No. 12-1493

In the Supreme Court of the United States

BRUCE JAMES ABRAMSKI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

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

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

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OPINION BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2013. On April 4, 2013, the Chief Justice extended the time to file a petition for a writ of certiorari to June 21, 2013, and the petition was filed on that date. The petition for a writ of certiorari was granted on October 15, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(a)(6) of Title 18 of the United States Code states:

> It shall be unlawful * * * for any person in connection with the acquisition or attempted acqui-

> sition 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[.]

Section 924(a)(1)(A) of Title 18 of the United States Code states:

> (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

Following a conditional guilty plea in the United States District Court for the Western District of Virginia, petitioner was convicted on one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6), and one count of making a false statement with respect to information required to be kept in the records of a licensed firearm dealer, in violation of 18 U.S.C. 924(a)(1)(A). He was sentenced to concurrent sen-

tences of five years of probation. The court of appeals affirmed.

1. Petitioner is a resident of Virginia and a former Roanoke police officer. Pet. App. 3a. In 2009, petitioner spoke to his uncle, Angel Alvarez, a resident of Pennsylvania, about Alvarez's desire to purchase a Glock 19 handgun. *Ibid.*; J.A. 23a-24a, 26a. Petitioner offered to purchase the gun for Alvarez from Town Police Supply, a federal firearms licensed dealer in Collinsville, Virginia that offered discounts to police officers. Pet. App. 3a; J.A. 24a. On November 15, 2009, Alvarez sent petitioner a check for $400 with "Glock 19 handgun" written in the memo line. Pet. App. 3a; J.A. 27a.

On November 17, 2009, petitioner purchased a Glock 19 handgun and other items with $2000 in cash from Town Police Supply, using his expired police identification credential to obtain the discount. Pet. App. 3a; see J.A. 30a-31a (government's observation during plea colloquy that at the time of purchase petitioner "had no relationship with the Roanoke Police force, and was not authorized to use that * * * identification card for any purpose").

During the transaction, petitioner completed a Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Form 4473, which included several questions requiring a "Yes" or "No" response. Pet. App. 3a-4a; J.A. 27a-30a; Supp. J.A. 1-6. Question 11.a. on the ATF Form 4473 asked:

> Are you the actual transferee/buyer of the firearm(s) listed on this form? **Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actu-**

> **al buyer, the dealer cannot transfer the firearm(s) to you.**

Supp. J.A. 1. The instructions for this question provided:

> **Question 11.a. Actual Transferee/Buyer:** For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself * * *. You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. **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.

Id. at 4.

Petitioner checked "Yes" in response to question 11.a, thus identifying himself as the "actual buyer" of the handgun. Supp. J.A. 1. He then signed a certification stating, among other things, that he "**underst[ood] that answering 'yes' to question 11.a if [he was] not the actual buyer is a crime punishable as a felony under Federal law**." *Id.* at 2.

Form 4473's instructions separately instructed the dealer that it "should stop the transaction if * * * the buyer answers 'no' to question 11.a" (Supp. J.A. 6) and that it "may not transfer the firearm" to an individual who answers "no" to that question (*id.* at 4). Employees of Town Police Supply were prepared to testify that "had there been any hint or indication" that petitioner "may have been purchasing the gun for

another, that the gun transaction would not or could not have gone forward, either as a matter of law or as a matter of their store's policy." J.A. 29a-30a.

On November 20, 2009, the $400 check from Alvarez was deposited in petitioner's bank account. Pet. App. 4a. The next day, petitioner transferred the firearm to Alvarez at a federally licensed firearm dealer in Easton, Pennsylvania. *Ibid.* Later, Alvarez gave petitioner a receipt confirming that Alvarez had purchased the Glock 19 handgun for $400. *Ibid.*; J.A. 27a-28a. Federal agents found and seized the receipt while executing a search warrant at petitioner's home after petitioner became a suspect in a bank robbery. Pet. App. 5a.

2. A federal grand jury in the Western District of Virginia returned a superseding indictment charging petitioner with one count of making a false statement material to the lawfulness of a firearm sale, in violation of 18 U.S.C. 922(a)(6) (making it unlawful "for any person in connection with the acquisition or attempted acquisition of any firearm * * * from a * * * licensed dealer * * * knowingly to make any false or fictitious oral or written statement * * * intended or likely to deceive such * * * dealer * * * with respect to any fact material to the lawfulness of the sale * * * under the provisions of this chapter"); and one count of making a false statement with respect to information required to be kept in the records of a licensed firearms dealer, in violation of 18 U.S.C. 924(a)(1)(A) (making 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"). See Pet. App. 5a-7a; J.A. 17a-19a.

Petitioner filed a pretrial motion to dismiss the charges on the ground that his "Yes" response to Question 11.a on the ATF Form 4473 was not a material misrepresentation because his uncle was legally eligible to purchase a firearm. Pet. App. 8a. The district court denied the motion in an oral ruling. *Ibid.*; see *id.* at 26a.

Petitioner then filed a second motion to dismiss on the ground that the "actual buyer" information requested by Question 11.a. on ATF Form 4473 is not information that is required to be kept in the records of a federal firearms dealer and that the ATF's decision to ask for that information was made without proper notice and comment rulemaking. Pet. App. 8a-9a. In a published opinion, the district court rejected those arguments. 778 F. Supp. 2d 678 (2011). It noted that several statutory provisions "require licensed firearms dealers to keep records containing information about the identity of individuals who buy firearms." *Id.* at 680 (quoting *United States* v. *Nelson*, 221 F.3d 1206, 1209 (11th Cir.), cert. denied, 531 U.S. 951 (2000), and citing 18 U.S.C. 922(b)(5), 923(s)(3)).

The district court explained that the "information required" under those provisions "is information about the identity of the actual buyer, who supplies money and intends to possess the firearm, as opposed to that individual's 'straw man' or agent." 778 F. Supp. 2d at 681 (quoting *Nelson*, 221 F.3d at 1209). The court said that a contrary reading, under which the identity of the actual buyer behind a straw purchase were not relevant to federal record-keeping requirements, would permit "easy evasion of a com-

prehensive scheme," contrary to Congress's intent. *Ibid.* (quoting *United States* v. *White*, 451 F.2d 696, 699-700 (5th Cir. 1971), cert. denied, 405 U.S. 998 (1972)).

The district court also rejected petitioner's notice-and-comment claim. 778 F. Supp. 2d at 682. The court explained that Section 924(a)(1)(A) itself "clearly contemplates liability for * * * 'straw purchases'" and that liability for false statements about such purchases was therefore not based on "an unpublished agency interpretation of that statute." *Ibid.* (quoting *Nelson*, 221 F.3d at 1210).

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

3. The court of appeals affirmed. Pet. App. 1a-24a. In doing so, the court noted that petitioner had appealed only the district court's denial of his first motion to dismiss. *Id.* at 9a & n.6; see Pet. C.A. Br. 3 (noting that petitioner was not challenging the alleged "administrative deficiencies" in ATF Form 4473 asserted in his second motion to dismiss).

The court of appeals rejected petitioner's argument that the "actual buyer" information required by Question 11.a. on ATF Form 4473 is only "material to the lawfulness of the sale" of a firearm, 18 U.S.C. 922(a)(6), if the person for whom the firearm is purchased is ineligible to purchase a firearm. Pet. App. 13a-17a. The court held that the "identity of the purchaser of a firearm is a constant that is always material to the lawfulness of the purchase of a firearm

under [Section] 922(a)(6)." *Id.* at 16a (quoting *United States* v. *Frazier*, 605 F.3d 1271, 1280 (11th Cir. 2010)) (emphasis omitted). Because the record established that the "sole reason" petitioner purchased the firearm was to transfer it to Alvarez, the court concluded that petitioner's statement on Form 4473 that he was the actual buyer was a false statement material to the lawfulness of the sale under Section 922(a)(6). *Ibid.*

The court of appeals also upheld petitioner's conviction under Section 924(a)(1)(A). Pet. App. 17a-18a. The court explained that the statute, which criminalizes making "any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter," 18 U.S.C. 924(a)(1)(A), "does not require that the falsehood on the ATF Form 4473 relate to the lawfulness of the firearm acquisition itself." Pet. App. 17a. "[T]he 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," so petitioner's false statement on that question violated Section 924(a)(1)(A). *Id.* at 18a.

SUMMARY OF ARGUMENT

Petitioner's knowingly false statement that he was the actual purchaser of the handgun violated both 18 U.S.C. 922(a)(6) and 924(a)(1)(A).

1. When petitioner misrepresented himself as the actual buyer of the Glock 19 handgun, he "knowingly" made a "false * * * statement * * * likely to deceive" the firearm dealer "with respect to [a] fact material to the lawfulness of the sale." 18 U.S.C. 922(a)(6). A firearm purchaser's true identity is always material because it has "a natural tendency to influence, or [is] capable of influencing" the lawfulness

of the sale. *Kungys* v. *United States*, 485 U.S. 759, 770 (1988). Federal law requires the name of a firearm purchaser to be recorded in a dealer's records, 18 U.S.C. 922(b)(5), his identity to be verified, 18 U.S.C. 922(t)(1)(C), and his background to be examined through use of federal databases, 18 U.S.C. 922(t)(1)(B). Those provisions effectuate federal law's twin objectives of keeping firearms away from ineligible individuals and allowing for the tracing of firearms involved in crimes. All of them depend on accurate identity information to achieve those goals.

Petitioner's contention that he was in fact the actual buyer of the Glock 19 handgun (because he filled out the required paperwork, handed money to the cashier, and walked out of the store with it) lacks merit. Section 922's provisions focus on the substance of firearm transactions and the actual recipient of the weapons. This understanding of the statute is confirmed by agency law principles, which make an undisclosed principal a party to a contract entered into by his agent. It is also confirmed by the statute's detailed provision limiting a dealer's ability to sell a firearm to a physically absent buyer, 18 U.S.C. 922(c), a provision that would serve no purpose if the absent buyer could simply obtain a firearm through an agent. Section 922's other record-keeping and identity-confirming provisions would also be largely ineffectual if recording and confirming the identity of a straw purchaser—who has only ephemeral control over the firearm—were deemed to satisfy them.

Petitioner's alternative contention that his false statement was not material because his uncle was legally eligible to obtain a firearm also fails. The statute prohibits false statements material to the

lawfulness of "*the* sale," *i.e.*, the one between the buyer and the dealer, not some other hypothetical sale involving an absent party. 18 U.S.C. 922(a)(6) (emphasis added). And the true identity of a firearm purchaser is always material to a sale by a dealer. Congress placed significant regulatory obligations on firearm dealers because they were in the best position to ensure that the various requirements of federal firearms law were satisfied. Petitioner's construction of the statute, in which a firearm purchaser can effectively take that responsibility away from the dealer when he is buying a weapon on behalf of someone he believes is eligible to own it, would subvert the statutory scheme.

Petitioner reasons that the only purpose of the sales restrictions in Section 922 is to keep firearms out of the hands of ineligible buyers and that the statute should not apply where that purpose is not implicated. Petitioner's premise is mistaken. While the goal of preventing felons and other ineligible individuals from obtaining firearms was plainly an important purpose of the statute, it was not the only one. In particular, Congress regulated firearm transactions in order to permit the tracing of weapons found at crime scenes. That purpose is implicated even when a straw purchase is made on behalf of an individual eligible to obtain a firearm himself.

Petitioner's contention that the firearm dealer could have lawfully sold him the Glock 19 handgun even if he had truthfully disclosed he was not the actual buyer is not correct. Such a sale in the acknowledged absence of the actual purchaser would have violated several provisions, including Section 922(c),

which strictly regulates sales to physically absent buyers.

2. Petitioner's false statement also violated the separate prohibition on misrepresentations with respect to "information required by this chapter to be kept in the records" of federally licensed firearm dealer. 18 U.S.C. 924(a)(1)(A). Petitioner falsely said he was the firearm's actual purchaser, resulting in the recording of incorrect information the dealer was legally required to maintain. Petitioner's effort to carve out from this provision information required to be maintained by regulations, as opposed to the statute itself, misconstrues the statutory scheme. In any event, that argument is beside the point because the identity information at issue here was required by Section 922 itself to be kept in the dealer's records. See, *e.g.*, 18 U.S.C. 922(b)(5).

ARGUMENT

I. PETITIONER VIOLATED 18 U.S.C. 922(a)(6) BY FALSELY STATING HE WAS THE ACTUAL BUYER OF THE HANDGUN

Section 922(a)(6) of Title 18 of the United States Code makes it unlawful "for any person in connection with the acquisition * * * of any firearm * * * from a * * * licensed dealer * * * knowingly to make any false or fictitious oral or written statement * * *, intended or likely to deceive such * * * dealer * * * with respect to any fact material to the lawfulness of the sale * * * under the provisions of this chapter." 18 U.S.C. 922(a)(6). Petitioner's conduct was covered by this prohibition. He knowingly made a false statement—that he was not purchasing the handgun on behalf of another—to a licensed firearm dealer. That false statement was

"likely to deceive" the dealer "with respect to" a "fact material to the lawfulness of the sale," namely the identity of the firearm's actual purchaser.

A. The True Identity Of A Firearm Purchaser Is Material To The Lawfulness Of The Sale

The "fact" of a firearm purchaser's identity is always "material to the lawfulness of the sale" to him. 18 U.S.C. 922(a)(6). Accordingly, the fact that an individual is formally completing the sale on behalf of another, who is the actual purchaser because he is paying for the firearm and will take possession of it, is material to the lawfulness of the sale.

A statement is "material" when it has "a natural tendency to influence, or [is] 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); see *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (same). The Court has emphasized that the determination of whether a falsehood is material "does not lend itself to mechanical resolution." *Kungys*, 485 U.S. at 771. In particular, "[i]t has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision." *Ibid.*

Instead, the question in a materiality inquiry is "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys*, 485 U.S. at 771. This approach reflects the materiality requirement's roots in the common-law perjury offense, which did not cover false statements regarding "trifling collateral circumstances, to which no regard

is paid." *Id.* at 769 (quoting 4 William Blackstone, *Commentaries* *137).

The "lawfulness of the sale" of a firearm by a federally licensed dealer—to which the false statement must be "material" under 18 U.S.C. 922(a)(6)—is governed by various provisions in 18 U.S.C. 922. In particular, before "sell[ing] or deliver[ing]" "any firearm * * * to any person," the dealer must note that person's "name, age, and place of residence" in its records. 18 U.S.C. 922(b)(5). In addition, the dealer must "verif[y] the identity of the transferee by examining a valid identification document" with a photograph. 18 U.S.C. 922(t)(1)(C). The dealer must also submit the purchaser's identity information to the National Instant Criminal Background Check System and complete the sale only if that system provides a "unique identification number" approving it, or if three business days have passed and that system has not disapproved the sale. 18 U.S.C. 922(t)(1)(B).

Section 922 also makes it unlawful to sell a firearm to any person when the seller "know[s] or ha[s] reasonable cause to believe that such person" falls into one of a variety of prohibited categories. See 18 U.S.C. 922(d)(1) (under indictment for, or convicted of, a felony); (d)(2) (fugitive from justice); (d)(3) ("an unlawful user of or addicted to any controlled substance"); (d)(4) ("adjudicated as a mental defective" or having been "committed to any mental institution"); (d)(5) (an alien not lawfully present in the United States); (d)(6) (dishonorably discharged from the Armed Forces); (d)(7) (a person who has renounced his United States citizenship); (d)(8) (individual subject to a qualifying protective order); (d)(9) (person convicted of a misdemeanor crime of domestic vio-

lence). It is also generally unlawful for a licensed firearm dealer to sell or deliver a firearm to a juvenile (and a handgun to a purchaser under 21), 18 U.S.C. 922(b)(1), and a handgun to a resident of a State other than the one where the dealer's business is located, 18 U.S.C. 922(b)(3).

Against the backdrop of the highly regulated nature of firearms sales by federally licensed dealers, petitioner's false statement that he was the "actual buyer" of the Glock 19 handgun was "material to the lawfulness of the sale." 18 U.S.C. 922(a)(6). Indeed, few facts, if any, are more "material to the lawfulness of [a firearm] sale" (*ibid.*) than the identity of the buyer because knowledge of purchaser identity is necessary to the application of all of the statute's requirements and prohibitions. See *United States* v. *Anaya*, 615 F. Supp. 823, 825 (N.D. Ill. 1985) ("Congress made identity per se material within the terms of Section 922(a)(6).").

By concealing the name of the actual buyer of the handgun, petitioner prevented the licensed dealer from accurately recording that buyer's name in its records, 18 U.S.C. 922(b)(5), and from verifying that buyer's identity, 18 U.S.C. 922(t)(1)(C). The false statement also prevented the dealer from submitting the actual buyer's identity information to the National Instant Criminal Background Check System for approval of the purchase. 18 U.S.C. 922(t)(1)(B). The false statement further prevented the dealer from determining whether the actual buyer was prohibited from receiving a firearm. 18 U.S.C. 922(b) and (d). In sum, the various provisions of 18 U.S.C. 922 make clear that a firearm purchaser's true identity is critical information that is anything but a "trifling collat-

eral circumstance[], to which no regard is paid." *Kungys*, 485 U.S. at 769 (quoting 4 William Blackstone, *Commentaries* *137). It is therefore material.

B. Petitioner's Contention That His False Statement About The Firearm's Actual Buyer Was Not Material Lacks Merit

Petitioner advances two distinct arguments for the proposition that his false statement on Form 4473 was not material to the lawfulness of the purchase. First, petitioner contends (Br. 30-31) that *he* was the handgun's actual buyer for purposes of federal law and that the fact that he was purchasing the firearm on behalf of another individual was legally irrelevant no matter who that individual was. Second, petitioner contends (Br. 28-30) in the alternative that even if a firearm purchaser's false statement that he was the actual buyer is sometimes material, it would be material only when the absent actual buyer was himself ineligible to make the purchase. Both contentions lack merit.

1. Petitioner was not the actual buyer of the firearm under federal law

a. Petitioner's broadest contention (Br. 24, 30-31) is that he was in fact the "actual buyer" of the handgun for purposes of Section 922. Petitioner observes (*id.* at 31) that he, not his uncle, "was the person who filled out the form, underwent a background check, paid for the gun, and physically took possession of it." Based on those circumstances, petitioner contends (*ibid.*) that his "false statement that he was the 'actual buyer,' as that term is uniquely identified in Question 11.a, was not material to the *lawfulness* of the sale because, as a legal matter * * * , he *was* the actual

buyer regardless of which box he checked on Question 11.a."

Under this reading of Section 922, an individual wishing to purchase a firearm from a federally licensed dealer could enter the premises with a straw purchaser, instruct him which firearm to buy, hand him the money to pay for it, and then take possession of the firearm from the straw purchaser immediately after the sale is completed—without ever having his name recorded, his identity checked, or his eligibility to receive a firearm confirmed.[1] And the straw purchaser could falsely state on Form 4473 that he was the "actual buyer" (as the true actual buyer looked over his shoulder), without violating Section 922(a)(6). This contention fails for several reasons.

i. The provisions of Section 922, when read in light of each other and the purpose of the statute as a whole, address substance, not empty formalities. Indeed, agency law, against whose backdrop Section 922 was enacted, has long provided that "[h]e who acts through another acts himself." *United States* v. *Moore*, 109 F.3d 1456, 1461 (9th Cir.) (en banc), cert. denied, 522 U.S. 836 (1997). For that reason, "[a]n undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority" (unless the contract expressly excludes him). 1 Restatement (Second) Agency § 186

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[1] The scenario in which the actual buyer accompanies the straw purchaser to a licensed firearm dealer's store and directs the straw purchaser to buy a firearm for the actual buyer while causing the straw purchaser to complete the ATF Form 4473 is not unusual. *E.g.*, *United States* v. *Bowen*, 207 Fed. Appx. 727, 729 (7th Cir. 2006); *United States* v. *Paye*, 129 Fed. Appx. 567, 570 (11th Cir. 2005) (per curiam).

(1958); see 2 Restatement (Second) Agency § 322 (1958) (noting that the agent is also a party to the transaction); see also 2 Restatement (Third) Agency § 6.03 (2006). As a result, when a principal provides the funds for a firearm purchase and sends an agent to act on his behalf, the absent individual is the actual buyer under standard principles of agency law.

Accordingly, the "name, age, and place of residence" that Section 922(b)(5) requires the licensed dealer to record are those of the principal, *i.e.*, the actual buyer of the firearm. 18 U.S.C. 922(b)(5). Congress explained that it viewed this record-keeping requirement as "implement[ing] each of the controls imposed by" the statute. H.R. Rep. No. 1577, 90th Cong., 2d Sess. 14 (1968) (House Report). That implementation would be dramatically undermined if it could be satisfied by recording the name of only a straw purchaser.

Likewise, the "identity" the dealer must "verif[y]" by examining photo identification, 18 U.S.C. 922(t)(1)(C), and the name it is required to submit to the National Instant Criminal Background Check System for approval of the purchase, 18 U.S.C. 922(t)(1)(B), are those of the individual who will actually receive the firearm. Petitioner's contrary reading, under which these provisions would be completely satisfied by the identity of a straw purchaser with only ephemeral control of the firearm, would render them utterly ineffectual in carrying out Congress's obvious purpose in enacting them, *i.e.*, to ensure that those coming into possession of firearms from licensed dealers are eligible to do so and that their identities are known.

ii. This commonsense understanding of Section 922's requirements is confirmed by the language Congress used in Section 922(a)(6). It applies to false statements made "in connection with the *acquisition* or attempted acquisition of any firearm," rather than just a sale or a purchase. 18 U.S.C. 922(a)(6) (emphasis added). The Court has explained that the word "acquisition" in this provision is not limited by concepts of "legal title" or formal "ownership." *Huddleston* v. *United States*, 415 U.S. 814, 820 (1974). Instead, it has a practical, physical meaning; the "word 'acquire' is defined to mean simply 'to come into possession, control, or power of disposal of.'" *Ibid.* (quoting *Webster's Third New International Dictionary* 18 (1966)); see *id.* at 823. The Court has further explained that this substance-over-form reading of Section 922(a)(6) is reinforced by its separate reference to "the lawfulness of the sale *or other disposition*" of a firearm. 18 U.S.C. 922(a)(6) (emphasis added); see *Hudleston*, 415 U.S. at 826. That language "was aimed at providing maximum coverage." *Id.* at 826-827. In this case, the "sale or other disposition" were to petitioner's uncle: he was "acqui[ring]" the firearm (and was the recipient of its "disposition") because—from payment to outcome—the entire point of the transaction was to deliver it into his hands. 18 U.S.C. 922(a)(6).

iii. Section 922's focus on the identity of the actual purchaser of the firearm is reinforced by the provision's tight restrictions on sales to physically absent buyers. See 18 U.S.C. 922(c); see also 27 C.F.R. 478.96, 478.124(f). The statute provides that a federally licensed dealer "may sell a firearm to a person who does not appear in person at the licensee's business

premises * * * *only if*" a series of conditions are satisfied. 18 U.S.C. 922(c) (emphasis added). In particular, the absent buyer must submit a "sworn statement" that he meets the relevant age minimum and that he is not statutorily prohibited from receiving the firearm under federal, State, or local law, and providing the name of the "principal law enforcement officer of the locality to which the firearm will be delivered." 18 U.S.C. 922(c)(1). The dealer must then mail the sworn statement and a description of the firearm to that law enforcement officer, receive a return receipt, and wait a week before shipping the firearm to the absent buyer. 18 U.S.C. 922(c)(2)-(3).

Section 922(c) provides the statutory scheme's exclusive mechanism for a physically absent person to purchase a firearm from a federally licensed dealer. Those carefully detailed restrictions would be rendered largely superfluous if such absent buyers could easily circumvent them by simply obtaining a firearm through a straw purchaser instead.

iv. Finally, petitioner's broad contention that federal law does not prohibit straw purchases of any kind would mean that an individual could purchase a firearm on behalf of a convicted felon (or otherwise statutorily ineligible individual), falsely deny he was doing so, and not violate Section 922(a)(6).[2] That would fly in the face of the "principal purpose" of the Gun Con-

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[2] In that case, the later transfer between the straw purchaser and the actual buyer would itself still violate federal law. See 18 U.S.C. 922(d). As petitioner recognizes (Br. 8), however, that would not have been true at the time of Section 922(a)(6)'s enactment, given that the prohibition on sales to ineligible purchasers applied only to dealers until 1986. See p. 22, *infra*.

trol Act of 1968,[3] which was "to curb crime by keeping 'firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.'" *Huddleston*, 415 U.S. at 824 (quoting S. Rep. No. 1501, 90th Cong., 2d Sess. 22 (1968)). If straw purchases for ineligible buyers were "insulated from the law's registration provisions, the effect would be tantamount to a repeal of those provisions." *United States* v. *Lawrence*, 680 F.2d 1126, 1128 (6th Cir. 1982) (per curiam). It is therefore not surprising that, as petitioner himself has emphasized, none of the lower courts has adopted this reading of the statute. Pet. Br. i ("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.'") (quoting 18 U.S.C. 922(a)(6)).[4]

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[3] Sections 921-928 of Title 18 of the United States Code were originally enacted as part of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 902, 82 Stat. 226-234. Those provisions were superseded later in 1968 by the Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1214-1226, which was almost identical except for extending coverage to certain transactions involving long guns as well as handguns. The 1968 statutes replaced the Federal Firearms Act, ch. 850, 52 Stat. 1250.

[4] Petitioner suggests that the ban on straw purchases is arbitrary because an individual can purchase a firearm as a gift for another without violating the statute. Br. 26 n.3; see W. Va. Amicus Br. 3, 13; NRA Amicus Br. 14-15. Even if correct, that contention would not entitle petitioner to make a false statement when purchasing a firearm, see p. 34, *infra*, and petitioner does not claim the Glock 19 was a gift for his uncle. In any event, the distinction the ATF draws (Supp. J.A. 4 ("[I]f Mr. Brown goes to buy a firearm with his own money to give to Mr. Black as a present, Mr. Brown is the actual transferee/buyer of the firearm and should answer **"YES"** to question 11.1.")) is reasonable. A person who

b. Petitioner makes an elaborate argument based on legislative history (Br. 4-11, 26-27, 29) that courts inappropriately created the "straw purchaser doctrine" to fill gaps they perceived in federal gun regulation. Petitioner is incorrect. As discussed above, the liability of an individual for falsely stating he is the actual buyer of a firearm flows directly from the text of Section 922(a)(6) and related provisions, not from any judge-made doctrine. Use of Section 922(a)(6) to prosecute straw purchases is thus not an "expansion of the Act's plain text through a court-created legal doctrine" (Pet. Br. 26) but instead a straightforward application of the provision to a common scheme for violating it.

Indeed, the concept of a straw purchaser is not unique to firearm transactions; it describes any scenario in which "a third party * * * is put up in name only to take part in a transaction." *Black's Law Dictionary* 1421 (6th ed. 1990). Such schemes can result in the violation of various statutory prohibitions. *E.g.*, *Gaudin*, 515 U.S. at 508 (straw purchasers used to buy real property as part of mortgage scheme); *Darby* v. *Cisneros*, 509 U.S. 137, 139-140 (1993) (straw purchasers used to circumvent mortgage insurance restrictions); *United States* v. *One 1936 Model Ford V-8 De Luxe Coach, Comm. Credit Co., Claimant*, 307 U.S. 219, 224 (1939) (bootlegger used

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purchases a firearm as a gift for another person using the gift giver's own money is not acting as the recipient's agent, and the gift recipient is in no way a party to the transaction. And, as a practical matter, a prohibited person is more likely to obtain a firearm through a planned straw purchase than an unanticipated or unrequested gift.

straw purchaser to buy vehicle used to transport liquor).

Petitioner notes (Br. 8) that Congress in 1986 amended Section 922(d) to make it unlawful for an unlicensed individual to sell a firearm to an ineligible person. See Firearm Owners Protection Act, Pub. L. No. 99-308, § 102(5)(A), 100 Stat. 451-452. In making that amendment, however, Congress did *not* amend Section 922(a)(6), thus undercutting petitioner's suggestion that the amendment was intended to eliminate liability for those who purchase firearms for others while falsely denying they are doing so. In amending Section 922(d), Congress closed a loophole that allowed any unlicensed individual to transfer a firearm to an ineligible person *regardless* of how he acquired it. Specifically, the loophole applied both to transactions between a straw purchaser and an ineligible individual and to transactions between an individual who acquired the firearm for himself and later decided to transfer it to the ineligible person. By closing that loophole, amended Section 922(d) therefore applies in some circumstances (*i.e.*, those not involving straw purchases) where Section 922(a)(6) would not—just as Section 922(a)(6) will apply in some circumstances (*i.e.*, those where the actual buyer is not ineligible) where Section 922(d) would be inapplicable. And the possibility that some conduct may fall within both prohibitions does not provide cause for reading either of them other than according to their plain terms. See *United States* v. *Batchelder*, 442 U.S. 114, 118-126 (1979).

2. The legal eligibility of the actual buyer to acquire a firearm is irrelevant to the materiality question

"Even if this Court believes the straw purchaser doctrine is valid as a general principle," petitioner contends, "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." Pet. Br. 28; see *id.* at 28-30. Petitioner's fallback argument fares no better than his broader submission.

a. As petitioner elsewhere recognizes (Br. 21), "Section 922(a)(6) criminalizes false statements 'material to the lawfulness of *the sale*,'" *i.e.*, "the firearm sale *in this case*." See 18 U.S.C. 922(a)(6). Accordingly, the relevant question is whether petitioner's false statement was material to the transaction that actually occurred, not to petitioner's later transfer of the handgun to his uncle or to a hypothetical transaction between his uncle and Town Police Supply. For the reasons discussed above (pp. 12-22, *supra*), the identity of the principal behind the purchase was material to the only transaction that mattered here because federal law required that identity to be corroborated, recorded, and screened for eligibility. Under this scheme, the identity of the purchaser has a "natural tendency" to influence the lawfulness of the sale, *Kungys*, 485 U.S. at 770, and is therefore material.

i. Petitioner's contrary reading of the statute would subvert it. Congress placed the obligation to conduct identity- and eligibility-related inquiries on firearm dealers for a reason. The Gun Control Act makes the dealer "the principal agent of federal enforcement." *Huddleston*, 415 U.S. at 824; see Pub. L. No. 90-351, § 901(a)(3), 82 Stat. 225 (congressional finding that "adequate Federal control * * * over

all persons engaging in the business[] of * * * dealing in" firearms is necessary to address illegal use of weapons). The dealer must be licensed and maintain adequate records, and it is subject to criminal and regulatory liability if it "dispos[es] of a weapon contrary to the provisions of the Act." *Huddleston*, 415 U.S. at 824 (citing 18 U.S.C. 922(a)(1), 923(a) and (g), 924). Congress channeled retail and wholesale firearm sales through dealers so that those highly regulated entities, which are expected to be familiar with firearm regulation, could "insure that, in the course of sales or other dispositions * * * , weapons could not be obtained by individuals whose possession of them would be contrary to the public interest." *Id.* at 825.[5]

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[5] The legislative history emphasizes the importance members of Congress placed on the requirement that most firearm purchases take place in person so that the dealer could ensure compliance with legal requirements. *E.g.*, House Report 13 ("The requirement that one [who] obtains a firearm or ammunition from a Federal licensee must properly identify himself is inherent in" Section 922(a)(6).); 114 Cong. Rec. 22,771 (1968) (Remarks of Rep. Railsback) ("We are saying that we want some dealer to see the purchaser, to see if he is a capable and competent person. * * * I simply want to ban the interstate mail-order sales because I am convinced from testimony that I have heard and from statements made to me by the Treasury Department that approximately 40 percent of the people give false and fictitious names."); *id.* at 16,951 (Remarks of Sen. Ribicoff) ("Weapons of this nature must be purchased in person. That is fundamental."); *id.* at 26,717 (Remarks of Sen. Dodd) (discussing requirement "that those who buy and keep guns in their possession appear personally before a licensed dealer, so that the law-enforcement authorities may be fully informed as to whether the buyer is eligible to buy and keep a gun").

Petitioner's position is that this entire dealer-based regulatory scheme can be bypassed—and that a straw purchaser can legally make a false statement purporting to be the actual buyer—whenever it turns out that the actual buyer of the firearm was legally eligible to receive it. On his view, such a false statement would be immaterial. But that approach would frustrate important record-keeping and screening obligations that Congress imposed on *dealers* for every retail and wholesale firearm transaction. It would instead place the responsibility of ensuring that a firearm does not end up in the hands of an ineligible person exclusively in the hands of the unlicensed straw purchaser, who is unlikely to be familiar with the specifics of federal and state firearm eligibility law, who does not have access to screening databases, and who may not "know[] or hav[e] reasonable cause to believe" (18 U.S.C. 922(d)) that the transferee is ineligible—even if he is. That position cannot be reconciled with the statutory scheme making the licensed dealer the central figure in preventing ineligible buyers from acquiring firearms.

ii. Petitioner's position would significantly erode the restrictions in Section 922 on an even more fundamental level because, by logical extension, it would seemingly extend to other false statements on a Form 4473. For example, it is not clear why, under petitioner's view, a firearm buyer could not write an alias on Form 4473 and likewise provide the dealer with a forged photo identification but escape all liability under Section 922(a)(6) on materiality grounds so long as he was in fact legally eligible to make the purchase. The lower courts have consistently rejected that counter-intuitive reading of Section 922's identity re-

quirements. See, *e.g.*, *United States* v. *Crandall*, 453 F.2d 1216, 1217 (1st Cir. 1972) (rejecting that contention on the ground that 18 U.S.C. 922(b)(5) requires the dealer to "correctly record[]" the "'name, age, and place of residence' of the purchaser"); *Anaya*, 615 F. Supp. at 824-826 (rejecting argument that false identity of firearm purchaser "becomes material only if and when [the] misrepresentation effectively conceals a prior felony conviction, nonresidency in the state or some other condition the firearms law seeks to regulate"); see also *United States* v. *Queen*, 408 F.3d 337, 338 (7th Cir. 2005) (rejecting contention that "gun buyers may lie about a street address so long as they live within the state where the gun is sold," meaning that the sale would have been legal if they had disclosed their correct address); *United States* v. *Gudger*, 472 F.2d 566, 567-568 (5th Cir. 1972) (same).[6]

iii. Petitioner's interpretation of the statute would undermine Section 922's protections in another fundamental way. Because materiality is an element of

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[6] In prosecutions for making a materially false statement under 18 U.S.C. 1001, the courts of appeals have consistently held that a person's false statement as to his identity is material. *E.g., United States* v. *Adekanbi*, 675 F.3d 178, 183 (2d Cir. 2012) (holding that defendant's use of false name during proffer session with government was material because "[g]iving a false identity can impede the government's ability to develop information about the subject crime, and to inform itself about the defendant and any relevant criminal history"); *United States* v. *Popow*, 821 F.2d 483, 487-488 (8th Cir. 1987) ("It cannot be seriously asserted that the use of a fictitious identification did not have the capability of influencing the inspector's decision as to whether to grant [defendant the] privilege" of entering the United States.); *United States* v. *Parten*, 462 F.2d 430, 432 (5th Cir.) (rejecting contention that false name used to enter country was not material), cert. denied, 409 U.S. 983 (1972).

the Section 922(a)(6) offense, the government bears the burden of establishing it. Under petitioner's view of the statute (Br. 28-30), that would apparently mean that the government would have to prove the actual purchaser's ineligibility to possess the firearm. Yet in some straw purchaser cases, neither the government nor the straw purchaser knows who the actual buyer was. See, *e.g.*, *United States* v. *Juarez*, 626 F.3d 246, 249 (5th Cir. 2010) (actual buyer in Section 924(a)(1)(A) case was known to straw purchaser "only as 'El Mano'"). Under those circumstances, it would likely be difficult, if not impossible, for the government to establish the ineligibility of the unknown actual purchaser to receive a firearm, thus effectively taking Section 922(a)(6) liability off the table in a particularly dangerous category of straw purchase cases.

iv. Petitioner's argument also rests on the flawed premise that the Gun Control Act was intended only to prevent firearms from falling into the hands of ineligible persons. That was certainly a key objective of the statute, but not its only one. See *Anaya*, 615 F. Supp. at 825. Congress also wanted federally licensed dealers to maintain accurate records about firearm sales so that law enforcement could use those records to trace firearms used in crimes, regardless of whether an eligible buyer purchased the firearm from the dealer.[7] Congress accordingly authorized the Attor-

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[7] The D.C. Circuit recently provided this explanation of firearm tracing:

> Law enforcement agencies use tracing to link a suspect to a firearm in a criminal investigation; to identify potential traffickers; and to detect patterns in the sources and kinds of firearms used in crime. In other words, tracing serves as a valuable tool for investigating drug crimes. Tracing begins when a

ney General to obtain any records required to be kept by licensed dealers, 18 U.S.C. 923(g)(5)(A), and required dealers to "respond immediately" to a request from the Attorney General for such record information "as may be required for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation," 18 U.S.C. 923(g)(7). See *10 Ring Precision, Inc.* v. *Jones*, 722 F.3d 711, 715 (5th Cir. 2013) (discussing ATF tracing of firearms); *National Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 204 (D.C. Cir. 2013) (same).

The government's interest in tracing a firearm to the person who purchased it from a licensed dealer exists regardless of whether that person was eligible to buy a firearm; eligible persons may acquire firearms that are later used in crimes. *E.g.*, *Queen*, 408 F.3d at 388 (during a six-month period, defendant purchased 39 guns, "and at least eleven of them later

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> law enforcement officer recovers a firearm used in a crime and makes a trace request by entering the firearm's identifying information—*e.g.*, serial number, caliber, make and model—into a database called the ATF Firearms Tracing System. ATF compares the identifying information to other firearms transactions records to determine[] the firearm's entry point into U.S. commerce and its path through the distribution chain. Because [federal law] limits ATF's ability to collect and maintain firearms transactions records, however, most of the records are kept by individual [licensed firearm dealers] and not routinely provided to ATF. Therefore, ATF often relies upon [dealer] records when it seeks to trace a firearm. Specifically, ATF must contact the manufacturer(s) or importer, then the wholesaler, and then the [dealer], who then provides [within twenty-four hours, see 18 U.S.C. § 923(g)(7)] information about to whom the firearm was sold.

National Shooting Sports Found., Inc. v. *Jones*, 716 F.3d 200, 204 (2013) (internal quotation marks and citations omitted).

were recovered at crime scenes"). And in a case where the actual buyer and the straw purchaser are not well acquainted and the gun is later used in a crime, the government's effort to trace the firearm would be substantially hindered because the trace would likely end with the discovery of the identity of the straw purchaser. *E.g.*, *Juarez*, 626 F.3d at 249 (actual buyer whom straw purchaser knew "only as 'El Mano'" hired straw purchaser to buy numerous military-style assault rifles, some of which were found in the possession of gang members in Mexico).

v. Finally, contrary to the contentions of petitioner and his amici, affirmance of petitioner's conviction would not mean that ATF has "add[ed] a new prohibition into the [Gun Control Act] that does not exist," *i.e.*, a prohibition on "transfer[s] of firearms between two non-prohibited persons." NRA Amicus Br. 17; see W. Va. Amicus Br. 2. Petitioner's offense is based on his *knowingly* having made a material false statement at the time he purchased the handgun, not on the later transfer to his uncle. Nothing in the statute prevented petitioner from selling his uncle a firearm—assuming the uncle was legally eligible and that they complied with the requirements for interstate transfers—so long as petitioner did not make a knowing false statement to the dealer at the time he purchased it.

b. In all events, petitioner's uncle would not have been a "*lawful* purchaser" (Pet. Br. 28) of the Glock 19 at the Virginia gun shop. Dealers are prohibited from selling handguns to "any person who the licensee knows or has reasonable cause to believe does not reside in * * * the State in which the licensee's place of business is located." 18 U.S.C. 922(b)(3). The

dealer here is located in Virginia (Supp. J.A. 3), and petitioner's uncle is a resident of Pennsylvania (J.A. 26a).[8]

3. The dealer could not have lawfully sold petitioner the handgun if petitioner had truthfully disclosed that he was not the actual buyer

Petitioner contends (Br. 23) that "the gun dealer lawfully could have sold the gun to petitioner regardless of his answer to Question 11.a." That is incorrect.

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[8] Amicus West Virginia's contention (Br. 14-17) that the federal prohibition on straw purchases impinges on state authority is incorrect. To the contrary, Section 922 in general, and the prohibition on straw purchases in general, protect state prerogatives. In enacting those provisions, Congress found that out-of-state sales of firearms "ha[d] materially tended to thwart the effectiveness of State laws and regulations, and local ordinances." § 901(a)(4), 82 Stat. 225. As a result, Congress found that "only through" federal regulation of firearm dealers could "effective State and local regulation of [firearm] traffic" be made possible." § 901(a)(3), 82 Stat. 225. Federal law thus prohibits a dealer from selling "any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any *State* law," 18 U.S.C. 922(b)(2) (emphasis added), and it also prohibits sales of handguns to out-of-state residents, 18 U.S.C. 922(b)(3). West Virginia correctly observes (Br. 14-15) that States have made different choices regarding firearm regulation, but those choices would be significantly undermined if a state resident could easily circumvent them by obtaining a firearm through a straw purchase in a State with different rules.

West Virginia's further contention (Br. 18) that the Court cannot affirm in this case without "resolv[ing] the debate" over whether the federal prohibition on licensed firearm dealer sales of handguns to 18- to 20-year-olds, 18 U.S.C. 922(b)(1), is consistent with the Second Amendment is incorrect. Petitioner's uncle was not in that age range, so that constitutional question is not implicated here.

a. As an initial matter, petitioner premises this argument on an incorrect legal standard. "It has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision." *Kungys*, 485 U.S. at 771. Instead, a misrepresentation is material if it "was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Ibid.* For the reasons discussed previously—*i.e.*, that the entire dealer-based regulatory scheme depends on recording and tracking the identity of a firearm's actual buyer and prevents absentee-buyer transactions that do not comply with federal law—that standard is satisfied here.

In any event, petitioner's false statement was material even under petitioner's overly demanding test. If petitioner had answered Question 11.a truthfully by stating that he was not the actual buyer, the dealer could not have lawfully sold him the firearm. See generally *Shawano Gun & Loan, LLC* v. *Hughes*, 650 F.3d 1070, 1075 (7th Cir. 2011) (affirming revocation of firearm dealer license based in part on "willful transfer of firearms on three occasions to persons who indicated on ATF Forms 4473 that they were not the actual buyer of the firearms").

As noted above (pp. 18-19, *supra*), Section 922 permits a dealer to "sell a firearm to a person who does not appear in person at the licensee's business premises * * * *only if*" certain strict conditions are satisfied. 18 U.S.C. 922(c). If an individual on a dealer's premises told the dealer that an absent party was the actual buyer and the dealer proceeded with the sale any way, the dealer would have violated Section 922(c) because it would have sold a firearm to the

absent party without satisfying that provisions' requirements. The dealer likewise would have violated the requirements that it verify and record the name of the actual purchaser of the firearm. See 18 U.S.C. 922(b)(5) and (t)(1)(c); see p. 13, *supra*. Finally, if a dealer completed a sale under those circumstances and signed the required certification that it was his "belief" that the transfer was "not unlawful" (Supp. J.A. 3), the dealer would have knowingly made a "false entry" on a required form in violation of 18 U.S.C. 922(m).

The unlawfulness of a sale to an individual who stated on Form 4473 that he was not the "actual buyer" of the firearm would not come as a surprise to that individual or the dealer. The Form itself repeatedly states that a transfer cannot be made under those circumstances. See Supp. J.A. 1 ("**If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you.**"); *id.* at 4 (dealer "may not transfer the firearm" to an individual who answers "no" to question 11.a); *id.* at 6 (dealer "should stop the transaction if * * * the buyer answers 'no' to question 11.a"). Indeed, the employees of the dealer where petitioner purchased the firearm in this case were prepared to testify that they would not have completed the sale (both "as a matter of law" and "their store's policy") if they had known petitioner was not the actual buyer. J.A. 29a-30a.

b. Petitioner suggests that the instruction on Form 4473 (Supp. J.A. 1) that "**[i]f you are not the actual buyer, the dealer cannot transfer the firearm(s) to you**" is invalid because it was not promulgated pursuant to the notice-and-comment requirement of the Administrative Procedure Act (APA), 5 U.S.C. 553. Pet. Br. 9,

23; see NRA Amicus Br. 22-32. For a variety of reasons, this case does not afford any occasion to decide that question.

First, petitioner's APA claim is not properly before the Court. As noted above (pp. 6-7, *supra*), the district court rejected this claim in denying petitioner's *second* motion to dismiss, and petitioner did not appeal that decision. Pet. App. 9a & n.6. In fact, petitioner went further and expressly told the court of appeals that he was not pressing his "administrative deficiencies" claim based on Form 4473. *Ibid.*; see Pet. C.A. Br. 3. The court of appeals thus did not address the contention. This Court does not ordinarily decide questions "neither pressed nor passed upon" below, *Clark* v. *Arizona*, 548 U.S. 735, 765 (2006), especially where they were expressly abandoned.

Second, any claim that ATF violated the notice and comment requirements of the APA in promulgating the current version of Question 11.a in the mid-1990s is time-barred. See 28 U.S.C. 2401(a) (generally applicable six-year statute of limitation); *Impro Prods., Inc.* v. *Block*, 722 F.2d 845, 850 n.8 (D.C. Cir. 1983) (Section 2401(a) applies to APA claims), cert. denied, 469 U.S. 931 (1984); see also *United States* v. *Lowry*, 512 F.3d 1194, 1202-1203 (9th Cir. 2008) (finding criminal defendant's attempted defense based on APA challenge to regulatory action time-barred).[9]

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[9] Under certain circumstances, lower courts have permitted *substantive* challenges to administrative actions to be asserted in the context of party-specific adjudicatory proceedings even when such claims would otherwise be untimely. See *JEM Broad. Co.* v. *FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994); cf. *Yakus* v. *United States*, 321 U.S. 414, 431-446 (1944). But that rule does not apply to procedural challenges, such as notice-and-comment claims. *JEM*

Third, even assuming arguendo that the question on Form 4473 was promulgated in a procedurally defective manner, that would not provide a defense in a prosecution for lying in an answer to that question. "[O]ne who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." *United States* v. *Knox*, 396 U.S. 77, 79 (1969). As this Court has explained, "it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Ibid.*; see *United States* v. *Mandujano*, 425 U.S. 564, 577 (1976) (plurality op.).

In any event, ATF was not required to use notice-and-comment procedures to change the "actual buyer" instructions on Form 4473. As petitioner notes (Br. 8) a previous version of the form stated that "[t]he sale or delivery of a firearm who is acting as an agent, intermediary, or 'straw purchaser' for someone whom the licensee knows or has reasonable cause to believe is ineligible to purchase a firearm directly, may result

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Broad. Co., 22 F.3d at 325 ("[C]hallenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the [statute of limitations].").

in a violation of the Federal firearm laws." *United States* v. *Ortiz-Loya*, 777 F.2d 973, 986 (5th Cir. 1985) (reprinting 1984 version of Form 4473). Likewise, an ATF "industry circular" from 1979 stated that the statute "does not necessarily prohibit a dealer from making a sale to a person who is actually purchasing the firearm for another person * * * so long as the ultimate recipient is not prohibited from receiving or possessing a firearm." ATF, Federal Firearm Regulation 63 (1984-1985) (reprinting Industry Circular 79-10).

Notwithstanding those statements, the Fifth Circuit in 1985 upheld a Section 922(a)(6) conviction where individuals falsely stated they were the firearm purchasers when in fact they were working as agents for the real purchaser, without any suggestion that the real purchaser was legally ineligible. *Ortiz-Loya*, 777 F.2d at 979. The court held that "[s]uch misstatements were clearly misrepresentations of material facts." *Ibid.* In 1994, ATF updated Form 4473 to reflect that same understanding and to incorporate the substance of the "actual buyer" instruction at issue here. See *United States* v. *Polk*, 118 F.3d 286, 295 n.7 (5th Cir.), cert. denied, 522 U.S. 988 (1997). ATF has likewise made consistently clear for at least 20 years that all straw purchases are prohibited, regardless of the eligibility of the firearm's ultimate recipient. *E.g.*, 1 *FFL Newsletter*, ATF (U.S. Dep't of Treasury, D.C.), 1992, at 1.

The APA's notice-and-comment requirement applies to legislative or substantive rules, but not to "interpretive" ones. 5 U.S.C. 553(b)(A); see *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993). While a legislative rule has "legal effect," an interpretive rule merely repre-

sents the agency's view of applicable legal requirements. See *American Min. Cong.* v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). The ATF statements at issue here are, at most, interpretive rules. The "actual buyer" question on Form 4473 expresses ATF's view that straw purchases are prohibited. But, for the reasons given above, it is the statute itself, not the Form 4473 instructions (or ATF statements in industry circulars), that makes such purchases unlawful.

II. PETITIONER VIOLATED 18 U.S.C. 924(a)(1)(A) BY MAKING A FALSE STATEMENT WITH RESPECT TO INFORMATION REQUIRED TO BE KEPT IN THE RECORDS OF A LICENSED DEALER

Section 924(a)(1)(A) of Title 18 prohibits "knowingly mak[ing] any false statement" with respect to "information required by this chapter to be kept in the records" of federally licensed dealer. Petitioner's false statement violated that prohibition.

Section 924(a)(1)(A) is broader than Section 922(a)(6) in one respect because it reaches "any false statement," not merely a false statement that is "material to the lawfulness of the sale." Congress' decision to include a materiality requirement in Section 922(a)(6), but to omit one in Section 924(a)(1)(A) is presumed to have been deliberate and intentional. *E.g.*, *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013). Further, the statutory phrase "any false statement" by itself does not have an implicit materiality element. See *United States* v. *Wells*, 519 U.S. 482, 490 (1997). At the same time, Section 924(a)(1)(A) includes an element absent from Section 922(a)(6): the false statement must relate to "information required by this

chapter to be kept in the records" of a licensed dealer. 18 U.S.C. 924(a)(1)(A).

Petitioner's conduct violated Section 924(a)(1)(A) because he made a false statement (that he was the actual buyer of the firearm) with respect to "information required by this chapter to be kept in the records" of a dealer. The term "this chapter" in Section 924(a)(1)(A) refers to all of the statutory provisions of Chapter 44. Three provisions are particularly relevant to the issue. As noted above, Section 922(b)(5) requires a licensed firearm dealer to note in his records the "name, age, and place of residence" of every person who buys a firearm from him. Section 923(g)(1)(A) requires a dealer to "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." Third, Section 926 directs the Attorney General to prescribe necessary rules and regulations to "carry out the provisions of this chapter." 18 U.S.C. 926(a).

Because Sections 923(g)(1)(A) and 926 specifically authorize the Attorney General to issue regulations to implement Chapter 44, the Attorney General's regulations governing information that a licensed dealer must acquire from a prospective gun buyer is information "required by this chapter" to be maintained by the dealer. In turn, under 27 C.F.R. 478.124(a), the Attorney General requires a licensed dealer to record every firearm transaction to an unlicensed individual "on a firearm transaction record, Form 4473." Thus, all the information required by the ATF Form 4473 is information required to be kept for purposes of Section 924(a)(1)(A). Further, the "actual buyer" ques-

tion is required information because it directly implements the directive in Section 922(b)(5) that a dealer note the "name" of the gun buyer in his records. See p. 17, *supra*.

Accordingly, when an individual purchases a firearm at the direction of, and for the use, of another person, but he states that he is the actual buyer of the firearm on the ATF Form 4473, he has made a false statement with respect to the information that is required to be kept in the records of a licensed firearm dealer in violation of Section 924(a)(1)(A). Every court of appeals that has considered the issue agrees. See Pet. App. 17a-18a; *United States* v. *Johnson*, 680 F.3d 1140, 1146-1147 (9th Cir. 2012); *United States* v. *Soto*, 539 F.3d 191, 198-199 (3d Cir. 2008), cert. denied, 555 U.S. 1116 (2009); *Nelson*, 221 F.3d at 1209.

Petitioner contends (Br. 34) that any information ATF's regulations require licensed dealers to maintain is not information required "*by this chapter* to be kept," 18 U.S.C. 924(a)(1)(A) (emphasis added), positing that the provision extends only to statutory requirements, not those that come from implementing regulations. Even if petitioner's crabbed reading of this provision were correct, his argument would fail because, as noted above, the statute itself requires a dealer to record "in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence" of each firearm purchaser. 18 U.S.C. 922(b)(5). Petitioner made a false statement "with respect to" *that* "information required by this chapter to be kept." 18 U.S.C. 924(a)(1)(A).

In any event, petitioner's reading of Section 924(a)(1)(A) as allowing false statements in records that ATF regulations require to be maintained is

unfounded. Chapter 44 does not itself impose detailed record-keeping requirements but instead requires licensed firearm dealer to "maintain such records * * * as the Attorney General may by regulations prescribe." 18 U.S.C. 923(g)(1)(A). Accordingly, the information covered by those regulations is required "by this chapter," *i.e.*, Section 923(g)(1)(A), "to be kept," 18 U.S.C. 924(a)(1)(A).

That interpretation is consistent with the rule that "regulations, if valid and reasonable, authoritatively construe the statute itself." *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001); see *Global Crossing Telecomms., Inc.* v. *Metrophones Telecomms., Inc.*, 550 U.S. 45, 54, 58 (2007) (rejecting argument that private-right-of-action provision "authorize[d] only actions 'seeking damages for *statutory* violations' and not for 'violations merely of *regulations* promulgated to carry out statutory objectives'" on the ground that "to violate a regulation that lawfully implements [the statute's] requirements *is* to violate the statute"). Petitioner offers no explanation why Congress would have broadly delegated record-maintenance responsibilities to the Attorney General, while at the same time exempting the resulting record-keeping requirements from the protection of the statute's generally applicable false statement provision.

Petitioner observes (Br. 34) that, unlike Section 924(a)(1)(A), a different provision (involving forfeitures) expressly refers to violations of regulations. See 18 U.S.C. 924(d)(1). Regardless of whether that express reference to regulations was actually necessary in Section 924(d)(1), it was plainly not in Section 924(a)(1)(A), which expressly references "this chapter's" record-keeping requirements—which, in turn,

consist of requirements to keep such information as "the Attorney General may by regulations prescribe," 18 U.S.C. 923(g)(1)(A).

Petitioner's alternative argument (Br. 35-36) that ATF regulations do not require the licensed firearm dealer to maintain a record of the "actual buyer" of a firearm is incorrect. ATF regulations require the dealer to maintain a record of the buyer's "name, sex, residence address, [and] date and place of birth." 27 C.F.R. 478.124(c)(1). For the reasons discussed above involving 18 U.S.C. 922(b)(5)'s parallel elements, those requirements call for information on the actual purchaser, not just a straw. See p. 17, *supra*. In addition, ATF regulations require the dealer to "retain * * * as a part of the required records, each Form 4473 obtained in the course of transferring custody of the firearms." 27 C.F.R. 478.124(b). Accordingly, any false statement on Form 4473 is a false statement "with respect to the information required by this chapter to be kept in the records" of a federally licensed firearm dealer. 18 U.S.C. 924(a)(1)(A).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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