No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For purposes of the Fifth Amendment's Taking Clause, does a delegation of general legislative rule-making authority to an agency constitute an inherent restraint on title to any personal property that could be subsequently subjected to a prospective legislative rule, rendering the physical taking of the property non-redressable?

PARTIES TO THE PROCEEDING

Petitioners are Roy Lynn McCutchen, Paducah Shooter's Supply, Inc., individually and on behalf of all others similarly situated; and The Modern Sportsman, LLC, RW Arms, LTD., Mark Maxwell, and Michael Stewart.

Respondent is the United States of America.

RULE 29.6 STATEMENT

Petitioners have no parent company or publicly held company with a 10% or greater ownership interest in them.

RELATED PROCEEDINGS

United States Court of Federal Claims:

McCutchen, et al. v. United States., No. 18-1965C (Sept. 23, 2019) (order granting motion dismiss)

Modern Sportsman, LLC, et al. v, United States, No. 19-449 (Oct. 24, 2019) (order granting motion to dismiss)

United States Court of Appeals for the Federal Circuit:

McCutchen, et al. v. United States, No. 20-1188 (Oct. 1, 2021) (opinion)

Modern Sportsman, LLC, et al. v. United States, No. 20-1107 (Oct. 1, 2021) (opinion)

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JURISDICTION

The Federal Circuit entered judgments on October 1, 2021, and denied Petitioners' petitions for panel or en banc rehearing on February 2, 2022. App. 28-29, 127-29. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except

[1] Pursuant to Rule 12.4, this petition seeks review of two Federal Circuit decisions that raise identical issues.

in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 922(o) states:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

18 U.S.C. § 926(a) states:

The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter ...

26 U.S.C. § 5845(b) states:

> **Machinegun.**--The term "machinegun" means 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. The term shall also include 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.

INTRODUCTION

This case raises fundamental questions about the interaction of the administrative state and the Fifth Amendment's Takings Clause. Petitioners are owners and sellers of bump stocks. Petitioners acquired their bump stocks when their purchase, possession, and sale was unquestionably legal. After the Bureau of Alcohol, Tobacco and Firearms (ATF) promulgated a rule banning the possession of bump stocks—while affirming that prior to the effective date of the rule, the purchase, possession, and sale of them was legal—Petitioners complied with the rule and destroyed or surrendered their bump stocks. They then sought just compensation for the taking of their private property. The Federal Circuit rejected their Fifth Amendment claims, with a majority of the panel holding that there is an inherent restriction on title to any piece of personal property in America that is potentially subject

to a federal agency's general delegated legislative rulemaking authority.

The Federal Circuit's holding raises fundamental questions about the nature of personal property in a nation in which nearly every object is subject to some general grant of legislative authority to an agency. By redefining the nature of title to personal property in a country dominated by grants of general regulatory authority to executive branch agencies, the Federal Circuit has removed a bedrock restraint on government power and eliminated a means of redress for citizens harmed by exercises of such power. If the Federal Circuit is right, then federal agencies can, with a stroke of a pen, outlaw not just the future sale but the *mere private possession* of cars that burn too much gas, or light bulbs deemed too inefficient, and so on—without paying a dime of compensation to their owners. The Federal Circuit's holding thus presents questions of substantial importance that the courts below, as well as commentators in the property field, have recognized as doctrinally incoherent. And the decision conflicts with this court's prior holdings applying the Takings Clause to personal property in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), and emphasizing the constitutional significance of bans on the mere *possession* of personal property in *Andrus v. Allard*, 444 U.S. 51 (1979).

Under the Federal Circuit's decision, citizens and merchants alike are left with no recourse for the forced seizure and destruction of millions of dollars' worth of lawfully-acquired property. This Court's review is warranted.

STATEMENT OF THE CASE

A. The federal government's longstanding authorization of bump stocks.

Three federal statutes regulate the sale and possession of firearms in the United States. *First*, the National Firearms Act of 1934 (NFA) regulates the manufacture, transfer, sale, and possession of certain firearms, including what the statute refers to as "machine guns." 26 U.S.C. §§ 5801 *et seq*. The Act provides for a penalty and forfeiture and subjects violators to enforcement measures under the internal revenue laws. *Id.* §§ 5871-72.

Second, the Gun Control Act of 1968 (GCA) establishes a licensing scheme and imposes criminal prohibitions on certain firearm transactions. 18 U.S.C. § 923.

Third, the Firearm Owners' Protection Act of 1986 (FOPA) makes it "unlawful for any person to transfer or possess a machinegun." 18 U.S.C. § 922(o)(1). The Act also provides that it "does not apply with respect to ... any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect"—May 19, 1986. *Id.* § 922(o)(2)(B). A "knowing[]" violation of the machinegun ban is subject to criminal penalties, *id.* § 924(a)(2), and a "willful" violation is subject to "seizure and forfeiture," *id.* § 924(d)(1).

For purposes of the § 922 ban, Congress provided that:

> The term "machinegun" means 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. The term shall also include 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); *see also* 18 U.S.C. § 921(a)(23) ("The term 'machinegun' has the meaning given such term in section 5845(b) of the National Firearms Act.").

Congress delegated to the Attorney General regulatory authority to promulgate legislative rules and regulations "necessary to carry out" § 922(o). 18 U.S.C. § 926(a). The Attorney General, in turn, has delegated this power to ATF. 28 C.F.R. § 0.130(a)(1)-(2).

ATF has long treated bump stocks as falling outside the statutory definition of "machine gun." ATF permits gun makers to seek classification letters from ATF prior to manufacturing a gun. S*ee Sig Sauer, Inc. v. Brandon*, 826 F.3d 598, 599 (1st Cir. 2016) (citing

ATF, National Firearms Act Handbook § 7.2.4 (2009)). ATF classification 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." *Id.* § 7.2.4.1.

In ten classification rulings between 2008 and 2017, ATF held that several bump-stock devices were not machineguns. For example, in 2010, a bump fire type rifle stock was submitted to ATF for examination and classification, and ATF deemed it an unregulated firearm part. *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 82 Fed. Reg. 60,929, 60,930 (Dec. 26, 2017) (hereinafter "Advanced Notice of Proposed Rulemaking"). In this vein, for nearly a decade, ATF issued a series of classification decisions announcing and affirming the agency's determination that bump stocks are not machine guns, as defined by the GCA and FOPA, and not subject to federal regulation. *Bump-Stock-Type-Devices*, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018) (hereinafter "Final Rule") (noting prior ATF determinations that "the devices did not rely on internal springs or similar mechanical parts to channel recoil energy").

B. The ATF ban on bump stocks.

On October 1, 2017, a shooter opened fire on a concert in Las Vegas, killing 58 people and wounding hundreds more. Authorities reported that the shooter used firearms equipped with bump stocks. In December 2017, the Department of Justice published an advance notice of proposed rulemaking explaining that "questions have arisen" as to whether bump-stock

devices "should be classified as machineguns" under federal law. Advanced Notice of Proposed Rulemaking at 60,930.

On February 20, 2018, President Donald Trump issued a "Presidential Memorandum on the Application of the Definition of Machinegun to 'Bump Fire' Stocks and Other Similar Devices" noting that "the Obama Administration repeatedly concluded that particular bump-stock-type devices were lawful to purchase and possess," and announced that he had asked his Administration to "clarify" whether bump stocks "should be illegal" under the federal statutory framework banning machine guns. *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 83 Fed. Reg. 7,949, 7,949 (Feb. 23, 2018).

The full review mandated by President Trump led to the issuance of a Notice of Proposed Rulemaking seeking "to clarify that [bump stocks] are 'machineguns'" for purposes of the NFA and GCA. *Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442, 13,442 (Mar. 29, 2018).

In late 2018, ATF issued the Final Rule in which it broadened elements of the definition of "machinegun" under the NFA and GCA such that the FOPA ban on machine guns could reach bump stocks. *See* Final Rule at 66,514. The Rule required all owners of bump stocks "to destroy the devices or abandon them at an ATF office prior to the effective date of the rule. *Id.* The Rule states that individuals would be subject to "criminal liability only for possessing bump-

stock-type devices *after the effective date* of" the Final Rule. *Id.* at 66,525 (emphasis added). The Rule also expressly stated that a person in possession of a bump stock type device was "not acting unlawfully unless they fail to relinquish or destroy their device after the effective date of this regulation." *Id.* at 66,523.

Challenges to the validity of the Final Rule were filed in various jurisdictions, all of which have upheld the Final Rule. In doing so, the Court of Appeals for the D.C. Circuit, affirming the district court below, held that the Rule is unequivocally an exercise of ATF's legislative authority, notwithstanding "the government's litigating position in this case that seeks to reimagine the Rule as merely interpretive." *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 920 F.3d 1, 19 (D.C. Cir. 2019) (per curiam). Similarly, the Tenth Circuit, in an opinion affirmed en banc, held that the Final Rule is a legislative, rather than interpretive, rule but upheld it as reasonable at *Chevron* step two. *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) ("Because ATF's Final Rule sets forth a reasonable interpretation of the statute's ambiguous definition of 'machinegun,' it merits our deference."). The Sixth Circuit also considered the Final Rule en banc and held that it was a legislative rule that was a "permissible and reasonable" construction of the "ambiguous" machine gun ban. *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 907 (6th Cir. 2021) (en banc). A panel of the Fifth

Circuit has held that ATF's reading of the machine gun ban was the "best" reading of the statute and did not reach the *Chevron* question. *Cargill v. Garland*, 20 F.4th 1004, 1009 n.4 (5th Cir. 2021), *reh'g en banc granted, judgment vacated*, 2022 WL 2255712, No. 20-51016 (5th Cir. Jun. 23, 2022).[2]

C. Proceedings below.

Petitioners are the former owners of lawfully acquired bump-fire type rifle stocks (collectively referred to as "bump stocks" or "stocks"). The Petitioners in the *McCutchen* case were individuals and businesses who owned bump stocks for their own personal, recreational or business use. App. 132-33. Petitioner in the *Modern Sportsman* case is a commercial seller of bump stocks. App. 32. Petitioners complied with the ATF rule and completely dispossessed themselves of their lawfully acquired stocks, either by voluntarily destroying them or surrendering them to ATF. App. 8, 94.

In December 2018, Petitioners brought class actions in the Court of Federal Claims on behalf of themselves and all other persons in the United States who lawfully purchased bump stocks and were forced by the ATF Final Rule to abandon or destroy their property. App. 94, 104. Petitioners claimed that the ATF

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[2] Some of these cases are the subject of separate petitions for certiorari that remain pending before this Court. *See, e.g., Gun Owners of Am., Inc. v. Garland,* No. 21-1215 and *W. Clark Aposhian v. Garland,* No. 21-159. The takings issue presented in this petition is distinct from those challenges and does not depend on their resolution.

ruling took their property without just compensation in violation of the Fifth Amendment. App. 94. The government filed a motion to dismiss Petitioners' complaint for failure to state a claim. *Id.*

The trial court granted the government's motion and issued a final judgment dismissing the complaints on September 23, 2019. *Id.* The court held that the Rule did not constitute a taking for public use because ATF was acting "pursuant to its police power." App. 108. The court went on to conclude that the Rule did not constitute a physical taking because the term "take[]" does not encompass a regulation requiring dispossession of property by destruction or surrender to the government. App. 115-17. Finally, the court rejected Petitioners' claim for total elimination of value because personal property, as opposed to real property, is "subject to pervasive government regulation." App. 120.

The Federal Circuit affirmed the dismissal of Petitioners' claims, but on different grounds. The panel noted that the lower court's "police power" rationale raised "substantial questions" that would require "extensive exploration of … doctrinal issues" for which the Court had "no precedent". App. 54. Instead, the panel majority proceeded under an alternative approach: it held that Petitioners never acquired a property interest in the possession of their bump stocks in the first place. According to the majority, two federal statutes prevented proper acquisition of any protectable title in their property. App. 63. First, 18 U.S.C. § 922(o) bans the possession of "machineguns." App. 56-57. Second, 18 U.S.C. § 926(a) grants the Attorney

General authority to implement § 922(o)'s machinegun ban. App. 61. Taken together, this meant (in the majority's view) that the property Petitioners owned was subject to an inherent limitation on title, since Congress has authorized the Attorney General to issue regulations defining the term "machinegun." App. 61-62. To the panel majority, it was of no matter that ATF has repeatedly affirmed that their property was legal when they acquired it. App. 63-64. Because the executive branch retained the authority to redefine the meaning of "machinegun," Petitioners had no property interest redressable under the Fifth Amendment. *Id*.

Judge Wallach concurred in the result only. App. 69. He criticized the majority extending the *per se* takings analysis in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), to personal property. App. 74. Judge Wallach observed that the "Circuit Courts have not reached a clear consensus on how broadly to apply *Lucas*'s *per se* rule." App. 72. Judge Wallach instead would have affirmed the Court of Claims' reasoning that the ban on possession was within the federal government's police powers, and for this reason was never a taking at all. App. 89.

Petitioners filed timely petitions for rehearing en banc, which were denied on February 2, 2022. App. 28-29, 127-29.

REASONS FOR GRANTING THE PETITION

This Court should grant review of this case because it raises an "important question of federal law that has not been, but should be, settled by this Court" and because the decision below "conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

I. The Federal Circuit's decision departs from this Court's precedent and raises questions of vital importance regarding the relation of legislative rulemaking power and the Takings Clause.

The decision below is extraordinary. There is no dispute that Petitioners acquired their bump stocks lawfully, after ATF had repeatedly opined in writing that the devices did not fall within § 922(o)'s definition of a machinegun. When ATF reversed course, issuing regulations that interpreted § 922(o) to prohibit such devices, it did not grandfather in the existing bump stocks. Instead, it required Petitioners to surrender or destroy them.

That is a quintessential taking of personal property. Petitioners were both physically dispossessed and denied all beneficial use of their bump stocks. That renders the Final Rule a taking under this Court's decisions in *Horne* and *Lucas*, among others.

The Federal Circuit avoided this conclusion with circular reasoning that cannot survive scrutiny (and which divided the panel below). The panel majority held that plaintiffs simply never acquired a protectable interest in their property at all. In the majority's

view, because § 922(o) *could have* been read by ATF to banish bump stocks all along (even though it wasn't), and because ATF always retained the authority to promulgate a rule saying as much (even though it hadn't), Petitioners never gained a protectable interest in their bump stocks. That holding flies in the face of the relevant precedents, which simply acknowledge that a person takes property subject to background legal principles that might restrict use (such as easements or nuisance law). That caveat has never been stretched to apply to the mere possibility of contrary rulemaking, and certainly not when the agency at issue had long announced that bump stocks were legal.

This is no small matter. The overnight conversion of Petitioners' property from legal to illegal affected hundreds of thousands of devices, worth tens of millions of dollars. But the principle at stake is even more astounding; taken to its logical end, the Federal Circuit's reasoning would authorize the administrative state—which touches nearly every feature of modern life—to extinguish all sorts of personal property rights via publication in the Federal Register. This Court should grant review to decide whether the Fifth Amendment can so easily be evaded.

A. The Federal Circuit's decision departs from this Court's takings jurisprudence.

"The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). This protection has its roots in Magna Carta, which prevented the taking of personal property "without immediately tendering

money therefor." *Horne*, 576 U.S. at 358. "The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property." *Id.*

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The Court has also recognized that regulations can likewise give rise to a compensable taking, either because they "physically appropriate[] property," *Cedar Point*, 141 S. Ct. at 2072, or because they "prohibit all economically beneficial use," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). Either way, that a taking comes "garbed as a regulation" does not allow the government to circumvent these rules. *Cedar Point*, 141 S. Ct. at 2072. *See also Lucas*, 505 U.S. at 1029 (explaining that "confiscatory regulations" of property "cannot be newly legislated or decreed (without compensation)").

This case involves "direct government appropriation." *Lingle*, 544 U.S. at 537. Petitioners were ordered to surrender their bump stocks to ATF or to destroy them by the effective date of the Final Rule. Final Rule at 66,523. On that date, "title" to the Petitioners' stocks effectively passed to the government, and Petitioners "los[t] the entire 'bundle' of property rights in the[m]—'the rights to possess, use and dispose of' them." *Horne*, 576 U.S. at 361-62 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

Even if the Final Rule is viewed not as a physical appropriation but a "use restriction," *see* App. 73, the same result follows. Under this Court's jurisprudence, a regulation that deprives a property owner of all "economically beneficial or productive use" is also a "categorical" taking. *Lucas*, 505 U.S. at 1015. The Final Rule undoubtedly meets that test; it prohibits *any* use of Petitioners' devices and indeed required their surrender or destruction. Final Rule at 66,523. And the Federal Circuit has recognized that this doctrine applies to regulations of personal property. *See, e.g.*, *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151 (Fed. Cir. 2014).

Indeed, this Court's decision in *Andrus v. Allard*, 444 U.S. 51 (1979), is illustrative. In that case, the Court considered a takings claim brought by individuals who traded in the feathers of certain migratory birds. *Id.* at 54, 64-65. Their claim arose from regulations that barred the sale of feathers of certain species, as required by the Eagle Protection Act and the Migratory Bird Treaty Act. *Id.* at 52-54. In rejecting the claim, this Court emphasized that "[t]he regulations challenged *here do not compel the surrender* of the artifacts, and there is no physical invasion or restraint upon them." *Id.* at 65. (emphasis added). Indeed, the Court found it "crucial that appellees retain the rights to possess and transport their property." *Id.* at 66.

The Final Rule did not leave Petitioners with any of the rights deemed "crucial" in *Andrus*. It compels surrender of their bump stocks. Final Rule at 66,523.

Continued possession is not allowed—at home or anywhere else within the United States.

None of this is to say that some form of a bump-stock ban couldn't be implemented without effecting a taking. ATF could have grandfathered in existing devices and imposed its ban on a *prospective* basis. But it chose a different path. A takings claim arises as a consequence; the government, "by *ipse dixit*, may not transform private property into public property without compensation." *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env't Prot.*, 560 U.S. 702, 715 (2010); *see also Lucas*, 505 U.S. at 1029 (noting that confiscatory regulations "cannot be newly legislated or decreed (without compensation)").

B. The panel's holding stretches *Lucas*'s exception for restrictions inherent in the title past the breaking point.

Restrictions that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership" are an exception to categorical takings. *Lucas*, 505 U.S. at 1029. This exception makes sense; a landowner is not subjected to a taking if his otherwise lawful activity meets the requirements of a public nuisance under applicable property law. *Id*. Nor does the Fifth Amendment prohibit the government from gaining an easement through the operation of ordinary law. *Id*. at 1028-29.

But the Federal Circuit's decision distorts this exception; it holds that the mere *possibility* of future rulemaking by ATF eliminated Petitioners'

protectable property rights. App. 62. Of course, this in no way reflects any "background principle" of ordinary property law. Petitioners no doubt would have had legal remedies available if another person had converted or destroyed their bump stocks. And ATF's only actual pronouncements prior to the Final Rule were a series of letters *authorizing* the possession of bump stocks under § 922(o). Final Rule at 66,514. One wonders why this isn't sufficient to create an interest protected by the Fifth Amendment.

In its attempt to answer this question, the Federal Circuit highlighted that Petitioners "accept that the Final Rule's implementation of the preexisting prohibition is an authorized and legally valid interpretation of the statutory prohibition." App. 59. The Federal Circuit then reasoned that if the regulation is valid, it must be either (1) the only valid construction of unambiguous statutory language, *id.* 60-61, or (2) an acceptable interpretation of an ambiguous statute under *Chevron*, *id.* at 61-63. Either way, the Federal Circuit concluded, if the Final Rule is a valid application of § 922(o), Petitioners necessarily "had no property interest protected by the compensation requirement of the Takings Clause against such a valid interpretation when adopted." *Id.* at 62.

This analysis is seriously flawed. To begin, Petitioners never conceded that ATF's promulgation of the Final Rule was lawful. Rather, for purposes of its takings claim, it assumed that the law was valid—because Federal Circuit *requires* this assumption. 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)).[3] But that does not mean that Petitioners conceded that ATF could exercise its reserved rulemaking power *without effecting a taking*. But that is the upshot of the Federal Circuit's decision.

The flaw in this reasoning is evident. For example, it is certainly a "background principle" of property law that a state may exercise eminent domain or alter the requirements of adverse possession. But that truism does not mean that every landowner's title is inherently limited by that possibility, such that the government is excused from paying just compensation upon exercise of that authority. As this Court has noted, the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987). The Federal Circuit's rule turns this on its head, holding that the possibility of a future taking undermines the ability to assert a protectable interest at all. App. 62-63. This circular logic guts the Fifth Amendment—

[3] Nor does this assumption mean that if a confiscatory regulation is later deemed invalid, there can be no taking liability at all; those who lost their property by an invalid act of government may still be entitled to compensation for unlawful takings. *See Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) (noting that "[m]erely because a government agent's conduct is unlawful does not mean that it is unauthorized; a government official may act within his authority even if his conduct is later determined to have been contrary to law").

which is why this Court has rejected similar arguments in the past. *See, e.g.*, *Stop the Beach Renourishment*, 560 U.S. at 728 (rejecting a "predictability" test for judicial takings because "elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance is nonetheless a taking").

Indeed, although Petitioners assume (as they were required to) that the Final Rule was valid, they vigorously argued below that it 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. A legislative rule alters "individual rights and obligations," *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, (1979)), and has the "force and effect of law," *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 215 (2016). By contrast, an interpretive rule merely "advise[s] the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quoting *Chrysler Corp.*, 441 U.S. at 302 n.31).

A number of other circuits have expressly held the Final Rule to be legislative, not interpretive. *See Gun Owners of Am.,* 19 F.4th at 901 (declaring the Final Rule to be a "legislative regulation"); *Aposhian,* 958 F.3d at 980 (finding that "it is evident that the Final Rule intends to speak with the force of law" and is thus legislative); *Guedes*, 920 F.3d at 17-20 ("All pertinent indicia of agency intent confirm that the Bump-Stock Rule is a legislative rule.").

Because the Final Rule is a legislative rule, it cannot inhere in the title to property purchased *before* the legislative rule was promulgated. Rather, "the Final Rule demonstrates that ATF intended to *change* the legal rights and obligations of bump-stock owners." *Aposhian*, 958 F.3d at 980 (emphasis added). The Federal Circuit disregards the distinction between legislative and interpretive rulemaking, allowing the inhere-in-title exception in *Lucas* to swallow the general rule of the Fifth Amendment. App. 57-58. But this Court made clear that the exception applied only to "existing rules or understandings" when title is taken. *Lucas*, 505 U.S. at 1030.[4]

The Federal Circuit's expansion of this exception is even more striking in light of the *Chevron* doctrine, which allows federal agencies to "authoritatively resolve ambiguities in statutes." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring in the judgment). Under the Federal Circuit's logic, any future reasonable interpretation of ambiguous text is sufficient to insulate the government from a takings claim. *See* App. 62. Given the size and scope of the modern administrative state, *that* is a breathtaking proposition. It is no wonder that the decision

[4] To the extent the Federal Circuit's decision suggests that Petitioners understood that ATF could retroactively bar possession of their property, it runs afoul of yet another decision of this Court. In *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), the Court held that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208. No such language exists in § 922(o), and ATF expressly acknowledged that possession of bump stocks remained lawful until the date the Final Rule became effective. Final Rule at 66,514, 66,525.

below prompted surprise among informed commentators.[5] Indeed, scholars have long observed the *Lucas* exception's tendency to expand in troubling ways.[6]

The Federal Circuit's holding unsettles title to nearly all personal property and provides the federal Executive with an easy way to circumvent the Fifth Amendment. It allows the Executive to do what even Congress cannot. If Congress prohibits the possession of cars tomorrow, it could not avoid the need to provide just compensation by pointing to its general

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[5] *See, e.g., Fed Cir Tries To Avoid 'Police Power' Takings Exception In Bump Stock Case By (Unsuccessfully) Finessing The Property Interest*, inversecondemnation.com (Oct. 5, 2021), tinyurl.com/yradppvd ("Property rights are shaped by *Chevron*? Holy cow, that's a new one[.]").

[6] *See, e.g.*, R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Envtl. L.J. 449, 483-84 (2001) (noting that Lucas's background principle "restriction has typically been ignored or misconstrued by commentators, regulators, and the courts—many of which have held that virtually any restrictive land use regulation, no matter what its origin or how recent its enactment, qualifies as a 'background principle of state law'"); Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. Cal. L. Rev. 1, 3 (1996) (noting that "[t]he scope of the uncertainty is enormous" for the inherent limitations exception); Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise Of Background Principles As Categorical Takings Defenses*, 29 Harv. Envtl. L. Rev. 321, 368 (2005) (analyzing decisional law and noting the "wide and perhaps expanding array of doctrinal, statutory, and constitutional limitations on land use" that increasingly "serve to defeat most takings claims").

legislative authority under the Commerce Clause. Yet the Federal Circuit allows the Executive to do precisely the same thing. But the Takings Clause "is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor." *Stop the Beach Renourishment*, 560 U.S. at 713-14. The Federal Circuit's ruling is fundamentally incompatible with a Constitution premised upon the idea that "'[p]roperty must be secured, or liberty cannot exist.'" *Cedar Point*, 141 S. Ct. at 2071 (Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851)).

C. The question presented is an important one.

In promulgating the Final Rule, ATF estimated that there were between 280,000-520,000 bump stocks in circulation. Final Rule at 66,538. It also estimated the average retail price of bump stocks to be $301. *Id.* Thus assuming the low end of ATF's figures, these cases implicate the taking of more than $84 million of lawfully acquired property. This case thus easily qualifies as "important" in its own right under Rule 10(c). *See Mobil Oil Expl. & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 214 (1991) (certiorari granted "[i]n light of the economic interests at stake"); Stephen M. Shapiro et al., Supreme Court Practice § 4.13, at 269-270 (10th ed. 2013).

But the importance of the principle at issue in these cases is much greater. The Federal Circuit's decision clouds the title of any personal property over which the federal government retains general authority to regulate in the future. *See supra*, at 4. "The

Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). The "administrative state" has become "pervasive ... in the lives of ordinary Americans," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring in the judgment). And the Code of Federal Regulations contains a vast array of restrictions governing the legality of chattels as commonplace as automobiles, *see* 49 C.F.R. § 571, and as trivial as onion rings. 21 CFR § 102.39. It is easy to imagine how all kinds of currently lawful personal property could be subject to dispossession based on some future "valid" application of *Chevron*.

That this case involves the taking of bump stocks makes it no less an appropriate vehicle for judicial review. It is hardly surprising that the government might move to ban or confiscate property that is the subject of serious political debate. But the political desirability of the taking cannot influence the right to compensation; the Fifth Amendment protects against *all* takings, not just uncontroversial ones. As James Madison wrote, "[T]hat alone is a just government, which impartially secures to every man, whatever is his own." For the National Gazette, Property (Mar. 27, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983) (italics omitted). *See also Kelo v. City of New London, Conn.*, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting) (warning against a reading of the Takings Clause that benefits "those

citizens with disproportionate influence and power in the political process").

D. These cases are an appropriate vehicle to reach the question presented.

Nothing about the history of this litigation creates an obstacle to this Court's review. Petitioners presented and preserved all of their takings arguments below. Nor is there any underlying factual dispute to muddy the waters; the timing and effect of the Final Rule on Petitioners' possessory right to their bump stocks is not at issue. The question for this Court is a legal one: was the Federal Circuit correct that the general reservation of rulemaking authority and the *Chevron* doctrine were enough to eliminate a protectable property right for purposes of the Fifth Amendment?

Moreover, the Federal Circuit has nearly exclusive appellate jurisdiction over takings claims of this kind against the federal government. As a general matter, "[t]he Tucker Act … provides the standard procedure for bringing" takings claims against the federal government. *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2170 (2019) (citing 28 U.S.C. § 1491(a)(1)). Although federal district courts have concurrent jurisdiction over smaller claims "not exceeding $10,000"), *see* 28 U.S.C. § 1346(a)(2), those decisions (like decisions from the Court of Federal Claims) are appealed to the Federal Circuit. *See* 28 U.S.C. §§ 1295(a)(2)-(a)(3). Percolation in other circuits will not produce a better vehicle; the Federal Circuit's decision is going to govern the scope of the "inhere-in-title" exception in all takings claims against

the United States. Only this Court can correct its deviation from the governing principles.

Finally, the concurring opinion's alternative ground for decision in no way mitigates against certiorari. To begin, Judge Wallach himself was critical of the majority's expansion of the inhere-in-title exception, albeit for different reasons than Petitioners. *See* App. 72-74. More importantly, Judge Wallach's proposed holding is just as circular as the majority's. In his view, Petitioners "lack a compensable takings claim" because "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." App. 81-82 (cleaned up). This assertion is unsatisfying, to say the least—nothing in the Takings Clause exempts "police powers" from the requirement of just compensation. And this Court has consistently "rejected" advocates who "urge blanket exemptions from the Fifth Amendment's instruction" for fear that "recognizing a just compensation claim would unduly impede the government's ability to act in the public interest." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 36-37 (2012).

Indeed, if Judge Wallach had prevailed below, he would have been creating a circuit split. *See Yawn v. Dorchester Cnty.*, 1 F.4th 191, 195 (4th Cir. 2021) ("That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court's jurisprudence.") Another trial court considering claims

identical to the ones raised here was likewise skeptical of this argument prior to the Federal Circuit's decision. *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"). And the two judges in the majority themselves recognized that the "police power" rationale raised a number of "substantial questions" that would require "extensive exploration of the doctrinal issues." App. 54. And so even if this Court believed the "police power" exemption might be a viable defense, certiorari would still be appropriate to resolve the uncertainty in the decisions below about the general scope of such exemption and its application to the Final Rule.

CONCLUSION

This Court should grant the petition.

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