IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND SHALL ISSUE, INC., *et al.*, *Plaintiffs*, v. LAWRENCE HOGAN, *Defendant*.	Case No. 1:18-cv-01700-JKB

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

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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF AMICUS CURIAE

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

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I. INTRODUCTION AND STATEMENT OF THE ARGUMENT

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

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

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

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

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

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

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

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

II. ARGUMENT

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

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

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.[2]

[2] 26 U.S.C.A. § 5845(b).

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

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

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

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

[4] *Id.*

[5] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Courts Have Uniformly Upheld These Machine Gun Restrictions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[22] *Id.* at 125.

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

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

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

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

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

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

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

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

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

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

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

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

[28] DOJ Notice of Proposed Rule at 13445.

[29] *Id.*

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

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

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

D. The Maryland Statute Does Not Implicate the Takings Clause

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

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

[32] *Id.*

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

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

[35] *Id.* § (m)(1).

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

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

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

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

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

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[37] Compl. ¶¶ 8-11.

[38] Motion at 10-13.

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

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

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

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

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

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

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

the governmental action.'"[44]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[52] Motion at 10 n.6.

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

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

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

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Respectfully submitted,

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

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