

No. 12-1493

---

---

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

---

BRUCE JAMES ABRAMSKI, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

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

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

MYTHILI RAMAN  
*Acting Assistant Attorney  
General*

THOMAS E. BOOTH  
*Attorney*

*Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

---

---

## QUESTIONS PRESENTED

1. Whether petitioner's statement that he was the actual buyer of a firearm on a Bureau of Alcohol, Tobacco, Firearms and Explosives Form 4473 was a false statement "material to the lawfulness of the sale" under 18 U.S.C. 922(a)(6), where petitioner purchased the firearm for his uncle and both he and his uncle were eligible to purchase a firearm.

2. Whether the identity of the actual buyer of a firearm is information that is required to be kept in the records of a federal firearms dealer under 18 U.S.C. 924(a)(1)(A).

## TABLE OF CONTENTS

	Page
Opinion below .....	1
Jurisdiction .....	1
Statement.....	1
Argument.....	6
Conclusion.....	16

## TABLE OF AUTHORITIES

### Cases:

<i>Bryson v. United States</i> , 396 U.S. 64 (1969).....	9
<i>Huddleston v. United States</i> , 415 U.S. 814 (1974).....	8
<i>United States v. Buck</i> , 548 F.2d 871 (9th Cir.), cert. denied, 434 U.S. 890 (1977).....	7
<i>United States v. Crandall</i> , 453 F.2d 1216 (1st Cir. 1972) .....	7
<i>United States v. Frazier</i> , 605 F.3d 1271 (11th Cir. 2010) .....	5, 9, 10, 11
<i>United States v. Gaudin</i> , 515 U.S. 506 (1995) .....	7
<i>United States v. Gudger</i> , 472 F.2d 566 (5th Cir. 1972).....	7
<i>United States v. Johnson</i> , 680 F.3d 1140 (9th Cir. 2012) .....	16
<i>United States v. Lawrence</i> , 680 F.2d 1126 (6th Cir. 1982) .....	13
<i>United States v. Moore</i> , 109 F.3d 1456, (9th Cir.) cert. denied, 522 U.S. 836 (1997).....	12
<i>United States v. Morales</i> , 687 F.3d 697 (6th Cir. 2012) .....	5, 10
<i>United States v. Nelson</i> , 221 F.3d 1206 (11th Cir.), cert. denied, 531 U.S. 951 (2000).....	6, 7, 13, 14, 16
<i>United States v. Ortiz-Loya</i> , 777 F.2d 973 (5th Cir. 1985) .....	12

IV

Cases—Continued:	Page
<i>United States v. Polk</i> , 118 F.3d 286 (5th Cir.), cert. denied, 522 U.S. 988 (1997).....	5, 6, 10, 11
<i>United States v. Rodgers</i> , 466 U.S. 475 (1984) .....	9
<i>United States v. Soto</i> , 539 F.3d 191 (3d Cir. 2008), cert. denied, 555 U.S. 1116 (2009).....	16
<i>United States v. Williams</i> , 504 U.S. 36 (1992) .....	13, 15
<i>Wisniewski v. United States</i> , 353 U.S. 901 (1957) .....	12
Statutes and regulations:	
Gun Control Act of 1968, 18 U.S.C. 921 <i>et seq.</i> .....	8
18 U.S.C. 922(a)(6) .....	<i>passim</i>
18 U.S.C. 922(b)(1)-(3) .....	7
18 U.S.C. 922(b)(5) .....	15
18 U.S.C. 922(d) .....	7
18 U.S.C. 923(g)(1) .....	16
18 U.S.C. 924(a)(1)(A).....	<i>passim</i>
27 C.F.R.:	
Section 478.124 .....	6
Section 478.124(a).....	16
Section 478.124(b) .....	16
Miscellaneous:	
H.R. Rep. No. 1577, 90th Cong., 2d Sess. (1968).....	9

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

---

No. 12-1493

BRUCE JAMES ABRAMSKI, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

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

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINION BELOW**

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 706 F.3d 307.

**JURISDICTION**

The judgment of the court of appeals was entered on January 23, 2013. On April 4, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 21, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a conditional guilty plea in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6); and one count of

making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of 18 U.S.C. 924(a)(1)(A). Pet. App. 2a. The district court sentenced petitioner to five years of probation on each count, to run concurrently. *Id.* at 10a. The court of appeals affirmed. *Id.* at 1a-24a.

1. Under 18 U.S.C. 922(a)(6), it is unlawful “for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a \* \* \* licensed dealer \* \* \* knowingly to make any false or fictitious oral or written statement \* \* \* intended or likely to deceive such \* \* \* dealer \* \* \* with respect to any fact material to the lawfulness of the sale \* \* \* under the provisions of this chapter.”

Under 18 U.S.C. 924(a)(1)(A), it is unlawful to “knowingly make[] any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter.”

2. Petitioner is a resident of Virginia and a former state police officer. In 2009, petitioner spoke to his uncle, Angel Alvarez, a resident of Pennsylvania, about Alvarez’s desire to purchase a Glock 19 handgun. Petitioner offered to purchase the firearm for Alvarez from a firearms dealer in Collinsville, Virginia, that offered discounts to police officers. Alvarez spoke with three licensed firearms dealers about how to conduct such a transaction. The dealers apparently told Alvarez that petitioner could purchase the firearm in Virginia and then transfer ownership to Alvarez at a licensed dealer in Pennsylvania. On November 15, 2009, Alvarez sent petitioner a check for \$400 with “Glock 19 handgun” written in the memo line. Pet. App. 3a; C.A. J.A. 552-556.

On November 17, 2009, petitioner purchased a Glock 19 handgun and other items with cash from the dealer in Collinsville. During the transaction, petitioner completed a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Form 4473, which included several questions requiring a “Yes” or “No” response. Pet. App. 3a-4a; C.A. J.A. 585-590. Question 11.a. on the ATF Form 4473 asked:

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.*

Pet. App. 4a. Petitioner checked “Yes” in response to question 11.a. C.A. J.A. 585. On November 20, 2009, the \$400 check from Alvarez was deposited in petitioner’s bank account. The next day, petitioner transferred the Glock 19 handgun to Alvarez at a licensed federal firearms dealer in Easton, Pennsylvania. Alvarez gave petitioner a receipt confirming that Alvarez had purchased the Glock 19 handgun from petitioner for \$400. Pet. App. 4a. Federal agents found and seized the receipt while executing a search warrant at petitioner’s home after petitioner became a suspect in a bank robbery. *Id.* at 5a.

3. A federal grand jury in the Western District of Virginia returned a superseding indictment charging petitioner with one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6); and one count of making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of 18 U.S.C. 924(a)(1)(A). Pet. App. 5a-7a. Petitioner moved to dismiss both counts of the indict-

ment on the grounds that his “Yes” response to Question 11.a. on the ATF Form 4473 was not a material misrepresentation because his uncle was legally eligible to purchase a firearm. *Id.* at 8a; 7:10-cr-00068-GEC Docket entry No. (Docket entry No.) 44 (Mar. 10, 2011).

The district court denied the motion. Docket entry No. 50 (Mar. 14, 2011). The court concluded that “both counts of the indictment are legally sound” and that “if the government is able to prove what the grand jury has alleged in the indictment, \* \* \* [petitioner] would be in violation of the[] two statutes” under which he was charged. Pet. App. 26a.

Petitioner later filed a second motion to dismiss, in which he argued that the “actual buyer” information requested by Question 11.a. on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer and that the ATF’s decision to require that information was made without proper notice and comment rulemaking. Pet. App. 8a-9a. The district court rejected those arguments in a published opinion. 778 F. Supp. 2d 678 (2011).

Petitioner entered a conditional guilty plea to both counts of the superseding indictment, preserving his right to raise his legal challenges to the indictment on appeal. Pet. App. 10a. The district court sentenced petitioner to five years of probation on each count, to run concurrently. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-24a. The court rejected petitioner’s argument that the “actual buyer” information required by Question 11.a. on the ATF Form 4473 is only “material to the lawfulness of the sale” of a firearm, 18 U.S.C. 922(a)(6), if the person for whom the firearm is purchased is not eligible to purchase a firearm. The court held that “the identity of



the actual purchaser of a firearm is a constant that is always material to the lawfulness of a firearm acquisition under [Section] 922(a)(6).” Pet. App. 16a. Because it was clear from the record that the “sole reason” petitioner purchased the firearm was to transfer it to Alvarez, the court concluded that petitioner’s statement on the ATF Form 4473 that he was the actual buyer of the Glock 19 handgun was a false statement material to the lawfulness of the sale under Section 922(a)(6). *Id.* at 17a.

The court of appeals acknowledged that the Fifth Circuit had concluded in *United States v. Polk*, 118 F.3d 286, cert. denied, 522 U.S. 988 (1997), that Section 922(a)(6) is not violated when a firearm purchaser falsely represents that he is the “actual buyer,” but the true purchaser is also eligible to lawfully purchase a firearm. Pet. App. 14a-15a. The court of appeals, however, followed more recent decisions of the Sixth and Eleventh Circuits that have rejected *Polk*. See *id.* at 15a-16a (citing *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010)).

The court of appeals further upheld petitioner’s conviction under Section 924(a)(1)(A). The court explained that the statute, which criminalizes making “any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter,” 18 U.S.C. 924(a)(1)(A), “does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself.” Pet. App. 17a.

The court of appeals noted that petitioner did not appeal the denial of his second motion to dismiss, which had argued that the “actual buyer” information required

by Question 11.a. is not information that a dealer is required to keep in its records and that the ATF's decision to require that information was made without proper notice and comment rulemaking. Pet. App. 9a.

#### ARGUMENT

Petitioner contends (Pet. 7-19) that, because his uncle was not prohibited from purchasing a firearm, petitioner's representation on the ATF Form 4473 that he himself was the "actual buyer" of a Glock 19 handgun that he purchased on his uncle's behalf was not a false statement "material to the lawfulness of the sale" within the meaning of 18 U.S.C. 922(a)(6). The court of appeals correctly rejected that argument and its decision does not conflict with any decision of this Court. Although the court of appeals' decision conflicts with the Fifth Circuit's decision in *United States v. Polk*, 118 F.3d 286, cert. denied, 522 U.S. 988 (1997), the conflict does not warrant this Court's review. Petitioner further contends (Pet. 19-22) that he did not violate 18 U.S.C. 924(a)(1)(A) because the "actual buyer" question on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer. The court of appeals properly upheld petitioner's Section 924(a)(1)(A) conviction and its decision does not conflict with any decision of this Court or another court of appeals. Further review of that claim is therefore unwarranted.

1. a. An individual purchasing a firearm must complete the ATF Form 4473, which requires him to certify that he is the "actual buyer" of the firearm and that he is legally entitled to purchase the firearm. See 27 C.F.R. 478.124. The "actual buyer" is the person who supplies the money and intends to possess the firearm. See *United States v. Nelson*, 221 F.3d 1206, 1209 (11th

Cir.), cert. denied, 531 U.S. 951 (2000). By contrast, a person who purchases a firearm at the direction of, and for use by, a third party is not the actual buyer but an agent of the third party known as a “straw purchaser.” *Id.* at 1209-1210. The ATF Form 4473 warns the purchaser that “[y]ou are not the actual buyer if you are acquiring the firearm(s) on behalf of another person.” C.A. J.A. 585 (emphasis omitted). The form also gives the following example: “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.” *Id.* at 588.

Under 18 U.S.C. 922(a)(6), it is unlawful for a firearms purchaser “knowingly to make any false or fictitious oral or written statement” that is “intended or likely to deceive” the dealer “with respect to any fact material to the lawfulness of the sale.” A statement is “material” if it has a “tendency to influence” or is “capable of influencing” the action of a decision-maker. *United States v. Gaudin*, 515 U.S. 506, 509 (1995). Because both federal and state law impose a variety of restrictions on who may lawfully purchase firearms, see 18 U.S.C. 922(b)(1)-(3) and (d), a firearms dealer must know the identity of the would-be purchaser to determine whether a sale is lawful. Few facts, if any, are more “material to the lawfulness of [a firearm] sale” than the buyer’s identity. See *United States v. Buck*, 548 F.2d 871, 876 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States v. Gudger*, 472 F.2d 566, 568 (5th Cir. 1972); *United States v. Crandall*, 453 F.2d 1216, 1217 (1st Cir. 1972).

Because petitioner purchased a Glock 19 handgun as an agent for his uncle and falsely represented that he

was himself the “actual buyer” of the firearm, he made a false statement that was material to the lawfulness of the sale in violation of Section 922(a)(6). The identity of the purchaser must be considered by the firearms dealer in determining whether the dealer may lawfully sell a firearm. A false statement about the identity of the purchaser is therefore material to the lawfulness of the sale.

b. That interpretation of Section 922(a)(6) is supported by this Court’s decision in *Huddleston v. United States*, 415 U.S. 814 (1974). In *Huddleston*, the Court described Section 922(a)(6) as a provision that was “enacted as a means of providing adequate and truthful information about firearms transactions.” *Id.* at 824-825. Explaining that the record-keeping required by the statute would help keep guns out of the hands of criminals, drug addicts, juveniles, and others whose possession of firearms is too dangerous to allow, the Court noted that “any false statement with respect to the eligibility of a person to obtain a firearm from a licensed dealer was made subject to a criminal penalty.” *Id.* at 825. The Court’s description of Section 922(a)(6) shows that it is not whether the purchaser is actually a prohibited person that matters for purposes of this provision. A false statement “with respect to the eligibility of a person” supports a reading that any fact that would help the dealer to determine the buyer’s eligibility must be truthfully provided.

The legislative history of the Gun Control Act of 1968, 18 U.S.C. 921 *et seq.*, confirms that interpretation. The House Report states that “[t]he requirement that one [who] obtains a firearm or ammunition from a Federal licensee must properly identify himself” is “inherent in th[e] prohibition” against making false statements

that are material to the lawfulness of a firearm sale. H.R. Rep. No. 1577, 90th Cong. 2d Sess. 13 (1968). Furthermore, requiring a gun purchaser to truthfully identify the actual buyer of a firearm furthers Congress's compelling interest in "protecting the integrity of official inquiries." *United States v. Rodgers*, 466 U.S. 475, 481 (1984) (quoting *Bryson v. United States*, 396 U.S. 64, 70-71 (1969)).

c. The court of appeals' decision is consistent with recent decisions of the Sixth and Eleventh Circuits. In *United States v. Frazier*, 605 F.3d 1271 (11th Cir. 2010), the defendant was convicted of aiding and abetting the making of false statements to a firearms dealer in violation of Section 922(a)(6). *Id.* at 1274. Although the defendant was himself eligible to purchase firearms, he directed Cassandra Davis and Welline Lubin to purchase firearms for him. *Id.* at 1275. Davis and Lubin represented on ATF Forms 4473 that they were the "actual buyers" of the firearms. *Ibid.* The court concluded that the false answers to the "actual buyer" question were material to the lawfulness of the firearms sale. *Id.* at 1279. The court explained:

The identity of the purchaser is a constant that is always material to the lawfulness of the purchase of a firearm under [Section] 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. Therefore, under [Section] 922(a)(6), Davis's and Lubin's false statements of the identity of the actual buyer satisfy the "fact material to the lawfulness of a sale" element, regardless of whether the actors were all lawfully eligible to purchase a firearm.

*Id.* at 1280 (internal citations omitted).

Similarly, in *United States v. Morales*, 687 F.3d 697 (6th Cir. 2012), the defendant stated on ATF Forms 4473 that he was the actual buyer of firearms that he was purchasing on behalf of someone else. *Id.* at 699. The defendant argued that he had not violated Section 922(a)(6) because the actual buyer was also eligible to purchase firearms, and his false statements were therefore not material to the lawfulness of the transactions. *Ibid.* Following the Eleventh Circuit's decision in *Frazier*, the court held that the identity of the actual buyer is material to the lawfulness of a firearm sale regardless of whether the actual buyer is eligible to purchase a firearm. *Id.* at 701. The court explained that the identity of the purchaser is "central to the determination of his eligibility or ineligibility to purchase a firearm" and that even where the actual purchaser is eligible to purchase a firearm, "his identity is no less material to the lawfulness of the transaction" than if he were ineligible. *Ibid.*

As petitioner points out (Pet. 9-10), the Fifth Circuit reached the opposite conclusion in *Polk, supra*. In *Polk*, the defendant asked Douglas Davidson, a confidential informant, to purchase various firearms for him. 118 F.3d at 289. The defendant was charged with aiding and abetting violations of Section 922(a)(6) after Davidson made the purchases while falsely representing that he was the actual buyer. *Id.* at 294-295. The court concluded that the defendant did not aid and abet a violation of Section 922(a)(6) by asking Davidson to purchase firearms for him. *Id.* at 295. The court explained that the defendant was himself eligible to purchase firearms, and the court concluded that Davidson's false statements about the identity of the actual pur-

chaser therefore were not material to the lawfulness of the transactions. *Ibid.* The court stated:

[T]he plain language of the statute compels the conclusion \* \* \* that [Section] 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, [Section] 922(a)(6) liability (under a “straw purchase” theory) does not attach.

*Ibid.*

*Polk* was wrongly decided. The Fifth Circuit’s construction of Section 922(a)(6) disregards the word “material” in that provision. Section 922(a)(6) does not bar unlawful firearm sales. It bars any false statement that is “material” to a determination of whether the sale is lawful. Thus, as the Eleventh Circuit explained in *Frazier*, “[t]o say that the identity of the actual purchaser is material to the lawfulness of [the] sale” when the actual purchaser is ineligible to purchase a firearm, but not when the actual purchaser is eligible to purchase a firearm, “is counterintuitive.” 605 F.3d at 1280. As the Eleventh Circuit explained, *Polk* incorrectly “focused on whether one’s identity affected the lawfulness of a sale,” when the inquiry under Section 922(a)(6) is instead “whether one’s identity is a fact that is material to the lawfulness of a sale.” *Ibid.*

Although the decision in *Polk* conflicts with the court of appeals’ decision in this case and the decisions of other courts of appeals, the conflict does not warrant this Court’s review. *Polk* was decided in 1997, approximately 16 years ago. It has not been followed by any other court of appeals, and it has been rejected by three recent court of appeals decisions. Given that repudia-

tion, and given that the Fifth Circuit in *United States v. Ortiz-Loya*, 777 F.2d 973 (1985), upheld a Section 922(a)(6) conviction where the actual buyer appears to have been eligible to purchase a firearm, see *id.* at 981 (upholding Section 922(a)(6) conviction where actual buyer was apparently eligible to purchase firearms but used straw purchasers in part because he had left his Texas driver’s license in Mexico), review by this Court should be postponed until the Fifth Circuit has a chance to reconsider its precedent in light of recent decisions. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (“It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”).\*

d. Petitioner and his amici raise two additional challenges to Question 11.a. on the ATF Form 4473. They contend (Pet. 17; Br. of Amicus Curiae NRA Civil Rights Defense Fund (NRA Amicus Br.) 19-28) that the ATF’s position that straw purchases are illegal without regard to the eligibility of the buyer, reflected in Question 11.a., was adopted without proper notice and comment rulemaking. They further contend (Pet. 17; NRA Amicus Br. 10-11; Br. of Amicus Curiae Congressman Steve Stockman *et al.* (Stockman Amicus Br.) 17-18) that Question 11.a. is arbitrary because it states that the purchaser is the “actual buyer” of a firearm if he intends to give the firearm to another person as a gift, but not if

---

\* Contrary to petitioner’s contention (Pet. 10-11), the decision below does not conflict with the Ninth Circuit’s decision in *United States v. Moore*, 109 F.3d 1456 (en banc), cert. denied, 522 U.S. 836 (1997). In *Moore*, the Ninth Circuit upheld the Section 922(a)(6) conviction of a straw purchaser and the mother of a 14-year-old (and thus ineligible) buyer who assisted the straw purchaser in buying a firearm for her son. Because one of the buyers was not eligible to purchase a firearm, *Moore* did not squarely address the question presented.



he is purchasing the firearm on another person's behalf. See C.A. J.A. 588.

Neither of these arguments was raised in the court of appeals. See Pet. App. 9a & n.6 (explaining that petitioner had pointed out administrative deficiencies in the ATF Form 4473 in the district court but did not renew those arguments before the court of appeals). This Court ordinarily does not consider issues that were not pressed or passed upon below, see *United States v. Williams*, 504 U.S. 36, 41 (1992), and nothing justifies a departure from that practice in this case.

The arguments are also without merit. The “straw purchaser” theory of liability that underlies Question 11.a. on the ATF Form 4473 was not created by the ATF. Rather, the courts of appeals have explained that the doctrine follows from the statutory requirement that a dealer ascertain the identity of a gun purchaser. See, e.g., *Nelson*, 221 F.3d at 1209 (“If an ineligible buyer could simply use a ‘straw man’ or agent to obtain a firearm from a licensed dealer, the statutory scheme would be too easily defeated.”); *United States v. Lawrence*, 680 F.2d 1126, 1128 (6th Cir. 1982) (affirming a straw purchase conviction under Section 922(a)(6) and stating that “[i]f sales such as this one were insulated from the law’s registration provisions, the effect would be tantamount to a repeal of those provisions”).

As explained above, pp. 6-12, *supra*, Section 922(a)(6) criminalizes all false statements that are material to the lawfulness of a firearm sale, including falsely identifying oneself as the actual buyer of a firearm when one is actually purchasing it on behalf of someone else. It is thus irrelevant that Congress has not made it a crime for an eligible firearm purchaser to transfer a firearm to another eligible purchaser. See Pet. 14; NRA Amicus

Br. 6-8, 14; Stockman Amicus Br. 19-21. It is Section 922(a)(6) that prohibits petitioner's conduct, and Question 11.a. implements that statutory provision.

Furthermore, the fact that the ATF Form 4473 considers a gift-giver to be the actual purchaser of a firearm is not an arbitrary distinction. A person who purchases a firearm as a gift for another person is not acting as the recipient's agent, which is the premise underlying the straw-purchaser theory. See *Nelson*, 221 F.3d at 1209. And as a practical matter, a prohibited person is more likely to obtain a firearm through a planned straw purchase than an unanticipated or unrequested gift.

In the court of appeals, petitioner's challenge to his Section 922(a)(6) conviction was limited to whether a false answer to Question 11.a. on the ATF Form 4473 was material to the lawfulness of a firearm sale when the actual buyer is eligible to purchase a firearm. That question does not warrant this Court's review and petitioner's other arguments were not properly presented in this case.

2. Petitioner further contends (Pet. 19-22) that he did not violate Section 924(a)(1)(A) because the "actual buyer" information requested by Question 11.a. on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer. Further review of petitioner's Section 924(a)(1)(A) conviction by this Court is not warranted.

a. As an initial matter, petitioner did not raise this argument in the court of appeals. Although petitioner argued to the district court in a motion to dismiss that the "actual buyer" of a firearm is not information that is required to be kept in the records of a federal firearms

dealer under Section 924(a)(1)(A), petitioner did not appeal the denial of that motion, Pet. App. 9a & n.6.

Petitioner's challenge to his Section 924(a)(1)(A) conviction in the court of appeals was coextensive with his materiality challenge to his Section 922(a)(6) conviction. See Pet. C.A. Br. 11-22; *id.* at 11 (stating that “[s]ince the facts and the application of the law[] are so intertwined with [Section 922(a)(6) and Section 924(a)(1)(A)], they will both be addressed in this section”); *id.* at 12 n.2 (stating that references to Section 922(a)(6) in petitioner's court of appeals brief “are also intended to apply to [petitioner's] conviction under 18 U.S.C. § 924(a)(1)(A)”). Accordingly, the court of appeals affirmed petitioner's Section 924(a)(1)(A) conviction on the grounds that the provision “does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself.” Pet. App. 17a.

Nowhere in his court of appeals brief does petitioner argue that the “actual buyer” information required on the ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer for purposes of Section 924(a)(1)(A). This Court's “traditional rule \* \* \* precludes a grant of certiorari” when “the question presented was not pressed or passed upon below.” *Williams*, 504 U.S. at 41 (internal quotation marks and citation omitted). The Court should adhere to that rule here.

b. In any event, all of the information on ATF Form 4473 is information that is required to be kept in the records of a federal firearms dealer. A federal firearms dealer is required by statute to record the “name, age, and place of residence” of every individual to whom the dealer sells a firearm. 18 U.S.C. 922(b)(5). The dealer must maintain records of firearm sales “at his place of

business for such period, and in such form, as the Attorney General may by regulations prescribe.” 18 U.S.C. 923(g)(1). The Attorney General has promulgated a regulation that requires a federal firearms dealer to record firearms sales transactions on the ATF Form 4473, 27 C.F.R. 478.124(a), and the form requires the purchaser to certify that he is the actual buyer as part of the dealer’s collection of the name and other identifying information of the purchaser. See 27 C.F.R. 478.124(b); *United States v. Johnson*, 680 F.3d 1140, 1147 (9th Cir. 2012).

The courts of appeals that have considered the question have concluded that the “actual buyer” information required by the ATF Form 4473 is information required to be kept in the records of a federal firearms dealer within the meaning of Section 924(a)(1)(A). See *Johnson*, 680 F.3d at 1147; *United States v. Soto*, 539 F.3d 191, 198-199 (3d Cir. 2008), cert. denied, 555 U.S. 1116 (2009); *Nelson*, 221 F.3d at 1209. Petitioner identifies no case adopting his view that it is not. Further review of that issue is not warranted.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*  
MYTHILI RAMAN  
*Acting Assistant Attorney  
General*  
THOMAS E. BOOTH  
*Attorney*

AUGUST 2013