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.

REPLY BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1107

Short Case Caption The Modern Sportsman, LLC et. al. v. United States

Filing Party/Entity Appellant

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

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1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
The Modern Sportsman, LLC		
RW Arms LTD.		
Mark Maxwell		
Michael Stewart		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Ethan A. Flint		
Jennifer H. Gelman		

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTRODUCTION

It is a general principle of takings law that a property owner has a categorical right to just compensation when the government takes away all property rights in lawful private property to satisfy a public purpose. Plaintiffs argue that this Court's analysis of the Final Rule on bump stocks should begin with that general rule. From that starting place, Plaintiffs acknowledge that there is a narrow "police power" carve-out to the Fifth Amendment obligation to pay compensation when the federal government effects property rights as part of a scheme to enforce existing federal law. But the Final Rule was legislative and cannot qualify for that carve-out.

Defendant's Response Brief urges this Court to reverse the analysis and establish a categorical rule in favor of the federal government. Under that new rule, the federal government would be immune from takings liability when it exercises "police powers" for a purpose it deems to be in the interests of public safety; any public safety rationale would allow the federal government to skirt takings scrutiny entirely. Not a single case cited by Defendant is precedent for a federal "police power" exemption of that breadth. This Court will be making new law if adopts Defendant's

sweeping view of federal immunity from the Takings Clause. It should not do so.

Defendant's remaining attempts to escape a *per se* obligation to compensate Plaintiffs under either a physical or regulatory taking analysis must also fail because Defendant improperly obscures the most important fact: Plaintiffs lost all rights—*every single one*—in their lawfully acquired property as a result of the Final Rule. If that doesn't qualify Plaintiffs' loss as a categorical taking, then what is a categorical taking?

ARGUMENT

I. There is No Precedent for Exempting from a Takings Analysis a Federal Legislative Action that Deprives a Property Owner of All Rights in Lawfully Owned Property Simply Because the Federal Government Claims It Aimed to Protect Public Safety.

When government action takes *all* property rights in private property, it is a *per se* taking for which the government has a *per se* obligation to pay just compensation. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015). That should be the starting place for analyzing the Final Rule. Defendant asserts that "a long line of precedent involving the police power" precludes Plaintiffs' claims from qualifying for

compensation under that general principle. (Resp. Br. at 15.) But there is no precedent for exempting the federal government from its obligation to pay just compensation when it takes away every right in lawfully held personal property by a legislative enactment—not even when the government justifies its actions with a public safety rationale.

Defendant and the trial court have written off the Final Rule as an exercise of police powers that does not trigger the Takings Clause of the Fifth Amendment by relying on two types of "police powers" cases, neither of which pertains to the Final Rule on bump stocks. Defendant cites to a few courts that have ruled that a state government may exercise its police powers to protect public safety without implicating the Fifth Amendment. Even if this Court agrees with those decisions, there is no precedent for extending that principle to actions taken by the federal government. Next, where federal action is concerned, Plaintiffs do not dispute that there is ample precedent for exempting from Fifth Amendment scrutiny any loss of property that is incidental to the federal government's enforcement of existing federal law. That narrow line of cases does not apply to Plaintiffs' claim either because the ATF issued the Final Rule as a legislative rule, not as mere enforcement of existing

federal law. Therefore, Defendant's main contention is dead wrong: the trial court did not properly determine that precedent precludes Plaintiffs' claim. (Resp. Br. at 13.)

A. Courts Have Recognized a Broad Immunity from Takings Liability for the Exercise of "Police Powers" Only for Government Action Taken by One of the Fifty States.

Proponents of exemptions to a property owner's right to assert a claim for compensation under the Fifth Amendment invariably begin with citations to *Mugler v. Kansas*, 123 U.S. 623 (1887) and *Miller v. Schoene*, 276 U.S. 272 (1928). (Resp. Br. At 15.) As Plaintiffs argued in their opening brief, these cases may justify a diminution in property values without compensation, but the Supreme Court did not have occasion in either of these cases to decide whether a public safety rationale for government action is sufficient to justify *a total loss of all property rights* without compensation. (Pls.' Br. at 11-14.) The facts of these cases simply did not raise that issue because both plaintiffs were left with some property rights intact. So, it is not at all clear that *Mugler* or *Miller* supports the Court's dismissal of a claim for compensation premised on the complete loss of every property right in private property.

But this is not the only limitation to the application of *Mugler* and *Miller* to Plaintiff's claims.

Neither *Mugler* and *Miller* preclude Plaintiffs' claim for compensation because both cases concerned an action taken by a state government—a Kansas statute in *Mugler* and a Virginia law in *Miller*. The Supreme Court was acknowledging in these cases the well-established breadth of the police powers of the various states. The same is true of the Supreme Court's decision in *Samuels v. McCurdy*, which concerned the seizure of Mr. Samuels' store of wines, beers, and liquors pursuant to the Georgia Penal Code. 267 U.S. 188, 191 (1925). These were all state government actions taken pursuant to the widely acknowledged broad police powers of the states to legislate for the health, safety and welfare of their residents. Plaintiffs, on the other hand, were deprived of their property by a federal action—which has yet to be excused under a police powers rationale by the courts.

In addition to *Mugler*, *Miller* and *McCurdy*, Defendant cites to a pair of recent decisions in which courts appear to have exempted state governments from Fifth Amendment takings claims even when a state government took all property rights by legislative enactment. (Resp. Br.

at 17-20, discussing *Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400 (D. Md. 2018) and *Holiday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007)). Even if this Court agrees with the reasoning of those decisions, that reasoning does not preclude Plaintiffs' claim for compensation from the federal government for *federal action*. As Defendant points out, the district court in Maryland refused to subject the State of Maryland to Fifth Amendment liability for banning bump stocks because "[t]his theory would entail a radical curtailment of *the traditional state police powers*[.]" *Maryland Shall Issue*, 353 F. Supp. 3d at 408-409 (emphasis added). The federal government has no traditional police powers, and no court has decided that the federal government is immune from its obligation to pay just compensation when it exercises something it calls "police powers" to take away property rights.

B. The Federal "Police Powers" Exemption from Fifth Amendment Scrutiny Applies ONLY When the Federal Government Takes Private Property Incidental to the Enforcement of Existing Federal Law Which Does Not Include the ATF's Legislative Rule Making.

The remainder of the cases that form the basis of Defendant's contention that a line of precedent involving "police power" precludes

Plaintiffs' claim all belong to the narrow line of cases exempting federal enforcement actions from Fifth Amendment scrutiny. In every one of these cases, this Court rejected a property owner's claim for compensation for property that was taken incidental to the federal government's *enforcement of existing federal law*. (See Pls. Br. at 15-17, discussing, among others, *Acadia Tech., Inc v. United States*, 458 F.3d 1327 (Fed. Cir. 2006), *Kam-Almaz v. U.S.*, 682 F.3d 1364 (Fed. Cir. 2012) and *AmeriSource Corps. v. U.S.,* 525 F.3d 1149, 1154 (Fed. Cir. 2008)). In each of these cases, the federal government escaped the Takings analysis because it was acting in its capacity as *enforcer of the law*; that is to say, it was "policing" its *existing laws*. This Court has referred to this power to enforce the law (or power to police) as "police powers" in takings cases, but it should not be confused with the power of the states to *legislate* in the interests of health, safety and welfare. See D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. Miami L. Rev. 471, 477 (2004).

This Court has never exempted a federal *legislative* act from the takings analysis just because the government claimed it was a valid exercise of its police powers undertaken to protect public safety. That is

why it matters that the ATF was not interpreting the law (and enforcing it) when it issued the Final Rule; it was acting in its legislative capacity to create new law. That was the conclusion reached by the Court of Appeals for the D.C. Circuit, and it is the crucial difference between the Final Rule from the ATF's reclassification of the Akins Accelerator (see Pls. Br. at 18-23). Defendant knows the distinction between the ATF's interpretive function and its legislative function lies at the heart of the takings analysis. That is why it disagrees that the rule is legislative (Resp. Br. at 27) and strives at every turn to color the Final Rule as merely "clarified" that bump stocks are machine guns (Resp. Br. at 1, 2, 11 , 15 and 31) or "interpreted" them to be so. (Resp. Br. at 13, 23, 27 and 40). The D.C. Circuit looked past that self-serving choice of words and found that the ATF was making new law when it issued the Final Rule. This Court should do the same and disregard the federal enforcement cases cited by the trial court and the Government.

Once the cases involving actions taken by state governments and the cases involving federal enforcement actions are stripped away from Defendant's purported "long line of precedent," all that remains is Defendant's completely wrong-headed contention that Plaintiffs'

property interest in the possession of bump stocks is analogous to the asserted property interests in *Mitchell Arms v. United States*, 7 F.3d 212 (Fed. Cir. 1993) and *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988). (Resp. Br. at 20.) The property interest asserted by Plaintiffs is the right to the mere possession of their lawfully-purchased physical personal property. Defendant's insistence that *Mitchell Arms* foreclosed a property interest in mere possession is preposterous. This Court explained its rejection of Mitchell Arms' claim for compensation by emphasizing that Mitchell Arms retained "complete control over the rifles" and was merely prohibited from importing them. (Pls. Br. at 36.)

There is no easy "police power" escape hatch from Fifth Amendment analysis for a federal legislative action that completely robs a property owner of all rights in lawfully-acquired property. None of the cases Defendant cited or the trial court relied on precludes Plaintiffs' claim or justifies a departure from the same analysis that any federal government action that destroys all property rights would be afforded.

Finally, Defendant is wrong about the practical implications of engaging in a forthright legal analysis of the Final Rule under takings

law that doesn't put the cart before the horse. (Resp. Br. at 28-29.) A decision by this Court that the Final Rule resulted in a compensable taking would have no impact on the ability of a state government to ban property it deems to be harmful without paying just compensation. It would only confirm that just as the federal government does not share in the states' broad latitude to legislate for health, safety and welfare, neither does it share in the latitude afforded to the states by some courts to exercise those types of police powers without regard to the Takings Clause of the Fifth Amendment. Nor would just compensation to bump stock owners have any impact on the federal Government's ability to interpret the Controlled Substances Act so as to bring newly developed drugs, including the newest version of synthetic fentanyl, under the umbrella of the federal law without paying compensation. That is because Congress wrote the Controlled Substances Act in expansive language that classifies drugs according to their effects and easily embraces innovative new drugs even before they are listed. Granting compensation to bump stock owners will also not diminish the ability of the Consumer Product Safety Commission to ban "the sale of lawn darts" (Resp. Br. at 29) or any other dangerous product without paying

compensation. If the Final Rule had merely "banned *the sale* of bump stocks, Plaintiffs' claim for compensation under the Fifth Amendment would truly have been foreclosed by *Mitchell Arms*. (See Pls. Br. at 36.) Notably, the Consumer Product Safety Commission did not ban the possession of lawn darts or require their abandonment or destruction. The Commission merely "urged" consumers to discard or destroy their lawn darts without the threat of criminal liability for failing to do so.[1]

II. The Government Has Failed to Explain How Dictating the Destruction or Abandonment of Lawful Personal Property Is Not a *Per Se* Physical Taking under Binding Precedent.

The Government does not dispute that the Final Rule requires the physical dispossession of lawfully acquired personal property without compensation. See Black's Law Dictionary (11th ed. 2019) (defining "dispossession" as "deprivation of. . .possession of property). Nor could it, as the Final Rule on its face subjects countless law-abiding citizens to criminal prosecution, should they not "abandon [their] bump-stock-type devices at the nearest ATF office" or destroy their stocks by "melting,

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[1] *See* https://www.cpsc.gov/content/following-recent-injury-cpsc-reissues-warning-lawn-darts-are-banned-and-should-be-destroyed (last visited July 23, 2020).

crushing, or shredding," and "throw the pieces away." 83 Fed. Reg. at 66,549.

A regulation that requires a citizen to completely dispossess herself of lawfully acquired property to further an articulated public interest is a classic example of a taking. *See Lingle v. Chevron U.S.A Inc.*, 544 U.S. 528, 537-38 (2005). The very definition of a physical taking is "absolutely dispossess[ing] the owner" of property. *Loretto*, 458 U.S. at 435 n.12; see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002) (a physical taking "dispossess[es] the owner" of property); *Nixon v. United States*, 978 F.2d 1269, 1287 (D.C. Cir. 1992) (statute that "physically dispossessed" property owner "resulted in" *per se* taking); And a physical taking occurs when the Government dispossesses an owner of personal property, not just real property, as the "categorical duty" imposed by the Takings Clause applies "when [the government] takes your car, just as when it takes your home." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015). There is no less a taking if the Government plans to destroy the car (to reduce emissions) rather than drive it.

The Government does not seriously dispute that requiring Plaintiffs to "abandon [their bump-stocks] at the nearest ATF office," Final Rule, 83 Red. Reg. at 66-549, results in a physical taking. That conclusion is obvious, as relinquishing both title and possession of the bump-stocks forfeits "the entire 'bundle' of property rights" in the property—the rights to possess, use, and dispose. *Horne*, 135 S. Ct. at 2428. The Government instead argues, despite the Supreme Court's decision in *General Motors Corp. v. United States* defining the term "taken" to include destruction, 323 U.S. 373, 378 (1945), that the law does not effectuate a physical taking under *Loretto* or *Horne* because it allows citizens to destroy the stocks altogether. (Resp. Br. at 33) ("the Government did not require that Appellants transfer title in their bump stocks to the Government and has not otherwise physically invaded Appellant's property") But the Government's attempt to distinguish physical takings precedent finds no support in case law or common sense. For instance, in *Casitas Mun. Water Dist. v. United States*, the government forced a water district to build a fish ladder that diverted water it had a right to away from its canal. 543 F.3d at 1276. In defense of the taking the Government argued that it "did not appropriate the

water for its own use or for use by a third party." *Id.* In response, this Court explained that

> When the government forces Casitas to divert water away from the Robles-Casitas Canal to the fish ladder for the public purpose of protecting the West Coast Steelhead trout, this is a governmental use of the water. The fact that the government did not itself divert the water is of no import.

Id. Casitas was held to be a physical taking because the owners were completely dispossessed of their property rights, not because their rights were transferred to another or because the Government had physically invaded their property—indeed, the Government never touched the water. See *id.* at 1293; see also *United States v. General Motors*, 323 U.S. at 378 ("the deprivation of the former owner rather than the accretion of a right to the sovereign constitutes the taking"); *R. J. Widen Co. v. United States*, 357 F.2d 988, 993 (Ct. Cl. 1966).

The Government further seeks to distinguish *Horne* because it does not address a valid exercise of the police power. (Resp. Br. at 33.) But the Supreme Court in *Loretto*, on which *Horne* relied, held that a law requiring physical occupation of private property was both "within the State's police power" and a physical taking that required compensation. 458 U.S. at 425. The Court made clear that the question of whether a law

effects a physical taking is "a separate question" from whether the state has the power to enact it, and that an uncompensated taking is unconstitutional "without regard to the public interests that it might serve." *Id.* at 426; see also *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (distinguishing between physical taking and exercise of police power). The Supreme Court followed the same course in *Lucas v. South Carolina Coastal Council*, holding that a law enacted pursuant to a valid exercise of the state's "'police powers' to enjoin a property owner from activities akin to public nuisances" is not immune from scrutiny even under the *regulatory* takings doctrine. 505 U.S. 1003, 1020-27 (1992). The Court explained that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026. The same is certainly true for the categorical rule that the Government must compensate for physical takings. *Id.* at 1015; *Horne*, 135 S. Ct. at 2425.

The Government final attempt to distinguish *Horne* fares no better. According to the Government, "Appellants proceed as if the raisins at issues in *Horne* were dangerous street drugs." Resp. Br. at 33. But in fact,

Horne recognized that unlike raisins, some products are dangerous or hazardous, and in such cases government conditions on *selling* those products, even up to an appropriation of property, may be justified. *Id.* at. 366. In other words, given the Government's traditional control over commercial dealings, the Government may, in appropriate cases, subject products to stringent government regulation. *Id.* Thus, while *Horne* recognized that not all forms of personal property have the same set of expectations when it comes to *regulations*, it took the categorical stance that people still do not expect their personal property "to be actually occupied or taken away." *Id.* at 361.

The Government finally cites to a trio of decisions from this Court that pre-date *Horne* and *Arkansas Game and Fish* for the proposition that "the physical seizure of highly regulated goods pursuant to the police power has never been thought to constitute a *per se* taking." (Resp. Br. at 33 citing *Kam-Almaz v. United States*, 682 F.3d 1364, 1372 (Fed. Cir. 2012); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153-54 (Fed. Cir. 2008); *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332-33 (Fed. Cir. 2006)). But the laptop in *Kam-Almaz* or the cooling fans in *Acadia Tech* were not highly regulated at all. In each of these cases, the

property at issue was temporarily seized, not because it was highly regulated, but because the Government was enforcing the law. See *id.* And in each case the property was ultimately returned to its owner. *Id.* The Government is clearly permitted to *temporarily* seize evidence for use in investigations and trial. *Warden v. Hayden*, 387 U.S. 294 (1967). But it may not effect a *de facto* forfeiture of the property by holding it for an unreasonable period of time. *United States v. Premises Known as 608 Taylor Ave.*, *Apartment 302, Pittsburgh, Pa.*, 584 F.2d 1297, 1302 (3d Cir. 1978) citing *United States v. United States Coin and Currency*, 401 U.S. 715, 718 (1971) (forfeiture must be based on finding that property was used in connection with wrongful conduct); see also *Lowther v. United States*, 480 F.2d 1031 (10th Cir. 1973); *United States v. Wilson*, 176 U.S. App. D.C. 321, 325, 540 F.2d 1100, 1104 (1976). This makes sense. If the Government could permanently dispossess anyone of property outside of a valid forfeiture proceeding, private property would have no protection from the Government. As this Court's predecessor held:

> A taking compensable within the Fifth Amendment occurs when an owner is deprived of the use and possession of property. . .For a compensable taking to occur, however, it is axiomatic that the Government must obtain more than mere custodial possession. Instead, the Government action must *deprive the owner permanently* of property.

Kessler v. United States, 229 Ct. Cl. 472, 473–74 (1981) (emphasis added). This further distinguishes this case from this Court's enforcement cases. In *Kam-Almaz*, *AmeriSource*, and *Acadia Tech* the property owners all ultimately regained possession of their property and they were able to use it as before. Cf. *Tahoe-Sierra Pres. Council*, 535 U.S. at 332; *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012). Plaintiffs are not in such a position. Plaintiffs have permanently lost all rights in their property because it has been destroyed.

All of the Government's efforts to escape the physical takings analysis have one thing in common: they aim to deflect the analytical focus away from the impact of the Government action on the property owner. See *Lingle*, 544 U.S. at 537-38. A physical appropriation of property is a categorical taking precisely because of the severity of the impact on a property owner when the entire "bundle" of property rights—the rights to possess, use and dispose of property—is permanently taken. *Horne*, 135 S. Ct. at 2428 (citing *Loretto*, 458 U.S. at 435). That is exactly what happened to Plaintiffs, regardless of whether the government justifies its actions as in the service of public interest or in the interests

of public safety and regardless of whether Defendant seized the bump-stocks for its own use or required their destruction.[2]

III. The *Lucas* Categorical Regulatory Takings Analysis Must Be Applied Because the Final Rule Left Plaintiffs with No Property Rights.

If the Final Rule is analyzed as a regulatory taking, it cannot be analyzed under the *Penn Central* test because the Plaintiffs were deprived of all their property rights. Cavalierly, the Government's own *Penn Central* analysis doesn't even mention the impact of the Final Rule on Plaintiffs. The proper test is the *Lucas* test. The Government acknowledges that this Court applies the *Lucas* categorical taking analysis to personal property. (Resp. Br. at 35 citing *Rose Acre Farms Inc. v. United States*, 373 F.3d 1177 (Fed. Cir 2004); *Maritrans Inc. v. United States*, 342 F.3d 1344 (Fed. Cir. 2003)). Yet it insists that this Court should not apply *Lucas* here because "while an owner of personal property 'ought to be aware of the possibility that a new regulation might

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[2] The Government's assertion that Plaintiffs "never even pleaded a physical taking claim in their amended complaint," is without merit. (Resp. Br. at 30.) Plaintiffs plead that the Final Rule required the physical dispossession of their lawfully acquired bump-stocks. (Appx0042-0043). There is no such requirement in the RCFC that Plaintiffs must plead the takings framework it believes the court should apply.

even render his property economically worthless,' such an implied limitation was not reasonable in the case of land." (Resp. Br. at 34-35 quoting *Horne*, 135 S. Ct. 2419).

The "implied limitation" to which *Lucas* referred was "the State's traditionally high degree of control over commercial dealings." *Lucas*, 505 U.S. at 1027 (emphasis added). When a property's only economically productive use is sale or manufacture for sale," the state might restrict the *sale* to such a degree as to "render [the] property economically worthless." *Id*. at 1028. But *Lucas* certainly did not suggest that personal property is held subject to the "implied limitation" that the state may order its owner to dispossess herself of the property entirely. The rush to buy bump-stocks and consequent dramatic rise in their price (Am. Br. in Supp. of Appellee at 16 citing 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.) before the Final Rule was announced strongly suggests that the public expected a "limitation" of their property right to manufacture, buy or sell bump stocks, but the

right of possession was the one right property owners believed to be inviolate.

In any event, whatever expectations the Plaintiffs may have had are simply not part of the analysis. *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1357 (Fed. Cir. 2000). As this Court has noted, the question under the categorical analysis is only whether the plaintiff owned the property at the time of the taking. *Id.* Here, the state is seeking to dispossess its citizens of bump-stocks they lawfully obtained before the Final Rule transformed those stocks into contraband. The takings analysis would be different as to an individual who unlawfully obtained a bump-stock after the ban was already in place. But just as "confiscatory regulations" of real property "cannot be newly legislated or decreed (without compensation)," *Lucas*, 505 U.S. at 1029, neither can confiscations of personal property be decreed after the fact. That is because, as the Supreme Court observed, whatever expectations people may have regarding property regulations, they "do not expect their property, real or personal, to be actually occupied or taken away.'" *Horne*, 135 S. Ct. at 2427.

CONCLUSION

The Takings Clause of the Fifth Amendment requires just compensation when the federal government takes *all* property rights in lawfully held property from a citizen. That is a *per se* rule justified by the profound effect of a total loss of property rights and the Supreme Court's acknowledgement that whatever expectations people may have about the limitations to their property rights, "people still do not expect their property, real or personal, to be actually occupied or taken away." *Horne,* 135 S. Ct. at 2427.

There is no broad exception from this *per se* rule for federal actions that purport to be in the interests of public safety. Such an exception would eliminate *per se* takings altogether, replacing categorical takings with categorical government immunity upon the mere assertion of a public safety impetus for government action. The Final Rule does not qualify for the exception from that rule for enforcement actions because the ATF spoke loud and clear that the Final Rule was legislative in nature. Plaintiffs respectfully ask this Court to vacate the trial court's judgment and remand this case for adjudication consistent with the law.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 24th day of July 2020, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Dated: July 24, 2020

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