No. 20-1107

In The United States Court of Appeals for the Federal Circuit

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THE MODERN SPORTSMAN, LLC, *et al.*,

Plaintiffs/Appellants,

v.

UNITED STATES OF AMERICA,

Defendant/Appellee.

Appeal from the United States Court of Federal Claims
The Honorable Senior Judge Smith

AMICUS BRIEF OF MARYLAND SHALL ISSUE, INC., IN SUPPORT OF APPELLANTS AND REVERSAL

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Modern Sportsman LLC **v.** United States of America

Case No. 20-1107

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Maryland Shall Issue, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Maryland Shall Issue, Inc.	none	none

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

None

FORM 9. Certificate of Interest **Form 9**
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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Maryland Shall Issue, Inc., et al v. Hogan, 353 F.Supp.3d 400 (D. MD. 2018), appeal pending No. 18-2474 (4th Cir.) (argued January 29, 2020).

2/6/2020
Date

/s/ Mark W. Pennak
Signature of counsel

Please Note: All questions must be answered

Mark W. Pennak
Printed name of counsel

cc: All Counsel

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page:

Statutes and Constitution:

Rules:

INTEREST OF AMICUS

Maryland Shall Issue, Inc. ("MSI") is an 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 own bump stocks and are thus harmed by the rule at issue on this appeal. Bump Stock Rule, 83 FR 66514-01, 2018 WL 6738526 (December 26, 2018) ("the Rule" or "ATF Rule").

MSI also submitted public comments on the proposed ATF Rule. See https://www.regulations.gov/document?D=ATF-2018-0002-15158. In those comments, MSI argued extensively that the then-proposed ATF Rule, if adopted, would be a Taking under the Fifth Amendment to the Constitution.

In addition, MSI is the lead plaintiff, along with individual plaintiffs, in *Maryland Shall Issue, Inc., et al v. Hogan*, 353 F.Supp.3d 400 (D. MD. 2018), *appeal pending* No. 18-2474 (4th Cir.). At issue in that case is Maryland Senate Bill 707, 2018 Md. Laws Ch. 252, codified at

Md. Code Ann., Crim. Law §§ 4-301, 4-305.1, and 4-306. With the enactment of that legislation, Maryland banned the possession of bump stocks, as well as other devices, which are characterized as "rapid fire trigger activators."

MSI challenged that the Maryland law in federal district court as a Taking under the Taking Clause of the Fifth Amendment and the Taking Clause of the Maryland Constitution. The district court dismissed those claims for failure to allege a claim upon which relief can be granted. Plaintiffs have appealed that ruling to the Court of Appeals for the Fourth Circuit and oral argument on that appeal was held January 29, 2020. This amicus brief is filed so as to ensure that this Court is fully advised as to the Takings arguments presented in Fourth Circuit and in support of appellants in this case. All parties in this case have consented to the filing of this amicus brief.[1]

[1] All parties were timely notified and consented to the filing of this amicus brief. The brief was drafted and is filed solely by counsel for amicus. No part of this brief was authored by any party's counsel. No party, person or entity other than MSI funded the preparation or submission of this amicus brief.

ARGUMENT

I. THE SOVEREIGN'S "POLICE POWER" DOES NOT TRUMP THE TAKINGS CLAUSE

The government has insisted throughout this litigation and in issuing this Rule that the ban on bump stocks is an exercise of government's "police powers," which, supposedly, obviates completely any possibility of a Taking under the Takings Clause of the Fifth Amendment. In its final Rule, for example, the ATF rejected the comment that the ban was a Taking on grounds that "[a] restriction on 'contraband or noxious goods' and dangerous articles by the government to protect public safety and welfare 'has not been regarded as a taking for public use for which compensation must be paid.'" 83 Fed. Reg. at 66,524, citing *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332 (Fed. Cir. 2006). That position is fundamentally flawed.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982), the Supreme Court specifically noted that the lower court has determined that the Taking involved a "legitimate public purpose" and thus was "within the State's police power." 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).

Similarly, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992), the Court rejected the lower court's reliance on *Mugler v. Kansas*, 123 U.S. 623 (1887), for the proposition that no compensation is owing where the regulation "is designed 'to prevent serious public harm.'" (505 U.S. at 1009). The *Lucas* Court explained that *Mugler* simply was "our early formulation of the police power justification necessary to sustain without compensation *any* regulatory diminution." (Id. at 1026) (emphasis the Court's). The Court thus stressed 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." (505 U.S. at 1027).

These principles were expressly applied to personal property in *Horne v. Dep't of Agric.,* 135 S. Ct. 2419 (2015), where the Court make clear that personal property is protected by the Takings Clause no less than real property. In that case, the Ninth Circuit had stated that "[i]t is clear the holding of *Lucas* is limited to cases involving land" and that

"[t]he real/personal property distinction also undergirds *Loretto.*" *Horne v. Dept. of Agriculture*, 750 F.3d 1128, 1140 (9th Cir. 2014), *rev'd* 135 S.Ct. 2419 (2015). The Court of Federal Claims has relied on this same purported distinction between land and personal property in *McCutchen v. United States*, 145 Fed.Cl. 42, 54 (2019), suggesting that the *Lucas* test applies "only to land." (Citation omitted).

Whatever uncertainly existed on this point prior to *Horne*, the Court's decision in *Horne* disposed of it. There, the Court reversed the Ninth Circuit and, in so holding, expressly rejected that court's purported distinction between personal and real property. Specifically, the Court addressed the question presented of "[w]hether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property,' . . . applies only to real property and not to personal property" and answered that question with a resounding "*no*." 135 S.Ct. at 2425 (emphasis added). Looking to its decision in *Loretto*, the Court stated that "such an appropriation is a *per se* taking that requires just compensation." Id., citing *Loretto*, 458 U.S. at 426. The Court concluded that

"[n]othing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property." (Id.). That holding in *Horne* was definitive, making clear that "[t]he Government has a *categorical* duty to pay just compensation when it takes your car, just as when it takes your home." (135 S.Ct. at 2426) (emphasis supplied).

The trial court's reliance on *Mugler*[2] is not even supported by *Mugler* itself. In *Mugler*, the Supreme Court sustained a state's ban on the manufacture and sale of beer against a Takings claim, but in so holding, the Court 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) (emphasis supplied). As the Court explained in *Lucas*, "none" of the Court's cases, including *Mugler*, "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." (505 U.S. at 1026). Such a

[2] *The Modern Sportsman*, 145 Fed.Cl. at 582.

rule, the Court explained, would "essentially nullify *Mahon*'s [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)] affirmation of limits to the noncompensable exercise of the police power." (Id.).

Application of *Horne*, *Lucas* and *Loretto* is straightforward. The ATF Rule at issue here completely bans all possession by the owner and thus necessarily bars the owner from "the control or use of his property" and restricts "his right to dispose of it." *Mugler*, 123 U.S. at 668-69. The Rule thus does far more than simply ban a particular "use" as in *Mugler*, -- it bans *all uses and all possession*. Thus, as *Lucas* and *Loretto* teach, simply because a Taking is supported by the sovereign's police power, does not mean that the government may avoid its duty to afford just compensation. The court below plainly erred in holding to the contrary.

II. BUMP STOCKS ARE PROTECTED PERSONAL PROPERTY AND ARE NOT CONTRABAND

In the Rule, the ATF argued that the "courts have rejected arguments that restrictions on the possession of dangerous firearms, like machineguns, are takings requiring just compensation." 83 Fed. Reg. at 66,524. The Court of Federal Claims seemed to agree, holding that

plaintiffs here had no Takings claim because "the government, as the sovereign, has the power to take property that is dangerous, diseased, or used in criminal activities without compensation."[3] That holding was error. As explained below, the government simply does not have the power to declare something to be dangerous, through a simple *ipse dixit*, and thereby avoid the obligation to pay for a Taking.

A. The Government's *Ipse Dixit* Cannot Convert Legally Acquired Property Into Contraband

Lucas disposes of the notion that a regulatory *ipse dixit* is sufficient onto itself. As noted above, the *Lucas* Court first stressed 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" because if it were "departure would virtually always be allowed." *Lucas*, 505 U.S. at 1026. The Court then reinforced this point, stating 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

[3] *The Modern Sportsman*, 145 Fed.Cl. at 576.

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). 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. "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 v. Chevron U.S.A., Inc*. 544 U.S. 528, 538 (2005) (same).

Importantly, *Lucas* also makes clear that the government may not use its police power to take the entirety of 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.). Put slightly differently, such a "prevention" logic is not found anywhere in the common law of property or nuisance. See also *Northern Natural Gas Co. v. Approximately 9117 Acres*, 2013 WL 3328773 at 7 n.8 (D.

Kansas 2013) ("*Lucas* … rejected a taking standard that merely asks whether the regulation prevents a harmful use of private property.").

Lucas makes clear that the government cannot avoid the Takings Clause by simply declaring that an item of legally acquired personal property is contraband. Nor may such a regulation be justified so as "prevent" a "harmful use." Certainly, there is no "background principle of nuisance and property law" that remotely states that a law-abiding person loses his property rights in an item of ***his*** personal property because some ***other*** person has used a similar item to commit a crime. Nothing in the Rule even attempts to apply any "principle of nuisance and property law." See *Bowles v. United States*, 31 Fed. Cl. 37, 45 (1994) ("the government has the burden of proof to demonstrate that the prohibited use of the property constitutes a nuisance under state common-law doctrine. It cannot hide behind conclusory legislative findings that simply characterize land use restrictions as harm-preventing.").

The government's theory also proves too much. For example, on Bastille Day, July 14, 2016, a terrorist used a 19-tonne cargo truck to kill 86 people and harm 458 others in Nice, France. See

https://www.aljazeera.com/programmes/aljazeeraworld/2018/07/truck-attack-nice-180710132318265.html (last viewed January 21, 2020). Indeed, vehicles (unlike bump stocks) have been used repeatedly in terrorist attacks all over the world, including the United States. See https://www.counterextremism.com/vehicles-as-weapons-of-terror (last viewed January 21, 2020). If the government may ban, without compensation, all bump stocks owned by all persons because a bump stock was used by a domestic terrorist to commit a horrible crime in Las Vegas, then on the same theory, the government would likewise be entitled to ban, without compensation, all trucks because a truck was used by a terrorist to commit mass murder in Nice.

Even more fundamentally, the Rule violates fairness and justice by requiring the lawful owners of these devices bear all the costs associated with the ATF's determination that such property should be banned in the public interest. If a ban of these lawfully acquired and lawfully owned devices is in the public interest, then the public should bear the costs of the ban, not the innocent owners. As the Supreme Court explained in *Murr*, "[i]n all instances, the analysis must be driven 'by the purpose of the Takings Clause, which is to prevent the 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.'" (137 S.Ct. at 1942)(citations omitted). The Rule fails that test.

It bears emphasis that all the bump stocks owners affected by this Rule are innocent of any crime. As explained below, these bump stocks were legally acquired and owned with the express permission of the ATF, which ruled that they were mere firearm accessories and thus unregulated under federal law. Apart from Las Vegas, neither we nor the ATF have found any instance in which a bump stock has been used in a crime. See ATF FOIA response to counsel, dated May 1, 2019, reproduced at https://i.imgur.com/8MkLxWT.jpg ("We have conducted a search for 'any records documenting the use of a bump-fire type stock using during the commission of any crime to date,' and found no responsive records."). Yet, the Rule nonetheless forces these innocent owners to bear the entire costs of the public interest. There is no "fairness or justice" in that result.

B. The Government's Contention That Bump Stocks Have Always Been Machineguns Is Both Wrong And Irrelevant

Ignoring 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," *Lucas*, 505 U.S. at 1031-32, the Rule asserts that bump stocks are machineguns and are contraband, just like machineguns are supposedly contraband. Yet, contrary to the government's *ipse dixit*, bump stocks have *never* been deemed to be machineguns or even dangerous items until this proposed Rule was published. Indeed, the government's argument to the contrary was expressly rejected by the D.C. Circuit in *Guedes v. BATF*, 920 F.3d 1 (D.C. 2019), *petition for certiorari pending*, No. 19-296 (filed Sept. 4, 2019).

In *Guedes*, the government argued strenuously that the ATF Rule is merely an interpretative rule and that bump stocks have "'*always* been banned.'" (920 F.3d at 19, quoting the government's brief) (emphasis the government's). Noting that the government's argument "would mean that that bump-stock owners have been committing a felony for the entire time they have possessed the devices," the D.C. Circuit had no difficulty in rejecting that contention. (Id.). Rather, the D.C. Circuit held that "[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*." (Id.) (emphasis supplied). See also *Guedes*, 920 F.3d at 35 (rejecting plaintiff's argument that the Rule violated the ban on retroactive rulemaking of 26 U.S.C. §7805(b) and the Ex Post Facto Clause on grounds that "the Rule itself made clear that the possession of bump stocks would become unlawful only after the effective date").

The dissenting opinion by Judge Henderson in *Guedes* is in full accord with the majority's holding that the Rule is prospective only. More importantly, Judge Henderson points out that bump stock devices were specifically allowed under multiple ATF rulings rendered over a 10 year period. Those repeated rulings concluded that these devices were not "machineguns" as that term is defined by federal law, 26 U.S.C. § 5845(b), and thus were completely unregulated by federal law. See *Guedes*, 920 F.d at 37 (Henderson, J., dissenting) (referring to "ten letter rulings of the ATF between 2008 and 2017"). See also Proposed Bump Stock Rule, 83 Fed. Reg. at 13,444-13.446, 2018 WL 1519345 (March 29, 2018) (noting these prior ATF rulings). As Judge Henderson states, it is "difficult to ignore the ATF's repeated earlier determina-

tions that non-mechanical bump stocks do not initiate an automatic firing sequence." (920 F.3d at 47). Looking at the question *de novo* and without the *Chevron* deference employed by the majority, Judge Henderson concluded that bump stocks are not, and never have been, machineguns. *Guedes*, 920 F.3d at 48, Henderson, J., dissenting ("I believe the Bump Stock Rule expands the statutory definition of 'machinegun' and is therefore *ultra vires*.").

The government likewise errs in its premise that actual machineguns are "contraband." See 83 Fed. Reg. at 66,524. As explained below, *actual* machineguns are not banned; they are regulated. Lawfully acquired, lawfully used property is simply not "contraband." See *Luis v. United States*, 136 S.Ct. 1083, 1099-1101 (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) (noting that "[t]raditionally, forfeiture was an action against the tainted property itself and thus proceeded *in rem*" and holding that forfeiture is "limited to property the defendant himself actually acquired as the result of the crime"). The government's characterization of machineguns as "contraband" thus fails.

Specifically, under section 102 of the Firearms Owner's Protection Act of 1986, P.L. 99-308, 100 Stat. 449 (1986), codified as 18 U.S.C. § 922(o)(2)(B), Congress enacted a grandfather clause to provide that Act's ban on transfer and possession of actual machineguns "*does not apply with respect to * * * any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect*." (Emphasis added). In short, to this day, machineguns manufactured before 1986 may be possessed and transferred by persons in compliance with the National Firearms Act of 1934, by paying the tax, registering the machinegun and submitting to a background investigation prior to acquisition. See, e.g., https://www.atf.gov/qa-category/national-firearms-act-nfa?page=2. According to the ATF, as of 2017, there were 630,019 machineguns lawfully registered in this country. See https://www.atf.gov/resource-center/docs/undefined/firearms-commerce-united-states-annual-statistical-update-2017/download (Exh.8 at 15). Not even the government contends that bump stocks are *more* dangerous than these lawfully owned machineguns.

Moreover, as Judge Henderson's dissent in *Guedes* illustrates, it is far from established that the Rule is correct on the merits in defining

bump stocks as machineguns, *even prospectively*. That issue remains embroiled in litigation in other circuits. See *Aposhian v. Barr*, No. 19-4036 (10th Cir.) (appeal pending); *GOA v. Barr*, No. 19-1298 (6th Cir.) (appeal pending). The plaintiffs in *Guedes* have petitioned the Supreme Court for certiorari – not on the question of whether the court was correct in holding that the ATF's rule was prospective only – but rather on the question of whether the majority in *Guedes* erred in according this Rule *Chevron* deference rather than the *de novo* statutory review employed by Judge Henderson. As of this writing, the *Guedes* petition has been "relisted" three times by the Supreme Court. This Court should not accept the ATF's *ipse dixit* that bump stocks are machineguns, much less that they are some sort of contraband.

Finally, whether bump stocks are machineguns is not before this Court. The ATF has forced the destruction of over $102 million of otherwise lawful private property upon pain of criminal prosecution. See 83 Fed. Reg. at 66,547 ("ATF estimates that the total, undiscounted amount spent on bump-stock-type devices was $102.5 million."). These previously legal items have thus been already "Taken." The point of this suit is thus not to assess the prospective merits of the ATF's Rule,

but rather to establish that these existing owners are entitled to just compensation for this forced destruction of their otherwise lawful property.

That said, if the Rule is invalid as *ultra vires*, as Judge Henderson concluded in *Guedes*, then the ATF will have required the destruction of over $100 million of personal property without legal authority. See *Lingle*, 544 U.S. at 543 ("if a government action is found to be impermissible--for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process--that is the end of the inquiry. No amount of compensation can authorize such action."). There is no legitimate "public use" purpose associated with an *ultra vires* rule.

C. This Court's Cases Do Not Support The Government's Position

Even apart from *Lucas*, nothing in this Court's precedents suggests that the government is free, by *ipse dixit*, to declare that otherwise lawful private property is retroactively contraband and insist on its destruction without regard to the Takings Clause. The key to understanding this point is the difference between property that was acquired subject to an existing ban and property that was fully lawful when it

was acquired. See *Lucas*, 505 U.S. at 1027 (the state "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with").

As this Court has stated, a court must identify "the use interest proscribed by the governmental action" and determine whether that use "was part of the owner's title to begin with, *i.e.,* whether the land use interest was a 'stick in the bundle of property rights' acquired by the owner." *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995). That inquiry requires a court to analyze "existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, [to] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Air Pegasus of D.C., Inc. v. United States,* 424 F.3d 1206, 1212-13 (Fed. Cir. 2005) (internal quotation marks omitted). This approach is required by *Lucas* and its reliance on "background principles of property law." *Lucas*, 505 U.S. at 1031-32. It is also consistent with *Lucas'* express ban on any use of "the logic of 'harmful use' prevention" as an exception to the Takings Clause. *Id.,* 505 U.S. at 1026.

The proper application of these principles is illustrated by *A & D Auto Sales, Inc. v. United States,* 748 F.3d 1142 (Fed. Cir. 2014). There, this Court presciently rejected the notion that *Lucas* applied only to real property, noting that "[w]e have applied the categorical test to personal property on occasion." (748 F.3d at 1151). As explained above, that holding is confirmed by *Horne*. See also *Piszel v. United States*, 833 F.3d 1366, 1374-75 (Fed. Cir. 2016) (holding that the plaintiff there "had a cognizable Fifth Amendment property interest in his contract rights").

The *A & D Auto Sales* Court then explained that the controlling inquiry was whether the challenged burden could be said to "inhere" in the property, holding that "[i]f a challenged restriction was enacted before the property interest was acquired, the restriction may be said to inhere in the title." (748 F.3d at 1152). Concomitantly, "[i]f a challenged restriction was enacted after the plaintiff's property interest was acquired, it cannot be said to 'inhere' in the plaintiff's title." (Id.). Applying this principle, the Court went on to hold that the plaintiffs' franchise agreements, at issue in that case, were compensable property in-

terests for purpose of dealerships' takings claims because the rights embodied in these agreements existed prior to the challenged government action.

A & D Auto Sales controls here. As explained above, all the devices banned by this Rule were completely legal at the time they were acquired by plaintiffs in reliance on the ATFs assurances that these devices were fully legal, firearm accessories. The Rule itself is explicit that possession of these devices were lawful before the effective date of the Rule. As stated in *Guedes*, "[t]he Rule, by contrast, announces that a person 'in possession of a bump stock type device *is not acting unlawfully* unless they fail to relinquish or destroy their device after the effective date of this regulation.'" (920 F.3d at 20, quoting 83 Fed. Reg. at 66,523) (emphasis the Court's). Thus, as in *A & D Auto Sales*, in this case, the "challenged restriction was enacted after the plaintiff's property interest was acquired." The plaintiffs thus possessed a fully protected property interest in these devices.

Nothing in *Acadia Technology, Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006), on which the Rule relies,[4] is to the contrary. There, this Court merely held that "property has been seized pursuant to the criminal laws or subjected to in rem forfeiture proceedings, such deprivations are not 'takings' for which the owner is entitled to compensation." (Id.). See also *Spann v. Carter*, 648 Fed. Appx. 586, 589 (6th Cir. 2016) ("the Takings Clause does not prohibit the uncompensated seizure of evidence in a criminal investigation, or the uncompensated seizure and forfeiture of criminal contraband.") (citing *Acadia*). Here, the bump stocks were not seized pursuant to any *existing* criminal law or subject to any "in rem" proceedings. As *Guedes* confirms, these devices were perfectly legal until they were banned under this Rule. Nothing in *Acadia* suggests that the government may use its police powers to declare previously legal property to be contraband then seize and destroy it solely on that basis. See *Lucas*, 505 U.S. at 1026-27.

The lower court's reliance[5] on *Akins v. United States,* 82 Fed. Cl. 619 (2008), is misplaced for the same reason. *Akins* did not involve a

[4] See 83 Fed. Reg. at 66,524.

[5] *The Modern Sportsman,* 145 Fed.Cl. at 581-82.

ban on a person's existing lawful possession of machineguns. Rather, the ATF ruled that a particular new invention, (the "Akins accelerator") violated *previously existing law* concerning the manufacture of machineguns because it used a mechanical device to achieve a greater firing capacity. *Akins*, 82 Fed.Cl. at 623. Here, as *Guedes* holds, the devices banned by the Rule were all lawfully purchased and owned prior to the promulgation of the Rule in full reliance on prior ATF rulings that confirmed the legality of the devices. Unlike the device at issue in *Akins*, the devices at issue here did not violate any pre-existing statute.

III. A GOVERNMENT REGULATION THAT COMPLETELY BANS POSSESSION IS "TANTAMOUNT TO" OR THE "FUNCTIONAL EQUIVALENT OF" A DIRECT APPROPRIATION AND IS A *PER SE* TAKING

The foregoing disposes of the government's contention that it is free to exercise its "police power" without regard to the Takings Clause. It is likewise clear that the government has not satisfied the *Lucas* and *Lingle* test by reference to any underlying principle of property law and thus has not shown "that the proscribed use interests were not part of [the owner's] title to begin with." *Lucas*, 505 U.S. at 1027. In these circumstances, it is beyond dispute that the Rule is a *per se*, categorical

Taking because it is a total ban on possession of otherwise protected property. (Id.).

The Supreme Court long ago abandoned the notion that a physical "appropriation" was required in order to affect a *per se* Taking. Thus in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "Justice Holmes recognized * * * that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas*, 505 U.S. at 1014. Indeed, even before *Mahon*, the Takings Clause reached "a direct appropriation' of property *or the functional equivalent of a 'practical ouster of [the owner's] possession.'" Lucas*, 505 U.S. at 1014 (brackets the Court's)(citation omitted) (emphasis added). See also *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 539 (2005) (same).

In particular, the Supreme Court has put to rest any notion that the government itself must take possession of the property in order to constitute a Taking. As stated in *United States v. General Motors*, 323 U.S. 373, 378 (1945), the Takings Clause "is addressed to every sort of

interest the citizen may possess," and "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." The Court stated further that "[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.). See also *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977) ("it is sufficient" that the law "involves a direct interference with or disturbance of property rights," even if the government itself does not "directly appropriate the title, possession or use of the propert[y]"). That the ATF has not taken bump stocks for its own use is thus entirely irrelevant.

Rather, the Supreme Court has applied *Mahon* to adopt a *per se* "regulatory taking" test under which "the Court has recognized that government regulation of private property may, in some instances, be so onerous that its effect *is tantamount to a direct appropriation or ouster*-and that such regulatory takings' may be compensable under the Fifth Amendment." *Lingle,* 544 U.S. at 538 (emphasis added). Under *Lingle*, there are "two categories of regulatory action that generally will be

deemed *per se* takings for Fifth Amendment purposes," (1) "where government requires an owner to suffer a permanent physical invasion of her property -- however minor" or (2) "where regulations completely deprive an owner of "*all* economically beneficial us[e]" of her property." (Id.)(emphasis the Court's) (citing *Loretto* and *Lucas*). In so holding, the Court reiterated its holding in *Lucas*, stating that "the government must pay just compensation for such 'total regulatory takings,' except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property." (Id. at 539).

Stated simply, a regulatory ban on possession is "tantamount to a physical appropriation or ouster" and/or the "functional equivalent of" a classic Taking as it is a "'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 514. That focus on the owners' right to possession was confirmed in *Horne*, where the Court held that a Taking took place **because** the owners "lost the entire 'bundle' of property rights in the appropriated raisins – 'the rights to possess, use and dispose of' them,'" *Horne*, 135 S.Ct. at 2428, quoting *Loretto*, 458 U.S. at 435. See also *Henderson v. United States*, 135 S. Ct. 1780, 1784-86 (2015) (noting

that the right of "possession" is a "thick" stick in "the proverbial sticks in the bundle of property rights").

The most recent court of appeals decisions have all applied the regulatory takings analysis of *Lingle*, *Lucas*, *Loretto* and *Horne* to personal property Takings cases by focusing on the property rights *of the owners*. See *Ass'n. of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General of New Jersey,* 910 F.3d 106, 124 (3d Cir. 2018) (applying the *Lingle* "tantamount" test to assess whether a New Jersey ban on certain firearms magazines was a Taking); *Sierra Medical Services Alliance v. Kent*, 883 F.3d 1216, 1224-25 (9th Cir. 2018) (applying *Lingle*, *Horne*, *Lucas* and *Loretto* to assess whether the State's regulation of personal property rights was a Taking). See also *Duncan v. Becerra*, 366 F.Supp.3d 1131, 1185 (S.D. Cal. 2019) ("the Takings Clause prevents [the State] from compelling the physical dispossession of such lawfully-acquired private property without just compensation").

The only remaining inquiry is whether a complete ban imposed by the Rule is a "functional equivalent of" or is "tantamount to" a direct appropriation and thus a *per se* Taking. That question answers itself. The Rule requires that the owner either turn in the device to the ATF or

physically destroy it. See 83 Fed. Reg. at 66,523, 66,543. It is difficult to imagine a more complete destruction of all the "sticks" in the "bundle of property rights."

The importance of possession in the Takings analysis as applied to personal property was also stressed in *Andrus v. Allard*, 444 U.S. 51, 65-67 (1979). There, the Court sustained a federal regulatory ban on the sale of eagle feathers against a Takings challenge because "regulations challenged here *do not compel the surrender* of the artifacts, and there is *no physical invasion or restraint* upon them." *Andrus*, 444 U.S. at 65 (emphasis supplied). In so holding, the Court stated "*it is crucial* that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." (Id.) (emphasis supplied).

Similarly, in *Horne*, the Court stressed that there was no taking in *Andrus* because "the owners in that case retained the rights to possess, donate, and devise their property." *Horne*, 135 S.Ct. at 2429. The Court contrasted the retention of these rights to the raisin program at issue in *Horne*, where the Court found that the program "requires physical surrender of the raisins and transfer of title, and the growers lose any right to control their disposition." (Id.). 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"); *Chancellor Manor v. United States*, 331 F.3d 891, 902 (Fed. Cir. 2003) ("Courts have long recognized that property owners have the right to exclusive possession."). Cf. *Katzin v. United States*, 908 F.3d 1350, 1362 (Fed. Cir. 2018) (holding that the government's claim of ownership was not a physical taking or a *per se* regulatory taking because "the government did not: physically occupy some part of Plaintiffs' property, require Plaintiffs to suffer a permanent physical invasion, directly appropriate Plaintiffs' property, effect the functional equivalent of an ouster of Plaintiffs' possession, or deprive Plaintiffs of all economically beneficial use of Plaintiffs' property").

If, as *Horne* and *Andrus* hold, the rights to "possession," transport," "donation" and "devise" are "crucial" to the Takings analysis, then a *per se* Taking has occurred when all those rights are stripped away from the owner. Tellingly, the Rule's only response to *Horne* and *Andrus* is to assert, in a *non-sequitur*, that the Rule was justified as an exercise of the government's "police powers." 83 Fed. Reg. at 66,524.

That reliance on "police powers" fails under *Lucas* and *Loretto* for the reasons set forth above.

Indeed, if police powers is all it takes, then the ban on the sale of eagle feathers in *Andrus* could have been easily justified on that ground alone, thereby rendering utterly 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." The Supreme Court's reasoning in these cases cannot be ignored. See, e.g., *Smith v. Cupp*, 430 F.3d 766, 773 n.3 (6th Cir. 2005) ("As lower courts we are bound to follow the Supreme Court's reasoning and holdings, as much as, if not more so than, its 'instructions.'").

We acknowledge the observation in in *Lucas* that personal property is different because owners "ought to be aware of the possibility that new regulation might render his property economically worthless." *Lucas*, 505 U.S. at 1027. We have no quarrel with that principle. But, there is an obvious difference between a regulation that has rendered property "economically worthless" (but leaves the property in the owner's possession) and a law that criminally bans mere possession and

requires the physical destruction of the property. For example, in *Andrus*, the statute effectively rendered eagle feathers "economically worthless" by banning the **sale** of the feathers, but the Court held that the statute did not effect a Taking **because** the statute allowed the owner to continue to possess, transport and devise or donate the feathers.

Similarly unavailing is the Rule's reliance[6] on *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007), a case that pre-dates *Horne*. *Holliday* is inapposite for several reasons. First, the Fourth Circuit's primary holding in that case was that the Takings suit was unripe "under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)." *Holliday*, 493 F.3d at 406-09. That holding is no longer good law as *Williamson County* was expressly overruled by the Supreme Court last Term in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019). Second, the court's alternative holding in *Holliday* on whether the complaint stated a Takings claim was rendered prior to *Horne* and thus the court did not have the benefit of *Horne's* holding and reasoning. *Horne*

[6] See 83 Fed. Reg. at 66,524.

definitively settled the question of whether personal property is equally protected by the Takings Clause, a matter not even considered in *Holliday*.

More fundamentally, in addressing the takings claims, the *Holliday* court relied on *Mugler* for the proposition that a state may abolish gambling, just as a state in *Mugler* banned the sale of alcohol, but failed to acknowledge that *Mugler* merely sustained a ban on a particular **use** (123 U.S. at 668-69), not a ban on possession. The court thus completely missed the Supreme Court's guidance on the proper interpretation of *Mugler* in *Lucas*, discussed above.

Indeed, the *Holiday* court had no occasion to discuss the "crucial" nature of possession on which the Supreme Court focused in *Andrus* and *Horne*, as the plaintiff's contention in that case was that the State law meant that his property "lost all market value, and his business became worthless." *Holliday*, 493 F.3d at d. at 406. *Holliday* thus cannot be read as support for the proposition that the State is free to eliminate the "crucial" property right of possession without regard to the Takings Clause. See *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court

nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

CONCLUSION

The judgment below should be reversed and the case remanded with instructions that the Court of Federal Claims calculate and award just compensation for the fair market value of plaintiffs' bump stocks that were Taken because of the Rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Amicus hereby certifies that, on February 6, 2020, the foregoing Brief of Amicus, Maryland Shall Issue, Inc., was were served on counsel identified below via transmission of Notices of Electronic Filing generated by CM/ECF:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that the foregoing Amicus Brief of Maryland Shall Issue, Inc., is in a proportional font with serifs, *i.e.,* Century, utilizes 14-point type size in both text and footnotes, is double-spaced, except in headings and footnotes, and is 6,361 words long, including headings, footnotes and quotations, but excluding from that total those items identified in Rule 32(f) and this Court's local rules, as determined by the word-count function of Microsoft Word Version 2013 word processing software.

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