No. 20-855

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The State concedes that the items banned by Maryland are personal property under Maryland law and does not dispute that the decision below establishes legal standards applicable to *all* kinds of personal property. The State also does not dispute that an "ouster of possession" has always been the "functional equivalent" of a "direct appropriation" under this Court's precedents. Instead, Maryland contends that its "police power" supersedes the Takings Clause completely so as to allow the State to declare, *ipse dixit*, that lawfully acquired and lawfully possessed personal property to be contraband. Certiorari is appropriate to address the majority's incorrect view of an "appropriation" and to make clear that the "police power" cannot be invoked to destroy property rights otherwise protected by the Takings Clause.

The State also admits that the decision below conflicts with Federal Circuit precedent, but asserts that this precedent has been overruled, *sub silentio*, by this Court. That contention is plainly wrong, but the State's argument brings into stark focus the circuit split presented here. Allowing this conflict to stand would mean that different standards would apply to State takings than for federal takings. That result is intolerable. Plenary review is appropriate on this ground alone.

While conceding that the banned devices are property under Maryland law, the State argues that a mandated destruction of previously lawfully acquired property operates only prospectively and thus does not take any existing property right. That contention cannot be accepted as it would permit the State to destroy the right of possession through mere *ipse dixit.* At a minimum, the court below should have considered

certification of these issues to Maryland's highest court.

Finally, the State does not deny that the takings issues presented here are similar to those presented in *Cedar Point Nursery v. Hassid*, No. 20-107 (argued March 22, 2021). This Court should either summarily reverse or hold this case pending a decision in *Cedar Point*.

I. THE STATE'S POLICE POWER DOES NOT NULLIFY THE TAKINGS CLAUSE

A. A Taking Poses A Separate Question

The State insists that the district court below was correct in holding that the statute's ban regulates these devices "'as contraband'" and thus "'a legitimate exercise of the state's police power to regulate for public safety.'" (BIO 12, quoting Pet. App. 56a). Tellingly, the court of appeals did not adopt this rationale. The State's position cannot be accepted without eviscerating the Takings Clause.

As stated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), "[t]he 'public use' requirement is coterminous with the scope of a sovereign's police powers." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982), holds that the takings inquiry is separate from this public interest inquiry. There, this Court noted that the lower court had determined that the taking involved a "legitimate public purpose" and thus was "within the State's police power," but the Court nonetheless ruled that "[i]t is *a separate question* . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid." (458 U.S. at 425) (emphasis added).

Similarly, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992), this Court

rejected the lower court's reliance on *Mugler v. Kansas*, 123 U.S. 623 (1887), for the proposition that no compensation is owed where the regulation "is designed 'to prevent serious public harm.'" (505 U.S. at 1009). The *Lucas* Court explained that *Mugler* simply was "our early formulation of the police power justification necessary to sustain without compensation *any* regulatory diminution." (Id. at 1026) (emphasis the Court's).

The *Lucas* Court thus stressed that "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. *If it were, departure would virtually always be allowed*." (505 U.S. at 1027) (emphasis added). As the Court explained, "none" of the Court's cases, including *Mugler*, "employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land." (505 U.S. at 1026). Such a rule, the Court explained, would "essentially nullify *Mahon's* [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)] affirmation of limits to the noncompensable exercise of the police power." (Id.). See App.41a n.16 (Richardson, J., dissenting) (discussing *Mugler*).

Lucas holds that a State "must do more than proffer the legislature's declaration that the uses [plaintiff] desires are inconsistent with the public interest," stating further that "a 'State, by *ipse dixit*, may not transform private property into public property without compensation . . . .'" *Lucas*, 505 U.S. at 1031, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). Rather, the government "must identify background principles of nuisance and property law that prohibit the uses [the owner] now

intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031. See *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) (restating this test); *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 538 (2005) (same).

Here, as in *Lucas*, the State argues that the ban was designed to "*prevent*" harmful "use" (BIO 18) (emphasis the State's), but like the majority below, Maryland does not even attempt to "identify" any "background principles" which would support a ban on mere possession by innocent owners. Allowing the Fourth Circuit's decision to stand would thus permit a State to mandate destruction of existing personal property rights without regard to these basic Takings Clause principles set out in *Lucas*. No personal property, especially politically unpopular property, is protected from uncompensated destruction under the majority's analysis.

B. Lawfully Possessed Property Is Not Contraband

Lawfully acquired, lawfully possessed property is not "contraband." See *Luis v. United States*, 136 S.Ct. 1083, 1094-95 (2016) (plurality opinion), 136 S.Ct. at 1100 (concurring opinion) (holding that non-tainted assets of a criminal are not contraband); *Honeycutt v. United States*, 137 S.Ct. 1626, 1634-35 (2017) (holding that forfeiture is "limited to property the defendant himself actually acquired as the result of the crime"). Petitioners do not dispute that the State may use its police power to seize property that was *already illegal* under *preexisting* law. See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (sustaining the forfeiture of property actually used to carry out a crime); *Kam-Almaz v. United States*, 682 F.3d 1364, 1372 (Fed. Cir. 2012) (no taking where a laptop com-

puter had been lawfully seized under a preexisting Customs regulation); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) ("[t]he government's seizure of property to enforce criminal laws" is not a taking); *Acadia Technology, Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006) (same). None of those cases address a situation, like this case, where the government has declared, *ipse dixit*, perfectly legal property to be contraband and required its destruction *solely* on that basis.

We also agree that the government may seize, without paying just compensation, diseased or hazardous property where such seizure is otherwise appropriate under background principles of nuisance and property law. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (holding that the State may condemn diseased cedar trees in order to prevent the spread of the disease); *Gardner v. Michigan*, 199 U.S. 325, 331 (1905) (State may seize "table refuse, when dumped into receptacles kept for that purpose, will speedily ferment and emit noisome odors, calculated to affect the public health"); *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (government may destroy property to prevent the spread of a fire); *United States v. Caltex*, 344 U.S. 149 (1952) (property may be destroyed to prevent it from falling into enemy hands). Such circumstances may reasonably be said to "inhere in the title itself" under background principles. *Lucas*, 505 U.S. at 1029 & n.16. Cato Amicus Br. at 8. No such circumstances are remotely presented here.

Invoking the Las Vegas shooting and relying on the ATF rule that banned bump stocks (Pet. 3-4), Maryland appeals to raw emotion by arguing that bump stocks convert semi-automatic firearms into machine guns. (BIO 2, 6-7). The State's argument

obviously does not apply to Maryland's ban on other devices not covered by the ATF rule, including the ban on *any* device that increases the "rate of fire" of *any* firearm of *any* type by *any* amount. Pet. 2-3. As to bump stocks, the State's argument was rejected on the merits in *GOA, Inc. v. Garland*, — F.3d —, 2021 WL 1138111 (6th Cir. March 25, 2021), where the Sixth Circuit held that the ATF had misapplied the statutory definition of machine gun and refused to accord the ATF rule *Chevron* deference. On the *Chevron* point, *GOA* declined to follow *Guedes v. BATF*, 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S.Ct. 789 (2020), and *Aposhian v. Barr*, 958 F.3d 969, *rehearing en banc granted*, 973 F.3d 1151 (10th Cir. 2020), *original opinion reinstated sub. nom, Aposhian v. Wilkinson*, 980 F.3d 890 (10th Cir. 2021) (en banc), which sustained the ATF rule solely on *Chevron* deference grounds.

This circuit split on the *Chevron* question is important, but what is directly relevant to the takings analysis is that *all three* circuits agreed that bump stocks *were lawfully possessed property* prior to the effective date of the ATF rule. *GOA*, slip op. at 16; *Guedes*, 920 F.3d at 18, 20, 35; *Aposhian*, 958 F.3d at 980. The same is true for the other items banned by Maryland. As discussed above, such lawful property cannot be ordered destroyed without paying just compensation.

Indeed, as the State obliquely concedes (BIO 6), *actual* machine guns are also valuable lawful property. Under 18 U.S.C. § 922(o)(2)(B), Congress "grandfathered" machine guns manufactured prior to 1986 and thus law-abiding citizens may, to this day, lawfully own, possess, use and transfer such machine guns in accordance with the National Firearms Act

of 1934, 26 U.S.C. Ch. 53. Registered machine guns are likewise legal in Maryland. MD Code, Criminal Law, § 4-403(c). As of May of 2019, there were 699, 977 machine guns lawfully registered in this country. ATF, Firearms Commerce in the United States, Annual Statistical Update, Exh.8 (2019), *available at* https://bit.ly/31QjpKg (last viewed April 5, 2021). The devices banned by Maryland are hardly more dangerous than lawfully possessed machine guns.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH *HORNE*, *LORETTO*, *LUCAS* AND *ANDRUS*

Eight members of this Court expressly agreed, in *Horne v. Dep't. of Agric.*, 576 U.S. 350, 358-61 (2015), that appropriations of real property and personal property are to be treated "alike" for purposes of *per se* takings rules. Like the majority below, the State makes no attempt to address petitioners' point (Pet. 12) that 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. By its terms, *Horne* applies to all "appropriations," including ousters of possession. Indeed, *Horne* applied a *per se* rule even though the growers had refused to cede possession and suffered a civil fine as a result. Pet. 11. Petitioners here have suffered an actual ouster of possession.

The same point is fatal to the State's insistence (BIO 24) that *Loretto* is limited to cases where a physical transfer of possession takes place. The State, like the majority below, does not even *cite United States v. General Motors*, 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." Pet. 19-22. See also

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004 (1984) ("It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking. . . ."). The majority's holding that a mandated transfer of actual possession to the government or a third party is the *sine qua non* of an "appropriation" warrants summary reversal.

The State also wrongly suggests (BIO 23 & n.6) that the ban was not "absolute" because petitioners could have removed the devices to another State or could have registered the devices with the ATF, as contemplated by MD Code, Criminal Law, § 4-305.1. First, the State may not escape the Takings Clause by providing that personal property rights of State residents may be exercised only outside the State. See App. at 42a (Richardson, J, dissenting). Second, as the majority below recognized (App.4a), the ATF immediately and publicly advised Maryland owners that it was "without legal authority" to accept any registration applications. Nothing in the ATF rule remotely grants the ATF new "legal authority" to do so. The ATF registration provisions of Section 4-305.1 were thus a legal nullity *ab initio*.

Finally, the State, like the majority below, states (BIO 25) that *Lucas* is limited to "restrictions on land use," thereby making the same error committed by the Ninth Circuit in *Horne*. Pet. 10. The State's contention and the majority's holding ignore *Lucas'* reliance on *Webb's* (a personal property case) in ruling that a State may not employ *ipse dixit* edicts to destroy property rights. Pet. 18. See also *Ruckelshaus*, 467 U.S. at 1011-12 (applying the *ipse dixit* rule of *Webb's* to trade secrets). Like the majority below, the State does not even address petitioners' point (Pet. 18-19) that *Lucas* merely suggested that a ban may be imposed on the

sale of personal property consistent with the Takings Clause. The State and the majority have no answer to *Andrus v. Allard*, 444 U.S. 51, 65 (1979), and *Horne*, 576 U.S. at 364, which make clear that the government may ban the sale of personal property *as long as* it does not also destroy the "crucial" rights to possess, transport, donate or devise. *Lucas* relies on *Andrus* for that very point. Pet. 17. The majority's misreading of *Lucas* and *Horne* and its failure to follow *Andrus* require summary reversal.

III. THE FOURTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT WITH THE FEDERAL CIRCUIT

Maryland does not deny that multiple decisions of the Federal Circuit recognize that *Lucas* and *Loretto* fully apply to personal property without regard to whether physical possession was transferred to the government or a third party. Pet. 22-24. Rather, Maryland argues that none of these decisions remain good law because they were issued before *Horne* supposedly "confirmed that the *Lucas per se* rule applied only to takings of land." (BIO 28). As explained above, that argument misreads *Horne*. That assertion also overlooks *Alimanestianu v. United States*, 888 F.3d 1374, 1380 (Fed. Cir. 2018), *cert. denied*, 139 S.Ct. 1164 (2019), where the Federal Circuit construed *Horne*, *Lucas* and *Loretto* and confirmed that a "physical invasion" of personal property is a *per se* taking. The State does not dispute that a mandated destruction of property qualifies as a "physical invasion." Certiorari is necessary to address this circuit conflict. Pet. 24.

IV. THE FOURTH CIRCUIT ERRED IN REFUSING TO CONSIDER CERTIFICATION TO MARYLAND'S HIGHEST COURT

The State concedes that personal property is protected by the Maryland Constitution, but asserts that the Fourth Circuit merely held that the Maryland statute "did not operate retrospectively." (BIO 32). But the State does not dispute that petitioners lawfully acquired and possessed this property *before* the statute was enacted. The State, like the majority, skips over Maryland law which holds 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.'" *Muskin v. State Dep't. of Assessments and Taxation*, 422 Md. 544, 30 A.3d 962, 969 (2011) (citation omitted).

Any statute that bans lawful property that was lawfully acquired in "transactions" taking place prior to statute's enactment is "retrospective" as it destroys the right of continued possession that petitioners enjoyed **"**before passage of the act." (Id.). Like the attempt to "pre-empt" intangible property rights, rejected by the Court in *Ruckelshaus*, the State's (and the majority's) view of retrospectivity "proves too much" as it strips the Maryland Takings Clause of "all vitality" by allowing the uncompensated destruction of rights that the State admits are otherwise protected. *Ruckelshaus*, 467 U.S. at 1012. Pet. 27-28. At a minimum, the Fourth Circuit erred in refusing to consider certification of these State law issues. Pet. 28-30.

V. THE COURT SHOULD HOLD THIS CASE PENDING A DECISION IN *CEDAR POINT*

Contrary to the State's suggestion (BIO 18-19 & n.3), the *Cedar Point* petitioners did not endorse the

State's boundless view of a State's "police power." Rather, the *Cedar Point* petitioners rely on background principles of property law, just as petitioners do here, in arguing that their property rights had been taken. (Petitioners' Reply at 18). Indeed, the California statute at issue in *Cedar Point* could easily be justified as an exercise of "police power," which would, under Maryland's view, be dispositive of the takings question. Not even California makes that argument.

The State likewise erroneously asserts (BIO 19 n.3), that the *Cedar Point* petitioners suggested that otherwise legal "toxic chemicals" could be taken without just compensation. Rather, these petitioners argued that growing strawberries was not the same thing as manufacturing toxic chemicals, and thus California could not condition their agricultural business upon the surrender of an easement. That sort of "conditions" inquiry is relevant where the government is according a "benefit," such as a license to market and use pesticides, "in exchange" for the "voluntary" acceptance of a "rationally related" regulation that the government could not otherwise impose without affording just compensation. *Ruckelshaus*, 467 U.S. at 1007-08; Cato Amicus Br. at 8. Here, innocent owners lost all their property rights and received no benefit. That is not a fair or just result, a point the State ignores. Pet. 21-22.

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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