IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

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

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PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs hereby oppose defendant's Motion to Dismiss, stating as follows:

I. Introduction

Maryland passed legislation which is unconstitutional because it constitutes: 1) a government taking of private property without compensation; 2) a criminal regulatory measure with which it is impossible to comply as intended by the legislature; 3) an impermissibly vague law; and 4) a retroactive denial of vested property rights.

These grave constitutional concerns are the proper considerations before this Honorable Court. Yet, the defendant seeks to draw attention away from the State's violation of the state and federal constitutions with allusions to a tragic event which happened thousands of miles away. That event, while horrific, does not and cannot trump the constitutional rights at issue here. The defendant's reliance on this tactic is a tacit admission of the weakness of the defendant's position on the actual merits of the case.

Once the defense hyperbole is appropriately swept aside, the merits of this case become clear. The plaintiffs lawfully purchased and owned firearm accessories banned as of October 1, 2018 by the legislation under review here. The primary accessory at issue, a "bump-stock," was

undisputedly legal under Maryland and federal law prior to the passage of the legislation at issue. Indeed, prior to offering these devices for sale, their manufacturers submitted them for review by the United States Bureau of Alcohol, Tobacco and Firearms (ATF). The ATF provided written approval of the legality of these devices. A copy of that approval was widely distributed on the internet and included with each device sold.

The statute under review, Section 4-301 of the Criminal Law Article of the Maryland Code (Section 4-301), bans the lawfully purchased and owned devices defined thereunder throughout the State of Maryland unless the owner obtains "authorization" to possess the device from the ATF prior to October 1, 2018. It would appear that when drafting the statute, no one in the legislature bothered to contact the ATF to determine whether it had any policy or procedure for "authorizing" the devices it had already declared lawful. In fact, 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 Complaint thus alleges (ECF 1, ¶¶ 31, 32) -- and the defendants do not deny these allegations -- that the ATF has publicly announced its refusal to receive or consider requests for this authorization. In short, it is completely legally and factually impossible to comply with the ATF authorization requirement of the statute. As a result, what the legislature intended as, in effect, a registration statute has become an outright ban on the mere possession of these devices throughout Maryland. That ban on possession is a *per se* regulatory Taking under Supreme Court precedent and a Taking of property interests under the State Constitution as construed by the Maryland Court of Appeals.

Worse still, the statute provides no compensation to those whose property has now been rendered completely illegal to possess within their home state. Given that Marylanders can no longer use (or even keep) their property in Maryland, they have effectively lost beneficial use of it. As such, there has been a government taking which is unconstitutional unless just compensation is

provided. In failing to provide any means of compensating for this seizure of property, the statute under review violates the "takings" clauses of both the state and federal constitutions. For similar reasons, this statue also represents an unconstitutional retroactive denial of vested property rights.

The defense incorrectly argues that there is no taking here, but rather, an "exercise of the state's police power…" ECF 9-1, pg. 7. Yet, the Supreme Court has definitively made clear that invocation of police power simply cannot justify a Taking without just compensation as such a rule would effectively eviscerate the Takings Clause. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992). As the Court has thus made clear, the Takings inquiry is completely independent of the State's police power. *Id*.

The defense further errs in arguing that SB 707 does not amount to a taking or otherwise violate the right to due process because it still allows citizens to "store their rapid fire trigger activators outside Maryland and sell them outside the State." ECF 9-1, pg. 9. "This reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction...**a profoundly mistaken assumption**." *Ezell v. Chicago*, 651 F.3d 684, 697 (7th Cir. 2011).

In addition to failing to ascertain whether the ATF would accept applications to "authorize" the devices at issue, the legislature failed to develop any understanding of the devices they were trying to regulate. This failure resulted in a statute which is *wildly* vague to the point of being virtually unintelligible to anyone who understands firearm mechanics, such as the plaintiffs in this case.

SB 707 is also unconstitutionally vague because "any device" that "increases the rate of fire" is so broad as to encourage serious discriminatory enforcement. The definitions in SB 707 fail to provide an applicable standard against which to make determinations of what devices may befall subject to its application. On its face, the statute bans virtually any after-market accessory that

might marginally increase the rate of fire by any small amount. That scope of these provisions cannot be limited in the manner suggested by the State in its motion.

As written, SB 707 could be read to apply to 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, all of which 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. Such devices are typically "installed in or attached to a firearm" within the meaning of SB 707. All such devices are used for legitimate, law abiding purpose. ECF 1, para. 62. Furthermore, because SB 707's ban on "any device" that could increase the "rate of fire" is not limited to semi-automatic firearms, this language could further be read to a host of devices or modifications to non-semi auto firearms, such as bolt action rifles, single shot guns, pump action shotguns and even revolvers. All such devices are used for legitimate law-abiding purposes and none of these devices could be used to a rate of fire of a machine gun. Id. para. 65.

II. Standard of Review

A. Motion to Dismiss

In ruling on a Rule 12(b)(6) motion to dismiss, the court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). Consequently, a motion to dismiss under Rule 12(b)(6) may be granted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Furthermore, the court must "disregard the contrary allegations of the opposing party." *Gillespie v. Dimension Health Corp.*, 369 F. Supp. 2d 636, 640 (D. Md. 2005).

A motion to dismiss for failure to state a claim for relief should not be granted if the complaint is plausible on its face. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) *(citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Thus, the defendant must prove that plaintiff's complaint does not allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1940. The law requires that, in order to maintain the motion as a motion to dismiss, the defendant must prove these elements without presenting evidence extrinsic to the plaintiff's complaint. Fed. R. Civ. P. 12(d). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

B. Motion for Summary Judgment

A motion for summary judgment may be granted if the record shows that there is "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). A party "cannot create a genuine dispute of material fact through mere speculation or compilation of inferences." *Chung Shin v. Shalala*, 166 F. Supp. 2d 373, 375 (D. Md. 2001). If the non-moving party presents evidence which is "merely colorable or is not significantly probative," summary judgment should be granted. *Anderson*, 477 U.S. at 249.

"Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*,

477 U.S. at 323; *Stewart v. Prince George's County*, 75 Fed. Appx. 198, 202 (4th Cir. 2003); *Proa v. NRT Mid Atl., Inc.*, 618 F. Supp. 2d 447, 452 (D. Md.2009).

III. Facts

SB 707 was signed into law by Defendant Governor Hogan on April 24, 2018. ECF 1, para. 13. SB 707 established Section 4-305.1 of the Criminal Law Article of the Maryland code, criminalizing transporting, manufacturing, possessing, selling, offering to sell, transfer, purchase, or receipt of a rapid fire trigger activator, as of October 1, 2018. *Id*. para. 14. Any violation of this criminal section is subject to criminal penalty, including conviction of a misdemeanor, imprisonment up to three (3) years and/ or a fine of up to $5,000. *Id*. para. 19.

A "rapid fire trigger activator" is defined within the bill to include "any device, including a removable manual or power-driven activating device, constructed so that, when installed in or attached to a firearm the rate at which the trigger is activated increases; or the rate of fire increases." *Id*. para. 15. SB 707 does not provide for any just compensation being paid to existing owners of "rapid fire trigger activators." *Id*. para. 18.

An exception to the general ban on possession of a "rapid fire trigger activator" is provided for within SB 707 if "the possession" of a "rapid fire trigger activator" is by a person who "(1) possessed the rapid fire trigger activator before October 1, 2018; (2) applied to the federal Bureau of Alcohol, Tobacco, Firearms and Explosives 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 federal Bureau of Alcohol, Tobacco, Firearms and Explosives before October 1, 2019; and (4) is in compliance with all federal requirements for possession of a rapid fire trigger activator." *Id*. para. 28. However, the Bureau of Alcohol, Tobacco, Firearms and Explosives has refused to process applications pursuant to the exception, informing applicants 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.

Id. para. 31.

Given the ATF's position, it is impossible for existing owners to comply with SB 707 and obtain authorization, preserving their rights to continued possession of their property and not being subjected to criminal penalty. *Id.* para. 35

The enactment of SB 707 was intended to exempt citizens that are current owners of the devices from the ban on possession if the owner "(1) filed an application for authorization to possess with the ATF prior to October 1, 2018, and (2) obtained "authorization" from the BATF for the continued possession of a "rapid fire trigger activator" by October 1, 2019." *Id*. para. 33. The ATF's refusal to process applications and position that it is without "legal authority" to make such authorizations invalidates this provision of SB 707, creating a legal impossibility for current owners to maintain their rights and comply with SB 707. The ATF provisions of SB 707 thus do nothing to ameliorate the absolute ban imposed by SB 707. The State does not dispute that reality in its motion.

IV. Legal Analysis

A. SB 707 Constitutes an Unconstitutional Taking Without Just Compensation.

1. Banning Possession Is A *Per Se* Taking.

As set forth in the complaint (ECF 1, ¶ 30), in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) the Supreme Court stated 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." In response, amicus argues that the "Lucas's statement as to 'noxious-use justifications; has been repeatedly limited to cases involving total regulatory takings of real property." That statement is manifestly incorrect.

First, this very argument was soundly rejected by the Supreme Court in *Horne v. Dept. of Agriculture*, 135 S. Ct. 2419, 2427 (2015). There, the Supreme Court rejected the lower court's attempt to justify an appropriation of personal property (raisins seized by the government under a government marketing order program at issue in that case) as involving regulation of personal property, stating that "[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. As the Supreme Court explained, "[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." (135 S. Ct. at 2427-28). As the Court analyzed, 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. *Horne* squarely holds that the latter situation is a taking that must be compensated. *See also Tahoe–Sierra Preservation Council*, 535 U.S., at 322, 122 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.").

In short, *Horne* holds the government may no more appropriate personal property than it may appropriate real property. That holding is directly applicable here. In every meaningful respect, SB 707 takes away plaintiffs' personal property at issue in this case by depriving plaintiffs of physical possession of their property, just as the federal government in *Horne* physically

deprived the plaintiff Horne of physical possession of the raisins under a marketing order there at issue. There is no material difference between the raisins at issue in *Horne* and the "devices" at issue in this case. Both are personal property. As discussed more fully below, the lower court decisions cited by amicus (ECF 20, pg. 13, n. 41) and by the State that purport to rely on this distinction between real and personal property to justify a total appropriation of personal property were all issued prior to *Horne* and thus simply have no application post-*Horne*.

Second, amicus and the defendant vastly overstate the distinction between personal and real property in suggesting that *Lucas* can be read as allowing a complete regulatory deprivation of personal property because personal property may be subject to greater regulation. In *Lucas*, the Court referred to the "State's traditionally high degree of control over commercial dealings" noting that an owner "ought to be aware of the possibility that new regulation might render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale.)" *Lucas*, 505 U.S. at 1027-28. Yet, there is a world of difference between a regulation that renders personal property "economically worthless" and a regulation that bans possession. Indeed, the limits of this statement in *Lucas* are illustrated by the very case that the Supreme Court cites in the very next sentence of *Lucas*, viz., *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979). *Lucas*, 505 U.S. at 1028.

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*. In short, the rights "to possess and transport" personal property are "crucial" to the Takings analysis.

This point was further stressed in *Horne*, where the Supreme Court stressed 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.

Horne, Lucas and *Andrus* are controlling here. SB 707 expressly denies the right of plaintiffs "to possess and transport their property" and thus requires the "physical surrender" of that property. This is not a statute that simply denies plaintiffs the use of their property, it is a statute that bans possession of their property. Similarly, SB 707 bans any "transfer" of the "devices" and thus bans the right of plaintiffs to "donate or devise" their property. As the Court stated in *Andrus* and reiterated in *Horne*, these property rights are "crucial" to the Takings Clause analysis.

In short, under *Horne*, *Lucas* and *Andrus*, while the State may well be able to prohibit the sale of existing "devices" and thus render the devices "economically worthless" without running afoul of the Takings Clause, the State may not take the "crucial" property rights to "possess and transport their property." *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987) (explaining that in *Andrus v. Allard*, we viewed the right to sell property as just one element of the owner's property interest."). Here, the plaintiffs desire to possess and transport their existing devices in Maryland without regard to their ability to sell the devices elsewhere. *Horne*, *Lucas* and *Andrus* confirm that the State may not deprive them of these possessory rights without just compensation.

2. Police Powers Cannot Justify A Taking.

Relying on *Mugler v. Kansas*, 123 U.S. 623 (1887), the State asserts that "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." ECF 9-1, pg. 10. This assertion and its reliance on *Mugler* is simply wrong as a matter of law. First, *Mugler* itself is quite limited. There, the Court sustained a ban on the manufacture of beer. It did not involve a seizure of the brewery itself. The Court made that clear in stating "[a] prohibition simply upon 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, in any just sense, be deemed a taking or an appropriation of property for the public benefit. *Such 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." 123 U.S. at 668-69 (emphasis added). In this case, it is not merely a restriction being placed on the "use of property," but a complete ban of ownership of the property altogether.

The limits of *Mugler* have been stressed by modern Supreme Court precedent. Indeed, the Governor's argument that "police powers" trump the constitutional right to just compensation for property was expressly rejected by the Supreme Court in *Lucas.* There, 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:

> [T]he 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 (emphasis added).

S*ee also Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 425 (1982) (accepting the lower court's holding that the regulation at issue was "within the State's police power," but holding that "[i]t is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid").

The same point obviously applies to personal property. Under *Horne* and *Andrus*, banning the possession of personal property by its previously-lawful owner is "tantamount to a direct appropriation or ouster." *Loretto*, 458 U.S. at 426. Possession is a "crucial" property interest, which is precisely the point the Supreme Court made in *Andrus* and stressed again in *Horne*.

Indeed, those decisions are not alone in stressing the importance of possession rights. The word "property" in the Takings Clause of the federal Constitution means "the group of rights inherent in [a] citizen's relation to [a] ... thing, as the right *to possess*, use and dispose of it." *United States v. General Motors Corp*., 323 U.S. 373, 378 (1945) (emphasis added).

Under these decisions, a *per se* taking occurs where the regulation of private property is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Loretto*, 458 U.S. at 426. A statute that bans the right to possess, use and dispose of the property within the political boundaries of the jurisdiction imposing the ban is "tantamount to a direct appropriation or ouster."

Proper application of these principles is found in *Duncan v. Becerra*, 265 F. Supp.3d 1106 (S.D. Calif. 2017), *affirmed*, 2018 WL 3433828 (9th Cir. July 17, 2018). In that case, the district court properly applied *Loretto* and *Lucas* and held that California's ban on the possession of the type of existing magazines at issue in that case was a *per se* taking because it required dispossession by existing owners. *Duncan*, 265 F.Supp.3d at 1138. As the court explained, the California statute deprived Plaintiffs not just of the "*use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights." *Id*. (emphasis the court's). The court thereupon issued a

preliminary injunction barring enforcement of the California statute, in part, because it constituted a taking.

That holding was recently affirmed by the Ninth Circuit in *Duncan v. Becerra*, 2018 WL 3433828 (9th Cir. July 17, 2018). Addressing specifically the district court's Takings holding, the Ninth Circuit held that the court "did not abuse its discretion by granting a preliminary injunction on Takings Clause grounds." Slip op. at 3. In so holding, the court of appeals stated that the district court had "outlined the correct legal principles" and specifically quoted with approval the district court's holding that the California statute not only deprived plaintiffs "'of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights.'" *Id*., quoting 265 F. Supp. 3d at 1138. Citing *Lucas* and *Loretto*, the court also expressly affirmed the district court holding that "California could not use the police power to avoid compensation." *Id*.

Inexplicably, the defendant in this case does not even discuss the Ninth Circuit's affirmance of the district court's holding in *Duncan*. Amicus does not even cite *Duncan*. The State does tacitly acknowledges that *Duncan* is contrary to its position here with a terse "but see" citation (ECF 9-1, pg. 10), and then argues in a footnote the district court's ruling in *Duncan* "was based primarily on its conclusion that large-capacity magazines are protected under the Second Amendment." ECF 9-1, pg. 10, n.5. That statement is disingenuous at best.

While the *Duncan* court also addressed the Second Amendment issues, the Takings Clause ruling was an alternative and fully independent basis for the issuance of the preliminary injunction and one that was expressly affirmed by the Ninth Circuit in holding that the district court had applied the correct legal standards under the Takings Clause. Contrary to the State's suggestion, these holdings cannot be explained away by noting that the *Duncan* court also found the items to be protected by the Second Amendment. The Takings Clause and the Second Amendment inquiries are analytically distinct and the district court's and the court of appeals' Takings analysis did not

purport to rely on any aspect of the Second Amendment in the slightest. The State's evident inability to deal with the Takings analysis of *Duncan* amply illustrates the weakness of its arguments here.

3. None of the Cases on Which the State Replies Survive Recent Supreme Court Precedent.

All of the case law on which the State and amicus rely fail under *Horne*, *Lucas, Andrus* and *Lorretto*. For example, the State relies heavily *Fesjian v. Jefferson*, 399 A. 2d 861 (D.C. 1979). (State Mem. at 9). Yet, *Fesjian* predated the Supreme Court's decisions in *Horne*, *Lucas* and *Loretto* and expressly relies on the erroneous premise, rejected in *Lucas*, that legislative police power trumps the Takings Clause. *See Fesjian*, 388 A.2d at 866 (rejecting the takings argument on grounds that "the statute in question is an exercise of legislative police power and not of eminent domain").

A similar error was committed in *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 492 F.3d 404 (4th Cir. 2007), a case decided prior to *Horne*. In that case, the 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 purportedly 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* with respect to full appropriations of personal property. As the 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. The decision in *Holliday* does not survive the Supreme Court's subsequent holding in *Horne*. *See Chisolm v.*

TransSouth Financial Corp., 95 F.3d 331, 337 n.7 (4th Cir. 1996) (noting that circuit precedent is not binding if "superseded by a decision of the Supreme Court.")

Oddly, the Governor also relies on *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1184 (N.D. Ill. 1981). *See* ECF 9-1, pg. 9. *Quilici* quite properly stated that "[i]t is well established that a Fifth Amendment taking can occur through the exercise of the police power regulating property rights." *Quilici*, 532 F. Supp. at 1183. That ruling is, of course, precisely the opposite of the argument mounted by the State here. The *Quilici* court then, however, rejected the takings argument, ruling that the town ordinance (banning the possession of handguns) was not a taking because town residents could still "sell or otherwise dispose of their handguns" outside the town. *Id*. As explained below, that ruling was in error.

The defendant's reliance on *Akins v. United States*, 82 Fed. Cl. 619 (2008), is similarly misplaced. First, to the extent that *Akins* suggests that property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause, that suggestion is, as explained above, both inconsistent with *Lucas* and has been overruled by *Horne*. Second, and in any event, contrary to the State's suggestion, *Akins* did not involve a ban on a person's existing lawful possession of machine guns. Rather, in that case, the ATF ruled that a particular new invention, (the "Akins accelerator") violated previously existing law on the manufacture of machine guns. *Akins*, 82 Fed. Cl. at 621. In holding that this ATF ruling did not effect a Taking, the court ruled 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. *Id*. at 623.

All that means is that "the Takings Clause does not prohibit the uncompensated seizure of evidence in a criminal investigation, or the uncompensated seizure and forfeiture of criminal contraband." *Spann v. Carter*, 648 Fed. Appx. 586 (6th Cir. 2016), citing *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006).

Bump stocks are lawful property under Maryland law, not contraband. Maryland is not free to declare existing lawfully owned and lawfully acquired property to be "contraband" and then seize the property thus declared without just compensation. As stated in *Lucas* "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.

The State's reliance on *Wiese v. Becerra*, 306 F. Supp. 3d 1190 (E.D. Calif. 2018), is particularly misplaced. The court there purported to apply the *Lorretto* test, but held that the California magazine ban there at issue "does not require that owners turn over their magazines to law enforcement" (slip op. at 5) and did not constitute a taking because owners could sell the magazines to a dealer or alter them to become legal in California. No such in-state options exist for "trigger activators" under SB 707.

The *Wiese* court also misapplied *Lorretto* and *Lucas* in holding that no taking has occurred unless the regulation completely deprives the owner of all beneficial "use" of her property. (306 F. Supp. 3d at 1199). Yet, in so holding, the court ignored the Supreme Court's citation to *Andrus* in *Lucas*, which, as explained above, makes plain that right to "possess" personal property (eagle feathers in *Andrus*) is "crucial" to the Takings analysis. The *Weise* court unaccountably also ignored the Supreme Court's holding in *Horne* (a case not even mentioned by the court). The court thus did not apply the holding in *Horne* that there is a fundamental difference between a regulation that merely restricts the use of personal property and one that requires "physical surrender … and transfer of title." *Horne*, 135 S. Ct. at 2429. The *Wiese* court thus also missed the *Horne* Court's express endorsement of the takings analysis in *Andrus*, which makes clear that possession is "crucial" to the Takings Clause analysis. In short, the *Wiese* court failed to realize that while the

government may be free to deprive the owner of economic benefits of property, the government is not free to also deprive the owner of "possession" without paying just compensation.

Indisputably, SB 707 at issue here requires the "physical surrender" of plaintiffs' property as it completely bans possession in Maryland. Indeed, the holdings by the Ninth Circuit in *Duncan* will likely be dispositive of the claims in *Wiese*. Significantly, the *Wiese* court had, by order dated March 23, 2018, stayed further proceedings pending a decision in *Duncan*. On July 20, 2018, (three days after the Ninth Circuit's decision in *Duncan*), the district court in *Wiese* extended its stay of further proceedings until September 24, 2018. While final judgment has yet to be rendered, *Wiese* is unlikely to survive the Ninth Circuit's decision in *Duncan*.

Finally, the State erroneously seeks to rely on *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir.) (en banc), *cert. denied,* 138 S. Ct. 469 (2017), for support of the State interest in enacting SB 707 (State Mem. at 7) and as a purported basis for distinguishing *Duncan* (State Mem. at 10 n.5). At issue in *Kolbe* was the constitutionality under the Second Amendment of the State's regulation of certain rifles and magazines. While *Kolbe* held that these items were not protected by the Second Amendment, *Kolbe* did not involve any Takings question under either the Fifth Amendment or the Maryland Constitution.

Indeed, the treatment accorded the devices completely banned by SB 707 stands in stark contrast to the treatment accorded the rifles and magazines which the Fourth Circuit characterized as "weapons of war" in *Kolbe*. 849 F.3d at 121. Specifically, unlike SB 707, which imposes a complete ban on possession of the covered "devices" regardless of when the "devices" were acquired, Maryland has **not** banned **at all** the possession of "large capacity" magazines in Maryland, only their manufacture, sale or transfer. *See* MD Code Criminal Law 4-305 (b) (providing that "[a] person may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm.").

Maryland residents are thus free to purchase such magazines in other states and bring them into Maryland at will and people do precisely that all the time, perfectly legally. This Takings suit would not have been brought if Maryland had merely banned the sale or transfer of these SB 707 "devices."

Similarly, Maryland has **not** banned the continued "possession" of assault weapons in Maryland that were possessed as of October 1, 2013, the effective date of the legislation at issue in *Kolbe*. *See* MD Code, Criminal Law §4-303(b)(3) (providing that "[a] person who lawfully possessed, has a purchase order for, or completed an application to purchase an assault long gun or a copycat weapon before October 1, 2013, may: (i) possess and transport the assault long gun or copycat weapon"). No such "grandfather clause" is found in SB 707. If SB 707 had contained such a grandfather clause, this Takings suit simply would not have been brought. This disparate treatment illustrates the extreme nature of the Takings imposed by SB 707 at issue here.

Whatever else these "devices" may be, they can hardly be thought of as actual "weapons of war," the term used in *Kolbe*. Yet, Maryland declined to impose complete bans on possession of the personal property at issue in *Kolbe.* That was not accidental. Rather, in enacting that legislation, Maryland wisely choose to avoid the takings issues associated with complete bans on possession. As detailed below, Congress also wisely avoided the same takings issues in "grandfathering" private possession of existing machine guns in enacting 18 U.S.C. § 922(o)(2)(B) in 1986. Maryland illegally abandoned that approach in enacting SB 707. This Court should not allow Maryland to flout the Takings Clause of the Constitution in this manner.

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

1. The "Devices" Banned By SB 707 Are "Property."

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 bump stocks and magazines indisputably have "vested" rights in the continued possession of this lawfully acquired personal property. SB 707 indisputably abrogates those rights by banning continued possession.

In this regard, the property protections accorded by Article 24 and Article 40 of the Maryland Declaration of Rights are even stricter than the federal Takings Clause. 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.").

The Maryland Court of Appeals has thus 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. 373, 399, 863 A.2d 952, 967 (2004) (emphasis added). Thus in *Serio*, the Maryland Court of Appeals held that Baltimore County had committed a "Taking" under Article 40 and violated Article 24 when it refused to yield possession of firearms previously seized by the police from a person who became a disqualified person upon being convicted of a felony. The Court of Appeals held that "Serio did not lose his 'property' interest in the firearms because he is a convicted felon, and he retains due process protection against wrongful retention of his property

under Article 24 of the Maryland Declaration of Rights." *Serio*, 384 Md. at 393-94, 863 A.2d 952 at 964.

Serio also makes clear that the defendant errs in arguing here that plaintiffs cannot be correct because "[s]uch a rule would implicate the State's ability to ban possession of previously-owned firearms by felons." ECF 9-1, pg. 25. This claim is nonsense. *Serio* holds that the State is free to ban possession of firearms by persons who become felons because firearms possession is illegal for felons *under pre-existing law*. *Serio*, 384 Md. at 396, 863 A.2d at 966. What the State may not do under *Serio* is deprive the felon of his *other* property rights in his previously lawfully acquired firearms, including the right to sell or transfer. *Id*. ("Serio is not divested of his ownership interest, and the County cannot just retain the firearms."). *See also Muskin*, 30 A.3d at 974 ("When a statute enacted under the police power, purporting to regulate private property, takes private property completely from an individual for a public purpose, the doctrine of eminent domain is invoked, and the State must provide just compensation for the taking."). The ban on bump stocks and the ban on possession of magazines indisputably affect the "property's value" and destroy "the beneficial use" of this property. If **felons** retain property rights in actual firearms under *Serio*, then law-abiding citizens surely possess protected property interests in their existing, lawfully acquired "firearm parts" that the State now bans under SB 707.

The defense ignores *Serio* but otherwise does not dispute any of these principles. Rather, amazingly, the State's response to this case law is to deny that existing owners of so called "rapid fire trigger activators" have any cognizable property interest in the ownership or possession of their devices. ECF 9-1, pg. 22. Specifically, in its motion to dismiss, the State argues that owners of the covered "devices" have no "settled expectation" to the continued possession of their lawfully owned, lawfully purchased and lawfully used devices because the devices "are constructed to enable a semi-automatic firearm to mimic the automatic fire of a machine gun." ECF 9-1, pg. 23.

Similarly, the amicus characterizes these devices as machine guns and then expounds at length on how dangerous machine guns can be. As detailed below, these appeals to emotion are: 1) irrelevant to the Takings issues presented by this case; and 2) factually incorrect as the statute is not in any way limited to devices which increase the rate of fire to that approaching automatic fire.

In pursuit of their emotional appeal, the defense makes obvious legal errors. Specifically, the defendant flatly asserts that "the possession" of a machine gun "has long been prohibited by federal law." State Mem. at 23-24. This is completely false, as demonstrated by the very statutory provision to which the defense cites, 18 U.S.C. § 922(o).

Enacted in 1986 as part of section 102 of the Firearms Owner's Protection Act, P.L. 99-308, 100 Stat. 449 (1986), that legislation enacted Section 922(o)(1) to make it unlawful "for any person to transfer or possess a machinegun," but at the same time the Act *also* enacted Section 922(o)(2)(B) to provide that this ban on transfer and possession "*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).

These provisions make clear that machine guns were readily available prior to 1986 and *remain available* for civilian ownership and transfer to this very day. Indeed, amicus is careful not to repeat the defendant's error, noting merely that the 1986 legislation "effectively froze the number of legal machine guns in private hands at its 1986 level." ECF 20, pg. 5.

As long as the current owners comply with the registration provisions and tax requirements imposed by the National Firearms Act of 1934, 26 U.S.C §5845(a), those persons may continue to possess and transfer machineguns. *See* 26 U.S.C. § 5841 (governing registration of NFA items). The tax on transferring a firearm covered by the National Firearms Act is $200, per firearm. 26 U.S.C. §5811.

Maryland likewise permits the continued possession and transfer of machineguns under state law, requiring only that the owners promptly register them with the State Police upon acquisition. *See* MD Code Criminal Law § 4-403(c)(1) (requiring a "person who acquires a machine gun" to "register the machine gun with the Secretary of the State Police" within "24 hours after acquiring the machine gun" and every year thereafter "during the month of May"). The Maryland "nonrefundable registration fee" is $10. Section 4-403(c)(5). Maryland does not impose a transfer tax.

Both the defendant and the amicus ignore this body of long-standing law. *Real* machine guns thus remain fully legal (albeit tightly regulated) and thus fully protected property under the federal and state constitutions. Accordingly, the defendant's and the amicus' logical premise, viz., that devices banned by SB 707 are machine guns and that machine guns are *per se* unprotected contraband, fails as a matter of law.

Also specious is the State's argument, echoed by the amicus, that persons who lawfully acquired the "rapid fire trigger activators" newly banned by SB 707 have no vested property rights in this personal property because they should have expected the State to ban them, given the events that happened in Las Vegas. (ECF 9-1, pg. 23; ECF 20, pg. 8). Plaintiffs do not minimize the horror of Las Vegas. Yet, the State's and amicus' arguments ignore the reality that many of these "devices" were acquired long before the Las Vegas shooting.

The defense ignores as well the long-standing actions of the ATF which have fully allowed the purchase and possession of the very items that SB 707 now bans. The ATF specifically approved multiple bump-stock designs submitted by manufacturers and later sold in Maryland, including to the plaintiffs. These ATF approvals were typically shipped with the devices to end-users so as to assure purchasers that the devices were approved by the ATF. *See* Ex. 1A, 1B; 2A; 3A; 4A (ATF approval notices).

In each of these cases, the ATF specifically found that the design did not convert the weapon at issue into a machinegun, as that term is defined by federal law, 26 U.S.C. 5845(b) (defining a machinegun to be "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger").

Under these formal ATF determinations, the "devices" now banned by SB 707 were found to be merely a "firearm part" and thus not subject to regulation under the National Firearms Act. *See, e.g*., Exhibit 1 (Affidavit of David Orlin) and Ex. 1A (ATF Letter dated June 07, 2010) (finding that the "bump-stock" is a "firearm part" and is not regulated under Gun Control Act or the National Firearms Act); Ex. 1B (ATF Letter Dated November 20, 2013 (finding that the Echo binary trigger was not a machine gun as redesigned by the manufacturer.); Ex. 2 (Affidavit of Mark Pennak) and Ex. 2A (ATF Letter dated April 2, 2012) (finding the bump stock device "is incapable to initiating an automatic firing cycle that continues until the finger is release or the ammunition supply is exhausted" and was thus "not a machinegun" as defined under the NFA); Ex. 3 (Affidavit of Robert Brunger) and Ex. 3A (ATF Letter dated Nov. 20, 2013); Ex. 4 (Affidavit of Caroline Brunger) and Ex. 4A (ATF Letter dated Nov. 20, 2013).

Given these ATF letters, it is absurd for the defense to argue that law-abiding purchasers were on notice that that possession of these "firearm parts" would be banned, especially where Maryland has not banned the possession of actual machine guns. Indeed, we have found no instance, other than at Las Vegas, in which bump stocks have ever been used in a crime. "[T]he law does not require prescience." *Raffucci Alvarado v. Sonia Zayas*, 816 F.2d 818, 820 (1st Cir. 1987). *See also Goldsborough v. De Witt*, 171 Md. 225, 189 A. 226, 241 (1937) (same).

Equally absurd is the amicus argument that bump stocks are, or convert firearms to be, automatic "machine guns." With all due respect to the Brady Center, the ATF long ago determined

that the entire factual premise of their amicus Brief is wrong as a matter of fact and law. Bump stocks are not automatic "machine guns," nor do they convert semi-automatic guns into automatic machine guns. Ex. 2, 2A (finding the bump stock device "is incapable to initiating an automatic firing cycle that continues until the finger is release or the ammunition supply is exhausted" and was thus "not a machinegun" as defined under the NFA).

Indeed, in *Staples v. United States*, 511 U.S. 600, 608 (1994), the Supreme Court specifically rejected the government's contention that "all guns, whether or not they are statutory 'firearms,' are dangerous devices that put gun owners on notice that they must determine at their hazard whether their weapons come within the scope of the [National Firearms] Act." Rather, the Court imposed a *mens rea* requirement, compelling the government to prove that the gun owner actually knew that gun in question (allegedly a machinegun) possessed the features that made it subject to the National Firearms Act. The Court stated that "the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country" and that "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials.'" *Id*. at 610.

These considerations apply *a fortiori* to "firearm parts" which had been authoritatively determined by the ATF not to be machine guns at the time they were acquired by plaintiffs here. The assertion by the State and amicus that these purchasers "should have known" that these devices would be banned is thus utter and complete nonsense. If "guns in general" are not "obnoxious" materials, then gun "parts" expressly sanctioned by the ATF surely are not per se "obnoxious" materials subject to bans by States without regard to ownership interests. Indeed, as noted above, the Maryland Court of Appeals expressly held that firearms are protected property under Article 40 of the State Constitution, even when owned by a felon who is otherwise disqualified from possession. *See Serio v. Baltimore County*, 384 Md. 373, 863 A.2d 952 (2004). That holding is

simply ignored by the State. That holding applies *a fortiori* to what the ATF has heretofore characterized as a simple, unregulated "firearms part."

2. The Maryland Constitution Applies to Possession *In Maryland*.

The defendant's final argument, half-heartedly asserted, is that SB 707 is not a Taking under the federal and State constitutions because "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." ECF 9-1, pg. 14.

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 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." That, the Court ruled, was "a profoundly mistaken assumption." Relying on the Supreme Court's decision in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981), the Seventh Circuit noted that in the "First Amendment context, the Supreme Court long ago made it clear that '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.'" *See also Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939).

The defendant's argument here that existing Maryland owners of private personal property may escape the State's Taking of their private property by escaping from Maryland is similarly "profoundly mistaken." Some principles are fundamental. Among them are that the Constitution of the United States and the Constitution of Maryland form the basis of the respective polities, or form of civil government, within each jurisdiction. These documents and the constitutional rights therein set forth embody the consent of the governed to be governed. *See, e.g., Kenly v. Huntingdon Bld. Ass'n*, 166 Md. 182, 170 A. 526 (1934) ("The founders of this nation, imbued with the wisdom

attained by experience and study of the causes of the rise and fall of republics, ancient and modern, and realizing that the stability and perpetuity of the government then in process of formation must derive all of its just powers from the consent of the governed"). As the Supreme Court has stated, it may seem "trite but necessary to say" that "[w]e set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 640 (1943).

The "consent of the governed" must mean, at the very least, that constitutional rights "of the governed" must be respected by each government *within its jurisdiction*. In the Takings context, that means, at the very least, that the right protected by the Takings Clause of the Fifth Amendment and by Articles 24 and 40 of the Maryland Constitution to *possess* private personal property must be respected within that jurisdiction. Yet, under the defendant's approach, 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. There can be no doubt that such a law would not survive Supreme Court review, especially after the holding in *Horne* that the Takings Clause of the Fifth Amendment applies to the appropriation of personal property no less than it applies to the appropriation of real property.

The same result obtains under the Maryland Constitution which provides even greater protection to property rights than that obtained under the federal Constitution. *See, e.g*, *Muskin* 422 Md. at 566, 30 A.3d at 968-69 ("While generally the Maryland Declaration of Rights and Constitution are read *in pari materia* with their federal constitutional counterparts, this Court made clear in *Dua* that, under some circumstances, Maryland law may impose greater limitations (or extend greater protection than those prescribed by the United States Constitution's analog provisions.).").

The argument by the State that SB 707 does not constitute a taking because owners of the newly banned devices can store their property in other states and likewise sell their property in other states, also fails to consider or address that such theory would create a flooding of the market in neighboring jurisdictions, thereby diminishing the value of the devices. In addition, at a minimum, the State must present sufficient facts to show that the plaintiffs have an ability to take such action and make such accommodations for storing or selling their devices out of state. Such option is not available to every owner and the State's proposition that this is a viable alternative assumes certain facts for which they have failed to provide any supporting records or affidavits.

Finally, the defendant fails to acknowledge the effect of the adoption of its argument by courts nationwide. Suppose every state banned bump-stocks under state law pursuant to the same theories asserted by Maryland. Then there would be no state to which owners might finally retreat with their property. What then? 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 one of them, which state must yield? These rhetorical questions are meant only to illustrate the utter absurdity of the defendant's position and the complete unworkability of its widespread adoption.

The protections of Article 40 and Article 24 of the Maryland Declaration of Rights apply to Maryland residents and their property within Maryland. These rights would mean nothing if they could not be enjoyed in Maryland because the Declaration of Rights has no application beyond Maryland's borders.

C. <u>SB 707 Is Void for Vagueness</u>.

The Due Process Clause of the Fourteenth Amendment prohibits the enactment of such vague legislation. *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); see also ECF 1-para. 60. In order for a statute to pass constitutional standards and avoid being declared unconstitutionally vague, the statute must meet the requirements set out by the Court in *United States v. Williams*. 553 U.S. 285, 128 S. Ct. 1830. In *Williams*, the Court explained that "laws that are insufficiently clear are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of the sensitive First Amendment freedoms. *Id.* at 1306 (noting that "that a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe").

As the defendant has acknowledged, "[i]t is a basic principle of due 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). The Court in *Grayned* further explained that "void laws offend several important values." *Id.* First, since it is assumed that "man is free to steer between lawful and unlawful" conduct, it is insisted upon that laws give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* Moreover, if someone does not know how to "act accordingly" because of the vagueness of a law, an "innocent" person could be trapped by not providing a fair warning. *Id.* Second, the Court explains that in order to prevent "discriminatory enforcement . . . laws must provide explicit standards for those who apply them." *Id.* Third, vague laws delegate basic policy matters to police officers, judges and juries for resolution on an "*ad hoc* and subjective basis" analysis. *Id. See also Dimaya,* 138 S. Ct. at 1212 ("the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges"); *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983). ("[I]f 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, [it would] substitute the judicial for the legislative department") (internal quotation marks omitted).

SB 707 is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also Hill v. Colo.*, 530 U.S. 703 (2000) (noting that the Court's analysis was largely dependent on the First Amendment implications of the facts). Although we do not hold our legislatures to "unattainable standards," *Wag More Dogs Liab. Corp. v. Cozart*, 680 F.3d 359, 371 (4th Cir. 2012), or expect legislatures to draft legislation with "celestial precision" *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013), we do expect that legislatures are drafting and approving laws that when "construed if fairly possible so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Hager*, 721 F.3d at 183.

SB 707 fails these principles on all counts. 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), as amended, 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." Both items are covered. This express use of the disjunctive in this statutory definition refutes the State's assertion that the devices covered by SB 707 are limited to those that "impact the firearm's *trigger*" (ECF 9-1, pg. 18, emphasis in the original).

This definition also disposes of the State's related contention that the scope of SB 707 is limited to the devices specifically listed by SB 707. *Id*. at 2-3, 18. 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)). 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." 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*.") (Emphasis added). Under this provision, the scope of "rapid fire trigger activators" is **not** limited by the listed "included" devices. At the very least, the statute is hopelessly vague on that point.

Similarly, this definition belies the State's assertion SB 707 covers only devices that "modif[y a] firearm's rate of fire to mimic that of an automatic firearm." ECF 9-1, pg. 2. There, absolutely nothing in the statutory language that purports to limit the scope of SB 707 to devices that increases the rate of fire to that approaching the rate of machine guns of any type. Rather, the definition plainly encompasses any after-market accessory that might marginally increase the "rate of fire" by *any* small amount.

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"),[1] 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

[1] 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 8/31/2018) (Emphasis added).

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 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.

Moreover, the ban on "devices" is not limited to semiautomatic guns, but includes all firearms of any sort. Yet, the concept of a "rate of fire" is even more nonsensical when applied to such firearms as the "rate of fire" for non-semi-auto firearms 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. 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. Consider, for example, 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. Likewise, the "rate of fire" is very marginally increased when a larger bolt handle is included which allows for easier operation in cold temperatures during hunting season with cold or gloved hands. 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.

Moreover, as alleged in the complaint, but not disputed by the State in their motion, there are many devices which are primarily designed for safety and controllability of the firearm and have

no relationship to the devices used in Las Vegas or those which the bill's sponsor described as approaching the rate of fire of an automatic weapon. These include many devices in widespread and long-standing use such as barrel weights like those used in Olympic competition to reduce muzzle rise due to recoil, and a wide variety of fore grips and (non-bump) stocks. Such devices are often designed to and do increase the potential rate of fire by making the firearm more controllable (and therefore safer). A more controllable firearm can be held more steadily on target despite recoil for slightly faster follow-up shots.

Examples of commonly-owned firearm devices which increase controllability also include rifle slings (which many shooters wrap around their arms to help steady a rifle), heatshields to protect the shooter's hand from barrel heat during repeated fire, bipods and monopods to steady a rifle for shooting (particularly useful in hunting and target practice), and devices designed to reduce recoil, including certain stocks (other than bump-stocks) as well as internal springs used to reduce recoil. By increasing the rate at which the muzzle can be brought back on target, or the overall stability of the muzzle, each of these entirely benign devices increases the rate of fire (to a very small degree), in arguable violation of the statute as written.

These are very common accessories and modifications in use for decades, lacking any connection to recent tragic events. Modifying bolt-action hunting rifles in these ways does not increase the rate of fire to anything approaching an automatic weapon – but it does arguably violate the statute at issue, given the terribly vague language used in SB 707. Likewise, muzzle devices designed to direct burning gases safely out of the line of sight of shooters are also designed to and do marginally increase the rate that a shooter can place a follow-up shot.

The less time the muzzle is off target or the shooter's vision is obstructed, the faster follow-up shots can be accurately placed. In this way, these devices do very marginally increase the rate of fire, but nowhere near the rate of automatic firearms. In appearing to potentially sweep these

devices into its purview despite the undisputed fact that the bill was intended only to regulate devices that "modif[y a] firearm's rate of fire to mimic that of an automatic firearm," the final bill became unconstitutionally vague.

SB 707 is also vague in banning "a copy or a similar device" without providing any form of definition. The defendant cites to *Kolbe* in support of the position that the term "copy" as used in connection with the rifles at issues there is sufficient to provide understanding of the use of the term in SB 707. *Id*. pg. 19, citing *Kolbe*, 849 F.3d at 139. Yet, the defendant incorrectly argues that the term "similar device" is readily understood because "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." ECF 9-1, pg. 20 (quoting *In re Wallace W*., 333 MD. 186, 190-91(1993)). What the defendant fails to grasp is that here, unlike the specific listed firearms at issue in *Kolbe*, the devices listed in subsection 4-301(m)(2) are *not* an exclusive list because, as explained above, the definition of "rapid fire trigger activator" set forth in subsection 4-301(m)(1) is far broader and far more vague than these "included" devices set forth in subsection 4-301(m)(2). Stated differently, the term "similar device" does not limit the scope of "devices" encompassed by that definition of "rapid fire trigger activator" but serves only to increase the number of *additional* "included" devices.

These disparities are not cured, as suggested by the defendant, in looking to the legislative history. ECF 9-1, pg. 18. First, even assuming *arguendo* that Maryland General Assembly was concerned about machine guns, the language that the General Assembly actually chose is far broader, and quite intentionally so. *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."). More fundamentally, a statute is not saved from a

vagueness challenge merely because there are some applications that are clear. As the en banc Fourth Circuit stated in *Kolbe*, "[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. at 2561. What matters is the vagueness of the statutory language.

For example, in *Dimaya* the Supreme Court found unconstitutionally vague a civil provision that required the deportation of any alien convicted of a crime that "involves conduct that presents a serious potential risk of physical injury to another." *Dimaya*, 138 S. Ct. at 1212. In so holding, the Court did not look to the legislative history of the provision, it looked solely to the language itself, finding fatal vagueness in the statute's use of the word "risk" and the use of the word "serious." Id. at 1213-14. Similarly, in *Johnson*, the Court expressly looked to the statutory language in resolving the constitutionality of the statute at issue. See *Johnson*, 135 S. Ct., at 2557-58. More importantly, the purposes of the vagueness doctrine are obviously inconsistent with requiring citizens to look to legislative history or the "legislative purpose," rather than the statutory text, in order to ascertain what is prohibited and what is not. See *Johnson*, 135 S. Ct. at 2257 ("We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.").

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. This Court is not at liberty to save the statute in a vagueness challenge by rewriting it. *Johnson v. Mayor and City Council of Baltimore City*, 387 Md. 1, 19, 874 A.2d 439, 451 (2005) ("we are not free to rewrite a statute merely because the Court believes that the legislature's purpose would have been more

effectively advanced by an additional provision"). See also *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 150 (3d Cir. 2000) ("Given how vast the reach of the Act and how vague and ambiguous its terms, the entire Act is permeated with defects of constitutional dimension, defects 'judicial surgery' could not cure without a total rewrite."); *Wynn v. Carey*, 599 F.2d 193, 194 (7th Cir. 1979) ("We, therefore, agree with the district court that s 2(6) is unconstitutionally vague and that a court cannot rewrite a statute under the guise of construing it.").

V. Conclusion

For all the foregoing reasons, the plaintiffs respectfully request that this Honorable Court deny the defendant's Motion to Dismiss.

REQUEST FOR A HEARING

The plaintiffs request a hearing.

Respectfully submitted,

HANSEL LAW, PC

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of August, 2018, I caused the foregoing to be filed via the Court's electronic filing system, which will make service on all parties entitled to service.

/s/
Erienne A. Sutherell