No. 22-25

In the Supreme Court of the United States

ROY LYNN MCCUTCHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
STEVEN H. HAZEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly determined that no compensable taking occurred when petitioners destroyed or otherwise disposed of their bump stocks—devices which permit semiautomatic rifles to fire continuously with a single pull of the trigger—in light of a 2018 rulemaking by the Bureau of Alcohol, Tobacco, Firearms and Explosives concluding that bump stocks are machineguns as defined by federal statute and thus are unlawful to possess.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 22-25

ROY LYNN MCCUTCHEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The petition for a writ of certiorari was filed under Rule 12.4 of the Rules of this Court, seeking review of two judgments by the United States Court of Appeals for the Federal Circuit. Pet. 1 n.1.

The opinion of the court of appeals in *McCutchen* v. *United States* (Pet. App. 38-89) is reported at 14 F.4th 1355. The opinion of the Court of Federal Claims (Pet. App. 92-124) is reported at 145 Fed. Cl. 42.

The opinion of the court of appeals in *Modern Sportsman, LLC* v. *United States* (Pet. App. 1-4) is not published in the Federal Reporter but is available at 2021 WL 4486419. The opinion of the Court of Federal Claims (Pet. App. 5-23) is reported at 145 Fed. Cl. 575.

JURISDICTION

The judgments of the court of appeals were entered on October 1, 2021. Petitions for rehearing were denied

in both cases on February 2, 2022 (Pet. App. 28-29, 127-128). On April 7 and 12, 2022, the Chief Justice granted applications in the respective cases to extend the time within which to file petitions for writs of certiorari to and including July 2, 2022 (a Saturday preceding the federal holiday on Monday, July 4, 2022). The petition was filed on July 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Firearms Act, 26 U.S.C. 5801 *et seq.*, defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. 5845(b). Since 1968, the term has also been defined to encompass parts that can be used to convert a weapon into a machinegun. See Gun Control Act of 1968, Pub. L. No. 90-618, Tit. II, sec. 201, § 5845(b), 82 Stat. 1231. A "machinegun" thus includes "the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." 26 U.S.C. 5845(b).

Congress first regulated the sale and possession of machineguns in 1934 as part of the internal revenue laws. See Act of June 26, 1934, ch. 757, 48 Stat. 1236. In 1986, Congress amended Title 18 of the U.S. Code to prohibit the sale and possession of new machineguns, making it a crime "to transfer or possess a machinegun" unless a governmental entity is involved in the transfer or possession. Firearms Owners' Protection Act (FOPA),

Pub. L. No. 99-308, § 102(9), 100 Stat. 452-453 (18 U.S.C. 922(*o*)(1)). In enacting that criminal prohibition, Congress incorporated the definition of "machinegun" from the National Firearms Act. FOPA § 101(6), 100 Stat. 450 (18 U.S.C. 921(a)(24)).

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regularly issues guidance about whether particular weapons or devices constitute machineguns as defined above. In particular, ATF encourages manufacturers to submit novel weapons or devices to the agency, on a voluntary basis, for ATF to assess whether the weapons or devices should be classified as machineguns or other registered firearms under the National Firearms Act. See ATF, U.S. Dep't of Justice, *National Firearms Act Handbook* 41 (Apr. 2009) (*NFA Handbook*). The classification process enables ATF to provide manufacturers with "the agency's official position concerning the status of the firearms under Federal firearms laws," to assist manufacturers in "avoid[ing] an unintended classification and violations of the law." *Ibid.*; cf. 26 U.S.C. 5841(c) (requiring manufacturers to "obtain authorization" before making a covered firearm and to register "the manufacture of a firearm"). ATF has made clear, however, that "classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." *NFA Handbook* 41.

2. a. In 2004, a federal ban on certain semiautomatic "assault weapons" expired.[1] Since then, ATF has received a growing number of classification requests

---

[1] 18 U.S.C. 921(a)(30), 922(v) (2000). Those provisions had been enacted in 1994 with a ten-year sunset provision. See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, Tit. XI, Subtit. A, §§ 110102, 110105, 108 Stat. 1996-1998, 2000.

from inventors and manufacturers seeking to produce "devices that permit shooters to use semiautomatic rifles to replicate automatic fire," but "without converting these rifles into 'machineguns.'" 83 Fed. Reg. 66,514, 66,515-66,516 (Dec. 26, 2018). Whether such devices fall within the statutory definition of a "machinegun" turns on whether they allow a shooter to fire "automatically more than one shot * * * by a single function of the trigger." 26 U.S.C. 5845(b).

One such type of device is generally referred to as a "bump stock." ATF first encountered bump stocks in 2002, when it received a classification request for the "Akins Accelerator." 83 Fed. Reg. at 66,517. The Akins Accelerator, which attached to a standard semiautomatic rifle, used a spring to harness the recoil energy of each shot, causing "the firearm to cycle back and forth, impacting the trigger finger" repeatedly after the first pull of the trigger. *Ibid.* Thus, by pulling the trigger once, the shooter "initiated an automatic firing sequence" that was advertised as firing "approximately 650 rounds per minute." *Ibid.*

ATF initially declined to classify the Akins Accelerator as a machinegun because the agency "interpreted the statutory term 'single function of the trigger' to refer to a single movement of the trigger." 83 Fed. Reg. at 66,517. In 2006, however, ATF revisited that determination and concluded that "the best interpretation of the phrase 'single function of the trigger' includes a 'single pull of the trigger.'" *Ibid.* The agency explained that the Akins Accelerator created "a weapon that 'with a single pull of the trigger initiates an automatic firing cycle that continues until the finger is released, the weapon malfunctions, or the ammunition supply is exhausted.'" *Ibid.* (brackets and citation omitted). Ac-

cordingly, ATF reclassified the device as a machinegun under the statute, see *ibid.*, and the Eleventh Circuit later upheld the agency's decision, see *Akins* v. *United States*, 312 Fed. Appx. 197, 200-201 (per curiam), cert. denied, 557 U.S. 942 (2009).

In 2006, in anticipation of similar future classification requests, ATF issued a public ruling announcing its interpretation of the phrase "single function of the trigger" in the statutory definition of a machinegun. ATF Ruling 2006-2, at 2 (Dec. 13, 2006), perma.cc/PNL8-8NQV. ATF stated that, after reviewing the text of the National Firearms Act and its history, the agency had concluded that the phrase "single function of the trigger" includes a "single pull of the trigger." *Ibid.* When ATF reclassified the Akins Accelerator, however, it also advised owners of the device that "removal and disposal of the internal spring * * * would render the device a non-machinegun under the statutory definition," on the theory that, without the spring, the device would no longer operate "automatically." 83 Fed. Reg. at 66,517.

ATF soon received classification requests for bump stock devices that did not include internal springs. Those bump stocks replace the standard stock on an ordinary semiautomatic firearm. Unlike a regular stock, a bump stock channels the recoil from the first shot into a defined path, allowing the weapon contained within the stock to slide back a short distance—approximately an inch and a half—and shifting the trigger away from the shooter's trigger finger. 83 Fed. Reg. at 66,532. This separation allows the firing mechanism to reset. *Ibid.* When the shooter maintains constant forward pressure on the weapon's barrel-shroud or fore-grip, the weapon slides back along the bump stock, causing the trigger to "bump" the shooter's stationary finger

and fire another bullet. *Ibid.* In a series of classification decisions between 2008 and 2017, ATF concluded that such devices did not enable a gun to fire "automatically" and were therefore not "machineguns." *Id.* at 66,517.

b. In 2017, a shooter used semiautomatic weapons equipped with bump stock devices to murder 58 people and wound 500 more in Las Vegas. 83 Fed. Reg. at 66,516. The bump stock devices allowed the shooter to rapidly fire "several hundred rounds of ammunition" into a large crowd attending an outdoor concert. *Ibid.* The shooting prompted ATF to seek public comment on "the scope and nature of the market for bump stock type devices." 82 Fed. Reg. 60,929, 60,930 (Dec. 26, 2017).

After the comment period had ended, the Attorney General published a notice of proposed rulemaking regarding amendments to the definition of "machinegun" in three ATF regulations. 83 Fed. Reg. 13,442, 13,457 (Mar. 29, 2018); see 27 C.F.R. 447.11, 478.11, and 479.11. The notice stated that ATF's post-2006 classification letters addressing bump stock devices without internal springs "did not reflect the best interpretation of the term 'automatically' as used in the definition of 'machinegun.'" 83 Fed. Reg. at 13,447. The notice further stated that ATF had "applied different understandings of the term 'automatically'" over time in reviewing bump stock devices and that the agency had "authority to 'reconsider and rectify' potential classification errors." *Id.* at 13,445-13,446 (quoting *Akins*, 312 Fed. Appx. at 200); see *id.* at 13,447 (observing that ATF's classifications between 2008 and 2017 "did not reflect the best interpretation of the term 'automatically'"). The notice proposed to "clarify that all bump-stock-type devices are 'machineguns'" under the applicable statu-

tory definitions. *Id.* at 13,443. The notice elicited more than 186,000 comments. See 83 Fed. Reg. at 66,519.

ATF published a final rule on December 26, 2018. 83 Fed. Reg. at 66,514. The final rule explained that, upon review, the agency had concluded that bump stocks are machineguns as defined by federal law. Bump stocks enable a shooter to engage in a firing sequence that is "automatic." *Id.* at 66,531. As the shooter's trigger finger remains stationary on the ledge provided by the design of the device and the shooter applies constant forward pressure with the non-trigger hand on the barrel-shroud or fore-grip of the weapon, the firearm's recoil energy is directed into a continuous back-and-forth cycle without "the need for the shooter to manually capture, harness, or otherwise utilize this energy to fire additional rounds." *Id.* at 66,532. A bump stock thus constitutes a "self-regulating" or "self-acting" mechanism that allows the shooter to attain continuous firing after a single pull of the trigger and, accordingly, is a machinegun. *Ibid.*; see *id.* at 66,514, 66,518.

ATF noted, in response to comments asserting that the proposed rule would "violate the Takings Clause of the Fifth Amendment," 83 Fed. Reg. at 66,523, that "classifying bump-stock-type devices as machineguns * * * does not have the nature of a taking," *id.* at 66,524. The agency explained that a "restriction on 'contraband or noxious goods' and dangerous articles by the government to protect public safety and welfare 'has not been regarded as a taking for public use for which compensation must be paid.'" *Ibid.* (citation omitted). By way of illustration, ATF noted that in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), this Court had "rejected a distiller's argument that a State constitutional amendment prohibiting the manufacture and sale of intoxicating liquors

was an unconstitutional taking," 83 Fed. Reg. at 66,524, and the Court of Federal Claims had likewise rejected takings claims concerning the Akins Accelerator, *ibid.* (citing *Akins* v. *United States*, 82 Fed. Cl. 619, 623-624 (2008)).

Consistent with the amended regulations, ATF rescinded its prior letters concluding that certain bump stocks were not machineguns. See 83 Fed. Reg. at 66,514, 66,523, 66,530-66,531. The agency also instructed "[c]urrent possessors" of bump stocks to dispose of the devices by either "undertak[ing] destruction of the[m]" or "abandon[ing] [them] at the nearest ATF office." *Id.* at 66,530.

3. Petitioners are two sets of former bump stock owners who filed suit in the Court of Federal Claims after ATF's final rule, asserting that the rule effected a taking of their bump stocks and seeking compensation. The two suits proceeded before different judges, both of whom dismissed the respective complaints for failure to state a claim, and both sets of plaintiffs appealed. The court of appeals affirmed.

a. In *McCutchen* v. *United States*, an individual and a federally licensed firearms dealer brought a putative class action asserting that "the ATF rule * * * effected a 'taking' of their" bump stock devices. Pet. App. 94 (citation omitted). The complaint was filed the day ATF published the final rule. See *id.* at 130. During the litigation, the plaintiffs "complied with the final rule by destroying all of the bump-stock devices in their possession." *Id.* at 94.

The Court of Federal Claims dismissed the complaint. Pet. App. 92-124. As relevant here, the court reasoned that "it is well established that there is no taking for 'public use' where the government acts pursuant

to its police power, i.e. where it criminalizes or otherwise outlaws the use or possession of property that presents a danger to the public health and safety." *Id.* at 108; see *id.* at 108-109 (citing several of this Court's cases, including *Mugler* v. *Kansas*, *supra*). Applying that principle, the court determined that "[b]anning the possession" of machineguns, including bump stocks, and "requiring the[] owners * * * of such tools of war" to divest themselves of the devices represented a "paradigmatic example" of an exercise of the government's authority to prohibit dangerous property without effecting a compensable taking. *Id.* at 113.

The court of appeals affirmed on alternative grounds, with Judge Wallach concurring in the result. Pet. App. 38-89. The court determined that the *McCutchen* plaintiffs lacked any compensable property right in "continued possession or transferability of their bump-stock-type devices," given the "valid preexisting federal-law limitations" on their title. *Id.* at 57; see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1029-1030 (1992) (explaining that the government generally does not effect a taking when it makes "explicit" limitations that already "inhere[d] in the [property owner's] title" under any "background principles" limiting property rights, such as nuisance law). The court explained that any bump stock owners acquired those devices after Congress had already enacted a "statutory prohibition on possession or transfer of 'machineguns.'" Pet. App. 56 (citation omitted); see *id.* at 58. The court further explained that, for purposes of their takings claims, the plaintiffs "accept[ed]" that the ATF final rule was "an authorized and legally valid interpretation of the statutory prohibition." *Id.* at 59. The court then posited that a valid agency rule interpreting the statute might rep-

resent any of three possibilities: an interpretation that the statute itself unambiguously requires; the best interpretation of the statute; or a reasonable interpretation of an ambiguous statutory term entitled to deference under the *Chevron* framework. See *id.* at 59-60; see also *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984).

The court of appeals found it unnecessary to situate ATF's final rule in one of those three categories because it concluded that the plaintiffs' takings claims would fail under any of them. Pet. App. 60. The court viewed the takings analysis as "particularly simple" if the rule fell into either of the first two categories. *Ibid.* In those circumstances, the court explained, bump stock owners "never had a property right against government assertion of the duty to destroy the devices at issue or to surrender them," *id.* at 61, because the federal prohibition on machineguns always operated to limit their putative property rights. The court reasoned that the result would be the same even if ATF's final rule were viewed instead as adopting a reasonable interpretation of an ambiguous statutory term. *Id.* at 61-63. In that scenario, ATF's authority to promulgate the concededly valid final rule was itself a "preexisting limitation on [the plaintiffs'] title" when they acquired their bump stocks. *Id.* at 62.

Judge Wallach concurred in the result. Pet. App. 69-89. He would have affirmed on the same theory that the Court of Federal Claims had adopted—namely, that "the prohibition of dangerous and unusual weapons, and the enforcement of that prohibition through the criminal laws, 'is the kind of exercise of the police power that has repeatedly been treated as legitimate even in the

absence of compensation.'" *Id.* at 81-82 (citation omitted).

b. In *Modern Sportsman, LLC* v. *United States*, a second federally licensed firearms dealer asserted that ATF's final rule effected a taking of the dealer's bump stock devices. Pet. App. 32. As in *McCutchen*, the Court of Federal Claims dismissed the complaint on the ground that the prohibition on machineguns, including bump stocks, is an exercise of the government's authority to prohibit dangerous property without effecting a compensable taking. *Id.* at 5-23. The plaintiff appealed, and the court of appeals consolidated the appeal with the then-pending appeal in *McCutchen* for argument. 20-1107 C.A. Order 1 (Nov. 2, 2020). On the same day the Federal Circuit issued its published decision affirming in *McCutchen*, it issued an unpublished decision affirming in *Modern Sportsman* "[f]or the same reasons." Pet. App. 3. Judge Wallach concurred in the result for the reasons stated in his concurring opinion in *McCutchen*. *Id.* at 4.

c. The court of appeals denied petitions for rehearing en banc without noted dissent. Pet. App. 26-29, 127-128.

ARGUMENT

Petitioners are former owners of bump stock devices who contend (Pet. 14-17) that a compensable taking of their property occurred when ATF issued a final rule interpreting the statutory term "machinegun" to encompass such devices, which permit a semiautomatic rifle to fire continuously at rates of hundreds of bullets per minute with a single pull of the trigger. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. ATF correctly concluded

in its 2018 interpretive rule that bump stocks are "machinegun[s]" as defined by the National Firearms Act. 26 U.S.C. 5845(b). Since 1984, Congress has generally prohibited the possession of such devices, and giving effect to that pre-existing limitation on petitioners' asserted property rights does not constitute a taking. Even setting aside the pre-existing statutory limitation, the government may prohibit the possession of property "injurious to the health * * * or safety of the community," such as machineguns, addictive drugs, or other contraband, without effecting a taking. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 489 (1987) (citation omitted). Either way, petitioners' takings claims were properly rejected, and petitioners identify no persuasive basis for further review. This Court recently denied a petition for a writ of certiorari seeking review of a similar takings claim involving a state prohibition on bump stocks. *Maryland Shall Issue, Inc.* v. *Hogan*, 141 S. Ct. 2595 (2021) (No. 20-855). The same course is warranted here.

1. The lower courts correctly dismissed petitioners' takings claims. As the Court of Federal Claims recognized, this Court's precedent makes clear that a sovereign may protect the public by requiring the destruction of dangerous or injurious property without effecting a taking of that property. See Pet. App. 19-23, 108-114. And as the court of appeals held, petitioners' claims may also be rejected on the "related" ground that any state-law property rights that petitioners may have had in their bump stocks were always qualified by the pre-existing federal statutory ban on machineguns. *Id.* at 41.

a. This Court has long held that some laws enacted to protect the public do not cause compensable takings

even if they result in the destruction of private property or its diminution in value. The seminal case, *Mugler* v. *Kansas*, 123 U.S. 623 (1887), concerned a state law banning the manufacture or sale of liquor. In rejecting a takings claim brought by a distillery owner, the Court explained that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Id.* at 665. The Court further explained that 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." *Id.* at 668.

The Court later relied on that principle to hold that a State was not required to compensate owners of cedar trees for the value of trees that the State had ordered destroyed to prevent the spread of a disease that threatened local apple orchards. *Miller* v. *Schoene*, 276 U.S. 272, 279-280 (1928). "[W]here the public interest is involved," the Court observed, "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 every exercise of the police power which affects property." *Ibid.* Thus, although laws requiring the "destruction of diseased cattle, trees, etc., to prevent contagion" may "injuriously affect the value of or destroy property," those public-safety measures do not trigger the Fifth Amendment's Takings Clause because they are not takings of property for public use. *Omnia Commercial Co.* v. *United States*, 261 U.S. 502, 508-509 (1923); see, *e.g.*, *Bennis* v. *Michigan*, 516 U.S. 442, 452-453 (1996) (holding that a lawful forfeiture of property used to commit a crime does not constitute a taking); *Bowditch* v. *Boston*, 101 U.S. 16, 18 (1880) (ex-

plaining that city was not required to pay compensation for destroying private property to prevent a fire from spreading).

Those and other precedents confirm that a sovereign may prohibit the possession, or compel the destruction, of property that is "injurious" to the "safety of the community" without effecting a compensable taking. *Keystone Bituminous Coal*, 480 U.S. at 489 (quoting *Mugler*, 123 U.S. at 668). And one type of prohibition that has "'repeatedly been treated as legitimate even in the absence of compensation'" is "the prohibition of dangerous and unusual weapons." Pet. App. 81-82 (Wallach, J., concurring in the result) (citation omitted). Indeed, a long "historical tradition" exists of public authorities limiting the possession of "'dangerous and unusual weapons.'" *District of Columbia* v. *Heller*, 554 U.S. 570, 627 (2008) (citation omitted); see *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2143 (2022). As particularly relevant here, Congress has limited the sale or possession of machineguns for decades because of their "destructive potential" and their propensity to "exacerbat[e] * * * serious crime." *Guedes* v. *ATF*, 45 F.4th 306, 316 (D.C. Cir. 2022).

Like other machineguns, semiautomatic rifles modified with bump stocks "present a heightened capacity for lethality." *Guedes*, 45 F.4th at 316. The whole purpose and design of bump stocks is to achieve "'rapid fire' operation." 83 Fed. Reg. at 66,516. Semiautomatic rifles modified with bump stocks, like other machineguns, pose an acute threat to public safety because they allow "a single individual to take many lives in a single incident." *Id.* at 66,520. In the 2017 Las Vegas massacre, for example, a single individual equipped with bump stocks "fire[d] several hundred rounds of ammunition in

a short period of time, killing 58 people and wounding approximately 500." *Id.* at 66,516.

Bump stocks thus fit comfortably within the category of dangerous property that the government may prohibit without triggering any compensation obligation under the Fifth Amendment. As compared to intoxicating liquors, see *Mugler*, 123 U.S. at 665, or diseased trees, see *Miller*, 276 U.S. at 279, bump stocks pose an especially "obvious" threat to the community, 83 Fed. Reg. at 13,447. And there is no dispute that ATF's "purpose [in] promulgating" the final rule "was to promote public safety and to prevent public harm." Pet. App. 23. The Court of Federal Claims therefore correctly identified ATF's final rule as a "paradigmatic example" of a public-safety measure that does not implicate the Takings Clause. *Id.* at 113; see *id.* at 22-23.

b. Petitioners' takings claims also fail for the alternative but related reason identified by the court of appeals: "[T]he preexisting federal statutory prohibition on possession or transfer of 'machineguns'" was itself a valid prior limitation on any property rights petitioners may have had in their bump stocks, which the government could enforce or make more explicit without effecting a taking. Pet. App. 56 (citation omitted); see *id.* at 58 (observing that "the federal-law prohibition * * * predated the existence, let alone [petitioners'] possession, of the bump-stock-type devices").

No compensable taking of an interest in property has occurred "if the logically antecedent inquiry into the nature of the owner's [interest] shows" that the asserted property rights "were not part of his title to begin with." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992); see *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2079 (2021) (reaffirming that "the gov-

ernment does not take a property interest when it merely asserts a 'pre-existing limitation upon the [property] owner's title'") (quoting *Lucas*, 505 U.S. at 1028-1029). Thus, when a particular use of property was "*always* unlawful" under "background principles," giving effect to those pre-existing limitations does not effect a taking. *Lucas*, 505 U.S. at 1030.

Here, the court of appeals correctly determined that the federal statutory prohibition on the possession of new machineguns, 18 U.S.C. 922(*o*), is itself a relevant "background principle[]" that operated to limit any state-law property rights that petitioners may have had in their bump stocks. Pet. App. 57 (quoting, indirectly, *Lucas*, 505 U.S. at 1029). The statutory prohibition was enacted in 1986 and thus "predated the existence" of all the bump stock devices at issue here. *Id.* at 58. Enforcing that pre-existing statutory limitation does not constitute a taking because petitioners "never had a property right" to possess bump stocks in contravention of federal law. *Id.* at 61.

For the reasons set forth in the government's brief in opposition in *Guedes* v. *ATF*, 140 S. Ct. 789 (2020), the statutory definition of "machinegun," 26 U.S.C. 5845(b), is best read to encompass bump stocks, which allow a user to fire a semiautomatic rifle continuously with a single pull of the trigger. See Br. in Opp. at 14-19, *Guedes*, *supra* (No. 19-296) (*Guedes* Br. in Opp.). In ATF's final rule, the agency persuasively explained why bump stocks fall within the plain language of the statute, properly construed. ATF also made clear that the only source of legal force for the prohibition on bump stocks is Congress's statutory ban on new machineguns, not the rule itself. See *id.* at 21. Thus, in the final rule ATF concluded that bump stocks *are* machineguns, not

that the agency had discretion to classify them as such. *Ibid.*[2]

Viewing ATF's final rule in that light makes the takings analysis in these cases "particularly simple." Pet. App. 60. Because the final rule sets forth the best interpretation of the statutory definition of "machinegun," federal law has always limited petitioners' purported state-law property interests in bump stocks. To be sure, ATF "misclassified some bump-stock-type devices" as non-machineguns for a period of time, 83 Fed. Reg. at 66,523, but the agency withdrew those classification letters as part of issuing the final rule, see *id.* at 66,530-66,531. As ATF explained in the preamble to its final rule, "bump-stock-type devices are machineguns" as Congress itself defined that term, and the devices are

---

[2] ATF's final rule has been the subject of several challenges, none of which have succeeded. The D.C. Circuit recently held that the final rule is the "best interpretation of 'machine gun' under the governing statutes." *Guedes*, 45 F.4th at 310. In earlier proceedings in that case, a panel had affirmed the denial of a preliminary injunction after concluding that the rule was at least valid under *Chevron*, without addressing the best reading of the statute, and this Court declined to review that interlocutory judgment. *Guedes* v. *ATF*, 920 F.3d 1, 17-34 (D.C. Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 789 (2020). This Court also recently declined to review judgments of the Sixth and Tenth Circuits rejecting similar challenges to ATF's final rule. See *Gun Owners of Am., Inc.* v. *Garland*, 19 F.4th 890, 907 (6th Cir. 2021) (affirming by an equally divided vote of the en banc court), cert. denied, No. 21-1215 (Oct. 3, 2022); *Aposhian* v. *Barr*, 958 F.3d 969 (10th Cir. 2020), vacated on reh'g, 973 F.3d 1151 (10th Cir. 2020), reinstated, 989 F.3d 890 (10th Cir. 2021) (en banc), cert. denied, No. 21-159 (Oct. 3, 2022). A fourth challenge to the rule was rejected by a panel of the Fifth Circuit but remains pending before the en banc court. *Cargill* v. *Garland*, 20 F.4th 1004 (2021), vacated on reh'g, 37 F.4th 1091 (2022) (per curiam) (argued Sept. 13, 2022).

therefore "subject to the restrictions of the [National Firearms Act] and [Gun Control Act]." *Id.* at 66,537; see 18 U.S.C. 921(a)(24), 922(*o*); 26 U.S.C. 5845(b). And Congress's statutory prohibition on machineguns, including bump stocks, undisputedly predates any property rights petitioners claim to have.

Petitioners therefore err in asserting (Pet. 3) that their prior possession of bump stocks was "unquestionably legal," or that ATF "affirm[ed]" as much in the final rule. It is true that the final rule had an effective date, and ATF stated in the preamble to the rule that bump stock owners would not be "acting unlawfully unless they fail to relinquish or destroy their device[s] after the effective date." 83 Fed. Reg. at 66,523. But those statements merely reflected ATF's decisions not to prosecute individuals who possessed bump stocks during the period in which ATF itself had misclassified the devices as non-machineguns, and to provide a reasonable grace period for individuals to come into compliance with the statute. See *Guedes* Br. in Opp. at 24.

The court of appeals also correctly concluded that the same result would follow even if the final rule were viewed as setting forth a reasonable interpretation of an ambiguous statutory term under the *Chevron* framework. See Pet. App. 61-63. The court emphasized that petitioners "accept[ed]" for purposes of their takings claim that the final rule is "authorized and legally valid." *Id.* at 59. By hypothesis, then, the rule would represent a valid exercise of delegated authority to resolve a statutory ambiguity. On that view, petitioners' takings claims would still fail because their asserted property interests would have been limited by a preexisting delegation of authority to ATF to interpret the term "machinegun" to include bump stocks. *Id.* at 62.

The court of appeals did not actually endorse that view, and the government has consistently maintained that the final rule was *not* a discretionary exercise of delegated authority under *Chevron*, but rather an interpretive rule setting forth the best reading of the statute. See *Guedes* Br. in Opp. at 20-24. The court merely reasoned that petitioners' takings claims would fail *even if* the concededly valid rule were viewed as "valid only at *Chevron* Step 2." Pet. App. 61.

2. The decisions below do not conflict with the decision of any other court of appeals or of this Court, nor do they otherwise warrant further review.

a. Petitioners do not contend that the court of appeals' decisions implicate any conflict in the circuits. To the contrary, the other courts of appeals have consistently rejected similar takings claims. The Fourth Circuit, for example, recently held that a Maryland law prohibiting "rapid fire trigger activator[s]," including bump stocks, did not effect a taking. *Maryland Shall Issue, Inc.* v. *Hogan*, 963 F.3d 356, 359 (2020) (citation omitted), cert. denied, 141 S. Ct. 2595 (2021). The plaintiffs contended that Maryland had effected an uncompensated taking when it enacted that law after the Las Vegas massacre, on the theory that the prohibition was "tantamount to a direct appropriation" of their personal property. *Id.* at 365. The Fourth Circuit rejected that contention based largely on its prior decision rejecting takings claims by owners of gambling devices that a State had prohibited. See *id.* at 366 (discussing *Holliday Amusement Co. of Charleston, Inc.* v. *South Carolina*, 493 F.3d 404, 410-411 (4th Cir. 2007)). The court observed that owners of personal property over which the government has traditionally exercised a "high degree of control" must be "aware" of the possibility that

further regulation may diminish or effectively eliminate their property interests. *Id.* at 367 (quoting *Lucas*, 505 U.S. at 1027). And the court could "think of few types of personal property that are more heavily regulated" than bump stocks and similar devices. *Ibid.*

Similarly, courts of appeals have rejected takings claims arising from state prohibitions on large-capacity ammunition magazines. See *Duncan* v. *Bonta*, 19 F.4th 1087, 1112 (9th Cir. 2021) (en banc), vacated and remanded on other grounds, 142 S. Ct. 2895 (2022); *Association of N.J. Rifle & Pistol Clubs, Inc.* v. *Attorney Gen. N.J.*, 910 F.3d 106, 124 & n.32 (3d Cir. 2018) (*ANJRPC*), abrogated on other grounds by *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111 (2022). Those decisions rested in part on the particular features of the state laws at issue, but they also recognized the broader principle that "[a] compensable taking does not occur when the state prohibits the use of property as an exercise of its police powers rather than for public use." *ANJRPC*, 910 F.3d at 124 n.32; see *Duncan*, 19 F.4th at 1112.

And in the *Guedes* litigation, the district court rejected takings claims directed to the same ATF final rule at issue here, for the same reasons that the Court of Federal Claims gave in these cases. See *Guedes* v. *ATF*, 520 F. Supp. 3d 51, 69-70 (D.D.C. 2021), aff'd on other grounds, 45 F.4th 306 (D.C. Cir. 2022).[3] The district court observed, correctly, that "every [c]ourt to have considered a takings challenge in response to

---

[3] The district court was addressing consolidated cases. See *Guedes*, 520 F. Supp. 3d at 59. The plaintiffs raising the takings claims appealed the court's adverse judgment to the Federal Circuit, where the appeal is currently stayed. See C.A. Order at 1-2, *Codrea* v. *Garland*, No. 21-1707 (Fed. Cir. Mar. 22, 2022).

bump stock rules has rejected the claim," *id.* at 70, including when ATF concluded that the original Akins Accelerator was a machinegun, see *ibid.* (citing *Akins* v. *United States*, 82 Fed. Cl. 619, 622 (2008)).

Petitioners thus err in suggesting (Pet. 25) that the absence of any circuit conflict is traceable to the Federal Circuit's exclusive jurisdiction over appeals from the Court of Federal Claims. As just discussed, other courts of appeals have considered analogous takings claims involving state laws and have reached similar results. Indeed, petitioners do not identify any instance in which a court has held that a prohibition on bump stocks or comparable devices constituted a taking. And petitioners' contention (Pet. 26) that the rationale of Judge Wallach's concurring opinion "would have" been in conflict with a decision by the Fourth Circuit is both incorrect and, in any event, not a sound basis for certiorari. Judge Wallach did not suggest that all "actions taken pursuant to the police power" are "exempt from the Takings Clause." *Ibid.* (citation omitted). Instead, he recognized that this particular restriction "is the kind of exercise" of regulatory authority to protect public safety "that has repeatedly been treated as legitimate even in the absence of compensation." Pet. App. 81-82 (opinion concurring in the result) (citation omitted); see pp. 12-15, *supra*.

b. Petitioners contend (Pet. 13-23) that the decisions below contravene this Court's precedent, but they misstate the reasoning and scope of the court of appeals' decisions. The court of appeals did not suggest, much less hold, that any time a federal agency is granted "general delegated legislative rulemaking authority," the agency may exercise that authority to prohibit the possession of personal property without effecting a tak-

ing. Pet. 4; see, *e.g.*, Pet. 14, 22-23. As just explained, the court principally reasoned that Congress itself had enacted the relevant background limitation on petitioners' asserted property rights when, in 1986—before bump stocks were invented—Congress prohibited the possession of new machineguns. That prohibition extends to any device designed and intended "for use in converting a weapon into a machinegun," including a bump stock. 26 U.S.C. 5845(b). And, as the court explained, petitioners did not acquire any protected interests merely because ATF misclassified some bump stocks for several years before the final rule. See Pet. App. 57-61, 63-68.

Petitioners largely ignore that reasoning, focusing instead (Pet. 18-19) on the court of appeals' brief discussion of the hypothetical possibility the final rule could be upheld as valid at step two of the *Chevron* framework. See Pet. App. 61-63. That discussion—which was not necessary to the outcome because the final rule in fact sets forth the best interpretation of the statutory term "machinegun," as the D.C. Circuit has recently held, see p. 17 & n.3, *supra*—does not have the broad implications that petitioners ascribe to it. The court of appeals emphasized that the underlying statute that the final rule interprets is "very specific" and sets forth a limitation that is "defined in terms of the physical operation of particular devices." Pet. App. 58. The court made clear that it was not purporting to address other grants of "implementation authority," including where an agency is given "discretion to act in pursuit of a broadly stated statutory goal." *Id.* at 58-59. The court also stressed that the statutory definition of "machinegun" is, in its view, susceptible of only a "limited" number of possible readings. *Id.* at 62. All those limi-

tations cabin the scope of the court's discussion of what was, at all events, a hypothetical view of the final rule.

Petitioners further contend that the court of appeals' reasoning was "circular" and that the court presumed that Congress conferred on ATF the authority to prohibit bump stocks "without effecting a taking." Pet. 19 (emphasis omitted). But the court merely reasoned that if the rule were viewed as a valid exercise of delegated authority to resolve a statutory ambiguity, then the hypothetical delegation would have occurred in 1986 and therefore would have predated petitioners' acquisition of any bump stocks. Pet. App. 62. Put differently, if the statute all along was reasonably read to encompass bump stocks, making that pre-existing limitation more "explicit" was not a taking. *Lucas*, 505 U.S. at 1030.

The decisions below are also fully consistent with this Court's decisions in *Horne* v. *Department of Agriculture*, 576 U.S. 351 (2015), and *Andrus* v. *Allard*, 444 U.S. 51 (1979) (cited at Pet. 4, 15-16). As relevant here, the Court established in *Horne* that a per se taking occurs when the government "physically takes possession" of personal property for public use to the same extent that a per se taking occurs when the government physically appropriates real property for public use. 576 U.S. at 357 (citation omitted); see *id.* at 357-361. But that case concerned a direct physical appropriation of the property for use in a government program. The regulated parties were required to turn over their personal property (raisins) to the government as part of a federal scheme for maintaining market stability. See *id.* at 355, 361-362. By contrast, the statutory prohibition at issue here did not require petitioners or anyone else to turn over their bump stocks to the government for public use. See Pet. App. 116-117 (Court of Federal

Claims); see also *Horne*, 576 U.S. at 362 (emphasizing that "regulatory limit[s]" on personal property and direct physical appropriations must be analyzed differently even if their effects are similar because the "Constitution * * * is concerned with means as well as ends").

Moreover, the property at issue in *Horne*—raisins cultivated for commercial sale—was itself benign, and the growers in that case unquestionably had a property interest in the raisins before being required to turn them over to the government. This Court therefore had no occasion to address either of the rationales that led the lower courts to reject petitioners' takings claims in these cases. Cf. *Horne*, 576 U.S. at 365-366 (observing that raisins "are a healthy snack" and therefore unlike the "dangerous" property at issue in a prior case concerning chemicals).

To the extent that petitioners would read this Court's decision in *Horne* to mean that any state or federal law enacted to prohibit the possession of certain personal property is necessarily a "*per se* taking that requires just compensation," *Horne*, 576 U.S. at 358, that reading cannot be correct. In *Horne*, the Court did not call into question its prior decisions in cases like *Miller* v. *Schoene*, *supra*, recognizing that no compensable taking occurs when the government prohibits the continued possession of property injurious to the community, like diseased livestock. Indeed, if the rule were otherwise, the federal government and States could be required to compensate drug dealers for their lost inventory whenever seeking to prohibit a new narcotic. But "[n]othing in the case law suggests that any time a state adds to its list of contraband—for example, by adding a drug to its schedule of controlled substances—

it must pay all owners for the newly proscribed item." *Duncan*, 19 F.4th at 1112.

This Court's decision in *Andrus* likewise provides no support for petitioners' position, let alone a basis for certiorari. In *Andrus*, the federal government had prohibited commercial transactions in feathers and other parts of certain migratory birds, and commercial dealers in feathered artifacts covered by the prohibition challenged it as an uncompensated regulatory taking. 444 U.S. at 54-55. This Court rejected that challenge, explaining that all government regulation necessarily "involves the adjustment of rights for the public good." *Id.* at 65. The Court also stated that it was "crucial" that the property owners "retain[ed] the rights to possess and transport their property," even though they could not sell it. *Id.* at 66. But that statement was merely explaining the logic of the Court's conclusion that no regulatory taking had occurred under the flexible balancing test that the Court applied. See *id.* at 64-65 (discussing *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978)).

As in *Horne*, this Court had no occasion in *Andrus* to address the "logically antecedent" question of whether some pre-existing limitation already inhered in the property owners' title, *Lucas*, 505 U.S. at 1027, or whether the takings analysis might look quite different if the property at issue were "injurious to the * * * safety of the community," *Keystone Bituminous Coal*, 480 U.S. at 489 (citation omitted). And the Court reiterated in *Andrus* that the Takings Clause does not invariably compel the government "to regulate by purchase." 444 U.S. at 65 (emphasis omitted).

3. In any event, this case would not be an appropriate vehicle for addressing the question petitioners seek

to present even if that question otherwise warranted review. Petitioners frame the question presented (Pet. i.) as whether "a delegation of general legislative rulemaking authority to an agency constitute[s]" the kind of background limitation that may inhere in a property owner's title under the logic of *Lucas*. As already explained, however, the court of appeals' entire discussion of delegated authority to resolve statutory ambiguity was expressly hypothetical. The court did not actually determine whether Congress delegated to ATF the authority to resolve any ambiguity in the term "machinegun" by legislative rulemaking, or whether the final rule represented an exercise of such authority. And the court separately concluded that, if the rule sets forth the best reading of the statute, then the "preexisting" statutory bar "always limited [petitioners'] title," Pet. App. 61—an uncontroversial conclusion that petitioners fail to rebut.

The latter view of the statute and the final rule is the correct one. The statutory "'text, structure, [and] purpose'" establish that "a bump stock is a machine gun under the best interpretation of the statute." *Guedes*, 45 F.4th at 314, 317 (citation omitted). Accordingly, by virtue of the statutory prohibition itself, not ATF's interpretation of the statute, petitioners never had a cognizable property interest in their bump stocks "in the first place." *Cedar Point*, 141 S. Ct. at 2079. Petitioners' question about delegated agency authority is therefore entirely academic.

At a minimum, the presence of potentially dispositive threshold issues about how best to interpret the statute and how best to view ATF's final rule militates against granting further review in this case. Petitioners do not ask the Court to resolve those threshold issues, and the

Federal Circuit declined to do so because it concluded that petitioners' takings claims would fail in any event. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that this Court is generally "a court of review, not of first view").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MARK B. STERN
ABBY C. WRIGHT
STEVEN H. HAZEL
Attorneys

OCTOBER 2022