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 A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NRA CIVIL RIGHTS DEFENSE FUND IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives exceeded its statutory authority by criminalizing otherwise perfectly lawful conduct by simply amending a form – without notice and rulemaking – that firearms purchasers fill out when purchasing a firearm.

2. Whether the Bureau of Alcohol, Tobacco, Firearms and Explosives improperly adopted legislative rules redefining straw-purchases, federal firearm licensees transferring firearms to persons who are not "actual purchasers," and requiring transferees to certify that they are in fact actually buyers, all without notice and comment.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The NRA Civil Rights Defense Fund assists in the defense of the constitutional right to keep and bear arms by providing legal and financial assistance in cases relating to said right. It has a compelling interest in this case because BATFE prohibits lawful conduct.

SUMMARY OF ARGUMENT

In 1995, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATFE") added Question 11.a. to Form 4473, the effect of which was to criminalize the legal transfer of firearms between non-prohibited persons. There is no statutory authority for this prohibition and it violates the plain intent of Congress in passing the Gun Control Act of 1968 ("GCA").

[1] No counsel for any party authored this brief in whole or in part, nor made a financial contribution for the preparation or submission of this brief. Funding for printing and submission of this brief was provided solely by the Fund. This brief is filed with the written consent of all parties, reflected in letters filed by the parties with the clerk. Amicus complied with the conditions of those consents by providing timely notice of its intention to file this brief.

ARGUMENT

I. BATFE'S PROHIBITION OF THE TRANSFER BY A NON-PROHIBITED PERSON TO ANOTHER NON-PROHIBITED PERSON, IS NOT A PERMISSIBLE CONSTRUCTION OF THE GUN CONTROL ACT.

A. Congress' plain intent in enacting the GCA was to prevent the transfer of firearms to certain "prohibited" persons.

The GCA contains a list of persons who are prohibited from possessing firearms and ammunition and to whom it is unlawful for firearms or ammunition to be transferred or delivered to. 18 U.S.C. §§922(d) and (g). Specifically, §922(d) prohibits the transfer of firearms to "prohibited persons," such as convicted felons, certain misdemeanants, persons adjudicated mentally incompetent, persons involuntarily committed to mental institutions, etc. 18 U.S.C. §922(d).

> Congress . . . sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means. Thus, §922(d) prohibits a licensee from knowingly selling or otherwise disposing of any firearm . . . to the same categories of potentially irresponsible persons.

Barrett v. United States, 423 U.S. 212, 218 (1976). "Similarly, §922(g) prohibits the same categories of

potentially irresponsible persons" from possessing firearms. *Id*.

The GCA also prohibits making a "false or fictitious oral or written statement . . . intended or likely to deceive [a firearms dealer] with respect to any fact material to the lawfulness of the sale or other disposition of such firearm. . . ." 18 U.S.C. §922(a)(6). The GCA also criminalizes knowingly making "any false statement . . . with respect to the information required by this chapter to be kept in the records of a" federal firearms dealer. 18 U.S.C. §924(a)(1)(A).

Congress stated its intent in the GCA's preamble:

> Congress hereby declares that . . . it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms . . . and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes, or provide for the imposition by Federal regulation of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

Gun Control Act of 1968, §101, pmbl., 82 Stat. 1213 (1968).

In enacting the provisions which are the subject of this case, Congress was concerned with the availability of firearms "to those whose possession thereof was contrary to the public interest." *Huddleston v. United States*, 415 U.S. 814, 824 (1974). Congress passed the GCA because of a

> concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons. Its broadly stated principal purpose was 'to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.' S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).

Barrett, 423 U.S. at 220. "The principal purpose of the federal gun control legislation, therefore, was to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.' S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968)." *Huddleston*, 415 U.S. at 824.

Congressman Celler referenced "the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms out of the hands of such persons." 114 Cong. Rec. 13647 (1968).

Congress was concerned with "distinguishing between law-abiding citizens and those whose possession of weapons would be contrary to the public interest." *Huddleston*, 415 U.S. at 829. "The Act . . . thus contemplates interference with the ownership of weapons when those weapons fall into the hands of juveniles, criminals, drug addicts, and mental incompetents." *Id*.

Congress did not intend to *per se* prohibit the purchase of a firearm by an individual on behalf of another. Until 1995, even BATFE held the position that a purchase by a non-prohibited person for another non-prohibited person was lawful and did *not* constitute a straw-purchase. *See infra* Part I.C.

The GCA "pointedly and simply provides that it is unlawful for four categories of persons, including a convicted felon, 'to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.' The quoted language is without ambiguity. It is directed unrestrictedly at the felon's receipt of any firearm. . . ." *Barrett*, 423 U.S. at 216.

Congress' intent was *not* to prevent transfers of firearms between persons who are *both legally entitled to purchase the firearm*. Rather, Congress desired to prevent individuals from purchasing firearms on behalf of prohibited persons.

"Congress knew the significance and meaning of the language it employed" in this section of the GCA. *Id.* at 217. "[T]here is no ambiguity in the words of

§922(h), and there is no justification for indulging in uneasy statutory construction." *Id.* Effect should be given to Congress' intent.

B. Form 4473 prohibits and criminalizes conduct that Congress did not prohibit.

The Attorney General has the authority to "prescribe only such rules and regulations as are necessary to carry out the provisions of" the GCA. 18 U.S.C. §926(a).

Form 4473, which was not subject to notice and comment rulemaking, states that "[t]he information you provide will be used to determine whether you are prohibited under law from receiving a firearm." Bureau of Alcohol, Tobacco, Firearms and Explosives, ATF Form 4473 (5300.9), Part I (2012) (available at http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf).

Form 4473 has historically included a plethora of questions used to identify the transferee (including name, address, place of birth, height, weight, gender, birth date, SSN, and ethnicity) and questions used to determine whether or not the transferee was a prohibited person (listing the disqualifications set forth in §§922(d) and (g)).

However, in 1995 BATFE added a new question to Form 4473. *United States v. Dollar*, 25 F.Supp.2d 1320, 1325 n.6 (1998). Question number "11.a." now asks: "Are you the actual transferee/buyer of the firearm(s) listed on this form? **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." ATF Form 4473, at 1 (emphasis original).

Form 4473 informs: "you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself. . . ." *Id*. at 4. The form then provides an example of a prohibited transaction: "Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer "NO" to question 11.a. The licensee may not transfer the firearm to Mr. Jones." *Id*.

If an individual purchasing a firearm on behalf of another answers "no" to Question 11.a., the sale will be denied when the firearms dealer calls in to have the transfer approved. "If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." *Id.* at 1.

Thus, despite the fact that Congress never prohibited, nor intended to prohibit, the transfer of a firearm by one non-prohibited individual to another non-prohibited individual, Form 4473 prohibits such a lawful transfer.

Furthermore, if the transferee answers "yes" (indicating that he *is* the actual buyer) and then transfers the firearm to the other non-disqualified

individual, he may be charged: (1) with a felony for violating §922(a)(6), for making a false statement that is "material to the lawfulness of the sale," and/or (2) with a felony for violating §924(a)(1)(A), for knowingly making a false statement "with respect to the information required . . . to be kept" by a firearms dealer. 18 U.S.C. §922(a)(6) and §924(a)(1)(A).

This Court has stated that "the judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984). Further, the Administrative Procedure Act, 5 U.S.C. §500 et seq. ("APA") forbids federal agencies from promulgating regulations "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §706(2)(C).

The intent and result of Question 11.a. is to prevent a person who is legally entitled to purchase a firearm from purchasing a firearm on behalf of another person who is *also* legally entitled to purchase the firearm. This goes far beyond the intent of Congress to prevent transfers of firearms to persons who are prohibited under the GCA. Question 11.a. criminalizes transfers between individuals who are not prohibited persons.

C. BATFE is inconsistent and nonsensical in its application of this non-statutorily authorized prohibition.

"The term 'straw-purchase' is not defined in either the United States Code or the Code of Federal Regulations. It is in fact a judicially created doctrine. . . ." *Dollar*, 25 F.Supp.2d at 1322.

BATFE's current position is contrary to the position it previously took. The government long advised gun buyers that the straw-purchaser doctrine only applied when "the purchaser of record is merely being used to disguise the actual sale to another person, who could not personally make the purchase or is prohibited from receiving or possessing a firearm." *Id.* at 1324 (quoting Federal Regulations of Firearms and Ammunition, ATF P 5300.12 (1980)).

BATFE first defined "straw-purchaser" in its 1980 Industry Circular 79-10, stating that a purchase by a non-prohibited person for another non-prohibited person was lawful and did *not* constitute a straw-purchase. *Dollar*, 25 F.Supp.2d at 1323.

> The Gun Control Act of 1968 does *not* necessarily prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person. *It makes no difference that the dealer knows that the purchaser will later transfer the firearm to another person, so long as the ultimate recipient is not prohibited from receiving or possessing a firearm*. . . . What the Act forbids is the sale or delivery of a firearm to a person the

> licensee knows or has reason to believe is a person to whom a firearm may not be sold (e.g., a nonresident or a felon) or to a person the licensee knows will transfer the firearm to a person prohibited from receiving or possessing it.

Federal Regulations of Firearms and Ammunition, ATF P 5300.12, 24 (1980) (emphasis added).

BATFE's definition of "straw-purchase" was not changed in subsequent ATF publications in 1984 and 1988. Federal Firearms Regulations 1984-85; Federal Firearms Regulations 1988-89.

Without any basis in law, BATFE changed its position and made what it previously asserted was a perfectly lawful act, into a new prohibition.

In *Polk*, the Fifth Circuit noted the change in BATFE's "straw-purchase" warning in Form 4473. *United States v. Polk*, 118 F.3d 286, 295 n.7 (5th Cir. 1997). The Court noted that the August 1994 version of Form 4473 "significantly broadens the definition of 'straw-purchase,'" by dispensing, for the first time, the requirement that the ultimate recipient be a prohibited person. *Id*.

Furthermore, BATFE is inconsistent in the application of its new statutorily unauthorized prohibition. While Form 4473 now prohibits the transfer of firearms purchased by a non-prohibited person to another non-prohibited person in all cases, BATFE states that in some cases, such transfers are not prohibited.

Form 4473 states that "[i]f you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." ATF Form 4473, Question 11.a, at 1. However, in the Instructions portion of Form 4473, BATFE creates exceptions to this black letter rule:

> Question 11.a. Actual Transferee/Buyer: . . . you are the actual transferee/buyer if you are purchasing 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*. ACTUAL TRANSFEREE/BUYER EXAMPLES: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is NOT THE ACTUAL TRANSFEREE/BUYER of the firearm and must answer "NO" to question 11.a. The licensee may not transfer the firearm to Mr. Jones. *However, if Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer "YES" to question 11.a*. . . .

ATF Form 4473, "Notices, Instructions and Definitions," at 4 (emphasis added).

Thus, BATFE creates an exception to the prohibition for "gifts." Like the prohibition itself, this exception is not found anywhere in the GCA, and is created entirely by ATF Form 4473.

Furthermore, in the most recent edition of BATFE's *Federal Firearms Regulations Reference*

Guide ("*Reference Guide*"), BATFE states, in pertinent part, in the Questions and Answers section: "(B14) May a parent or guardian purchase firearms or ammunition as a gift for a juvenile (less than 18 years of age)? Yes." Federal Firearms Regulations Reference Guide, ATF P 5300.4, Sec. IV.C, Question B-14,179 (2005).

Thus, Mr. Brown can buy a firearm "with his own money to give to Mr. Black as a present," and a parent or guardian may purchase a firearm for a juvenile. However, in the instant case, purchasing a firearm for an uncle is a felony. There is no obvious difference why the law should treat these situations differently, and there certainly is no statutory basis to treat them differently.

D. The discretion afforded an administrative agency is not unlimited, and does not include prohibiting and criminalizing conduct that Congress specifically chose not to criminalize.

While an administrative agency is afforded discretion, this discretion is not unlimited. Rules and regulations that comply with APA's rule making requirements, including notice and comment, are afforded a high level of deference. The framework of deference set forth in *Chevron* applies to an agency interpretation contained in a properly promulgated regulation. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). However, even in these cases, the deference is not absolute. *See generally Chevron*.

Form 4473 was not promulgated in compliance with APA's rule making requirements. Agency actions that are not subject to APA's rule making requirements are afforded a lesser deference. *See Reno v. Koray*, 515 U.S. 50, 61 (1995). Such agency actions are "entitled [only] to some deference." *Reno*, 515 U.S. at 61 (citing *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157, (1991)). Agency interpretations, opinion letters, policy statements, agency manuals, enforcement guidelines, etc. do not warrant Chevron-style deference. *Christensen*, 529 U.S. at 587. They are "entitled to respect," but only to the extent that they are persuasive, which is not the case in relation to Question 11.a of Form 4473. *Id.*

For instance, Courts use a lower standard of deference when reviewing an administrative agency's interpretations. *See Vance v. Ball State Univ.*, No. 11-556, slip op. at 9, n.4 (2013); and *Univ. of Texas Southwestern Medical Center v. Nassar*, No. 12-484, slip op. at 20-21 (2013) (rejecting EEOC guidance manual's definitions).

Just because an agency believes that a statute should have included language to extend a 10-day trading suspension period, does not mean that the agency can do so. *SEC v. Sloan*, 436 U.S. 103 (1978). The suspension time "cannot be judicially or administratively extended simply by . . . arguments as to the need for a greater duration of suspension orders. . . . If extension of the summary suspension power is desirable, the proper source of that power is Congress."

Id. at 117. "[H]ad Congress intended the Commission to have the power to summarily suspend trading virtually indefinitely we expect that it could and would have authorized it more clearly than it did in" the statute. *Id*. at 122.

Likewise, if Congress had intended to prohibit transfer of firearms between two non-prohibited persons, it would have added such a prohibition to §§922(d) and (g), but it did not. The validity of agency actions are especially important in a criminal case, such as this, which exposes citizens to felony convictions. BATFE exceeded its statutory authority by prohibiting, via Form 4473, that which Congress did not prohibit.

E. This Court has previously refused to read exclusions into the GCA.

This Court has rejected attempts to read into the GCA exclusions, to prohibited transfers, that are not found in the plain language of the GCA. "Had Congress' desire been to exempt a transaction of this kind, it would have artfully worded the definition so as to exclude it." *Huddleston*, 415 U.S. at 822.

Neither should BATFE be allowed to add a new prohibition into the GCA that does not exist. "[T]here is nothing else in the statute that justifies [such an] imposition." *Id.* at 820.

F. The Fifth and Ninth Circuits support the conclusion that Form 4473 conflicts with the plain intent of Congress.

The Fifth and Ninth Circuits support the conclusion that Form 4473 effectively prohibits transactions that Congress did not intend to prohibit. *Polk*, 118 F.3d at 295 and *United States v. Moore*, 109 F.3d 1456, 1460 (9th Cir. 1997).

In *Polk*, Davidson purchased firearms on behalf of Polk. Polk was charged with making false statements to a licensee in the acquisition of a firearm. *Polk*, 118 F.3d at 291. Polk argued that the purchases "were not 'straw-purchases' because Polk had every right to purchase firearms (i.e., he was not an unlawful purchaser through Davidson)." *Id*. at 295. The Government argued that "Davidson's purchases were 'straw-purchase' transactions because, notwithstanding the fact that Polk could lawfully purchase firearms, Davidson falsely informed a federally licensed firearms dealer that he was the true purchaser. . . ." *Id*.

The Fifth Circuit held that "the Government's construction of §922(a)(6) sweeps too broadly. . . ." *Id*.

The Court admitted that it had previously held that straw-purchases may violate §922(a)(6). "Although §922(a)(6) on its face does not prohibit 'straw-purchases,' we have nonetheless held that such transactions violate §922(a)(6). *See*, *e.g.*, *United States v.*

Ortiz-Loya, 777 F.2d 973, 979 (5th Cir. 1985)." *Id*. at 295. However:

> It is clear to us – indeed, the plain language of the statute compels the conclusion – that §922(a)(6) criminalizes false statements that are intended to deceive federal firearms dealers with respect to facts material to the 'lawfulness of the sale' of firearms. . . . Thus, *if the true purchaser can lawfully purchase a firearm directly, §922(a)(6) liability* (under a 'straw-purchase' theory) *does not attach*.

Id. (emphasis added).

The Court also admitted that it had previously held that "the mere making of a false statement on ATF Form 4473 triggers §922(a)(6) liability." *Id*. n.8. Again the Court distinguished:

> However, these cases do not compel a different result here because *in each of those cases, the person signing the form was a convicted felon and lied about that fact*. In other words, the defendants' failure to state that they were convicted felons made the sale unlawful. *By contrast, in this case, it is undisputed that CI Davidson could have lawfully purchased weapons from a federally licensed firearms dealer*.

Id. (emphasis added).

In *Moore*, the Ninth Circuit also held the view that the "straw-purchase" of a firearm, where both individuals are not disqualified and could lawfully

have purchased the firearm, does not violate §922(a)(6). 109 F.3d at 1461. *See also Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981) (a "strawman" purchase occurs "when a lawful purchaser buys for an unlawful one").

The government argued that defendant Wiley engaged in a strawman purchase of a firearm on behalf of a prohibited minor. *Moore*, 109 F.3d at 1460. The issue was whether Wiley had purchased the firearm on behalf of the minor, Bobby Moore, or on behalf of Moore's mother, Mary Moore, who was not a prohibited minor.

The Court reasoned that the "strawman" doctrine was "nothing more than a long-standing construction of the relevant statutes," and that "a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables *the ineligible principal* to obtain a firearm." *Id*. at 1460-61 (emphasis added). "[S]ham or strawman purchases occur when a lawful purchaser buys for an unlawful one." *Id*. (quoting *Perri v. Department of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981) (internal citations omitted). *See also United States v. Lawrence*, 680 F.2d 1126, 1127-28 (6th Cir. 1982) (defendants who purchase firearms for ineligible foreign citizens violate section 922(a)(6)); *United States v. Ortiz-Loya*, 777 F.2d 973, 978 (5th Cir. 1985) (same)); *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994) (the essence of a straw-purchaser case is "'an eligible purchaser who is

acting as an agent, intermediary, or 'straw-purchaser' for someone' who is ineligible to purchase the firearm directly," quoting *Ortiz-Loya*, 777 F.2d at 979).

The Court quoted with approval the District Court's statement that "Wiley was an archetypical strawman. He was recruited and compensated for his role because Bobby could not buy the coveted firearm. . . ." *Moore*, 109 F.3d at 1462. Because Moore, as a juvenile, was a prohibited person under federal law, Wiley would be making the purchase on behalf of a prohibited person; and preventing purchases on behalf of prohibited persons *was* Congress' intent in passing the GCA. *Id.* at 1462-63.

Thus, while the Ninth Circuit affirmed the conviction, it holds that §922(a)(6) does not apply to straw-purchases where the ultimate recipient of the firearm is not prohibited.

The Fifth Circuit in *Polk* and the Ninth Circuit in *Moore, Perri, Lawrence*, and *Ortiz-Loya* all demonstrate that criminalizing such a transfer flies in the face of the Congressional intent of the GCA.

G. This case presents a five-circuit split.

The Fourth Circuit joined the Sixth and Eleventh Circuits in rejecting the reasoning of *Polk* and *Moore*. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012) and *United States v. Frazier*, 605 F.3d 1271, 1281 (11th Cir. 2010). There exists a split of authority on whether a felony is committed when a

non-prohibited person purchases a firearm for another non-prohibited person. This exposes well intentioned citizens, who are not prohibited persons, to the danger of felony prosecution, in some jurisdictions but not in others, for conduct that Congress did not criminalize. This Court has previously granted certiorari "to resolve an existing conflict among the circuits [in regard to] the prohibition against making false statements in connection with the acquisition of a firearm." *Huddleston*, 415 U.S. at 818-19.

II. THE ACTUAL BUYER POLICY WAS PROMULGATED WITHOUT NOTICE AND COMMENT IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT.

The actual buyer policy is a legislative rule. The APA requires that legislative rules be promulgated via notice and comment procedures. Because the actual buyer policy was not promulgated in accordance with those requirements, it is procedurally invalid.

A. The APA requires notice and comment.

The APA establishes procedures that agencies must use in enacting rules, 5 U.S.C. §553 (LEXIS through P.L. 113-18), which are defined as, "the whole or a part of an agency statement of general or particular applicability and future effect designed to

implement, interpret, or prescribe law or policy. . . ." *Id.* §551(4).

B. The actual buyer policy does not qualify for any exception to the notice and comment requirements.

Agencies may avoid notice and comment procedures for rules relating to specific subjects, none of which apply here, *id.* §553(a), or when the agency finds with good cause that, "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest." *Id.* §553(b)(B). An agency claiming the latter exception must publish its finding and a statement of its reasons in the rule. *Id.* BATFE has not done that here.

C. The actual buyer policy is not an interpretive rule, general statement of policy, or rule of organization or procedure.

Section 553 of the APA also excludes from the notice and comment requirement, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. §553(a)(A). These are "non-legislative rules." Rules that fall into none of the exceptions are subject to notice and comment rule making and are commonly referred to as legislative rules. Legislative rules promulgated without notice and comment are procedurally invalid.

As an initial matter, rules of "organization, procedure, or practice" are internal rules that do not

"substantially effect the rights of those over whom the agency exercises authority." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974). Clearly, the actual buyer policy – which regulates federal firearm licensees ("FFL") and transferees – is not this type of rule.

The *Attorney General's Manual on the Administrative Procedure Act* defines several key terms as follows:

> Substantive rules – rules, other than organizational or procedural under section 3(a)(1) and (2), issued by an agency pursuant to statutory authority and which implement the statute. . . . Such rules have the force and effect of law.
>
> Interpretative rules – rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. . . .
>
> General statements of policy – statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.

American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993), quoting *Attorney General's Manual on the Administrative Procedure Act* at 30 n.3 (1947). "The *Attorney General's Manual* is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA." *Pacific Gas & Electric Co. v. Federal Power Commission*, 506

F.2d 33, 38 n.17 (D.C. Cir. 1974). These definitions have been bolstered by judicial gloss.

Interpretative rules "merely restate or explain the preexisting legislative acts and intentions of Congress." Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1312, 1324 (1992) (citations omitted). In *American Mining Congress*, the D.C. Circuit considered Program Policy Letters ("PPLs") issued without notice and comment by the Mine Safety and Health Administration ("MSHA"). MSHA had previously enacted regulations requiring affected parties to report "diagnoses" of certain occupational illnesses. The disputed PPLs established standards for determining when chest x-rays constituted "diagnoses." 995 F.2d at 1107-1108. The *American Mining Congress* court laid out the following test for determining whether a rule is legislative and is therefore subject to notice and comment requirements:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or

> (4) whether the rule effectively amends a prior legislative rule.

Id. at 1112. An affirmative answer to any of these questions indicates a legislative rule. This approach has been favorably cited or outright followed, in whole or in part, by numerous federal appellate courts. *See*, *e.g.*, *Sweet v. Sheahan*, 235 F.3d 80, 91 (2d Cir. 2000); *Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary*, 93 F.3d 103, 113 (3d Cir. 1996); *West Virginia v. Thompson*, 475 F.3d 204, 211 n.2 (4th Cir. 2007); *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1088 (9th Cir. 2003); *Mission Group Kan. v. Riley*, 146 F.3d 775, 784 (10th Cir. 1998).

American Mining Congress concluded that the PPLs were merely interpretive rules. The MSHA had neither published them in the Code of Federal Regulations ("CFR"), nor invoked its legislative authority in issuing them. The PPLs merely required reporting of certain x-ray results that were "surely equivalent, in normal terminology, to a diagnosis"; thus the PPLs neither repudiated nor were irreconcilable with the prior regulation. 995 F.2d at 1113. The Court concluded that, even absent the PPLs, there would have been sufficient legislative basis for agency action by virtue of the prior regulation.

American Mining Congress distinguished earlier cases that inquired whether a disputed rule had "binding effect," explaining that this analysis was

useful for determining whether a rule was an exempt general policy statement, but not whether it was an interpretive rule. *Id.* at 1111.

An important case in this vein was *Pacific Gas & Electric Co. v. Federal Power Commission*, 506 F.2d 33 (D.C. Cir. 1974), which involved a Policy Statement, issued by the Federal Power Commission without notice and comment, establishing priorities for pipeline owners in delivering natural gas during shortages. The Policy declared the Commission's intent to adhere to the priority schedule except in cases of individualized showings by pipeline companies that a different plan would be "more in the public interest." *Id*. at 36. Holding that the Policy Statement was a general statement of policy, the Court reasoned that a substantive rule "establishes a standard of conduct which has the force of law" and generally cannot be challenged in subsequent administrative proceedings. *Id*. at 38. In contrast, a general policy statement merely "announces the agency's tentative intentions for the future. [And w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id*. Since the Policy Statement disclaimed any intent to establish a binding rule, expressed an intent to permit parties to challenge the underlying policy, and "expressly envision[ed] further proceedings," the court held that it was a statement of general policy and not a substantive rule. *Id*. at 40.

The Court applied a similar, but retrospective, test in *United States Telephone Association v. Federal*

Communications Commission, 28 F.3d 1232 (D.C. Cir. 1994), in which the D.C. Circuit set aside a schedule of penalties for Communications Act violations. The FCC argued that the schedule was a statement of policy. The court reasoned that, "the distinction between [substantive rules and statements of general policy] . . . turns on an agency's intention to bind itself to a particular legal policy position." *Id*. at 1234. Relying heavily on the fact that the schedule had been applied "in over 300 cases and only in 8 does the Commission even claim that it departed from the schedule," the court concluded that the FCC intended to be bound by the penalty schedule. *Id.*

Applying these tests to BATFE's actual buyer policy compels the conclusion that that policy is a legislative rule.

1. The actual buyer policy is not an interpretive rule.

By the plain language of the *Attorney General's Manual*, the actual buyer policy cannot be an interpretive rule. Neither question 11.a of Form 4473, the associated notices or instructions, nor the statements published in the *Reference Guide* purport to "restate" the language of any statute or rule. None of these reference a specific statute or regulation. The terms "straw-purchase" and "actual buyer" or variants thereof do not appear in the GCA or in the CFR.

2. The actual buyer policy is not a general statement of policy; it establishes a categorical rule.

Nor is the actual buyer policy a general statement of policy. Looking to the *Attorney General's Manual*, it is noteworthy that no statute grants BATFE any generalized "discretionary power" to prohibit previously lawful firearm transfers. *Pacific Gas & Electric* compels the same conclusion. No published expression of the actual buyer policy, whether in the *Reference Guide* or on Form 4473, evinces an intent by BATFE to permit case-by-case challenges to the policy in subsequent administrative proceedings. *Pac. Gas & Elec.*, 506 F.2d at 40. The policy is no mere "statement of tentative intentions for the future." *Id.* at 38. Nothing in the policy suggests that an FFL who knowingly transfers a firearm to a person not the actual buyer could defend his license in a revocation proceeding by demonstrating that the ultimate recipient was not a prohibited person, and that the transferee and the ultimate recipient observed all requirements for lawful transfer of possession. Nothing in the policy appears to "envision further proceedings" at which its underlying basis may be challenged. *Id.* at 40. The actual buyer policy simply announces categorical rules, and categorical prohibitions based upon those rules. As the instant case demonstrates, FFLs and transferees completing Form 4473 must adhere to those rules without exception.

3. The actual buyer policy is a legislative rule, without which there would be no adequate legislative basis for enforcement.

Under *American Mining Congress*, the actual buyer policy is a legislative rule because "in its absence there would not be an adequate legislative basis," 995 F.2d 1112, for BATFE to prohibit an FFL from transferring a firearm to a middleman for ultimate delivery to a non-prohibited person, or for redefining straw-purchases to include transfers to persons entitled to receive and possess firearms. Nothing in the GCA or CFR inherently criminalizes those activities. Indeed, as discussed *supra*, at 10-11, for many years BATFE publicly conceded that the GCA does not prohibit that conduct. The GCA has not changed in any relevant respect in the intervening years. Nor has BATFE published any regulation in the CFR that plausibly can be read to prohibit the conduct reached by the actual buyer policy.

BATFE obviously knew when it implemented the actual buyer policy that it lacked "adequate legislative basis" for enforcement. Had BATFE believed it had such a basis, it could simply have repudiated Industry Circular 79-10 and begun enforcing the new rules. It did not. Only by adding the actual buyer certification and the accompanying instructions to Form 4473 was BATFE able to bootstrap previously lawful answers on the form into false statements. Those additions were part of the actual buyer policy itself. Without them there was no "adequate legislative basis" for enforcing the policy.

The actual buyer policy is procedurally invalid. It should have been promulgated by notice and comment rule making.

CONCLUSION

BATFE's Question 11.a Form 4473 exceeds statutory authority because it criminalizes the legal transfer of firearms between non-prohibited persons. There is no statutory authority for this prohibition and it violates the plain intent of Congress. Even if this Court concludes that the actual buyer policy is within BATFE's discretion, the policy is procedurally invalid because it was not issued through notice and comment rule making.

Respectfully submitted,

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