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 PETITIONER

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QUESTIONS PRESENTED

When a person buys a gun intending to later sell it to someone else, the government often prosecutes the initial buyer under 18 U.S.C. § 922(a)(6) for making a false statement about the identity of the buyer that is "material to the lawfulness of the sale." These prosecutions rely on the court-created "straw purchaser" doctrine, a legal fiction that treats the ultimate recipient of a firearm as the "actual buyer," and the immediate purchaser as a mere "straw man."

The lower courts uniformly agree that a buyer's intent to resell a gun to someone who cannot lawfully buy it is a fact "material to the lawfulness of the sale." But the Fourth, Sixth, and Eleventh Circuits have split with the Fifth and Ninth Circuits about whether the same is true when the ultimate recipient *can* lawfully buy a gun. The questions presented are:

1. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a fact "material to the lawfulness of the sale" of the firearm under 18 U.S.C. § 922(a)(6)?

2. Is a gun buyer's intent to sell a firearm to another lawful buyer in the future a piece of information "required . . . to be kept" by a federally licensed firearm dealer under 18 U.S.C. § 924(a)(1)(A)?

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The opinion of the court of appeals is reported at 706 F.3d 307. Pet. App. 1a-24a. The relevant rulings and judgment of the district court are unpublished and reprinted at Pet. App. 25a-27a and Pet. App. 28a-41a.

JURISDICTION

The court of appeals filed its opinion on January 23, 2013. Pet. App. 1a. On April 4, 2013, the Chief Justice extended the time to file a petition for a writ of certiorari to June 21, 2013. The petition for a writ of certiorari was filed on June 21, 2013 and granted on October 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(a)(6) provides:

> (a) It shall be unlawful . . . (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. § 924(a)(1)(A) provides:

> (a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever (A) knowingly makes 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 or in applying for any license or exemption or relief from disability under the provisions of this chapter . . . shall be fined under this title, imprisoned not more than five years, or both.

STATEMENT OF THE CASE

I. BACKGROUND OF THE GUN CONTROL ACT OF 1968.

The Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968), is the primary federal law regulating the purchase, sale, and possession of firearms. Among its provisions are two key restrictions on the possession and sale of firearms.

First, the statute makes it unlawful for certain categories of people to possess firearms. These groups of people, collectively called "prohibited persons," include juveniles, felons, fugitives, drug addicts, the mentally incompetent, and illegal aliens. *See* 18 U.S.C. § 922(g).

Second, the statute makes it unlawful to sell firearms to any person the seller knows or has reasonable cause to believe is a prohibited person. *See* 18 U.S.C. § 922(d).

As explained in more detail below, this provision initially applied only to sales by licensed gun dealers but was amended in 1986 to apply to all firearm sales. *See* Pub. L. No. 99-308, 100 Stat. 449, § 102 (1986).

The purpose of these two statutory provisions is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Barrett v. United States*, 423 U.S. 212, 220 (1976) (quoting S. Rep. No. 90-1501 (1968)). The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has promulgated regulations that reaffirm these restrictions but do not expand them. *See* 27 C.F.R. § 478.99.

Aside from these statutes and regulations, there are no laws that limit when a licensed gun dealer may sell a gun to a qualified purchaser. Of critical importance to this case, there are no statutes or regulations that prohibit a gun dealer from selling a firearm to a buyer who, at the time of the sale, intends to resell the gun in the future.

The Gun Control Act also criminalizes certain false statements made to licensed gun dealers during the purchase of a firearm. Two of those provisions are at issue in this case.

First, 18 U.S.C. § 922(a)(6) makes it unlawful for a person buying a gun from a licensed dealer "knowingly to make any false or fictitious oral or written statement . . . intended or likely to deceive" the gun dealer "with respect to any fact material to the lawfulness of the sale."

Second, 18 U.S.C. § 924(a)(1)(A) makes it 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."

II. HISTORY OF THE STRAW PURCHASER DOCTRINE.

As noted above, when Congress first enacted the Gun Control Act in 1968, it prohibited licensed gun dealers from selling guns to prohibited persons. Pub. L. No. 90-618, § 102, 82 Stat. at 1220. But the law did not prohibit ordinary citizens (those who are not federally licensed gun dealers) from selling guns to prohibited persons. *Id.* Thus, in its initial form, the Gun Control Act did not bar a lawful gun buyer from purchasing a firearm with the intent to resell it to a prohibited person. Indeed, the statute did not even criminalize the sale of a firearm from a nonlicensee to a prohibited person. *Id.*

Congress long understood that the Gun Control Act of 1968 did not criminalize that conduct. For example, in 1975, during hearings concerning the impact of the Gun Control Act, Senator Birch Bayh discussed that "loophole" with Rex Davis, the Director of ATF:

> Senator BAYH: Is there anything in the law now which makes it illegal for me, as a citizen who is not in one of those categories proscribed from purchasing firearms, from going into your store and buying a hand weapon; going home and selling it to my father-in-law, who does fit into one of those categories, whose purchase from a dealer is illegal?

> Mr. DAVIS: No, sir, there is no prohibition against the sale—by sale, we mean casual sale—of handguns between individuals. It does not matter—the only restriction would be that if you knew he was not a resident of that State, then it would be illegal. But that would be the only restriction placed on the sale or transfer of weapons between individuals.
>
> Senator BAYH: Is that not one of the biggest loopholes under the law? It is not illegal for me, as an individual? This allows, it seems to me, the wrong persons to have ready access. Why bother to risk stealing a weapon? If you have a felon who has just come out of the "big house" who wants to commit a felony, he can simply go to a relative and say, Sam, go in there and buy a handgun; here is the money. The relative buys it. There is nothing illegal. He sells it to the felon. There is nothing illegal about it—and the felon has the best gun in the town.
>
> Mr. DAVIS: Yes, sir, there is no question that this represents a gap in the law.[1]

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1. ATF Director Davis suggested in his testimony that it would be illegal to sell a gun to someone who is a nonresident of the state. However, the Gun Control Act provides a separate statutory means for individuals to buy guns and then resell them to out-of-state residents. To do so, the initial buyer must purchase the gun in his home state and then travel to the non-resident's home state and transfer the firearm through a licensed gun dealer in that state, who obtains the necessary paperwork and performs the required background check. *See* 18 U.S.C. §§ 922(a)(3), (a)(5), (b)(3), (d); 27 C.F.R. §§ 478.29, 478.30; *see generally* Federal Firearms Regulations Reference Guide, ATF Publ'n 5300.4, at 177 (2005).

Oversight of 1968 Gun Control Act–The Escalating Rate of Handgun Violence: Hearing on S. Res. 72, § 12 Before the Subcomm. to Investigate Juvenile Delinquency of the S. Comm. on the Judiciary, 94th Cong. 118 (1975).

When Congress failed to close this perceived loophole in the years after the Gun Control Act's passage, the lower federal courts sought to close it themselves by creating the straw purchaser legal doctrine. Those courts reasoned that "[i]f 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. Nelson*, 221 F.3d 1206, 1209 (11th Cir. 2000).

Thus, in an effort to effectuate what these courts perceived as the congressional intent of the Gun Control Act, they created the straw purchaser legal fiction, which treats the ultimate recipient of a gun as the "actual buyer" and the initial buyer as a mere "straw man." As the Ninth Circuit has explained, this legal fiction uses a common law agency principle to criminalize straw purchases under the laws governing false statements to gun dealers:

> In effect, this doctrine is merely an application of a principle that dates back to the time when the legal profession relied regularly on maxims expressed in Latin to illuminate the law: "Qui facit per alium facit per se," or "He who acts through another acts himself." In this context, it is a construction of the statute that directly serves the primary purpose of the Gun Control Act, which is "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."

United States v. Moore, 109 F.3d 1456, 1461 (9th Cir. 1997) (en banc) (quoting *Barrett*, 423 U.S. at 220)). Thus, "[t]he straw man doctrine, which is nothing more than a long-standing construction of the relevant statutes, holds that a person violates section 922(a)(6) by acting as an intermediary or agent of someone who is ineligible to obtain a firearm from a licensed dealer and making a false statement that enables the ineligible principal to obtain a firearm." *Id.* at 1460-61.

When the courts first created the straw purchaser doctrine, they described it as applying only in circumstances where the ultimate recipient of the gun was a prohibited person. *See Perri v. Dep't of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981); *see also United States v. Ortiz-Loya*, 777 F.2d 973, 978 (5th Cir. 1985). As one federal district court held, after discussing the historical application of the doctrine, "[a]ny reasonable jury would be compelled to conclude that none of the firearm purchases disclosed by the evidence fall into the definition of a straw purchase. This is so because all the alleged 'straw purchasers,' as well as the alleged actual purchasers, were eligible to purchase firearms." *United States v. Dollar*, 25 F. Supp. 2d 1320, 1324-25 (N.D. Ala. 1998).

The government also initially viewed the court-created straw purchaser doctrine as limited to transactions involving those ineligible to buy guns themselves. For example, a 1979 ATF circular with the heading "CLARIFICATION OF 'STRAW MAN TRANSACTIONS'" states that "[t]he Gun Control Act of 1968 does not necessarily prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person. It makes no difference that the dealer

knows that the purchaser will later transfer the firearm to another person, so long as the ultimate recipient is not prohibited from receiving or possessing a firearm." Industry Circular No. 79-10, Dep't of the Treas., Bureau of Alcohol, Tobacco and Firearms (Aug. 7, 1979).

Likewise, ATF Form 4473, which is the form that gun applicants must complete when buying a gun from a federally licensed firearm dealer, stated for years "that a 'straw purchase' may violate federal firearms laws if the licensee knows and has reasonable cause to believe that the true purchaser of the firearm(s) *is 'ineligible' to make that purchase directly*." *United States v. Polk*, 118 F.3d 286, 295 n.7 (5th Cir. 1997) (describing 1991 version of Form 4473) (emphasis added).

In 1986, Congress finally closed the "loophole" that gave rise to the straw purchaser doctrine. *See* Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, § 1(b) (1986). In the Firearms Owners' Protection Act, Congress amended 18 U.S.C. § 922(d), which had previously barred only licensed gun dealers from selling guns to prohibited persons, and expanded it to prohibit *anyone* from selling guns to prohibited persons. *Id.*

The legislative history of this provision indicates that it was enacted because "[t]here has been substantial concern since 1968 that the Gun Control Act had serious omissions that limited its ability to keep firearms out of the hands of criminals." H.R. Rep. No. 99-495, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1329. "The bill makes it unlawful for any person, not only licensees, to sell or otherwise dispose of firearms to certain prohibited

categories of persons, e.g., a convicted felon." *Id.* at 17, 1986 U.S.C.C.A.N. at 1343. As a result, the amendment "close[d] an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons." *Id.*

Although the Firearms Owners' Protection Act of 1986 eliminated the "loophole" upon which the lower federal courts relied to create the straw purchaser doctrine, those courts did not abandon the doctrine after the Act took effect. To the contrary, some circuits expanded the straw purchaser doctrine, holding that it also applies in circumstances where a person buys a gun intending to resell it to another *lawful* purchaser. The expanded straw purchaser doctrine thus criminalizes conduct that Congress chose not to prohibit in its 1986 amendments to the Gun Control Act.

This expansion of the straw purchaser doctrine began in the mid-1990s when ATF changed the wording of Form 4473 and the Federal Firearms Regulations Reference Guide by "redefining the term 'straw purchase' to include eligible purchasers." *Dollar*, 25 F. Supp. 2d at 1324; *see also Polk*, 118 F.3d at 295 n.7. Neither change was subject to any public notice and comment period or other administrative rulemaking procedure. Instead, ATF simply changed the wording of the "actual buyer" question on ATF Form 4473 and then released the new form to the public. *Dollar*, 25 F. Supp. 2d at 1325 n.6; *see also Polk*, 118 F.3d at 295 n.7.

That version of Form 4473, which is still in use today, addresses the straw purchaser doctrine in Question 11.a:

> 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.**

SA-1; *see also* ATF Form 4473, Question 11.a, *available at www.atf.gov/files/forms/download/atf-f-4473-1.pdf*. The instructions at the end of Form 4473 contain additional guidance for answering Question 11.a, including the following example:

> **ACTUAL TRANSFEREE/BUYER EXAMPLES**: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is **NOT THE ACTUAL TRANSFEREE/BUYER** of the firearm and must answer **"NO"** to question 11.a.

SA-4.

After ATF revised its forms to expand the straw purchaser doctrine, at least three circuits likewise held that the straw purchaser legal fiction applies even in circumstances where the buyer purchases the firearm for another lawful buyer. *See United States v. Morales*, 687 F.3d 697, 701 (6th Cir. 2012); *United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010); Pet. App. 1a-24a. Two other circuits have rejected this reasoning. *See Moore*, 109 F.3d at 1460-61; *Polk*, 118 F.3d at 295.

III. PETITIONER'S PROSECUTION FOR VIOLATING §§ 922(a)(6) and 924(a)(1)(A).

In the fall of 2009, Petitioner Bruce Abramski's elderly uncle decided he wanted a gun to protect himself inside his home. He went to petitioner for advice because petitioner was a former police officer and had experience with firearms. Petitioner told his uncle that he could obtain a law enforcement discount at gun stores and offered to buy the gun for his uncle to save him some money. Pet. App. 3a; JA 26a, 28a.

Petitioner's uncle wanted to ensure that they "do things by the book," so he spoke to three different licensed gun dealers to ensure that petitioner could buy the gun for him and legally transfer it to him at another gun dealer near his home. JA 27a-28a, 31a. All three gun dealers confirmed that petitioner lawfully could purchase the gun for his uncle in Virginia and then transfer title to his uncle through a licensed gun dealer in Pennsylvania. Pet. App. 3a; JA 28a, 31a.

After determining that the gun transfer would be legal, petitioner's uncle sent him a check to cover the cost of the gun. Petitioner then went to a local gun store and bought the gun. As part of the necessary paperwork and background check, petitioner filled out ATF Form 4473, discussed *supra* at 8-10. Petitioner checked the "Yes" box in response to question 11.a, indicating that he was the actual buyer. SA-1.

After buying the gun, petitioner traveled to his uncle's hometown and met him at a nearby gun store. Petitioner and his uncle filled out all the necessary federal

paperwork to resell the gun to his uncle. His uncle passed the required background check and petitioner and his uncle paid all the necessary transfer fees. At a hearing in the district court, an ATF agent testified under oath that petitioner's transfer of the gun to his uncle was lawful:

> Q. Okay. So we're in agreement that the transfer to Mr. Alvarez was legal?
>
> A. Yes, sir.

JA 9a.

Nevertheless, after discovering that petitioner's uncle wrote a check for the gun *before* petitioner bought it, the government indicted petitioner in the District Court for the Western District of Virginia for violating 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A). The government contended that petitioner made a false statement about the identity of the "actual buyer" of the gun. JA 17a-18a.

Petitioner moved to dismiss the indictment on the ground that neither § 922(a)(6) nor § 924(a)(1)(A) apply to petitioner's allegedly false statement on Question 11.a because both petitioner and his uncle were lawful gun purchasers. Pet. App. 8a; JA 12a-13a. Thus, petitioner argued that his answer to Question 11.a was not "material to the lawfulness of the sale" under § 922(a)(6) and was not "information required by this chapter to be kept" under § 924(a)(1)(A). The district court denied the motion in an oral ruling. Pet. App. 26a.

Petitioner later entered a conditional guilty plea, reserving his right to appeal on the issue of whether §§

922(a)(6) and 924(a)(1)(A) apply when a person fails to disclose the intent to resell a firearm to another lawful purchaser in the future. Pet. App. 10a. Petitioner then timely appealed on that issue. Pet. App. 10a; JA 4a.

The Court of Appeals for the Fourth Circuit rejected petitioner's arguments and affirmed. First, the court rejected petitioner's argument that his answer to Question 11.a was not "material to the lawfulness of the sale." The court held that the straw purchaser doctrine applies even where one lawful purchaser buys a gun for another lawful purchaser, rejecting the contrary holding of the Fifth Circuit in *Polk*. Pet. App. 15a. The court adopted the reasoning of the Eleventh Circuit, holding that:

> [T]o say that the identity of the actual purchaser is material to the lawfulness of one sale but not to another, is counterintuitive. . . . [W]e 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.

Pet. App. 15a-16a (quoting *Frazier*, 605 F.3d at 1280). The court concluded by holding that "[b]ecause the identity of the actual purchaser of the handgun was material to the lawfulness of its acquisition by petitioner on November 17, 2009, he made a false and fictitious statement to the licensed dealer when he answered 'Yes' to question 11.a

on ATF Form 4473, assuring the dealer that he was the actual buyer." Pet. App. 17a.

The court also rejected petitioner's argument concerning § 924(a)(1)(A), holding that "the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm." Pet. App. 18a.

SUMMARY OF ARGUMENT

1. Petitioner's statement that he was the "actual buyer" of the gun was not "material to the lawfulness of the sale" under § 922(a)(6). A false statement "is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988). This is a case-specific analysis that asks whether the misrepresentation was capable of affecting the outcome of the governmental decision at issue.

Here, the law permits petitioner to buy a gun with the intent to resell it to another lawful buyer such as his uncle—*i.e.*, it permits him to engage in a "straw purchase" with a lawful buyer. Thus, applying the case-specific materiality analysis outlined in *Kungys*, petitioner's false statement was not material to the *lawfulness* of the sale because the gun dealer lawfully could have sold petitioner the gun even if petitioner had disclosed his intent to resell it to his uncle.

2. Even if the Court departs from its case-specific materiality analysis applied in *Kungys*, petitioner's false

statement was not material because the court-created straw purchaser doctrine cannot apply here. That legal fiction, which this Court has not previously addressed or endorsed, is an impermissible judicial expansion of the plain text of a criminal statute. The lower courts created the straw purchaser doctrine to close a perceived "loophole" in the plain text of the original Gun Control Act that permitted gun buyers to readily acquire guns on behalf of those not lawfully entitled to possess them. But it is well-settled that the sole function of the courts is to enforce criminal laws as written, not to rewrite them to better achieve the courts' perception of the law's goals. Moreover, Congress later expressly closed the "loophole" that was the genesis of the straw purchaser doctrine, but did so through means other than criminalizing the purchase of a gun with the intent to resell it to another buyer. Nevertheless, the lower courts continue to apply the straw purchaser doctrine despite no present justification for doing so.

Moreover, whatever the merits of the straw purchaser doctrine generally, it certainly cannot apply where a gun buyer purchases a firearm for another lawful buyer. In that circumstance, the underlying rationale for the doctrine—preventing guns from falling into the hands of those not legally entitled to possess them—does not apply. Because this Court narrowly construes any judicial expansion of a criminal law, it should reject application of the straw purchaser doctrine in circumstances involving lawful gun buyers.

If the Court rejects the straw purchaser doctrine, it should reverse the court of appeals. The definition of "actual buyer" on the ATF form conforms to the

meaning of that term under the straw purchaser doctrine. That special meaning of "actual buyer" is not found in the Gun Control Act or its accompanying regulations. Indeed, without the straw purchaser rule, the person who completes the ATF form, undergoes the background check, and physically takes possession of the gun is the "actual buyer" under the law. Accordingly, without the straw purchaser rule, petitioner's answer to the "actual buyer" question, even if false based on the definition in the form, was not material to the *lawfulness* of the sale because it was consistent with the Gun Control Act and its regulations.

3. Petitioner's answer to the "actual buyer" question also was not a false statement concerning information "required by this chapter to be kept" in a gun dealer's records under § 924(a)(1)(A). The chapter of the U.S. Code containing the Gun Control Act only requires that a licensed dealer keep three specific pieces of information about gun buyers—name, age, and place of residence. Even if the Court construes the phrase "required *by this chapter* to be kept" to include ATF regulations promulgated under the Gun Control Act, those regulations similarly do not require gun dealers to record information about the ultimate recipient or "actual buyer" of the firearm. In any event, the government's theory again depends on the straw purchaser doctrine and, for the reasons explained above, that doctrine cannot apply on the facts of this case.

Accordingly, the Court should reverse the court of appeals and remand for dismissal of the indictment.

ARGUMENT

I. PETITIONER DID NOT MAKE A FALSE STATEMENT "MATERIAL TO THE LAWFULNESS OF THE SALE" UNDER § 922(a)(6).

A. Petitioner's false statement was not "material to the lawfulness of the sale" even if the Court applies the straw purchaser doctrine.

Title 18 U.S.C. § 922(a)(6) criminalizes false statements to gun dealers that are "material to the lawfulness of the sale" of the firearm. The government indicted petitioner under § 922(a)(6) based on his answer to Question 11.a on ATF Form 4473, where petitioner indicated that he was the "actual buyer" of the gun. JA 17a-18a. The government contends that petitioner was required to disclose his intent to resell the gun to his uncle, and that his failure to do so was a false statement "material to the lawfulness of the sale" under § 922(a)(6).

But as explained below, no matter what answer petitioner gave to that question, the dealer still could have lawfully sold petitioner the gun. Thus, under well-settled materiality precedent from this Court, petitioner's answer to the actual buyer question was not "material to the lawfulness of the sale."

The legal meaning of the term "material" in criminal statutes is controlled by this Court's decision in *Kungys v. United States*, 485 U.S. 759 (1988). In *Kungys*, the Court held that a false statement "is material if it 'has a natural tendency to influence, or was capable of influencing, the

decision of' the decisionmaking body to which it was addressed." *Id.* at 770. Notably, although the Court has restated the *Kungys* standard in several other cases, *Kungys* is the only case in which this Court actually analyzed and applied that test.

Juozas Kungys was a native Lithuanian who was naturalized as a U.S. citizen in the 1950s. In 1982, the U.S. government sought to denaturalize Kungys because of his alleged participation in the execution of 2,000 Lithuanians, most of them Jewish, during World War II. *Id.* at 764. The government argued that Kungys had falsely stated his date of birth and place of birth in his naturalization paperwork in an effort to conceal his involvement in these atrocities. *Id.* at 764-65.

Federal law permits the government to denaturalize a U.S. citizen whose naturalization was "procured by concealment of a material fact." *Id.* at 767. Kungys conceded that he "willfully misrepresented the date and place of his birth in his naturalization proceeding in 1954" but argued that those misrepresentations were not "material." *Id.*

This Court adopted the "natural tendency to influence" or "capable of influencing" test, explaining that this materiality analysis turns on whether the false statement was capable of influencing the decision *in that particular case*:

> We think it safer in the naturalization context, as elsewhere, to fix as our guide the central object of the inquiry: whether the misrepresentation or concealment was predictably capable of

> affecting, i.e., had a natural tendency to affect, the official decision. The official decision in question, of course, is whether *the applicant* meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation or concealment had a natural tendency *to produce the conclusion that the applicant was qualified*.

Id. at 771-72 (emphasis added).

The Court's application of the materiality test in *Kungys* leaves no doubt that it is case-specific. Although the Court's announcement of the standard for materiality was a majority holding authored by Justice Scalia, the application of that standard in *Kungys* did not produce a majority opinion. *Id.* at 762-63. However, both Justice Scalia's opinion (joined by Chief Justice Rehnquist and Justice Brennan) and Justice Stevens' opinion concurring in the judgment (joined by Justice Marshall and Justice Blackmun) applied a case-specific, contextual test to conclude that Kungys' false statement was not material.

Justice Scalia concluded that Kungys' misrepresentation of his date and place of birth was not material because "[t]here has been no suggestion that those facts were themselves relevant to his qualifications for citizenship." *Id.* at 774. In other words, Justice Scalia's opinion concluded that Kungys' false statements were not material because the result of the naturalization decision would have been the same even if Kungys had provided his true date and place of birth. Justice Scalia also considered whether providing the truthful information "would predictably have disclosed other facts relevant to

his qualifications" but again concluded that "not even that has been found here." *Id.* Thus, the opinion concluded that Kungys' citizenship was not "procured by concealment of a material fact." *Id.* at 773-74.

Justice Stevens, concurring in the judgment, also concluded that Kungys' false statements were not material. Justice Stevens noted that "the Government failed to prove the existence of any fact that, if known, would have . . . disqualified [Kungys] from later becoming an American citizen." *Id.* at 785. Justice Stevens further explained that, to be material, the "misrepresentation must have had the effect of allowing the person to obtain citizenship when a truthful statement would have led directly or after investigation to the denial of citizenship." *Id.* at 788.

Even Justice White's dissenting opinion indicates that the materiality analysis is contextual—meaning that it must focus on whether the false statement affected the official decision *in that case*, not whether, hypothetically, that type of false statement could affect the outcome of that type of decision. *See id.* at 809-10 (White, J., dissenting).

Commentators acknowledge that this Court's decision in *Kungys* requires a case-specific, contextual analysis. *See* Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. Marshall L. Rev. 111, 120 (2009) ("[T]he *Kungys* definition of materiality indicates a subjective approach, asking whether the actual statement made was capable of influencing the actual government decisionmaker involved."); Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*,

54 Wm. & Mary L. Rev. 83, 105 (2012-2013) ("[M]ateriality cannot be evaluated in the abstract. . . . Courts and schools agree that this renders the materiality threshold heavily context- and fact-dependent."). Moreover, this contextual approach is sound policy. The historical purpose of materiality provisions in criminal statutes is to avoid imposing harsh criminal punishments on individuals whose statements, while false, turned out to be unimportant or trivial—that is, the false statement was not capable of affecting the outcome. *See* 2 William Blackstone, *Commentaries* *137 (a false statement under oath "must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance" it is not punishable); *United States v. Beer*, 518 F.2d 168, 170-71 (5th Cir. 1975).

Finally, even if this Court is not inclined to follow *Kungys*' contextual approach to materiality as a general principle, the statutory language of § 922(a)(6) requires that the contextual approach be applied here. Section 922(a)(6) criminalizes false statements "material to the lawfulness of *the sale*." In other words, the statute applies only if the false statement had "a natural tendency to influence, or was capable of influencing" the determination of whether the firearm sale *in this case* (*i.e.*, "the sale") was lawful. That determination requires a case-specific approach.

Applying this case-specific, contextual materiality analysis, the court of appeals erred by holding that the identity of the actual purchaser "*always*" is material to the lawfulness of the sale. Pet. App. 15a-16a. Here, the law permits petitioner to buy a gun for his uncle. As explained above, there is no statute or regulation that

prohibits a gun dealer from selling a firearm to someone who intends to resell it to another lawful buyer (*i.e.*, someone who, under the straw purchaser fiction, is not the "actual buyer"). Indeed, the statutes and accompanying regulations provide several lawful means for people to buy guns intending to resell them to other lawful buyers. For example, one can buy a gun and immediately resell it lawfully to another resident of that state without any federal paperwork or background checks at all (provided the recipient is not a prohibited person). *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. Likewise, that same gun buyer lawfully can resell the gun to an out-of-state resident by traveling to the recipient's home state and transferring the gun through a licensed gun dealer in that state, as petitioner did in this case. *See* 18 U.S.C. §§ 922(a)(3), (b)(3); *see also* ATF Reference Guide, *supra*, at 177.[2]

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2. ATF's Reference Guide states:

> (B)(3) May an unlicensed person obtain a firearm from an out-of-State source if the person arranges to obtain the firearm through a licensed dealer in the purchaser's own State?
>
> A person not licensed under the [Gun Control Act] and not prohibited from acquiring firearms may purchase a firearm from an out-of-State source and obtain the firearm if an arrangement is made with a licensed dealer in the purchaser's State of residence for the purchaser to obtain the firearm from the dealer.
>
> [18 U.S.C. 922(a)(3) and 922(b)(3)]

ATF Reference Guide, *supra*, at 177.

To be sure, Question 11.a on ATF Form 4473 states that "If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." SA-1. But that statement is simply not the law. There is no corresponding statute or regulation that imposes this restriction on gun dealers, nor was this statement on Form 4473 ever subject to the administrative requirements necessary to give it the power of law. *See* 18 U.S.C. § 926(b); *United States v. Am. Invest. of Pittsburgh, Inc.*, 879 F.2d 1087, 1091 n.4 (3d Cir. 1989). Thus, while that statement may, as a practical matter, discourage some gun dealers from selling guns to individuals who answer "No" to Question 11.a, it has no bearing on the "lawfulness" of the sale. The lawfulness of the sale is governed by the applicable statutes and regulations, and no statute or regulation prohibits a gun dealer from selling a gun to someone who, like petitioner, intends to resell the gun to another lawful purchaser in the future.

In sum, because the gun dealer lawfully could have sold the gun to petitioner regardless of his answer to Question 11.a, petitioner's allegedly false statement on Question 11.a was not "material to the lawfulness of the sale." Accordingly, this Court should reverse and remand this case for dismissal of count I of the indictment.

B. The straw purchaser doctrine cannot apply in this case.

Even if the Court abandons the contextual materiality analysis established in *Kungys*, it should reverse the court of appeals. The court of appeals' materiality ruling—which held that petitioner had concealed the "actual purchaser" of the firearm—depends on application of the

court-created straw purchaser doctrine. As explained below, that legal fiction is an impermissible judicially created expansion of the unambiguous text of § 922(a)(6) which this Court should disapprove. At a minimum, the doctrine cannot apply in a case like this one, where the buyer purchases the gun with the intent to resell it to another *lawful* purchaser.

If this Court rejects application of the straw purchaser doctrine—either in all cases or solely for sales to other lawful buyers—it should reverse the court of appeals' materiality determination. Without the straw purchaser doctrine, petitioner's answer to Question 11.a on ATF Form 4473 was not "material to the lawfulness of the sale" because, regardless of what the form says, petitioner was the actual buyer of the gun.

1. The straw purchaser doctrine is an impermissible judicial expansion of a criminal statute.

This Court has never considered, much less endorsed, the straw purchaser doctrine created by the lower courts. As explained below, that doctrine should be rejected because it improperly expands an unambiguous criminal statute. Moreover, the doctrine is no longer necessary (if it ever was) because Congress closed the loophole that gave rise to the doctrine in the first place.

As an initial matter, the straw purchaser doctrine is an impermissible expansion of the plain text of the Gun Control Act. When a statute's language is plain, the sole function of the courts is to enforce the statute according to its terms. *Dodd v. United States*, 545 U.S. 353, 359

(2005); *see also Carr v. United States*, 560 U.S. 438, 456 (2010). Indeed, "Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted).

The straw purchaser doctrine is not mentioned anywhere in the Gun Control Act. To the contrary, the statutes and accompanying regulations actually provide several lawful means for individuals to buy guns with the intent to resell them to other lawful purchasers. *See supra* at 22. But despite the plain text of these statutes, the lower courts created the straw purchaser doctrine to plug a perceived loophole in the law. *See supra* at 6-7. As one court explained, "[i]f 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." *Nelson*, 221 F.3d at 1209.

Federal courts do not have the power to create new criminal law or expand existing criminal laws to reach new conduct. "The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). Indeed, to ensure the legislature retains this exclusive power, this Court repeatedly has held that there can be no federal criminal common law. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

By creating the "straw purchaser" doctrine, the lower courts overstepped their power and judicially created new criminal law. The plain text of § 922(a)(6) and its sister provisions in the Gun Control Act do not prohibit straw

purchases—a fact Congress has long understood. *See supra* at 4-6. Indeed, as discussed in more detail *infra* at 27, Congress ultimately closed the statutory "loophole" on which the courts relied to create the straw purchaser doctrine, but did so through means that did not prohibit buyers from purchasing guns on behalf of other lawful buyers. The straw purchaser doctrine thus criminalizes activity that Congress *intentionally* did not prohibit in § 922(a)(6) or elsewhere in the law. As a result, the lower courts' creation and continued use of the straw purchaser doctrine impermissibly amends § 922(a)(6) and deprives Congress of its exclusive authority to create criminal laws. *See generally* 1 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 3:27 (7th ed. 2007).

To be sure, some courts have claimed that the straw purchaser doctrine stems from a "construction of the relevant statutes." *See, e.g.*, *Moore*, 109 F.3d at 1460-61. But there is no ambiguous statutory language in § 922(a)(6) that could be interpreted to include straw purchases. Rather, the lower courts rely solely on a purported purpose of the Gun Control Act—keeping guns out of the hands of criminals—to justify the doctrine. *See, e.g.*, *Nelson*, 221 F.3d at 1209. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon v. United States*, 494 U.S. 152, 160 (1990). This Court should remain faithful to the language chosen by Congress in the Gun Control Act—and the specific means chosen by Congress to achieve its legislative objectives—and reject the expansion of the Act's plain text through a court-created legal doctrine.[3]

3. Even the government has been unable to consistently apply this court-created doctrine. For example, the government permits

In addition, even if the straw purchaser doctrine were permissible (and it is not), it is unnecessary. The lower courts created the straw purchaser doctrine because the Gun Control Act initially failed to prohibit an individual from buying a gun and then transferring it to a prohibited person. *See supra* at 6-7. As a result, the government purportedly lacked any means to deter "a 'straw man' or agent" from buying guns and reselling them to prohibited persons. *Id.*

Congress was aware of this purported gap in the law. *See supra* at 4-6. Ultimately, in 1986, Congress broadened § 922(d) to bar individuals from transferring guns to prohibited persons. This expansion of § 922(d) was intended to prohibit illegal straw purchases. *See* H.R. Rep. No. 99-495, at 17 (1986) *reprinted in* 1986 U.S.C.C.A.N. 1327, 1343 (stating that the amendment "closes an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons"); *United States v. Jefferson*, 334 F.3d 670, 675 (7th Cir. 2003). Indeed, the government now uses § 922(d) to prosecute straw purchasers. *See, e.g.*, *United States v. Manis*, 344 F. App'x 160, 166 (6th Cir. 2009) (upholding a conviction under § 922(d) for "unlawful straw purchases with a prohibited person").

Furthermore, § 922(d) is hardly the only statutory tool available to the government to prosecute those who buy guns for prohibited persons. For instance, the

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a person to buy a gun for another lawful buyer if it is intended as a gift. SA-4. But the lower courts' rationale for the straw purchaser doctrine applies equally regardless of whether the ultimate recipient pays for the gun or receives it as a gift.

government may prosecute a straw purchaser under the aiding and abetting statute, 18 U.S.C. § 2(a), which "applies with full force to one who furnishes a firearm to a person prohibited . . . from receiving it." *United States v. Falletta*, 523 F.2d 1198, 1201 (5th Cir. 1975); *see also United States v. Samuels*, 521 F.3d 804, 812 (7th Cir. 2008) (holding a defendant aids and abets a felon in possession of a firearm when the defendant assists the felon in possession of the firearm and has knowledge that individual is a felon). The government may also prosecute straw purchasers under the conspiracy statute, 18 U.S.C. § 371. *See, e.g.*, *United States v. Santiesteban*, 825 F.2d 779, 782 (4th Cir. 1987) (upholding a conviction for conspiracy for transporting a firearm to a prohibited person).

In sum, because Congress closed the perceived loophole that was the genesis of the straw purchaser doctrine, there is no longer any justification for it. Whatever the merits of the straw purchaser doctrine when the loophole existed, it is certainly impermissible to continue applying it after Congress amended the statute to remove the loophole that animated the doctrine in the first place.

2. The straw purchaser doctrine does not apply when the ultimate recipient is a lawful gun buyer.

Even if this Court believes the straw purchaser doctrine is valid as a general principle, the Court should hold that it does not apply in a case like this one, where an individual purchases a gun on behalf of another *lawful* purchaser.

This Court construes criminal statutes narrowly and disfavors expanding criminal laws beyond their plain text. *See Dowling v. United States*, 473 U.S. 207, 213-14 (1985) (noting courts generally "find a 'narrow interpretation' appropriate" when "assessing the reach of a federal criminal statute"). This is especially true in instances where the statute does not clearly criminalize the conduct at issue. *See Williams v. United States*, 458 U.S. 279, 286 (1982) ("[W]hen interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'"); *United States v. Alpers*, 338 U.S. 680, 685-86 (1950) (noting courts should be wary of interpreting criminal statutes "to include conduct that Congress might have barred, but did not, by the language it used"). This principle should apply with even greater force to a court-created doctrine that itself expands the plain text of the statute.

Here, the lower courts created the straw purchaser doctrine in order to plug a perceived loophole that readily permitted individuals to obtain guns for prohibited persons without violating the law. *See supra* at 6-7. The doctrine was necessary, according to these courts, to vindicate a key goal of the Gun Control Act—keeping guns out of the hands of those not legally entitled to possess them. *See Nelson*, 221 F.3d at 1209.

But when the ultimate recipient of a gun is legally entitled to buy and own guns, that concern is not even implicated. Thus, construing the straw purchaser doctrine narrowly—as this Court's precedent requires, *see Williams*, 458 U.S. at 286—the doctrine cannot apply to the facts of this case, where a lawful gun buyer

purchased a firearm with the intent to resell it to another lawful buyer.

C. Because the straw purchaser doctrine does not apply, petitioner was the actual buyer of the firearm and his statement on Form 4473 was not "material to the lawfulness of the sale."

Without the straw purchaser doctrine, petitioner's answer to Question 11.a was not "material to the lawfulness of the sale" under either a contextual or categorical approach to materiality.

The government's theory in this case is that, although petitioner stood at the counter and bought the gun himself, he was not the "actual buyer" of the firearm. This theory relies on the straw purchaser legal fiction, which transforms the person standing at the gun counter into a mere conduit for some ultimate recipient who, as a legal matter, is treated as the true buyer. The government argued—and the court of appeals agreed—that the identity of that ultimate recipient or "actual buyer" is a fact material to the lawfulness of the sale. Pet. App. 15a-17a.

Question 11.a is designed to obtain the information necessary to determine if the straw purchaser legal fiction applies. It asks whether the person completing the form is the "actual buyer" and explains in bold print that "You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person." SA-1. Importantly, Question 11.a standing alone has no legal power. To be sure, it defines the term "actual buyer" to exclude anyone buying a gun "on behalf of another person." SA-1. But the Gun Control Act and its accompanying regulations do not use

the term "actual buyer" at all. That term, along with the corresponding notion that a gun buyer who intends to resell the gun is not the "actual buyer," stem solely from the court-created doctrine. *See supra* at 6-7, 9-10; *see also Am. Invest. of Pittsburgh,* 879 F.2d at 1091 n.4 ("[T]he form provides an interpretation of activity . . . otherwise lacking in the statute and regulations. . . . Since utilization of this definition could be construed to impose new duties on financial institutions, courts have refused to treat the form as an agency rulemaking establishing a basis for liability because the form was not promulgated in accordance with the safeguards provided by the Administrative Procedure Act.").

Thus, the straw purchaser doctrine is the sole reason petitioner's answer to Question 11.a is material to the *lawfulness* of the sale. To be sure, petitioner's answer to Question 11.a may have been false based on the definition of "actual buyer" in the form itself. But the form's definition of "actual buyer" is not the statute's or regulations' definition of actual buyer. *See id.* Without the straw purchaser rule, petitioner *was* the actual buyer under the Gun Control Act and its accompanying regulations—regardless of his intent to resell the gun to someone else—because he was the person who filled out the form, underwent a background check, paid for the gun, and physically took possession of it. Accordingly, if this Court rejects application of the straw purchaser doctrine, petitioner's false statement that he was the "actual buyer," as that term is uniquely defined in Question 11.a, was not material to the *lawfulness* of the sale because, as a legal matter under the Gun Control Act and its regulations, he *was* the actual buyer regardless of which box he checked on Question 11.a.

II. PETITIONER'S INTENT TO RESELL THE GUN TO HIS UNCLE IS NOT INFORMATION "REQUIRED BY THIS CHAPTER TO BE KEPT."

The Gun Control Act also imposes certain record-keeping requirements on gun dealers who sell firearms. *See* 18 U.S.C. §§ 922(b)(5) and 923(g)(1)(A). In addition to criminalizing false statements to gun dealers that are "material to the lawfulness of the sale," Congress also criminalized false statements "with respect to the information required by this chapter to be kept in the records of a [licensed gun dealer]." 18 U.S.C. § 924(a)(1)(A).

Count II of the indictment charged petitioner with violating § 924(a)(1)(A). The government alleged that petitioner's answer to Question 11.a, which asked whether petitioner was the "actual buyer" of the firearm, was "information required by this chapter to be kept" in a gun dealer's records. JA 18a. The court of appeals agreed, holding that "the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer that sold the firearm." Pet. App. 18a.

This is wrong. As explained below, Chapter 44 of Title 18 of the United States Code (the chapter containing the Gun Control Act) only requires that a licensed dealer keep three specific pieces of information about gun buyers—name, age, and place of residence. Even if the Court construes the phrase "required *by this chapter* to be kept" to include ATF regulations promulgated under the Gun Control Act, those regulations also do not require gun dealers to record the information contained in Question 11.a. Finally, the government cannot argue that petitioner

made a false statement about the name of the "transferee" in Question 1 (which, admittedly, is information required to be kept) because the indictment only alleges a false statement in Question 11.a. In any event, that argument depends on the straw purchaser doctrine, which the Court should reject for the reasons discussed above.

A. The answer to Question 11.a on Form 4473 is not information required to be kept by Chapter 44.

The court of appeals erred by holding that "the identity of the actual purchaser of the Glock 19 handgun was a fact required to be maintained by the Virginia firearms dealer" under § 924(a)(1)(A). Pet. App. 18a. There are only two provisions of the Gun Control Act that reference the information that must be kept by licensed gun dealers: 18 U.S.C. § 922(b)(5) and § 923(g)(1)(A). Section 922(b)(5) requires that "the licensee note[] in his records, required to be kept pursuant to section 923 of this chapter, the *name*, *age*, and *place of residence*" of a gun purchaser. *Id.* (emphasis added). Section 923(g)(1)(A) requires that "[e]ach licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of . . . sale, or other disposition of firearms 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)(A).

Thus, one statute, § 922(b)(5), provides specific information that Chapter 44 itself requires gun dealers to keep in their records. The other, § 923(g)(1)(A), authorizes the Attorney General to promulgate regulations requiring additional information to be kept. This is significant because § 924(a)(1)(A) only criminalizes false statements

about information "required *by this chapter* to be kept." *Id.* (emphasis added). Thus, the Gun Control Act, by its plain terms, does not criminalize false statements about information required *by ATF regulations* to be kept. *See Williams*, 458 U.S. at 290 (this Court construes criminal statutes narrowly).

The surrounding text of the Gun Control Act confirms this conclusion. Section 924(d)(1), just a few paragraphs below § 924(a)(1)(A), permits forfeiture of a firearm if it is involved in a violation of any "provision of this chapter *or any rule or regulation promulgated thereunder*." 18 U.S.C. § 924(d)(1) (emphasis added). This language shows that Congress ascribes different meanings to "this chapter" and "this chapter or any rule or regulation promulgated thereunder." As this Court has held, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Simply put, Congress' use of the phrase "this chapter or any rule or regulation promulgated thereunder" in § 924(d)(1) indicates that, when drafting the Gun Control Act, Congress did *not* believe the phrase "this chapter" means the regulations in addition to the statute.

Applying the plain meaning of "required *by this chapter* to be kept," § 924(a)(1)(A) criminalizes false statements concerning only the three pieces of information expressly listed in the statute itself— name, age, and place of residence. 18 U.S.C. § 922(b)(5). Notably, the intent to resell the gun to someone else, and the identity of that

ultimate recipient (*i.e.*, the "actual buyer"), are not facts required to be kept under § 922(b)(5). Thus, petitioner's false statement in Question 11.a did not involve information "required by this chapter to be kept."

Even if the Court construes the phrase "required by this chapter to be kept" to include information required to be kept by the accompanying regulations, petitioner did not make a false statement concerning that information either. Under § 923(g)(1)(A), ATF has promulgated regulations identifying the information required to be kept by gun dealers. *See* 27 C.F.R. § 478.124(a), (c). Section 478.124(a) prohibits gun dealers from selling firearms to nonlicensees "unless the licensee records the transaction on a firearms transaction record, Form 4473." Section 478.124(c) sets out the information that must be contained in Form 4473:

> Prior to making an over-the-counter transfer of a firearm to a nonlicensee who is a resident of the State in which the licensee's business premises is located, the . . . licensed dealer so transferring the firearm shall obtain a Form 4473 from the transferee showing the transferee's *name*, *sex*, *residence address* (including county or similar political subdivision), *date and place of birth*; *height*, *weight* and *race* of the transferee; the transferee's *country of citizenship*; the transferee's *INS-issued alien number or admission number*; the transferee's *State of residence*; and *certification by the transferee that the transferee is not prohibited by the Act* from transporting or shipping a firearm in interstate or foreign commerce or receiving a

> firearm which has been shipped or transported in interstate or foreign commerce or possessing a firearm in or affecting commerce.

27 C.F.R. § 478.124(c)(1) (emphasis added).

Again, as with the statute itself, the regulations do not require a gun dealer to keep a record of whether the gun buyer intends to resell the gun—*i.e.*, whether he is the "actual buyer" as that term is defined in Question 11.a on Form 4473. As a result, even if the Court interprets § 924(a)(1)(A) to apply both to the information required to be kept in Chapter 44 itself and to the additional information required by ATF regulations, petitioner did not violate § 924(a)(1)(A). His only allegedly false statement was on Question 11.a of the Form and that question does not request information "required by this chapter to be kept" in a gun dealer's records. 18 U.S.C. § 924(a)(1)(A).

B. The straw purchaser doctrine cannot be used to expand the scope of § 924(a)(1)(A).

The government may argue that the Court should apply the straw purchaser doctrine and conclude that petitioner made a false statement about the name of the "transferee" in Question 1 of Form 4473. Admittedly, the name of the transferee is a piece of information required to be kept both by the Gun Control Act itself and by the accompanying regulations. *See* 18 U.S.C. § 922(b)(5); 27 C.F.R. § 478.124(c).

But the government did not indict petitioner for making a false statement about the name of the transferee.

The indictment states that petitioner "represented that he was the actual buyer of the firearm, when in fact . . . he was buying the firearm for another individual." JA 18a. On appeal, the government cannot expand its theory of the case beyond the charges actually made in the indictment. *See Stirone v. United States*, 361 U.S. 212, 216 (1960). Here, petitioner's statement "that he was the actual buyer of the firearm," as alleged in the indictment, is found solely in Question 11.a of the form. As explained above, the answer to that question is not information "required by this chapter to be kept" by a licensed gun dealer.

Moreover, the term "transferee" means something different than "actual buyer," even in the context of the straw purchaser doctrine. The plain meaning of the term transferee is "one to whom title or property is transferred." *See, e.g.*, Webster's II New College Dictionary 1170 (1995).[4] In a straw purchase, the person "to whom title or property is transferred" is the straw man, not the ultimate recipient of the firearm—after all, the straw man's role in the transaction is to obtain legal title to the firearm and then resell it to the actual buyer at a later time. As a result, the government cannot rely on petitioner's answer to Question 1 to support his conviction under § 924(a)(1)(A).

Finally, even if the Court concludes that the indictment can be read to allege that petitioner falsely identified himself as the "transferee" in Question 1, that allegation depends entirely on application of the straw purchaser

4. The term "transferee" is undefined in the Gun Control Act or its accompanying regulations and thus its ordinary meaning applies. *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

doctrine. Only through that legal fiction can petitioner's uncle be considered the transferee even though petitioner was the person to whom the dealer conveyed title and physically transferred the firearm. But, for the reasons discussed in Part I.B, *supra* at 23-30, the straw purchaser doctrine does not apply to petitioner's purchase of the gun for his law-abiding uncle. Accordingly, the Court should reverse and remand for dismissal of count II of the indictment.

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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