

No. 18-2474

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Maryland Shall Issue, Inc., *et al.*,
Plaintiffs-Appellants,

v.

Lawrence Hogan,
Defendant-Appellee.

On Appeal from the United States District Court for the
District of Maryland | No. 1:18-cv-01700-JKB
(Honorable James K. Breddar)

**BRIEF OF *AMICUS CURIAE*
GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE
IN SUPPORT OF APPELLEE
AND AFFIRMANCE OF THE JUDGMENT**

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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.¹ 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.*

¹ All parties have consented to the filing of this *amicus* brief. Accordingly, this brief may be filed without leave of court under Rule 29(a) of the Federal Rules of Appellate Procedure.

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, *amicus* also certifies that (1) this brief was authored entirely by counsel for *amicus*, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money intended to fund preparing or submitting this brief; and (3) apart from *amicus*, no other person contributed money intended to fund preparing or submitting this brief.

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).

I. INTRODUCTION AND STATEMENT OF THE ARGUMENT

On October 1, 2017, a single shooter armed with AR-15 assault rifles unleashed a torrent of gunfire on a crowd of 22,000 people attending a country music festival in Las Vegas. Tess Owen & David Gilbert, *Vegas Shooter Had an Arsenal of Guns, Chemicals, and Ammunition*, VICE News (Oct. 3, 2017). In about ten minutes, he killed 58 people, hit 422 with gunshots, and caused more than 800 total injuries, all from his 32nd floor hotel room in the nearby Mandalay Bay Resort and Casino. It was the deadliest mass shooting in modern American history. Of the 23 guns the perpetrator had in his hotel room and used during the rampage, 12 were outfitted with “bump stock devices.” Miles Kohrman, *The Las Vegas Shooter’s Accessories*, The New Yorker (Oct. 4, 2017). The bump stock devices increased the speed of fire of his semiautomatic rifles to 90 rounds in 10 seconds—nearly the same speed as a machine gun—enabling the attack’s unprecedented level of carnage. *Id.*

Bump stocks “allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger,” “*convert[ing] an otherwise semiautomatic firearm into a machinegun.*” Notice of Proposed Rulemaking, Department of Justice, *Bump-Stock-Type Devices*, 83 Fed. Reg. 13442, 13443 (Mar. 29, 2018) (emphasis added).² “[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.*” *Id.* (emphasis added).

While the firing rate of a semiautomatic firearm is typically limited to the speed with which the shooter can pull the trigger, “rapid fire trigger activators” allow semiautomatics to mimic the automatic firing action of a machine gun. The bump stock is only one such trigger activator. Others include trigger cranks, hellfire triggers, binary trigger systems, and burst trigger systems. These rapid fire trigger activators erase the distinction between machine guns and semiautomatic rifles. As late as 2018, federal law allowed for a loophole that regulated machine guns, but exempted rapid fire trigger activators. As a result, device manufacturers could *legally* sell the equivalent of machine guns without triggering the federal ban—enabling the Las Vegas gunman to unleash unprecedented mayhem on a group of unsuspecting civilians using legally purchased weapons. *See Yaron*

² This proposed rule became effective March 26, 2019; the final rule is codified at 27 C.F.R. § 478.11 (2019).

Steinbuch, *Las Vegas Shooter Likely Altered Guns to Be Even Deadlier*, N.Y. Post (Oct. 5, 2017).

Maryland closed that loophole early last year. In April of 2018, Governor Hogan signed into law Maryland Senate Bill 707 (as Chapter 252 of the 2018 Laws of Maryland, Md. Code Crim. Law § 4-301 *et seq.*) (“the Act”). The Act prohibits the transport, manufacture, possession, sale, purchase, or receipt of rapid fire trigger activators that transform semiautomatic weapons into machine guns. *See* Md. Code Ann., Crim. Law § 4-305.1. The Act ensures that these extraordinarily dangerous and unusual devices cannot be used in Maryland as they were in Las Vegas.

Plaintiffs in this case, the organization Maryland Shall Issue, Inc. and four of its members (“MSI”), argue that the Takings Clause of the Fifth Amendment compels Maryland to compensate MSI for the rapid fire trigger activators now prohibited under the Act. MSI’s argument fails as a matter of fact and law. In 2019, after Plaintiffs noted this appeal, the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) followed Maryland’s example by promulgating a final rule that closes the loophole that enabled the Las Vegas shooting. The final rule clarified that the definition of machine guns includes guns “functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single [pull] of the trigger.” 27 C.F.R. § 478.11. As a

result, MSI's challenge to the Maryland law with respect to devices covered by federal law is moot. *See* Appellee's Opening Br. at 13, 16–17. Regardless of the scope of the federal regulation, however, Maryland's exercise of its police power in restricting the possession and use of rapid fire trigger activators does not implicate the Takings Clause at all.

II. ARGUMENT

A. A Rifle Equipped with a Rapid Fire Trigger Activator Is for All Practical Purposes a Machine Gun

The Maryland law prohibits “rapid fire trigger activator[s],” including “a bump stock, trigger crank, hellfire trigger, binary trigger system, burst trigger system, or a copy or a similar device, regardless of the producer or manufacturer.” Md. Code Ann., Crim. Law § 4-301(m)(2). Each of those devices elevates the destructive capability of a semiautomatic weapon to that of a machine gun, as follows:

A bump stock replaces the standard stock of a rifle—the part of the rifle that the shooter holds between his or her shoulder. *See* Larry Buchanan *et al.*, *What Is a Bump Stock and How Does It Work?*, N.Y. Times (Feb. 20, 2018); *see also* Md. Code Ann., Crim. Law § 4-301(f) (defining bump stock). With the bump stock, the weapon can “slide back and forth rapidly, harnessing the energy from the kickback shooters feel when the weapon fires.” Buchanan, *supra*. That energy allows the stock to “‘bump’ back and forth between the shooter’s shoulder and

trigger finger, causing the rifle to rapidly fire again and again.” *Id.* The result: so long as the shooter keeps pressure on his or her trigger finger, the weapon will continue firing. *Id.*

A rotating-trigger actuator—or “trigger crank,” is “affixed to a gun’s trigger guard.” Kohrman, *supra*. “Turning the crank activates a gear whose ‘teeth’ depress the trigger—allowing a shooter to discharge several shots per revolution.” Lindsay Nichols & David Chipman, *Legal and Lethal: 9 Products that Could Be the Next Bump Stock* at 5, Giffords Law Center (Sept. 28, 2018); *see* Md. Code Ann., Crim. Law § 4-301(n) (defining trigger crank). A semiautomatic weapon with a trigger crank resembles a Gatling gun. Kohrman, *supra*. One trigger crank product—a “GatCrank”—costs \$40 online. *Id.*

A hellfire trigger is a spring-loaded pedal inserted behind the gun’s trigger. *Id.* When the shooter pulls the trigger, the trigger springs back to firing position, enabling rapid fire. *Id.*; *see* Md. Code Ann., Crim. Law § 4-301(k) (defining hellfire trigger). A gunman used a weapon equipped with a hellfire trigger to kill eight people and injure six more at a law office in San Francisco—the event that led to the formation of *amicus curiae* (then known as the Legal Community Against Violence). *See supra* at 1; Kohrman, *supra*. Online sellers provide hellfire triggers for as little as \$59.95. Kohrman, *supra*. Calls to bar these devices

began with the law firm shooting and gained additional traction after the Sandy Hook Elementary School massacre. *Id.*

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.” Md. Code Ann., Crim. Law § 4-301(e). In other words, the system “doubl[es] the rate of fire” of an un-augmented semiautomatic rifle. Joshua Eaton, *Gunmakers Have the Successor to the Bump Stock Lined Up*, ThinkProgress (June 14, 2018). YouTube features one video in which a weapon with a binary trigger fired 30-round magazines in less than five seconds. *Id.* Another video shows a semiautomatic with a binary trigger “beat[ing] out a fully-automatic weapon.” *Id.* A shooter can purchase a binary firing system for about \$380. *See* Bud’s Gun Shop.com, https://www.budsgunshop.com/catalog/mobile/product/20628/franklin_armory_5550_binary_firing_system_bfs_trigger_gen_3_metal_black (last visited Apr. 18, 2019).

A burst trigger system is “a device that, when installed in or attached to a firearm, allows the firearm to discharge two or more shots with a single pull of the trigger by altering the trigger reset.” Md. Code Ann., Crim. Law § 4-301(g). One online gun seller advertises a version of the burst-trigger device as “allow[ing] you to pull your own trigger and shoot single shots, bursts or empty complete mags at a fully automatic rate, legally and accurately,” which “[i]nstalls in seconds” and

“works on most any semiautomatic rifle or pistol.” *Auto Burst Trigger System*, Firequest, <https://www.firequest.com/AB225.html> (last visited Apr. 18, 2019); *see also* American Specialty Ammo, http://www.americanspecialtyammo.com/Tac_Trigger.html (last visited Apr. 18, 2019) (advertising burst triggers that allow 100–200 rounds per minute for \$36.99).

These devices substantially increase the deadliness of semiautomatic rifles. For example, in the 2016 shooting at Orlando nightclub “Pulse,” the gunman used an AK-15 semiautomatic assault rifle and shot approximately 24 rounds in 9 seconds. Larry Buchanan *et al.*, *Nine Rounds a Second: How the Las Vegas Gunman Outfitted a Rifle to Fire Faster*, N.Y. Times (Oct. 5, 2017); *see also* Ralph Ellis *et al.*, *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016). That same weapon, enhanced by a bump stock, allowed the Las Vegas shooter to shoot 90 rounds in 10 seconds. Buchanan, *Nine Rounds*, *supra*; *see also* Ed Leefeldt, *Stephen Paddock Used a “Bump Stock” to Make His Guns Even Deadlier*, CBS NEWS (Oct. 4, 2017). And Slide-Fire Solutions, a former bump-stock seller, had advertised that its bump stocks allowed semiautomatic weapons to fire 100 rounds in 7 seconds. Justin Peters, *This Single Legal Add-On Lets an AR-15 Fire 900 Rounds per Minute*, Slate Crime Blog (Jan. 7, 2013). In other words, rapid fire trigger activators like the bump stock allow semiautomatic rifles to shoot like machine guns, firing hundreds of rounds per minute more than

an un-augmented semiautomatic rifle. Even without the bump stock, the Pulse shooter killed 49 people and wounded 53. Leefeldt, *supra*. There is no telling how many lives he would have taken if he had used one of the devices now prohibited by Maryland's law.

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 Strictly Regulated Since the 1930s and Those 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.” *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). Unsurprisingly, machine guns have long been the subject of state and federal government regulation. *See United States v. Knutson*, 113 F.3d 27, 30 (5th Cir. 1997) (“Section 922(o) [barring the transfer or possession of a machine gun] . . . is but the latest manifestation of the federal government’s longstanding record of regulating machineguns.”).

Between 1925 and 1933, as machine guns began to proliferate among the civilian population, at least 28 states imposed laws strictly regulating the use, sale, and transfer of machine guns. Robert Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *Law & Contemp. Probs.* 55, 67–68. In

1934, Congress followed suit by passing the National Firearms Act (“NFA”). Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§ 5801–5872 (2012)). The NFA, which “was popularly known as an ‘anti-machine gun’ law,” subjected machine guns to federal registration and taxed their manufacture, sale, and transfer. Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. Legal Stud. 133, 183 n.29 (1975). Several decades later, in 1986, Congress passed the Firearm Owners Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986), which effectively froze the number of legal machine guns in private hands at its 1986 level. *See United States v. Kirk*, 105 F.3d 997, 1001 (5th Cir. 1997).

The state and federal governments’ efforts to restrict machine guns in the civilian sphere 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. 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”).

2. *Courts Have Uniformly Upheld Machine Gun Restrictions*

In *Heller*, while generally upholding an individual right to gun ownership, the Supreme Court said that it would be a “startling” reading of the Second Amendment to suggest that restrictions on machine gun ownership are unconstitutional. *Heller*, 554 U.S. at 624. Since *Heller*, circuit courts, including this circuit, have uniformly approved of governmental efforts to regulate machine guns.³ In *United States v. Pruess*, this Court 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.’” 703 F.3d 242, 246 n.2 (4th Cir. 2012). More recently in *Kolbe*, this Court sitting en banc rejected a challenge to a Maryland law restricting certain semiautomatic assault weapons. 849 F.3d at 124. In that decision this Court left no uncertainty as to how the circuit would consider a challenge to machine guns, calling “fully automatic counterparts” of the banned assault weapons “firearms designed for the battlefield.” *Id.* at 125.

³ 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*

C. **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 MSI's Takings Clause claim must fail. MSI 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, like binary triggers and trigger cranks, that let them mimic machine gun fire. *See supra* 5–11. Plaintiffs cannot be heard to complain that the government owes them compensation for their contraband.

“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.” *Mugler v. Kansas*, 123 U.S. 623, 668 (1887). Restricting the possession of devices that give legal weapons illegal firepower falls squarely within the permissible scope of the State of Maryland's police power. And Plaintiffs cannot make any plausible arguments that a compensable taking occurred despite the exercise of that power.

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); *Hamblen v. United States*, 591 F.3d 471 (6th Cir. 2009); *Henry*, 688 F.3d at 637; *United States v. Zaleski*, 489 F. App'x 474 (2d Cir. 2012) (summary order).

1. *Maryland's Exercise of the Police Power to Restrict Access to Lethal Devices That Let Shooters Mimic Automatic Fire Was Reasonably Foreseeable*

Amicus curiae agrees with Appellee that, in light of the 2019 ATF regulation, MSI's challenge to the Act's ban on bump-stock-type devices is moot, as "possession of such devices is now banned by federal law." Appellee's Opening Br. at 13. But as Appellee explains, MSI still seeks a judicial determination that Maryland's prohibition of rapid fire trigger activators beyond those covered by federal law constitutes an appropriation of those devices and a *per se* compensable taking. *Id.* at 14, 22. It is not. And by arguing that the Act functions only as an appropriation of property, MSI has waived the argument that the Act is a regulatory taking. *Id.* Even if this Court were to examine whether *Penn Central* required the State to compensate owners of rapid fire trigger activators as a regulatory taking, however, Appellants would still not be entitled to relief. Maryland's law is not a regulatory taking, either.

Whether a regulation effects a partial taking turns on application of the Supreme Court's *Penn Central* test. That test requires "essentially ad hoc, factual inquiries," but focuses on "several factors that have particular significance," and "particularly," "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). 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.” *Piszel v. United States*, 833 F.3d 1366, 1374–75 (Fed. Cir. 2016), *cert. denied*, 138 S. Ct. 85 (2017). 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.” *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’”). And as the Supreme Court warned in *Lucas*, “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*.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027–28 (1992) (emphasis added) (citing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979)).

Lucas’s caution is “all the more true in the case of a heavily regulated and highly contentious activity.” *Holliday Amusement Co. of Charleston v. South*

Carolina, 493 F.3d 404, 411 (4th Cir. 2007). 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 the activity to support a claim of legitimate investment-backed expectations. *Id.* (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”). 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.” *Akins v. United States*, 82 Fed. Cl. 619, 623–24 (2008) (quoting *Mitchell Arms, Inc. v. United States*, 26 Cl. Ct. 1, 5 (1992), *aff’d*, 7 F.3d 212 (Fed. Cir. 1993)). In fact, since Maryland enacted the Act, the ATF has revised its position and determined that semiautomatic firearms modified with bump-stock-type devices are machine guns under federal law. *See* 27 C.F.R.

§ 478.11 (defining a “bump-stock-type device” as “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”).

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. 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 reasonable expectation that they were engaging in constitutionally protected activity when they purchased their rapid fire trigger activators. MSI cannot claim unfair surprise that Maryland, along with several other states and cities, would target both bump stocks and other devices that mimic the rate of fire of machine guns, such as trigger cranks. *Cf.* Comments of Everytown for Gun Safety to 82 Fed. Reg. 60929 (Dec. 27, 2017).

To be sure, the ATF previously classified most rapid fire trigger activators as not subject to NFA regulations, either because the 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. *Id.* But as was demonstrated in Las Vegas, the ATF’s

distinction was a matter of form over substance. (And one the ATF definitively rejected as to bump-stock-type devices in 2019.)

In fact, many online sellers—and commentators—promote rapid fire trigger activators by advertising how the devices emulate the effects of machine guns. *See, e.g.*, Auto Burst Trigger System, *supra* (“This incredible system allows you to . . . [shoot] bursts or empty complete mags at a fully automatic rate, legally and accurately”); *Turn Your AR-15 into a Mini Gatling Gun*, Am. Shooting J. (Aug. 12, 2016). Buyers of devices specifically designed to exploit the putative loophole in the federal machine gun definition should well have expected federal and state regulators to quickly close the loop, especially when those weapons proved during mass shootings to be practically indistinguishable from their prohibited counterparts.

2. *Plaintiffs Retain Significant Interests and Value in Their Rapid Fire 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. Under Maryland law, Plaintiffs may retain possession of any rapid fire trigger activators not prohibited under federal law by storing them out of state; they may gift them to relatives or friends who live outside of Maryland; or they may sell their rapid fire trigger activators outside of Maryland to other firearm enthusiasts. MSI’s complaint does not allege

that any of these options pose an undue burden, nor that the economic value of the rapid fire trigger activators is diminished in any way by the imposition of the Act.⁴ 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 trigger activators—especially in light of Plaintiffs' voluntary entry into the highly regulated firearm arena (under the *Penn Central* test). *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002), as amended (Jan. 27, 2003), abrogated on other grounds by *Heller*, 554 U.S. at 638 n.2 (“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.”).

⁴ 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 machine guns and the availability of other lawful means of possession or dispossession outside the state. *Fesjian v. Jefferson*, 399 A.2d 861, 865–66 (D.C. 1979).

* * *

MSI's "participation in a traditionally regulated industry greatly diminishes the weight of [its] 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 the Maryland law. *Holliday Amusement Co. of Charleston*, 493 F.3d at 411 n.2. "Thus, under any analysis, plaintiff[s]' claim must fail." *Id.*

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 4,412 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: April 19, 2019

/s/ Kathryn Cherry
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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2019, I electronically filed the foregoing *amicus* brief with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Registered CM/ECF users participating in this appeal will be served by the appellate CM/ECF system.

Dated: April 19, 2019

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