No. 12-1493

IN THE
Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF

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ARGUMENT

I. THE DEEP CIRCUIT SPLIT ON THE FIRST QUESTION PRESENTED CAN BE RESOLVED ONLY BY THIS COURT.

As the government concedes in its brief, there is a split among the circuits on the proper interpretation of 18 U.S.C. § 922(a)(6) and the court-created straw purchaser doctrine. Br. in Opp. 6, 11. But the government suggests this issue does not warrant review for two reasons. First, the government contends that the Fifth Circuit's decision in *Polk* "was decided in 1997, approximately 16 years ago" and "has not been followed by any other court of appeals." Br. in Opp. 11. Second, the government states that a 1985 decision by the Fifth Circuit "appears" to conflict with *Polk* and thus "review by this Court should be postponed until the Fifth Circuit has a chance to reconsider its precedent in light of" the decisions in other circuits. Br. in Opp. 11-12. These arguments are flawed.

First, the Fifth Circuit will never have an opportunity to reconsider its decision. Under *Polk*, a federal prosecutor in the Fifth Circuit cannot charge someone in Abramski's situation under § 922(a)(6), where the ultimate recipient of the gun is a lawful purchaser. Thus, the issue will not be presented to the Fifth Circuit again.

Second, the government has manufactured an intra-circuit split between *Polk* and *United States v. Ortiz-Loya*, 777 F.2d 973 (5th Cir. 1985) where no conflict actually exists. Br. in Opp. 11-12. The

government states that *Ortiz-Loya* upheld a § 922(a)(6) conviction where "the actual buyer *appears* to have been eligible to purchase a firearm." Br. in Opp. 12 (emphasis added). But in framing this argument, the government simply *assumes* that the recipient of the gun could lawfully purchase it because he had a Texas driver's license that he mistakenly left in Mexico. *Id.* But many people who have a driver's license are nevertheless prohibited from buying guns, such as 16-year-olds, convicted felons, and habitual drug users. *See* 18 U.S.C. § 922(b), (d). The Fifth Circuit in *Ortiz-Loya* did not address whether the ultimate recipient in that case was a lawful purchaser and there simply is no way to know from the decision. Thus, the cases are not in conflict.

The government also downplays the significance of the circuit split on this issue. Other circuits, where this issue has not yet been addressed, continue to recognize the vitality of this persistent split. *See, e.g.*, *United States v. Bryant*, No. 13-CR-14, 2013 WL 3423275, at *6 (E.D. Wis. July 8, 2013) ("[T]he law is not settled that where the government prosecutes under a straw buyer theory that the actual buyer must also be a prohibited buyer . . ."). The fact that the Fifth Circuit addressed this issue a decade and a half before the Fourth, Sixth, and Eleventh Circuits says nothing about which side's reasoning is likely to be followed in these other courts.

Moreover, the government dismisses the Ninth Circuit's *en banc* decision in *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997), because

"one of the buyers was not eligible to purchase a firearm" and thus "*Moore* did not squarely address the question presented." Br. in Opp. 12. But the majority of the *en banc* Ninth Circuit stated that, if the defendant had proved the gun was purchased for the lawful recipient (and not the unlawful one), the conviction would have been reversed. *Moore*, 109 F.3d at 1461. As a majority of the active judges of the Ninth Circuit explained, § 922(a)(6) applies only "when a lawful purchaser buys for an unlawful one." *Id.* This is strong confirmation that the Ninth Circuit agrees with *Polk*'s reasoning.

Finally, the government devotes several pages of its brief to the merits of this issue. The government contends that "[f]ew facts, if any, are 'more material to the lawfulness of [a firearm] sale' than the buyer's identity." Br. in Opp. 7.

The government's position underscores why this Court's review is necessary. Abramski *did* provide the buyer's identity—he was the buyer. When he later sold the gun to his uncle at another licensed gun dealer, his uncle was the buyer. And at all times, the government possessed the information required to be provided by law about who owned the gun and where that person could be located. Pet. 5-6.

Nothing in the federal firearm statutes or the ATF regulations required anything more from Abramski. More important, even if Abramski had told the gun dealer that he intended to later resell the gun to his uncle, the dealer still could have lawfully sold Abramski the gun. Pet. 18. Thus,

Abramski's answer to the "actual buyer" question was not material to the lawfulness of the sale.

The government's position requires the Court to go beyond the firearm statutes and regulations and apply the court-created straw purchaser legal fiction—in other words, to conclude that Abramski was not the "actual buyer" of the gun because he intended to resell it to his uncle. As discussed in detail in the petition, Pet. 15-18, that legal fiction was created by courts to close a perceived loophole in the firearm statutes that permitted ineligible persons to readily obtain guns. Whatever the merits of the straw purchaser fiction in that circumstance, it simply cannot be applied in a case like this one, where both Abramski and his uncle lawfully could buy and possess a firearm.

In sum, the Court should grant review in this case to resolve this persistent circuit split and provide clarity to the lower courts concerning the congressional intent of this frequently-used criminal firearm statute.

II. BOTH QUESTIONS PRESENTED INVOLVE THE SAME LEGAL ISSUE AND THIS COURT SHOULD REVIEW THEM BOTH.

The government also argues that this Court should decline review of the second question presented for two reasons, both of which are similarly flawed. First, the government asserts that "petitioner did not raise this argument in the court of appeals." Br. in Opp. 14-15. This is simply wrong. To be sure, Abramski abandoned his Administrative

Procedure Act challenge to § 924(a)(1)(A), as the Fourth Circuit pointed out in a footnote. Pet App. 9a & n.6. But Abramski preserved the § 924(a)(1)(A) challenge raised in this petition. *See* Fourth Circuit Appellant's Br. 17. More important, the Fourth Circuit expressly considered, and rejected, this argument in its decision. Pet. App. 17a-18a. Thus, the issue was "passed upon" by the lower court and is not waived regardless of whether Abramski included it in his briefs below. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (stating that the Court's traditional rule permits "review of an issue not pressed so long as it has been passed upon").

Next, the government argues that there is no circuit split on this issue. But the government also concedes that "Petitioner's challenge to his Section 924(a)(1)(A) conviction in the court of appeals was coextensive with his materiality challenge to his Section 922(a)(6) conviction." Br. in Opp. 15. Because both issues turn entirely on the Fourth Circuit's erroneous application of the straw purchaser doctrine, any decision by this Court reversing the Fourth Circuit's interpretation of § 922(a)(6) would necessarily invalidate its interpretation of § 924(a)(1)(A).

Thus, the Court should grant certiorari on these interrelated straw purchaser doctrine questions so that it may squarely address both. *See Blumenthal v. United States*, 332 U.S. 539, 541 (1947) (recognizing that with a grant of certiorari the Court may accept review of other "inseparably connected" issues). Otherwise, Abramski may be faced with the injustice of having prevailed on his

legal arguments but nevertheless left to serve out his sentence for a felony conviction that this Court's decision would otherwise render invalid.

CONCLUSION

For the reasons stated in the petition and this reply brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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