No. 22-25

In the Supreme Court of the United States

ROY LYNN MCCUTCHEN, ET AL.,
Petitioners,
v.
UNITED STATES,
Respondent.

THE MODERN SPORTSMAN, LLC, ET AL.,
Petitioners,
v.
UNITED STATES,
Respondent.

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

BRIEF OF AMICI CURIAE STATE OF MONTANA AND 16 OTHER STATES SUPPORTING PETITIONERS

AUSTIN KNUDSEN
Attorney General

DAVID M.S. DEWHIRST
Solicitor General
**Counsel of Record*

MONTANA DEPARTMENT OF JUSTICE
215 N Sanders
Helena, MT 59601
David.Dewhirst@mt.gov
(406) 444-2026

KATHLEEN L. SMITHGALL
Assistant Solicitor General

Counsel for Amicus Curiae State of Montana
(Additional Counsel listed on signature page)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici Curiae States of Montana, Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Kentucky, Louisiana, Mississippi, New Hampshire, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming ("the States"), represented by their respective Attorneys General, seek to preserve the fundamental and inalienable rights of their citizens to keep and bear arms. Here, the Bureau of Alcohol, Tobacco, and Firearms ("ATF") issued an erroneous rulemaking that instantaneously transformed hundreds of thousands of law-abiding gun owners in the States into criminals. *See Wooden v. United States*, No. 20-5279, slip op. at 49 (Mar. 7, 2022) (Gorsuch, J., concurring) ("Any new national laws restricting liberty require the assent of the people's representatives and thus input from the country's 'many parts, interests and classes.'" (quoting The Federalist No. 51, at 324 (J. Madison)). More troubling still, the rulemaking weaponized the ATF's change of policy preference, permitting the federal government to seize previously lawful property without any compensation. Such upheaval far exceeds the bounds of permissible administrative action. And it foils bedrock constitutional guarantees by endangering fundamental property rights and the rights of citizens to keep and bear arms.

---

[1] Pursuant to Supreme Court Rule 37.2(a), the States timely notified counsel of record of their intent to file an *amicus curiae* brief in support of Petitioner.

SUMMARY OF ARGUMENT

ATF's 2018 regulation ("ATF Rule"), which changes the definition of "machinegun" and criminalizes previously lawful behavior, is subject to numerous challenges before this Court. *See, e.g.*, *Gun Owners of America v. Garland*, *petition for cert. filed* (Mar. 3, 2022) (No. 21-1215); *Aposhian v. Garland*, *petition for cert. filed* (Aug. 2, 2021) (No. 21-159); *Guedes v. BATFE*, 920 F.3d 1, 440 U.S. App. D.C. 141, 762 Fed. Appx. 7 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789, 206 L. Ed. 2d 266 (2020). These challenges stem from the fact that since 1934, Congress has consistently defined "machineguns." 26 U.S.C. § 5845(a). And ATF—for decades—has affirmed that non-mechanical bump stocks are not machine guns. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,516 (Dec. 26, 2018).

ATF's dramatic reinterpretation of the National Firearm Act and the Gun Control Act to prohibit possession or transfer of bump stocks presents important questions of constitutional and statutory law. In this case, the Petitioners seek compensation for the taking of previously lawful property under the Fifth Amendment.

But the Federal Circuit denied that claim, and in fact declared a vast new realm of administratively seize-able, Takings-proof property. In an age when the federal bureaucracy touches the life of every American in countless ways, the Federal Circuit's ruling profoundly diminishes constitutional protections of lawfully acquired property. This petition raises important questions about how the ever-growing

administrative state threatens "the security of Property"—one of the "great object[s] of government"—as well as the right to keep and bear arms. 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). The Court should grant the petition.

ARGUMENT

By compelling owners to destroy or relinquish lawfully acquired property, the ATF Rule constituted a taking. *Compare Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,543 (Dec. 26, 2018) (requiring destruction of bump stocks) *with Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (holding that a total and permanent dispossession of tangible property constitutes a taking). When embarking on a Takings Clause analysis, courts presume administrative rules to be valid. That's unremarkable, and the default for courts fielding challenges to statutes and regulations. But this presumption of validity doesn't force courts to examine regulations deferentially; and it doesn't automatically defeat Fifth Amendment claims for just compensation. First, the Federal Circuit concluded, remarkably, that present property rights depend on the future application of the *Chevron* doctrine. Second, the Federal Circuit assumed that *Chevron* applies to this case and deferred to ATF's interpretation. Finally, the Federal Circuit seemed to leave in place the Court of Federal Claims' troubling analysis about the [nonexistent] federal police powers.

I. Constitutional property protections should not depend on mercurial agency decisions that courts may afford deference.

The Federal Circuit held that Petitioners' right to constitutional compensation for their lost property turns upon the application of *Chevron* deference: "the preexisting limitation on [plaintiffs'] title *included* subjection to future valid agency interpretations of the possession-and-transfer prohibition (as assumed here) adopted in the exercise of that authority." *McCutchen v. United States*, No. 20-1188, slip op. at 21 (Fed. Cir. Oct. 1, 2021) (emphasis added). In other words, where statutory ambiguity exists (*Chevron* Step 1), an owner's present property rights depend on future *Chevron* deference to an agency's interpretation (*Chevron* Step 2). *Id.* (finding that "plaintiffs had no property interest protected by the compensation requirement of the Takings Clause against such a valid interpretation when adopted").

The Federal Circuit explained that plaintiffs lacked an established property right because there was "the possibility that the agency would adopt one rather than another of the limited range of interpretations." *McCutchen*, slip op. at 21. But the property ATF captured here has been firmly established. For almost two decades ATF took the opposite position from the new rule, permitting bump stock accessories for lawful purposes. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,517 (Dec. 26, 2018). And between 2008 and 2017, ATF concluded on *ten separate occasions* that bump stocks fell outside the definition of

"machineguns"—meaning there was no prohibition on bump stock possession or transfer. *Id.* Based on this clear, longstanding understanding of federal law, these bump stock devices "were readily available in the commercial marketplace through online sales directly from the manufacturer, and through multiple retailers." *Id.* at 66,514. When the new ATF Rule took effect, the agency estimated there were between 280,000 and 520,000 bump stocks owned in the United States. *Bump-Stock-Type Devices*, 83 Fed. Reg. 13,442, 13,451 (Mar. 29, 2018) (but acknowledging that this was merely an estimate).

Property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (internal quotations omitted); *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (Roberts, C.J., dissenting) ("[T]he Takings Clause protects private property rights as state law creates and defines them."); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl Prot.*, 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests ...."). Limitations on these property rights, then, "inhere in the title itself." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). And "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself." *Id.* Following decades of affirmative federal nonregulation, Americans assumed ownership of approximately half-a-million bump stocks. *See id.* at 1031 ("The fact that a particular use has long been engaged in by

similarly situated owners ordinarily imports a lack of any common-law prohibition…"). New legislation or agency rulemaking may impact these property rights, but it does not rewrite history and extinguish those rights altogether. The new rule might even affect a taking of property, but it cannot transform lawfully acquired property into non-property.

Not so, concluded the Federal Circuit. The court failed to identify the "background principles" or preexisting limitations—other than the Rule, itself—that would prohibit the possession or transfer of bump stock devices. *Lucas*, 505 U.S. at 1031. Instead, the Federal Circuit concluded the owners of bump stock devices "*never* had a property right against government assertion of the duty to destroy the devices at issue or surrender them." *McCutchen*, slip op. at 20 (emphasis added).

Under this decision, an owners' property rights depend entirely on whether the government—at some uncertain, future date—changes its mind and decides to regulate property it has always considered outside its regulatory reach. "How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law … but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared 'reasonable'; and to guess again whether a later and opposing agency interpretation will also be held 'reasonable'?" *Guedes v. Bureau of Alcohol, Tobacco,*

Firearms and Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., statement regarding denial of certiorari).

This question strikes a particular chord in the context of property rights and the right to keep and bear arms. *See McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion) (the Second Amendment is not "a second-class right"); *Kelo v. City of New London*, 545 U.S. 469, 510 (2005) (O'Connor, J., concurring) (discussing "the Framers' understanding that property is a natural, fundamental right"); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 81 (1993) (Thomas, J., dissenting) (property rights are "central to our heritage"); *Calder v. Bull*, 3 Dall. 386, 388 (1978) (prohibiting the government from "tak[ing] property from A. and giv[ing] it to B."). Millions of law-abiding gun owners in the States depend on semiautomatic rifles for security, safety, and sporting purposes. Many have chosen to enhance those rifles with bump stock accessories, which—at the federal level—has always been unquestionably lawful. That property doesn't become something less than property simply because a federal agency changed its mind.

The Federal Circuit's contrary holding marks a sea change in the understanding and protection of constitutional rights. Mercurial bureaucratic decision-making is a lousy surety for constitutional guarantees. Those bedrock protections are made of sterner stuff.

II. The ATF Rule Is Not Entitled to *Chevron* Deference.

Although a Takings analysis presumes the validity of a regulation—which may, perhaps, be entitled to deference—courts should not afford any deference to the flawed ATF Rule. First, the Rule criminalizes certain conduct, extricating it from the *Chevron* framework. Second, the Rule diminishes core, fundamental rights. Accordingly, the Federal Circuit misfired when relying on *Chevron* to find the ATF's statutory interpretation reasonable.

A. The rule of lenity, not *Chevron*, applies to the ATF Rule.

This Court has never held that *Chevron* applies to criminal statutes like the one here. *See Abramski*, 573 U.S. at 191 (citing *United States v. Apel*, 571 U.S. 359, 369 (2014)). In *Apel*, this Court clarified that it "ha[s] never held that the Government's reading of a criminal statute is entitled to any deference." 571 U.S. at 369. In *Abramski*, this Court reiterated that "[w]hether the Government interprets a criminal statute too broadly (as it sometimes does) or too narrowly … a court has an obligation to correct its error." *Abramski v. United States*, 573 U.S. 169, 191 (2014). While agencies may freely interpret and enforce criminal statutes when Congress "distinctly" delegates authority to do so, this Court owes no deference to those interpretations. *See United States v. Grimaud*, 220 U.S. 506, 519 (1911).

The rule of lenity provides a more appropriate tool of statutory interpretation. Whereas *Chevron* exists as a "tool of interpretive convenience," the rule of lenity "provides a time-honored interpretive guideline" and "addresses core constitutional concerns." *Aposhian v. Wilkinson*, 989 F.3d 890, 899 (10th Cir. 2021) (Tymkovich, C.J., dissenting from denial of rehearing en banc); *see also United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, C.J.) (The rule of lenity "is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department. It is the legislature … which is to define a crime, and ordain its punishment."). Unlike *Chevron*, the rule of lenity gives the benefit of the doubt to the criminal defendant—not the government.

Courts should not put citizens to the choice of destroying lawful property or facing criminal penalties. Instead, the Court must construe any purported ambiguities in the statutory definition of "machineguns" in a manner that acknowledges the lack of fair notice inherent in the ATF's new classifications of criminal conduct. *See Wooden v. United States*, No. 20-5279, slip op. at 48 (Mar. 7, 2022) (Gorsuch, J., concurring) ("[L]enity's emphasis on fair notice … is about protecting an indispensable part of the rule of law—the promise that, whether or not individuals happen to read the law, they can suffer penalties only for violating standing rules announced in advance.").

In this case, the Rule departs from ATF's decades-long view. With the stroke of a pen, ATF criminalized previously lawful conduct and seized previously lawful property for no reason other than a policy about-face and dubious reinterpretation of a statute. The rule of lenity protects individuals from this type of volatility. Affording deference to the government in these circumstances, conversely, upends a paradigmatic and constitutionally impelled interpretive mandate. *See Aposhian*, 989 F.3d at 899.

B. Courts should not defer to an agency's interpretation of a statute when the interpretation diminishes fundamental rights.

The ATF's interpretation of "machine gun" should also garner no deference because the statute implicates the fundamental right to keep and bear arms. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843, slip op. at 8 (June 23, 2022) (requiring the government to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation"). As discussed above, *Chevron* should not apply to criminal statutes. But even under *Chevron*'s framework, the ATF Rule's impingement of a fundamental right renders ATF's interpretation unreasonable.

The reasonableness of a legislative rule change—even under deferential review—must be measured against that rule's foray into constitutionally protected property and conduct. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011) (quoting *Chevron*, 467 U.S. at 844) ("[T]he

second step of *Chevron* ... asks whether the … rule is a 'reasonable interpretation' of the statutory text."); *see also Miller v. Bonta,* No. 19-cv-1537 BEN (JLB), 2021 U.S. Dist. LEXIS 105640 at *122-23 (S.D. Cal. June 4, 2021) ("Government is not free to impose its own new policy choices on American citizens where Constitutional rights are concerned."). Existing precedent supports this view—many of this Court's interpretive canons tilt toward limitations on government power. For example, this Court has long recognized in the constitutional doubt canon that courts should construe statutes to avoid interpretations—even reasonable ones—that raise serious constitutional concerns. *See Crowell v. Benson*, 285 U.S. 22, 62 (1932). Courts rightly assume that Congress avoids legislating by inference when an interpretation triggers separation of powers concerns. *Cf. United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States."); *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

Elsewhere, the Court view doubtfully agencies' discoveries of energetic new powers in largely fallow statutory provisions: "Congress does not … hide elephants in mouseholes." *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001); *see also King*

v. Burwell, 135 S. Ct. 2480, 2491, 2494 (2015) (courts do not apply *Chevron* deference to statutory interpretations that implicate "major questions"). Likewise, the "clear statement" rule suggests that when an ambiguous statute implicates a fundamental constitutional right, reviewing courts should err on the side of liberty. *See, e.g.,* Antonin Scalia & Brian A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 426 (2012). (arguing that "treating [the rule of lenity] as a clear statement rule would comport with the original basis for the canon); *id.* at 426 (noting that the constitutional doubt canon is an example of the clear statement rule).

The ATF regulates in an area fraught with constitutional dangers. All its firearm regulations presumptively implicate Second Amendment rights. For that reason alone, the ATF should eschew expansive views of its own regulatory power; for the same reason, courts should view the ATF's firearm regulations through a non-deferential lens.

But beyond that global concern, this ATF Rule, specifically, raises the same concerns for reviewing courts. The ATF Rule rewrote the National Firearm Act to—for the first time—prohibit firearm components owned by half-a-million law-abiding Americans. *See Gun Owners of America, Inc. v. Garland*, 992 F.3d 446, 471–73 (6th Cir. 2021). Such a sweeping statutory *re*-interpretation should always arouse suspicion, but when it criminalizes previous lawful and constitutionally protected behavior, this Court should withhold any interpretive deference. If Congress had

wanted to categorically expand the National Firearms Act to cover semiautomatic firearms that use a bump-stock accessory, it would—and must—have done so explicitly.

In *Bruen*, this Court held that "the Constitution presumptively protects that conduct" covered by the plain text of the Second Amendment. *Bruen*, slip op. at 15. The government bears the burden of showing that the challenged regulation is "consistent with the Nation's historical tradition of firearm regulation." *Id.*; *see also District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (the Second Amendment protects weapons "in common use"); *see also Caetano v. Massachusetts*, 577 U.S. 411 (2016) (Alito, J., concurring) ("[T]he pertinent Second Amendment inquiry is whether [the firearms in question] are commonly possessed by law-abiding citizens for lawful purposes today."); *United States v. Miller*, 307 U.S. 174, 178 (1939) (implying that a commonly-owned weapon used for the common defense of a militia member is protected by the Second Amendment).

Bump stock owners most often use the devices to increase the rate of fire of one of the country's most popular firearms: the AR-15 semiautomatic rifle. *See Miller*, 2021 U.S. Dist. LEXIS 105640, at *2 (S.D. Cal. June 4, 2021) ("Like the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment."). These "ordinary, popular, modern rifles" are not "bazookas, howitzers, or machineguns." *Miller*, 2021 U.S. Dist. LEXIS 105640 at *3-4. They are popular,

commonly used devices owned by law-abiding citizens. *See Bruen*, slip op. at 30; *Heller,* 554 U.S. at 627.

The bottom line: bump stocks don't transform semiautomatic rifles into machineguns. *See Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 472 (6th Cir. 2021), *rev'd en banc*, 19 F.4th 890 (6th Cir. 2021). Suddenly criminalizing them obviously implicates Americans' Second Amendment rights. Courts should afford the ATF Rule no deference.

The ATF Rule impairs another fundamental right, too—the bedrock right not to lose property without just compensation. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."). By reclassifying bump stocks as machineguns, Petitioners lost *all* rights in their lawfully acquired property. And they did so without *any* compensation from the federal government. This deprivation further cautions against affording the ATF Rule any deference.

III. This Court must reject the lower courts' attempt to legitimize a so-called federal police power.

Our national government possesses no police power. *See United States v. Morrison*, 529 U.S. 598, 618–19 (2000) ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."); *United States v. Lopez*, 514 U.S. 549,

566 (2000) ("The Constitution … withholds from Congress a plenary police power."); *id.* at 584–85 (Thomas, J., concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power."); *see also United States v. Kebodeaux*, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring) ("I write separately to stress not only that a federal police power is immaterial to the result in this case, but also that such a power could not be material to the result in this case—because it does not exist."). The federal government's powers "are limited, and … are not to be transcended." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see also Gibbons v. Ogden*, 22 U.S. 1, 195 (1824) ("The enumeration presupposes something not enumerated[.]").

And these limits are real. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 155 (1992) ("No one disputes the proposition that 'the Constitution created a Federal Government of limited powers.") (internal quotations omitted); *Chisholm v. Georgia*, 2 U.S. 419, 435 (1793) ("The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.").

While this Court's earlier cases suggest that the government can exercise something resembling the police power without implicating the Takings Clause,

these cases are limited to circumstances when the government regulation merely diminishes the value of the property. *See Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."). *But see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992) (explaining that earlier Court references to a police power were embryonic attempts to articulate the difference between "regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation"); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938) ("[I]t is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."). In these early cases, courts distinguished between takings under eminent domain and certain prohibitions under a "police power" to prevent noxious use. *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 500–01 (2004) (discussing *Commonwealth v. Alger*, 61 Mass (7 Cush.) 53 (1851)).

For example, in *Mugler v. Kansas*, this Court held that the restriction of property for uses that harm the "health, morals, or safety of the community" don't fall within the power of eminent domain. 123 U.S. 623, 669 (1887). But importantly, the Court noted that such an exercise of power did not fully deprive the property owner of his property—rather, it limited its use to "lawful purposes." *Id.* In other words, not a total taking. Rather, this exercise of power merely

decreased the value of the property. *See Lucas*, 505 U.S. at 1004. "[T]otal regulatory takings must be compensated." *Id.* at 1026. The ATF Rule, of course, affects a total regulatory taking. So any specter of a federal police power—which the modern Court rejects—wouldn't factor into this case at all.

The Court of Federal Claims thought differently: "[b]ecause the prohibition on possession [of bump stocks] involved an exercise of the government's police power (the power to protect health and safety), there was no taking within the meaning of the Fifth Amendment. *McCutchen v. United States*, No. 18-1965, slip op. at 10 (Ct. Fed. Cl. Sept. 23, 2019). It further explained that "it is well established" no taking exists when "the government acts pursuant to its police power." *Id.*

The Federal Circuit affirmed on related grounds, acknowledging the existence of a federal police power, but declining to say when the exercise of that power exempts the government from Takings Clause obligations. *McCutchen*, slip op. at 13–15. The court's conclusion that the plaintiffs lacked a property right "in continued possession," though, appeared to rely on the premise that the federal government may—at any time, and without providing compensation—seize property in the interest of public health and safety. *Id.* at 4. The majority opinion thus relies implicitly on this misguided conception of a federal police power.

The concurring opinion expanded this discussion, noting that the Supreme Court excludes exercises of the federal police power from compensable liability

imposed by the Fifth Amendment. *McCutchen*, slip op. at 7 (Wallach, J., concurring). The concurrence explained the government issue a new rule pursuant to a "well-established regulatory regime." *Id.* at 10 (Wallach, J., concurring). This is incorrect for two reasons.

First, only States possess the police power in our system. Because States possess what the federal government lacks—the police power—the State alone can exercise this power without facing Takings liability. In the Takings context, this Court premises the State police power "on the simple theory that since no individual has a right to use his property … to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 , 491 n.20 (1987). Where a State "reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted," this Court has determined the regulation doesn't constitute a taking. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978); *see also e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962); *Berman v. Parker*, 348 U.S. 26, 31–32 (1954); *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928). Thus, to the extent the Fifth Amendment exempts government action taken pursuant to a police power, this exemption can only apply only to States—not the federal government.

Tellingly, the cases relied upon by the lower courts involve the exercise of *State* police power. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1940–42 (2017) (Wisconsin

regulation preventing use of small lots as separate building sites); *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 531 (2005) (Hawaii statute limiting rent that oil companies may charge certain dealers); *Bennis v. Michigan*, 516 U.S. 442, 446 (1996) (Michigan's abatement scheme); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 476–77 (1987) (Pennsylvania statute prohibiting certain mining activity); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 233 (1984) (Hawaii statute condemning certain residential tracts of land); *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 664 (1974) (Puerto Rico statutes providing for seizure and forfeiture of vessels); *Miller v. Schoene*, 276 U.S. 272, 277 (1928) (State entomologist ordered the destruction of ornamental red cedar trees); *Van Oster v. Kansas*, 272 U.S. 465, 466 (1926) (Kansas statute establishing forfeiture procedure for automobiles used to transport liquor); *Samuels v. McCurdy*, 267 U.S. 188, 196 (1925) (Georgia statute prohibiting possession of liquor); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922) (Pennsylvania statute prohibiting certain mining activity); *Mugler v. Kansas*, 123 U.S. 623, 653 (1887) (Kansas statute prohibiting sale of alcohol). The ATF is an organ of the federal government—a government of enumerated powers, bereft of a police power. *See McCulloch*, 17 U.S. at 421; *Lottery Case*, 188 U.S. 321, 357 (1903). Those powers that didn't make the constitutional list are reserved to the States. U.S. CONST. amend. X.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

AUSTIN KNUDSEN
Attorney General
DAVID M.S. DEWHIRST
Solicitor General
Counsel of Record
KATHLEEN L. SMITHGALL
Assistant Solicitor General
MONTANA DEPARTMENT
OF JUSTICE
215 N Sanders
Helena, MT 59601
(406) 444-4145
david.dewhirst@mt.gov

Counsel for Amicus Curiae
State of Montana

August 8, 2022

ADDITIONAL COUNSEL

Steve Marshall
ALABAMA
ATTORNEY GENERAL

Treg Taylor
ALASKA
ATTORNEY GENERAL

Mark Brnovich
ARIZONA
ATTORNEY GENERAL

Leslie Rutledge
ARKANSAS
ATTORNEY GENERAL

Lawrence Wasden
IDAHO
ATTORNEY GENERAL

Derek Schmidt
KANSAS
ATTORNEY GENERAL

Daniel Cameron
KENTUCKY
ATTORNEY GENERAL

Jeff Landry
LOUISIANA
ATTORNEY GENERAL

Lynn Fitch
MISSISSIPPI
ATTORNEY GENERAL

John Formella
NEW HAMPSHIRE
ATTORNEY GENERAL

John M. O'Connor
OKLAHOMA
ATTORNEY GENERAL

Alan Wilson
SOUTH CAROLINA
ATTORNEY GENERAL

Ken Paxton
TEXAS
ATTORNEY GENERAL

Patrick Morrisey
WEST VIRGINIA
ATTORNEY GENERAL

Sean D. Reyes
UTAH
ATTORNEY GENERAL

Bridget Hill
WYOMING
ATTORNEY GENERAL