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.

THE UNITED STATES,
Defendant-Appellee.

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

RESPONSE BRIEF OF DEFENDANT-APPELLEE

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

L. MISHA PREHEIM
Assistant Director

NATHANAEL B. YALE
Trial Attorney
Civil Division
Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, D.C. 20530
Tel: (202) 616-0464

Attorneys for Defendant-Appellee

May 22, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Rules

Regulations

Other Authorities

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Federal Circuit rules, counsel for defendant-appellee states that he is unaware of any other appeal from this civil action that previously has been before this Court or any other appellate court under the same or similar title. *McCutchen v. United States*, No. 20-1188 (Fed. Cir.); *Rouse et al. v. United States*, No. 18-1980C (Fed. Cl.); and *Lane et al. v. United States*, No. 3:19-cv-01492-S (N.D. Tex.) may directly affect or be affected by this Court's decision in this appeal.

/s/ Nathanael B. Yale

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.	)))))))))))))	No. 2020-1107

RESPONSE BRIEF OF DEFENDANT-APPELLEE

Defendant-appellee, the United States, respectfully submits this response brief in the appeal brought by plaintiffs-appellants The Modern Sportsman, LLC, RW Arms, Ltd., Mark Maxwell and Michael Stewart (Appellants).

INTRODUCTION

On October 1, 2017, a shooter in Las Vegas, Nevada using several weapons with "bump stocks" – firearm attachments that convert semi-automatic rifles into machines guns – fired rapidly and repeatedly into an outdoor concert, killing 58 people and wounding approximately 500 others. In response to this tragedy, the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) clarified that bump stocks are machine guns under 18 U.S.C. § 922(o), the

Federal statute prohibiting such weapons; ATF issued a final regulation explaining that bump stocks are machine guns. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Final Rule).

On appeal, Appellants contend that the Final Rule constituted a compensable taking under the Fifth Amendment's Takings Clause, a claim that the United States Court of Federal Claims (trial court) properly dismissed for failure to state a claim. A criminal prohibition on the possession of highly dangerous, contraband weapons "is the kind of exercise of the police power that has repeatedly been treated as legitimate even in the absence of compensation to the owners." *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332-33 (Fed. Cir. 2006).

Appellants urge a departure from decades of settled law, and the consequences of their position are striking. Under their view, the regulation of dangerous products would constitute a taking whenever the Government prohibits novel dangerous products or, as is the case here, whenever the Government had not previously recognized that a product falls within a statutory prohibition, but clarifies that it does. A plaintiff is, of course, free to challenge the correctness of the Government's determination, or the legality of a prohibition, and several such challenges to the Final Rule are pending in district courts and courts of appeals. But, the Constitution does not require payment when, as here, the Government exercises its responsibility to protect the public safety.

STATEMENT OF THE ISSUE

In the Final Rule, the Government explained that bump stocks fall within the longstanding statutory prohibition on the possession or transfer of machine guns, 18 U.S.C. § 922(o). The sole issue is whether the trial court properly determined that the Final Rule did not result in a compensable taking under the Fifth Amendment.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

Appellants, The Modern Sportsman, LLC, RW Arms, Ltd., Mark Maxwell and Michael Stewart, seek review of the April 5, 2019 decision of the United States Court of Federal Claims in *The Modern Sportsman, LLC, et al. v. United States*, No. 19-449. Appx0001-0010.[1] In that decision, the trial court dismissed Appellants' takings claim for failure to state a claim pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), because the Government acted pursuant to its police power in recognizing that bump stocks constitute machine guns pursuant to Federal law.

[1] "Appx __" refers to the joint appendix to be filed in conjunction with this case.

II. Statutory Framework

Since 1986, it has been "unlawful for any person to transfer or possess a machinegun" not lawfully possessed before the statute's effective date. 18 U.S.C. § 922(o)(2). This statutory provision reflected Congress' increasing regulation of certain firearms, including machine guns, for more than 50 years.

Beginning with the National Firearms Act of 1934 (NFA), Pub. L. No. 73-474, 48 Stat. 1236 (1934), codified at 26 U.S.C. Chapter 53, Congress imposed responsibilities on persons possessing or engaged in the business of selling certain "firearms,"[2] including registering the firearms, subjecting all regulated firearm sales to a special tax, and requiring that regulated-firearm transactions use written forms.[3]

In 1986, Congress enacted the Firearm Owners Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), which specifically addressed the danger of machine guns. *See* H.R. Rep. No. 99-495, at 2, 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1328, 1333 (describing proposed machine gun restrictions as

[2] Under the NFA, "firearms" include a narrow set of dangerous weapons such as machine guns, short-barreled shotguns, and short-barreled rifles. *See* 26 U.S.C. § 5845(a). Standard-length shotguns and rifles (including all semi-automatic rifles) and non-automatic handguns are generally not "firearms" under the NFA. *Id*.

[3] Congress also regulated firearms with the passage of the Gun Control Act of 1968 (GCA), Pub. L. 90-618, 82 Stat. 1213 (1968), codified at 18 U.S.C. Chapter 44. Although the GCA supplanted some prior firearms regulations, it continues to exist alongside the NFA. *See* Pub. L. No. 785, 52 Stat. 1250 (1938) (repealed 1968).

"benefits for law enforcement" and citing "the need for more effective protection of law enforcement officers from the proliferation of machine guns"); *id*. at 4, 1986 U.S.C.C.A.N. at 1330 (describing machine guns as "used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the proceeds of crime"). Among its provisions, the statute added 18 U.S.C. § 922(o), which – with limited exceptions – makes it "unlawful for any person to transfer or possess a machinegun." Pursuant to Federal law, a "machinegun"[4] is defined 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." 18 U.S.C. § 921(a)(23); 26 U.S.C. § 5845(b). The statutory definition also includes parts that can convert a weapon into a machine gun. 26 U.S.C. § 5845(b).

The Attorney General has the authority to promulgate regulations enforcing and administering the NFA and other Federal firearms statutes; the Attorney General delegated this authority to ATF. *See* 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a)(2)(A), 7805(a); *see* 28 CFR § 0.130(a)(1)-(2).

[4] We use the ordinary spelling of "machine gun" as two words, rather than the single-word spelling used in federal statutes and regulations: "machinegun." *See, e.g.*, 26 U.S.C. § 5845(b); 27 C.F.R. § 447.11.

III. ATF's Prior Classifications Of Bump Stocks

Although no Federal statute or regulation requires a firearms manufacturer or owner to obtain a classification letter from ATF, a manufacturer may request ATF's "official position concerning the status of the firearms under Federal firearms laws." Bureau of Alcohol, Tobacco, Firearms and Explosives, National Firearms Act Handbook § 7.2.4;[5] *see Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 599-600 (1st Cir. 2016). Such a classification, however, is explicitly "subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." National Firearms Act Handbook § 7.2.4.1.

In 2002, an inventor requested ATF's classification of the Akins Accelerator, a bump stock model that "uses an internal spring and the force of recoil to reposition and refire the rifle." *Akins v. United States*, 312 F. App'x. 197, 198 (11th Cir. 2009) (*per curiam*); *see* Final Rule, 83 Fed. Reg. at 66,517. ATF initially concluded the Akins Accelerator did not constitute a machine gun under the NFA. *Akins*, 312 F. App'x at 198. After receiving additional requests to classify similar devices, ATF reversed its view, classified the Akins Accelerator as a machine gun, and ordered the inventor "to register the devices he possessed or to surrender them." *Id.* at 199.

[5] Available at https://www.atf.gov/firearms/docs/undefined/atf-national-firearms-act-handbook-chapter-7/download (last visited May 21, 2020).

ATF subsequently issued a policy statement concluding that "devices attached to semiautomatic firearms that use an internal spring to harness the force of the recoil so that the firearm shoots more than one shot with a single pull of the trigger are machineguns." Final Rule, 83 Fed. Reg. at 66,516. The Court of Appeals for the Eleventh Circuit upheld ATF's classification decision, *Akins*, 312 F. Appx. at 198, and the Court of Federal Claims concluded that the determination did not give rise to a compensable taking. *Akins v. United States*, 82 Fed. Cl. 619, 620 (2008).

In the following years, ATF received classification requests for other bump stocks that, unlike the Akins Accelerator, did not include internal springs. Between 2008 and 2017, ATF concluded that several devices were not machine guns because, in the absence of internal springs or similar parts that would channel recoil energy, the bump stocks did not fire "automatically." Final Rule, 83 Fed. Reg. at 66,517.

IV. The Final Rule

Following the Las Vegas tragedy, and at the urging of members of both Congress and non-governmental organizations, the Department of Justice and ATF reviewed the definition of machine gun found in 26 U.S.C. 5845(b), and reconsidered whether all bump stocks should be properly classified as machine guns. *See* Final Rule, 83 Fed. Reg. at 66,516-17. On March 29, 2018, the

Department published a notice of proposed rulemaking, proffering changes to the regulations in 27 C.F.R. §§ 447.11, 478.11, and 479.11 regarding the application of the terms "single function of the trigger" and "automatically" to bump stocks. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442 (Mar. 29, 2018).

On December 26, 2018, ATF published the Final Rule in the Federal Register. *See* Final Rule, 83 Fed. Reg. 66,514.[6] The Final Rule (1) concluded that "[t]he term 'machine gun' includes a [bump stock]," and (2) overruled ATF's prior classification letters treating bump stocks as unregulated firearms parts. *Id.* at 66,553-54; *see id*. at 66,516, 66,531. The Final Rule further provided instructions for "current possessors" of bump stocks: to avoid liability under the statute the devices could be destroyed or abandoned at the nearest ATF office. *Id.* at 66,530, 66,549.[7]

[6] The Final Rule amends ATF's regulations, and was promulgated by the Attorney General and the Department of Justice, which are responsible for overseeing ATF. *See* 28 C.F.R. § 0.130(a)(1). Although applicable provisions of the NFA still refer to the "Secretary of the Treasury," *see* 26 U.S.C. ch. 53, the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002), transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the authority of the Attorney General. 26 U.S.C. § 7801(a)(2); 28 U.S.C. § 599A(c)(1).

[7] In the Final Rule, ATF estimated that 520,000 bump stocks were sold at an estimated average price of approximately $300. Final Rule, 83 Fed. Reg. at 66,538.

After ATF issued the Final Rule, several groups of plaintiffs filed lawsuits in Federal district courts seeking to enjoin the regulation. *See, e.g., Guedes et al. v. ATF, et al.*, 356 F.Supp.3d 109 (D.D.C. 2019), *aff'd* 920 F.3d 1 (D.C. Cir. 2019) (*per curiam*) *cert denied* 140 S.Ct. 789 (2020); *Gun Owners of America, Inc., et al. v. Barr, et al*., No. 19-1298, 2019 WL 1395502 (6th Cir. Mar. 25, 2019); *Aposhian et al v. Barr et al.*, --F.3d--, 2020 WL 2204198 (10th Cir. May 7, 2020). Among their allegations, these suits argue that the Final Rule violates the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. *See Guedes*, 920 F.3d at 9. Federal districts courts, courts of appeals, and the Supreme Court have uniformly denied preliminary injunctive relief in these cases upon determining that the plaintiffs failed to demonstrate a likelihood of success on the merits. *See Guedes*, 920 F.3d at 6 *cert denied* 140 S.Ct. 789; *Gun Owners*, 2019 WL 1395502 at *1-2; *Aposhian*, 2020 WL 2204198 at *1.[8]

V. Procedural History

Appellants, two individuals and two corporations, filed their amended complaint on March 28, 2019.[9] Appx0037. According to the amended complaint,

[8] Litigation in a number of these cases continue. *See Gun Owners*, 2019 WL 1395502 at *1.

[9] Two other cases were filed in the Court of Federal Claims alleging that the Final rule constituted a taking. *McCutchen v. United States*, No. 20-1188 (Fed. Cir.) is currently on appeal to this Court following dismissal by the Court of Federal Claims for failure to state a claim. *Rouse et al. v. United States*, No. 18-1980 (Fed.

The Modern Sportsman, LLC and RW Arms, Ltd are registered firearms dealers and retailers of firearms, ammunition, firearm parts, and accessories. Appx0039. The amended complaint alleges that Michael Stewart and Mark Maxwell are Texas residents who relied upon prior ATF classifications to purchase and own multiple bump-stocks "for both [their] personal use and for economic gain." Appx0040.

The amended complaint alleges that manufacturers, retailers, and individuals relied upon ATF's prior bump-stock classifications. Appx0038; Appx0041-0042. The plaintiffs contend that in 2006, certain spring-loaded devices, including the Akins Accelerator, were classified as machine guns, and that ATF subsequently advised individuals that they could remove the Akins Accelerator's internal spring, thus placing the device outside the machine-gun classification. Appx0041. The amended complaint alleges that between 2008 and 2017, ATF issued many classification decisions finding that other bump stocks, not relying upon internal springs, were unregulated firearm parts. Appx0042. Appellants allege that in accordance with the Final Rule they destroyed – and discarded the scrap of – between 25 and 73,462 bump stocks. Appx0038. Appellants allege that the Final Rule constitutes a Fifth Amendment taking of their bump stocks. Appx0042.

Cl.) is currently stayed pending this Court's decision in this case, and in *McCutchen*.

On May 28, 2019, the United States filed a motion to dismiss. Appx0045; Appx0051. On October 23, 2019, the trial court dismissed the amended complaint for failure to state a claim. In its opinion, the trial court surveyed precedent regarding the police power, finding that "[w]hen properly exercised, the police power provides the government with the authority, under limited circumstances, to take or require the destruction of property without compensation, as the Takings Clause is not implicated in such limited circumstances." Appx0008. The trial court explained that this Court has found that compensation was not due upon "valid exercises of the police power where the government seized property to enforce criminal laws, and where the seized property 'was evidence in an investigation or the object of the law enforcement action.'" Appx0008 (quoting *Amerisource Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008)).

Applying the rational of these cases to the Final Rule, the trial court held that no compensable taking existed for the regulation of bump stocks. Appx0009. The court held that by acting pursuant to its statutory authority when promulgating the Final Rule, "it is clear that ATF intended to further 'the public safety goals of the NFA and GCA' by clarifying that the definition of 'machinegun' includes 'bump-stock-type devices[s]' and by requiring the surrender or destruction of bump stocks within 90 days of publication of the Final Rule." Appx0009. Therefore, no taking

existed because the ATF was acting pursuant to the confines of the police power in requiring the destruction or surrender of bump stocks. Appx0009.

This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court correctly dismissed Appellants' amended complaint for failure to state a claim. A criminal prohibition on the possession of highly dangerous, contraband weapons "is the kind of exercise of the police power that has repeatedly been treated as legitimate even in the absence of compensation to the owners. . . ." *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332-33 (Fed. Cir. 2006).

Fighting against this settled precedent, Appellants argue that the trial court erred in rejecting their takings claim; specifically, that mandating the destruction or forfeiture of their bump stocks constituted a Fifth Amendment taking, even though the devices are machine guns, and thus contraband under Federal criminal law. In so arguing, Appellants urge this Court to adopt a theory of takings liability that requires the Government to pay compensation whenever it bans a novel dangerous product or determines that a product falls within an existing statutory prohibition. But, as the trial court properly found, a long line of precedent forecloses Appellants' position.

As before the trial court, Appellants focus much of their brief on the argument that the Government changed the law with respect to bump stocks, and, therefore, the Final Rule was a taking of their property. In support of this argument, Appellants cite *Guedes et al. v. ATF et al.*, 920 F.3d 1 (D.C. Cir. 2019) (*per curiam*), in which United States Court of Appeals for the D.C. Circuit determined that the Final Rule was a "legislative rule" instead of an "interpretive rule."

Appellants misread the applicable precedent and its underlying rationale, and misunderstand the significance of *Guedes*. There is no dispute that the Federal Government may prohibit the use and possession of goods that threaten public safety. That an individual may have been able to use the good previously—whether because there was no statutory prohibition or because the Government incorrectly interpreted an existing statutory prohibition—does not transform a criminal prohibition into a taking. Whether the Final Rule is legislative or interpretive simply has no bearing here. Were the law different, the Federal Government would be hamstrung in responding to new information and developments with regard to a wide range of products from harmful pharmaceuticals to dangerous toys. Appellants identify no case that so dramatically restricts the Government's power to protect its citizens.

Even assuming that the prohibition on bump stocks was otherwise subject to a takings analysis, it amounts to neither a *per se* taking nor a categorical regulatory taking, and would be evaluated, at most under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Because Appellants made no attempt to satisfy the applicable standard found in *Penn Central*, any such argument has been waived and is, in any event, without merit.

The trial court's decision should be affirmed.

ARGUMENT

I. Standard Of Review And Burden Of Proof

"The question of whether a complaint was properly dismissed for failure to state a claim upon which relief could be granted is one of law, which [this Court] review[s] independently." *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995); *see also Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (whether the trial court properly dismissed a "complaint for failure to state a claim upon which relief could be granted is an issue of law which we review de novo") (citing *Dehne v. United States*, 970 F.2d 890, 892 (Fed. Cir. 1992)). To avoid dismissal for failure to state a claim, a complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Cambridge*, 558 F.3d at 1335.

II. The Trial Court Properly Dismissed Appellants' Takings Claim Because ATF's Interpretation That Bump Stocks Are Machine Guns Under Long-Standing Federal Law Is Not A Taking

The trial court properly dismissed Appellants' amended complaint for failure to state a claim because the Government acted pursuant to its police power in clarifying that bump stocks constitute machine guns under well-established Federal firearms law. The Court should conclude (1) a long line of precedent bars Appellants' takings claim; and (2) Appellants incorrectly attempt to circumvent this precedent based heavily on the unsupported suggestion that this precedent is inapplicable to "new" prohibitions.

A. The Trial Court Properly Determined That Precedent Precludes Appellants' Claim

As the trial court recognized, a long line of precedent involving the police power precludes Appellants' takings claim. Appx0008-0009.

This Court has recognized that there are certain exercises "of the police power that ha[ve] repeatedly been treated as legitimate even in the absence of compensation to the owners of the. . . property." *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332-33 (Fed. Cir. 2006).

This Court has traced the doctrine's original rationale to the Supreme Court's decisions in *Mugler v. Kansas*, 123 U.S. 623 (1887) and *Miller v. Schoene*, 276 U.S. 272 (1928). *Acadia Tech.*, 458 F.3d at 1332-33. In *Mugler*, the Supreme Court held that a state could outlaw the manufacture and sale of alcoholic

beverages without requiring compensation. As the Supreme Court articulated the doctrine, "[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." 123 U.S. at 668-69; *see Acadia Tech., Inc.*, 458 F.3d at 1333. In *Miller*, the Supreme Court reached a similar conclusion where, to prevent the transmission of cedar rust—an infectious disease that destroyed apple trees—the Commonwealth of Virginia enacted a statute to condemn and destroy any red cedar trees that were, or might be, the disease's origin. *See Miller*, 276 U.S. at 277-79. The Supreme Court held that "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction is one of the distinguishing characteristics of the police power which affects property." *Id*. at 279-80; *see also Samuels v. McCurdy*, 267 U.S. 188, 190-92, 198-99 (1925) (applying *Mugler* and holding no compensation due for liquor seized by the state of Georgia that had been lawfully acquired before Prohibition).

Courts have also specifically applied the police power justification to dismiss takings claims when addressing prohibitions concerning the very type of device at issue in this case. *Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400 (D. Md. 2018); *Akins v. United States*, 82 Fed. Cl. 619 (2008).

In *Akins*, the inventor of the Akins Accelerator brought a physical takings claim based upon the required removal and surrender of the recoil springs in the device, and a regulatory takings claim based upon ATF's reversal of its classification of the device as a machine gun. *Akins*, 82 Fed. Cl. at 621-22. The Court of Federal Claims granted the Government's motion to dismiss, holding that, "[a]s ATF was acting pursuant to the police power conferred on it by Congress, Plaintiff's complaint fails to state a compensable takings claim under the Fifth Amendment." *Id*. at 623 (citing *AmeriSource Corp.*, 525 F.3d 1149, 1154 (Fed. Cir. 2008). The court noted that Congress granted ATF the authority to investigate criminal and regulatory violations of Federal firearms laws, including 18 U.S.C. § 922(o). *Id*. The court determined that ATF was acting under this authority when it classified the Akins Accelerator, and when it required plaintiff to register or physically surrender the devices. *Id*. This was the case even though ATF had previously provided its view in a classification letter to the plaintiff that the device was an unregistered firearm part, and therefore lawful to own under Federal law. *Id*. at 621; *see also Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 214-15, 217 (Fed. Cir. 1993) (takings claim properly dismissed where ATF had changed its position with regard to whether certain firearms were permitted to be imported).

Similarly, in addressing the State of Maryland's ban on bump stocks, a Federal district court rejected the plaintiffs' argument that a statutory prohibition

on bump stocks constituted a Fifth Amendment taking. The court rejected the very contention Appellants make here—that "states cannot completely ban any item of personal property, no matter how dangerous, and no matter how compelling the state's interest in doing so, without compensating all individuals in the state who happen to already own it." *Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 411 (D. Md. 2018). The district court recognized that "[t]his theory would entail a radical curtailment of traditional state police powers, one that flies in the face of a long history of government prohibitions of hazardous contraband." *Id.* at 408-09. The court emphasized that the principle that the Government may ban hazardous materials without compensation is consistent with "the long history of state laws that criminalize, ban, or otherwise restrict items deemed hazardous under the police power," citing the regulation of machine guns, explosive devices, controlled substances, child pornography, fireworks, and lead-based paint. *Id.* at 409.

This Court has also consistently recognized the continued vitality of the police power doctrine, applying such precedent to bar takings claims where Federal law enforcement acted pursuant to seizure statutes and criminal laws to protect public safety. *Kam-Almaz v. United States*, 682 F.3d 1364, 1371-72 (Fed. Cir. 2012) (no taking where laptop seized at airport); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153-54 (Fed. Cir. 2008) (no taking where pharmaceuticals seized in criminal investigation); *Acadia Tech., Inc.*, 458 F.3d at 1333 (no taking

where counterfeit goods seized). In finding that no compensable takings existed, this Court has emphasized that "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." *AmeriSource*, 525 F.3d at 1153. Notably, in each of these decisions, this Court upheld the findings of the Court of Federal Claims that—pursuant to the police power—no taking existed, irrespective of whether the Government had physically seized the property, or rendered it worthless. *AmeriSource*, 525 F.3d at 1153-54; *Acadia*, 458 F.3d at 1333. Put simply, there is a fundamental difference between items that are taken for the public's use and items that are outlawed, and thus placed beyond the public's use. A claim against the Government may only attach to the former, as that is the only compensable taking claim envisioned in the Fifth Amendment.

In addition, other circuit courts have also relied upon the principles underlying the police-power doctrine. For example, in *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, the United States Court of Appeals for the Fourth Circuit rejected a takings claim where the state outlawed, and required the forfeiture of, video gaming machines. 493 F.3d 404, 406, 410 (4th Cir. 2007). In reaching its decision, the Fourth Circuit recognized that deviating from the principles underlying the police power decisions and awarding compensation for

the machines could cause "the most basic exercises of the police power [to] become the subject of ever more expense and litigation." *Id.* at 410.

The trial court's conclusion that the Final Rule does not affect a taking is further bolstered by considering the nature of Appellants' property interest in their bump stocks. No individual has a protected property interest in using dangerous products. For example, in *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (Fed. Cir. 1993), this Court rejected a takings claim brought by a firearms business whose permits to import semi-automatic rifles were revoked. In doing so, the Court compared the case to *Allied–General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988), emphasizing that "'the basic rule that is dispositive here is that as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public.'" *Mitchell Arms*, 7 F.3d at 217 (quoting *Allied-General*, 839 F.2d at 1576); *see Akins*, 82 Fed. Cl. at 624.

As set forth above, even if Congress had enacted a new statutory prohibition on bump stocks, the police power doctrine would preclude a taking here. But ATF explained in its Final Rule that Appellants' property interest in their bump stocks was always subject to Section 922(o)'s long-standing criminal prohibition against machine gun possession. *See A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014); *Acceptance Ins. Co., v. United States*, 583 F.3d 849,

857 (Fed. Cir. 2009) ("existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for the purposes of establishing a cognizable taking.") (quotation marks omitted); *Abrahim-Youri v. United States*, 139 F.3d 1462, 1468 (Fed. Cir. 1997) ("Certain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights.").

In sum, as the trial court properly held, Appellants' claim is foreclosed by precedent. Appx0008-0009. The Government action in this case—interpreting long-standing Federal criminal law regarding machine guns as prohibiting the possession of bump stocks—does not implicate the Takings Clause. By issuing the Final Rule, the Government exercised the core of its police powers to recognize the prohibition of a dangerous, contraband good. *See* Appx0009. As cases such as *Miller*, *Samuels*, *Akins*, and *Maryland Shall Issue* make clear, this result holds true regardless of whether the Government changes its view on the lawfulness of a particular product, or whether the Government recognized what may be considered to be a "new" prohibition.

B. Appellants' Attempts To Render The Police Power Doctrine Inapplicable To The Final Rule Fail

In their brief, Appellants launch two primary attacks on the trial court's correct conclusion that because the Government was acting within its authority to regulate dangerous goods no compensable taking occurred. First, Appellants unpersuasively attempt to distinguish the cases applying the police power doctrine and finding that no taking occurred. Second, Appellants erroneously urge that the D.C. Circuit's determination that the Final Rule was "legislative," makes the regulation a new prohibition, and renders the police power doctrine inapplicable. Both attacks fail.

1. Appellants' Attempts To Distinguish Police Power Precedent Fail

Appellants spend a significant portion of their brief unpersuasively attempting to distinguish the precedent that bars their takings claim. App. Br. 9-26.

Relying heavily on statements from the Supreme Court's decision in *Lucas v. South Carolina Council*, 505 U.S. 1003 (1992), Appellants imply that *Mugler* and *Miller* are no longer good law, and are "nothing more than the Court's early formulation of the police power justifying a regulatory diminution in value of property without compensation." App. Br. 11 (emphasis omitted). However, *Mugler* and *Miller* have never been overruled, and continue to be relied upon,

including by this Court in cases where the Government has seized property pursuant to its police power. *See Acadia Tech*, 458 F.3d at 1332-33.

In addition, the fact that the *Lucas* Court opined that the Government cannot shield itself from takings liability in all cases simply by stating that it is exercising the police power did not eliminate the long-standing doctrine that there are certain core police power actions that have been held to be, and must continue to be, non-compensable. This is especially the case where the property itself is inherently dangerous contraband. This fact distinguishes this case from, for example, *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (finding the Government's police power relevant to the *Penn Central* analysis where a subset of chickens and eggs were diseased). Indeed, the Supreme Court has never held that a statutory prohibition on dangerous personal property constitutes a taking. The Final Rule interpreted bump stocks to be machine guns—weapons that Congress deemed too dangerous for the public almost 35 years ago. The statements from *Lucas* simply do not implicate the exercise of the police power at issue here.

Appellants also attempt to distinguish *Mugler* and *Miller* by emphasizing that the plaintiffs in those cases did not lose all their property rights, including the tangible property itself, as a result of the government's actions. App. Br. 11-13. But, in a similar police power case, for example, the Supreme Court rejected a

claim under precisely those circumstances—where the plaintiff's alcohol, although lawfully acquired prior to Prohibition, was later seized without compensation. *Samuels v. McCardy*, 267 U.S. 188, 194, 197-99 (1925).

Likewise, Appellants attempt to limit *Acadia* and *AmeriSource* to the Government's enforcement of then-existing laws. App. Br. 15-18. But the rationale underlying those decisions is much broader than the view embraced by Appellants. In rejecting takings claims, *Acadia* and *AmeriSource* describe the police power doctrine in broad terms, focusing on the Government's efforts to protect the public by seizing personal property and enforcing criminal and seizure laws. *See AmeriSource Corp.*, 525 F.3d at 1153-54; *Acadia Tech* 458 F.3d at 1332-33. In those cases, this Court emphasized the statutory authority under which the Government was acting, and whether the Government's actions sought to protect the public. *See id*.

With respect to *Maryland Shall Issue* and *Holiday Amusement*, Appellants deem them to be wrongly decided cases involving state law bans on personal property. App. Br. 23-26. Instead, Appellants contend that *Duncan et al. v. Becerra*, 742 F. App'x 218, 222 (9th Cir. 2018), and *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002), are germane to the analysis if state law police power cases are considered. App. Br. 24-25. But *Duncan*, an unpublished decision on appeal, did not involve a ban on the possession of bump stocks. Instead, the case

involved a challenge to a state law banning the possession of large capacity magazines, and the primary focus of the lower court's decision was a holding that the statute should be enjoined because it violated the Second Amendment, an issue that does not exist in this case. *See Duncan et al. v. Becerra*, 265 F. Supp. 3d 1106, 1114-1134 (S.D. Cal. 2017). Likewise, dicta in *Silveira* that a grandfather clause for assault weapons that would permit owners to continue to possess them precluded the finding of a taking does not demonstrate that a taking would be found in the absence of such a clause.[10] *See Silveira*, 31 F.3d at 1092.

Appellants' attempts to write the police power doctrine out of existence fail.

2. Whether The Final Rule Is A Legislative Rule Is Not Material

Appellants next argue that even accepting the police power doctrine, it does not bar their takings claim because at the time of the Final Rule they lawfully owned their bump stocks. App. Br. 2, 7-8, 18-23. This argument lacks merit, and the trial court properly rejected it.

[10] Appellants further contend that "it is questionable whether the analysis of a state's police powers is applicable to federal exercise of police powers." App. Br. 23-24. To the extent Appellants are attempting to assert that the Federal Government lacks a police power, that argument is undeveloped and waived. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). Regardless, it is incorrect. The Federal Government acts pursuant to its police power when, acting pursuant to its enumerated powers, it acts to protect public safety. *See Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 n.17 (Fed. Cir. 1994).

Appellants acknowledge that in certain circumstances, this Court has determined that no taking has occurred when the Federal Government exercises its police power. App. Br. 15-16. They also appear to acknowledge that if the Final Rule were deemed to be an interpretive rule under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*., then the Takings Clause would not be implicated. App. Br. 20-21.[11] But, according to Appellants, because the D.C. Circuit in *Guedes et al. v. ATF et al.*, 920 F.3d 1 (D.C. Cir. 2019) (*per curiam*)[12] determined that the Final Rule was a legislative rule under the APA, the Final Rule constituted a new prohibition, and the trial court erred in applying the police power doctrine to property that was lawfully owned under the Government's prior interpretation of the statute. App. Br. 18-23.

Appellants are mistaken; the classification of the Final Rule as legislative or interpretive has no bearing on the takings analysis, and the distinction between

[11] The APA distinguishes between legislative rules and interpretive rules. As a general matter, an interpretive rule "advise[s] the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem. Hosp*., 514 U.S. 87, 99 (1995) (citation and quotation marks omitted). In contrast, a legislative rule is issued pursuant to an agency's statutory authority and has the force and effect of law. *PDR Network, LLC v. Carlton & Harris Chiropractic*, Inc., 139 S.Ct. 2051, 2055 (2019).

[12] In ruling on the appeal of a denial of a preliminary injunction enjoining the Final Rule, the Tenth Circuit also determined that the Final Rule was a legislative rule. *Aposhian et al v. Barr et al.*, --F.3d--, 2020 WL 2204198, at *6 (10th Cir. May 7, 2020).

legislative and interpretive fails to advance their position. Although the Government disagrees with the *Guedes* decision's holding that the Final Rule is legislative, it makes no difference for this case. Irrespective of whether it was legal to own a bump stock before the Final Rule, however, the proper focus of this Court's inquiry is on the action taken by the Government and its connection to the police power. Viewed either as a legislative or interpretive rule, the Government was acting pursuant to its statutory authority to interpret the prohibition on certain dangerous weapons under well-established statutory law; accordingly, the trial court properly found a connection to the police power more than sufficient to preclude a taking here. Appx0005-0006; Appx0008-0009; *see* Final Rule, 83 Fed. Reg. at 66,518-66,519. Nor is there any allegation suggesting that the Final Rule was actually pretext for the Government's acquisition of Appellants' bump stocks so that they could be used by the Government itself.

Thus, Appellants attempt to reframe the *Akins* case as relying upon the distinction between a legislative and interpretive rule fails. App. Br. 21-22. There is nothing in the *Akins* decision that suggests that the distinction had legal significance for the takings analysis.[13] Further, in addition to *Akins*, the cases

[13] Further, the Court should ignore as irrelevant Appellants' assertions that (1) *Akins* is not applicable because the Final Rule was a product of politics, and (2) there was no mechanical evaluation of the bump stocks banned in the Final Rule, App. Br. 20-21. Plaintiffs are required to litigate a takings claim on the assumption that the "action was both authorized and lawful." *Rith Energy, Inc. v. United*

relied on in the trial court firmly show that the Government's prohibition of a dangerous good does not effect a taking, irrespective of whether the good was "lawful" prior to its prohibition. For example, the district court in Maryland rejected the very argument Appellants continue to make—that "states cannot completely ban any item of personal property, no matter how dangerous, and no matter how compelling the state's interest in doing so, without compensating all individuals in the state who happen to already own it." *Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 411 (D. Md. 2018). That court explained that "[t]his theory would entail a radical curtailment of traditional state police powers, one that flies in the face of a long history of government prohibitions of hazardous contraband." *Id.* at 408-09. The same is true here. The Government did not engage in a taking when it issued the Final Rule.

Moreover, the necessary implication of Appellants' theory here is that the Government must compensate owners for the value of *any* property the possession of which is deemed to be unlawful, no matter how harmful. This would be the case even under the Controlled Substances Act, which makes it unlawful to possess previously lawful substances, *See* Pub. L. No. 91-513, tit. II, 84 Stat. 1242 (1970)

States, 247 F.3d 1355, 1366 (Fed. Cir. 2001) *see Del-Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998). Appellants may not challenge the validity of the regulation here.

(codified as amended at 21 U.S.C. §§ 801–904, and delegates to the Attorney General the authority to ban new substances, *id.* § 811(a)). The fact, for example, that MDMA, also known as ecstasy, was lawful prior to its listing as a controlled substance in the 1980's, plainly does not mean that the Government effected a compensable taking when it banned possession of the drug. *See United States v. Forrester*, 616 F.3d 929, 935 (9th Cir. 2010) (noting MDMA's classification date as a Schedule I drug). Nor does the Government engage in a taking if in the future it were to prohibit the newest version of synthetic fentanyl that does not currently exist.

Similarly, on December 19, 1988, the Consumer Product Safety Commission banned the sale of all lawn darts in the United States, after they had been responsible for the deaths of three children.[14] Appellants proffer a reading of the Constitution that would require compensation to the manufacturers for their entire stock of these deadly toys. Courts, however, have concluded that these core exercises of police powers do not implicate the Fifth Amendment's Takings Clause. *See supra* Section II.A.

[14] *See* https://www.cpsc.gov/content/following-recent-injury-cpsc-reissues-warning-lawn-darts-are-banned-and-should-be-destroyed (last visited May 21, 2020)

III. The Final Rule Is Not A Taking Under *Penn Central* Or Any *Per Se* Test

Appellants and Amicus Maryland Shall Issue, Inc. identify no case awarding relief for a takings claim under analogous circumstances. Instead, they attempt to shoehorn the Final Rule into being (1) a *per se* physical taking under *Horne*; (2) and a *per se* regulatory taking under *Lucas*. As set forth above, the police power doctrine bars Appellant's takings claims prior to the application of any takings test. But even when viewed through the lens of the *per se* tests identified in *Horne* and *Lucas*, Appellants' claims fail.

If it were appropriate to apply any takings test it would be the multi-factor test identified in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Appellants have waived any argument with regard to application of *Penn Central*, and regardless, no taking exists if it were to be applied.

A. The Final Rule Is Not A *Per Se* Physical Taking

Appellants and the Amicus contend that the Final Rule constitutes a *per se* physical taking of their bump stocks and that, therefore, the Government has a categorical duty to pay compensation regardless of any Government interests in taking the weapons off the street. App. Br. 26-32; Am. Br. 23-24. Appellants ignore the fact that they never even pleaded a physical takings claim in their amended complaint, a flaw that should defeat any application of a physical taking theory here. Regardless, in making their physical takings argument, they (1)

misinterpret Supreme Court precedent that was not addressing dangerous contraband, and (2) mistakenly equate interpretation of a statutory prohibition on possessing certain personal property with a physical invasion or appropriation.

In the Final Rule, the Government clarified that bump stocks are machine guns, and therefore illegal to possess. Final Rule, 83 Fed. Reg. at 66,514-16, 66,553-54. At bottom, that is the character of the Government's action. Under the Final Rule, "current possessors" of bump stocks were directed to "undertake destruction of the devices" or "abandon [them] at the nearest ATF office," *id.* at 66,549 or face liability under the statute. But, once again, that is the natural result of the fact that bump stocks cannot lawfully be possessed because they are machine guns under Federal law – statutory law that has barred the possession of all machine guns acquired after 1986. Indeed, the nature of the Government's action would have been no different had ATF originally stated that the bump stocks fell within the scope of § 922(o), or if Congress had so stated in 1986, circumstances that Appellants appear to concede would not constitute a taking.

According to Appellants, the Final Rule "actually *physically* dispossessed [them] of the tangible property itself." App. Br. 26-27 (emphasis in original). This is the case, they say, even though the Final Rule did not mandate that the Government physically *invade* Appellants' property, nor did it require the physical *appropriation* of Appellants' bump stocks for the Government's use. *See Lingle v.*

Chevron U.S.A. Inc., 544 U.S. 528, 537-38 (2005); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951). Appellants contend that the Final Rule constituted the equivalent of a practical ouster of their property, and then identify no cases holding that a statutory prohibition on the possession of dangerous property, or the Government's interpretation of such a prohibition, has ever been treated as such. App. Br. 27-32.

In support of their argument, Appellants incorrectly rely upon the Supreme Court's decisions in *Loretto* v. *Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982), and *Horne v. Department of Agriculture*, 135 S.Ct. 2419 (2015). App. Br. 29-32.

The *Loretto* decision says nothing about regulating or prohibiting the possession of inherently dangerous property. Instead, *Loretto* involved a challenge to a state law requiring a property owner to install cable television facilities on the property owner's apartment building. The Court found a *per se* physical taking based upon the physical invasion of the landlord's real property.

The Court in *Horne* applied *Loretto's* physical takings analysis to personal property, and found that a physical taking occurred because the Government had engaged in a "physical appropriation" of raisins. *Id*. at 2427. In finding a "clear physical taking," the Court focused on the fact that "raisins are transferred from the growers to the Government," and that "[t]itle to the raisins passes" to the

Government. *Id*. at 2428. Here, in contrast, the Government did not require that Appellants transfer title in their bump stocks to the Government, and has not otherwise physically invaded Appellants' property. *See id*. at 2428 ("The Constitution, however, is concerned with means as well as ends.").

Appellants contend that *Horne* makes no exception from categorical takings with regard to the Government's exercise of its police powers. App. Br. 30-31. But that contention fails to advance their claim. *Horne* does not address, and cannot therefore be read to preclude, the very argument that we have raised: (1) that recognizing the criminal prohibition on bump stocks is a valid exercise of the Government's police power, and (2) that such a prohibition does not present a cognizable takings claim. Appellants proceed as if the raisins at issue in *Horne* were banned because the raisins were dangerous street drugs. That framing bears no resemblance to the facts of that case.

Indeed, as explained above, even the physical seizure of highly regulated goods pursuant to the police power has never been thought to constitute a *per se* taking. *See 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). In each of these cases, even though the Government *physically* took possession of the plaintiffs' property, the Court found no cognizable takings claim. These cases

demonstrate that some core exercises of the police power doctrine do not yield even in the face of the Government taking physical possession of property.

B. Appellants Fail To State A *Per Se* Regulatory Takings Claim Under *Lucas*

Appellants and the Amicus contend that they have demonstrated a *Lucas* categorical regulatory taking, which Appellants say occurs "when a regulation deprives land of all economically beneficial use." App. Br. 33; Am. Br. 26-30. Not so. Appellants contend that this same analysis must occur with respect to personal property. App. Br. 33-34. Appellants' contention finds no basis in law or logic.

The Supreme Court has explained that the categorical takings analysis applies only in the "relatively rare" and "extraordinary circumstance when no productive or economically beneficial *use of land* is permitted." *Lucas*, 505 U.S. at 1017-18 (emphasis added). Although the Supreme Court has had reason to consider *Lucas* on multiple occasions, it has never applied the rule to any type of property rights other than real property. *See Ark. Game & Fish Com'n v. United States*, 568 U.S. 23, 31-32 (2012) (citing *Penn Central*, 438 U.S. at 124). This makes sense. A regulation that deprives an owner of all use of his or her land is an exceptional circumstance because, "while an owner of personal property 'ought to be aware of the possibility that new regulation might even render his property economically worthless,' such an 'implied limitation' was not reasonable in the

case of land." *Horne v. Dept. of Agric.*, 135 S. Ct. 2419, 2427 (2015) (quoting *Lucas*, 505 U.S. at 1027-28).

Although this Court has applied the *Lucas* analysis to certain personal property, s*ee Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1196-98 (Fed. Cir. 2004) (chickens); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1353-55 (Fed. Cir. 2003) (barges), contrary to Appellants' suggestion, it has never announced a blanket rule that *Lucas* applies to all personal property. More importantly, this Court has not applied the *Lucas* analysis to the enforcement of criminal or seizure laws. This is the case even where personal property may become worthless as a result of the Government's action. *See Supra* Section II.A.; *AmeriSource*, 525 F.3d at 1151, 1154 (finding no taking where the drugs seized passed their expiration date and became worthless). *Lucas* also does not apply to the regulation of personal property of the type involved in this case. The Supreme Court has never held that a ban on possessing dangerous personal property constitutes a *per se* taking under *Lucas* (or any *per se* test).

A&D Auto is also not to the contrary. In that decision, in evaluating whether *Lucas* would be applied to certain intangible property, this Court noted that *Lucas* had been applied to the factual situations in *Rose Acre* and *Maritrans* "on occasion," but stopped short of announcing or recognizing any sort of blanket rule.

See A&D Auto Sales, Inc. v. United States, 748 F.3d 1142, 1151 (Fed. Cir. 2014).[15] Although machine guns and chickens that may or may not be diseased may both constitute tangible personal property, they are plainly not comparable in terms of the Government's police power. Any consideration of the application of *Lucas* to the disposition of Appellants' bump stocks should reflect this obvious difference.

Regardless, even if *Lucas* were to apply, the *Lucas* Court recognized that the owner of personal property "ought to be aware of the possibility that new regulation might even render his property economically worthless." 505 U.S. at 1027-28. Appellants have long had notice that a regulation might render their property worthless. This principle is enhanced by the fact that Appellants' property consists of firearms designed to increase the rate of fire of semi-automatic weapons. In a world where machine guns have long been outlawed, Appellants efforts to turn legal weapons into machine guns was always a risky venture – ultimately, after obtaining sufficient information, the ATF interpreted bump stocks to constitute machine guns under statutory law, and therefore too dangerous for civilians to possess.

In their opening brief, Appellants contend that in differentiating land from personal property, *Lucas* discussed the state's "traditionally high control over

[15] The *A&D* Court also specifically recognized that a number of other circuits specifically do not apply *Lucas* outside of the context of takings of real property. 748 F.3d at 1151.

commercial dealings," App. Br. 34 (emphasis in original), and they note that the Supreme Court in *Lucas* did not point out that a new regulation "might demand the surrender or destruction of his property." App. Br. 34. Based upon this language, Appellants contend that "[p]rivate ownership of tangible property is not commercial dealing," and that therefore the language the trial court identified in *Lucas* is inapplicable to bump stock possession, as opposed to sale or manufacture. *Id.*

This contention wholly fails to advance Appellants' claim: Appellants in this case include two commercial dealers and retailers with over 75,000 bump stocks; the contention that their bump stocks are not the product of commercial dealing is therefore not serious. Appx0039. In reality, bump stocks are exactly the type of personal property recognized by *Lucas* as subject to Government regulation, even to the point of rendering them valueless—tangible commercial personal property in a highly regulated environment.

Appellants recognize that, under *Lucas*, background principles of law from independent sources affect the application of *Lucas' per se* rule. App. Br. 15 n.5. But, Appellants contend that bump stocks have never been determined to be nuisances under state law. *Id.* Although it is true that we have not identified state nuisance law as prohibiting bump stocks, it is well established that background principles of Federal law may also inhere in the title of property. *A&D Auto,* 748

F.3d at 1152. And here, as previously stated, Section 922(o)—the statutory authority that ultimately forbids the possession of Appellants' machine guns—has existed for almost 35 years.

Finally, *Andrus v. Allard*, 444 U.S. 51 (1979), does not indicate that *Lucas* applies here. App. Br. 34-35; Am. Br. 28-31. In *Andrus*, the Supreme Court upheld the Department of the Interior's regulations prohibiting the sale of eagle parts. The Court in *Andrus* noted that, under the given regulatory takings analysis, it was crucial that individuals were permitted to continue to possess the bird parts already owned. *Andrus*, 444 U.S. at 66. The *Andrus* case at no point holds or suggests that a prohibition on possessing personal property must constitute a *per se* taking; nor is it fairly read as dictating the rule set forth in *Lucas* over a decade later. *Andrus* did not address whether continued possession would be an important factor in addressing the type of criminal prohibition at issue here. Nor did *Andrus* consider the sort of dangerous personal property addressed by the Final Rule.

Accordingly, the Court should reject Appellants' argument that their takings claims should be evaluated under a *per se* analysis.

C. The Final Rule Is Not A Taking Under *Penn Central*

Even if the Court concludes that appellants' takings claims are not precluded by the police power doctrine – a position with which we disagree – the multi-factor test identified in *Penn Central Transportation Co. v. City of New York*, 438 U.S.

104, 124 (1978), makes clear that no taking occurred here. Under *Penn Central*, a court considers: (1) the character of the Government's actions, (2) the property holder's investment backed expectations, and (3) the economic impact on the property holder. *Id*.

For decades, *Penn Central* has been the default test applied to takings claims, even in situations where plaintiffs contend that a *per se* taking has occurred. *See Ark. Game & Fish Com'n v. United States*, 568 U.S. 23, 31-32 (2012); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 332-33 (2002); *Alimanestianu v. United States*, 888 F.3d 1374, 1383 (Fed. Cir. 2018). Given the heightened interest in keeping machine guns out of the hands of the public, failing to employ a takings framework that even acknowledges the Government's interest in the equation makes little sense, and is certainly not mandated by precedent.

Except a single footnote referencing the dissent in *Horne*, App. Br. 37, Appellants' brief offers no details as to how they might satisfy the *Penn Central* test. They have, thus, waived any such argument, *see SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). Regardless, a proper *Penn Central* analysis demonstrates that no taking occurred here.

With respect to the character of the Government's actions, it is well established that a restriction "directed at the protection of public health and safety .

. . is the type of regulation in which the private interest has traditionally been most confined and governments are given the greatest leeway to act without the need to compensate those affected by their actions." *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1281 (Fed. Cir. 2009); *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489-90 (1987). On its face, the Final Rule protects public safety by interpreting bump stocks – weapons used in the Las Vegas massacre – to constitute machine guns that Congress long ago deemed criminal contraband. It is not reasonably disputed that Federal firearms laws, including the NFA and the GCA, sit upon the bedrock foundation of protecting the public and law enforcement officers from prohibited firearms. The Final Rule interprets those pre-existing Federal statutes, and protects the public from the dangers posed by prohibited machine guns. *See* Final Rule, 83 Fed. Reg. at 66,520 ("[T]his rule reflects the public safety goals of the [National Firearms Act] and [Gun Control Act.]").

In addition, Appellants had no reasonable expectations that their property would go unregulated. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004). An individual's "reasonable investment-backed expectations are greatly reduced in a highly regulated field," *Branch v. United States*, 69 F.3d 1571, 1581 (Fed. Cir. 1995), such as the firearms industry. *See Mitchell Arms, Inc. v. U.S.*, 7 F.3d 212,

216 (Fed. Cir. 1993). Further, Appellants were fully aware that their bump stocks might be considered machine guns within the meaning of the statute and that, at a minimum, the devices tested the border of the statutory definition. The *Akins* case – where formerly permitted bump stocks were outlawed – prevents the Appellants from arguing the converse.

In their amended complaint, Appellants fail to make any specific allegations as to the circumstances of their acquisition of bump stocks, and for example, how and when RW Arms, Ltd. acquired over 70,000 bump stocks. Appx0039. Instead, Appellants allege that they relied on ATF classification letters to other applicants as providing their investment-backed expectations. Appx0038; Appx0041-0042. But, although such letters "may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms laws," the "classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *See* Bureau of Alcohol, Tobacco, Firearms and Explosives, National Firearms Act Handbook § 7.2.4.1.

On appeal, Appellants seemingly concede that they have no reasonable investment-backed expectations here: only a cursory mention is made of these classification letters and their significance. As the Supreme Court has made clear, "an owner of personal property 'ought to be aware of the possibility that new

regulation might even render his property economically worthless.'" *See Lucas*, 505 U.S. at 1027-28. Quite simply, ATF's prior classification letters concerning bump stocks did not provide Appellants with property rights; the letters were subject to change, had changed in the past, and did not protect the appellants from long-standing Federal firearms laws. *See Akins*, 82 Fed. Cl. at 623-24.

Because Appellants have failed to sufficiently allege two of the *Penn Central* factors, the Court should affirm the dismissal of the Appellants' complaint.

CONCLUSION

For these reasons, this Court should affirm the trial court's decision.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR
Director

/s/ L. Misha Preheim
L. MISHA PREHEIM
Assistant Director

/s/ Nathanael B. Yale
NATHANAEL B. YALE
Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone:(202) 616-0464
Facsimile:(202) 353-0461

Attorneys for Defendant-Appellee

May 22, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Respondent-Appellee's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This Brief was printed in Times New Roman font at 14 points. According to the word-count calculated by Microsoft Word, this brief contains a total of 9,251 words, which is within the 14,000 word limit.

/s/ Nathanael B. Yale
NATHANAEL B. YALE