

No. 12-1493

**In The
Supreme Court of the United States**

BRUCE JAMES ABRAMSKI, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT*

**BRIEF OF AMICUS CURIAE CITY OF NEW
YORK IN SUPPORT OF RESPONDENT**

MICHAEL A. CARDOZO
CORPORATION COUNSEL OF THE CITY OF NEW YORK
100 Church Street,
New York, New York 10007
(212) 356-2032
ERIC PROSHANSKY*
RICHARD J. COSTA
MELANIE C.T. ASH
**Counsel of Record*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE.....	1
ARGUMENT	2
I. Abramski’s Virginia Gun Purchase as an Agent for his Out-of-State Uncle Violates Sections 922(a)(6) and 924(a)(1)(A) Regardless of the Uncle’s Status as a Principal Eligible to Purchase a Gun in Pennsylvania	10
II. This Court Should Dismiss the Petition as Improvidently Granted Because there is No Circuit Split on the Question of Whether Petitioner Abramski’s Conviction Can Stand.....	25
CONCLUSION.....	29

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>City of New York v. A-1 Jewelry & Pawn, et al.</i> , 06 CV 2233 (JBW)(CLP), August 29, 2007, Default judgment granted, 644 F. Supp. 2d 201 (E.D.N.Y. 2009), <i>aff'd</i> 645 F.3d 114 (2d Cir. 2010).....	3, 7
<i>City of New York v. Bob Moates Sports Shop, Inc.</i> , 06 CV 6504 (JBW)(CLP) (E.D.N.Y.)	7
<i>In re Sealed Case</i> , 352 F.3d 409 (D.C. Cir. 2003).....	19
<i>State v. Moore</i> , 906 P.2d 150 (Idaho Ct. App. 1995)	27
<i>The Monrosa v. Carbon Black Export</i> , 359 U.S. 180 (1959).....	28
<i>United States v. Abfalter</i> , 340 F.3d 646 (8th Cir. 2003).....	19
<i>United States v. Abramski</i> , 706 F.3d 307 (4th Cir. 2013).....	20, 28
<i>United States v. Belt</i> , 250 Fed. Appx. 957 (11th Cir. 2007)	17, 18
<i>United States v. Blake</i> , 394 F.3d 1089 (8th Cir. 2005).....	19

<i>United States v. Crandall</i> , 453 F.2d 1216 (1st Cir. 1972).....	16
<i>United States v. Dollar</i> , 25 F. Supp. 2d 1320 (N.D. Ala 1998).....	12
<i>United States v. Frazier</i> , 605 F.3d 1271 (11th Cir. 2010).....	16, 20, 21, 28
<i>United States v. Hawkins</i> , 794 F.2d 589 (11th Cir. 1986).....	14
<i>United States v. Howell</i> , 37 F.3d 1197 (7th Cir. 1994).....	10, 19
<i>United States v. Lawrence</i> , 680 F.2d 1126 (6th Cir. 1982).....	18, 24
<i>United States v. Moore</i> , 109 F.3d 1456 (9th Cir. 1997).....	12, 18, 19, 25, 26, 27
<i>United States v. Morales</i> , 687 F.3d 697 (6th Cir. 2012).....	16, 20, 21, 28
<i>United States v. Nelson</i> , 221 F.3d 1206 (11th Cir.), <i>cert. denied</i> , 531 U.S. 951 (2000).....	14, 17, 19, 23, 24
<i>United States v. Ortiz</i> , 318 F.3d 1030 (11th Cir. 2003).....	14, 18, 21
<i>United States v. Ortiz-Loya</i> , 777 F.2d 973, 979 (5th Cir. 1985).....	13, 20, 26

<i>United States v. Phanphil</i> , 57 M.J. 6 (C.A.A.F. 2002)	16, 19
<i>United States v. Polk</i> , 118 F.3d 286 (5th Cir. 1997) 13, 14, 21, 25, 26, 27	
<i>United States v. Soto</i> , CR. NO. 06-328-2, 2007 U.S. Dist. LEXIS 17070 (E.D. Pa. Mar. 8, 2007)	19, 24
<i>United States v. Sullivan</i> , 459 F.2d 993 (8th Cir. 1972).....	13
<i>United States v. White</i> , 451 F.2d 696 (5th Cir.1971)	24

<u>Statutes</u>	<u>Pages</u>
18 U.S.C. §922(a)(6)	2, 8, 9, 12, 13, 14, 15, 16, 17, 18, 20, 24, 25, 26, 27, 28
18 U.S.C. §922(b)(1)	27
18 U.S.C. §922(b)(5)	22, 23
18 U.S.C. §922(s)(3).....	22, 23
18 U.S.C. § 923(g)	22
18 U.S.C. §§ 923(g)(1)(A).....	23
18 U.S.C. §924(a)(1)(A)	2, 8, 9, 12, 13, 14, 17, 20, 22, 23, 24, 25, 28

<u>Other Authorities</u>	<u>Pages</u>
38 RCNY §3-01 - §5-33.....	2, 3
Bureau of Alcohol, Tobacco, Firearms and Explosives, Federal Firearms Regulations Reference Guide (2005)	12
Department of the Treasury, Bureau of Alcohol, Tobacco, Firearms and Explosives, <i>Following the Gun: Enforcing Federal Law Against Firearms Traffickers</i> (2000)	5
Mayors Against Illegal Guns, Coalition Principles	5
Mayors Against Illegal Guns, <i>Inside Straw Purchasing: How Criminals Get Guns Illegally</i> (April 2008)	5, 6
National Shooting Sports Foundation, <i>Don't Lie For the Other Guy, The Firearm Industry's Anti-Straw Purchasing Program</i>	10, 11
United States Attorney's Office, <i>Firearms Trafficking 101 Or Where Do Crime Guns Come From?</i> United States Attorney's Bulletin January 2002	5

Webster, Daniel W. and Vernick Jon S.,
Spurring Responsible Firearms Sales
Practices Through Litigation, Ch. 9 in
Webster and Vernick, Eds, *Reducing Gun
Violence in America* (2013) 7

INTEREST OF AMICUS CURIAE¹

Amicus Curiae the City of New York (the “City”), is a municipal corporation existing by and under the laws of the State of New York. The City seeks *amicus* status in this case to stress its paramount interest in the continued prohibition of straw purchases of firearms under Federal law, and the preservation of straw purchase prosecutions as a viable law enforcement measure to address the scourge of gun violence that continues to plague not only large cities like New York City but the rest of the nation. The City has an especially strong interest in ensuring the accuracy of records identifying the actual purchasers of firearms, assuring the ability of law enforcement to investigate and interdict the gun-trafficking operations by which the majority of illegally-possessed handguns are transported into New York City, at great risk to its citizens and law enforcement professionals alike.

The Federal statutory requirement that firearms purchasers certify that they are the actual purchasers, and that federally-licensed gun dealers refuse to sell guns to anyone other than the actual gun purchaser has a direct impact on the safety of citizens of New York City, reducing the likelihood that illegal handguns will be used and recovered in

¹ Petitioner has granted blanket consent to *amici curiae*, and Respondent’s consent was obtained.

connection with crimes in the City. Records of federally-licensed gun dealers that document the true identity of gun purchasers permit law enforcement such as the New York Police Department (the “NYPD”) and its NYPD-ATF Joint Firearms Taskforce to trace rapidly the path by which illegal handguns recovered in New York City found their way into the City, a crucial law enforcement tool in the investigation and prevention of gun violence that affects New York City and endangers its citizens.

ARGUMENT

The prohibition of straw purchases, through Sections 922(a)(6) and 924(a)(1)(A), is critical to law enforcement efforts to reduce and/or interdict the occurrence of firearms trafficking.

New York City is the safest large City in the nation, in part because its citizens have chosen to impose strict limits on who may possess firearms within its borders by enacting laws intended to, *inter alia*, keep guns out of the hands of juveniles and criminals. Those laws include prohibitions on the possession of firearms without a license, and on the possession of firearms by felons, persons with mental disorders, and persons under the age of 21; and requirements that prior written authorization be obtained by licensees from the NYPD before purchasing guns, and that the NYPD be notified by an owner when selling a gun. 38 RCNY §3-01 to 38

RCNY §5-33. Notwithstanding those efforts, during the 11 year period from 1995 to 2005, the NYPD's ballistics analysis unit processed more than 70,000 handguns that had been recovered by the NYPD or other law enforcement agencies. Virtually all of these firearms were recovered from individuals who were prohibited from possessing guns.²

Firearms are by far the preferred method of homicide in New York City, responsible for approximately 60% of the homicides committed each year. From 1995 to 2004, approximately 5,400 people died in New York City as a result of gun violence. In addition, tens of thousands of rapes, robberies and assaults were committed with guns in New York City during that time. Virtually every firearm involved in a violent crime was wielded by an illegal possessor. Plainly, gun violence in New York City is the result of the thousands of guns possessed by those for whom gun ownership is illegal by reason of criminal history, mental infirmity, age and, especially, lack of a license. Illegally possessed firearms are most commonly trafficked into New York City from distant states

² See Amended Complaint in *City of New York v. A-1 Jewelry & Pawn, et al.*, 06 CV 2233 (JBW)(CLP), filed August 29, 2007 at ¶¶ 47-50. (Default judgment granted, 644 F. Supp. 2d 201 (E.D.N.Y. 2009), *aff'd* 645 F.3d 114 (2d Cir. 2010) (affirming default judgment while vacating injunctions and remanding for further proceedings)).

after being obtained from federally-licensed gun dealers (“Federal Firearms Licensees” or “FFLs”). Frequently, the guns are obtained through “straw purchases,” in which a person legally permitted to purchase a firearm falsely asserts that they are the actual purchaser for the transaction in question, when in fact the gun is purchased for someone who is ineligible to purchase, or while eligible, merely wishes to remain an anonymous buyer.³

One law enforcement study showed that more than 50% of the firearms subject to firearm trafficking investigations had been acquired in straw purchases:

Straw purchases are one of the most frequent methods used to divert firearms out of lawful commerce, where they are a heavily regulated commodity, and onto the street, where they are available to anyone. Convicted felons will simply use a friend, a family member or a girlfriend to buy a gun for them. The felon provides the money for the gun, selects the gun, and directs the purchase. The straw purchaser just fills out all of the required paperwork, posing as the buyer.

³ *Id.*

Firearms Trafficking 101 Or Where Do Crime Guns Come From? United States Attorneys bulletin, January 2002 at 7. See also, Department of the Treasury, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Following the Gun: Enforcing Federal Law Against Firearms Traffickers*, at 11, 18 (2000) (“*Following the Gun*”) (available at <https://www.atf.gov/sites/default/files/assets/Firearms/chap1.pdf>)(concluding that between July 1996 to December 1998, 709 out of 1,530 (46%) gun trafficking investigations involved illegal straw purchasing.

A more recent study of straw purchasing was undertaken by Mayors Against Illegal Guns (“MAIG”),⁴ a coalition of more than 1,000 of the Nation’s mayors formed by New York City Mayor Michael R. Bloomberg and Boston Mayor Thomas M. Menino in 2006. See Mayors Against Illegal Guns, *Inside Straw Purchasing: How Criminals*

⁴ MAIG seeks to fight illegal possession and distribution of firearms in a manner consistent with the right of Americans to own guns. Mayors joining the coalition are asked to pledge to support several principles consistent with that goal, including: increased punishment for illegal possession, use and trafficking of firearms; holding FFLs accountable for permitting straw purchasing; and opposing restrictions on the use of firearms tracing data by ATF and other federal, state and local authorities. See Mayor’s Against Illegal Guns, *Coalition Principles* (available at <http://mayorsagainstillegalguns.org/html/about/principles.html>).

Get Guns Illegally (April 2008) (“*Inside Straw Purchasing*”). MAIG’s investigation of straw purchasing included a review of 1,000 firearms trafficking prosecutions, involving 14,000 firearms in 4,000 separate transactions; reports issued by ATF, the Federal Bureau of Investigation, the Department of Justice and the Centers for Disease Control and Prevention; interviews of 100 witnesses; expert studies; and other materials. *Inside Straw Purchasing*, at 6. *Inside Straw Purchasing* details the results of MAIG’s investigation. The investigators concluded, *inter alia*, that traffickers repeatedly returned to stores with a reputation for allowing straw purchases, that straw purchasers were paid for their services in drugs and money, that FFLs often sell to straw purchasers who have no knowledge about the guns they purchase, that the “principal” often accompanies the straw purchaser into the FFL to purchase the gun, that multiple guns were purchased at each sale, that salespersons often allow straw purchases to occur despite suspicions, that trafficking across state lines is common, and that traffickers make large profits on the guns they acquire through straw purchases. *Id.* at 7-19.

Rigorous scientific analysis has shown that implementation of simple measures to prevent straw purchases will reduce the number of firearms diverted into the illegal market. For example, a recent study assessed the effect of lawsuits brought by New York City against 27 FFLs who had sold a

disproportionate number of guns later recovered at New York City crime scenes,⁵ on the subsequent recovery of guns sold by those FFLs recovered in crimes. The bringing of the lawsuits -- and their resolution by consent decrees requiring FFL education and monitoring by a court-appointed Special Master -- reduced the odds that a gun sold by those FFLs would be recovered by the NYPD in New York City by **84.2%**. The findings were “consistent with a growing body of research evidence which indicates that gun dealers’ sales practices affect the probability of guns getting to criminals, and that policies designed to hold gun sellers accountable can curtail the diversion of guns to criminals.” Daniel W. Webster and Jon S. Vernick, “Spurring Responsible Firearms Sales Practices Through Litigation,” Ch. 9 in Webster and Vernick, Eds, *Reducing Gun Violence in America* at p. 130.

The New York City litigation result described by the Webster and Vernick study confirms the wisdom of ATF’s recommendation that an FFL confronted with indicators of a potential straw purchase should probe the parties to ensure that the person buying the firearm is the actual purchaser. To that end, a videotape presentation by an ATF agent instructs retailers that they can

⁵ See *City of New York v. A-1 Jewelry & Pawn, Inc.*, 06 CV 2233 (E.D.N.Y.); *City of New York v. Bob Moates Sports Shop, Inc.*, 06 CV 6504 (E.D.N.Y.).

prevent straw purchases, and the consequent diversion of firearms into the illegal market, by adhering to an important principle: if one person fills out the paperwork to purchase a firearm, that same person should pay for the firearm. National Shooting Sports Foundation videotape, *Identifying and Deterring Straw Purchasers*.

In the face of indisputable evidence that the prevention of straw purchasing by identifying the actual purchaser of a firearm is the key to preventing the illegal trafficking of guns, Petitioner and several *amici curiae* supporting its appeal urge this Court to invalidate the only mechanism available to address the diversion of handguns into the illegal market by straw purchasers -- prosecutions under Sections 922(a)(6) and 924(a)(1)(A). Under the guise of challenging the application of the “straw purchase doctrine” to circumstances where the ultimate purchaser of the handgun is legally eligible to purchase a handgun, Petitioner and the *amici curiae* seek to overturn the doctrine writ large. *See* Petitioner’s Brief, pp. 23-31 (arguing that the “legal fiction” of the “court-created straw purchaser doctrine is an impermissible judicially created expansion of the unambiguous text of § 922(a)(6) which this Court should disapprove”); Brief *Amicus Curiae* of Congressman Steve Stockman, et al., pp. 25-31 (arguing that the ATF’s “unilateral” straw purchase doctrine prohibiting firearm transfers involving eligible third parties encroaches on

Congress' legislative powers and misrepresents that it is illegal for any person to buy a firearm on behalf of another person eligible to own it); *Brief Amicus Curiae of NRA Civil Rights Defense Fund*, pp. 7-32 (seeking to invalidate the "actual buyer" requirement imposed by question 11.a of Form 4473).

As the brief of the United States makes clear, such an interpretation would entirely undermine the purposes of the Gun Control Act. *See* United States' Brief at p. 17 (commenting that "Petitioner's ... reading, under which [the statutory requirements] would be completely satisfied by the identity of a straw purchaser with only ephemeral control of the firearm, would render them utterly ineffectual in carrying out Congress's obvious purpose in enacting them, *i.e.*, to ensure that those coming into possession of firearms from licensed dealers are eligible to do so and that their identities are known.").

Petitioner's position also goes far beyond the analysis that is necessary or appropriate to address the narrow issue properly before this Court. The City urges this Court to uphold existing jurisprudence which takes a common sense approach to the prohibition of straw purchases as violations of Sections 922(a)(6) and 924(a)(1)(A). As set forth *infra* Point I.A, straw purchases prosecuted as violations of Sections 922(a)(6) and 924(a)(1)(A) involve nothing more than a legitimate

statutory interpretation of the Gun Control Act. Even where the “straw” purchases a firearm for an Eligible Principal, as set forth infra Point I.B, there is nothing impermissible about such prosecutions. Such prosecutions, which limit the number of firearms illegally trafficked to New York City and reduce gun violence and bloodshed on City streets, are a legitimate law enforcement tool that ought to be upheld by this Court.

I. Abramski’s Virginia Gun Purchase as an Agent for his Out-of-State Uncle Violates Sections 922(a)(6) and 924(a)(1)(A) Regardless of the Uncle’s Status as a Principal Eligible to Purchase a Gun in Pennsylvania

A straw purchase is nothing more than a purchase in which a person who is eligible to purchase a firearm under Federal, State and applicable local law (the “Straw”), acts as an agent or intermediary for another, the principal, who is either ineligible to purchase a firearm (hereinafter the “Ineligible Principal”) or eligible to purchase a firearm, but desires anonymity (hereinafter, the “Eligible Principal”) (a “Straw Purchase”). *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994) (describing typical Straw Purchase involving an Ineligible Principal); National Shooting Sports Foundation, *Don’t Lie for the Other Guy, The Firearm Industry’s Anti-Straw Purchasing Program* (pamphlet from firearm industry trade

group, in partnership with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), defining straw purchase to include both Ineligible and Eligible Principals) (the “Don’t Lie Pamphlet,” available at <http://www.nssf.org/factsheets/PDF/strawPurchase.pdf>).⁶

⁶ The *Don’t Lie* Pamphlet defines a straw purchase, as follows: “A straw purchase occurs when the actual buyer of a firearm is unable to pass the required federal background check, or does not want his or her full name associated with the purchase, and has someone else who can pass the required background check purchase the firearm for him or her.” ATF agrees with this interpretation:

In some instances, a straw purchaser is used because the actual purchaser is prohibited from acquiring the firearm. That is to say, the actual purchaser is a felon or is within one of the other prohibited categories of persons who may not lawfully acquire firearms or is a resident of a State other than that in which the licensee's business premises is located. Because of his or her disability, the person uses a straw purchaser who is not prohibited from purchasing a firearm from the licensee. *In other instances, neither the straw purchaser nor the actual purchaser is prohibited from acquiring the firearm.*

In both instances, the straw purchaser violates Federal law by making false statements on Form 4473 to the licensee with respect to the identity of the actual purchaser of the firearm, as well as the actual purchaser’s residence address and date of birth. The actual purchaser who utilized the straw purchaser

Straw purchase transactions are a federal crime, not because the purchase violates a criminal statute expressly criminalizing the conduct *in haec verba*, but because the conduct connected to the purchase violates the plain language of two federal statutes that prohibit misrepresentations to FFLs: 18 U.S.C. §922(a)(6) (prohibiting false statements with respect to any fact material to the lawfulness of the sale of a firearm) and 18 U.S.C. §924(a)(1)(A) (prohibiting a false statement with respect to information required to be kept by an FFL). Although “[t]he term ‘straw purchase’ is not defined in either the United States Code or the Code of Federal Regulations[,] a Straw Purchase is simply ‘a judicially created doctrine, a construction of one of the provisions of the Gun Control Act of 1968, 18 U.S.C. § 922(a)(6).” *United States v. Dollar*, 25 F. Supp. 2d 1320 (N.D. Ala 1998) (citing *United States v. Moore*, 109 F.3d 1456, 1460-1461 (9th Cir. 1997) (“‘straw man doctrine,’ as it is referred to is nothing more than a long-standing construction of the relevant statutes”)).

to acquire a firearm has unlawfully aided and abetted or caused the making of the false statements.

Bureau of Alcohol, Tobacco, Firearms and Explosives, Federal Firearms Regulations Reference Guide, at 165 (2005) (emphases added) (available at <http://www.atf.gov/files/publications/download/p/atf-p-5300-4.pdf>).

The gravamen of a violation of either Sections 922(a)(6) or 924(a)(1)(A) in a Straw Purchase is the making of false statements to an FFL. Although neither Sections 922(a)(6) nor 924(a)(1)(A) on their face prohibit “straw purchases,” it is entirely settled that such transactions violate both provisions. “It is clear . . . 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.” *United States v. Polk*, 118 F.3d 286, 295 (5th Cir. 1997); *United States v. Ortiz-Loya*, 777 F.2d 973, 979 (5th Cir. 1985) (holding in prosecution under 18 U.S.C. §922(a)(6) that in signing ATF form the straw purchaser made a misrepresentation of material fact).

Straws can be prosecuted under either statute, although Section 922 prosecutions appear to predominate. Prosecutions can proceed simultaneously under both Sections 922 and 924 for the same transaction, because each section requires proof of an element that the other does not. The same conduct can thus produce two separate statutory violations. *United States v. Sullivan*, 459 F.2d 993, 994 (8th Cir. 1972). Section 922 requires proof that the defendant made a false statement material to the lawfulness of the sale of firearms. *Polk*, 118 F.3d at 295 (“[T]he 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.”). By contrast, Section 924 only requires proof of a false statement *related to information required by law to be kept in the records of a federally-licensed firearms dealer*. This information need not necessarily be material to the lawfulness of the sale, and Section 924 does not require proof of materiality. *United States v. Hawkins*, 794 F.2d 589, 591 (11th Cir. 1986).

To sustain a conviction under Section 922, the government must prove beyond a reasonable doubt that: (1) the defendant knowingly made; (2) a false or fictitious written statement in connection with the purchase of firearms; (3) intended to deceive or likely to deceive a licensed firearms dealer; (4) and the false statement was a fact material to the lawfulness of the sale or disposition of the firearm. *United States v. Ortiz*, 318 F.3d 1030, 1036 (11th Cir. 2003); *United States v. Nelson*, 221 F.3d 1206, 1210 n.6 (11th Cir.), *cert. denied*, 531 U.S. 951 (2000); *Polk*, 118 F.3d at 294-95.

A. Straw Purchase Charges Prosecuted as Violations of Sections 922(a)(6) and 924(a)(1)(A) Involve Nothing More than a Legitimate Statutory Interpretation of the Gun Control Act

ATF Form 4473 is the foundation on which every Straw Purchase prosecution must rest. Form 4473, which a firearm purchaser must fill out when purchasing a firearm, consists in large part of a series of questions intended to identify the buyer (name, address) and test the qualifications of the purchaser, *e.g.*, the purchaser's age, mental history and criminal history.⁷

For purposes of Section 922(a)(6), Form 4473 solicits the "facts material to the lawfulness of the sale of firearms," and a false representation on Form 4473 therefore violates Section 922(a)(6), if the fact is "material to the lawfulness of the sale of firearms." For purposes of Section 924, Form 4473 solicits "the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter." Providing false facts on Form 4473 therefore violates Section 924, because Form 4473 must be kept in the records of the dealer selling the firearm.

Question 11 and its subparts on Form 4473 requests information necessary for an FFL to determine whether a person is legally entitled to purchase a firearm consistent with federal law. In particular, Question 11.a focuses on who is the "actual buyer," so that a firearms purchaser cannot

⁷ Form 4473 is available on ATF's website. See <http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf>.

simply avoid the federal eligibility requirements by hiding behind an agent. Question 11.a 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. (See Instructions for Question 11.a)

(Emphasis in original.) The Instructions for Question 11.a provide, “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”

Thus, because the identity of the actual buyer is “a fact material to the lawfulness of the sale” of a firearm under Section 922, a false representation concerning the identity of the “actual buyer,” which is inherent in a Straw Purchase, violates that section. *See, e.g., United States v. Morales*, 687 F.3d 697, 700-01 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271, 1279 (11th Cir. 2010); *United States v. Phanphil*, 57 M.J. 6, 8 (C.A.A.F. 2002); *United States v. Crandall*, 453 F.2d 1216, 1216-17 (1st Cir. 1972). Section 924 similarly applies to straw purchases because a Straw who purchases on behalf of a Principal

misrepresents him or herself to be the actual buyer of the firearm. *United States v. Nelson*, 221 F.3d 1206, 1210 (11th Cir. 2000). “[A] false representation made with respect to the identity of the actual buyer of a firearm is prohibited under § 924(a)(1)(A).” *United States v. Belt*, 250 Fed. Appx. 957, 958-59 (11th Cir. 2007) (citing *Nelson*, 221 F.3d at 1209-10).

It is equally clear, however, that when the person answering Question 11.a is indeed the “actual buyer” of the firearm (*i.e.*, the person is not a Straw), there is no misrepresentation for purposes of either Section 922 or Section 924. The legality *vel non* of a purported Straw Purchase thus turns on the definition of “actual buyer.” As set forth on Form 4473, a person is an “actual buyer” if the gun is purchased “for yourself,” and not “for” or “on behalf of” someone else.

There is substantial, unanimous authority explaining what it means to purchase a gun “for yourself” and not “for” or “on behalf of” someone else. The “‘actual buyer’ for the purpose of ATF Form 4473 is the person who supplies the money for *and intends to possess the firearms*, not the ‘straw man’ or agent.” *Belt*, 250 Fed. Appx. at 958-59 (citing *Nelson*, 221 F.3d at 1210). “[I]f the person buying [the guns] has no intention of keeping them for herself or giving them as a gift, she misrepresents that she is the ‘actual buyer.’” *Id.* “The actual buyer is the person who is actually

going to take possession of the firearm.” *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997) (*en banc*); *United States v. Lawrence*, 680 F.2d 1126, 1128 (6th Cir. 1982) (determining in a prosecution under Section 922 that defendant who signed ATF form with no intention of keeping the weapons is not transferee or buyer).

The analysis in *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003), is illustrative. In *Ortiz*, a Georgia resident purchased guns in Georgia and transported them to New York City at the request of a City resident, who purchased them from Ortiz upon Ortiz’s arrival in New York: “[A] straw transaction occurred here because “at the time of completing Form 4473 Ortiz [the Straw] had no intention of keeping the firearms or giving them as a gift. . . .” *Id.* at 1038. Ortiz therefore misrepresented that he was the actual buyer. *Id.* “Ortiz ...bought the firearms for Rivera, promptly delivered them to Rivera and was paid by Rivera.” *Id.* “Ortiz equally was not buying the guns sold to Jenkins for himself or as a gift to another, but specifically was purchasing the guns for the sole purpose of immediately delivering and selling them to a ... buyer in New York City . . .” 318 F.3d at 1038 (emphasis added); *see Belt*, 250 Fed. Appx. at 959 (affirming conviction because “Belt attested that she was the actual purchaser of the guns when she did not intend to keep the guns for herself or

give them away as a gift.”).⁸ Straws acting with knowledge that the guns they purchase are to be resold, evidencing the Straw’s intent at the time of sale to surrender possession, are also not “actual buyers.”⁹

⁸ *Accord United States v. Nelson*, 221 F.3d 1206, 1210 (11th Cir.) (“representations [by Agent] were false because [Principals] supplied the money for these purchases, intended to possess the firearms, and thus actually bought these firearms”), *cert. denied*, 531 U.S. 951 (2000); *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997) (en banc) (straw purchase where, *inter alia*, Straw “had no intention of keeping the gun for himself”); *United States v. Howell*, 37 F.3d 1197, 1202 (7th Cir. 1994) (evidence supported Straw’s conviction where, *inter alia*, principal and straw did not deny statement that dealer did not think Agent was picking up gun for herself); *United States v. Phanphil*, 57 M.J. 6, 8 (C.A.A.F. 2002) (Agent convicted where, on Form 4473, he certified that he was the actual buyer of the firearms, “knowing full well that the firearms would be going to” Principal).

⁹ *See, e.g., United States v. Blake*, 394 F.3d 1089 (8th Cir. 2005); (“[Agent] knew the guns would be resold on the black market in another state...”); *In re Sealed Case*, 352 F.3d 409 (D.C. Cir. 2003) (sustaining conviction for conspiracy to falsify firearms transaction records where testimony showed appellant knew guns to be transported to the District of Columbia for resale); *United States v. Abfalter*, 340 F.3d 646, 651 (8th Cir. 2003) (evidence sufficient to prove Agent was not actual buyer where she purchased guns for Principal to resell later); *United States v. Soto*, CR. NO. 06-328-2, 2007 U.S. Dist. LEXIS 17070, at *14-15 (E.D. Pa. Mar. 8, 2007) (“[Principal’s] knowledge of the falsity of the statement that [Agent] was the actual owner was demonstrated by the

B. The Prosecution of a Straw Who Buys for an Eligible Principal is an Application of a Legitimate Interpretation of Sections 922(a)(6) and 924(a)(1)(A)

Three Circuit Courts have explicitly upheld the conviction of a Straw for an Eligible Principal under Sections 922(a)(6) and 924(a)(1)(A). *See United States v. Abramski*, 706 F.3d 307 (4th Cir. 2013)¹⁰; *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010). The Fifth Circuit, as well, has upheld the conviction in such circumstances, without addressing the Eligible Principal’s status explicitly. *United States v. Ortiz-Loya*, 777 F.2d 973, 981 (5th Cir. 1985).

In *Frazier*, the Eleventh Circuit, in determining whether the identity of the purchaser was “material to the lawfulness of the sale” appropriately focused on the actual identity of the

evidence that [Principal] knew the gun was being purchased to resell ...”).

¹⁰ Significantly, while the ultimate purchaser in this case is an Eligible Principal in that he was eligible to purchase *a firearm*, he was not, in fact, eligible to purchase *this firearm* from Town Police Supply, the Virginia FFL where Abramski made the purchase, since he is not a resident of the state of Virginia. *See* the Brief of the United States at pp. 29-30 on this point.

purchaser and not on whether the purchaser's identity affected the lawfulness of the sale:

To say that the identity of the actual purchaser is material to the lawfulness of one sale [involving an Ineligible Principal] but not to another [involving an Eligible Principal], is counterintuitive. Although Polk focused on whether one's identity affected the lawfulness of a sale under §922(a)(6), we focus on whether one's identity is a fact that is material to the lawfulness of a sale. The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under §922(a)(6). Thus, it can be reasoned that although the lawfulness of a sale may change depending on the identity of the purchaser, the fact that the identity of the purchaser is material to the lawfulness of the sale does not.

Frazier, 605 F.3d at 1280 (emphasis added)(citing *Polk*, 118 F.3d at 295; *Ortiz*, 318 F.3d at 1036-37); *see also Morales*, 687 F.3d at 701 (noting that “the identity of the purchaser is, of course, central to the determination of his eligibility or ineligibility to purchase a firearm[,]” and that “[w]here, as here, the purchaser is in fact eligible to purchase the

firearm, his identity is no less material to the lawfulness of the transaction[.]”).

Section 924(a)(1)(A) also applies to the prosecution of a Straw of an Eligible Principal. That section, which requires only truthful disclosure of information required to be kept by an FFL, contains no materiality requirement. As noted by the Eleventh Circuit in *Nelson*, numerous provisions of the Gun Control Act require disclosure of actual buyer:

Several provisions in Chapter 44 of Title 18 of the United States Code, which is the ‘chapter’ referred to in §924(a)(1)(A), require licensed firearms dealers to keep records containing information about the identity of individuals who buy firearms. These provisions include 18 U.S.C. §§ 923(g), 922(b)(5), and 922(s)(3). Section 923(g) sets forth the general requirement that ‘each ... licensed dealer shall maintain ... records of ... sale[] or other disposition of firearms at his place of business.’ Section 922(b)(5) then makes clear that these records must contain, at a minimum, ‘the name, age, and place of residence’ of any individual who purchases a firearm from a licensed dealer. In addition, prior to selling a

handgun to an individual ‘transferee,’ a licensed dealer must, under section 922(s)(3), obtain a statement from that transferee which contains ‘the name, address, and date of birth appearing on a valid identification document ... of the transferee and a description of the identification used.’ Further, the dealer must verify the transferee’s identity by examining the identification document described in the transferee’s statement. Thus, licensed firearms dealers are required to keep information about the identity of firearms buyers in their records. As a result, false statements or representations relating to this information are prohibited under §924(a)(1)(A).

Nelson, 221 F.3d at 1209 (citing 18 U.S.C. §§ 923(g)(1)(A); 922(b)(5); 922(s)(3); 924(a)(1)(A)).

The information “material to the lawfulness of the sale” as provided for in Section 922(a)(6), and the information required to be kept by the FFL pursuant to Section 924(a)(1)(A), for present purposes, is simply the identity of the purchaser, the actual buyer of the firearm. To interpret those sections to only require true and accurate disclosure of the Straw renders the requirement of identifying the person who will eventually actually

possess the gun a nullity because that actual possessor, the Principal, could hide behind his or her agent and escape the requirements of both statutes. *Nelson*, 221 F.3d at 1209; *accord Soto*, 539 F.3d at 198; *United States v. Lawrence*, 680 F.2d 1126, 1128 (6th Cir.1982) (to exclude straw purchasers from the ambit of Section 922(a)(6) would be “tantamount to a repeal of those provisions”); *United States v. White*, 451 F.2d 696, 699-700 (5th Cir.1971) (noting that “[s]urely, Congress could not have intended to allow such easy evasion of a comprehensive scheme” by excluding straw purchasers from the ambit of Section 922(a)(6)).

By falsely disclosing that he was the actual buyer on Form 4473, Bruce James Abramski, Jr., the Petitioner and Agent here who purchased the firearm on behalf of his uncle, Angel Alvarez, an Eligible Principal¹¹, was subject to prosecution under both Sections 922(a)(6) and 924(a)(1)(A). Alvarez’s identity, as the actual buyer of the firearm, was material to the lawfulness of the sale, because it was for the FFL and ATF to determine whether or not Abramski’s purchase was lawful and whether Alvarez was in fact eligible to purchase. By lying in response to Question 11.a on Form 4473, Abramski therefore violated Section 922(a)(6). Moreover, that lie also amounts to a

¹¹ *See, infra*, footnote 6.

violation of Section 924(a)(1)(A) because the identity of the actual buyer is information required to be kept by FFLs.

II. This Court Should Dismiss the Petition as Improvidently Granted Because there is No Circuit Split on the Question of Whether Petitioner Abramski's Conviction Can Stand

Petitioner cites no Circuit Court authority on the precise issue of whether a Straw can be convicted under Sections 922(a)(6) and 924(a)(1)(A) when the Straw lies on Form 4473 by claiming to be the actual buyer of the gun but knowing that he or she is acquiring the gun for an undisclosed Eligible Principal. The two cases cited by Petitioner as creating the Circuit split justifying this Court's *certiorari* jurisdiction – *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997) and *United States v. Moore*, 109 F.3d 1456 (9th Cir. 1997) (*en banc*) – did not involve prosecutions of Straws under circumstances similar to Petitioner.

In *Polk*, the Fifth Circuit considered the prosecution of the Eligible Principal under an aider and abettor theory of liability. The Straw in *Polk* was actually the Government's confidential informant, who was not being prosecuted. Although the Court in *Polk* did question the viability of prosecutions under Sections 922(a)(6) and 924(a)(1)(A) in the case of an Eligible Principal,

it ultimately concluded “that Polk’s participation in the alleged crime consisted of nothing more than a request to purchase firearms.” *Polk*, 118 F.3d at 296. The Fifth Circuit distinguished its earlier holding in *United States v. Ortiz-Loya*, a case involving an Eligible Principal, because in that case the “evidence showed that the defendant (1) instigated the entire transaction; (2) provided up-front money for the purchase; and (3) because he did not have a Texas drivers’ license (the defendant left it in Mexico), asked others to accompany him to sign the ATF forms.” *Polk*, 118 F.3d at 296 (citing 777 F.2d 973, 981 (5th Cir. 1985)). Thus, rather than deciding that Polk’s conviction could not stand because he was an Eligible Principal,¹² the Fifth Circuit actually held that Polk’s conviction could not stand because there was insufficient evidence to support Polk’s role as an aider and abettor of the Agent. *See Polk*, 118 F.3d at 296 (reversing Polk’s conviction for aiding and abetting a violation of Section 922(a)(6) because of “insufficient evidence”).

In *Moore*, the Ninth Circuit upheld the conviction of a Straw charged with a violation of Section 922(a)(6). The Straw in *Moore* was an elderly neighbor recruited by a 14-year old to purchase a gun for the latter. The 14-year old, by definition an Ineligible Principal, *see* 18 U.S.C.

¹² Polk’s status as an Eligible Principal was not at issue in the case because, at the time of his arrest he had no felony convictions that would render him ineligible.

§922(b)(1), recruited the neighbor after his mother refused to buy a gun for him. In purchasing the gun, the Straw lied on Form 4473 by claiming to be the actual purchaser. When questioned by the FFL, the Straw lied again, falsely stating that he was the child's grandfather and would hold the gun until the child reached age 21. The FFL, not satisfied with the answer, inquired about whether the child's parents consented to the purchase. The child's mother, who had been waiting in the car, briefly appeared in the store to confirm the Straw's lies regarding his status as the child's grandfather and his intent to hold the gun until the child could legally own it. Although the Court expressed some doubt about the viability of a prosecution of a Straw under Section 922(a)(6) in the case of an Eligible Principal, the *en banc* panel never actually decided that the prosecution was impermissible because the jury rejected the mother's claim that she, an otherwise Eligible Principal, was the actual buyer of the gun.¹³

There is accordingly no split in authority among the Circuit Courts justifying the grant of

¹³ Like the principal in *Polk*, the principal in *Moore*, the fourteen-year old child, was hardly an innocent. Bobby Moore used the gun his neighbor purchased for him "to shoot Ronald Wade Feldner, a New Plymouth, Idaho police officer, in the face. Officer Feldner died, leaving behind a wife and minor children." *Moore*, 109 F.3d at 1459; *see also State v. Moore*, 906 P.2d 150 (Idaho Ct. App. 1995) (upholding sentence of 25 years to life following Moore's guilty plea).

certiorari in this case. Every Circuit Court that has considered the prosecution of a Straw who falsely states on Form 4473 that he or she is the actual buyer, when in fact the actual buyer is an Eligible Principal, has concluded that such conduct violates Sections 922(a)(6) and 924(a)(1)(A). *See United States v. Abramski*, 706 F.3d 307 (4th Cir. 2013); *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010). In the absence of a split in authority among the Circuit Courts, or any other ground asserted by Petitioner for this Court's grant of *certiorari*, it is appropriate for this Court to dismiss this case as improvidently granted, if the Court indeed did not fully appreciate the lack of a split. *See* Sup. Ct. Rule 10; *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 183-184 (1959).

CONCLUSION

For all the above reasons, and those stated in the United States' brief, Abramski's conviction should be upheld. The ability to prosecute purchasers for falsehoods made in connection with the purchase of a firearm is critical to law enforcement efforts to attack the straw purchases that serve as the primary means by which guns are diverted from the legal market into the illegal market. The frequency with which such diverted guns are later recovered in connection with crimes in New York City, make straw purchase prosecutions especially important to the ability of the City to protect its citizens from gun violence. Accordingly, the City of New York urges this Court to affirm the decision of the Court of Appeals for the Fourth Circuit.

Dated: New York, New York
December 30, 2013

Respectfully submitted,

MICHAEL A. CARDOZO
CORPORATION COUNSEL OF THE
CITY OF NEW YORK
100 Church Street
New York, New York 10007
(212) 356-2032
ERIC PROSHANSKY*
RICHARD J. COSTA
MELANIE C.T. ASH
eproshan@law.nyc.gov
* *Counsel of Record*