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 Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Las Vegas, Nevada on October 1, 2017, a gunman firing semiautomatic rifles modified with bump stocks killed 58 people and wounded more than 850 others. The use of bump stocks enabled the gunman to fire more than a thousand rounds of ammunition in just ten minutes, a rate of fire comparable to that of machine guns banned by federal law.

In response to the Las Vegas shooting, Maryland, like many other States, exercised its police powers to outlaw bump stocks and other devices that mimic the firepower of a machine gun. The federal government took similar action. No party before the Court contends that Maryland lacked the power to institute the ban; nor does any party contend that this exercise of the police power infringes the constitutional right to bear arms.

The questions presented are as follows:

1. May the State outlaw dangerous devices without having to pay compensation under the Takings Clause of the Fifth Amendment, when the State exercises its public safety police power to ban the devices and not its power of eminent domain to take them for a public use?

2. When addressing a post-decision petition for rehearing, does an appellate court act within its discretion in declining to certify a question to a State's highest court when the request to do so is based on the requesting party's misunderstanding of the appellate court's decision and its treatment of State law?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari neither identifies an outcome-determinative circuit split nor asks the Court to resolve ambiguities in the Court's own precedents. The petition does not assert a Second Amendment right to own, possess, or use bump stocks to increase a firearm's capacity to fire ammunition cartridges in rapid succession, and it concedes the State's authority to ban bump stocks and other rapid fire trigger activators. Pet. 2. The petition's only argument is that the State, if it wishes to outlaw these dangerous devices, must *pay* owners for the privilege of doing so.

In effect, the petition seeks a new category of per se takings for "possession-bans," under which a State or the federal government must pay compensation whenever it outlaws the possession of unreasonably dangerous personal property, whether it be weapons, lethal chemicals, dangerous drugs, or child pornography.

This Court has declined to require such "regulation by purchase," and it has long held that exercises of the State's core police power to protect public safety do not implicate the Takings Clause. The Court's takings jurisprudence does not recognize a category of per se taking of personal property other than when the government takes the property for public use, either for use by the government itself, as was the case in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), or for use by third parties, as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

And *Lucas v. South Carolina Coastal Council*, on which the petition heavily relies, limited its category of per se takings for "denial of all economically viable use" to regulatory takings of land, which has not been subject to the State's "traditionally high degree of control" over personal property. 505 U.S. 1003, 1027 (1992). *Horne* highlighted that distinction and did not disavow it.

Finally, the petition provides no grounds for remanding to certify state-law issues to Maryland's highest court, relief that petitioners requested for the first time in their petition for rehearing and rehearing en banc. That request was based on both a misunderstanding of Maryland law and a misreading of the Fourth Circuit's panel decision, which does not opine, as the petition suggests, that "no property rights are acquired by purchase." Pet. 29.

STATEMENT

The Las Vegas Massacre and Maryland's Ban on Bump Stocks and Other Rapid Fire Trigger Activators

On October 1, 2017, Las Vegas experienced the deadliest mass shooting in this country's modern history. A gunman armed with several semi-automatic rifles equipped with bump stocks fired hundreds of rounds of ammunition into an outdoor concert. The resulting casualties included 58 dead and more than 850 wounded. Pet. App. 45a. The Las Vegas shooting "highlighted the destructive capacity of firearms

equipped with bump-stock-type devices and the carnage they can inflict" and "made their potential to threaten public safety obvious."[1]

In response to the Las Vegas massacre, Maryland enacted legislation to ban bump stocks and similar devices that, as the sponsor of the legislation explained, "modif[y] the firearm's rate of fire to mimic that of an automatic firearm." 4th Cir. Joint Appendix ("4th Cir. J.A.") 82. The legislation, Senate Bill 707 (2018 Legis. Sess.), was intended to "'sav[e] . . . innocent lives, and minimiz[e] the magnitude of tragic events such as the Las Vegas shooting.'" Pet. App. 48a (quoting legislative testimony).

On April 24, 2018, Governor of Maryland Lawrence J. Hogan, Jr. signed Senate Bill 707 into law as Chapter 252 of the 2018 Laws of Maryland (the "Act"). Pet. App. 49a. Effective October 1, 2018, the Act made it unlawful for a person to "transport a rapid fire trigger activator into the State; or . . . manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator." Md. Code Ann., Crim. Law § 4-305.1(a) (LexisNexis Supp. 2020). A person who violates the Act is guilty of a misdemeanor and subject to imprisonment not exceeding 3 years and a fine of up to $5,000. *Id.* § 4-306(a).

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[1] Bump-Stock-Type Devices, 83 Fed. Reg. 13,442, 13,447 (Mar. 29, 2018), available at https://www.gpo.gov/fdsys/pkg/FR-2018-03-29/pdf/2018-06292.pdf. "The contents of the Federal Register shall be judicially noticed. . . ." 44 U.S.C. § 1507.

The Act defines a "rapid fire trigger activator" to mean any device "constructed so that, when installed in or attached to a firearm: (i) the rate at which the trigger is activated increases; or (ii) the rate of fire increases," *id*. § 4-301(m)(1), including bump stocks and binary trigger systems, *id.* § 4-301(m)(2). A bump stock is "a device that, when installed in or attached to a firearm, increases the rate of fire of the firearm by using energy from the recoil of the firearm to generate a reciprocating action that facilitates repeated activation of the trigger." *Id*. § 4-301(f). A "binary trigger system" is "a device that, when installed in or attached to a firearm, fires both when the trigger is pulled and on release of the trigger." *Id*. § 4-301(e).

The Act's ban does not apply to the possession of a device if the owner (1) possessed the device before October 1, 2018; (2) applied to the Bureau of Alcohol, Tobacco, Firearms and Explosives (the "ATF") before October 1, 2018, for authorization to possess the device; (3) by October 1, 2019, received authorization from the ATF to possess a rapid fire trigger activator; and (4) complies with all federal requirements for possession of the device. Md. Code Ann., Crim. Law § 4-305.1(b) (LexisNexis Supp. 2020). On April 24, 2018, the ATF issued an advisory stating that it "is without legal authority to accept and process such an application" for authorization and, thus, "applications or requests will be returned to the applicant without action." Pet. App. 52a.

The Federal Government's Long-Standing Regulation of Machine Guns and Recent Classification of Bump Stocks as Machine Guns

The federal government has long regulated the possession of machine guns and, with exceptions not relevant here, has banned their transfer or possession. 18 U.S.C. § 922(o). The National Firearms Act of 1934 ("NFA") "regulates the production, dealing in, possession, transfer, import, and export of" machine guns, among other covered firearms. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 6 (D.C. Cir. 2019) (citing 26 U.S.C. §§ 5801-5861, 5845(a)), *cert. denied*, 140 S. Ct. 789 (2020). The NFA defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[2] 26 U.S.C. § 5845(b). The definition also covers "the frame or receiver of any such weapon" and "any part" or "combination of parts designed and intended, for use in converting a weapon into a machinegun." *Id.*

The Gun Control Act of 1968 ("GCA"), as amended, 18 U.S.C. §§ 921-931, incorporates by reference the NFA's definition of machine gun. 18 U.S.C. § 921(a)(23). In 1986, Congress passed the Firearm Owners' Protection Act, Pub. L. 99-308, 100 Stat. 499, which made it "unlawful for any person to transfer or possess a

[2] Except where quoting statutes or other sources, this brief uses the more common two-word spelling of "machine gun."

machinegun," with an exception for lawful transfers or possession of machine guns that were lawfully possessed when the statute went into effect. 18 U.S.C. § 922(o). The value of these pre-1986 machine guns "has steadily increased over time," and this increase in price "has spurred inventors and manufacturers to develop firearms, triggers, and other devices that permit shooters to use semiautomatic rifles to replicate automatic fire without converting these rifles into 'machineguns' under the GCA and NFA." 83 Fed. Reg. at 13,444.

After the 2017 Las Vegas shooting, the ATF undertook formal rulemaking to interpret the term "machinegun"; the resulting rule defines the term to include "a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger." 27 C.F.R. § 478.11. The regulation includes within the definition of "machinegun" a "bump-stock-type device," which "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." *Id.*

The federal regulation was adopted to "'rectify'" previous "classification errors" that had resulted from insufficient legal analysis regarding bump-stock devices. 83 Fed. Reg. 66,514, 66,516 (Dec. 26, 2018) (final rule, quoting *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) (per curiam)). For example, as of

2006, the ATF considered a bump-stock device to fall within the definition of machine gun only if it "use[d] an internal spring" to harness the recoil to fire multiple shots. 83 Fed. Reg. at 66,516; *see also Akins*, 312 F. App'x at 199. Between 2008 and 2017, the ATF issued classification decisions concluding that other "bump-stock-type devices did not fire 'automatically,' and thus were not 'machineguns,' because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy," 83 Fed. Reg. at 66,516, but instead required the shooter to maintain forward pressure on the barrel. That conclusion "relied on the mistaken premise that the need for 'shooter input' (*i.e.*, maintenance of pressure) for firing with bump-stock type devices means that such devices do not enable 'automatic' firing." *Id.* at 66,531. Those 2008 to 2017 classification decisions were "correct[ed]" by the December 2018 final rule. *See id.* at 66,530.

In issuing the final rule, the ATF responded to comments suggesting that the proposed change in classification amounted to a taking under the Fifth Amendment because continued possession of the newly classified machine guns would be unlawful. Rejecting that contention, the ATF explained that a "restriction on 'contraband or noxious goods' and dangerous articles by the government to protect public safety and welfare 'has not been regarded as a taking for public use for which compensation must be paid.'" 83 Fed. Reg. at 66,524 (quoting *Acadia Tech., Inc. v.*

United States, 458 F.3d 1327, 1332 (Fed. Cir. 2006), and citing and discussing other cases).

Procedural History

On June 11, 2018, plaintiffs (petitioners in this Court) filed a five-count, putative class action complaint in the United States District Court for the District of Maryland. Pet. App. 48a. The lead plaintiff, Maryland Shall Issue, Inc. ("MSI"), is an organization that is "dedicated to the preservation and advancement of gun owners' rights in Maryland." Pet. ii. It brought this action on behalf of itself and, separately, on behalf of its members. Pet. App. 2a. The individual plaintiffs, Paul Mark Brockman, Robert Brunger, Caroline Brunger, and David Orlin, are all Maryland residents and MSI members, each of whom claims to have lawfully owned "bump stocks" or "binary trigger" systems or both. Pet. App. 52a; 4th Cir. J.A. 161, 169, 171.

The complaint sought compensatory damages for the loss of the banned devices and declaratory and permanent injunctive relief to bar enforcement of the Act. Pet. App. 52a-53a. But it "did not challenge the power of the State to ban" bump stocks, Pet. 2, and did not claim that the ban implicated the individual plaintiffs' Second Amendment right to bear arms.

Counts I and II of the complaint alleged that the Act's ban on possession of bump stocks and other devices violates the Takings Clause of the Fifth Amendment to the United States Constitution and Article III, § 40 of the Maryland Constitution, respectively. Pet.

App. 53a-54a; 4th Cir. J.A. 24-25. Counts III and IV alleged that the Act violates the Due Process Clause of the Fourteenth Amendment because (1) the plaintiffs' inability to take advantage of the Act's conditional exception for certain pre-owned devices rendered compliance with the Act impossible, and (2) the definition of what constitutes a "rapid fire trigger activator" is unconstitutionally vague. Pet. App. 54a-55a; 4th Cir. J.A. 25-29. Count V alleged that the statute violates Article 24 of the Maryland Constitution because it retrospectively abrogates vested property rights. Pet. App. 54a.

Governor Hogan filed a motion to dismiss the complaint, which the district court granted. Pet. App. 45a. The district court began by concluding that MSI lacked standing in its organizational capacity, because "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.'" Pet. App. 55a (quoting Compl. ¶ 8, 4th Cir. J.A. 11). The court also dismissed the complaint's vagueness claim (count IV) for lack of standing because there was no "credible threat" that the statute would be enforced in the way that would, according to the complaint, render it vague. Pet. App. 76a-78a.

Relying on this Court's and circuit takings jurisprudence, the district court dismissed the complaint's takings challenges (counts I and II) on the merits. The court concluded that Maryland's prohibition on bump stocks and similarly dangerous devices was a proper exercise of the State's police power, and it rejected the

plaintiffs' argument that the ban on possession constituted a taking under *Horne*. Pet. App. 56a-73a. Next, the court dismissed the complaint's state-law Article 24 claim (count V) on the ground that the Act does not operate retrospectively to abrogate vested rights. Pet. App. 73a-75a. Finally, the court dismissed the due process claim (count III), because the complaint had failed to identify any requirement of the law with which it is impossible to comply. Pet. App. 79a-84a.

The court of appeals affirmed. It first held that MSI did not have organizational standing, because the only injury it suffered was "a mere disagreement with the policy decisions of the Maryland legislature." Pet. App. 9a. The court also upheld the district court's conclusion that none of the plaintiffs had standing to challenge the ban as unconstitutionally vague, when the ambiguity they asserted—that the law could be read to prohibit a bipod or any other device that made it easier to aim and fire a weapon—was not "even arguably" implicated by a law that bans devices that "essentially turn firearms into automatic weapons." Pet. App. 12a. The petition in this Court challenges neither holding.

On the merits, the court of appeals first concluded that the Maryland bump-stock ban did not amount to a "physical appropriation" because it did not require owners of the devices to "physically turn them over to the Government," as in *Horne*, or to a third party, as in *Loretto*. Pet. App. 13a-15a. The court also held that the ban did not qualify as a regulatory taking under *Lucas* because the per se rule of that case "applies only to real property." Pet. App. 14a n.4. In rejecting plaintiffs'

state-law takings claim for retrospective abrogation of vested rights, the court explained that the statute did not operate retrospectively and that plaintiffs had not argued as much and thus had waived the claim. Pet. App. 18a-20a.

Judge Richardson dissented. He would recognize a new class of per se takings—called "classic" takings—that would require compensation whenever the government "'ousts the owner' of possession," even if the property is not put to public use by the Government or any third party. Pet. App. 21a (citation omitted).

Plaintiffs timely filed a petition for rehearing and rehearing en banc in which they reiterated their appellate arguments and asked "alternatively," Pet. 28, in a single sentence, that the court of appeals certify to Maryland's highest court "the extent to which personal property is protected by the Maryland Takings Clause," Doc. 51 at 18-19. The court of appeals denied the petition, with no judge requesting a poll under Rule 35. Pet. App. 44a.

REASONS FOR DENYING REVIEW

I. A State's Exercise of its Public Safety Police Power, as Opposed to its Power of Eminent Domain, Does Not Require Compensation.

A taking does not occur when the State bans dangerous devices, and the lower courts' adherence to this established principle does not conflict with

the holdings of this Court or any other circuit. The district court's decision correctly concluded that "[t]he Act regulates rapid fire trigger activators as contraband, a legitimate exercise of the state's traditional police power to regulate for public safety." Pet. App. 56a. This 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." Pet. App. 57a (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978)).

Over a century ago, in *Mugler v. Kansas*, 123 U.S. 623 (1887), the Court rejected a claim under the Takings Clause by challengers who had purchased or erected their breweries before enactment of a Kansas law prohibiting the manufacture and sale of alcoholic beverages. The Court ruled that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69. That holding applied with equal force to (1) the ban on manufacture and use of liquor and (2) the seizure and the destruction of the contraband liquor and the equipment used to make and serve it. *Id*. at 670-71; *see also Samuels v. McCurdy*, 267 U.S. 188, 198 (1925) (applying *Mugler* and concluding that "[l]egislation making possession unlawful is therefore within the police power of the states as a reasonable mode of reducing the evils of drunkenness").

The principle applied in *Mugler* has been applied to insulate other exercises of the State's police powers from challenge on takings grounds. *See, e.g.*, *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (no taking resulted from order to destroy diseased cedar trees to prevent infection of nearby orchards); *Gardner v. Michigan*, 199 U.S. 325, 330-32 (1905) (State's destruction of hotel's accumulated kitchen scraps not a taking even though the refuse had value as livestock feed); *United States v. Caltex*, 344 U.S. 149 (1952) (destruction of oil terminal during wartime not a taking when at risk from enemy combatants); *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (no compensation required when public officials "destroy real and personal property . . . to prevent the spreading of a fire"); *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 410-11 (4th Cir. 2007) (relying on *Mugler* to find no taking from State ban on the possession of certain gambling machines); *Garcia v. Village of Tijeras*, 108 N.M. 116, 123 (Ct. App. 1988) (ban on possession of American pit bulls not a taking).

The same result obtains when a State seizes lawfully purchased property in connection with its enforcement of criminal laws and the administration of other measures under its police powers. *See Bennis v. Michigan*, 516 U.S. 442 (1996) (forfeiture of car used in criminal activity not a taking, even as to innocent co-owner); *Kam-Almaz v. United States*, 682 F.3d 1364, 1371 (Fed. Cir. 2012) (customs' seizure and inadvertent destruction of laptop not a taking); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008)

(no taking from seizure of pharmaceuticals from innocent party in connection with criminal prosecution, despite expiration of drugs during trial); *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1329 (Fed. Cir. 2006) (seizure of cooling fans with potentially counterfeit certification not a taking).

Applying these principles, lower federal courts and state courts have concluded that bans on unreasonably dangerous weapons do not implicate the Takings Clause of the Fifth Amendment. *See, e.g.*, *Association of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen.*, 910 F.3d 106 (3d Cir. 2018) (ban on large capacity magazines constitutes an exercise of police power and is not a taking); *Akins v. United States*, 82 Fed. Cl. 619 (Fed. Cl. 2008) (ban on "Akins accelerators," which like bump stocks mimicked machine guns, was a valid exercise of police power and thus did not constitute a taking); *Fesjian v. Jefferson*, 399 A.2d 861 (D.C. Ct. App. 1979) (ban on machine guns in District of Columbia constitutes an exercise of police power, not eminent domain, and thus does not require compensation).

Consistent with this body of law, *every* lower court to address the takings implications of bump-stock bans enacted in the wake of the 2017 Las Vegas shooting has rejected the claim that compensation was due, even when the banned items were legal when purchased. *See McCutcheon v. United States*, 145 Fed. Cl. 42 (2019), *appeal filed* No. 20-1188 (Fed. Cir. Nov. 27, 2019) (rejecting takings challenge to federal bump-stock ban); *Modern Sportsman v. United States*, 145 Fed. Cl. 575 (2019), *appeal filed* No. 20-1107 (Fed. Cir.

Nov. 1, 2019) (same; consolidated on appeal with *McCutcheon*); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, No. 18-CV-2988 (DLF), 2021 WL 663183, at *9-*10 (D.D.C. Feb. 19, 2021), *appeals filed* Nos. 21-5045, 21-1707 (D.C. Cir. Feb. 23 and March 2, 2021) (rejecting takings challenge to federal bump-stock ban); *Roberts v. Bondi*, 2018 WL 3997979 (M.D. Fla. 2018) (rejecting takings challenge to Florida's bump stock possession-ban); *Hunt v. State*, No. 1D19-2143, 2021 WL 282284 (Fla. Dist. Ct. App. Jan. 28, 2021) (same).

Thus, federal court decisions are not divided on the principal issue presented by this case: Whether compensation is due to owners of property that the State has deemed to be so injurious to public health or safety as to merit its ban. Instead, "[c]ourts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987) (citing cases); *see also id.* at 485 (no taking where character of government action is to address a "significant threat to the common welfare"). That conclusion is consistent with the Nation's "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (citation omitted).

This Court recognized the important difference between a State's exercise of eminent domain and its exercise of the police power in *Mugler*, which

distinguished *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), on that very ground. *Pumpelly*, on which petitioners and the dissent below rely, found a taking where Wisconsin flooded the plaintiff's land in connection with a public works system "for improving the navigation of the Fox and Wisconsin Rivers." *Mugler*, 123 U.S. at 667. Because the public works project required the flooded land "to be devoted to the use of the public," the "question in *Pumpelly v. Green Bay Co*., arose under the state's power of eminent domain." *Mugler*, 123 U.S. at 668. But as the Court explained in *Mugler*, in rejecting a takings challenge to a Kansas law prohibiting the manufacture or sale of intoxicating liquors within the State, "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69.

Thus, the question in *Mugler* arose "under what are, strictly, the police powers of the state, exerted for the protection of the health, morals, and safety of the people." *Id.* at 668. That police power, exercised here to protect *lives*, not sobriety, places this case outside the realm of the Takings Clause, as every court to have analyzed similar bump-stock bans has concluded. *See, e.g.*, *McCutcheon*, 145 Fed. Cl. at 52 ("Because the prohibition on possession involved an exercise of the government's police power," and not its power of eminent domain, "there was no taking within the meaning of the Fifth Amendment."); *Guedes*, 2021 WL 663183, at

*9 (federal ban not a taking because bump stocks were not " 'taken for a public use' " but prohibited " 'pursuant to a valid exercise of the government's police power' " (citation omitted)); *Roberts v. Bondi*, 2018 WL 3997979, at *4 (upholding Florida's bump-stock ban as "an exercise of the legislative police power, not the state's eminent domain power"). As the Court observed in *Bennis*, "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." 516 U.S. 442, 452 (1996).

The principle that the State's exercise of its police powers to ban the possession and use of dangerous contraband does not give rise to a taking makes both textual and practical sense.

The principle makes textual sense because the Fifth Amendment prohibits the Government from taking private property "for public use." It does not matter whether it is the Government, the public, or even private parties that ultimately use the property that is "taken," so long as it is taken for a public purpose. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005). But whenever the Government exercises its powers of eminent domain, *someone* uses the property for that public purpose. The federal government took the raisins in *Horne* and used them to regulate the raisin market. *See* 576 U.S. at 354. The City of New London took Ms. Kelo's property and used it for tax-generative redevelopment. *See Kelo*, 545 U.S. at 472. Even Mr. Lucas's beachfront property, though it was

required to remain undeveloped, was "pressed into some form of public service," *Lucas*, 505 U.S. at 1018, namely, to preserve the beaches that promote tourism, serve as habitat for indigenous flora and fauna, and protect existing homes from hurricane-related erosion, *id.* at 1075.

Here, no "public use" is even potentially implicated because no one uses the banned bump stocks; they are simply prohibited, the objective being to *prevent* their use. The State thus is not exercising its eminent domain powers, but is instead banning the possession and use of bump stocks within Maryland as an exercise of its police powers.

The principle makes practical sense because the potentially prohibitive costs of paying compensation claims should not be permitted to deter a State from taking steps to address new threats to public safety. The contrary rule, urged by petitioners here, "would effectively compel the government to regulate by *purchase*," *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (emphasis in original), which this Court has never required. And it would undermine state police powers that this Court has identified as "a paramount governmental interest which justifies summary administrative action," even when it results in the "deprivation of property." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981).[3]

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[3] One of petitioners' amici, the Cato Institute, agrees that "[a] regulation that prevents a true public harm is a valid exercise of the police power for which no compensation is required[.]" Brief

II. *HORNE* DID NOT CREATE A NEW CATEGORY OF PER SE TAKINGS FOR GOVERNMENT POSSESSION-BANS.

Although petitioners concede that the State has the police power to enact the bump-stock ban, Pet. 2, they do not address the distinction between exercises of the State's police power and its power of eminent domain. Instead, they contend that the Court's eminent domain jurisprudence establishes that the State's decision to ban unreasonably dangerous items constitutes a per se taking that *always* requires compensation. As the court of appeals correctly perceived, petitioners misread this Court's precedents.

The Court's takings cases distinguish between two types of takings: (1) physical appropriation of private property and (2) regulatory burdens. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942-43 (2017). In the case of a physical appropriation of land or personal property for public use, this Court has found the plain language of the Takings Clause to require compensation. *Id.* at 1942; *see also Horne*, 576 U.S. at 361 (physical

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of the Cato Institute as *Amicus Curiae* in Support of Petitioners at 7. So too do the petitioners in *Cedar Point Nursery v. Hassid*, No. 20-107, which plaintiffs here consider "similar" to this case, Pet. 9. The *Cedar Point* petitioners acknowledge that, because "[p]roperty owners hold title subject to background principles of property law," governmental exercises of the police power do not "implicat[e] the Takings Clause," *Cedar Point*, No. 20-107, Reply Br. of Pet'rs at 18-19, when addressing a public harm, *see* Transcript of Oral Argument at 36 (lines 15-21; noting the "unambiguous line" between entering into an agricultural operation and regulating "toxic chemicals" and other things that "cause public harm").

appropriation of personal property). The government's acquisition of land for a highway is the archetype of this form of taking, and it has always required compensation.

Regulatory takings are different. First recognized in *Pennsylvania Coal Co. v. Mahon*, regulatory takings involve situations where the government does not actually seize title to the property, but instead regulates it in a way that "goes too far." 260 U.S. 393, 415 (1922). Regulatory takings are typically evaluated through "'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.'" *Murr*, 137 S. Ct. at 1942 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)).

The Court has identified "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015. The first concerns "regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* The archetype for this taking is *Loretto*, in which owners of apartment buildings were required to allow third parties to attach cable television equipment to their buildings to facilitate access to cable services. 458 U.S. at 421-22. The second type of per se regulatory taking arises "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. The archetype here is Mr. Lucas's beachfront lot, which he was required to leave undeveloped to preserve intact the beaches that promote tourism,

preserve habitat, and provide hurricane-protection. *Id.* at 1075.

Plaintiffs do not assert a claim under the *Penn Central* test that typically governs regulatory takings, Pet. App. 13a n.3, and for good reason: the character of the government action—here, the State's compelling interest in public safety—weighs heavily against such a claim, as does the tenuousness of petitioners' investment-backed expectations in devices that, at the time of their acquisition, pushed the limits of legality.[4] Consequently, petitioners' only way forward is to try to fit Maryland's regulatory ban into one of the three categories of takings that do not require application of the *Penn Central* balancing test.

But the Court has never held that a ban on the possession of dangerous devices constitutes either a government appropriation of property (like the raisins in *Horne*) or a per se regulatory taking (as in *Loretto* or *Lucas*). Despite the Court's admonition to "resist the temptation to adopt *per se* rules" under the Takings

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[4] The bump stocks and other devices that petitioners purchased came with non-binding interpretive letters from the ATF concluding that, at the time, the devices did not fully meet the definition of a machine gun. *See* 4th Cir. J.A. 163 (June 7, 2010 ATF letter concluding that bump stocks are not prohibited as machine guns because, instead of "automatically functioning mechanical parts," the shooter "must apply constant forward pressure with the non-shooting hand and constant rearward pressure with the shooting hand"), 164 (November 20, 2013 ATF letter reevaluating the agency's earlier classification of binary trigger as a machine gun, based on its redesign with a "positive disconnector function").

Clause, *Tahoe-Sierra*, 535 U.S. at 326, petitioners ask the Court to read *Horne* as having done just that.

A. The Act Does Not Constitute a Per Se Taking Under *Horne*, *Loretto*, or *Lucas*.

Plaintiffs read *Horne* as requiring compensation both for the "direct appropriation" of property and for regulations that ban possession, Pet. 12, but that sweeping proposition far exceeds the case's holding. *Horne* clarified that the government owes compensation when it physically appropriates private property for its own use, regardless of whether the property at issue is personal property or real estate. "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[5] 576 U.S. at 358. The government's confiscation of raisins in *Horne* mirrored the archetypal taking of land for a highway: "Actual raisins are transferred from the growers to the Government," *id*. at 361; "[t]itle to the raisins passes to the [Government]," *id.* at 364; and the government uses the raisins "as it wishes," *id*.

This case is not like *Horne*. Maryland did not acquire title to bump stocks or the other devices covered by the Act or use them in any way. In the language of the Fifth Amendment, the State did not "take" the devices or put them to "public use"; it banned their possession. *See Association of N.J. Rifle & Pistol Clubs*,

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[5] Of course, as discussed above, the government does *not* owe compensation when it seizes the car through the exercise of its public safety police power. *Bennis*, 516 U.S. 442.

910 F.3d at 124 n.32 (distinguishing *Horne* on the ground that it "dealt with a taking involving property for government use").

Nor was the Maryland ban absolute. Plaintiffs had six months between enactment of the legislation and its effective date in which to sell the devices or remove them for use outside the State. *See, e.g.*, *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 440-41 (8th Cir. 2007) (no taking of banned lottery machines when owner "may take them to another state (or nation) that allows monitor-vending-machine gambling"). Alternatively, the law provided an exception permitting owners to retain a covered device if the owner complied with the Act's requirements.[6] Crim. Law § 4-305.1(b). The Act thus is not the blanket prohibition that petitioners make it out to be.

But even if the Act were a complete ban, petitioners' argument that a regulatory possession-ban constitutes a per se taking would still find no support in *Horne*, which repeatedly emphasized that it addressed, not the regulation of use or possession, but "direct

[6] Although the court of appeals suggested that the ATF's refusal to accept applications for authorization to retain the banned devices rendered "ineffectual" the Act's exception for devices owned before its effective date, Pet. App. 14a, the unavailability of a formal federal approval process is mitigated by the ATF's subsequent rulemaking, which identified devices that were legal (e.g., binary triggers) and illegal (e.g., bump stocks). *See* 83 Fed. Reg. 66,534. That rulemaking, combined with the agency's issuance of interpretive letters, may provide a substitute means for effectuating the Maryland legislature's intent to provide a path to continued possession when consistent with federal law.

appropriations" of personal property for the government's own use. 576 U.S. at 361. Rather than extending its holding to regulatory takings, as petitioners suggest, *Horne* stressed "the 'longstanding distinction' between government acquisitions of property and regulations," *id.* at 361 (quoting *Tahoe-Sierra*, 535 U.S. at 323), and "the settled difference" between the two in the Court's takings jurisprudence, *id.* at 362.

The Court's careful and oft-repeated distinction between physical appropriations and regulatory takings makes clear that *Horne*'s holding is limited to "direct appropriations" or "government acquisitions of property." 576 U.S. at 361. Here, because it is undisputed that the State has not physically acquired the banned devices for its own use, the ban on possession is not a per se taking under the rule announced in *Horne*.

Nor does *Loretto* apply here. *Loretto* involved a challenge to a New York statute requiring a landlord to permit a cable television company to install its cable facilities on her property. 458 U.S. at 421-22. The Court's "narrow" holding in that case "affirm[ed] the traditional rule that a permanent physical occupation of property" authorized by the government "is a taking." *Id.* at 441. *Horne* found *Loretto*'s reasoning regarding "a physical *appropriation*" of real property to be "equally applicable to a physical appropriation of personal property." 576 U.S. at 360 (emphasis in original). It did not, however, hold that a ban on possession of dangerous devices constitutes a per se taking.

Finally, the per se rule applied in *Lucas* to regulations that deprive land of its economic value does not apply here under *Lucas*'s plain terms, which limit its holding to restrictions on land use. *See* 505 U.S. at 1119, 1028 (describing its holding as pertaining to "owner[s] of real property" and "the case of land"); *see also*, *e.g.*, *Murr*, 137 S. Ct. at 1943 (describing *Lucas*'s categorical rule as requiring "the denial of all economically beneficial use of land"); *Holliday Amusement*, 493 F.3d at 411 n.2 ("*Lucas* by its own terms distinguishes personal property.").

Petitioners argue that *Horne* expanded the *Lucas* category of per se takings beyond regulations of real property to encompass any regulation that renders personal property valueless. Pet. 16-18. But *Lucas* made clear that its categorical rule was limited to real estate, because "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 of the possibility that new regulation might even render his property economically worthless."[7] 505

[7] *Lucas*'s caution is "all the more true in the case of a heavily regulated and highly contentious activity," *Holliday Amusement*, 493 F.3d at 411, and it applies with extra force with respect to bump stocks and other devices that have always been of questionable status in light of federal machine gun restrictions, as the ATF letters accompanying them establish. As at least one court has stated with respect to another device that mimics a machine gun, "'enforceable rights sufficient to support a taking claim . . . cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control.'" *Akins*, 82 Fed. Cl. at 623 (quoting *Mitchell Arms, Inc. v. United States*, 26 Cl. Ct. 1, 5 (1992), *aff'd*, 7 F.3d 212 (Fed. Cir. 1993)).

U.S. at 1027-28. And *Horne*, in eliminating the distinction between real and personal property within the context of physical appropriations, repeatedly reiterated the distinction that *Lucas* drew between the two forms of property in the context of regulatory takings:

> *Lucas* recognized that while an owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless," such an "implied limitation" was not reasonable in the case of land. . . . The 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.

576 U.S. at 361 (citation omitted).

Because the Act does not constitute a per se taking under any of the Court's precedents, petitioners urge the Court to expand the three, narrow categories of per se takings to include any governmental action that results in the dispossession of *any* property for *any* reason. To justify that expansion, petitioners take language from various decisions describing the *effect* of governmental takings and characterize that language as having silently created a new, stand-alone category of per se taking for the "deprivation of the right of possession." Pet. 10. The Court, however, "is bound by holdings, not language," *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001), and petitioners offer nothing about the holdings of this Court's precedents to overcome the

Court's traditional "resist[ance]" to adopting per se rules, *Tahoe-Sierra*, 535 U.S. at 326.

B. There Is No Circuit Split That Requires this Court's Resolution of Whether the *Lucas* Per Se Test Applies to Regulations of Personal Property.

There is no outcome-determinative circuit split on whether *Lucas*'s per se rule applies to personal property. Petitioners argue incorrectly that there is such a division of authority, based on language in *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014). In that case, the Federal Circuit noted that "other circuits view the *Lucas* categorical test as applying only to land," and it quoted the passage from *Lucas* in which this Court distinguished personal property from real estate based on the former being subject to " 'the State's traditionally high degree of control over commercial dealings.' " *Id.* at 1151 (quoting *Lucas*, 505 U.S. at 1027-28). The Federal Circuit acknowledged that it had "applied the categorical test to personal property on occasion," 748 F.3d at 1151 (citing two cases), but it "declined to decide" whether that test applied to the intangible property that was before it, *id.* at 1152.

Although the Federal Circuit had considered the issue in the two cases cited by *A&D Auto Sales*, in neither case did the court find a categorical taking of personal property. In *Maritrans, Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003), the appellate court initially

applied *Lucas*'s categorical test to the restriction at issue—a requirement that oil tankers be double-hulled—but ultimately rejected both that claim, *id*. at 1355, and a claim under the more flexible *Penn Central* standard, *id.* at 1359. And in *Rose Acre Farms, Inc. v. United States*, the Federal Circuit held that *Lucas*'s categorical approach did *not* apply to the government's seizure and destruction of hens suspected of salmonella contamination. 373 F.3d 1177, 1197 (Fed. Cir. 2004) ("We think not.").

More importantly, all these decisions were issued before *Horne* confirmed that the *Lucas* per se rule applied only to takings of land. Courts within the Federal Circuit have noted as much, concluding that "the Federal Circuit has not squarely addressed whether and under what circumstances the *Lucas* categorical regulatory taking standard applies to personal property." *McCutcheon*, 145 Fed. Cl. at 55 (citing *Horne* and concluding that the *Lucas* per se approach "should not be applied" to the federal bump-stock ban).

And as to the principal issue in this case, the courts within the Federal Circuit uniformly hold that bans on dangerous devices are exercises of the police power, not eminent domain, and thus do not give rise to takings claims to begin with. *See Modern Sportsman*, 145 Fed. Cl. at 582 (federal ban on bump stocks not a taking because "the courts have consistently found that property is not taken for a 'public use' when seized or retained pursuant to the police power"); *Akins*, 82 Fed. Cl. at 623 (ban on "Akins Accelerator" device, also used to mimic machine gun fire, is an

exercise of police power and thus not a taking). On the issue that controls this case, the Federal Circuit has declared that its "precedent is clear: 'Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause.'" *Kam-Almaz*, 682 F.3d at 1371 (quoting *AmeriSource*, 525 F.3d at 1153).

As petitioners point out, the Federal Circuit is currently deciding the consolidated appeals in *McCutcheon* and *Modern Sportsman*, and its decision there might create a circuit split on the specific issue presented by this case. The District of Columbia Circuit may also rule, as the plaintiffs in *Guedes* have appealed the dismissal of their takings claim. If either appellate court were to disagree with the conclusion reached by the Fourth Circuit, this Court would presumably have the opportunity to address the resulting circuit split and do so in a case having nationwide effect. But current law in the Federal Circuit provides no basis for certiorari review here.

The effect of the federal ban on bump stocks also reduces the scope of this case, as it renders moot petitioners' permanent takings claim as applied to bump stocks, leaving in place only their claims with respect to "binary trigger systems" and any other devices placed at issue in the complaint and not banned by federal law. *See, e.g.*, 83 Fed. Reg. 66,534 (disagreeing with comments that "binary triggers . . . will be reclassified as machineguns under this rule"). The limited effect of the Maryland law provides further reason why this

case is not a suitable vehicle for addressing the issues that petitioners raise.

III. THE REQUEST TO CERTIFY STATE-LAW QUESTIONS TO MARYLAND'S HIGHEST COURT REFLECTS A MISUNDERSTANDING OF MARYLAND LAW AND A MISREADING OF THE FOURTH CIRCUIT'S DECISION.

The petition's second question presented does not warrant this Court's review because it merely asks whether, in denying a petition for rehearing, the Fourth Circuit acted within its discretion in declining to grant petitioners' alternative request to certify state-law takings issues to Maryland's highest court. The court below did not abuse its discretion by denying that request, which was based on petitioners' misunderstanding of Maryland law and the Fourth Circuit's treatment of it.

Maryland law recognizes two types of takings claims. The first is under Article III, § 40 of the Maryland Constitution: "The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation[.]" Section 40 is "equated with the Takings Clause of the Fifth Amendment," *Ellis v. McKenzie*, 457 Md. 323, 332 (2018), and this Court's precedents "are practically direct authorities," *Neifert v. Department of Env't*, 395 Md. 486, 517 n.33 (2006). Plaintiffs brought a claim under this provision in Count II of their complaint. Pet. App. 49a; 4th Cir. J.A. 25.

The second type of state-law takings claim is brought under Article 24 of the Maryland Declaration of Rights: "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."[8] This provision, when read in combination with Article III, § 40, gives rise to a "vested rights" takings claim that goes beyond federal law and for which "federal cases interpreting the federal constitutional provisions are treated merely as potentially persuasive authority." *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 556 (2011). Count V of the complaint asserts this type of claim. Pet. App. 49a; 4th Cir. J.A. 29-31.

The petitioners take issue with the Fourth Circuit's statement that the Act " 'does not alter the rights Appellants possessed when they purchased their rapid fire trigger activators.' " Pet. 27 (quoting Pet. App. 20a). They interpret this statement to mean that "a prior, lawful purchase of these items did not give rise to any property right to possess these items," Pet. 27—which,

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[8] Article 24's language is derived from Chapter 39 of the original Magna Carta (1215). *See Piselli v. 75th Street Med.*, 371 Md. 188, 205 n.6 (2002). Article 24 "vindicate[s] important personal rights protected by the Maryland Constitution or those recognized as vital to the history and traditions of the people of this State." *Attorney Gen. of Md. v. Waldron*, 289 Md. 683, 715 (1981). Personal rights protected by Article 24 include due process of law, *see Kane v. Board of Appeals of Prince George's County*, 390 Md. 145, 169 n.16 (2005), and equal protection, *see Waldron*, 289 Md. at 704-05.

in their view, "necessarily means that personal property is wholly unprotected by Maryland's Constitution," Pet. 8. Fortunately for Marylanders, the petitioners misunderstand the Fourth Circuit's meaning.

The statement in question appears in Part III.D. of the opinion, which addresses petitioners' Article 24 vested rights claim. Pet. App. 18a. As discussed above, that claim is a "separate per se takings theory under the State Constitution," Pet. App. 4a, and it requires the plaintiff to establish that the law operates *retrospectively* to abrogate vested rights. *See Ellis*, 457 Md. at 335 (to determine whether a legislative enactment is constitutional under Article 24, the court must "evaluate[] 'whether the statute purports to apply retrospectively'" (quoting *Muskin*, 422 Md. at 557)). The Fourth Circuit was merely making the point that the bump-stock ban did not operate retrospectively to alter the rights that petitioners possessed in their devices "when they purchased" them, i.e., *before* the ban was in effect. Pet. App. 20a. In other words, the ban did not reach back and alter the legal consequences of prior actions or "impose new liability back to the date of purchase," Pet. App. 20a, which would be the type of retrospective deprivation prohibited under Article 24, *see Muskin*, 422 Md. at 557-58. The court was not opining that Maryland law recognizes no "property right" in personal property, Pet. 27; rather, the court was merely observing that, because the ban acted prospectively only, it did not constitute a retrospective abrogation of vested rights under Maryland law.

A valid takings claim under Article III, § 40 of the Maryland Constitution, like one brought under the Fifth Amendment, does not require that the law at issue have retrospective effect, if it otherwise constitutes a taking. The Fourth Circuit, however, disposed of that aspect of petitioners' claim in Part II.C. of its opinion, where it rejected their takings claim under this Court's Fifth Amendment precedents, which effectively govern state-law takings claims brought under § 40. *Neifert*, 395 Md. at 517 n.33.

Given the clarity of pertinent Maryland law, there was no need to certify a question to Maryland's highest court. Certification is committed to " 'the sound discretion of the federal court,' " and because it "can prolong the dispute and increase the expenses incurred by the parties," it is resorted to "only rarely" and in "exceptional instances." *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) (quoting *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974)). Ordinarily, "[o]ur system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law." *McKesson*, 141 S. Ct. at 51. That presumption is well warranted here, given the Fourth Circuit judges' familiarity with the laws of Maryland, one of four states within the circuit. *See Lehman Bros.*, 416 U.S. at 391 (remanding for Second Circuit to certify issue of Florida law, as to which the Second Circuit judges "lack[ed] the common exposure to local law which comes from sitting in the jurisdiction"); *see also*, *e.g.*, *Clayland Farm Enters., LLC v. Talbot County, Md.*, 987

F.3d 346 (4th Cir. 2021) (addressing Maryland takings claims brought under Article III, § 40 and Article 24).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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