No. 07-8046

In The
United States Court of Appeals
for the Tenth Circuit

STATE OF WYOMING, *EX REL.*, PATRICK J. CRANK,
WYOMING ATTORNEY GENERAL,

Appellant,

v.

UNITED STATES, *ET AL.*,

Appellees.

On Appeal from the United States District Court
for the District of Wyoming
Honorable Alan B. Johnson, District Judge

BRIEF *AMICUS CURIAE* OF GUN OWNERS FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), it is hereby certified that the *amicus curiae,* Gun Owners Foundation, is a nonstock, nonprofit corporation having no parent corporation, and that there is no publicly held corporation owning any portion of, or having any financial interest in, Gun Owners Foundation.

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

This *amicus curiae* brief is submitted on behalf of Gun Owners Foundation ("GOF"), a nonprofit corporation dedicated to the defense of the Second Amendment right of United States citizens to keep and bear arms, and to the correct interpretation and application of federal and state firearms laws. Incorporated in 1983 under the laws of the Commonwealth of Virginia, GOF is exempt from federal income tax as an organization described in Internal Revenue Code section 501(c)(3), and classified as a public charity.

GOF primarily engages in nonpartisan research, public education and assistance concerning the construction of constitutions and statutes related to the right of citizens to bear arms, and engages in public interest litigation in defense of human and civil rights secured by law, including the defense of the rights of crime victims, the right to own and use firearms, and related issues. GOF has filed *amicus curiae* briefs in other federal litigation involving such issues, including briefs in the United States district courts, courts of appeals, and Supreme Court.

This brief, the filing of which has been consented to by the parties,[1] is intended to assist the United States Court of Appeals for the Tenth Circuit in addressing the question whether the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATF") exceeded its statutory authority and/or acted arbitrarily and capriciously, and not in accordance with federal law, conflicting with a clearly-expressed Congressional policy to protect the distinct and diverse firearms policies of the 50 States.

STATEMENT OF THE CASE

Effective on November 30, 1998, pursuant to the Brady Handgun Violence Prevention Act of 1993 ("the Brady law"), a Federal Firearms License ("FFL") holder may not transfer a firearm to a non-FFL holder unless the FFL holder contacts the National Instant Criminal Background Check System ("NICS"). *See* S. Halbrook, Firearms Law Deskbook, § 2:7, pp. 103-04 (2007 ed: Thomson/West). *See also* 18 U.S.C. § 922(t)(1)(A). However, the Brady law provides an exemption whereby the FFL holder need not contact NICS if: (a) the

[1] Counsel for GOF requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Copies of such written consents, in the form of letters or e-mail from counsel of record for the parties, have been submitted to the Clerk of Court.

transferee presents a State permit to possess or acquire[2] a firearm; (b) the permit "was issued not more than five years earlier by the State in which the transfer is to take place; and" (c) "the law of the State provides that such a permit is to be issued only after" a criminal background check whereby "an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law...." 18 U.S.C. § 922(t)(3).

At issue in this case is whether the criminal background check provided for by Wyoming's concealed carry law (Wyo. Stat. Ann. § 6-8-104) fully complies with 18 U.S.C. § 922(t)(3)(ii) as applied to a transferee whose conviction for a misdemeanor crime of domestic violence ("MCDV") has been "expunged" pursuant to Wyoming law (Wyo. Stat. Ann. § 7-13-1501).

A. Wyoming MCDV Expungement Statute.

According to the Wyoming statute, a person convicted of a MCDV may obtain an expungement of such a conviction if: (a) one year "has passed since the expiration of the terms of sentence" have passed; (b) there is no other conviction "for which firearms rights have been lost;" (c) the MCDV for which expungement

[2] By a BATF clarifying regulation, this exemption applies to state permits to "carry" a firearm. 27 CFR 478.102(d)(1)(I).

is being sought did not involve "the use or attempted use of a firearm;" (d) there has been no previous expungement of a MCDV conviction; and (e) a court finds that the person seeking the expungement (I) "is eligible for relief;" (ii) "does not represent a substantial danger to himself;" and (iii) does not represent a substantial danger to "any identifiable victim or society." *See* Wyo. Stat. Ann. § 7-13-1501(a), (g), and (k). If such an expungement is obtained, the record of the MCDV conviction is sealed, but "only ... for the purposes of restoring firearm rights that have been lost to persons convicted of misdemeanors." *See* Wyo. Stat. Ann. § 7-13-1501(k). Thus, the record of such an expunged conviction would not be available to the Wyoming Attorney General's criminal background check required before such a person sought a concealed gun permit, but would be available "for [other] criminal justice purposes." *See* Wyo. Stat. Ann. § 7-13-1501(m)(I) and 7-13-1401(j)(I).

B. BATF's Initial Advisory.

By letter dated August 6, 2004, BATF advised the Wyoming Attorney General that, after review of the Wyoming MCDV expungement statute, it had concluded that the Wyoming law did not meet the federal "complete expungement" standard governing MCDV convictions, as set forth in 18 U.S.C. § 921(a)(33). *See* Complaint, Exhibit 2; Appellant's Appendix ("App.") herein),

pp. 28-30. Therefore, BATF advised that the Wyoming permit statute would not render a transferee convicted of a MCDV eligible to purchase a firearm, under the Brady law (18 U.S.C. § 922(t)(3)(a)(ii)) and by 18 U.S.C. § 922(g)(9). *Id.,* p. 3; App., p. 30.

In support, BATF asserted its view that 18 U.S.C. § 921(a)(33) imposes a "federal expungement standard" that requires a complete "physical destruction" of a record of a MCDV conviction before a previously convicted MCDV misdemeanant may possess a firearm under federal law. *Id.,* p. 2; App., p. 29. BATF explained that the Wyoming expungement law fell short of its view of this federal standard because Wyoming law provides only that the MCDV conviction be "sealed" for the "purposes of restoring firearms rights that have been lost to persons convicted of misdemeanors," leaving the conviction on the record "for criminal justice purposes." *See id.,* pp. 1-2; App., pp. 28-29.

C. BATF's Subsequent Notice and Finding.

On July 5, 2005, reiterating its August 2004 advisory, BATF notified the Wyoming Attorney General: (a) of its "find[ing] that Wyoming's concealed weapons permit no longer qualifies as a NICS check alternative";[3] and (b) of its

[3] BATF uses the term "NICS check alternative" to describe the exemption in 18 U.S.C. § 922(t)(3).

having set a deadline of September 30, 2005, by which the attorney general was to notify BATF "that Wyoming's concealed weapons permits are not being issued to persons who have been convicted of an MCDV, regardless of whether such persons received an expungement under" section 7-13-1501 of the Wyoming Statute. *See* Complaint, Exhibit 3, p. 2; App., p. 32. BATF further advised that, if the September 30 deadline were not met, it would not "consider Wyoming permits as a NICS alternative." *Id.*, p. 2; App., p. 32.

D. Wyoming Attorney General's Response.

On August 30, 2005, the Wyoming Attorney General urged BATF to "reconsider [its] position," and "withdraw the September 30, 2005, deadline." In support, the attorney general contended that, for federal firearms purposes, an expungement of a MCDV conviction is determined by state, not federal, law, as provided for by the choice-of-law provisions defining convictions of state crimes in the relevant federal firearms statutes. *See* Complaint, Exhibit 4; App., pp. 34-38.

E. BATF's Final Ruling.

On January 23, 2006, BATF reaffirmed its position that its policy of complete physical destruction of the record of a MCDV conviction overrides Wyoming's MCDV partial expungement statute. *See* Complaint, Exhibit 5; App.,

pp. 39-43. Thus, BATF reaffirmed its previous ruling that "the Wyoming permit does not qualify as a NICS alternative." Complaint, Exhibit 5, p. 5; App., p. 43.

F. Wyoming Attorney General's Complaint.

On May 8, 2006, having reached an impasse in its effort to persuade the BATF that its expungement law and its Concealed Carry Weapon ("CCW") criminal background check qualified under the NICS exemption, the State of Wyoming filed a complaint in the United States District Court for the District of Wyoming seeking judicial review of BATF's action pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706. In its First Cause of Action, the State claimed that BATF's ruling that Wyoming's CCW criminal background check did not qualify as an exemption from the NICS requirement of 18 U.S.C. § 922(t)(3)(A) was "arbitrary and capricious, and in direct violation of federal law" and, therefore, in violation of 5 U.S.C. § 706(2)(A). Complaint, p. 11, ¶ 41; App., p. 19. In its Second Cause of Action, the State claimed that this same BATF action was "in excess of BATF's statutory jurisdiction and authority," and violative of 5 U.S.C. § 706(2)(C).[4] Complaint, pp. 1-12; App., 9-20.

[4] In a Third Cause of Action, not before this court on appeal, the State claimed a violation of the Tenth Amendment.

G. District Court Opinion and Judgment.

After briefing by the parties and oral argument, the district court ruled against the State, adopting BATF's interpretation of the disputed firearms statutes and concluding that, because the Wyoming MCDV expungement statute did not conform to the federal definition of complete physical destruction of the record of a MCDV conviction, the state criminal background check did not qualify for the exemption from the NICS check as provided in 18 U.S.C. § 922(t)(3). Wyoming v. United States, Case No. 06-CV-0111-ABJ (May 8, 2007) (hereinafter "Slip Op."); App., pp. 171-211.

SUMMARY OF ARGUMENT

Contrary to relevant and controlling case law precedent, the district court erroneously upheld BATF's ruling that — because the Wyoming statute providing for expungements of MCDV convictions did not physically destroy the records of such convictions, as required by federal law — the Wyoming CCW criminal background check did not qualify for an exemption from the NICS under 18 U.S.C. § 922(t)(3). *See* Part II A through C herein.

Contrary to clearly articulated Congressional statutory policy, the district court erroneously upheld BATF's rejection of Wyoming's MCDV partial expungement policy, and implementation of that policy by way of the Wyoming

CCW criminal background check, as authorized by 18 U.S.C. § 922(t)(3). *See* Part II D and E and Part III herein.

Because Congress has directly and unambiguously established that expungements of state criminal convictions are to be determined by state law, not by an overriding federal standard, the BATF action in this case was arbitrary, capricious, not in accord with law, and excess of its statutory authority and, therefore, should be set aside. *See* 5 U.S.C. § 706(2)(A) and (C).

ARGUMENT

I. INTRODUCTION

At the heart of the district court's ruling sustaining BATF's action was its finding that the Wyoming MCDV expungement policy failed to provide for the complete physical destruction of an MCDV conviction as required by BATF's interpretation of federal law. *See* Slip Op., pp. 26-30; App., pp. 196-200. In so deciding, the district court agreed with BATF that 18 U.S.C. § 921(a)(33) required that a Wyoming MCDV conviction be defined by federal law, **not** by Wyo. Stat. Ann. § 7-13-1501, even though the latter, not the former, is the law of the convicting jurisdiction.

On the strength of this ruling alone, the district court further affirmed BATF's action disqualifying Wyoming's criminal background check, as provided

in Wyo. Stat. Ann. § 6-8-104, as an exemption from the NICS, because it agreed with BATF that, unless and until Wyoming's MCDV expungement law completely erased an MCDV conviction, Wyoming's CCW law did not meet the criteria laid down in 18 U.S.C. § 922(t)(3)(A)(ii). *See* Slip Op., pp. 34-37; App., pp. 204-07.

Both of these district court rulings were plainly erroneous.

II. BATF'S RULING AGAINST WYOMING'S MCDV EXPUNGEMENT POLICY WAS ARBITRARY, CAPRICIOUS, AND NOT IN ACCORD WITH FEDERAL LAW.

A. It Is Undisputed that the Provisions Defining a Felony Conviction in 18 U.S.C. § 921(a)(20) and an MCDV Conviction in 18 U.S.C. § 921(a)(33) Are Co-Extensive.

In BATF's final letter notifying the Wyoming Attorney General of its determination that Wyoming's MCDV partial expungement policy did not meet the overriding federal policy requiring complete physical destruction of any MCDV conviction, BATF stated that it "agree[d] that the analysis used in section 921(a)(20) [governing the expungement of felony convictions] applies in the MCDV context contained in section 921(a)(33)." *See* Complaint, Exhibit 5, p. 2; App., p. 40. Further, in its response brief filed with the district court, BATF stated that the two sections were so "similar" that "it has been ATF's longstanding

position that the sections should be read **coextensively**." *See* Response Brief of Defendants ("BATF Resp."), p. 14, n.4 (emphasis added); App., p. 137.

In its opening brief in this Court, the Wyoming Attorney General has agreed with BATF's view, observing that "[f]ederal courts look to case law interpreting 18 U.S.C. § 921(a)(20) (felony restoration of firearms rights statute) when analyzing the restoration provisions of 18 U.S.C. § 921(a)(33)(B)(ii)." *See* Opening Brief of Appellant ("Applnt. Open. Br."), p. 11, n.5. Thus, in the court below, BATF correctly relied upon cases interpreting 18 U.S.C. § 921(a)(20) (felonies) as equally applicable to the proper interpretation of 18 U.S.C. § 921(a)(33)(B)(ii) (MCDV's). *See* BATF Resp., pp. 13-16; App., pp. 136-39. However, the district court, following BATF's lead, misinterpreted the rule of those cases.

B. The District Court Mistakenly Applied the Federal Appellate Rulings on which It Relied.

In support of its ruling against Wyoming's partial expungement policy, the district court purported to rely upon three federal appellate cases: United States v. Cassidy, 899 F.2d 543 (6th Cir. 1990); United States v. Hall, 20 F.3d 1066 (10th Cir. 1994), and United States v. Caron, 77 F.3d 1 (1st Cir. 1996), *aff'd sub nom*

Caron v. United States, 524 U.S. 308 (1998). Not one of these cases supports the district court's conclusion.

In each of these three cases, the defendant had been convicted of a **state** crime punishable by imprisonment for a term exceeding one year. *See* United States v. Cassidy, 899 F.2d at 544; United States v. Hall, 20 F.3d at 1067; United States v. Caron, 77 F.3d at 1. In each case, the person convicted had received from the **convicting state** a restoration of his civil rights under the law of that state. *See* United States v. Cassidy, 899 F.2d at 544; United States v. Hall, 20 F.3d at 1067; United States v. Caron, 77 F.3d at 1-4.

As the Supreme Court explained in Caron v. United States, 524 U.S. 308 (1998), the court of appeals in each of the three cases concluded that "federal law **gives effect** to [each **state's**] rule" providing for restoration of civil rights. *See id.,* 524 U.S. at 313 (1998) (emphasis added). In Cassidy, the U.S. Court of Appeals for the Sixth Circuit — without reference to any federal policy governing restoration of civil rights — gave effect to **Ohio** law because "state law" expressly restricted Cassidy from "possessing a firearm," even though **Ohio** law had, otherwise, restored him to his civil rights. United States v. Cassidy, 899 F.2d at 549-50. In Hall, this Court gave effect to the **Colorado** law that automatically restored Hall to his civil rights, without regard for any allegedly overarching

federal policy defining or even providing for the restoration of such rights. *See* United States v. Hall, 20 F.3d at 1069. And in Caron, the U.S. Court of Appeals for the First Circuit concluded that **Massachusetts** law governed, because it is "the clearly manifested purpose of Congress to **defer to state laws** ... in determining predicate convictions and the removal of firearm disqualifications." United States v. Caron, 77 F.3d at 9 (emphasis added).

There is no basis in these three cases, therefore, for the district court's conclusion that "State law may determine whether a person's ... conviction [has been] expunged under state law, but federal law determines whether the procedure is sufficient for federal purposes." Slip Op., pp. 24-25; App., pp. 194-95. To the contrary, the cases relied upon by the district court state just the opposite.

C. The District Court Decision Conflicts with Governing Supreme Court Precedent.

Not once did the district court cite any Supreme Court case in support of its ruling. This omission is most remarkable in light of the district court's detailed reliance upon the reasoning of the court of appeals in United States v. Caron,[5] a case subsequently taken up by the Supreme Court to resolve a conflict among the circuits. *See* Caron v. United States, 524 U.S. at 310. Prior to reaching the precise

[5] *See* Slip Op., pp. 22-24; App., pp. 192-94.

restoration of civil rights issue in Caron, the Supreme Court noted that "**[u]ntil 1986**, **federal law alone determined** whether a **state** conviction counted, regardless of whether the State had **expunged** the conviction." *Id.*, 524 U.S. at 313, citing Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 119-122 (1983) (emphasis added).

In Dickerson, BATF had revoked a corporation's federal license to deal and manufacture firearms and ammunition upon the ground that the corporation's chairman of the board had been convicted of a **state** crime of concealing a handgun, punishable by more than one year's imprisonment. *Id.*, 460 U.S. at 106-09. In its defense, the corporation established that, in accordance with Iowa law, the chairman's conviction "had been expunged." *Id.*, 460 U.S. at 107-08. Therefore, the corporation argued, the chairman had not been "convicted" of a disqualifying crime, the expungement having "rendered [that conviction] a nullity." *Id.*, 460 U.S. at 110-111. The Dickerson Court disagreed, asserting that whether a person had been "convicted" of a disqualifying offense was "a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State." *Id.*, 460 U.S. at 111-12. In support of its interpretation of the then existing Gun Control Act ("GCA"), the court stated that its ruling "made for [a] desirable national uniformity unaffected

by varying state laws, procedures, and definitions of 'conviction.'" *Id.*, 460 U.S. at 112. Any other rule, the Court reasoned, "would give effect to expunctions under varying state statutes [that] would seriously hamper effective enforcement of [the GCA]." *Id.*, 460 U.S. at 121.

Fifteen years after Dickerson, the Supreme Court acknowledged that Congress had changed the rule, "**modif[ying] this aspect** of Dickerson by adopting the following language,"[6] now embodied in 18 U.S.C. § 921(a)(20):

> What constitutes a **conviction** of such a crime (a crime punishable by a term of more than one year) **shall be determined** in accordance with the **law of the jurisdiction** in which the proceedings were held. Any conviction which has been **expunged, set aside** or for which a person has been **pardoned** or has had his civil rights restored shall **not be considered a conviction** for the purposes of this chapter, **unless** such pardon, expungement, or restoration of civil rights expressly provides that any person may not ship, transport, possess, or receive firearms. [Caron v. United States, 524 U.S. at 313 (emphasis added).]

Thus, the Supreme Court explained, "[t]he first sentence and the first clause of the second sentence [of the quoted portion of 18 U.S.C. § 921(a)(20)] **define** convictions, pardons, **expungement**, and restorations of civil rights by reference to the **law** of the **convicting jurisdiction.**" Caron v. United States, 524 U.S. at 313 (emphasis added).

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[6] Caron v. United States, 524 U.S. at 313 (emphasis added).

The district court simply failed to follow this mandatory choice-of-law rule. Instead of looking to the law of the convicting jurisdiction — here the Wyoming expungement statute — to determine if a person's MCDV conviction had been expunged, it accepted the "law" of a nonconvicting jurisdiction — here BATF's definition of expungement:

> The BATF's position is that in order to receive the benefits of GCA's safe harbor provision, there must be an expungement in the traditional sense; that is, an expungement of the conviction and all incidents related to the conviction.
>
> The federal defendants argue a point of common sense — the definition used by the Wyoming legislature is not remotely close to the common understandings of "expungement" in the criminal law context. Black's Law Dictionary defines "expunge" as "to destroy; blot out; obliterate; erase; efface designedly; strike out wholly.... The practical effect of the Wyoming statute is to leave the conviction in place for every purpose under the law while allowing the person convicted of misdemeanor domestic violence to possess firearms. The Court agrees with the BATF that the procedure in WYO. STAT. ANN. § 7-13-1501 is not an expungement. [*See* Slip Op., pp. 26-27; App., pp. 196-97.]

In so ruling, the district court adhered to the very "**aspect**" of the Dickerson case that the Supreme Court in Caron said had been "**modified**" by Congress. Caron, 524 U.S. at 313 (emphasis added). Remarkably, the Iowa expungement law in Dickerson was rejected by the Supreme Court for the same reason that the district court below rejected the Wyoming MCDV expungement statute, namely,

because "the record of a conviction under Iowa law is not expunged completely." *Id.*, 460 U.S. at 122. Indeed, the Iowa law in Dickerson, like the Wyoming statute here[7], provided that "[a]t the time of expunction, a separate record is maintained, not destroyed [and] all 'criminal history data' may be released to 'criminal justice agencies.'" *Id.* Just as the Dickerson Court had found the Iowa law insufficient to meet a uniform federal standard of complete erasure of the conviction, the district court below found the Wyoming statute suffering from the same defect, "insufficient for federal purposes." *See* Slip Op., p. 30; App., p. 200.

The district court's reasoning in this case was precisely the same as that employed by the Dickerson Court, namely, that to allow state statutes to define when a state conviction is expunged for federal firearms purposes would introduce an undesirable "national patchwork" of "expunction provisions ... [s]ome absolute [and] others ... limited." *See id.*, 460 U.S. at 121, 122. However, three years after Dickerson was decided, Congress established that very same federalist "national patchwork" as the law of the land, thereby "render[ing] the *Dickerson* decision inapposite." *See* "Federal Firearms Owners Protection Act," S. Rep. 98-583, 98th Cong. 2d Sess., p. 7, n.16 (italics original); *see also* D. Hardy, "The Firearms

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[7] *See* Wyo. Stat. Ann. §§ 7-13-1501(g), (k), and (m)(I) and 7-13-1401(j)(I).

Owners' Protection Act: A Historical and Legal Perspective," 17 *Cumberland L. Rev.* 585, n.8, 640-41 (1986).

D. The District Court Ruling Contravenes Congressional Choice of Law Policy in 18 U.S.C. § 921(a)(20).

As the Senate Judiciary Committee report on the Firearms Owners Protection Act ("FOPA") explained, the amended federal policy governing the definition of "conviction" in 18 U.S.C. § 921(a)(20) "requires that a conviction must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held." S. Rep. 98-583, at p. 7. In justification, the Senate committee stated that the new choice-of-law provision was "intended to accommodate state reforms"[8]:

> Since the Federal prohibition is keyed to the state's conviction, **state law should govern in these matters**. [*Id*. (emphasis added). *See also* House Report 99-495, reprinted in 4 U.S.C.C.A.N., p. 1355 (99th Cong., 2d Sess. 1986) (hereinafter "House Rep. 99-495").]

Despite these official statements of Congressional policy, BATF convinced the district court to impose BATF's policy preference on Wyoming, even though Congress had expressly rejected that very position at the time that it enacted FOPA. In an "assessment" memorandum, which BATF officials only

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[8] *Id*.

"reluctan[tly] turned over to the [House Judiciary] subcommittee"[9] conducting hearings on FOPA, BATF expressed its firm support of the Dickerson rule:

> State pardons and State court proceedings which set aside a plea or verdict of guilty upon a successful completion of probation do **not** eliminate the underlying conviction insofar as Federal law is concerned and such a person must still apply for and receive relief from Federal firearms disabilities." [House Rep. 99-495 at 1346 (emphasis added).]

In the same report, BATF registered its strong opposition to the provision in FOPA "that what constitutes a felony conviction would be determined by the law of the jurisdiction where the conviction occurred"[10]:

> This would require the Bureau to examine the **peculiar laws of each State** to determine whether a person is convicted for Federal purposes. Further, any conviction which has been **expunged** or pardoned would not be considered a disabling offense under GCA. [*Id.* at 1346 (emphasis added).]

But BATF failed to persuade Congress to continue the uniform federal policy of the GCA, as the Supreme Court had construed it in Dickerson. As the Supreme Court stated in Caron v. United States, Congress "modified" the old rule, substituting "the law of the convicting jurisdiction" to define "convictions, pardons, expungement and restorations of civil rights" for what theretofore had

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[9] House Rep. 99-495 at 1342.

[10] *Id.* at 1346.

been determined by federal law. *Id.*, 524 U.S. at 312-13. *See also* Beecham v. United States, 511 U.S. 368, 371 (1994) (federal, not state, law determines the restoration of civil rights of a person convicted of a federal crime because federal, not state, law was the law of the convicting jurisdiction).

While the Supreme Court has acceded to this Congressional change of policy, BATF and the district court have not. In defiance of FOPA, BATF promulgated its own regulation on the effect of pardons and expunctions of state convictions:

> [A]ny expunction, reversal, setting aside of a conviction, or other proceeding rendering a conviction nugatory, or a restoration of civil rights shall remove any disability which otherwise would be imposed by the provisions of this part.... [27 CFR 478.142(b).]

According to BATF's interpretation of this regulation, the Wyoming expungement statute, having failed to erase completely any record of a MCDV conviction, "does not render [that] conviction nugatory." *See* Slip Op., p. 28; App., p. 198. The district court, in turn, relied upon this interpretation, permitting BATF to pull itself up by its own regulatory bootstraps, in direct contravention of Congress's change from a policy of federal uniformity to state diversity. *See* Slip Op., pp. 28-29; App., pp. 198-99.

E. The District Court Ruling Contravenes Congressional Choice of Law Policy in 18 U.S.C. § 921(a)(33).

In 1986, when Congress changed the choice of law policy in 18 U.S.C. § 921(a)(20) with respect to felony convictions, there was no federal law divesting a person convicted of a MCDV of his firearms rights. That changed in 1996, with the adoption of 18 U.S.C. §§ 921(a)(33) and 922(g)(9), popularly known as the Lautenberg Amendment. *See* 110 Stat. 3009, 3009-371; Pub. Law 104-208, § 658, p. 371 (Sept. 30, 1996).

While BATF is mistaken about Congress's choice-of-law policy in both 18 U.S.C. § 921(a)(20) and § 921(a)(33), it has, as noted above, correctly conceded that "the [choice of law] analysis used in section 921(a)(20) applies in the MCDV context contained in section 921(a)(33)." *See* Complaint, Exhibit 5, p. 2, ¶ 1, App., p. 40. Indeed, while the agency's regulations are also mistaken in 27 CFR 478.142(b) about the choice-of-law policy with respect to both felonies and MCDV's, BATF rightfully recognizes that the meaning of convictions, expunctions, reversals, set asides and restorations of civil rights is the same, whether the predicate conviction is a felony as defined by § 921(a)(20), or a MCDV as defined by § 921(a)(33). *See* BATF Resp., p. 14, n.4; App., p. 137 ("[I]t has been ATF's longstanding position that the sections should be read

coextensively."). Throughout its opinion, the district court has likewise correctly assumed that the rule governing expungement of a conviction is the same, whether the conviction is for a felony, as defined in 18 U.S.C. § 921(a)(20), or for a MCDV, as defined in 18 U.S.C. § 921(a)(33). *See, e.g.,* Slip Op., pp. 18-20; App., pp. 188-190.

To be sure, the language delimiting the meaning of conviction in subsection (B)(ii) of the MCDV provision is not identical to that in the felony provision. Nonetheless, the choice-of-law policy is the same. As previously noted, the Supreme Court pointed out, in Caron v. United States, that "[t]he first sentence and the first clause of the second sentence of [18 U.S.C. § 921(a)(20)] define convictions, pardons, expungement, and restorations of civil rights by reference to the law of the convicting jurisdiction." *Id.*, 524 U.S. at 313. The first sentence contains a "choice-of-law clause," and the first clause of the second sentence contains an "exemption clause." *See* Beecham v. United States, 511 U.S. at 369.

While section 921(a)(33)(B)(ii) does not contain an explicit "choice-of-law clause," it does contain an "exemption clause," namely, the parenthetical phrase referring to "the law of the applicable jurisdiction" to determine whether a person who has been convicted of a MCDV "shall not be considered to have been convicted of such an offense" because he has been restored to his civil rights. If

the person has been convicted of such a "misdemeanor under Federal ... law"— as provided in section 921(a)(33)(A)(I) — then the "applicable" law would be federal; if "under ... State law" — as also provided for in section 921(a)(33)(A)(I) — then the applicable jurisdiction would be the law of the State jurisdiction in which the criminal proceedings were held. Thus, the "plain meaning" of the parenthetical phrase, as it appears in light of the "whole statute," indicates that whether a convicted MCDV misdemeanant has been restored to his civil rights is determined by the law of the convicting jurisdiction, not by a general federal rule or policy. *Cf.* Beecham, 511 U.S. at 372.

Although there is no comparable parenthetical phrase applying to an "expungement," "set aside" or "pardon" in section 921(a)(33), there is no good reason to read a different choice-of-law policy with respect to those state actions, as contrasted with a state action restoring a person convicted of an MCDV to his civil rights. To the contrary, subsection B(ii) of section 921(a)(33) treats all four actions comparably, stating that "[a] person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had his civil rights restored...." Further, the phrase "such an offense" in relation to a law providing for an expungement or set aside implicitly refers back

to the two kinds of MCDV's set forth in 18 U.S.C. § 921(a)(A)(I), one "under Federal ... law" and the other "under ... State law."

Finally, there is nothing in the legislative history of the MCDV prohibition indicating that Congress intended to provide a different choice-of-law policy governing MCDV's in contrast to felonies. The Lautenberg Amendment was inserted into the GCA, having been "passed ... as a part of a major federal spending bill." *See* A. Nathan, "At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment," 85 *Cornell L. Rev.* 822, 826, n.32 (2000). As Senator Lautenberg, the principal sponsor of the MCDV legislation, stated on the floor of the Senate:

> Mr. President, another new provision in the final agreement clarifies that a conviction will not lead to a firearm disability if the conviction has been expunged.... This language mirrors similar language in current law that applied to those convicted of felonies. [142 Cong. Rec. S11877-78 (statement of Sen. Lautenberg), as quoted in United States v. Wegrzyn, 305 F.3d 593, 596 (6th Cir. 2002).]

F. BATF's Ruling Against Wyoming's Partial Expungement Policy Does Not Deserve Deference.

Purporting to exercise its independent judgment assessing whether BATF's expungement policy was mandated by statute, the district court, in fact, deferred to BATF's argument that "State law may determine whether a person's rights have been restored or their conviction expunged, under state law, but federal law

determines whether that procedure is sufficient for federal purposes." *See* Slip Op., pp. 24-25; App., pp. 194-95. While the district court disclaimed that its ruling was not "because of deference," but "through reason that the Court here agrees with the BATF's conclusions regarding the interplay between state and federal law under the GCA," it nonetheless grounded its ruling in the "find[ing] that the BATF had the authority to conclude that § 7-13-1501 does not remove a firearm disability under § 921((a)(33)(B)(ii)." *See* Slip Op., pp. 33-34; App., pp. 203-04. As pointed out above, that finding was clearly incorrect.

In both 18 U.S.C. § 921(a)(20) and 18 U.S.C. § 921(a)(33), Congress explicitly decided that the law of the convicting jurisdiction, not federal law, determined whether a person had been convicted of a felony or a MCDV, including whether such conviction had been expunged or set aside, or vitiated by pardon or a restoration of civil rights. And, as the Supreme Court ruled in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., where Congress:

> has directly spoken to the precise question at issue [and] the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. [*Id.*, 467 U.S. 837, 842-43 (1984).]

Only in those cases where Congress has left a "gap for the agency to fill" is it appropriate to defer the an agency's decision "based on a permissible construction of the statute." *Id.*, 467 U.S. at 843.

Clearly, 18 U.S.C. §§ 921(a)(20) and (33) do not leave such a gap. Rather, as the Supreme Court stated in Beecham v. United States, Congress decided that the "plain, unambiguous meaning"[11] of 18 U.S.C. § 921(a)(20) determined that whether a person stood convicted of a felony and, as such, was disentitled by federal law to possess a firearm, depended upon the law of the convicting jurisdiction, including that jurisdiction's laws governing expungements, set asides, pardons and restorations of civil rights. *See* Beecham, 511 U.S. at 370-74. And, as BATF itself has conceded, the language of 18 U.S.C. § 921(a)(33), although not identical to 18 U.S.C. § 921(a)(20), is "coextensive" with it,[12] providing plainly and unambiguously the same choice-of-law rule for persons convicted of MCDV's as for those convicted of felonies.

Unquestionably then, BATF's action rejecting Wyoming's policy of a partial expungement does not accord with 18 U.S.C. § 921(a)(33) and should be

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[11] *Id.*, 511 U.S. at 374.

[12] BATF Resp., p. 14, n.4; App., p. 137.

set aside as arbitrary and capricious and in excess of its statutory jurisdiction and authority, as required by 5 U.S.C. § 706(2)(A) and (C).

III. WYOMING'S CONCEALED CARRY PERMIT CRIMINAL BACKGROUND CHECK UNMISTAKABLY QUALIFIES AS AN EXEMPTION FROM THE NICS UNDER 18 U.S.C. § 921(t)(3).

The district court's decision upholding the BATF ruling — that Wyoming's criminal background check conducted pursuant to its CCW permit system fails to qualify as an exemption from the NICS check, as provided for in 18 U.S.C. § 921(t)(3) — rests wholly upon its previous determination that it was neither arbitrary nor capricious, nor in excess of its statutory authority, for BATF to have rejected § 7-13-1501, the Wyoming MCDV expungement statute, as having fallen short of the purported federal requirement of complete destruction of the record of conviction. *See* Slip Op., pp. 34, 36; App., pp. 204, 206.

As demonstrated in Part II above, however, the district court erred in upholding the BATF ruling that the Wyoming partial expungement policy transgressed what turns out to be a nonexistent Congressional policy requiring complete physical erasure of a MCDV conviction in order for a person so convicted to meet the eligibility requirement of 18 U.S.C. § 922(g)(9). For this reason alone, the district court erred when it concluded that BATF did not exceed its statutory authority by refusing to recognize the Wyoming CCW criminal

background check as an exemption from the NICS, as provided in 18 U.S.C. § 921(a)(t)(3).

Further, as pointed out above, under the state's CCW alternative criminal background check, no person convicted of a MCDV would be able to obtain a CCW permit, unless the MCDV had been expunged pursuant to Wyo. Stat. Ann. § 7-13-1501. Thus, Wyoming's CCW criminal background check would not permit any ineligible person to possess a gun under 18 U.S.C. § 922(g)(9). And it would be arbitrary and capricious — and not in accord with the federal law dictating a convicting jurisdiction choice-of-law policy — for BATF to rule otherwise.

Likewise, it would be arbitrary, capricious, and not in accord with federal law for BATF to rule against the Wyoming CCW criminal background check on the ground that the check, as limited by the Wyoming partial expungement policy, "essentially creates an expungement provision expressly designed to remove the Federal MCDV prohibition without expunging the conviction for other purposes," as BATF has also contended. *See* Complaint, Exhibit 3, pp. 1-2; App., pp. 31-32. In support of this contention, BATF accused the Wyoming MCDV expungement law of "'exploit[ing] a loophole,'" erasing a MCDV conviction solely for the

purpose of "restor[ing] Federal firearms rights lost pursuant to 18 U.S.C. § 922(g)(9)." *See* Complaint, Exhibit 5, p. 3; App., p. 41.

As Appellant has pointed out in its Opening Brief, however, there is nothing incorrect or inappropriate about such a purpose. Applnt. Open. Br., p. 17, n.9. Indeed, 18 U.S.C. § 921(a)(33) contemplates that a person who has been convicted of a MCDV may have his federal firearms rights restored by way of expungement, set aside, pardon or restoration of civil rights under "widely divergent laws." United States v. Smith, 171 F.3d 617, 625 (8th Cir. 1999). Yet, "cognizant of the disparity that it would create," Congress continued with the enactment of 18 U.S.C. § 921(a)(33) "to look to state law" to define the meaning of a MCDV conviction. *Id.*

In its Response Brief in the district court, BATF worried that the implementation of such a diversity policy "would be contrary to the very purpose of the federal MCDV law ... allow[ing] the states to avoid federal firearms laws merely by applying a label to their laws...." *See* BATF Resp., p. 20; App., p. 143. This criticism, however, is based upon a **total mischaracterization** of the Wyoming MCDV expungement statute.

As Appellant has persuasively argued in its Opening Brief, Wyo. Stat. Ann. § 7-13-1501 in no way automatically grants a MCDV expungement; rather it

contains significant limits and conditions, all of which are designed to ensure that a person once-convicted of a MCDV may be restored to his firearms rights only if a court is satisfied that such restoration does not create a "substantial" danger to the person, to an identifiable victim or to society. *See* Applnt. Open. Br., pp. 3-4, 15-16. Moreover, as Appellant also has pointed out, Wyoming's partial expungement approach is actually better designed to keep firearms out of the hands of dangerous persons than BATF's blanket expungement policy. *Id.*, at pp. 20-21.

In fact, Wyoming's partial expungement policy — in contrast with the BATF's complete erasure policy — operates as a deterrent, because the expunged MCDV conviction would still be available to justify an enhanced penalty if the person should engage in future criminal activity. *See* Wyo. Stat. Ann. § 7-13-1501(k). Furthermore, the Wyoming partial expungement statute requires particularized findings that restoration of firearms rights to a person previously convicted of a MCDV does not pose a danger to the public, whereas BATF's complete expungement policy would not require any such finding.

In short, the Wyoming statute is in harmony with the overall purpose of federal firearms policy of keeping firearms out of the hands of persons who, because of a past conviction, pose a danger to others. *See* House Report No. 103-

344, 103d Cong., 1st Sess. (1993) and A. Nathan, "At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment," 85 *Cornell L. Rev.* 822, 833-38 (2000). Moreover, the conditions attached to, and procedures provided for, expungement under the Wyoming statute are consistent with the federal policy embodied in 18 U.S.C. § 925(c), which provides for federal relief from a firearms disability upon a showing that removal of that disability would not be "dangerous to public safety [or] contrary to the public interest." Finally, it is noteworthy that 18 U.S.C. § 927 provides that federal firearms law should be interpreted so as not to exclude the law of any State "on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." There is no such conflict here.

In sum, BATF's negative response to the Wyoming statute neither accords with the ultimate purposes of 18 U.S.C. §§ 921(a)(33) and 922(g)(9) and 18 U.S.C. § 922(t)(3), nor harmonizes with 18 U.S.C. §§ 925(c) and 927. BATF's ruling disallowing the Wyoming CCW criminal background check as an exemption from the NICS, as provided in 18 U.S.C. § 921(t)(3) is, thus, arbitrary, capricious, and in excess of its statutory authority, and should be set aside as provided for in 5 U.S.C. § 706(2)(A) and (C).

CONCLUSION

For the reasons stated, as well as for the reasons advanced by Appellant, the district court's judgment upholding the BATF ruling that Wyoming's CCW criminal background check does not meet the requirements of 18 U.S.C. § 922(t)(3)(ii) should be reversed and remanded with instructions to enter judgment for Appellant and to grant the injunctive and declaratory relief requested.

Respectfully submitted,

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August 21, 2007

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief Amicus Curiae of Gun Owners Foundation in Support of Appellant and Reversal complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,949 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

3. This brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point Times New Roman.

CERTIFICATE REGARDING DIGITAL VERSION OF BRIEF

IT IS HEREBY CERTIFIED that (1) all required privacy redactions have been made and the foregoing Brief submitted in Digital Form is an exact copy of the written document filed with the Clerk, and (2) the Digital Form has been scanned for viruses with Symantec Antivirus Corporate Edition, version 8.1.0.825 with the most recent virus definitions (version 8/20/2007 rev. 48).

_____

John S. Miles

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief *Amicus Curiae* of Gun Owners Foundation in Support of Appellant and Reversal was sent via First Class Mail, postage prepaid, on this the 21st day of August, 2007, to counsel of record for all parties, addressed as follows:

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