No. 22-25

In the Supreme Court of the United States

ROY LYNN MCCUTCHEN, PADUCAH SHOOTER'S SUPPLY, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED STATES,

Respondent.

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

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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The government cannot hide the extraordinary implications of the Federal Circuit's opinion. The decision below held that federal agencies can retroactively eliminate title to personal property via legislative rulemaking. In the court's view, it did not matter whether the agency's rule was valid only under the *Chevron* framework. Thus, as the law now stands in the Federal Circuit, a federal agency wields the power to destroy title to all property within its regulatory jurisdiction, so long as the property was acquired after passage of an ambiguous statute.

Strikingly, the government's brief in opposition defends that holding on the merits. BIO.18 ("The court of appeals also correctly concluded that the same result would follow even … under the *Chevron* framework."). The government tries to minimize the impact of that holding by concocting a limiting principle: Agencies can retroactively limit title if the statute is "very specific," but not if the statute sets out a "broadly stated statutory goal." BIO.22. But that limit is illusory.

The rest of the government's brief tries to distract attention from the vital question this petition presents. There is no federal police power to confiscate lawfully acquired guns without paying just compensation. The government's cited cases are about nuisance regulation. Nor is the Federal Circuit's holding dicta. To avoid resolving whether the ban was compelled by statute, the court decided a broader issue: It held that both legislative *and* interpretive rules can retroactively eliminate title to personal property. That is the

issue Petitioners ask this Court to review. And because the Federal Circuit has near-exclusive jurisdiction over takings claims against the United States, no circuit split will likely emerge to aid the Court in resolving it. The Court should decide it now.

I. The Federal Circuit's holding is expansive, and the government's limiting principle is illusory.

The decision below allows federal agencies to invoke *Chevron* deference to confiscate property that was legal when acquired without paying the owner just compensation. App.60. A split panel reasoned that an agency's legislative rules retroactively become "'background principles' of law" that "inhere in the title" of regulated property. App.57 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992)). That is true even for legislative rules promulgated *after* the owner took title. App.62. And it remains true despite the agency having concluded for nearly a decade that the statute did *not* restrict the property. App.63-64. The Federal Circuit has thus redefined the nature of title to any personal property subject to a grant of legislative authority to an agency. That cannot be right.

Yet the government defends that holding *on the merits*. BIO.18. That is a striking assertion of executive power, and one that pushes *Lucas*'s inhere-in-title exception past the breaking point. As this Court recently clarified, the *Lucas* exception applies to "longstanding" and "traditional" background limits on property rights, like nuisance abatement and privileged access. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021). This Court has never held that

agencies can create *new* background limitations through legislative rulemaking, let alone apply them retroactively to confiscate legally acquired property without paying compensation. Such a holding would authorize the administrative state to extinguish all manner of personal property rights via publication in the Federal Register.

The government contrives a limiting principle to downplay the significance of the Federal Circuit's holding. It argues that a legislative rule can retroactively create inherent limits on title only when the agency acts under a "very specific" statutory provision, but not when the agency acts "in pursuit of a broadly stated statutory goal." BIO.22. But whether a statute is specific enough to authorize agency action is a longstanding difficulty in administrative law, and the government offers no guidance for drawing that line in this context. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Besides, this case shows why the government's limit is illusory. For nearly a decade, ATF concluded that the supposedly "very specific" statute at issue did *not* cover Petitioners' property. *See Bump-Stock-Type-Devices*, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018) ("Final Rule") (noting prior ATF determinations that "the devices did not rely on internal springs or similar mechanical parts to channel recoil energy"). Now, the agency has revisited the statute and concluded that it does. *Id.* Thus, the government's limiting principle lets agencies choose whether or not to extinguish Petitioners' property rights. That is hardly a limit.

The Federal Circuit's holding will have staggering consequences. In the modern administrative state, few articles of property lie beyond federal agencies' regulatory reach. *See*, *e.g.*, 49 C.F.R. § 571 (automobiles); 21 C.F.R. § 102.39 (onion rings). And *Chevron* gives agencies the power to decide, with force of law, whether an ambiguous statute covers that property. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in the judgment). According to the Federal Circuit, agencies can use their delegated rulemaking authority to retroactively eliminate rights in property that was both lawful and unregulated when acquired, all without paying the owner just compensation. The Court should review that consequential decision.

II. The government has no 'federal police power' to ban guns without compensation.

The government's brief leads with the argument that the Final Rule is justifiable under a federal police power and thus exempt from the Fifth Amendment's just compensation requirement. BIO.12-15. Below, the panel majority refused to adopt that rationale, finding "no precedent" to support such a theory. App.54. It was right to be skeptical: Granting federal agencies a "police power" exception would displace this Court's regulatory takings doctrine and exempt the administrative state from the Fifth Amendment's just compensation requirement. The government's "federal police power" theory is a nonstarter.

For one thing, federal agencies simply do not have police power. This Court's takings cases have long described the police power as vested "exclusively in the

states." *Mugler v. Kansas*, 123 U.S. 623, 659 (1887); *see also United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution … withhold[s] from Congress a plenary police power."); *United States v. Morrison*, 529 U.S. 598, 618 (2000). Instead, a federal agency is a "creature of statute" that can only act by the authority of an enumerated constitutional power. *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002). *See also Lane v. United States*, No. 3:19-CV-01492-X, 2020 WL 1513470, at *1 (N.D. Tex. Mar. 30, 2020) (denying motion to dismiss takings claim based on the Final Rule, and instructing the government to "try again and explain which enumerated power justifies the federal regulation and whether it allows a taking without compensation").

None of the government's cited cases supports a police-power exception to the Fifth Amendment. They merely illustrate two well-worn principles of ordinary takings doctrine: (1) "if regulation goes too far" in devaluing property "it will be recognized as a taking," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and (2) title to real property is inherently limited by "background principles of the State's law of property and nuisance," *Lucas*, 505 U.S. at 1029.

Take *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). There, the Court upheld a state law that restricted subsurface coal mining. No compensation was required because the law neither prevented landowners from "profitably engag[ing] in their business," nor interfered with "their investment-backed expectation." *Id.* at 485 (citing *Mahon* and *Penn Central Trans. Co. v. New York City,*

438 U.S. 104, 124 (1978)). In other words, the land-use restriction was not a taking because it did not "go[] too far." *Mahon*, 260 U.S. at 415.

Miller and *Mugler* are both nuisance cases. In *Miller v. Schoene*, the Court upheld a state law that declared trees carrying a contagious plant disease to be a nuisance and required landowners to remove them. 276 U.S. 272 (1928). Although the state reimbursed the landowners for the cost of removing the trees and permitted them to retain title in the resulting lumber, the Court did not require compensation for diminished land value because the landowners never had a right to foster a nuisance. *Id.* at 277, 279-80. Similarly, in *Mugler*, the Court upheld a state law that declared alcohol sales to be a nuisance and prohibited the use of factories to produce and store liquor. 123 U.S. 623. No compensation was required because a landowner has no right to create "a public nuisance." *Id.* at 669. Plus, the law did "not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it." *Id.* Nor did the law require owners to forfeit or destroy liquor manufactured before the ban, so long as it was not being held "for sale, barter, or delivery." *Id.* at 670.

Miller, *Mugler*, and *Keystone Bituminous Coal Association* offer no support for the government's assertion that federal agencies can confiscate personal property whenever it deems the owner's possession to no longer be in the public interest.

III. The government's attempts to distinguish *Horne* and *Andrus* fail.

Unlike *Miller*, *Mugler*, and *Keystone Bituminous Coal Association*, this case involves direct appropriation of personal property. The Court's decision in *Horne* is the proper starting point. That case held that compensation is required whenever the government "physically takes possession of an interest in [personal] property." *Horne v. Dep't of Agriculture*, 576 U.S. 350, 357 (2015). *Horne* undeniably covers this case.

The government tries to distinguish *Horne* first by asserting that it has no plans to put confiscated bump stocks to public use. BIO.23. To the extent the government argues it can avoid constitutional restraint simply by taking property *without* a public use, it is wrong. *See*, *e.g.*, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Regardless, *Horne* itself involved a similar notion of public use as is present here. In *Horne*, the "public use" for confiscated grapes was to "maintain stable markets" by limiting the amount for sale. 576 U.S. at 355.[1] And here, the "public use" for confiscated bump stocks is to "increase public safety by … limiting legal access to them." Final Rule at 66,515. Either way, *Horne* makes clear that the government must pay compensation if it wishes to remove property from private hands as a means of furthering

[1] Although the government sometimes donated the crops to public schools or charities, that was discretionary and played no role in the Court's analysis. *Horne*, 576 U.S. at 355.

its policy goals. 576 U.S. at 362. *See also* Amicus Br. of Montana 14.

The government next contends that *Horne* does not apply because that case involved grapes ("a healthy snack") while this case involves guns. BIO.24. The Court must reject the government's 'guns are different' rationale. Petitioners' property receives no less protection under the Fifth Amendment than goods the government considers "benign." *Id.* Moreover, and contrary to the government's suggestion, nothing in *Horne* creates an exception for property that an agency classifies as "dangerous." BIO.24. The government misleadingly cites the Court's discussion of a takings claim brought by manufacturers of "dangerous pesticides" who were forced to disclose valuable "trade secrets" (safety information) in order to receive a federal license. *Horne*, 576 U.S. at 365-66 (discussing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)). That case was "hardly on point" in *Horne*, and it no more applies here: Petitioners were required to turn over or destroy their property without condition or return benefit. *Id*.

The Final Rule also requires compensation under the Court's regulatory taking framework. *See Lucas*, 505 U.S. at 1029. The Court's decision in *Andrus* makes that clear. In *Andrus v. Allard*, the Court upheld a federal statute that banned commercial transactions of certain eagle feathers. 444 U.S. 51 (1979). The ban did not require compensation, the Court held, in part because property owners "retain[ed] the rights to possess and transport their property." *Id*. at 66. Indeed, that fact was "crucial." *Id.*

The government downplays that statement as the Court "merely explaining the logic of [its] conclusion." BIO.25. Petitioners agree that this is the logic behind the Court's conclusion. And under that logic, the Final Rule—which *eliminates* the right to possess and transport lawfully acquired property as well as all other rights in that property—requires just compensation.

IV. The government cannot recast the Federal Circuit's holding as dicta, and no other vehicle issues prevent this Court's review.

The government tries in vain to find roadblocks in the Court's way to reviewing the lower court's expansive holding. To the contrary, Petitioners' question is squarely presented.

To start, the Federal Circuit's holding was not dicta. The panel majority held that, *even if* the Final Rule *were not* compelled by statute, any agency interpretation entitled to *Chevron* deference still becomes part of the "'background principles' of law" inherent in the property's title. App.57. Thus, as the law stands in the Federal Circuit, agencies can invoke *Chevron* deference to confiscate property beyond what Congress proscribed, so long as the owner acquired title after the ambiguous statute became law. For such after-acquired property, the statute creates a "preexisting limitation on [the owner's] title" that includes "subjection to *future* valid agency interpretations of the … prohibition." App.62 (emphasis added). This is the

holding—which the government defends, BIO.18—that Petitioners ask the Court to review.[2]

The government tries to avoid the *even-if* part of the Federal Circuit's holding by asserting that the Final Rule *is* compelled by statute. BIO.17, 26. This Court should follow the D.C. Circuit and reject the government's late-breaking attempt to "reimagine the Rule as merely interpretive." *Guedes v. ATF*, 920 F.3d 1, 19 (D.C. Cir. 2019) (*Guedes I*).[3] The agency expressly relied on *Chevron* when promulgating it. Final Rule, 66,527; *see also Guedes I*, 920 F.3d at 8-9. And the en banc Sixth and Tenth Circuits upheld the rule only at step two of the *Chevron* framework. *See Aposhian v. Barr*, 958 F.3d 969, 989 (10th Cir. 2020), *reh'g en banc granted, judgment vacated*, 973 F.3d 1151 (10th Cir. 2020), *vacated sub nom*; *Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021), *and opinion reinstated sub nom. Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) (en banc); *Gun Owners of Am.,*

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[2] The government contends that Petitioners "fail to rebut" the possibility the Final Rule may be valid without relying on *Chevron* deference. BIO.26. But that question was not necessary to Petitioners' claim. Under circuit precedent, Petitioners are required to *assume* the rule's validity to pursue a takings claim. *See* App.59 (noting that "a plaintiff must 'litigate its takings claim on the assumption that the administrative action was both authorized and lawful'") (citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001)). Still, Petitioners vigorously argued below that the Final Rule could not operate as a pre-existing limitation on title because it was a "legislative" rule and not an interpretative one. *See* App.113 n.3.

[3] The Court should likewise follow the D.C. Circuit in rejecting the government's attempt to explain the previously legal status of bump stocks as merely an exercise of enforcement discretion. BIO.18; *see Guedes I*, 920 F.3d at 20.

Inc. v. Garland, 19 F.4th 890, 907 (6th Cir. 2021) (en banc). And although a panel of the Fifth Circuit had concluded that the statute was "best" read to authorize the bump stock ban, *Cargill v. Garland*, 20 F.4th 1004, 1009 n.4 (5th Cir. 2021), that opinion was subsequently vacated by the en banc court. 37 F.4th 1091 (5th Cir. 2022). The D.C. Circuit now stands as the lone dissenting voice. It concluded that the "best reading" of the statute permits the bump stock ban. *Guedes v. ATF*, 45 F.4th 306, 314 (D.C. Cir. 2022) (*Guedes II*). But it reached that conclusion only after first upholding the rule under *Chevron* at the preliminary injunction stage. *Guedes I*, 920 F.3d at 28.

The question of whether agencies' new legislative rules can retroactively cloud title of legally acquired property is thus squarely presented by the Federal Circuit's decision. And contrary to the government's contentions, BIO.19, no circuit split will likely arise to aid the Court in resolving it. By statute, takings claims against federal agencies are channeled to the Federal Circuit. *See Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2170 (2019); 28 U.S.C. § 1491(a)(1); 28 U.S.C. §§ 1295(a)(2)-(a)(3). Unless this Court grants review, the Federal Circuit's decision will govern the scope of *Lucas*'s inhere-in-title exception in all takings claims against federal agencies.

The cases cited by the government to show agreement among circuits deal with completely different issues. In *Maryland Shall Issue, Inc. v. Hogan*, the Fourth Circuit upheld a state law that bans bump stocks without compensating the owners. The law was not a taking because it did "not require owners of

[bump stocks] to turn them over to the Government or to a third party." 963 F.3d 356, 366 (4th Cir. 2020). In *Duncan v. Bonta*, the Ninth Circuit upheld a state law that requires gun owners to modify magazines above a certain capacity. The law was not a taking because the modification requirement did not deprive the magazine of all "beneficial use." 19 F.4th 1087, 1112 (9th Cir. 2021) (en banc), *vacated and remanded on other grounds*, 142 S. Ct. 2895 (2022). And in *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General of New Jersey*, the Third Circuit upheld a similar state law against a takings challenge because it did "not require that owners turn over their magazines to law enforcement," nor did it deprive the magazines "all economically beneficial or productive uses." 910 F.3d 106, 124 & n.32 (3d Cir. 2018) (cleaned up), *abrogated on other grounds by New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

None of these cases presents the issue decided by the Federal Circuit: that federal agencies can use delegated legislative authority to retroactively eliminate a person's rights in legally acquired property. That important question warrants this Court's review.

CONCLUSION

This Court should grant the petition.

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