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 – Appellants,

v.

UNITED STATES,

Defendant – Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN NO. 1:19-cv-00449-LAS, JUDGE LOREN A. SMITH.

BRIEF OF APPELLANTS

Adam M. Riley
FLINT LAW FIRM, LLC
222 East Park Street, Suite 500
Post Office Box 189
Edwardsville, Illinois 62025
(618) 288-4777
ariley@flintlaw.com

Counsel for Plaintiffs – Appellants

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Modern Sportsman, LLC **v.** United States

Case No. 20-1107

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
The Modern Sportsman, LLC	None	None
RW Arms, LTD.	None	None
Mark Maxwell	None	None
Michael Stewart	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Flint Law Firm, LLC; Ethan Flint; Adam Riley; Jennifer Gelman

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

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. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Roy Lynn McCutchen et. al. v. United States, 18-1965C, CFC
Gary Rouse et. al. v. United States, 18-1980C, CFC
Brian P. Lane et. al. v. United States, 19-cv-01492-X, ND Texas
John Doe et. al. v. Trump, 3:19-cv-00006-SMY-RJD, SD Illinois

11/15/2019
Date

/s/ Adam M. Riley
Signature of counsel

Please Note: All questions must be answered

Adam M. Riley
Printed name of counsel

cc: Nathanael B. Yale

Reset Fields

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

No other appeal in or from this civil action was previously before this or any other appellate court.

Plaintiffs are aware of two other lawsuits pending before this Court and the Court of Federal Claims, respectively, seeking just compensation under the Fifth Amendment for property taken by the Final Rule at issue in this case. *See McCutchen et al. v. United States*, 20-1188 (Fed. Cir.); *Rouse, et al. v. United States*, 18-cv-1980 (Fed. Cl.).

STATEMENT OF SUBJECT MATTER JURISDICTION

This is an appeal from a final decision and judgment of the U.S. Court of Federal Claims entered October 23, 2019. The decision is reported at *Modern Sportsman, LLC v. United States*, 145 Fed. Cl. 575 (2019). Plaintiffs filed the underlying action in the Court of Federal Claims pursuant to the jurisdictional provision of the Tucker Act seeking just compensation under the Fifth Amendment for property taken by the United States Government. 28 U.S.C.A. § 1491(a). Plaintiffs timely filed their Notice of Appeal on November 1, 2019. This Court has jurisdiction over final judgments issued in the Court of Federal Claims. 28 U.S.C.A. § 1295(a)(3).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Government commits a categorical physical taking when it uses its legislative authority to require the abandonment or total destruction of lawfully acquired personal property.

2. Whether the Government commits a categorical regulatory taking when it uses its legislative authority to require the abandonment or total destruction of lawfully acquired personal property.

STATEMENT OF THE CASE

Plaintiffs are the former owners of lawfully acquired bump-fire type rifle stocks (collectively referred to as "bump-stocks" or "stocks"). On December 26, 2018, in response to the Las Vegas mass shooting of October 1, 2017, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") issued a legislative rule ("Final Rule" or "Rule") that prospectively banned bump-stocks and required anyone who had legally purchased and possessed a bump-stock prior to the issuance of the rule to dispossess themselves of it by surrendering their property to the United States government or destroying it. Plaintiffs complied with the ATF rule and destroyed their lawfully acquired stocks. Appx43.

Plaintiffs brought this action to vindicate their rights under the Taking Clause of the Fifth Amendment for property taken by the government without just compensation. The government filed a motion to dismiss Plaintiffs' complaint for failure to state a claim. The trial court granted the government's motion and issued a final judgment dismissing the complaint on October 23, 2019. *See Modern Sportsman, LLC v. U.S.*, 145 Fed. Cl. 575 (2019). Plaintiffs seek this Court's review of that judgment.

STATEMENT OF FACTS

Three federal statutes regulate the sale and possession of firearms in the United States, the National Firearms Act of 1934 (NFA), 26 U.S.C. Chapter 53; the Gun Control Act of 1968 (GCA), 18 U.S.C. Chapter 44; and the Firearm Owners Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986). The GCA and FOPA specifically define the term "machinegun,"[1] and in 1986, FOPA made it unlawful for any person to transfer or possess any firearm that meets that statutory definition, if it was not lawfully possessed before FOPA's effective date in 1986. Notably,

[1] The federal statutes regulating firearms spell "machinegun" as a single word. Plaintiffs use the common spelling "machine gun" except when quoting statutory language.

FOPA was prospective only. FOPA did not forbid the "lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect." 18 U.S.C. § 922(o)(2). The ATF is the federal agency charged with administering the NFA, GCA and FOPA.

In 2010, a bump fire type rifle stock was submitted to the ATF for examination and classification, and the ATF deemed it an unregulated firearm part. 82 Fed. Reg. 60929 (Dec. 26, 2017). For nearly a decade, the ATF issued a series of classification decisions announcing and affirming the agency determination that bump-stocks are not machine guns, as defined by the GCA and FOPA, and not subject to federal regulation. 83 Fed. Reg. 66,514.

On October 1, 2017, a shooter opened fire on a concert in Las Vegas, killing 58 people and wounding hundreds more. Authorities reported that the shooter used firearms equipped with bump-stocks. In December 2017, the Department of Justice ("DOJ") published an advance notice of proposed rulemaking explaining that "questions had arisen" as to whether bump-stock devices "should be classified as machineguns" under federal law. 82 Fed. Reg. 60929 (Dec. 26, 2017). On February 20, 2018, President Donald Trump issued a "Presidential Memorandum on the

Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices" noting that "the Obama Administration repeatedly concluded that particular bump stock type devices were lawful to purchase and possess," and announced that he had asked his Administration to "clarify" whether bump-stocks "should be illegal" under the federal statutory framework banning machine guns. 83 Fed. Reg. 7950.

The full review mandated by President Trump culminated in the issuance of a Final Rule by the ATF that broadened elements of the definition of "machinegun" under the NFA, GCA and FOPA, such that the FOPA ban on machine guns could reach bump-stocks. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 13442 (Mar. 29, 2018). The Rule required owners of bump-stocks to surrender them to the government or destroy them, but it made clear that a person in possession of a bump-stock type device was "not acting unlawfully *unless* they fail to relinquish or destroy their device *after* the effective date of this regulation." 83 Fed. Reg. 66,523 (emphasis added).

Challenges to the validity of the Final Rule were filed in various jurisdictions. In examining the Final Rule, the District Court for the

District of Columbia determined that the Rule was legislative in nature, rather than merely interpretive of the firearm statutes under the purview of the ATF. The Court of Appeals for the D.C. Circuit agreed that the Rule is unequivocally an exercise of the ATF's legislative authority, notwithstanding "the government's litigating position in this case that seeks to reimagine the Rule as merely interpretive." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 19 (2019) (*per curiam*).

On March 26, 2019, Plaintiffs filed this action seeking just compensation under the Fifth Amendment for the 74,995 bump-stocks they were required to destroy or surrender to the government.[2] See Appx43.

SUMMARY OF THE ARGUMENT

The Takings Clause of the Fifth Amendment of United States Constitution provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. It is beyond question that Plaintiffs' bump-stocks were cognizable private

[2] According to ATF estimates, Plaintiffs' bump-stocks had a combined fair market value of approximately $22,498,500 at the time of the issuance of the Final Rule. See Final Rule, 83 Fed. Reg. at 66,538.

property. It is also beyond question that the Final Rule permanently deprived Plaintiffs of every property right they had in their lawfully acquired property without providing compensation. Appx43. Plaintiffs legally purchased their bump-stocks and legally possessed them until the ATF Final Rule demanded their abandonment or destruction on March 26, 2019. Appx38.

The trial court nonetheless held that Plaintiffs failed to state a claim for just compensation under the Takings Clause of the Fifth Amendment. The trial court erred by making the determination that there is no taking "for public use" within the meaning of the Fifth Amendment when the government acts pursuant to its "police powers" in the interests of public health and safety. Under Supreme Court and federal circuit court precedents, a "police powers" exception to Fifth Amendment liability for categorical takings applies only when government acts in its enforcement capacity, e.g., when it enforces an *existing* criminal or remedial statutory scheme, not when government acts in its legislative capacity to readjust legal rights. The Final Rule was no mere enforcement action or interpretation of the statutory definition

of machine gun; it was an exercise of the ATF's legislative authority to make new law. *Guedes*, 920 F.3d at 17-21 (2019).

The Final Rule was a classic taking because it totally and permanently dispossessed Plaintiffs of their tangible personal property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). That is the very blueprint for a *per se* physical taking that demands compensation no matter how weighty the government interest behind it. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); *Horne v. Department of Agriculture*, -- U.S. --, 135 S. Ct. 2419, 2427 (2015). A regulatory taking analysis also inexorably leads to a categorical duty to compensate Plaintiffs because an act of government that destroys tangible property necessarily also deprives its owner of all beneficial use of the property—the lynchpin of a categorical regulatory taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992). This Court has recognized the applicability of the *Lucas* standard to personal property; and, indeed, there is nothing in either *Lucas* or common sense to prohibit the application of categorical regulatory takings analysis to tangible personal property. Under either theory, the government has a Fifth Amendment obligation to pay just compensation to Plaintiffs.

STANDARD OF REVIEW

When reviewing a judgment of the Court of Federal Claims, this Court reviews legal conclusions *de novo*. *Holland v. United States*, 621 F.3d 1366, 1374 (Fed. Cir. 2010). The question of whether a complaint was properly dismissed for failure to state a claim upon which relief may be granted is a question of law which this Court reviews independently. *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). A motion to dismiss should be granted only when the plaintiff's allegations, viewed in the light most favorable to the plaintiff do not establish any plausible claim to a legal remedy. *Bell. Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT

I. The Final Rule took Plaintiffs' property for "public use" within the meaning of the Taking Clause of the Fifth Amendment.

The Fifth Amendment's Taking Clause provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. The Supreme Court defines public use broadly. *See Kelo v. City of New London*, 545 U.S. 469, 480 (2005). The Supreme Court has also long rejected the notion that the government or general public

must actually use the property at issue to constitute a taking.[3] *See Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 178 (1871) (holding the Government's destruction of property by flooding to be a public use).

Early Supreme Court taking cases appear to give the government wide latitude to exercise its police powers without implicating the Taking Clause of the Fifth Amendment, but the Supreme Court has subsequently explained that these cases apply only to instances when government regulation does no more than diminish the value of an owner's property. It does not change the categorical rule that government must compensate when it takes *all* value from private property. Modern jurisprudence recognizes only one category of government action as an exercise of "police powers" exempt from takings liability. That is when private property is affected by government enforcement of existing law. This exception does not apply to Plaintiffs' claims because the Final Rule

[3] The Supreme Court has held "that the scope of the 'public use' requirement of the Taking Clause is 'coterminous with the scope of a sovereign's police powers.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984)). In other words, the valid exercise of the Government's police powers is a public use itself. *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002).

was not an act of enforcement of existing law; it was a legislative act that destroyed preexisting property rights. *See*, *e.g.*, *United States v. Sec. Indus. Bank*, 459 U.S. 70, 82 (1982).

A. The Supreme Court's early "police powers" cases do not defeat the public use prong of Plaintiffs' claims.

In the nineteenth and early twentieth century, the Supreme Court found no compensable taking in a number of cases in which government regulation designed to protect public health and safety resulted in the loss of private property. *See Miller v. Schoene*, 276 U.S. 272 (1928); *Mugler v. Kansas*, 123 U.S. 623 (1887). The reasoning in these cases cannot be extrapolated to support a conclusion that the Final Rule did not take Plaintiffs' property "for public use." The U.S. Supreme Court has subsequently held that the "harmful or noxious use" principle in *Miller* and *Mugler* cases was nothing more than the Court's early formulation of the police power justifying a regulatory *diminution in value* of property without compensation. *Lucas v. South Carolina Council*, 505 U.S. 1003, 1004 (1992). The U.S. Supreme Court specifically pointed out that neither *Miller* nor *Mugler* involved an allegation that the government action destroyed all rights in their property. *Lucas*, 505 U.S. at 1026.

In *Mugler*, the government prohibited the plaintiff to operate a brewery on his land, but he retained his land for other legal uses. The *Mugler* Court was clear that the Fifth Amendment was not implicated precisely because the Kansas statute at issue did no more than restrict Mr. Mugler's use of his property without disturbing his other property rights:

> As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition *simply upon the use of property* for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. *Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it*, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.

Mugler, 123 U.S. at 668-69 (emphases added). Restraints on the *use* of private property raise different legal issues than interference with the

possession of private property. *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (emphasis added).[4]

In *Miller*, a Virginia statute ordered the destruction of the plaintiff's blighted cedar trees to protect the health of apple trees. The United States Supreme Court affirmed the Virginia Supreme Court's holding that the plaintiff had no right to compensation for his lost property rights. *Miller v. Schoene*, 276 U.S. at 281. To the extent that the Virginia Supreme Court considered the plaintiff's loss of the trees themselves, as distinct from the diminished value of his land, it noted that "[u]nder the statute in question, all of the parts of the trees available for fuel or fence posts are left undestroyed and remain the property of the owner." *Bowman v. Virginia State Entomologist*, 105 S.E. 141, 148 (Va. 1920).

In other words, neither the *Mugler* plaintiff nor the *Miller* plaintiff lost all rights in his property. The Court's determination that the government's health and safety rationale excused payment of just

[4] The trial court cited to *Raidoptics, Inc. v. United States*, 223 Ct. Cl. 594 (1980) and *Allied-Gen. Nuclear Servs. v. United*, 839 F.2d 1572 (Fed. Cir. 1988) for the suggestion that there is a harm prevention exception for a categorical taking, but both cases limited their rational to a mere use restriction.

compensation was made in the context of a mere diminution of property values. The plaintiffs in these early cases suffered a diminution of rights in their property by government regulation of use, but they were not totally deprived of their property as Plaintiffs were by the Final Rule. The U.S. Supreme Court has subsequently clarified that the use of a police powers rationale in these early cases is not dispositive of a modern takings claim, certainly when plaintiffs are totally dispossessed of their property. As the Supreme Court held in *Lucas*:

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* 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. If it were, departure would virtually always be allowed.

Lucas 505 U.S. at 1026.[5] Consequently, *Mugler* and *Miller* do not control the outcome of Plaintiffs' claims of complete dispossession, and they certainly do not establish that Plaintiffs failed to satisfy the "public use" prong of a taking claim.

B. *Bennis v. Michigan* and subsequent federal circuit decisions exempting government enforcement actions from Fifth Amendment claims do not defeat the "public use" prong of Plaintiffs' claims.

1. When private property is taken by government enforcement of a criminal or remedial statute, it is not taken for public use within the meaning of the Fifth Amendment.

The government is not required to pay compensation for a taking when a property owner is deprived of his property rights as a consequence of a government enforcement action. *See Bennis v. Michigan*, 516 U.S.

[5] The trial court selectively quoted a sentence from *Mugler* that says, "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for a public use, or from depriving a person of his property without due process of law." Appx8. But there was no argument or finding at the trial level that bump-stocks themselves constituted a nuisance at common law, and the fact that hundreds of thousands of machineguns are still legally possessed across the country negates any such contention. *Lucas*, 505 U.S. at 1031; see also Firearm Commerce in the United States, https://www.atf.gov/resource-center/docs/undefined/firearms-commerce-united-states-annual-statistical-update-2017/download (last visited January 28, 2020).

442 (1996). *Bennis* established that even an innocent property owner has no claim for compensation when the government takes private property pursuant to its enforcement of a criminal statutory scheme and related nuisance abatement statutes. Actions taken as part of the "punitive and remedial jurisprudence of the country" have long been authorized without compensation. *Bennis*, 516 U.S. at 452–53 (quoting *J.W. Goldsmith Jr.–Grant Co. v. United States*, 254 U.S. 505, 511 (1921).

This principle explains the outcome in several decisions in the Federal Circuit in which plaintiffs who temporarily lost all rights in their property were deemed to have no right to compensation under the Fifth Amendment. In *AmeriSource Corp. v. United States*, the Government seized plaintiffs' prescription drugs as part of the prosecution of the purchasing pharmacy for various offenses, including "unlawful distribution of prescription pharmaceuticals, operating an unregistered drug facility, and conspiracy to commit money laundering." 525 F.3d 1149, 1150 (Fed. Cir. 2008). In *Acadia Technology v. United States*, the Federal Circuit found no taking because the government took Acadia's property as part of its enforcement of the Lanham Act's prohibition against imported goods suspected of bearing a counterfeit mark. 458 F.3d

1327, 1329 (Fed. Cir. 2006). In *Kam-Almaz v. United States*, the plaintiff's laptop was seized at the border as part of a custom officer's border search. 682 F.3d 1364, 1366 (Fed. Cir. 2012). The Eighth Circuit applied the same reasoning in concluding that Minnesota's seizure of property pursuant to its enforcement of drug trafficking statutes did not effect a taking. *United States v. $7,999.00*, 170 F.3d 843, 845 (8th Cir. 1999).

In all these cases, the plaintiffs' losses were an unfortunate by-product of the law enforcement process. The complicity or innocence of the property owner does not matter, nor does it matter whether the property at issue is contraband; the character of the government action is the sole focus. *Amerisource*, 525 F.3d at 1154-55. This Court pointed out in *Amerisource* that a property owner subject to such a property loss has her remedy in a possessory action to reclaim property wrongfully withheld under the Fourteenth Amendment; and, in fact, this Court found the availability of such a remedy in *Amerisource* to be evidence of a governmental seizure of property for law enforcement purposes, or in other words, an exercise of police power beyond the reach of the Taking Clause of the Fifth Amendment. *Amerisource*, 525 F.3d at 1154-55.

Plaintiffs who lost their bump-stocks to the Final Rule had no recourse to a possessory action. The character of the government action was entirely different. It was not part of the punitive and remedial scheme recognized by *Bennis* as an exception to the Taking Clause.

2. The Final Rule was a legislative act, not an act of law enforcement.

The *Bennis* line of cases has no bearing on Plaintiffs' Fifth Amendment claims because the ATF was not acting in its enforcement capacity when it demanded the abandonment or destruction of bump-stock devices. It was acting under its legislative authority to make new law. See *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952). The ATF has authority to issue legislative and interpretive rules. *Guedes*, 920 F.3d at 17-18 (2019). Legislative rules result from an agency's exercise of delegated legislative power from Congress and have the force of law. *Id.* As the United States Court of Appeals for the D.C. Circuit explained in its April 1, 2019 decision in *Guedes*, the Final Rule was a legislative rule with the force and effect of law that criminalized Plaintiffs' possession of previously lawful property *going forward*. 920 F.3d 1 (2019), 17-21.

The D.C. Circuit determined that the Final Rule was legislative by identifying specific indicia of the exercise of legislative authority in the ATF's language and conduct. *Id.* at 18. Legislative rules establish a new legal rule going forward, whereas interpretive rules reflect what the interpreted statute always meant. *Id.* at 19. The language of the Rule itself clearly indicates that bump-stocks will be prohibited only in the future when the Rule takes effect. *Id.* The Rule specifically invoked both its legislative authority delegated by Congress and the *Chevron* deference accorded only to legislative rules by the courts. *Id.* The ATF published the Final Rule in the Code of Federal Regulations. *Id.* The D.C. Circuit found that the Final Rule "unequivocally bespeaks an effort to adjust the legal rights and obligations of bump-stock owners, i.e., to act with the force of law." *Id.*

Guedes determined that the Final Rule was legislative despite the Government's efforts to recast the rule as interpretive, presumably to pre-empt a takings claim like Plaintiffs'. *Guedes* observed that if the Government's assertion that the Final Rule was an interpretive rule was correct, then bump-stocks would always have been illegal and any possessors would have always been felons. *Id.* In this case, that would

mean Plaintiffs' bump-stocks were always illegal contraband and Plaintiffs never acquired any legal rights in the bump-stocks in the first place. The D.C. Circuit, however, noted that the Final Rule itself assured bump-stock owners that "[a]nyone currently in possession of a bump-stock-type device is not acting unlawfully unless they fail to relinquish or destroy their device after the effective date." *Id.* at 18.

Because the ATF was acting in a legislative capacity and not in its enforcement capacity when it issued the Final Rule, *Bennis* and the federal circuit enforcement cases are inapposite. This is also what distinguishes Plaintiffs' claims from *Akins v. United States*. The *Akins* court held that the "interpretation" by the ATF the definition of machine gun included the Akins Accelerator was reasonable. *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009). In other words, the *Akins* court assumed the ATF reclassification of the Akins Accelerator to be the enforcement of an existing ban—just the opposite of the *Guedes* conclusion that the Final Rule introduced a new legislative rule.

Unlike the Final Rule, the ATF classification of the Akins Accelerator had no indicia of the agency's intention to exercise its legislative authority—e.g., it did not reference the ATF's delegated

legislative authority or make a case for *Chevron* deference, and it was not published in the Code of Federal Regulations. There are also real-world indications that ATF was acting in its retroactive interpretive capacity in *Akins* and in its prospective legislative rule-making capacity when it promulgated the Final Rule. The ATF's early determinations that the Akins device did not meet the definition of machinegun were made on the basis of design specifications and a non-functioning sample of the device. The determination was based only on the Accelerator's "theory of operation," which "was clear even though the rifle/stock assembly did not perform as intended." *Akins*, 312 F. App'x at 198. The subsequent determination that the Accelerator was a "machinegun" under the federal firearms statutes was the result of the ATF's obtaining and testing an Accelerator that did perform as intended. *Id*. at 199.

The Final Rule's change of heart about bump-stock devices, on the other hand, was unrelated to organic statutory interpretation or new technical information about how bump-stock devices function. It was a political response. President Trump underscored the political nature of the Final Rule by reminding the public that "the Obama Administration repeatedly concluded that particular bump stock type devices were lawful

to purchase and possess." The Final Rule was prompted by a change in policy, not by greater familiarity with bump-stocks. The Final Rule was obviously new legislation, not interpretation of statutory language.

The ATF reclassification that took property rights from Akins was an act of interpreting and enforcing 18 U.S.C. § 922(o), the ban on the possession or transfer of machine guns. The Akins Accelerator had, therefore, always been subject to the machine gun ban. As this Court explained in *A & D Auto Sales, Inc. v. United States*, "[i]f a challenged restriction was enacted before the property interest was acquired, the restriction may be said to inhere in the title. If a challenged restriction was enacted after the plaintiff's property interest was acquired, it cannot be said to "inhere" in the plaintiff's title." 748 F.3d 1142, 1152 (Fed. Cir. 2014). The challenged restriction here, the Final Rule, on the other hand, was a prospective legislative act whereby the ATF created new law to bring bump-stocks under 18 U.S.C. § 922(o) for the first time after Plaintiffs' property interest was acquired.

Consequently, the Court of Federal Claims' observation that Congress has consistently regulated ownership of machineguns since 1934 is true but irrelevant. This Court has rejected the contention that

an owner's "expectations of keeping or losing her property under various possible scenarios define for that owner the extent of her title." *Preseault*, 100 F.3d at 1540; see also *Horne*, 135 S. Ct. at 2427. The question here is only whether Plaintiffs had the right to possess their bump-stocks when they acquired title to them (i.e. whether bump-stocks were legal). The Final Rule and the D.C. Circuit make it clear that they did. *Guedes*, 920 F.3d at 18.

C. Fifth Amendment analyses of state law bans on personal property that misapply *Mugler*, *Miller* and the *Bennis* enforcement rationale should not determine the outcome of Plaintiffs' claims.

Courts in other jurisdictions have misused *Mugler*, *Miller* and *Bennis* to reach the conclusion that state law bans on personal property deemed injurious to the public do not implicate the Fifth Amendment. *See Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400 (D. Md. 2018); *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007). These decisions should hold no sway over this Court because they are premised on the same flawed application of *Mugler* outlined above. Moreover, it is questionable whether the analysis of a state's police

powers is applicable to federal exercise of police powers, and the rulings of these courts are not binding on this Court.[6]

However, if the Court intends to consider the decisions of sister courts with respect to state laws to resolve Plaintiffs' claim, the Court should consider the Ninth Circuit's decision in a Fifth Amendment challenge to a California ban on assault weapons which held "that a government may enact regulations pursuant to its broad powers to promote the general welfare that diminish the value of private property, yet do not constitute a taking requiring compensation, so long as a reasonable use of the regulated property exists." *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002), as amended (Jan. 27, 2003), abrogated on other grounds by *District of Columbia v. Heller*, 554 U.S. 570, 638 n.2 (2008). The Nine Circuit found that since the plaintiffs who owned assault weapons prior to the enactment of the ban were protected by a grandfather clause that permitted them to continue to use the weapons no taking occurred. *Id.*

[6] "Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance." *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980).

The Ninth Circuit more recently affirmed a decision of the Southern District of California that a ban on firearm magazines violates the Taking Clause of the Fifth Amendment. *Duncan v. Becerra*, 742 App'x 218, 222 (9th Cir. 2018) In particular, the court ruled that California could not use the police power to avoid compensation for banned firearm magazines. *Id.* In its decision affirmed by the Ninth Circuit, the district court characterized the California law as a "rare hybrid taking" in that it forces owners to choose between surrendering their property to law enforcement for destruction (effecting a *per se* taking), selling their magazines at a deeply discounted rate, or removing the magazines from the state. *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1184 (S.D. Ca. 2019). The court in *Duncan* concluded that "[w]hatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical dispossession of such lawfully-acquired private property without compensation." *Id.* Unlike *Maryland Shall Issue* and *Holiday Amusement Co.*, the Nine Circuit decisions reflect the *Lucas* understanding of *Mugler* and *Miller* as justifying only government action that diminishes the value of property without compensation. *Maryland Shall Issue* and *Holiday Amusement*

Co. were wrongly decided because they improperly apply *Mugler* to a government action that completely dispossesses an owner of his property. The reasoning of the Ninth Circuit is consistent with the general proposition that the validly of an exercise of the state's police power is a question separate and apart from the takings analysis and should guide this Court's decision. *Loretto*, 458 U.S. at 425.

II. The Government's Final Rule requiring surrender or destruction of lawfully acquired bump-stocks was a *per se* physical taking.

The ATF Final Rule required owners of bump-stocks to surrender their private property to the government or destroy it.[7] One way or the other, Plaintiffs were permanently dispossessed of their property. The Rule also acknowledged that ownership of the stocks was entirely legal before the effective date of the Rule. 83 Fed. Reg. 66,523. This is a Fifth Amendment "taking" in the most literal sense of the word. The Rule did not just take *value* from Plaintiffs' property by placing restraints on the *use* of the property; it actually *physically* dispossessed Plaintiffs of the

[7] The ATF's website confirms "[c]urrent possessors of bump-stock-type devices must divest themselves of possession as of the effective date of the final rule[.]" https://www.atf.gov/rules-and-regulations/bump-stocks (last visited January 19, 2020).

tangible property itself. Unlike a regulation that leaves some property rights intact, Plaintiffs were left with nothing.

The takings analysis of a physical dispossession of personal property by the Government is uncomplicated. A physical dispossession of personal property by the government is *per se* a taking that must be compensated, regardless of the public benefit the government sought to achieve or the economic impact on the owner. *Horne*, 135 S. Ct. at 2425-27. Courts do not balance the government's interests against the owner's interest. The Government's obligation to compensate is absolute. *Loretto*, 458 U.S. 419.

A. The Government does not escape liability for a categorical physical taking by offering property owners a choice between surrendering their property to the Government or destroying it themselves.

The Final Rule required Plaintiffs to either abandon their property at a drop-off site or completely destroy it at their own expense. For purposes of Plaintiffs' Fifth Amendment right to just compensation for taken property, it does not matter that the ATF did not physically seize Plaintiffs' property. The end result for Plaintiffs would not have been any different if the property had been physically seized. One way or the other, Plaintiffs were left with nothing.

Courts have recognized that a *per se* physical taking occurs when the owner is completely dispossessed of her property. *Loretto*, 458 U.S. at 435 n.12; *Campbell v. United States*, 932 F.3d 1331, 1337 (Fed. Cir. 2019) (quoting *Katzin v. United States*, 908 F.3d 1350, 1361 (Fed. Cir. 2018)) ("A physical taking generally occurs when the government directly appropriates private property or engages in the functional equivalent of a '*practical ouster of [the owner's] possession*.'") (emphasis added). The *Loretto* Court determined that a physical taking by the government had occurred where a small cable box owned by a private cable television company was installed on plaintiff's property. *Loretto*, 458 U.S. at 425-26. In other words, the government never took possession of any part of the plaintiff's property. The focus of the *Loretto* Court was not on whether the government physically seized the property, but on the consequences to the property owner.

Loretto was not a case involving personal property, but the *Horne* Court explicitly adopted the *Loretto* Court's focus on the impact on the property rights of the owner, rather than the government's reasons or methods of dispossession:

> In *Loretto*, the Court held that requiring an owner of an apartment building to allow the installation of a cable box on her rooftop was a physical taking of real property, for which compensation was required. That was true without regard to the claimed public benefit or the economic impact on the owner. The Court explained that such protection was justified not only by history, but also because "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests," depriving the owner of "the rights to possess, use and dispose of" the property. 458 U.S. at 435, 102 S. Ct. 3164 (internal quotations omitted). That reasoning—both with respect to history and logic—is equally applicable to a physical appropriation of personal property.

Horne, 135 S. Ct. at 2427.

It is undisputed here that the Plaintiffs have been completely and permanently ousted from the possession of their property. There is no reason the Fifth Amendment should treat property owners who have been completely dispossessed of their personal property by government action differently depending on how the government chose to dispossess them. The *Horne* Court did not suggest that the Fifth Amendment makes such distinctions. The only critical distinction identified in the *Horne* decision is the difference between prohibiting the sale of raisins (which the Government could do without effectuating a taking) and requiring raisin growers to set aside a reserve of raisins for the Government (which *Horne* deemed to be a categorical taking because the growers lost *all*

rights in the raisins). *Horne*, 135 S. Ct. at 2428. That distinction underscores the hallmark of a categorical taking. Under a mere prohibition on the sale of raisins, the owner of raisins would still enjoy the right of possession. And should sentiment or social conditions change, as they do from time to time, and the restriction be removed, "the owner will again be free to enjoy his property as heretofore." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandies, J., dissenting). Plaintiffs are not in such a position. Plaintiffs have permanently lost all rights in their property because it has been destroyed. The term "taken" includes destruction. *General Motors Corp. v. United States*, 323 U.S. 373, 378 (1945).[8]

B. *Horne* makes no exception from categorical physical takings for the Government's exercise of police powers.

The *Horne* decision supports Plaintiffs' position that the invocation of "police powers" should not defeat Plaintiffs' claims. The *Horne* Court took the categorical stance that the government has an absolute obligation to pay just compensation when it physically takes private

[8] Complete destruction was not enough for the ATF as the final rule also contemplated that possessors should dispossess themselves of any remaining scrap. See Appx43.

property—be it real property or personal property. *See Horne*, 135 S. Ct. 2425-26. The *Horne* Court was clear: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Id.* at 2426. A physical taking of property gives rise to a *per se* taking "without regard to other factors that a court might ordinarily examine." *Id.* at 2428 (quoting *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. at 432). The *Horne* Court specified that the "character of the government action" or "the claimed public benefit" do not come into consideration in a *per se* physical takings analysis. *Id.* at 2427.

C. Government "use" of taken property is not a requirement of a categorical physical taking under *Horne*.

The Supreme Court's justification for applying a categorical standard to a physical taking focuses on the profound consequences for the property owner. A physical appropriation is a categorical taking without regard to any other factors because of the severity of the property owner's loss: the entire "bundle" of property rights in their property—the rights to possess, use and dispose of property. *Horne*, 135 S. Ct. at 2428 (citing *Loretto*, 458 U.S. at 435). The property owner's loss of the entire

"bundle" of property rights is complete whether the government puts taken property to use or destroys it.

It is the "the deprivation of the former owner rather than the accretion of a right to the sovereign constitutes the taking." *United States v. General Motors Corporation*, 323 U.S. at 378. Whether the Government directly appropriates property or destroys all of an owner's existing rights in the property "the Fifth Amendment concerns itself solely with the property." *Id; see also United States v. Welch*, 217 U.S. 333, 339 (1910) ("a destruction for public purposes may as well be a taking as would be an appropriation for the same end.").

As Justice Holmes noted in *Miller v. Horton*: "When a healthy horse is killed by a public officer, acting under a general statute, for fear that it should spread disease, the horse certainly would seem to be taken for public use as truly as if it were seized to drag an artillery wagon. The public equally appropriates it, whatever they do with it afterwards. Certainly the legislature could not declare all cattle to be nuisances, and order them to be killed without compensation." 26 N.S. 100, 102 (Mass. 1891).

III. Even under a regulatory takings analysis, the Final Rule was still a categorical taking.

The Final Rule was obviously a physical taking: it required Plaintiffs to surrender tangible property or destroy it. However, even if the Final Rule were construed as a regulatory taking, it would, nonetheless, be a *per se* regulatory taking because the Rule stripped Plaintiffs of all property rights in the property he lawfully acquired.

The Government may reasonably regulate property, but a taking will occur when a police power regulation goes "too far." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). In *Penn Central Transportation Co. v. New York City*, the Supreme Court developed an "ad hoc" factual inquiry to determine for how far was "too far." 438 U.S. 104, 124 (1978). However, the Court subsequently clarified that when a regulation deprives land of all economically beneficial use, the Government must pay just compensation unless the proscribed use interests were not part of the property owner's title to begin with. *Lucas*, 505 U.S. at 1027.

This Court has applied a *per se* regulatory principle to tangible personal property. *A & D Auto Sales Inc.*, 748 F.3d at 1151; *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1196–98 (Fed. Cir. 2004); *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1353–55 (Fed. Cir. 2003).

Opponents of applying a *per se* regulatory taking analysis to personal property selectively invoke language from the *Lucas* decision, but the frequently-quoted language from *Lucas* does not foreclose a finding of *per se* regulatory taking of personal property. The *Lucas* Court merely admonished that, "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." *Id.* 1027-28. Awareness of the state's "traditionally high control over *commercial* dealings" (emphasis added) does not put an owner of tangible personal property on notice that the government might demand the surrender or destruction of his property. Private ownership of tangible property is not commercial dealing.

The *Lucas* dicta merely reaffirms the principle announced in *Andrus v. Allard*: that the Government may ban the sale of an item of personal property without effecting a taking, providing the owner maintains possession and other beneficial uses of her lawfully acquired property. 444 U.S. 51, 66 (1979). But as recognized by the Court in

Andrus, and reaffirmed by *Horne*, while property owners may expect some uses of their personal property to be restricted by newly enacted measures, people still do not expect their personal property to be "taken away." *Horne*, 135 S. Ct. at 2427.

As this Court recognized in *Maritrans*, the Supreme Court's decision in *Andrus v. Allard* comports with such a reading of *Lucas*. 342 F.3d at 1354. In *Andrus*, the Supreme Court held that the simple prohibition on the sale of lawfully acquired eagle feathers does not effect a taking in violation of the Fifth Amendment when the challenged regulations "do not compel the surrender" of the property in question, and "there is no physical invasion or restraint upon" it. *Id.* at 65. But the Court warned that, "it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66. When the effect of regulation is that the owner of personal property is entirely dispossessed of what was lawfully his, a finding of *per se* taking is permissible under a regulatory analysis.

This Court engaged in the same kind of reasoning when it explored, within the context of firearms, what separates a permissible government restriction on property from a Fifth Amendment taking requiring just

compensation. *See Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993). This Court found no compensable taking resulting from ATF's withdrawal of a previously held license to sell assault rifles in the United States because Mitchell Arms retained some property rights in the assault rifles. This Court reasoned that:

> [i]n revoking the permits, ATF withdrew its prior authorization for Mitchell to sell certain types of assault rifles in the United States. **Otherwise, Mitchell retained complete control over the rifles. Mitchell could have done anything it wished with the rifles, except import them into the United States in their original configuration. Put another way, ATF did not take the rifles.**

Id. at 217 (emphasis added). Unlike the plaintiffs in *Mitchell Arms*, Plaintiffs retained no control over the bump-stocks. They had to abandon or destroy them. Put another way, the ATF took the bump-stocks.

The Final Rule compelled the utter surrender of Plaintiff's' bump-stocks. Plaintiffs lost every property right they had in their property—the right to transport, to sell, to donate, to devise and to possess. No rights remained because the Government demanded destruction of the bump-stocks or abandonment to the ATF. Appx43. This is an exercise of

police power that goes "too far" in its regulation of the use of property that categorically requires compensation by the Government.[9]

CONCLUSION

The trial court erred in dismissing Plaintiffs' complaint alleging a taking under the Fifth Amendment. When Government destroys all property rights in lawfully acquired private property, not as a byproduct of its role as enforcer of the law, but as a matter of policy, in its legislative role, the Fifth Amendment requires that affected property owners receive just compensation for their losses. Whether the mandated destruction or surrender of Plaintiffs' property is conceptualized as physical taking or a regulatory taking, it was no less categorical. Plaintiffs respectfully ask this Court to vacate the trial court's judgment and remand this case for adjudication consistent with the law.

[9] Plaintiffs' claim here renders the *Penn Central* test a foregone conclusion since Plaintiffs have no rights left in their property. *See Horne* 135 S. Ct. at 2438 (Sotomayor, J., dissenting).

Respectfully submitted,

/s/ Adam M. Riley

Adam M. Riley
Flint Law Firm, LLC
222 E. Park St., Suite 500
P.O. Box 189
Edwardsville, IL 62025
T: (618) 288-4777
F: (618) 288-2864
ariley@flintlaw.com

January 30, 2020

Attorney for Plaintiffs-Appellants