No. 12-1493

IN THE

Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR., *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief *Amicus Curiae* of Congressman Steve Stockman, Former ATF Assistant Director Robert E. Sanders, Gun Owners Foundation, U.S. Justice Foundation, Gun Owners of America, Inc., Institute on the Constitution, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, Downsize DC Foundation, DownsizeDC.org, Policy Analysis Center, Oregon Firearms Federation, and Virginia Citizens Defense League in Support of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Congressman Steve Stockman represents the 36th Congressional District of Texas in the U.S. House of Representatives. Robert E. Sanders is the former Assistant Director of Criminal Investigation for the Bureau of Alcohol, Tobacco, and Firearms.

Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, Downsize DC Foundation, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc., Abraham Lincoln Foundation, and DownsizeDC.org are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

The organizational *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

rights secured by law, including the defense of the rights of crime victims, the Second Amendment and individual right to acquire, own, and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and other federal courts.

Oregon Firearms Federation and Virginia Citizens Defense League are state firearms advocacy groups.

All of these groups and individuals filed an *amicus curiae* brief in this case in support of the Petition for Writ of Certiorari on July 25, 2013.[2]

SUMMARY OF ARGUMENT

At issue in this case is the legality of the Government's current "straw purchase" doctrine as stated on the ATF Form 4473, and as enforced by prosecutions of firearms purchasers based on the prohibitions against making false statements in violation of 18 U.S.C. Sections 922(a)(6) and 924(a)(1)(A).

The current ATF Form 4473 states that a firearms purchaser cannot receive a firearm from a federal firearms licensee unless the "transferee" is the "actual buyer," and that to be the "actual buyer" he must use his own funds either to buy the firearm for himself or as a gift for another. If the transferee is using the funds of another person to purchase a firearm for

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[2] http://lawandfreedom.com/site/firearms/Abramski_Amicus.pdf.

another, then according to the Form the transfer is not permitted.

There is, however, neither statute nor regulation that prohibits such a transfer. To the contrary, 18 U.S.C. Section 922(d) prohibits only those transfers that the transferor knows or has reason to believe that the transferee is ineligible to receive a firearm. By requiring a firearms transferee to state on the ATF Form 4473 that he is the "actual buyer," the Government has created out of whole cloth new offenses based on the prohibition of false statements in Sections 924(a)(1)(A) and 922(a)(6).

To establish a violation of Section 924(a)(1)(A), however, the Government is required to demonstrate that a statutory provision of Chapter 44, Title 18, United States Code "requires" a licensed dealer to identify the "actual buyer" of a firearm and to keep that identification as part of his records. But there is no statute containing any such requirement. Rather, the relevant statutes (and regulations) require the FFL to identify only the person who is the "transferee" of a firearm. As for a violation of Section 922(a)(6), the Government has misused its straw purchase doctrine to secure a conviction without any evidence that Abramski intended to deceive, or even deceived, any person by his statement on the Form 4473.

In sum, the Government secured the false statement convictions in this case because its straw purchase doctrine invites arbitrary prosecutions of firearm purchasers that have no basis in law. Additionally, that doctrine imposes unworkable

burdens upon licensed firearm dealers that are inconsistent with the Congressional policy providing for a rapid background check to facilitate the transfer of firearms.

ARGUMENT

U.S. v. Abramski was not only an unjust conviction, it was an absurd prosecution. There is no other way to describe it. Abramski was eligible under federal, state, and local laws to possess firearms. *Id*., 706 F.3d 307, 311. He went to a gun store, passed a background check, and bought a firearm. *Id.* He then took the firearm to another gun store, where his uncle — also eligible to possess firearms — passed a background check, and then received the firearm. *Id.* Both Abramski and his uncle were eligible persons, each having passed federal background checks. Neither attempted to evade any part of any law. In fact, Abramski consulted multiple FFLs to make sure everything was done "by the book." *Id.* *See also* Brief of Petitioner ("Pet. Br.") at 11; Brief for the United States in Opposition to Petition for Writ of Certiorari ("Opp. Br.") at 2.

Notwithstanding the foregoing, Bruce Abramski now inexplicably stands convicted as a felon, having violated the so-called "straw purchase" **doctrine** — a legal construct created by an overzealous administrative agency, employed by cooperative prosecutors, and sanctioned by deferential courts, but not an actual crime enacted by Congress or even by administrative regulation. Pet. Br. at 6. To devise a

crime, the Government has lit upon 18 U.S.C. Section 922(a)(6), which requires as an element a statement that is "intended or likely to deceive" an FFL. Yet none of Abramski's answers was intended to deceive anyone — nor did those answers deceive anyone. Rather, Abramski explained exactly what he was doing to each FFL with whom he dealt, in order to be assured that he was following the law. And each FFL agreed that the sale was lawful. *See* Pet. Br. at 11.

I. THE IDENTITY OF THE "ACTUAL BUYER" IS NOT INFORMATION AN FFL IS REQUIRED BY LAW TO OBTAIN AND RETAIN.

In its Brief in Opposition to the Abramski petition for a writ of certiorari, the Government represented to this Court that "all of the information on ATF Form 4473 is information that is required to be kept in the records of a federal firearms dealer." Opp. Br. at 15. Rather than join issue with Petitioner on the lawfulness of the "actual buyer" question on the Form 4473,[3] this Government response is nothing more than a diversionary tautology — that all of the information on the Form is information ATF requires the FFL to keep because ATF requires the FFL to keep the Form in its records.

Additionally, in its opposition brief, the Government asserts that the Form 4473 "requires the purchaser to certify that he is the actual buyer as part

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[3] *See* Petition for a Writ of Certiorari at 19-21.

of the dealer's collection of the name and other identifying information of the purchaser." *Id.*, at 16. Thus, the Government argues that Abramski was rightfully convicted under 18 U.S.C. § 924(a)(1)(A), having misrepresented on the ATF Form 4473 that he was the "actual buyer" when, in fact, the actual buyer was his uncle. *See Id.* But again, the Government's response is circular, focusing only on what the Form 4473 requires, while conveniently ignoring the issue of lawful authority for the actual buyer question on the Form 4473.

Such omissions are especially troublesome, as Congress expressly required that prosecutions be based only on a false statement "with respect to information **required by this chapter** to be kept...." 18 U.S.C. Section 924(a)(1)(A) (emphasis added). In seeking to preserve its conviction, the Government repeatedly ignores Abramski's true claim, and fails to identify any specific statutory provision in the United States Code that requires such information identifying the "actual buyer," to be kept by an FFL.

Rather than providing necessary textual support for its proposition that the ATF Form 4473 properly requires an FFL to keep records of the identity of the "actual buyer," the Government simply lists a number of supposedly supporting authorities: (A) 18 U.S.C. § 922(b)(5); (B) 18 U.S.C. § 923(g)(1); (C) 27 C.F.R. § 478.124(a) and (b); and (D) a trio of court of appeals opinions,[4] as if the answer to the question were self-

[4] United States v. Johnson, 680 F.3d 1146 (9th Cir. 2012); United States v. Soto, 539 F.3d 191 (3d Cir. 2008), *cert. denied*, 555 U.S.

evident. *See id.* at 15-16. However, not one of these cited authorities supports the Government's position that the name of what it calls the "actual buyer" of a firearm is "information required by [Chapter 44 of Title 18, United States Code] to be kept" by an FFL.

A. 18 U.S.C. Section 922(b)(5) Does Not Require an FFL to Keep Records of a Principal on Whose Behalf a Buyer May Be Purchasing a Firearm.

Section 922(b)(5) provides that "it shall be unlawful for any licensed ... dealer to sell or deliver ... any firearm ... to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person, if the person is an individual...." Thus, "person," as it appears in Section 922(b)(5), is singular, and clearly means the human being who is physically present at the point of transfer, to whom the FFL delivers the firearm.

This reading comports with the ordinary meaning canon of statutory construction. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts ("Reading Law"), p. 69 (West: 2012).[5] In

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1116 (2009); and United States v. Nelson, 221 F.3d1206 (11th Cir. 2000), *cert. denied*, 531 U.S. 951 (2000).

[5] *See also* 1 James Kent, Commentaries on American Law 432 (Claytor's 1st ed: 1826) ("The words of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense.").

the ordinary course of business, a licensed dealer would not make inquiry as to what a purchaser will eventually do with a firearm — whether the person in the store is buying the firearm to give to or sell to another person, or whether the purchaser is buying the gun on behalf of a person who is not physically present.[6] There is nothing whatsoever in Section 922(b)(5) requiring the FFL to determine whether the firearm will or could be transferred later to another person, or whether the person who is the transferee is using his own money or the money of another to purchase the firearm for that other person.

Nor does Section 922(b)(5), by implication, impose upon an FFL any burden to make any such inquiry. To construe Section 922(b)(5) otherwise would be to violate the canon of construction that "[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*)." Reading Law at p. 93. It is not within the judicial power for judges to speculate, and then to fill up any perceived legislative omission. *See* Reading Law, pp. 94-97. Rather, Section 922(b)(5) plainly prescribes the FFL's duty: to record the specific identifying information related to the individual person with whom the FFL is dealing. And just as clearly, the statute does not impose upon the FFL any additional duty to determine if the purchaser is acting as an agent for another, or making the purchase for himself.

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[6] If multiple persons visit an FFL's place of business, the FFL would need to know which one of those persons is the transferee so that the FFL can run a proper criminal background check. *See* 18 U.S.C. Section 922(t)(1).

B. 18 U.S.C. Section 923(g)(1)(A) Does Not Authorize the Attorney General to Require an FFL to Determine Whether a Firearms Purchaser is Acting as an Agent for Another Person.

18 U.S.C. Section 923(g)(1)(A) authorizes the Attorney General by regulation to accomplish two firearms record-keeping objectives. First, he is empowered to issue regulations governing the "period" of time that an FFL is obligated to "maintain such records of ... sale or other disposition of firearms at his place of business." Second, he is authorized to adopt regulations governing the "form" in which such records are to be kept. But this section does not, as the Government apparently assumes,[7] authorize the Attorney General to require an FFL to obtain any information for his files in addition to the information specifically required by Section 922(b)(5).

To be sure, Section 926(a) authorizes the Attorney General to "prescribe ... rules and regulations" but, unlike the broad power delegated to some agencies, the authority of the Attorney General is expressly limited to "**only** such rules and regulations **as are necessary** to carry out the provisions of this chapter." (Emphasis added.) Thus, the Attorney General has no authority to add to the records that Section 922(b)(5) requires an FFL to keep, but only such rules and regulations that are objectively necessary to ensure that the "name,

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[7] *See* Opp. Br. at 16-17.

age, and place of residence" of the person physically present at the point of sale or delivery are "kept."

This reading of the Attorney General's limited authority is reinforced by the legislative history of Section 926(a). Prior to the enactment of the Firearm Owners' Protection Act ("FOPA") of 1986, Section 926 conferred upon the Secretary of the Treasury (the predecessor to the Attorney General in the current statutory scheme) the power to "prescribe such rules as he **deems necessary** to carry out the provisions of this chapter." *See* Pub. L. 90-618, 82 Stat. 1226 (1968) (emphasis added). However, FOPA amended this authorization, limiting the Secretary (now Attorney General) to "prescrib[ing] **only** such rules and regulations **as are necessary** to carry out the provisions of this chapter." *See* Pub. L. 99-308, § 926, 100 Stat. 459 (1986) (emphasis added).

Furthermore, before the Attorney General may exercise his authority under Section 926(a), he must "give ... public notice, and ... afford interested parties opportunity for hearing." But no such notice or public hearing was given in connection with the imposition by ATF of its current straw practice doctrine by adding new terminology, a new question, and new instructions to the ATF Form 4473. *See* Brief of Petitioner at 9.

C. 27 C.F.R. § 478.124 Requires an FFL to Keep a Record Identifying the "Transferee," not the "Actual Buyer."

As Abramski has shown, 18 U.S.C. Section 924(a)(1)(A) applies only if a statute — not a

regulation — requires the information to be kept. *See* Pet. Br. at 32-35. But, even if Section 924(a)(1)(A) is construed to apply even to information required by regulation, the Government's argument should be rejected.

The Government contends that:

> The Attorney General has promulgated a **regulation** that requires a [FFL] to record firearms transactions on the ATF Form 4473, 27 C.F.R. 478.124(a), and the form requires the purchaser to certify that he is the "**actual buyer**" as part of the dealer's collection of the name and other identifying information of the purchaser. *See* 27 C.F.R. § 478.124(b). [Opp. Br. at 16 (emphasis added).]

The Government is mistaken. There is nothing in 27 C.F.R. Section 478.124(a) or (b) requiring the ATF Form 4473 to contain any information identifying an "actual buyer" by name, or providing for any other form containing identifying information of an "actual buyer." Indeed, the term "actual buyer" does not even appear in either subsection of the referenced regulation. Instead, the firearm purchaser is consistently referred to as the "transferee," and the identifying information that is required to appear on the Form 4473 is that of "transferee," not "actual buyer," the latter term having been informally invented and inserted into the form by ATF.

Stripped of this unauthorized ATF overlay, 27 C.F.R. Section 478.124(c)(1) requires the FFL to:

> obtain a form 4473 from the **transferee** showing the **transferee's** name, age, residence address[,] date and place of birth; height, weight and race of the **transferee**; the **transferee's** country of citizenship; the **transferee's** INS issued alien number or admission number; the **transferee's** State of residence; and certification by the **transferee** that the transferee is not prohibited by the Act from ... receiving a firearm.... [27 C.F.R. § 478.124(c)(1) (emphasis added).]

Additionally, subsection (c)(2) provides for obtaining the "**transferee's** social security number" which may "help avoid the possibility of the **transferee** being misidentified as a felon or other prohibited person." 27 C.F.R. § 478.124(c)(2) (emphasis added). Finally, subsection (c)(3)(i) provides that "[a]fter the **transferee** has executed the Form 4473, the licensee shall verify the identity of the **transferee** by examination of the identification document (as defined in § 478.11) presented, and shall note on the Form 4473 the type of identification used." 27 C.F.R. § 478.124(c)(3)(i) (emphasis added).

These numerous and repeated references to the firearms purchaser as the "transferee" brings the regulations governing the ATF Form 4473 into

harmony with 18 U.S.C. § 922(t)(1), which provides that an FFL:

> shall not **transfer** a firearm to any other person who is not [an FFL], unless — before the completion of the **transfer** ... the system has not notified the licensee that the receipt of a firearm by **such other person** would violate subsection (g) or (n) of this section; and the **transferor** has verified the identity of the **transferee** by examining a valid identification document (as defined in 1028(d) of this title)[8] of the **transferee** containing a photograph of the **transferee**. [(Emphasis added.)]

Consistent with the language of the Brady Act, as codified in 18 U.S.C. Section 922(t)(1), the Department of Justice regulations governing the National Instant Criminal Background Check System ("NICS"), and the ATF regulations governing the Form 4473, refer to the person to whom a firearm is to be transferred by the FFL as the "**transferee**." *See* 28 C.F.R. Section 25.6(c)(1)(iv)(B) and (C) and 27 C.F.R. Section 478.124(c) (emphasis added.) Moreover, not once does the word "actual" appear as a modifier of "transferee." Nor is the transferee ever referred to as a "buyer." Rather, the several provisions in the Form 4473

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[8] According to 18 U.S.C. Section 1028(d), the term "'identification document' means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State ... which, when completed with information concerning a particular individual, is of the type commonly accepted for the purpose of identification of individuals."

regulation referring to "transferee" are all related to the duty of the FFL to physically identify the "transferee," calling for a process of identification that can only be conducted on the person standing before the FFL.

The word "transferee" is not defined in either 18 U.S.C. Section 921(a) or in the FBI regulations governing NICS. *See* 28 C.F.R. § 25.2. Nor is "transferee" defined in the ATF's regulations addressing the meaning of terms. *See* 27 C.F.R. § 478.11. Since it is not defined, the term "transferee" should be understood according to its "ordinary, contemporary, common meaning." *See* Perrin v. United States, 444 U.S. 37, 42 (1979). Within the context in which it appears in the statutes and regulations, "transferee" is consistently used as an identifier of the person to whom property is physically transferred, without regard to the legal nature of the transfer. Indeed, as 18 U.S.C. Section 922(t)(1)(C) provides, the FFL transferor is commanded to verify the "identity of the transferee," not the identity of the transferee as a buyer to whom the transfer of the firearm creates a legal right or interest. Rather, use of the word "transferee" contemplates that, upon verification of a person's physical identity, the FFL transferor, having received NICS clearance to transfer a firearm, is free to transfer that firearm. And the transferee is free to receive that firearm because NICS has given the "go-ahead" to the transfer.

D. The Cases Relied on By the Government Are Unpersuasive.

As noted above, the Government's brief in opposition to Abramski's petition relied upon the decisions of three courts of appeals — one from the Eleventh Circuit,[9] another from the Third Circuit,[10] and another from the Ninth.[11] According to the Government, each court ruled "that the 'actual buyer' information required by the ATF Form 4473 is information required to be kept in the records of a [FFL] within the meaning of Section 924(a)(1)(A)." Opp. Br. at 16. However, none of the three opinions employed any textual analysis, and consequently, none should be considered authoritative.

Purporting to rely on 18 U.S.C. Sections 922(b)(5) and 922(s)(3), the courts of appeals in Nelson and Soto concluded that both statutes supported the proposition that the "information required [under both statutes] is information about the identity of the **actual buyer**, who supplies the money and intends to possess the firearm, as opposed to that individual's 'straw man' or agent." Nelson, 221 F.3d at 1209. *Accord*, Soto, 539 F.3d at 198-99. Remarkably, neither court arrived at this conclusion after any analysis of the language of

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[9] United States v. Nelson, 221 F.3d 1206 (11th Cir. 2000), *cert. denied*, 531 U.S. 951 (2000).

[10] United States v. Soto, 539 F.3d 191 (3d Cir. 2008), *cert. denied,* 555 U.S. 1116 (2009).

[11] United States v. Johnson, 680 F.3d 1146 (9th Cir. 2012).

either section. As pointed out in Section II.A. *supra*, the language in 18 U.S.C. Section 922(b)(5), requiring identification of the "person" to whom a firearm has been sold or delivered, is satisfied by a record that identifies the human being who receives the firearm. It imposes no duty upon the FFL to determine whether that person is acting on his own behalf or on behalf of another, as presumed by the Nelson and Soto courts.

The two courts' reliance on Section 922(s)(3) is even more problematic. Like Section 922(t)(1) and 27 C.F.R. § 478.124(c), Sections 922(s)(3)(A) and (B) require "the name, address, and date of birth ... of the **transferee** [and] a statement that the **transferee**" is not ineligible to receive a "handgun." (Emphasis added.) As noted above, a person is the "transferee" even if he is acting as an agent for another person and, thus, the information requirements of Section 922(s) are to be met by the person physically receiving the transferred firearm, not some other person.

The courts in both Nelson and Soto finessed these textual issues, baldly asserting that, "[i]f an ineligible buyer could simply use a 'straw man' or agent to obtain a firearm from a [FFL], the statutory scheme would be too easily defeated." *See* Nelson, 221 F.3d at 1209; *accord*, Soto, 539 F.3d at 198. Thus the Nelson court decided "[s]urely Congress could not have intended to allow such easy evasion of a comprehensive scheme." Nelson, 221 F.3d at 1210. However, "[t]he question is ... not what Congress 'would have wanted' but what Congress enacted." *See* Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992). As federal court of appeals Judge Easterbrook has

observed: "[J]udicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be a little more than wild guesses." Frank H. Easterbrook, "Statute Domains," 50 U. CHI. L. REV. 533, 548 (1983).

The Ninth Circuit treatment of the relevant statutory language in Johnson is even more cavalier. Although the court examined the text of Section 924(a)(1)(A) to determine whether it required proof that "'an element of materiality should be read into the language concerning false statements made for the dealer's records,'" it conducted no such inquiry as to whether the language of Section 924(a)(1)(A) dictated that the identity of the "actual buyer" be included in an FFL's records. *Compare* Johnson, 680 F.3d. at 1144-46 *with id.* at 1146-47. Instead, after taking a quick look at Sections 922(b)(5) and 923(g)(1)(A), the court concluded that, because 27 C.F.R. Section 478.124(a) and (b) require the FFL to keep the ATF Form 4473, the record-keeping requirement of Section 924(a)(1)(A) was met. Johnson, 680 F.3d at 1147. Completely missing from the Johnson opinion is any reference whatsoever to 27 C.F.R. Section 478.124(c), which provides that the only identifying information that is required to be kept, even by regulation, is that of the transferee, not the "actual buyer" as it appears on the ATF Form 4473.

II. THE ATF "STRAW PURCHASE" DOCTRINE IS ARBITRARY AND UNWORKABLE.

A. The "Straw Purchase" Doctrine is Arbitrary.

Abramski was not charged with violating 18 U.S.C. Section 922(d), which prohibits ineligible persons from acquiring firearms. *See* Pet. Br. at 1-2. That law was not breached here. Yet the Government argues that the law was violated simply because Abramski used his uncle's money to make the purchase. If Abramski had used his own money to buy the firearm, the Government's concedes that the transfer would have been lawful. Opp. Br. at 6-7. Likewise, had Abramski used his uncle's money, but had the firearm shipped to the second FFL rather than taking possession of it himself, the Government would not have brought this case. Thus, ATF's "straw purchase" theory of the case criminalizes virtually the same behavior that it sanctions — distinguishing the two on the basis of a statement made in response to a question that ATF had no authority to ask — whether Abramski was the "actual buyer." A prosecution based on such a theory is completely arbitrary, defying the plain language of 18 U.S.C. Section 922.

1. Congress Has Failed to Enact the Very "Straw Purchase" Doctrine Which ATF Now Espouses.

Currently, it is not against the law to purchase a firearm with the intent to transfer it to another person. Such a purchase, however, is treated as a

crime by ATF, which considers it a "straw purchase" because of the requirement that a transferee state on the Form 4473 that he is the "actual buyer." Thus, gun control advocates both within Congress and in the broader community claim that "straw purchasers who buy guns for other people are only guilty of paperwork violations under federal law." *See* S. Trumble and L. Hatalsky, "What You Need to Know About the Stop Illegal Trafficking in Firearms Act," p. 1 (Mar. 2013).[12]

In response to this perceived "loophole," and in the aftermath of the Newtown, Connecticut mass shooting that killed 20 children in December 2012, there was a flurry of activity in the United States Senate to respond to the tragedy. Democratic Senators Patrick Leahy (D-VT) and Richard Durbin (D-IL) introduced S. 54 – the "Stop Illegal Trafficking in Firearms Act of 2013." The featured provision of that bill was its section punishing and deterring the "straw purchase" of firearms.[13] As originally drafted, the operative provision stated as follows:

> Any person ... who knowingly purchases any firearm for, on behalf of, or with intent to transfer it to, **any other person** ... shall be fined under this

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[12] http://content.thirdway.org/publications/668/Third_Way_One-Pager_-_What_You_Need_to_Know_about_the_Stop_Illegal_Trafficking_in_Firearms_Act.pdf.

[13] *See* J. Steinhauer, "Senate Panel Approves two Gun Control Bills," *The New York Times* (Mar. 12, 2013). http://www.nytimes.com/2013/03/13/us/politics/senate-panel-likely-to-vote-on-gun-measure.html?_r=0.

> title, imprisoned not more than 20 years or both. [*Id.*, section 3 (emphasis added).]

Excepted from this proposed prohibition was any "firearm that is lawfully purchased by a person ... to be given as a bona fide gift to a recipient who provided no service or tangible thing of value to acquire the firearm...." *Id*. Also excepted was the transfer of a firearm to a "bona fide winner of an organized raffle, contest, or auction...." *Id*. Congress, however, did not pass this bill.

As there would have been no reason for Congress to consider a bill to prohibit something that was already illegal, the Senators supporting this bill could not have considered a "straw purchase" to be an activity currently prohibited by statute. Moreover, evidence that Congress considered but did not enact the "straw purchase" doctrine is compelling confirmation that the "straw purchase" doctrine is "an illegitimate exercise of power by the executive branch of government.

Because Congress decided not to act, the prosecutorial decision here continues to be unfettered by any statute defining what constitutes an unlawful straw purchase. The Government may choose to indict a straw purchaser for violation of two statutes, 18 U.S.C. Section 922(a)(6) or Section 924(a)(1)(A), as it did here, or one but not the other. It may make an exception for "gifts," or it may decline to do so. It may define an excepted "gift" without any Congressional

guidance whatsoever. And it may add to the gift exception without limitation.

The decision to criminalize purchases made for an eligible third party under the "straw purchase" doctrine, while exempting gifts for third parties — without even so much as a regulation — is unquestionably an arbitrary policy decision made by the ATF.

2. The Solicitor General Has Exercised Unfettered Discretion to Define What Constitutes a "Straw Purchase."

The Government in its brief argues that a straw purchase occurs when "a person ... purchases a firearm at the direction of, and for use by, a third party...." Opp. Br. at 7. This is based on the Government's erroneous — or at least arbitrary — assumption that gifts are always "unanticipated or unrequested." Opp Br. at 14. But this contention is fraught with uncertainty, as illustrated by the following scenarios.

1. A man requests that his wife buy him a firearm as a present. Here, the wife's purchase is a "gift," but a gift that was "anticipated and requested." Is it a legitimate gift under the Form 4473's instructions?

2. A man purchases a firearm for his wife, who is eligible to possess firearms, in order for her to learn to shoot, and ultimately

lawfully carry. He uses funds from their joint bank account. They consider the firearm their joint property. To which of them does the firearm belong? Who was the actual buyer? Was it a gift? Was the purchase a straw purchase?

3. A man purchases a firearm as a birthday gift for his wife. His wife, however, is the sole breadwinner, so the money that he used to buy her a gift was her money. On the one hand, she had no knowledge of the gift. On the other hand, her husband used money that technically was hers. Was this a gift, or a "straw purchase"?

4. A father uses his own money and purchases a gift for his felon son, who has no knowledge of the purchase. Under ATF's theory, would the purchase itself (albeit not the subsequent transfer to the son) be legal, since it was a gift, and thus no false statement was made?

5. A son purchases a firearm locally for his eligible father, who lives some distance away in the same state. When the father and son see each other on the holidays, the father pays his son and the son gives his father the firearm. The purchase did not occur at an FFL, but instead the son purchased the firearm "face-to-face" from a private seller. This is the same case as this case, except no "false statement" was made

> on a Form 4473, as there is no Form 4473 required for private sales. Would ATF still argue that this was a straw purchase? Or does a different rule apply to purchases at FFLs than applies to purchases from private sellers, the only difference being the checking of a box on a form? How could a statement in one case be material to the lawfulness of the sale, while in the other case that same fact is irrelevant?

3. ATF Has Used Its Unfettered Discretion in Arbitrary Ways.

18 U.S.C. Section 922(b)(1) prohibits anyone under 18 years of age from receiving any firearm, and anyone under 21 years of age from receiving a handgun from an FFL. Additionally, 27 C.F.R. Section 478.124(f) requires that the transferee "show ... in case the firearm to be transferred is a firearm other than a shotgun or rifle, the transferee is 21 years or more of age; in case the firearm to be transferred is a shotgun or rifle, the transferee is 18 years or more of age...."

However, ATF's website sanctions parents or guardians purchasing firearms "as gifts" for minors.[14] This would fit with ATF's "gift exception" on the Form 4473 only if the parent used his own money. However, there is no such condition explained on the ATF website. The U.S. Court of Appeals for the Ninth

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[14] "Firearms - Frequently Asked Questions - Unlicensed Persons," http://www.atf.gov/content/firearms-frequently-asked-questions-unlicensed-persons#parent-purchases.

Circuit assumed that a parent could purchase a firearm for a minor, **even using the minor's money**, and such a transfer would not be a straw purchase. U.S. v. Moore, 109 F.3d 1456 (9th Cir. 1997). Apparently, the ATF had admitted as much at trial. *See* U.S. v. Moore, 84 F.3d 1567, 1571 (9th Cir. 1996) ("At trial, a BATF agent testified that it is not illegal for a parent to buy a gun for a 14-year-old child with the child's own money. The agent testified that in doing so, the parent would be required to list his or her name as the 'transferee (buyer)' on the BATF Form. This would not be a false statement even if the parent intended immediately to turn over the gun to the child.").[15]

This would mean that ATF's "straw purchase" doctrine is as follows: an eligible person may purchase a firearm, **unless** he is buying it for third person, **unless** it is with his own money as a gift for the third person, **unless** that third person is his child, in which case he may use the minor's money, at least in the Ninth Circuit. Such nuanced distinctions have no basis in the law, and are not supported by any regulation. To allow the ATF the authority to make such arbitrary distinctions based on its whim cannot be permitted.

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[15] This panel opinion was overruled on other grounds by the *en banc* court.

B. The "Straw Purchase" Doctrine is Unworkable.

1. The Government Misstates the Role of an FFL in Transferring a Firearm.

In order to justify Abramski's conviction, the Government argues that Section 922(a)(6) should be read to include words that do not appear in the text. The statute prohibits false statements that are "material to the lawfulness of the sale." However, the Government argues that this statute prohibits statements that are material "to **a determination of whether** the sale is lawful." Opp. Br. at 11 (emphasis added). But that is a meaning entirely different from the statute's plain language. And the Government claims that it is the "firearms dealer [who] must ... determine whether a sale is lawful." Opp. Br. at 7. But in enacting federal gun control statutes, Congress never intended to place such a burden on an FFL to determine whether a sale is, in fact, lawful. Moreover, an FFL could never hope to meet such a burden. Rather, "lawfulness" is a determination made by the Government through the NICS check

The Government claims that the FFL "must know the **identity of the would-be-purchaser** to determine whether a sale is lawful." Opp. Br. at 7 (emphasis added). Then the Government goes even further, not only requiring the FFL to determine the identity of some "would-be-purchaser," but also arguing that material facts include "any fact that would help the dealer to **determine the buyer's eligibility**...." Opp. Br. at 8 (emphasis added). But

the FFL is not required by law to inquire or determine the identity of some "would-be-purchaser," much less his eligibility. Instead, before making a transfer, ATF's own regulations only require the "licensee [to] verif[y] the **identity of the transferee** by examining the identification document presented...." 27 C.F.R. § 478.102(a)(3) (emphasis added). *See also* 18 U.S.C. § 922(t)(1)(C).

To protect its conviction, the Government manufactures new duties for an FFL. The FFL is never required , as the Government appears to assert, to: (i) ask the buyer if he is buying the firearm for himself or someone else;[16] then (ii) inquire as to that third person's eligibility; then (iii) ask for details about how the firearm purchase is being financed; and based on all of the above, (iv) somehow reach a **legal conclusion** about whether the sale is lawful.

Indeed, nowhere is the FFL required to certify anything about a third party "would-be-purchaser." The FFL is simply required to determine the identity of the transferee — the person standing in front of him. 27 C.F.R. Section 478.102(a)(3). A person's identity is a simple, **factual question**. An FFL simply needs to examine the transferee's identification to see if he is, in fact, the person he claims to be. On the other hand, the lawfulness of the sale is a nuanced **legal question**. That is the function of NICS in the first instance, and ultimately the courts, to determine.

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[16] For example, the FFL is not required to ask "is the gift recipient eligible to own this firearm?" and a buyer is not required to represent "this firearm is a not gift for someone else."

No FFL could be expected to make such a determination.

2. The FFL's Proper Role is Ministerial, Not to Provide Substantive Legal Judgment.

Contrary to what the Government argues, the FFL's primary role is administrative, and geared towards keeping the proper records of the transaction. All an FFL is required to do is **verify the identity of the person standing in front of him**, and make sure that the appropriate boxes are checked on the Form 4473. *See* 18 U.S.C. § 922(t)(1)(C). It is up to the NICS system to determine the lawfulness of the sale. The Form 4473 reinforces this understanding, where an FFL is required to certify only that:

> On the basis of: (1) the statements in Section A ... (2) my verification of the identification ... and (3) the information in the current State Laws and Published Ordinances, it is my belief that it is not unlawful for me to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the person identified in Section A. [ATF Form 4473, Section D.]

The Government erroneously claims that the FFL must determine that a sale **objectively** "**is lawful**," from a **legal** perspective. Opp Br. at 7. But the Form 4473 requires the FFL only to certify his "**belief**" that the sale is "**not unlawful**" based on two **factual**

observations — the completed Form 4473 and the demonstrated identity of the person standing before him.

III. THE ATF STRAW PURCHASE DOCTRINE USURPS LEGISLATIVE POWER.

The Brady Handgun Violence Protection Act, codified by 18 U.S.C. § 922(t), provides that, upon the FFL's verification of the identity of the "transferee" of a firearm, the FFL is free to transfer a firearm to that transferee if, after "3 business days," the "national instant background check system" has "not notified" the FFL "that receipt of a firearm" by such transferee "would violate subsection (g) or (n) of this section." 18 U.S.C. § 922(t)(1)(B) and (C). The FFL's duty to verify is limited to the identity of the transferee and is discharged "by examining a valid identification document of the transferee containing a photograph of the transferee." 18 U.S.C. § 922(t)(1)(C).

The ATF straw purchase doctrine adds to the duty to verify the identity of the transferee physically in the presence of the FFL, a new duty to identify a downstream transferee who is not even in the store — who ATF calls the "actual buyer." A fair reading of the text of Section 922(t)(1)(C) does not accommodate a requirement that the FFL review the identification of an absent third party. By design and in effect, however, ATF's straw purchase doctrine posits the existence of multiple transferees and requires an FFL to verify the identity of **two or more** transferees, in violation of the canon of construction against

"read[ing] an absent word into the statute." Lamie v. United States Trust, 540 U.S. 526, 538 (2004).

In its zeal to prevent an ineligible person from obtaining a firearm, the ATF (and the court of appeals below) have perceived, and then filled in what they have considered to be a "gap in the Brady regulatory apparatus process." *See* J. Jacobs and K. Potter, "Keeping Guns out of the Wrong Hands: The Brady Law and Limits of Regulation," 86 J. OF CRIM. LAW AND CRIMINOLOGY 93, 107 (1995). This so-called "gap" was not the product of a congressional oversight, but of the legislative reality of cobbling a bill that would pass both the Senate and the House of Representatives in the intensely fought battle over gun control on Capitol Hill.[17] *See* R. Aborn, "The Battle Over the Brady Bill and the Future of Gun Control Advocacy," 22 FORDHAM URBAN L. J. 417 (1995). While the ATF and the courts may desire to add to "Congress' chosen words," they must "'defer[] to the supremacy of the Legislature, as well as recognition that Congressman typically vote on the language of a bill.'" Lamie, 540 U.S. at 538 (citations omitted).

As the U.S. District Court for the Northern District of Alabama perceptively observed in United States v. Dollar, 25 Supp. 2d 1320 (N.D. Ala. 1998), the ATF changed the law by modifying the Form 4473. Instead of stating that it was unlawful to transfer a firearm that the transferor knew or had reason to

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[17] This compromise legislation, unlike the ATF straw purchase doctrine, also has the benefit of being workable. *See* Section II.B, *infra*.

believe was a transfer to another person who was ineligible to receive a firearm, the Form 4473 stated the rule to be against any transfer to a third party regardless of eligibility. *See id.* at 1322-25. Such a change in policy is plainly an illegitimate usurpation of legislative power.

There is simply nothing in the Brady Act that requires an FFL to go beyond identifying the transferee of a firearm. Indeed, to require an FFL to go beyond such an identification process would frustrate a key feature of NICS: to serve as a

> national **instant** criminal background check system, that any [FFL] may contact, by telephone or by other electronic means in addition to the telephone, for information, to be supplied **immediately**, on whether receipt of a firearm by a prospective **transferee** would violate section 922 of Title 18, United States Code, or State law. [Pub. L. 103-159, 107 Stat. 1541 (Nov. 30, 1993), Section 103(b), (emphasis added.)][18]

Thus, in order to obtain clearance to transfer a firearm, the FFL need only convey to NICS: the (i) name; (ii) sex; (iii) race; (iv) complete date of birth;

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[18] According to the FBI, "NICS is a computerized background check system designed to respond within **30 seconds** on most background check inquiries so that the FFLs receive an almost **immediate** response." *Id.* (emphasis added). http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet.

and (v) state of residence of the proposed transferee. 28 C.F.R. § 25.7(a). This accelerated process to provide an instant response system was not accidental, but critical to the enactment of the NICS system. In the years leading up to the passage of the Brady Bill, the major stumbling block for those Senators and Representatives favoring a criminal background check was the delay that would ensue between purchase and possession. *See* R. Aborn, "The Battle Over the Brady Bill," *supra*.

CONCLUSION

Whether out of frustration or presumption, the ATF cannot justify its decision unilaterally to implement its straw purchase doctrine to prohibit firearm transfers involving third parties who are eligible to receive them. Not only has this ATF doctrine encroached upon the legislative powers of Congress, it has corrupted the administrative process, misrepresenting on an official Government form that it is illegal for any person to buy a firearm on behalf of another person eligible to own the firearm. Clearly at odds with the law as it is written, it is time for this Court to put a stop to this lawlessness, vacating Petitioner Abramski's conviction and remanding this case with instructions to dismiss the indictment.

Respectfully submitted,

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