RECORD No. 18-2474

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Appellants,

v.

LAWRENCE HOGAN, *et al.*

Appellees,

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

JOINT APPENDIX

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APPEAL,CLOSED

U.S. District Court
District of Maryland (Baltimore)
CIVIL DOCKET FOR CASE #: 1:18-cv-01700-JKB

Maryland Shall Issue, Inc. et al v. Hogan
Assigned to: Chief Judge James K. Bredar
Case in other court: Fourth Circuit Court of Appeals, 18-02474
Cause: 28:1343 Violation of Civil Rights

Date Filed: 06/11/2018
Date Terminated: 11/16/2018
Jury Demand: Plaintiff
Nature of Suit: 950 Constitutional - State Statute
Jurisdiction: Federal Question

Plaintiff

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Date Filed	#	Docket Text
06/11/2018	1	COMPLAINT against All Defendants (Filing fee $ 400 receipt number 0416-7380773.), filed by Maryland Shall Issue, Inc.. (Attachments: # 1 Civil Cover Sheet Cover Sheet, # 2

		Supplement MSI Disclosure, # 3 Supplement Brockman Disclosure, # 4 Supplement Brunger Disclosure, # 5 Supplement Brunger_C Disclosure, # 6 Supplement Orlin Disclosure, # 7 Supplement Summons)(Hansel, Cary) (Entered: 06/11/2018)
06/11/2018	2	QC NOTICE: 1 Complaint, filed by Maryland Shall Issue, Inc. was filed incorrectly. ***Please refile Local Rule 103.3 Disclosure Statement as separate events.* (bas, Deputy Clerk) (Entered: 06/12/2018)
06/11/2018		Jury Trial Demand by Paul Mark Brockman, Caroline Brunger, Robert Brunger, Maryland Shall Issue, Inc., David Orlin(bas, Deputy Clerk) (Entered: 06/12/2018)
06/12/2018	3	Summons Issued 21 days as to Lawrence Hogan.(bas, Deputy Clerk) (Entered: 06/12/2018)
06/12/2018	4	Local Rule 103.3 Disclosure Statement by Maryland Shall Issue, Inc. (Attachments: # 1 Supplement Corporate Disclosure, # 2 Supplement Corporate Disclosure, # 3 Supplement Corporate Disclosure)(Hansel, Cary) (Entered: 06/12/2018)
06/28/2018	5	MOTION for Extension of Time to File Answer re 1 Complaint, by Lawrence Hogan (Attachments: # 1 Text of Proposed Order)(Katz, Jennifer) (Entered: 06/28/2018)
07/02/2018	6	RESPONSE in Opposition re 5 MOTION for Extension of Time to File Answer re 1 Complaint, filed by Paul Mark Brockman, Caroline Brunger, Robert Brunger, Maryland Shall Issue, Inc., David Orlin. (Attachments: # 1 Text of Proposed Order Proposed Order) (Hansel, Cary) (Entered: 07/02/2018)
07/03/2018	7	PAPERLESS ORDER granting 5 MOTION for Extension of Time to File Answer re 1 Complaint. Lawrence Hogan answer due 7/20/2018. Signed by Chief Judge James K. Bredar on 7/2/2018. (vdcs, Chambers) (Entered: 07/03/2018)
07/16/2018	8	SUMMONS Returned Executed by Maryland Shall Issue, Inc.. Lawrence Hogan served on 6/13/2018, answer due 7/20/2018.(Hansel, Cary) (Entered: 07/16/2018)
07/20/2018	9	MOTION to Dismiss for Failure to State a Claim by Lawrence Hogan (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Text of Proposed Order)(Katz, Jennifer) (Entered: 07/20/2018)
07/25/2018	10	MOTION to Appear Pro Hac Vice for Marc J. Fagel (Filing fee $100, receipt number 0416-7465638.) by Giffords Law Center to Prevent Gun Violence(Davis, Thad) (Entered: 07/25/2018)
07/25/2018	11	MOTION to Appear Pro Hac Vice for Vivek R. Gopalan (Filing fee $100, receipt number 0416-7465647.) by Giffords Law Center to Prevent Gun Violence(Davis, Thad) (Entered: 07/25/2018)
07/25/2018	12	MOTION to Appear Pro Hac Vice for Jennifer E. Rosenberg (Filing fee $100, receipt number 0416-7465649.) by Giffords Law Center to Prevent Gun Violence(Davis, Thad) (Entered: 07/25/2018)
07/27/2018	13	MOTION for Leave to File *Amicus Curiae Brief* by Giffords Law Center to Prevent Gun Violence (Attachments: # 1 Exhibit 1 - Brief of Amicus Curiae Giffords Law Center to Prevent Gun Violence in Support of Defendant and Dismissal)(Davis, Thad) (Entered: 07/27/2018)
07/27/2018	14	PAPERLESS ORDER granting 13 Motion for Leave to File Amicus Curiae Brief. Signed by Chief Judge James K. Bredar on 7/27/2018. (bpgs, Chambers) (Entered: 07/27/2018)
07/30/2018	15	PAPERLESS ORDER granting 10 Motion to Appear Pro Hac Vice on behalf of Marc Fagel. Directing attorney Marc Fagel to register online for CM/ECF at

		http://www.mdd.uscourts.gov/electronic-case-filing-registration. Signed by Clerk on 7/30/2018. (srd, Deputy Clerk) (Entered: 07/30/2018)
07/30/2018	16	PAPERLESS ORDER granting 11 Motion to Appear Pro Hac Vice on behalf of Vivek Gopalan. Directing attorney Vivek Gopalan to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic-case-filing-registration. Signed by Clerk on 7/30/2018. (srd, Deputy Clerk) (Entered: 07/30/2018)
07/30/2018	17	PAPERLESS ORDER granting 12 Motion to Appear Pro Hac Vice on behalf of Jennifer Rosenberg. Directing attorney Jennifer Rosenberg to register online for CM/ECF at http://www.mdd.uscourts.gov/electronic-case-filing-registration. Signed by Clerk on 7/30/2018. (srd, Deputy Clerk) (Entered: 07/30/2018)
08/01/2018	18	Consent MOTION for Extension of Time to File Response/Reply as to 9 MOTION to Dismiss for Failure to State a Claim by Paul Mark Brockman, Caroline Brunger, Robert Brunger, Maryland Shall Issue, Inc., David Orlin. (Attachments: # 1 Text of Proposed Order)(Hansel, Cary) (Entered: 08/01/2018)
08/01/2018	19	PAPERLESS ORDER granting 18 Motion for Extension of Time to File Response/Reply re 9 MOTION to Dismiss for Failure to State a Claim: Plaintiffs' opposition to Defendant's Motion to Dismiss (ECF No. 9) is due on August 24, 2018, and Defendant's reply is due September 14, 2018. Signed by Chief Judge James K. Bredar on 8/1/2018. (bpgs, Chambers) (Entered: 08/01/2018)
08/15/2018	20	NOTICE by Giffords Law Center to Prevent Gun Violence re 9 MOTION to Dismiss for Failure to State a Claim *of AMICUS BRIEF* (Davis, Thad) (Entered: 08/15/2018)
08/22/2018	21	Consent MOTION for Extension of Time to File Response/Reply as to 9 MOTION to Dismiss for Failure to State a Claim, 19 Order on Motion for Extension of Time to File Response/Reply, by Maryland Shall Issue, Inc..(Hansel, Cary) (Entered: 08/22/2018)
08/23/2018	22	PAPERLESS ORDER granting 21 Consent MOTION for Extension of Time to File Response/Reply as to 9 MOTION to Dismiss for Failure to State a Claim. Plaintiffs' response due 8/31/18; Defendant's reply due 9/21/18. Signed by Chief Judge James K. Bredar on 8/23/2018. (vdcs, Chambers) (Entered: 08/23/2018)
08/31/2018	23	RESPONSE in Opposition re 9 MOTION to Dismiss for Failure to State a Claim filed by Paul Mark Brockman, Caroline Brunger, Robert Brunger, Maryland Shall Issue, Inc., David Orlin. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit)(Hansel, Cary) (Entered: 08/31/2018)
09/07/2018	24	Emergency MOTION for Preliminary Injunction by Paul Mark Brockman, Caroline Brunger, Robert Brunger, Maryland Shall Issue, Inc., David Orlin (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Hansel, Cary) (Entered: 09/07/2018)
09/07/2018	25	ORDER Setting date for hearing re 24 Emergency MOTION for TRO and for Preliminary Injunction filed by David Orlin, Maryland Shall Issue, Inc., Paul Mark Brockman, Caroline Brunger, Robert Brunger. Signed by Chief Judge James K. Bredar on 9/7/2018. (cags, Deputy Clerk) (Entered: 09/07/2018)
09/12/2018	26	RESPONSE in Opposition re 24 Emergency MOTION for Preliminary Injunction filed by Lawrence Hogan.(Katz, Jennifer) (Entered: 09/12/2018)
09/13/2018	27	REPLY to Response to Motion re 24 Emergency MOTION for Preliminary Injunction filed by Paul Mark Brockman, Caroline Brunger, Robert Brunger, Maryland Shall Issue, Inc., David Orlin. (Attachments: # 1 Exhibit)(Hansel, Cary) (Entered: 09/13/2018)
09/14/2018	28	PAPERLESS ORDER re 24 Emergency MOTION for Preliminary Injunction filed by

		David Orlin, Maryland Shall Issue, Inc., Paul Mark Brockman, Caroline Brunger, Robert Brunger. The Motion (ECF No. 24) is DENIED for the reasons stated in open court. Signed by Chief Judge James K. Bredar on 9/14/2018. (vdcs, Chambers) (Entered: 09/14/2018)
09/14/2018	29	Motion Hearing held on 9/14/2018 re 24 Emergency MOTION for Preliminary Injunction filed by David Orlin, Maryland Shall Issue, Inc., Paul Mark Brockman, Caroline Brunger, Robert Brunger before Chief Judge James K. Bredar.(Court Reporter: Christine Asif) (mds, Deputy Clerk) (Entered: 09/14/2018)
09/17/2018	30	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 9/14/2018, before Judge James K. Bredar. Court Reporter Christine T. Asif, Telephone number 410-962-4492. Total number of pages filed: 45. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained from the Court Reporter or through PACER. Redaction Request due 10/9/2018. Redacted Transcript Deadline set for 10/18/2018. Release of Transcript Restriction set for 12/17/2018.(ca, Court Reporter) (Entered: 09/17/2018)
09/18/2018	31	Consent MOTION for Extension of Time to File Response/Reply as to 9 MOTION to Dismiss for Failure to State a Claim by Lawrence Hogan (Attachments: # 1 Text of Proposed Order)(Katz, Jennifer) (Entered: 09/18/2018)
09/19/2018	32	PAPERLESS ORDER granting 31 Consent MOTION for Extension of Time to File Response/Reply as to 9 MOTION to Dismiss for Failure to State a Claim . Defendant's reply due 9/28/18. Signed by Chief Judge James K. Bredar on 9/18/2018. (vdcs, Chambers) (Entered: 09/19/2018)
09/28/2018	33	REPLY to Response to Motion re 9 MOTION to Dismiss for Failure to State a Claim filed by Lawrence Hogan.(Katz, Jennifer) (Entered: 09/28/2018)
11/16/2018	34	MEMORANDUM. Signed by Chief Judge James K. Bredar on 11/15/2018. (bas, Deputy Clerk) (Entered: 11/16/2018)
11/16/2018	35	ORDER Granting 9 Motion to Dismiss for Failure to State a Claim. Signed by Chief Judge James K. Bredar on 11/15/2018. (bas, Deputy Clerk) (Entered: 11/16/2018)
12/06/2018	36	NOTICE OF APPEAL as to 35 Order on Motion to Dismiss for Failure to State a Claim by Paul Mark Brockman, Caroline Brunger, Robert Brunger, Maryland Shall Issue, Inc., David Orlin. Filing fee $ 505, receipt number 0416-7712795.(Hansel, Cary) (Entered: 12/06/2018)
12/07/2018	37	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 36 Notice of Appeal. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to http://www.ca4.uscourts.gov and click on Forms & Notices.(slss, Deputy Clerk) (Entered: 12/07/2018)
12/13/2018	38	USCA Case Number 18-2474 for 36 Notice of Appeal, filed by David Orlin, Maryland Shall Issue, Inc., Paul Mark Brockman, Caroline Brunger, Robert Brunger - Case Manager - Joy Hargett Moore. (slss, Deputy Clerk) (Entered: 12/13/2018)

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02/11/2019 09:50:58

PACER Login:	hansellawpc:2816517:0	**Client Code:**	TNB C MSI 2
Description:	Docket Report	**Search Criteria:**	1:18-cv-01700-JKB
Billable Pages:	5	**Cost:**	0.50

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, INC.
for itself and its members,
1332 Cape St. Claire Rd #342
Annapolis, MD 21409

and

PAUL MARK BROCKMAN
6014 River Birch Ct
Hanover, MD 21076

and

ROBERT and CAROLINE BRUNGER
11281 Gunsmoke Ct.
Lusby, MD 20657

and

DAVID ORLIN
867 Caulford Drive
Westminster, MD 21157

and

All of the above Individually Named Plaintiffs On Behalf of Themselves and all Others Similarly Situated

Plaintiffs,

v.

LAWRENCE HOGAN,
in his capacity of
GOVERNOR OF MARYLAND
100 State Circle
Annapolis, MD 21401

Defendant.

CASE No._____
JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

COME NOW Plaintiffs Maryland Shall Issue, Inc., Paul Mark Brockman, Robert and Caroline Brunger, and David Orlin, individually and on behalf of themselves and others similarly situated, by and through undersigned counsel, and hereby file suit against Governor Larry Hogan, Governor of the State of Maryland in his official capacity, and in support thereof, state as follows:

INTRODUCTION

1. Effective October 1, 2018, the Maryland General Assembly passed House Bill 1302 and defendant Hogan signed into law Senate Bill 707 (Chapter 252 of Maryland laws) ("SB 707" or "Senate Bill 707"). Senate Bill 707 now creates Section 4-305.1 of the Criminal Law Article of the Maryland Code to provide that, with specified exceptions, a person may not "transport" into Maryland or "manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator." Senate Bill 707 defines "a rapid fire trigger activator" extremely broadly 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." A rapid fire trigger activator is further defined to include a "bump stock, trigger crank, hellfire trigger, binary trigger, burst trigger system, or a copy or a similar device, regardless of the producer or manufacturer." A "rapid fire trigger activator" does not include "a semiautomatic replacement trigger that improves the performance and functionality over the stock trigger."

2. The only exception to the total ban on "rapid fire trigger activators" is for "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 federal Bureau of Alcohol, Tobacco,

Firearms and Explosives ["BATF"] 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." This exception for BATF authorization applies by its terms only to "possession." It does not apply to permit the manufacture, the sale, or the offer to sell, or the transfer or the receipt of a rapid fire trigger activator otherwise prohibited by SB 707. There is no provision anywhere in SB 707 for just compensation being "first paid" to existing owners of "rapid fire trigger activators" for the seizure and dispossession of their property rights in such "rapid fire trigger activators." A person who violates Section 4-305.1 newly enacted by SB 707 "is guilty of a misdemeanor and subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both" under MD Code Criminal Law § 4-306.

3. This class action lawsuit challenges the newly enacted SB 707 on five grounds. First, by prohibiting the continued possession of or the exercise of other property rights in existing "rapid fire trigger activators" by Plaintiffs and class members without any compensation or authorization of any compensation, SB 707 facially violates the Takings Clause of the Fifth Amendment to the United States Constitution. Second, and independently, by prohibiting the continued possession of existing "rapid fire trigger activators" by Plaintiffs and class members and further prohibiting the sale, the offering for sale, transfer or receipt of such existing "rapid fire trigger activators" without any compensation or authorization of any compensation, SB 707 facially violates the Takings Clause of Article III, § 40, of the Maryland Constitution ("Takings Clause of the Maryland Constitution"). Third, by authorizing continued possession of existing "rapid fire trigger activators" after October 1, 2018, only where the owner has applied for

"authorization" from the BATF by October 1, 2018 and received such "authorization" from the BATF by October 1, 2019, SB 707 violates the Due Process Clause of the Fourteenth Amendment by imposing a condition with which it is legally impossible for Plaintiffs and class members to comply. Under Maryland law, these BATF provisions of SB 707 are not severable from the rest of SB 707 and thus the entirety of SB 707 must be declared unconstitutional. Fourth, in banning "any device" that increases "the rate of fire" by any amount, and in failing to define "installed in or attached to a firearm," or a "binary trigger system or burst trigger system or a copy or a similar device," SB 707 is so vague that it does not provide "fair notice of the conduct" of the conduct it proscribes. These terms fail to "provide standards to govern the actions of police officers, prosecutors, juries, and judges" and thus will impermissibly lead to the risk of "arbitrary or discriminatory law enforcement" in violation of the Due Process Clause of the Fourteenth Amendment. Fifth, by retroactively abolishing vested property rights of Plaintiffs and class members in presently owned "rapid fire trigger activators" Defendant has violated Article 24 of the Maryland Constitution.

4. This suit is brought on behalf of MSI, its members and the individuals listed in the caption above, as well as the class of all similarly-situated individuals, in order to seek reasonable compensation for the losses incurred as well as injunctive and declaratory relief for the protection of Plaintiffs' and class members' State and Federal Constitutional rights.

JURISDICTION AND VENUE

5. This action arises under the Constitution and laws of the United States. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has supplemental jurisdiction over the State claims alleged in this Complaint under 28 U.S.C. § 1367 as such claims form a part of the same case or controversy.

6. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court and by 42 U.S.C. § 1983.

7. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

THE PARTIES

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

"devices" banned by SB 707, who are thus directly injured by SB 707 and who would have standing to bring each of the legal claims set forth herein.

9. Class Plaintiff Paul Brockman is an adult citizen and resident of the state of Maryland. At all times relevant hereto, Paul Brockman is an existing lawful owner of one or more of the "rapid fire trigger activators" newly banned by SB 707. Paul Brockman is a member of MSI.

10. Class Plaintiffs Robert and Caroline Brunger are husband and wife and are both adult citizens and residents of the state of Maryland. At all times relevant hereto, Robert and Caroline Brunger are existing lawful owners of one or more of the "rapid fire trigger activators" newly banned by SB 707. Robert and Caroline Brunger are members of MSI.

11. Class Plaintiff David Orlin is an adult citizen and resident of the state of Maryland. At all times relevant hereto, David Orlin is an existing lawful owner of one or more of the "rapid fire trigger activators" newly banned by SB 707. David Orlin is a member of MSI.

12. Class Plaintiffs identified individually herein bring this action pursuant to Fed. R. Civ. P. 23 on behalf of themselves and on behalf of the entire class of people similarly situated. The members of the class are so numerous that joinder of all members is impracticable and questions of law and factual circumstances are common to the class. The representative parties herein present typical claims and defenses common to all members of the class, the class members will be fairly represented by the parties herein and class members' interests will therefore be adequately protected.

FACTS

13. On April 24, 2018, defendant Governor Hogan signed into law Senate Bill 707, Chapter 252, with an effective date of October 1, 2018 ("Senate Bill 707" or ("SB 707").

14. Senate Bill 707 created Section 4-305.1 of the Criminal Law Article of the Maryland Code to provide that, with specified exceptions, a person may not "transport" into Maryland or "manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator."

15. Senate Bill 707 defines "a rapid fire trigger activator" 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." A rapid fire trigger activator is further defined to include a "bump stock, trigger crank, hellfire trigger, binary trigger, burst trigger system, or a copy or a similar device, regardless of the producer or manufacturer." The term "installed in or attached to a firearm" is not defined within SB 707. The term "rate of fire" is not defined within SB 707. The terms "binary trigger, burst trigger system, or a copy or a similar device" are not defined within SB 707.

16. The term "firearm" is a broadly defined term under MD Code Public Safety § 5-101(h) to include "(i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or (ii) the frame or receiver of such a weapon." SB 707 imposes a ban on "any device" that increases the "rate of fire" when "installed in or attached to" any "firearm." The terms "installed in or attached to" are not defined within SB 707. The term "firearm" in SB 707 can thus be read to include any "firearm" defined by MD Code Public Safety § 5-101(h). The bans imposed by SB 707 are thus not limited to semi-automatic weapons but may also include revolvers and single-shot weapons.

17. Under Senate Bill 707, a "rapid fire trigger activator" does not include "a semiautomatic replacement trigger that improves the performance and functionality over the stock trigger."

18. There is no provision anywhere in Senate Bill 707 for just compensation being first paid to existing owners of "rapid fire trigger activators" for the dispossession of their property rights in existing "rapid fire trigger activators" owned prior to the enactment of SB 707.

19. A person who violates MD Code Criminal Law § 4-305.1, as newly enacted by SB 707, "is guilty of a misdemeanor and subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both" under MD Code Criminal Law § 4-306. A person convicted of a violation of MD Code Criminal Law § 4-306 is subject to a lifetime federal firearms disability under 18 U.S.C. 922(g)(1), and 18 U.S.C. 921(a)(20)(B), regardless of the actual sentence imposed. A similar lifetime firearms disability is imposed under Maryland law.

20. Article III, Section 40 of the Maryland Constitution provides: "The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation."

21. "Section 40 has been determined to 'have the same meaning and effect in reference to an exaction of property, and that the decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities.'" *Litz v. Maryland Department of the Environment*, 446 Md. 254, 265-66, 131 A.3d 923, 930 (2016).

22. The Takings Clause of the Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. The Takings Clause of the Fifth Amendment has been

incorporated into the Fourteenth Amendment so as to be made fully applicable to the States, including Maryland. *Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994), citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

23. A "taking" under the Fifth Amendment and under Article III, § 40 of the Maryland Constitution occurs "[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).

24. The term "property" for purposes of Article III, § 40 of the Maryland Constitution includes "every interest or estate which the law regards of sufficient value for judicial recognition." *Dodds v. Shamer*, 339 Md. 540, 548, 663 A.2d 1318, 1322 (1995). Similarly, the word "property" in the Takings Clause of the Fifth Amendment means "the group of rights inhering 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). "Whenever 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, the owner is deprived of his property within the meaning of Article III, Section 40." *Serio v. Baltimore County*, 384 MD. 373, 398, 863 A.2d 952, 967 (2004). The term "property" under both the Maryland Takings Clause and the Fifth Amendment's Takings Clause includes both real property and personal property. *Horne v. Dept. of Agriculture*, 135 S.Ct. 2419, 2427-28 (2015); *Serio v. Baltimore County*, 384 Md. 373, 399, 863 A.2d 952, 967 (2004).

25. Takings in bills passed by the Maryland General Assembly are unconstitutional if the bills do not include a "provision" for compensation "being first paid." *Steuart v. City of*

Baltimore, 7 Md. 500 (1855) ("the Legislature may pass a law taking private property for public uses, if provision be made for compensation first to be paid or tendered to the owner"). "A statute having the effect of abrogating a vested property right, and not providing for compensation, does 'authoriz[e] private property, to be taken ..., without just compensation' (Article III, § 40)." *Dua v. Comcast Cable of Maryland, Inc.,* 370 Md. 604, 630, 805 A.2d 1061, 1076 (2002). A failure to enact such a provision or to make a tendering of compensation renders the entire bill unconstitutional and void.

26. SB 707 does not include any "provision" providing for "compensation first to be paid or tendered" within the meaning of the Takings Clause of the Maryland Constitution for the abrogation of Plaintiffs' vested property rights in their previously owned "rapid fire trigger activators" newly banned in SB 707.

27. "Rapid fire trigger activators," as defined in SB 707, are property covered and protected by the Takings Clause of the Fifth Amendment and the Takings Clause of the Maryland Constitution. By banning possession as well as other as all other property rights associated with continued ownership of this personal property in Maryland, SB 707 deprives existing owners of "rapid fire trigger activators" of all beneficial uses of their previously owned "rapid fire trigger activators."

28. SB 707 makes an exception on its general ban on possession of a "rapid fire trigger activator" after October 1, 2018, 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." These provisions of SB 707 ("BATF provisions") were intended to allow persons who owned or possessed "rapid fire trigger activators" as of October 1, 2018, to continue to maintain lawful possession of these devices by obtaining BATF authorization.

29. A statute that bans continued possession of personal property in which the owner has a vested interest is a *per se* Taking under the Takings Clause of the Fifth Amendment and the Takings Clause of the Maryland Constitution, regardless of whether physical possession of the property is actually assumed by the government. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 324 n.19 (2002) (a physical taking "dispossess[es] the owner" of property); *Nixon v. United States*, 978 F.2d 1269, 1287 (D.C. Cir. 1992) (statute that "physically dispossessed" property owner "resulted in" a *per se* taking).

30. Under the Takings Clause of the Fifth Amendment and the Takings Clause of the Maryland Constitution, the State of Maryland may not abrogate vested rights in private property without compensation, even in the exercise of its otherwise valid police powers. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) ("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"); *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").

31. After the enactment of SB 707, persons in Maryland, including members of Plaintiff MSI, have applied to the BATF for "authorization to possess a rapid fire trigger activator." In response to these requests, the BATF refused to accept or process the application for authorization, informing the applicant 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.

The accuracy of this communication was confirmed by correspondence between the President of MSI and Kyle Lallensack, Chief, Firearms Industry Programs Branch, Firearms and Explosives Industry Division, Bureau of Alcohol, Tobacco, Firearms, and Explosives

32. Dated April 24, 2018, the BATF issued a "Special Advisory," on its Internet website specifically in reference to SB 707, stating, in relevant part:

> **Maryland residents who intend to file applications with ATF for "authorization" to possess devices covered by the 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.

https://www.atf.gov/news/pr/maryland-law-restricting-rapid-fire-trigger-activators (bold in original). In light of this stated public policy of the BATF, any further applications for "authorization" under the BATF provisions of SB 707 would be futile.

33. In enacting SB 707, the Maryland General Assembly intended to exempt from the ban on possession otherwise imposed by SB 707 if persons who owned rapid fire trigger activators prior to October 1, 2018, (1) filed an application for authorization to possess with the BATF 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.

34. In light of the BATF's position that it lacks authority to accept or process any applications for "authorization" for possession of "rapid fire trigger activators" within the meaning of SB 707, it is legally impossible for existing owners, including the individual Plaintiffs in this lawsuit, other members of Plaintiff MSI and class members, to comply with the BATF provisions of SB 707 and obtain "authorization" from the BATF so as to preserve continued possession of their "rapid fire trigger activators" owned prior to the enactment of SB 707.

35. The legal impossibility of obtaining "authorization" for the continued possession of "rapid fire trigger activators" means that the BATF provisions of SB 707 are contrary to the Due Process Clause of the Fourteenth Amendment and are thus unenforceable. 1 W. Lafave & A. Scott, Jr., Substantive Criminal Law § 3.3(c) at 291 (1986) ("[O]ne cannot be criminally liable

for failing to do an act which he is physically incapable of performing."). See also *Broderick v. Rosner*, 294 U.S. 629, 639 (1935) (Brandeis, J.) (invalidating a statute, in part, because it "imposes a condition which, as here applied, is legally impossible of fulfillment"); *Ezell v. City of Chicago*, 651 F.3d 684, 710-11 (7th Cir. 2011) (invalidating a requirement that that Chicago had made legally impossible to satisfy within the city); *Hughey v. JMS Dev. Corp*., 78 F.3d 1523, 1530 (11th Cir. 1996) ('The law does not compel the doing of impossibilities."); BLACK'S LAW DICTIONARY 912 (6th ed. 1990) (same). Cf. *United States v. Dalton*, 960 F.2d 121, 126 (10th Cir. 1992) (reversing a conviction for failing to register a machinegun with the BATF where the court concluded that such registration was made legally impossible by a subsequent statute). The BATF provisions of SB 707 thus place an unconstitutional prior condition on the continued possession of existing "rapid fire trigger activators."

36. Under Maryland law, a statute is presumed to have a severability clause by operation of law. MD Code, General Provisions, § 1-210. However, "when a statute contains both a general provision and an invalid exception, courts have often refused to sever when the severed statute would impose a duty, sanction or substantial hardship on the otherwise excepted class." *O. C. Taxpayers For Equal Rights, Inc. v. Mayor and City Council of Ocean City*, 280 Md. 585, 601, 375 A.2d 541, 550 (1977). "A long established principle of statutory construction in determining severability questions, is that where the Legislature enacts a prohibition with an excepted class, and a court finds that the classification is constitutionally infirm, the court will ordinarily not presume that the Legislature would have enacted the prohibition without the exception, thereby extending the prohibition to a class of persons whom the Legislature clearly intended should not be reached." *State v. Schuller*, 280 Md. 305, 319, 372 A.2d 1076, 1083 (1977).

37. Invalidation of the unconstitutional BATF provisions in SB 707 would impose "a duty, sanction or substantial hardship" on persons who have or otherwise would have applied to the BATF for authorization under the BATF provisions of SB 707 as part of the excepted class created by the BATF provisions as it would impose the ban on continued possession of "rapid fire trigger activators" on such persons.

38. The invalid, unconstitutional BATF provisions of SB 707 are not severable from the remainder of SB 707. Invalidation of the BATF provisions thus renders invalid the entirety of SB 707 under Maryland law.

THE CLASS

39. Plaintiffs bring each claim set forth in this Complaint as a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure. MSI is the named class representative and has associational standing to represent its members who are class members. MSI members include individuals who are class members, as defined below. A class action is appropriate under Rule 23(b)(1), (b)(2) and/or (b)(3).

40. The members of the Plaintiff class are so numerous that their joinder is impracticable. The prosecution of separate actions by the class members would create a risk of inconsistent adjudications with respect to the constitutional rights of members of the class. Such inconsistent adjudications could impede or substantially impair the ability of non-joined members to protect their interests and rights. The class and subclasses include individuals who are presently known to the class representative as well as potentially many individuals who may prefer to remain unidentified. The total number of class and subclass members is thus numerous but unknowable.

41. Plaintiffs seek to certify the following class and sub-classes (referred to throughout collectively as the "class"), defined as:

CLASS: All persons in Maryland who may own or possess prior to October 1, 2018, any "device" that is or could be banned by SB 707.

SUB-CLASS A: All persons in Maryland who may own or possess prior to October 1, 2018, any "bump stock, trigger crank, Hellfire trigger, binary trigger system or burst trigger system" banned by SB 707.

SUB-CLASS B: All persons in Maryland who lack "fair notice" of the types of "devices" that are banned by SB 707 because of the vagueness of SB 707 and thus may be at risk of arbitrary or discriminatory enforcement of SB 707 with respect to the "devices" that these persons may possess currently or in the future.

42. To the extent revealed by discovery and investigation, there may be additional appropriate classes and/or subclasses.

43. Excluded from the class are any local, state, or federal government entities.

44. This Court may maintain these claims as a class action pursuant to Fed. R. Civ. P. 23.

45. There are common questions of law and fact that affect the rights of every member of each respective class, and the types of relief sought are common to every member of each respective class. The same conduct by the Defendant has injured every member of each respective class and each member of every class has been harmed in the same way. Common questions of law and/or fact common to each respective class include, but are not limited to:

(a) Whether SB 707 represents an unlawful taking, thereby violating citizens' rights pursuant to the Takings Clause of the Fifth Amendment and the Takings Clause of the Maryland Constitution.

(b) Whether SB 707 is void for vagueness in failing to lawfully define the term "installed in or attached to a firearm" or the term "rate of fire" or the terms "binary trigger, burst trigger system, or a copy or a similar device" as applied to "rapid fire trigger activator."

(c) Whether SB 707 violates the Due Process Clause of the Fourteenth Amendment by conditioning continued lawful possession of "devices" otherwise banned by SB 707 upon compliance with the BATF provisions where such compliance with the BATF provisions is legally impossible.

46. Concentrating the litigation in this forum is logical and desirable as the jurisdiction of this Court includes all of Maryland, the plaintiffs are Maryland residents, the Defendant is the Governor of Maryland sued in his *ex officio* capacity, and the suit challenges a Maryland state-wide statute. Inconsistent or varying adjudications of claims of individual subclass members would establish incompatible standards of conduct for the Defendant in the enforcement or application of SB 707.

47. The Defendant has acted or refused to act on grounds that apply generally to each subclass, so that final injunctive or declaratory relief is appropriate respecting each subclass as a whole.

WHEREFORE, Plaintiffs respectfully request that this Court certify each of the claims alleged in this case as a class action under Rule 23(b)(1), (b)(2) and (b)(3), Federal Rules of Civil Procedure, consisting of all persons in Maryland may own or possess prior to October 1, 2018, any "device" that is or could be covered by SB 707 and of all persons defined in the class and

sub-classes herein. Plaintiffs further respectfully request that this Court divide the aforementioned class into subclasses as detailed in paragraph 41 above, designate plaintiff MSI as class and subclasses representative, and appoint undersigned counsel as counsel for the class and subclasses.

CLAIMS FOR RELIEF

COUNT I

VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

48. Plaintiffs adopt and incorporate by reference each and every allegation contained elsewhere herein verbatim with the same effect as if herein fully set forth..

49. SB 707 constitutes a *per se* Taking of Plaintiffs' vested interests in personal property in violation of the Takings Clause of the Fifth Amendment.

50. As a direct and proximate result of Defendant's violation of the Takings Clause of the Fifth Amendment, the Plaintiffs and the class have suffered irreparable harm, including the loss of property and of constitutional rights entitling them to declaratory and injunctive relief, as well as compensatory damages under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs and the class members demand judgment against Defendant, in an amount to be determined at trial, plus interest, costs and attorneys' fees and such other and further relief as the nature of the case requires, including, but not limited to, declaratory relief that SB 707 violates the Takings Clause of the Fifth Amendment. Plaintiffs and the class members further demand temporary, preliminary, and permanent injunctive relief barring the Defendant from "Taking" Plaintiffs' and class members' personal property without just compensation. Plaintiffs and the class further seek monetary damages commensurate with the fair market value or purchase price of the devices banned by SB 707.

COUNT II

VIOLATION OF THE TAKINGS CLAUSE OF THE MARYLAND CONSTITUTION

51. Plaintiffs adopt and incorporate by reference each and every allegation contained elsewhere herein verbatim with the same effect as if herein fully set forth.

52. SB 707 is a *per se* "Taking" of Plaintiffs' and class members' vested interests in vested personal property in violation of the Takings Clause of the Maryland Constitution.

53. As a direct and proximate result of Defendant's violation of the Takings Clause of the Maryland Constitution, the Plaintiffs and class members have suffered irreparable harm, including the loss of constitutional rights entitling them to declaratory and injunctive relief, as well as compensatory damages.

WHEREFORE, Plaintiffs and the class members demand judgment against Defendant, in an amount to be determined at trial, plus interest, costs and attorneys' fees and such other and further relief as the nature of the case requires, including, but not limited to, declaratory relief that SB 707 violates the Takings Clause of the Maryland Constitution. Plaintiffs and the class members further demand temporary, preliminary, and permanent injunctive relief barring the Defendant from "Taking" Plaintiffs' personal property without just compensation. Plaintiffs and the class members further seek monetary damages commensurate with the fair market value or purchase price of the devices banned by SB 707.

COUNT III

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

54. Plaintiffs adopt and incorporate by reference each and every allegation contained elsewhere herein verbatim with the same effect as if herein fully set forth.

55. The BAFT provisions of SB 707 are legally impossible to comply with and are thus a violation of the Due Process Clause of the Fourteenth Amendment.

56. The BATF provisions are not severable from the rest of SB 707, thus rendering the remainder of SB 707 likewise invalid.

57. Defendant, acting under the color of state law, violated Plaintiffs' rights and the rights of class members under the Due Process Clause of Fourteenth Amendment by imposing legally impossible conditions precedent to continued lawful possession of "rapid fire trigger activators."

58. As a direct and proximate result of Defendant's violation of the Due Process Clause of the Fourteenth Amendment, the Plaintiffs and members of the class have suffered irreparable harm, including the loss of constitutional rights entitling them to declaratory and injunctive relief, as well as compensatory damages under 42 U.S.C. § 1983.

WHEREFORE, Plaintiffs and the class demand judgment against Defendant in an amount to be determined at trial, including monetary damages commensurate with the fair market value or purchase price of the devices banned by SB 707, plus interest, costs and attorneys' fees, and such other and further relief as the nature of the case requires, including, but not limited to, declaratory relief that the BATF provisions of SB 707 violate the Due Process Clause of the Fourteenth Amendment, that the BATF provisions of SB 707 are not severable from the remainder of SB 707 and that, accordingly, all of SB 707 is invalid. Plaintiffs and the class further demand temporary, preliminary and permanent injunctive relief barring the Defendant from applying or enforcing SB 707 in any manner.

COUNT IV

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

59. Plaintiffs adopt and incorporate by reference each and every allegation contained elsewhere herein verbatim with the same effect as if herein fully set forth.

60. The Due Process Clause of the Fourteen Amendment prohibits a legislature from enacting a vague criminal provision. "'The prohibition of vagueness in criminal statutes,' our decision in *Johnson* explained, is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'" *Sessions v. Dimaya,* 138 S.Ct. 1204, 1212 (2018), quoting *Johnson v. United States*, 135 S.Ct. 2551, 2557 (2015). Accordingly, "[t]he void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *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." (Id.).

61. The definition set forth in Senate Bill 707 for a "a rapid fire trigger activator" as including "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**" can be read to include any device (other than replacement triggers specifically exempted by SB 707), that could possibly result in an "increase" in a "rate of fire" no matter how minimal that increase may be.

62. By thus specifically banning "any device" that could, by any amount, result in an increase of a "rate of fire," 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 purposes.

63. Because the 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 include revolver speed loaders, revolver speed strips and revolver moon clips, all of which permit a user to more rapidly reload a revolver and thus potentially increase the "rate of fire" of the revolver. Such speed loaders, speed strips and moon clips can be said to at least temporarily be "installed in or attached to" a revolver when in normal use. All such devices are used for legitimate law-abiding purposes. The term "installed in or attached to a firearm" is not a defined term.

64. None of these foregoing 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, a "bump stock, trigger crank, Hellfire trigger, binary trigger system or burst trigger system" otherwise identified and banned by SB 707.

65. While SB 707 purports to define a "bump stock" and a "Hellfire trigger," and a "trigger crank," SB 707 also bans a "binary trigger system or burst trigger system or a copy or a similar device" and those terms are entirely undefined. Such undefined "similar devices" may or may not include a "semiautomatic replacement trigger that improves the performance and functionality over the stock trigger" that is otherwise expressly exempt from the ban created by SB 707.

66. In banning "any device" that increases "the rate of fire" by any amount, and in failing to define "rate of fire," "installed in or attached to a firearm" and a "binary trigger system

or burst trigger system or a copy or a similar device," SB 707 is so vague that it does not provide "fair notice of the conduct" it proscribes. These terms fail to provide "provide standards to govern the actions of police officers, prosecutors, juries, and judges" and thus will impermissibly lead to the risk of "arbitrary or discriminatory law enforcement" in violation of the Due Process Clause of the Fourteenth Amendment.

WHEREFORE, Plaintiffs and the class demand judgment against Defendant in an amount to be determined at trial, including monetary damages commensurate with the fair market value or purchase price of the devices banned by SB 707, plus interest, costs and attorneys' fees, and such other and further relief as the nature of the case requires, including, but not limited to declaratory relief that SB 707 is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs and the class further demand temporary, preliminary and permanent injunctive relief barring the Defendant from applying or enforcing SB 707's ban on "any device" that increases "the rate of fire"… "when installed in or attached to a firearm."

COUNT V

VIOLATION OF ARTICLE 24 OF THE MARYLAND CONSTITUTION

67. Plaintiffs adopt and incorporate by reference each and every allegation contained elsewhere herein verbatim with the same effect as if herein fully set forth.

68. The existing owners of "rapid fire trigger activators" have a vested property interest in the possession of their devices which will be banned by SB 707, effective October 1, 2018.

69. Article 24 of the Maryland Constitution provides that "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or,

in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

70. Under Maryland law, "[a] statute having the effect of abrogating a vested property right, and not providing for compensation, does 'authoriz[e] private property, to be taken ..., without just compensation' (Article III, § 40). Concomitantly, such a statute results in a person or entity being 'deprived of his ... property" contrary to 'the law of the land' (Article 24)." *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 630, 805 A.2d 1061, 1076 (2002).

71. "Retrospective 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). "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.)." *Muskin* 422 Md. at 566, 30 A.3d. at 968-69. "It has been firmly settled by this Court's opinions that the Constitution of Maryland prohibits legislation which retroactively abrogates vested rights. No matter how 'rational' under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking of a person's property and giving it to someone else." *Muskin*, 422 Md. at 566, 30 A.3d. at 968-69, quoting *Dua*, 370 Md. at 623, 805 A.2d at 1072.

72. For purposes of Article 24, "retrospective statutes are those that 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Muskin*, 422 Md. at 557-58, 30 A.3d at 969 (citations omitted). Retrospective statutes within the meaning of Article 24 are those "acts

which operate on transactions which have occurred or rights and obligations which existed before passage of the act." *Langston v. Riffe,* 359 Md. 396, 406, 754 A.2d 389, 394 (2000).

73. SB 707 has the direct and intended effect of "abolishing" vested property interests of Plaintiffs by banning the possession and other attributes of ownership associated with their previously owned, existing "rapid fire trigger activators" without "providing for compensation." Consequently, SB 707 deprive Plaintiffs and the members of MSI and members of the class of their vested property interests contrary to the "law of the land" within the meaning of Article 24 of the Maryland Constitution.

74. As a direct and proximate result of Defendant's violation of Article 24 of the Maryland Constitution, the Plaintiffs and class members have suffered irreparable harm, including the loss of constitutional rights, entitling them to declaratory and injunctive relief, as well as compensatory damages.

WHEREFORE, Plaintiffs and the class demand judgment against Defendant in an amount to be determined at trial, including monetary damages commensurate with fair market value or purchase price of the devices newly banned by SB 707, plus interest, costs and attorneys' fees, and such other and further relief as the nature of the case requires, including, but not limited to declaratory relief that SB 707 violates Article 24 of the Maryland Constitution. Plaintiffs and the class further demand temporary, preliminary and permanent injunctive relief barring the Defendant from applying or enforcing SB 707 in any manner.

JURY DEMAND

Plaintiffs and the class demand a jury trial as to all claims so triable.

Respectfully submitted,

HANSEL LAW, PC

/s/

Cary J. Hansel (Bar No. 14722)
Erienne A. Sutherell (Bar No. 20095)
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Phone: 301-461-1040
Facsimile: 443-451-8606

Counsel for Plaintiffs and for the Class

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Maryland Shall Issue, Inc.
1332 Cape St. Claire Rd., #342

(b) County of Residence of First Listed Plaintiff Anne Arundel County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Cary J. Hansel, Erienne A. Sutherell
Hansel Law, P.C.
2514 N. Charles St., Baltimore, MD 21218

DEFENDANTS

Lawrence W. Hogan
100 State Circle

County of Residence of First Listed Defendant Anne Arundel County
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☑ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☑ 1	☑ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

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- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

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- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
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- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
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- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☑ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☑ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
5th Amendment Takings Clause, 14th Amendment

Brief description of cause:
Challenging the Constitutionality of SB 707

VII. REQUESTED IN COMPLAINT:

☑ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $ Decl., Inj., Monetary Relief

CHECK YES only if demanded in complaint:
JURY DEMAND: ◉ Yes ○ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
June 11, 2018

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP JA 33 JUDGE _____ MAG. JUDGE _____

Print Save As... Reset

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked**.** (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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

_____.
(names of affiliates)

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

_____.
(names of entities with possible financial interests)

Disclosure of Corporate Interest

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

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

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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

_____.
(names of affiliates)

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

_____.
(names of entities with possible financial interests)

Disclosure of Corporate Interest

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

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

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

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esutherell@hansellaw.com
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301-461-1040
Telephone number

Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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

_____.
(names of affiliates)

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

_____.
(names of entities with possible financial interests)

Disclosure of Corporate Interest

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

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

2514 North Charles Street, Baltimore, MD 21218
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esutherell@hansellaw.com
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301-461-1040
Telephone number

Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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

_____.
(names of affiliates)

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

_____.
(names of entities with possible financial interests)

Disclosure of Corporate Interest

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

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

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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

_____.
(names of affiliates)

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

_____.
(names of entities with possible financial interests)

Disclosure of Corporate Interest

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

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

Fax number

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Maryland

Maryland Shall Issue, Inc., et al.

Plaintiff(s)

v.

Lawrence Hogan

Defendant(s)

Civil Action No. 1:18-cv-01700

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Lawrence Hogan
Governor of Maryland
100 State Circle
Annapolis, MD 21401

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Cary J. Hansel
Erienne A. Sutherell
Hansel Law, P.C.
2514 North Charles Street, Baltimore, MD 21218
Tel: (301) 461-1040

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 1:18-cv-01700

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

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June 11, 2018
Date

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Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

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Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

Fax number

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Maryland Shall Issue, et al. *

Plaintiff, *

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

Lawrence Hogan *

Defendant. *

DISCLOSURE OF CORPORATE INTEREST

Check all that apply:

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

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(name of party)

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

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

June 11, 2018
Date

/s/ Erienne A. Sutherell
Signature

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

2514 North Charles Street, Baltimore, MD 21218
Address

esutherell@hansellaw.com
Email address

301-461-1040
Telephone number

Fax number

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.	*	

* * * * * * * * * * * * *

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

For the reasons stated in the accompanying memorandum, defendant Governor Lawrence J. Hogan, Jr., sued in his official capacity, moves to dismiss the complaint in its entirety, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim on which relief can be granted. A proposed order is attached.

Respectfully submitted,

BRIAN E. FROSH
Attorney General

/s/ Jennifer L. Katz

JENNIFER L. KATZ (Fed. Bar #28973)
ROBERT A. SCOTT (Fed. Bar # 24613)
Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
410-576-7005 (tel.); 410-576-6955 (fax)
jkatz@oag.state.md.us

Dated: July 20, 2018

Attorneys for Defendants

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.	*	

* * * * * * * * * * * * * *

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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Attorney General

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Dated: July 20, 2018

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EXHIBIT 1

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THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

Testimony in SUPPORT of SB 707

Criminal Law – Firearm Crimes – Rapid Fire Trigger Activator

Chairman Zirkin, Vice Chair Kelley, and members of the committee:

SB 707 serves the purpose of prohibiting a person from transporting, receiving, selling, or manufacturing a form of rapid fire trigger activator in the state. This bill establishes a penalty for using a rapid fire trigger activator in the commission of a crime.

Last year our country faced a horrific tragedy, the deadliest mass shooting in Modern U.S. history. It's a troubling to know 58 innocent victims had their lives taken and hundreds more were injured, because the availability of a "bump stock," a device that modified the firearm's rate of fire to mimic that of an automatic firearm. By banning rapid fire trigger activators and other devices that modify a firearm, we can place further protections and we can prevent the loss of innocent lives.

SB 707 makes it clear that its intent is to target devices, parts, or combination of the two that function to accelerate the firearm's rate of fire beyond the standard rate. If a person fails to comply with these rules they are subject to penalties, especially if the rapid fire trigger activator is used in the commission of a crime. This legislation models the 2013 assault weapon ban (SB 623), and would be adding to the copycat section of the legislation.

Current law allows these devices for both regulated and unregulated firearms, to be bought, sold, and transferred with little to no regulation. These devices can be bought for less than $100 dollars with no background checks, meaning it's a little to no expense for someone who wants to cause serious damage.

If an individual violates the established rules under SB 707 they are subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000, or both. If an individual uses a rapid fire trigger activator in the commission of a felony or crime of violence, they shall be sentenced to imprisonment for no less than 5 years but not exceeding 20 years.

This legislation is intended to be a reasonable approach to protect the lives in Maryland, there is no reason someone should be making a semi-automatic weapon into an automatic weapon, with the ban of rapid trigger activators we can potentially be saving numerous of innocent lives, and minimizing the magnitude of tragic events such as the Las Vegas shooting.

For these reasons I ask for a favorable report on SB 707.

EXHIBIT 2

SENATE JUDICIAL PROCEEDINGS COMMITTEE
BOBBY A. ZIRKIN, CHAIR · COMMITTEE REPORT SYSTEM
DEPARTMENT OF LEGISLATIVE SERVICES · 2018 MARYLAND GENERAL ASSEMBLY

FLOOR REPORT

Senate Bill 707

Criminal Law – Firearm Crimes – Rapid Fire Trigger Activator

SPONSORS: Senator Ramirez, et al.

COMMITTEE RECOMMENDATION: **Favorable with Amendments (3)**

SHORT SUMMARY:

As amended, this bill prohibits a person from transporting a "rapid fire trigger activator" into the State. A person is also prohibited from manufacturing, possessing, selling, offering to sell, transferring, purchasing, or receiving a "rapid fire trigger activator." Violators are subject to an existing misdemeanor penalty of a maximum of three years imprisonment and/or a fine of $5,000. In addition, the bill prohibits a person from using a rapid fire trigger activator in the commission of a felony or a crime of violence. Violators are subject to the existing more stringent penalties that apply to the use of an assault weapon or a magazine with a capacity of more than 10 rounds of ammunition in the commission of a felony or crime of violence.

The bill 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 federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) before October 1, 2018, for authorization to possess a rapid fire trigger activator; and

(3) is in compliance with all federal requirements for possession of a rapid fire trigger activator.

A person must receive the authorization from ATF by October 1, 2019 in order to be able to continue to possess the rapid fire trigger activator lawfully.

As amended, this bill is identical to House Bill 888 as passed by the House Judiciary Committee and currently in the House of Delegates.

COMMITTEE AMENDMENTS: There are three (3) committee amendments

AMENDMENT NO. 1: makes technical changes and changes to the purpose paragraph.

AMENDMENT NO. 2: establishes new definitions for devices that are included in the definition of a "rapid fire trigger activator", and strikes definitional language from the bill as originally drafted.

AMENDMENT NO. 3: establishes an exemption on possession of a rapid fire trigger activator for certain individuals who possess a rapid fire trigger activator before October 1, 2018.

SUMMARY OF BILL:

As amended, the bill provides that:

"binary trigger system" means a device that, when installed in or attached to a firearm, fires both when the trigger is pulled and on release of the trigger;

"bump stock" means 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;

"burst trigger system" means 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.

"hellfire trigger" means a device that, when installed in or attached to a firearm, disengages the trigger return spring when the trigger is pulled;

"rapid fire trigger activator" *means* any device, including a removable manual or power–driven activating device, constructed so that when installed in or attached to a firearm: (1) the rate at which the trigger is activated increases, or (2) the rate of fire increases;

"rapid fire trigger activator" *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;

"rapid fire trigger activator" *does not include* a semiautomatic replacement trigger that improves the performance and functionality over the stock trigger;

"trigger crank" means 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.

CURRENT LAW:

The Firearm Safety Act of 2013 (Chapter 427) modified and expanded the regulation of firearms, firearms dealers, and ammunition in Maryland and made changes to related mental health restrictions on the possession of firearms. Among other things, the Act extended the scope of assault pistol prohibitions to all assault weapons, created a new licensing scheme for handguns under the authority of the Department of State Police (DSP), and imposed restrictions on the capacity of detachable magazines and ammunition.

Among its many provisions, the Act created a definition of "assault weapon," encompassing assault pistols, assault long guns, and copycat weapons. The Act applied existing prohibitions relating to assault pistols to all assault weapons. With specified exceptions, transporting, possessing, selling, offering to sell, transferring, purchasing, or receiving any assault weapon is prohibited. A person who lawfully possessed an assault pistol before June 1, 1994, and who registered the pistol with DSP before August 1, 1994, may continue to possess and transport the assault pistol. A person who lawfully possessed, had a purchase order for, or completed an application to purchase an assault long gun or a copycat weapon before October 1, 2013, is allowed to continue to possess and transport the weapon. A licensed firearms dealer may continue to possess, sell, offer for sale, or transfer an assault long gun or a copycat weapon that the dealer lawfully possessed on or before October 1, 2013. Chapter 427 also clarified when the inheritance of a prohibited assault weapon is permitted.

A person who uses an assault pistol or a magazine that has a capacity of more than 10 rounds of ammunition in the commission of a felony or a crime of violence is guilty of a misdemeanor and, in addition to any other sentence imposed for the felony or crime of violence, must be sentenced as follows:

- for a first violation, a nonsuspendable, nonparolable, mandatory minimum sentence of 5 years with a maximum imprisonment of 20 years; and
- for each subsequent violation, a mandatory minimum sentence of 10 years with a maximum imprisonment of 20 years.

A sentence imposed under this penalty provision must be consecutive to and not concurrent with any other sentence imposed for the underlying felony or crime of violence.

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. A violator is guilty of a misdemeanor and on conviction is subject to maximum penalties of imprisonment for three years and/or a $5,000 fine.

Section 5-101 of the Public Safety Article defines a "crime of violence" as (1) abduction; (2) arson in the first degree; (3) assault in the first or second degree; (4) burglary in the first, second, or third degree; (5) carjacking and armed carjacking; (6) escape in the first degree; (7) kidnapping; (8) voluntary manslaughter; (9) maiming; (10) mayhem; (11) murder in the first or second degree; (12) rape in the first or second degree; (13) robbery; (14) robbery with a dangerous weapon; (15) sexual offense in the first, second, or third degree; (16) home invasion; (17) an attempt to commit offenses (1) through (16); or (18) assault with the intent to commit offenses (1) through (16) or a crime punishable by imprisonment for more than one year.

BACKGROUND:

Bump stocks made national news in October 2017 when a gunman fired into a Law Vegas concert crowd killing almost 60 people and injuring more than 600 in less than 10 minutes with the use of such a device. Shortly after the incident, the Bureau of Alcohol, Tobacco, Firearms, and Explosives advised that while simulating automatic fire, bump stocks do not actually alter a firearm to fire automatically; therefore, they are legal under federal law. Bump fire stocks 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.

According to the National Conference of State Legislatures, at least 15 states and a number of local jurisdictions have taken up proposals to ban bump stocks. On February 20, 2018, President Trump proposed a regulatory ban on devices, including bump stocks, that "turn weapons into machine guns."

FISCAL IMPACT:

State Effect: Minimal increase in general fund revenues and expenditures due to the bill's application of existing penalty provisions. The Judiciary and other affected State agencies can implement the bill's provisions with existing budgeted resources.

Local Effect: Minimal increase in revenues and expenditures due to the bill's application of existing penalty provisions. Affected local agencies can implement the bill's provisions with existing budgeted resources.

Small Business Effect: None.

ADDITIONAL INFORMATION:

Prior Introductions: None.

Cross File: HB 888 (Delegate Moon, et al.) - Judiciary.

COUNSEL: Jamie Lancaster (410) 946–5372

EXHIBIT 3

Chapter 252

(Senate Bill 707)

AN ACT concerning

Criminal Law – Firearm Crimes – Rapid Fire Trigger Activator

FOR the purpose of prohibiting a person from transporting a certain rapid fire trigger activator into the State or manufacturing, possessing, selling, offering to sell, transferring, purchasing, or receiving a certain rapid fire trigger activator, subject to a certain exception; applying certain penalties; establishing a certain penalty for using a rapid fire trigger activator in the commission of a certain crime; defining certain terms; providing for a delayed effective date for certain provisions of this Act; and generally relating to firearm crimes.

BY repealing and reenacting, with amendments,
Article – Criminal Law
Section 4–301 and 4–306
Annotated Code of Maryland
(2012 Replacement Volume and 2017 Supplement)

BY adding to
Article – Criminal Law
Section 4–305.1
Annotated Code of Maryland
(2012 Replacement Volume and 2017 Supplement)

BY repealing and reenacting, with amendments,
Article – Criminal Law
Section 4–305.1
Annotated Code of Maryland
(2012 Replacement Volume and 2017 Supplement)
(As enacted by Section 1 of this Act)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Criminal Law

4–301.

(a) In this subtitle the following words have the meanings indicated.

(b) "Assault long gun" means any assault weapon listed under § 5–101(r)(2) of the Public Safety Article.

(c) "Assault pistol" means any of the following firearms or a copy regardless of the producer or manufacturer:

(1) AA Arms AP–9 semiautomatic pistol;

(2) Bushmaster semiautomatic pistol;

(3) Claridge HI–TEC semiautomatic pistol;

(4) D Max Industries semiautomatic pistol;

(5) Encom MK–IV, MP–9, or MP–45 semiautomatic pistol;

(6) Heckler and Koch semiautomatic SP–89 pistol;

(7) Holmes MP–83 semiautomatic pistol;

(8) Ingram MAC 10/11 semiautomatic pistol and variations including the Partisan Avenger and the SWD Cobray;

(9) Intratec TEC–9/DC–9 semiautomatic pistol in any centerfire variation;

(10) P.A.W.S. type semiautomatic pistol;

(11) Skorpion semiautomatic pistol;

(12) Spectre double action semiautomatic pistol (Sile, F.I.E., Mitchell);

(13) UZI semiautomatic pistol;

(14) Weaver Arms semiautomatic Nighthawk pistol; or

(15) Wilkinson semiautomatic "Linda" pistol.

(d) "Assault weapon" means:

(1) an assault long gun;

(2) an assault pistol; or

(3) a copycat weapon.

(E) "BINARY TRIGGER SYSTEM" MEANS A DEVICE THAT, WHEN INSTALLED IN OR ATTACHED TO A FIREARM, FIRES BOTH WHEN THE TRIGGER IS PULLED AND ON RELEASE OF THE TRIGGER.

(F) "BUMP STOCK" MEANS 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.

(G) "BURST TRIGGER SYSTEM" MEANS 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.

~~(e)~~ **(H)** (1) "Copycat weapon" means:

(i) a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:

1. a folding stock;

2. a grenade launcher or flare launcher; or

3. a flash suppressor;

(ii) a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds;

(iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches;

(iv) a semiautomatic pistol with a fixed magazine that can accept more than 10 rounds;

(v) a semiautomatic shotgun that has a folding stock; or

(vi) a shotgun with a revolving cylinder.

(2) "Copycat weapon" does not include an assault long gun or an assault pistol.

~~(f)~~ **(I)** "Detachable magazine" means an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge.

~~(g)~~ **(J)** "Flash suppressor" means a device that functions, or is intended to function, to perceptibly reduce or redirect muzzle flash from the shooter's field of vision.

(K) "HELLFIRE TRIGGER" MEANS A DEVICE THAT, WHEN INSTALLED IN OR ATTACHED TO A FIREARM, DISENGAGES THE TRIGGER RETURN SPRING WHEN THE TRIGGER IS PULLED.

~~(h)~~ **(L)** "Licensed firearms dealer" means a person who holds a dealer's license under Title 5, Subtitle 1 of the Public Safety Article.

~~**(I) "MACHINE GUN" HAS THE MEANING STATED IN § 4–401 OF THIS TITLE.**~~

~~**(J)**~~ **(M) (1) "RAPID FIRE TRIGGER ACTIVATOR" MEANS** ~~**ANY DEVICE, PART, OR COMBINATION OF DEVICES OR PARTS THAT IS DESIGNED AND FUNCTIONS TO ACCELERATE THE RATE OF FIRE OF A FIREARM BEYOND THE STANDARD RATE OF FIRE FOR FIREARMS THAT ARE NOT EQUIPPED WITH THAT DEVICE, PART, OR COMBINATION OF DEVICES OR PARTS**~~ **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.

(2) "RAPID FIRE TRIGGER ACTIVATOR" INCLUDES A BUMP STOCK ~~**AND TRIGGER CRANK**~~**, TRIGGER CRANK, HELLFIRE TRIGGER, BINARY TRIGGER SYSTEM, BURST TRIGGER SYSTEM, OR A COPY OR A SIMILAR DEVICE, REGARDLESS OF THE PRODUCER OR MANUFACTURER.**

(3) "RAPID FIRE TRIGGER ACTIVATOR" DOES NOT INCLUDE A SEMIAUTOMATIC REPLACEMENT TRIGGER THAT IMPROVES THE PERFORMANCE AND FUNCTIONALITY OVER THE STOCK TRIGGER.

(N) "TRIGGER CRANK" MEANS 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.

4–305.1.

~~**A**~~ **(A) EXCEPT AS PROVIDED IN SUBSECTION (B) OF THIS SECTION, A PERSON MAY NOT:**

(1) TRANSPORT A RAPID FIRE TRIGGER ACTIVATOR INTO THE STATE; OR

(2) MANUFACTURE, POSSESS, SELL, OFFER TO SELL, TRANSFER, PURCHASE, OR RECEIVE A RAPID FIRE TRIGGER ACTIVATOR.

(B) THIS SECTION 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 FEDERAL BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES BEFORE OCTOBER 1, 2018, FOR AUTHORIZATION TO POSSESS A RAPID FIRE TRIGGER ACTIVATOR; AND

(3) IS IN COMPLIANCE WITH ALL FEDERAL REQUIREMENTS FOR POSSESSION OF A RAPID FIRE TRIGGER ACTIVATOR.

4–306.

(a) Except as otherwise provided in this subtitle, a person who violates this subtitle is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both.

(b) (1) A person who uses an assault weapon, **A RAPID FIRE TRIGGER ACTIVATOR,** or a magazine that has a capacity of more than 10 rounds of ammunition, in the commission of a felony or a crime of violence as defined in § 5–101 of the Public Safety Article is guilty of a misdemeanor and on conviction, in addition to any other sentence imposed for the felony or crime of violence, shall be sentenced under this subsection.

(2) (i) For a first violation, the person shall be sentenced to imprisonment for not less than 5 years and not exceeding 20 years.

(ii) The court may not impose less than the minimum sentence of 5 years.

(iii) The mandatory minimum sentence of 5 years may not be suspended.

(iv) Except as otherwise provided in § 4–305 of the Correctional Services Article, the person is not eligible for parole in less than 5 years.

(3) (i) For each subsequent violation, the person shall be sentenced to imprisonment for not less than 10 years and not exceeding 20 years.

(ii) The court may not impose less than the minimum sentence of 10 years.

(iii) A sentence imposed under this paragraph shall be consecutive to and not concurrent with any other sentence imposed for the felony or crime of violence.

SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland read as follows:

Article – Criminal Law

4–305.1.

(a) Except as provided in subsection (b) of this section, a person may not:

(1) transport a rapid fire trigger activator into the State; or

(2) manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator.

(b) This section 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 federal Bureau of Alcohol, Tobacco, Firearms and Explosives before October 1, 2018, for authorization to possess a rapid fire trigger activator; **[**and**]**

(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.

SECTION 3. AND BE IT FURTHER ENACTED, That Section 2 of this Act shall take effect October 1, 2019.

SECTION ~~2.~~ 4. AND BE IT FURTHER ENACTED, That, except as provided in Section 3 of this Act, this Act shall take effect October 1, 2018.

Approved by the Governor, April 24, 2018.

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.	*	

* * * * * * * * * * * * * *

ORDER

It is, this _____ day of _____ 2018, by the United States District Court for the District of Maryland:

ORDERED that the defendant's motion to dismiss the complaint (ECF 1) is GRANTED; and it is further

ORDERED that the complaint is DISMISSED in its entirety.

_____
James K. Bredar
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

Plaintiffs,

v.

LAWRENCE HOGAN,

Defendant.

Case No. 1:18-cv-01700-JKB

BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF DEFENDANT AND DISMISSAL

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August 15, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 9(c)(1), Giffords Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Amicus curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. The organization was founded in 1993 after a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate gun violence prevention research and policy proposals, and participate in Second Amendment litigation nationwide. Giffords Law Center has provided informed analysis as an *amicus* in numerous important firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Woollard v. Sheridan*, 863 F. Supp. 2d 462 (D. Md. 2012), *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), and *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017).

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I. INTRODUCTION AND STATEMENT OF THE ARGUMENT

On October 1, 2017, a lone gunman armed with AR-15 assault rifles modified with "bump stocks" unleashed a torrent of gunfire on a crowd of concert-goers in Las Vegas, Nevada. In about ten minutes of mayhem, the Vegas gunman killed 58 people, hitting 422 with gunshots and injuring a total of 851 people. It was the deadliest mass shooting in modern American history. The shooter's use of legally purchased bump stocks, which enabled him to turn his rifles into machine guns, is what made this unprecedented carnage possible.

A bump stock, a type of rapid fire trigger activator ("trigger activator"), is a device that modifies a rifle to shoot at a much more rapid pace than could be achieved by individual pulls of a trigger. The Department of Justice recently described these devices in the following manner:

> [Bump stocks] allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger. Specifically, these devices convert an otherwise semiautomatic firearm into a machinegun by functioning as a self-acting or self-regulating mechanism that harnesses the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter. Hence, a semiautomatic firearm to which a bump-stock-type device is attached is able to produce automatic fire with a single pull of the trigger.[1]

In other words, the Department of Justice has described rifles equipped with these devices as akin to machine guns—weapons largely banned across the United States under regulations repeatedly upheld by the courts. Trigger activators thus effectively open a deadly loophole in long-standing laws carefully restricting machine gun purchases and ownership.

In April of 2017, Maryland enacted Senate Bill 707, which generally prohibits people from owning, manufacturing, selling or purchasing trigger activators. Pursuant to this law,

[1] Department of Justice; Bump-Stock-Type Devices, 83 Fed. Reg. 13442, 13443 (Mar. 29, 2018) (to be codified at 27 CFR 447-79), https://www.justice.gov/file/1046006/download (hereafter "DOJ Notice of Proposed Rule").

which becomes effective after a grace period on October 1, 2018—exactly one year after the Las Vegas massacre—Maryland will close the end-run around the automatic weapons ban that enabled the Las Vegas shooter to murder 58 people in minutes. The purpose of this law is to ensure that these extraordinarily dangerous and unusual devices cannot be used in Maryland as they were in Las Vegas.

Plaintiffs in this case argue that the Takings Clause of the Fifth Amendment compels Maryland to compensate plaintiffs for their trigger activators, which they can no longer legally own after October 1. Plaintiffs' argument fails as a matter of fact and law. Maryland has simply closed a loophole which allowed for a contravention of legitimate restrictions on automatic firearms, and Maryland's exercise of its police power in restricting the possession and use of trigger activators does not implicate the Takings Clause at all.

II. ARGUMENT

A. A Rifle Equipped With a Trigger Activator Is for All Practical Purposes a Machine Gun

An automatic weapon, or a machine gun, sprays multiple bullets at a rapid pace with a single pull of the trigger. Congress, in the National Firearms Act ("NFA"), defined a machine gun as follows:

> The term "machinegun" means 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. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.[2]

[2] 26 U.S.C.A. § 5845(b).

A bump stock is an accessory that converts semiautomatic firearms so that they fire automatically, simulating a machine gun. It works as follows:

> A "bump stock" replaces a rifle's standard stock, which is the part held against the shoulder. It frees the weapon to slide back and forth rapidly, harnessing the energy from the kickback shooters feel when the weapon fires.
>
> The stock "bumps" back and forth between the shooter's shoulder and trigger finger, causing the rifle to rapidly fire again and again. The shooter holds his or her trigger finger in place, while maintaining forward pressure on the barrel and backward pressure on the pistol grip while firing.[3]

A machine gun and a semiautomatic rifle equipped with a trigger activator function essentially the same: they both fire rounds at exceptional speed. A machine gun can shoot at a rate of 98 shots in 7 seconds.[4] In Las Vegas, using a rifle equipped with a bump stock, the gunman was able to shoot 90 rounds in 10 seconds.[5] Either variant unleashes bullets far faster than an already-deadly unmodified semiautomatic rifle. For example, in the June 2016 Orlando nightclub shooting, in which 49 people were killed and 53 were wounded, an analysis shows that the gunman was able to shoot 24 rounds in 9 seconds using a semiautomatic AR-15 assault rifle—the same type of gun the Vegas shooter "enhanced" with a bump stock.[6] That is a difference of hundreds of shots per minute using the same weapon equipped with a bump stock.

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[3] Larry Buchanan et. al., *What Is a Bump Stock and How Does It Work?*, N.Y. TIMES (Feb. 20, 2018), https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html.

[4] *Id.*

[5] *Id.*

[6] *Id.*; *see also* Ed Leefeldt, *Stephen Paddock Used a "Bump Stock" to Make His Guns Even Deadlier*, CBS NEWS (Oct. 4, 2017), https://www.cbsnews.com/news/bump-fire-stock-ar-15-stephen-paddock-guns-deadlier/.

B. Because Machine Guns Are So Dangerous, They Have Been Subject to Longstanding Restrictions Which Have Repeatedly Withstood Legal Challenges

1. Machine Guns Have Been Tightly Regulated Since the 1930s and These Restrictions Have Effectively Reduced Their Use in Crime

As the Ninth Circuit stated, "[s]hort of bombs, missiles, and biochemical agents, we can conceive of few weapons that are more dangerous than machine guns."[7] As a result, governments have long sought to restrict the purchase, use, and sale of these weapons.[8]

Between 1925 and 1933, as ownership of machine guns began to spread in the civilian population, at least twenty-eight states imposed laws strictly regulating machine guns.[9] In 1934, Congress followed suit by passing the National Firearms Act ("NFA").[10] The NFA, which "was popularly known as an 'anti-machine gun' law,"[11] subjected machine guns to federal registration and taxed their manufacture, sale, and transfer. Several decades later, in 1986, Congress passed the Firearm Owners Protection Act ("FOPA"), which "effectively froze the number of legal machine guns in private hands at its 1986 level."[12]

The state and federal governments' efforts to restrict machine guns in the civilian sphere

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[7] *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (holding that the Second Amendment did not extend to the defendant's possession of a homemade machine gun).

[8] *See United States v. Knutson*, 113 F.3d 27, 30 (5th Cir. 1997) ("Section 922(o) . . . is but the latest manifestation of the federal government's longstanding record of regulating machineguns.").

[9] Robert Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & CONTEMP. PROBS. 55 (Vol. 80:55 p. 67-68).

[10] National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at I.R.C. §§ 5801-5872 (2012)).

[11] Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of* 1968, 4 J. LEGAL STUD. 133, 183 n.29 (1975).

[12] *See United States v. Kirk*, 105 F.3d 997, 1001 (5th Cir. 1997) (18 U.S.C. § 922(o) "left lawful the possession of machine guns manufactured before 1986 and lawfully possessed before that date . . . . [The statute] froze in place the market in machine guns.").

have been successful. Today, few crimes are committed with machine guns, and no American mass shooter has used a fully automatic weapon in nearly 40 years.[13] Figures from the National Firearms Registry show that in 2013, machine guns accounted for a little more than 0.1% of the total guns in circulation in the United States.[14] As a result of their legal scarcity, those machine guns that are legally available for sale are extremely expensive. "[P]rices can vary from $15,000 for a submachine gun firing pistol rounds to $50,000 for a military-style long-range weapon."[15] In stark contrast, a rifle equipped with a bump stock costs a fraction of that. Though the prices of bump stocks have increased dramatically as a direct result of current regulatory efforts,[16] the retail price of bump stocks has generally been under $200.[17]

2. Courts Have Uniformly Upheld These Machine Gun Restrictions

In *Heller*, while generally upholding an individual right to gun ownership, the Supreme

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[13] Marianne W. Zawitz, *Guns Used in Crime*, U.S. Dep't of Justice, Bureau of Justice Statistics (July 1995) (in 1994, only 0.1% of ATF's requests to trace guns used in crime were requests to trace a machine gun); Osita Nwanevu, "Are Machine Guns Legal? Yes (And Mostly) No," SLATE, Oct. 2, 2017 (of the last 91 American mass shootings since 1982, "not one has seen the use of a fully automatic machine gun").

[14] *See* Christopher Ingraham, *There Are Now More Guns than People in the United States*, WASH. POST: WONKBLOG (Oct. 5, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/05/guns-in-the-united-states-one-for-every-man-woman-and-child-and-then-some/?utm_term=.ea11c7a0452a.

[15] *Id.* Another analysis found that "the current average price range for pre-1986 fully automatic versions of AR-type rifles is between $20,000 and $30,000, while the price range for semiautomatic versions of these rifles is between $600 and $2,500." *See* DOJ Notice of Proposed Rule at 13444 (citations omitted).

[16] Polly Mosendz, *Bump Stock Prices Soar After Trump Proposes Ba*n, BLOOMBERG (Feb. 21, 2018), https://www.bloomberg.com/news/articles/2018-02-21/bump-stock-prices-soar-after-trump-proposes-ban.

[17] Polly Mosendz et al., *Bump-Fire Stock Prices Double, Thanks to the NRA*, BLOOMBERG (Oct. 4, 2017), https://www.bloomberg.com/news/articles/2017-10-05/bump-fire-stock-prices-double-thanks-to-the-nra.

Court said that it would be a "startling" reading of the Second Amendment to suggest that restrictions on machine gun ownership are unconstitutional.[18] Since *Heller*, circuit courts, including this circuit, have uniformly approved of governmental efforts to regulate machine guns.[19] In *United States v. Pruess*, the Fourth Circuit held that the defendant's possession of machine guns, among other weapons, was not "within the scope of the Second Amendment based on the statement in *Heller* that 'the sorts of weapons' the Amendment protects are 'those in common use at the time' of ratification—not 'dangerous and unusual weapons,' which there is 'historical tradition of prohibiting.'"[20] More recently, the Fourth Circuit sitting en banc rejected a challenge to a Maryland law restricting certain semiautomatic assault weapons.[21] The en banc court was emphatic in upholding the restrictions on these assault weapons, and left no uncertainty as to how the circuit would consider a challenge to machine guns:

> In short, like their fully automatic counterparts, the banned assault weapons are firearms designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed. Their design results in

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[18] *Heller*, 554 U.S. at 624.

[19] *See. e.g.*, *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016) (NFA prohibition on manufacturing machine guns is constitutional because machine guns are not protected by the Second Amendment); *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136 (3d Cir. 2016) (NFA prohibitions on manufacturing machine guns and possessing an unregistered machine gun are constitutional because machine guns are not protected by the Second Amendment); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (NFA prohibition on possessing an unregistered machine gun is constitutional because machine guns are not protected by the Second Amendment); *Hamblen v. United States*, 591 F.3d 471 (6th Cir. 2009) (NFA prohibition on possessing an unregistered machine gun is constitutional because machine guns are not protected by the Second Amendment); *Henry*, 688 F.3d 637 (NFA prohibition on possessing an unregistered machine gun is constitutional because machine guns are not protected by the Second Amendment); *United States v. Zaleski*, 489 F. App'x 474 (2d Cir. 2012) (summary order) (NFA prohibition on possessing unregistered machine guns and silencers is constitutional because machine guns and silencers are not protected by the Second Amendment).

[20] 703 F.3d 242, 246 n.2 (4th Cir. 2012).

[21] *Kolbe*, 849 F.3d at 124.

> a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns.[22]

The long tradition of strict restrictions on machine guns forecloses any argument that the purchasers of bump stocks or other devices that simulate automatic weapon fire had any expectation that they were engaging in constitutionally protected activity when they purchased their trigger activators. Buyers of devices specifically designed to exploit a putative loophole in the federal machine gun definition should well have anticipated that these devices would be outlawed when government acted to close that loophole.

C. After Las Vegas, Governments Moved to Close the Loophole That Allowed Gun Owners to Use Trigger Activators to Convert Their Rifles into Machine Guns

1. Trigger Activators Were Only Legal Because of an ATF-Created Loophole

In response to the scarcity and high price of legal machine guns, the firearms industry has long sought to circumvent the NFA restrictions.[23] Almost immediately after FOPA was enacted thirty years ago, weapons manufacturers began submitting various iterations of trigger activators to the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), seeking an opinion on whether their invention would be classified as a machine gun under the NFA and banned as a result.[24] Indeed,

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[22] *Id.* at 125.

[23] *See* DOJ Notice of Proposed Rule at 13444. Indeed, "the inventor of the trigger activators used in [the] Las Vegas shooting has attributed his innovation of those products specifically to the high cost of fully automatic firearms." In a 2011 interview, he stated that he developed the original device because he "couldn't afford what [he] wanted – a fully automatic rifle – so . . . [he made] something that would work and be affordable." *Id.* (citing Donnie A. Lucas, *Firing Up Some Simple Solutions*, Albany News (Dec. 22, 2011), http://www.thealbanynews.net/archives/2443).

[24] ATF has long promulgated rules governing "the procedural and substantive requirements relative to the importation, manufacture, making, exportation, identification and registration of, and the dealing in, machine guns." Courts have upheld ATF's leading regulatory role in regulating firearms generally, and ATF's authority to classify devices as machine guns under the NFA. *See* DOJ Notice of Proposed Rule at 13444.

as early as 1988, ATF began receiving "classification" requests seeking a determination on the legality of new trigger activator devices.[25] The pace of these requests increased after the expiration of the federal assault weapons ban in 2004.[26]

Eventually, the industry was able to devise trigger activators that circumvented Congress' restrictions on machine guns. The industry did so by exploiting the fact that ATF's apparent focus was on the manner in which these devices facilitated rapid firing, rather than whether these weapons actually fired rounds at a rate akin to machine guns. In November 2003 and January 2004, ATF initially determined that a "bump-fire" system known as the Akins Accelerator was not regulated as a firearm under the NFA. In late 2006, however, ATF reversed its determinations by publishing a rule, ATF Rul. 2006-2, reclassifying a bump-fire system like the Akins Accelerator as a machine gun, because it was equipped with a "coiled spring" and initiated automatic fire with a single trigger pull. A federal circuit court upheld ATF's decision in this matter.[27]

By focusing on the "coiled spring" aspect of the Akins Accelerator, ATF created an opening for the industry to create a trigger accelerator that fell outside of ATF's interpretation of a machine gun. Beginning in 2008, other manufacturers submitted modified "bump-fire" or "slide-fire" stocks that did not include a "coiled spring" or similar mechanisms to ATF for

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[25] *Id.* The process of determining whether a device is a firearm or a NFA weapon is known as a "classification" determination. Manufacturers and inventors can voluntarily submit devices to ATF for classification determinations to facilitate compliance with the law, including licensing requirements, and to provide certainty in the lawful firearms market. In making a classification, ATF determines only whether the device is a firearm, a NFA weapon, or a part or accessory that is not subject to ATF's regulatory authority. *See id.*

[26] DOJ Notice of Proposed Rule at 13444 (citing Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. 921(a)(30) (repealed effective Sept. 13, 2004)).

[27] *Akins v. United States*, 312 F. App'x 197 (11th Cir. 2009).

classification.[28] ATF classified most of these to be firearm accessories that are not subject to NFA regulations, either because ATF determined that the devices shot only one bullet per "function" of the trigger (even though users only had to pull the trigger once), or because the devices did not appear to initiate a fully automatic firing cycle.[29] But as was demonstrated in Las Vegas when the gunman turned these very devices onto a crowd of people, ATF's distinction was a matter of form over substance.[30]

In short, prior ATF determinations that certain trigger activators were not themselves banned by the NFA were not based on meaningful distinctions between banned and legal devices, and the varying ATF opinions over time confirm that the agency's views are subject to change. Any reasonable gun owner would understand that by buying such a device—however classified by ATF—he or she would be stepping into a heavily regulated area, and the device's legal status could be altered by further legislation or a different regulatory interpretation. That is exactly what is happening now, as both ATF and many states, including Maryland, are taking action to close this loophole permitting an end-run around machine gun restrictions.

2. Maryland and Other States Have Moved to Close the Loophole That Allowed for the Purchase of Deadly Trigger Activators

In the months following the massacre in Las Vegas, belated efforts were made on the federal level to close the trigger activator loophole. On March 23, 2018, Attorney General

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[28] DOJ Notice of Proposed Rule at 13445.

[29] *Id.*

[30] This "form over substance" approach is unsupported by the NFA; indeed, ATF's distinction incorrectly applied its own precedents interpreting the NFA definition of machine guns. *See generally* Giffords Law Ctr. to Prevent Gun Violence, Public Comment on DOJ Notice of Proposed Rule, *available at* https://www.regulations.gov/document?D=ATF-2018-0001-27330.

Sessions announced proposed ATF regulations intended to "clarify[] that bump stocks fall within the definition of 'machinegun' under federal law, as such devices allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger."[31] If this proposed rule is adopted, it will effectively ban bump stocks at the federal level.[32]

However, cities and states have not waited on federal action to eliminate this loophole.[33] Maryland enacted a law prohibiting "possessing, selling, offering to sell, transferring, purchasing or receiving" rapid fire trigger activators within the state.[34] The Maryland law defines trigger activators to include any device "that is designed and functions to accelerate the rate of fire of a firearm beyond the standard rate of fire for firearms that are not equipped with that device."[35] The legislation allows individuals who already own such devices to keep them until October 1, 2018.[36]

D. The Maryland Statute Does Not Implicate the Takings Clause

The long history of pervasive federal and state regulatory regimes restricting the possession and sale of highly lethal machine guns underscores why Plaintiffs' Takings Clause

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[31] Press Release, Dept. of Justice, Attorney General Announces Regulation Effectively Banning Bump Stocks (Mar. 23, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-regulation-effectively-banning-bump-stocks.

[32] *Id.*

[33] Since the Las Vegas shooting, seven other states have adopted laws prohibiting the sale or possession of bump stocks. Giffords Law Ctr. to Prevent Gun Violence, *Gun Law Trendwatch: 2018 Mid-Year Review* (July 21, 2018), http://lawcenter.giffords.org/wp-content/uploads/2018/07/Mid-year-Trendwatch-2018%E2%80%94FINAL-7.19.18-pages.pdf (citing laws enacted in Maryland, Connecticut, Delaware, Florida, Hawaii, New Jersey, Rhode Island, and Washington).

[34] 2018 Maryland Laws ch. 252, to be codified at Md. Code Ann., Crim. Law § 4-301 *et seq*.

[35] *Id.* § (m)(1).

[36] 2018 Maryland Laws ch. 252, to be codified at Md. Code Ann., Crim. Law § 4-305.1(b)(1).

claim must fail. Plaintiffs, as "lawful gun owners" concerned about "gun owners' rights in Maryland,"[37] could not have been unaware of the regulatory restrictions on machine guns and automatic weapons, or of the risk of legislative or regulatory action, when they undertook to purchase devices which converted their rifles into deadly machine guns. Now that Maryland, joining other governmental entities, has exercised its police power to close a loophole in order to prevent another Las Vegas massacre, Plaintiffs cannot be heard to complain that the government owes them compensation for their contraband.

As the State detailed at length in its Motion to Dismiss, the Supreme Court long ago "articulated a police power exception to the Takings Clause," under which valid regulation of dangerous articles pursuant to the state's police power will not be considered a compensable taking.[38] Accordingly, courts have long held that under the police power doctrine, there is "no taking where the government regulates the sale and manufacture of firearms . . . ."[39] Restricting the possession of devices that give legal weapons illegal firepower falls directly within the permissible scope of the State of Maryland's police power. And Plaintiffs cannot make any plausible arguments that a compensable taking occurred through the exercise of that power.

1. Maryland's Exercise of the Police Power to Restrict Access to Lethal Devices that Convert Weapons to Fire Automatically Was Reasonably Foreseeable

Citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), Plaintiffs allege that "the State of Maryland may not abrogate vested rights in private property without

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[37] Compl. ¶¶ 8-11.

[38] Motion at 10-13.

[39] *Rupp v. Becerra*, No. 8:17-CV-00746-JLS-JDE, 2018 WL 2138452, at *8 (C.D. Cal. May 9, 2018) (citing *Mugler v. Kansas*, 123 U.S. 623, 668 (1887); *Akins v. United States*, 82 Fed. Cl. 619, 623-24 (Fed. Cl. 2008); *Fesjian v. Jefferson*, 399 A.2d 861, 866 (D.C. 1979); *AmeriSource Corp. v. United States*, 525 F.3d 1149 (Fed. Cir. 2008)).

compensation, even in the exercise of its otherwise valid police powers," purportedly because *Lucas* states 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."[40] Plaintiffs are wrong. *Lucas*'s statement as to "noxious-use justifications" has been repeatedly limited to cases involving total regulatory takings of real property[41]—and, as the State aptly explained, Senate Bill 707 does not effect a total regulatory taking,[42] much less a total regulatory taking of real property. Moreover, the Fourth Circuit has stated its view that under Supreme Court precedent, regulations for the public good in heavily regulated contexts "per se do not constitute takings, and thus analysis under existing takings frameworks is unnecessary."[43]

Assuming that valid exercise of the police power is not enough on its own to exempt Senate Bill 707 from a Takings Clause challenge altogether, however, the analysis of whether a regulation amounts to a partial regulatory taking under the Supreme Court's *Penn Central* test "entail[s] 'ad hoc, factual inquiries,' focusing on, inter alia, the regulation's economic impact, particularly its interference with 'distinct investment-backed expectations"; and "the character of

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[40] Compl. ¶ 30 (quoting *Lucas*, 505 U.S. at 1026).

[41] *Lucas*, 505 U.S. 1028 (explicitly examining the difference between regulations of real property depriving owner of all economic benefit and regulation of personal property, which carries a heightened expectation of loss of all economic benefit or value); *see also*, *e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015); *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 411 & n.2 (4th Cir. 2007) ("*Lucas* by its own terms distinguishes personal property."); *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 543 (S.D. Ohio 2012), *aff'd*, 744 F.3d 409 (6th Cir. 2014) (*Lucas* clarified that "for the purpose of regulatory taking analysis, a distinction exists between personal and real property").

[42] Motion at 8-10 (explaining remaining rights).

[43] *See Holliday Amusement Co.*, 493 F.3d at 411 & n.2 (analyzing gambling regulations outlawing video gaming machines in South Carolina).

the governmental action.'"[44]

Where, as here, "the government acts in a highly regulated environment to bolster restrictions or eliminate loopholes in an existing regulatory regime, the existence of government regulation . . . is relevant to whether there were investment-backed expectations under the Penn Central test."[45] Among other factors, core to the consideration of whether there were any reasonable investment-backed expectations is the question "whether the plaintiff could have 'reasonably anticipated' the possibility of such regulation in light of the 'regulatory environment' at the time of purchase."[46] And the Supreme Court warned in *Lucas* that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a plaintiff] ought to be aware of the possibility that new regulation might even render his property *economically worthless . . . .*"[47]

Lucas's caution is "all the more true in the case of a heavily regulated and highly contentious activity," and where the subject of the regulation implicates such "highly contentious activity," courts will reject a plaintiff's attempt to rely on the past legality of an activity to set up

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[44] *Id.* (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Given Senate Bill 707's focus on fulfilling the State's compelling interest in public safety, *Penn Central*'s governmental action element weighs heavily against finding a compensable taking here. *Cf. Kolbe*, 849 F.3d at 139.

[45] *Piszel v. United States*, 833 F.3d 1366, 1374-75 (Fed. Cir. 2016), *cert. denied,* 138 S. Ct. 85 (2017); *cf. Rupp*, 2018 WL 2138452, at *2 (rejecting Takings Clause claim where regulation sought to close a "loophole" exempting magazine locks with bullet-button features from ban on detachable magazines).

[46] *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004); *see also Maine Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145, 155 (1st Cir. 2012) ("a key aspect of the investment-backed expectations inquiry is the claimant's awareness of 'the problem that spawned the [challenged] regulation'").

[47] *Lucas*, 505 U.S. at 1027-28 (emphasis added) (citing *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979)).

a claim of legitimate investment-backed expectations.[48] Indeed, regulation is so ubiquitous in the firearms arena that in considering other gun regulations, at least one court has stated that "'enforceable rights sufficient to support a taking claim . . . cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control.'"[49]

Against the backdrop of state and federal regulations, no conclusion may be drawn except that Plaintiffs had no reasonable investment-backed expectations that can support their takings claim. Plaintiffs here voluntarily chose to purchase or possess trigger activators they knew could be used to convert their firearms to mimic heavily regulated rapid-fire weapons. Thus, when Plaintiffs purchased their rapid-fire trigger activators, they were surely aware—or at least could have "reasonably anticipated"[50]—that the devices they purchased could become illegal to own at any time precisely because of their "inherently dangerous" nature and the fact that they were specifically designed to circumvent existing federal and state regulatory regimes.[51]

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[48] *Holliday Amusement Co.*, 493 F.3d at 411 (rejecting Takings Clause claim based on a ban of video gambling, even in light of plaintiff's contention that "the fact that video gaming was legal in South Carolina for years gave him a legitimate expectation of its continued legality and hence the continued well-being of his business enterprise"); *see also Mugler*, 123 U.S. at 669 (no taking effected by new law outlawing manufacture and sale of alcohol; though "the laws of the State did not [previously] forbid the manufacture of intoxicating liquors . . . the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged").

[49] *Akins*, 82 Fed. Cl. at 623-24 (emphasis added) (quoting *Mitchell Arms, Inc. v. United States*, 26 Cl. Ct. 1, 5 (1992), *aff'd*, 7 F.3d 212 (Fed. Cir. 1993)).

[50] *Piszel*, 833 F.3d at 1374-75.

[51] *Wilkins*, 913 F. Supp. 2d at 543 (no regulatory taking where new regulations directed to safe containment of snakes, bears, lions, and other dangerous wild animals could force owners to, among other things, dispossess themselves of the animals because of the inability to comply with cage size requirements; animals were personal property that could be subject to "onerous" regulations given their "unique threats to human life").

2. Plaintiffs Retain Significant Interests and Value in Their Trigger Activators

In any case, Plaintiffs are not being completely deprived of all or even most of the economic and other value of their purchases, and therefore they are due no compensation for the diminution of any rights.[52] Plaintiffs may retain possession of their trigger activators by storing them out of state; they may gift them to relatives or friends who live outside of Maryland; they may sell their trigger activators outside of Maryland to other firearm enthusiasts. Plaintiffs' complaint does not allege that any of these options pose any undue burden, nor that the economic value of the trigger activators is diminished in any way by the imposition of Senate Bill 707.[53] These allegations do not carry Plaintiffs' burden to show either a total deprivation of all economic use (under the *Lucas* test) or a diminution in the value or breadth of their rights strong enough to overcome the State's interest in protecting the public from the dangers of rapid fire firearms—especially in light of Plaintiffs' voluntary entry into the highly regulated firearm arena (under the *Penn Central* test).[54]

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[52] Motion at 10 n.6.

[53] Instead, Plaintiffs repeatedly make the bald assertion that they have suffered an "irreparable harm, including the loss of property and of constitutional rights," untethered to any particular loss in the value or economic benefit of their property. *See* Compl. ¶¶ 50, 53. Even had Plaintiffs alleged some diminution in value because of "a quick 'forced sale' of the firearms at less than fair market value," though, such allegation would not establish a compensable taking given the highly regulated nature of the trigger activators and availability of other lawful means of possession or dispossession outside the state. *Fesjian v. Jefferson*, 399 A.2d at 865-66.

[54] *E.g.*, *id.*; *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002), *as amended* (Jan. 27, 2003) ("In light of the substantial safety risk posed by assault weapons that prompted the passage of the [assault weapons ban], any incidental decrease in their value caused by the effect of that act does not constitute a compensable taking."); *Rupp*, 2018 WL 2138452, at *8-9 (no compensable taking effected by state assault weapons ban where plaintiffs did not allege that "the value of their weapons was reduced" and the "law offer[ed] a number of options to lawful gun owners that do not result in the weapon being surrendered to the government"); *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1198 (E.D. Cal. 2018) (similar, even where plaintiff alleged devaluation of high capacity magazines); *Quilici v. Village of Morton*

* * *

In short, "Plaintiff[s'] participation in a traditionally regulated industry greatly diminishes the weight of [their] alleged investment-backed expectations, while the challenged government action is a classic 'instance[ ] in which a state tribunal reasonably concluded that the health, safety, morals, or general welfare would be promoted' by the prohibition embodied in [Senate Bill 707]. [Citation]. Thus, under any analysis, plaintiff[s'] claim must fail." *Holliday Amusement Co*., 493 F.3d at 411 (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 125).

Dated August 15, 2018

Respectfully submitted,

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Grove, 532 F. Supp. 1169, 1184 (N.D. Ill. 1981) (no taking where firearm owners could sell firearms outside city); Motion at 8-10.

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court for the District of Maryland via the CM/ECF System. I certify that all counsel in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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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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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**

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. <u>The Maryland Constitution Applies to Possession *In Maryland*</u>.

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/

Cary J. Hansel (Bar No. 14722)
Erienne A. Sutherell (Bar No. 20095)
2514 N. Charles Street
Baltimore, Maryland 21218
cary@hansellaw.com
esutherell@hansellaw.com
Phone: 301-461-1040
Facsimile: 443-451-8606
Counsel for Plaintiffs and for the Class

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

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

AFFIDAVIT OF DAVID ORLIN

COMES NOW the affiant, David Orlin, and hereby solemnly swears under the penalties of perjury and upon personal knowledge that the contents of the following affidavit are true:

1. My name is David Orlin and I am over eighteen (18) years of age and competent to testify.

2. Included in packaging of the replacement sliding shoulder stock that I purchased was the letter dated June 7, 2010, from the BATF, identifying that the device (referred to in the correspondence as a "bump stock") that I purchased was a firearm part and not regulated as a firearm under the Gun Control Act or the National Firearms Act.

3. I relied upon this declaration by the BATF that the device I had purchased was legal.

4. Included in the packaging of the Fostech AR-II Binary Trigger device that I purchased was a letter dated November 20, 2013 from the BATF, identifying that the device does not convert a weapon into a machine gun.

Ex. 1

5. I relied upon this declaration by the BATF that the device I had purchased was legal.

6. A copy of the letter is submitted with this filing as an exhibit.

David J. Orlin

David Orlin

8/29/18

Date

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Martinsburg, West Virginia 25405
www.atf.gov

903050:MMK
3311/2010-434

JUN 0 7 2010

This is in reference to your submission and accompanying letter to the Firearms Technology Branch (FTB), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), asking for an evaluation of a replacement shoulder stock for an AR-15 type rifle. Your letter advises that the stock (referenced in this reply as a "bump-stock") is intended to assist persons whose hands have limited mobility to "bump-fire" an AR-15 type rifle. Your submission includes the following: a block to replace the pistol grip while providing retention for the selector stop spring; a hollow shoulder stock intended to be installed over the rear of an AR-15 fitting with a sliding-stock type buffer-tube assembly; and a set of assembly instructions.

The FTB evaluation confirmed that the submitted stock (see enclosed photos) does attach to the rear of an AR-15 type rifle which has been fitted with a sliding shoulder-stock type buffer-tube assembly. The stock has no automatically functioning mechanical parts or springs and performs no automatic mechanical function when installed. In order to use the installed device, the shooter must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand. Accordingly, we find that the "bump-stock" is a firearm part and is not regulated as a firearm under Gun Control Act or the National Firearms Act.

Per your telephoned instructions, we will contact you separately to make return delivery arrangements.

We thank you for your inquiry and trust that the foregoing has been responsive.

Sincerely yours,

John R. Spencer
Chief, Firearms Technology Branch

Enclosure

Ex. 1A

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Martinsburg, WV 25405

www.atf.gov

903050: WJS
3311/301397

NOV 2 0 2013

Dear Mr. Hawbaker,

This is in reference to your latest correspondence to FTB, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which is accompanied by an AR-type firearm in which AR-15 pattern fire-control components are installed (see enclosed photos). Your item was submitted in response to FTB letter # 2012-683-WS, which provided our evaluation of the last sample of your proposed trigger device. Although we informed you in letter #2012-683 that FTB had classified this device as a "machinegun" per 26 U.S.C. § 5845(b), we indicated that our Branch would evaluate it again if you could redesign your trigger device to incorporate a positive disconnector mechanism.

The current sample examined by FTB consists of a modified trigger device (assembly) for AR-15 pattern firearms. This assembly is designed to allow one shot to be fired when the trigger is pulled, and another shot when the trigger is released. Further, we found that the device selector has not been machined to enable the trigger to be pulled further than an unmodified selector would allow. The trigger has been modified to incorporate a shaft which adjusts the position of the disconnector relative to the trigger. Additionally, FTB observed that material on the top and bottom portion of the hammer has been removed, and our evaluation also disclosed that there is an additional "disconnector" located directly behind the primary disconnector. This "secondary" disconnector enables the hammer to be held positively to rear, prior to the release of trigger, for the "release shot."

To determine its two modes of operation, FTB first performed a manual function test on the submitted sample in its "normal mode" with the device selector placed in its "12 o'clock position." This test disclosed that the submitted sample would function as an un-modified semiautomatic AR-type firearm.

The second function test, performed in the "modified mode," with the device selector placed in its "9 o'clock position," found that (1) a pull of the trigger would release the hammer, and (2) a subsequent release of the trigger would allow the secondary disconnector to release the hammer. At this point, an unmodified trigger group would retain the hammer on the trigger-engagement surface; the modified group, however, allows the hammer to travel forward, firing a cartridge by releasing the trigger.

Based on these function tests, our Branch has determined your system is designed and intended to allow only *a single shot to be fired with each movement of the trigger* since it incorporates a positive disconnector function for the "pull" shot and the "release" shot. As a result, the safe capture of the hammer after the "pull" shot has been fired is not affected by the rapid release of the trigger by the shooter. Consequently, if the trigger is pulled slowly, a condition known as "hammer-follow" *does not* occur.

Live-fire testing of the accompanying host firearm with your submitted trigger device installed confirmed the results of the manual function testing. If the trigger was pulled and released deliberately and quickly, a single shot was fired for each pull and each release. Further, if the trigger was pulled slowly, "hammer-follow," which could cause a firearm to shoot automatically more than one shot, without manual reloading, by a single function of the trigger, *was not observed*—in contrast to our findings when testing your previously submitted sample.

Therefore, based on the results of our examination and testing, FTB has determined that your submitted trigger device, as received and examined, *does not* constitute a combination of parts designed and intended for use in converting a weapon into a machinegun. Also, FTB finds that the host AR-type firearm, CMMG MK-4 (serial number SCM-101303), not having any modifications made to the receiver that would cause it to fire automatically, is not a "machinegun" as defined in 26 U.S.C. 5845(b). This firearm, along with the installed trigger device, will be returned to you as soon as our Branch has received either a FedEx (or alternate carrier) account number, or a prepaid return label.

We thank you for providing FTB with a new sample and trust the foregoing has been responsive to your current evaluation request.

Sincerely yours,

/s/ Earl Griffith
Chief, Firearms Technology Branch

Enclosure

Ex. 1B

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

DECLARATION OF MARK W. PENNAK

COMES NOW the declarant, Mark W. Pennak, and hereby solemnly swears under the penalties of perjury and upon personal knowledge that the contents of the following declaration t are true:

1. My name is Mark W. Pennak and I am over eighteen (18) years of age, and competent to testify. I am the President of class plaintiff Maryland Shall Issue ("MSI"), which provides representation in this suit on behalf of itself and its members.

2. MSI is a non-profit membership organization incorporated under the laws of Maryland with its principal place of business in Annapolis, Maryland, with over 1,100 members, statewide. MSI is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. The purposes of MSI include promoting the exercise of the right to keep and bear arms; and education, research, and legal action focusing on the Constitutional right to privately own, possess and carry firearms and firearms accessories. The SB 707 requirements at issue in this case directly

Ex. 2

harm MSI as an organization by undermining its message and acting as an obstacle to the organization's objectives and purposes. The membership of MSI includes individuals who currently possess "rapid fire trigger activators" as defined by SB 707. MSI has standing to bring this suit as a plaintiff in both its organizational status and as a representative of its membership, including members who own the devices newly banned by SB 707.

3. As provided to me by a MSI member, included in packaging of a Bump Fire Systems Stock that was purchased in Maryland is a letter from the BATF, dated April 2, 2012, stating that the legally purchased bump stock device there addressed "is incapable of initiating an automatic firing cycle that continues until the finger is release or the ammunition supply is exhausted" and was thus "not a machinegun."

4. Upon information and belief, the MSI member in receipt of this letter relied upon this declaration by the BATF that the device that was purchased was legal.

5. A copy of the letter is submitted with this filing as an exhibit.

Mark W. Pennak
President, MSI

August 31, 2018
Date

U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

Martinsburg, West Virginia 25405

www.atf.gov

903050:MRC
3311/2012-196

APR 0 2 2012

This is in reference to your correspondence to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Firearms Technology Branch (FTB), requesting FTB to evaluate an accompanying stock and determine if its design would violate any Federal statutes.

As background information, the National Firearms Act (NFA), 26 U.S.C. Section 5845(b), defines "**machinegun**" as—

"*...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. The term shall also include the frame or receiver of any such weapon,* ***any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun,*** *and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.*"

The FTB evaluation confirmed that you have submitted a plastic shoulder stock designed to function on an AR-15 type rifle (see enclosed photos). For your stock to function in the manner intended, it has to be attached to an AR-15 type platform that is assembled with a collapsible-stock receiver extension. Along with the shoulder stock, you have submitted what you have identified as a "receiver module." This module is a plastic block approximately 1-5/16 inches high, about 1-3/8 inches long, and approximately 7/8-inch wide. Additionally, there are two extensions, one on each side, that are designed to travel in the two slots configured on the shoulder stock. The receiver module replaces the AR-15 pistol grip.

Further, the submitted custom shoulder stock incorporates a pistol grip. This grip section has a cavity for the receiver module to move forward and backward. Additionally, two slots have been cut for the receiver module extensions to travel in. The upper section of the shoulder stock is designed to encapsulate the collapsible receiver extension. Further, the custom stock is

Ex. 2A

designed with a "lock pin." When the handle on the lock pin is facing in the 3- to 9-o'clock positions, the stock is fixed and will not move; and when the handle on the lock pin is facing in the 12- to 6-o'clock positions, the stock is movable.

The FTB live-fire testing of the submitted device indicates that if, as a shot is fired, an *intermediate* amount of pressure is applied to the fore-end with the support hand, the shoulder stock device will recoil sufficiently rearward to allow the trigger to mechanically reset. Continued intermediate pressure applied to the fore-end will then push the receiver assembly forward until the trigger re-contacts the shooter's stationary firing hand finger, allowing a subsequent shot to be fired. In this manner, the shooter pulls the firearm forward to fire each shot, the firing of each shot being accomplished by a single trigger function. Further, each subsequent shot depends on the shooter applying the appropriate amount of forward pressure to the fore-end and timing it to contact the trigger finger on the firing hand, while maintaining constant pressure on the trigger itself.

Since your device is incapable of initiating an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted, FTB finds that it is **not** a machinegun as defined under the NFA, 26 U.S.C. 5845(b), or the Gun Control Act, 18 U.S.C. 921(a)(23).

Please be advised that our findings are based on the item as submitted. Any changes to its design features or characteristics **will void** this classification. Further, we caution that the addition of an accelerator spring or any other non-manual source of energy which allows this device to operate automatically as described will result in the manufacture of a machinegun as defined in the NFA, 5845(b).

To facilitate the return of your sample, to include the module, please provide FTB with the appropriate FedEx or similar account information within 60 days of receipt of this letter. If their return is not necessary, please fax FTB at 304-616-4301 with authorization to destroy them on your behalf.

We thank you for your inquiry and trust the foregoing has been responsive to your evaluation request.

Sincerely yours,

John R. Spencer
Chief, Firearms Technology Branch

Enclosure

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

AFFIDAVIT OF ROBERT BRUNGER

COMES NOW the affiant, Robert Brunger, and hereby solemnly swears under the penalties of perjury and upon personal knowledge that the contents of the following affidavit are true:

1. My name is Robert Brunger and I am over eighteen (18) years of age and competent to testify.

2. Included in the packaging of the Fostech Echo AR-II Binary Trigger device that I purchased on March 16, 2018 was a letter dated November 20, 2013, from the BATF, identifying that the device does not convert a weapon into a machine gun.

3. I relied upon this declaration by the BATF that the device I had purchased was legal.

4. A copy of the letter is submitted with this filing as an exhibit.

Robert Brunger

8/30/2018
Date

Ex. 3

U.S. Department of Justice
Bureau of Alcohol, Tobacco,
Firearms and Explosives

Martinsburg, WV 25405

www.atf.gov

903050: WJS
3311/301397

NOV 2 0 2013

Dear Mr. Hawbaker,

This is in reference to your latest correspondence to FTB, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which is accompanied by an AR-type firearm in which AR-15 pattern fire-control components are installed (see enclosed photos). Your item was submitted in response to FTB letter # 2012-683-WS, which provided our evaluation of the last sample of your proposed trigger device. Although we informed you in letter #2012-683 that FTB had classified this device as a "machinegun" per 26 U.S.C. § 5845(b), we indicated that our Branch would evaluate it again if you could redesign your trigger device to incorporate a positive disconnector mechanism.

The current sample examined by FTB consists of a modified trigger device (assembly) for AR-15 pattern firearms. This assembly is designed to allow one shot to be fired when the trigger is pulled, and another shot when the trigger is released. Further, we found that the device selector has not been machined to enable the trigger to be pulled further than an unmodified selector would allow. The trigger has been modified to incorporate a shaft which adjusts the position of the disconnector relative to the trigger. Additionally, FTB observed that material on the top and bottom portion of the hammer has been removed, and our evaluation also disclosed that there is an additional "disconnector" located directly behind the primary disconnector. This "secondary" disconnector enables the hammer to be held positively to rear, prior to the release of trigger, for the "release shot."

To determine its two modes of operation, FTB first performed a manual function test on the submitted sample in its "normal mode" with the device selector placed in its "12 o'clock position." This test disclosed that the submitted sample would function as an un-modified semiautomatic AR-type firearm.

The second function test, performed in the "modified mode," with the device selector placed in its "9 o'clock position," found that (1) a pull of the trigger would release the hammer, and (2) a subsequent release of the trigger would allow the secondary disconnector to release the hammer. At this point, an unmodified trigger group would retain the hammer on the trigger-engagement surface; the modified group, however, allows the hammer to travel forward, firing a cartridge by releasing the trigger.

Based on these function tests, our Branch has determined your system is designed and intended to allow only ***a single shot to be fired with each movement of the trigger*** since it incorporates a positive disconnector function for the "pull" shot and the "release" shot. As a result, the safe capture of the hammer after the "pull" shot has been fired is not affected by the rapid release of the trigger by the shooter. Consequently, if the trigger is pulled slowly, a condition known as "hammer-follow" ***does not*** occur.

Live-fire testing of the accompanying host firearm with your submitted trigger device installed confirmed the results of the manual function testing. If the trigger was pulled and released deliberately and quickly, a single shot was fired for each pull and each release. Further, if the trigger was pulled slowly, "hammer-follow," which could cause a firearm to shoot automatically more than one shot, without manual reloading, by a single function of the trigger, ***was not observed***—in contrast to our findings when testing your previously submitted sample.

Therefore, based on the results of our examination and testing, FTB has determined that your submitted trigger device, as received and examined, ***does not*** constitute a combination of parts designed and intended for use in converting a weapon into a machinegun. Also, FTB finds that the host AR-type firearm, CMMG MK-4 (serial number SCM-101303), not having any modifications made to the receiver that would cause it to fire automatically, is not a "machinegun" as defined in 26 U.S.C. 5845(b). This firearm, along with the installed trigger device, will be returned to you as soon as our Branch has received either a FedEx (or alternate carrier) account number, or a prepaid return label.

We thank you for providing FTB with a new sample and trust the foregoing has been responsive to your current evaluation request.

Sincerely yours,

for Earl Griffith
Chief, Firearms Technology Branch

Enclosure

Ex. 3A

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

AFFIDAVIT OF CAROLINE BRUNGER

COMES NOW the affiant, Caroline Brunger, and hereby solemnly swears under the penalties of perjury and upon personal knowledge that the contents of the following affidavit are true:

1. My name is Caroline Brunger and I am over eighteen (18) years of age and competent to testify.

2. Included in the packaging of the Fostech Echo AR-II Binary Trigger device that I purchased on March 16, 2018 was a letter dated November 20, 2013 from the BATF, identifying that the device does not convert a weapon into a machine gun.

3. I relied upon this declaration by the BATF that the device I had purchased was legal.

4. A copy of the letter is submitted with this filing as an exhibit.

Caroline Brunger

8/30/2018
Date

Ex. 4

U.S. Department of Justice
Bureau of Alcohol, Tobacco,
Firearms and Explosives

Martinsburg, WV 25405

www.atf.gov

903050: WJS
3311/301397

NOV 2 0 2013

Dear Mr. Hawbaker,

This is in reference to your latest correspondence to FTB, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which is accompanied by an AR-type firearm in which AR-15 pattern fire-control components are installed (see enclosed photos). Your item was submitted in response to FTB letter # 2012-683-WS, which provided our evaluation of the last sample of your proposed trigger device. Although we informed you in letter #2012-683 that FTB had classified this device as a "machinegun" per 26 U.S.C. § 5845(b), we indicated that our Branch would evaluate it again if you could redesign your trigger device to incorporate a positive disconnector mechanism.

The current sample examined by FTB consists of a modified trigger device (assembly) for AR-15 pattern firearms. This assembly is designed to allow one shot to be fired when the trigger is pulled, and another shot when the trigger is released. Further, we found that the device selector has not been machined to enable the trigger to be pulled further than an unmodified selector would allow. The trigger has been modified to incorporate a shaft which adjusts the position of the disconnector relative to the trigger. Additionally, FTB observed that material on the top and bottom portion of the hammer has been removed, and our evaluation also disclosed that there is an additional "disconnector" located directly behind the primary disconnector. This "secondary" disconnector enables the hammer to be held positively to rear, prior to the release of trigger, for the "release shot."

To determine its two modes of operation, FTB first performed a manual function test on the submitted sample in its "normal mode" with the device selector placed in its "12 o'clock position." This test disclosed that the submitted sample would function as an un-modified semiautomatic AR-type firearm.

The second function test, performed in the "modified mode," with the device selector placed in its "9 o'clock position," found that (1) a pull of the trigger would release the hammer, and (2) a subsequent release of the trigger would allow the secondary disconnector to release the hammer. At this point, an unmodified trigger group would retain the hammer on the trigger-engagement surface; the modified group, however, allows the hammer to travel forward, firing a cartridge by releasing the trigger.

Based on these function tests, our Branch has determined your system is designed and intended to allow only ***a single shot to be fired with each movement of the trigger*** since it incorporates a positive disconnector function for the "pull" shot and the "release" shot. As a result, the safe capture of the hammer after the "pull" shot has been fired is not affected by the rapid release of the trigger by the shooter. Consequently, if the trigger is pulled slowly, a condition known as "hammer-follow" ***does not*** occur.

Live-fire testing of the accompanying host firearm with your submitted trigger device installed confirmed the results of the manual function testing. If the trigger was pulled and released deliberately and quickly, a single shot was fired for each pull and each release. Further, if the trigger was pulled slowly, "hammer-follow," which could cause a firearm to shoot automatically more than one shot, without manual reloading, by a single function of the trigger, ***was not observed***—in contrast to our findings when testing your previously submitted sample.

Therefore, based on the results of our examination and testing, FTB has determined that your submitted trigger device, as received and examined, ***does not*** constitute a combination of parts designed and intended for use in converting a weapon into a machinegun. Also, FTB finds that the host AR-type firearm, CMMG MK-4 (serial number SCM-101303), not having any modifications made to the receiver that would cause it to fire automatically, is not a "machinegun" as defined in 26 U.S.C. 5845(b). This firearm, along with the installed trigger device, will be returned to you as soon as our Branch has received either a FedEx (or alternate carrier) account number, or a prepaid return label.

We thank you for providing FTB with a new sample and trust the foregoing has been responsive to your current evaluation request.

Sincerely yours,

for Earl Griffith
Chief, Firearms Technology Branch

Enclosure

Ex. 4A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, INC., Plaintiff, vs. GOVERNOR OF MARYLAND, LAWRENCE HOGAN, Defendant.	CIVIL NO.: JKB-18-1700

Transcript of Proceedings
Before the Honorable James K. Bredar
Friday, September 14th, 2018
Baltimore, Maryland

For the Plaintiff:

Cary Johnson Hansel, III, Esquire

Erinne Sutherell, Esquire

For the Defendant:

Jennifer L. Katz, Esquire

Robert Scott, Esquire

Christine T. Asif, RPR, FCRR
Federal Official Court Reporter
101 W. Lombard Street, 4th Floor
Baltimore, Maryland 21201

P R O C E E D I N G S

THE COURT: Good afternoon. Be seated, please.

The clerk will call the case.

THE CLERK: The matter pending before this Court is civil docket number 18-1700, Maryland Shall Issue, et al., versus Governor of Maryland Lawrence Hogan. Counsel for the plaintiff is Cary Hansel and Erinne Sutherell. And counsel for the defendant is Robin Scott and Jennifer Katz. This matter comes before the Court for TRO hearing.

THE COURT: Good afternoon, Counsel. The matter does come on this afternoon on the plaintiff's application for a temporary restraining order. The plaintiffs request that the Court enter a TRO preventing a Maryland statute from going into effect on the 1st of October. The statute which was to be codified in the Maryland Criminal Article, at Section 4-301(m)(1), purports to ban and criminalize the possession and transfer of rapid fire trigger activators. And then some examples are provided in the legislation.

Any time a party asks for the Court to enter a temporary restraining order we need to start with the admonition given to us by the United States Supreme Court in the opinion deciding *Mazurek v. Armstrong* at 520 U.S. 968, the pincite 972, which is that injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to this relief.

In deciding whether or not to enter a temporary restraining order, the Court applies the familiar test given to us for preliminary injunctions and restraining orders in the Supreme Court's opinion deciding *Winter versus The Natural Resources Defense Counsel*, which of course is at 555 U.S. 7, with a pincite of 20.

There are four things that a plaintiff must demonstrate in order to be entitled to the entry of an extraordinary order like a temporary restraining order. Of course those four items are -- those four topics are that it is likely to succeed on the merits; it is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his favor; and that an injunction is in the public's interest. And I emphasize again, the plaintiff must carry their burden on each of these four elements. If they fail on just one, then under the law they're not entitled to the relief they seek at this point in the process.

Today I'll hear from counsel for both sides, although it is an application for a temporary restraining order, which in theory can be heard ex parte. That's not going to happen today, because the state was given notice and they're present and ready to assert the state's interests in this hearing.

Before you begin -- and Mr. Hansel, I will begin

with you -- I want to confine our discussion, at least at the outset here, to the question of irreparable harm. That's where my sharpest focus is. I'd like to hear you on that element in particular. Mr. Hansel.

MR. HANSEL: Thank you, Your Honor. I appreciate the Court's directing us in a particular direction. And it's always my preference to know exactly what is at most concern. With respect to the element of irreparable harm, the irreparable harm to our clients in the first instance -- and then I'll address some of the push back from the state -- in the first instance is a violation of their constitutional rights. We've cited cases to the Court, primarily in the First Amendment context, where a deprivation of constitutional rights is itself deemed always irreparable.

THE COURT: Well, in this case, let's be clear, though, you're not asserting a Second Amendment interest here, it's only a Fifth Amendment interest that is the focus. And constitutional rights are different from each other, one from another, in terms of how they might be addressed and how their violation may be redressed; true?

MR. HANSEL: I agree with parts of your statement, Your Honor. With respect to the case before the Court, there's a Takings Clause argument being made. There's also a void for vagueness argument being made. There are aspects of the argument that touch also on due process. But it is

certainly the case that different constitutional tests are -- or standards rather, are subject to different tests, that's certainly the case.

But with respect to this question, first, of whether or not constitutional claims ought to always meet the test for irreparable harm, I'm going to suggest to the Court that they ought to. And here's the reason: If they do not, there really are no constitutional rights. And here's why: If we permit the state -- if the Court were to find, and I'm asking the Court to so find, that there's a pending violation of our client's constitutional rights. And that obviously is the, as the Court points out, the first element of this test is likelihood of success, I'm not focusing on that for the moment, but that's of course the first element.

If that element is met then we have agreed, you and I, that there is a pending violation of constitutional rights. If the government, in a case like this, is allowed to say in response to what the Court has deemed a violation of constitutional rights, well, we can pay you later for it, then the Court puts its imprimatur on a violation of the constitution, which I think the Court ought not do, because it was reduce our constitution --

THE COURT: It's clever, but it's not where we're going today. We're not on the first element. We're on irreparable harm. And your irreparable harm problems really

aren't just about whether or not a violation could be adequately compensated later, which is, I think, a strong argument, but I have an even more fundamental issue, and that is I don't understand what could possibly happen to one of your clients on the 1st of October that would be harmful to them in an irreparable way. All they've got to do is apply to the ATF and they instantly are allowed to possess this item for another year.

MR. HANSEL: That was the intent of the legislature, that has proved impossible and --

THE COURT: What's impossible?

MR. HANSEL: Well, the ATF --

THE COURT: You and I sit down together, we write out a letter to the ATF, they have a mailing address. And we tell them exactly what we want them to do, knowing full well that they have no process by which to receive that application, to process it, to in any way meaningfully consider it, we know that. And nonetheless, we write our letter and we tell them exactly what we want them to do. That is give us permission to hold on to this device. And we put it in an envelope, we put a stamp on it, and we put it in the mail.

MR. HANSEL: I --

THE COURT: We've applied.

MR. HANSEL: The plaintiff's position is there can

be no application without an application process, that that would be a farce in effect. Because there -- we know in advance the application won't be accepted, won't be processed. However --

THE COURT: But that's not what this statute requires, the statute doesn't require that it be meaningfully received by the ATF, that the ATF deliberates, that they avoid, you know, arbitrariness in their consideration of it. There's no language like that in the statute. The statute is very simple, you have to apply. And if you apply you have a blanket exemption.

MR. HANSEL: Except that in this instance if you apply -- and I'll put apply in quotes, respectfully, I don't believe that's an application under this circumstance, but I don't want to quibble with the Court.

THE COURT: Would you agree with me that what is an application would be a matter for a court to interpret --

MR. HANSEL: Yes.

THE COURT: -- and that that would be an objective process by which a court would analyze, well, did that person -- okay, this is the People of the State of Maryland versus Cary Hansel, we're in criminal court, in the circuit court for Baltimore City, and that's the charge that's brought. And the question is, did you possess one of these rapid fire activators, and did you do so without having

applied to the Bureau of Alcohol, Tobacco, Firearms and Explosives for permission to hold on to it after the 1st of October of 2018, that would be the question.

And a prosecutor would be heard to argue, well, yeah, he sent a letter in, but he sent that letter in knowing full well that there was no process on the other end ready to receive it, and consider it. And accordingly, he did not apply to them. I mean, that's what it would have to be.

MR. HANSEL: And that's the risk.

THE COURT: That's totally illogical.

MR. HANSEL: The problem is this, Your Honor: There are in Maryland, in the 23 counties and the city of Baltimore, 24 different state's attorneys. The state's position, and with great respect, even the Court's position, absent an order so stating, has no effect on those 24 independent prosecutors. So our clients --

THE COURT: Well, and even the decision of the prosecutor has no effect on your client, ultimately. It has -- he can bring a charge, but that prosecutor can't convict them. That's ultimately left to a court. And a court is assumed to operate in a logical, objective fashion with respect to the matter that's before it. And your problem is how are you going to persuade me that in that little scenario that I just described, that you or whoever a defendant in that criminal action is, didn't apply to the ATF.

MR. HANSEL: Here's my answer, Your Honor, I don't think I need to persuade you of that because the harm to the client starts earlier. The harm to the client isn't just might he win in court. Because after all, this Court and the courts of Maryland and the courts of every state that I'm aware of, recognize claims for the mere arrest, the mere inappropriate or false arrest of someone. So that is a legally cognizable harm. So the harm that our clients face is not just the -- what a judge might do in district court in Maryland.

THE COURT: Can I enjoin the enforcement of, you know, other statutes out of perception of a risk that there's a rogue prosecutor out there who might seek to charge someone on some completely illogical theory.

MR. HANSEL: The problem, Your Honor, is it doesn't take a rogue prosecutor. The statute as written, in terms of that language to apply, is impossible to comply with, I think by the -- and I think that interpretation is more reasonable than the Court has given credit. And that's where I think our disagreement is. But the 24 different prosecutors may well prosecute on those crimes. We see all the time, my colleagues who practice in those courts, unusual and extraordinary decisions being made to prosecute.

And so instead of subjecting our clients to the risk, not just of prosecution once it's in the hands of a

state's attorney, but also of arrest, when it's the police officer on the scene making the decision, of having those charges follow that person with computers as they do now in effect for the rest of that person's life, even if a state court judge agrees with Your Honor.

Now, let me pose it another way, if it is the case that applying means what the state says it means, all our clients need do is dash off a letter, then where would the harm be to the state in so ordering? And indeed, I asked the State before we came --

THE COURT: In what?

MR. HANSEL: Where would the harm be to the State in granting that relief? In other words, if Your Honor were to order that apply in the statute -- the statute is complied with by anyone who owns one of these devices and writes a letter to the ATF and that --

THE COURT: Well, that's not for me to determine.

MR. HANSEL: Well, that's my --

THE COURT: I'm assessing whether or not there would be irreparable harm to your client if I denied a temporary restraining order in the current context of the situation. I don't get to change the context.

MR. HANSEL: Well, but you can through an order. You can file an order that simply agrees with the State that application means all they have to do is dash off a letter.

It would be far less than I'm asking for. But it would at least prevent the harm that my clients are most afraid of, which is the harm of prosecution in the interim. The harm that they're arrested in the interim, and even if --

THE COURT: You have clients who fear that they're going to be prosecuted in the state of Maryland, even though they filed what, objectively, anyone would have to accept was a letter with the Bureau of Alcohol, Tobacco, Firearms and Explosives asking for permission to retain possession of such a device?

MR. HANSEL: Absolutely. Because the -- this statute, as written, requires them to apply. And here's what happened to make that concern very real, the day the statute was passed the ATF sent out an advisory, put up on its website, it was widely distributed in the media, telling people not to apply --

THE COURT: They respectfully requested that they not send in applications.

MR. HANSEL: That's correct. When you are a gunner, and the ATF respectfully requests you not to do something, it would be unreasonable in most cases to do it, for obvious reasons --

THE COURT: In most cases, but not in the case where there's a statute that otherwise tells you that that's what you have to do if you want to hold on to your bump stock until

October 1st of 2019, then that would be a very rational thing to do.

MR. HANSEL: But the problem is to require --

THE COURT: And to keep a copy of the document and the -- maybe the return receipt requested that you send off to them.

MR. HANSEL: But to require that of a layperson, Your Honor, just isn't reasonable, because they're being told actually not to send these things. And then the State remains silent and doesn't say no, please send them, they'll still count. Doesn't do anything to educate the public. So a reasonable owner of one of these objects being told that you must apply on the one hand from the state, and then being told by the federal government, the agency that regulates the object after all, do -- please don't, respectfully, we ask you not to apply. They're stuck in this conundrum. And because of that there are likely many people who did not apply. There are likely many people who quite reasonably would not have applied, and who will -- and who face irreparable harm.

Now, there are a couple of ways we can avoid that through very minimal intrusion on the state's prerogative here. So for instance, the Court needn't strike down the law in its entirety or stay the law entirely, but might, on this issue, only say order that current owners may maintain these objects until further court order, or to take a step back, the

current owners may maintain these devices if they have first sent a letter to the ATF, which shall satisfy the apply language.

Which if that is the law, and if Your Honor, as you have suggested, believes that's the obvious import of this statute, then why not so order? Because the burden, and I know that's another element, but the burden on the state would be near zero, because you're simply agreeing with their position. And it would save my clients from what is very real -- the very real possibility of irreparable harm because they may in the interim get arrested by any one of the thousands of police officers in the state, or any one -- or prosecuted by anyone of at least 24 different prosecutors in the state, under an interpretation that how can they possibly have applied because the ATF says it isn't accepting applications.

And I'm going to suggest to the Court that amongst those thousands of officers and two dozen prosecutors, that suggestion is not as unlikely as perhaps the Court might believe. But if the Court does believe that's unlikely, what you are in effect saying to us is that this statute means you just have to send a letter to the ATF and then you're protected until October 1st, 2019, if so please order. The burden on the State is almost nil, because that's what they've said the statute means. Our clients then are prevented from

any harm. Even if the harm is relatively remote, all I need prove to you is that it's irreparable and that the possibility exists. And that goes back to the cases we've cited the Court. So there is at least a possibility that many one of officers in the state might disagree respectfully with the Court's interpretation.

THE COURT: I think *Winter* told us that harms can't be remote, remotely possible. It's got to be more than a showing, I think, is actually the test from *Winter*. More than -- it has to be a showing of more than a remote possibility of irreparable harm, that's my recollection what it says.

MR. HANSEL: I think you -- I'll defer to the Court as I always do, Your Honor. But with respect to that question, I think there is more than a remote possibility given the number of prosecutors in the state, given the problems with the statute, given that a prosecutor could reasonably look at this circumstance and say, in a case where the ATF has refused to accept applications, I don't think it's legally possible, physical possible, to have applied. You know, that's with respect to the question of the application.

Now, with respect to the question --

THE COURT: So there's a 7-11 down the street, and they have a big sign on the window, and it says we are experiencing full employment, don't bother to apply for a job

here. We don't want any applications. If you do apply, we're not going to consider it. We have no slots for you, so don't bother. Okay. And you walk into the store with a job application and you drop it off at the manager of the store, hand it to him. Turn around and walk out. Did you just apply for a job there?

MR. HANSEL: In that case I probably did. However, if the sign instead said, we're not accepting applications for I don't know -- we're not in the business of buying cars, and I went in to sell my car. And they wouldn't hear me or accept my offer and they told me they're not in the business, they don't deal with cars, there's no mechanism. At that 7-11 even though at that moment they might not be hiring, there's an ordinary mechanism by which they hire. There's an ordinary process. If I went down to 7-11 --

THE COURT: Believe me, the ATF takes applications for special permission for all kinds of things all the time. They have all kinds of processes set up for that.

MR. HANSEL: I agree with that except here. They've told us they don't.

THE COURT: That's because right now they don't have -- they've got full employment and they don't need to hire anybody right now.

MR. HANSEL: Except this is a little bit different, because here the ATF has taken position they don't even have

statutory authority to do this. It's not a temporary bump in the system, it's not a situation where I could find some application somewhere in the --

THE COURT: Okay. So the sign on the outside of the 7-11 says, we're not hiring anybody because we were shut down by the health department yesterday and there's a regulation in the City of Baltimore that says that it's against the law to hire people if you have a health department restriction and you're not allowed to operate. And accordingly, please, please, do not apply for any jobs here. We're not allowed to accept applications. It would violate the city code if we did. Do not apply for a job. Nonetheless, you walk in there and you drop off your job application. Did you apply for a job there?

MR. HANSEL: I don't know, I honestly, to me --

THE COURT: Well, I know. You did.

MR. HANSEL: Then I will -- as I say, I will defer to the Court.

THE COURT: Let's turn to your argument about the inability to successfully remediate a constitutional violation that's in the nature of a taking, both under federal law and Maryland law.

MR. HANSEL: Well, not just with respect to taking, Your Honor, but we also have a due process claim here and the void for vagueness claim. With respect to taking, the

argument of course will be, well, it's taking without just compensation, just compensation is ultimately money payment --

THE COURT: Well, if you took the person's bump stock away from them and later the statute was found to be void for vagueness, and as a consequence unconstitutional, it's not just a taking that you're trying to compensate at that point, but --

MR. HANSEL: Correct.

THE COURT: But it's a -- it's what?

MR. HANSEL: Well, it's a number of things, it's a taking, under Maryland law it's a due process violation. It's -- but more importantly, Your Honor, I think before getting to that point, it's important to understand the legislative intent was for there to be a path for current owners to permanent ownership, some path. They -- it was set up that there be an ATF application. The legislature, obviously, there's no dispute intended that the ATF would consider those and in some cases grant them. So the legislature imagined a path to legal ownership.

There is irreparable harm when that path is severed. They can't simply be compensated for by money for this reason: Those people who followed that path, which we now know is impossible, whether by, you know, October 1 of this year or next year, we now know eventually it becomes impossible, those

who would have followed that path would have these devices.

If that path is cut off, and if during the pendency of this case those people get rid of the devices, the bump stocks I'm talking about, they're specifically named in the statute, then even if the other provisions of the statute are held as void for vagueness, but the bump stock provision survives, those people, who in the interim have divested themselves of their bump stocks, have no legal path to reacquire them and money would not suffice in that case.

So that harm, the loss of that property, which the legislature intended these people to be able to keep, at least to have a path to keep, becomes literally irreparable because they can't buy it, they can't get it back. These become sort of unicorns in Maryland, because there presumably will be some body -- if the law were given its full effect -- some body of legal bump stocks left in Maryland.

That possibility is foreclosed under the statute as drafted. And so there is irreparable harm to that subset of people who would have applied and been given permission to keep those objects. There's nothing about later money damages that can get those objects back, if the balance of the statute is struck on void for vagueness. And that's why there is irreparable harm also, just in the loss of these devices.

If they're put out of state, if they're sold, and then we're successful only on the void for vagueness argument,

which does not touch the bump stock ban itself, you know, the enumerated items, then those people can never get them back. They can't be repurchased. And there was a path to ownership that was anticipated in the legislature.

THE COURT: Well, they could go to another state and purchase it.

MR. HANSEL: They could, Your Honor, but they couldn't bring them back into Maryland under that circumstance, because that wouldn't be a grandfathered in device, that would be a new device. And the Courts have held that it is a profoundly mistaken assumption -- this is a 7th Circuit case, *Ezell versus Chicago* involving gun ranges -- to assert that the availability of a right outside of the state somehow cures the denial of it inside of the state.

In that case Chicago said no gun ranges in Chicago. And they argued, obviously Chicago's much smaller than the state of Maryland, they argued you don't have to drive far to get to a gun range outside of Chicago. And the 7th Circuit said, no, we're sorry, it's a profoundly mistaken presumption to force people to leave the jurisdiction. That problem is compounded whereas here we have state constitutional claims. What would it mean to have a Maryland Takings Clause violation or a Maryland due process claim, as we've asserted, if those could be side stepped by forcing the property out of the state, because that Maryland constitution only has any effect

in the state after all. So it can't be that forcing these items out of state is sufficient.

The other reason it's a practically unworkable issue, is eventually if every state bans them what do you do then? Then it becomes completely unworkable.

THE COURT: If those rights arise only under the laws, Declaration of Rights or Constitution of Maryland, then perhaps this court would have to consider whether it appropriately asserts supplemental jurisdiction over those questions, having separately disposed of the possibly easier federal questions.

MR. HANSEL: If that were the Court's rulings, that may be, Your Honor. But the federal questions are real and are before the Court, both on the void for vagueness question and on the question of whether or not it's even possible to comply with this statute in the first place.

With respect to irreparable harm, on the void for vagueness, because we have addressed irreparable harm to some degree with respect to the other argument, with respect to takings. With respect to void for vagueness, there is significant irreparable harm that, in effect, can't be saved by any of the arguments, I think, the State has made. And that is this: The statute, and I will paraphrase, but we can parse the specific language if the Court prefers, the statutes, in essence, applies to any device that might be

attached to a firearm such that it increases the rate of fire.

Now, the State has told the Court, and has cited the bill's sponsor, Delegate Moon, that to the effect that that only means those devices that increase the rate of fire to something similar to a fully automatic machine gun. But the problem is that language isn't in the statute. So we have a statute, which on its face appears to potentially sweep within its reach any manner of devices in Maryland that even marginally increase the rate of fire.

And I'm not talking about devices that are from Las Vegas or something. I'm talking about very simple, very common devices, muzzle devices that direct gases away from the shooter's field of vision. A smoother action even in a single action bolt action rifle would increase the rate of fire because it increases the rate by which somebody can work that action. A wide variety of devices that help with controllability, foregrips, things that absorb shock, springs in firearms, again, that don't increase the rate of fire like a bump stock, but just simply absorb shock. Even some sighting devices, bipods, monopods, devices that have been in use with firearms for hundreds of years, that are perfectly lawful otherwise, arguably increase the rate of fire.

If I have a rifle, and I'm taking a shot without a bipod, for instance, it takes me longer to line up the next shot. So even if it's a single shot rifle, and I'm loading

each bullet for each shot, it's not the type of device that the state says this was intended to apply to, we're in a circumstance where we have clients that don't know whether putting a bipod on the gun, because it increases the rate of fire, and is therefore defined as one of these banned devices, whether they're committing a violation or not.

Was it the intent of the statute? Absolutely not. The state's right about that. But unfortunately, the statute as written, would appear to ban all manner of devices, anything --

THE COURT: So what's the solution to that, does the Court have an intermediate solution? Does the Court have the capacity to back off and say, no, only actually the enumerated items.

MR. HANSEL: I think you could. And I think the reason is simple, because the other language is void for vagueness. And so I think there are two solutions the Court might offer, limit it to the enumerated items, which are the items that if you accept the state's definition of what this was meant to apply to, they haven't listed any other items other than the enumerated ones. In other words, they can't name a single other device and haven't in their papers, neither is there another device mentioned in the legislature history, other than the enumerated items. And I'll suggest respectfully that if there was another device it also would

have been enumerated. That's why they're enumerated.

So the Court could find that just that provision of the statute that applies to other than the enumerated items is void for vagueness, because it leaves our clients, and all Maryland citizens, in a situation where they have to guess what might increase the rate of fire.

THE COURT: But any one of them who is stuck in that situation and guessing and trying to decide whether a bipod or a tripod, or even something as simple as gun oil, that improves the action of a firearm falls within the sweep of the statute, still has the option of writing a letter to the ATF and saying, you know, some people think I'm crazy in my club, but you know we were talking around the table about this, and I think that just, you know, like gun oil coming into the action, increases my rate of fire. So you can write to the ATF and apply.

MR. HANSEL: Except that we would ask that the Court so order, to solve the problem of the potential for arrest and prosecution by our clients. And if the Court would so order that with respect to these other items, with respect to rapid fire trigger activators, all that need to be done is a letter go to the ATF and that will be considered an application under the process. Then if the Court would make that order it would solve our concern. And they're -- I'm going to suggest respectfully --

THE COURT: Let me stop you there, Mr. Hansel.

Ms. Katz, good afternoon.

MS. KATZ: Good afternoon, Your Honor.

THE COURT: So the Attorney General issues opinions from time to time on topics of interest to the people of the state of Maryland, to lawyers, to state's attorneys, in particular. What's wrong with the idea of the Attorney General issuing an opinion that indicates that regardless of the position of the ATF anyone who makes application by sending a letter off to them at their address in Washington, D.C., or wherever they are, has met the test, met the test of the exception, and accordingly, is in compliance with the statute, even though they persist in their possession of this otherwise banned item?

MS. KATZ: Well, that's what we've set forth in our papers. I don't think there's anything inherently wrong with the Attorney General's office issuing an opinion, although I don't control that process. So can't speak to that here today specifically. But there's no need to issue an opinion to parrot language that is plainly present in the statute, that the General Assembly has enacted and the Governor has signed into law.

And that's the missing piece here. That governs the 24 state's attorneys across the state of Maryland. The general assembly's clear language that in order to comply with

the exception prior to October 1st, 2019, possessed the banned device prior to October 1st, 2018, apply to the ATF. So we're not even talking about -- a minor distinction, but not even an application. So assuming that there is an application process that you can print off the web and send in and apply, it's really to seek, to ask, you've done that and you're in compliance with all other federal law, you can fall within this exception until October 1st, 2019.

THE COURT: What about a person who is not worried about their bump stock, but is instead worried about the broader sweep of the statute, arguably, to pick up other things that would effect how rapidly a firearm can be discharged?

MS. KATZ: Well, you could certainly apply if you were concerned, if you had the concern that the statute reached the particular conduct that you were concerned about. But I don't think that's a reasonable reading of the statutory language. And there's no threat of enforcement or application of the statute in the way plaintiffs have suggested that would give rise to a risk or likelihood of irreparable harm in this case.

THE COURT: The concern I have is about the language and its sweep. Can you quote it to me exactly.

MS. KATZ: The definition of the device, rapid fire?

THE COURT: Exactly.

MS. KATZ: So a rapid fire trigger activator means any device, including a removable, manual, or power driven activating device, constructed so that when installed in or attached to a firearm; one, the rate at which the trigger is activated increases; or two, the rate of fire increases.

And I think that the way that the plaintiffs have suggested that the potential breadth of this statutory language misses a few of the key terms in the statute. First it's divorced from the actual device that is being defined, which is a rapid fire trigger activator.

THE COURT: Yeah, I understand that, but it's all in the statute and the rapid fire activator, whatever, that's listed there, and then the examples are given and so forth. But -- and I'm not firearms expert, but let's take a bolt action rifle that fires one shot at a time, and then requires a manual, mechanical, motion or action by the operator of the weapon in order to fire another round. That is not, I understand, the object of this statute, it's not concerned with those kinds of firearms, at least that's what the state tells me.

MS. KATZ: Well, the --

THE COURT: But we have to give statutes their plain meaning, and not be confined to the Attorney General's interpretation of them, the legislature's interpretation of it, even the legislative history, if the plain language itself

answers our question as to what it means. And so, you know, you take a bolt action rifle, boom, you fire. You pull the bolt. You pull it back. You rechamber another round. You drop back in and you fire again. It's not inconceivable to me that somebody could be thinking about how to make that process a little bit more efficient so that there were three motions instead of four necessary to chamber the next round.

MS. KATZ: Well, the -- I think that the language in the statute that negates that concern is where it says that the -- a device, any device constructed so that when installed in or attached to a firearm. And I think what that means is that the device itself is intrinsic to the device. The device is constructed, it is designed and built to accomplish this end. And it necessary --

THE COURT: And the end is what?

MS. KATZ: It necessarily -- by installing that on to the firearm, it necessarily, without any affirmative action of the user, other than one pull of a trigger, it increases the rate at which the trigger activates --

THE COURT: Where does the statute confine the definition of devices in the manner that you described, that is no involvement of the operator, just improves the efficiency of the firearm, intrinsically, without its interaction with the user or other facts or circumstances.

MS. KATZ: It has to be constructed so that this is

what occurs, so it's -- it necessarily increases the rate of fire when it's attached to a firearm and the person pulls the trigger. That's -- the construction of the device causes that. It doesn't depend --

THE COURT: Does it say necessarily?

MS. KATZ: It doesn't say necessarily in the statute, but it's constructed so that when it is attached this is what happens. So there is some cause and effect --

THE COURT: Well, in my theory we're going to have a bolt action rifle where you don't have to flip up the bolt, you just pull the bolt back and push it back in and somehow that accomplishes the chambering of the round.

MS. KATZ: That's still the user pulling back, accomplishing the chamber of the round, perhaps in fewer steps, but that's an affirmative step of the user. And it's not necessary, the user can --

THE COURT: Yeah, but the necessary word isn't in the statute.

MS. KATZ: The necessary word isn't in the statute, but I think it's implied by the constructed so that when it is attached this is what happens. It's intrinsic to the device itself, it doesn't depend on an individual user being able to fire more efficiently, pull the trigger each time more efficiently. It's what occurs by the construction of the device when it is attached to a firearm and the trigger is

activated. And that's -- that is a read of this statute that comports with the text, comports with the legislative history, comports with the actual name of the item that is being banned under Maryland law, and should be adopted by the Court.

But in any event there's no risk of immediate irreparable harm, because there's no threatened enforcement or application of the statute in the way that the plaintiffs have proffered. And people can apply to the ATF to keep them during the pendency of this litigation. And the preliminary injunction standard is about what happens during the pendency of the litigation, not whether at this point in time Your Honor thinks that this is a reasonable -- reasonably likely to occur if the statute goes into effect.

THE COURT: The petition for a temporary restraining order is denied. The plaintiff is unable to demonstrate the potential for irreparable harm by the requisite standard. The escape hatch of someone in possession of one of these devices being able to extend the period during which they're able to lawfully possess it, by merely applying to the ATF for permission to do so, is what eliminates the potential for irreparable harm, possibly among other circumstances, but that by itself eliminates the potential for irreparable harm in this circumstance.

The word "apply" is a very general term. The Court's example with respect to applying for a job, I think is

germane. I accept the state's rapid but persuasive, what are we going to call it, the thesaurus moment when we talk about what does apply mean, to seek, to try to obtain, whatever, it's -- it doesn't take much to apply. So it's on that basis that the request for this relief is denied.

We have a long road ahead of us in this case, I suspect. Ms. Katz, it would be a mistake for the State to leave here today thinking that the Court is unconcerned about the vagueness argument raised by plaintiffs. The sweep of the statute, the fact that it does not contain some of the qualifiers like "necessary," that you employed in your argument, are of concern to the Court. These are not issues that I have to reach today, because the ruling is grounded elsewhere. But -- and ultimately, I may well be persuaded that applying the precedents that I'm bound to follow, there at the end of the day is not a vagueness problem with the language as it is presently composed. But maybe I will have a problem with it. And that's a message I hope will be heard.

MS. KATZ: Okay. Thank you, Your Honor. Can I just make one request?

THE COURT: Yes.

MS. KATZ: I spoke with opposing counsel earlier. Our, the State's response or reply in support of the motion to dismiss is currently due next Friday, given the --

THE COURT: You want an extension?

MS. KATZ: I would like an extension.

MR. HANSEL: No objection, Your Honor.

THE COURT: How much time do you want?

MS. KATZ: An additional week is what we --

MR. HANSEL: No objection.

THE COURT: Okay. Put that in writing so we don't miss it on the docket and we will grant it and make sure that you note that it's a consent motion.

MS. KATZ: Sure. Of course.

THE COURT: And we'll see what you have to say about this issue in that circumstance.

MR. HANSEL: Your Honor, may by heard on one question?

THE COURT: Yes.

MR. HANSEL: I hope I'm not treading on the Court's patience. Given the structure of the Court's ruling.

THE COURT: Yes.

MR. HANSEL: That the --

THE COURT: Why I ruled the way I did, as I explained it here in my oral ruling.

MR. HANSEL: Correct, Your Honor, I just have one question, the statute as contemplated gave people 160 days to apply. The ATF immediately said, respectfully, don't apply. I would ask whether the Court would be willing to give people 160 days from today to give effect to that statutory language

for the many, many people who took the ATF at its word. And an order like that, I think would strengthen the Court's view that that savings clause is what saves things, that people have had that 160 days that they've been denied --

THE COURT: I understand the request, but the basic threshold for that sort of emergency relief has not been successfully crossed by the plaintiff. Having found that there is not a danger of irreparable harm, given how the statute is constructed, I have foreclosed the possibility of the Court taking any action to mitigate, even if I agree with it, and I'm not saying I do, mitigate the sharp edges, if there are any, of the provision.

MR. HANSEL: Thank you for hearing me.

THE COURT: I don't have the authority to do that. Given the way that I've ruled. It's not that I don't understand what you're asking me. I do.

MR. HANSEL: Thank you, Your Honor.

THE COURT: We're in -- I do not intend to issue a written order or opinion in this regard. The record should reflect that the request for a temporary restraining order was denied for the reasons stated here in open court. We're in recess. Thank you.

(The proceedings were concluded.)

I, Christine Asif, RPR, FCRR, do hereby certify that the foregoing is a correct transcript from the stenographic record of proceedings in the above-entitled matter.

_____/s/_____
Christine T. Asif
Official Court Reporter

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.	*	

* * * * * * * * * * * * * *

DEFENDANT'S REPLY IN SUPPORT OF
MOTION TO DISMISS COMPLAINT

I. MARYLAND'S BAN ON DANGEROUS RAPID FIRE TRIGGER ACTIVATORS IS A PROPER EXERCISE OF THE STATE'S POLICE POWER AND DOES NOT CONSTITUTE A TAKING.

As set forth in the defendant's opening memorandum (ECF 9-1), what is at stake in this litigation is the State's ability to exercise its police power to ban the possession of dangerous devices that threaten public safety. After the nation's deadliest mass shooting in Las Vegas in October 2017, the General Assembly exercised its legislative police power to ban the possession, sale, and transfer of rapid fire trigger activators, such as the bump stocks used in the Las Vegas shooting and other devices that similarly are constructed to allow a firearm to mimic automatic fire. *See* 2018 Md. Laws, ch. 252 (the "Law") (ECF 9-4). The Las Vegas shooting "highlighted the destructive capacity of firearms equipped with bump-stock-type devices and the carnage they can inflict" and "made their potential to threaten public safety obvious," Bump-Stock-Type Devices, 83 Fed. Reg. 13,442, 13,447 (Mar. 29, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-03-29/pdf/2018-

06292.pdf.[1] Notably, the plaintiffs do not allege that these devices are protected by the Second Amendment or even are useful for in-home self-defense. Rather, the plaintiffs contend that the Law constitutes a taking because the plaintiffs purchased these dangerous devices before Maryland enacted the ban on possession. This is wrong for the following reasons.

The State's ban on these dangerous devices does not constitute an unconstitutional taking. Rather, it is a permissible exercise of the State's police power to further the State's compelling public interest in promoting public safety and reducing the negative effects of firearms violence. *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."); *see also Roberts v. Bondi*, No. 18-cv-1062-T-33TGW, 2018 WL 3997979, at *3-4 (M.D. Fla. Aug. 21, 2018) (dismissing takings challenge to Florida's ban on bump stocks because the ban "'prohibits the possession of contraband'" and, thus, is a proper "exercise of the legislative police power" (quoting state's brief)).

Arguing to the contrary, the plaintiffs misinterpret and misapply the holdings of the governing Supreme Court cases. First, the plaintiffs misplace reliance on *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), in which the Supreme Court held that the government's "physical *appropriation* of property," in that case raisins, constituted a compensable taking. *Id.* at 2427 (emphasis in original). Here, in contrast, because the

[1] "The contents of the Federal Register shall be judicially noticed . . . ." 44 U.S.C. § 1507.

State has not physically *appropriated* the plaintiffs' property, *Horne* is inapplicable. The plaintiffs erroneously contend, however, that the Law "takes away plaintiffs' personal property . . . by depriving plaintiffs of physical possession of their property[.]" (ECF 23, Pls.' Opp'n at 8.) But in *Horne*, the Court was careful to highlight "the 'longstanding distinction' between government acquisitions of property and regulations" in its takings cases, *id.* at 2427, and acknowledged that even where a "physical taking" and "a regulatory limit . . . may have the same economic impact," the distinction lies in "the means [the government] uses to achieve its ends . . . ," *id.* at 2428. Here, because the plaintiffs' personal property has not been "actually occupied or taken away," *id.* at 2427, the plaintiffs' reliance on *Horne* is misplaced.

Second, the plaintiffs misconstrue the scope of the Law and misinterpret the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 595 U.S. 1003 (1992) to argue that the State's ban on the possession of rapid fire trigger activators constitutes "a complete regulatory deprivation of personal property." (ECF 23, Pls.' Opp'n at 9.) In *Lucas*, the Court considered a state regulation that "wholly eliminated the value of the claimant's land." *Id.* at 1026. Unlike the land regulation at issue in *Lucas*, the State's ban on the possession of rapid fire trigger activators does not render the devices devoid of economic value, because the plaintiffs can continue to possess, use, and sell the devices out of state.[2] Moreover, in *Lucas*, the Court was careful to distinguish regulations on the

[2] The plaintiffs misplace reliance on *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011), in which the Seventh Circuit held that the district court improperly found no likelihood of irreparable harm from ordinances that operated to outlaw gun ranges because individuals could travel outside the city limits to exercise their Second

use of real property from those that impact the use of personal property, explaining that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless[.]" *Id.* at 1027-28; *see also Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("[G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*." (emphasis in original)). Here, akin to the regulation of commercial dealings for the public good, the State has banned the possession of inherently dangerous devices to further the State's interest in public safety. Thus, employing a "case-specific inquiry into the public interest advanced in support of the restraint," *Lucas*, 505 U.S. at 1015, the State's interest in protecting the public from the dangers associated with the use of rapid fire trigger activators justifies the regulatory action at issue and "do[es] not require compensation," *id.* at 1026; *see also Roberts*, 2018 WL 3997979, at *3-4.

The plaintiffs also misread *Andrus v. Allard*, in arguing that because the State has prevented them from possessing their rapid fire trigger activators in Maryland, the State has effected a taking. On the contrary, the Court in *Andrus* explained that "where an owner possess a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is

Amendment rights, which they alleged included the right to maintain proficiency in firearm use at a gun range. Here, the plaintiffs have not alleged that the Law violates their Second Amendment rights.

not a taking, because the aggregate must be viewed in its entirety." 444 U.S. at 65-66. Thus, in that case, although the commercial ban on the sale of protected bird artifacts "prevent[ed] the most profitable use of the [challengers'] property," the government had not effected a taking because the challengers still retained the less valuable rights to possess and transport the goods. *Id.* at 66. Here, like the plaintiffs in *Andrus*, the plaintiffs retain property rights in the personal property that is the subject of the regulation, even though they can no longer possess them in Maryland. In *Andrus*, the government was not compelled "to regulate by purchase," *id.* at 65 (emphasis omitted), where it sought to protect endangered species by severely curtailing the challengers' property rights in their protected bird artifacts. Certainly, then, the State also need not regulate by purchase in order to exercise its police power to ban possession of inherently dangerous devices that pose grave risks to public safety.

Finally, the plaintiffs misinterpret *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the Supreme Court rejected a takings claim where the challengers had purchased or erected their breweries before a state law prohibiting the manufacture and sale of alcoholic beverages was enacted. The Court ruled 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, in any sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* 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"). The plaintiffs attempt to distinguish *Mugler* on the ground that the challenged law "did not involve a

seizure of the brewery itself" (ECF 23, Pls.' Opp'n at 11), but, of course, Maryland has not seized rapid fire trigger activators from the plaintiffs or required that they be forfeited to the State. Like the ban on the sale and manufacture of beer at issue in *Mugler*, the State's ban on the possession of rapid fire trigger activators, enacted to protect the public from inherently dangerous devices, is not a compensable taking.

Moreover, here, as in *Mugler*, "the State did not . . . give any assurance, or come under an obligation, that its legislation upon [the] subject [of the regulation] would remain unchanged." 123 U.S. at 669. As described above, the State has exercised its police power to ban devices that function to modify a firearm to mimic a type of weapon "the ownership of which would have the same quasi-suspect character [the Supreme Court has] attributed to owning hand grenades," *Staples v. United States*, 511 U.S. 600, 611-12 (1994). *See Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 411 (4th Cir. 2007) (rejecting in takings challenge the contention that the plaintiff had "a legitimate expectation of [video gaming's] continued legality," particularly "in the case of a heavily regulated and highly contentious activity . . . [in which] the pendulum of politics swings periodically between restriction and permission"); *Akins v. United States*, 82 Fed. Cl. 619, 624 (Fed. Cl. 2008) (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). Machine guns have long been subject to heavy government regulation, and the federal government has in the past determined that devices that modify firearms to achieve rapid fire constitute machine guns. *See Akins*, 82 Fed. Cl. 619. In their

declarations, the plaintiffs have all acknowledged that they purchased their rapid fire trigger activators in the years *after* the Bureau of Alcohol, Tobacco, Firearms, and Explosives changed its interpretation of whether the device at issue in *Akins* constituted a machine gun under federal law. (*See* ECF 23-1, 23-2, 23-3, 23-4.) Thus, they cannot plausibly claim that they had legitimate expectations in the continued legality of the similar devices they purchased that fall within the same heavily-regulated area.[3]

As the Supreme Court stated in *Mugler*, "the supervision of the public health . . . is a governmental power, continuing in its nature, and to be dealt with as the special exigencies of the moment may require." 123 U.S. at 669 (internal citation and quotation marks omitted). Here, in the wake of the nation's deadliest mass shooting, Maryland exercised its police power to ban devices like those used in the Las Vegas shooting that enabled the shooter to fire off hundreds of rounds in mere minutes and that pose significant public safety risks. Given the nation's long history of regulating machine guns and the undisputed character of the banned devices as modifying firearms to allow them to mimic

[3] Nor can the plaintiffs assert any investment-backed expectation in continuing to possess these devices, given that they function to allow semi-automatic firearms to mimic heavily-regulated machine guns and were relatively inexpensive to purchase and legal to possess because of a loophole in federal and State regulatory regimes. *See* 83 Fed. Reg. at 13,444 (the ATF recognizing that "the inventor and manufacturer of the bump-stock-type devices used in the Las Vegas shooting has attributed his innovation of those products specifically to the high cost of fully automatic firearms"); ECF 20, Br. of *Amicus Curiae* Giffords Center to Prevent Gun Violence in Support of Defendant and Dismissal at 8-15; *see also Holliday*, 493 F.3d at 411 n.2 (under a partial-takings analysis, plaintiff's "participation in a traditionally regulated industry greatly diminishes the weight of his alleged investment-backed expectations).

the rate of fire of automatic weapons, the State's exercise of its police power does not constitute a taking.[4]

II. MARYLAND'S BAN ON DANGEROUS RAPID FIRE TRIGGER ACTIVATORS IS NOT A RETROACTIVE ABROGATION OF VESTED RIGHTS.

The considerations discussed above also compel dismissal of the plaintiffs' claims that the State's ban on rapid fire trigger activators is a violation of the Maryland Constitution. As discussed in the defendant's opening memorandum, "it is a fundamental principle" of State law 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 Educ.*, 45 Md. App. 626, 633 (1980) (quoting *Jacobson*

[4] For these same reasons, the plaintiffs heavy reliance on *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), *aff'd*, No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018), is misplaced. In *Duncan*, the district court preliminarily enjoined California's ban on the possession of magazines holding more than 10 rounds of ammunition. The district court's finding that the plaintiffs were likely to succeed on their takings claim, however, stemmed from the court's decision that large-capacity magazines were protected under the Second Amendment and were not, as the state had deemed, "a nuisance." *Id.* at 1137 (noting the Supreme Court's observation that "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials'" (quoting *Staples*, 511 U.S. at 610 (alteration in *Duncan*)). The district court went on to conclude that "[a]s the law-abiding owner relinquishes his magazine, he or she may also forfeit the self-defense peace of mind that a large capacity magazine had instilled. As in other cases where constitutional rights are likely chilled, the balance of hardships weighs in the citizen's favor." *Duncan*, 265 F. Supp. 3d at 1138. These Second Amendment interests are not implicated here. The plaintiffs have not alleged that the State's ban on rapid fire trigger activators chills their Second Amendment rights, or even that the banned devices are useful for in-home self-defense. Moreover, as the Ninth Circuit panel's dissenting judge persuasively explained, because the current owners of the magazines could transport them out of state and retain ownership of them, the state had not effected a physical appropriation of the magazines, and the record lacked any evidence that the overall economic impact of the ban constituted a regulatory taking. *Duncan v. Becerra*, No. 17-56081, 2018 WL 3433828, at *5 (9th Cir. July 17, 2018) (Wallace, J., dissenting).

v. Massachusetts, 197 U.S. 11, 25 (1905)). Cases the plaintiffs cite in which the State divested owners of all benefits in their property rights and transferred those rights to another defined group are, thus, inapposite, because they do not involve the State's exercise of its police power to ban possession of inherently dangerous devices that pose significant risks to public safety.

Further, in *Muskin v. State Department of Assessments & Taxation*, 422 Md. 544 (2011) and *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604 (2002), the statutes at issue were found to act retroactively to abrogate vested rights because the property owners in those cases reasonably relied on their settled expectations in continuing to benefit from past transactions, *Muskin*, 422 Md. at 558, and had "a firm expectation for the future enjoyment" of the benefits conferred from owning the property, *id.* at 560. Here, in contrast, for the reasons described above, the plaintiffs had no reasonable expectation in the continued possession of inherently dangerous devices in Maryland that were designed to take advantage of a loophole in the laws banning machine guns.

Even where the State has completely deprived an individual of his or her property to further the State's interest in public safety, the Maryland appellate courts have found no constitutional violation. For example, in *Raynor v. Maryland Department of Health and Mental Hygiene*, 110 Md. App. 165 (1996), the Court of Special Appeals of Maryland held that the State's destruction of the plaintiff's pet ferret for public safety purposes was not a compensable taking where a public nuisance was abated, and there was no settled expectation to keep a wild animal free of government regulation that may result in its destruction. *Id.* at 188-93.

Further, in *Serio v. Baltimore County*, 384 Md. 373 (2004), although the Court of Appeals of Maryland held that an owner of firearms who was ineligible to lawfully possess them retained a property interest in those firearms, the Court did not remotely suggest that the ban on *possession* violated the State Constitution. Rather, the Court found that "[w]hen property has been physically appropriated by a governmental entity from a property owner, the government must 'justly' compensate the property owner," *Serio*, 384 Md. at 399, which in that case "may be realized through a court ordered sale of the firearms[,]" *id.* Here, not only has the State not physically appropriated the plaintiffs' personal property, but the plaintiffs are free to possess or sell their devices outside of Maryland.[5] They, thus, retain an economic interest in their property, even though, as in *Serio*, they cannot lawfully possess the banned devices in Maryland.

Moreover, the firearms at issue in *Serio* were not intrinsically illegal in character and were only unlawful to possess due to the plaintiff's status as a convicted felon. *See* 384 Md. at 396. Here, in contrast, the State has properly exercised its police power in determining that rapid fire trigger activators are illegal to possess because of their inherent dangerousness. Maryland law has long recognized that the State's broad police power encompasses the 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

[5] Regulatory efforts have reportedly increased the economic value of the devices banned by Maryland law. *See* Polly Mosendz, *Bump Stock Prices Soar After Trump Proposes Ban*, BLOOMBERG (Feb. 21, 2018), https://www.bloomberg.com/news/articles/2018-02-21/bump-stock-prices-soar-after-trump-proposes-ban

protection of those interests." *Davis v. State*, 183 Md. 385, 297 (1944). This "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.*

This Court should, thus, reject the plaintiffs' strained reading of Maryland law, under which the State 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 purchased before its inherent dangerousness became widely known to the general public.

III. THE STATUTE'S TERMS ARE NOT VOID FOR VAGUENESS.

The plaintiffs erroneously contend that a single provision of the General Assembly's definition of a rapid fire trigger activator—"the rate of fire increases"—is vague because it is broad enough to encompasses devices that do not modify or activate a trigger to achieve rapid fire, despite the clear and undisputed legislative purpose of the Law to ban devices that modify a firearm's rate of fire to mimic that of an automatic firearm.

At the outset, the plaintiffs do not allege that they own any such devices, and, thus, they lack standing to bring this vagueness challenge. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (requiring a "concrete and particularized" injury to establish standing). Nor do any of the plaintiffs allege that they are under any threat of enforcement of the Law in the way they purport to interpret it, and, thus, their claims are not ripe for review. *See Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 759 (4th Cir. 2013) ("The hardship prong of our ripeness analysis is 'measured by the immediacy of the threat and

the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law.'" (quoting *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992))).

Moreover, for the reasons discussed in the defendant's opening memorandum, the plaintiffs' vagueness challenge depends on a misinterpretation of the plain text of one statutory provision in the Law that is divorced from the statutory scheme as a whole and the statutory purpose. Both the Supreme Court and the Court of Appeals of Maryland have rejected the notion that a statute's terms should be read in isolation from the remainder of the statutory scheme and with no eye to the statute's clear purpose.

On the contrary, when construing a statute's text, the Supreme Court has instructed that courts "must . . . interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 134 S. Ct. 2259, 2266-67 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)); *see also King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("[W]hen deciding whether the language is plain, [a court] must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 133 (2000))); *Martin v. Lloyd*, 700 F.3d 132, 136 (4th Cir. 2012) ("[W]hen considering phrases or words within a statute, those phrases or words should be considered in the context of the statute as a whole."). Likewise, the Court of Appeals of Maryland has made clear that because '"[t]he meaning of the plainest language is controlled by the context in which it appears, . . . related statutes or a statutory scheme that fairly bears on the fundamental issue of legislative purpose or goal must also be considered.'" *Brown v. State*, 454 Md. 546, 551

(2017) (citation omitted); *see also Smith v. State*, 425 Md. 292, 299 (2012) ("[Legislative] purpose becomes the context within which [courts] apply the plain-meaning rule. Thus results that are unreasonable, illogical or inconsistent with common sense should be avoided with the real legislative intention prevailing over the intention indicated by the literal meaning." (quoting *Allen v. State*, 402 Md. 59, 75 (2007))).

This is because "the meaning of a statute's 'words or phrases may only become evident when placed in context.'" *King*, 135 S. Ct. at 2489 (quoting *Brown & Williamson*, 529 U.S. at 132)). For a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Abramski*, 134 S. Ct. at 2267 n.6 (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). As the Supreme Court has recognized, a court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *King*, 135 S. Ct. at 2489 (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

Here, the statutory context, structure, history, and purpose, together with "common sense," *Abramski*, 134 S. Ct. at 2267, all demonstrate that the challenged provision of the definition of a "rapid fire trigger activator," to be codified at § 4-301(m)(1)(ii) of the Criminal Law Article of the Maryland Code, is not susceptible to the broad definition proffered by the plaintiffs that they allege renders the provision vague.

The Law criminalizes the possession, transfer, or sale of a particular object—a "rapid fire trigger activator." The title of the banned device that the General Assembly

chose when enacting the statute "shed[s] light on legislative intent," *Canaj, Inc. v. Baker & Div. Phase III, LLC*, 391 Md. 374, 407 (2006), and, therefore, bears on the fundamental issue of legislative purpose or goal [that] must . . . be considered" when interpreting Maryland statutes, *Brown*, 454 Md. at 551. Thus, interpreting the definition of a "rapid fire trigger activator" to encompass devices that do not in any way modify or activate the function of a firearm's trigger to allow for rapid fire, as the plaintiffs purport to, would be directly contrary to the clearest indication of what the General Assembly intended to ban, particularly because the Law's definition of what constitutes a "rapid fire trigger activator" does not expressly include such devices, nor is there any language in the statute that would compel that result.

The General Assembly defined a "rapid fire trigger activator" in two ways. First, a "rapid fire trigger activator" is defined as "any 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 Md. Laws, ch. 252, to be codified at Md. Code Ann., Crim. Law § 4-301(m)(1). This more generic definition is informed by the second definition of a "rapid fire trigger activator," which further clarifies the scope of the ban by providing a list of specifically-enumerated devices that constitute a "rapid fire trigger activator." *Id.*, to be codified at § 4-301(m)(2). These devices, in one way or another, all modify or activate the firearm's *trigger* such as to allow the firearm to achieve rapid fire that mimics fully automatic fire either by increasing the speed at which the trigger is

activated[6] or the amount of ammunition expelled with each pull of the trigger.[7] The generic definition of a "rapid fire trigger activator," when properly read in "context and with a view to [its] place in the overall statutory scheme," *King*, 135 S. Ct. at 2489, obviously was intended to reach any device that, like the specifically-enumerated devices, is constructed to allow the firearm to achieve rapid fire that mimics automatic fire by modifying or activating the trigger function.

This interpretation is further consistent with the "undisputed" purpose of the Law (ECF 23, Pls.' Opp'n at 33), which is to regulate devices that "modif[y a] firearm's rate of fire to mimic that of an automatic firearm." Test. of Sen. Victor R. Ramirez in Support of S.B. 707 (Senate Judicial Proceedings Committee) (ECF 9-2); *see also* Senate Judicial Proceedings Committee, Floor Report, S.B. 707 (2018) (ECF 9-3) (explaining 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"). Given this context, it defies common sense to interpret the generic definition of a "rapid fire trigger activator" to extend to devices that the plaintiffs acknowledge are not "attached to or serve to operate the trigger at any increased rate" nor

[6] A "bump stock," for example, "means 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." 2018 Md. Laws, ch. 252, to be codified at Crim. Law § 4-301(f).

[7] A "burst trigger system," for example, "means 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 Md. Laws, ch. 252, to be codified at Crim. Law § 4-301(g).

"are in anyway akin to, or function like," the specifically-enumerated banned devices. ECF 1, Compl. ¶ 64.

Even divorced from the statutory context, structure, and purpose, nothing in the text of the challenged provision supports, much less compels, the plaintiffs' interpretation of the Law's scope. The express language of the generic definition refers to devices that are "constructed so that, when installed in or attached to a firearm" a specific result occurs—"the rate at which the trigger is activated increases; or . . . the rate of fire increases." The use of "so that" indicates that the resulting increased rate is the "purpose" of the device's construction. *See* Webster's II New Riverside Univ. Dict. (defining use of "so that" to mean "in order that," which is defined as "for the purpose of"). The language, thus, makes plain that the resulting increase occurs because of how the device itself was constructed to impact the firearm, independent of a particular user's ability to fire off a faster shot by more rapidly pulling the trigger or loading the firearm. Notably, the generic definition of a "rapid fire trigger activator" does not make any mention of or depend in any way on the *user* of the firearm; that is to say, a "rapid fire trigger activator" is not expressly defined to mean any device "constructed so that, when installed in or attached to a firearm" a user can increase the rate at which he or she loads or fires the weapon.

This omission is critical, because the plaintiffs' incorrect reading of the statute relies implicitly on the impact that a "rapid fire trigger activator" has on the *user's* potential to more rapidly fire or load a firearm when using a device that does not itself impact the firearm's trigger. (*See* ECF 1, Compl. ¶ 62 (alleging statute 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 . . . 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"); *id.* ¶ 63 (alleging definition could include "revolver speed loaders, revolver speed strips and revolver moon clips, all of which permit a user to more rapidly reload a revolver and thus potentially increase the 'rate of fire' of the revolver"); ECF 23, Pls.' Opp'n at 30 (claiming statute is vague because "a device that helps one person fire faster than normal *for that person* may not make a bit of difference *for another person*" (emphasis in original)); *id.* at 31 (describing devices that allow user to more efficiently operate "a bolt which must be manually opened . . . [and] manually closed again for firing"); *id.* at 32 (referring to devices that "increase the potential rate of fire by making the firearm more controllable" for the user); *id.* at 32 (describing devices that "are designed to and do marginally increase the rate that a shooter can place a follow-up shot").)

Moreover, as described above, even if it were "ambiguous in isolation" as to whether the generic definition of a "rapid fire trigger activator" encompassed devices that merely increased the user's potential to fire follow-up shots or reload a firearm, the generic definition "is . . . clarified by the remainder of the statutory scheme," *Abramski*, 134 S. Ct. at 2267 n.6 (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)), which unambiguously extends only to devices constructed to modify a firearm's rate of fire to mimic that of an automatic firearm. *See King*, 135 S. Ct. at 2492 (where statutory language is ambiguous, courts "must turn to the broader structure of the [Law] to determine the meaning" of the statute at issue).

Further, unlike criminal prohibitions that have been found to be void for vagueness because they required "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," *United States v. Williams*, 553 U.S. 285, 306 (2008) (referring to vague terms such as "annoying" or "indecent"), a "rapid fire trigger activator" is defined by the Law without any reference to terms requiring subjective or speculative judgments.[8] Thus, even absent the obvious narrowing context of the Law as a whole, merely because the plaintiffs contend that the challenged language may be read to sweep in more conduct than the legislature intended does not render the statute vague. Rather, where a statute is capable of objective application, the potential risk that it may be enforced in a particular way is properly "the subject of an as-applied challenge." *Id.* at 302-03; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982) (explaining that even where "it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise" (quoting *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52 (1966) (alteration in *Vill. of Hoffman Estates*)); *Martin*, 700 F.3d at 137 ("A difference of opinion amongst judges or law enforcement does not make a statute unconstitutionally vague."); *Schleifer by Schleifer v. City of Charlottesville*, 159

[8] Although the plaintiffs contend that the "rate of fire" language "is wholly undefined by reference to any intelligible standard" (ECF 23 at 31), this is the same term used by ATF to explain that "bump-stock-type devices . . . are designed principally to increase the rate of fire of semi automatic firearms." 83 Fed. Reg. at 13,444. Other states have used it as well. *See, e.g.*, Cal. Penal Code § 16930(b) (defining a "multiburst trigger activator" to include "[a] manual or power-driven trigger activating device constructed and designed so that when attached to a semiautomatic firearm it increases the rate of fire of that firearm").

F.3d 843, 853 (4th Cir. 1998) ("Nullification of a law in the abstract involves a far more aggressive use of judicial power than striking down a discrete and particularized application of it.").

In any event, "[o]nly by taking a wrecking ball to a statute that can be salvaged through a reasonable narrowing interpretation," *Skilling v. United States*, 561 U.S. 358, 409 n.43 (2010), can the plaintiffs obtain the relief they truly seek—to gut entirely the criminal prohibition of bump stocks and other devices that modify a firearm's rate of fire to mimic automatic fire. Even if "[r]eading the statute to proscribe a wider range of offensive conduct" than clearly intended by the General Assembly "would raise the due process concerns underlying [a] vagueness challenge," this Court can "preserve the statute" *id.* at 408-09, by construing the definition of a "rapid fire trigger activator" to be codified at § 4-301(m)(1)(ii) narrowly to encompass only those devices that modify or activate a firearm's trigger to achieve rapid fire that mimics fully automatic fire. *See id.* (interpreting statutory prescription against "honest services" fraud narrowly to encompass only bribes and kickback schemes to avoid vagueness problems where there was "no doubt that Congress intended" the statute to extend at least to the narrowed scope of conduct).[9]

[9] The plaintiffs also argue that the phrase "a copy or a similar device" that follows the list of specifically-enumerated devices in the definition to be codified at § 4-301(m)(2) is susceptible to a vagueness challenge because those words should be read into the generic definition of a "rapid fire trigger activator" to be codified at § 4-301(m)(1). (*See* ECF 23, Pls' Opp'n at 33.) This is wrong for the simple reason that the words "a copy or a similar device" follow the specifically-enumerated devices and, thus, clearly were intended to relate to these specifically-enumerated devices. Thus, to the extent the plaintiffs' vagueness claim as to the definition to be codified at § 4-301(m)(1)(ii) survives the defendant's motion to dismiss, that has no bearing on the clear phrasing and purpose of "a

Finally, even if the plaintiffs' vagueness challenge to the statutory definition set forth in § 4-301(m)(1)(ii) survives the defendant's motion to dismiss, this Court should dismiss all of the plaintiffs' other claims because the remaining provisions of the Law are complete and capable of being executed in accordance with the legislative intent. *See* Md. Code Ann., Gen. Prov. § 1-210(a) ("Except as otherwise provided, the provisions of all statutes enacted after July 1, 1973, are severable."); *id.* § 1-210(b) (providing that a finding that "part of a statute is unconstitutional or void does not affect the validity of the remaining portions of the statute, unless . . . the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent").

CONCLUSION

The Court should dismiss the plaintiffs' complaint in its entirety with prejudice.

Respectfully Submitted,

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copy or a similar device" as those words follow the list of specifically-enumerated devices set forth in the definition to be codified at § 4-301(m)(2).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, et al.	*	
Plaintiffs,	*	
v.	*	**CIVIL NO. JKB-18-1700**
LAWRENCE HOGAN*, in his official capacity as Governor of Maryland*	*	
Defendant.	*	

* * * * * * * * * * * *

MEMORANDUM

I. Introduction[1]

On October 1, 2017, a gunman opened fire on a concert crowd in Las Vegas. In the span of barely ten minutes, the attacker unleashed hundreds of rounds of ammunition, killing 58 people and injuring more than 850. It was the deadliest mass shooting in the modern era. (Brief of Amicus Curiae Giffords Law Center to Prevent Gun Violence in Support of Def. at 2, ECF No. 13-1.) The shooter used semiautomatic rifles modified with devices known as "bump stocks," which enabled rapid fire approaching the rate of a fully automatic machine gun. (*Id*. at 2, 4.[2]) According to the Department of Justice,

> [o]rdinarily, to operate a semiautomatic firearm, the shooter must repeatedly pull and release the trigger to allow it to reset, so that only one shot is fired with each pull of the trigger. When a bump-

[1] In this Introduction, in order to set the context, the Court takes notice of certain background facts about which there appears to be no genuine issue.

[2] The Las Vegas shooter fired an estimated ninety rounds in ten seconds, while a fully automatic machine gun can fire approximately ninety-eight shots in seven seconds; by comparison, the rate of fire for an unmodified semiautomatic weapon is in the range of twenty-four rounds in nine seconds. (*See* Amicus at 4 (citing Larry Buchanan, et al., *What Is a Bump Stock and How Does It Work?*, N.Y. Times (Feb. 20, 2018), https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html).) The addition of a bump stock to a semiautomatic firearm can therefore mean an increase of hundreds of shots per minute. *Id.*

> stock-type-device is affixed to a semiautomatic firearm, however, the device harnesses the recoil energy to slide the firearm back and forth so that the trigger automatically re-engages by 'bumping' the shooter's stationary trigger finger without additional physical manipulation of the trigger by the shooter. The bump-stock-type device functions as a self-acting and self-regulating force that channels the firearm's recoil energy in a continuous back-and-forth cycle that allows the shooter to attain continuous firing after a single pull of the trigger . . . .

Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms, & Explosives (ATF), Bump-Stock-Type Devices, 83 Fed. Reg. 13442, 13443 (proposed Mar. 29, 2018) [hereinafter "DOJ Notice of Proposed Rulemaking"] (cited in Amicus Brief at 2).

Machine guns have been regulated under federal law for decades. *See e.g.*, National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at I.R.C. §§ 5801–5872); Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended at 18 U.S.C. §§ 921–927, 929(a)). However, federal law does not classify most bump-stock-type devices as machine guns, despite their impact on a semiautomatic weapon's rate of fire. *See* DOJ Notice of Proposed Rulemaking, 83 Fed. Reg. at 13444–46 (summarizing the history of ATF decisions involving bump stocks). Largely unregulated, such devices are widely available, often for $200 or less. (Amicus Brief at 6.)

In the wake of the Las Vegas shooting, numerous elected officials called for changes to federal law. DOJ Notice of Proposed Rulemaking, 83 Fed. Reg. at 13446. Even the National Rifle Association publicly declared support for more stringent regulation. *See* Polly Mosendz & Kim Bhasin, *Bump-Fire Stock Prices Double, Thanks to the NRA*, Bloomberg (Oct. 5, 2017), https://www.bloomberg.com/news/articles/2017-10-05/bump-fire-stock-prices-double-thanks-to-the-nra (cited in Amicus Brief at 6 n.17). In early 2018, President Trump "directed the Department of Justice . . . 'to dedicate all available resources[,] . . . as expeditiously as possible, to propose for notice and comment a rule banning devices that turn legal weapons into

machineguns.'" DOJ Notice of Proposed Rulemaking, 83 Fed. Reg. at 13446 (quoting Exec. Office of the President, Memorandum for the Attorney Gen., Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices, 83 Fed. Reg. 7949, 7949 (Feb. 23, 2018)). Shortly thereafter, DOJ proposed a rule that would reclassify bump-stock-type devices as machine guns under federal law, *id.* at 13442, but no changes have yet been made.

The Maryland General Assembly moved more decisively. In April 2018, the democratically elected representatives of Maryland enacted Senate Bill 707, which made manufacture, sale, transport, or possession of "rapid fire trigger activators," including bump stocks and similar devices, unlawful in Maryland. 2018 Md. Laws ch. 252 (to be codified as amended at Md. Code Ann., Crim. Law §§ 4-301, 4-305.1, and 4-306) [hereinafter "SB-707"]. In crafting the law, legislators expressed concern about mass shootings, the lethality of firearms equipped with bump-stock-type devices, their unregulated status, and the danger to public safety. *See* S. Judicial Proceedings Comm. Floor Rep. on SB-707, at 4, 2018 Reg. Sess. (Md. 2018) (citing the Las Vegas shooting, lack of federal regulation, and the ability for such devices to enable "rates of fire between 400 to 800 rounds per minute"); Testimony of Sen. Victor R. Ramirez in Support of SB-707 at 2, S. Judicial Proceedings Comm., 2018 Reg. Sess. (Md. 2018) ("[T]here is no reason someone should be making a semi-automatic weapon into an automatic weapon[.] [W]ith the ban o[n] rapid fire trigger activators[,] we can . . . sav[e] . . . innocent lives, and minimiz[e] the magnitude of tragic events such as the Las Vegas shooting.") Seven other states similarly moved to restrict bump-stock-type devices. (Amicus at 11 n.33 (referring to laws in Connecticut, Delaware, Florida, Hawaii, New Jersey, Rhode Island, and Washington).)

In this case, a putative class action filed on June 11, 2018, Plaintiffs seek to invalidate SB-707's restrictions on bump stocks and similar devices. Plaintiff Maryland Shall Issue, Inc.

(MSI), a non-profit membership organization "dedicated to the preservation and advancement of gun owners' rights in Maryland," asserts claims on its own behalf, and on behalf of its members and others similarly situated. (Compl. ¶ 8, ECF No. 1.) Four individual MSI members are also named as individual plaintiffs. (*Id.* ¶¶ 9-12.) Plaintiffs have sued Governor Larry Hogan in his official capacity, alleging that SB-707 violates their constitutional rights under the Federal and State Constitutions. (*Id.* ¶ 3.) The Complaint puts forward five counts: a violation of the Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states via the Fourteenth Amendment (Count I); a violation of the Takings Clause of the Maryland Constitution, Article III, § 40 (Count II); a violation of the federal Due Process Clause, because of the imposition of an impossible condition (Count III); a violation of the federal Due Process Clause, because of vagueness (Count IV); and a violation of Article 24 of the Maryland Constitution, because of the abrogation of vested property rights (Count V). (*Id.*)

Currently before the Court is Defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. (ECF No. 9.) The issue is fully briefed, and no hearing is required. *See* Local Rule 105.6 (D. Md. 2016). For the reasons set forth below, Defendant's motion will be granted as to all counts of the Complaint.

II. Factual Background

On April 24, 2018, Governor Hogan signed Senate Bill 707 ("the Act," or "SB-707") into law. (Compl. ¶ 13.) The Act makes it unlawful for any person to "manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator" or to "transport" such a device into the state. SB-707, sec. 2, § 4-305.1(a). Violation of the Act is a criminal misdemeanor subject to a term of imprisonment up to three years, a fine of up to $5,000, or both. SB-707, sec. 1, § 4-306(a).

The Act defines a "rapid fire trigger activator" to be "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." SB-707, sec. 1, § 4-301(M)(1). The term is defined to include "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." § 4-301(M)(2). These named devices are defined as follows:

- "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." § 4-301(F).
- "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." § 4-301(N).
- "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." § 4-301(K).
- "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." § 4-301(E).
- "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." § 4-301(G).

Finally, the Act exempts from the definition any "semiautomatic replacement trigger that improves the performance and functionality over the stock trigger." § 4-301(M)(3).

The Act contains an exception clause to permit certain individuals to continue to possess the otherwise prohibited devices in Maryland, provided that the individual:

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

SB-707, sec. 2, § 4-305.1(b). Most provisions of the Act went into effect on October 1, 2018. (Compl. ¶ 13.) The requirement that an individual have received "authorization" from the ATF to qualify for the exception does not go into effect until October 1, 2019. SB-707, sec. 3.

On the same day that the Act was signed into law, the ATF issued a "Special Advisory" on its website stating that "ATF is without legal authority to accept and process" applications for authorization under the Act. (Compl. ¶ 32 (quoting Special Advisory, Bureau of Alcohol, Tobacco, Firearms & Explosives, Maryland Law Restricting 'Rapid Fire Trigger Activators,' (Apr. 24, 2018) [hereinafter ATF Special Advisory], https://www.atf.gov/news/pr/maryland-law-restricting-rapid-fire-trigger-activators).) The Advisory declared that "[a]ny such applications or requests will be returned to the applicant without action." (*Id.* (quoting ATF Special Advisory).)

According to the Complaint, Plaintiff MSI is a non-profit organization that works to "educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public." (Compl. ¶ 8.) Its purpose is to "promot[e] the exercise of the right to keep and bear arms," and to conduct activities including "education, research, and legal action focusing on the Constitutional right to privately own, possess and carry firearms and firearms accessories." (*Id.*) MSI sues on its own behalf, alleging that SB-707 "undermin[es] its message and act[s] as an obstacle to the organization's objectives and purposes," and sues on behalf of its members, who "currently possess 'rapid fire trigger activators' which are effectively and totally banned by" the Act. (*Id.*) The individual Plaintiffs, Paul Brockman, Robert Brunger, Caroline Brunger, and David Orlin, are all Maryland residents and MSI members, each of whom is alleged to have lawfully owned one or more of the devices prior to the Act's effective date. (*Id.* ¶¶ 9–11.) Plaintiffs seek compensatory damages for the

loss of their banned devices, as well as declaratory and permanent injunctive relief to bar enforcement of the Act. (*Id.* ¶ 4.)

III. Standard for Dismissal 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In analyzing a Rule 12(b)(6) motion, the Court views all well-pleaded allegations in the light most favorable to the plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). Nevertheless, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "A pleading that offers 'labels and conclusions' or . . . 'naked assertion[s]' devoid of 'further factual enhancement'" will not suffice. *Iqbal*, 556 U.S. at 678 (alteration in original) (citation omitted) (quoting *Twombly*, 550 U.S. at 555, 557). The Court must be able to infer "more than the mere possibility of misconduct." *Id.* at 679. In addition, 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) (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)).

IV. Analysis

Although the Complaint alleges five counts, Plaintiffs have four main theories of relief:

- In Counts I and II, Plaintiffs argue that the Act is a per se taking without just compensation under the United States Constitution, as well as the Maryland Constitution, to the extent its Takings Clause follows federal law. (*See* Compl. ¶ 21 (citing *Litz v. Md. Dep't of Env't.*, 131 A.3d 923, 930 (Md. 2016) ("[T]he decisions of the Supreme Court on the Fourteenth Amendment are practically direct authorities [for construing Article III, § 40]."))).

- In Counts II and V, Plaintiffs put forward a separate per se takings theory under the State Constitution—that the Act retrospectively abrogates vested property rights in

violation of Article 24, which also constitutes a taking under Maryland law. (*See id.* ¶ 70 (citing *Dua v. Comcast Cable of Md., Inc.*, 805 A.2d 1061, 1076 (Md. 2002) ("A statute having the effect of abrogating a vested property right, and not providing for compensation, does 'authoriz[e] private property[]' to be taken . . . without just compensation (Article III, § 40). Concomitantly, such a statute results in a person . . . being 'deprived of his . . . property' contrary to 'the law of the land' (Article 24).")).)

- In Count IV, Plaintiffs argue that the Act is unconstitutionally vague, because its terms can be read to encompass a number of devices that have only "minimal" impact on a firearm's rate of fire and are otherwise functionally and operationally dissimilar to bump stocks and other devices named in the Act. (*Id.* ¶¶ 61–66.)

- In Count III, Plaintiffs argue that ATF's refusal to process applications and grant authorizations for continued lawful possession makes it "legally impossible to comply" with the Act's exception clause, thus imposing a "legally impossible condition precedent" that violates due process and cannot be severed from the rest of the Act. (*Id.* ¶¶ 55–57.)

The Court will address each of these claims in turn.

Before analyzing Plaintiffs' claims, however, the Court must first address a preliminary jurisdictional issue. According to the Complaint, Plaintiff MSI sues on its own behalf (organizational or "individual" standing) and on behalf of its members (associational or representational standing). (*Id.* ¶ 8.) However, MSI does not allege a direct harm to itself sufficient to support standing in a non-representational capacity. A plaintiff's standing to sue in federal court is "an integral component of the case or controversy requirement" of Article III, implicating the court's subject matter jurisdiction. *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). "Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). The first requirement to establish standing is that a plaintiff shows that it has suffered an injury in fact to a legally cognizable interest that is "concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Here, the only direct harm MSI alleges to support standing in its non-representational, organizational capacity is that the Act "undermin[es] [MSI's] message and act[s] as an obstacle

to the organization's objectives and purposes." (Compl. ¶ 8.) In short, MSI disagrees with the policy decisions of the Maryland Legislature embodied in SB-707, which are inconsistent with MSI's own policy objectives. To the extent this is an "injury" at all, it is neither concrete, nor particularized. "[A] mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient [to establish standing]." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Therefore, MSI lacks standing to bring claims on its own behalf. Accordingly, in evaluating the motion to dismiss, the Court will only consider MSI's allegations as to harms suffered by its individual members.

A. Takings Claim (Counts I and II)

Plaintiffs allege that SB-707 effects a "per se taking," because it bans the manufacture, sale, transfer, transport, possession, purchase, or receipt of rapid fire trigger activators without compensation. (Compl. ¶¶ 14, 18, 20–27, 49, 52.) The Court will first address this theory under the federal Takings Clause, and under Maryland's Taking Clause, Art. III, § 40, to the extent its protections are analogous to its federal counterpart. *Litz*, 131 A.3d at 930.

i. The Act regulates rapid fire trigger activators as contraband, a legitimate exercise of the state's traditional police power to regulate for public safety.

Plaintiffs argue that any ban on possession of personal property is a taking requiring payment of just compensation, no matter how dangerous or threatening the property might be to public safety. (Opp'n Mot. Dismiss at 7–8, 11–12, ECF No. 23). Under Plaintiffs' theory, a state may ban the sale or particular uses of existing items of personal property, but a state may never ban possession of *any* item that is already lawfully owned. (*Id.* ¶ 16 ("Maryland is not free to declare existing lawfully owned and lawfully acquired property to be 'contraband' . . . .").)

This theory would entail a radical curtailment of traditional state police powers, one that flies in the face of a long history of government prohibitions of hazardous contraband.

A state's interest in "the protection of its citizenry and the public safety is not only substantial, but compelling." *Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017) (en banc). (*See also* Mot. Dismiss Mem. Supp. at 7, ECF No. 9-1.) In recognition of this and other important state police powers, the Supreme Court has routinely upheld property regulations, even those that "destroy[]" a recognized property interest, where a state "reasonably concluded that the health, safety, morals, or general welfare" would be advanced. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978); *see also Mugler v. Kansas*, 123 U.S. 623, 668 (1887) ("A prohibition . . . 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 . . . ."); *cf. Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 n.2 (4th Cir. 2007) (stating that regulations for the public good in heavily regulated fields "per se do not constitute takings").

These principles are entirely consistent with the long history of state laws that criminalize, ban, or otherwise restrict items deemed hazardous under the police power. *See, e.g.*, Md. Code. Ann., Crim. Law §§ 4-303(a) (assault weapons), 4-305(b) (large capacity, detachable magazines), 4-402 to 4-405 (machine guns), and 4-503 (destructive, explosive, and incendiary devices, and toxic materials); Md. Code Ann., Crim. Law §§ 5-601(a) (controlled dangerous substances), 5-619(c) (drug paraphernalia), and 5-620(a) (controlled paraphernalia); Md. Code Ann., Crim. Law §§ 11-207(a)(4)–(5) (child pornography); Md. Code Ann., Envir. § 6-301 (lead-based paint); Md. Code Ann., Agric. § 9-402(6) (noxious weeds and exotic plants); Md. Code Ann., Pub. Safety § 10-104(a) (fireworks); *Kolbe v. Hogan*, 849 F.3d at 120 (assault weapons

and large capacity magazines); *see also Garcia v. Village of Tijeras*, 767 P.2d 355 (N.M. Ct. App. 1988) (pit bulls).[3] Plaintiffs argue that many existing and past bans were more limited in scope than SB-707, for example, because they banned sale, but not possession, or banned possession, but not in all circumstances. (Opp'n Mot. Dismiss at 11, 17–18.) This only suggests that legislatures may have been persuaded, for political or policy-based reasons, that narrower laws were warranted under past circumstances. In this case, the Maryland General Assembly concluded otherwise. Plaintiffs point to no authority holding such prior legislative concessions to be constitutionally mandated.

Plaintiffs also make much of the fact that, prior to the passage of SB-707, rapid fire trigger activators were "lawful property" in Maryland, "not contraband." (*Id.* at 16.) Although true, this point is irrelevant. Practically all products later defined as contraband were not contraband before the enactment of the law that named them as such. Rapid fire trigger activators used to be lawful in Maryland, but SB-707 makes them unlawful. This is a predictable and uncontroversial consequence of new criminal laws: they criminalize things that would not have been criminal but for the law. Ignoring this basic truth about the nature of criminal legislation, Plaintiffs suggest that states can pass and enforce contraband laws only with respect to items that were already defined as contraband (*id.* at 15), a circular argument leading to absurd results—nothing could be contraband unless it was already contraband. Under such an approach, public safety regulations would be permanently frozen in the past, and states would be inhibited

[3] Contraband laws are also a normal part of the regulatory landscape at the federal level. Although Congress lacks a broad police power to regulate for the general welfare, federal statues similarly criminalize, ban, and restrict contraband items, pursuant to Congress's enumerated powers. *See, e.g.*, Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (illicit drugs); Firearms Owners' Protection Act, 100 Stat. at 449 (machine guns); Child Pornography Prevention Act of 1996, Pub. L. 104-208, sec. 121, 110 Stat. 3009-26 (child pornography); *Akins v. United States*, 82 Fed. Cl. 619 (2008) (firearm accessory known as the Akins accelerator); 16 C.F.R. § 1500.18 (lawn darts and other hazardous toys).

from addressing new threats to the public, no matter how grave. The Constitution does not tie the hands of state governments to such crippling effect.

To the contrary, in the context of firearms specifically, the Supreme Court confirmed that our nation's "historical tradition of prohibiting" "dangerous and unusual weapons" is entirely consistent with the Constitution. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008); *see also United States v. Pruess*, 703 F.3d 242, 246 n.2 (4th Cir. 2012) (quoting *Heller*, 554 U.S. at 627). The Court concluded that the Constitution "does not protect those weapons not typically possessed by law abiding citizens for lawful purposes," like machine guns (which rapid fire trigger activators mimic), or "sophisticated arms" designed for modern warfare. *Heller*, 554 U.S. at 625, 627. In upholding Maryland's assault weapons ban, the Fourth Circuit, applying these principles, reasoned that:

> like their fully automatic counterparts, the banned assault weapons are firearms designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed. Their design results in a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns.

Kolbe, 849 F.3d at 125 (quotations and citations omitted). This rationale is equally applicable to SB-707's prohibition on rapid fire trigger activators, which are designed to enable a rate of fire approaching that of fully automatic guns. (Amicus Brief at 8–9.) *See also* DOJ Notice of Proposed Rulemaking, 83 Fed. Reg. at 13444 (describing the development of bump stocks as motivated by a desire for "affordable" alternatives to automatic weapons). The Maryland Legislature considered the ability of bump stocks and similar devices to inflict mass injury and mass casualties with great speed, as well as their use to horrific effect in Las Vegas. *See* S. Judicial Proceedings Comm. Floor Rep. at 4; Testimony of Sen. Ramirez at 1–2. It then

concluded that these devices pose such an unreasonable risk to public safety that they should be banned from Maryland.

Based on this legislative and constitutional history, the Court concludes that SB-707 falls well within Maryland's traditional police power to define and ban ultra-hazardous contraband.

ii. The Supreme Court did not reject all consideration of traditional state police powers in all Takings Clause analyses.

Plaintiffs insist that, under current Supreme Court precedent, "the Takings inquiry is completely independent of the State's police power." (Opp'n Mot. Dismiss at 3.) Primarily relying on the Court's decision in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), they argue that proper exercises of the police power cannot prevent a regulation from being a compensable taking. (Opp'n Mot. Dismiss at 7–8, 11, 14.) In Plaintiffs' view, a state's power to declare dangerous property to be contraband will always be constrained by an obligation to pay just compensation if possession is banned—in effect, states cannot completely ban any item of personal property, no matter how dangerous, and no matter how compelling the state's interest in doing so, without compensating all individuals in the state who happen to already own it. (Mot. Dismiss Mem. Supp. at 12 ("Taken to its logical conclusion, the plaintiffs' theory would require the state to pay compensation [for new prohibitions on] . . . yet-to-be-developed drugs, poisons, toxic materials, explosives and the like.").) Although the Court must construe factual allegations in Plaintiffs' favor, the Court need not accept their interpretation of the law. *Wag More Dogs*, 680 F.3d at 365. Here, Plaintiffs' reliance on *Lucas* overstates that case's conclusions.

Lucas does acknowledge an inherent tension in subjecting takings inquiries in their entirety "to unbridled, uncompensated qualification under the police power," because, at the extreme, all property rights could be destroyed under that rationale. 505 U.S. at 1014. However, the Supreme Court's answer to this conundrum is not to dismiss traditional police power

justifications entirely, but, rather to subject such justifications to a certain degree of scrutiny, depending on the nature of the taking alleged—physical or regulatory, real or personal property. In a limited number of contexts, the Court applies per se rules, under which the very nature of the state action qualifies as a categorical taking, irrespective of the asserted justification. *Id.* at 1015 ("We have . . . described [a limited number of] discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.").[4]

Outside of these categorical exceptions, the state's asserted justification for a regulation remains a relevant and important consideration. In *Lucas*, the Court reiterated this principle, noting that, although the language employed in takings analyses changed over time, the underlying principle remained consistent:

> The 'harmful or noxious uses' principle [employed in early cases] was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.

Id. at 1022–23; *see also Penn Cent. Transp. Co.*, 438 U.S. at 125 ("[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted[,] . . . this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests [without compensation]."); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests . . . .'"). The holding in *Lucas* is entirely consistent with these background principles. 505 U.S. at 1026, 1028.

[4] Recognized categories to which per se rules apply are discussed *infra*, Section IV.A(iii).

Of particular relevance to this case, *Lucas* distinguishes between real and personal property in discussing the extent to which the police power informs property rights and takings analyses:

> [O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; '[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power.' And *in the case of personal property*, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless . . . . *In the case of land*, however, . . . the notion . . . that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Id. at 1027–28 (emphases added) (citations omitted) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). The *Lucas* Court limited its skepticism of justifications based on the police power to those cases in which the State "eliminate[s] all economically valuable use" "*of land*." *Id.* (emphasis added). Simultaneously, the Court expressly recognized that personal property is held "subject to an implied limitation" greater than the implied limitation on real property and, under that limitation, interests in personal property occasionally "must yield to the police power." *Id.* Indeed, legitimate exercises of the police power may even render personal property "worthless." *Id.* *Lucas*, therefore, reaffirmed the appropriate and important role for the police power in property regulations in certain contexts, including many involving personal property. This is a far cry from the wholesale rejection of the police power that Plaintiffs attribute to *Lucas*.

At its broadest, *Lucas* might be read to suggest that this rationale limiting police power justifications extends to other contexts in which, like *Lucas*, a per se rule applies, but it extends no further. Plaintiffs attempt to characterize another landmark takings case, *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), as rejecting that limited reading of *Lucas* and extending its rationale to all takings cases. *Horne* did no such thing. Like *Lucas*, the *Horne* majority similarly reiterated the appropriate role of the police power in some property regulations. 135 S. Ct. at 2427 (distinguishing regulatory from physical takings in considering the police power, and holding that only physical takings apply equally to real and personal property alike). Therefore, even under the broadest reading of *Lucas*, the Court will not ignore the compelling nature of Maryland's interest in passing SB-707 *unless* Plaintiffs first plausibly allege a per se taking under a categorical rule recognized by the Supreme Court. As discussed below, Plaintiffs fail to do so.

iii. Plaintiffs fail to allege a taking under any of the per se theories recognized by the Supreme Court.

There are three categories of takings to which the Supreme Court has applied per se rules: (1) cases involving direct, physical appropriations (so-called "physical takings"), in which government takes title to or "physically takes possession of" real or personal property "for its own use," *see Horne*, 135 S. Ct. at 2425 (first quoting *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012); then quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002)); (2) cases in which a regulation "denies all economically beneficial or productive use of land," *see Lucas*, 505 U.S. at 1015; and (3) cases in which regulations compel a landowner to suffer "a permanent physical occupation of real

property," *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). SB-707 falls into none of these categories. [5]

The per se rules exemplified by *Lucas* and *Loretto* do not apply to this case, because, by their very terms, they are limited to real property. *See Lucas*, 505 U.S. at 1119, 1028 (describing its holding as pertaining to "owner[s] of real property" and "the case of land"); *id.* at 1015–16 (positioning the opinion as part of a line of land use cases involving, e.g., inverse condemnation, subsurface mining rights, and government-mandated easements); *Horne*, 135 S. Ct. at 2427 (construing *Lucas* to mean that "implied limitations" under the police power are "not reasonable in the case of land"); *Loretto*, 458 U.S. at 427 (applying a per se rule to "a permanent physical occupation of real property"); *cf. Lucas*, 505 U.S. at 1015 (discussing *Loretto* as aligned with past land-use cases involving airspace and a navigation servitude on a private marina). This reading is consistent with Fourth Circuit precedent, as well. *See Holliday Amusements Co.*, 493 F.3d at 411 n.2 ("*Lucas* by its own terms distinguishes personal property.").

Plaintiffs assert that the distinction between real and personal property was "soundly rejected" by the Supreme Court in *Horne*, such that all takings theories now apply to real and personal property alike. (Opp'n Mot. Dismiss at 8.) In Plaintiffs' reading, *Horne* effectively threw out a century or more of Takings Clause jurisprudence, obliterating the traditional distinctions between real and personal property, and between direct, physical appropriations and regulations. (*See id.* at 14 (arguing that pre-*Horne* cases did not "survive" as binding precedent); *see also* Mot. Dismiss Mem. Supp. at 12.) But, *Horne* never characterized its holding as overruling precedent. Plaintiffs' theory suggests the Supreme Court overruled not just a single case but decades of jurisprudence without ever expressly acknowledging that its holding

[5] Plaintiffs exclusively allege a *per se* theory. (Compl. at ¶¶ 49, 52.) They do not assert a regulatory taking under the ad hoc balancing test laid out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Accordingly, the Court will not evaluate their claim under that test.

represented a radical break from the past. This Court would decline to apply such a breathtaking sweep to *Horne* even if the Supreme Court had been silent as to the scope of its ruling; however, the Court plainly positioned its holding as leaving past approaches intact.

First, *Horne* traced the development of Takings Clause jurisprudence into two strands: direct government appropriations of property, which were the only kind of takings originally recognized; and regulatory takings, which were first acknowledged in early twentieth century cases. *Horne*, 135 S. Ct. at 2427. Then, the majority repeatedly limited its holding, that a per se rule applied to real and personal property alike, to the first strand—that is to "direct appropriations" or "government acquisitions of property" only. *Id.*; *see also id.* at 2425 (holding that a per se rule applied when the government "physically takes possession of an interest in property"). Far from claiming to overrule past cases, *Horne* positioned this holding as consistent with precedent, including *Lucas*: "The different treatment of real and personal property *in a regulatory case* . . . [does] not alter the established rule of treating *direct appropriations* of real and personal property alike." *Id.* at 2427–28 (emphases added). Finally, the Court acknowledged that, because the two strands are distinct, "[i]t is 'inappropriate to treat cases involving physical takings as controlling precedent for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Id.* at 2428 (quoting *Tahoe-Sierra Pres. Council*, 535 U.S. at 323). Thus, the Court made clear that its rejection of a distinction between real and personal property under the Takings Clause *only* applied to cases involving direct, physical appropriations. As such, the per se rules defined in *Lucas* and *Loretto* remain limited to real property. They do not apply to Maryland's ban on rapid fire trigger activators.

Plaintiffs have also failed to plausibly allege a per se taking under *Horne*'s direct appropriation rule. The challenged regulation in *Horne* constituted a physical taking because it

mandated that private property owners transfer title and possession of personal property directly to the government. *Id.* at 2424 ("The [challenged order] requires growers in certain years to give a percentage of their crop to the Government, free of charge. . . . [A government body] acquires title to the reserve raisins that have been set aside, and decides how to dispose of them in its discretion."). Plaintiffs argue that SB-707 "depriv[es] plaintiffs of physical possession of their property, just as the federal government in *Horne* physically deprived the plaintiff . . . of physical possession of the raisins." (Opp'n Mot. Dismiss at 8–9). That is, Plaintiffs claim that their rapid fire trigger activators have been "actually occupied or taken away," "directly appropriat[ed]," and "physically surrender[ed]," just like the raisins in *Horne*. (*Id.* at 8 (quoting *Horne*, 135 S. Ct. at 2427, 2429).) But, *Horne* was not a case about a regulation that burdened possession in a way that might be considered analogous to government confiscation of personal property; *Horne* was a case about *actual* government confiscation of personal property. Its holding places a critical emphasis on that fact. *Horne*, 135 S. Ct. at 2428 ("The reserve requirement . . . is a clear physical taking. Actual raisins are transferred from the growers to the Government. Title to the raisins passes to [a government entity]."). The Court acknowledged that an indirect regulation with the "same economic impact" on raisin growers would have been permissible, even though direct confiscation was not, because "[t]he Constitution . . . is concerned with means as well as ends." *Id.* It is undisputed in this case that SB-707 involves neither a confiscation of rapid fire trigger activators by the State of Maryland, nor a mandate for Plaintiffs to cede title to or possession of them to the State. Therefore, SB-707 does not effect a direct government appropriation of rapid fire trigger activators under *Horne*.[6]

[6] In a few places, the *Horne* majority implies that *Loretto*, which involved a law requiring a landowner to permit permanent physical occupation of its rooftop by a private third party, could be understood as a physical taking case. *See* 135 S. Ct. at 2426 (citing *Loretto*, 458 U.S. at 426–35); *id.* at 2427 (citing *Loretto*, 458 U.S. at 435). If so, *Horne* might suggest that *Loretto*'s rationale—in which a private third party is granted possession,

Thus, Plaintiffs do not assert a per se taking under any of the three discrete categories recognized by the Supreme Court. Instead, Plaintiffs' propose a new per se rule: that "[b]anning possession is a per se taking." (Opp'n Mot. Dismiss at 7.) No Supreme Court or Fourth Circuit precedent has ever adopted such a rule. Plaintiffs attempt to locate their rule in *Loretto*, arguing that banning possession is a per se taking because it is "so onerous that its effect is tantamount to a direct appropriation or ouster." (Opp'n Mot. Dismiss at 14.) However, this quoted language, which Plaintiffs repeatedly misattribute to *Loretto*, does not appear anywhere in that case.[7]

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rather than the government—could apply equally to personal property. At most, this might mean that a regulation mandating that title or possession of personal property be permanently transferred to a private third party would also qualify as a per se physical taking. However, any such implication was not essential to *Horne*'s holding, because *Horne*—which involved direct government confiscation of the raisins—was not that case. Because SB-707 does not purport to allocate permanent possession of Plaintiffs' rapid fire trigger activators to private third parties, this is not that case either.

Plaintiffs cite no case in which a burden on possession of personal property was found to be violate the Constitution *unless* direct government appropriation was involved. *See Nixon v. United States*, 978 F.2d 1269, 1285 (D.C. Cir. 1992) ("[T]he Act authorized [a government official] to assume complete possession and control of [the] presidential papers."); *see also Serio v. Baltimore Cty.*, 863 A.2d 952, 966 (Md. 2004) (police and County officials seized and retained a handgun in violation of due process). Thus, Plaintiffs' fail to identify any case law supporting their expansive reading of *Horne*.

[7] In what appears to be, at best, a gross oversight in Plaintiffs' legal research, the quoted language Plaintiffs misattribute to *Loretto*, about regulation "so onerous that its effect is tantamount to a direct appropriation or ouster," appears to have originated in a different opinion, never cited by Plaintiffs, and issued more than twenty years after *Loretto*: *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Even had Plaintiffs correctly attributed the language to *Lingle*, it would still fail to support their proposed per se rule.

Lingle, which involved a challenge to a Hawaii law limiting the amount of rent oil companies could charge for company-owned oil stations, was a regulatory takings case involving restriction of a commercial use of real property. *Id.* at 533. It neither created nor applied any per se rules, and it did not discuss personal property regulations at all. The misquoted language appears in a passage describing general developments in the history of Takings Clause jurisprudence, as a paraphrase of *Pennsylvania Coal v. Mahon*, the milestone case first recognizing the possibility that a land regulation not involving government appropriation might nonetheless be compensable if it "goes too far." *Id.* at 537 (quoting *Mahon*, 260 U.S. at 415). At most, the *Lingle* Court was thus expressing a general background principle about regulatory takings, but it did not put forth "tantamount to a direct appropriation or ouster" as a doctrinal test—not in general, and not as a test for identifying new per se rules. Rather, in the ensuing paragraphs, the *Lingle* majority explicitly recounted the three recognized tests courts should apply to non-physical, regulatory takings claims: the per se rule exemplified by *Lucas* (which this Court already concluded does not apply to this case); the per se rule exemplified by *Loretto* (which this Court similarly concluded does not apply here); and the multi-factor balancing test announced in *Penn Central* (which Plaintiffs do not allege as a theory of relief). *Id.* at 538–40. The primary purpose of the *Lingle* opinion was to resolve confusion about the appropriate doctrinal tests for takings, and whether a ban on personal property is "tantamount to direct appropriation" is not one of the tests it identified. *See id.* at 548.

Plaintiffs also imply that *Horne* extended the per se rule they incorrectly attribute to *Loretto* to the context of personal property. (Opp'n Mot. Dismiss at 14.) However, *Horne* never used the misquoted language, either; the

Plaintiffs' purported per se rule is thus rooted in a perplexing and unambiguous misstatement of the rule announced in *Loretto*—a rule that, as already discussed, does not govern this case. *See supra* pp. 16–18, 19 n.6.

Plaintiffs also rely heavily on *Andrus v. Allard*, 444 U.S. 51 (1979), in which the Supreme Court concluded that a ban on the sale of eagle feathers did not constitute a taking, as another ostensible source of their per se rule. Plaintiffs emphasize that, in that case, the challenged regulation "[did] not compel surrender of the artifacts," there was "no physical invasion" of them, and existing feather owners "retain[ed] the right to possess and transport their property." (Opp'n Mot. Dismiss at 9–10 (citing *Andrus*, 444 U.S. at 65–66).) According to Plaintiffs, *Andrus* and *Horne* together make possession "dispositive" of a per se taking. (*Id.* at 10.) However, Plaintiffs' reading flips the holding in *Andrus* on its head. *Andrus* held that, where a property owner retains possession, control, and non-sale disposition rights in personal property, a taking has not occurred. 444 U.S. at 66–68. *Andrus* never draws a bright line rule making the retention of all those rights—or of any one of them—dispositive in favor of finding a taking. Nor did *Horne* read *Andrus* to create such a rule. In *Horne*, the Court distinguished *Andrus* because, unlike the eagle feather regulation, "the raisin program requires physical surrender of the raisins and transfer of title" to the government. 135 S. Ct. at 2429. Possession alone was not the dispositive factor.[8] *Cf. Serio*, 863 A.2d at 966 (finding the plaintiff to retain

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majority never cites *Lingle* at all. *Horne*, 135 S. Ct. at 2424–33. It could not have adopted language it never used as the doctrinal test for per se takings of personal property.

There is one final irony in Plaintiffs' puzzling and mistaken reliance on this language from *Lingle*. In *Lingle*'s opening line, the Court remarked that "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined." *Lingle*, 544 U.S. at 531. This is precisely what Plaintiffs attempt to do with an out-of-context, misquoted phrase—improperly transform it into a "would-be doctrinal rule." Even if properly attributed, this Court would decline to take the bait.

[8] It is also worth noting that, unlike in *Horne*, Plaintiffs indisputably retain rights to possess, transfer, or use rapid fire trigger activators outside of Maryland. (Mot. Dismiss Mem. Supp. at 9, 10 n.6; Opp'n Mot. Dismiss

meaningful property rights despite a ban on personal possession). Unlike *Horne*, SB-707 does not require Plaintiffs to physically surrender their devices or transfer title to the government.

The only case providing support for Plaintiffs' theory that possession bans are per se takings is a recent Ninth Circuit case. *Duncan v. Becerra*, Civ. No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018), *aff'g* 265 F. Supp. 3d 1106 (S.D. Cal. 2017). Notably, that case affirmed, under an abuse of discretion standard, a district court decision that conflicts with binding Fourth Circuit precedent on crucial questions, including whether large-capacity magazines are protected by the Second Amendment and the scope of *Lucas*'s limitation on the police power. *Compare Duncan*, 2018 WL 3433828, at *1 (no abuse of discretion in finding that the Second Amendment protects large capacity magazines), *and id.* at *3 (affirming the district court's reliance on *Lucas* to reject California's police power justification for its regulation of personal property), *with Kolbe v. Hogan*, 849 F.3d at 137 (finding no Second Amendment protection for large-capacity magazines), *and Holliday Amusements Co.*, 493 F.3d at 411 n.2 (limiting *Lucas*'s dismissal of police power justifications to real property). A single case in a non-controlling jurisdiction that is inconsistent with binding authority on related legal questions is not enough to overcome the weight of authority against Plaintiffs' position.

Thus, reading all alleged facts in Plaintiffs' favor, Plaintiffs failed to plausibly allege a per se taking under any theory recognized in federal Takings Clause jurisprudence. Accordingly, Count I will be dismissed in full, and Count II will be dismissed insofar as it relies on federal law to establish a per se taking under the Maryland Constitution.

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at 26–27 (acknowledging but dismissing possible out-of-state uses).) However, the Court's conclusion that no taking has occurred does not depend on these out-of-state uses.

B. Abrogation of Vested Rights (Counts II and V)

Plaintiffs allege a separate per se theory under the Maryland Constitution. Plaintiffs argue that SB-707 "abrogate[es] a vested property right" in violation of Article 24's protection against "retrospective statutes," and that an Article 24 violation, in turn, constitutes a taking under Article III, § 40. (Compl. ¶¶ 68–73; *see also id.* ¶ 52.) Under Maryland law, "retrospective statutes are those that 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" (*Id.* ¶ 72 (quoting *Muskin v. State Dep't of Assessments & Taxation*, 30 A.3d 962, 969 (Md. 2011)).) According to Plaintiffs, SB-707 violates this rule because Plaintiffs have a "vested property interest in the possession of their devices," a right that was abrogated when SB-707 made future possession of those devices unlawful. (*Id.* at ¶ 68.)

The first problem with this theory is that it is not at all clear how SB-707's provisions can be understood to operate retrospectively. It is not as if SB-707 rendered Plaintiffs' past lawful purchases of rapid fire trigger activators to have been unlawful as of the date of purchase; nor did it retroactively impose the exception clause's authorization requirements. Such effects would have "increas[ed] . . . liability for past conduct," or "impair[ed] rights" and "impos[ed] new duties with respect to transactions already completed." *Muskin*, 30 A.3d at 969. By its terms, SB-707 operates on a purely prospective basis: passed in April 2018, it bans in-state possession after October 1, 2018, with the exception of authorization requirements that go into effect gradually, first in October 2018 and then in October 2019. SB-707, sec. 4. This statutory structure is not retrospective, as Plaintiffs define the term under Maryland law.

There is a second, even more fundamental flaw in Plaintiffs' theory. Plaintiffs provide no authority for the proposition that Maryland law recognizes, under Article 24, "vested" rights to possess tangible personal property like rapid fire trigger activators in perpetuity. The cases cited

by Plaintiffs concern vested rights to real property, contract rights, and previously accrued causes of actions—none pertains to personal property. *See Muskin*, 30 A.3d at 971 (reversionary rights in ground rent leaseholds); *Dua v. Comcast Cable of Md.*, 805 A.2d at 1078 (rights under pre-existing contracts); *id.* (accrued cause of action limited by a new statute of limitation).

Plaintiffs emphasize that Maryland law "may impose greater limitations" on the abrogation of vested property rights than federal law. (Compl. ¶ 71 (quoting *Muskin*, 30 A.3d at 968–69 (indicating that Maryland law may be broader than federal counterparts "under some circumstances")).) Even if so, that does not necessarily mean that Maryland's "vested rights" jurisprudence equally encompasses all property rights without regard for the nature of the property in question. To the contrary, the Maryland Court of Appeals, in discussing the scope of Article 24's protection of "vested" rights, made explicit that some categories of property—namely contract rights and real property—are more strongly protected than others. *See, e.g.*, *Muskin*, 30 A.3d at 972 ("[I]n the spectrum of vested rights recognized previously by this Court, [vested causes of action] are not as important as the vested real property and contractual rights which have almost been sacrosanct in our history."); *id.* at 974 (similarly emphasizing the central importance of "[r]eal property and contractual rights" as "the basis of economic stability"). Plaintiffs have not identified a single Maryland case suggesting that rights in tangible personal property can "vest" for the purposes of Article 24.

The Court therefore concludes that Plaintiffs' per se theory under Maryland law also fails.[9] Accordingly, Counts II and V will be dismissed.

[9] Plaintiffs also cite *Steuart v. City of Baltimore*, 7 Md. 500 (1855), for the proposition that bills passed by the Maryland Legislature that take property are void if they do not include a provision for compensation "being first paid." (Compl. ¶ 25.) In *Steuart*, the Court of Appeals concluded that no taking occurred where a plaintiff had already accepted payment and still remained "secure[] in the use and enjoyment of his property." 7 Md. at 516. It does not appear to announce a rule about the required remedy in the event a law *does* effect a taking but fails to provide for compensation by its own terms. However, because the Court concludes that SB-707 does not constitute a taking, the Court need not consider what the appropriate remedy would have been, had a taking occurred.

C. Void for Vagueness (Count IV)

Plaintiffs next argue that SB-707 is unconstitutionally vague in defining a rapid fire trigger activator as "any 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*." (Compl. ¶ 61 (emphasis added) (quoting § 4-301(M)(1)).) According to Plaintiffs, this definition can be read to encompass any number of firearm accessories that "allow for faster, controlled follow-up shots" and, therefore, might "increase, by some small measure, the effective 'rate of fire.'" (*Id.* at ¶ 62.) Plaintiffs cite muzzle weights, fore grips, recoil-reducing devices, and devices that redirect flash as items that could be covered by this reading of SB-707. (*Id.*) In addition, because the Act does not by its terms limit its scope to devices that operate on semiautomatic weapons, Plaintiffs further claim that accessories that "permit a user to more rapidly reload a revolver" could also be interpreted as minimally increasing the "rate of fire." (*Id.* at 63.) For these reasons, Plaintiffs argue that the Act fails to provide "fair notice of the conduct [it] proscribes" and risks "arbitrary and discriminatory law enforcement," in violation of due process. (*Id.* at ¶ 60 (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2015)).)

The Court cannot reach the merits of Plaintiffs' vagueness claim, because Plaintiffs failed to establish standing with respect to this count of the Complaint. Although Defendant's motion was filed as a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court may construe the motion as one filed under Rule 12(b)(1) when the Court's subject matter jurisdiction is implicated. *Hawkins v. Elaine Chao*, Civ. No. JKB-16-3752, 2017 WL 5158349, at *1 (D. Md. Nov. 7, 2017).

In mounting a pre-enforcement facial challenge to a criminal law, a plaintiff can establish constitutional standing by demonstrating (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest," and (2) a "credible threat of prosecution" under

the Act. *Hamilton v. Pallozzi*, 165 F. Supp. 3d 315, 320 (D. Md. 2016) (quoting *W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839 (4th Cir. 2012) (per curiam)), *aff'd*, 848 F.3d 614 (4th Cir. 2017); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (requiring "a realistic danger of sustaining a direct injury as a result of the statute's operation"). At the motion to dismiss stage, Plaintiffs bear the burden of alleging sufficient facts, considered in the light most favorable to them, to support subject matter jurisdiction. *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017). "When plaintiffs 'do not claim that they have ever been threatened with prosecution [or] that a prosecution is likely,' . . . they do not allege a dispute susceptible to resolution by a federal court." *Babbitt*, 442 U.S. at 298–99 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)).

Here, Plaintiffs do not allege any facts suggesting a "credible threat" that the Act will be enforced in accordance with Plaintiffs' broad reading. Plaintiffs do not claim to have been threatened with prosecution on the basis of their possession of the additional devices as to which SB-707 is allegedly vague. Nor do they allege that any state official with enforcement authority has made statements or taken actions from which the Court might infer intent to prosecute in such a manner. All Plaintiffs allege is that a literal reading of one clause of SB-707's definition of a rapid fire trigger activator, taken in isolation from the additional provisions that make up the definition section, might encompass devices that Plaintiffs themselves acknowledge are not "in anyway [*sic*] akin to" and do not "function like" the devices specifically named as "rapid fire trigger activators" in the Act. (Compl. ¶ 64.) In order for Plaintiffs to face a risk of "direct injury" from overbroad enforcement, *Babbitt*, 442 U.S. at 298, an enforcement agent would need to conclude that a "rapid fire trigger activator" includes accessories that, in Plaintiffs' own words, do not "attach[] to or serve to operate the trigger" (Compl. ¶ 64), and then actually

attempt to enforce the Act accordingly, without any superseding authority intervening. Plaintiffs simply have not alleged any facts suggesting that the threat of such enforcement rises above pure "speculation" and "conjecture." *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) (dismissing as "conjecture" the notion that police will routinely enforce the law unconstitutionally and as "speculation" the possibility that the plaintiff would be part of a traffic stop in future that would lead to an arrest and provoke the use of a chokehold).

Because Plaintiffs have not alleged facts from which the Court could infer a credible threat of prosecution, Plaintiffs lack standing to mount a pre-enforcement challenge on vagueness grounds. Accordingly, Count IV will be dismissed. Plaintiffs are free to return to the courts later should there be an actual record or imminent threat of enforcement on the grounds alleged.

D. Impossibility of Complying with the Exception Clause (Count III)

Plaintiffs' final claim is that SB-707 violates due process, because the ATF's position that it is "without legal authority" to process applications for authorization makes it legally impossible for Plaintiffs to comply with the Act's exception clause. (Compl. ¶ 34.) *See also* ATF Special Advisory. Plaintiffs further argue that the invalid exception clause cannot be severed from the rest of SB-707 under a "long-established" rule of statutory interpretation:

> [W]here the Legislature enacts a prohibition with an excepted class, and a court finds that the classification is constitutionally infirm, the court will ordinarily not presume that the Legislature would have enacted the prohibition without the exception, thereby extending the prohibition to a class of persons whom the Legislature clearly intended should not be reached.

(*Id.* ¶ 36 (quoting *State v. Schuller*, 372 A.2d 1076, 1083 (Md. 1977)).) Therefore, Plaintiffs conclude, SB-707 must be struck down in its entirety. (*Id.* ¶ 38.)

Assuming that ATF's announced position makes it completely impossible for any individual to obtain authorization prior to the 2019 deadline, Plaintiffs still fail to state a plausible claim for relief.[10] Even if it is impossible to access the exception in SB-707, it is *not* impossible to comply with the statute overall. The statute does not obligate current owners of prohibited devices to obtain ATF authorization; it obligates them not to possess rapid fire trigger activators within the state of Maryland, *unless* they obtain ATF authorization prior to the statutory deadline. §§ 4-305.1(a), (b). In the absence of authorization, Plaintiffs can fully comply with the statute by moving, storing, or selling their devices out of state, or by destroying them. Plaintiffs offer no facts suggesting any of these alternative means of compliance is impossible.

A comparison to *Hughey v. JMS Dev. Corp.*, relied on by Plaintiffs, is instructive. In *Hughey*, the Eleventh Circuit dissolved an injunction against defendant JMS under the citizen suit provision of the Clean Water Act (CWA), because it concluded that compliance with the CWA was impossible under the circumstances. 78 F.3d 1523, 1530 (11th Cir. 1996). The substantive provision at issue imposed a "zero discharge" standard for rain water runoff on JMS, unless the discharge was made in accordance with the terms of a permit issued under EPA authority. *Id.* at 1524–25. In JMS's case, the Georgia Environmental Protection Division (EPD) would have had to issue such a permit, because the EPA had previously designated EPD as the exclusive authority to administer the program within Georgia. *Id.* at 1525. At the time JMS was in operation, JMS could not obtain a federal permit because of the grant of exclusive authority to

[10] The impossibility of obtaining authorizations is not a foregone conclusion. The authorization requirement does not go into effect for another eleven months, SB-707, sec. 3, and, at the time the Special Advisory was issued, ATF was actively reconsidering the legal status of bump stocks and similar devices under federal law. *See* DOJ Notice of Proposed Rulemaking, 83 Fed. Reg. at 13442. As yet, no final decision has been announced. Therefore, it is not beyond the realm of possibility that the ATF might alter its position at some point before the statutory deadline expires. However, because all facts and inferences must be construed in Plaintiffs' favor at this stage, the Court assumes that ATF authorization will be impossible to obtain for the purposes of this analysis.

EPD, but EPD permits were not yet available. *Id.* at 1525–26. However, the permit's unavailability, on its own, did not render compliance impossible. In addition, the evidence was "uncontroverted" that compliance with a zero-discharge standard for rain water was factually impossible under any circumstance, because "whenever it rained[,] . . . some discharge was going to occur." *Id.* at 1530. JMS "could not stop the rain water that fell on [its] property from running downhill, and [in fact] nobody could." *Id.* Importantly, JMS could not even "abate the discharge . . . by ceasing operations." *Id.* Therefore, the mere fact that a permit to access the statutory exception was unavailable was not enough to render compliance impossible. It was the combination of a legally unavailable permit alongside the factual impossibility of achieving substantive compliance through any other means, including halting operations entirely. The contrast to this case is plain: while it may be impossible for Plaintiffs to access the exception, substantive compliance remains fully within Plaintiffs' control. To comply, all they need to do is move the banned devices out of state or get rid of them altogether.

In other cases cited by Plaintiffs, the unavailability of an exception itself created a constitutional problem. *See, e.g.*, *Broderick v. Rosner*, 294 U.S. 629, 639, 647 (1935) (holding that the impossibility of fulfilling the requirements of an exception permitting New Jersey courts to exercise jurisdiction violated the Full Faith and Credit Clause); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (enjoining ordinances preventing access to gun ranges, where the City mandated range training as a condition of lawful handgun possession, and, therefore, such access implicated Second Amendment rights).[11] As discussed *supra*, Plaintiffs have failed to

[11] Plaintiffs also cite *United States v. Dalton*, 960 F.2d 121 (10th Cir.1992), but *Dalton*'s reasoning, which is non-binding on this Court in any event, does not extend to this case either. First, the statutes at issue in *Dalton* are distinguishable. In that case, the defendant was convicted of violating provisions of the Internal Revenue Code criminalizing possession of an unregistered machine gun and failure to register a machine gun. I.R.C. §§ 5861(d), (e). The Tenth Circuit reversed the convictions after concluding that, for both statutes, the central conduct that was criminalized was a failure to register, but registration was legally impossible under a later statute. *Id.* at 122, 124 (finding that the inability to register the gun was "undisputed," and that "the failure to register is a fundamental

establish a plausible claim under any of their other constitutional theories. None of the Court's conclusions in dismissing those constitutional claims predicated the constitutionality of SB-707 on the existence of an accessible exception clause. In short, the factual impossibility of obtaining authorization for continued lawful ownership in Maryland presents no constitutional problem in this case; nor have Plaintiffs alleged that the exception clause is itself dependent on any constitutionally suspect classification. Therefore, the exception clause is not invalid.

Plaintiffs' remaining arguments about severability need not be addressed, because there has been no threshold finding that any provision of the law is unconstitutional or otherwise invalid. *See O.C. Taxpayers for Equal Rights, Inc. v. Mayor & City Council of Ocean City*, 375 A.2d 541, 551 (Md. 1977) (holding that a voting restriction contained an "invalid exception" that violated equal protection before considering severability); *Schuller*, 372 A.2d at 1082, 1083–84 (first concluding that an exception to an anti-picketing statute was "constitutionally infirm" for violating freedom of speech and equal protection and then finding that it could not be severed). Having concluded that SB-707's exception clause is not invalid, the Court need not consider whether it would be severable.[12]

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ingredient of [the I.R.C. provisions]"). However, all parties agreed that there would have been no ground for objection had the defendant been tried and convicted for violating the later statute, 18 U.S.C. § 922(*o*), which criminalized possession, rather than failure to register. *Dalton*, 960 F.2d at 123. *Dalton* is thus limited to the specific statutory scheme under the I.R.C., which "clearly evince[d] Congress's intent that the Act regulate machineguns through a proper exercise of the taxing power," rather than through an outright ban. *Id.* at 124.

Second, and more importantly, *Dalton* is a post-conviction challenge, not a pre-enforcement suit. The defendant sought relief from a specific criminal penalty imposed under specific circumstances. Here, Plaintiffs seek to invalidate SB-707's statutory scheme *in toto*. Although the Tenth Circuit reversed the convictions, nothing in *Dalton* even remotely suggests that the underlying prohibition on possession was invalid or that the defendant therefore retained a right to possess the firearm in question—which is ultimately what Plaintiffs seek here.

[12] Although the Court need not reach the severability question, there are a few aspects of Plaintiffs' argument that warrant comment. Plaintiffs seem to read SB-707's exception clause as evidence of a clear intent on the part of the Maryland Legislature to exempt an entire class of existing owners—or at least some of them—from the prohibition on possession of rapid fire trigger activators. (*See* Compl. ¶¶ 33, 36–37.) However, the design of the statute's exception clause does not support that conclusion.

Had the Legislature intended to guarantee a path to continued lawful possession, it could have followed the example of past Maryland firearms regulations and crafted either a straightforward grandfather clause excepting all

Accordingly, Count III will be dismissed.

V. Conclusion

For the foregoing reasons, an order shall enter granting Defendant's motion to dismiss (ECF No. 9) as to all counts of the Complaint. Plaintiff MSI, in its non-representational capacity, lacks standing to pursue relief on its own behalf. Accordingly, it will not be permitted to bring claims in that capacity. As to Plaintiffs' remaining claims, Count IV of the Complaint will be dismissed under Federal Rule of Civil Procedure 12(b)(1), and Counts I, II, III, and V will be dismissed under Federal Rule of Civil Procedure 12(b)(6).

DATED this 15th day of November, 2018.

BY THE COURT:

/s/

James K. Bredar
Chief Judge

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lawful purchases prior to a certain date, *see, e.g.*, Md. Code Ann., Crim. Law § 4-303(b)(2) (exception to assault long gun ban for licensed dealers in lawful possession before October 1, 2013), or a registration or authorization requirement involving a state agency to whom the Legislature could have delegated the requisite authority, *see, e.g.*, § 4-303(b) (exception clause in assault pistol ban requiring registration with the Maryland State Police); § 4-403(c)(1) (same requirement in machine gun regulation). Instead, the exception scheme as enacted made continued lawful possession contingent on the independent legal and policy decisions of a federal agency over which Maryland has no control. Furthermore, at the time SB-707 was enacted, the very federal agency it placed in charge of authorization was actively reconsidering the status of bump stocks and similar devices under federal law, including a proposal to redefine them as machine guns subject to stringent, existing regulations. DOJ Notice of Proposed Rulemaking, 83 Fed. Reg. at 13442. Because the status of such devices was, at best, unsettled at the time SB-707 was passed, it seems reasonably foreseeable that ATF might have decided to deny every single application received as a matter of federal policy or of binding federal law. The Court fails to see how such a result—with the same practical effect for Maryland device-owners as the current ATF position—would be inconsistent with the statute. Contrary to Plaintiffs' argument, it is not at all clear from the structure of the exception procedure that SB-707 embodied a clear legislative intent that any existing owner be entitled to continued lawful possession of rapid fire trigger activators in Maryland.

Finally, even assuming, *arguendo*, that there might be an independent ground for objection based on the formal distinction between ATF processing but denying each and every application and ATF refusing to process any applications at all, a suit against the State of Maryland is not the proper vehicle for relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, et al.	*	
Plaintiffs,	*	
v.	*	**CIVIL NO. JKB-18-1700**
LAWRENCE HOGAN*, in his official capacity as Governor of Maryland*	*	
Defendant.	*	

* * * * * * * * * * * *

ORDER

For the reasons stated in the foregoing memorandum, it is hereby ORDERED:

1. Plaintiff Maryland Shall Issue (MSI) lacks standing to pursue relief on its own behalf, and, accordingly, all of the claims brought in its organizational, non-representational capacity (i.e., its "individual" capacity) are DISMISSED.
2. As to all Plaintiffs, Defendant's Motion to Dismiss (ECF No. 9) is GRANTED as to all counts of the Complaint on the following bases:
    - Construed as a motion under Federal Rule of Civil Procedure 12(b)(1), the motion is GRANTED as to Count IV of the Complaint; and
    - Construed as a motion under Federal Rule of Civil Procedure 12(b)(6), the motion is further GRANTED as to all remaining counts of the Complaint (Counts I, II, III, and V).
3. This case is DISMISSED.
4. The Clerk is directed to CLOSE THIS CASE.

DATED this 15th day of November, 2018.

BY THE COURT:

/s/

James K. Bredar
Chief Judge

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**

NOTICE OF APPEAL

Notice is hereby given that all plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on the 16th day of November, 2018.

Respectfully submitted,

HANSEL LAW, PC

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of December, 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/
Cary J. Hansel