

2020-1107

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE MODERN SPORTSMAN, LLC, RW ARMS, LTD., MARK MAXWELL,
MICHAEL STEWART,

Plaintiffs-Appellant,

v.

THE UNITED STATES

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in
Case No. 2019-449C, Senior Judge Loren A. Smith

**CORRECTED BRIEF OF AMICI CURIAE REP. PAUL BAUMBACH, VIC BENCOMO,
JIM BERZOWSKI, MATTHEW DEFALCO, SCARLETT FLORES, DR. DAVID FITZ,
AND OTHER INDIVIDUAL GUN OWNERS IN SUPPORT OF DEFENDANT-
APPELLEE**

Scott A. Edelman
sedelman@gibsondunn.com
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Los Angeles, CA 90067
(310) 557-8061

Vivek R. Gopalan
vgopalan@gibsondunn.com
GIBSON, DUNN & CRUTCHER
555 Mission St., Ste. 3000
San Francisco, CA 94105
(415) 393-8200

Praatika Prasad
pprasad@gibsondunn.com
GIBSON, DUNN & CRUTCHER
200 Park Ave.
New York, NY 10016
(212) 351-6239

Counsel for Amicus Curiae
June 12, 2020

Additional Counsel :

Hannah Shearer

hshearer@giffords.org

GIFFORDS LAW CENTER TO PREVENT

GUN VIOLENCE

268 Bush St. #555

San Francisco, CA 94104

(415) 433-2062

CERTIFICATE OF INTEREST

In accordance with Federal Circuit Rule 47.4, counsel for *amici curiae* Rep. Paul Baumbach, Vic Bencomo, Jim Berzowski, Matthew DeFalco, Scarlett Flores, Dr. David Fitz, and Other Individual Gun Owners, certifies the following:

1. The full name of every party of amicus represented by me:
Rep. Paul Baumbach; Vic Bencomo; Jim Berzowski; Matthew DeFalco; Scarlett Flores; Dr. David Fitz; Peter Gurfein; Megan Harper; George Higgins; Bob Mokos; Mike Meyers; Jim Pederson; Matt Pierce; Conner Siegel; and Whitney Toutenhoofd.
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me:
N/A.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party of amicus curiae represented by me:
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4. The names of all law firms and the partners or associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court and who are not already listed on the docket for the current case:
None.
5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:
None.

June 12, 2020

/s/ Scott A. Edelman
Scott A. Edelman

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INTEREST OF AMICI CURIAE

Amici curiae are 15 firearm owners who support reasonable gun safety laws, including measures designed to address and prevent mass shootings and other forms of gun violence, while protecting the rights of responsible gun owners. Their advocacy for safer communities includes volunteer work with Giffords, the partner organization of co-counsel for *amici* Giffords Law Center to Prevent Gun Violence. One of the undersigned is a native Las Vegas who was personally impacted by the massacre in 2017. A complete list of *amici curiae* is included in the addendum to this brief.

Amici keep firearms for self-defense, hunting, and recreational purposes. Many have owned firearms for their entire adult lives. As firearm owners, they are uniquely situated to offer first-hand, personal perspectives regarding bump stocks and the expectations gun owners had about these devices. *Amici* believe bump stocks are dangerous and unnecessary. They support the challenged regulations as a foreseeable exercise of the federal government's power to prohibit dangerous

contraband that is not a Fifth Amendment “taking.”¹

I. INTRODUCTION AND STATEMENT OF THE ARGUMENT

As long-time gun enthusiasts, *amici* understand that machine guns are in a separate class of weapons from other firearms. Every responsible gun owner should know that these automatic weapons are tightly regulated, and for good reason: machine guns are weapons of war that are unique in their lethality. With a single pull of the trigger, machine guns can fire hundreds of bullets in mere seconds. Those among *amici* who have used these types of weapons on the battlefield know of their power to create carnage.

Unfortunately, Americans have now seen the power of these weapons unleashed on our own people. On October 1, 2017, a lone gunman armed with AR-15 assault rifles modified with bump stocks

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, *amici* also certify that (1) this brief was authorized entirely by counsel for *amici*, and not by counsel for any party, in whole or in part; (2) no party and no counsel for any party contributed money intended to fund preparing or submitting this brief; and (3) apart from *amici* and their counsel, no other person contributed money intended to fund preparing or submitting this brief.

unleashed a torrent of gunfire from an adjacent hotel on a crowd of concert-goers in Las Vegas, Nevada.² In about ten minutes, he killed 58 people, hit 422 people with bullets or shrapnel, and between bullets and chaos caused injuries to 851 people total. See Jennifer Medina, *A New Report on the Las Vegas Gunman Was Released. Here Are Some Takeaways*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/las-vegas-attack-shooting-paddock.html>. It was the deadliest mass shooting in modern American history. The shooter's use of bump stocks, which turned his rifles into machine guns, made this unprecedented carnage possible. *Id.*

Amici are familiar with bump stocks and other types of rapid-fire

² Semiautomatic weapons became popular in the United States after the 1989 school shooting in Stockton, California where the shooter used a semiautomatic weapon to kill five children and injure 29 others. See Daniel Brown, *The Pittsburgh Synagogue Shooter was Reportedly Armed with an AR-15—Here's How it Became the Weapon of Choice for America's Mass Shooters*, BUS. INSIDER (Oct. 27, 2018), <https://www.businessinsider.com/ar-15-semi-automatic-history-why-used-mass-shootings-2018-2>. The Las Vegas shooter was not the first to alter a gun in a manner that allowed it to function like a machine gun. In the 1993 mass shooting at 101 California Street in San Francisco, the shooter equipped his assault pistol with a Hellfire trigger activator that allowed him to pull the trigger in rapid succession, killing eight people and wounding six others. See Richard Cole, *One Year Later, San Francisco Massacre Leaves Shattered Lives*, AP NEWS (June 29, 1994), <https://apnews.com/6e69d5a59149716c22c47a90acb20d6d>.

trigger activators, and believe that a rifle equipped with a bump stock is the equivalent of a machine gun because bump stocks modify rifles to shoot *continuously* after only a single pull of the trigger. See Notice of Proposed Rulemaking, Department of Justice, *Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442, 13,443 (Mar. 29, 2018) (hereafter “DOJ Notice of Proposed Rule”). Bump stocks, or trigger activators, “harness[] 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, . . . convert[ing] an otherwise semiautomatic firearm into a machinegun.” *Id.*

Amici believe that sellers and purchasers of bump stocks recognized that these devices exploited a regulatory loophole. Machine guns, of course, are tightly regulated under federal law and by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). Although these regulations did not expressly cover semiautomatic firearms with attached bump stocks or trigger activators, there is no question that bump stocks were a workaround to the longstanding federal law restricting machine guns. Indeed, they were explicitly designed and marketed for precisely this purpose. It was only a matter of time before the law caught up.

As a result, a responsible gun owner would not have been surprised when the government acted to clarify that bump stocks are unlawful, which is ultimately exactly what happened. After the Las Vegas shooting, President Trump issued a memorandum urging the Department of Justice (“DOJ”) to “fully review” how ATF regulates bump stocks and similar devices, and, “as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.” Application of the Definition of Machinegun to “Bump Fire” Stocks and Other Similar Devices, 83 Fed. Reg. 7,949, 7,949–50 (Feb. 20, 2018). On December 26, 2018, ATF issued a Final Rule clarifying that the term “machinegun” encompasses “bump-stock-type device[s].” Bump-Stock-type Devices, 83 Fed. Reg. 66,514, 66,516–17 (Dec. 26, 2018)³ (hereafter “Final Rule”). The Final Rule took effect on March 26, 2019, giving the owners of bump stocks a period of ninety days to either destroy or surrender their bump stocks at a local ATF office.

³ This rule became effective March 26, 2019; the final rule is codified at 27 C.F.R. §§ 447–79.

ATF's commonsense regulatory action did not violate the Constitution's Takings Clause. Like *amici*, other law-abiding gun owners knew that the availability of bump stocks was a result of a regulatory loophole, and therefore cannot claim surprise or outrage by ATF's actions after the Las Vegas shooting to close that loophole and confirm that bump stocks are unlawful. Because purchasers of bump stocks could not have had a reasonable expectation of economic value for their bump stocks, their Takings Clause claim fails.⁴ See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004) (Takings Clause analysis considers whether plaintiffs had "reasonable investment-backed expectations in property" and whether they could have "reasonably anticipated" the possibility of contested regulation).

⁴ *Amici* do not take a position on whether the federal government *should* compensate bump stock owners or sellers for bump stocks they had to destroy or surrender under the rule. Some gun owners and gun-violence-prevention advocates may support efforts to provide compensation. Cf. Rev. Code. Wash. § 43.43.920 (state law providing compensation for bump stock owners). However, *amici* submit that the Takings Clause does not *require* the government to compensate owners and sellers after ATF adopted a foreseeable ban on bump stocks to protect public safety and prevent another mass shooting like Las Vegas.

II. ARGUMENT

A. A Rifle Equipped with a Bump Stock or Trigger Activator Is for All Practical Purposes a Machine Gun

An automatic weapon, or machine gun, fires multiple bullets at a rapid pace with a single pull of the trigger. Congress, in the National Firearms Act (“NFA”), defined 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.” 26 U.S.C.A. § 5845(b) (2018).⁵ The NFA’s longstanding restrictions on machine guns have effectively protected public safety. Today, few crimes are committed with machine guns, and an automatic weapon has not been used in a U.S. mass shooting in nearly 40 years. See Marianne W. Zawitz, *Guns Used in Crime*, U.S. DEP’T OF JUSTICE, BUREAU OF JUST. STATS. (July 1995) (in 1994, only 0.1 percent of ATF’s requests to trace guns used in crime were requests to trace machine guns).

⁵ The NFA specifies that the term includes “any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun.” 26 U.S.C.A. § 5845(b) (2018).

A bump stock is an accessory that converts semiautomatic firearms so that they fire automatically, simulating machine guns. Bump stocks “replace 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.” 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>. Bump stocks work by allowing “[t]he stock to bump[]” 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. *Id.*

Machine guns and semiautomatic rifles equipped with bump stocks or trigger activators function essentially the same way: they both fire rounds at exceptional speed. A machine gun can shoot 98 shots in 7 seconds. *Id.* In Las Vegas, using a rifle equipped with a bump stock, the gunman was able to shoot at a rate of 90 rounds in 10 seconds. *Id.* Either option unleashes bullets far faster than an unmodified semiautomatic rifle. For example, in the June 2016 Orlando nightclub shooting, in which 49

people were killed and 53 wounded, 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. *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/>. That is a difference of hundreds of shots per minute using the same weapon equipped with a bump stock—a difference that can result in exponentially more carnage, as Las Vegas made clear.

B. Bump Stock Purchasers Could Have No Reasonable Economic Expectation in Their Purchase of a Bump Stock

1. *Gun Owners Could Anticipate That Bump Stocks Would Be Regulated Because They Convert Semiautomatic Weapons into Machine Guns*

As longtime gun owners, *amici* know that gun-related regulations are subject to changes and clarifications that impact the use of certain firearms or accessories. *Amici* monitor these regulations to ensure continued enjoyment of their guns without breaking the law. *Amici* also know that machine guns are a different class of firearms, and are essentially illegal to own. For good reason. Machine guns are weapons of war with the

potential to cause enormous harm. Furthermore, bump stocks and similar rapid-fire trigger activators can be used to transform regular guns into weapons functionally indistinguishable from machine guns. Since guns equipped with bump stocks allow for continuous shooting with a single pull of the trigger, these modified guns have the potential to be as lethal as machine guns.

Several of the undersigned *amici* offer their individual perspectives on the foreseeability of bump stock regulation.

Connor Siegel, for example, was strongly familiar with using bump stocks on his own legally owned firearms prior to the Las Vegas massacre. He says, “I thought it was a fun legal modification to use at the range, but after the Vegas shooting, I was horrified by its potential for harm. I genuinely can’t imagine these being readily available to the general public.”

Jim Pederson is a lifelong gun owner who began hunting at 16 years old. Mr. Pederson says, “bump stocks are unsafe, unsportsmanlike, totally irresponsible, and I will have nothing to do with them.” He also says it is irresponsible and misinformed to be “surprised and/or caught off guard [by ATF’s challenged regulation].”

Whitney Toutenhoofd, a rising high school senior in Colorado, competes in biathlons, which combine rifle shooting with cross-country skiing. Bump stocks “serve no other purpose other than for killing large numbers of people,” she says. “I’m sure that anyone who sold or purchased bump stocks was well aware of how powerful and dangerous they are, especially since they essentially turn an AR-15 into a machine gun, a kind of weapon which has been illegal for a long time.”

Jim Berzowski, an avid hunter, says that when he learned about bump stocks, he was “very concerned” about the public safety risks. Since automatic weapons require a special license, he says, “owners of the bump stock weapons should not be surprised [about the challenged regulation]. If I altered my automobile in a way which made it a public safety concern I would not be surprised if the authorities issued me a citation.”

David Fitz, a retired surgeon, is a certified Firearm Safety Instructor, who owns firearms for hunting and target practice, and is a member of his local gun club. “No ethical hunter should ever be near [a bump stock], nor should anyone ever need one,” he says. They are “totally unnecessary and a workaround to create an automatic weapon.”

Mike Meyers grew up hunting, served for four years in the Navy as a Gunners Mate, and has participated in marksmanship competitions. Like Mr. Fitz, Mr. Meyers says that bump stocks are “a sneaky way to get around machine gun laws. In essence, they are a machine gun without the paperwork. Owners of bump stocks should not be surprised that this is an issue now. They bought the bump stock to skirt the machine gun laws.”

2. *Gun Owners and Sellers Demonstrated that they Knew Bump Stocks were Subject to Regulation*

Since those who transacted in bump stocks were exploiting a regulatory loophole, sellers and owners cannot now claim surprise that ATF has closed this regulatory loophole by correcting its past error in classifying bump stocks. That would be like a child claiming total shock that her parents’ ban on television extends to television on her iPad. It is a particularly disingenuous claim given that bump stock purchasers and sellers in the wake of the Las Vegas massacre explicitly acknowledged that this product might be banned. After the shooting, there was a surge in bump stock sales precisely because gun owners expected bump stocks to soon be illegal. See, e.g., ExpressDigest, *High capacity magazines sell out after Las Vegas massacre*, <https://expressdigest.com/high-capacity-magazines->

sell-out-after-las-vegas-massacre/ (explaining that bump stocks were in high demand after the Vegas shooting because “people think they’re going to get banned”).

Bump stock makers and sellers, including one of the plaintiffs in this case, took advantage of this charged atmosphere with bump stock advertising campaigns encouraging people to buy bump stocks while they still could. Plaintiff RW Arms engaged in bump stock sales even after ATF announced its plans to adopt the regulation at issue in this case, displaying a “countdown clock” on its website and sending promotional emails pointing to the impending ban. *See, e.g.,* Martin Kaste, *Bump Stocks Will Soon Be Illegal, But That’s Not Stopping Sales*, NPR (Feb. 4, 2019), <https://www.npr.org/2019/02/04/691287471/bump-stocks-will-soon-be-illegal-but-thats-not-slowing-sales> (discussing RW Arms clock that “tracks the days, hours, minutes and seconds until they’re no longer permitted to sell bump stocks” and emails encouraging customers to order to “enjoy this unique firing experience” while they can).

Other bump stocks may have been purchased before the ATF announced its intention to ban but after a number of states had either enacted, or announced their intention to enact, legislation restricting bump

stocks. See Giffords Law Ctr. to Prevent Gun Violence, *Gun Law Trendwatch: 2018 Mid-Year Review* (July 21, 2018), <https://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).

C. **After Las Vegas, ATF 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*

Amici's belief that the legality of bump stocks was a loophole in ATF policy, and that demand for bump stocks was fueled by purchasers' desire for machine guns, is confirmed by history and economics.

Machine guns that are legally available for sale are extremely expensive while bump stocks were cheap. "[T]he 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 13,444 (citations omitted). A rifle equipped with a bump stock costs a

fraction of what machine guns cost. Though the prices of bump stocks increased dramatically after the Las Vegas massacre (because people anticipated regulatory action), the retail price of bump stocks has generally been under \$200. See Polly Mosendz, *Bump Stock Prices Soar After Trump Proposes Ban*, BLOOMBERG (Feb. 21, 2018), <https://www.bloomberg.com/news/articles/2018-02-21/bump-stock-prices-soar-after-trump-proposes-ban>.

In response to the scarcity and high price of legal machine guns, the firearms industry has long sought to circumvent the NFA restrictions. See DOJ Notice of Proposed Rule at 13,444. Indeed, the “inventor [] of the bump-stock-type devices used in the Las Vegas shooting has attributed his innovation of those products specifically to the high cost of fully automatic firearms.” *Id.* (citing Donnie A. Lucas, *Firing Up Some Simple Solutions*, ALBANY NEWS (Dec. 22, 2011), <http://www.thealbanynews.net/archives/2443>).

The history of how ATF has regulated bump stocks also supports the view that bump stock transactions purposefully exploit a loophole. 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” 27 C.F.R. § 479.1 (1979). As early as 1988, ATF began receiving “classification” requests seeking a determination on the legality of new types of trigger activator devices under the NFA. See Final Rule at 66,516. Over the next few decades, the industry moved to devise trigger activators that appeared to circumvent Congress’s restrictions on machine guns, exploiting ATF’s apparent focus on the manner in which these devices facilitated rapid firing, as opposed to the rate of fire itself.

The agency’s focus was expressed in ATF decisions on the legality of a “bump-fire” system known as the Akins Accelerator. In 2006, ATF reversed an earlier determination about the Akins device by publishing a rule, ATF Rul. 2006-2, classifying the device as a machine gun, because it was equipped with a “coiled spring” and initiated automatic fire with a single trigger pull. By focusing on the “coiled spring” aspect of the Akins Accelerator, ATF created an opening for the industry to create trigger accelerators that did not utilize a “coiled spring” and were arguably not subject to the NFA. Beginning in 2008, other manufacturers submitted to ATF modified “bump-fire” or “slide-fire” stocks that did not include a “coiled spring” or similar mechanisms. See DOJ Notice of Proposed Rule at

13,445. ATF classified most of these as not subject to NFA regulations, although users only had to pull the trigger once and these accessories otherwise enabled firing as quickly as the Akins Accelerator.

2. *ATF Moved to Close the Loophole That Allowed for the Purchase of Deadly Trigger Activators*

ATF's unsupported and arbitrary distinction between devices that included a "coiled spring" and those that did not was a matter of form over substance, as was brutally demonstrated in Las Vegas when the gunman used bump stocks to devastate a crowded music festival.

This "form over substance" approach created a loophole that is unsupported by the NFA, and has now been roundly rejected by ATF. With the recent rule, ATF admitted that its prior distinction incorrectly applied its own precedents interpreting the NFA definition of "machine guns." See Final Rule at 66,523 ("ATF has now concluded that it misclassified some bump-stock-type devices and therefore initiated this rulemaking pursuant to the requirements of the APA. An agency is entitled to correct its mistakes."). And ATF was not merely choosing between one discretionary interpretation and another, but clarifying that bump stocks should previously have been regulated under the NFA. See,

e.g., Final Rule at 66,529 (“The bump-stock-type device rule is not a discretionary policy decision based upon a myriad of factors that the agency must weigh, but is instead based only upon the functioning of the device and the application of the relevant statutory definition.”).

In short, prior ATF determinations that certain trigger activators did not fall within the scope of 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 were subject to change and error-correction. 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 a different regulatory interpretation. *See id.* at 66,531 (“ATF clearly has authority to ‘reconsider and rectify’ its classification errors.”) (quoting *Akins v. United States*, 312 F. App’x 197, 200 (11th Cir. 2009)).

D. The ATF Rule Does Not Implicate the Takings Clause

The long history of pervasive federal and state regulatory restrictions on the possession and sale of machine guns underscores why Plaintiffs’ Takings Clause claim must fail. Plaintiffs, as “lawful [gun] owners,” Am. Compl. ¶ 8, knew that their rifles outfitted with bump stocks worked like

automatic weapons—and that functionality is undoubtedly why they purchased the bump stocks. And, those same purchasers knew (especially those who purchased their bump stocks after the Las Vegas massacre), that it was likely that regulatory restrictions on machine guns would extend to bump stocks. Now that a federal agency, joining other governmental entities, has exercised its constitutional authority to do just that, Plaintiffs cannot reasonably claim they have been denied their investment-backed expectations in their purchase and that the government owes them compensation for their contraband.

1. *The Federal Restrictions on Lethal Devices That Convert Weapons to Fire Automatically Were Reasonably Foreseeable*

Citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1992), Plaintiffs allege that “[t]he Government may reasonably regulate property, but a taking will occur when a police power regulation goes ‘too far.’” Appellants Opening Br. at 33. Plaintiffs further allege that the “amended regulations have destroyed all economic value and all investment-backed expectations in Plaintiff’s bump-stocks.” Am. Compl. ¶ 32. But Plaintiffs fail to recognize that context matters. Regulations for the public good in heavily regulated contexts “per se do not constitute takings, and thus

analysis under existing takings frameworks is unnecessary.” See *Holliday Amusement Co. of Charleston v. South Carolina*, 493 F.3d 404, 411 n.2 (4th Cir. 2007) (analyzing gambling regulations outlawing video gaming machines in South Carolina). Like gambling, regulations on machine guns and other weapons of war are the types of heavily regulated contexts where regulatory takings cannot occur.

Even if this Court finds that context is not enough on its own to exempt the Final Rule from a Takings Clause challenge altogether, the Supreme Court’s analysis of regulatory takings under *Penn Central* also forecloses Plaintiffs’ claim. The *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 the governmental action.” *Id.* (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Given the Final Rule’s focus on fulfilling the Government’s compelling interest in public safety, *Penn Central*’s governmental action element weighs heavily against finding a compensable taking here. *Cf. Kolbe v. Hogan*, 849 F.3d 114, 139 (4th Cir. 2017).

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); *cf. Rupp v. Becerra*, No. 817CV00746JLSJDE, 2018 WL 2138452, at *2 (C.D. Cal. May 9, 2018) (rejecting Takings Clause claim where regulation sought to close a “loophole” exempting magazine locks with bullet-button features from ban on detachable magazines).

Among other factors, core to the consideration of whether there were any reasonable investment-backed expectations is the question of “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*, 381 F.3d at 1349; *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.’”). The Supreme Court warned in *Lucas v. South Carolina Coastal Council* 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*.” 505 U.S. 1003, 1027–28 (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,” 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 a claim of legitimate investment-backed expectations. *Holliday Amusement Co.*, 493 F.3d at 411 (rejecting Takings Clause challenge to video gambling ban, even in light of plaintiff’s contention that “video gaming was legal in South Carolina for years” which “gave him a legitimate expectation of its continued legality and hence the continued well-being of his business enterprise.”); *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (no taking effected by new law outlawing alcohol manufacture and sale, though “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.”); *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 543 (S.D. Ohio 2012), *aff’d*, 744 F.3d 409 (6th Cir. 2014) (no regulatory taking effected by laws that could force wild

animal owners to dispossess themselves of snakes, bears, and lions; animals were personal property that could be subject to “onerous” regulations given their “unique threats to human life”).

The above rationale applies with extra force in the firearms arena, where regulation is so ubiquitous that 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)). And in this case, the rationale undoubtedly applies to bump stocks. These devices were always of questionable status in light of the federal machine gun restrictions, but particularly so after the Las Vegas shooting, and to an even greater degree after the ATF rule at issue here was announced and adopted. RW Arms, for its part, cannot credibly complain about a Takings clause violation when it used the adoption of the ATF rule as an opportunity to engage in sales of items that would not just foreseeably be prohibited but were, certainly, going to be prohibited. *See supra* page 12–13. And the company’s customers cannot now claim they deserve compensation for bump stocks

they purchased from a website that displayed a countdown clock showing when the devices would be unlawful. *Id.* at 13.

Against the broader 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 bump stocks they knew could be used to convert their firearms to function as heavily regulated rapid-fire weapons. Indeed, “they bought the bump stock to skirt the machine gun laws,” as Mr. Meyers notes. Thus, when Plaintiffs purchased their bump stocks, they were surely aware—or at least could have “reasonably anticipated,” *Piszel*, 833 F.3d at 1374–75—that the devices they purchased could be deemed 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.

2. *Total Deprivation of Economic Value of Bump Stocks Does Not Necessitate Compensation*

Plaintiffs’ argument that they must receive compensation for being “totally dispossessed of their property” must also fail. Appellants Opening

Br. at 14. Plaintiffs incorrectly rely on *Lucas* to argue that complete deprivation of bump stocks equates an unlawful taking. Under plaintiffs' reasoning, a regulation banning lethal types of personal property necessitates compensation even if the property is taken pursuant to the government's police power, or its power to regulate dangerous articles in interstate commerce.⁶ But *Lucas* makes clear that personal property must be treated differently than real property. *Lucas*, 505 U.S. at 1028 (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.*, 576 U.S. 350, 350 (2015); *Holliday Amusement Co.*, 493 F.3d at 411 n.2 (“*Lucas* by its own terms distinguishes personal property.”); *Wilkins*, 913 F. Supp. 2d at 543 (*Lucas* clarified that “for the purpose of regulatory taking analysis, a distinction exists between personal and real property.”).

⁶ *See, e.g., United States v. Kenney*, 91 F.3d 884, 890–91 (7th Cir. 1996) (holding that the Commerce Clause authorizes the federal restrictions on machine guns, a “weapon whose unusual destructive power was of great appeal to interstate organized crime”).

Here, Plaintiffs cannot show that the economic loss of their personal property is strong enough to overcome the United States’ 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). See, e.g., *Holliday Amusement Co.*, 493 F.3d at 410 (explaining that “[p]laintiff is not challenging an ordinary regulation . . . but a law relating to gambling—an area in which the state traditionally enjoys wide latitude to regulate activity minutely or to outlaw it *completely*”) (emphasis added).

* * *

As gun owners, *amici* agree that “[p]laintiff[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 [the Final Rule].

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,

/s/ Scott A. Edelman

Scott A. Edelman
sedelman@gibsondunn.com
GIBSON, DUNN & CRUTCHER
2029 Century Park East
Los Angeles, CA 90067
(310) 557-8061

Vivek R. Gopalan
vgopalan@gibsondunn.com
GIBSON, DUNN & CRUTCHER
555 Mission St., Ste. 3000
San Francisco, CA 94105
(415) 393-8200

Praatika Prasad
pprasad@gibsondunn.com
GIBSON, DUNN & CRUTCHER
200 Park Ave.
New York, NY 10016
(212) 351-6239

Hannah Shearer
hshearer@giffords.org
GIFFORDS LAW CENTER TO
PREVENT GUN VIOLENCE
268 Bush St. # 555
San Francisco, CA 94104
(415) 433-2062

Attorneys for *Amicus Curiae* Rep. Paul
Baumbach, Vic Bencomo, Jim
Berzowski, Matthew DeFalco, Scarlett
Flores, Dr. David Fitz, And Other
Individual Gun Owners

APPENDIX

AMICI CURIAE SIGNATORIES

Rep. Paul Baumbach

Paul is a member of the Delaware House of Representatives. He founded a financial advisory firm in Newark in 1996, served for two years on the Newark Housing Authority Board. Paul serves on the board of the Delaware Coalition Against Gun Violence. He has owned a .22 rifle and a shotgun for over 20 years.

Vic Bencomo

Vic is the President of Colorado Gun Owners for Safety. He is an avid sportsman and hunter, and a retired combat veteran of the United States Navy. Vic has testified before the Colorado state legislature and federal Gun Violence Prevention Taskforce.

Jim Berzowski

Jim is an avid hunter based in Wisconsin. He completed a hunter safety course at age 12 to hunt with his family, and today owns three shotguns and two rifles. He is an active volunteer with WAVE (Wisconsin Anti Violence Effort) and Milwaukee's chapter of MOMS Demand Action.

Matthew DeFalco

Matthew is a native Las Vegas who is a public servant, a political professional, and a community leader. Matthew previously soldiered in the United States Army, where he deployed overseas in support of the Global War on Terrorism in Afghanistan during Operation Enduring Freedom. He also is a wildland firefighter with the federal government, having fought more than a dozen wildfires on public lands in eight different states over the past three years.

Scarlett Flores

Scarlett was born and raised in Houston, Texas. She is a gun violence survivor. Her father was murdered during an armed robbery when she was two.

Dr. David Fitz

David, a retired surgeon, husband, and grandfather serves on the Maine

Gun Safety Coalition Board. He is a longtime gun owner, hunter, and member of his local rod and gun club in Maine, where he has recently become a certified Firearm Safety Instructor.

Peter Gurfein

Peter is an attorney and avid hunter. He has been a bird hunter for about 15 years. He owns seven shotguns, a .22 rifle, and three handguns.

Megan Harper

Megan is a sixth-generation Texan and works as a criminal investigator in the felony trial division of the Harris County Public Defenders' Office.

George Higgins

George has been a gun owner for 58 years, since college ROTC. He is active nationally as board chair for States United to Prevent Gun Violence. He serves on the advisory boards of the Delaware Suicide Prevention Coalition and the Delaware Violent Death Reporting System. George is the former Director of Delaware Against Gun Violence.

Bob Mokos

Bob is the co-leader of Minnesota Gun Owners for Safety and a retired airline pilot and veteran. He is a former NRA member and survivor who lost his sister to gun violence.

Mike Meyers

Mike Meyers is a member of Minnesota Gun Owners for Safety, as well as a veteran, firearms collector, and lifelong hunter.

Jim Pederson

Jim has owned guns for his entire adult life. He helped create the Michigan hunting and fishing Democratic caucus and also works with the Union Sportsmen Alliance.

Matt Pierce

Matt is the co-leader of Minnesota Gun Owners for Safety, a mining engineer, and a local business owner. He is a lifelong gun enthusiast and has handled firearms since boyhood. He is also an avid hunter. Matt's father was a gun-range officer and avid handgun collector.

Conner Siegel

Conner is a multi-use gun owner and firearm safety advocate from the southwest living in Denver, Colorado. Having studied socio-legal studies at the University of Denver, Conner is pursuing a career in social justice and advocacy efforts dealing with preventing gun violence in his community.

Whitney Toutenhoofd

Whitney is a rising high school senior in Boulder, Colorado. Whitney is a biathlon athlete and has been involved with the Colorado coalition for sixth months. She owns a .22 rifle.