No. _____

In The

Supreme Court of the United States

ARMAMENT SERVICES INTERNATIONAL, INC. and MAURA ELLEN KELERCHIAN,
Petitioners,

v.

WILLIAM P. BARR, Attorney General of the United States; REGINA LOMBARDO, Acting Deputy Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; JUAN F. ORELLANA, Director of Industry Operations Bureau of Alcohol, Tobacco, Firearms and Explosives; and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the
Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit applied an improperly deferential standard of review in a *de novo* federal firearms licensing proceeding under 18 U.S.C. § 923(f)(3), when determining whether Petitioners "willfully" violated any provisions of the Gun Control Act?

2. Whether the Third Circuit, while imputing the alleged conduct of a former officer of a federal firearms licensee to the company and its new president, inconsistently and improperly denied them the same statutory safeguards and protections regarding licensing decisions guaranteed to that former officer under 18 U.S.C. § 923(f)(4)?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE

Petitioners Armament Services International, Inc. (ASI) and Maura Ellen Kelerchian were the petitioners in the district court and the appellants in the Third Circuit. Petitioner ASI is a privately held corporation. It is not publicly traded and has no publicly traded parent or affiliate.

Respondent William P. Barr is the current Attorney General of the United States and the successor to Jefferson B. Sessions, III, the Attorney General of the United States at the time of the Third Circuit Appeal. General Sessions was an appellee in the Third Circuit. His predecessor, and respondent in the district court, was Acting Attorney General Sally Q. Yates.

Respondent Regina Lombardo is the Acting Deputy Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). She is the successor to Deputy Director and Acting Director Thomas E. Brandon. Acting Director Brandon was a respondent in the district court and appellee in the court of appeals.

Respondent Juan F. Orellana is the Director of Industry Operations for the Philadelphia Field Division of ATF. He was a respondent in the district court and appellee in the court of appeals.

Respondent United States of America was a respondent in the district court and an appellee in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the District Court for the Eastern District of Pennsylvania granting Respondents summary judgment and dismissing the petition for review is unpublished but available at 2017 WL 5886048 and attached at Appendix B1-B25.

The decision of the Third Circuit affirming the district court is unpublished but available at 760 Fed. Appx. 114 and is attached at Appendix A1-A10. The Third Circuit's order denying the petition for rehearing or rehearing *en banc* is unpublished but available on PACER, Case No. 18-1125, Doc. 003113190405, and is attached at Appendix C1-C2.

JURISDICTION

The Third Circuit issued its order denying rehearing and rehearing *en banc* on March 21, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

18 U.S.C. § 922 regarding unlawful acts provides, in relevant part:

* * *

> **(o)(1)** Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> **(2)** This subsection does not apply with respect to—
>
> **(A)** a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof;

* * *

18 U.S.C. § 923 regarding the licensing of firearms dealers, states, in part, as follows:

> **(a)** No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General.

* * *

> **(c)** Upon the filing of a proper application and payment of the prescribed fee, the Attorney General shall issue to a qualified applicant the appropriate license which, subject to the provisions of this chapter and other applicable pro-

visions of law, shall entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce during the period stated in the license.

* * *

(d)(1) Any application submitted under subsection (a) or (b) of this section shall be approved if—

* * *

(C) the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder;

*** * ***

(e) The Attorney General may, after notice and opportunity for hearing, revoke any license issued under this section if the holder of such license has willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter * * *. The Secretary's action under this subsection may be reviewed only as provided in subsection (f) of this section.

(f)

* * *

(2) If the Attorney General denies an application for, or revokes, a license, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation.

* * *

(3) If after a hearing held under paragraph (2) the Attorney General decides not to reverse his decision to deny an application or revoke a license, the Attorney General shall give notice of his decision to the aggrieved party. The aggrieved party may at any time within sixty days after the date notice was given under this paragraph file a petition with the United States district court for the district in which he resides or has his principal place of business for a *de novo* judicial review of such denial or revocation. In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Attorney General was not authorized to deny the application or to revoke the license, the court shall order the Attorney General to take such action as may be necessary to comply with the judgment of the court.

(4) If criminal proceedings are instituted against a licensee alleging any violation of this chapter or of rules or regulations prescribed under this chapter, and the licensee is acquitted of such charges, or such proceedings are terminated, other than upon motion of the Government before trial upon such charges, the Attorney General shall be absolutely barred from denying or revoking any license granted under this chapter where such denial or revocation is based in whole or in part on

> the facts which form the basis of such criminal charges. No proceedings for the revocation of a license shall be instituted by the Attorney General more than one year after the filing of the indictment or information.

18 U.S.C. § 924 regarding penalties states, in part, as follows:

> **(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;
>
> * * *
>
> or
>
> **(D)** willfully violates any other provision of this chapter,
>
> shall be fined under this title, imprisoned not more than five years, or both.

27 C.F.R. § 478.71, Denial of an application for license, provides in relevant part:

> Whenever the Director has reason to believe that an applicant is not qualified to receive a license under the provisions of § 478.47, he

> may issue a notice of denial, on Form 4498, to the applicant. The notice shall set forth the matters of fact and law relied upon in determining that the application should be denied, and shall afford the applicant 15 days from the date of receipt of the notice in which to request a hearing to review the denial.

* * *

STATEMENT OF THE CASE

1. This case involves a challenge to the constructive revocation/denial of several federal firearms licenses ("FFLs") for Petitioners Armament Services International, Inc. ("ASI") and its current president and co-owner, Maura Kelerchian. The asserted basis for revoking and denying the FFLs to Petitioners involves an alleged conspiracy to violate certain record-keeping and firearms possession provisions of the Gun Control Act ("GCA") by the former president of ASI, Vahan Kelerchian, Maura's husband and co-owner of ASI.[1] Vahan was removed from his position at ASI and removed as a responsible person from ASI's FFLs promptly upon his indictment. He was convicted of the GCA violations and his conviction is currently on appeal in the Seventh Circuit. His individual FFLs, however, remain in force pursuant to statute until his conviction becomes final and until disposition of certain FFL-specific avenues of post-conviction relief. *See* 18 U.S.C. §§ 923(f)(4), 925(c).

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[1] For ease of reference, Maura Kelerchian and Vahan Kelerchian hereafter will be referred to by their first names.

Neither ASI nor Maura were charged in connection with the alleged conspiracy, the criminal court rejected the government's attempt to name Maura as a co-conspirator, and yet ATF seeks to deny or revoke their FFLs even while Vahan's FFLs remain in force.

2. Petitioner ASI is a privately held company licensed to manufacture and import firearms and destructive devices. It possesses several FFLs, which require periodic renewals. App. B1-B2.

In May 2013, Vahan was indicted for several violations of the Gun Control Act and other felonies. The indictment alleged that Vahan and employees of the Sheriff's Department for Lake County, Indiana, bought machineguns from the licensed firearms dealer Heckler and Koch ("H & K") under false pretenses in order to disassemble them and sell the parts.

The trial court in Vahan's criminal case summarized the indictment as follows:

> The Indictment allege[d] that Mr. Kelerchian and his co-conspirators fraudulently represented to ATF and other federal firearms licensees that the machine guns were for the Lake County Sheriff's Department. To back up these claims, they used the Lake County Sheriff's Department letterhead, fabricated Lake County Sheriff's Department purchase orders, and issued false letters in the name of the Sheriff's Department. The machine guns were shipped to the Sheriff's department but taken by the co-conspirators to their homes. There they removed the barrels and sold them. Some of the barrels were sent to Mr. Kelerchian. On

> the basis of these allegations, the Grand Jury charged Mr. Kelerchian with conspiracy to provide false information to other federal firearms licensees in violation of 18 U.S.C. §§ 371 and 924(a)(1)(A).

App. B2-3 (district court below quoting *United States v. Kelerchian*, No. 2:13-CR-66 JVB, 2015 U.S. Dist. LEXIS 80336 at *2, *4-5, 2015 WL 3832667 at *1, *1-2 (N.D. Ind. June 22, 2015)).

Soon after Vahan's indictment, Maura informed ATF that Vahan was no longer a responsible person on ASI's licenses, effective immediately, and thereafter ASI applied to renew its licenses. App. B4. Prior to Vahan's indictment in 2013, Maura had been the nominal Vice President of ASI and a responsible person on its FFLs but had solely secretarial duties. Following Vahan's removal she became President of ASI, remained a responsible person on ASI's licenses, and submitted the renewal applications on behalf of ASI for its several FFLs.

While not formally ruling on the renewal applications, ATF accepted the applications and issued authorization letters for ASI to continue its operations. App. B4. No charges were ever filed against ASI in connection with Vahan's alleged violations of the GCA. And while the government sought to name Maura as a co-conspirator, the judge in that case denied the government's request.

In 2015, Vahan was convicted. A few days later, Maura applied for her own individual license to operate as a firearms dealer. App. B4. In light of the restrictions on revoking or denying a license contained in 18 U.S.C. § 923(f)(4), however, final action on Va-

han's own FFL is stayed until the conviction and all post-conviction appeals are final. Even then, adverse action on his FFL remains stayed pending action on a pending request for post-conviction relief. 18 U.S.C. § 925(c), (when licensee applies for post-conviction "relief from disabilities under this chapter," license remains effective pending final action on such application for relief).

ATF subsequently denied Maura and ASI's applications under 18 U.S.C. § 923(d)(1)(C) for willfully violating the Gun Control Act. App. B5-B6. ATF concluded that ASI, via the conduct of its former president, Vahan, had knowingly made false statements with respect to the information required to be kept in H & K's transaction records in violation of 18 U.S.C. § 924(a)(1)(A) and had unlawfully possessed machineguns in violation of 18 U.S.C. § 922(o), and that Maura had aided and abetted those violations. After a hearing before another ATF employee, ATF affirmed its initial denial.

3. Petitioners timely sought review in the District Court for the Eastern District of Pennsylvania. Under 18 U.S.C. § 923(f)(3), a district court conducts "*de novo* judicial review" of a denial or revocation of an FFL. The court "may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered" at the hearing before the ATF. *Id*. Despite a request for discovery, the district court considered this case only on the administrative record and granted ATF's motion for summary judgment. App. B7, B24-B25.

Regarding the standard of review, the district court initially acknowledged that under *de novo* re-

view, "the decision under review 'is not necessarily clothed with any presumption of correctness or other advantage.'" App. B8 (quoting *Stein's, Inc. v. Blumenthal*, 649 F.2d 463, 466–67 (7th Cir. 1980)). But it ultimately and mistakenly settled on a familiar and deferential administrative-law standard that ATF's "decision may be upheld when the trial court concludes in its own judgment that the evidence supporting the decision is substantial." App. B9-B10 (quoting 649 F.2d at 467); *see also* App. B10 ("the legal standard requires only that there has been evidence of even a single violation committed willfully" (citing *American Arms Int'l v. Herbert*, 563 F.3d 78, 86 (4th Cir. 2009)").

Regarding whether ASI willfully violated provisions of the GCA, the district court said little other than to lump ASI and Maura together and argue that both had aided and abetted Vahan's alleged violations. App. B21-B22. It did not address whether the alleged conspiracy was beyond the scope of Vahan's employment and hence whether ASI as an entity had knowingly or willfully violated the GCA.

On the question whether Maura had willfully violated the GCA, the court first recited the standard that a "licensee's violation is willful 'where the licensee knew of his legal obligation and purposefully disregarded or was plainly indifferent to the requirements.'" App. B11 (citations omitted). In discussing the two alleged violations of the GCA, however, the court then proceeded to recite a string of otherwise mundane secretarial conduct without meaningfully examining whether such conduct – none of which was itself illegal or fraudulent – was in knowing or willful

furtherance if the underlying alleged illegal acts of others.

Regarding whether Maura willfully aided and abetted a conspiracy to make false statements to H&K in violation of 18 U.S.C. § 924(a)(1)(A), the district court pointed to a list of ministerial actions it claimed were "directly involved" in the illegal conduct. App. B21. But none of the listed actions – explaining required paperwork and procedures for lawful firearms purchases, reviewing required letters sent by the Sherriff's Department, providing FedEx labels, sending invoices, collecting payments, etc., App. B21-B22 – is itself illegal. Indeed, they were utterly mundane activities well within Maura's ordinary secretarial duties. The court cited no evidence that she knew the forms she forwarded or the letters from the Sherriff's Department would be or had been false, knew of the deputies' allegedly improper plans for the firearms after acquisition, or otherwise willfully aided a known violation of § 924(a)(1)(A).

On the question whether she had also willfully aided and abetted a conspiracy for ASI to unlawfully possess machineguns for improper purposes in violation of 18 U.S.C. § 922(o), the district court again held that she was "directly involved" in the mundane mechanics of obtaining the firearms – as was part of her ordinary job – but offered no evidence or analysis suggesting she knew the purchases were illegal or willfully supported illegal conduct. App. B23.

The only facts cited by the district court that even arguably speak to knowledge or willfulness involve who sent payment on her invoices and her having forwarded, at Vahan's direction, publicly available

ATF instructions on how to disassemble a machinegun to Chief Kumstar at the Sherriff's Department. App. B22. It then, *ipse dixit*, asserted that Maura "was directly involved and assisted in the purchase of these illegal firearms." App. B22.

The district court also rejected Petitioners' argument that ATF could not deny Petitioners' licenses until Vahan's conviction and appeals were final. Under 18 U.S.C. § 923(f)(4), if a licensee is criminally charged but then acquitted or otherwise obtains a favorable outcome post-trial, the Attorney General is "absolutely barred from denying or revoking *any license* granted under this chapter where such denial or revocation is *based in whole or in part on the facts which form the basis of such criminal charges*." (Emphasis added.) The district court, however, held that the provision was inapplicable to *Petitioners* because only Vahan had been charged, it is their licenses that are at issue, and Vahan had been removed as a responsible party from ASI's licenses. App. B16. It did this despite that Petitioners' alleged violations were only *derivative* of Vahan's alleged violations, that ASI's responsibility was exclusively based on Vahan's conduct and position at the company, and that the statute prohibits revocation of "any" license based in whole or in part on the *facts* of the criminal charges.

4. Petitioners timely appealed to the Third Circuit. The court of appeals recognized that its review of the grant of summary judgment in this case was plenary and that it should apply the same standard as the district court to determine whether summary judgment was appropriate. App. A3.

Though not directly addressing the district court's deferential "substantial" evidence standard, the court of appeals described the object of its review as being to determine whether the Attorney General merely had "reason to believe" that a violation had occurred. App. A5. It did not purport to decide, *de novo*, whether the evidence actually established such a violation applying an appropriate standard of proof.

Regarding whether § 923(f)(4) and the lack of finality in Vahan's criminal case precluded denying Petitioners' licenses based on Vahan's alleged illegal conduct, the court of appeals held that no criminal proceedings had been brought against Maura or ASI, and hence the statutory safeguard did not apply to them. App. A8. Ignoring the language of the statute, it further held that "Vahan's convictions — final or not — are not dispositive, since ATF's denials were *also* based on the guilty pleas of the co-conspirators, documentary and testimonial proof of affirmative acts by Maura, and Maura's interview with ATF." *Id.* (emphasis added).

Regarding whether Petitioners engaged in "willful" violations of the Gun Control Act, the court first noted that a "'violation of the Gun Control Act is willful where the licensee: (1) knew of his legal obligation under the Gun Control Act, and (2) either purposefully disregarded or was plainly indifferent to its requirements.'" App. A4 (quoting *Simpson v. Attorney Gen. United States of Am.*, 913 F.3d 110, 113–15 (3d Cir. 2019)).

Regarding Petitioner ASI, the court of appeals asserted that there was "no doubt" that Vahan – whose case was and is still on appeal – caused H&K to have

false statements in its records in violation of 18 U.S.C. § 924(a)(1)(A) and that his conduct was attributable to ASI. It found the conduct of ASI and Vahan equivalent based on a subsection of the licensing provisions defining "the applicant" for a license as "including, in the case of a corporation, * * * any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation." App. A5 (quoting 18 U.S.C. § 923(d)(1)(B)).

Regarding whether Maura had "willfully" aided and abetted the § 924(a)(1)(A) record-keeping violation, the court found reason to believe she acted willfully based solely upon her nominal position as Vice President, her role as a "responsible party" on ASI's licenses, unspecified testimony that she "appeared" to know what was going on based on unspecified emails, and that she forwarded to the Sheriff's Department publicly available information that was otherwise lawful but that supposedly advanced illegal ends. App. A5. After reciting mundane and otherwise innocent facts involving Maura's performance of her ordinary secretarial duties, the court concluded that "[r]egardless of whether this evidence shows that Maura shared in her husband's criminal intent beyond a reasonable doubt, it surely gave ATF 'reason to believe that [she was] not qualified to receive a license' due to at least plain indifference to the requirements of the Gun Control Act." App. A5-A6 (quoting 27 C.F.R. § 478.71).

Regarding alleged violations of § 922(o) from ASI possessing 5 machineguns under the allegedly false pretense that they were being kept available for the

lawful purpose of demonstrations to the Sherriff's Department, the court merely noted that the letters sent from Sherriff's Department asserted an interest in demonstrations that was "fictitious from the outset" and hence ASI's possession of the machineguns was unlawful App. A7.

As for Maura's supposed "willful" aiding and abetting of the § 922(o) violation, the court again cited mundane administrative conduct fully consistent with the steps required for *lawful* acquisition and possession of machineguns. It then cited her sending to one of the Sherriff's deputies ATF instructions on lawfully disassembling machineguns as suggesting that she knew or disregarded the falsity of the letters discussing machineguns for demonstration purposes. App. A7. The court did not explain how such instructions were relevant to her knowledge of the legality of the 5 firearms that were never sent to the Sherriff's Department and that were kept, intact, at ASI and available for demonstrations.

5. Petitioners sought rehearing or rehearing *en banc*, which the Third Circuit denied. App. C1-C2.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition for a writ of certiorari because the decision below applies an improperly deferential standard of review of what constitutes "willful" violations contrary to the *de novo* standard or review required by § 923(f)(3), and because it improperly limited § 923(f)(4)'s bar, in certain circumstances, of revocation or denial of licenses following criminal proceedings to the licensee charged in those proceedings, and not to "any license" denied

based on derivative alleged culpability predicated in whole or in part on the same underlying facts.

I. The Decision Below Applies an Improper Standard for Reviewing whether a Violation of the Gun Control Act Was "Willful," as Required for Revocation or Denial of a Federal Firearms License.

The court of appeals affirmed the denial of Maura's license based on its conclusion that the Attorney General had "reason to believe" Maura had committed a willful violation of the GCA in aiding and abetting the alleged conspiracy to submit false records to H&K in order to obtain machineguns. App. A5-A6. That standard of proof and review is contrary to the plain language of the statute and resulted in the complete evisceration of the requirement that any alleged violation be willful.

Under § 923(f)(3), district courts engage in *de novo* review of a decision to deny or revoke a license. The district court, however, looked only to the deferential administrative law question whether there was "substantial evidence" of a violation, rather than analyzing the evidence *de novo*. App. B16.[2]

And despite recognizing that it also should apply the same *de novo* review, the court of appeals went

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[2] And while the court, in its conclusion, added the boiler-plate claim that it would have reached the same conclusion itself, App. B24-B25, it actually failed to consider the contrary evidence or explain why the numerous facts equally consistent with unknowing or non-willful violations must nonetheless be found willful under any non-deferential burden of proof.

even further afield into deference, looking to whether ATF had "reason to believe" a violation had occurred. App. A5.

The court of appeals, however, conflated the "reason to believe" standard for giving *notice* of a denial under 27 C.F.R. § 478.71 – a procedural step allowing an FFL holder to request a hearing – with the eventual standard for finally revoking or denying a license. The reason to believe standard – like probable cause – is merely the lower threshold to *initiate* the process. But to ultimately deny or revoke a license, ATF must establish that the applicant or FFL holder in fact fails one of the criteria for licensure. Otherwise, the statutory command that a license "shall" issue and the requirement of *de novo* review are meaningless. 18 U.S.C. §§ 923(c), (d)(1), & (f)(3).[3]

In holding only that the Attorney General had reason to believe there was a willful violation, the court of appeals never itself determined, *de novo*, whether

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[3] Once it is recognized that to revoke or deny a license ATF must establish a violation of one of the licensing conditions, rather than a mere *suspicion* or *belief* of such a violation, there remains the further issue of what level of proof is required – preponderance of the evidence or proof beyond a reasonable doubt. In this case any reasonable level of proof requires a reversal and remand. But there remains a substantial case for requiring proof beyond a reasonable doubt, at least for claimed violations of the GCA, given that § 923(f)(4) plainly contemplates situations where proof of a violation may lie somewhere above preponderance but still within the realm of reasonable doubt, and it expressly forbids license revocation or denial under such circumstances. Section 923(f)(4) is discussed further, *infra*, given the court's other errors concerning that section.

the evidence established Maura's or ASI's willful aiding and abetting of any violations. Indeed, the court cited not a single piece of evidence that would demonstrate Maura's knowledge of the scheme prior to ATF indicting Vahan. Every piece of evidence cited by the government and the courts below are perfectly consistent with innocent secretarial actions regardless whether they in fact served to facilitate the unknown illegal ends of the alleged conspiracy. Literally the only thing that would make such actions culpable, much less make her supposed violation of the GCA "willful," would be proof that she *knew* the representations made in letters sent by the Sherriff's Department to H&K were false.

Absent evidence establishing such knowledge, all of Maura's actions were precisely what she would have done to assist lawful firearms purchases. There was nothing intrinsically unlawful about the purchases in this case, it is only the alleged secret falsity of the representations by the Sherriff's Department deputies that converted the transactions from legal to illegal. Given that Maura was assisting law enforcement officers in the purchase of firearms that they have a perfectly legal right to purchase, there needs to be far more than speculation from her ministerial conduct to establish that she knew of the illegal underlying scheme, knew of the falsity of the representations made by the Sherriff's deputies, and willfully assisted notwithstanding such knowledge. Only then could she possibly be said to have been indifferent to the requirements of the GCA.

Even her subsequent forwarding of information – from the ATF itself – on how to disassemble a ma-

chinegun offers, at best, the weakest possible inference of a knowing violation. After all, she was sending ATF's own instructions to *law enforcement officers*, who could readily be expected to come into contact with both legal and illegal machineguns (for example, via seizure from criminals). It is hardly a red flag that they would seek information on how to safely and properly disassemble such weapons.[4] Indeed, even disassembly and sale by the Sherriff's Department of weapons it had purchased for its own use would not have been illegal, and hence there is no basis to infer Maura's knowledge of the individual deputies' private illegality from her merely sending them otherwise proper information.

Given that there is absolutely no evidence that Maura was *aware* that the deputies might have misstated their intentions in the forms and letters, that they had some improper purpose for the ATF information they sought, or that she herself falsified anything, it is improper to *assume* an essential element of aiding and abetting – *mens rea* – or to assume that her factual participation in any violations was "willful." Merely waiving one's hand to impute Vahan's alleged state of knowledge and intent to Maura is not even remotely proof, much less proof by a preponderance or beyond a reasonable doubt.

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[4] Even if such seized firearms were to be disassembled and sold for parts, that too would have been unexceptional. Seized property, such as automobiles, is routinely sold by police departments when no longer needed as evidence. And rendering a machinegun inoperable as a machinegun is simple prudence and, indeed, evidence of *adherence* to the GCA, not disregard for the law.

The problem here is not merely an error in applying the law to the facts, but rather stems from a fundamental misconception of the standard of review. Neither the district court's substantial evidence standard or nor the court of appeals' reason to believe standard involved *de novo* review of the substance of the alleged illegality. It is the very error of applying such forgiving standards that allowed the courts below to skip any meaningful review of the essential elements of *mens rea* or willfulness and instead rely on a weak inference from otherwise innocent conduct. *See Stein's Inc.*, 649 F.2d at 470-71 (Swygert, J., dissenting) (criticizing district court for applying the "substantial evidence" test, thereby treating the "administrative decision as presumptively correct" and failing to make its own factual determinations regarding willfulness). As Judge Swygert noted in dissent in *Stein's, Inc.*, the failure to make independent determinations taking into account all competing facts renders "the requirements that the violations be willful and that judicial review be de novo * * * meaningless" with ensuing results that "illustrate[] the reason the requirements were enacted by Congress and the abuses which result when they are not satisfied." *Id*. at 471.

A proper application of *de novo* review can be seen in *Jim's Pawn Shop v. Bowers*, 2008 WL 11380078 (E.D.N.C. 2008). There, the court conducted a detailed analysis of the evidence, focused on both direct and circumstantial evidence regarding willfulness, and concluded that ATF had failed to show by a preponderance of the evidence "the types of 'conscious, intentional, deliberate, [and] voluntary' actions that

are deemed willful." *Id*. at *8 (citation omitted); *see also Harris News Agency, Inc. v. Bowers*, 809 F.3d 411, 413-14 (8th Cir. 2015) (*de novo* review reversing district court and ATF based on detailed examination of aiding and abetting claim and holding that evidence was insufficient to establish a violation even where individual knew family member was a felon, knew family member handled firearms as part of his job while under his supervision, yet did not enforce GCA prohibition against felons in possession). Where *de novo* review is genuinely applied, it is rigorous and demands more substantial proof of a willful violation than was considered in this case.

That the evidence shows Maura took mundane actions – sent otherwise innocent e-mails, ATF forms and model letters, and a FedEx label, App. A6, B22 – that ultimately were determined to facilitate the conspiracy does not even come close to demonstrating knowing or willful involvement. Indeed, if that were the standard then FedEx, H&K, and Maura's e-mail provider are equally culpable in that they in fact may have furthered the alleged conspiracy but were equally in the dark regarding the full details and illegality of the underlying conduct.

At the end of the day, the court's standard merely begs the question and reduces the willfulness requirement to a nullity. That Maura sent required forms, legally compliant form letters, and other publicly available information to Sherriff's deputies does not establish her knowledge of their illegal scheme. The only thing distinguishing lawful from unlawful activity here was the intent of the individual deputies requesting the firearms and their plans for those

firearms post-receipt. Nothing establishes that Maura knew of their secret intent or plans or was plainly indifferent to such plans. ATF's and the courts' seeming syllogism that "you helped them so you must have known what they were up to" simply assumes the conclusion rather than establishes it.

Allowing this denial to be upheld would eviscerate Congress' requirement that a disqualifying violation of the GCA be "willful," would eviscerate Congress' requirement of *de novo* review, and would subject anyone who lacked personal knowledge of an underlying violation but somehow interacted with the perpetrators to denial of a firearms license in perpetuity.

This Court should grant certiorari to clarify that the willfulness requirement is separate from any conduct that may have unknowingly aided a violation of the GCA. Under the *de novo* standard of § 923(f)(3), federal courts must themselves find that the evidence establishes the essential *mens rea* element of willfulness before affirming the revocation or denial of a license under the statute.

II. The Decision Below Inconsistently Imputes to Petitioners Responsibility for Alleged Unlawful Conduct of a Former Corporate Officer while Denying them the Statutory Safeguards and Protections Guaranteed to such Accused Persons.

The court of appeals rejected Petitioners' argument that § 923(f)(4) barred the denial of their FFLs where Vahan's criminal case was not yet final. Its brief rationale for doing so is contrary to the plain language of the statute and incompatible with the de-

rivative culpability imputed to Petitioners. If the court is going to impose the consequences of Vahan's alleged conduct on Petitioners, it likewise must afford them the same protections he would have. Otherwise we are left with the absurdity that, if Vahan prevails on appeal or thereafter, ATF could not revoke or deny his licenses but could deny Petitioners' licenses based on the identical underlying facts and, in the case of ASI, based on Vahan's own conduct.

The inconsistency in the court's treatment of derivative responsibilities and protections can be seen from its equating ASI's conduct to Vahan's conduct based on the definition of an "applicant" as "including, in the case of a corporation, * * * any individual possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation." App. A5 (quoting 18 U.S.C. § 923(d)(1)(B)). Likewise with Maura, the claim of aiding and abetting fails without Vahan's supposed involvement in the conspiracy because she was performing secretarial duties at his direction and it is only if both he and she knew of the illegality that there would be a willful violation of the GCA at all.

But having tied Petitioners' licensing fate to Vahan's underlying conduct, the court below seeks to avoid that linkage when it comes to the protection for a licensee charged with such violations. While asserting that § 923(f)(4)'s absolute bar to license revocation or denial following an acquittal or other successful outcome applies only to the person criminally charged, the language of the statute is actually much broader. The statute does not say the Attorney General is barred from revoking or denying the licensee's

license, but instead says "the Attorney General shall be absolutely barred from denying *any license* granted under this chapter where such denial is *based in whole or in part on the facts* which form the basis of such criminal charge." (Emphasis added.) That Congress broadly referred to "any license" is ample evidence that this protection reaches beyond the individual licensee and protects affiliated persons and entities as well. It would be absurd for the individual to be protected in his license but to allow ATF nonetheless to destroy that person's livelihood by denying a license to his company based on identical facts.

Similarly, regarding the court of appeals' claim that the outcome in Vahan's case is irrelevant because the denials here "were *also* based" on other evidence of the underlying conspiracy, App. A8 (emphasis added), that too conflicts with the plain language of the statute. The court does not contest that the denials here are based, at least in part, on the facts that form the basis of Vahan's charges. The statute expressly forbids such denials based "in part" on the same underlying facts, regardless whether there are alternative sources of such facts or even additional facts not part of the underlying case.

By imposing on Petitioners the burdens of Vahan's indictment but disallowing them the protections such an indictment triggers, ATF is circumventing the statutory scheme by selectively prosecuting individuals and then claiming it may use the results of even a failed prosecution to deny an FFL to the company with whom such person was affiliated. That undermines the absolute bar against using failed prosecutions as a basis for denying a license or renewal.

Indeed, that a defendant can be acquitted even if there is some evidence of guilt but not evidence beyond a reasonable doubt suggest the courts were wrong in applying a lower bar to license denials. Section 923(f)(4) specifically contemplates situations where there may be some evidence but not enough for criminal conviction and still insists that such evidence is not permitted to be used for license denial. It would be bizarre, to say the least, that ATF, recognizing that a prosecution would fail, could simply deny a license in situations where it could not do so had it sought but failed to obtain a conviction.

This Court should grant certiorari to resolve the inconsistency in the treatment of culpability and protection under the statute and to enforce the express protections of § 923(f)(4).

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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