No. 20-___

IN THE

Supreme Court of the United States

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

Petitioners,

v.

LAWRENCE HOGAN, in his capacity of Governor of Maryland,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is about whether the Takings Clause of the Fifth Amendment and the Takings Clause and Due Process Clause of the Maryland Constitution protect lawfully acquired and lawfully owned personal property that the State legislature subsequently decided to ban totally. In *Horne v. Dep't of Agric.*, 135 S.Ct. 2419, 2427-28 (2015), this Court held that "direct appropriations of real and personal property" are treated "alike." Yet, in a published ruling broadly applicable to all types of personal property, the Fourth Circuit has ruled that this holding in *Horne* applies to personal property only if the regulation in question requires the owner to "turn over" the property to the government or a third party. The Fourth Circuit also construed the Maryland Constitution in such a way as to effectively eliminate any protection for lawfully purchased personal property. The court ignored petitioners' request to certify basic questions of Maryland property law to Maryland's highest court.

The questions presented are:

1. Whether the Fourth Circuit erred in ruling that this Court's holding in *Horne* that appropriations of personal property and real property must be treated "alike" under the Takings Clause applies *only* where the statute requires that the owner "turn over" the personal property to the government or a third party.

2. Whether the Fourth Circuit erred, under *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), *Elkins v. Moreno*, 435 U.S. 647 (1978), and *McKesson v. Doe*, --- S.Ct. ---, 2020 WL 6385692 (Nov. 2, 2020), in failing to consider whether to certify petitioners' Maryland constitutional claims to Maryland's highest court pursuant to a Maryland statute allowing such certifications.

PARTIES TO THE PROCEEDINGS

Petitioner Maryland Shall Issue, Inc., is a not-for-profit Maryland corporation. Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. The other petitioners are Paul Mark Brockman, Robert and Caroline Brunger, and David Orlin, who are individuals and members of Maryland Shall Issue. They were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondent is Lawrence Hogan in his official capacity as Governor of the State of Maryland. He was the defendant in the district court and defendant-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner Maryland Shall Issue, Inc., has no parent corporation and no publicly held company owns 10 percent or more of its stock. The remaining petitioners are individuals.

LIST OF RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), petitioners state that there are no "directly related" proceedings pending in this Court or in other state or federal court, as the term is defined by that Rule. Similar Takings Clause legal issues concerning possessory interests in property are presently pending before this Court in *Cedar Point Nursery v. Hassid*, No. 20-107, --- S.Ct. ----, 2020 WL 6686019 (cert. granted, Nov. 13, 2020).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Maryland Shall Issue, Inc., Paul Mark Brockman, Robert and Caroline Brunger, and David Orlin respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 963 F.3d 356 and reproduced at App.1a. The order denying rehearing en banc is reprinted at App.44a. The district court's opinion is reported at 353 F.Supp.3d 400, and is reproduced at App.45a.

JURISDICTION

The Fourth Circuit issued its opinion on June 29, 2020. Petitioners filed a timely petition for rehearing, which the court denied on July 27, 2020. On March 19, 2020, this Court issued its COVID-19 Order, stating that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." (Order List: 589 U.S.) (March 19, 2020). This petition is timely under that Order. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment, U.S. Const. Amend. 5, Section 1 of the Fourteenth Amendment, U.S. Const. amend. 14, §1, 2018 Md. Laws ch. 252, codified at MD Code,Criminal Law §§4-301(m), 4-305.1, and 4-306, MD Code, Courts and Judicial Proceedings,

§12-603, §24 of the Maryland Declaration of Rights and Article III, §40 of the Maryland Constitution are reproduced at App.88a-91a.

STATEMENT OF THE CASE

A. Statutory Background

1. On April 24, 2018, Maryland Governor Larry Hogan signed Senate Bill 707 ("SB-707") into law. SB-707 provides that a person may not "manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator" in Maryland. MD Code, Criminal Law, §4-305.1(a). (App.89a). SB-707 bans 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." MD Code, Criminal Law, §4-301(m)(2). (Id.). In addition to these specific devices, SB-707 has a catch-all provision that bans any "rapid fire trigger activator," which is defined 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." MD Code, Criminal Law, §4-301(m)(1). (Id.).

The court of appeals construed these provisions to encompass devices that "increase the rate at which the firearm is capable of firing." (App.12a) (emphasis omitted). The law thus applies to devices attached to any firearm and covers any increase of the "rate of fire," no matter how slight. Violation of these provisions is a criminal misdemeanor subject to a term of imprisonment up to three years, a fine of up to $5,000, or both. MD Code, Criminal Law, §4-306(a). (App.90a). SB-707 became effective October 1, 2018.

In their class action complaint, the petitioners did not challenge the power of the State to ban "rapid fire trigger activators." Rather, petitioners sought "just

compensation" for the forced dispossession of their previously legal private property which they had lawfully purchased and possessed prior to the enactment of SB-707. The individual petitioners and members of Maryland Shall Issue alleged that they legally owned one or more "rapid fire trigger activators" and thus had standing bring their claims for just compensation.

2. After Maryland enacted SB-707, the Federal Bureau of Alcohol and Tobacco ("ATF") issued new federal regulations amending 27 C.F.R. §478.11, to redefine "machine gun" to include "a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." Final Rule, Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018). The ATF Rule states that "persons in possession of bump-stock-type devices must destroy or abandon the devices." 83 Fed. Reg. at 66543. Prior to this Rule, the ATF had, "between 2007 and 2017," issued numerous approval letters to various manufacturers, finding that these devices were mere firearm accessories and thus unregulated by federal law. 83 Fed. Reg. at 66517-18.

The ATF Rule does not ban "binary triggers" or other devices that do not "harness[] the recoil energy" of a "semi-automatic firearm." 83 Fed. Reg. at 66534. SB-707 is broader, as it applies to devices attached to any firearm (not merely semi-automatics) and also specifically bans binary triggers and other devices that do not "harness the recoil energy" in this way. MD Code, Criminal Law §4-301(m)(2). (App.89a). Unlike the Maryland law, the ATF Rule also does not

encompass all devices that increase the "rate at which a trigger is activated or the rate of fire increases," concluding that "there is no rate of fire that can identify or differentiate a machinegun from a semi-automatic firearm." 83 Fed. Reg. at 66533.

The ATF's reinterpretation of "machinegun" remains embroiled in litigation. In *Guedes v. BATF*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S.Ct. 789 (2020), the D.C. Circuit, over the dissent of Judge Henderson, sustained a denial of the plaintiffs' motion for a preliminary injunction on the plaintiffs' APA claims. But, in so holding, the court confirmed that the possession of these devices prior to the effective date of the Rule was lawful and that the Rule was purely prospective. See *Guedes*, 920 F.3d at 18, 20, 35. A similar challenge to the ATF Rule is also now pending, *en banc*, in the Tenth Circuit in *Aposhian v. Barr*, 958 F.3d 969, *vacated and petition for rehearing en banc granted*, 973 F.3d 1151 (10th Cir. 2020). A challenge to the Rule is also pending in *GOA v. Barr*, No. 19-1298 (6th Cir.) (argued Dec. 11, 2019).

The destruction of property required by the ATF's reinterpretation has also been challenged as a taking in two cases consolidated for argument before the Federal Circuit. *The Modern Sportsman, LLC v. United States*, No. 20-1107 (Fed. Cir.); *McCutchen v. United States*, No. 20-1188 (Fed. Cir.) (argued Dec. 8, 2020). The issue in both cases is whether prior owners whose bump stocks were either destroyed or turned over to the ATF, as required by the Rule, were entitled to just compensation under the Takings Clause. See 83 Fed. Reg. at 66547 ("ATF estimates that the total, undiscounted amount spent on bump-stock-type devices was $102.5 million.").

B. Procedural History

Petitioners filed suit in federal district court alleging that the bans imposed by SB-707 constituted a "taking" under the federal Takings Clause and the Maryland Takings Clause and Due Process Clause. The complaint invoked the jurisdiction of the district court under 28 U.S.C. §1331 and 28 U.S.C. §1343. The district court dismissed the Fifth Amendment and Maryland takings claims for failure to state a claim upon which relief can be granted. (App.86a). The district court ruled that SB-707 did not effect a taking because "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." (App.68a). Final judgment was entered November 16, 2018. (Dkt. 35). Petitioners filed a timely notice of appeal to the Fourth Circuit on December 6, 2018. (Dkt. 36). The Fourth Circuit had jurisdiction over that appeal under 28 U.S.C. §1291.

Over a scholarly dissent by Judge Richardson, the Fourth Circuit affirmed. Citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982), the majority recognized that "[t]hough a 'per se' taking originally only applied to physical takings, the Supreme Court has held that regulatory takings, too, can be per se." (App.14a n.4). The majority also recognized that this Court had expressly applied *Lucas* and *Loretto* to personal property in *Horne v. Dep't of Agric.*, 135 S.Ct. 2419, 2426 (2015). (Id.).

The majority nonetheless held that the complete destruction of property rights imposed by SB-707 was not a *per se* taking. It reasoned that "the per se regulatory taking in *Lucas* applies only to real property." (App.14a n.4). It also held that "the per se

regulatory taking in *Loretto* is readily distinguishable because SB-707 does not require or permit third parties to take physical possession of the personal property" and "does not require owners of the banned devices to physically turn them over to the Government." (Id.). The majority purported to distinguish *Horne* on the ground that the personal property there at issue was "appropriated" by the government, while in this case SB-707 "does not require owners of the banned devices to physically turn them over to the Government" (App.14a n.4) or "to a third party." (App.18a). The majority likewise held that plaintiffs had failed to allege a takings claim under the Takings Clause of the Maryland Constitution, Article III, §40 (App.88a), because "SB-707 does not alter the rights Appellants possessed when they purchased their rapid fire trigger activators." (App.20a).

Judge Richardson dissented. In his view, "[a] classic' taking occurs not only when 'government directly appropriates private property,' but also when it 'ousts the owner' of possession—as Maryland does here." (App.21a) (citation omitted). The dissent explained that, "[a]s originally understood, 'the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession.'" (App.27a, quoting *Murr v. Wisconsin*, 137 S.Ct. 1933, 1942 (2017), quoting *Lucas*, 505 U.S. at 1014). The dissent further reasoned that "[t]he bedrock rights of property are 'to possess, use and dispose' of an item" and "the government takes property in the classic sense when it eliminates each of these property rights." (App.32a). Judge Richardson found *Horne* to be on point, explaining that *Horne* involved a *per se* physical taking because the owners "los[t] the entire 'bundle' of property rights in the appropriated raisins—'the rights to

possess, use and dispose of' them.'" (App.33a, quoting *Horne*, 135 S.Ct. at 2428, quoting *Loretto*, 458 U.S. at 435.

Judge Richardson concluded that Maryland's "ban on possession is not just 'the functional equivalent of a practical ouster of the owner's possession,' like the permanent flooding of property . . . [a] possession ban is an *actual* ouster." (App.36a) (emphasis in original). Such a ban "actually and physically defeats one's property rights—a classic taking." (Id.). Judge Richardson would have sustained the Maryland Takings Clause and Maryland's Due Process Clause claims for the "same reasons." (App.38a n.12).

Petitioners filed a timely petition for rehearing and rehearing *en banc* in which petitioners requested (Pet. at 18-19) that the court of appeals certify the state law questions to the Maryland Court of Appeals. The petition was denied by the court of appeals without addressing that request.

REASONS FOR GRANTING THE PETITION

I. SUMMARY

1. The first issue is whether a State may destroy all rights in previously lawfully acquired and lawfully owned personal property without paying just compensation. The majority held that such a destruction may be imposed where the State does not "require owners of [the property] to turn them over to the Government or to a third party." (App.18a). The dissent would hold that compensation is owed because "[a] possession ban is an actual ouster" that "actually and physically defeats one's property rights—a classic taking." (App.36a). For the reasons stated by the dissent, the majority's decision is so clearly erroneous that summary reversal is appropriate. See S. Shapiro, et al., *Supreme Court Practice*, §5.12(c) at 5-44 (11th ed. 2019) ("Shapiro").

This purely legal issue is fundamentally important because it goes to the heart of whether personal property is entitled to constitutional protection under the Takings Clause.

2. The Fourth Circuit's decision also creates a direct conflict with the Federal Circuit which has long applied *Lucas* to personal property and held that personal property is protected without regard to whether the government or a third party takes possession. The Takings Clause cannot mean one thing for a federal taking and something entirely different when the taking is done by a State, especially where the different standards affect the same population of American citizens within the Fourth Circuit. This conflict warrants plenary review.

3. The majority also misread the Maryland Constitution, Takings Clause, Article III, §40 and the Maryland Constitution, Declaration of Rights, Due Process Clause, §24 (App.88a), when it held that "SB-707 does not alter the rights Appellants possessed when they purchased their rapid fire trigger activators." (App.20a). That holding necessarily means that personal property is wholly unprotected by Maryland's Constitution, a result that is contrary to controlling Maryland case law that the court below either misconstrued or ignored. Indeed, if the court of appeals is correct, then Maryland has effectively allowed the legislature to abolish personal property rights, a result so onerous that it would violate the Takings Clause. See *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Given the gravity of its holding, the court of appeals should have certified the state law questions to the Maryland Court of Appeals pursuant to MD Code, Cts. & Jud. Proc., §12–603 (App.90a), as petitioners

requested. This Court should thus either reverse the Fourth Circuit's patently incorrect and unconstitutional construction of Maryland law, or vacate and instruct the Fourth Circuit to consider whether to certify these questions of State property law to Maryland's highest court. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997), *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), *Elkins v. Moreno*, 435 U.S. 647 (1978), and *McKesson v. Doe*, --- S.Ct. ----, 2020 WL 6385692 (Nov. 2, 2020).

4. The takings issues presented by this case are similar to and no less important than the takings issues presented in *Cedar Point Nursery v. Hassid*, No. 20-107, --- S.Ct. ---, 2020 WL 6686019 (cert. granted, Nov. 13, 2020). At issue in *Cedar Point* is whether California's regulatory imposition of an easement on real property and the resulting loss of the right of *exclusive* possession is a *per se* taking. If, as *Horne* holds, appropriations of personal and real property are to be treated "alike," *Horne*, 135 S.Ct. at 2427-28, then it follows *a fortiori* that a judgment for petitioners in *Cedar Point* would likewise compel judgment for petitioners here, as Maryland has ousted petitioners of *all* possession, not just *exclusive* possession.

If, on the other hand, the Court holds that the easement imposed by California in *Cedar Point* was not a *per se* taking because it did not deprive the owner of all strands of the bundle of rights, as the Ninth Circuit held,[1] then certiorari in this case would still be appropriate to consider whether a regulatory destruction of *all* strands of the bundle of rights in personal

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[1] *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 532-33 (9th Cir. 2019), *cert. granted*, No. 20-107, -- S.Ct. ---, 2020 WL 6686019 (Nov. 13, 2020).

property is a *per se* taking. Either way, a decision in *Cedar Point* will likely inform the analysis in this case. The Court should thus either grant review and summarily reverse, or hold this petition pending a decision in *Cedar Point*. See Shapiro, §4.16 at 4-49-4-50, §6.31(e) at 6-126.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S TAKINGS PRECEDENTS

A. The Deprivation of the Right of Possession Is Controlling

In *Horne v. Dep't. of Agric*., 135 S.Ct. 2419, 2425 (2015), the question presented was "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' . . . applies only to real property and not to personal property." The Court answered that question with a resounding "no." (Id). In so holding, this Court reversed the Ninth Circuit's holding that *Lucas* and *Loretto* did not apply because personal property is entitled to "less protection." *Horne*, 135 S.Ct. at 2425-26. Specifically, the Ninth Circuit had held "*Loretto* applies only to a total, permanent physical invasion of real property" and read *Lucas* as holding that "the Takings Clause affords less protection to personal than to real property." *Horne v. Dept. of Agric*., 750 F.3d 1128, 1139 (9th Cir. 2014).

In reversing the Ninth Circuit, this Court held that "[n]othing in the text or history of the Takings Clause, or our precedents, suggests that the [*per se*] rule is any different when it comes to appropriation of personal property," and that the Takings Clause "protects 'private property' without any distinction between different types." (*Horne*, 135 S.Ct. at 2426). Ruling that "[t]he

Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home," (id.), the Court stressed "the established rule of treating direct appropriations of real and personal property alike." (Id. at 2427-28). That part of the majority opinion (Part II) was expressly joined by three other members of the Court. *Horne*, 135 S.Ct. at 2433 (Breyer, J., concurring in part, dissenting in part).

In every meaningful sense, petitioners here are in the same position as the growers in *Horne*. Like the growers, petitioners are "subject to" a statute that deprives owners of their rights to "'possess, use, and dispose of'" their personal property. *Horne*, 135 S.Ct. at 2428, quoting *Loretto*, 458 U.S. at 435. In *Horne*, the growers refused "to obey" the order to give up their raisins and the refusal resulted in a fine equal to the market value of the raisins and a *civil* penalty of over $200,000. *Horne*, 135 S.Ct. at 2425. In this case, a failure "to obey" SB-707's command to dispossess will "subject" the property owner to a criminal fine and/or up to three years in prison. MD Code, Criminal Law, §4-306(a) (App.90a). As the dissent explained, Maryland "requires owners to physically dispossess themselves—or face imprisonment." (App.36a). While SB-707 does not expressly require owners to "physically turn them over" (App.14a n.4), it bans mere possession and thus authorizes the State to physically seize the property. *Carroll v. United States*, 267 U.S. 132, 158 (1925). See Black's Law Dictionary 402 (11th ed. 2019) (defining contraband). Either way, possession is lost by governmental edict. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 66 (1985) ("Epstein") ("That the government has not taken physical possession of the land is neither here nor there. It clearly will enter the land by force if the

covenant it has created by fiat is not respected by the parties who are subject to it.").

The majority below refused to follow *Horne*, holding that *Lucas* applies only to personal property and that *Loretto* is limited to cases where the property has been turned over to the government (or third party). (App.14a n.4, 18a). These holdings accord personal property "less protection" than real property and thus commit the same error committed by the Ninth Circuit's decision reversed in *Horne*. *Horne*, 135 S.Ct. at 2422. According to the court of appeals, *Horne* applies only to "appropriations" and, to the court of appeals, the *sine qua non* of an "appropriation" of personal property is not dispossession of the owner, but rather a required physical transfer of the personal property to the possession of the government or a third party. (App.14a n.4, 18a). Certiorari is necessary to address these profoundly flawed readings of *Horne, Lucas* and *Loretto*.

The term "appropriation" has *always* included the "practical ouster of possession" which is the "functional equivalent of" a "direct appropriation." *Lucas*, 505 U.S. at 1014 (emphasis added). See also *Murr v. Wisconsin*, 137 S.Ct. 1933, 1942 (2017) (noting that prior to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a direct appropriation of property, *or the functional equivalent of a practical ouster of the owner's possession*") (emphasis added). A *per se* taking is thus found where the regulation is so complete "that its effect is *tantamount to a direct appropriation or ouster*." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005), citing *Mahon*, 260 U.S. at 415 (emphasis added).

As *Lingle* explained, there are "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." (544 U.S. at

539). The first is "where government requires an owner to suffer a permanent physical invasion of her property -- however minor." (Id., citing *Loretto*, 458 U.S. at 419). The second is where "regulations completely deprive an owner of '*all* economically beneficial us[e]' of her property." (Id., citing *Lucas*, 505 U.S. at 1019) (emphasis the Court's). These categories are "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. See also *Arkansas Game and Fish Com'n v. United States*, 568 U.S. 23, 31-32 (2012) (same). "The paradigmatic taking . . . is a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537.

The ouster of possession is key. In *Horne*, the Court stressed that the growers who were subject to the reserve requirement had suffered a *per se* taking *because* they lost "the entire 'bundle' of property rights in the appropriated raisins—'*the rights to possess, use and dispose* of' them" (Id. at 2428, quoting *Loretto*, 458 U.S. at 435) (emphasis added). In short, the reserve requirement in *Horne* was merely the means of achieving this "ouster" of property rights. As Judge Richardson explained, *Horne* applied a *per se* rule because "the government's reserve requirement . . . eliminated the handler's property rights to possess, use, and dispose." (App.35a, citing *Horne*, 135 S.Ct. at 2427).

Loretto also focused on possession, noting that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto*, 438 U.S. at 435, quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). *Loretto* explained that when the government occupies property "it effectively destroys *each* of these rights" because the owner loses

the right to "possess the occupied space for himself" and has "no power to exclude the occupier from possession and use of the space." (Id.). As the Court reasoned, the very definition of a physical taking is an act that "absolutely dispossesses the owner of his rights to use, and exclude others from his property." (Id. at 435 n.12). A physical occupation is a taking *because* it causes the loss of these rights, not because the government assumes possession.

The right of possession was crucial to the result in *Andrus v. Allard*, 444 U.S. 51, 65 (1979). There, the Court sustained a federal regulatory ban on the sale of eagle feathers because the "regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them." (Id.). The Court stated "it is *crucial* that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." (Id. at 66) (emphasis added). *Horne* distinguishes *Andrus* on precisely that basis, ruling that there was no taking in *Andrus* because "the owners in that case retained the rights to possess, donate, and devise their property." *Horne*, 135 S.Ct. at 2429. See also *Phillips v. Washington Legal Found.*, 524 U.S. 156, 170 (1998) ("possession, control, and disposition are nonetheless valuable rights that inhere in the property"). Here, as the dissent states, SB-707 "destroy[s] all the rights the Supreme Court found crucial in *Andrus*." (App.35a).

The right of possession was also determinative in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979), where this Court stated that the right to exclusive possession is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," and held that a regulation that required marina proprietors to afford public access to a private

waterway was a taking. *Kaiser* ruled that this right of exclusive possession is so "fundamental" that "Government cannot take [it] without compensation." (444 U.S. at 179-80). See also *Nollan v. California Coastal Com'n.*, 483 U.S. 825, 831 (1987) (same). This right of exclusive possession is also at issue in *Cedar Point*, where the State imposed an access easement on real property for the benefit of third-party union organizers. Here, the State has permanently destroyed *all* rights of possession, not just the right of exclusive possession.

The right of possession made all the difference in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 n.19 (2002). There, the Court distinguished a physical taking from a regulatory taking on grounds that the latter does not "dispossess the owner or affect her right to exclude others." (Id.). The Court held that the moratorium on development did not deprive the landowner of "all economically beneficial uses" and thus was not a "functional equivalent of an appropriation" under *Lucas*. (Id.).

In all these cases, the focus was on rights. In *Horne*, the rights to "possess, use, and dispose" were lost, and the Court held there was a *per se* taking. In *Andrus*, the owners lost the right to sell eagle feathers but retained the "crucial" rights to possess, devise and donate, and the Court held that was no taking. Both *Horne* and *Andrus* involved personal property. Neither decision remotely suggested that the taking analysis depended on whether the property is physically "turned over" to the government or to a third party, as the court of appeals held here. (App.14a n.4, 18a). Indeed, if the court of appeals is correct, then *Andrus* could have been decided on that basis alone, as the eagle feathers were never "turned over" to the government.

Instead, this Court focused on the "crucial" rights "retain[ed]" in holding that there was no taking. It is impossible to reconcile the court of appeals' analysis with that of *Horne* and *Andrus*.

In short, SB-707 *does* "compel the surrender" of possession and thus necessarily involves the "physical invasion" of this personal property. *Andrus*, 444 U.S. at 65. Such a statute is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. The dissent is thus correct in concluding that "the government must compensate owners for their personal property if it physically dispossesses owners," because a ban on possession "is an *actual* ouster." (App.36a) (emphasis in original). SB-707 "is a blunt chop through the bundle of rights" (id.), that "goes beyond even those rights 'effectively destroyed' in *Loretto* and *Horne*." (Id. at 35a).

B. *Lucas* Fully Applies to Personal Property

The majority below held that *Horne* "has left intact *Lucas'* distinction between real and personal property with regard to *regulatory* takings," concluding that "the per se regulatory taking in *Lucas* applies only to real property." (App.14a n.4) (emphasis in original). The court purported (id.) to base this ruling on *Horne*'s observation 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." (135 S.Ct. at 2427). Certiorari is necessary to correct that fundamentally wrong construction of *Lucas* and *Horne*.

Nothing in *Lucas* limits its underlying holding to real property. The Court merely observed that "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 (at least if the property's only economically productive use is sale or manufacture for sale)." *Lucas*, 505 U.S. at 1027-28. On its face, that statement suggests that personal property may be rendered "economically worthless" by restricting *sales*, not that the government is free to destroy *all* rights in personal property, including the right of possession. Indeed, *Lucas* cited *Andrus* as support, parenthetically noting that *Andrus* had sustained a "prohibition on sale of eagle feathers." (Id. at 1028). As explained above, the "crucial" rights to possess, devise and donate were not taken in *Andrus*.

Horne also explains that the controlling distinction in *Lucas* was between a "physical taking[]" and "a 'regulatory taking.'" *Horne*, 135 S.Ct. at 2427-28, quoting *Tahoe-Sierra*, 535 U.S. at 323. *Horne* thus stressed that "[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." (Id. at 2427-28) (emphasis added). *Tahoe-Sierra* makes clear that a "regulatory case" does not include a case where the government conduct at issue "dispossess the owner or affect her right to exclude others." *Tahoe-Sierra*, 535 U.S. at 324 n.19. As Judge Richardson stated, a "possession ban does not make property ownership uneconomical or undesirable, as in a regulatory taking. It actually and physically defeats one's property rights—a classic taking." (App.36a).

The majority's refusal to apply *Lucas* to personal property allows the State to destroy *all* rights in such property simply by labeling the destruction "regula-

tory." That result is at war with *Lucas*' holding that "a 'State, by *ipse dixit*, may not transform private property into public property without compensation.'" *Lucas*, 505 U.S. at 1031. That statement applies equally to personal property as it is a quotation from *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), a personal property case where the Court found a taking of accrued interest on interpleader funds deposited in the registry of a State court. See also *Phillips*, 524 U.S. at 167 (holding that interest on attorney IOLTA accounts was private property under "traditional property law principles"). Here, as in *Lucas* and *Webb's*, all property rights are stripped from the owners by government edict without regard to any "independent source," such as "background principles of the State's law of property and nuisance." *Lucas*, 505 U.S. at 1030. That SB-707 did not require that physical possession be turned over to the government (or to a third party) is no more controlling here than it was in *Lucas*.

Purporting to reply on *Lucas*, the court of appeals also wrongly suggested that the devices banned by Maryland are "heavily regulated" and thus plaintiffs should have expected a total ban on possession. (App.18a). Yet, in *per se* taking cases, "[t]he expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights." *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (*en banc*). As explained by the Federal Circuit in *Bair v. United States*, 515 F.3d 1323, 1330 (Fed. Cir.), *cert. denied*, 555 U.S. 1084 (2008), property rights cannot be "defined" or "limited" by the possibility of "'future regulatory activity.'" (Citation omitted).

"[I]investment-backed expectations are, of course, relevant considerations" under *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). But that principle applies to *non*-categorial takings. *Lingle*, 544 U.S. at 538-39. Whether a regulation is a *per se* taking turns on whether the owners have "retained the rights to possess, donate, and devise their property." *Horne*, 135 S.Ct. at 2429. The court of appeals thus improperly applied an element of the *Penn Central* test to the *per se* takings analysis while failing to apply the correct standard set out in *Horne*, *Andrus*, *Lucas* and *Loretto*.

More fundamentally, heavy regulation might lead owners to expect a regulatory ban on *sales*, as noted in *Lucas* and discussed in *Andrus*, but people do not "expect" that the continued *possession* of their lawfully acquired personal property will be banned and their owners carted off to jail. That is especially true where, as here, the property was acquired only after a federal agency (the ATF) had issued multiple rulings over a ten year period finding that this very type of property was completely lawful to purchase and possess. See *Guedes v. BATF*, 140 S.Ct. 789, 790 (2020) (Gorsuch, J., statement regarding certiorari) (noting that bump stocks were legal "[f]or years" under the ATF's prior interpretation). See also *Guedes*, 920 F.3d at 18, 20, 35 (holding that bump stocks were lawfully possessed prior to the effective date of the ATF's new Rule). Contrary to the majority's suggestion, this property was not regulated at all prior to the enactment of SB-707.

C. The Owner's "Point of View" Is Controlling Under *Loretto*

The majority below held that "the per se regulatory taking in *Loretto* is readily distinguishable because SB-707 does not require or permit third parties to take

physical possession of the personal property." (App.14a n.4). That holding is irreconcilable with *United States v. General Motors Corp*., 323 U.S. 373, 378 (1945), where this Court stated that "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." That principle is well-established. See *Brown v. Legal Found.*, 538 U.S. 216, 235-36 (2003) ("the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain"); *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) ("our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself"); *Arkansas Game and Fish*, 568 U.S. at 33 ("takings claims" are "not confined to instances in which the Government took outright physical possession of the property involved"). See also Epstein at 66 ("That the government has not taken physical possession of the land is neither here nor there.").

For example, in *Pumpelly v. Green Bay Co*., 13 Wall. (80 U.S.) 166 (1871), this Court held that the owner's land had been taken by virtue of flooding caused by the government. In so holding, the Court stated that "[i]t would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property . . . it can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken* for the public use." (Id. at 177-78) (emphasis the Court's). As Judge Richardson explained, "*Pumpelly* was a taking because the owners' property rights were destroyed, not because their rights were transferred to another—indeed, no transfer occurred at all." (App.39a).

Similarly, in *Lucas*, the Court stated that a *per se* rule was justified because "that total deprivation of beneficial use is, *from the landowner's point of view*, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017 (emphasis added). In so noting, *Lucas* relied on the dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653 (1981), where Justice Brennan made the same point, explaining that "[i]t is only logical, then, that government action *other than* acquisition of title, occupancy, or physical invasion can be a 'taking,' and therefore a *de facto* exercise of the power of eminent domain, *where the effects completely deprive the owner of all or most of his interest in the property*." (Emphasis added). Justice Brennan stressed that such deprivation is determined *"[f]rom the property owner's point of view*," because "the effect" of the government action "is to deprive him of all beneficial use" of the property. (Id. at 652) (emphasis added). *Knick v. Township of Scott*, 139 S.Ct. 2162, 2172 & n.4 (2019), and *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304, 315-18 (1987), likewise relied heavily on Justice Brennan's view of a taking.

Finally, there is no "fairness and justice" in making these lawful property owners bear all the burdens created by SB-707. *Murr*, 137 S.Ct. at 1943. If a ban of these lawfully acquired items is in the public interest, then the costs "of the relief afforded in the public interest" should "be borne by the public," not imposed exclusively on innocent owners. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As stated in *Mahon*, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (260 U.S. at 416). See also *Horne*, 135 S.Ct. at 2427 (quoting *Mahon*). As the dissent states,

"constitutional restraints on the government's power over private property are deeply rooted in our history, and they have been integral to the preservation of personal liberty and improved human condition over time." (App.43a). Accord *Murr*, 137 S.Ct. at 1943 (stressing the importance of "freedoms at the core of private property ownership"); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("That rights in property are basic civil rights has long been recognized."); *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (same). Certiorari here is necessary to protect these basic rights.

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH FEDERAL CIRCUIT PRECEDENT

The majority's refusal to apply *Lucas* to personal property and the limitation it imposed on *Loretto* are in direct conflict with Federal Circuit precedent which has long held that personal property, including tangible property and contract rights, are fully protected by categorical rules without regard to whether the property was "turned over" to the government. The same sort of conflict with Federal Circuit precedent is also presented in *Cedar Point*. As there, the conflict presented here should not be allowed to stand.

In *R.J. Widen Co. v. United States*, 174 Ct.Cl. 1020, 357 F.2d 988, 993 (1966), the Court of Claims applied *General Motors* and *Pumpelly* to assess a takings claim for loss of personal property and the value of a business. The court reasoned that the government need not "directly appropriate the title, possession or use of the properties in question since it is 'the deprivation of the former owner rather than the accretion of a right or interest to the sovereign (which) constitutes the taking.'" (Id., quoting *General Motors*, 323 U.S. at 378). The court explained that "[t]he principle is applicable

to personal property where 'the owner is deprived of its use . . . as the natural consequence of the deliberate, intended exercise of an asserted power' of the government." (Id.) (citation omitted). The "decisive factor," the court ruled, is that "the personal property or other rights had been directly appropriated or destroyed by actions of agents or officials of the government." (Id.). Petitioners' property rights here have been "destroyed."[2]

In *Maritrans, Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003), a barge owner challenged a federal statute banning the use of single hull oil barges on navigable waterways as a *per se* taking. The Federal Circuit applied *Andrus* to hold that the owner's barges were protected property under the Takings Clause, noting that "tangible property may be the subject of a takings claim." (Id. at 1352). The court then applied *Lucas* and ruled that "in determining whether a categorical taking occurred in this case, we must decide whether [the plaintiff] was called upon to sacrifice all economically beneficial uses of its single hull tank barges." (Id. at 1354). The court held that the owners had not suffered such a loss because the law allowed the owner to retrofit its barges. (Id. at 1354-55). Petitioners here have no such options.

In *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014), the Federal Circuit applied *Lucas* and held that car dealers' franchise contract rights were "property," noting that "[w]e have applied the categorical test to personal property." The court found that the allegation that the government

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[2] *R.J. Widen* is binding precedent in the Federal Circuit. *South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (*en banc*) (adopting Court of Claims decisions).

"coerced" the manufacturer into nullifying the franchisees' contract rights was sufficient to state a takings claim. (Id. at 1154-56). The destruction of rights in *A & D Auto* is indistinguishable in principle from the destruction of property rights here. *None* of these cases suggested that *Lucas* is limited to real property or required that the property be "turned over" to the government or a third party in order to state a takings claim.

Under 28 U.S.C. §1295(a), the Federal Circuit has nationwide, exclusive appellate jurisdiction over federal taking issues arising under the Tucker Act, 28 U.S.C. §1491(a)(1), or the Little Tucker Act, 28 U.S.C. §1346(a)(2). The Takings Clause has been applicable to the States for over 120 years. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). Thus, decisions of the Federal Circuit establish precedent that are fully applicable to State takings. As this Court has recently stressed, "[i]ncorporated Bill of Rights guarantees are 'enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019) (citation omitted).

Allowing the Fourth Circuit's decision to stand would eviscerate that principle. Federal takings arising within the Fourth Circuit are adjudicated under Federal Circuit precedent. Yet, *State* takings in the five States comprising the Fourth Circuit are now governed by the majority's conflicting opinion in this case. The right to recover for a taking accrues "when [the government] takes property without compensation." *Knick*, 139 S.Ct. at 2177. That right cannot turn on which sovereign does the taking. By any measure, the conflict posed here involves an "important matter" within the meaning of Rule 10(a) of this Court's Rules.

IV. THE FOURTH CIRCUIT MISCONSTRUED MARYLAND PROPERTY LAW AND ERRED IN FAILING TO CERTIFY STATE LAW QUESTIONS TO MARYLAND'S HIGHEST COURT

A. The Fourth Circuit Misconstrued Maryland Law

The majority below also interpreted "property" in a way that renders personal property unprotected by both the Maryland Takings Clause, Article III, §40, and the Due Process Clause, Article 24 of the Maryland Declaration of Rights. (App.88a-89a). It did so even though Maryland's highest court has held that these provisions are interpreted *in pari materia* with the Fifth Amendment, fully encompass personal property and may even afford more protection than the Fifth Amendment. See, e.g., *Dua v. Comcast Cable*, 370 Md. 604, 805 A.2d 1061, 1072 (2002) ("No matter how 'rational' under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking one person's property and giving it to someone else.").

The majority, purporting to rely on *Muskin v. State Dept. of Assessments and Taxation*, 422 Md. 544, 30 A.3d 962, 968 (2011), held that a taking required that the statute be retroactive. (App.19a). SB-707 was not retroactive, the court reasoned, because it did not "impose new liability back to the date of purchase" and petitioners "had fair notice of the change in law" because it "was passed six months before it went into effect." (App.20a). Such notice and the lack of retroactive criminal liability might well be pertinent to a procedural due process or *Ex Post Facto* claim, but they do not control as to whether SB-707 destroyed a

vested property right protected by the Maryland Constitution.

Indeed, the majority skipped over a portion of *Muskin* where the Maryland Court of Appeals explained that "[r]etrospective statutes are those 'acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act.'" (30 A.3d at 969) (citation omitted). That is also the rule under the Fifth Amendment. See *Lucas*, 505 U.S. at 1027 (to escape the Takings Clause, the government must show "that the proscribed use interests were not part of [the owner's] title to begin with"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) (same); *A & D Auto Sales*, 748 F.3d at 1152 (same). Here, SB-707 necessarily "retrospectively operate[s]" on the purchase "transactions" which "occurred" "before passage" of SB-707 by destroying *all* the property rights that arise from such prior purchases. *Muskin*, 30 A.3d at 969.

The majority below also ignored *Serio v. Baltimore County*, 384 Md. 373, 863 A.2d 952, 967 (2004), where the Maryland Court of Appeals held that Maryland's Taking's Clause and Due Process Clause are 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* applied that rule to hold that the refusal of a county police department to relinquish a firearm so that a convicted felon could exercise his remaining "ownership" interest violated these provisions of the Maryland Constitution. (863 A.2d at 966, 968).

Maryland's highest court was equally clear in *Pitsenberger v. Pitsenberger*, 287 Md. 20, 410 A.2d 1052, 1057-1060 & n.5 (1980), where the court ruled

that "possessory interests" in personal property "are within the protection of the Fourteenth Amendment" and that "Article III, §40 and the Fourteenth Amendment have the same meaning in reference to a 'taking' of property." Petitioners relied on *Dua*, *Serio*, *Muskin*, *Pitsenberger* and other Maryland cases in arguing that their "vested" property rights had been taken.[3] Yet, the majority misconstrued *Muskin* and ignored all these other decisions.

Even more inexplicable is the majority's holding that "SB-707 does not alter the rights Appellants possessed when they purchased their rapid fire trigger activators." (App.20a). As no one disputes that petitioners lawfully possessed these items prior to the enactment of SB-707, that ruling is, in effect, a holding that a prior, lawful purchase of these items did not give rise to any property right to possess these items. That ruling is just wrong. In Maryland, "property is a term that has broad and comprehensive significance; it embraces '*everything which has exchangeable value* or goes to make up a man's wealth . . . .'" *Dodds v. Shamer*, 339 Md. 540, 663 A.2d 1318, 1322 (1995) (citation omitted) (emphasis added). See *Serio*, 863 A.2d at 965 (relying on *Dodds*). The personal property items banned by SB-707 indisputably had "exchangeable value" when they were purchased. The majority's

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[3] The majority below recognized that petitioners had argued that SB-707 destroyed their "vested" rights under the Maryland Constitution, but ruled that petitioners had not specifically argued that SB-707 was "retrospective" in their opening brief. (App.19a). The court purported to affirm the district court on that basis. (Id.). That ruling is specious. Petitioners preserved their state law takings contentions by extensively arguing that their "vested" property rights in these items had been destroyed by SB-707. No more is required.

ruling cannot be reconciled with this definition of "property" applied in *Dodds* and *Serio*.

The court's holding that petitioners' existing rights were not "alter[ed]" by SB-707 also conflicts with "traditional property law principles" long recognized by this Court. *Phillips*, 524 U.S. at 167. See *Palazzolo*, 533 U.S. at 630 (discussing "essential Takings Clause principles"). Property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *General Motors Corp.*, 323 U.S. at 378. Thus, "[t]he constitutional provision is addressed to every sort of interest the citizen may possess." (Id.). See also *Loretto*, 438 U.S. at 435. Those rights include personal property acquired by purchase. See, e.g., *Whitfield v. United States*, 92 U.S. 165, 170 (1875) ("A sale of personal property, when completed, transfers to the purchaser the title of the property sold."). "Title" is "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property." Black's Law Dictionary 1788 (11th ed. 2019). See also *Phillips*, 524 U.S. at 169-71. Cf. *McBurney v. Young*, 569 U.S. 221, 229 (2013) ("the right to 'take, hold and dispose of property, either real or personal,' has long been seen as one of the privileges of citizenship") (citation omitted). In short, the court of appeals is so plainly wrong that summary reversal is warranted.

B. The Fourth Circuit Erred In Failing To Consider Certification To Maryland's Highest Court

Petitioners detailed the court's errors in their rehearing petition and alternatively urged (Pet. at 18-19) that the court certify the state law questions to the Maryland Court of Appeals pursuant to MD Code, Cts.

& Jud. Proc., §12–603. (App.90a). The court ignored the request and that failure to at least consider certification cannot be justified. As explained in *Arizonans for Official English*, "[c]ertification procedure . . . allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." (520 U.S. at 76). See also *Lehman Brothers*, 416 U.S. at 391 (same).

Certification may often be appropriate in takings cases. Under *Knick*, plaintiffs may now seek immediate relief in federal court for State takings. Nearly every State has a counterpart to the Fifth Amendment's Takings Clause. The two claims, federal and State, will likely be joined in future federal suits cognizable under *Knick*, just as they were joined in this case. Certification would preserve the right of access to the federal courts recognized in *Knick*, while accommodating federalism concerns by respecting the right of the State courts to authoritatively adjudicate uncertain questions of State law. See *Knick*, 139 S.Ct. at 2188 (Kagan, J., dissenting) ("federal courts should refrain whenever possible from deciding novel or difficult state-law questions"); *McKesson*, slip op. at 4 (same).

These federalism concerns are especially present here. While the definition of "property" under the Fifth Amendment may often be a matter of State property law, *Lucas*, 505 U.S. at 1030, "States do not have unfettered authority to 'shape and define property rights.'" *Murr*, 137 S.Ct. at 1944-45, quoting *Palazzolo*, 533 U.S. at 626-27. If Maryland law actually states that no property rights are acquired by purchase, as the court of appeals held, then Maryland law is "so

unreasonable or onerous as to compel compensation." *Palazzolo*, 533 U.S. at 627. See *Phillips*, 524 U.S. at 167 ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."). Such an extraordinary ruling should be made by the Maryland Court of Appeals in the first instance, not by the Fourth Circuit. See *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978) (*sua sponte* certifying a state law question to the Maryland Court of Appeals, stating "it is obviously desirable that questions of law which . . . are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts").

In sum, by failing to consider certification, the court of appeals "departed from the accepted and usual course of judicial proceedings" within the meaning of Rule 10(a) of this Court's Rules. See Shapiro, §4.15 at 4-47. The rationale for certification has been set out repeatedly in *Arizonans for Official English*, *Lehman Brothers, Elkins* and *McKesson*. See also *Knick*, 139 S.Ct. at 2190 (Kagan, J., dissenting) ("this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges' hands"). An exercise of this Court's supervisory authority is necessary to make clear that the lower federal courts have an affirmative, independent duty to consider whether to certify these types of fundamentally important state law questions.

Certification "rests in the sound discretion of the federal court," *Lehman Brothers*, 416 U.S. at 391. In *Lehman Brothers* and in *McKesson*, this Court vacated the judgment of the court of appeals and remanded with instructions to consider whether to certify state law questions. This Court should either summarily

reverse or follow *Lehman Brothers* and *McKesson* and vacate and remand with instructions to consider certification. See Shapiro, §9.4 at 9-11 (collecting cases).

CONCLUSION

The petition for certiorari should be granted. The judgment below on the federal takings claims should be summarily reversed. The judgment below on the state law claims should be summarily reversed or vacated and remanded with instructions to consider certification. Alternatively, the petition should be held pending a decision in *Cedar Point*.

Respectfully submitted,

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December 21, 2020

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2474

MARYLAND SHALL ISSUE, INCORPORATED; PAUL MARK BROCKMAN; ROBERT BRUNGER; CAROLINE BRUNGER; DAVID ORLIN, all of the above individually named plaintiffs on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

LAWRENCE HOGAN, in his capacity of Governor of Maryland,
Defendant-Appellee.

GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE,
Amicus Supporting Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
James K. Bredar, Chief District Judge.
(1:18-cv-01700-JKB)

Argued: January 29, 2020
Decided: June 29, 2020

Before FLOYD, THACKER and RICHARDSON,
Circuit Judges.

Affirmed by published opinion. Judge Thacker wrote the opinion, in which Judge Floyd joined. Judge Richardson wrote an opinion concurring in the judgment in part and dissenting in part.

ARGUED: Mark William Pennak, MARYLAND SHALL ISSUE, INC., Annapolis, Maryland, for Appellants. Adam Dean Snyder, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee. ON BRIEF: Cary J. Hansel, Erienne A. Sutherell, HANSEL LAW, P.C., Baltimore, Maryland, for Appellants. Brian E. Frosh, Attorney General, Jennifer L. Katz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee. Scott A. Edelman, Los Angeles, California, Kathryn Cherry, Dallas, Texas, Vivek R. Gopalan, GIBSON, DUNN & CRUTCHER, San Francisco, California; Hannah Shearer, San Francisco, California. J. Adam Skaggs, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, New York, New York, for Amicus Curiae.

THACKER, Circuit Judge:

On its own behalf and on behalf of its members, Maryland Shall Issue, Inc. ("MSI") challenges a Maryland statute banning "rapid fire trigger activators" – devices that, when attached to a firearm, increase its rate of fire or trigger activation. MSI argues the statute violates the Takings Clause of the United States Constitution as well as Maryland's takings provisions. And because the statute does not define "rate of fire" or "trigger activation," MSI also argues it is void for vagueness. The district court held MSI did not have organizational standing to pursue these claims on its own behalf and also rejected its substantive contentions.

Because we agree with the district court that MSI lacks standing and that the Complaint otherwise fails to state a claim, we affirm for the reasons detailed herein.

I.

On April 24, 2018, Maryland Governor Lawrence Hogan ("Appellee" or "Maryland") signed Senate Bill 707 ("SB-707") into law. SB-707 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 SB-707 is a criminal misdemeanor subject to a term of imprisonment of up to three years, a fine of up to $5,000, or both. *Id.*, sec. 1, § 4-306(a).

SB-707 defines "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 the rate at which the trigger is activated increases; or the rate of fire increases." SB-707, sec. 1, § 4-301(M)(1). In addition to any other device which increases the rate of trigger activation or fire, SB-707 specifies that the following enumerated devices are rapid fire trigger activators: "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.* § 4-301(M)(2). Further, SB-707 exempts from the definition any "semiautomatic replacement trigger that improves the performance and functionality over the stock trigger." *Id.* § 4-301(M)(3).

SB-707 contains an exception clause which purports to permit individuals to continue to possess the otherwise prohibited devices, provided that the indi-

vidual "(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; (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. 1, § 4-305.1(b). However, on the day SB-707 went into effect, October 1, 2018, the ATF released a "Special Advisory" on its website indicating, "ATF is without legal authority to accept and process [the exception] application." J.A. 13.[1] Consequently, the ATF asked Maryland residents to not file any such applications and advised that any it received would be "returned to the applicant without action." *Id.*

On June 11, 2018, MSI and four individual plaintiffs (collectively, "Appellants") filed the instant putative class action complaint in the District of Maryland (the "Complaint"). The Complaint alleged five counts, which the district court characterized as follows:

> - In Counts I and II, [Appellants] argue that [SB-707] 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.
> - In Counts II and V, [Appellants] put forward a separate per se takings theory under the State Constitution—that [SB-707] retrospectively abrogates vested prop-

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

erty rights in violation of Article 24, which also constitutes a taking under Maryland law.

- In Count IV, [Appellants] argue that [SB-707] 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.
- In Count III, [Appellants] argue that ATF's refusal to process applications and grant authorizations for continued lawful possession makes it "legally impossible to comply" with [SB-707]'s exception clause, thus imposing a "legally impossible condition precedent" that violates due process and cannot be severed from the rest of [SB-707].

J.A. 232–33.

Appellee moved to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). After a hearing, the district court granted Appellee's 12(b)(6) motion with respect to all counts except Count IV. Thereafter, the district court sua sponte dismissed Count IV pursuant to Federal Rule of Civil Procedure 12(b)(1) after determining that all plaintiffs lacked standing to pursue the vagueness claim. Although the district court also determined that MSI lacked organizational standing to sue on its own behalf, it nonetheless concluded that MSI did have representative standing to sue on behalf of its members.

Appellants noted a timely appeal to this court.

II.

We review dismissals pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. *Ott v. Maryland Department of Public Safety and Correctional Services*, 909 F.3d 655, 658 (4th Cir. 2018). To survive a 12(b)(6) motion, a complaint must contain enough facts "'to raise a right to relief above the speculative level' and 'state a claim to relief that is plausible on its face.'" *Occupy Columbia v. Haley*, 738 F.3d 107, 116 (4th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A]lthough a court must accept as true all factual allegations contained in a complaint, such deference is not accorded legal conclusions stated therein," and "[t]he mere recital of elements of a cause of action, supported only by conclusory statements is not sufficient." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012).

A dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) is also reviewed de novo. *See Demetres v. East West Const., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015). When reviewing a complaint dismissed for failure to allege facts supporting subject matter jurisdiction, we afford the plaintiff "the same procedural protection as she would receive under a Rule 12(b)(6) consideration, wherein the facts alleged in the complaint are taken as true, and the defendant's challenge must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (internal quotation marks and citations omitted).

III.

A.

MSI's Organizational Standing

Appellants' first claim of error is that the district court wrongly determined MSI lacked organizational standing to sue on its own behalf.

An organization can sue on its own behalf rather than as a representative of its members when it independently satisfies the elements of Article III standing: (1) "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted). "[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) (internal quotation marks omitted).

The district court determined MSI failed to meet the first prong of Article III standing – injury in fact. In the Complaint, MSI alleged "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." J.A. 11–12. In support, MSI alleged 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.

Id.

MSI argues the district court erred because the Supreme Court has found standing where a defendant's actions impede an organization's efforts to carry out its mission. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982)). However, MSI's alleged harms fall well short of the harms alleged in *Havens*. There, the plaintiff was a non-profit organization offering counseling and referrals to clients in search of equal opportunity housing. *See Havens*, 455 U.S. at 368. When the plaintiff organization in *Havens* was faced with complaints of housing discrimination in its service area, it investigated and referred those complaints to the relevant authorities. *See id.* The plaintiff organization and its members sued Havens Realty Corporation ("Havens") for violating the Fair Housing Act of 1968. *See id.* at 366.

In alleging organizational standing, the plaintiff organization argued Havens' practices had frustrated its counseling and referral services, causing a drain on resources. *See id.* at 379. Specifically, the plaintiff organization alleged it had expended resources to identify and counteract Havens' discriminatory practices. *See id.* The Supreme Court found standing. It held that Havens' practices had "perceptibly impaired"

the plaintiff's activities and "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

Here, MSI only alleged that SB-707 "undermined" and "acted as an obstacle to" its purpose and message. J.A. 11–12. MSI did not allege that it had expended resources as a result of SB-707, nor did it explain a way in which SB-707 "perceptibly impaired" its activities. *Havens*, 455 U.S. at 379. Instead, MSI only alleged, at most, a "setback to its social interests." *Id.* And, as this court has explained,

> to determine that an organization that decides to spend its money on educating members, responding to member inquiries, or undertaking litigation in response to legislation suffers a cognizable injury would be to imply standing for organizations with merely "abstract concern[s] with a subject that could be affected by an adjudication."

Lane v. Holder, 703 F.3d 668, 675 (4th Cir. 2012) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976)). MSI's alleged injury is no more than a mere disagreement with the policy decisions of the Maryland legislature, which is insufficient to meet the constitutional threshold for an injury in fact.

Accordingly, we agree with the district court that MSI lacks organizational standing.

B.

Standing as to Vagueness Challenge

Next, we address Appellants' argument that the district court improperly dismissed their pre-enforcement vagueness challenge for lack of standing.[2]

Appellants alleged in the Complaint 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*." SB-707, sec. 2, § 4-301(M)(1) (emphasis supplied). Though SB-707 includes a list of enumerated devices that are encompassed by this definition, Appellants argue it can also include any number of other firearm accessories "that modify a firearm's rate of fire to mimic that of an automatic firearm, as well as any device that increases the rate of fire by any marginal amount, *no matter how minimally*." Appellants' Br. 25 (emphasis in original). According to Appellants, the term "rate of fire" is "unintelligible" when applied to semi-automatic and single-action firearms because such firearms have no "mechanically determinable" speed for "how fast mechanically the firearm can fire while cycling rounds through the chamber while the trigger is held down." *See id.* at 28–29. Instead, Appellants allege the rate of fire for a semi-automatic firearm is "as fast as the trigger can be pulled for each shot." *Id.* Appellants

[2] Appellants first argue the district court improperly considered standing without providing notice to the parties. However, because a "federal court has an independent obligation to assess its subject-matter jurisdiction," we find no error in the district court's decision to consider standing. *Constantine v. Rectors & Visitors of George Mason Univ.*, 441 F..3d 474, 480 (4th Cir. 2005).

claim this speed can vary from person to person. Indeed, Appellants argue SB-707 is so vague that it could include devices that help *the shooter* be prepared to aim and fire more quickly. *See id.* at 25–27. They claim devices such as a bipod for stabilizing the firearms, slings used to stabilize weapons on shooters' arms, barrel weights used to reduce recoil, and muzzle devices designed to direct gasses away from the shooter's line of sight are all examples of devices "that marginally increase the 'rate of fire' [of the shooter] by *some small amount." Id.* at 26 (emphasis in original).

Rather than determining whether Appellants stated a claim that SB-707 is unconstitutionally vague, however, the district court determined Appellants lacked standing to pursue such a pre-enforcement challenge. As discussed above, to possess standing, Appellants needed to allege a sufficient injury in fact. *Lujan*, 504 U.S. at 560–61. A plaintiff alleges sufficient injury in a pre-enforcement suit if she alleges [1] "'intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [2] there exists a credible threat of prosecution thereunder.'" *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018) (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). A credible threat of prosecution exists only if it "is not imaginary or wholly speculative," chimerical, or wholly conjectural. *Id.* (internal quotation marks and citations omitted). The district court determined, "Plaintiffs do not allege any facts suggesting a 'credible threat' that [SB-707] will be enforced in accordance with Plaintiffs' broad reading. . . . Plaintiffs simply have not alleged any facts suggesting that the threat of such enforcement rises above pure speculation and conjecture." J.A. 251–52.

Though the district court based its decision on Appellants' lack of a credible threat of prosecution, *Kenny's* second prong, we hold that Appellants fail on the first prong of *Kenny* – they have not stated an intent to engage in conduct *arguably* proscribed by a statute. *Kenny*, 885 F.3d at 288; *see United States v. McHan*, 386 F.3d 620, 623 (4th Cir. 2004) (recognizing "we are, of course, entitled to affirm on any ground appearing in the record, including theories not relied upon or rejected by the district court" (alterations and internal quotation marks omitted)). Though Appellants claim they own "potentially banned devices" such as bipods, slings, and barrel weights, we are unpersuaded that those devices are even arguably proscribed by SB-707. SB-707 prohibits devices "constructed so that, when [they are] installed in or attached to a firearm[,] (i) the rate at which the trigger is activated increases; or (ii) the rate of fire increases." SB-707, sec. 1, § 4- 301(M)(1). The enumerated devices encompassed by the term "rapid fire trigger activator" all actually increase the rate at which the *firearm* is capable of firing. Indeed, such devices essentially turn firearms into automatic weapons. By contrast, the devices Appellants suggest may minimally increase the rate of fire do not increase the rate at which the *firearm* is capable of firing. Instead, those devices help prepare the *shooter* to fire again more quickly than she may have been able otherwise. But these devices Appellants point to are not similar in design or function to the devices banned by SB-707. As a result, they do not even come close to accomplishing what SB-707 set out to ban – they do not activate a trigger for rapid fire.

Thus, we find no basis to hold that Appellants have alleged an intent to engage in a course of conduct arguably proscribed by SB-707. For the same reasons,

we hold that Appellants have not shown a credible threat that SB-707 would be enforced in this manner. Accordingly, we affirm the district court on this issue.

C.

Failure to State a Takings Clause Claim

Appellants also argue the district court wrongly determined they failed to state a claim that SB-707 violates the Takings Clauses of the United States Constitution and the Maryland Constitution, Art. III, section 40, to the extent it is analogous to the federal Constitution.

The Fifth Amendment to the Constitution, incorporated to the states via the Fourteenth Amendment, provides "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. A "taking" can be of personal or real property, and it can be effected through either a physical appropriation of the property by the Government or through a regulation that goes "too far" in depriving the owner of her property rights. *See e.g. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014–15 (1992). Each of these scenarios has been treated differently in Takings jurisprudence. Relevant here, Appellants claim SB-707 effects a per se taking of their personal property.[3] [4] Specifically, because the

[3] Appellants only argue SB-707 amounts to a per se taking. They make no argument that, even if SB-707 is not a per se taking, it would be a taking when analyzed pursuant to the ad hoc balancing test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S, 104, 124 (1978). Therefore, we do not analyze SB-707 under that test.

[4] We pause here to note a fundamental distinction between the majority and the dissenting opinions. The dissent is of the view that the two types of takings are "classic" or per se takings, and

provision permitting registration with the ATF is ineffectual, Appellants argue SB-707's regulatory prohibition on one's ability to "transport . . . into the State" or "manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger

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"regulatory" takings. Thus, according to the dissent, for the taking here to be per se, it must fall under the framework of a "classic" taking, which occurs when the Government itself directly physically appropriates property "for its own use." *Horne v. Dept. of Agriculture*, 135 S. Ct. 2419, 2425 (2015). The dissent is incorrect in this regard. Though a "per se" taking originally only applied to physical takings, the Supreme Court has held that regulatory takings, too, can be per se. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). For this reason, we refer herein to "classic" takings as physical takings, which are distinct from regulatory takings.

Per se regulatory takings have been recognized in only two limited instances – *Loretto*, where the regulation required property owners to permit third parties to physically occupy their property, 458 U.S. 419, and *Lucas*, where the regulation rendered *real property* economically worthless, 505 U.S. 1003. As we explain below, the Supreme Court has left intact *Lucas*' distinction between real and personal property with regard to *regulatory* takings. *See Horne*, 135 S. Ct. at 2427. Thus, the per se regulatory taking in *Lucas* applies only to real property. And, as we further explain, the per se regulatory taking in *Loretto* is readily distinguishable because SB-707 does not require or permit third parties to take physical possession of the personal property.

Without recognizing the distinction between physical and regulatory takings, the dissent classifies the alleged taking here as a "classic" or *physical* taking. This, too, is incorrect, as SB-707 is (1) a regulation, and (2) does not require owners of the banned devices to physically turn them over to the Government. Therefore, SB-707 is not a classic, per se physical taking. And, because *Loretto and Lucas* are distinguishable, there is no framework under which we could conclude that it is a per se regulatory taking.

activator," SB-707, sec. 1, § 4-305.1(a), is tantamount to a direct appropriation of the personal property.

To date, the Supreme Court has recognized only two types of per se regulatory takings. First, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court considered whether a New York law requiring landlords to permit cable television companies to install equipment on their properties violated the Takings clause. 458 U.S. 419 (1982). Though the cable boxes and lines landlords were required to allow to be installed did not take much space on the landlords' properties, the Court characterized them as a "minor but permanent physical occupation" of the property. *Id.* at 421. The Court concluded "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426. Thus, when a regulation authorizes a third party to physically take property, that regulation effects a per se regulatory taking.

Then, in *Lucas v. South Carolina Coastal Council*, the Court found a per se or total regulatory taking "where regulation denies all economically beneficial or productive use *of land*." 505 U.S. at 1015 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis supplied). In explaining its reasoning for adopting this per se rule, the Court provided some insight into the distinctions between takings of real property and personal 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; as 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* (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think 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 (emphasis supplied) (internal quotation marks, citations, and alterations omitted).

Against this backdrop of cases, we held in *Holliday Amusement Co. of Charleston, Inc. v. South Carolina* that a South Carolina ban on the possession or sale of certain gambling machines was not a taking. 493 F.3d 404, 410–11 (4th Cir. 2007). There, the appellant previously had lawfully acquired video poker machines which it distributed for profit. *See id.* at 406. When South Carolina passed a law making possession of the machines unlawful and subjecting them to forfeiture, the appellant filed suit claiming a regulatory taking and requesting just compensation. *See id.* We concluded, "We believe that Supreme Court case law makes clear that gambling regulations like Act 125 per se do not constitute takings." *Id.* at 411 n.2. We came to this conclusion relying on *Andrus v. Allard*, 444 U.S. 51, 65 (1979), in which the Supreme Court held "government regulation—by definition—involves the adjustment of rights for the public good," and *Lucas*,

where the Court noted "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware that new regulation might even render his property economically worthless," 505 U.S. at 1027–28. Because gambling is "an area in which the state traditionally enjoys wide latitude to regulate activity minutely or to outlaw it completely," *Holliday*, 493 F.3d at 410, we held the appellant "was well aware that the South Carolina legislature might not continue to look favorably upon it. The fact that this possibility came to pass does not yield him a constitutional claim," *id.* at 411.

Though Appellee argues *Holliday* squarely forecloses Appellants' Takings claim, Appellants argue *Holliday* did not survive the Supreme Court's 2015 decision in *Horne v. Dept. of Agriculture*, 135 S. Ct. 2419 (2015). According to Appellants, *Horne* makes clear that both types of per se regulatory takings apply equally to real property and personal property. Appellants' contention plainly fails.

In *Horne*, the Supreme Court did hold that the first type of per se regulatory takings identified in *Loretto* – direct appropriation – applies to personal property. *See Horne v. Dept. of Agriculture*, 135 S. Ct. 2419, 2425–27 (2015) (explaining the "Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home," because "[n]othing in this history suggests that personal property was any less protected against *physical appropriation* than real property") (emphasis supplied)). *Lucas*, which established the second type, however, was about purely *regulatory* takings, not direct appropriations authorized by regulation. *Id.* at 2427. Thus, *Horne* distinguished *Lucas*: "[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*." *Id.* (emphasis supplied).

Appellants overlook this distinction and how it applies in this case. SB-707 does not require owners of rapid fire trigger activators to turn them over to the Government or to a third party. Regardless of whether we would today decide *Holliday* – which required *forfeiture* of the gambling machines – the same way, the *Horne* Court expressly preserved the reasoning behind *Holliday*'s conclusion as it appears in *Lucas* and *Andrus*. Though SB-707 may make the personal property economically worthless, owners are "aware of th[at] possibility" in areas where the State has a "traditionally high degree of control." *Lucas*, 505 U.S. at 1027–28. We can think of few types of personal property that are more heavily regulated than the types of devices that are prohibited by SB-707. And, "government regulation—by definition—involves the adjustment of rights for the public good." *Andrus*, 444 U.S. at 65.

Thus, we agree with the district court that Appellants do not state a claim that SB-707 violates the Takings Clause.

D.

Maryland Declaration of Rights

Finally, we address Appellants' claim that the district court improperly determined SB-707 does not violate Article 24 of the Maryland Declaration of Rights.

"Together, Maryland's Declaration of Rights and Constitution prohibit the retrospective reach of statutes

that would have the effect of abrogating vested rights." *Muskin v. State Dept. of Assessments and Taxation*, 30 A.3d 962, 968 (Md. 2011). "If a retrospectively-applied statute is found to abrogate vested rights or takes property without just compensation, it is irrelevant whether the reason for enacting the statute, its goals, or its regulatory scheme is rational." *Id.* at 969 (internal quotation marks omitted).

The first step in analyzing whether SB-707 violates Maryland's Constitutional provisions is determining whether the law operates retrospectively. Importantly, though Appellants have challenged the district court's holding that SB-707 does not abrogate vested rights, they have not challenged the district court's ruling that the statute is not retrospective, thereby waiving the issue. *See Roe v. United States DOD*, 947 F.3d 207, 219 (4th Cir. 2020) (citation omitted) ("Issues that [the appellant] failed to raise in his opening brief are waived."). Because a statute must be retrospective to violate the Maryland Declaration of Rights, we affirm the district court's decision on this issue.

In any event, though Maryland has not identified a "bright line rule" for determining what constitutes retrospective application, the Maryland Court of Appeals has held a retrospective application "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." *John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.*, 957 A.2d 595, 599 (Md. 2008) (internal quotation marks omitted). And the Maryland Court of Appeals "adopted the [United States] Supreme Court's *Landgraf* factors analysis for retrospectivity that evaluates 'fair notice, reasonable reliance, and settled expectations' to determine 'the nature and extent of

the change in law and the degree of connection between the operation of the new rule and a relevant past event.'" *Muskin*, 30 A.3d at 970 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). The district court held that SB-707 does not operate retrospectively, and we agree. SB-707 does not alter the rights Appellants possessed when they purchased their rapid fire trigger activators, nor does it impose new liability back to the date of purchase. Instead, Appellants had fair notice of the change in law – SB-707 was passed six months before it first went into effect.

IV.

For the foregoing reasons, the decision of the district court is

AFFIRMED.

RICHARDSON, Circuit Judge, concurring in the judgment in part and dissenting in part:

In 2018, Maryland banned "rapid fire trigger activators"—bump stocks, burst triggers, and similar devices that permit a gun to fire faster. Unlike most bans, the Maryland law fails to grandfather-in existing property owners. For them, the real-world consequences of Maryland's ban are manifest: owners must destroy their devices, abandon them, surrender them, or send them out of state. The principal question in this appeal is whether Maryland's ban runs afoul of the Fifth Amendment because it takes "private property for public use, without just compensation." U.S. CONST. amend. V.

In my view, it does. A "classic" taking occurs not only when "government directly appropriates private property," but also when it "ousts the owner" of possession—as Maryland does here. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). The traditional "[p]roperty rights in a physical thing" are "to possess, use and dispose of it." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 417, 435 (1982) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). And Maryland's ban expressly eliminates *each* of these rights—it "does not simply take a single 'strand' from the 'bundle,'" rather "it chops through" and "tak[es] a slice of every strand." *Id.* When this type of taking occurs, an ousted owner is *per se* entitled to just compensation under the Fifth Amendment—period. *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2426 (2015). So I would vacate the district court's dismissal of Plaintiffs' takings claims and remand the case for further proceedings.

I. Facts

A. The Maryland ban

On October 1, 2018, private ownership of "rapid fire trigger activators" in Maryland became illegal. A "rapid fire trigger activator" is "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." Md. Code § 4-301(M)(1). The term "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." § 4-301(M)(2).[1] On pain of fine or up to three years in prison, private citizens may not

[1] Maryland law defines each of these enumerated mechanisms:

- A "bump stock" "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).
- A "trigger crank" "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).
- A "hellfire trigger" "disengages the trigger return spring when the trigger is pulled." § 4-301(K).
- A "binary trigger system" "fires [a gun] both when the trigger is pulled and on release of the trigger." § 4-301(E).
- 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." § 4-301(G). Semiautomatic "replacement triggers" that merely "improve[] performance and functionality over the stock trigger" do not fall within the ban. § 4-301(M)(3).

"manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator." § 4-305.1(a). Nor may they "transport" these devices into the state. § 4-306(a).

One provision of Maryland law purports to permit owners to hold on to their banned devices so long as they:

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

§ 4-305.1(b) (emphasis added). But—whether by design or mistake—this grandfather clause is illusory. The ATF, a federal agency, lacks the authority to assess applications for the State of Maryland. *See* Bureau of Alcohol, Tobacco, Firearms & Explosives Special Advisory, *Maryland Law Restricting "Rapid Fire Trigger Activators"* (Apr. 24, 2018). So the agency rebuffed all applications and returned any requests to the applicant without action. *See id.*

B. The proceedings below

Maryland Shall Issue ("MSI") and four of its members filed this putative class action in the District of Maryland. MSI, a Maryland nonprofit corporation, seeks to "preserv[e] and advance[] gun owners' rights in Maryland." J.A. 11. According to MSI, its members possess "rapid fire trigger activators which are effectively and totally banned" by Maryland law. J.A. 12.

The four named MSI members similarly claim to "own[] one or more of the 'rapid fire trigger activators' newly banned by [Maryland]." *Id.* And they assert the ban "dispossesses [them] of their property" without compensation. J.A. 14.

Plaintiffs assert two related takings claims. First, Plaintiffs contend the Maryland ban violates the Takings Clause of the U.S. Constitution. Second, they argue the ban is an impermissible taking under the Maryland Declaration of Rights. The district court disagreed and granted Maryland's motion to dismiss. *See* FED. R. CIV. P. 12(b)(6).[2] Plaintiffs timely appealed. With all claims dismissed below, this appeal properly lays before us. *See* 28 U.S.C. § 1291.

II. Discussion

We review the district court's dismissals de novo. At the 12(b)(6) stage, we accept all well-pleaded facts as true and draw all reasonable inferences in favor of Plaintiffs. *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020). When viewed in this light, Plaintiffs' claims survive if they provide a plausible legal basis for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A. Standing to assert takings claims

As a judge on a court of limited jurisdiction, I first must confirm our power to hear this appeal. *See General Technology Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 118 (4th Cir. 2004). Article III limits the federal "judicial Power" to "cases and controversies." U.S. CONST. art. III, § 2. Beyond this limit, we lack

[2] Plaintiffs also claimed the ban is unconstitutionally vague. The district court dismissed this claim for lack of subject-matter jurisdiction. And I agree that Plaintiffs lack standing to bring this claim.

subject-matter jurisdiction. "One element of the case-or-controversy requirement" that all federal-court plaintiffs must establish is standing. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). And standing's "irreducible constitutional minimum" has three components: "Plaintiffs must show that they have (1) suffered an injury in fact, that is (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "[A]t least one plaintiff must have standing to sue" on each claim asserted. *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019).

I agree with the majority's (implicit) determination that individual Plaintiffs have standing to bring their takings claims. In *Andrus v. Allard*, the Supreme Court considered whether owners of protected bird products had standing to claim that a federal ban on selling their products amounted to a taking without compensation. 444 U.S. 51, 54–55 (1979). "Because the regulations [the owners] challenge[d] restrict[ed] their ability to dispose of their property," the Court reasoned, they had "a personal, concrete, live interest in the controversy." *Id.* at 64 n.21. Here, Maryland law not only eliminates Plaintiffs' property right to "sell [or] transfer" their devices, but also to "possess" or "transport" them. §§ 4-305.1(a), 4-306(a). So, as in *Andrus*, the individual Plaintiffs suffer a concrete injury from Maryland's ban, and a favorable judicial decision promises relief.[3]

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[3] Maryland urges this appeal is moot because federal regulations now ban bump stocks. *See* 27 C.F.R. § 478.11; *Guedes v. BATF*, 920 F.3d 1 (D.C. Cir. 2019). Thus, the state claims, the outcome of this case will have no practical effect on Plaintiffs. Not so.

Because individual Plaintiffs have standing to assert their takings claims, I see no need to address MSI's associational standing on this issue. *See Department of Commerce*, 139 S. Ct. at 2565. Yet the majority does, and I find their analysis peculiar. Rather than identifying a plaintiff with standing to assert the takings claims, the majority instead chooses to discuss and reject one associational standing theory that fails. I fail to see the rhyme or reason for this approach here.

B. Takings claims

Having confirmed our court's power to entertain Plaintiffs' takings claims, I now turn to the merits.

1. The Supreme Court's "classic" and "regulatory" takings jurisprudence

The Fifth Amendment's Takings Clause provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend V. For

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Simply put, the federal regulations and Maryland ban are coextensive in neither time nor scope. First, this argument fails to consider the time between the Maryland ban and the federal ban. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 320 (1987) (The government has a "duty to provide compensation for the period during which the taking was effective."). Second, even assuming later changes to federal law could moot a taking by operation of state law, Maryland's ban applies more broadly than its federal counterpart. *Compare* 27 C.F.R. § 478.11 (bump stocks) *with* § 4-301(M)(2) (trigger cranks, hellfire triggers, binary trigger systems, and more); *accord* Appellee Br. 17 n.4. Indeed, the ATF specifically excluded binary triggers from its regulations, *see* 83 Fed. Reg. 66534, but Maryland bans them. And Plaintiffs claim more than just their bump stocks were taken. *See* J.A. 12. So Plaintiffs retain a legally cognizable interest in the outcome, and their case remains live. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969).

the last century-and-a-quarter, this constitutional prohibition has bound the states as well as the federal government. *See Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). As originally understood, "'the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession.'" *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)). Grounded in our history and constitutional tradition, the Supreme Court has called this historic form of government interference a "classic taking." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005); *see Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2425 (2015) (tracing classic takings back to the "principles of the Magna Carta").

Over time, the Supreme Court expanded the scope of the Takings Clause beyond the classic paradigm. In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court endorsed an ad hoc factual inquiry to determine when "regulation goes too far" so as to be "recognized as a taking." 260 U.S. 393, 415 (1922). On one hand, the Court explained, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the law." *Id.* at 413. But, at the same time, "a strong public desire to improve the public interest is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id*. at 416. The proper balance between these two apparently contradictory principles, Justice Holmes said, "is a question of degree—and therefore cannot be disposed of by general propositions." *Id*.

Mahon laid the cornerstone for the "regulatory takings" doctrine that jurists apply today.[4] And despite Justice Holmes's suspicion of "general propositions" in the regulatory-takings context, the Court has since identified "two guidelines" that channel this inquiry. *Murr*, 137 S. Ct. at 1937. First, a regulation that "denies all economically beneficial or productive use of land" is considered a "total regulatory taking" that generally requires compensation. *Lucas*, 505 U.S. at 1015. Second, *Mahon*'s "ad hoc, factual inquiry" has been distilled to three factors for consideration: the economic impact of a regulation, the regulation's interference with investment-backed expectations, and the character of the government action. S*ee Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Relatedly, the Court has identified two propositions that cut against finding a regulatory taking. A regulatory-takings claim generally fails if "the challenged limitations 'inhere . . . in the restrictions that background principles of the State's law of property and nuisance already placed on land ownership.'" *Murr*, 137 S. Ct. at 1943 (quoting *Lucas*, 505 U.S. at 1029). And, due to the state's "high degree of control over commercial dealings," the Court has

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[4] Unfortunately, this label creates a slight linguistic difficulty: "regulatory takings" need not arise from federal-registrar-type "regulations." As described below, the Supreme Court has used this label to refer to the nature of the government action, not the form of a legal edict. Accordingly, *regulations* have given rise to "classic takings." *See Horne*, 135 S. Ct. at 2428 (Department of Agriculture regulation was a classic taking). Similarly, *laws* or *other forms of government action* have resulted in "regulatory takings." *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 529–37 (1999) (plurality) (federal statute gave rise to regulatory taking). Thus, the term "regulatory takings" is best understood as referring to a conceptual class of takings, rather than a taking caused by a "regulation." *Contra* Majority Op. 13–14 n.4.

suggested that personal property may be less protected than real property in the regulatory-takings context. *See Lucas*, 505 U.S. at 1027–28; *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 410–11 (4th Cir. 2007).

Yet, the "classic taking" retains a distinct identity in our Fifth Amendment jurisprudence. Indeed, the Supreme Court has repeatedly warned against confusing its inquiry for classic takings with the analysis for regulatory takings. *Horne*, 135 S. Ct. at 2428–29; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). Whatever the role of categorical rules in the "more recent" regulatory-takings inquiry, the classic taking, "old as the Republic[,] . . . involves the straightforward application of *per se* rules." *Tahoe-Sierra Pres. Council*, 535 U.S. at 322. A classic taking always requires compensation—no matter how trivial the economic consequences. *Horne*, 135 S. Ct. at 2426; *Loretto*, 548 U.S. at 434–35. Even if we recognize different sets of expectations for personal and real property in the regulatory-takings context, *see Lucas*, 505 U.S. at 1027–28, they are treated the same in the classic framework, *Horne*, 135 S. Ct. at 2426–28. And although the state's police powers or background principles of property law may defeat a regulatory-takings claim, *see Lucas*, 505 U.S. at 1029, they will not affect a classic-takings claim, *Horne*, 135 S. Ct. at 2425, 2428; *Loretto*, 548 U.S. at 434–35.[5]

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[5] This is not to say that "*per se*" rules either do not or cannot apply in the regulatory context. *Contra* Majority Op. 13 n.4. Indeed, the Supreme Court has at various times referred to *Lucas* as establishing either a "*per se*" or a "categorical" regulatory takings rule. *Compare Tahoe-Sierra Pres. Council*, 535 U.S. 302, 325 (describing *Lucas* as "a regulatory takings case that, neverthe-

You might wonder how a singular constitutional clause can be imbibed with such disparate meanings. I might too. One meaning is rooted in the original understanding of a taking, *see Horne*, 135 S. Ct. at 2426–27; *compare* 1 William Blackstone Commentaries 134–36 (1st ed. 1765), the other is a newer doctrine shaped by the forward-march of government regulation during the twentieth century, *see Murr*, 137 S. Ct. at 1942. But students of the law are no stranger to parallel legal theories that spring from the same constitutional source. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (noting the Fourth Amendment shelters privacy interests "that existed when the Fourth Amendment was adopted" as well as contemporary "reasonable expectations of privacy"). In this respect, the Takings Clause is simply par for the course.[6]

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less, applied a categorical rule"), *with Lingle*, 544 U.S. at 528 (suggesting that Lucas established a "*per se*" rule). But the *Lucas* rule, however it is characterized, has exceptions. *See Lucas*, 505 U.S. at 1029. Classic takings do not and so always require just compensation. *See Horne*, 135 S. Ct. at 2425.

[6] Of course, this only highlights certain fundamental questions: How do we justify two parallel doctrines rising from a single source? Are parallel doctrines tenable? *See* Craig S. Lerner, *Justice Scalia's Eighth Amendment Jurisprudence: The Failure of Sake-of-Argument Originalism*, 42 HARV. J.L. & PUB. POL'Y 91 (2019) (discussing the breakdown of the Eighth Amendment compromise between evolving standards of decency and the original understanding of cruel and unusual punishment). Why do we think the judiciary is well-equipped to evaluate the reasonableness of investment or privacy expectations? *See* The Federalist No. 78, at 468–69 (Hamilton) (C. Rossiter ed., 1961) (discussing the independence of the judiciary from public opinion). And as our own decisions may in turn influence the public's expectations, where lies the line between deciding what the law is and what it should be? *See* Michael Abramowicz, *Constitutional*

But by applying distinct legal rules in the classic- and regulatory-takings contexts, the Supreme Court has concentrated considerable pressure on the threshold question of categorization. In this case, that pressure comes to a head. Plaintiffs argue Maryland's ban amounts to either a *per se* classic taking (*see Loretto*/*Horne*) or a total regulatory taking (*see Lucas*).[7] If Maryland's ban is a taking within the former framework, just compensation is required—no matter the state's interest. But if Maryland's ban is more aptly characterized as a total regulatory taking, then background principles of Maryland law likely defeat Plaintiffs' takings claim. *See* Majority Op. 15–17; *Holliday Amusement*, 493 F.3d at 410–11. *But see Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1136–39 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018). This stark doctrinal divide requires confronting the deceptively difficult question of whether Maryland's ban falls within the scope of the classic-takings doctrine. I conclude it does.

2. The Maryland ban is a "classic taking"

We return to the text of the constitutional prohibition: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. As framed here, this case turns on what it means to "take" "property" in the classic context.[8]

Circularity, 49 UCLA L. REV. 1, 60–63 (2001); *Lucas*, 505 U.S. at 1035–36 (Kennedy, J., concurring) (citing *Katz v. United States*, 389 U.S. 347 (1967)).

[7] Plaintiffs do not make an ad-hoc-regulatory-takings claim (*see Penn Central*).

[8] The parties do contest the meaning of "public use." *See Kelo v. City of New London*, 545 U.S. 469, 484 (2005) (holding that the

The Supreme Court explains that "property," within the text of the Fifth Amendment, "denote[s] the group of rights inherent in the citizen's relation to [a] physical thing," as opposed to merely the physical thing itself. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945); *see also Eaton v. Boston, C. & M.R.R.*, 51 N.H. 504, 511 (1872) ("'[P]roperty,' although in common parlance frequently applied to a tract of land or chattel, in its legal signification 'means only the rights of the owner in relation to it.'") (quoting *Wynehamer v. The People*, 13 N.Y. 378, 433 (1856)); 1 Blackstone Commentaries 138 (Property "denotes a right" over a thing). The bedrock rights of property are "to possess, use and dispose" of an item. *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 435 (1982) (quoting *General Motors*, 323 U.S. at 378); *compare* 1 Blackstone Commentaries 134 ("use, enjoyment, and disposal"). And the government takes property in the classic sense when it eliminates each of these property rights. *See Loretto*, 458 U.S. at 435; *Eaton*, 51 N.H. at 511–12.

In *Loretto*, for instance, the Supreme Court considered whether a government-mandated physical occupation of real property by a third party was a taking. There, New York law required landlords to permit cable-television companies to install cable hookups on their rooftop. *Id.* at 421. After explaining that property rights in a physical thing are "the rights 'to possess, use and dispose of it," the Court reasoned that a permanent physical occupation is a *per se* taking *because* "it effectively destroys each of these rights." *Id*. at 435. First, the owner loses the right to possess the occupied space himself and has no power to

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condemnation of property for private economic development is a "public use").

exclude the occupier. *Id*. Second, the owner is denied any control over the use of the occupied property. *Id*. And last, even though the owner retains the right to dispose of the occupied space, that right is void of value since the property is occupied by another. *Id*. So the physical occupation is of a special character only *because*—to use the Supreme Court's metaphor—that occupation "chops through the 'bundle'" of property rights, rather than takes "a single 'strand.'" *Id.*; *see also YMCA v. United States*, 395 U.S. 85, 92 (1969) ("Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property, and *it is this deprivation* for which the Constitution requires compensation.") (emphasis added).

Similarly, in *Horne*, the Supreme Court considered whether a Department of Agriculture regulation requiring raisin handlers to set aside a portion of their raisins for the government amounted to a classic taking. 135 S. Ct. at 2424. Although the raisins may remain on the premises of the handlers, a government committee dictated whether the set-aside raisins would be sold in noncompetitive markets or donated to charitable causes. *Id*. at 2424, 2428. Net proceeds—if any—would be distributed to the handler. *Id*. at 2424. The court explained that the set-aside requirement "is a clear physical taking." *Id*. at 2428. And it reasoned that growers subject to the reserve requirement "thus lose the entire 'bundle' of property rights in the appropriated raisins—"the rights to possess, use and dispose of' them." *Id.* (quoting *Loretto*, 458 U.S. at 435). Therefore, the Court explained that "[t]he Government's 'actual taking of possession and control' of the reserve raisins gives rise to a taking." *Id*. (quoting *Loretto*, 458 U.S. at 435).

In contrast, consider *Andrus v. Allard*, when the Supreme Court analyzed whether the federal government took property from commercial dealers when it prohibited transactions in protected bird feathers and other items. 444 U.S. at 55. There, the Court acknowledged the "significant restriction [] imposed on one means of disposing of the artifacts"—a prohibition on their sale. *Id*. at 66. But, it reasoned, "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id*. at 66–67 (citations omitted). And "[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*. at 68. So the Court applied a regulatory-takings lens and held that the federal restriction on sales did not amount to a taking.[9]

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[9] Similarly, the Supreme Court requires a "total" regulatory-taking analysis when an owner loses a single property right that zeros out the economic value of his holding while the rest of his property rights remain intact. In *Lucas v. South Carolina Coastal Council*, the Court assessed whether a South Carolina ban on coastal-zone construction amounted to a taking. 505 U.S. at 1007. There, the state took Lucas's right to construct "occupiable improvements," like single-family homes, on his land. *Id*. at 1008–09. Although taking this right "eliminated all economically viable use of his land," *id.* at 1021, Lucas retained the full bundle of remaining property rights. Lucas continued to own and possess the land, and he could sell it or build other structures on it. *See id.* at 1009 n.2; *see also id.* at 1044 (Blackmun, J., dissenting) ("Petitioner can [exclude, alienate,] picnic, swim, camp in a tent, or live on the property in a movable trailer."). Because only a single property right was taken, *Lucas* fell within the regulatory-takings framework. And the Court set out a "total" regulatory-takings doctrine for the South Carolina Supreme Court to apply on remand. *See id.* at 1027–32.

Loretto, *Horne*, and *Andrus* highlight key distinctions that determine the applicability of either the classic or the regulatory framework. In *Loretto*, government action "effectively destroyed" the owner's core property rights to possess and use his property, and it impaired the owner's right to dispose of his property. 458 U.S. at 421. And in *Horne*, the government's reserve requirement similarly eliminated the handler's property rights to possess, use, and dispose. *See* 135 S. Ct. at 2427. Accordingly, the Court applied the classic takings framework in *Loretto* and *Horne*. But in *Andrus*, the owner retained the rights to possess, transport, and donate his property, losing only a single property right—the right to sell. 444 U.S. at 68; *see also Lucas*, 505 U.S. at 1009. So the Court used a regulatory framework. Together, these cases teach that when government action cuts across a broad swath of property rights, the classic framework applies. (For this reason, both physical appropriations and ousters of possession are classic takings.) But where only a single property right is taken or impaired—such as a use or sale regulation—the regulatory-takings framework provides the proper mode of analysis.

With these distinctions in mind, I find the classic-takings framework applies to Maryland's ban. That ban *expressly* eliminates the current owners' property rights to possess, transport, donate, devise, transfer, or sell their devices. §§ 4-305.1(a), 4-306(a). Not only does this list destroy all the rights the Supreme Court found crucial in *Andrus*, but it goes beyond even those rights "effectively destroyed" in *Loretto* and *Horne*. The *Loretto* plaintiff could at least sell the occupied property—even if that right was void of value. And the *Horne* raisin handlers retained a contingent interest in the profits from the sales of the set-aside raisins.

But here, Plaintiffs are prohibited not just from "sell[ing]" their property, but from even "offer[ing] to sell" their devices or "transfer[ing]" them, such as by donation or devise. §§ 4-305.1(a). So the law is a far cry from the destruction of a single strand of the owner's property—it is a blunt chop through the bundle of rights that gives rise to a classic taking.

Moreover, the physical consequences of the enumerated list—although obvious—make the classic nature of this taking clear. Surely, the government must compensate owners for their personal property if it physically dispossesses owners. *See Horne*, 135 S. Ct. at 2428. But Maryland instead requires owners to physically dispossess themselves—or face imprisonment.[10] The dispossession mandate leaves the owner with a finite list of tangible options to effect dispossession of their rapid fire trigger activators: destroy them, trash them, abandon them, or surrender them. So a ban on possession is not just "'the functional equivalent of a practical ouster of the owner's possession,' like the permanent flooding of property." *Murr*, 137 S. Ct. at 1942 (internal citations omitted). A possession ban is an *actual* ouster. *See Oust*, Black's Law Dictionary (11th ed. 2019) ("To put out of possession."); *Oust*, 7 Oxford English Dictionary 240 (2d ed. 1989) ("To put out of possession, eject, dispossess, disseise."). In other words, the possession ban does not make property ownership uneconomical or undesirable, as in a regulatory taking. It actually and physically defeats one's property rights—a classic taking.

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[10] *Cf.* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 66 (1985) ("That the government has not taken physical possession of the land is neither here nor there. It clearly will enter the land by force" if its edict is "not respected by the parties who are subject to it.").

Notably, the Maryland ban lacks the features that have traditionally prevented firearms-related regulations from being considered classic takings—namely use restrictions or registration options for existing owners. *See* Note, *The Public Use Test: Would a Ban on the Possession of Firearms Require Just Compensation*, 49 LAW & CONTEMP. PROBS. 223, 246 (1986) (discussing how regulations are typically drawn to avoid outright takings or absolute bans on possession). For example, in *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General of New Jersey*, the Third Circuit considered whether New Jersey's partial ban on the possession of magazines that held greater than ten rounds of ammunition amounted to a taking. 910 F.3d 106 (3d Cir. 2018). There, the court reasoned that the *per se* framework did not apply "because owners have the option to transfer or sell their [magazines] to an individual or entity who can lawfully possess [them], modify their [magazines] to accept fewer than ten rounds, or register" the magazines. *Id*. Here, Plaintiffs have no such options. Although the Maryland ban purports to allow for registration of rapid fire trigger activators with the ATF, that provision never took effect. *See* Bureau of Alcohol, Tobacco, Firearms & Explosives Special Advisory, *Maryland Law Restricting "Rapid Fire Trigger Activators"* (Apr. 24, 2018).[11]

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[11] Unlike the New Jersey case, in *Duncan v. Becerra*, a federal district court found that a more restrictive California magazine regulation was a taking. 265 F. Supp. 3d 1106, 1137 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018). In *Duncan*, the California law, also banning magazines holding more than ten rounds, "provid[ed] three options for dispossession." First, an owner may "remove the large-capacity magazine from the State." *Id*. at 1110 (citation omitted). Second, one may "sell the large-capacity magazine to a licensed firearm dealer." *Id.* (citation

For these reasons, I would find that Plaintiffs' factual allegations are sufficient to show that Maryland's ban is a classic taking. So I would allow Plaintiffs' Fifth Amendment claim to proceed.[12]

According to the majority, the classic line of cases is simply inapplicable. In their view, the ban "does not require owners of rapid fire trigger activators to turn them over to the Government or to a third party." Majority Op. 17. I do not find this distinction persuasive, and neither has the Supreme Court. Property need not be turned over *to the government* to effect a classic taking. *See Loretto*, 458 U.S. at 433 n.9; *cf. Kelo*, 545 U.S. at 477 ("[A] State may transfer property from one private party to another."). Indeed, property need not physically be turned over to anyone at all—not even a "third party"—for a classic taking to arise. For instance, in *Pumpelly v. Green Bay & Mississippi Canal Co.*, Wisconsin argued that property was not

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omitted). And third, a person may "surrender the large-capacity magazine to a law enforcement agency for destruction." *Id.* (citation omitted). Although California provided three options for disposal, the court emphasized that the regulation deprived owners of "not just use of their property, but of *possession*, one of the most essential sticks in the bundle of property rights." *Id.* at 1138 (emphasis in original). So it found a taking—although under a novel "hybrid takings" theory. *See id.* Here, the Maryland law goes even further: it requires dispossession *without* the possibility of sale.

[12] For the same reasons, I would allow Plaintiffs' state law takings claim to proceed. Article 24 of the Maryland Declaration of Rights provides "That no man ought to be . . . deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The Maryland Court of Appeals has held that, at a minimum, Article 24 provides the same protections for property as the Fifth Amendment. *See, e.g.*, *Raynor v. Maryland Department of Health & Mental Hygiene*, 110 Md. App. 165, 185 (1996).

taken by the state when an owner's land was flooded after the construction of a dam. 80 U.S. 166, 178 (1871).[13] In response, the Supreme Court explained:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . it shall be held that if the government refrains from the absolute conversion of real property . . . it can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not *taken*.

Id. at 177–78 (emphasis in original).[14] So *Pumpelly* was a taking because the owners' property rights were *destroyed*, not because their rights were *transferred* to another indeed, no transfer occurred at all. *See id*. at 174, 177–80; *see also Murr*, 137 S. Ct. at 1942 (noting that "the permanent flooding of property" is the "functional equivalent of a practical ouster of the owner's possession" and thus a classic taking). So too here.

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[13] "The defendant's lands have not been *taken or appropriated*. They are only affected by the overflow occasioned by raising the water in Lake Winnebago. Whatever may be the extent of this injury, it is remote and consequential and without remedy." *Pumpelly*, 80 U.S. at 174 (argument of the appellee) (emphasis in original).

[14] Although *Pumpelly* was a pre-incorporation case that arose from the Takings Clause of the Wisconsin Constitution, the Court noted that the state and federal provisions were "almost identical in language." *Id*. at 177–78. And *Pumpelly* has continued to serve as an important precedent for modern takings claims under the federal constitution. *See, e.g.*, *Loretto*, 458 U.S. at 433 n.9; *First English*, 482 U.S. at 316–17.

Additionally, the majority says that *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007), decides this case. *Holliday*, which "required *forfeiture* of [] gambling machines," Majority Op. 17, may indeed explain the failure of Plaintiffs' claim under *Lucas*' "total" regulatory-takings doctrine. But it has nothing to say about the merits of Plaintiffs' classic-takings claim under *Loretto* and *Horne*. As our Court explained in *Holliday*, those plaintiffs proceeded under a regulatory-takings theory, not a classic-takings theory. *See id*. at 407, 410, 411 n.2.[15] And as discussed above, regulatory-takings precedents are distinct from classic-takings precedents. *See Horne*, 135 S. Ct. at 2429; *Tahoe-Sierra Pres. Council*, 535 U.S. at 323. Indeed, the *Holliday* court denied compensation under a regulatory-takings framework based on South Carolina's traditionally high degree of control over gambling activities. *See Holliday Amusement*, 493 F.3d at 410–11. But as *Horne* makes clear, background principles of state law have no place in the classic-takings analysis—the Government has a *per se* duty "to pay just compensa-

[15] I find it unsurprising that plaintiffs in *Holliday Amusements* did not make this argument. Before the Supreme Court's decision in *Horne*, many courts and commentators believed different *per se* rules applied for personal and real property. *See generally Horne v. Department of Agriculture*, 750 F.3d 1128, 1140 (9th Cir. 2014). But as the Supreme Court has since made clear: "Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property." *Horne*, 135 S. Ct. at 2426; *see also James v. Campbell*, 104 U.S. 356, 358 (1882) (discussing the taking of patents).

tion when it takes your car, just as when it takes your home." 135 S. Ct. at 2426.[16]

On the other hand, the district court seems to suggest that the classic framework does not apply because device owners may retain some property interests. *See* J.A. 246 n.8; *Horne*, 135 S. Ct. at 2437 (Sotomayor, J., dissenting) ("[E]ach and every property right must be destroyed by governmental action before that action can be said to have effected a *per se* taking."). In this view, if "even one property right" remains, the regulatory-takings framework provides the appropriate analysis. *Id*. at 2438 (Sotomayor, J., dissenting).

Assuming the ban left some ability to transfer the devices out of state, any such rights would not defeat the classic-takings analysis. First, it is simply incorrect that the government must destroy every stick in the bundle of property rights to effect a taking. As described above, in *Loretto*, the owner retained the right to sell or transfer the occupied property. 458 U.S. at 437. The court still applied a *per se* framework. *See also Horne*, 135 S. Ct. at 2428.[17]

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[16] For the same reasons, the cases cited in Maryland's brief on this issue are inapposite. *Mugler v. Kansas*, for instance, was a regulatory-takings case involving a prohibition on the use of land for the manufacture and sale of alcoholic beverages; it in no way ousted the owners from their land. 8 S. Ct. 273, 279 (1887) (explaining "the owner is in nowise *deprived* of his property") (emphasis in original); *see also Lucas*, 505 U.S. at 1022 (describing *Mugler* as one of the Court's "early attempt[s]" to explain why the government may "affect property values by regulation without incurring an obligation to compensate") (citing *Penn Central*, 438 U.S. at 125).

[17] *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 165–66 (1979). In *Kaiser Aetna*, the Supreme Court considered whether the government "took" property within the meaning of the Fifth

Second, the statute unambiguously destroys Plaintiffs' ability to possess, use, or transfer property in the state where they reside. Never before have we required individuals to leave a jurisdiction to enjoy constitutional protections. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (explaining that a locality's First Amendment "time, place, or manner restrictions" must leave open "ample alternative channels"). And we should not do so today. The incorporated provisions of the Bill of Rights limit the powers of the several states, "necessarily tak[ing] certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). And incorporation would be hollow indeed if it provided no protection from State power so long as one can go elsewhere to exercise his "rights." *See McDonald v. Chicago*, 561 U.S. 742, 790 (2010) ("Incorporation always restricts experimentation and local variations."). The Fifth Amendment prohibits uncompensated takings; it does not require flight to avoid them.

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Amendment when it required owners to afford public access to a marina created when the owners connected a private pond to a Hawaiian bay. The marina proprietors retained their ownership of the marina and could continue to charge their customers an annual $72 fee. *See id*. at 179–80. And they similarly retained the right to sell, transfer, or devise their property. *See id*. But, by requiring public access, the owners lost the property right to exclude others. Homing in on the loss of this right to exclude, the Supreme Court held "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id*. (footnote and citations omitted). So it found just compensation to be required.

As Justice Holmes noted almost a century ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, 260 U.S. at 416. And as Alexander Hamilton recognized, "one great obj. of Govt. is personal protection and security of Property." 1 Records of the Federal Convention of 1787, at 302 (Max Farrand ed., 1911); *see also* John Locke, *Second Treatise of Government* 62 (Blackwell ed., 1946) (describing the "great and chief end" of government as "the preservation of . . . property"). Indeed, constitutional restraints on the government's power over private property are deeply rooted in our history, and they have been integral to the preservation of personal liberty and improved human condition over time. *See generally* Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 44 J. ECON. HIST. 803 (1989).

I do not doubt the sincerity of the Maryland legislature passing this ban. But in my view, it requires paying just compensation. By banning "rapid fire trigger activators" without exception, Maryland law destroys the panoply of property rights that private owners previously enjoyed—including possession, use, and devise. This amounts to a classic taking of private property under the Fifth Amendment, so I would allow this case to proceed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: July 27, 2020]

No. 18-2474
(1:18-cv-01700-JKB)

MARYLAND SHALL ISSUE, INCORPORATED; PAUL MARK BROCKMAN; ROBERT BRUNGER; CAROLINE BRUNGER; DAVID ORLIN, all of the above individually named plaintiffs on behalf of themselves and all others similarly situated
Plaintiffs-Appellants

v.

LAWRENCE HOGAN, in his capacity of Governor of Maryland
Defendant-Appellee

GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE
Amicus Supporting Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Floyd, Judge Thacker, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed: November 16, 2018]

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Civil No. JKB-18-1700

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MARYLAND SHALL ISSUE, et al.

Plaintiffs,

v.

LAWRENCE HOGAN, *in his official capacity as Governor of Maryland*

Defendant.

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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

[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.

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-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).

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[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.*

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

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[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).

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 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 de-

> signed 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 inde-

pendent 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

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

holding in *Lucas* is entirely consistent with these background principles. 505 U.S. at 1026, 1028.

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

[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.

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 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]

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[6] In a few places, the *Horne* majority implies that *Loretto*, which involved a law requiring a landowner to permit permanent

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

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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, 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*.

appear anywhere in that case.[7] Plaintiffs' purported per se rule is thus rooted in a perplexing and

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[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.

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.

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 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.

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 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

[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 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.

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.

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.

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[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

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),

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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.

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 author-

ity 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

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[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,

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

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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.

permit because of the grant of exclusive authority to 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 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

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[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 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.

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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[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 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 regis-

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

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tration 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.

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

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

[Filed: November 16, 2018]

Civil No. JKB-18-1700

MARYLAND SHALL ISSUE, et al.

Plaintiffs,

v.

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

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MD Constitution, Declaration of Rights, Art. 24

That 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.

MD Constitution, Art. III, §40

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.

MD Code, Criminal Law, § 4-301(m)

(m)(1) "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:

(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, 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.

MD Code, Criminal Law, § 4-305.1

In general

(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.

Exception

(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;

(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.

MD Code, Criminal Law, § 4-306(a)

In general

(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.

MD Code, Courts & Judicial Proceedings, § 12–603

The Court of Appeals of this State may answer a question of law certified to it by a court of the United States or by an appellate court of another state or of a

tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State.