstrate that the purported uncertainty as to the scope of the statute is not reasonable or logical. The statute regulates rapid fire *trigger* activators, and the General Assembly provided a non-exhaustive, illustrative list of devices that fall within the regulated class, all of which are separately defined to demonstrate how they are constructed so that when they are installed in or attached to a firearm they impact the firearm's *trigger*. A bump stock "us[es] energy from the recoil of a firearm to generate a reciprocating action that facilitates repeated activation of the *trigger*"; a trigger crank "repeatedly activates the *trigger* of the firearm"; a hellfire trigger "disengages the *trigger* return spring when the *trigger* is pulled"; a binary trigger system "fires both when the *trigger* is pulled and on release of the *trigger*"; and a burst trigger system "allows the firearm to discharge two or more shots with a single pull of the *trigger* by altering the *trigger* reset." 2018 Maryland Laws ch. 252 (emphases added).

In addition to the statute's plain text, the legislative history makes clear the types of devices the statute was intended to prohibit. The Senate Floor Report explains that the background of the law was the mass murder in "October 2017 when a gunman fired into a Las Vegas concert crowd killing almost 60 people and injuring more than 600 in less than l0 minutes" with the use of "[b]ump stocks." Ex. 2. The Floor Report further makes clear the purpose of the law to ban bump stocks and other like devices that "allow semi-automatic firearms to mimic the firing speed of fully automatic firearms and can achieve rates of fire between 400 to 800 rounds per minute." *Id.*

2. The Terms "Copy" and "Similar Device" Are Not Unconstitutionally Vague.

The Fourth Circuit's decision in *Kolbe*, 849 F.3d 114, forecloses the plaintiffs' allegation that the term "copy" in the prohibition of rapid fire trigger activators is unconstitutionally vague. In *Kolbe*, the Fourth Circuit rejected a similar vagueness challenge to the prohibition of a "copy" of specifically enumerated assault weapons. *Id.* at 148-49. The Fourth Circuit explained that "[t]he term 'copies,' as used in [the statute banning assault weapons], is not new to Maryland's firearms statutes," but rather has been in use "for more than two decades." *Id.* at 148. The court looked to the Maryland Attorney General's opinion that a "'copy' of a designated assault weapon must be similar in its internal components and function to the designated weapon," and also the Maryland State Police's explanation that a "copy" of a banned firearm "possesses 'completely interchangeable internal components necessary for the full operation and function of any one of the specifically enumerated assault weapons.'" *Id.* (citations omitted). Together, the Fourth Circuit held, these definitions "explain how to determine whether a particular firearm is a copy of an identified assault weapon," and, thus, the term "copy" is not "unconstitutionally vague." *Id.* 148-149.

Without any indication from the General Assembly that the term "copy" in the ban on rapid fire trigger activators has any different meaning than the term "copy" in the ban on assault weapons, the only reasonable construction of that term is that a copy of a rapid fire trigger activator is "similar in its internal components and function" to the designated rapid fire trigger activators and possesses "interchangeable internal components necessary

for the full operation and function of any one of the specifically enumerated" rapid fire trigger activators. Under the Fourth Circuit's holding in *Kolbe*, the term "copy" is not unconstitutionally vague.

Also without merit is the plaintiffs' allegation that the Law's prohibition of "a similar device" to the specifically enumerated rapid fire trigger activators is unconstitutionally vague. Under Maryland law, "when general words in a statute follow the designation of particular things or classes of subjects or persons, the general words will usually be construed to include only those things or persons of the same class or general nature as those specifically mentioned." *In re Wallace W.*, 333 Md. 186, 190-91 (1993) (citation omitted)). Further, the Court of Appeals of Maryland has defined "similar" as "that which resembles" and further explained that similarity is "determined by comparing" the object specifically enumerated by statute with the object at issue "and making some judgment regarding any variances between them. A departure that is relatively minor . . . does not preclude a finding of similarity." *Seipp v. Baltimore City Bd. Of Elections*, 377 Md. 362, 373-74 (2003). Under Maryland law, then, a "similar device" would be one that is in the same class or general nature as the specifically enumerated rapid fire trigger activators, allowing for only "relatively minor" variances from the banned devices. The Fourth Circuit has likewise interpreted "similar" to mean objects "bearing a family resemblance" to specifically enumerated objects. *Ayes v. U.S. Dep't of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006).

The plaintiffs mistakenly allege that the term "similar devices" is vague because it "may or may not include 'a semiautomatic replacement trigger that improves the

performance and functionality over the stock trigger,'" ECF 1, Compl. ¶ 65, even though such replacement triggers are *expressly* exempted from the definition of a rapid fire trigger activator. *See* 2018 Maryland Laws ch. 252. Thus, under the plaintiffs' reading of the Law, a term expressly defined not to include a particular device could be read to the contrary to include that device. There is no logical or reasonable reading of these terms that would allow such a conclusion and, thus, the terms are not unconstitutionally vague. It is a "well-established canon[] of statutory construction" that "a statute must be given 'a reasonable interpretation, not one that is absurd, illogical, or incompatible with common sense.'" *Smith v. State*, 425 Md. 292, 299 (2012) (citation omitted). That "principle applies even when the statute is ambiguous." *Id.*

3. The Terms "Binary Trigger System" and "Burst Trigger System" Are Clearly Defined by the Statute and Are Not Unconstitutionally Vague.

Inexplicably, the plaintiffs allege that the terms "binary trigger system" and "burst trigger system" are not defined by the law and, thus, are unconstitutionally vague. The law, however, does clearly define "Binary trigger system" to mean "a device that, when installed in or attached to a firearm, fires both when the trigger is pulled and on release of the trigger," and further defines "Burst trigger system" as "a device that, when installed in or attached to a firearm, allows the firearm to discharge two or more shots with a single pull of the trigger by altering the trigger reset." 2018 Maryland Laws ch. 252. The plaintiffs do not allege how either of these definitions is vague, and, thus, their vagueness claim must be dismissed.

III. MARYLAND'S BAN ON THE POSSESSION OF DANGEROUS DEVICES THAT ENABLE FIREARMS TO MIMIC FULLY AUTOMATIC MACHINE GUNS DOES NOT VIOLATE THE MARYLAND CONSTITUTION.

The plaintiffs allege that Maryland's ban on rapid fire trigger activators violates Article 24 of the Maryland Constitution because the statute acts retrospectively to abrogate vested rights. This claim should be dismissed because the statute does not abrogate vested rights, and, in any event, is a proper exercise of the State's police powers.

In *Muskin v. State Department of Assessments & Taxation*, 422 Md. 544 (2011), the Court of Appeals of Maryland held unconstitutional a state statute that divested an owner of his or her fee simple interest in ground rent and transferred that interest to the lease holder. Similarly, in *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604 (2002), the Court of Appeals held unconstitutional statutes that retroactively created a statutory interest rate for and validated late fees in consumer contracts, and that retroactively authorized subrogation actions by health maintenance organizations. In those cases, the legislation divested a party of a real property right, a contractual right, or a cause of action and transferred that right to another, "impact[ing] impermissibly the reasonable reliance and settled expectations" of the party that maintained the right prior to the legislation's enactment. *Muskin*, 422 Md. at 558. In such a case, where the legislature divests an owner of a real property or contractual right and transfers that right to another, the State's "rational" policy justifications do not save the statute from constitutional attack. *Muskin*, 422 Md. at 557; *see also id.* at 561-62 (explaining that "vested real property and contractual rights . . . have been almost sacrosanct in [Maryland's] history").

Here, in stark contrast to the legislative enactments in *Muskin* and *Dua*, the General Assembly did not abrogate a vested property right and transfer that right to another. As discussed above, owners of rapid fire trigger activators maintain an ownership right in the devices and can store and use the devices out of state, sell or transfer the devices in another state, or choose to dispose of the devices in some other way. More critically, neither *Muskin* nor *Dua* concerned the State's exercise of its police power to curtail the use of personal property that the General Assembly determined was dangerous to the health and welfare of the public. Nowhere in *Muskin* or *Dua* did the Court of Appeals indicate any intent to overrule the long-tradition of deferring to the State's broad police power "to determine not only what is injurious to the health, morals or welfare of the people, but also what measures are necessary or appropriate for the protection of those interests," *Davis v. State*, 183 Md. 385, 297 (1944). As the Court of Appeals has made clear, "[t]he exercise of the police power may inconvenience individual citizens, increase their labor, or decrease the value of their property," without running afoul of the State constitution. *Id.*

Further, unlike the holders of vested rights in *Muskin* and *Dua* who "rel[ied] reasonably" on their "settled expectations" that they would continue to benefit from the property right at issue in those cases, *see Muskin*, 422 Md. at 558, owners of rapid fire trigger activators cannot legitimately claim any such entitlement to continue, unabated by government regulation, to possess devices that are constructed to enable a semi-automatic firearm to mimic the automatic fire of a machine gun. Machine guns have been heavily regulated by the federal government since the enactment of the National Firearm Act in 1934, and the possession or transfer of a machinegun has long been prohibited by federal

law. *See* 18 U.S.C. § 922(o)(1); *see also Staples v. United States*, 511 U.S. 600, 611-12 (1994) (explaining that "machineguns . . . that Congress has subjected to regulation" would likely be classified "as items the ownership of which would have the same quasi-suspect character [the Court] attributed to owning hand grenades"). Plaintiffs here voluntarily purchased items that pose a threat to public safety, in that they are constructed to increase the rate at which a firearm's trigger is activated or increase the rate of fire so as to mimic the firing speed of fully automatic firearms. *See Akins*, 82 Fed. Cl. at 624 (manufacturer of device "that increased the rate at which semi-automatic weapons are discharged" had no property interest that derived from his expectation that he could continue to manufacture the item free from government regulation); *see also Samuels v. McCurdy*, 267 U.S. at 198 (holding no due process violation where owners of liquor should have known due to its "possible vicious uses" that "legislation calculated to suppress its use in the interest of public health and morality was lawful and possible").

Under Maryland law, "it is a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State." *Syska v. Montgomery County Bd. of Ed.*, 45 Md. App. 626, 633 (1980) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905)). The holdings in *Muskin* and *Dua* do not disturb the legislature's broad powers to preserve and protect public safety by curtailing the use of personal property that threatens public safety. Under the plaintiffs' strained reading of Maryland law, the General Assembly would have no authority to ban possession of any dangerous or deleterious object no matter how compelling the State's interest in protecting public safety, merely because that object was

lawfully owned in the past. Such a rule would implicate the State's ability to ban possession of previously-owned firearms by felons, which no Maryland court has ever suggested violates the State constitution, or the possession or use of weapons, explosive devices, animals, gaming devices, or drugs deemed too deleterious or dangerous by the legislature. That cannot be. The power to regulate in these areas resides in the General Assembly, "so that all may be bound; else . . . 'society will be at the mercy of the few, who, regarding their own appetites or passions only, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please.'" *Sprigg v. Town of Garrett Park*, 89 Md. 406 (1899) (quoting *Mugler*, 123 U.S. at 660-61).

CONCLUSION

For the reasons set forth above, the Court should dismiss the complaint in its entirety with prejudice.

Respectfully Submitted,

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Dated: July 20, 2018

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