

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 THE BRADY CENTER TO PREVENT GUN
VIOLENCE, THE MAJOR CITIES CHIEFS
ASSOCIATION, AND THE INTERNATIONAL
BROTHERHOOD OF POLICE OFFICERS AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENT**

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**STATEMENT OF INTEREST OF
AMICI CURIAE¹**

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous *amicus* briefs in cases before this Court involving the interpretation and application of firearms regulations, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415, 427 (2009) (citing Brady Center brief), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). The Brady Center's Legal Action Project has studied and published reports bearing on the dangers posed by straw purchasing, and represents people who have been injured by, or lost loved ones to, straw-purchased guns. The Brady Center brings a broad and deep perspective to the issues raised by this case.

The Major Cities Chiefs Association is composed of police executives heading the fifty-six largest police departments in the United States, including Atlanta, Chicago, Dallas, Detroit, Los Angeles, New York, Philadelphia, Washington, D.C.,

¹ Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

and many others, which protect roughly forty percent of America's population. The Association has filed amicus briefs in numerous cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), and *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).

The International Brotherhood of Police Officers ("IBPO") is one of the largest police unions in the country, representing a significant number of members across the nation. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports reasonable federal and state gun laws that protect the public and law enforcement officers.

INTRODUCTION AND SUMMARY OF ARGUMENT

On December 24, 2012, before the crack of dawn in Webster, New York, William H. Spengler set his house and car on fire. Firefighters rushed to the scene and prepared to quench the blaze, unaware that Spengler had armed himself with a revolver, a Mossberg 12-gauge shotgun, and a .223-caliber Bushmaster semiautomatic rifle. As Police Chief Gerald L. Pickering would later recount: “He was equipped to go to war to kill innocent people.” Setting the fire, it turned out, was a trap, and when the firefighters arrived, Spengler ambushed them from his porch. In the end, Spengler burned down seven homes, damaged two others, severely wounded two firefighters, and killed four people—43-year-old firefighter Michael Chiapperini, 19-year-old firefighter Tomasz Kaczowka, himself, and his sister, whose charred body was found inside the home.²

As federal authorities have alleged, this tragedy was made possible after Dawn Nguyen purchased a Mossberg 12-gauge shotgun and a .223-

² See generally Liz Robbins & Joseph Goldstein, *Gunman Who Killed 2 Firefighters Left Chilling Note*, N.Y. Times (Dec. 25, 2012); Victoria E. Freile, *Human Remains, Chilling Note Found at Webster Crime Scene*, Democrat & Chronicle (Dec. 25, 2012); George M. Walsh & Mary Esch, *William Spengler’s Note Before Killing Webster Firefighters: Do What I Like Doing Best, Killing People*, Huffington Post (Dec. 25, 2012).

caliber Bushmaster semiautomatic rifle from Gander Mountain, a federally licensed firearms dealer in western New York, in June 2010. The federal indictment asserts that Nguyen was not purchasing the firearms for herself, but was instead making a “straw purchase.” That is, Nguyen is alleged to have knowingly made a false statement material to the lawfulness of the sale when she represented that she was the actual buyer of the firearms; in fact, she was purchasing the firearms on behalf of her next-door neighbor, William H. Spengler. See Indictment, *United States v. Nguyen*, No. 6:13-cr-6044 (W.D.N.Y. Mar. 14, 2013) (alleging violation of 18 U.S.C. § 922(a)(6)).³ In other words, a straw purchase—a seemingly innocent neighborly gesture—may have set the Christmas Eve tragedy in motion.

Congress has sought to address the dangers posed by straw purchases. As part of its carefully crafted system of regulating firearm sales, Congress requires federally licensed firearms dealers to subject all prospective firearms purchasers to an instant background check. This process is an integral part of Congress’ efforts to clamp down on gun trafficking, maintain records of gun transactions, and ensure that firearms are not channeled into the hands of unlawful recipients.

The federally required background check, however, can only verify the eligibility of the person

³ See also David Andreatta & Bennett J. Loudon, *Spengler Was With Greece Woman When She Bought His Guns*, *Court Papers Allege*, *Democrat & Chronicle* (Dec. 29, 2012).

standing before the firearms dealer. The use of a “straw purchaser”—a sham buyer who obtains the gun with the sole purpose of transferring it to another—frustrates the intent of Congress and nullifies the purpose of the background check. The courts have long recognized that straw purchasers are not immune under the statute. By reading the statute in light of established common law rules governing the principal and agent relationship, courts across the country have concluded that an agent who acts on behalf of an unseen principal may not lawfully represent himself to be the actual buyer of the firearm. Instead, these courts have preserved the integrity of the background check system by requiring that the person who submits to the background check must be the true purchaser of the weapon.

Petitioner and his supporting amici put forward an interpretation of the statute that would eliminate the clear rule barring straw purchases, and would replace it with one that is both more complex and less effective. In doing so, petitioner ignores the statutory language and basic common law principles. Moreover, petitioner’s proffered interpretation would cripple Congress’ carefully considered background check system, embolden gun traffickers, hamper efforts by firearms dealers to keep guns out of the hands of ineligible persons, and confuse lawful gun purchasers.

The prohibition against straw purchases remains necessary to prevent gun violence. The number of persons killed or injured by guns in the United States is staggering. In 2011-12 (the latest

years for which data are available), more than 30,000 people were murdered, committed suicide, or were killed in gun accidents, and more than 80,000 individuals were injured by guns. Moreover, government studies have shown that a large percentage of the firearms used in the commission of crimes in the United States are traceable to straw purchases.

The gun industry itself acknowledges that a significant percentage of the firearms used in crimes are obtained through straw purchases. The industry therefore recognizes the importance of the NICS background-check system and the need for prospective firearm purchasers to provide accurate and truthful information so as to curb the unlawful acquisition of guns by criminals.

In addition, numerous government reports have shown that straw purchases of firearms fuel the illegal international trafficking of weapons. For example, many firearms involved in shoot-outs between Mexican drug cartel members and Mexican law enforcement officials have been traced to straw purchases in the United States. Mexican authorities regard firearms trafficking as the number one threat to that country's security.

In sum, the straw purchaser rule is essential to ensure that the NICS background check verifies the eligibility of the true purchaser of the firearm, and it provides an important safeguard to protect individuals and communities from gun violence.

ARGUMENT

- I. **Under the Federal Statutory Scheme, Prospective Firearms Purchasers Must Identify Themselves So That An Accurate Background Check Can Be Performed**
 - A. **The Basic Operation of the National Instant Background Check System (“NICS”)**

Congress has long had a role in regulating the possession and transfer of firearms in the United States. *See., e.g., Huddleston v. United States*, 415 U.S. 814, 824 (1974) (noting Congress’s “concern[] with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest”). In the Gun Control Act of 1968, Congress made it unlawful for certain individuals, including convicted felons, fugitives from justice, and illegal aliens, to purchase firearms from federally licensed firearms dealers. *See* Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220 (codified as amended at 18 U.S.C. § 922(d)). However, unless background checks are performed on prospective purchasers, prohibited persons could “lie and buy” simply by falsely stating that they were not prohibited from buying a gun. Twenty years ago, Congress began to close this loophole through the Brady Handgun Violence Prevention Act of 1993 (the “Brady Act”), which directed the Attorney General to establish a “national instant criminal background check system,” known as the NICS, to search the

backgrounds of prospective gun purchasers for criminal records or other information that would disqualify them from possessing firearms. *See* Pub. L. No. 103-159, § 103(b), 107 Stat. 1536, 1536 (codified as amended at 18 U.S.C. § 922(f)).

The NICS is a computerized system, operated by the FBI, that searches for disqualifying information in three separate databases: (1) the “NICS Index,” containing records on individuals known to be disqualified from possessing firearms under federal law; (2) the “National Crime Information Center,” containing records on protective orders, deported felons, and fugitives from justice; and (3) the “Interstate Identification Index,” containing criminal history records. 28 C.F.R. § 25.6(c)(1)(iii).

Before completing a sale, a firearms dealer—also known as a federal firearms licensee or “FFL”—must submit the prospective purchaser’s name, sex, race, date of birth, and state of residence to the NICS operations center at the FBI. *Id.* § 25.7(a). If the FFL is located in a state that has elected to serve as a “point of contact” for NICS queries, the dealer must submit the inquiry to the relevant state agency. *Id.* § 25.6(d). Upon receiving such an inquiry, the FBI or state agency must immediately provide the gun dealer with one of three responses: (1) “proceed,” if no information in the system indicates that a firearm transfer would be unlawful; (2) “denied,” if the prospective purchaser may not legally possess a firearm; or (3) “delayed,” if further inquiry is necessary. *Id.* § 25.6(c)(1)(iv).

The FFL may not proceed with a firearm transaction unless it first submits the prospective purchaser's identifying information to the NICS. 18 U.S.C. § 922(t). If the FFL learns through the NICS that the prospective purchaser may not legally possess a firearm, the FFL may not transfer the firearm to that person. *Id.* § 922(d).

The NICS represents the primary means by which the federal government ensures and regulates transfers of firearms to lawful purchasers through an FFL. *See Huddleston*, 415 U.S. at 825 (“[I]t is apparent that the focus of the federal scheme is the federally licensed firearms dealer.”). Therefore, it is essential that the FFL receive complete and accurate information about the prospective purchaser. To accomplish that objective, Congress enacted the two provisions at issue in this case: 18 U.S.C. § 922(a)(6), which criminalizes giving a false statement to an FFL that is material to the lawfulness of the firearm sale, and 18 U.S.C. § 924(a)(1)(A), which criminalizes making a false statement in providing information that an FFL is required to keep in connection with each firearm sale.⁴

Together, these statutes underscore the high priority Congress placed on ensuring that the name and other identifying information that are run through the NICS background check accurately reflect the identity of the actual buyer of the firearm.

⁴ The information that must be kept by a firearms dealer includes the name, age and place of residence of the firearm transferee. 18 U.S.C. § 922(b)(5).

If a buyer could simply provide a false name, or if the buyer could designate an agent whose name would be provided (instead of the actual buyer's name), the purpose of the NICS system would be undermined. *See United States v. Nelson*, 221 F.3d 1206, 1209 (11th Cir. 2000) (observing that "the statutory scheme would be too easily defeated" if buyers could use a straw purchaser in lieu of providing accurate information). The rule against straw purchases applies well-known common law agency principles to effectuate Congress' intent that FFLs obtain accurate information about gun buyers.

B. The Statutory Scheme Assumes That Actual Purchasers of Firearms Will Be Subjected to Background Checks

When it enacted the Brady Act, Congress understood that the best time to ensure that only lawful purchasers are in possession of firearms is at the point of sale. The NICS was designed to balance the desire of gun buyers to minimize the delay between purchase and possession with the government's need to prevent guns from being unlawfully transferred, by "enabl[ing] licensed firearms transferors to determine instantly whether a proposed transfer would be a prohibited one." H.R. Rep. No. 103-344 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1988. To accomplish this goal, the system requires that the purchaser of the firearm present himself to the firearms dealer so that the purchaser's identifying information can be submitted to the NICS for a background check.

The NICS is designed to verify the eligibility of the person standing in front of the gun dealer; it cannot verify the eligibility of an absent and unknown principal. A straw purchaser, for his part, often will not know whether or not the intended transferee is a lawful purchaser. (Indeed, the Brady Act no longer allows licensed dealers to accept even the sworn statements of purchasers that they are not prohibited; their records must be checked to determine if they can legally buy.) For this reason, the statutory scheme can function properly only when the firearm purchase is made, not by an agent, but by the actual purchaser, whose identifying information can be submitted for the required NICS background check.

Apart from preventing prohibited individuals from directly purchasing firearms, the background check requirement serves several other important law enforcement objectives. Even where the true buyer is a non-prohibited person, the use of a straw purchaser who falsely represents himself to be the actual buyer frustrates other safeguards built into the gun laws. For example, to protect against gun trafficking, FFLs are required to report to the ATF when a purchaser buys multiple handguns at once or within a five-day period. 18 U.S.C. § 923(g)(3). If gun traffickers could use a network of straw purchasers, however, they could circumvent this important statutory safeguard. Moreover, in many cases the sales record kept by the FFL (typically the ATF Form 4473) is the only permanent record of a firearm transfer. In the event of a criminal investigation, it is vital that those records accurately reflect the identity of the actual firearm purchaser.

The facts of one decision petitioner cites in support of his position vividly illustrate why Congress required that actual buyers of firearms present themselves in person before the FFL to purchase those weapons. In *United States v. Polk*, 118 F.3d 286 (5th Cir. 1997), the court vacated an aiding and abetting conviction under § 922(a)(6) in part because Polk could have lawfully purchased the firearms himself. Though Polk was not a “prohibited person,” the reason he used a straw purchaser was that he was accumulating an arsenal of weapons in preparation for a “massive offensive” against the federal government, centered around blowing up several IRS buildings. *Polk*, 118 F.3d at 289-90. It is clear why, despite being “eligible” to purchase the guns himself, Polk did not wish to have his name associated with the transaction; it is equally clear why it is imperative, for legitimate law enforcement purposes, that the purchasing documents accurately reflect the gun buyer’s true identity.

Fortunately, the straw purchaser in *Polk* was a confidential informant, and the government was therefore aware of the underlying criminal conspiracy. In many cases, however, the purchase records will be the primary or even the sole resource available to investigators seeking to identify the owner of firearms used in criminal activity. The importance of maintaining complete and accurate records of such information does not dissipate merely because the actual purchaser may be lawfully entitled to purchase the weapons. Indeed, the statutory scheme is premised on lawful buyers submitting themselves to background checks.

II. The Straw Purchaser Rule Derives From the Plain Language of 18 U.S.C. § 922

A. The Actual Buyer of the Firearm Is the Firearm’s “Transferee”

Petitioner and his supporting amici object to the straw purchaser rule, contending that there are no statutory grounds for inquiring into the “actual buyer” of the firearm. *See* Pet. Br. at 30-31; Stockman Br. at 11. They contend that the statute speaks only of a “transferee,” which they assert refers only to the person who happens to be standing before the FFL—regardless of whether that person is purchasing the weapon for himself or on behalf of another. In 1982, the Sixth Circuit described this contention as “novel, although specious.” *United States v. Lawrence*, 680 F.2d 1126, 1127 (6th Cir. 1982) (per curiam). More than thirty years later, this same contention remains without merit.

The term “transferee” is not defined in the statute. *See* 18 U.S.C. § 921(a) (defining terms). In interpreting the meaning of undefined statutory terms, courts follow the interpretative canon that “Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law.” *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980). *See also United States v. Morrissette*, 342 U.S. 246, 258-59 (1952) (noting the general incorporation of common law mens rea requirements even where they were not written into the statute).

The term “transferee” is properly understood in light of the common law rule of principal and agent liability, one of the oldest principles in the law. The Latin term is “Qui facit per alium facit per se,” or “He who acts through another acts himself,” *United States v. Moore*, 109 F.3d 1456, 1461 (9th Cir. 1997) (en banc), and “the English law has recognized that maxim as far back as it is worth while to follow it.” Oliver Wendell Holmes, *Agency*, 4 Harv. L. Rev. 345, 347 (1891). “[W]ithin the scope of the agency, principal and agent are one.” *Id.* at 345.

Thus, “transferee,” as used in the statute, incorporates well established common law agency principles. Viewed from the perspective of the common law, the straw purchaser rule is not mysterious or even particularly remarkable. Section 922 requires certain truthful statements from the “transferee” regarding his identity, to facilitate a NICS background check. Section 922(b)(5) similarly requires that the FFL maintain records about the name, age, and place of residence of the transferee. When a principal uses an agent to effectuate a gun purchase, the principal *is* the transferee under common law agency principles—the straw purchaser is merely a vehicle through which the transaction is accomplished. *See United States v. Soto*, 539 F.3d 191, 198-99 (3d Cir. 2008); *Nelson*, 221 F.3d at 1209. Hence, incorporation of common law agency principles into the statutory scheme supports the common-sense understanding that the principal—the true gun buyer—is the person subject to regulation under § 922 and it is his name that must be provided to the FFL.

B. A Purchaser's Identity Is Always Material to the Lawfulness of the Sale

Section 922(a)(6) prohibits a gun buyer from “knowingly [making] a false or fictitious oral or written statement . . . intended or likely to deceive” a gun dealer “with respect to any fact material to the lawfulness of the sale.” Petitioner argues that the straw purchaser rule should apply only *after* the transaction has been completed, if and when it turns out that the true buyer is ineligible to purchase the firearm. As the court below correctly observed, however, the identity of the purchaser is “a constant that is always material to the lawfulness of the purchase of a firearm.” *United States v. Abramski*, 706 F.3d 307, 316 (4th Cir. 2013) (quoting *United States v. Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010)).

“The federal courts have long displayed a quite uniform understanding of the ‘materiality’ concept as embodied in [criminal false statement] statutes. . . . The most common formulation of that understanding is that a concealment or misrepresentation 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) (internal quotation marks omitted).

In the context of § 922(a)(6), the “decisionmaking body” in question is the FFL, together with FBI or state agency operating the NICS in the FFL’s state. Any false statement

“capable of influencing” the results of the NICS query is a “material” falsehood. As described above, the background-check system established by the Brady Act requires FFLs to submit the transferee’s identifying information to the NICS before consummating a sale, 18 U.S.C. § 922(t), and if the NICS informs the FFL that the prospective purchaser is legally prohibited from possessing a firearm, the FFL may not proceed with the transaction, *id.* § 922(d).

An FFL’s decision to proceed with a sale hinges on the background check result it receives from the NICS, which in turn hinges on the identifying information submitted by the purchaser to the FFL. *See United States v. Klais*, 68 F.3d 1282, 1283 (11th Cir. 1995) (noting that a fact material to the lawfulness of the sale of a firearm is one upon which the lawfulness of the sale “can hinge”). Any false information that could impair the integrity and accuracy of the NICS background check is thus “material to the lawfulness of the sale” of the firearm because it is “capable of influencing” the outcome of the NICS query. *Kungys*, 485 U.S. at 770.

Petitioner contends that if, in an individual case, the NICS would not return negative background-check results for either the straw purchaser or the actual buyer, then the false identifying information cannot be material. On the contrary, the proper standard for materiality is not whether the false statement actually altered the outcome of the NICS query, but rather whether it had “a natural tendency to influence or was capable of influencing” the outcome. *Kungys*, 485 U.S. at

770. This Court has consistently adopted this standard in the context of other false statement statutes. *See, e.g., Neder v. United States*, 527 U.S. 1, 16 (1999) (false statements on tax returns). A false statement that the straw purchaser is the actual buyer is certainly “capable of influencing” the outcome of a particular background check. Such a false statement is therefore unquestionably “material” within the meaning of § 922(a)(6).

C. The Straw Purchaser Rule Provides Clear Guidance and Avoids Unacceptable Constructions of the Statutory Text

If a person falsely holds himself out as the true purchaser of a firearm when in reality he is acting as an agent for another, that person is frustrating the purpose behind § 922. Petitioner and his supporting amici give several examples of seemingly innocuous conduct that would be prohibited by the straw purchaser rule; they point to the heightened convenience to the true purchaser of using an agent, or to the possibility of receiving a price discount through the agent. *Br. of West Virginia*, at 5. But, as the facts of the *Polk* case demonstrate, there also are decidedly less innocent reasons (such as planning to carry out a large-scale violent crime spree) why a non-prohibited person would prefer to use a straw purchaser.

Regardless, any mild inconvenience that might result from requiring the actual firearm purchaser to visit an FFL in person and submit to a background check is clearly dwarfed by the

important federal interest in obtaining complete, accurate, and relevant information for performing the NICS check. The straw purchaser rule, as implemented by question 11a on the ATF form, places gun buyers on clear notice that the actual purchaser of the gun must undergo a background check and cannot rely on an agent. In contrast, the interpretation favored by petitioner would render § 922(a)(6) meaningless.

Section 922(a)(6) criminalizes “knowingly” making “any false or fictitious oral or written statement” about a fact “material” to the lawfulness of the gun sale. The statute thus contains a mens rea term along with two separate elements: the statement must be “false”, and the statement must be “material” to the lawfulness of the firearms sale. When a statute contains multiple elements but only a single mens rea term, courts must decide whether the mens rea applies only to the immediately proximate element (here, a false or fictitious statement) or to each element of the offense. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) Either option, when coupled with petitioner’s flawed interpretation of “material,” leads to an absurd interpretation of § 922.

A reading of § 922 that would require the government to show not only that the straw purchaser knew he was making a false statement (*i.e.*, that he was the actual buyer), but also that the straw purchaser knew that the actual buyer was not lawfully entitled to purchase a firearm, would eviscerate the statute. Under this reading, so long as gun traffickers engaging in straw purchases

maintain a studious ignorance as to whether their clients are lawfully entitled to purchase firearms, they would remain immune from prosecution. See, e.g., *United States v. Ortiz*, 318 F.3d 1030 (11th Cir. 2003) (per curiam) (no evidence in the appellate record that the straw buyer, a gun trafficker, knew his clients were unlawful purchasers); *United States v. Stewart*, No. 05-CR-216, 2006 U.S. Dist. LEXIS 1878, at *5 (E.D. Wisc. Jan. 11, 2006) (straw purchaser denied knowing that the true buyer, her boyfriend, had a prior felony conviction). Indeed, it would be highly unusual for a straw purchaser to determine whether the person to whom he was transferring a gun was prohibited. And, even if a straw purchaser wished to supply firearms only to lawful owners, without a NICS check it would be very difficult to determine whether a transferee was or was not, in fact, prohibited.

In short, this reading of the statute would frustrate the intent of Congress by placing the transfer of guns to unlawful purchasers largely beyond regulation. Gun traffickers who do not “know” that their clientele consist of unlawful purchasers could operate with impunity under the statute. Moreover, this reading would also insulate from liability straw purchasers supplying firearms to non-prohibited persons who seek to evade being “tied to the gun” because they intend to use the gun to commit criminal acts, such as the defendant in *Polk*, or even a would-be hit man.

Alternatively, § 922(a)(6) could be read to apply whenever a straw purchaser knowingly made a false statement (that he was the actual buyer) and it

turned out that the true buyer was ineligible—regardless of whether the straw purchaser knew that the true buyer was not lawfully entitled to purchase the firearm. The knowledge requirement would apply only to the first statutory element (the false statement that the straw purchaser was the actual buyer); the straw purchaser would be strictly liable whenever the true buyer happened to be ineligible. *See Flores-Figueroa v. United States*, 556 U.S. 646, 660 (2009) (Alito, J., concurring). The purchase of a gun is an activity that a “reasonable person should know is subject to stringent public regulation,” *Liparota v. United States*, 471 U.S. 419, 433 (1985); *United States v. Collins*, 949 F.2d 1029, 1031 (8th Cir. 1991), and in such contexts courts have been willing to impose strict liability on certain statutory elements. But under this reading, § 922 would become a trap: it would hold out the promise that a person could freely buy a gun as an agent for another, but it would impose criminal liability if—unknown to the straw purchaser—the transferee was prohibited from purchasing a firearm (for instance, if the true recipient had an undisclosed felony conviction).

In contrast to petitioner’s strained interpretation of the statute, which leads to unacceptable results not contemplated by Congress, the ATF’s simple requirement that the person receiving the NICS background check be the actual recipient of the gun being purchased is workable and is consistent with the statutory scheme. Every buyer

is informed at the outset that (unless his intent is to give the gun as a gift⁵) he must be the “actual buyer” of the gun, and that if he is “acquiring the firearm(s) on behalf of another person” then he is not the “actual buyer.” ATF Form 4473, question 11a. This approach provides a clear guideline as to conduct that would subject a person to criminal liability, it guards against straw purchases by gun traffickers, and it ensures that the NICS background check verifies that the actual buyer of the gun is eligible to purchase it.⁶

III. Prohibiting Straw Purchases Is Necessary to Prevent Gun Violence

A. The Straw Purchaser Rule Keeps Guns Out of the Hands of Criminals

Congress enacted the Brady Act “to prevent convicted felons and other persons who are barred by

⁵ There is no merit to the argument by petitioner and his supporting amici that the ATF’s exception for gifts renders the straw purchaser rule arbitrary. A gift-giver is not the “agent” of the gift-recipient when he purchases the product. Indeed, the intended recipient may not even know about the gift until he receives it, which could be long after it has been purchased. Further, in weighing the burden placed on lawful purchasers against the need to ensure that guns stay out of the hands of those not entitled to possess them, the ATF reasonably could have assumed that gun traffickers do not operate on a not-for-profit basis (*i.e.*, they are not in the business of giving gifts).

⁶ This approach also renders moot the mens rea problem posed by petitioner’s interpretation, because after reading and answering question 11a on ATF Form 4473, any purchaser would necessarily know that a false statement that he is the true purchaser of the firearm is a “material” false statement.

law from purchasing guns from licensed gun dealers, manufacturers or importers.” H.R. Rep. No. 103-344 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1984, 1984. Congress implemented the background-check system to help combat what it called “an epidemic of gun violence” in the United States, evidenced by the alarming prevalence of gun murders—15,377 Americans were murdered with firearms in 1992—as well as robberies, assaults, and rapes carried out with the assistance of firearms. *Id.*

The Brady Act and numerous other law enforcement initiatives have achieved some success in reducing the rates of violent crime involving firearms, but gun crime in the United States remains tragically high. In 2011, the last year for which data are available, there were 11,101 firearm homicides. *See* Donna L. Hovert & Jiaquan Xu, *Deaths: Preliminary Data for 2011 - Selected Causes*, National Vital Statistics Reports, U.S. Dept’t of Health & Human Servs. (2012). Averaged over the whole year, approximately 30 Americans were killed by a gun *every day* in 2011—and this number does not include firearm suicides, accidental gun deaths, or injuries involving guns. In 2011, 19,766 individuals committed suicide with a gun, and 851 were killed in gun accidents. *Id.* In 2012, 81,396 people were injured by guns. *See Nonfatal Injury Report*, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention (2012). All told, approximately 311 Americans are killed or injured by guns during every single day of the year.

The total number of firearms in the United States—possessed both lawfully and unlawfully—has been estimated at approximately 310,000,000. See William J. Krouse, *How Many Guns Are in the United States?*, Congressional Research Service (2012). Even with all these firearms in circulation, evidence collected by the ATF indicates that persons with criminal intent frequently obtain guns supplied by dealers—often new guns—and straw purchasing is a commonly used, and perhaps the most widely used, method for the unlawful acquisition of firearms. The ATF collects information on the channels through which firearms are trafficked or unlawfully transferred. The agency has found that straw purchases account for “nearly 50 percent of the trafficking investigations” that the agency conducts, “by far the largest number of trafficking investigations” for any single illicit distribution channel. See *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, Bureau of Alcohol, Tobacco & Firearms (June 2000).

As then-ATF Director Bradley A. Buckles noted, “Virtually every crime gun in the United States starts off as a legal firearm.” *Id.* Based on the percentage of ATF gun trafficking investigations involving straw purchasers, more of these legal firearms are diverted from lawful commerce by straw purchasers than through any other method.

During a comprehensive study of gun trafficking channels in the late 1990s, the ATF found that “illegally diverted firearms associated with straw purchasers represent[ed] nearly a third of the illegally diverted firearms in all ATF investigations

initiated between July 1996 and August 1998.” *Id.* at 18. During this period, some 26,000 illegally diverted firearms were associated with straw purchasers. *Id.*

There is no reason to think that the heavy reliance by gun traffickers on straw purchasers to assist them in acquiring firearms has abated since the 1990s. On the contrary, a survey of firearms dealers published in early 2013 demonstrates that straw purchasing remains one of the primary avenues by which criminals divert firearms from the lawful stream of commerce. According to the study, FFLs experienced approximately 34,000 attempted straw purchases during the year preceding the study. See Garen J. Wintemute, *Frequency of and Responses To Illegal Activity Related To Commerce In Firearms: Findings From The Firearms Licensee Survey*, 19 *Inj. Prev.* 369 (2013). It is important to note that this number represents a mere fraction of actual straw purchases, as it reflects only those transactions in which the FFL became aware of an attempted straw purchase, not those in which the straw purchase was unreported and completed successfully.

As an empirical matter, therefore, the straw purchaser rule is an important public safety measure. Indeed, straw-purchased firearms are too often a catalyst for devastating and tragic shootings. It is well known that friends of Eric Harris and Dylan Klebold, the perpetrators of the Columbine High School massacre, purchased weapons on their behalf. See David Olinger, *Following the Guns*, *The Denver Post* (Aug. 1, 1999). As described above (at p.

3), William H. Spengler went to “war” against firefighters on Christmas Eve 2012 with an arsenal of allegedly straw-purchased weapons. In May 2010, a straw-purchased Smith & Wesson .45-caliber handgun killed Thomas Wortham IV, an off-duty Chicago policeman and Iraq war veteran. *See* Frank Main, *The Straw Purchasers: Don’t Let This Happen to You*, *The Chicago Sun-Times* (Aug. 27, 2012) (“In recent years, Chicago Police officers and young children have been among those shot to death with weapons supplied by straw buyers.”).⁷ And just two months ago, federal prosecutors secured a guilty plea from an individual whose straw purchase “led directly to the murder[s]” of Nate Leon—“an innocent pizza delivery driver” and “a dedicated family man who had the bad luck to be working hard one night”—and Tom Clements, the Executive Director of the Colorado Department of Corrections, who “tirelessly devoted his career to improving the lives of prisoners.” *See* U.S. Attorney’s Office for the District of Colorado, *Stevie Marie Vigil Pleads Guilty To Purchasing Firearm For Evan Ebel*, Press Release (Oct. 22, 2013), <http://www.justice.gov/usao/co/news/2013/oct/10-22b-13.html>. These representative examples underscore the importance of the straw purchase rule in

⁷ *See also* Brady Center to Prevent Gun Violence, *Brady Center Files Lawsuit against Gun Dealer, Purchaser, and Trafficker for Family of Thomas Wortham IV, Police Officer and Iraq War Veteran Killed with Straw Purchased Gun*, Press Release (Apr. 24, 2013), <http://www.bradycampaign.org/?q=brady-center-files-lawsuit-against-gun-dealer-on-behalf-of-police-officer-shot-with-straw-purchased>.

safeguarding individuals and communities from gun violence.

Notably, statistics corroborate the correlation between straw purchasing and violent crime—even when the straw purchase is made on behalf of a family member or a close friend. Although it is tempting to believe that a nephew who purchases a gun on behalf of his uncle—someone he presumably knows, trusts, and loves—is unlikely to be engaging in dangerous or harmful conduct, studies have shown that “the data suggest the opposite”:

In studies of prison inmates, nearly 35% obtained their guns from friends and family members—the largest single source of criminals’ guns. Studies also show that many “straw purchases” . . . are made by spouses, girlfriends and other close friends. Personal relationships often make it difficult for someone asked to buy a gun to say no.

See Adam Winkler, *Who Gets a Gun?*, Los Angeles Times (Feb. 15, 2013); see also Caroline W. Harlow, *Firearm Use by Offenders*, Bureau of Statistics Special Report, U.S. Dep’t of Justice (Nov. 2001) (“The percentage of inmates receiving their gun from family or friends rose from 34% in 1991 to 40% in 1997.”); Anthony A. Braga et al., *The Illegal Supply of Firearms*, 29 Crime & Just. 319, 326 (2002) (noting that the “predominant source of guns was a store . . . followed by family members”). Thus, the straw purchaser rule is particularly important to deter the type of purchase made in this case: a

purchase on behalf of a family member, by someone whose loyalty may blind him to the inherent wrongfulness of his conduct.

To illustrate this point, a woman from Canton, Pennsylvania, was recently sentenced in connection with her conviction for straw-purchasing a handgun for her husband. The wife admitted that her late husband repeatedly asked her to purchase a handgun for him because “everyone else could go hunting or target shooting, but he could not.” She “finally got tired of listening to him” and purchased the handgun—which the husband used to kill himself and another Canton woman in May 2013. See Eric Hrin, *Canton Woman Sentenced in Straw Purchase*, *The Daily Review* (Dec. 20, 2013).

In 2003, Kansas was the scene of yet another tragic case involving a trusting family member who underestimated the danger of purchasing a gun for a loved one. Imogene Glass was aware that her grandson, Russell Graham, had a temper and a tendency to erupt in violent episodes—most of which were directed at Elizabeth Shirley, the mother of Graham’s 8-year old son Zeus. Glass nevertheless agreed to accompany Graham to the Baxter Springs Gun & Pawn Shop to purchase a shotgun, purportedly as a gift for Zeus. See *Shirley v. Glass*, 308 P.3d 1, 3-4 (Kan. 2013).

Glass proceeded to give her own name to the firearms dealer and attested that she was the “actual buyer” of the shotgun on ATF Form 4473. While Glass reportedly knew that Graham had been convicted of attempted rape and kidnapping and was

prohibited from possessing firearms, *id.* at 3, she may have trusted her grandson when he told her that the gun would be kept at her house and that he would not maintain possession of the gun. *Id.*

After Glass purchased the gun in her own name but with Graham's money, Glass drove Graham back to his house, and he took the gun from her car. *Id.* at 4. Later that night, Graham called Shirley and told her that if she did not come over to his house to talk, he would shoot Zeus and himself. Although Shirley left a message saying she was on her way, Graham shot and killed the young boy, and then turned the gun on himself. *Id.*

Horrific episodes like the Kansas case illustrate with extreme clarity the inability of straw purchasers to judge for themselves whether a friend or family member should possess a gun. Congress understood this dynamic when it enacted the Brady Act and established the NICS. Through the background-check system, Congress took the decision about whether a third party should or should not possess a firearm away from straw purchasers—whose judgment may be clouded by close relationships or familial bonds—and gave it to law enforcement agencies and licensed firearms dealers. *See Huddleston*, 415 U.S. at 825. The statutory scheme requires that FFLs (informed by the NICS background check), not elderly grandmothers, be the gatekeepers of firearm possession.

B. The Gun Industry Itself Acknowledges That Straw Purchasing is Illegal and Dangerous, Even If The Ultimate Buyer Is Not Prohibited

The gun industry recognizes that giving accurate and truthful information when purchasing firearms is important to combat the unlawful acquisition of guns by criminals. The prominent “Don’t Lie for the Other Guy” education and advertising campaign, a cooperative effort between the ATF and the firearms industry trade association, the National Shooting Sports Foundation, acknowledges that a significant percentage of the firearms obtained by criminals and used in crimes are obtained through straw purchasers. *See Don’t Lie for the Other Guy: A National Campaign to Prevent the Illegal “Straw Purchase” of Firearms FAQs*, available at <http://www.dontlie.org/faq.cfm>.

The same campaign also acknowledges that an unlawful straw purchase occurs whenever the true buyer acts through an agent, even if only to conceal the purchaser’s actual identity from the FFL. Thus, the problems associated with straw purchases have been noted even within the gun industry and gun owners’ community. *See National Shooting Sports Foundation, Don’t Lie for the Other Guy: The Firearm Industry’s Anti-Straw Purchasing Program Fast Facts*, available at <http://www.nssf.org/factsheets/PDF/strawPurchase.pdf> (defining a straw purchase as “when the actual buyer of a firearm is unable to pass the required federal background check, *or does not want his or her*

full name associated with the purchase, and has someone else who can pass the required background check purchase the firearm for him or her.”) (emphasis added).

Narrowing or eliminating the straw-purchaser rule, as petitioner demands, would also limit the ability of conscientious FFLs to detect and report instances in which guns may be diverted to unlawful possessors. FFLs can often use their considerable professional experience to detect if a buyer is in fact a straw purchaser. What they are less able to do is divine whether the absent true buyer is or is not a lawful purchaser.

This point is illustrated by *United States v. Jackson*, No. 13-cr-129, 2013 U.S. Dist. LEXIS 87858 (E.D. Va. June 20, 2013). In that case, defendant Jackson visited an FFL and asked to buy a Draco 7.62mm AK-47 type pistol. The firearms dealer was “intrigued” by the request, noting that such a weapon is not typically purchased for self-defense and that its substantial recoil would be difficult for Jackson, “a slight woman in her fifties,” to manage. *Id.* at *2-3. Upon further discussion, the dealer discovered that Jackson “knew practically nothing about firearms,” despite claiming to be a collector, and could not identify the caliber of the weapon she was purchasing or the size of the bullet it fired. *Id.*

Suspecting a straw purchase, the FFL called the ATF and agreed to stall Jackson until agents could arrive at the store. *Id.* at *4. After the purchase was completed, Jackson entered the car of Timothy McLeod, who was waiting in the parking lot. *Id.* at

*6. Officers later observed Jackson attempt to hand the gun over to McLeod. It eventually emerged that McLeod was a five-time convicted felon who was “known as a drug dealer” and who had recently been the subject of a controlled crack cocaine purchase. *United States v. Jackson*, No. 13-cr-129, 2013 U.S. Dist. LEXIS 82352, at *8 (E.D. Va. June 11, 2013) (denying motion to suppress). McLeod had used Jackson as a straw purchaser for firearms at least 15 times before. *Jackson*, 2013 U.S. Dist. LEXIS 87858, at *8.

The FFL in *Jackson* had ample reason to suspect that Jackson was a straw purchaser. Because he knew that “purchasing the firearm for someone else” was “a violation of federal law,” he contacted the ATF to report the potentially illegal transaction. *Id.* at *4. But what the FFL did not know, and could not have known, was that the true buyer (McLeod) was a convicted felon. Under petitioner’s view, that unknown fact is the difference between a lawful and unlawful sale. Jackson’s suspicious behavior only indicated that a straw purchase was being made, but petitioner’s entire case rests on the claim that straw purchases, on their own, are not unlawful. Hence, under petitioner’s interpretation of § 922, the FFL would not have had any grounds to suspect that a crime was being committed and may not have called the ATF. The result would have been yet another firearm in the hands of a convicted felon.

C. Straw Purchases of Firearms Fuel the Illegal International Trafficking of Weapons

According to a 2009 report from the U.S. Government Accountability Office (“GAO”), 87 percent of firearms that were seized in Mexico and successfully traced had originated in the United States. See U.S. Government Accountability Office, *Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges*, GAO-09-709, at 3 (June 2009). The unfettered access of Mexican drug cartels to firearms from the United States has “undoubtedly escalated the violence on both sides of the border, which in Mexico has resulted in 50,000 people killed from 2006 until 2011, including over 12,000 in 2011 alone.” David H. Pendle, *From Minnesota to Mexicali: Connecting the Dots with Trafficked Firearms*, 40-Dec. Prosecutor 30 (Winter 2011).

Not surprisingly, the GAO has concluded that a primary source of the infusion of American firearms into Mexico is straw purchasing. See GAO-09-709 Report, *supra*, at 21; see also Evan Perez, *An American Gun in Mexico*, Wall St. J. (May 21, 2011); Guillermo Contreras, *The Buyers: Straw Purchases in the U.S. Profit From Murder in Mexico*, San Antonio Express News (Dec. 14, 2008) (“Crucial to the flow of guns into Mexico, where they are largely illegal, are networks of straw buyers—U.S. citizens with clean criminal backgrounds who are bankrolled by the cartels to shop for guns.”); Todd Bensman, *Gunrunners’ Land of Plenty*, San Antonio Express News (Nov. 30, 2008) (“The cash-rich cartels pay

handsomely for ‘straw buyers’ . . . to acquire the lethal firepower from licensed retailers . . . sometimes leaving no paper trail before handing them over to killers.”).

In the aftermath of shoot-outs between drug cartel members and Mexican authorities, straw-purchased firearms are routinely recovered from the rubble. See Jonathan Lowy, *Exporting Gun Violence: How Our Weak Gun Laws Arm Criminals in Mexico and America*, The Brady Center to Prevent Gun Violence, at 10-13 (Mar. 2009). To illustrate: In February 2007, a violent battle between narcotics traffickers and the local police in Aguascalientes, Mexico left four officers dead. See Bensman, San Antonio Express News, *supra*. The officers’ “old .38 caliber revolvers” were no match for the powerful weaponry that the cartel gunmen wielded on that “Black Thursday.” *Id.* At the scene of the carnage, investigators recovered a straw-purchased Walther G22 assault rifle and a Beretta M9 semi-automatic handgun. *Id.* ATF traced these firearms back to Universal Sporting Goods in Laredo, Texas. *Id.*

In May 2007, armed assailants waged a gun battle in the mining town of Cananea, in northern Mexico. Twenty-three people, including five police officers, were killed. The assailants’ arsenal included a semi-automatic Kalashnikov—which had been straw-purchased in a Phoenix gun store one year before what is known as the “*matazon*,” or the “big slaughter.” See Tim Gaynor, *Following a Hit Man’s Rifle to Mexico*, Reuters (Mar. 16, 2008).

In March 2008, drug cartel members and Mexican soldiers battled in coastal Ciudad Madero, Tamaulipas. *Id.* After the shootout, the soldiers recovered several firearms, including a Bushmaster .223-caliber assault rifle that had been straw-purchased from Academy Sports and Outdoors in San Antonio, Texas. *See* Contreras, San Antonio Express News, *supra*.

These examples illuminate the connection between straw purchasing in the United States and violent tragedies across our borders. Indeed, even a single American straw purchaser is capable of unleashing an alarming amount of death and destruction in Mexico. In February 2007, for example, four police officers and three government secretaries were killed in the “Acapulco Massacre.” John Hernandez, a 25 year-old United States citizen, straw-purchased some of the lethal weaponry that was used that day, including two Bushmaster Model 16M4, .223 caliber semiautomatic assault rifles. *See* Dane Schiller, *Mexican Gangsters Buying Weapons in Houston*, Houston Chronicle (Nov. 30, 2008). Hernandez, in fact, led a straw-purchasing ring, and over the course of a year “paid \$24,800 to purchase at least twenty-three firearms that were ‘military in style and utility,’” five of which were recovered at crime scenes in Mexico. *United States v. Hernandez*, 633 F.3d 370, 371 (5th Cir. 2011) (affirming conviction under 18 U.S.C. § 922(a)(6)).

The problem of firearms trafficking has grown so dire that Mexico regards it as the “number-one threat to its national security.” *See* Pendle, *supra*. At bottom, the danger posed by straw purchasing

should not be underestimated. The practice fuels crime at home and abroad, with devastating consequences.

* * *

Congress enacted the Brady Act to prevent legal firearms from falling into the hands of those who would use them to commit violent acts. Notwithstanding the Act's success in establishing the NICS background-check system, criminals remain able to obtain firearms at a startling rate, and the most prominent way they obtain these firearms is through straw purchases. Far too often, straw purchasing spawns devastating tragedy. Purchasing a firearm on behalf of a neighbor, a grandson, or an uncle may seem innocuous, but the loved ones of countless individuals who have been killed by straw-purchased firearms would surely disagree.

The straw purchaser rule is a critical means of containing the tide of violent crimes in this country committed through firearms. Congress made the policy decision to protect individuals and communities from gun violence by establishing the NICS background-check system to verify the eligibility of persons who seek to purchase firearms from federally licensed gun dealers. As a matter of law, the straw purchaser rule flows from a straightforward application to the statute of noncontroversial agency principles that have been accepted by courts for centuries.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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