19-1298

United States Court of Appeals for the Sixth Circuit

GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; VIRGINIA CITIZENS DEFENSE LEAGUE; MATT WATKINS; TIM HARMSEN; RACHEL MALONE,

Plaintiffs-Appellants,

-and-

GUN OWNERS OF CALIFORNIA, INC.,

Movant-Appellant,

-against-

WILLIAM P. BARR, U.S. Attorney General, in his official capacity as Acting Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; THOMAS E. BRANDON, in his official capacity as Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN AT GRAND RAPIDS

BRIEF OF THE NATIONAL ASSOCIATION FOR GUN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Association for Gun Rights (NAGR) is a nonprofit social welfare organization operating under § 501(c)(4) of the Internal Revenue Code. NAGR is not a subsidiary or affiliate of a publicly owned corporation, and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to amicus's participation.

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INTEREST OF AMICUS CURIAE

National Association for Gun Rights is a nonprofit membership organization that works to defend the right to keep and bear arms and promote individual liberty, throughout the United States. NAGR engages in direct and grassroots advocacy, research, legal efforts, outreach, and education to this end.

Amicus addresses an issue that no other amicus discusses: that the ATF action at issue is a violation of the Fifth Amendment takings clause. The implications of this case extend far beyond bump stocks.

Pursuant to Fed. R. App. P. 29, counsel for amicus states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than amicus made a monetary contribution to fund its preparation or submission.

"[N]or shall private property be taken for public use, without just compensation." Fifth Amendment, United States Constitution.

INTRODUCTION

The regulation at issue in this case is a taking of private property for a public use or purpose, without compensation. For more than a decade the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") consistently held that "bump fire" rifle stocks, or "bump stocks", did not meet the definition of a machinegun under the National Firearms Act (the "NFA").[1] Then, in response to political pressure after the horrible 2017 Las Vegas, Nevada mass shooting, the ATF reversed this long held policy and issued the regulation at issue in this case, 83 Fed. Reg. 66514 (Dec. 26, 2018) (the "Final Rule"). This regulation re-classified bump stocks as machineguns and made ownership, possession, and sale of them illegal, depriving thousands of American citizens of their property rights and subjecting them to harsh criminal penalties for merely owning or possessing something that was legal to own and possess until the enactment of this Final Rule.

The Plaintiffs asserted this as the basis for their Third Cause of Action in their *Complaint for Declaratory and Injunctive Relief* filed in the trial court. Amicus concurs with this contention, and offer this brief in support.[2]

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[1] 26 U.S.C. §§ 5801., et seq.

[2] For purposes of this brief, amicus assumes that bump stocks are in fact machineguns, as the ATF regulation decreed.

I. ATF's regulation banning bump stocks violates the Fifth Amendment's Takings Clause.

The Fifth Amendment protects personal property as well as real property and there is no distinction between these two types of property for purposes of the Takings Clause. *Horne v. Department of Agriculture*, 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.")

In *Horne*, the Court considered a Federal law that required raisin growers to give part of their raisin crop to a government entity that would then primarily use those confiscated raisins to sell to raise money for promotion of raisin consumption, and also to control the amount of raisins offered for sale in the United States, to keep prices up. The Court said:

> The first question presented asks "Whether 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." The answer is no.

Id. at 2425 (internal citations omitted).

Furthermore, banning the ownership of a certain type of personal property is a taking. See *Duncan v. Becerra*, 366 F.Supp.3d 1131 (S.D. Cal. 2019) (Holding California's ban on possession of firearm magazines that exceed a certain magazine capacity was a taking under the Fifth Amendment). When the ATF

categorized bump stocks as machineguns, it made possession of bump stocks illegal thereby depriving owners of their property rights just as if they had confiscated them.

A. The regulation completely takes all property interest in bump stocks, because it bars all possession of them.

Under the NFA, possession of a machinegun that is not registered to the possessor is a crime. After May 19, 1986, when 18 U.S.C. § 922(o) went into effect, there is no provision for registration of an existing or a newly made machinegun by ordinary persons. According to ATF, over 100,000 machineguns were registered in the years between the enactment of the NFA in 1934 and May 19, 1986. These already registered machineguns continue to be lawfully possessed and transferred within the regulation of the NFA. Any machinegun made in violation of the NFA is contraband. Once ATF decided that it considered bump stocks to be machineguns, they became subject to the restrictions of the NFA. Their possession became illegal. As of the effective date of the Final Rule at issue here, bump stocks possessed by ordinary persons became contraband. This total deprivation of any ability to lawfully own or sell formerly lawful, indeed unregulated, personal property fits into the definition of a regulatory taking or a per se taking. There is no property interest in the bump stock left after the ATF regulation applies to it. All the bump stock owner can and must do is destroy it or, if she prefers, give it to the government for destruction.

Although the government is not necessarily taking possession of the bump stocks, this total confiscation of all rights in the bump stock makes ATF's regulation much more like a per-se taking than a regulatory taking. In her dissent in *Horne*, Justice Sotomayor outlined the law on a regulatory taking versus a per se taking:

> Finally—and this is the argument the Hornes do rely on—we have held that the government effects a per se taking when it requires a property owner to suffer a "permanent physical occupation" of his or her property. *Loretto*, 458 U. S., at 426. In my view, however, *Loretto*—when properly understood—does not encompass the circumstances of this case because it only applies where all property rights have been destroyed by governmental action. Where some property right is retained by the owner, no per se taking under *Loretto* has occurred.
>
> This strict rule is apparent from the reasoning in *Loretto* itself. We explained that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" Id., at 435 (quoting *United States v. General Motors Corp.*, 323 U. S. 373, 378 (1945)). A "permanent physical occupation" of property occurs, we said, when governmental action "destroys each of these rights." 458 U. S., at 435 (emphasis in original); see ibid., n. 12 (requiring that an owner be "absolutely dispossess[ed]" of rights). When, as we held in *Loretto*, each of these rights is destroyed, the government has not simply "take[n] a single 'strand' from the 'bundle' of property rights"; it has "chop[ped] through the bundle" entirely. Id., at 435. In the narrow circumstance in which a property owner has suffered this "most serious form of invasion of [his or her] property interests," a taking can be said to have occurred without any further showing on the property owner's part. Ibid.

> By contrast, in the mine run of cases where governmental action impacts property rights in ways that do not chop through the bundle entirely, we have declined to apply per se rules and have instead opted for the more nuanced *Penn Central* test. See, e.g., *Hodel v. Irving*, 481 U. S. 704 (1987) (applying *Penn Central* to assess a requirement that title to land within Indian reservations escheat to the tribe upon the landowner's death); *PruneYard Shopping Center v. Robins*, 447 U. S. 74 –83 (1980) (engaging in similar analysis where there was "literally . . . a 'taking' of th[e] right" to exclude); *Kaiser Aetna v. United States*, 444 U. S. 164 –180 (1979) (applying *Penn Central* to find that the Government's imposition of a servitude requiring public access to a pond was a taking); see also *Loretto*, 458 U. S., at 433–434 (distinguishing *PruneYard* and *Kaiser Aetna*). Even governmental action that reduces the value of property or that imposes "a significant restriction . . . on one means of disposing" of property is not a per se taking; in fact, it may not even be a taking at all. *Andrus v. Allard*, 444 U. S. 51 –66 (1979).

Horne, 135 S.Ct. at 2437-38.

B. The total confiscation of bump stocks is different than any previous government firearm control action.

In *Fesjian v. Jefferson*, 399 A.2d 861 (D.C. Ct. App. 1979) the District of Columbia Court of Appeals upheld a Washington, D.C. law that effectively banned "machine guns" from being lawfully possessed in the city. The D.C. law had a much broader definition of a machine gun than that found in the NFA, which is at issue in this case. The definition in the D.C. law included semiautomatic firearms that had the ability to accept a magazine capable of holding more than 12 cartridges (even if the firearm possessed by the person was not equipped with such

a magazine). The law permitted owners to remove them from the city, thus allowing owners to retain them or sell them and realize at least some of their value, outside of the city.

The court reviewed a number of arguments on why the D.C. law was unconstitutional, rejecting them all. As to a taking, the court concluded, citing no authority, that a governmental exercise of its police power is never a taking. This conclusion, if it was correct then, has been rejected by the United States Supreme Court since. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court reasoned 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." *Id.* at 1026. Likewise, in March 1989 the government decided to start regulating importation of semi-automatic rifles into the United States based on their appearance. Importation of firearms into the United States requires a permit. Several importers, relying on previously approved import permits, had spent considerable sums with foreign manufacturers to purchase firearms which they could no longer import for sale to the public. *Gun South, Inc. v. Brady,* 677 F.2d 858 (11th Cir. 1989) and *Mitchell Arms, Inc., v. United States*, 7 F.3d 212 (Fed. Cir. 1993) both rejected a Takings Clause challenge to ATF's revocation of the import permits, finding there was no property right in a permit that could be revoked before it was used. As a practical matter, in

the time after March 1989, most importers stuck with non-importable firearms reached agreements with ATF on ways to realize value from the firearms they had purchased. Some were able to alter the firearms to meet ATF's new criteria as to their appearance, while others (such as Gun South) were able to import and sell their inventory to government entities.

Again, in this line of cases, the facts are markedly different from those here. The importers were both able to realize some value from their firearms, and they ran into prior law on whether or not there was a property right in a government permit. The importers were never compelled to destroy their inventory by threat of rather harsh criminal penalties. Such a fact pattern is brand new, because the government has never enacted such a rule until now.

C. While the Tucker Act, 28 U.S.C. § 1491 may provide a means for monetary compensation for Federal takings it does not eliminate a Fifth Amendment violation.

In the recent decision in *Knick v. Township of Scott*, __ U.S. __ (2019), slip op at 6, the Supreme Court reiterated that the fact that the law may provide a mechanism for compensation does not change whether or not a law violates the Fifth Amendment:

> Contrary to *Williamson County [Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U. S. 172 (1985)]*, a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it. The Clause provides: "[N]or shall private property be taken for

> public use, without just compensation." It does not say: "Nor shall private property be taken for public use, without an available procedure that will result in compensation."

The question of whether or not compensation will be due greatly informs governmental decision making on enacting a ban such as the one here. ATF estimated that "the total undiscounted cost of this rule [is] $312.1 million over 10 years[.]" ATF estimates that there are as many as 520,000 bump stocks owned by gun owners throughout the United States — all of these devices are now required to be destroyed or surrendered for destruction.

Whether or not a law or a rule makes sense for government to enact is informed, at least in part, on its financial burden to the government. It is quite possible that this rule would not have been enacted if the government knew it would have to pay $312,100,000 to the various owners of the bump stocks it was banning. Therefore it is important for this court to review the issue of whether or not this rule requires payment of compensation to the parties that suffered the loss of $312,100,000.

II. ATF's bump stock regulation is not a proper exercise of police power for public use or purpose.

Compensability aside, a taking must be for a public use or public purpose to be lawful under the Fifth Amendment. A taking for a private use or the private

purpose of a particular government official is not a lawful government action. *Kelo v. City of New London*, 545 U.S. 469 (2005).

Nineteenth century cases took the position that police power regulation of nuisances was not a taking, even though private property was arguably rendered worthless by government action, and that government action was taken to serve a public purpose. In *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887), the Court said:

> As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community cannot in any just sense be deemed a taking or an appropriation of property for the public benefit. Such 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 anyone for certain forbidden purposes is prejudicial to the public interests.

Mugler concerned a Kansas law imposing Prohibition, and its effect on the owner of a facility meant for making beer. The brewery buildings at issue in the case obviously had remaining value and utility even with Kansas' Prohibition law. Essentially the case asked the Court to consider the idea of a regulatory taking, which the *Mugler* court declined to do. Amicus submits that in its totality *Mugler* does not constitute an accurate view of modern takings jurisprudence, because it rejects the idea of a regulatory taking. Certainly its view that a police power

regulation is never a taking is no longer true. Cases that apparently follow this idea, like *Fesjian v. Jefferson*, 399 A.2d 861 (D.C. Ct. App. 1979), are wrong on this point. Otherwise lawful use of property cannot be totally barred, without such a bar constituting a taking. *Lucas,* 505 U.S. 1003.

III. Firearms, including machineguns, are not a nuisance that can be regulated out of existence under the police power without triggering the Fifth Amendment.

In this case the Federal government regulates machineguns through its taxing power and its power to regulate interstate commerce although the Federal government lacks a general police power under the United States Constitution, it can achieve some police power goals through exercise of its enumerated powers. Indeed, in a case concerning whether or not a prior bump stock regulation was a taking, the Court of Claims dropped the pretense of a Federal government of limited enumerated powers, and called the Federal Government's regulation of machineguns to be the exercise of its police power. *Akins v. United States*, 82 Fed. Cl. 619 (U.S. Claims 2008).

This, however, does not make machineguns a nuisance. There is a long line of cases holding that government regulation of uses of property are not a taking, so long as other valuable uses of the property are still permitted. Likewise there is a long line of cases that hold that the government does not owe compensation for destroying property that constitutes a hazard or a nuisance, such as food that is

unfit for consumption. Amicus submits that under current precedent, this category of nuisances is the only assertion of the police power by government that can both take all value from property and not result in compensation being due. In fact another way of looking at this fact pattern is that such government action is not a taking because the property lacks value; if it has any value it is a negative one. Spoiled food, or old and unstable dynamite is only a liability. It has no positive value.

Declaring a common, not inherently dangerous object to be a nuisance, without value and therefore banned under a power like the police power, is not a way out of the application of the Fifth Amendment. In *Staples v. United States*, 511 U.S. 600 (1994), the Supreme Court rejected the argument that the NFA's regulation of machineguns should put all gun owners on notice that guns that might be machineguns were subject to the strict liability regulation that might apply to possession of hand grenades or narcotics: "Guns in general are not 'deleterious devices or products or obnoxious waste materials,'…that put their owners on notice that they stand 'in responsible relation to a public danger.'" *Id.* at 610 (internal citations omitted).

Items that are a nuisance are often those for which their manufacturers and users have strict liability in tort for harm that results from them (such as explosives or dangerous chemicals). However this treatment for firearms has been expressly

rejected by Congress. The Protection of Lawful Commerce in Arms Act ("PLCAA") enacted in 2005 and codified at 15 U.S.C. §§ 7901 et. seq., bars strict liability in tort for firearm manufacturers for the use or misuse of the firearms they made. The PLCAA constitutes a decision by Congress that firearms, including machineguns, are not a nuisance that should trigger strict liability for their use or misuse under state tort law. Indeed, a court has found that the PLCAA protected a maker of bump stocks from liability for their alleged misuse in the 2017 Las Vegas music concert murders that were the motivating factor for enactment of the ATF rule at issue here. *Prescott v. Slide Fire Solutions, LP*, 341 F. Supp. 3d 1175 (D. Nev. 2018).

Finally, the Southern District of California's recent decision in *Duncan v. Becerra,* 366 F. Supp.3d 1131, concerned a total ban on possession of certain firearm magazines within the State of California. The court held that the ban was a taking, and not a valid, uncompensable exercise of the police power. The court held this to be true even though, unlike the situation here, California law allowed owners of such magazines to arguably obtain some measure of value for them by selling them to a California state sanctioned dealer or to a lawful buyer outside California. Amicus quotes from the decision at length, because Judge Benitez brilliantly summarizes why a total ban on possession of a firearm part is a taking:

> Plaintiffs also contend that the State's confiscatory and retrospective ban on the possession of magazines over

ten rounds without government compensation constitutes an unconstitutional taking. "For centuries, the primary meaning of "keep" has been "to retain possession of." There is only one straightforward interpretation of "keep" in the Second Amendment, and that is that "the people" have the right to retain possession of arms, subject to reasonable regulation and restrictions." *Silveira v. Lockyer*, 328 F.3d 567, 573 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc). The Attorney General asserts that, when the government acts pursuant to its police power to protect the safety, health, and general welfare of the public, a prohibition on possession of property declared to be a public nuisance is not a physical taking. See Oppo. at 22, (citing *Chicago, B. & Q. Railway Co. v. Illinois*, 200 U.S. 561, 593–594 (1906) and *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008)). The Attorney General then cites a few courts that have rejected Takings Clause challenges to laws banning the possession of dangerous weapons. See Oppo. at 23 (citing *Akins*, 82 Fed. Cl. at 623–24 (restrictions on manufacture and sale of machine guns not a taking) and *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (temporary suspension on importation of assault weapons not a taking)).

California has deemed large-capacity magazines to be a nuisance. See Cal. Pen. Code § 32390. That designation is dubious. The Supreme Court recognized a decade before *Heller*, "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials.'" *Staples v. United States*, 511 U.S. 600, 610 (1994) (citation omitted). Casting a common sized firearm magazine able to hold more than 10 rounds as a nuisance, as a way around the Second Amendment, is like banning a book as a nuisance, as a way around the First Amendment. It conjures up images from Ray Bradbury's novel, Fahrenheit 451, of firemen setting books on fire, or in this case policemen setting magazines on fire.

Plaintiffs remonstrate that the law's forced, uncompensated, physical dispossession of magazines holding more than 10 rounds as an exercise of its "police power" cannot be defended. Supreme Court precedent casts doubt on the State's contrary theory that an exercise of the police power can never constitute a physical taking. In *Loretto*, the Supreme Court held that a law requiring physical occupation of private property was both "within the State's police power" and an unconstitutional physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court explained that whether a law amounts to a physical taking is "a separate question" from whether the state has the police power to enact the law. Id.at 425–26 ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."). In a similar vein, the Supreme Court holds that a law enacted pursuant to the state's "police powers to enjoin a property owner from activities akin to public nuisances" is not immune from scrutiny under the regulatory takings doctrine. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020–27 (1992). The Court reasoned that it was true "[a] fortiori" 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."

Recently, the Supreme Court summarized some of the fundamental principles of takings law in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). "The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use, without just compensation. The Clause is made applicable to the States through the Fourteenth Amendment. As this Court has recognized, the plain language of the Takings Clause requires the payment of compensation whenever the government acquires private property for a public

purpose, but it does not address in specific terms the imposition of regulatory burdens on private property." Id. at 1942 (quotations and citations omitted). *Murr* notes that almost a century ago, the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. (*quoting Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Takings jurisprudence is flexible. There are however, two guides set out by *Murr* for detecting when government regulation is so burdensome that it constitutes a taking. "First, with certain qualifications a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr*, 137 S. Ct. at 1938 (citations and quotation marks omitted). "[A] physical appropriation of property g[ives] rise to a per se taking, without regard to other factors." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015).

. . .

Here, California will deprive Plaintiffs not just of the use of their property, but of possession, one of the most essential sticks in the bundle of property rights. Of course, a taking of one stick is not necessarily a taking of the whole bundle. *Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting) ("Where an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety."). Nevertheless, whatever expectations people may have regarding property regulations, they "do not expect their property, real or

> personal, to be actually occupied or taken away." *Horne*, 135 S. Ct. at 2427.
>
> Thus, whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical dispossession of such lawfully-acquired private property without just compensation.

CONCLUSION

The ATF rule completely banning possession of bump stocks is a taking within the Fifth Amendment, requiring the government to pay affected owners the fair market value of their bump stocks before the ban. For these reasons, and those stated by the Appellant, the district court's decision should be reversed.

Dated: July 1, 2019
Loveland, Colorado

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 4,380 words of text.

The brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2016, Times New Roman, Size 14.

Dated: July 1, 2019
Loveland, Colorado

Respectfully submitted,

s/ James Bardwell, Esq.
James Bardwell, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

I further certify that on July 1, 2019, a copy of the foregoing Brief was mailed by first-class U.S. Mail, postage prepaid, and properly addressed to the following:

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