

No. 12-1493

IN THE
Supreme Court of the United States

BRUCE JAMES ABRAMSKI, Jr., *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Petition for 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
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Lincoln Institute for Research and Education,
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DownsizeDC.org, Downsize DC Foundation,
Policy Analysis Center, Oregon Firearms
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and Wisconsin Gun Owners in Support of
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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

¹ It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; 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.

constitutions and statutes related to the rights of citizens, and questions related to human and civil 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, Virginia Citizens Defense League, and Wisconsin Gun Owners are state firearms advocacy groups.

STATEMENT OF FACTS

The case against Petitioner Bruce Abramski is yet further proof of the maxim that no good deed goes unpunished. In an effort to help his elderly uncle in Pennsylvania, who asked for assistance in the purchase of a gun for self-defense in the home, Abramski, a former police officer, offered to select a suitable firearm and acquire it from a federal firearms licensee (“FFL”) in Collinsville, Virginia that offered discounts to police officers. United States v. Abramski, 706 F.3d 307, 311 (4th Cir. 2013) (“Abramski II”).

Abramski consulted with three different FFLs on how such a purchase could be accomplished legally. The FFLs “apparently advised Abramski, in essence, that a licensed dealer in Pennsylvania could complete the transfer to his uncle after the handgun had been purchased by Abramski in Virginia.” *Id.* Following this advice, Abramski went to the Virginia dealer, completed a Bureau of Alcohol, Tobacco, Firearms and

Explosives (“ATF”) Form 4473, and purchased a Glock 19 for his uncle. *Id.* Abramski traveled to Pennsylvania and transferred the firearm to his uncle at a Pennsylvania FFL, completing the necessary paperwork. Abramski’s uncle gave him a check in the amount of \$400 in payment for the gun. Confirming the transfer, the uncle gave Abramski a receipt reflecting that the uncle had purchased the Glock 19 handgun for \$400. *Id.*

As the court of appeals below recounted, “[m]eanwhile” Abramski became a suspect of a bank robbery which led to Abramski’s arrest and to an FBI investigative search that led to the discovery of the “written receipt confirming the transfer of the Glock 19 handgun from Abramski to” his uncle. *Id.* Federal authorities never charged Abramski with bank robbery, and state bank robbery charges were dismissed. However, federal prosecutors obtained a two-count indictment charging Abramski with having made a false statement in violation of 18 U.S.C. §§ 922(a)(6), 924(a)(2), and 924(a)(1)(A) on the ground that Abramski had represented falsely to the Collinsville, Virginia FFL that he was the “actual buyer” of the Glock 19, when the real buyer was his uncle.² *Id.* at 311-12.

² The prosecution’s strategy to go after Abramski for making a “straw purchase” appears to be akin to that employed in United States v. Costello, 666 F.3d 1040 (7th Cir. 2012), wherein Circuit Judge Richard Posner observed that “[n]o doubt” the prosecution of a defendant for harboring an illegal alien “was brought because the Justice Department suspects that the defendant was involved in her boyfriend’s drug dealings, but cannot prove it, so the Department reaches into its deep arsenal (the 4000-plus federal

Before trial, Abramski moved to dismiss both counts, arguing that he had not made a “material misrepresentation” when he claimed he was the “actual transferee/buyer” of the Glock 19. *See id.* at 311-12. The district court denied the motion, rejecting that contention and also rejecting Abramski’s argument that the “actual buyer” question was unauthorized by law. *See United States v. Abramski*, 778 F. Supp. 2d 678, 680-81 (W.D. Va.).

The court of appeals affirmed, concluding that the ATF Form 4473 warned Abramski “in bold type” that he was not the “actual buyer” of the Glock 19 “if he was buying it for someone else,” and that the “undisputed facts show that Abramski’s transfer of the Glock 19 [to his uncle] was not an afterthought[,] but a carefully calculated event — indeed, it was the sole reason for Abramski’s purchase of the Glock 19 handgun.” *Abramski II*, 706 F.3d at 316.

It is undisputed that both Abramski and his uncle were eligible to purchase and possess firearms. It is undisputed that both Abramski and his uncle had their backgrounds checked, and both were cleared by the FBI to acquire the firearm. It is undisputed that there is no law or regulation prohibiting the purchase of a firearm from an FFL by one person for a third party, if both are eligible to receive a firearm. And yet, inexplicably, Abramski now stands before this Court a felon, convicted of having made a false statement in violation of federal law.

crimes) and finds a crime that she doubtless never heard of that it can pin on her.” *Id.* at 1048.

SUMMARY OF ARGUMENT

Bruce James Abramski's conviction cannot stand for three reasons. First, the question he was asked by the ATF Form 4473 — whether he was the “actual buyer” of the firearm — is invalid, not only unauthorized by law and regulation, but in actual conflict with both. Second, Mr. Abramski's statement was not, in fact, false, since the question posed by the ATF Form 4473 is ambiguous, and the accompanying instructions are confusing. Third, the question as posed by the ATF Form 4473 arbitrarily and discriminately imposed a duty upon Mr. Abramski inconsistent with the policy it purports to enforce.

The Court should grant review on the merits of these arguments because the straw purchase theory upon which Mr. Abramski's conviction rests is the product of an illegitimate exercise of administrative power, which has been approved by a divided federal judiciary, and which has not been, but should be, rejected by this Court. At stake in this petition is not just a single conviction of one man, but the principle of judicial fidelity to the canon of construction that the text of a statute determines the intent of Congress, not the language of a bureaucratic form, nor even the opinions of judges.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES COMPELLING CONCERNS ABOUT THE ADMINISTRATION OF THE NATIONAL INSTANT BACKGROUND CHECK SYSTEM THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As Petitioner Bruce Abramski has ably demonstrated, this Court should grant review on the merits of the questions presented because the decision of the court of appeals below is in direct conflict with the decision of two other courts of appeals on the question whether a person may be prosecuted and convicted of making a false statement that he is the “actual buyer” of a firearm, when that statement is not material to the lawfulness of the sale. Additionally, as demonstrated below, this Court should grant review because the decision of the court of appeals below was based upon an illegitimate ATF “straw purchase doctrine,” wholly unauthorized by, and in conflict with, federal law. This is a compelling question that has not been, but should be, settled by this Court now, rather than allowing it to fester unresolved in the lower federal courts.

A. The ATF “Straw Purchase” Doctrine Upon Which Abramski’s Conviction Rests Conflicts with Both Statute and Regulation.

At the heart of the Government’s case against Abramski is a “straw purchase” theory that it is

impermissible for a person to purchase a firearm from an FFL if the transferee is acting as an agent for a third party who furnishes the funds for the purchase, even if both parties are eligible to possess a firearm. This theory is reflected in Question 11.a. of the ATF Form 4473, the prescribed form required of all persons seeking to purchase a firearm from an FFL. 27 C.F.R. § 478.124.

Section A of the Form states that it “Must Be Completed Personally By Transferee (Buyer).” Question 11.a. of the Form asks: “Are you the actual transferee/buyer of the firearm listed on this form?” After posing this question, the form states in bold:

Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.

Immediately following this warning is the directive, in italics, “*See Instructions for Question 11.a.*” This instruction is found on page 4 of the 6-page Form 4473 under the bold heading: “**Actual Transferee/Buyer.**” Underneath this heading is the following narrative:

For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself.... You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party.

Although “the [ATF] Director is authorized [by ATF regulation] to prescribe all forms,” that authorization is strictly limited to developing forms to gather “[a]ll of the information called for” by law or regulation. 27 C.F.R. § 478.21. Accordingly, the ATF Form 4473 was supposedly designed to facilitate FFL compliance with National Instant Criminal Background Check System (“NICS”), as provided in 27 C.F.R. § 478.124, but the Director has no authority to make policy in this area. There is no statute or regulation authorizing the Director — by form, industry guideline, or other action — to prohibit the purchase of a firearm from an FFL for a third party, or, indeed, to exempt gift purchases from that prohibition, as stated in the instructions to Question 11.a.

To the contrary, 18 U.S.C. § 922(t)(1) 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 [the named transferee] 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)³ of the **transferee**

³ 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 a type intended or commonly accepted for the purpose of **identification** of

containing a photograph of the **transferee**.” (Emphasis added.) There is nothing in the United States Code that requires an FFL to go beyond identifying the transferee to be the person who the transferee claims to be.⁴

In compliance with this statute, and consistent with the identity policy stated therein, 28 C.F.R. § 25.7(a) provides that, in order to obtain clearance to transfer a firearm, the FFL need only to transmit to NICS the: (i) name; (ii) sex; (iii) race; (iv) complete date of birth; and (v) state of residence of the proposed transferee.⁵ To require an FFL to do more than verify the physical and personal identity of the transferee would undermine a key purpose of the NICS system —

individuals.” (Emphasis added.)

⁴ “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.” See FBI, “National Instant Criminal Background Check System, Fact Sheet (NICS Fact Sheet), p. 1, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet>.

⁵ To be sure, “additional identifiers may also be” included by the FFL, either voluntarily or upon request, including “height, weight, eye and hair color, and place of birth” (28 C.F.R. § 25.7(b)), but none of these identifiers would impede a quick response. Even the ATF Form 4473 regulations contemplate a Form that should facilitate a rapid reply. According to 27 C.F.R. § 478.124(c)(2), Form 4473’s request for “optional information,” such as a Social Security Number, is sought “in order to **facilitate** the transfer of a firearm and **enable** NICS to verify the **identity** of the person acquiring the firearm number ... to help avoid the possibility of the **transferee** being **misidentified** as a felon or other prohibited person.” (Emphasis added.)

to serve as “a national **instant** background check system that any [FFL] may contact ... 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.” Public Law 103-159, 107 Stat. 1541 (Nov. 30, 1993).

This accelerated process to provide an instant response legislation was not accidental, but critical to the forging of NICS. 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 and the Future of Gun Control Advocacy,” 22 *FORDHAM URBAN LAW J.* 417 (1995). “As originally structured, the Bill required a seven-day waiting period.” Finally, the necessary technology to conduct the instant background check instantaneously was developed. *See id.* Any further investigation into whether a purchase constitutes a “straw purchase,” as the 4473 Form would require, is inconsistent with this key NICS feature to immediately determine the eligibility of the transferee.

In contrast with the Form 4473 requirement that the “transferee” be the “actual buyer,” the statutes, the NICS regulations, and even the ATF regulations governing the Form 4473 refer to the person to whom a firearm is to be transferred as the “transferee,” not the “buyer,” not the “actual buyer,” and not even the “actual transferee.” Indeed, 27 C.F.R. § 478.124, the ATF regulation governing the Form 4473, refers to

“transferee” no less than 15 times, but never once with the modifier “actual,” nor the word “buyer.” Thus, the ATF regulations reinforce the NICS regulations requiring an FFL only to physically identify the “transferee,” the person standing before him, not some third party outside the FFL’s presence. Nowhere in any statute or regulation is there any duty imposed on the FFL — or authority given to ATF — to inquire as to whether the transferee is the “actual buyer” — whatever that term may mean.

While the word “transferee” is ubiquitous, it is found neither among the definitions set forth in 18 U.S.C. § 921(a) nor in the NICS regulations. *See* 28 C.F.R. § 25.2. Nor is transferee defined in the ATF regulations addressing the meaning of terms. *See* 27 C.F.R. § 478.11. Since it is not defined, the term “transferee” must be understood according to its “ordinary, contemporary, common meaning.” *See Perrin v. United States*, 444 U.S. 37, 42 (1979). In the context of the applicable statutes and regulations, “transferee” is consistently used as an identifier of the person to whom property is physically transferred, not some other person. Indeed, as provided in 18 U.S.C. § 922(t)(1)(C), the FFL transferor is instructed to verify the physical and personal identity of the person inside the gun store seeking the transfer of a firearm — not some other person who the ATF might deem the “actual buyer.” Rather, the statutory guidelines contemplate that, upon verification of a person’s physical identity and clearance from NICS, the FFL transferor is authorized to transfer that firearm, and the transferee is authorized to receive it.

Likewise, the FFL signature paragraph on page three of the ATF Form 4473 contemplates that the FFL's only duty is to identify the physical transferee. Otherwise how could the FFL sign his name affirming that "it is [his] belief that it is not unlawful for [him] to sell, deliver, transport, or otherwise dispose of the firearm(s) listed on this form to the **person identified in Section A**"? Form 4473 (emphasis added). Only if the FFL's duty is limited to verifying the physical identity of the transferee could the FFL have sufficient assurance that the transfer of a firearm is "not unlawful." If, however, the "person identified in Section A" must be the "actual transferee/buyer," as required by Question 11.a., then the FFL would be put into the unenviable position of basing his statement solely upon the representation of the transferee, or of having to make inquiry whether that transferee is, in fact, the "actual buyer." Unlike the statutory duty to determine the physical identity of the individual person to whom a firearm is to be delivered, as set forth in 18 U.S.C. § 922(t)(1)(C), there are no statutory or regulatory guidelines explaining how an FFL is to determine whether the person identified under the law is the "actual buyer." Yet, the ATF Form 4473 requires the FFL to sign a statement that he believes that it is not unlawful to deliver a firearm to the person who answers "yes" to the question whether he is the "actual transferee/buyer."

In order for the ATF Form 4473 to identify, and thus truly curtail, straw purchases, the FFL transferor could not just rely on the transferee's word that he is buying the firearm for himself, much less upon the transferee's word that he is buying it as a gift. Yet, in

a section entitled “**NOTICES, INSTRUCTIONS AND DEFINITIONS,**” ATF Form 4473 states that “the seller of a firearm **must determine the lawfulness** of the transaction and maintain proper records of the transaction.” (Emphasis added.)

Unlike all other questions asked of the transferee on the form (for example, whether he is a felon), the FFL cannot rely on the NICS check for his “belief” that the transferee is the “actual buyer.” After all, prior to making the firearm transfer, NICS only would have “inform[ed] the licensee that it has **no information** that receipt of the firearm by the **transferee** would be in violation of Federal ... law.” 27 C.F.R. § 478.102(a)(2) (emphasis added). Without the NICS system running the name of the person whom the ATF deems to be the “actual transferee/buyer,” the NICS clearance is of absolutely no value to the FFL.

B. The ATF Form 4473’s Question 11.a. and Instructions Are Misleading and Confusing, Creating a Trap for the Unwary.

The ATF Form 4473 states that “the information and certification on this form are designed” not just for the licensee, but “to alert the **buyer** of certain restrictions on the receipt and possession of firearms.” (Emphasis added.) Section A of the Form, which is to be “completed personally” by the buyer, refers to that buyer in four different ways. First, it identifies the person who is completing the form as the “Transferee (Buyer).” Second, the form requires in box 1 the “Transferee’s Full Name.” Third, Question 11.a asks

the one filling out the form whether he is “the actual transferee/buyer,” followed immediately thereafter by a warning that, unless the person is the “actual buyer, the dealer cannot transfer the firearm.” Fourth, in the instructions referring to Question 11.a., which are found on page 4, the Form appears to settle on “actual transferee/buyer,” restating that phraseology six times, without repeating any of the other terms.

As discussed above, nowhere does the statutory or regulatory text use either the term “buyer,” or the word “actual” as a modifier of either “buyer” or “transferee.” Both of those words have been added by ATF. Moreover, as noted above, the Form 4473 contains no definition of any of these terms. They are used interchangeably, as if synonymous — but they are not.

There are four possible ways of interpreting the term, “transferee/buyer.” Two can be immediately discounted; one is ATF’s interpretation, which is flawed; and the last appears to be the correct one.

The **first** possibility is that the forward slash is most commonly used as a word substitute for “or” to indicate a choice such as Male/Female (often mutually exclusive) between the two words. However, a mutually exclusive definition, whereby none of one classification can belong to the other, would mean that in no case can a transferee be a buyer, which is absurd on its face.

The **second** possibility is a Venn diagram, in which buyers and transferees are distinct

classifications, with some overlap. Some buyers may be transferees, and some transferees may be buyers. This too, is absurd, because the Form 4473 could not ask a question of a buyer who was not also the transferee — since the transferee is always the person present and completing the form.

The **third** possibility, which is ATF's position, is that buyers and transferees are in all cases synonyms — and where this is not the case, the law has been violated. This understanding is policy-driven, describing what the ATF desires the law to be, but is inconsistent with the ATF's own regulations and with other usages separating “transferee” and “buyer” on the Form 4473.

The **fourth** possibility is a type of Euler diagram, with a small circle completely inside a larger one, wherein all buyers must be transferees, but not all transferees must be buyers. This is the possibility that makes the most sense when considering the text and purpose of the statute.

While such imprecise usage of terminology might be permissible in ordinary discourse, the Form 4473 is a legal document, and serves as a basis for felony prosecutions for making a false statement. Indeed, at the end of Section A of the Form 4473 is a statement requiring the “transferee's/buyer's” signature that his “answers to Section A are true, correct, and complete” and that it is his “understanding that making any false oral or written statement ... with respect to this transaction, is a crime punishable as a felony under Federal law....”

In Question 11.a, the person filling out the form is warned that if he is not the “actual buyer,” then the FFL is not permitted to transfer the firearm to him. But since that question is posed to “the actual transferee/buyer,” not just the “actual buyer,” a person who is purchasing the firearm with another person’s money might reasonably infer that he is the “actual transferee,” not the “actual buyer.” Thus, he could reasonably determine that the warning to the “actual buyer” is inapplicable to him. Of course, the instructions on page 4 could dispel any such inference, but only if the forward slash is perceived as connoting that there is no real difference between an actual transferee and an actual buyer. Instead of introducing clarity, the instructions continue the ambiguity.

Although the instructions to Question 11.a. are designed to clarify who is an “actual transferee/buyer,” they may very well be a cause for confusion. Consider Petitioner Abramski, for example. The instructions state that an actual buyer/purchaser includes a person who buys a firearm as a gift for another. Although Abramski did not pay for the firearm for his uncle, he did make a gift to his uncle in the form of using a discount to which only Abramski was entitled, and a service in selecting, buying, and transporting the Glock 19 as a favor to an elderly relative. Almost certainly, Abramski was moved by a compassionate desire to help a family member, rather than by a commercial interest to make a profit or assist an ineligible person.

Finally, the instructions on the Form 4473 prohibit buying a firearm with another person’s money given to

the transferee **before** the sale, but permit buying one with one's own money. Here, Abramski clearly purchased the firearm with his own money, since he was reimbursed three days **after** he purchased the gun. The instructions make it appear that this distinction might matter.

In short, the instructions provided to the person completing the Form 4473 would invite various behaviors which ATF can selectively investigate and recommend for prosecution.⁶

C. The Form 4473 Distinction Between a Third Party Gift and a Third Party Purchase is Arbitrary and Capricious.

The purported rationale for the straw purchase doctrine is to keep guns out of the hands of persons who could not pass the NICS check, by preventing such persons from using another person to obtain the

⁶ Allowing the exercise of such discretionary power also puts at risk the Second Amendment right to keep and bear arms, including the right to keep and bear arms for self-defense secured in D.C. v. Heller, 554 U.S. 570 (2008). The right “to keep” is the right “[t]o retain; not to lose, and to have in custody.” *Id.* at 582. Implicit in a right to hold, to retain in one's power or possession, is the right to acquire a firearm by purchase or gift. Otherwise, the right to keep and bear arms would belong only to those persons who could manufacture a firearm by and for themselves. Under the straw purchase theory, many persons constitutionally entitled to keep and bear a firearm for self-defense would be denied that right, ostensibly to prevent other persons not entitled to that right from obtaining a firearm by third-party purchase. The conflict among the circuits is ripe, and the exercise of Second Amendment rights hangs in the balance.

firearm. See United States v. Nelson, 221 F.3d 1206, 1209-10 (11th Cir. 2000). An exception is made by ATF, however, for gifts. Thus, despite the purported rationale, question 11.a. of Form 4473 is both underinclusive and overinclusive. On one hand, in the case of a gift, the form does not inquire disclosure of the “actual transferee,” the donee. On the other hand, in case of a third party purchase, the form demands the disclosure of the “actual transferee,” the buyer. Yet, in some cases the donee would be ineligible to obtain a firearm in his own name, and the buyer would be eligible to obtain a firearm in his own name, such as was the case involving Abramski and his uncle. Had Abramski made the Glock 19 a gift, he would not be a convicted felon, even though the actual transferee in both cases was his elderly uncle. The distinction between a purchase and a gift, then, is wholly arbitrary in light of the rationale underlying the straw purchase theory.

Further evidence of the ATF’s arbitrary and capricious use of the straw purchase doctrine is the agency’s infamous Operation Fast and Furious. In that operation, the ATF intentionally facilitated straw purchases for over 2,000 firearms. Unlike Abramski’s purchase which went to a law abiding citizen, the firearms acquired through ATF’s straw purchases went to Mexican cartel members, who obviously were ineligible to possess firearms and, in fact, used ATF’s guns to commit countless murders.⁷ To this day, none

⁷ See R. Serrano, “Police chief killed with rifle lost in ATF gun-tracking program,” *L.A. Times*, July 5, 2013, www.latimes.com/news/nation/nationnow/la-na-nn-atf-fast-

of the federal agents, including ATF personnel, who facilitated those unlawful (and ultimately tragic) straw purchases have been charged with any crime.⁸ Yet, Abramski has been prosecuted for helping his elderly, law abiding uncle obtain a firearm for self-defense.

Because question 11.a. does not reflect a coherent policy of keeping firearms out of the hands of ineligible persons, and is arbitrary and capricious, it cannot form a legitimate legal basis for the charge against Abramski.

D. Congress Has Not Enacted Any Law Authorizing the Prevention of Straw Purchases of Firearms From Licensed Firearm Dealers.

As demonstrated by the Petition, ATF policy as expressed in its Form 4473 has become the operative law governing straw purchases in those Circuits that have followed the lead of the Sixth and Eleventh Circuits. The Court of Appeals for the Eleventh Circuit expressed this policy decision as follows: “If an ineligible buyer could simply use a ‘straw man’ or agent to obtain a firearm from a licensed dealer, the statutory scheme (prohibiting sales to ineligible

[furious-20130705,0,2692834.story](#).

⁸ See generally D. Wagner, “Family of slain border agent Brian Terry calls for prosecution of feds,” *The Arizona Republic*, Dec. 15, 2011, <http://www.azcentral.com/arizonarepublic/local/articles/2011/12/15/20111215family-slain-border-agent-calls-prosecution-feds.html>.

buyers) would be too easily defeated.” Nelson, 221 F.3d at 1209. As a justification for creating new law, the court claimed that: “Surely, Congress could not have intended to allow such easy evasion of a comprehensive scheme.” *Id.* at 1210.

But the intent of Congress is not found in the bosom of a court. Rather, it is found by a careful analysis of the language in the applicable statutes and regulations. See Lamie v. United States Trust, 540 U.S. 526, 534 (2004) (“The starting point in discerning congressional intent is the existing statutory text ... and not the predecessor statutes.”) Instead of examining the relevant statutory and regulatory texts, the court of appeals below based its decision on the text of the ATF Form that, unless the transferee is the “actual buyer” of the firearm, the sale is illegal. See Abramski II, 706 F.3d at 316.

Under the canon of statutory construction set forth in Lamie, the court’s starting point should have been the congressional language in the Brady Bill, codified in 18 U.S.C. § 922(t), subsection (1)(C) of which spells out the duty of the transferor to verify the identity of a single transferee by “examining a valid identification document,” such as a state-issued driver’s license with the transferee’s picture on it. ATF’s curious “straw purchase” doctrine impermissibly substitutes for this statutorily mandated identification process a duty to verify the identify of some other transferee who is not there, who the ATF Form 4473 dubs to be the “actual transferee/buyer.” In sum, the straw purchase doctrine 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, 540 U.S. at 538.

In its zeal, the ATF (aided by the court of appeals below) has filled in what is perceived 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 “gap,” however, was not the product of congressional oversight, but a reflection of the legislative process of cobbling together a bill that could pass both houses of Congress in an intensely fought battle over gun control on Capitol Hill. *See* R. Aborn, “The Battle Over the Brady Bill,” *supra*.

Firearms legislation in the United States is usually fraught with such controversy and, for that reason, filled with compromises. These compromises may look like inordinate gaps to judges, but they are oftentimes necessary to forge a winning coalition to obtain passage of a bill. Thus, courts must look at the text of the law that was actually enacted by Congress, rather than affirming the actions of unelected ATF bureaucrats who bypassed the regulatory process to add a new provision to the law by fiat. The intent of Congress cannot be replaced by judicial reasoning, and certainly not by the unfettered discretion of an executive agency.

E. Congress Has Thus Far Declined to Enact the ATF “Straw Purchase” Doctrine into Law.

After 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. See J. Steinhauer, “Senate Panel Approves two Gun Control Bills,” *The New York Times* (March 12, 2013). Democratic Senators Leahy and Durbin 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. The operative provision stated as follows:

Any person ... who knowingly purchases any firearm for, on behalf of, or with the intent to transfer it to any other person ... shall be fined under this title, and imprisoned not more than 20 years or both. [*Id.*, section 3 (adding new section 932(a) to Title 18, United States Code, Chapter 44).]

The only exception to this prohibition was any “firearm that is lawfully purchased by a person ... to be given as a bona fide gift to the recipient who provided no service or tangible thing of value to acquire the firearm.” *Id.*, section 932(b)(1).

Hailed by gun control advocates as a step in the right direction, the bill almost died in committee, until it was amended to prohibit only purchases where the purchaser knows or has reason to believe that the

person for whom the firearm was being purchased was not eligible to receive the firearm under federal or state law. See E. Donga, “Leahy’s ‘Straw Purchase’ Firearms Bill Clears Committee,” *Times Argus* (March 8, 2013). *The New York Times* incorrectly reported that Leahy’s initial straw purchase bill was already a crime, and that the original bill only ratcheted up the penalty. See J. Steinhauer’s “Senate Panel Approves Two Gun Control Bills,” *supra*. See also 18 U.S.C. § 922(d). But the first proposal was already a crime only because the ATF said so and the court permitted it. In reality, had the original Leahy/Durbin bill made it out of committee, it would have changed the law, by conforming the U.S. Code with ATF’s currently illegitimate “straw purchase” doctrine.⁹

As the United States District Court for the Northern District of Alabama observed in United States v. Dollar, 25 F. Supp. 2d 1320 (N.D. Ala. 1998), the ATF changed the law without legislation or regulation, simply by changing the Form 4473. Previously, the Form 4473 had contained a prohibition on transfer when an eligible person was buying a firearm for an ineligible person. However, in 1995 the ATF changed this language to include a prohibition on transfer even when one eligible person was buying it for another eligible person. See *id.*, 25 F. Supp. 2d at

⁹ The only difference between the proposed bill and the current ATF straw purchase policy would have been an additional exception for a purchase of a firearm “to be given to a bona fide winner of an organized raffle, contest, or auction....” S. 54, section 932(b)(2).

1324 n.6. Such a change in policy is plainly an illegitimate usurpation of legislative power.

CONCLUSION

It is true that it is possible to avoid the NICS check when a person purchases a firearm for a third person who is ineligible to own it. But Congress never gave the ATF the authority, in a NICS check, to question where a firearm might eventually wind up. Rather, the text of the statutes prohibit only the transfer of a firearm from an FFL to an ineligible person, and the receipt of a firearm by a person who knows he is ineligible. *See* 18 U.S.C. § 922(d)(1)-(9). It is neither for the courts nor for ATF to create crimes where Congress has not done so.

For the reasons stated herein and in the Petition, the Petition should be granted.

Respectfully submitted,

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