No. 22-25

IN THE

Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES,

Respondent.

THE MODERN SPORTSMAN, LLC,

Petitioner,

v.

UNITED STATES,

Respondent.

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

AMICUS BRIEF OF MARYLAND SHALL ISSUE, INC., IN SUPPORT OF PETITIONERS

MARK W. PENNAK
Counsel of Record
MARYLAND SHALL ISSUE, INC.
9613 Harford Rd., Ste. C #1015
Baltimore, MD 21234-2150
(301) 873-3671
mpennak@marylandshallissue.org

Counsel for Amicus Curiae

August 8, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF AMICUS[1]

Maryland Shall Issue, Inc. ("MSI") is a Section 501(c)(4), all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners' rights in Maryland. MSI seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. Many members of MSI are harmed by the federal rule at issue here and MSI opposed the rule in submitting comments. Bump Stock Rule, 87 Fed. Reg. 24652 (April 26, 2022) ("the Rule" or "ATF Rule").

MSI was an *amicus* below in support of the *Modern Sportsman* plaintiff. MSI was also a plaintiff in *Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356 (4th Cir. 2020), *cert. denied,* 141 S.Ct. 2595 (2021), a case in which plaintiffs challenged as a Taking a similar ban on bump stocks imposed by the Maryland General Assembly. 2018 Md. Laws Ch. 252. Because of this prior litigation, MSI has a unique perspective and offers this amicus brief to aid the Court.

SUMMARY OF ARGUMENT

Four circuits are in a state of conflict concerning the appropriate analysis for governmental bans on the possession of personal property that was legally acquired and possessed prior to the enactment of the

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[1] Pursuant to Supreme Court Rule 37, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no party other than amicus curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. On July 11, 2022, Petitioners filed a blanket consent to the filing of all amicus briefs. On July 29, 2022, Respondent United States consented in writing to the filing of this amicus brief.

regulation in question. The Federal Circuit's test in this case is particularly egregious as it gives controlling weight in the Takings analysis to the ATF's new substantive Rule banning possession of personal property that the Rule itself acknowledges was lawfully owned and possessed prior to the effective date of the Rule. The Federal Circuit justifies that result on the unwarranted assumption that the ATF has the authority to issue such a Rule. That holding is unprecedented and sweeping in its implications.

The tests for a Taking employed by other circuits are likewise flawed and in conflict. The Fourth Circuit and the Ninth Circuit hold that there is no Taking where the possession ban does not require a transfer of actual possession to the government or a third party. The Third Circuit, the trial courts below and Judge Wallach in his concurring opinion in this case, believe that a State need only invoke its "police power" to avoid "just compensation" under the Takings Clause, a test that has been expressly rejected by the Fourth Circuit. All of these approaches are in direct conflict with this Court's precedents. The Court's intervention is needed to clarify the correct standard for adjudicating possession bans.

Alternatively, this Court should hold the petition. The Federal Circuit premised its entire Takings analysis on the "assumption" that the ATF Rule was a valid substantive law. This Court already has two petitions for certiorari pending before it on the validity of this ATF Rule and both petitions were rescheduled and held over to next Term. Three other cases are pending in the Courts of Appeals; one before the *en banc* Fifth Circuit, one in the D.C. Circuit and still another in the Federal Circuit. Fairness and justice demand full consideration of this issue prior to allowing the government to escape Takings liability

over the forced destruction of over $102 million worth of personal property.

ARGUMENT

I. THE COURTS OF APPEALS ARE IN CONFLICT ON AN ISSUE OF EXCEPTIONAL IMPORTANCE

In *Knick v. Township of Scott*, 139 S.Ct. 2162, 2170 (2019), this Court overruled *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and held that "[t]he Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner." *Knick* has opened up the federal judiciary to the claims for just compensation for Takings by States. State Takings are assessed under the same test applicable to federal Takings. *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019). Compensation for a Taking in a given State cannot turn whether it is by a federal agency or by a State.

The issue presented in this case is the scope of the Takings Clause concerning governmental bans on the possession of legally acquired and legally possessed personal property. The government has insisted throughout this litigation, and in issuing this Rule, that the ban on possession of bump stocks is an exercise of government's "police powers," which, supposedly, obviates any possibility of a Taking. (App. 6, 54, 108). The Federal Circuit declined to decide "under what circumstances a measure that newly bars possession of personal property (as opposed to restricting a use of property) . . . and serves a 'police power' purpose . . . is not a 'taking,' and thus requires no compensation."

(App. 53).[2] Instead, the court of appeals held that petitioners had failed to establish "a property interest" because the "preexisting federal statutory prohibition on possession or transfer of 'machineguns,'" found in 18 U.S.C. § 922(o), meant that "plaintiffs lacked a property right in what they allege was taken – continued possession or transferability of their bump-stock devices." (App. 56-57). The Federal Circuit deemed it irrelevant that the ATF Rule was clear in declaring these items were legally purchased and lawfully possessed prior to the effective day of the ATF Rule. App. 68

The other courts of appeals pursue different tacks in refusing to recognize a Taking in the face of governmental bans on possession of personal property. In *Maryland Shall Issue, Inc. v. Hogan,* 963 F.3d 356 (4th Cir. 2020), *cert. denied,* 141 S.Ct. 2595 (2021) ("*MSI*"), the Fourth Circuit held, in a split decision, that there is no Taking where the challenged statute banned possession of bump stocks. The Fourth Circuit majority held that "the per se regulatory taking in *Lucas* [*v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)], applies only to real property" and *Loretto* [*v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982)], were "distinguishable" because the State statute at issue "does not require or permit third parties to take physical possession." *MSI*, 963 F.3d at 364 n.4. According to the majority, a *per se* Takings analysis applied only to "appropriations" and, to the majority, the *sine qua non* of an "appropriation" of personal

[2] The Federal Circuit recognized that the federal government has no general "police powers" and thus used the term as limited to those powers exercised by the federal government "within the context of constitutional authorization of particular powers." App. 53 n.4. This amicus brief uses "police powers" in the same limited sense.

property was not dispossession of the owner, but whether a law requires the owner "to turn them over to the Government or to a third party." (963 F.3d at 366). Judge Richardson dissented in a lengthy opinion.[3]

In *ANJRPC v. Rogers*, 910 F.3d 106 (3d Cir. 2018), on an appeal from a denial of a preliminary injunction, the Third Circuit vacillated between two takings theories in a case involving a ban by New Jersey on the possession of so-called "large capacity magazines" ("LCM"). The court first stated that "New Jersey's LCM ban seeks to protect public safety and therefore it is not a taking at all," explaining 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." (910 F.3d at 124 n.32). The Third Circuit also stated that the State's ban on the possession of large capacity magazines was not a taking because the owners could "transfer to an individual or entity who can lawfully possess LCMs, modify their LCMs to accept fewer than ten rounds, or register those LCMs that cannot be modified." (910 F.3d at 124).[4]

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[3] The *MSI* majority did not address the "police power" doctrine, even though that theory was pressed by the State in briefing. In a later decision, the Fourth Circuit expressly rejected the argument that police power is controlling. See *Yawn v. Dorchester County*, 1 F.4th 191, 195 (4th Cir. 2021) ("That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court's jurisprudence.").

[4] The Third Circuit's 2018 decision was followed by a later decision in the same case after a final judgment. On that appeal, the Third Circuit held it was bound by its 2018 decision. Both decisions addressed a Second Amendment claim in addition to the Takings claim. That second decision was vacated and remanded for further consideration in light of *NYSRPA v. Bruen*, 142 S.Ct.

In *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*), *cert. granted, vacated and remanded on other grounds,* --- S.Ct. ----, 2022 WL 2347579 (2022),[5] the Ninth Circuit *en banc* court sustained a State ban on the possession of "large capacity magazines" against a Takings claim, holding that the prohibition did not amount to a Taking because "California reasonably chose to prohibit the possession of large-capacity magazines due to the danger that they pose to society." (19 F.4th at 1112-13). That holding is indistinguishable from the "police power" theory adopted by the trial courts in this case and by the Third Circuit in *ANJRPC* (but rejected by the Fourth Circuit).[6] Yet, the court did not stop there. It also opined that there was no Taking because "the government here in no meaningful sense takes title to, or possession of, the

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2111 (2022). See *ANJRPC v. Attorney General*, 974 F.3d 237 (3d Cir. 2020), *cert. granted, vacated and remanded on other grounds,* --- S.Ct. ---, 2022 WL 2347576 (2022). The Third Circuit's Takings analysis was not addressed in *Bruen*. The court's 2018 decision thus remains binding circuit precedent on the Takings claim.

[5] Like the Third Circuit in *ANJRPC,* the Ninth Circuit in *Duncan* also decided Second Amendment questions and this Court has vacated and remanded that court's judgment for further consideration in light of *Bruen*. While a vacated judgment is not technically binding, parts of such vacated decisions that are not addressed in a GVR order are nonetheless commonly cited as authority. See, e.g., *O'Connor v. Donaldson,* 422 U.S. 563, 577 n.12 (1975) (noting an unrelated part of the lower court's newly vacated decision "needs no further consideration"); *California v. American Stores, Co.*, 492 U.S. 1301, 1305 (1989) (O'Connor, J.,) (granting a stay of mandate pending a petition for certiorari); *United States v. Jackson*, 30 F.4th 269, 274 (5th Cir. 2022). That the Ninth Circuit's judgment was vacated in light of *Bruen*, thus has little bearing on the Takings question separately addressed in *Duncan.*

[6] See note 3, *supra*.

item." (*Id.*). As explained below, all these Taking theories conflict with this Court's precedents. This Court's intervention is necessary to provide much-needed guidance on these issues.

II. FIRST PRINCIPLES

A. Personal Property Is Protected By The Takings Clause

The first question in any Takings case is whether the regulation at issue regulates "property." That question is easily answered here. The property interests protected are broad. *United States v. General Motors*, 323 U.S. 373, 378 (1945) ("[t]he constitutional provision is addressed to every sort of interest the citizen may possess"). *Horne v. Dep't. of Agric.*, 576 U.S. 350, 358 (2015), thus held that the governmental duty to pay just compensation for a Taking fully extends to personal property, noting that "[t]he Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." The Court stated that "nothing" in the history of the Takings Clause suggests that personal property "was any less protected against physical appropriation than real property." *Horne*, 576 U.S. at 360. The Court thus rejected the Ninth Circuit's holding that an appropriation of personal property was less protected by the Takings Clause than real property. *Horne*, 576 U.S. at 360-61.

This is not to say that there is no difference whatsoever between real property and personal property. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992), the Court observed that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he 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)." Nonetheless, in *Horne*, the Court stressed that "[t]he different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike." (576 U.S. at 361). As the Court explained, "[w]hatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away." (*Id*.). In short, appropriations of personal property are *per se* Takings no less than appropriations of real property. *Horne*, 576 U.S. at 362. Eight members of this Court agreed with that holding. *Horne*, 576 U.S. at 370) (Breyer, J., agreeing with "Parts I and II of the Court's opinion").

Equally defective is the Third Circuit's alternative holding in *ANJRPC* that there was no Taking of the magazines in that case because owners could dispossess themselves by transferring their magazines to a federal firearms licensee or could permanently modify the magazines to limit the capacity. (910 F.3d at 124). In *Horne*, the Court made short work of a similar argument, advanced by the government, that there was no Taking because the growers in that case could "sell their raisin-variety grapes as table grapes or for use in juice or wine." *Horne*, 576 U.S. at 365 (citation omitted). As the Court explained, "property rights 'cannot be so easily manipulated.'" *Id*. quoting *Loretto*, 458 U.S. at 439 n.17. See also *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2076 (2021).

B. A Government-Mandated Deprivation Of Possession Is An "Appropriation" And Thus A *Per Se* Taking

Under *Horne*, the question presented by this case is whether the ATF Rule is an "appropriation" of the property it bans. That question answers itself. Simply put, a ban on possession of personal property is a *per se* Taking because such a regulatory ban is so complete "that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). The "ouster" referenced in *Lingle* is the ouster of *possession*. *Id*., at 539. See also *Lucas*, 505 U.S. at 1014 (noting that the "practical ouster of possession" is the "functional equivalent of" a "direct appropriation"); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (same). See *MSI*, 963 F.3d at 376 (Richardson, J., dissenting) ("a possession ban is an actual ouster" that "physically defeats one's property rights").

In *Horne*, the Court stressed that the growers who were subject to the raisin reserve requirement there at issue had suffered a *per se* Taking because they lost "the entire 'bundle' of property rights in the appropriated raisins—'the rights to possess, use and dispose of' them" (*Id.* at 2428, quoting *Loretto,* 458 U.S. at 435. See also *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (stating that the right to exclusive possession is "one of the most essential sticks in the bundle of rights commonly characterized as property"); *Cedar Point*, 141 S. Ct. at 2073 ("Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation").

For example, in *Andrus v. Allard*, 444 U.S. 51, 65 (1979), this Court held there was no Taking of

personal property (eagle feathers) where the law at issue banned the sale of these items (thus rendering them "economically worthless"), but nonetheless allowed the owners to possess, donate, and devise their property, rights that the Court called "crucial." In *Horne*, this Court held that a Taking had occurred by virtue of the loss of the right of possession and distinguished *Andrus* on that very basis. See *Horne,* 576 U.S. at 364 (noting that in *Andrus*, the "Government did not 'compel the surrender of the artifacts, and there [was] no physical invasion or restraint upon them'") (quoting *Andrus*, 444 U.S. at 65-66).

Taken together, *Andrus* and *Horne* teach that the government may ban the sale of personal property as long as it does not also destroy the "crucial" rights to possess, transport, donate or devise. Here, of course, the ATF Rule completely bans continued possession and is thus an "appropriation" under *Horne* and *Lucas*.

III. A CHANGE OF POSSESSION IS NOT REQUIRED

As noted, both the Fourth Circuit in *MSI* and the Ninth Circuit in *Duncan* held that there can be no Taking where the government (or a third party) does not take possession of the property it has banned. Those holdings in *MSI* and *Duncan* are plainly wrong. As stated in *United States v. General Motors*, 323 U.S. 373, 378 (1945), "[t]he courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." (*Id.*). Similarly, in *Lucas*, the Court stated that a *per se* rule was justified because "that total deprivation of beneficial use is, from the *landowner's point of view*, the equivalent of a physical appropriation." *Lucas,* 505 U.S. at 1017 (emphasis added). See also Richard A. Epstein, *Takings: Private*

Property and the Power of Eminent Domain, 66 (1985) ("That the government has not taken physical possession of the land is neither here nor there.").

The Court's other cases on this point are in accord. See *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1004 (1984) ("It has never been the rule that only governmental acquisition or destruction of the property of an individual constitutes a taking."); *Brown v. Legal Found.*, 538 U.S. 216, 235-36 (2003) ("the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain"); *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) ("our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself"); *Arkansas Game and Fish Com'n v. United States*, 568 U.S. 23, 33 (2012) ("takings claims" are "not confined to instances in which the Government took outright physical possession of the property involved"); *Pumpelly v. Green Bay Co.,* 13 Wall. (80 U.S.) 166, 177-78 (1871) (same). This recurring issue should be put to rest.

IV. THE FEDERAL CIRCUIT'S "POLICE POWER" APPROACH IS WRONG

Unique among the circuits is the Federal Circuit's holding in this case that personal property that was lawfully acquired and lawfully possessed nonetheless is not cognizable as property under the Takings Clause because a governmental agency has the power to prospectively expand the coverage of a statutory scheme to ban this heretofore lawful property. According to the Federal Circuit, bump stocks are not property because the federal prohibitions on the possession of machineguns "predated the existence, let alone plaintiffs' possession, of the bump stock-type devices." (App. 58). In so holding, the Federal Circuit purports to

disclaim reliance on the government's police power theory espoused by the Court of Federal Claims, but concedes that its reasoning is "related." (App. 55).

In reality, the Federal Circuit's approach is but an ill-disguised rendition of the police power theory. According to the Federal Circuit, it is enough that the ATF was assumed to have the authority (or "police power") under 26 U.S.C. § 7801(a), to expand an existing regulatory ban on machineguns, 18 U.S.C. § 922(o), so as to encompass new items (bump stocks) that the ATF Rule expressly acknowledges were legally acquired and lawfully possessed for years prior to the effective date of the ATF's Rule. App. 60. As the D.C. Circuit stated in *Guedes v. BATF*, 920 F.3d 1, 18 (D.C. Cir. 2019), *cert. denied*, 140 S.Ct. 789 (2020), "[t]he Rule makes clear throughout that possession of bump stock devices will become unlawful only as of the Rule's effective date, not before." The court repeated the same point throughout its opinion. *Guedes*, 920 F.3d at 19-20, 35.[7]

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[7] Illegally possessed property is contraband and thus may, of course, be seized or destroyed without paying compensation. See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). However, lawfully purchased and possessed property is not contraband. See *Luis v. United States*, 578 U.S. 5, 12-13 (2016) (holding that non-tainted assets of a criminal are not contraband under the common law and could not be seized by the government); *Honeycutt v. United States,* 137 S.Ct. 1626, 1634-35 (2017) (forfeiture is "limited to property the defendant himself actually acquired as the result of the crime"). Similarly, lawfully owned bump stocks are not akin to diseased trees, *Miller v. Schoene*, 276 U.S. 272 (1928), or malodorous "table refuse," *Gardner v. Michigan*, 199 U.S. 325, 331 (1905). The destruction of bump stocks is not necessary to keep them from falling into enemy hands, *United States v. Caltex,* 344 U.S. 149 (1952), or to prevent the spread of a fire, *Bowditch v. Boston,* 101 U.S. 16, 18 (1879).

That the property was legally acquired and possessed prior to the issuance of the ATF Rule is dispositive. *Lucas* disposes of the notion that a regulatory *ipse dixit* is sufficient onto itself. The Court stated that a State "must do more than proffer the legislature's declaration that the uses [plaintiff] desires are inconsistent with the public interest, * * * As we have said, a 'State, by *ipse dixit*, may not transform private property into public property without compensation.'" *Lucas*, 505 U.S. at 1031, quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (a personal property case).

Rather, the government "*must identify background principles of nuisance and property law* that prohibit the uses [the owner] now intends in the circumstances in which the property is presently found." *Lucas*, 505 U.S. at 1031 (emphasis added). "Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the [statute] is taking nothing." (*Id.*). See also *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) (restating this test); *Lingle,* 544 U.S. at 538 (same). As stated in *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Prot*., 560 U.S. 702, 715 (2010) (plurality), "[i]f 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."

Importantly, *Lucas* also makes clear that the government may not use its police power to take private property just in order to "prevent" a "'harmful use.'" *Lucas*, 505 U.S. at 1026. As the Court stressed, "[n]one" of the Court's cases have "employed the logic of 'harmful use' prevention to sustain a regulation involved an allegation that the regulation wholly

eliminated the value of the claimant's land." (*Id.*). Such a "prevention" logic is not found anywhere in the common law of property or nuisance. There is no "background principle of nuisance and property law," *Lucas*, 505 U.S. at 1031, that remotely states that the right to possess lawfully acquired property is conditioned on some future governmental action that bans continued possession of the property. A Takings theory dependent on *future* events to justify the complete "ouster" of possession cannot logically form a "background" principle concerning property legally acquired and possessed.

Contrary to the holdings in *Duncan* and *ANJRPC*, and the "related" holding in this case (App. 55), these principles cannot be trumped by "police powers." In *Loretto*, this Court specifically noted that the lower court had determined that the alleged Taking there involved a "legitimate public purpose" and thus was "within the State's police power." (458 U.S. at 425). The Court stated that it had "no reason to question that determination," but nonetheless expressly held that "[i]t is *a separate question* . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid." (*Id.*) (emphasis added). *Lucas* made the same point, holding that "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would *virtually always* be allowed." *Lucas*, 505 U.S. at 1027 (emphasis added).

In short, if "police powers" were all that mattered, then "just compensation" under the Takings Clause would hardly ever be available as the power to conduct *any* Taking for "public use" is "coterminous" with a jurisdiction's "police power." *Hawaii Housing Authority*

v. Midkiff, 467 U.S. 229, 240 (1984). See also *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (same). For example, the ban on the sale of eagle feathers in *Andrus* could have been easily justified on that ground alone, thereby rendering superfluous the Court's reasoning concerning the "crucial" nature of possession. Similarly, *Horne* would have been decided the other way because the raisin program there at issue was undeniably an exercise of the sovereign's "police power."

Mugler v. Kansas, 123 U.S. 623 (1887), cited by the Court of Federal Claims, (App. 19-20), and the concurring opinion of Judge Wallach (App. 84-85), is not to the contrary. *Mugler* merely sustained a state's ban on the manufacture and sale of beer against a Takings claim and took pains to note that "[s]uch legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests." (123 U.S. at 668-69). Thus, in *Lucas,* this Court explained that *Mugler* simply was "our early formulation of the police power justification necessary to sustain without compensation *any* regulatory diminution." (505 U.S. at 1026) (emphasis the Court's). Nothing in *Mugler* immunizes a total ban on possession.

V. THE COURT SHOULD HOLD THIS CASE PENDING *APOSHIAN* AND *GOA* AND LOWER COURT PROCEEDINGS IN *GUEDES* AND *CARGILL*

Acknowledging the Court's insistence in *Lucas* that a refusal to pay must be based on "an independent source," such as the "common law of property or nuisance" (App. 57), the Federal Circuit nonetheless ignored the common law and held that petitioners

lacked a property interest because the court was willing to "assume" that the ATF had the delegated power under 26 U.S.C. § 7801(a), to declare that bump stocks are machineguns within the meaning of 26 U.S.C. § 5845(b). See App. 61-62. Accordingly to the Federal Circuit, petitioners did not have a property interest in these lawfully purchased items because civilian possession of machineguns made after 1986 is banned by federal law under 18 U.S.C. § 922(o). See App. 62 ("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.") (emphasis added).

For the reasons detailed by petitioners (Pet. at 18-20), this line of circular reasoning in a Takings case is both unprecedented and wildly wrong. Given the scope of modern regulatory systems, there is simply no end to the potential for abuse of such an approach. Pet. at 3-4, 14. But even apart from that, the Federal Circuit's reasoning is premised on the *assumed* validity of the ATF Rule as a substantive rule. See App. 59-62. If the ATF erred in its interpretation of 26 U.S.C. § 5845(b), or if the ATF otherwise exceeded its authority in issuing the Rule, then the assumption fails.

Such an illegal Taking would not be supported by a "legitimate public purpose," *Loretto*, 458 U.S. at 425, and thus would fall outside whatever "police power" the ATF may possess. See *Kelo*, 545 U.S. at 487 & n.17. The owners of property illegally ordered destroyed by the government are thus entitled to "just compensation" for their loss. See *Lingle*, 544 U.S. at 543 ("if a government action is found to be impermissible . . . that is the end of the inquiry"); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362-

63 (Fed. Cir. 1998) (unlawful government action may still be a Taking). See Petition at 19 & n.3.

While assumed away by the Federal Circuit in this case, the validity of the ATF Rule is presented in the pending petition for certiorari filed in *Aposhian v. Barr,* 958 F.3d 969 (10th Cir. 2020), *rehearing en banc granted*, 973 F.3d 1151 (10th Cir. 2020), *rehearing vacated, panel opinion reinstated*, 989 F.3d 890 (10th Cir. 2021) (*en banc*), *petition for certiorari pending, sub nom*., *Aposhian v. Garland,* No. 21-159 (filed Aug. 4, 2021). The *Aposhian* petition was first distributed for the December 12, 2021 conference, but was thereafter rescheduled **20** times during this Court's 2021 Term without resolution. The case remains pending.

Similarly, a panel of the Sixth Circuit struck down the ATF Rule, but the case went *en banc*. *Gun Owners of America, Inc. v. Garland*, 992 F.3d 446 (6th Cir. 2021), *on rehearing en banc,* 19 F.4th 890 (6th Cir. 2021). The *en banc* court ended up affirming the decision of the district court in favor of the government by an equally divided court (the court split 8-8). A petition for certiorari from that affirmance has been filed with this Court. *GOA v. Garland*, No. 21-1215 (filed March 8, 2022). That petition was originally set for the June 23, 2022, conference, but was, like *Aposhian*, rescheduled and then left unresolved at the end of this Court's last Term.

The *GOA* petition for certiorari details the current state of disarray and various splits among courts and judges of the lower courts on the validity of the ATF Rule, not only as to the proper interpretation of Section 5845(b), but also as to whether the ATF is entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and whether *Chevron* deference is appropriate even where

the government does not invoke it. Here, the Federal Circuit relied on Section 7801(a)(2) as empowering the ATF to issue the Rule. App. 61-62. But, that provision – which merely assigns to the Attorney General the responsibility for the "administration and enforcement" of Section 5845 – cannot be read as authorizing the ATF to create a crime by rule, as it has here. Section 7801(a) does not even expressly authorize rule making.

Compare the language of Section 7801(a)(2) to the authority granted in 15 U.S.C. § 78n(e), which expressly authorizes the SEC to issue regulations with the force of law. A willful violation of those regulations is a criminal offense. 15 U.S.C. § 78ff(a). *United States v. O'Hagan*, 521 U.S. 642, 672-73 (1997). In contrast, illegal possession of a machinegun is a crime under 18 U.S.C. § 922(o), if done "knowingly," 18 U.S.C. § 924(a)(2), but, unlike Section 78ff(a), nothing in Section 922(o) or Section 924(a)(2) makes violation of a *regulation* a crime. The Federal Circuit was thus wrong to "assume," (App. 61-62), that Section 7801(a)(2), authorized the ATF to promulgate such a legislative rule. It does not.

The government maintains that the ATF Rule is merely interpretive. *GOA* BIO at 23-24. That "litigation strategy" was rejected in *Guedes*, which found that "the Rule is legislative in character and therefore purely prospective." (920 F.3d at 35). The Tenth Circuit agrees. *Aposhian*, 958 F.3d at 980. See *Azar v. Allina Health Services,* 139 S.Ct. 1804, 1812 (2019) (the "agency's own label, while relevant, is not dispositive"). See also *GOA*, 19 F.4th at 910 (Murphy J., dissenting) ("There thus can be no doubt that the Bump-Stock Rule creates a new crime.").

The "new crime" created by the ATF Rule cannot possibly be a "background" principle of property law under *Lucas* for property lawfully acquired prior to the Rule, as such a rule is prospective only. Alternatively, if the Rule is merely interpretive, then the Rule is irrelevant to the Takings claim, as such a rule does not have the "'force and effect of law.'" *Perez v. Mortgage Bankers Ass'n.*, 575 U.S. 92, 96 (2015) (citation omitted). Then the question logically becomes (under the Federal Circuit's test) whether Section 5845(b) itself so clearly banned bump stocks as to form such a background principle, notwithstanding the prior ATF determinations, which found that these bump stocks were *not* machineguns. App. 47-48. The Federal Circuit never considered *that* question, relying solely on the ATF Rule.

The government has also claimed authority to promulgate the ATF Rule under 26 U.S.C. § 7805(a), and 18 U.S.C. § 926(a). *Aposhian* BIO at 7 n.3. But, Section 7805(a) accords regulatory power to the Secretary of the Treasury, not the Attorney General. While Section 926(a) gives the Attorney General regulatory authority to carry out the "provisions of this chapter," the term "machinegun" in Section 922(o) is defined in 18 U.S.C. § 921(a)(24), which cross-references the definition found in Section 5845(b), the administration of which is controlled by Section 7801(a). Section 7801(a) is thus the *sole* source of the ATF's authority to issue the Rule.

The validity of the ATF Rule is currently before other courts of appeals. The district court's final judgment in *Guedes* is on appeal to the D.C. Circuit, *Guedes v. BATF*, No. 21-5045 (D.C. Cir.) (appeal docketed, Feb. 23, 2021), and that appeal was recently argued. A separate appeal from the same district court

decision is also pending before the Federal Circuit. See *Codrea v. Garland*, No. 21-1707 (docketed March 2, 2021). The Federal Circuit is holding that appeal in abeyance pending *Aposhian* and *GOA* in this Court and *Guedes* in the D.C. Circuit. Order of March 22, 2022.

Similarly, the Fifth Circuit has gone *en banc* on these questions. *Cargill v. Garland*, 20 F.4th 1004 (5th Cir. 2022), *petition for rehearing en banc granted*, 37 F.4th 1091 (5th Cir. 2022). *En banc* argument in *Cargill* is currently set for September 13, 2022. Another appeals court has already rejected the ATF Rule in the context of a criminal proceeding, holding that the ATF was not owed *Chevron* deference and that bump stocks were not machineguns under the text of Section 5845(b). *United States v. Alkazahg*, 81 M.J. 764, 784 (U.S. Navy-Marine Corps Ct. Crim. App. 2021). The issues associated with the validity of the ATF Rule are plainly of exceptional importance.

If, as appears likely, this Court is waiting for the lower courts to finish addressing the merits of the ATF Rule, then the Court should hold this petition pending final disposition of that litigation. See *Guedes*, 140 S.Ct. at 791 (Gorsuch, J.) (statement regarding certiorari) (noting that the Court "would benefit" from the "considered judgments" of the lower courts on the validity of the ATF Rule). Basic "fairness and justice" demands that the merits of that question be fully litigated before the government is allowed to escape liability for the wholesale destruction of personal property mandated by the ATF Rule. *Murr*, 137 S.Ct. at 1943. If this Court should find ATF Rule invalid, or hold that the ATF Rule is merely interpretative, then the Court may GVR this case in light of that holding.

CONCLUSION

The petition for certiorari should be granted. Alternatively, the petition should be held pending this Court's consideration of the petitions pending in *Aposhian* and *GOA* and final dispositions in *Cargill* and *Guedes*.

Respectfully submitted,

MARK W. PENNAK
Counsel of Record
MARYLAND SHALL ISSUE, INC.
9613 Harford Rd., Ste. C #1015
Baltimore, MD 21234-2150
(301) 873-3671
mpennak@marylandshallissue.org

Counsel for Amicus Curiae

August 8, 2022