No. 20-855

IN THE

Supreme Court of the United States

MARYLAND SHALL ISSUE, INC., ET AL.,
Petitioners,

v.

LAWRENCE J. HOGAN, JR., GOVERNOR OF MARYLAND,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Ilya Shapiro
Counsel of Record
Trevor Burrus
Mallory Reader
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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QUESTION PRESENTED

This case is about whether the Takings Clause of the Fifth Amendment 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 ruled that *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 lower court also construed the Maryland Constitution in such a way as to effectively eliminate any protection for lawfully purchased personal property. *Amicus* takes no position on that point of state law, but addresses the federal constitutional question presented:

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.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case is of central concern to Cato because the fundamental attributes of personal property—the strands in its "bundle of rights"—should be accorded the same protection from state interference as real property. Furthermore, the government cannot avoid paying just compensation for taken property by simply not setting up a "turn over" program.

INTRODUCTION AND SUMMARY OF ARGUMENT

Maryland Senate Bill 707 (SB-707) makes it a criminal offense to "manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid-fire trigger activator." Md. Code, Crim. Law § 4-305.1(a). The law also prohibits a "bump stock, trigger crank, hellfire trigger, binary trigger system, burst trigger system, or a copy or a similar device." *Id.* at § 4-301(m)(2). And there is a catch-all provision that bans

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

any "rapid-fire trigger activator" defined to mean any device that increases the rate at which a trigger is activated or the rate of fire increases. *Id.* at § 4-301(m)(1). Violation of the law is a misdemeanor subject to a term of imprisonment up to 3 years, a fine of up to $5,000, or both. *Id.* at § 4-306(a).

In their class-action complaint, petitioners didn't challenge the power of the state to pass such law, but rather sought just compensation for the dispossession of their previously legal private property. The district court dismissed the Fifth Amendment Takings Clause claim for failure to state a claim. *Md. Shall Issue, Inc. v. Hogan*, 353 F. Supp. 3d 400 (D. Md. 2018). The court held that since SB-707 does not involve a confiscation of the firearm accessories, nor a mandate for owners to cede title or possession to the state, a taking did not occur. *Id.* at 414.

The Fourth Circuit affirmed. *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356 (4th Cir. 2020). The court recognized that *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), apply to regulatory takings, and that the Takings Clause applies to personal property under *Horne v. Dep't of Agriculture*, 576 U.S. 350 (2015), but found SB-707 not to be a per se taking because *Lucas* applies only to real property and, unlike *Loretto*, here neither the state nor a third party takes possession of the property. *Md. Shall Issue Inc.*, 963 F.3d at 364–65. The court then distinguished *Horne* because, again, possession was not ceded to the state. *Id.* at 366.

Amicus urges the Court to grant the petition for a writ of certiorari for the following reasons:

1. Without possession, all other property rights are also eliminated. Of the "bundle of sticks" that make up our understanding of property rights—and the Framers' understanding—possession is arguably the most fundamental. The Takings Clause requires just compensation whenever private property is taken for public use. Dispossession is a classic taking.

2. Interferences with the right of possession that do not restrict harmful uses in a meaningful manner or do not provide an in-kind, reciprocal advantage are per se takings. Maryland cannot justify SB-707 as preventing harmful uses when there are alternative means for achieving the same goal. Nor can SB-707 be justified under an "in-kind" compensation analysis, as any potential advantage is purely speculative and cannot outweigh the cost of dispossession.

3. Finally, it is irrelevant that Maryland does not have a "turn over" program to physically take possession of the now banned property. SB-707 is so disruptive to the right to possess that it is equivalent to a confiscation. If states are able to avoid the Fifth Amendment's just compensation requirement simply by not mandating the collection of the newly banned property, then the Takings Clause lacks any bite.

ARGUMENT

I. DISPOSSESSION OF PROPERTY IS THE FUNDAMENTAL FEATURE OF FIFTH AMENDMENT TAKINGS

Neither colonial statutes nor the first state constitutions provided a right to just compensation when the government took private property. *See* William M. Treanor, *The Origins and Original*

Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 695 (1985) (explaining takings law before the just compensation requirement). Colonial legislatures regularly took private land without providing compensation to the owner. *Id.* at 697. English legal thought, with roots in feudal notions of property and kingship, legitimized transfers of unimproved land to another person for development. *Id.* at 695, 697.

Although American independence ended the use of royal authority to justify takings, it did not immediately manifest an acknowledgment of the need for just compensation. *Id.* at 698. Private property continued to be seized without compensation in the revolutionary era. *Id.* All states except South Carolina passed laws confiscating loyalist estates. *Id.*; *see also* Allan Nevins, *The American States During and After the Revolution* 507 (1924). Goods were frequently taken for military use. *See, e.g., Respublica v. Sparhawk*, 1 Dall. 357 (Pa. 1788) (denying compensation for such a taking); 1 S. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the United States and of the Commonwealth of Virginia*, Book 1 at 305–06 (1803) (during the revolutionary war, supplies for the military were "too frequently obtained" through uncompensated takings).

That all stopped with the ratification of the Constitution, more specifically the Bill of Rights two years later. Since the enactment of the Fifth Amendment, this Court has applied a broad reading of "property" to reflect the Framers' Lockean reverence for the private realm. Indeed, the Framers recognized the dangers even their balanced form of

republicanism posed to property rights. *See* Federalist No. 10 (Madison), in *The Essential Debate on the Constitution: Federalist and Antifederalist Speeches and Writings* 125 (Robert J. Allison & Bernard Bailyn eds., 2018) (1787) ("Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property."). But they also knew that majoritarian needs would often supersede individual liberties. *See* Treanor, *Origins*, *supra*, at 699–701 (discussing the balancing of public and private rights, including the insight that "a major strand of republican thought held that the state could abridge the property right in order to promote common interests"). Requiring compensation offered a compromise: allowing public needs to be fulfilled, with just payment ensuring that the only intrusions made into the private realm were indeed necessary. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 825–34 (1995) (discussing the growing support for "just compensation" among colonial thinkers).

James Madison, the primary author of the Fifth Amendment, realized the importance of a just-compensation requirement. Treanor, *Origins*, *supra*, at 708. While serving in the Virginia legislature, he had opposed state seizure of loyalist property and pushed through the first bill providing compensation for taking unimproved land for roads. *See, e.g.*, "Bill Prohibiting Further Confiscation of British Property" (submitted Dec. 3, 1784), *reprinted in* 8 James Madison, *The Papers of James Madison* 173 (R. Rutland & W. Rachal eds., 1973); *see also* An Act

Concerning Public Roads, Va. Stat. ch. LXXV (1785). Madison prided himself on the Fifth Amendment's indication that the federal government was now committed to the proposition that "no land or merchandize [sic]" "shall be taken *directly* even for public use without indemnification to the owner." "Property," Nat'l Gazette, Mar. 27, 1792, *in* 4 James Madison, *The Papers of James Madison* 267 (R. Rutland & T. Mason eds., 1983) (emphasis original).

The post-Founding generation continued to elevate protections for private property. Cases from this period show that the Framers' need to find a compromise between the common law's reverence for the private realm and the public's needs remained alive and well into the late 19th century. *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 668–69 (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 be deemed a taking or an appropriation of property for the public benefit."). The "anti-harm" and "reciprocity of advantage" principles—those courts didn't call them that—figured prominently in drawing the line between private and public rights. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1585–1605 (2003) (surveying 19th-century eminent domain case law). The default view was that property conferred absolute use and dominion up to the border of a superseding public right. *Id.* at 1597 ("If the people vest their equal property rights in a commons . . . a neighboring private owner becomes subject to a duty not to use his own in a manner that interferes with the purposes of the public domain.").

As today, however, early courts over-relied on the reciprocity-of-advantage justification, often ruling that interferences with, and thus takings of, fundamental attributes of ownership were "compensated" through the general good the interferences conferred. *Id.* at 1587–89 (discussing two right-of-way cases, representative of then-prevailing jurisprudence, in which the claimants' consolation for public interferences with private property was "what Frank Michelman and Richard Epstein have described as an 'implicit in-kind compensation' justification for a restraint on private property"). Recent precedent continues to reflect the absolutist view of property's elementals—even if courts continue to over-broaden the scope of the average reciprocity of advantage.

II. INTERFERENCES WITH THE RIGHT OF POSSESSION THAT DO NOT RESTRICT HARMFUL USES OR CONFER RECIPROCAL ADVANTAGES ARE PER SE TAKINGS

The Constitution's reverence for private property does not mean that all interferences require compensation. Many interferences are compensated through reciprocal advantages, while others only appear to be interferences but in reality restrict property to non-harmful uses (including uses that impede public benefits).

A regulation that prevents a true public harm is a valid exercise of the police power for which no compensation is required, but a regulation intended to confer a public benefit is potentially a regulatory taking for which compensation is constitutionally

mandated. Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 Vand. L. Rev. 1449, 1452 (1997). The reciprocity-of-advantage rule holds that there is a subset of regulations that do *not* rise to the level of a compensable taking: those that provide reciprocal benefits to regulated parties. *Id.* (emphasis original).

Examples of preventing a true public harm include the government's prerogative to destroy property to prevent a fire's spread, *Taylor v. Inhabitants of Plymouth*, 49 Mass. 462 (1844), or from its falling into enemy hands. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 154 (1952). In neither case did the government have to compensate the injured owner because neither the "right" to spread fire nor to enemy occupation is within the proper ambit of ownership. One recent example includes the government's apparent, if unfortunate, power to chase a criminal into a private home, destroying it in the process. *See Lech v. Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019), *cert. denied*, *Lech v. Jackson* (U.S., June 29, 2020) (No. 19-1123). *See Miller v. Schoene*, 276 U.S. 272, 279–80 (1928) ("[W]here the public interest is involved preferment of that interest over the property of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").

Bump stocks and other devices that increase a firearm's rate of fire do not create a cognizable public harm that can be properly limited via dispossession without compensation. All guns are inherently dangerous if they work correctly. Similarly, swimming pools are inherently dangerous. There are

real dangers arising from the private ownership of bump stocks and swimming pools, yet those fears reasonably arise from essentially any firearm or swimming pool. In other words, the purported harm being regulated is not one that can be achieved by contouring property rights within non-harmful uses, because prohibition of all firearms and swimming pools is the only way to do that. Instead, a regulation that tried to properly contour property rights to non-harmful uses would look to regulate various aspects of use rather than ban possession entirely.

In the pool context, this would include requiring notices, fencing, non-slip surfaces, and other rules. In the bump-stock context, it would include regulations on where they can be used, who can own them, and possible safety modifications. Such regulations could mitigate the possible harmful uses and would not require compensation, but banning ownership outright, even if it truly benefits the public—again, petitioners here aren't challenging the government's determination to that effect—is a per se taking that requires just compensation, because it goes too far in harming property owners for a public benefit. The Takings Clause has never been about preventing the government from providing a public benefit, but about preventing the government from forcing a subset of citizens to pay for that public benefit in the form of diminished or lost property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) ("the purpose of the Takings Clause . . . is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Armstrong* v. *United States,* 364 U. S. 40, 49 (1960)).

"It is obvious that a public interest which is strong enough to justify regulation may not be strong enough to justify destruction or confiscation without compensation." Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 511, 549 (1904). No one argues that the prevention of shootings is not in the public interest, but Maryland has sought to advance that interest by making certain property owners bear the brunt of the attendant costs.

When interferences don't contour private property rights within anti-harm borders or are not otherwise reciprocated "in kind," courts tend to recognize the right to compensation as absolute, as in *Loretto*. One problem with the reciprocity-of-advantage rule, however, is that, over time, it has lost its "former potency as a tool for distinguishing valid police power actions from invalid regulatory takings" and "instead has become a method for simply rubberstamping legislative acts." Oswald, *supra*, at 1489.

Under this argument, it is difficult to imagine any court's calling into question almost any mass taking of property. Courts are unlikely to gainsay a legislative determination that outlaws a piece of property for public safety reasons. And if banning a piece of property is presumed by courts to confer a public benefit because the legislature says so, then it follows that the benefit must also go to dispossessed property owner, thus creating a "reciprocity of advantage." It's turtles all the way down.

Reciprocity of advantage should not be used as such a de facto rubber stamp. This is especially true when laws do not merely regulate a piece of property—perhaps by requiring bump-stocks to be

registered, stored securely, or in some sense altered—and instead dispossess owners and thus abridges a fundamental property right. That is a per se taking.

III. THE LAW HERE COMPELS PROPERTY OWNERS TO CEDE POSSESSION

Although SB-707 does not delineate procedures for turning over personal property, its prohibitory rule is so disruptive of a fundamental attribute of ownership that it is, in both economic and conceptual terms, equivalent to confiscation. There is no distinction here between "classic" and "regulatory" takings.

Contrary to the Fourth Circuit's opinion, it is irrelevant that Maryland does not have a "turn over" program to take possession (or title) of the property. The criminalization of ownership—which prohibits possession, sale, offer to sell, transfer, purchase, or receipt of a rapid-fire trigger activator, Md. Code, Crim. Law § 4-305.1(a)—constitutes dispossession. Current owners of such devices violate the law; the only thing they can do with their property—the thing they *must* do—is disown it. Abandonment, destruction, or relinquishment of the property to the state is the only legal option. Without the rights to possess, use, or transfer their private property, owners have lost *all* property rights under this government mandate. This is exactly the kind of government-forced dispossession for which the Fifth Amendment requires just compensation.

Horne stands for the principle that physical dispossession of personal property forced by a government regulation is a taking subject to just compensation. No one disputes that a classic taking

occurs when the government seizes private property for its own use. *Horne*, 576 U.S. at 357 (relying on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 303, 324 (2002)). And such an appropriation is a per se taking requiring just compensation to the owner. *Id.* at 358 (relying on *Loretto*, 458 U.S. at 426–35). For the *Horne* majority, Chief Justice Roberts wrote, "Nothing in 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. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* at 358.

Even if the Takings Clause was initially understood to provide compensation only against a direct expropriation, a century ago the Court expanded its protection by holding that just compensation was also required when a restriction on the use of property went "too far." *Horne*, 576 U.S. at 360 (citing *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The Court more recently reaffirmed the rule that a physical appropriation of property gives rise to a per se taking, without regard to any other factors. *Id.* (citing *Loretto*, 458 U.S. 419). In *Loretto*, the Court explained that "such protection was justified not only by history, but also because 'such an appropriation is perhaps the most serious form of invasion of an owner's property interests,' depriving the owner of 'the rights to possess, use and dispose of' property." *Id.* (quoting *Loretto*, 458 U.S. at 435).

The dissent below got it right. Judge Richardson would have held that just compensation is owed because "[a] possession ban is an actual ouster" that

"actually and physically defeats one's property rights—a classic taking." *Md. Shall Issue, Inc*, 963 F.3d at 376 (Richardson, J., dissenting). He relied on three landmark cases to illustrate the point.

First, in *Loretto*, the Court held that a government-mandated physical occupation of real property by a third property was a taking subject to compensation. *Id.* at 373 (*see Loretto*, 458 U.S. at 421). The Court reasoned that a permanent physical occupation is a per se taking because the rights to possess, use, and dispose of property are effectively destroyed. *Id.* at 374 (*see Loretto*, 458 U.S. at 435).

Next, in *Horne*, the Court found the regulation that raisin handlers set aside a portion of their raisins to be a clear taking because those subject to the reserve requirement lose the entire "bundle" of property rights—the rights to possess, use, and dispose of them. *Id.* (*see Horne*, 575 U.S. at 361).

Finally, and in contrast, the Court in *Andrus v. Allard* held that a prohibition on transactions in protected bird feathers did not amount to a taking largely because owners retained the rights to possess and transport their property, and to donate or devise it. *Id.* (citing *Andrus v. Allard*, 444 U.S. 51 (1979)). "Together, these cases teach that when a government regulation cuts across a broad swath of property rights," a classic taking occurs and just compensation is required under the Fifth Amendment. *Id.* at 375.

CONCLUSION

The Court should grant the petition and use this case to clarify for lower courts that personal and real property must be treated alike under the Takings

Clause regardless of whether a given statute or regulation requires property owners to physically turn over their property to the government. When all fundamental aspects of property ownership are gutted by the government, just compensation is owed.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Trevor Burrus
Mallory Reader
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

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