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

REPLY BRIEF

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INTRODUCTION

It is not illegal to buy a gun for someone else. In the Gun Control Act of 1968, Congress chose a regulatory scheme that permits law-abiding citizens to buy guns with the intent to resell them. This was not an oversight; legislative history shows that Congress long understood buying guns for others was legal.

The government and its amici disagree with this intentional policy decision of Congress. And in their briefs, they freely admit that they favor the court-created straw purchaser doctrine because it does precisely what Congress chose not to do—prohibit individuals from buying firearms for other lawful gun owners. But the arguments advanced in defense of the straw purchaser doctrine are fatally flawed and should be rejected.

The government first contends that the straw purchaser doctrine is simply an application of the well-settled maxim that "he who acts through another acts himself." To be sure, this legal maxim is a part of criminal law—indeed, Congress codified it in 18 U.S.C. § 2, which provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." But petitioner was not convicted of a violation of § 2, and that is not the doctrine that the government actually invokes here. Instead, the government relies on a civil common-law agency rule providing that property purchased by an agent on behalf of an "undisclosed principal" belongs to the principal as a matter of law. This *civil* law doctrine cannot be applied to a federal *criminal* statute. Moreover, even in the civil law context, it is the

agent—not the undisclosed principal—who is considered the "buyer" of the goods. Thus, this civil law principle cannot justify the court-created straw purchaser doctrine applied by the lower court in this criminal case.

The government and its amici also argue that the straw purchaser doctrine is necessary to keep track of who actually owns firearms and to ensure that gun buyers have undergone background checks. This argument is premised on what the government and its amici *want* the law to be, not what it is. Congress made the intentional policy decision not to track every firearm sale and not to maintain a national gun registry. To the contrary, Congress permits most second-hand gun sales without any recordkeeping or background check at all. A rejection of the straw purchaser doctrine, therefore, would not be inconsistent with the recordkeeping and background check regime actually enacted by Congress.

In sum, the ability to buy guns for others is not an oversight or unintended consequence of the federal gun laws. Rather, it is a purposeful policy decision by Congress on a deeply divisive political issue—one that invariably results in compromise legislation. Because it is legal to buy a gun intending to resell it to someone else, and because the statutes and regulations governing gun sales do not require dealers to record whether a gun buyer plans to resell the gun, petitioner cannot be convicted of violating either § 922(a)(6) or § 924(a)(1)(A).

ARGUMENT

I. THE GOVERNMENT FAILS TO JUSTIFY APPLICATION OF THE COURT-CREATED STRAW PURCHASER DOCTRINE.

The government devotes most of its brief to defending the court-created straw purchaser doctrine. The government first argues that "agency law . . . has long provided that '[h]e who acts through another acts himself.'" Resp. Br. 16. The government contends that the straw purchaser doctrine is a straightforward application of this agency law rule. Resp. Br. 16.

To be sure, the concept of *qui facit per alium facit per se*, or he who acts through another acts himself, is part of federal criminal law. Indeed, like nearly all principles of modern federal criminal law, Congress has codified this rule. Title 18 U.S.C. § 2 provides that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

But the government fails to acknowledge that the straw purchaser doctrine is *not* an application of this criminal law principle. Here, the government is not seeking to hold petitioner's uncle responsible for petitioner's actions. Rather, the government contends that, because petitioner bought a gun intending to resell it to his uncle, petitioner did not actually buy the gun—his uncle did. This argument has several fatal flaws.

First, this principle does not exist in criminal law. Tellingly, the government supports its theory by citing the

Restatement (Second) of Agency for the proposition that "when a principal provides funds for a firearm purchase and sends an agent to act on his behalf, the absent individual is the actual buyer under standard principles of agency law." Resp. Br. 17. The Restatement is a summary of *civil* law, not *criminal* law. Criminal and civil agency law are not interchangeable, and for good reason. Courts and commentators have repeatedly acknowledged that civil agency law principles can impose liability in circumstances incompatible with criminal law doctrine. *See, e.g.*, *Montana v. Woolsey*, 259 P. 826, 833 (Mont. 1927) (holding that "the civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law"); *United States v. Food and Grocery Bureau of S. Cal.*, 43 F. Supp. 966, 973 (S.D. Cal. 1942) (rejecting an argument "applying to criminal law the civil law of agency" because that "cannot and should not be done").

This case underscores why civil agency law cannot be applied to federal criminal statutes. In criminal law, words are given their plain meaning and statutes are written to be understood according to their text. *Salinas v. United States*, 522 U.S. 52, 57 (1997). Here, the plain meaning of "buyer" or "actual buyer" is the person who buys the gun—*i.e.*, the person who walks into the store, fills out the forms, pays for the gun, and leaves the store having possession and control of it. In the context of plain meaning, it makes no difference what that buyer intends to do with the gun later. Indeed, dictionary definitions of the word "buyer" often include agents buying on behalf of someone else. *See* Webster's II New College Dictionary 151 (1995) (defining buyer to include "a purchasing agent"); Concise Oxford English Dictionary 191 (11th ed. 2004)

(defining buyer to include "a person employed to select and purchase stock for a business").

Here, the government asks this Court to alter the plain meaning of the term "actual buyer" based on a civil law doctrine not found in the text of the criminal law. This runs counter to centuries of settled precedent from this Court. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.).

Moreover, the government grossly oversimplifies civil agency law in its brief. The government suggests that every time someone buys something for another person, a principal-agent relationship is created under civil common law. It is not that simple. "Agency is the *fiduciary relationship* that arises when one person (a 'principal') manifests assent to another person (an 'agent') *that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act*." Restatement (Third) of Agency § 1.01 (2006) (emphasis added). That agency relationship thus requires mutual assent for the agent to enter into a *fiduciary relationship* in which the agent's actions are controlled by the principal, and in which various legal duties are imposed on the agent to act in the principal's best interests. *See id.* & cmts. c, d, e. Moreover, "[a]n agency relationship arises *only*

when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in . . . popular usage is not controlling." Restatement (Third) of Agency § 1.02 (emphasis added).

This formal agency law relationship will not exist in most "straw purchases." For example, if a stranger on the street asks someone to walk into a nearby gun store and buy a gun for him, offering to pay a premium over whatever the gun costs, there is no agency relationship created. The buyer, if he chooses to enter the store and buy the gun, has not entered into a fiduciary relationship, has not consented to the control of the stranger, and is under no obligation to act in that stranger's best interests or even to deliver the gun after buying it.

Indeed, petitioner's case highlights the challenges of applying this complex civil law doctrine to the plain text of a criminal law. Petitioner received no consideration for buying the firearm for his uncle and was under no contractual obligation to do so. He was merely doing a favor for a family member and could have changed his mind at any time, even after buying the gun, and returned the check to his uncle. JA 26a-28a. Yet the government contends—without citing a single case applying common law agency principles—that doing a favor for one's uncle forms a binding principal-agent relationship with corresponding fiduciary duties as a matter of law. Resp. Br. 16-17.

In short, the government's civil agency law justification for the straw purchaser doctrine is fatally flawed. Even if a civil common-law legal fiction concerning the "actual buyer" of property could be applied to the *statutory*

federal criminal system, the mere fact that someone buys a gun for someone else is not enough to create the principal-agent relationship necessary to invoke that legal fiction. Accordingly, the Court should reject the government's agency law justification for the straw purchaser doctrine.

In any event, even the civil agency law principle on which the government relies does not support the government's theory. The government cites the Restatement section providing that "[a]n undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority." Resp. Br. 16. But the government ignores a critical point: even in the case of an undisclosed principal, it is still the agent (not the principal) who actually buys the goods. In the real estate context for example, the agent buys the property and records it in his own name, but is required by agency law to convey it later to the undisclosed principal. *See, e.g.*, *Shelby v. Burrow*, 89 S.W. 464, 464 (Ark. 1905). In that circumstance, civil agency law permits the seller to hold both the agent and the undisclosed principal responsible for the agent's actions, *see* Restatement (Third) of Agency § 6.03, but it does not change the fact that the *agent* is the "actual buyer" of the property and must later convey it to the principal in a separate transaction.

The government asserts several other flawed arguments in defense of the straw purchaser doctrine. First, it argues that the doctrine conforms with the "commonsense" interpretation of § 922(a)(6) because that statute governs "false statements 'in connection with the *acquisition* or attempted acquisition of any firearm.'" Resp. Br. 18. The government then quotes this Court's decision in *Huddleston*, a § 922(a)(6) case involving a

felon who pawned a firearm at a pawn shop and later retrieved it. In *Huddleston*, the Court explained that the "word 'acquire' is defined to mean simply 'to come into possession, control, or power of disposal of.'" Resp. Br. 18. But this language hurts—not helps—the government. At the time petitioner filled out the paperwork and bought the gun, *he*, not his uncle, was the person with "possession, control, or power of disposal of" the gun. Indeed, this "commonsense" understanding of words like "buyer" and "acquire" is precisely why the straw purchaser doctrine—a legal fiction running counter to the plain text—is impermissible in the criminal context. *Wiltberger*, 18 U.S. (5 Wheat.) at 95.

The government also argues that the separate restrictions on sales to physically absent buyers "would be rendered largely superfluous if such absent buyers could easily circumvent them by simply obtaining a firearm through a straw purchaser instead." Resp. Br. 19. But there is no "absent buyer" here. Congress created the "absent buyer" provisions for sales done by telephone, internet, or mail, where no one was physically present at the gun store. 18 U.S.C. § 922(c) (providing additional requirements before a "licensed dealer may sell a firearm . . . to a person *who does not appear in person at the licensee's business premises*") (emphasis added). Here, by contrast, petitioner was present at the gun store and truthfully provided all of the identification and contact information required by law.

The government next contends that "the concept of a straw purchaser is not unique to firearm transactions," citing several court decisions in other contexts. Resp. Br. 21. But none of those cases involve the straw purchaser

legal fiction that the government invokes here—a fiction from civil agency law that means the person who buys the firearm is not actually the buyer. For example, the government cites this Court's decision in *United States v. Gaudin*, 515 U.S. 506, 508 (1995), asserting that it involves "straw purchasers used to buy real property as part of a mortgage scheme." Resp. Br. 21. But the prosecution in *Gaudin* did not involve the straw purchaser doctrine; rather, the government alleged "that respondent had made false statements on [a federal form] by knowingly inflating the appraised value of the mortgaged property" and by stating that "the buyer was to pay some of the closing costs, whereas in fact he, the seller, had arranged to pay all of them." *Gaudin*, 515 U.S. at 508.

Likewise, the other cases cited by the government use the term "straw purchase" but have nothing to do with the legal fiction the government invokes here. Indeed, in *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219 (1939), the Court appears to have rejected the straw purchaser theory advanced by the government here. In that case, the Court described the purchase of a vehicle by a bootlegger's brother as a "straw purchase" because the bootlegger arranged the purchase and actually used the vehicle. But this Court treated the straw purchaser (the brother), not the ultimate recipient (the bootlegger), as the actual buyer of the vehicle to determine whether a credit company had an interest in the vehicle after its forfeiture. *Id.* at 224.

In short, the agency law theory advanced by the government to justify the straw purchaser doctrine is a novel one—it is not found in historical criminal common law or modern federal criminal statutes. This Court should

decline the government's invitation to change the scope of unambiguous criminal statutes by grafting on a court-created legal fiction that stems from civil law principles.

II. THE GOVERNMENT'S RECORDKEEPING AND TRACING ARGUMENTS CONFLICT WITH THE *INTENTIONAL* POLICY CHOICES OF CONGRESS.

The government and its amici also rely heavily on policy arguments concerning recordkeeping and background checks for gun sales. But, as explained below, these policy arguments do not justify a court-created doctrine at odds with the plain text of the Gun Control Act.

The government first contends that if the straw purchaser doctrine is not applied in all circumstances it "would frustrate important recordkeeping and screening obligations that Congress imposed on dealers for every retail and wholesale firearm transaction." Resp. Br. 25. The Brady Center makes a similar argument, focusing on the background check requirements enacted in the Brady Handgun Violence Prevention Act of 1993. The Brady Center concedes that this background check process "is designed to verify the eligibility of the person standing in front of the gun dealer" but argues that, without the straw purchaser doctrine, those guns can later be delivered to an "unknown principal" for whom no background check was done. Brady Ctr. Br. 11-12.

These policy arguments fail because they conflict with how Congress *intentionally* wrote the law. Private sales of firearms by law-abiding citizens have no recordkeeping or background check requirements at

all. Only the initial sale to "the person standing in front of the gun dealer," Brady Ctr. Br. 11, is subject to those recordkeeping and background check requirements. This was not an oversight; Congress chose not to place similar requirements on private and second-hand sales of firearms as part of the political compromise necessary to enact the Gun Control Act. 18 U.S.C. § 922(a)(3), (b)(3).

So, for example, the Gun Control Act permits a buyer to resell a firearm to the person standing behind him in line at a gun store, just moments after he bought it, without *any* recordkeeping or background check at all. 18 U.S.C. § 922(a)(3), (b)(3); Federal Firearms Regulations Reference Guide, ATF Publ'n 5300.4, at 176 (2005).[1]

The government also worries that, "in a case where the actual buyer and the straw purchaser are not well acquainted and the gun is later used in a crime, the government's efforts to trace the firearm would be substantially hindered." Resp. Br. 29. But again, that outcome necessarily results from how Congress wrote the law. Private citizens, unlike licensed dealers, have no

1. The only exception to this rule is sales from a resident of one state to a resident of another state. In that case, the seller must deliver the gun to a dealer in the buyer's home state, who performs a background check on the buyer. *See* 18 U.S.C. §§ 922(a)(3), (a)(5), (b)(3), (d); 27 C.F.R. §§ 478.29, 478.30; *see generally* ATF Reference Guide, *supra*, at 177. But in that case, the policy concerns of the government and its amici are not even implicated, because both the initial sale and the second-hand sale involved full recordkeeping and background checks. Notably, that is precisely what happened in this case—both petitioner and his uncle filled out the necessary paperwork and underwent separate background checks with their respective purchases. *See* Pet. Br. 11-12.

obligation to record *any* information about a person to whom they sell a gun. *See* 18 U.S.C. §§ 922(a)(3), (a)(5), (d); 27 C.F.R. §§ 478.29, 478.30; *see also* ATF Reference Guide, *supra*, at 176. The way the law works, a gun buyer could purchase a firearm from a licensed gun dealer and promptly resell it to a complete stranger.

Moreover, the government and its amici ignore that Congress prohibited the government from even maintaining any information about guns or gun owners. In the Firearm Owners' Protection Act, Congress stated that after its passage the government is prohibited from establishing "any system of registration of firearms, firearm owners, or firearm transactions." 18 U.S.C. § 926. Thus, Congress knew that in every case, tracing guns would be a burdensome task. The government must start by matching the firearm's serial number with the manufacturer's records, follow that firearm in the stream of commerce to the distributors, then the gun dealer, then each subsequent private owner of the firearm. Resp. Br. 27 n.7. Tracing a firearm to the ultimate recipient of a "straw purchase" is no more burdensome than doing so for other private sales, for guns given as gifts, or for guns awarded to the winners of contests and raffles. *See* ATF Reference Guide, *supra*, at 165, 176-77, 195. The government concedes that sales in all of those circumstances are perfectly lawful with no background check at all.

In sum, these policy arguments of the government and its amici turn on what they *want* the law to be, not what it is. Congress chose a statutory scheme in which many lawful buyers—perhaps most buyers—do *not* fill out federal paperwork or undergo a background check. Indeed, Congress expressly prohibited the government

from establishing the sort of national gun database that the government and its amici advocate. Thus, applying the court-created straw purchaser doctrine does not advance the policy goals of the Gun Control Act and its amendments; Congress made the deliberate policy choice that only the *initial* buyers of a firearm from a licensed dealer would be subject to recordkeeping and background check requirements.

It is important for this Court to remain faithful to the deliberate choices Congress made in these federal gun laws. "As is often true, this legislation is the product of multiple and somewhat inconsistent purposes that led to certain compromises." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring in the judgment). Thus, even if Congress considered recordkeeping and tracing requirements as important policy goals of the Gun Control Act, "its Members may differ sharply on the means for effectuating that intent." *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). Here, as in other cases involving long-standing, politically divisive issues, searching for better means of achieving a perceived legislative goal "at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* Accordingly, the Court should reject the government's request to depart from the Gun Control Act's plain text; that plain text reflects precisely what Congress wanted to achieve through these politically controversial laws.

III. THE GOVERNMENT'S OTHER POLICY ARGUMENTS ARE SIMILARLY FLAWED.

The government and its amici also assert a series of other policy arguments in defense of the straw purchaser doctrine. Those arguments are similarly flawed.

First, the government contends that rejecting the straw purchaser doctrine "would mean that an individual could purchase a firearm on behalf of a convicted felon (or otherwise statutorily ineligible individual), falsely deny he was doing so, and not violate Section 922(a)(6)." Resp. Br. 19. This is simply wrong. It is illegal for an individual to sell a gun to someone he knows is a prohibited person. *See* 18 U.S.C. § 922(d).[2] Consequently, a gun dealer cannot sell a gun to someone who plans to resell it to a prohibited person because doing so would be aiding and abetting in the violation of § 922(d). *See* 18 U.S.C. § 2(a). This, in turn, means that falsely denying an intent to sell a gun to a prohibited person affects the legality of the initial sale—that is, it conceals a fact "material to the lawfulness of the sale." Thus, even without the court-created straw purchaser doctrine, the government can continue to prosecute people under § 922(a)(6) for false statements that conceal the intent to buy guns for prohibited persons.

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2. As explained in petitioner's opening brief, Pet. Br. 8-9, Congress added this prohibition to the Gun Control Act in 1986 to "close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." H.R. Rep. No. 99-495, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1343. This is devastating to the government's argument because it shows that Congress chose to address this perceived problem in a way other than banning all purchases of firearms on behalf of others—which is the ultimate effect of the court-created straw purchaser rule.

The Brady Center also asserts a series of policy arguments in its amicus brief. First, it contends that "it would be highly unusual for a straw purchaser to determine whether the person to whom he was transferring the gun was prohibited." Brady Ctr. Br. 19. This argument misstates federal gun law. Section 922(d) criminalizes the private sale of firearms if the individual knows or has reasonable cause to believe that the recipient is a prohibited person. 18 U.S.C. § 922(d). Thus, far from being "highly unusual" for private citizens to confirm the person for whom they are buying a gun is not a prohibited person, this is commonplace and expressly anticipated by Congress. Indeed, Congress designed § 922(d) to deter the precise conduct that the Brady Center claims is undeterred absent the court-created straw purchaser doctrine. *See* H.R. Rep. No. 99-495, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1343 (Congress amended § 922(d) in 1986 to "close[] an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons.").

Finally, the Brady Center argues that petitioner's position "would frustrate the intent of Congress by placing the transfer of guns to unlawful purchasers largely beyond regulation." Brady Ctr. Br. 19. Again, this is simply wrong. Section 922(d) already criminalizes the transfer of guns to unlawful purchasers. 18 U.S.C. § 922(d).[3] That

3. The Brady Center opens its brief by recounting a tragic event in New York in which a man killed two firefighters and his sister before taking his own life, all using firearms that a neighbor bought for him. Brady Ctr. Br. 3-4. But the Brady Center omits a key fact noted prominently in the opening paragraphs of a newspaper article it cites to this Court: "Having served time in prison for bludgeoning his grandmother to death with a hammer

provision will remain in full force if the Court rejects the straw purchaser doctrine. Likewise, as explained above, § 922(d) and 18 U.S.C. § 2 criminalize a gun dealer's sale of a firearm to a "straw purchaser" whom the dealer knows will later transfer it to a prohibited person. And the government can assist federally licensed dealers in determining whether a gun buyer intends to transfer the gun to a prohibited person by asking *that* question on Form 4473, instead of the far broader "actual buyer" question it uses now.[4]

In sum, these policy arguments demonstrate that the reason the government and its amici insist upon applying the straw purchaser fiction—rather than relying on the criminal laws Congress actually enacted—is that the straw purchaser doctrine does something *other than* prevent the transfer of guns to prohibited persons. The doctrine criminalizes purchases of firearms on behalf of other *lawful* buyers as well, thus barring anyone from buying a gun for someone else in any circumstance. But as explained above, Congress, in the Gun Control Act and

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30 years earlier, Spengler could not legally buy the guns." David Andreatta & Bennett J. Loudon, *Spengler Was With Greece Woman When She Bought His Guns, Court Papers Allege*, Democrat & Chronicle (Dec. 29, 2012). Thus, even without the court-created straw purchaser doctrine, the neighbor's purchase of those guns for Spengler was illegal. *See* 18 U.S.C. § 922(d).

4. The Brady Center also contends that disapproving the straw purchaser doctrine is "an unacceptable construction of the statutory text" of § 922(a)(6). Brady Ctr. Br. 17. This is a curious argument because—as even one of the government's own amici concedes—the straw purchaser fiction is not found in the statute and is "a judicially created doctrine." New York City Br. 11 (citing *United States v. Dollar*, 25 F. Supp. 2d 1320, 1322 (N.D. Ala. 1998)).

its amendments, made the deliberate policy decision to permit buying a firearm for another lawful gun owner. If the government and its amici want to change that, they must take the issue up with Congress, not this Court.

IV. THE GOVERNMENT IGNORES THE CASE-SPECIFIC NATURE OF MATERIALITY.

The government also disputes petitioner's contention that he prevails on the materiality issue even if the Court applies the straw purchaser doctrine. Resp. Br. 31. The government cites this Court's holding in *Kungys* that a misrepresentation is material if it "was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Id.* The government then argues that "the entire dealer-based regulatory scheme" depends on accurate information about the buyer. Thus, the government asserts, false statements about the "actual buyer" of a firearm always are material.

Kungys demonstrates that this reasoning is flawed. After all, the official decision to naturalize someone as a U.S. citizen necessarily requires accurate information about where that person is from. But this Court held in *Kungys* that a false statement about an applicant's place of birth was not material unless the evidence showed it would have been capable of influencing the naturalization decision *in that case*. Pet. Br. 18-20. Simply put, the materiality analysis under § 922(a)(6) is case-specific; it turns on whether the particular false statement at issue was capable of influencing "the lawfulness of the sale" in that particular case. As explained in petitioner's opening brief, his allegedly false statement is not material under that standard. Pet. Br. 21-22.

The government next argues that, if this Court applies the settled materiality test from *Kungys*, "the government would have to prove the actual purchaser's ineligibility to possess a firearm." Resp. Br. 27. The government contends that in some cases the ultimate recipient of the firearm is unknown and "it would likely be difficult, if not impossible" for the government to obtain a conviction under § 922(a)(6) in that circumstance. *Id*. Of course, courts cannot judicially broaden a criminal law's plain text simply to make prosecutions easier for law enforcement. *Cf. Williams v. United States*, 458 U.S. 279, 286-87 (1982). In any event, the government cites only a single instance in which it could not identify the ultimate recipient of a firearm. Resp. Br. 27. If this problem becomes significant enough to require redress, Congress can step in and resolve it.

The government also argues that, even under the *Kungys* test, petitioner's statement was material because Form 4473 states that a gun dealer cannot sell a gun to someone intending to resell it later. Resp. Br. 31. As explained in petitioner's opening brief, that statement on a government form is not an accurate statement of the law. Pet. Br. 23. In response, the government argues that petitioner waived his right to challenge the legal effect of that statement on the form because he abandoned his APA claim in the court of appeals. Resp. Br. 32-33. This argument fails because the issue has nothing to do with the APA. To be sure, in the district court petitioner challenged the authority of the ATF to include Question 11.a on the form based on APA rules. Pet. App. 8a-9a. And petitioner later chose not to pursue that argument in the court of appeals. Pet. App. 9a. But petitioner asserted in the court of appeals the same claim he asserts here—that

notwithstanding what ATF writes on a form, there is no statute or regulation prohibiting a gun dealer from selling a gun to someone in petitioner's situation. Pet. App. 13a-14a. That argument is not an APA challenge.

In any event, in a critical concession, the government notes that "the ATF statements at issue here are, at most, interpretive rules" based on court precedent, not the text of the Gun Control Act or its accompanying regulations. Resp. Br. 36. This is fatal to the government's argument because interpretive rules cannot change what the law is. *See Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 172 (2007). Here, even the case law on which ATF based its "interpretive rule" permits petitioner and others like him to buy guns on behalf of other *lawful* buyers. Pet. Br. 7-8. Based on this precedent, ATF long acknowledged that "straw purchases" among lawful buyers were permissible. Pet. Br. 7-8. That interpretation persisted through six presidential administrations, from 1968 until 1995. When ATF altered its own interpretation in 1995, it was not based on any change in the case law; instead, it was done to accomplish an ATF policy goal not shared by Congress—prohibiting individuals from buying guns on behalf of other lawful buyers. In sum, ATF's statement in Question 11.a is not a valid "interpretive rule" and, even if it were, that statement conflicts with the text of the statute and thus does not have the force of law.

Finally, the government also asserts that, even if ATF's statement in Question 11.a does not have the force of law, that fact is no defense because "[o]ne who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the

requirement itself." Resp. Br. 34 (citing *United States v. Knox*, 396 U.S. 77, 79 (1969)). This argument might work if § 922(a)(6) criminalized all material false statements on the form. It does not. Instead, § 922(a)(6) criminalizes only false statements "material *to the lawfulness* of the sale." *Id.* (emphasis added). Thus, whether ATF's statement has the force of law is a dispositive inquiry because there is no statute or regulation that creates a similar prohibition. Pet. Br. 24-26.

V. THE GOVERNMENT'S INTERPRETATION OF § 924(a)(1)(A) CONFLICTS WITH THE PLAIN LANGUAGE.

The government responds to petitioner's § 924(a)(1)(A) argument by asserting that, because § 923(g)(1)(A) requires gun dealers to maintain records of gun sales "for such period, and in such form, as the Attorney General may by regulations prescribe," the government is allowed to ask whatever it wants on Form 4473. Resp. Br. 37. And the government then asserts that "all the information required by the ATF Form 4473 is information required to be kept for purposes of Section 924(a)(1)(A)." *Id.*

This argument does not withstand scrutiny. Under the government's view of the Gun Control Act, it could ask what color socks gun buyers are wearing, or what their favorite color is, and then prosecute false statements about that information under § 924(a)(1)(A). On the contrary, Congress used the words "required *by this chapter* to be kept" specifically to limit the type of information that could be the basis for a § 924(a)(1)(A) prosecution. Indeed, as the government points out, there is no materiality requirement in § 924(a)(1)(A). Resp. Br. 36.

Congress chose not to include a materiality requirement because it believed that false statements about certain information on these federal forms was so damaging that no materiality analysis was necessary. *Compare* 18 U.S.C. § 924(a)(1)(A) *with* 18 U.S.C. § 922(a)(6). And Congress identified precisely what information that was: the "name, age, and place of residence" of the person acquiring the gun from the dealer. 18 U.S.C. § 922(b)(5). For all other information on the form—including ATF's "actual buyer" information about the ultimate recipient of the firearm—false statements are governed by § 922(a)(6) and its materiality requirement. Here, petitioner did not make a false statement about his own name, age, or place of residence and thus did not violate the provisions of § 924(a)(1)(A), even if this Court applies the straw purchaser doctrine.

* * *

In sum, the government does not hide its reason for seeking to criminalize the conduct of petitioner and other well-intentioned gun buyers like him—it wants to prevent people from buying guns for other law-abiding gun owners. But Congress made the intentional policy decision to permit that conduct. This Court should remain faithful to that unambiguous statutory language and reverse the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals and remand this case for dismissal of the indictment.

Respectfully submitted,

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