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APPENDIX A

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

2020-1107

[Filed: October 1, 2021]

MODERN SPORTSMAN, LLC, RW ARMS, LTD., MARK MAXWELL, MICHAEL STEWART, *Plaintiffs-Appellants*	)
v.	)
UNITED STATES, *Defendant-Appellee*	)

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00449-LAS, Senior Judge Loren A. Smith.

Decided: October 1, 2021

JENNIFER GELMAN, Flint Law Firm LLC, Edwardsville, IL, argued for plaintiffs-appellants. Also represented by ADAM MICHAEL RILEY.

KENNETH DINTZER, Commercial Litigation Branch, Civil Division, United States Department of Justice,

Washington, DC, argued for defendant-appellee. Also represented by JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR., LOREN MISHA PREHEIM, NATHANAEL YALE.

MARK W. PENNAK, Law Offices of Mark W. Pennak, Chevy Chase, MD, for amicus curiae Maryland Shall Issue, Inc.

PRAATIKA PRASAD, Gibson, Dunn & Crutcher LLP, New York, NY, for amici curiae Paul Baumbach, Vic Bencomo, Jim Berzowski, Matthew DeFalco, Scarlett Flores, David Fitz, Peter Gurfein, Megan Harper, George Higgins, Bob Mokos, Mike Meyers, Jim Pederson, Matt Pierce, Conner Siegel, Whitney Toutenhoofd. Also represented by SCOTT EDELMAN, Los Angeles, CA; VIVEK R. GOPALAN, San Francisco, CA; HANNAH SHEARER, Giffords Law Center to Prevent Gun Violence, San Francisco, CA.

Before TARANTO, WALLACH,[*] and CHEN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TARANTO.

Opinion concurring in the result filed by *Circuit Judge* WALLACH.

TARANTO, *Circuit Judge*.

The Modern Sportsman, LLC, RW Arms, Ltd., Mark Maxwell, and Michael Stewart (collectively, Modern

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[*] Circuit Judge Evan J. Wallach assumed senior status on May 31, 2021.

Sportsman) sued the United States in the Court of Federal Claims (Claims Court), alleging that the Bureau of Alcohol, Tobacco, Firearms, and Explosives had, through promulgation of Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Final Rule), taken its bump stocks in violation of the Fifth Amendment. J.A. 37–44 (Amended Complaint).

The government moved to dismiss Modern Sportsman's amended complaint for failure to state a claim on which relief can be granted. The Claims Court granted the government's motion and dismissed Modern Sportsman's amended complaint. *Modern Sportsman, LLC v. United States*, 145 Fed. Cl. 575 (2019); J.A. 10 (Judgment).

Modern Sportsman timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3). We heard oral argument in this and a related case, *McCutchen v. United States*, No. 2020-1188, as the cases present materially identical issues. *See* Fed. R. App. P. 3(b). For the same reasons we today affirm the Claims Court's judgment in the *McCutchen* case, we affirm the Claims Court's judgment in the present case.

The parties shall bear their own costs.

AFFIRMED

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

MODERN SPORTSMAN, LLC, RW ARMS, LTD., MARK MAXWELL, MICHAEL STEWART,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2020-1107

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00449-LAS, Senior Judge Loren A. Smith.

WALLACH, *Circuit Judge*, concurring in the result.

This appeal is related to *McCutchen v. United States*, No. 2020-1188 (Fed. Cir. 2021), decided concurrently. For all reasons stated in my concurrence in *McCutchen*, I concur in affirming the Court of Federal Claims' decision in *Modern Sportsman, LLC v. United States*, 145 Fed. Cl. 575 (2019). *See McCutchen*, No. 2020-1188 (Wallach, E., concurring).

APPENDIX B

In the United States Court of Federal Claims

No. 19-449

[Filed: October 23, 2019]

THE MODERN SPORTSMAN, LLC, et al.,	)
Plaintiff,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

Fifth Amendment Takings Claim; Informal Rulemaking; Police Power; Bureau of Alcohol, Tobacco, Firearms and Explosives; Bump Stock; Machinegun; Motion to Dismiss; RCFC 12(b)(6).

Ethan Albert Flint, Flint Law Firm, LLC, Edwardsville, IL, for plaintiffs.

Nathanael Brown Yale, U.S. Department of Justice, Civil Division, Washington, DC, for defendant.

OPINION AND ORDER

***SMITH*, Senior Judge**

In reviewing this case, the Court is sympathetic to the plaintiffs who have lost the rights to the bump stocks they purchased while they and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") seemingly thought bump stocks were not machineguns and were therefore legal. In a private context, what occurred would be remedied by the concept of justifiable reliance and plaintiffs would be compensated. However, the law is different in this case because the government, as the sovereign, has the power to take property that is dangerous, diseased, or used in criminal activities without compensation. Here, ATF acted properly within the confines of the limited federal police power. In nearly all cases, if the government confiscated a gun legally possessed by a person not committing a crime, the government would have to pay just compensation or return the gun. Importantly, however, guns are protected by the Second Amendment of the Constitution, but machineguns are not, as the crime waves of the 1920s and 1930s convinced Congress that machineguns do not fall within the scope of protections offered by the Second Amendment. The courts have not overturned this measure and this Court will not endeavor to do so now.

This case is before the Court on defendant's Motion to Dismiss. On December 26, 2018, the Department of Justice's ("DOJ") Bureau of Alcohol, Tobacco, Firearms and Explosives issued a Final Rule clarifying that the term "machinegun" encompasses "bump-stock-type device[s]" (hereinafter "bump stocks"), and

consequently requiring the timely surrender or destruction of bump stocks.[1] Plaintiffs allege that the Final Rule's requirement to surrender or destroy their bump stocks effected a Fifth Amendment taking of their property.

The impetus for ATF modifying its regulations arose when, after the deadly mass shooting in Las Vegas on October 1, 2017, President Trump issued a memorandum to the Attorney General. *Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices*, 83 Fed. Reg. 7,949, at 7,949–50 (Feb. 20, 2018) (hereinafter "Bump Stock Memorandum"). In that memorandum, the President urged the DOJ to "fully review" how ATF regulates bump stocks and similar devices, and, "as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." *Id.*; *see Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,516–17 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479) (hereinafter

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[1] Pursuant to the transfer of functions from the Department of the Treasury to the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") under the Homeland Security Act of 2002, the Attorney General is responsible for prescribing rules and regulations necessary to carry out the provisions of 18 U.S.C. §§ 921 *et seq.* (2018), which concern crimes and criminal procedure related to firearms. Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135 (2002); 26 U.S.C. §§ 7801, 7805 (2018) (authorizing the Secretary of the Department of Treasury to administer and enforce this title, and to "prescribe all needful rules and regulations for the enforcement of this title."); 18 U.S.C. § 926 (providing the Attorney General with the authority to prescribe rules and regulations to carry out the provisions of 18 U.S.C. §§ 921 *et seq.*).

"Final Rule"). In response to the President's Bump Stock Memorandum, ATF published a Notice of Proposed Rulemaking in the Federal Register on March 29, 2018, in which it proposed changes to its regulations concerning machineguns listed at 27 C.F.R. §§ 447.11, 478.11, and 479.11. *Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442 (proposed Mar. 29, 2018) (hereinafter "NOPR"). After an opportunity for notice and comment, which closed on June 27, 2018, ATF published a Notice of the Final Rule on December 26, 2018. *See generally* Final Rule. The Final Rule had an effective date of March 26, 2019, affording owners of bump stocks a period of ninety days to either destroy or surrender their devices at a local ATF office. *Id.* at 66,530, 66,554. Accordingly, plaintiffs collectively destroyed and discarded the resulting scrap from 74,995 bump stocks.[2] *See* Amended Complaint (hereinafter "Am. Compl.") at 7.

Plaintiffs filed their Complaint with this Court on March 26, 2019, and an amended complaint on March 28, 2019. *See generally* Complaint; *see generally* Am. Compl. On May 28, 2019, defendant filed its Motion to Dismiss pursuant to Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"), arguing that a taking did not occur because the requirement to surrender or destroy bump stocks served to protect the

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[2] Plaintiff, The Modern Sportsman, LLC, destroyed and discarded the resulting scrap from 1,479 bump stocks; plaintiff RW Arms, Ltd. destroyed and discarded the resulting scrap from 73,462 bump stocks; plaintiff Mark Maxwell destroyed and discarded the resulting scrap from 29 bump stocks; and plaintiff Michael Stewart destroyed and discarded the resulting scrap from 25 bump stocks pursuant to the Final Rule. Plaintiffs' Amended Complaint at 7.

public health and safety, and was therefore a valid exercise of the police power. Defendant's Motion to Dismiss (hereinafter "Def.'s MTD") at 1. Defendant further alleged that "a compensable taking does not occur when the Government takes property that is, or may be, subject to a statutory prohibition." *Id.* Plaintiffs filed their Response to defendant's Motion to Dismiss on June 23, 2019, reiterating their takings arguments. *See generally* Plaintiffs' Opposition to Defendant's Motion to Dismiss (hereinafter "Pls.' Resp."). On July 22, 2019, defendant filed its Reply in support of its Motion to Dismiss. *See generally* Defendant's Reply in Support of Its Motion to Dismiss (hereinafter "Def.'s Reply"). The Court held oral argument on August 28, 2019, and defendant's Motion to Dismiss is fully briefed and ripe for review. For the reasons set forth below, the Court grants defendant's Motion to Dismiss.

I. Background

Over the past century, Congress has passed a series of laws to regulate the interstate firearms industry with the underlying goal of increasing public safety. When enacting the first of these major statutes, the National Firearms Act of 1934 ("NFA"), Congress wanted to ensure firearm regulations would not be too liberally construed. *See* H.R. REP. NO. 73-9741, at 1–2 (1934). Accordingly, the NFA regulated the manufacture, importation, and dealing of a narrowly-tailored set of firearms.[3] 26 U.S.C. § 5801 *et seq*. (2018);

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[3] The National Firearms Act of 1934 originally defined "firearms" as:

see H.R. REP. NO. 73-9741, at 1–2 (1934). Among those firearms was the "machine gun," which the NFA originally defined as "any weapon which shoots, or is designed to shoot, automatically or semi-automatically, more than one shot, without manual reloading, by a single function of the trigger." National Firearms Act, 73 Pub. L. No. 474, 48 Stat. 1236 (1934); H.R. REP. NO. 73-9741, at 1–2.

Congress further augmented its regulation of machineguns through the Gun Control Act of 1968 ("GCA"), 18 U.S.C. § 921 *et seq*. The purpose behind enacting the GCA was to more effectively regulate interstate commerce in firearms, with the ultimate goal of combatting the "skyrocketing increase in the incidence of serious crime." S. REP. NO. 89-1866, at 1 (1966); *see generally* 18 U.S.C. § 921 *et seq*. Moreover, Congress sought "to reduce the likelihood that [firearms] fall into the hands of the lawless or those who might misuse them," and to assist States and their political subdivisions in enforcing existing firearms laws. S. REP. NO. 89-1866, at 1; *see generally* 18 U.S.C. § 921 *et seq*.

> [A] shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

National Firearms Act, 73 Pub. L. No. 474, 48 Stat. 1236 (1934); H.R. REP. NO. 73-9741, at 1 (1934).

Less than two decades later, Congress passed the Firearm Owners Protection Act ("FOPA"), Pub. L. 99-308, 100 Stat. 449 (1986), reiterating its desire to fight violent crime while simultaneously strengthening protections for the rights of law-abiding gun owners. 132 Cong. Rec. 9590 (1986) (statement of Sen. Orrin Hatch); *see generally* Pub. L. No. 99-308, 100 Stat. 449 (1986). Significantly, FOPA added 18 U.S.C. § 922(o) to the GCA, making it "unlawful for any person to transfer or possess a machinegun" not lawfully obtained prior to May 19, 1986. Consistent with this prohibition, both FOPA and the GCA incorporated the definition of "machinegun" as used in the NFA,[4] which the NFA has for decades defined as:

> any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. 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) (emphasis added).

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[4] The National Firearms Act of 1934 originally included the term machinegun as two words, 73 Pub. L. No. 474, 48 Stat. 1236, but now includes machinegun as one word, 26 U.S.C. § 5845(b) (2018).

Altogether, these three statutes form the foundation upon which ATF has promulgated rules and regulations that interpret and enforce the objectives of those statutes, including restrictions related to the prohibition on owning machineguns not lawfully obtained prior to 1986. Indeed, since the enactment of FOPA in 1986, ATF has promulgated a number of regulations interpreting provisions of the GCA and NFA pursuant to its delegated authority to investigate and enforce criminal and regulatory violations of Federal firearms law. Def.'s MTD at 5 (citing 18 U.S.C. § 926(a), 26 U.S.C. §§ 7801(a)(2)(A), 7805(a), 28 U.S.C. § 599A(b)(1), 28 C.F.R. § 0.130(a)(1)–(2)). Among those regulations are 27 C.F.R. §§ 447.11, 478.11, and 479.11, which contained identical definitions of the term "machinegun" to those in the NFA and GCA prior to the Final Rule. Final Rule at 66,514. Pursuant to those regulations and ATF's delegated authority, if the owner of a firearm or device wants to know if their firearm or device meets the definition of "machinegun," he or she may request a clarification letter from ATF; ATF may in turn require the submission of a prototype for testing.[5] BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND

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[5] Section 7.2.3.1 of the ATF Handbook also provides the following disclaimer:

> ATF letter rulings classifying firearms may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms laws. Nevertheless, classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations. To make sure their classifications are current, FFLs/SOTs should stay informed by periodically checking the

EXPLOSIVES, NATIONAL FIREARMS ACT HANDBOOK § 7.2.4 (2009), https://www.atf.gov/firearms/docs/atf-national-firearms-act-handbook-chapter-7/download.

A. 2006–2017 ATF Classification Decisions

In 2002, ATF received a request for clarification regarding the Akins Accelerator, which ATF temporarily determined was not a machinegun. Final Rule at 66,517. Upon further review of the device and receipt of related requests from members of the firearms industry, however, ATF determined that the Akins Accelerator was in fact a machinegun. *Id.* (citing ATF Ruling 2006-2). Thus, ATF first classified a certain bump stock as a machinegun in 2006, concluding that "a device attached to a semiautomatic firearm that uses an internal spring to harness the force of a firearm's recoil so that the firearm shoots more than one shot with a single pull of the trigger is a machinegun." *Id.* at 66,514. ATF reached this decision by interpreting the phrase "single function of the trigger" from the NFA's definition of machinegun to synonymously mean "single pull of the trigger."[6] *Id.* at

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> information published on ATF's website, particularly amendments to the law or regulations, published ATF rulings, and "open letters" to industry members.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, NATIONAL FIREARMS ACT HANDBOOK § 7.2.3.1 (2009), https://www.atf.gov/firearms/docs/atf-national-firearms-act-handbook-chapter-7/download.

[6] The inventor of the Akins Accelerator challenged ATF's classification decision of the Akins Accelerator as a machinegun in the United States District Court for the Middle District of Florida,

66,514. As a result, ATF required all owners of the Akins Accelerator to remove the internal spring and either dispose the spring or surrender it at an ATF location. *Id.* at 66,517. When later presented with the question of whether the result of this clarification decision effected an unconstitutional taking, this Court held it did not. *Akins v. United States*, 82 Fed. Cl. 619, 622–23 (2008).

Notwithstanding its 2006 classification decision, between 2008 and 2017, ATF received additional clarification requests from owners of bump-stock-type devices with varying functional differences as compared to the Akins Accelerator. Final Rule at 66,514; *see* Am. Compl. at 6. Based largely on ATF's hasty conclusion that "the devices did not rely on internal springs or similar mechanical parts to channel recoil energy," ATF concluded that those other bump-stock-type devices did not meet the definition of machinegun. *See* Final Rule at 66,514, 66,518; *see also* Am. Compl. at 6. However, ATF concurrently concluded that other types of trigger actuators, two-stage triggers,

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claiming that ATF's decision was arbitrary and capricious under the Administrative Procedure Act. *Akins* v. *United States,* No. 08-988, slip op. at 7–8 (M.D. Fla. Sept. 23, 2008), *aff'd*, 312 F. App'x 197 (11th Cir. 2009). The District Court rejected plaintiff's argument, finding that ATF demonstrated a "reasoned analysis" for its new interpretation and application, including the need to "protect the public from dangerous firearms." *Id.* at 6. The United States Court of Appeals for the Eleventh Circuit affirmed, holding that the "interpretation by [ATF] of the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute and its legislative history." *Akins v. United States*, 312 Fed. Appx. at 200.

and other devices were in fact illegal machineguns under 18 U.S.C. § 922(o) based on its interpretation of "single pull of the trigger." Final Rule at 66,517–18.

B. Issuance of the Final Rule

In the wake of the deadly mass shooting in Las Vegas, President Trump issued the Bump Stock Memorandum in light of the disparity in ATF's classifications of bump stocks and related devices. *See generally* Final Rule. In response, ATF began reviewing its prior classification decisions. *See generally id.* ATF ultimately determined that its past classifications and conclusions "did not reflect the best interpretation of 'machinegun' under the NFA and GCA," and that the "[d]ecisions issued during that time did not include extensive legal analysis relating to the definition of 'machinegun.'" *Id.* at 66,514. Accordingly, ATF promulgated what is now the Final Rule to "bring clarity to the definition of 'machinegun'—specifically with respect to the terms 'automatically' and 'single function of the trigger,' as those terms are used to define 'machinegun.'" *Id.*

First, and consistent with its position since 2006, ATF formally defined the phrase "single function of the trigger" to mean "a single pull of the trigger and analogous motions." *E.g.*, 27 C.F.R. § 447.11; *see* Final Rule at 66,518. Next, ATF interpreted the modifying term "automatically" to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger," which reflects the ordinary meaning of that term when Congress enacted the NFA in 1934. *E.g.*, 27

C.F.R. § 447.11; *see* Final Rule at 66,519. Finally, ATF clarified that the definition of "machinegun":

> includes a bump-stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.

E.g., 27 C.F.R. § 447.11; *see* Final Rule at 66,515, 66,519. Upon publication of the Final Rule, these three amended definitions were incorporated into ATF's regulations at 27 C.F.R. §§ 447.11, 478.11, and 447.11. These definitions allowed ATF to further the underlying policy goals of the NFA and GCA, key statutes through which Congress sought to increase public safety after it had "determined that machineguns were a public safety threat." *See, e.g.*, Final Rule at 66,529. Thus, in promulgating the Final Rule, ATF sought to fulfill the Congressional goal of increased public safety by ensuring that all "devices that satisfy the statutory definition of 'machinegun' [are classified] as machineguns." *Id.* at 66,529, 66,537 ("This rule is a significant regulatory action that clarifies the meaning of the statutory definition of machinegun and reflects the public safety goals of the NFA and GCA.").

ATF began its efforts to fulfill its understanding of the NFA and GCA's public safety goals in connection with bump stocks in its NOPR, where it explained how "the Las Vegas tragedy made 'individuals aware that

these devices exist—potentially including persons with criminal or terrorist intentions—and made their potential to threaten public safety obvious.'" *Id.* at 66,520, 66,528 (quoting NOPR at 13,447). ATF expanded upon that concern in the Final Rule, acknowledging how the "ban also could result in less danger to first responders when responding to incidents, because it prevents shooters from using devices that allow them to shoot semiautomatic firearms automatically." *Id.* at 66,551. ATF echoed this concern throughout the Final Rule by repeatedly acknowledging how the revised definitions and effect of the Final Rule "reflects the public safety goals of those statutes." *See, e.g.*, *id.* at 66,520, 66,522, 66,529.

II. Discussion

Plaintiffs claim they were deprived of ownership and all economic value of their property when they disposed of their bump stocks pursuant to the Final Rule, and that the effect of the Final Rule resulted in a Fifth Amendment Taking. Pls.' Resp. at 1–2. For the reasons set forth below, the Court finds that the Final Rule's mandate to surrender or destroy bump stocks does not satisfy the public use requirement under a Fifth Amendment Takings analysis, and that ATF appropriately acted within the confines of the police power.

A. Standard of Review

The Court will dismiss a case under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." *Spectre Corp. v. United States*, 132 Fed. Cl. 626, 628 (2017) (quoting *Lindsay v. United*

States, 295 F.3d 1252, 1257 (Fed. Cir. 2002)). In reviewing a motion to dismiss for failure to state a claim, the Court "must accept as true all the factual allegations in the complaint . . . and [] must indulge all reasonable inferences in favor of the non-movant." *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). The Court need not, however, accept legal conclusions "cast in the form of factual allegations," and will grant a motion to dismiss when faced with conclusory allegations that lack supporting facts, as "a formulaic recitation of the elements of a cause of action" alone will not withstand a motion to dismiss. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Akins*, 82 Fed. Cl. at 622.

This Court will grant a motion to dismiss when a plaintiff's Fifth Amendment Takings claim fails to assert "the kind of property right that could be the subject of a taking claim," or when the government validly exercises its limited authority under the police power doctrine. *Mitchell Arms v. United States*, 7 F.3d 212, 213 (Fed. Cir. 1993); *Akins*, 82 Fed. Cl. at 623. Thus, in order to prevail on a motion to dismiss in the context of a takings claim, a plaintiff must demonstrate it has a protected property interest, and, separately, that said property interest was taken for a "public use" and was not seized or retained pursuant to a valid exercise of the government's police power. Property taken by the government for private use, for example redistribution to other private persons, does not escape the Fifth Amendment's protections, though injunctive rather than compensatory relief might be the remedy. *Carole Media LLC v. N.J. Transit Co.*, 550 F.3d 302, 308 (3d Cir. 2008) ("A plaintiff that proves that a

government entity has taken its property for a private, not a public, use is entitled to an injunction against the unconstitutional taking, not simply compensation.").

B. Fifth Amendment Takings Claims

The Takings Clause of the Fifth Amendment of the Constitution provides: "[N]or shall private property be taken for public use without just compensation." U.S. Const. amend. V. When alleging a takings claim, a plaintiff "must demonstrate that they have a property interest to assert and that the government physically or by regulation infringed on that interest for public use." *Craig Patty & Craig Thomas Expeditors, LLC v. United States*, 136 Fed. Cl. 211, 214 (2018). Thus, to bring a successful takings claim, the plaintiff must satisfy both the public use and protected property interest requirements under the Fifth Amendment. *Amerisource Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008); *see Mitchell Arms*, 7 F.3d at 215, 217.

It is a well-established principle that, when a plaintiff alleges a physical taking, the "nature of the [government's] action is critical in [a] takings analysis." *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Indeed, the Supreme Court has long-held 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 or an appropriation of property for the public benefit." *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887). That principle exists in large part because the "government hardly could go on if to some extent

values incident to property could not be diminished without paying for every such change in the general law." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

Courts have construed the text of the Takings Clause to mean that only those whose property has been "taken for a public use" are entitled to compensation. *Amerisource Corp.*, 525 F.3d at 1152; *Akins*, 82 Fed. Cl. at 622. Though the Takings Clause itself does not specify the exact grounds of public use "that trigger the just compensation requirement," the courts have consistently found that property is not taken for a "public use" when seized or retained pursuant to the police power. *Amerisource Corp.*, 525 F.3d at 1153; *Acadia Tech., Inc. v. United States*, 65 Fed. Cl. 425, 429 (2005) ("[I]f [property] is taken to prevent public harm, the government action may be an exercise of police power." (emphasis in original)), *aff'd Acadia Technology, Inc. v. United States*, 458 F.3d 1327, 1332 (Fed. Cir. 2006); *see also Tate v. District of Columbia*, 601 F.Supp.2d 132 (D.D.C. 2009). Moreover, "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law." *Mugler v. Kansas*, 123 U.S. at 668–69.

When properly exercised, the police power provides the government with the authority, under limited circumstances, to take or require the destruction of property without compensation, as the Takings Clause

is not implicated in such limited circumstances. *See, e.g.*, *id.*; *see also Craig Patty*, 136 Fed. Cl. at 213–14 ("The Supreme Court has long taught that the Takings Clause is not implicated when the government exercises its police power."); *Akins*, 82 Fed. Cl. at 622–23 (finding that ATF's requirement that owners of the Akins Accelerator remove and surrender the recoil springs without compensation was a valid exercise of the police power). Indeed, this Court's predecessor, the Court of Claims, explained that "where the purpose of a regulation which causes interference with property rights is to prevent injury to the public welfare as opposed to merely bestowing upon the public a nonessential benefit, compensation under the fifth amendment is not required." *Radioptics, Inc. v. United States*, 223 Ct. Cl. 594 (1980); *see also Allied-Gen. Nuclear Servs. v. United States*, 839 F.2d 1572, 1576 (Fed. Cir. 1988) (reaching the same conclusion).

The Federal Circuit and this Court have found valid exercises of the police power where the government seized property to enforce criminal laws, and where the seized property "was evidence in an investigation or the object of the law enforcement action." *Amerisource Corp.*, 525 F.3d at 1153–54 (holding the government validly exercised its police power when it seized pharmaceuticals without compensation in order to enforce criminal laws, suggesting that such seizure was another "classic example of the government's exercise of the police power to condemn contraband or noxious goods."); *see Craig Patty*, 136 Fed. Cl. 211 at 214–15; *see also, e.g.*, *AmeriSource Corp.*, 75 Fed. Cl. at 744. In those instances, the Court upheld such exercises of the police power because, as this Court has explained, the

property was not seized "as a convenience to the government . . . ." *Craig Patty*, 136 Fed. Cl. at 214–15.

Finally, Congress has consistently regulated ownership of machineguns since 1934. To require compensation in circumstances such as these would effectively "compel the government to regulate by purchase." *See Andrus v. Allard*, 444 U.S. 51, 54 (1979) (emphasis omitted). Though the Court is highly receptive to plaintiffs' fairness arguments, the Court must acknowledge that the "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *See id.* (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. at 413).

As explained above, Congress bestowed upon ATF the authority "to investigate and enforce criminal and regulatory violations of Federal firearms law," including the power to prescribe rules and regulations necessary to carry out the provisions of 18 U.S.C. §§ 921 *et seq*. Def.'s MTD at 5 (citing 18 U.S.C. § 926(a), 26 U.S.C. §§ 7801(a)(2)(A), 7805(a), 28 U.S.C. § 599A(b)(1), 28 C.F.R. § 0.130(a)(1)–(2)). Acting pursuant to this authority when promulgating the Final Rule, it is clear that ATF intended to further "the public safety goals of the NFA and GCA" by clarifying that the definition of "machinegun" includes "bump-stock-type device[s]," and by requiring the surrender or destruction of bump stocks within ninety days of publication of the Final Rule. *See* Final Rule at 66,529, 66,537 ("This rule is a significant regulatory action that clarifies the meaning of the statutory definition of machinegun and reflects the public safety goals of the

NFA and GCA."). As the purpose of promulgating the Final Rule was to promote public safety and to prevent public harm, the Court must conclude that ATF acted within the narrow confines of the police power when it required the surrender or destruction of all bump stocks. Accordingly, the Court grants defendant's Motion to Dismiss.

III. Conclusion

For the foregoing reasons, defendant's Motion to Dismiss is hereby **GRANTED**. Plaintiffs' takings claims are accordingly **DISMISSED** pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted. The Clerk is directed to enter judgment consistent with this opinion and order. No costs.

IT IS SO ORDERED.

s/ Loren A. Smith
Loren A. Smith,
Senior Judge

APPENDIX C

In the United States Court of Federal Claims

No. 19-449 C

[Filed: October 24, 2019]

THE MODERN SPORTSMAN, LLC, et al.	)
	)
v.	)
	)
THE UNITED STATES	)

JUDGMENT

Pursuant to the court's Opinion and Order, filed October 23, 2019, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiffs' taking claims are dismissed for failure to state a claim upon which relief can be granted. No costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX D

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2020-1107

[Filed: December 20, 2021]

MODERN SPORTSMAN, LLC, RW ARMS, LTD., MARK MAXWELL, MICHAEL STEWART, *Plaintiffs-Appellants*	)
v.	)
UNITED STATES, *Defendant-Appellee*	)

Appeals from the United States Court of Federal Claims in No. 1:19-cv-00449-LAS, Senior Judge Loren A. Smith.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, WALLACH[1], TARANTO,

[1] Circuit Judge Wallach participated only in the decision on the petition for panel rehearing.

CHEN, HUGHES, STOLL, and CUNNINGHAM,
Circuit Judges.

PER CURIAM.

O R D E R

Mark Maxwell, Modern Sportsman, LLC, RW Arms, Ltd., and Michael Stewart filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on December 27, 2021.

FOR THE COURT

December 20, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX E

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2020-1107

[Filed: February 2, 2022]

MODERN SPORTSMAN, LLC, RW ARMS, LTD., MARK MAXWELL, MICHAEL STEWART, *Plaintiffs-Appellants*	)
v.	)
UNITED STATES, *Defendant-Appellee*	)

Appeal from the United States Court of Federal Claims in No. 1:19-cv-00449-LAS, Senior Judge Loren A. Smith.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, WALLACH[1], TARANTO,

[1] Circuit Judge Wallach participated only in the decision on the petition for panel rehearing.

CHEN, HUGHES, STOLL, and CUNNINGHAM,
Circuit Judges.

PER CURIAM.

O R D E R

Mark Maxwell, Modern Sportsman, LLC, RW Arms, Ltd., and Michael Stewart filed a petition for rehearing en banc. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on February 9, 2022.

FOR THE COURT

February 2, 2022
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX F

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 19-449 C

[Filed: March 26, 2019]

THE MODERN SPORTSMAN, LLC,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE UNITED STATES,	)
	)
Defendant.	)
	)

COMPLAINT

NATURE OF THE CLAIM

1. Plaintiff brings its claim for a taking of its property without just compensation, by means of the reversal of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' determination that bump-fire stocks, slide-fire devices, and devices with certain similar characteristics (collectively referred to as "bump-stocks") are a firearm part and, thus, not regulated as a firearm under the Gun Control Act of 1968 ("GCA") or the National Firearms Act of 1934 ("NFA").

2. Specifically, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") published a Notice of Proposed Rulemaking ("NPR") in the Federal Register on March 29, 2018, 83 FR 13422. In the NPR, the ATF proposed an amendment to its regulations that would reverse its previous determinations that bump-stocks are a firearm part and not subject to federal regulation.

3. The ATF's NPR was an initial step to substantively, through fiat regulation, redefine bump-stocks as "machineguns" under the NFA and GCA.

4. The NPR, 83 FR 13422, was an abrupt reversal of clear ATF guidance that was followed by hundreds-of-thousands of law-abiding citizens and retailers who legally purchased bump-stocks as an accessory over more than an eight-year period.

5. More than ten previous classification decisions from the ATF have classified bump-stocks as a firearm part or accessory, which hundreds-of-thousands of citizens relied on when purchasing these devices.

6. Because the ATF has long classified bump-stocks as mere firearm accessories, owners of devices classified as firearm accessories had an investment-backed expectation in their bump-stocks as firearm parts.

7. On December 26, 2018, the ATF published its final rule in the federal register, 83 FR 66514, amending 27 CFR parts 447, 478, and 479, retroactively redefining bump-fire stocks as "machineguns" under the NFA and GCA.

8. Moreover, the final rule incredibly requires that previously lawful owners destroy or surrender the device within 90-days without offering compensation. On March 20, 2019, Plaintiff destroyed the 1,479 bump-fire stocks in its possession in accordance with the final rule.

9. The final rule's unprecedented requirement that bump-stocks be surrendered or destroyed within a 90-day period, with no opportunity for registration, effected a taking under the 5th Amendment of the United States Constitution.

PARTIES

10. Plaintiff, The Modern Sportsman, LLC, is a corporation duly organized and existing under the laws of the state of Minnesota, with its principal place of business at 3541 County Road 42 West, Burnsville, Minnesota 55306. The Modern Sportsman, LLC, is a registered FFL firearms dealer. It is also a retailer of firearms, optics, ammunition, and firearm parts and accessories. The Modern Sportsman, LLC, also regularly rents firearms at its range, including fully automatic weapons, to enthusiasts.

11. Prior to the filling of this complaint, Plaintiff had a property interest in 1,479 bump-stock devices. As detailed herein, Plaintiff suffered a taking as a result of the ATF's amendment of 27 CFR parts 447.11, 478.11, and 479.11, requiring it to destroy or surrender its bump-fire devices.

JURISDICTION AND VENUE

12. This Complaint states causes of action for taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. The Court has jurisdiction over this action under the Tucker Act, 28 U.S.C. § 1491(a).

13. Venue is proper in the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491(a).

FACTUAL BACKGROUND

14. The Attorney General is responsible for enforcing the GCA, as amended, and the NFA, as amended. This includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA.

15. The Attorney General has delegated the responsibility for administering and enforcing the GCA and NFA to the Director of the ATF, subject to the direction of the Attorney General and the Deputy Attorney General.

16. The Department and ATF have promulgated regulations implementing both the GCA and the NFA.

17. As the primary authority for administering and enforcing the GCA and NFA, manufactures, retailers, and the public alike have relied on the ATF for classification decisions on new bump-stock-type devices.

18. In 2006, the ATF concluded that certain spring-loaded devices were classified as machineguns under the GCA and NFA.

19. Specifically, the ATF concluded that certain devices attached to semi-automatic firearms that use an internal spring to harness the force of the recoil so that the firearm shoots more than one shot with a single pull of the trigger are machineguns.

20. One such bump-stock-type device that relied on internal springs and was classified as a machinegun was the Akins Accelerator.

21. After reclassification, the ATF advised individuals who had purchased the Akins Accelerator that they had the option of removing the internal spring, thereby placing the device outside the classification of machinegun and allowing the purchaser/possessor to *retain the device* in lieu of *destroying or surrendering the device*.

22. Between 2008 and 2017 the ATF also issued many classification decisions concluding that certain other bump-stock-type devices, that did not rely on springs, were not machineguns.

23. The ATF indicated that semiautomatic firearms modified with these bump-stock-type devices did not fire "automatically," and were thus not "machineguns," because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy.

24. The ATF classified these bumps-stock devices as firearm accessories which are not subject to regulation.

COUNT I

(FIFTH AMENDMENT TAKING)

25. On December 26, 2018, the ATF amended 27 CFR parts 447.11, 478.11, and 479.11, retroactively redefining bump-fire stocks as "machineguns" under the NFA and GCA.

26. The amended regulations have destroyed all economic value and all investment-backed expectations in plaintiffs' bump-stocks.

27. Bump-stocks that were once legally owned, and unregulated, firearm accessories by Plaintiff are now considered machineguns under the NFA and cannot be lawfully possessed, transported, donated, or devised.

28. Bump-stock devices possessed by individuals were required to be destroyed or surrendered to the ATF within 90-days of the effective date of the regulation, March 26, 2019

29. The ATF's website explains that bump-fire devices can be surrendered to a local ATF office or destroyed.

30. The website also explains how to properly destroy a bump-stock, see Exhibit 1.

31. Indeed, the final rule states "any method of destruction must render the device so that it is not readily restorable to a firing condition or is otherwise reduced to scrap."

32. In the event of destruction, the final rule also states that after the stock is reduced to scrap, an owner must "throw the pieces away."

33. Plaintiff destroyed and discarded the resulting scrap from 1,479 bump-fire stocks pursuant to the final rule.

34. A federal law or regulation that requires previously lawful owners of property to destroy or surrender said property, without just compensation, is unprecedented in the history of the United States.

35. Unlike individual states, the federal government does not have a plenary police power.

36. The amended regulation effectively took plaintiffs property without just compensation.

37. The ATF took Plaintiff's property for a public purpose.

38. The ATF's regulation has prohibited private uses.

39. The ATF's actions are attributable to the United States.

40. The United States government has not provided Plaintiff with just compensation for the taking of Plaintiff's property.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, prays for relief pursuant to each cause of action set forth in this Complaint as follows:

A. For an order finding that Defendant took Plaintiff's property without just compensation in violation of the Fifth Amendment of the United States Constitution;

B. For Judgment entered against the Defendants and in favor of Plaintiff for compensation for the property right taken from them, together with the costs of suit, including reasonable attorneys' fees and interest;

C. That Plaintiff be awarded just compensation for their deprivation and losses;

D. That Plaintiff have such other, further, and different relief as the case may require and the Court may deem just and proper under the circumstances.

Dated: March 26, 2019

Respectfully Submitted,

/s/ Ethan A. Flint
Ethan A. Flint, *Attorney of Record*
Adam M. Riley, *Of Counsel*
Flint Law Firm, LLC
222 E. Park St., Suite 500
P.O. Box 189
Edwardsville, IL 62025
T: (618) 288-4777 F: (618) 288-2864
eflint@flintlaw.com
ariley@flintlaw.com

APPENDIX G

United States Court of Appeals for the Federal Circuit

2020-1188

[Filed: October 1, 2021]

ROY LYNN MCCUTCHEN, PADUCAH SHOOTER'S SUPPLY, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *Plaintiffs-Appellants*	)
v.	)
UNITED STATES, *Defendant-Appellee*	)

Appeal from the United States Court of Federal Claims in No. 1:18-cv-01965-EDK, Judge Elaine Kaplan.

Decided: October 1, 2021

JENNIFER GELMAN, Flint Law Firm LLC, Edwardsville, IL, argued for plaintiffs-appellants. Also represented by ADAM MICHAEL RILEY.

KENNETH DINTZER, Commercial Litigation Branch, Civil Division, United States Department of Justice,

Washington, DC, argued for defendant-appellee. Also represented by JEFFREY B. CLARK, ROBERT EDWARD KIRSCHMAN, JR., LOREN MISHA PREHEIM, NATHANAEL YALE.

Before TARANTO, WALLACH,[*] and CHEN, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TARANTO.

Opinion concurring in the result filed by *Circuit Judge* WALLACH.

TARANTO, *Circuit Judge*.

On December 26, 2018, the U.S. Department of Justice, exercising congressionally granted authority to implement various federal firearms statutes, promulgated a rule that is the basis for the takings claim in this case. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (Final Rule). The impetus for the proceeding was the massacre in Las Vegas on October 1, 2017, when a lone shooter, using "rifles with attached bump-stock-type devices," fired "several hundred rounds of ammunition in a short period of time, killing 58 people and wounding approximately 500." *Id.* at 66,516. Since 1986, 18 U.S.C. § 922(o) has declared it to be unlawful to possess or transfer a "machinegun" (with exceptions not applicable here, for governments and for lawful possession before the 1986 law took effect), with "machinegun" defined with specificity by statute, 26 U.S.C. § 5845(b) (incorporated

[*] Circuit Judge Evan J. Wallach assumed senior status on May 31, 2021.

by 18 U.S.C. § 921(a)(23)). In the Final Rule, the Department, which houses the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), adopted regulations that interpret the statutory definition and specifically provide that the definition includes "a bump-stock-type device, *i.e.*, a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter." 83 Fed. Reg. at 66,553–54. The Final Rule states that "[t]he bump-stock-type devices covered by this final rule were not in existence prior to" 18 U.S.C. § 922(o). *Id.* at 66,514. As of March 26, 2019, the Rule's effective date, possessors of such devices had to destroy them or abandon them to ATF, or else face criminal penalties under 18 U.S.C. § 924(a)(2) for a "knowing" violation of 18 U.S.C. § 922(o). *See id.* at 66,514, 66,520, 66,523.

Plaintiffs Roy McCutchen and Paducah Shooter's Supply, Inc. brought this action against the United States in the Court of Federal Claims (Claims Court) under the Tucker Act, 28 U.S.C. § 1491. Asserting that the Final Rule effected a taking for public use of their bump-stock-type devices by requiring the devices' destruction or surrender to ATF, plaintiffs seek just compensation under the Fifth Amendment's Takings Clause. Because it is the Final Rule that plaintiffs challenge and "[t]he bump-stock-type devices covered by this final rule were not in existence prior to the effective date of" 18 U.S.C. § 922(o), 83 Fed. Reg. at 66,514, plaintiffs' bump-stock-type devices necessarily

were not in existence before § 922(o) took effect. Although the Rule's validity has been disputed in other cases, plaintiffs accept, in their pursuit of their compensation claim, that the Final Rule is an authorized and lawful (*i.e.*, valid) implementation of the statutory bar on possession or transfer of a "machinegun."

The government moved to dismiss the claim under Court of Federal Claims Rule 12(b)(6). By the time the motion was fully briefed, the Rule's effective date had arrived, and plaintiffs had complied with the Rule and destroyed their bump-stock-type devices. The Claims Court granted the motion and dismissed the takings claim. It principally relied on the "police power" doctrine, concluding that, because the Final Rule sought to protect health and safety, it did not effect a taking for public use. *See McCutchen v. United States*, 145 Fed. Cl. 42, 51–53 (2019).

We affirm, but we do so on a threshold ground different from, though related to, the Claims Court's grounds. The interest that plaintiffs allege was taken was the interest in continued possession or transferability of their devices. The takings claim depends on plaintiffs having an established property right in continued possession or transferability even against a valid agency implementation of the preexisting statutory bar on possession or transfer. But plaintiffs' title, which we assume is otherwise valid under state law, was always inherently limited by 18 U.S.C. § 922(o), a very specific statutory prohibition on possession and transfer of certain devices defined in terms of physical operation, together with a

congressional authorization of a (here undisputedly) valid agency interpretation of that prohibition. That title-inhering limit means that plaintiffs lacked an established property right in continued possession or transferability. The takings claim therefore fails.

I

A

In 1934, Congress enacted the National Firearms Act, Pub. L. No. 73–474, 48 Stat. 1236 (NFA or 1934 Act). The Act regulated the importation, manufacture, transfer, sale, and possession of certain firearms, including "machineguns."[1] *See* 26 U.S.C. § 5801 *et seq.* Congress specifically defined "machinegun." *Id.* § 5845(b) (current version, quoted *infra*). Congress included penalty and forfeiture provisions and also subjected violators to the general enforcement measures available under the internal-revenue laws. *Id.* §§ 5871–72.

About thirty years later, Congress enacted the Gun Control Act of 1968, Pub. L. No. 90–618, 82 Stat. 1213 (GCA or 1968 Act). *See* 18 U.S.C. § 921 *et seq.* In that Act, Congress established a regulatory licensing scheme and imposed criminal prohibitions on certain firearm transactions. 18 U.S.C. § 923. The GCA incorporates the National Firearm Act's "machinegun" definition. *Id.* § 921(a)(23) ("The term 'machinegun' has

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[1] Statutory and regulatory provisions sometimes use "machinegun," sometimes "machine gun." Except when quoting, we use the latter.

the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).").

In 1986, Congress adopted the Firearm Owners' Protection Act, Pub. L. No. 99–308, 100 Stat. 449 (FOPA or 1986 Act), which amended the Gun Control Act and National Firearm Act. The 1986 Act added 18 U.S.C. § 922(o), which provided when enacted and still provides:

> (o)(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 [May 19, 1986].

§ 102, 100 Stat. at 453; 18 U.S.C. § 922(o). That language makes it unlawful to possess or transfer a "machinegun," with exceptions for governments and pre-FOPA lawful possession. *See* Final Rule, 83 Fed. Reg. at 66,515 (noting that the amendment "effectively froze the number of legally transferrable machineguns to those that were registered before the effective date of the statute"). A "knowing" violation subjects the

violator to criminal penalties, 18 U.S.C. § 924(a)(2); a "willful" violation subjects the violator to "seizure and forfeiture" remedies, *id.* § 924(d)(1).

The crucial term, "machinegun," is declared, in 18 U.S.C. § 921(a)(23), to have the meaning specified in 26 U.S.C. § 5845(b). Since 1986, that definition has provided:

> 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) (emphases added).[2]

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[2] The italicized phrase, "any part designed . . . ," was substituted in 1986 for the phrase, "any combination of parts designed and intended for use in converting a weapon into a machinegun." 1986 Act, § 109(a), 100 Stat. at 460. The 1968 Act enacted the following version of 26 U.S.C. § 5845(b): "(b) 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 combination of parts designed and intended for use in converting a weapon into a machinegun, and any

In 18 U.S.C. § 926(a), Congress has granted the Attorney General the authority to promulgate rules and regulations "necessary to carry out" chapter 44 of Title 18, U.S. Code, which includes 18 U.S.C. § 922. In 26 U.S.C. § 7801(a), Congress has made the Attorney General responsible for the "administration and enforcement" of chapter 53 of Title 26, U.S. Code, which includes 26 U.S.C. § 5845. The grants of implementation authority have been in place since 1986: The current "necessary to carry out" language of 18 U.S.C. § 926(a) was adopted in the 1986 Act, replacing the preexisting "reasonably necessary" authority, § 106, 100 Stat. at 459; and even before the 1986 Act, 26 U.S.C. § 7801(a) granted the Executive the "administration and enforcement" authority relevant here, 26 U.S.C. § 7801(a) (1982). Before 2002, both authorities resided with the Secretary of the Treasury, *see* 18 U.S.C. §§ 921(a)(18), 926(a) (2000); 26 U.S.C. § 7801(a) (2000), but in 2002, they were transferred to the Attorney General as part of the relocation of ATF to the Department of Justice, *see* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1111, 116 Stat. 2135, 2274–75; 28 U.S.C. § 599A(c)(1). The Attorney General has delegated relevant authority to ATF. 28 C.F.R. § 0.130(a)(1)–(2).

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combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." § 201, 82 Stat. at 1231.

The 1934 Act's original definition reads: "The term 'machine gun' means any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger." § 1(b), 48 Stat. at 1236.

B

A rifle is semiautomatic if, after it has been fired, rechambering of ammunition is automatic but refiring is not. Specifically, "[t]he term 'semiautomatic rifle' means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge." 18 U.S.C. § 921(a)(28). A "bump-stock-type device" transforms a semiautomatic rifle so that "a separate pull of the trigger to fire each cartridge" is not needed. Such a device replaces the generally stationary stock resting against the shooter's shoulder with a sliding stock that lets the shooter substantially increase the rate of fire without a commensurate increase in the number of finger motions pulling the trigger. Final Rule, 83 Fed. Reg. at 66,516. The device channels and directs the recoil energy from each shot "into the space created by the sliding stock (approximately 1.5 inches) in constrained linear rearward and forward paths." *Id.* at 66,518. By maintaining constant backward pressure on the trigger (without repeated finger motions to pull the trigger) and constant forward pressure on the front of the gun, a shooter can fire bullets continuously and at a high rate to "mimic" the performance of a fully automatic weapon. *Id.* at 66,516.

A variety of devices with different mechanisms for using the firearm's recoil energy to refire without a new movement of the finger (a separate new pull motion of the finger) came to ATF's attention long before the proceeding that ended with the Final Rule.

In 2002, ATF "initially reviewed the Akins Accelerator." *Id.* at 66,517. Unlike the devices at issue here, the Akins Accelerator used springs to cause the trigger to continue to make contact with the shooter's finger rather than relying on the shooter to maintain pressure on the trigger and the firearm. *See id.* at 66,514, 66,516–17; *see also Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) ("After a single application of the trigger by a gunman, the Accelerator uses its internal spring and the force of recoil to fire continuously the rifle cradled inside until the gunman releases the trigger or the ammunition is exhausted.").

Initially, in 2002, ATF determined that the device was *not* a machine gun "because ATF interpreted the statutory term 'single *function* of the trigger' to refer to a single *movement* of the trigger." Final Rule, 83 Fed. Reg. at 66,517 (emphases added). But in 2006, ATF reversed course in a published ruling. *See* ATF Ruling 2006-2. After retesting the Akins Accelerator, ATF determined that with the device, "a single pull of the trigger initiates an automatic firing cycle [that] continues until the finger is released or the ammunition supply is exhausted." *Id.* at 2. This time ATF interpreted the statutory phrase "single *function* of the trigger" as "single *pull* of the trigger." *Id.* (emphases added). Given that interpretation, ATF readily determined that the Akins Accelerator was a machine gun under the NFA and GCA. *Id.* at 2–3. When Akins challenged ATF's determination in federal court, the Eleventh Circuit, agreeing with the district court, affirmed ATF's statutory interpretation and consequent determination that the Akins Accelerator was a machine gun. *Akins*, 312 F. App'x at 199–201;

Akins v. United States, No. 8:08-cv-988-T-26TGW, 2008 WL 11455059, at *3–8 (M.D. Fla. Sept. 23, 2008).

Thereafter, ATF considered other bump-stock-type devices. As ATF later described its actions, ATF advised that a number of such devices were not machine guns—including the ones at issue here. *See* Final Rule, 83 Fed. Reg. at 66,517. Specifically, in ten unpublished classification rulings between 2008 and 2017, ATF "provided different explanations for why certain bump-stock-type devices were not machineguns, but none of them extensively examined the meaning of 'automatically.'" *Id.* at 66,518. All those decisions were subject to ATF's publicly available handbook warning that such rulings could not be relied upon as guaranteeing inapplicability of the existing statutory prohibitions if reconsidered and modified. *See* National Firearms Act Handbook § 7.2.4.1 (Handbook) (relevant portions have stayed the same from at least 2007 to now). Indeed, the Eleventh Circuit relied on ATF's power to "reconsider and rectify" a classification decision when upholding ATF's 2006 ruling on the Akins Accelerator after ATF's contrary 2002 ruling. *See Akins*, 312 F. App'x at 200 ("Based on the operation of the Accelerator, the Bureau had authority to 'reconsider and rectify' what it considered to be a classification error.").

C

Within a few months of the October 1, 2017 massacre in Las Vegas, reconsideration of bump-stock-type devices began. The Department of Justice issued an Advanced Notice of Proposed Rulemaking on December 26, 2017, to get "information and comments

from the public and industry regarding the nature and scope of the market for" "certain devices, commonly known as 'bump fire' stocks." Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 82 Fed. Reg. 60,929, 60,929 (Dec. 26, 2017). About two months later, the President "direct[ed] the Department of Justice to dedicate all available resources . . . as expeditiously as possible, to propose for notice and comment a rule banning all devices that turn legal weapons into machineguns." Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 83 Fed. Reg. 7,949, 7,949 (Feb. 20, 2018).

Nearly a month after that, the Department issued a Notice of Proposed Rulemaking that sought "to clarify that [bump-stock-type devices] are 'machineguns.'" *See* Bump-Stock-Type Devices, 83 Fed. Reg. 13,442, 13,442 (Mar. 29, 2018). On December 26, 2018, the Department completed its process of "reexamining" its 2008–17 decisions and issued the Final Rule, which adopted new regulations, with an effective date of March 26, 2019. 83 Fed. Reg. at 66,514, 66,520–21, 66,553–54.

The regulations specifically interpret one phrase and one term in the detailed statutory definition of "machinegun." *Id.* at 66,553–54; *see also* 27 C.F.R. §§ 447.11, 478.11, 479.11. Thus, codifying the 2006 definition from the Akins Accelerator proceeding, the regulations define the phrase "single function of the trigger" as "a single pull of the trigger and analogous motions." 83 Fed. Reg. at 66,553–54. The regulations also newly define the term "automatically"—to mean

"functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger." *Id.* at 66,553. The regulations also make clear that, under those definitions, bump-stock-type devices, as specifically defined in the regulations (quoted *supra*), are "machineguns." *Id.* at 66,553–54. The Department explained that the two adopted definitions were the "best interpretation" of the statutory definition of "machinegun." *Id.* at 66,514, 66,517–18, 66,521. It added that, although the "final rule reflects the public safety goals of the NFA and GCA," *id.* at 66,522, "[t]he bump-stock-type device rule is not a discretionary policy decision based upon a myriad of factors that the agency must weigh, but is instead based only upon the functioning of the device and the application of the relevant statutory definition," *id.* at 66,529.

The Final Rule's consequence was that individuals would be subject to "criminal liability only for possessing bump-stock-type devices *after* the effective date of [this] regulation"—March 26, 2019. *Id.* at 66,514, 66,525; *see also*, *e.g.*, *id.* at 66,525 ("The rule would criminalize only future conduct, not past possession of bump-stock-type devices that ceases by the effective date of this rule."). To avoid liability, possessors of bump-stock-type devices had to destroy their devices or abandon them at an ATF office by March 26, 2019. *Id.* at 66,549 (describing "[d]isposal" options); *see also*, *e.g.*, *id.* at 66,514–15, 66,530, 66,539, 66,543.

II

On December 26, 2018, plaintiffs sued the United States in the Claims Court. *See* J.A. 22–30 (Complaint).[3] McCutchen and Paducah possessed bump-stock-type devices before the publication of the Rule and destroyed those devices before the Rule's effective date. J.A. 23–24, ¶¶ 10–11; *McCutchen*, 145 Fed. Cl. at 45 (citing ECF No. 12).

The government moved to dismiss the complaint for failure to state a claim under Rule 12(b)(6), and the Claims Court granted the motion. *See McCutchen*, 145 Fed. Cl. at 45. In reaching that result, the court determined that the Final Rule did not effect a taking for public use because ATF acted "pursuant to its police power." *Id.* at 51. The Claims Court also concluded that plaintiffs' claim of a physical taking failed because the term "take[]" does not cover a regulation compelling dispossession of property by requiring the owner to destroy the property (or else surrender it to the government) and that plaintiffs' alternative claim of total elimination of value failed because personal (not real) property is "subject to pervasive government regulation." *Id.* at 53–55. Finally, the court determined that plaintiffs "waived" any argument for a taking under the flexible takings standard governing use restrictions and, in any event, could not show such a taking. *Id.* at 55–57.

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[3] Plaintiffs sought certification of a class. J.A. 26, ¶ 26. The Claims Court dismissed the complaint under Rule 12(b)(6) without ruling on class certification.

Plaintiffs timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

III

We review the grant of a motion to dismiss de novo. *Prairie County v. United States*, 782 F.3d 685, 688 (Fed. Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). We may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). "Whether a taking has occurred is a question of law based on factual underpinnings." *Caquelin v. United States*, 959 F.3d 1360, 1366 (Fed. Cir. 2020).

A

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Takings have been classified in various ways. For example, some involve "physical appropriations" and some "use restrictions." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071–72 (2021). Categorical rules have generally applied to the former category. *Id.* at 2071. Use restrictions generally are subject to the "flexible test developed in [*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)]," *see Cedar Point*, 141 S. Ct. at 2072,

although use restrictions that deprive a landowner of "all economically beneficial or productive use of land" have been deemed a categorical taking, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 1019 (1992). On appeal, plaintiffs pursue only physical-appropriation and *Lucas* categorical-taking contentions. *See* McCutchen Opening Br. at 34–39, 39 n.9 (not making *Penn Central* contention).

We do not reach the grounds on which the Claims Court relied. In particular, we do not decide under what circumstances a measure that *newly* bars possession of personal property (as opposed to restricting a use of property) and that serves a "police power" purpose (and is constitutionally authorized for the federal government) is not a "taking," and thus requires no compensation.[4] Nor do we decide whether mandating permanent dispossession by ordering destruction of personal property cannot be a "physical taking," even if the government-specified alternative to destruction is surrender to the government and the mandate is backed by government remedies of seizure and forfeiture for a willful violation as well as criminal remedies for a knowing violation.

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[4] We have recognized that a "police power" rationale, where the federal government is concerned, must be considered within the context of constitutional authorization of particular powers. *See*, *e.g.*, *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1191–92 & n.10 (Fed. Cir. 2004); *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1568 n.17 (Fed. Cir. 1994); *Allied-Gen. Nuclear Servs. v. United States*, 839 F.2d 1572, 1576 (Fed. Cir. 1988).

We do not resolve substantial questions raised by those issues. For example, the Supreme Court has said that the Takings Clause both bars takings that are not for a "public use" and requires payment for takings that are for such a use, *see Kelo v. City of New London*, 545 U.S. 469, 480 (2005); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), and it has also said that "[t]he 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," *Midkiff*, 467 U.S. at 240; *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984). Under those premises, the question arises: If a "police power" justification for a measure means that there is no taking, what government acts would fall into the category of takings that the Clause permits (because the act is for a "public use," *i.e.*, within the "sovereign's police powers") but only upon payment of just compensation? And if the "police power" doctrine is to be cabined to some subset of police powers, as the Claims Court suggested might be necessary, 145 Fed. Cl. at 51, and the government suggested at oral argument, Oral Arg. at 48:42–52:53 (referring without definition to "core police powers"), the questions arise: What would that cabining be, what ground would it rest on, and how would it address recognized challenges, among them challenges of workable line-drawing? *See Lucas*, 505 U.S. at 1024, 1026; *Midkiff*, 467 U.S. at 239–40.

These and other questions would be unavoidable were we to address the Claims Court's rationales. We have no precedent that is so on point—involving facts and holdings so close to those presented here—that we could justifiably apply the rationales without extensive exploration of the doctrinal issues. Notably, the main

authorities from this court relied on by the Claims Court for its police-power analysis involved government dispossessions of personal property that rested on specific government authority that long predated the possession of the personal property at issue. *See*, *e.g.*, *Kam-Almaz v. United States*, 682 F.3d 1364, 1372 (Fed. Cir. 2012) (evidentiary seizure at airport upon entry from overseas, exercising the "government's power to police the border"); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1150, 1153 (Fed. Cir. 2008) (seizure of drugs for use in criminal prosecutions); *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1328–29 (Fed. Cir. 2006) (seizure and forfeiture of goods entering country with counterfeit trademarks). Reviewing the Claims Court's rationales would call for extensive analysis to decide how far beyond such circumstances a "police power" rationale properly applies and whether it properly reaches this case. *Cf. Cedar Point*, 141 S. Ct. at 2079 (discussing "longstanding background restrictions on property rights" including "background limitations" of "traditional common law privileges").

We resolve the case on a threshold ground that differs from, though is related to, the Claims Court's grounds—one that involves the preexisting-law circumstance that was present in the just-cited cases. Plaintiffs' takings claim depends on the "threshold matter" of whether they have "established a property interest for purposes of the Fifth Amendment" against the government action. *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1377 (Fed. Cir. 2008); *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Prot.*, 560 U.S. 702, 715 (2010) (plurality) ("If a legislature *or a court* declares that what was once an

established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." (second emphasis added)). "[T]o have a cause of action for a Fifth Amendment taking, the plaintiff must point to a protectable property interest that is asserted to be the subject of the taking." *Palmyra Pacific Seafoods, LLC v. United States*, 561 F.3d 1361, 1364 (Fed. Cir. 2009); *see also*, *e.g.*, *Gadsden Indus. Park, LLC v. United States*, 956 F.3d 1362, 1368 (Fed. Cir. 2020) ("The plaintiff in a takings case bears the burden to demonstrate a protectable property interest."); *American Bankers Ass'n v. United States*, 932 F.3d 1375, 1384–85 (Fed. Cir. 2019) ("To state a claim for a taking under the Fifth Amendment, a plaintiff must identify a legally cognizable property interest."); *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) ("It is axiomatic that only persons with a valid property interest at the time of the taking are entitled to compensation."); *Alimanestianu v. United States*, 888 F.3d 1374, 1380 (Fed. Cir. 2018); *Sharifi v. United States*, 987 F.3d 1063, 1068 (Fed. Cir. 2021).[5]

As explained next, we conclude that, given the preexisting federal statutory prohibition on possession or transfer of "machineguns," 18 U.S.C. § 922(o), subject to a valid implementation by the Attorney

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[5] Unlike Judge Wallach, we see no basis for limiting this general threshold aspect of takings analysis, concerning the property right alleged to have been taken, to the particular type of government activity—a land-use restriction that deprives a landowner of all economically beneficial or productive use of the land—that was at issue in *Lucas*.

General, plaintiffs lacked a property right in what they allege was taken—continued possession or transferability of their bump-stock-type devices.

B

"[P]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source." *Ruckelshaus*, 467 U.S. at 1001 (cleaned up); *see also Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (similar). Here, we assume that, as a matter of state law standing alone, plaintiffs had property rights in the personal property at issue. But "the government does not take a property interest when it merely asserts a 'pre-existing limitation upon the [property] owner's title.'" *Cedar Point*, 141 S. Ct. at 2079 (quoting *Lucas*, 505 U.S. at 1028–29). As we have explained, "[t]he Supreme Court in *Lucas* made clear that property interests are acquired subject to 'background principles' of law, and that limitations on property rights that otherwise would effect a categorical taking are permissible if they 'inhere in the title itself.'" *Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008) (quoting *Lucas*, 505 U.S. at 1029); *see also A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152–53 (Fed. Cir. 2014) (explaining the principle). And valid preexisting federal-law limitations on what otherwise would be state-law property rights are among the limitations that may inhere in title so as to limit compensable property rights. *See Bair*, 515 F.3d at 1329 (explaining that "a federal statute or authority can constitute a 'background principle' that inheres in the title to property interests arising after

its enactment, therefore precluding a takings claim based on the application of the statute to those property interests"); *see also Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (rejecting takings claim on this basis); *cf. Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1349 (Fed. Cir. 2021) (rejecting exaction claim for lack of protected property interest based on *Dames & Moore* and *American Bankers Ass'n*).

In this case, the federal-law prohibition on possession and transfer, together with a congressional grant of implementation authority, predated the existence, let alone plaintiffs' possession, of the bump-stock-type devices that plaintiffs were compelled to destroy or surrender.[6] That prohibition is a very specific one, defined in terms of the physical operation of particular devices, not in terms simply of a broadly stated goal. The latter situation raises issues not presented here. *See Preseault v. United States*, 100 F.3d 1525, 1537–38 (Fed. Cir. 1996) (en banc); *see also Bair*, 515 F.3d at 1330 (explaining this court's *Preseault* conclusion that "broad general legislation authorizing a federal agency to engage in future regulatory activity, did not effectively limit the property right" (cleaned up)). And the Final Rule is an interpretation of the text of that specific statutory prohibition (in context, of course), not an exercise of

[6] In at least this respect, the present case differs critically from *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356 (4th Cir. 2020), which involved a state law enacted after the creation and acquisition of the property at issue (there, bump-stock-type devices as well). *Id.* at 359–60.

discretion to act in pursuit of a broadly stated statutory goal.

Moreover, plaintiffs accept that the Final Rule's implementation of the preexisting prohibition is an authorized and legally valid interpretation of the statutory prohibition, making no argument to the contrary. For that reason, and in light of our precedents, we accept that premise. *See Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) ("[I]n a takings case we assume that the underlying governmental action was lawful . . . ."); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001) (stating that a plaintiff must "litigate its takings claim on the assumption that the administrative action was both authorized and lawful"); *see also St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018); *Acadia*, 458 F.3d at 1330–31; *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1369–70 (Fed. Cir. 2005); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998); *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997).

The accepted validity of the Final Rule as an interpretation of the preexisting statutory prohibition on possession and transfer must, at least in this case, rest on one of three premises: (1) the interpretive-deference doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable, and the Final Rule is valid as the best interpretation of the statutory prohibition; (2) *Chevron* applies and the Final Rule is valid at Step 1, so that the statutory prohibition unambiguously requires the

interpretation articulated in the Final Rule; or (3) *Chevron* applies and the Final Rule is valid at Step 2, so that it is (merely) one reasonable interpretation of the statutory prohibition. We do not decide which possibility would govern in a determination of the validity of the Final Rule (which we assume); in particular, we do not decide whether 18 U.S.C. § 922(o), to which criminal penalties apply if the violation is knowing, is subject to *Chevron*. Under any of these three possibilities, we hold, based on the preexisting federal law, that plaintiffs lack a property right in continued possession or transferability of the devices at issue. We first address the legal bases for so concluding and then explain why, in this case, the ATF classification rulings between 2008 and 2017 do not support a different conclusion.

1

The analysis of the first two possibilities is particularly simple. If *Chevron* is inapplicable, validity entails that the Final Rule's interpretation is the "best interpretation" of 18 U.S.C. § 922(o), with its incorporated "machinegun" term, as defined in 26 U.S.C. § 5845(b). *See Chudik v. Hirshfeld*, 987 F.3d 1033, 1039 (Fed. Cir. 2021) ("Where the *Chevron* framework is inapplicable, we determine the best interpretation of the statute for ourselves, while giving the agency's position such weight as warranted under [*Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)]." (citations and internal quotation marks omitted)). Similarly, if *Chevron* applies but validity is resolved at *Chevron* Step 1, then validity entails that the Final Rule's interpretation is the unambiguous

meaning of 18 U.S.C. § 922(o). In either event, the preexisting statute itself, properly understood, barred the possession or transfer at issue. In these circumstances, the bar always limited plaintiffs' title, and plaintiffs never had a property right against government assertion of the duty to destroy the devices at issue or surrender them. *See Hurtado v. United States*, 410 U.S. 578, 588 (1973) ("[T]he Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed.").[7]

The remaining possibility for the validity of the Final Rule's interpretation—that *Chevron* applies and the interpretation is valid only at *Chevron* Step 2—requires somewhat more analysis, but the conclusion is the same. The additional element is the pair of preexisting statutory grants of implementation authority to the Executive. 18 U.S.C. § 926(a) (authority to adopt rules "necessary to carry out" the provisions of chapter 44 of Title 18, U.S. Code, including 18 U.S.C. § 922(o)); 26 U.S.C. § 7801(a)

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[7] We do not consider whether, and if so when, it could make a difference if, before a plaintiff's possession, some courts had actually, though incorrectly, adjudicated the relevant property to be outside a statutory prohibition on possession. No such adjudication took place with respect to plaintiffs' bump-stock-type devices. Relatedly, and relevant to the third possibility (*Chevron* Step 2) discussed next, there was no authoritative judicial adoption of a contrary meaning from which the agency departed in the Final Rule. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that an agency may depart from a prior judicial interpretation that adopted the best reading of a statute but did not find that reading to be the unambiguous meaning of the statute).

(authority over "administration and enforcement" of chapter 53 of Title 26, U.S. Code, including 26 U.S.C. § 5845(b)). For plaintiffs here, the preexisting limitation on their title included subjection to future valid agency interpretations of the possession-and-transfer prohibition (as assumed here) adopted in the exercise of that authority. In these circumstances, plaintiffs had no property interest protected by the compensation requirement of the Takings Clause against such a valid interpretation when adopted.

By 1986, the Supreme Court's 1984 decision in *Chevron* already made clear that the law, for a statute like 18 U.S.C. § 922(o), included the possibility of reasonable resolutions of ambiguities. For the title-limiting § 922(o) in particular, the choices were limited as relevant here—focused overwhelmingly, though not exclusively, on whether 26 U.S.C. § 5845(b)'s "single function of the trigger" language, in context, could be understood to mean a single volitional finger movement of the shooter (which could produce multiple firings if recoil energy were captured). We cannot say that plaintiffs had "an established right of private property," *Stop the Beach*, 560 U.S. at 715 (plurality), in the possibility that the agency would adopt one rather than another of the limited range of interpretations (both reasonable, by assumption) relevant here. *Cf. Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) (reasoning that the Takings Clause protects owners of "*established* property rights"). We have no basis for deeming any interest in either possibility a "*recognized* property interest" required for a takings claim. *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (emphasis added). Rather,

such possibilities are "contingent and uncertain," "speculative or discretionary," which is not enough. *Bowers v. Whitman*, 671 F.3d 905, 913 (9th Cir. 2012) (citation and internal quotation marks omitted); *see also id.* ("To determine whether a property interest has vested for Takings Clause purposes, 'the relevant inquiry is the certainty of one's expectation in the property interest at issue.' . . . [I]f the property interest is 'contingent and uncertain' or the receipt of the interest is 'speculative' or 'discretionary,' then the government's modification or removal of the interest will not constitute a constitutional taking." (citations omitted)); *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015) (same).

At least in the absence of other circumstances not present here, we conclude, the preexisting law limiting title means that plaintiffs had no property interest in continued possession or transferability that was taken when the Final Rule—validly, by assumption here—required destruction or surrender of their bump-stock-type devices.

2

Only one more circumstance requires discussion, but it does not support a different conclusion. As the Final Rule describes, between 2008 and 2017, ATF issued "ten letter rulings" stating that certain bump-stock-type devices, including the ones at issue here, did not meet the statutory definition of "machinegun" and so were not within the prohibition of 18 U.S.C. § 922(o). 83 Fed. Reg. at 66,517–18. But those rulings at best gave plaintiffs a property interest subject to the express reservation to change the devices' classification

if the agency later determined, as it did, that the earlier classification was erroneous. Accordingly, those letter rulings gave plaintiffs no property right in continued possession or transferability.

ATF's handbook, which is public, states that a classification provided by letter is "subject to change if later determined to be erroneous" by ATF:

> **7.2.4 Do you know how ATF would classify your product?** There is no requirement in the law or regulations for a manufacturer to seek an ATF classification of its product prior to manufacture. Nevertheless, a firearms manufacturer is well advised to seek an ATF classification before going to the trouble and expense of producing it. Perhaps the manufacturer intends to produce a GCA firearm but not an NFA firearm. Submitting a prototype of the item to ATF's Firearms Technology Branch (FTB) for classification in advance of manufacture is a good business practice to avoid an unintended classification and violations of the law.
>
> > **7.2.4.1 ATF classification letters.** ATF letter rulings classifying firearms may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms laws. Nevertheless, *classifications are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations*. To make sure their

> classifications are current, FFLs/SOTs [federal firearms licensees/special occupational taxpayers] should stay informed by periodically checking the information published on ATF's website, particularly amendments to the law or regulations, published ATF rulings, and "open letters" to industry members.

Handbook § 7.2.4 (italics emphasis added); *see also id.* §§ 1.2.6, 1.2.11 (definitions for "FFL" and "SOT"). The quoted express reservation is present in the 2007 Handbook, predating the 2008–17 classification letters at issue, and remains there today. *Id.* § 7.2.4.1. Moreover, it was long ago established that, even for formal approvals of import applications, ATF "must necessarily retain the power to correct [an] erroneous approval," consistent with the widespread recognition of "an implied authority in other agencies to reconsider and rectify errors even though the applicable statute and regulations do not expressly provide for such reconsideration." *Gun S., Inc. v. Brady*, 877 F.2d 858, 862–63 (11th Cir. 1989). And the Eleventh Circuit, in early February 2009, confirmed specifically with respect to a classification ruling involving an early bump-stock-type device (the Akins Accelerator) that ATF "had authority to 'reconsider and rectify' what it considered to be a classification error." *Akins*, 312 F. App'x at 200 (quoting *Gun S.*, 877 F.2d at 862–63).

Given the clear provisional character of a classification letter, plaintiffs cannot be said to have a compensable property right in the classification letters sent between 2008 and 2017, which have been properly

corrected (as the assumption of the Final Rule's validity entails). The Supreme Court in *Dames & Moore* concluded that the President's nullification of an attachment against certain bank assets was not a taking because the pre-attachment regulations made clear that, in the Court's words, "any attachment is null and void 'unless licensed,' and all licenses may be revoked at any time." 453 U.S. at 674 n.6; *see also id.* at 663 (quoting regulations). On that basis, the Court held, the "petitioner did not acquire any 'property' interest in its attachments of the sort that would support a constitutional claim for compensation." *Id.* at 674 n.6. We drew a similar conclusion in *American Bankers Ass'n*. We held that the plaintiffs lacked a property right, for takings purposes, in continuation of a particular statutory dividend rate on Federal Reserve stock, where Congress had "expressly reserved" its right to change the dividend rate. 932 F.3d at 1385; *cf. Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986) ("The provision simply cannot be viewed as conferring any sort of 'vested right' in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation."); *Columbus Reg'l Hosp.*, 990 F.3d at 1349 (concluding that the plaintiff "never had an unconditional interest" in certain funds because the government "expressly reserved the right to recover those funds for certain reasons within a specific period of time"). For the same reason, plaintiffs here had no property right in the 2008–17 classification letters, which the agency could correct for error without effecting a taking.

Although we think that no more is needed to reject plaintiffs' reliance on the 2008–17 letters, we note in addition several aspects of those letters, identified by the Final Rule itself, that undermine reliance on them as having legal force and effect. They were informal rulings, not published on ATF's website or otherwise and not issued through the authorized rulemaking process that is presumed to be the means of securing *Chevron* deference. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("A premise of *Chevron* is that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme."); *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). ATF's Handbook, besides expressly declaring the revisability of a classification letter, defines "ATF Ruling" to "mean[] a *formal ruling published by ATF* stating its interpretation of the law and regulations as applied to a specific set of facts," Handbook § 1.2.3 (emphasis added), and says, even as to those Rulings, that they "do not have the force and effect of law but may be cited as precedent with respect to substantially similar fact situations," *id.* § 1.4.2. All the more so for the informal classification letters. Further, the Final Rule suggests that those classification letters were "procedurally defective" in a sense recognized in *Encino* as eliminating *Chevron* deference—namely, they omitted discussion that would be needed to meet the requirement of "adequate reasons." 136 S. Ct. at 2125; *see* Final Rule, 83 Fed.

Reg. at 66,518 ("Of the rulings issued between 2008 and 2017, ATF provided different explanations for why certain bump-stock-type devices were not machineguns, but none of them extensively examined the meaning of 'automatically.'").

Plaintiffs point to the D.C. Circuit's conclusion that the Final Rule is a "legislative rule." *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 17–20 (D.C. Cir. 2019). But that ruling does not aid plaintiffs in their takings claim. It does not adjudicate the essential question here—whether plaintiffs had a compensable property right in continued possession and transferability when, as assumed here, the Final Rule adopted a valid interpretation of the preexisting ban on possession and transfer of "machineguns," as defined.

IV

For the foregoing reasons, we affirm the Claims Court's judgment.

The parties shall bear their own costs.

AFFIRMED

United States Court of Appeals
for the Federal Circuit

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

v.

UNITED STATES,
Defendant-Appellee

2020-1188

Appeal from the United States Court of Federal Claims in No. 1:18-cv-01965-EDK, Judge Elaine Kaplan.

WALLACH, *Circuit Judge*, concurring in the result.

I agree we should affirm the Court of Federal Claims' decision. I do not, however, agree with the majority's reasoning and concur as to the result only. I believe the "inhere in title" exception, set forth in *Lucas*, is not the proper vehicle to ascertain whether Mr. McCutchen and Paducah failed to state a compensable takings claim. That exception may inadvertently grant protections reserved to real property, and limited instances of personal property under extraordinary circumstances, to dangerous and unusual weapons. I write separately to explain why the

Court of Federal Claims correctly concluded that the Bump Stock Rule was not a compensable taking under the police powers doctrine.

I. PROCEDURAL HISTORY

In December 2018, Mr. McCutchen and Paducah filed their Complaint in the Court of Federal Claims. J.A. 22; *see* J.A. 22–30 (Complaint). Paducah is a registered firearms dealer and retailer of "firearm parts and accessories." J.A. 24. Prior to the Bump Stock Rule, it "had a property interest in multiple bump-stock devices." J.A. 24. Mr. McCutchen previously purchased multiple bump stocks "for both his personal use and for economic gain." J.A. 23. The Complaint alleged that the Bump Stock Rule constitutes a compensable Fifth Amendment taking of bump stocks as it "destroyed all economic value and all investment-backed expectations in [parties'] bump-stocks." J.A. 29. The Government moved to dismiss Paducah's Amended Complaint for failure to state a claim on which relief can be granted. J.A. 31, 37 (Motion to Dismiss).

The Court of Federal Claims dismissed Appellants' Amended Complaint. *See McCutchen v. United States*, 145 Fed. Cl. 42, 45 (2019). The Court of Federal Claims concluded that Appellants had "failed to state a takings claim," because its "bump-stock devices were not taken for a public use, but were instead prohibited through the government's exercise of its police power" and, further, "[e]ven if the police power doctrine were inapplicable," it "would nonetheless dismiss the complaint because there [wa]s no merit to [Appellants'] argument that the [Bump Stock] [R]ule effected a categorical taking of [its] bump-stock devices." *Id.* at

53. The Court of Federal Claims concluded that Appellants suffered neither a physical taking, *id.* at 53–55, nor a regulatory taking of their bump stocks, *id.* at 55–56 (noting that Appellants had failed to raise any regulatory taking arguments and that, "even if the argument were not waived, [Appellants] ha[d] failed to state a regulatory takings claim").

There is no dispute that the Court of Federal Claims correctly concluded that Mr. McCutchen and Paducah failed to state a compensable takings claim. However, as I explain below, I do not agree with the majority's reasoning that the *Lucas* "inhere in title" exception should extend to dangerous and unusual weapons. *See* Maj. Op. at 4, 16–17. In my view, the police power doctrine supports affirming the decision of the Court of Federal Claims. For the reasons which follow, I agree with the Court of Federal Claims that the Bump Stock Rule was "an exercise of police power and did not effect a taking for public use." *McCutchen*, 145 Fed. Cl. at 51 (capitalization normalized).

II. THE "INHERE IN TITLE" EXCEPTION IS NOT THE PROPER VEHICLE TO ASCERTAIN WHETHER MR. MCCUTCHEN AND PADUCAH FAILED TO STATE A COMPENSABLE TAKINGS CLAIM

Lucas holds that a "categorical" takings analysis is appropriate "where regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992); *see id.* at 1015–16 ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation . . . *denies an owner economically viable use of his land*." (emphasis in original) (internal quotation marks

and citation omitted)). The cases in which the Supreme Court has applied *Lucas's* total takings rule have involved real property, and Circuit Courts have not reached a clear consensus on how broadly to apply *Lucas's* per se rule. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) ("By declaring that the denial of all economically beneficial use of land constitutes a regulatory taking, *Lucas* stated what it called a 'categorical' rule."); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 330 (2002) ("[O]ur holding [in *Lucas*] was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" (emphasis in original) (quoting *Lucas*, 505 U.S. at 1017)); *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1151–52 (Fed. Cir. 2014) (noting the question and collecting cases).

However, *Lucas* understands its categorical rule to be an application of the Supreme Court's prior land-use regulation cases, *see Lucas*, 505 U.S. at 1015 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 295–96 (1981)), and limited by "background principles of nuisance and property law that prohibit [specific] uses" of real property, *id.* at 1031. As such, "a landowner may not recover for a taking when the government forbids a use that is a nuisance at common law." *A & D Auto Sales*, 748 F.3d at 1152 (citing *Lucas*, 505 U.S. at 1029–30). "The law

of nuisance inheres in the landowner's title, so there is no taking if a use restriction falls within the scope of nuisance law." *Id*. (citing *Lucas*, 505 U.S. at 1029–30).

As such, *Lucas* itself expressly declines to extend its reasoning to the regulation of personal property. *Lucas*, 505 U.S. at 1028; *see Horne v. Dep't of Agric.*, 576 U.S. 350, 361–62 (2015) (clarifying that *Lucas's* per se regulatory taking analysis applies to real property). *Lucas* contrasts real property, which it concludes is subject to its per se regulatory taking rule, with "personal property," which is not subject to the same per se rule. *Lucas*, 505 U.S. at 1028; *see Horne*, 576 U.S. at 361–62. The contrast makes sense, as real property is afforded greater protections than personal property. *See Lucas*, 505 U.S. at 1027–28 ("[H]e ought to be aware of the possibility that new regulation might . . . render his property economically worthless" "by reason of the [government's] traditionally high degree of control over commercial dealings[.]" (citing *Andrus v. Allard*, 444 U.S. 51, 66–67 (1979))); *see Andrus*, 444 U.S. at 66–67 (finding no regulatory takings even where "regulations . . . prevent[ed] the most profitable use of [the owners' personal] property").

Bearing in mind that *Lucas* warns that personal property owners "ought to be aware of the possibility that new regulation might . . . render [their] property economically worthless" "by reason of the [government's] traditionally high degree of control over commercial dealings," *Lucas*, 505 U.S. at 1027–28, this court has "applied the categorical test to personal property [only] on occasion," *A & D Auto Sales*, 748 F.3d at 1151. Accordingly, this court has cautiously

examined the "inhere title" exception in cases involving non-physical personal property, specifically, liens, permits, or higher statutory dividend rates. *See American Bankers Ass'n v. United States*, 932 F.3d 1375, 1384–86 (Fed. Cir. 2019) (concluding that plaintiffs had no property interest in a higher statutory dividend rate on Federal Reserve stock); *A & D Auto Sales*, 748 F.3d at 1151–52 (declining to decide the issue of whether *Lucas* should extend to "intangible [personal] property"); *Bair v. United States*, 515 F.3d 1323, 1327 (Fed. Cir. 2008) (concluding that the "inhere in title" exception did apply to federal statutory processor liens); *Conti v. United States*, 291 F.3d 1334, 1343 (Fed. Cir. 2002)(concluding that a swordfishing permit did not constitute a cognizable property interest).

I fear that the majority has overread our case law by extending *Lucas's* per se regulatory taking analysis to dangerous and unusual weapons; here, bump stocks. The majority cites cases that appear inapplicable here; those cases address non-physical personal property—not physical personal property, like bump stocks. *See* Maj. Op. at 15–18 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981) (discussing whether the petitioner acquired a property interest in its attachment against foreign banks' assets); *American Bankers Ass'n*, 932 F.3d 1375, 1384–85 (discussing whether plaintiff had a property interest in a higher statutory dividend rate); *A & D Auto Sales*, 748 F.3d at 1152–53 (discussing whether *Lucas* should extend to "intangible [personal] property"); *Bair*, 515 F.3d at 1327 (discussing whether plaintiff had property interest in statutory processor liens)). Additionally, the

majority does not cite a single case where a court concluded that a claimant did not have a cognizable property interest in physical property. *See* Maj. Op. at 15–18. Such an overextension of our case law may inadvertently afford dangerous and unusual weapons special protections that are reserved to real property and limited instances of personal property, as discussed in *Lucas*. Consequently, in my opinion, the "inhere in title" exception is an inappropriate vehicle to ascertain whether Mr. McCutchen and Paducah failed to state a compensable takings claim. Instead, for the reasons to follow, I would affirm under the police powers doctrine.

III. MR. MCCUTCHEN AND PADUCAH'S TAKINGS CLAIMS ARE PRECLUDED BY THE POLICE POWERS DOCTRINE

The Court of Federal Claims concluded that the Bump Stock Rule "did not effect a taking for public use" under the police powers doctrine. *McCutchen*, 145 Fed. Cl. at 51 (capitalization normalized). The Court of Federal Claims explained that "it is well established that there is no [compensable] taking for 'public use' where," as here, "the government acts pursuant to its police power" to "criminalize[] or otherwise outlaw[] the use or possession of property that presents a danger to the public health and safety." *Id.* (citing *Keystone Bituminous*, 480 U.S. at 491; *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928); *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008)). Mr. McCutchen and Paducah argue that the Court of Federal Claims "erred" when it "determin[ed] that

[their] property was not taken 'for public use'" under the police powers doctrine. Appellants' Br. 9. I disagree with Appellants.

"Long ago" the Supreme Court "recognized 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'" and that "the Takings Clause did not transform that principle to one that requires compensation whenever the [government] asserts its power to enforce" that implied obligation. *Keystone Bituminous*, 480 U.S. at 491–92 (quoting *Mugler*, 123 U.S. at 665). Accordingly, certain government actions in furtherance of the health, safety, and general welfare of the public have a "special status" within our takings jurisprudence. *Id.* at 491& n.20; *see id.* at 491 n.20 (explaining that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the [government] has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity"); *see also Ruckelshaus*, 467 U.S. at 1005 (concluding that a health and safety regulation's lack of "interference with reasonable investment-backed expectations" was "so overwhelming . . . that it disposes of the taking question" (internal quotation marks and citation omitted)). Courts have sometimes described such actions as a "legitimate exercise of the government's police power," rather than a compensable taking, *Murr*, 137 S. Ct. at 1947, or as non-compensable under the "police power doctrine," *Akins v. United States*, 82 Fed.

Cl. 619, 622 (2008); *see AmeriSource*, 525 F.3d at 1153.[1] Rather than being compensable, "loss due to an exercise of the police power is properly treated as part of the burden of common citizenship." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *see Andrus*, 444 U.S. at 65 ("The Takings Clause . . . preserves governmental power to regulate, subject only to the dictates of justice and fairness." (internal quotation marks and citation omitted)). For example, "[c]ourts have consistently held that [the government] need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Keystone Bituminous*, 480 U.S. at 492 n.22; *see Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004). Similarly, "[w]hen property has been seized pursuant to the criminal laws or subjected to in rem forfeiture proceedings, such deprivations are not [compensable] takings." *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006) (internal quotation marks

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[1] This nomenclature has its roots in the Supreme Court's early police power cases, prior to the advent of its regulatory takings jurisprudence, when a regulation pursuant to the government's "police power" did not effect a compensable taking. *Murr*, 137 S. Ct. at 1942–47; *see Horne*, 576 U.S. at 360 ("Prior to th[e Supreme] Court's decision in [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)], the Takings Clause was understood to provide protection only against a direct appropriation of property—personal or real."). In *Pennsylvania Coal*, the Supreme Court held that "[t]he general rule" is that "if regulation goes too far it will be recognized as a taking." 260 U.S. at 415; *see Lucas*, 505 U.S. at 1026 (explaining that in *Pennsylvania Coal*, the Supreme Court established that there are "limits to the noncompensable exercise of the police power").

omitted) (citing *Bennis v. Michigan*, 516 U.S. 442, 452–53 (1996); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974); *Van Oster v. Kansas*, 272 U.S. 465, 468 (1926)).

The Court of Federal Claims correctly concluded that the Bump Stock Rule was not a compensable taking under the police powers doctrine. Congress enacted the National Firearms Act ("NFA") and Gun Control Act ("GCA") to regulate "lethal weapons," particularly machine guns, "[that] could be used readily and efficiently by criminals." H.r. REP. NO. 83-1337, at A395 (1954); *see* GCA, Pub. L. 90-618, sec. 101, 82 Stat. 1213 (1968); S. REP. NO. 89-1866, at 1 (1966); *see also National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. On Ways and Means*, 73d Cong. 2d Sess. 4–6 (1934) (statement of the Hon. Homer S. Cummings Attorney General of the United States) ("A machine gun, of course, ought never to be in the hands of any private individual. There is not the slightest excuse for it . . . and we must, if we are going to be successful in this effort to suppress crime in America, take these machine guns out of the hands of the criminal class."); H.R. REP. NO. 99-495, at 1–2 (1986) (explaining that the Firearm Owners Protection Act was intended to amend certain provisions of the Gun Control Act to, inter alia "enhance the ability of law enforcement to fight violent crime," including placing "[c]ontrols [on] all parts designed or intended to be use for converting weapons into machine guns"). The Bump Stock Rule, "[b]y making clear that [bump stocks] are subject to the restrictions that the NFA and GCA place on machineguns, . . . reflect[ed] the public safety goals of those statutes." Bump-Stock-Type Devices, 83 Fed.

Reg. 66,514, 66,520 (Dec. 26, 2018) ("Bump-Stock Rule"). In particular, the Bump Stock Rule sought to "ameliorate th[e] threat" to the public posed by bump stocks, Bump-Stock-Type Devices, 83 Fed. Reg. 13,442, 13,447 (Mar. 29, 2018) ("Notice"), as devices "designed to be affixed to semiautomatic long gun . . . for the express purpose of allowing 'rapid fire' operation," Bump Stock Rule, 83 Fed. Reg. at 66,516; *see id.* at 66,520 ("[A] bump-stock-type device combined with a semiautomatic firearm can empower a single individual to take many lives in a single incident."); Notice, 83 Fed. Reg. at 13,447 (explaining that the Las Vegas mass shooting "made many individuals aware that these devices exist—potentially including persons with criminal or terrorist intentions—and made their potential to threaten public safety obvious").

Further, the ATF promulgated the Bump Stock Rule pursuant to its statutory authority to make such regulations necessary to enforce the NFA and GCA. Bump Stock Rule, 83 Fed. Reg. at 66,515–16; *see* 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a), 7805(a); 28 C.F.R. § 0.130(a)(1)–(2). The Bump Stock Rule clarified that bump stocks fall within the statutory term "machinegun," because they "convert an otherwise semiautomatic firearm into a machinegun," and therefore, also fall within the criminal prohibition on the transfer and possession of machine guns. Bump Stock Rule, 83 Fed. Reg. at 66,514; *see id* at 66,521 (providing that the ATF has "initiated this rulemaking to clarify the regulatory interpretation of the NFA and GCA" and that "the purpose of th[e Bump Stock R]ule is to clarify that such devices are machineguns under the NFA"); *see also* 18 U.S.C. § 922(o); 26 U.S.C.

§ 5845(b); 27 C.F.R. §§ 447.11, 478.11, 479.11. "[W]illful violation" of this prohibition results in the "seizure and forfeiture" of the machine gun. 18 U.S.C. § 924(d)(1); *see id.* § 924(a)(2); 26 U.S.C. § 5872(a)–(b). Accordingly, in requiring that "possessors of [bump-stock] devices . . . destroy the devices or abandon them at an ATF office prior to the effective date of the [Bump Stock R]ule," Bump Stock Rule, 83 Fed. Reg. at 66,514, the ATF acted pursuant to its authority to "administer[] and enforce the laws related to" firearms, 28 C.F.R. § 0.130(a)(1)–(2); *see* 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a), 7805(a); 27 C.F.R. §§ 479.181, 479.182—specifically, to enforce the criminal prohibition on the transfer and possession of machine guns manufactured after 1986, 18 U.S.C. §§ 922(o), 924(d)(1); *see* Bump Stock Rule, 83 Fed. Reg. at 66,514.

"[T]he cases authorizing" such government action without compensation are "firmly fixed in the punitive and remedial jurisprudence of the country." *Bennis*, 516 U.S. at 453 (internal quotation marks and citation omitted). In promulgating the Bump Stock Rule, the ATF acted pursuant to a well-established regulatory regime and in consonance with a known "limitation on the right to keep and carry arms"—"the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" including machine guns. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (citing, inter alia, 4 Commentaries on the Laws of England 148–49 (1769); *State v. Langford*, 10 N.C. 381, 383–84 (1824))[2]; *see* 18 U.S.C. §§ 922(o), 924(d)(1), 926(a); 26

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[2] *See, e.g.*, *Langford*, 10 N.C. at 383–84 ("[W]hen a man arms himself with dangerous and unusual weapons, in such a manner

U.S.C. §§ 7801(a), 7805(a); 27 C.F.R. §§ 479.181, 479.182; 28 C.F.R. § 0.130(a)(1)–(2); *see also* Bump Stock Rule, 83 Fed. Reg. at 66,522 (collecting cases and noting that "lower courts have consistently upheld prohibitions on machine guns"). Further, in requiring Appellants abandon or destroy their bump stocks, the ATF acted "under the exercise of governmental authority other than the power of eminent domain," *Bennis*, 516 U.S. at 452—the government's authority to "seize[] [property] pursuant to . . . criminal laws" and "to condemn contraband . . . goods," *Acadia*, 458 F.3d at 1331–32; *see* 18 U.S.C. §§ 924(a)(2), (d)(1); 26 U.S.C. § 5872(a)–(b); *see also Bennis*, 516 U.S. at 452–53 (noting the Supreme Court's "longstanding practice" of neither requiring compensation for, nor finding unconstitutional, seizures, forfeitures, and abatements of personal property "to deter illegal activity," even of an "innocent owner"); *Calero-Toledo*, 416 U.S. at 683 (tracing in rem forfeiture proceedings against contraband personal property from "[l]ong before the adoption of the Constitution" to "contemporary [F]ederal and state forfeiture statutes" that "reach virtually any type of property that might be used in the conduct of a criminal enterprise").

"While it is insufficient to avoid" the Takings Clause "to invoke the 'police powers' of the state," 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

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as will naturally cause a terror to the people; which is said always to have been an offence at common law, and is strictly prohibited by statute." (citation omitted)).

has repeatedly been treated as legitimate even in the absence of compensation." *Acadia*, 458 F.3d at 1332–33; *see Bennis*, 516 U.S. at 453; *Calero-Toledo*, 416 U.S. at 683. Mr. McCutchen and Paducah, therefore, lack a compensable takings claim for their bump stocks against the Bump Stock Rule, because it is precluded by the police powers doctrine. Accordingly, the Bump Stock Rule's requirement that possessors destroy or relinquish their bump stocks as illegal machine guns is not a taking of "private property . . . for public use, without just compensation." U.S. CONST. amend. V, cl. 4.

Mr. McCutchen and Paducah's counterarguments are unpersuasive. First, Appellants argue that the "'police powers' exception" is inapplicable here because the doctrine only applies when the "government acts in its enforcement capacity, e.g., when it enforces an *existing* criminal or remedial statutory scheme, not when [the] government acts in its legislative capacity to readjust legal rights." Appellant's Br. 7; *see id.* at 7–8 (asserting that *Guedes* held that the Bump Stock Rule was not an "enforcement action" but "an exercise of the ATF's legislative authority to make new law" (citing *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 17–21 (D.C. Cir.), *judgment entered*, 762 F. App'x 7 (D.C. Cir. 2019), and *cert. denied*, 140 S. Ct. 789 (2020)), 18 (asserting that the "*Bennis* line of cases has no bearing on [Mr. McCutchen and Paducah's] Fifth Amendment claims" because the ATF, in requiring they destroy or surrender their bump stocks, was acting "under its legislative authority to make new law" (citing *Gibson Wine Co. v. Snyder*, 194

F.2d 329, 331 (D.C. Cir. 1952))). This argument is without merit.

Appellants ignore that the Bump Stock Rule was promulgated to enforce an existing criminal law—the prohibition on transfer and possession of machine guns, including parts designed to convert weapons into a machine gun, manufactured after 1986. 18 U.S.C. § 922(o); 26 U.S.C. § 5845(b); 27 C.F.R. §§ 447.11, 478.11, 479.1126; *see* Bump Stock Rule, 83 Fed. Reg. at 66,536–37 (explaining that "[b]ecause bump-stock-type devices are properly classified as 'machineguns' under the NFA and GCA, . . . [the] ATF must regulate them as such" and "does not have the authority to restrict only the future manufacture and sale of bump-stock-type devices" or "remove the general prohibition on the transfer and possession of machineguns that were not lawfully possessed" prior to 1986). Appellants also fail to recognize that the ATF acted within an established regulatory regime, pursuant to delegated and retained discretion, to conclude that Appellants' bump stocks "allow a shooter of a semiautomatic firearm to initiate a continuous firing cycle with a single pull of the trigger" and to classify Appellants' bump stocks as illegal machine guns. Bump Stock Rule, 83 Fed. Reg. at 66,515–16; *see id.* at 66,520 ("The reason for the [ATF's] classification change is that ATF, upon review . . . believes that bump-stock-type devices must be regulated because they satisfy the statutory definition of 'machinegun' in the NFA and GCA."); *see also* 18 U.S.C. § 926(a); 26 U.S.C. §§ 7801(a), 7805(a); 27 C.F.R. §§ 478.1, 479.1, 489.1; 28 C.F.R. § 0.130(a)(1)–(2); NFA Handbook §§ 7.2.4, 7.2.4.1; *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009); *Akins v.*

United States, No. 8:08-CV-988-T-26TGW, 2008 WL 11455059, at *8 (M.D. Fla. Sept. 23, 2008), *aff'd*, 312 F. App'x 197 (11th Cir. 2009). Appellants misunderstand that, having classified bump stocks as illegal machine guns, the ATF acted in its enforcement capacity when it required Appellants abandon or destroy their bump stocks—specifically, to enforce the criminal prohibition on the possession of illegal machine guns. Bump Stock Rule, 83 Fed. Reg. at 66,530 (providing that "enforcement of and compliance with" the Bump Stock Rule requires "possessors of bump-stock-type devices . . . to dispose of the[ir] devices"), 66,539 (providing that failure to comply by the "effective date" will result in "violation of Federal law"), 66,544 (explaining that "this rulemaking aims to apply Congress's policy decision to prohibit machineguns"); *see* 18 U.S.C. §§ 922(o), 924(d)(1); 26 U.S.C. §§ 5872(a)–(b), 7801(a), 7805(a); 27 C.F.R. §§ 447.63, 478.152, 479.182; 28 C.F.R. § 0.130(a)(1)–(2); *cf.* Appellants' Br. 15 (agreeing that "[t]he government is not required to pay compensation for a taking when a property owner is deprived of his property rights as a consequence of a government enforcement action." (citing *Bennis*, 516 U.S. at 442)).

Second, Mr. McCutchen and Paducah assert that the Court of Federal Claims erred because "[t]he Supreme Court's early 'police powers' cases do not defeat the public use prong of [their] claims." Appellants' Br. 11 (citing *Miller*, 276 U.S. 272; *Mugler*, 123 U.S. 623). They argue that "the 'harmful or noxious use' principle," articulated in the "*Miller* and *Mugler* cases was nothing more than the Supreme Court's early formulation of the police power justifying a regulatory *diminution in value* of property without

compensation," *id.* (citing *Lucas*, 505 U.S. at 1004), and therefore inapplicable to the "total[] depriv[ation] of their property" effected by the Bump Stock Rule, *id.* at 14. This argument is without merit.

As an initial matter, the police power doctrine is not directed to the "public use" prong of our takings analysis. The police power doctrine is directed to the question of whether property has been "taken." *Keystone Bituminous*, 480 U.S. at 491 n.20. If property has not been taken, then compensation is not required. *See Lingle*, 544 U.S. at 536–37. The public use prong is directed to whether property, having been taken, was taken for a "public use." *See id.* at 543. If property has not been taken for "public use," then "[n]o amount of compensation can authorize [the] action." *Id.*; *see Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 239 (1984). The police power doctrine is premised "on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the [s]tate has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous*, 480 U.S. at 491 n.20; *see Bennis*, 516 U.S. at 453; *Acadia*, 458 F.3d at 1331. It focuses on specific exercises of the police power in furtherance of the health, safety, and general welfare of the public. *Keystone Bituminous*, 480 U.S. at 491–92; *see Berman v. Parker*, 348 U.S. 26, 32 (1954) (explaining that "[p]ublic safety" and "public health" are "some of the more conspicuous examples of the traditional application of the police power," and therefore "they merely illustrate the scope of the power and do not delimit it"). In contrast, the public use prong seeks to prevent the government from taking property "for the

purpose of conferring a private benefit on a particular private party." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005). It focuses broadly on whether a taking is for "public purpose," *id.* at 480, and, therefore, unlike the police powers doctrine, is "coterminous" with the full "scope of a sovereign's police powers," *Midkiff*, 467 U.S. at 240; *see id.* at 239 ("An attempt to define [the police powers'] reach or trace its outer limits is fruitless, for each case must turn on its own facts." (quoting *Berman*, 348 U.S. at 32)); *Kelo*, 545 U.S. at 483 ("[Supreme Court] public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

More substantively, Appellants misunderstand the import of the Supreme Court's early police power cases to our analysis here. We do not need to analogize solely from cases about the state-mandated closure of breweries, *see Mugler*, 123 U.S. at 623, and compelled destruction of diseased cedar trees, *see Miller*, 276 U.S. at 279–80, to conclude that the government may ban dangerous and unusual weapons, *see Heller*, 554 U.S. at 627, and enforce that ban without compensation, *see Bennis*, 516 U.S. at 452–53; *Calero-Toledo*, 416 U.S. at 683; *Acadia*, 458 F.3d at 1331–32. Rather, because the Supreme Court's takings jurisprudence has "traditionally been guided" by the reasonable expectations of property owners, we may look to these early cases to establish that, "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Lucas*, 505 U.S. at 1027 (quoting *Pennsylvania Coal*, 260 U.S. at 413); *see,*

e.g., *Keystone Bituminous*, 480 U.S. at 490 (explaining that in *Miller*, 276 U.S. 272, the Supreme Court concluded that "the Takings Clause did not require the [state] to compensate the owners of cedar trees for the value of the trees that the [s]tate had ordered destroyed," because "it was clear that the [s]tate's exercise of its police power to prevent the impending danger was justified, and did not require compensation"), 491–92 (quoting *Mugler*, 123 U.S. at 665, for the proposition that "[l]ong ago it was recognized 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'"); *Allied-Gen. Nuclear Servs. v. United States*, 839 F.2d 1572, 1576 (Fed. Cir. 1988) (noting that in *Keystone Bituminous* "the Supreme Court has dusted off *Mugler* and put it back on its pedestal").

Further, contrary to Appellants' arguments, the Supreme Court's early police-power cases are not limited to the "diminution of rights" through "government regulation of use," Appellants' Br. 14, but instead confirm the government's longstanding authority to regulate personal property, even to "the destruction of [that] property," without a categorical duty to compensate. *Samuels v. McCurdy*, 267 U.S. 188, 196 (1925). For example, in *Samuels*, the Supreme Court concluded that the seizure of "certain intoxicating liquors" pursuant to a state's criminal prohibition, even to "the destruction of property" and disappointment of a previously legal interest, was not a compensable taking because the case did "not involve the power of eminent domain," but the "police power." *Id.* at 190, 195–96. Similarly, in *Omnia Com. Co. v.*

United States, the Supreme Court concluded that Federal requisition of a "steel company's entire production of steel plate for the year 1918" was not a compensable taking of another company's preexisting contract to buy that steel, as the "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense." 261 U.S. 502, 507–08 (1923). Thus, the early police power cases support the conclusion that "not every destruction or injury to property by governmental action" is a "'taking' in the constitutional sense," *Armstrong v. United States*, 364 U.S. 40, 48 (1960), but rather may be a non-compensable exercise of the police power, *Lucas*, 505 U.S. at 1027 (explaining that "some values . . . must yield to the police power" (quoting *Pennsylvania Coal*, 260 U.S. at 413)); *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 594 (1906) (explaining that the Takings Clause "is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community" as "[i]t has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given" (citation omitted)); *see, e.g.*, *Juragua Iron Co. v. United States*, 212 U.S. 297, 305 (1909) (concluding that Takings "principle[s]" could not "be enforced in respect of [real and personal] property destroyed by the United States in the course of military operations for the purpose . . . of protecting the health and lives of its soldiers," specifically, in the belief that it would prevent the spread of infectious disease); *Bowditch v. City of Bos.*, 101 U.S. 16, 18–19 (1879) (finding no compensable taking for the destruction of property to prevent the spread of fire, explaining that

"[a]t the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire" with "the common law adopt[ing] the principle of the natural law, and find[ing] the right and the justification in the same imperative necessity"). Accordingly, the Court of Federal Claims correctly concluded that the Bump Stock Rule was not a compensable taking under the police powers doctrine.

IV. CONCLUSION

I would affirm the decision of the Court of Federal Claims that, "[Mr. McCuthcen and Paducah's] bump-stock devices were not taken for a public use, but were instead prohibited through the government's exercise of its police power." *McCutchen*, 145 Fed. Cl. at 53. I therefore concur in today's result.

APPENDIX H

United States Court of Appeals for the Federal Circuit

October 4, 2021

ERRATA

Appeal No. 2020-1188

[Filed: October 4, 2021]

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

v.

UNITED STATES,
Defendant-Appellee

Decided: October 1, 2021
Precedential Opinion

Please make the following changes:

Page 5, line 5 (majority opinion): change "Firearm" to "Firearms".

Page 5, line 9 (majority opinion): change "Firearm" to "Firearms".

Page 5, line 12 (majority opinion): change "Firearm" to "Firearms".

Page 9, line 8 (Wallach, J., concurring): change "Firearm Owners" to "Firearms Owners"'.

APPENDIX I

In the United States Court of Federal Claims

No. 18-1965C

[Filed: September 23, 2019]

ROY LYNN MCCUTCHEN, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Keywords: Bump Stocks; Fifth Amendment; Categorical Takings; Regulatory Takings; Police Power

Ethan A. Flint, Flint Law Firm, LLC, Edwardsville, IL, for Plaintiff. *Adam M. Riley*, Flint Law Firm, LLC, Edwardsville, IL, Of Counsel.

Nathanael B. Yale, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, DC, for Defendant, with whom were *L. Misha Preheim*, Assistant Director, *Robert E. Kirschman, Jr.*, Director, and *Joseph H. Hunt*, Assistant Attorney General. *Melissa Anderson*,

Associate Chief Counsel, Litigation, Bureau of Alcohol, Tobacco, Firearms and Explosives, Of Counsel.

OPINION AND ORDER

KAPLAN, Judge.

On the evening of October 1, 2017, a lone gunman stationed himself in a high-rise, Las Vegas hotel room and fired 1100 rounds of ammunition downward onto a crowd attending a country music concert. Fifty-eight people were killed. Over eight hundred more were wounded by gunshots or as a result of the ensuing panic. When the authorities entered the shooter's hotel room, they found twelve semi-automatic weapons equipped with "bump stocks"—devices that allow a semi-automatic weapon to fire continuous rounds at a rate similar to that of a machinegun. See Barbara Goldberg et al., One Year Later, Las Vegas Honors 58 Killed in Mass Shooting, REUTERS, Oct. 1, 2018, https://www.reuters.com/article/us-lasvegas-shooting/one-year-later-las-vegas-honors-58-killed-in-mass-shooting-idUSKCN1MB3CO.

As of the date of this opinion, the mass shooting in Las Vegas remains the deadliest in American history. In its wake, the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") re-examined the status of bump-stock devices under federal firearms laws. Ultimately, after a period of notice and comment, it issued a final rule that re-classified bump stocks as "machineguns" under the National Firearms Act of 1934 and the Gun Control Act of 1968, thereby outlawing their possession and sale effective March 26, 2019. The regulation specified that,

to avoid prosecution, owners of bump stocks must either destroy their devices or abandon them at an ATF office by that date.

Plaintiff Roy Lynn McCutchen legally purchased and owns multiple bump-stock devices "for both his personal use and for economic gain." Class Action Compl. ("Compl.") ¶ 10, ECF No. 1. Plaintiff Paducah Shooter's Supply, Inc., is a registered firearms dealer that sells bump-stock devices and also operates a shooting range that occasionally hosts paid "machine gun shoots" where participants use bump-stock-type devices affixed to firearms. Id. ¶ 11. Both Plaintiffs complied with the final rule by destroying all of the bump-stock devices in their possession. Pls.' Opp'n to Def.'s Mot. to Dismiss ("Pls.' Opp'n") at 5, ECF No. 12.

Plaintiffs brought this putative class action on behalf of themselves and "[a]ll United States persons who have purchased a bump-fire stock or bump-fire type device, as listed in Exhibit 1 [to the complaint], for personal or commercial use, during the period extending from June 7, 2010, through and to the filing date of th[e] Complaint." Compl. ¶ 26. They allege that the ATF rule has effected a "taking" of their property for which just compensation is required under the Fifth Amendment. Id. ¶ 1.

Currently before the Court is the government's motion to dismiss the complaint under Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC") for failure to state a claim. For the reasons set forth below, the government's motion is **GRANTED** and the complaint is **DISMISSED with prejudice**.

BACKGROUND

I. Statutory Framework

To protect the public safety, Congress has enacted a series of statutes that regulate the manufacture, transfer, and possession of firearms generally—and machineguns in particular. These statutes include the National Firearms Act of 1934 ("NFA"), Pub. L. 73-474, 48 Stat. 1236 (codified as amended at I.R.C. §§ 5801–72); the Gun Control Act of 1968 ("GCA"), Pub. L. No. 90-618, 82 Stat. 1213 (amending 18 U.S.C. §§ 921–28 and I.R.C. ch. 53); and the Firearms Owners' Protection Act ("FOPA"), Pub. L. 99-308, 100 Stat. 449 (1986) (amending 18 U.S.C. §§ 921–29).

The NFA was enacted a year after Prohibition ended. Its purpose was, among other things, to regulate "lethal weapons . . . [that] could be used readily and efficiently by criminals and gangsters." H.R. Rep. No. 83-1337, at A395 (1954); see United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517 (1992) (observing that it was "clear from the face of the Act that the NFA's object was to regulate certain weapons likely to be used for criminal purposes"). The NFA imposed a tax on the manufacture and transfer of certain types of firearms. See NFA § 2. It further required that the Secretary of the Treasury maintain a registry of such firearms (referred to in I.R.C. § 5841 as the National Firearms Registration and Transfer Record). See generally NFA.

Machineguns were among the firearms covered by the NFA. "Machine gun" was defined as "any weapon which shoots, or is designed to shoot, automatically or

semiautomatically, more than one shot, without manual reloading, by a single function of the trigger." NFA § 1(b).

Some thirty-four years later, in the aftermath of the assassinations of President John F. Kennedy, Attorney General Robert Kennedy, and Dr. Martin Luther King, Jr., Congress enacted the GCA. See Gun Control Act of 1968, Bureau of Alcohol, Tobacco, Firearms and Explosives (July 2, 2019), https://www.atf.gov/rules-and-regulations/gun-control-act. The purpose of the 1968 law was to "regulate more effectively interstate commerce in firearms," to help "combat the skyrocketing increase in the incidence of serious crime," and to assist state and local governments "to enforce their firearms control laws." S. Rep. No. 89-1866, at 1 (1966). The GCA imposed stricter regulation of the firearms industry, defined new categories of firearms offenses, and placed further restrictions on the sale of firearms. See Gun Control Act of 1968, https://www.atf.gov/rules-and-regulations/gun-control-act.

Among many other provisions, the GCA made it a criminal offense for "any person [except] a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any . . . machinegun (as defined in section 5845 of the Internal Revenue Code []) . . . except as specifically authorized by [the Attorney General] consistent with public safety and necessity." GCA § 102 (amending 18 U.S.C. § 922). The GCA also amended and expanded the definition of "machinegun" set forth in the NFA, to encompass "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," as well as "the frame or receiver of any such weapon, any 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." GCA § 201 (amending I.R.C. § 5845).

Finally, in 1986 Congress passed FOPA, which amended the GCA by making it "unlawful for any person [with exceptions not relevant here] to transfer or possess a machinegun" not lawfully possessed before FOPA's effective date, May 19, 1986. FOPA §§ 102, 110 (amending 18 U.S.C. § 922). The new restrictions were intended, among other things, to protect law enforcement officers from the "proliferation" of machineguns, and to prevent "racketeers and drug traffickers" from using machineguns "for intimidation, murder and protection of drugs and the proceeds of crime." H.R. Rep. No. 99-495, at 4 (1986).

As amended by FOPA, and in its current form, a "machinegun" is defined in the United States code 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." I.R.C. § 5845(b). The Act left in place portions of the prior definition of "machinegun" that include "the frame or receiver of any such weapon." Id. It added new language, however, specifying that the term machinegun would also

include "any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun." FOPA § 109 (amending I.R.C. § 5845(b)).

II. Regulatory Framework

Congress has delegated the authority to promulgate rules and regulations necessary to enforce the provisions of the NFA and GCA to the Attorney General. See 18 U.S.C. § 926(a); 26 U.S.C. § 7805(a). The Attorney General, in turn, has delegated his authority to administer the statutes to the Director of ATF. 28 C.F.R. § 0.130(a).

Consistent with that delegation, ATF has published a number of regulations in the Federal Register which, after a period of notice and comment, were codified in the Code of Federal Regulations. These include provisions that incorporate and also elaborate on the definitions of certain statutory terms, including "machinegun." See 27 CFR pts. 478, 479.

ATF also "publishes rulings in its periodic bulletins and posts them on the ATF website." Bureau of Alcohol, Tobacco, Firearms and Explosives National Firearms Act Handbook ("ATF Handbook") § 1.4.2 (rev. Apr. 2009), https://www.atf.gov/firearms/docs/guide/atf-national-firearms- act-handbook-atf-p-53208/download. "These [rulings] contain ATF's interpretation of the law and regulations as they pertain to a particular fact situation." Id. They "do not have the force and effect of law but may be cited as precedent with respect to substantially similar fact situations." Id.

Finally, "ATF permits—but does not require—gun makers to seek classification letters from ATF prior to manufacturing a gun." See Sig Sauer, Inc. v. Brandon, 826 F.3d 598, 599 (1st Cir. 2016) (citing ATF Handbook § 7.2.4). 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." ATF Handbook § 7.2.4.1. Such classifications, however, "are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." Id. They do not have the force and effect of law. See Innovator Enters. v. Jones, 28 F. Supp. 3d 14, 23 (D.D.C. 2014).

III. Administrative Treatment of Bump-Stock Devices Before the Las Vegas Mass Shooting

Over the years, ATF has issued a number of rules and classification letters regarding the status of bump-stock devices under federal firearms laws. One of the cited purposes of the final rule at issue in this case was to reconcile the previously inconsistent approaches ATF had taken regarding the devices in the preceding almost twenty years. See Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,518 (Dec. 26, 2018) (noting that "prior ATF rulings concerning bump-stock-type devices did not provide substantial or consistent legal analysis regarding the meaning of the term 'automatically,' as it is used in the NFA and GCA").

In 2002, the inventor of the "Akins Accelerator"—a type of bump-stock device that is spring-powered to allow a semi-automatic firearm to "cycle back and forth, impacting the trigger finger without further

input by the shooter while the firearm discharged multiple shots"—requested a classification opinion from ATF. Id. at 66,517. ATF initially determined that the Akins Accelerator was not a machinegun because, "the statutory term 'single function of the trigger' [referred] to a single movement of the trigger." Id.

ATF subsequently received several classification requests concerning devices that—like the Akins Accelerator—were "exclusively designed to increase the rate of fire of semiautomatic firearms." Id. In Ruling 2006-2, issued on December 13, 2006, ATF retreated from the position it had taken in its classification letter to the inventor of the Akins Accelerator. Id. In its Ruling, ATF reasoned that the phrase "single function of the trigger" was best understood to mean a "single pull of the trigger." Id. Moving forward, ATF stated, devices like the Akins Accelerator would be classified as machineguns if, "when activated by a single pull of the trigger, such devices initiate an automatic firing cycle that continues until either the finger is released or the ammunition supply is exhausted." Id. (citing ATF Ruling 2006-2) (internal quotations and alterations omitted).[1]

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[1] On January 19, 2007, ATF required the producer and distributor of the Akins Accelerator "to remove recoil springs from all Akins Accelerators and surrender them to ATF, thereby rendering the devices nonfunctional and without value." See Akins v. United States, 82 Fed. Cl. 619, 621 (2008). As described in greater detail below, the inventor subsequently brought an unsuccessful lawsuit in the Court of Federal Claims alleging a Fifth Amendment taking of his property. See id. at 620. He also unsuccessfully challenged the rule's lawfulness in federal district court. See Akins v. United States, 312 F. App'x 197 (11th Cir. 2009).

ATF subsequently received classification requests for other bump-stock devices which—unlike the Akins Accelerator—did not employ internal springs. Id. at 66,516. Instead, these devices "harnesse[d] and direct[ed] the firearm's recoil energy to slide the firearm back and forth so that the trigger automatically re-engage[d] by 'bumping' the shooter's stationary finger without additional physical manipulation of the trigger by the shooter." Id. In a series of classification decisions between 2008 and 2017, ATF concluded that these devices were not "machineguns" because, lacking internal springs or other mechanical parts that would channel the recoil energy of the gun, they did not fire "automatically." Id. at 66,517.

IV. The Regulation at Issue in this Case

In the wake of the mass shooting in Las Vegas, "ATF received correspondence from members of the United States Congress, as well as nongovernmental organizations, requesting that ATF examine its past classifications and determine whether bump-stock-type devices available on the market constitute machineguns under the statutory definition." Id. at 66,516. Based on this public reaction, and at the direction of the President, the Department of Justice revisited the issue of whether and under what circumstances bump-stock-type devices should be classified as machineguns. Id. at 66,516–517. On March 29, 2018, ATF published a notice of proposed rulemaking. Id. at 66,517; Bump-Stock-Type Devices, 82 Fed. Reg. 13,442 (Mar. 29, 2018) (notice of proposed rulemaking). The notice proposed changes to the

regulations defining "machinegun" contained at 27 C.F.R. § 447.11, 478.11, and 479.11, and directed that public comment would close on June 27, 2018. 82 Fed. Reg. at 13,442.

ATF issued a final rule on December 26, 2018. 83 Fed. Reg. at 66,514. The new rule amended the definition of the term "machinegun" as used in parts 477 through 479 of the Code of Federal Regulations to specifically include bump-stock devices like the one used in the Las Vegas mass shooting. It states as follows:

> A "machinegun" . . . is a firearm 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 . . . . [T]he term "automatically". . . means functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger; and "single function of the trigger" means a single pull of the trigger and analogous motions . . . . <u>The term "machinegun" includes a bump-stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.</u>

83 Fed. Reg. at 66,553–54 (codified at 27 C.F.R. §§ 447.11(b), 478.11, 479.11) (emphasis supplied).

The final rule provided that it would become "effective" on March 26, 2019, ninety days after promulgation. Id. at 66,514. In the Federal Register notice, ATF stated that individuals would be subject to "criminal liability only for possessing bump-stock-type devices after the effective date of regulation, not for possession before that date." Id. at 66,525; see also id. (stating that the final rule "criminalize[s] only future conduct, not past possession of bump-stock-type devices that ceases by the effective date"); id. at 66,539 ("To the extent that owners timely destroy or abandon these bump-stock-type devices, they will not be in violation of the law."). Bump-stock owners were directed to either abandon their devices at an ATF office by March 26, 2019 or destroy them by "melting, crushing, [] shredding," or using a hammer to disable them "in a manner that renders the device incapable of ready restoration." Id. at 66,549.

V. APA Litigation

The lawfulness of ATF's final rule defining bump-stock devices as machineguns is currently the subject of several Administrative Procedure Act ("APA") challenges before the United States District Courts for the District of Columbia, the Western District of Michigan, and the District of Utah. All three district courts denied motions for preliminary injunctions filed by the plaintiffs in those cases. Aposhian v. Barr, 374 F. Supp. 3d 1145 (D. Utah 2019), appeal docketed, No. 19-4036 (10th Cir. Mar. 18, 2019); Gun Owners of Am. v. Barr, 363 F. Supp. 3d 823 (W.D. Mich. 2019), appeal docketed, No. 19-1298 (6th Cir. Mar. 22, 2019); Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives,

356 F. Supp. 3d 109 (D.D.C. 2019), aff'd 920 F.3d 1 (D.C. Cir. 2019), petition for cert. filed, — U.S.L.W. — (U.S. Sept. 4, 2019) (No. 19-296).

In a recent decision, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's denial of the plaintiffs' motion for a preliminary injunction. Guedes, 920 F.3d at 6. It held that the plaintiffs had failed to show a substantial likelihood of success on the merits of their APA claim. Id. Finding that the rule was legislative as opposed to interpretive and applying the standards set forth in Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), the court of appeals held that the statutory definition of "machinegun" is ambiguous and that ATF's interpretation of the statute, under which bump-stock devices were included within that definition, was a reasonable one. Id. at 29.

VI. The Present Action

Plaintiffs Roy Lynn McCutchen and Paducah Shooter's Supply, Inc. filed a class action complaint in this court on December 26, 2018. See generally Compl. They allege that ATF's reclassification of bump stocks as machineguns effected a taking of their property without just compensation pursuant to the Fifth Amendment. Id. ¶¶ 40–52. They ask the Court to certify a class, to find that the government's actions violated the Fifth Amendment, and to award Plaintiffs compensation for their losses. Id. at 9.

The government filed a motion to dismiss for failure to state a claim on May 2, 2019. Mot. to Dismiss at 1, ECF No. 9. It contends that ATF's rule did not effect a

compensable taking because it was issued pursuant to the government's police power and not its authority to take private property for a public use. Id. at 10. In the alternative, the government argues, even if the rule effected a taking, it was a regulatory and not a physical one, and not compensable under the multi-factor analysis prescribed for regulatory takings in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) and its progeny. Id. at 17.

Plaintiffs filed their response to the government's motion to dismiss on June 27, 2019. See generally Pls.' Opp'n. In their response, Plaintiffs allege that the final rule effected either a per se physical or per se regulatory taking of their property, so that the government has a categorical obligation to compensate them for the value of their property. Id.

Oral argument was held on the government's motion to dismiss on August 29, 2019.

DISCUSSION

I. Jurisdiction

The Tucker Act authorizes the Court of Federal Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a). Claims for damages under the Takings Clause of the Fifth Amendment are within this Court's Tucker Act jurisdiction. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 12, (1990); see also

Lion Raisins, Inc. v. United States, 416 F.3d 1356, 1368 (Fed. Cir. 2005); Narramore v. United States, 960 F.2d 1048, 1052 (Fed. Cir. 1992). Therefore, this Court has jurisdiction over the takings claims before it.

II. Standard for Motions to Dismiss under RCFC 12(b)(6)

A complaint should be dismissed under RCFC 12(b)(6) "when the facts asserted by the claimant do not entitle him to a legal remedy." Lindsay v. United States, 295 F.3d 1252, 1257 (Fed. Cir. 2002). When considering a motion to dismiss for failure to state a claim upon which relief may be granted, the Court "must accept as true all the factual allegations in the complaint, and [the Court] must indulge all reasonable inferences in favor of the non-movant." Sommers Oil Co. v. United States, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted); see also Huntleigh USA Corp. v. United States, 63 Fed. Cl. 440, 443 (2005). The Court, however, is not required to "accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." Kowal v. MCI Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

III. Overview of Takings Principles

The Fifth Amendment's Takings Clause provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. The purpose of the Takings Clause is to prevent "Government from forcing some people alone to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole." Penn Cent., 438 U.S. at 123.

"Takings claims typically come in two forms: per se or regulatory." Alimanestianu v. United States, 888 F.3d 1374, 1380 (Fed. Cir. 2018). A per se (or "categorical") taking occurs where there is a physical invasion or appropriation of property, whether real, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982), or personal, Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015). Further, a regulation that "denies all economically beneficial or productive use of land" also effects a per se or categorical taking. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

"When the Government commits a per se taking, it has a categorical duty to pay just compensation." Alimanestianu 888 F.3d at 1380 (citing Horne, 135 S. Ct. at 2426). That duty exists "without regard to the claimed public benefit or the economic impact on the owner." Horne, 135 S. Ct. at 2427.

In addition to per se (or categorical) takings, the Supreme Court has recognized that where a regulatory restriction "does not entirely deprive an owner of property rights," Horne, 135 S. Ct. at 2429, but nonetheless goes "too far," id. at 2427 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)), it may effect a regulatory taking. In Penn Central, 438 U.S. at 124, "the Court clarified that the test for how far was 'too far' required an 'ad hoc' factual inquiry." Horne, 135 S. Ct. at 2427. That ad hoc inquiry requires the court to consider "the character of the governmental action,"

"the extent to which the regulation has interfered with distinct investment-backed expectations," and "[t]he economic impact of the regulation on the claimant." Alimanestianu, 888 F.3d at 1381 (quoting Penn Cent., 438 U.S. at 124).

Here, Plaintiffs contend that the ATF rule effected a physical taking or, alternatively, what they call a "per se regulatory taking," either of which gives rise to "a categorical duty to pay just compensation." Pls.' Opp'n at 7 (citing Horne, 135 S. Ct. at 2425–27); id. at 24 (explaining that "even if the Final Rule were construed as a regulatory taking, it would, nonetheless, be a per se regulatory taking"). For the reasons set forth below, Plaintiffs' arguments lack merit.

IV. The ATF Rule Prohibiting Bump-Stock Devices Was an Exercise of Police Power and Did Not Effect a Taking for Public Use

As is evident from its plain language, the Takings Clause does not require compensation unless private property—whether personal or real—has been taken, whether physically or through regulation, "for public use." AmeriSource Corp. v. United States, 525 F.3d 1149, 1152 (Fed. Cir. 2008) (quoting U.S. Const. amend. V) ("The clause does not entitle all aggrieved owners to recompense, only those whose property has been 'taken for a public use.'"). Further, 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. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470,

491 (1987) (explaining that the Takings Clause does not transform the government's power to "restrict[] the uses individuals can make of their property . . . to one that requires compensation whenever the State asserts its power to enforce it"); Miller v. Schoene, 276 U.S. 272, 279–80 (1928) (holding that no taking occurred where the state ordered the destruction of red cedar trees to protect health of apple trees and observing that "where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property"); Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."); AmeriSource, 525 F.3d at 1153 (noting that "it is clear that the police power encompasses the government's ability to seize and retain property to be used as evidence in a criminal prosecution").

Of course, "it is insufficient to avoid the burdens imposed by the Takings Clause simply to invoke the 'police powers' of the state." Acadia Tech., Inc. v. United States, 458 F.3d 1327, 1332 (Fed. Cir. 2006). Nonetheless, there are certain exercises of the police power "that ha[ve] repeatedly been treated as legitimate even in the absence of compensation to the owners of the . . . property." Id. at 1332–33. Among these are government actions taken to enforce prohibitions on the use or possession of dangerous

contraband, or to require the forfeiture of property used in connection with criminal activity. See e.g., Bennis v. Michigan, 516 U.S. 442, 453 (1996) (holding that the forfeiture of an innocent owner's property that was used in a crime was not a taking); Kam-Almaz v. United States, 682 F.3d 1364, 1371 (Fed. Cir. 2012) (quoting AmeriSource Corp., 525 F.3d at 1153) (finding that a laptop "seized and retained pursuant to the police power" at a border crossing was "not taken for a 'public use' in the context of the Takings Clause"); AmeriSource Corp, 525 F.3d at 1155 (finding that the seizure of pharmaceuticals from an innocent third party for use in a criminal prosecution was an exercise of police power and not a taking); Holliday Amusement Co. of Charleston, Inc. v. South Carolina, 493 F.3d 404, 411 n.2 (4th Cir. 2007) (finding that a state statute outlawing possession of video gaming machines did not effect a taking and observing that regulations for the public good in heavily regulated fields such as gambling "per se do not constitute takings"); Acadia Tech, 458 F.3d at 1332 (determining that a customs seizure of goods suspected of bearing counterfeit marks is not a compensable taking for public use but was instead "a classic example of the government's exercise of the police power to condemn contraband or noxious goods"); United States v. $7,990.00, 170 F.3d 843, 845 (8th Cir. 1999) ("[F]orfeiture of contraband is an exercise of the government's police power, not its eminent domain power.").

In this case, Plaintiffs' bump-stock devices were not "taken for a public use," within the meaning of the Takings Clause. Instead, because the devices have been designated as machineguns under ATF's regulatory

authority, they are subject to 18 U.S.C. § 922(o), which makes their possession a criminal offense. ATF, in the exercise of its police power, directed that owners of the devices must either destroy or abandon them at an ATF office, to avoid prosecution. Because the prohibition on possession involved an exercise of the government's police power, there was no taking within the meaning of the Fifth Amendment.

In Akins v. United States, 82 Fed. Cl. 619, 623 (2008), the court similarly concluded that ATF was exercising police power when it reclassified another bump-stock-type device—the so-called "Akins Accelerator"—as a machinegun, and directed the owners of the device to surrender its recoil springs. The court reasoned that when ATF classified the Akins Accelerator as a machinegun and ordered its inventor to surrender the springs, it was acting under its authority to enforce 18 U.S.C. § 922(o), which outlaws the possession or transfer of machineguns. Id. Because "ATF was acting pursuant to the police power conferred on it by Congress," the court concluded, the plaintiff had failed to state a claim under the Takings Clause. Id.

The United States District Court for the District of Maryland recently reached a similar conclusion in Maryland Shall Issue v. Hogan. See generally 353 F. Supp. 3d 400 (D. Md. 2018). It rejected plaintiffs' claim that their property (bump stocks and similar devices) was taken without just compensation as a result of a state law that made it unlawful for any person to "'manufacture, possess, sell, offer to sell, transfer, purchase, or receive a rapid fire trigger activator' or to

'transport' such a device into the state." Id. at 405. The court observed that the state legislature had "considered the ability of bump stocks and similar devices to inflict mass injury and mass casualties with great speed, as well as their use to horrific effect in Las Vegas" and "concluded that these devices pose such an unreasonable risk to public safety that they should be banned from Maryland." Id. at 410. It held that the law "falls well within Maryland's traditional police power to define and ban ultra-hazardous contraband" and so did not effect a taking for public use within the meaning of the Fifth Amendment. Id.[2]

The Court finds these decisions relevant and persuasive. The ATF regulation at issue here was promulgated pursuant to statutory authority and consistent with our nation's "historical tradition of prohibiting . . . dangerous and unusual weapons." District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (internal quotation marks omitted). Weapons within these prohibitions have included machineguns and others that are used primarily by the military in warfare. See id. at 624; Hollis v. Lynch, 827 F.3d 436, 451 (5th Cir. 2016) (observing that machineguns do not receive Second Amendment protection "because they

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[2] See also Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106, 124 n.32 (3d Cir. 2018) (stating, in dicta, that New Jersey's ban on large capacity magazines "seeks to protect public safety and therefore it is not a taking at all," and observing 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.") (citing Lucas, 505 U.S. at 1027–28, 1027 n.14; Mugler, 123 U.S. at 668–69; Nat'l Amusements Inc. v. Borough of Palmyra, 716 F.3d 57, 63 (3d Cir. 2013)).

are dangerous and unusual and therefore not in common use"); Akins, 82 Fed. Cl. at 624 (observing that the manufacture and sale of firearms is "subject to pervasive federal regulation"). Banning the possession of such weapons and requiring their owners to divest themselves of such tools of war is the paradigmatic example of the exercise of the government's police power, which defeats any entitlement to compensation under the Takings Clause.

The Court finds no merit in Plaintiffs' contention that the police power doctrine does not apply where, as here, the property owners came into possession of their bump-stock devices lawfully and continued to lawfully possess them until the effective date of the ATF rule.[3] Plaintiffs have failed to cite a single case in which a court has found this distinction significant. They also fail to point to a case that has found the police powers doctrine inapplicable in circumstances where an individual is required to destroy or abandon property that was designated as contraband after the owner first came into possession of it. See Samuels v. McCurdy, 267 U.S. 188, 198–99 (1925) (finding no taking where

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[3] Citing the D.C. Circuit's decision in Guedes, 920 F.3d 1 (described above), Plaintiffs go on at some length in their opposition to establish that the rule at issue here is a "legislative," rather than interpretive one. See, e.g., Pls.' Opp'n at 2–3. The purpose of this discussion, as the Court understands it, is to show that until the regulation was enacted, there was no prohibition—statutory or regulatory—against the possession of bump-stock devices. The Court sees no reason to delve into this issue given its conclusion, discussed in the text, that the fact that the prohibition was only recently enacted is irrelevant to the applicability of the police powers doctrine.

liquor once lawfully purchased and possessed was seized and destroyed pursuant to the police power under subsequent law prohibiting liquor possession). As the district court in Maryland Shall Issue observed, "[p]ractically all products later defined as contraband were not contraband before the enactment of the law that named them as such." 353 F. Supp. 3d at 409–10. Yet no court has ever ruled that the government must compensate individuals who are required to divest themselves of dangerous items if the ban on their possession is of recent vintage.

Moreover, the rationale of the police powers doctrine is that it is improper to "burden[]" the government's power to prohibit the use of property in a manner that endangers public safety "with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." Mugler, 123 U.S. at 669. That rationale applies regardless of whether the property now thought to present a danger to public health and safety was once lawfully held.

In short, under ATF's final rule, Plaintiffs' bump-stock devices were not taken for a public use, but were instead prohibited through the government's exercise of its police power. For this reason alone, Plaintiffs have failed to state a takings claim.

V. The Regulation Did Not Effect a Categorical Taking

Even if the police power doctrine were inapplicable, the Court would nonetheless dismiss the complaint because there is no merit to Plaintiffs' argument that the rule effected a categorical taking of their bump-stock devices.

A. No Physical Taking

First, the final rule did not result in the physical appropriation of Plaintiffs' bump-stock devices. Instead, it imposed a criminal prohibition on their possession of bump-stock devices, enforced by requiring their owners to either destroy them or abandon them at an ATF office for destruction. In Plaintiffs' case, in fact, the bump-stock devices were never turned over to the government. Instead, Plaintiffs destroyed them on their own.

Plaintiffs' reliance on Horne v. Department of Agriculture in support of their per se physical takings argument is misplaced. The physical taking in that case arose out of a U.S. Department of Agriculture marketing order which required raisin growers to set aside a portion of their crop in certain years for the account of the government, free of charge. 135 S. Ct. at 2424. In accordance with the order, raisin growers were required to ship all of their raisins to a raisin "handler" who would separate out the portion due the government and pay the growers only for the remainder. Id. A "Raisin Administrative Committee" would take title to the raisins allotted to the government (known as "reserve raisins") and then

dispose of them in various authorized ways, including selling them in non-competitive markets or donating them to charity. Id. Proceeds from sales were used primarily to subsidize handlers who sold raisins for export. Id.

The central issue before the Court in Horne was whether the government's "'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property'" applied to personal as well as real property. Id. at 2425 (quoting Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012)). The Court answered that question in the affirmative. Id. Further, it found that the reserved requirement effected "a clear physical taking." Id. at 2428. Actual raisins were transferred from the growers to the government. Id. at 2424. Title to the raisins passed to the Raisin Committee. Id. And the Committee "disposes of what become its raisins as it wishes" to promote the marketing order's purposes. Id. at 2428. Because the government took title to and then directly appropriated the raisins for its own use, the Court held, it had effected a per se physical taking that required compensation. Id. at 2426.

Here, by contrast, the ATF Rule did not effect a physical taking of Plaintiffs' property. Plaintiffs were not required to surrender possession of their devices to the government. There was no transfer of title to the government. And if Plaintiffs had chosen to abandon their bump-stock devices at the local ATF office, the agency would not have put the devices to its own use; it would have destroyed them. The USDA regime of direct physical appropriation of private property for the

government's own use is distinguishable from the criminal prohibition on possession of personal property deemed dangerous, enforced by a requirement that the property be destroyed or abandoned.

Indeed, in Horne itself, the Court acknowledged that, had the government simply prohibited the sale of the raisins by the growers, it would not have effected a per se taking. "[T]hat distinction," the Court observed, "flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation." Id. at 2428.

In short, there is no merit to Plaintiffs' argument that the ATF rule effected a per se physical taking of their bump-stock devices. The Court therefore turns to Plaintiffs' alternative argument that the rule effected a per se regulatory taking.

B. The Rule Did Not Effect a "Per Se Regulatory Taking"

Plaintiffs contend that even if the rule did not effect a physical taking, "it would, nonetheless, be a per se regulatory taking." Pls.' Opp'n at 24 (emphasis removed). As explained above, the Supreme Court has held that regulatory actions may result in categorical or per se takings where they "den[y] all economically beneficial or productive use of land." Lucas, 505 U.S. at 1015.

The Supreme Court has never decided whether and to what extent this standard applies to personal property. As the Court explained in Horne, Lucas's application of a categorical standard to certain takings of real estate was grounded at least in part in the

recognition "that while an owner of personal property 'ought to be aware of the possibility that new regulation might even render his property economically worthless,' such an 'implied limitation' was not reasonable in the case of land." Horne, 135 S. Ct. at 2427 (quoting Lucas, 505 U.S. at 1027–28).

In A & D Auto Sales, Inc. v. United States, the Federal Circuit noted that it had, "on occasion," applied the Lucas standard where it was alleged that personal property had been rendered economically worthless. 748 F.3d 1142, 1151 (Fed. Cir. 2014) (citing Rose Acre Farms, Inc. v. United States, 373 F.3d 1177, 1196–98 (Fed. Cir. 2004); Maritrans, Inc. v. United States, 342 F.3d 1344, 1353–55 (Fed. Cir. 2003)). But A & D Auto Sales did not engage in any analysis of the propriety of that approach given the Lucas Court's recognition of the different expectations attached to the regulation of personal as opposed to real property. Further, as the court of appeals acknowledged in A & D Auto Sales, "other circuits view the Lucas test as applying only to land." Id. (citing Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430, 441 (8th Cir. 2007); Unity Real Estate Co. v. Hudson, 178 F.3d 649, 674 (3d Cir. 1999)); see also Horne v. Dep't of Agric., 750 F.3d 1128, 1140 (9th Cir. 2014), rev'd on other grounds, 135 S. Ct. 2419 (stating that it is clear the holding of Lucas is limited to cases involving land). It appears, therefore, that the Federal Circuit has not squarely addressed whether and under what circumstances the Lucas

categorical regulatory taking standard applies to personal property.[4]

Plaintiffs contend that the Supreme Court's reference in Lucas to the "implied limitation" on the expectations of owners of personal property is only applicable in the commercial context, and not to the mere ownership or possession of personal property. See Pls.' Opp'n at 25–26. Thus, Plaintiffs argue that, in Lucas, the Court observed that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." Id. at 25.

Of course, the only economically productive use of bump-stock devices is in their sale, manufacture for sale, or related commercial use. Plaintiff Paducah Shooter's Supply, Inc., for example, sells firearms and their accessories and operates a shooting range. It also previously provided bump-stock devices for patrons to

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[4] Neither of the two cases cited in A & D Auto Sales held that a categorical taking under Lucas occurs where a government regulation renders personal property economically worthless. In Rose Acre Farms, Inc., the court of appeals agreed with the trial court's rejection of "the government's contention that a 'per se' takings analysis is never applicable when personal property is at issue," but found no such taking in that case. 373 F.3d at 1196 (emphasis supplied). In Maritrans, Inc., the court of appeals applied the standard to personal property without discussing the dichotomy between real and personal property discussed in Lucas, but ultimately found that no categorical taking had occurred. 342 F.3d at 1353–54.

use when it held so-called "machine gun shoots." Compl. ¶ 11. Likewise, Plaintiff Roy Lynn McCutchen alleges that he has "purchased and owns multiple bump-fire type devices for both his personal use and for economic gain." Id. ¶ 10 (emphasis supplied).

Further, the Supreme Court's observations regarding the relative expectations of owners of personal property (as compared to owners of real property) surely apply to personal property whose ownership itself is subject to pervasive government regulation, as is the ownership of firearms in general, and machineguns in particular. Cf. Mitchell Arms v. United States, 7 F.3d 212, 213, 216 (Fed. Cir. 1993) (finding no enforceable rights sufficient to support a takings claim where plaintiff whose license to import assault rifles was suspended and then revoked "voluntarily entered the firearms import business, thereby knowingly placing itself in the governmentally controlled arena of firearms importation").

For these reasons, it appears to the Court that—even assuming there are circumstances in which the Lucas categorical taking standard could be applied to personal property—it should not be applied here. The Court therefore rejects Plaintiffs' argument that the ATF rule effected a categorical or per se regulatory taking of their property.

VI. Regulatory Taking Under Penn Central

Plaintiffs' complaint appears to be based on the theory that the ATF rule effected a regulatory taking under the Penn Central analysis. That analysis, as noted above, requires the Court to balance several

factors when deciding whether compensation is owed for a regulatory taking. These include "[t]he economic impact of the regulation on the claimant," "the character of the governmental action," and "the extent to which the regulation has interfered with distinct investment-backed expectations." Penn Cent., 438 U.S. at 124.

In opposing the government's motion to dismiss, however, Plaintiffs do not argue that the ATF rule effects a regulatory taking under Penn Central. Instead, they have chosen to rely upon the categorical takings theories described above. Any argument based on Penn Central has therefore been waived. See, e.g., Md. Shall Issue, 353 F. Supp. 3d at 413 n.5 (declining to evaluate plaintiffs' claims under the Penn Central test where the plaintiffs put forth only per se takings theories).

In any event, even if the argument were not waived, Plaintiffs have failed to state a regulatory takings claim under Penn Central. Plaintiffs have alleged that the ATF rule has "destroyed all economic value" of their bump-stock devices. Compl. ¶ 41. But their allegations are insufficient to establish a regulatory taking upon consideration of the character of the government's actions and the extent to which the rule interferes with reasonable investment-backed expectations.

As the Supreme Court has observed, "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required." Keystone Bituminous Coal Ass'n, 480 U.S. at 488. Where, as

here, the government's action is aimed at protecting the public health and safety, that fact weighs strongly against finding a regulatory taking. See, e.g., Dimare Fresh, Inc. v. United States, 808 F.3d 1301, 1311 (Fed. Cir. 2015) (finding that FDA press releases and media briefing warning consumers about an outbreak of salmonella in tomato producers' products did not effect a regulatory taking in part because the agency was acting to protect public health and safety); Rose Acre Farms, 559 F.3d at 1281 (holding that a USDA regulation which mandated that egg producers remove diseased eggs from the market was not a taking because the government was protecting public health); Appolo Fuels, Inc. v. United States, 381 F.3d 1338, 1351 (Fed. Cir. 2004) (holding that the government's decision to declare a portion of a watershed unsuitable for mining under the Surface Mining Control and Reclamation Act was "the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations" (quoting Rith Energy, Inc. v. United States, 270 F.3d 1347, 1352 (Fed. Cir. 2001))); Rith Energy, Inc., 270 F.3d at 1352 (holding that a federal agency's decision to revoke a coal mining permit "was an exercise of the police power directed at protecting the safety, health, and welfare of the communities surrounding the Rith mine site by preventing harmful runoff").

Further, the regulation does not interfere with what can fairly be considered reasonable investment-backed expectations. The investment-backed expectations factor "is designed to account for property owners' expectation that the regulatory regime in existence at

the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted." Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1345 (Fed. Cir. 2018).

"[R]easonable investment-backed expectations are greatly reduced in a highly regulated field." Branch v. United States, 69 F.3d 1571, 1581 (Fed. Cir. 1995). The firearms industry is the quintessential "highly regulated field." It is subject "pervasive Government control." Akins, 82 Fed. Cl. at 623 (quoting Mitchell Arms, Inc. v. United States, 26 Cl. Ct. 1, 5 (1992), aff'd, 7 F.3d at 212). Anyone who enters the firearms industry has to be aware that shifting public sentiments, evolving research concerning firearms availability and public safety, and events like the Las Vegas mass shooting may lead to rule changes that render unlawful what was once permissible.

In particular, Plaintiffs could not have reasonably expected that existing rules regarding bump-stock devices would not be made more restrictive. Such devices, after all, are designed to enable semi-automatic weapons to simulate the firepower of machineguns, whose possession has been prohibited for decades.[5]

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[5] In their complaint, but not in their opposition to the government's motion to dismiss, Plaintiffs allege that their investment-backed expectations in the lawfulness of their devices were reasonably based on prior ATF classification letters. Compl. ¶¶ 17–24, 42. But as discussed above, classification letters lack the force and effect of law and are explicitly made subject to subsequent changes in the law or regulations. See Lucas, 505 U.S. at 1027–28 (observing that an owner of personal property "ought to be aware of the possibility

Plaintiffs, in short, have waived any argument based on the Penn Central analysis by failing to make it in opposing the government's motion to dismiss. And even if the argument were not waived, the Court concludes that they have failed to allege a regulatory taking claim under Penn Central.

CONCLUSION

For the foregoing reasons, the government's motion to dismiss for failure to state a claim is **GRANTED**. The complaint will be **DISMISSED with prejudice**. The Clerk is directed to enter judgment accordingly. Each side will bear its own costs.

IT IS SO ORDERED.

s/ Elaine D. Kaplan
ELAINE D. KAPLAN
Judge

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that new regulation might even render his property economically worthless").

APPENDIX J

In the United States Court of Federal Claims

No. 18-1965 C

[Filed: September 27, 2019]

ROY LYNN MCCUTCHEN and PADUCAH SHOOTER'S SUPPLY, INC., individually and on behalf of all others similarly situated	)
v.	)
THE UNITED STATES	)

JUDGMENT

Pursuant to the court's Opinion and Order, filed September 23 , 2019, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's complaint is dismissed, with prejudice, for failure to state a claim. Each side shall bear their own costs.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

APPENDIX K

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2020-1188

[Filed: February 2, 2022]

ROY LYNN MCCUTCHEN, PADUCAH SHOOTER'S SUPPLY, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)
Plaintiffs-Appellants	)
v.	)
UNITED STATES,	)
Defendant-Appellee	)

Appeal from the United States Court of Federal Claims in No. 1:18-cv-01965-EDK, Judge Elaine Kaplan.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, WALLACH[1], TARANTO, CHEN, HUGHES, STOLL, and CUNNINGHAM, *Circuit Judges*.

PER CURIAM.

O R D E R

Roy Lynn McCutchen and Paducah Shooter's Supply, Inc. filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by the United States. The petition was first referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on February 9, 2022.

FOR THE COURT

February 2, 2022
Date

[1] Circuit Judge Wallach participated only in the decision on the petition for panel rehearing.

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX L

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 18-1965 C

[Filed: December 26, 2018]

ROY LYNN MCCUTCHEN and PADUCAH SHOOTER'S SUPPLY, INC., Individually and behalf of all others similarly situated,	)
Plaintiffs,	)
v.	)
THE UNITED STATES,	)
Defendant.	)

CLASS ACTION COMPLAINT

NATURE OF THE CLAIM

1. Plaintiffs bring their claims for a taking of their property without just compensation, by means of the reversal of the Bureau of Alcohol, Tobacco, Firearms, and Explosives's determination that bump-fire stocks, slide-fire devices, and devices with certain similar characteristics (collectively referred to as "bump-stocks") are a firearm part and, thus, not regulated as

a firearm under the Gun Control Act of 1968 ("GCA") or the National Firearms Act of 1934 ("NFA").

2. Specifically, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") published a Notice of Proposed Rulemaking ("NPR") in the Federal Register on March 29, 2018, 83 FR 13422. In the NPR, the ATF proposed an amendment to its regulations that would reverse its previous determinations that bump-stocks are a firearm part and not subject to federal regulation.

3. The ATF's NPR was an initial step to substantively, through fiat regulation, redefine bump-stocks as "machineguns" under the NFA and GCA.

4. The NPR, 83 FR 13422, was an abrupt reversal of clear ATF guidance that was followed by hundreds-of-thousands of law-abiding citizens and retailers who legally purchased bump-stocks over more than an eight-year period.

5. More than ten previous classification decisions from the ATF have classified bump-stocks as a firearm part or accessory, which hundreds-of-thousands of citizens relied on when purchasing these devices.

6. Because the ATF has long classified bump-stocks as mere firearm parts, owners of devices classified as firearm parts had an investment-backed expectation in their bump-stocks as firearm parts.

7. On December 26, 2018, the ATF published its final rule in the federal register, 83 FR 66514, amending 27 CFR parts 447, 478, and 479, retroactively redefining bump-fire stocks as "machineguns" under the NFA and GCA.

8. Moreover, the final rule incredibly requires that previously lawful owners destroy or surrender the device within 90-days without offering compensation.

9. The final rule's unprecedented requirement that bump-stocks be surrendered or destroyed within a 90-day period, with no opportunity for registration, effected a taking under the 5th Amendment of the United States Constitution.

PARTIES

10. Plaintiff Roy L. McCutchen is an individual who resides in the county of McCracken, Kentucky. In reliance on the ATF's many classification decisions, Mr. McCutchen legally purchased and owns multiple bump-fire type devices for both his personal use and for economic gain. At the time of the issuance of the final rule, Plaintiff had a property interest in a bump-stock. As detailed herein, Plaintiff suffered a taking as a result of the ATF's amendment of 27 CFR parts 447.11, 478.11, and 479.11, requiring him to destroy or surrender his legal bump-fire devices.

11. Plaintiff Paducah Shooter's Supply, Inc., is a corporation duly organized and existing under the laws of the state of Kentucky, with its principal place of business at 3919 Cairo Rd, Paducah, Kentucky 42001. Paducah Shooter's Supply, Inc., is a registered FFL firearms dealer doing business as PSS. It is also a retailer of recreational clothing, accessories, and firearm parts and accessories. Paducah Shooter's Supply, Inc., operates a shooting range which, on occasion, hosts "machine gun shoots" whereby it charges customers to shoot firearms at various targets.

Some of these shoots feature a bump-stock type device affixed to various firearms. As of the filling of this complaint, Plaintiff had a property interest in multiple bump-stock devices. As detailed herein, Plaintiff suffered a taking as a result of the ATF's amendment of 27 CFR parts 447.11, 478.11, and 479.11, requiring it to destroy or surrender its bump-fire devices.

JURISDICTION AND VENUE

12. This Complaint states causes of action for taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution. The Court has jurisdiction over this action under the Tucker Act, 28 U.S.C. § 1491(a).

13. Venue is proper in the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491(a).

FACTUAL BACKGROUND

14. The Attorney General is responsible for enforcing the GCA, as amended, and the NFA, as amended. This includes the authority to promulgate regulations necessary to enforce the provisions of the GCA and NFA.

15. The Attorney General has delegated the responsibility for administering and enforcing the GCA and NFA to the Director of the ATF, subject to the direction of the Attorney General and the Deputy Attorney General.

16. The Department and ATF have promulgated regulations implementing both the GCA and the NFA.

17. As the primary authority for administering and enforcing the GCA and NFA, manufactures, retailers, and the public alike have relied on the ATF for classification decisions on new bump-stock-type devices.

18. In 2006, the ATF concluded that certain spring-loaded devices were classified as machineguns under the GCA and NFA.

19. Specifically, the ATF concluded that certain devices attached to semi-automatic firearms that use an internal spring to harness the force of the recoil so that the firearm shoots more than one shot with a single pull of the trigger are machineguns.

20. One such bump-stock-type device that relied on internal springs and was classified as a machinegun was the Akins Accelerator.

21. After reclassification, the ATF advised individuals who had purchased the Akins Accelerator that they had the option of removing the internal spring, thereby placing the device outside the classification of machinegun and allowing the purchaser/possessor to *retain the device* in lieu of destroying or surrendering the device.

22. Between 2008 and 2017 the ATF also issued many classification decisions concluding that certain other bump-stock-type devices, that did not rely on springs, were not machineguns.

23. The ATF indicated that semiautomatic firearms modified with these bump-stock-type devices did not fire "automatically," and were thus not "machineguns,"

because the devices did not rely on internal springs or similar mechanical parts to channel recoil energy.

24. The ATF classified these bumps-stock devices as firearm parts which are not subject to regulation.

CLASS ACTION ALLEGATIONS

25. Plaintiffs incorporate by reference all prior paragraph as if fully set forth in their entirety herein.

26. Pursuant to Rule of the United States Court of Federal Claims ("RCFC") 23, Plaintiffs bring this class action and seek certification of the claims and certain issues in this action on behalf of a Class defined as:

> **All United States persons who have purchased a bump-fire stock or bump-fire type device, as listed in Exhibit 1, for personal or commercial use, during the period extending from June 7, 2010, through and to the filing date of this Complaint.**

27. Plaintiffs reserve the right to amend the Class definition if further investigation and discovery indicates that the Class definition should be narrowed, expanded, or otherwise modified. Excluded from the Class are governmental entities, and individuals, corporations, non-profits, or any other entities who have chosen to challenge the regulation in a federal district court or to pursue an individual takings claim in a federal district court. Also excluded from the Class is any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

28. The federal regulation was applied uniformly to all members of the Class so that the questions of law and fact are common to all members of the Class and any potential future subclass.

29. All members of the Class and any future subclass were and are similarly affected by the promulgated regulation, and the relief sought herein is for the benefit of Plaintiff and members of the Class and any future subclass.

30. Based on the annual sales of the bump-fire stocks and the popularity of the bump-fire stocks, it is apparent that the number of bump-fire stock owners is so large to make joinder impractical, if not impossible.

31. Questions of law and fact common to Plaintiff Class exist that predominate over questions affecting only individual members, including, inter alia:

a. Whether the ATF's promulgated regulation effected a taking under the 5th Amendment of the United States Constitution;

b. Whether physically surrendering a bump-stock to the ATF is a taking under the 5th Amendment of the United States Constitution; and

c. Whether Plaintiffs are entitled to just compensation.

32. The claims asserted by Plaintiff in this action are typical of the claims of the members of the Plaintiff Class, as the claims arise from the same action by the

Defendant, and the relief sought within the Class is common to the members of each.

33. Plaintiff will fairly and adequately represent and protect the interests of the members of the Plaintiff Class and any potential future subclass.

34. Plaintiff has retained counsel competent and experienced in both Fifth Amendment takings and class action litigation.

35. Certification of this class action is appropriate under RCFC 23 because the questions of law or fact common to the respective members of the Class predominate over questions of law of fact affecting only individual members. This predominance makes class litigation superior to any other method available for fair and efficient decree of the claims.

36. Absent a class action, it would be highly unlikely that the representative Plaintiffs or any other members of the Class would be able to protect their own interests and property rights because the cost of litigation through individual lawsuits might exceed expected recovery.

37. Certification also is appropriate because Defendant acted, or refused to act, on grounds generally applicable to both the Class and any subclass, thereby making appropriate the relief sought on behalf of the Class and any subclass as respective wholes. Further, given the large number of property owners with an investment backed expectation that are affected by the regulation, allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent and conflicting adjudications.

38. A class action is a fair and appropriate method for the adjudication of the controversy, in that it will permit a large number of claims to be resolved by a single judge simultaneously, efficiently, and without the unnecessary hardship that would result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense and burden on the Court—with its many judicial vacancies—that individual actions would engender.

39. The benefits of proceeding as a class action, including providing a method for obtaining redress for constitutional violations that would not be practical to pursue individually, outweigh any difficulties that might be argued with regard to management of this class action.

COUNT I

(FIFTH AMENDMENT TAKING)

40. On December 26, 2018, the ATF amended 27 CFR parts 447.11, 478.11, and 479.11, retroactively redefining bump-fire stocks as "machineguns" under the NFA and GCA.

41. The amended regulations have destroyed all economic value and all investment-backed expectations in plaintiffs' bump-stocks.

42. Bump-stocks that were once legally owned, and unregulated, firearm parts by plaintiffs are now considered machineguns under the NFA and cannot be lawfully possessed, transported, donated, or devised.

43. Bump-stock devices currently possessed by individuals are required to be destroyed or surrendered to the ATF within 90-days of the effective date of the regulation.

44. The ATF's website explains that bump-fire devices can be surrendered to a local ATF office or destroyed.

45. The website also explains how to properly destroy a bump-stock, see Exhibit 1.

46. Indeed, the final rule states "any method of destruction must render the device so that it is not readily restorable to a firing condition or is otherwise reduced to scrap."

47. A federal law or regulation that requires previously lawful owners of property to destroy or surrender said property, without just compensation, is unprecedented in the history of the United States.

48. Unlike individual states, the federal government does not have a plenary police power.

49. The amended regulation effectively took plaintiffs property without just compensation.

50. The ATF took Plaintiffs' property for a public purpose.

51. The ATF's actions are attributable to the United States.

52. The United States government has not provided Plaintiffs with just compensation for the taking of Plaintiffs' property.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf themselves and all others similarly situated, prays for relief pursuant to each cause of action set forth in this Complaint as follows:

A. For an order certifying that the action may be maintained as a class action, certifying Plaintiffs as representatives of the Class, and designating their counsel as counsel for the Class;

B. For an order finding that Defendant took Plaintiffs' property without just compensation in violation of the Fifth Amendment of the United States Constitution;

C. For Judgment entered against the Defendants and in favor of Plaintiffs for compensation for the property right taken from them, together with the costs of suit, including reasonable attorneys' fees and interest;

D. That Plaintiffs be awarded just compensation for their deprivation and losses;

E. That Plaintiffs have such other, further, and different relief as the case may require and the Court may deem just and proper under the circumstances.

Dated: December 26, 2018

Respectfully Submitted,

/s/ Ethan A. Flint
Ethan A. Flint, *Attorney of Record*

Adam M. Riley, *Of Counsel*
Flint Law Firm, LLC
222 E. Park St., Suite 500
P.O. Box 189
Edwardsville, IL 62025
T: (618) 288-4777 F: (618) 288-2864
eflint@flintlaw.com
ariley@flintlaw.com