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United States Court of Appeals  
*for the*  
Tenth Circuit

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No. 07-8046

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STATE OF WYOMING, *ex rel.* Patrick J. Crank, Wyoming Attorney General,  
*Plaintiff-Appellant,*

v.

UNITED STATES; Bureau of Alcohol, Tobacco, Firearms & Explosives; Carl  
J. Truscott, in his official capacity as Director of Bureau of Alcohol, Tobacco,  
Firearms & Explosives, and David H. Chipman, in his official capacity as the  
Chief, Firearms Division, Bureau of Alcohol, Tobacco, Firearms & Explosive,  
*Defendants-Appellees.*

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*On Appeal from the United States District Court for the District of Wyoming in  
Case No. 06-CV-0111-J (Hon. Alan B. Johnson, District Judge)*

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**BRIEF OF *AMICI CURIAE* THE BRADY CENTER TO PREVENT GUN  
VIOLENCE AND THE NATIONAL CENTER FOR VICTIMS OF  
CRIME IN SUPPORT OF APPELLEES**

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October 9, 2007

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**DISCLOSURE STATEMENT OF *AMICI CURIAE*  
THE BRADY CENTER TO PREVENT GUN VIOLENCE AND  
THE NATIONAL CENTER FOR VICTIMS OF CRIME  
PURSUANT TO FRAP 26.1 AND CIRCUIT RULE 26.1**

*Amicus Curiae* Brady Center to Prevent Gun Violence is a non-profit corporation. No publicly held company owns any of its stock.

*Amicus Curiae* The National Center for Victims of Crime is not a corporation. Accordingly, no publicly held company owns any of its stock.

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## **STATEMENT OF INTEREST**

This brief is filed on behalf of *Amici Curiae* The Brady Center to Prevent Gun Violence (the “Brady Center”) and The National Center for Victims of Crime (the “National Center”).<sup>1</sup> Each organization is actively involved in addressing the problem of domestic violence involving firearms.

The Brady Center, together with its sister organization the Brady Campaign to Prevent Gun Violence, is a leading organization in the fight to prevent gun violence. Both are dedicated to creating an America free from gun violence, where all are safe at home, at school, at work and in their communities. The Brady Center works to reform the gun industry and educate the public about gun violence through litigation and grassroots mobilization, and to enact and enforce sensible laws—such as the Brady Act and the Lautenberg Amendment at issue here—that will reduce gun violence.

The National Center, founded in 1985, is the Nation’s leading resource and advocacy organization for victims of crime. The National Center’s mission is to forge a national commitment to help victims of crime rebuild their lives. As part of that mission, the National Center works to advance laws and policies that secure rights and protections for victims at the federal and state levels. Among the

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<sup>1</sup> All parties have consented to the filing of this brief.

National Center's many programs is the National Stalking Resource Center, which provides training and technical assistance for enhancing community responses to stalking, including assistance understanding the intersection between stalking and domestic violence and the continuing threat posed by intimate partner stalkers. The National Center is particularly interested in the issues raised by this case because of its commitment to victims of domestic violence and all other victims whose safety would be jeopardized if their offenders are no longer barred from possessing or purchasing a firearm.

### **INTRODUCTION AND STATEMENT OF FACTS**

*Amici Curiae* agree with the Statement of the Case and Statement of Facts set forth in Appellees' Brief at 2-7. *Amici* offer the following additional information regarding the important federal statutes and policies at issue here.

Congress enacted the Lautenberg Amendment to the Gun Control Act of 1968, 18 U.S.C. §§ 921 *et seq.* (2000 & Supp. IV 2004) ("GCA"), to protect victims of domestic violence by prohibiting individuals convicted of misdemeanor crimes of domestic violence ("MDCV") from possessing firearms. As the court below correctly noted, this case involves a dispute between the State of Wyoming and the United States regarding the interpretation of *federal* laws regulating firearms, particularly the Lautenberg Amendment. The interpretation Wyoming seeks could threaten the effective enforcement of the Nation's gun control laws.

The specific issue before this Court is whether the Bureau of Alcohol, Tobacco, Firearms & Explosives (“ATF”) acted arbitrarily or capriciously in determining that—because Wyoming had passed a new statute permitting a limited expungement of MCDV convictions *solely* for the purpose of avoiding the federal law—permits issued by the State for carrying concealed firearms would no longer exempt an individual from federal background checks under the National Instant Criminal Background Check System (“NICS”). As the district court found, ATF properly exercised its duties in construing and applying federal law, and therefore did not act arbitrarily or capriciously. This Court should accordingly affirm the ruling below.

**A. Purpose and History of the Lautenberg Amendment**

The federal law most directly at issue here is the Lautenberg Amendment, which seeks to prevent crimes by removing guns from the hands of domestic violence perpetrators. Prior to enactment of the Lautenberg Amendment, federal law only barred felons from possessing firearms; however, Congress ultimately recognized that plea bargains “often result in misdemeanor convictions for what are really felony crimes [of domestic violence].” 142 Cong. Rec. 22988 (1996) (statement of Sen. Feinstein).

Domestic batterers pose a continuing danger to their families and society, and frequently use guns to kill their partners and children. According to the

Department of Justice, more than two-thirds of spouse and ex-spouse homicide victims were killed by guns. U.S. Dep't of Justice, *Homicide Trends in the United States, Intimate Homicide* at 58 (2007). Thirty-three percent of women who are murdered with firearms are killed by an intimate partner. FBI: Uniform Crime Reports, *Crime in the United States in 2000*, at 18 (2001).

Access to firearms is one of the strongest predictors of homicide in abusive relationships. Jacquelyn C. Campbell *et al.*, *Risk Factors for Feticide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 Am. J. Pub. Health, No. 7, at 1089, 1092 (July 2003). Women living with a gun in the home are nearly three times more likely to be murdered than women with no gun in the home.

Douglas J. Weibe, *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*, 41 Annals of Emergency Med. 771, 775 (June 2003). Indeed, a gun in the home of a previous domestic violence offender increases the risk of murder to the survivor twentyfold. Arthur L. Kellerman *et al.*, *Gun Ownership as Risk Factor for Homicide in the Home*, 329 N.E. J. Med., Issue No. 15, at 1084, 1087 (1993).

Recidivism rates for domestic violence are high. P.A. Langan and C.A. Innes, *Preventing Domestic Violence Against Women*, Bureau of Justice Statistics Special Report NCJ-102937 (1986). One study shows that 47% of admitted

batterers report three or more assaults per year. U.S. Dep't of Justice, Uniform Crime Reports, *Crime in the United States*, 601, 603 (1994).

Faced with such compelling evidence that gun possession by perpetrators of domestic violence perpetrators so often yields fatal results, Congress took action by adopting the Lautenberg Amendment in 1996. Senator Lautenberg explained the urgent need to remove guns from the hands of batterers, noting that there are approximately two million cases of domestic abuse are reported in the United States each year, and that approximately 150,000 of those cases involve a firearm. 142 Cong. Rec. 25002 (1996) (statement of Sen. Lautenberg). “Every year thousands of women and children die at the hands of a family member, and sixty-five percent of the time those murderers use that gun.” 142 Cong. Rec. 21438 (1996) (statement of Sen. Lautenberg). “[F]or many battered women and abused children, whether their abuser gets access to a gun will be nothing short of a matter of life or death.” 142 Cong. Rec. 26675 (1996) (statement of Sen. Lautenberg). As Representative Woolsey put it, “[i]t is simple: Wife-beaters, child abusers, and other domestic violence offenders should not have access to a gun. Period.” 142 Cong. Rec. 18544 (1996) (statement of Rep. Woolsey).

**B. The Relevant Federal Firearms Statutes**

To accomplish those goals, Congress passed the Lautenberg Amendment, which provides in pertinent part:

It shall be unlawful for any person—

\* \* \*

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(9). In 18 U.S.C. § 921(a)(33)—which defines what is a “misdemeanor crime of domestic violence” and thus the crimes to which the Lautenberg Amendment applies—Congress set out several narrow exceptions:

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 civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)* unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(33)(B)(ii) (emphasis added).<sup>2</sup>

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<sup>2</sup> Section 921(a)(20) contains nearly identical language as part of the definition of “crime punishable by imprisonment for a term exceeding one year.”

The Brady Act, a 1993 amendment to the GCA, requires that firearms dealers conduct a NICS search before transferring a firearm to an unlicensed person in order to ensure that person is not prohibited from owning firearms. 18 U.S.C. § 922(t)(1). That provision of the Brady Act does not apply if the person presents a permit from a State where, among other things, the law of the State provides that such a permit is to be authorized only after an authorized 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 ....” *Id.* § 922(t)(3).

**C. The Wyoming MCDV “Expungement” Statute**

In 2004, Wyoming enacted Wyo. Stat. Ann. § 7-13-1501 (2007) (the “Wyoming Statute”) in order to circumvent the Lautenberg Amendment by providing a limited “expungement” of misdemeanor convictions for the “purposes of restoring any firearm rights lost ....” *Id.* § 7-13-1501(a). That state legislation provides in pertinent part:

(a) A person who has pleaded guilty or nolo contendere to or been convicted of a misdemeanor ... may petition the convicting court for an expungement of the records of conviction for the purposes of restoring any firearm rights lost, subject to the following limitations:

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18 U.S.C. § 921(a)(20). As such, decisions interpreting that provision are also instructive with respect to § 921(a)(33).

\* \* \*

(g) If the court finds that the petitioner is eligible for relief under this section and that the petitioner does not represent a substantial danger to himself, any identifiable victim or society, it shall issue an order granting expungement of the applicable records. The court shall also place the court files under seal, available for inspection only by order of that court. The court shall transmit a certified copy of the order to the division of criminal investigation.

\* \* \*

(k) An expungement granted pursuant to this section shall only be used for the purposes of restoring firearm rights that have been lost to persons convicted of misdemeanors. Nothing in this section shall be construed to affect the enhancement of penalties for second or subsequent convictions of misdemeanors under the laws of this state.

*Id.* § 7-13-1501. Wyoming law does not appear to bar perpetrators of domestic violence misdemeanors from possessing firearms. Thus, the federal Lautenberg Amendment is the only basis upon which a batterer convicted of a misdemeanor could lose the ability to possess a firearm.

Prior to enactment of the Wyoming Statute, a Wyoming permit to carry a concealed weapon constituted an exception to the otherwise required background check under the Brady Act. Under Wyoming's interpretation of the Wyoming Statute, an individual who is convicted of a MCDV but has obtained a limited expungement under the Wyoming Statute may apply for and obtain a license to

carry a concealed firearm without being subjected to an NICS background check.

*See also* Appellant's Br. at 4.

**D. ATF's Determinations Regarding the Wyoming Statute**

The ATF is responsible for the administration and application of federal firearms laws. In 2004, it began a review of all state laws that used the permitting exception to the requirement for NICS background checks. Upon learning of and analyzing the newly enacted Wyoming Statute, the ATF wrote to the State and indicated that the State's concealed-carry permit would no longer meet the exception to § 922(t) because the Wyoming Statute would allow persons barred from possessing firearms under federal law to obtain a permit.

Wyoming responded by contending that its statute satisfied the exceptions set forth in 18 U.S.C. § 921. However, the ATF concluded that the process set forth in the Wyoming Statute was insufficient to satisfy the requirements of federal law. Despite extensive discussions between the ATF and Wyoming officials, ATF consistently held to its determination that the Wyoming Statute rendered the Wyoming permitting process ineligible to qualify for the exception to the Brady Act background check requirements.

**E. Proceedings and Judgment Below**

Rather than pursue modification of the Wyoming Statute or other avenues of recourse, Wyoming elected to file suit in the district court seeking declarations that

the Wyoming Statute was valid and that the ATF's determination should be set aside as arbitrary and capricious. The district court concluded that the ATF had not acted arbitrarily and capriciously, and indeed that the ATF was correct in concluding that federal law controlled whether a state law definition or process met a federal standard for the § 921(a)(33) exceptions. *Wyoming v. United States*, Case No. 06-CV-0111, Slip Op. at 30 (D. Wyo. May 8, 2007) ("District Court Opinion"). The district court also rejected Wyoming's additional arguments, which the State has not pursued on appeal.

### **SUMMARY OF ARGUMENT**

Wyoming and *amicus curiae* the Gun Owners Foundation argue that the district court should be reversed because the ATF acted arbitrarily and capriciously in determining that Wyoming's permit process would allow prohibited persons to obtain and possess firearms without an NICS check. They contend that the ATF's determinations should consequently be set aside under 5 U.S.C. § 706 (2000).

In light of the federal policy to keep batterers from possessing firearms and the extensive authority establishing that exceptions to § 922(g) must comply with a *federal* standard, however, the ATF did not act arbitrarily or capriciously.

Congress passed the Lautenberg Amendment precisely to ensure that dangerous perpetrators of domestic violence were not permitted to possess firearms. The

United States has a strong interest in the uniform application of this policy, and Wyoming's suggested interpretation of the various statutes involved would violate that policy because it would enable perpetrators of domestic violence to possess firearms.

Moreover, federal law must control whether a particular state law qualifies as an exception to the Lautenberg Amendment. Because the policy behind the federal statutes and the case law interpreting those statutes call for application of a federal standard, the ATF properly considered the Wyoming Statute, the GCA and the Brady Act in the context of applicable federal law and policy. Indeed, as the court below found, the ATF reached the correct conclusion. The Wyoming Statute is not a qualifying expungement, set aside, or restoration of rights. The district court should be affirmed.

### **ARGUMENT**

Congress has determined that perpetrators of domestic violence pose a continuing danger to their families and communities. Wyoming has been quite candid that the sole purpose of the Wyoming Statute is to remove federal firearms restrictions for such individuals. Wyoming, however, is not entitled to circumvent federal law. The ATF properly applied federal law in evaluating the effect of the Wyoming Statute and determining that it did not satisfy 18 U.S.C. § 921(a)(33)(B). Accordingly, the ATF did not act arbitrarily or capriciously in determining that

Wyoming firearms vendors would no longer be eligible to issue permits without conducting NICS background checks.

**I. THE FEDERAL STATUTE AND UNDERLYING FEDERAL POLICIES REQUIRE UNIFORM *FEDERAL* DETERMINATION WHETHER STATE ACTIONS QUALIFY FOR EXCEPTION**

**A. The Purpose and Scope of the Lautenberg Amendment**

The Supreme Court summarized Congress' intent in enacting the federal gun control laws as follows: "The principal purpose of the federal gun control legislation ... 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 v. United States*, 415 U.S. 814, 824 (1974). While federal firearms laws originally applied only to felons, the Lautenberg Amendment expanded their prohibitions to include MCDV perpetrators.

The Lautenberg Amendment reflects a sound policy choice that persons convicted of domestic violence offenses are a danger to society. Congress intended that it be construed broadly because "[t]here is no margin of error when it comes to domestic abuse and guns." 142 Cong. Rec. 22986 (1996) (statement of Sen. Lautenberg). As courts have recognized, "Congress considered the mere risk or potential for violence or irresponsible use sufficient reason to prohibit certain categories of persons from possessing firearms." *United States v. Chamberlain*, 159 F.3d 656, 660 (1st Cir. 1998) (*citing* H.R. 17735, 90th Cong., 2d Sess. (1968),

114 Cong. Rec. 21780, 21791, 21832, and 22270 (1968)). Thus, Congress intended for the Lautenberg Amendment to establish a “zero tolerance” policy for guns and domestic violence. 142 Cong. Rec. 19300, 19394 (1996) (statement of Sen. Lautenberg).

The federal gun control statutes require certain limited reference to state law. For example, § 921(a) provides that state law will determine what constitutes a conviction. Federal law thus makes a conviction for a domestic violence offense under state law a trigger for prohibiting firearms possession.

After such a conviction, § 921 recognizes only a *complete* expungement, set aside, or restoration of rights as a judgment by the state that the violator no longer poses a risk. As ATF’s implementing regulations explain, § 921(a)(33)(B)—which contains the exceptions at issue here—was intended to apply to actions that render a conviction “nugatory.” 27 C.F.R. § 478.142(b) (2006) (“Effect of pardons and expunctions of conviction.”).

As the Ninth Circuit has aptly stated, the appropriate test for determining whether a state action satisfies the standard for an exception is whether the state has “chosen not to vouch for its former felons or to treat them as full members of society, so as to remove their convictions from consideration under federal law.” *United States v. Meeks*, 987 F.2d 575, 578 (9th Cir. 1993). A *partial* expungement does not represent a determination that a person no longer poses a risk; the state

plainly is not vouching for a misdemeanor whose conviction has only partially been expunged. As such, the Lautenberg Amendment's prohibition against such individuals possessing firearms continues to apply.

Congress intended to broadly prohibit convicted domestic abusers from possessing guns. While it provided an exception where the threat posed by the misdemeanor has been demonstrably mitigated, its test for such mitigation is whether a state is willing to eliminate *completely* the effects of the prior conviction.

**B. The Strong Federal Interest in a Single National Policy**

Because Congress meant to keep guns away from all MCDV perpetrators who might cause harm, the United States has a compelling interest in a uniform federal interpretation of its firearm laws, including the GCA, Brady Act, and Lautenberg Amendment. *See Caron v. United States*, 524 U.S. 308, 316 (1998) (“As to the possession of weapons ... the Federal Government has an interest in a single, national, protective policy broader than required by state law.”); *see also, United States v. Dorsch*, 363 F.3d 784, 787 (8th Cir. 2004) (“One of the purposes of enacting the federal firearms ban was to establish national uniformity in determinations of whether a person is within a category of persons prohibited from possessing firearms. Once we determine that a defendant has been committed to a mental institution, state legislative intent is irrelevant ...”) (citations omitted).

The rule Wyoming seeks to have this Court adopt—that federal law cannot look to the substance of state law but instead is controlled by the label the state puts on it—would threaten enforcement of the GCA generally. The GCA contains numerous undefined provisions as to which the courts and ATF look to state law for guidance. In those instances, however, federal law still determines the effect of the procedure.

A prime example is the GCA’s prohibition of firearm possession by persons who have been committed to a mental institution. Section 922 makes it unlawful for any person “who has been adjudicated as a mental defective or who has been committed to a mental institution ... to ... possess in or affecting commerce, any firearm or ammunition ...” 18 U.S.C. § 922(g)(4). Like the § 921 exceptions, Congress did not define “commitment” or “mental institution.” And, as with the § 921 exceptions, federal courts have interpreted these terms under federal law, but have looked to the state law for the meaning of commitment. *United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995). This distinction is critical because the states use a wide variety of terms for compulsory psychiatric care, including admission, hospitalization, evaluation, observation, detention and commitment. *See, e.g., Chamberlain*, 159 F.3d at 661-663 (discussing whether Maine’s “involuntary admission” procedure qualifies as “commitment” under federal law); *see also* Barbara A. Weiner & Robert M. Wettstein, *Legal Issues in Mental Health*

*Care* 44-47 (1993) (distinguishing among “voluntary admission,” informal admission,” “emergency admission,” “observational commitment,” and “civil commitment”). Depending on the state, these terms may have the same or vastly different meanings. Therefore, federal law appropriately looks to the substance of the procedure to determine the impact of the state action.

The same rationale should apply here. If the ATF is not permitted to look to state procedure to determine whether it meets the federal standard, the federal government’s interest in uniform interpretation will be thwarted.<sup>3</sup> Moreover, the precedent set by such a decision will threaten to render large parts of the GCA subject to doubt and likely result in the possession and use of guns by people who should not have them.

**C. Wyoming’s Position Is Contrary to Federal Firearms Policy**

Notwithstanding the strong federal policy favoring enforcement of the Lautenberg Amendment, Wyoming argues that its statute is preferable to a “true” expungement because it keeps the criminal records of MCDV perpetrators available. Appellant’s Br. at 20-21. The opposite is true. Federal law considers an expungement or set aside to remove a firearm conviction precisely because the State has made a determination that the misdemeanor is no longer dangerous, and

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<sup>3</sup> The fact that state law varies, and thus different exceptions may be unavailable in some jurisdictions, makes the case for uniform application of a federal standard to state procedure all the more compelling.

demonstrated its faith in that determination by effectively erasing the conviction.

As the Ninth Circuit put it, the state has “vouched” for the misdemeanor. *Meeks*, 987 F.2d at 578.

Wyoming, in contrast, argues that its process should allow misdemeanants to possess firearms even though Wyoming has determined that it should retain access to their criminal records for other purposes. While *Amici* would prefer that batterers not possess firearms under any circumstances, it is in no way capricious for the ATF to insist that a state demonstrate its belief that a misdemeanant poses no danger by truly expunging his conviction before handing him a license to carry a concealed handgun. If Wyoming—from its experience prosecuting crimes—believes that such individuals are likely to be recidivists, and therefore believes that records of their prior MCDV convictions should be available to law enforcement, then such individuals still pose a danger to their families and society. As its own brief indicates, Wyoming *does* believe such individuals are dangerous. The federal policy for dealing with such misdemeanants is to enforce the Lautenberg Amendment as Congress intended—and prevent them from possessing firearms.

## II. STATES CANNOT SELECTIVELY DEFINE AROUND THE REQUIREMENTS OF THE FEDERAL FIREARMS LAWS

The substantive issue here is whether and to what extent federal firearms laws require uniform federal interpretation and application of an exception set forth in the federal statute. Wyoming attempts to avoid the effect of the Lautenberg Amendment through definitional sleight of hand. If—as Wyoming argues—states were permitted to simply define around federal laws with which they disagreed, these important federal firearms laws would become effectively unenforceable. Applying a uniform federal analysis that looks to the effect of state law rather than the label the state has given it, the Wyoming Statute clearly does not qualify.

Wyoming argues that its statute is either an expungement or—at a minimum—a “set aside.” *See* Appellant’s Br. at 12-13. It is neither. At most, the Wyoming Statute purports to restore *only* the ability to possess firearms that is taken away by the Lautenberg Amendment itself.<sup>4</sup> That limited and selective restoration is insufficient to qualify as an exception under § 921(a)(33). Nothing in those federal laws requires a state to have any exceptions, *United States. v. Phelps*, 17 F.3d 1334, 1343 (10th Cir. 1994), nor do they suggest that *any* procedure labeled as an

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<sup>4</sup> The Wyoming Statute is expressly labeled as an “expungement” but also states that its purpose is to effect a restoration of firearms rights lost. Wyo. Stat. Ann. § 7-13-1501. The only way a Wyoming misdemeanor can lose firearm rights is under the Lautenberg Amendment.

“expungement,” “set aside” or “restoration of rights” will qualify as an exception for federal purposes.

**A. Federal Law Must Determine Whether State Laws Qualify For Exceptions to the Federal Prohibitions Under the GCA**

Mere labels selected by a state cannot control the availability of the exceptions to this important federal statute. Although § 921 indicates that state law defines what is a “conviction,” and therefore provides the exceptions to § 922, interpretation of § 921 must look to the substance, not the label, of state law. With respect to the interpretation of other U.S. firearms laws, the Courts of Appeals have held that even where state law is relevant, state law labels do not control application of federal substantive law.

Wyoming argues against uniform interpretation by suggesting that Congress knew that states had divergent rules for expungement, pardon and restoration of rights. *See* Appellant’s Br. at 13 n.7. That is certainly true. Thus, for example, a misdemeanor may not be eligible for a restoration of rights because he or she may not lose any civil rights in the first instance. *See United States v. Jennings*, 323 F.3d 263, 272 (4th Cir. 2003). Some states have no provisions for expunction whatsoever. Nothing in the GCA requires a state to make any of the exceptions

available as a matter of state law.<sup>5</sup> Courts have regularly held that, even though the states have a wide divergence of laws regarding expungement, set aside, pardon and restoration of rights, the determination whether those state procedures adequately come within the exceptions to *federal* firearm laws is a matter of *federal* law.

Federal courts have been called upon to decide whether a state law “restoration of rights” is sufficient to restore the ability to possess firearms with some frequency. Numerous appellate decisions have held, as the district court did here, that various state laws or actions are insufficient to qualify as exceptions to § 922(g)(9).

As with the other exceptions, “Congress envisioned a restoration of more than a de minimis quantity of ... rights.” *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir. 1990). Every Circuit to consider it has held that the loss of any significant civil right will preclude a finding of restoration of rights for purposes of § 921(a)(20) or (33). *See, e.g., United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993) (loss of right to sit on jury precluded finding of restoration of right for purposes of § 921(a)(20)).

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<sup>5</sup> Federal law already contains a procedure by which individuals may apply for the removal of federal firearm disabilities. *See* 27 C.F.R. § 478.144 (2006) (Relief from Disabilities under the Act).

Moreover, courts considering the restoration of rights exception have all used federal law to interpret the state procedures, and many have concluded that state law did not satisfy the federal requirement for a “restoration of rights.” See *United States v. Brailey*, 408 F.3d 609, 611 (9th Cir. 2005) (“the [Washington] amendment did not ‘restore’ [defendant’s] ‘civil rights’ within the meaning of federal law.”); *United States v. Williams*, 128 F.3d 1128, 1134-35 (7th Cir. 1997) (restoration of some, but not all, civil rights did not remove federal firearm restrictions); *United States v. Oman*, 91 F.3d 1320 (9th Cir. 1996) (Massachusetts statute did not sufficiently restore rights to remove firearm prohibition); *Lapinsky v. United States*, 69 F.3d 541 (8th Cir. 1995)(full text available at 1995 WL 644987) (Missouri statute automatically restoring a felon's civil rights on completion of sentence did not restore civil rights sufficiently to satisfy § 921(a)(20)); *United States v. Metzger*, 3 F.3d 756, 759 (4th Cir. 1993) (loss of the right to sit on a jury “precludes a finding of a substantial restoration of civil rights necessary to satisfy § 921(a)(20)”); *United States v. Erwin*, 902 F.2d 510, 512 (7th Cir. 1990) (holding civil rights not restored for purposes of § 921(a)(20) because Illinois law prohibits convicted felons from owning guns and still counts conviction for purposes of recidivist laws). Thus “federal law, not state law, controls the right of a defendant to bear a firearm under a federal statute.” *U.S. v. Brailey*, 408 F.3d 609, 612 (9th Cir. 2005).

This is consistent with cases addressing the interplay between federal and state law involving other aspects of the GCA. For example, the Fourth Circuit concluded:

In interpreting section 922(g)(4), however, we are not bound by the terminology of Virginia statutory law; rather, we must look to the substance of the state procedure. *See Chamberlain*, 159 F.3d at 663. And when we do, we cannot help but conclude that [Defendant's] confinement was a commitment within the meaning of the statute.

*United States v. Midgett*, 198 F.3d 143, 146 (4th Cir. 1999). In a similar case, the Sixth Circuit rejected such a label-driven analysis, stating:

We do not agree that the federal interpretation of the term “commitment” should be so reliant on the terminology chosen by an individual state. To accept such a proposition would be to sacrifice any hope of a uniform application of the federal statute. Any state could expand or limit the scope of the federal firearms statute at will by merely changing the labels they place on their involuntary hospitalization procedures.

*United States v. Vertz*, 40 Fed. Appx. 69, 74-75 (6th Cir. 2002). Courts considering the exceptions set forth in §§ 921(a)(20) and (a)(33) have applied a similar analysis.

As this great weight of authority makes clear, the district court correctly determined that it is appropriate to evaluate—based on *federal* law—whether a state law or procedure meets the standards for the § 921 exceptions. It was entirely appropriate for the ATF to undertake the same type of substantive analysis that

these many federal courts have employed in considering whether a state has complied with the Brady Act and Lautenberg Amendment.

**B. The Wyoming Statute Is Not an “Expungement”**

Under the consistently applied federal standard, expungement, set aside and pardon are interpreted to vacate a conviction in some manner—in the words of ATF’s regulations, to render it nugatory. The Wyoming Statute is labeled as an “expungement” statute, and Wyoming claims it has made a decision to “remove federal firearms disabilities from a limited class of persons ... by eliminating the disqualifying conviction ....” Appellant’s Br. at 8. As the decision below made clear, however, the Wyoming Statute does not eliminate the disqualifying conviction at all, and is not an expungement. *See* District Court Opinion at 27-30.

Contrary to all common understanding of the meaning of “expungement,” the underlying conviction still exists, and may be used for any number of purposes, including sentencing enhancement and other law enforcement. There is no question that—labels aside—Wyoming still considers an individual to have been convicted of a MCDV even after a § 7-13-1501 “expungement.” As such, there is no question that the Wyoming Statute is not an expungement within the plain meaning of that term. Nor can the Wyoming Statute be said to render a conviction “nugatory.”

To the contrary, Wyoming proudly asserts that it does not, arguing that the ATF “apparently believes that if Wyoming [expunged] the conviction and made it disappear, then the offender would magically no longer be dangerous.” *See* Appellant’s Br. at 21. But that is precisely what Congress required states to do in order to qualify for exemption—to be sufficiently confident that an offender was no longer dangerous that the state was willing to negate the conviction entirely. Just as the fact of a conviction under state law triggers the federal firearms prohibitions, the complete erasure of that conviction can remove them.

However, no such erasure is presented here. Wyoming’s own arguments demonstrate: (1) that Wyoming in fact considers individuals convicted of MCDV to continue to be dangerous even after a § 7-13-1501 “expungement,” (2) that the Wyoming Statute does not render a MCDV conviction nugatory, and (3) that the state statute does not satisfy the intent or purpose of the exceptions to the Lautenberg Amendment. There simply is no real expungement here.

**C. The Wyoming Statute Is Not a “Set Aside”**

Wyoming relies on a distinction between expungement and set aside in the United States Sentencing Guidelines to argue that the Wyoming Statute is at least a “set aside.” Appellant’s Br. at 13-17. For the same reasons that the Statute is not an expungement, it is not a set aside: It does not render a MCDV conviction nugatory as intended by Congress and required by the implementing regulations.

The Sentencing Guidelines serve a very different purpose than the Lautenberg Amendment, and the distinction Wyoming cites has no relevance here. The commonly understood meaning of “set aside” is to vacate. *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 672 (D.C. Cir. 2006).<sup>6</sup> The Sentencing Guidelines recognize this, but also are mindful of the fact that while expungement and set aside have similar effects, they may result for very different reasons.

As this Court has stated, the Sentencing Commission “recognized a distinction, for purposes of the Guidelines, between convictions that are ‘set aside’ and those that are ‘expunged.’” *United States v. Wacker*, 72 F.3d 1453, 1459 (10th Cir. 1995). Thus, this Court concluded that a conviction set aside under the Federal Youth Correction Act was “set aside ... for reasons unrelated to innocence or errors of law” and therefore “not expunged for purposes of the Sentencing Guidelines.” *Id.* at 1479-1480 (citations omitted, ellipsis in original).

That distinction does not exist under the Lautenberg Amendment. Section 921(a)(33) focuses on the effect of state action, not the underlying intent. If the state action renders the conviction nugatory—if the state has effectively vouched

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<sup>6</sup> See also *Black's Law Dictionary* 1404 (8th ed. 2004) (defining “set aside” as “to annul or vacate”); cf. *Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J.) (“Setting aside means vacating; no other meaning is apparent.”) (superseded on other grounds); *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (“To vacate ... means to ... set aside.”) (internal quotation marks and citation omitted).

for the offender—then the exception will apply. Wyoming’s “set aside” argument thus fails for the same reason its “expungement” argument fails: The Wyoming Statute does not render the conviction nugatory.

**D. The Wyoming Statute Is Not a “Restoration of Rights”**

While the Wyoming Statute is neither an expungement nor a set aside within the meaning of the federal firearms laws, it admittedly purports to restore MCDV perpetrators one right—the ability to possess firearms that was taken away under the Lautenberg Amendment when they were convicted. But as the court below discussed at length, this highly selective and extremely limited change does not qualify as a “restoration of rights” under § 921(a)(33).

Rather than a nominal “expungement” law, Wyoming could have just as easily passed a statute of general application that automatically “restored the rights” of all persons convicted of MCDV’s but limited that restoration to “any firearms rights lost.” This, according to Wyoming’s reasoning, would automatically render § 922(g) meaningless in Wyoming. Wyoming did not, however, call the Wyoming Statute a “restoration of rights.” The reason why is simple: Wyoming knew that a so-called “restoration or rights” would be insufficient to overcome federal firearms prohibitions.

First, as set forth above, courts considering whether a state action satisfies the “restoration of rights” exception in § 921(a)(33) have overwhelmingly

determined that the restoration must satisfy a *federal* standard. Those cases all determined that a state law restoring some, but not all or substantially all, of a convict’s rights did not satisfy § 921(a), regardless of the label state law attached to it. If a state is unwilling to remove all taint of a conviction, federal law prohibits the convict from possessing a firearm.

Second, because Wyoming law does not prohibit misdemeanants from possessing firearms, there is nothing for Wyoming to restore. Both the statutory text—which provides that the restoration exception applies only “if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense”—and the case law agree that any “restoration” will not satisfy § 921(a). *See United States v. Jennings*, 323 F.3d 263, 275 (4th Cir. 2003) (“the literal application to [defendant] of the word ‘restored’ as contained in the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii) does not produce an absurd result. Because [defendant’s] civil rights were neither revoked nor restored, he cannot take advantage of the restoration exception of 18 U.S.C. § 921(a)(33)(B)(ii).”); *United States v. Keeney*, 241 F.3d 1040, 1043 (8th Cir. 2001) (“Thus, a defendant must have lost his or her civil rights pursuant to state statute in order to assert that the restoration exception [of 18 U.S.C. § 921(a)(33)(B)(ii) ] is applicable.”).<sup>7</sup>

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<sup>7</sup> *See also*, 142 Cong. Rec. 26675 (1996) (“Loss of these [civil] rights generally does not flow from a misdemeanor conviction, and so this language is

The Wyoming legislature apparently recognized that a statute that did not attempt to qualify as an “expungement” or “set aside” would be insufficient to meet the restoration of rights standard. Thus, it gave the Wyoming Statute an “expungement” label. Substantively, however, the Wyoming Statute attempts to “[restore] any firearm rights lost ...” Wyo. Sta. Ann. § 7-13-1501(a).

Federal law looks to the substance of the statute to determine whether state procedures satisfy the federal firearm law exceptions. *See, e.g., U.S. v. Valerio*, 441 F.3d 837 (9th Cir. 2006) (finding that state law expressly restoring firearm rights, but not others, did not satisfy § 921(a)). Here, the substance of the Wyoming Statute is an attempted restoration of rights restricted solely because of federal law. The question, therefore, is whether the Wyoming Statute could validly restore a misdemeanant’s ability to possess firearms when Wyoming did not itself bar misdemeanants from possession. The answer is that it cannot.

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probably irrelevant to most, if not all, of those offenders covered because of the new ban.”) (statement of Sen. Lautenberg).

**III. ATF'S REQUIREMENT THAT THE WYOMING STATUTE COMPLY WITH A FEDERAL STANDARD WAS NOT ARBITRARY OR CAPRICIOUS, NOR WAS IT AN ABUSE OF DISCRETION.**

Wyoming contends the district court's decision should be reversed because the ATF acted arbitrarily and capriciously in determining that Wyoming's process for issuing concealed-carry permits would allow prohibited persons to obtain and possess firearms without an NICS check. The State argues that the ATF's determinations should be set aside under 5 U.S.C. § 706 (2000). *See* Appellant's Br. at 9.

In light of the federal policy to keep batterers from possessing firearms and the extensive authority providing that exceptions to § 922(g) must comply with a federal standard, however, the ATF did not act arbitrarily or capriciously. Instead, it properly considered the Wyoming Statute, the GCA and the Brady Act in the context of applicable federal law and policy. Nor did the ATF exceed its statutory duties to administer federal firearm laws.

**CONCLUSION**

The ATF properly considered the Wyoming Statute, the GCA and the Brady Act in the context of applicable federal law and policy. As numerous federal courts have held, state law procedures must meet federal standards to qualify as § 921 exceptions. The ATF accordingly did not act arbitrarily in determining that

the Wyoming Statute failed to render MCDV convictions nugatory and thus did not qualify as an exception. Indeed, as the court below concluded, the ATF's decisions were correct.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

IT IS HEREBY CERTIFIED THAT:

1. The foregoing Brief of *Amici Curiae* The Brady Center To Prevent Gun Violence and The National Center For Victims of Crime in Support of Appellees complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,307 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 Microsoft Office Word 2003 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).

/s/ George Calhoun  
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Dated: October 9, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of October, 2007, I served the foregoing Brief of *Amici Curiae* The Brady Center To Prevent Gun Violence and The National Center For Victims of Crime in Support of Appellees by causing copies to be delivered to the Court electronically and by Federal Express, and to the following counsel electronically and by Federal Express:

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