IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF WYOMING

No. 2:06-cv-00111-ABJ

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, & EXPLOSIVES,
Defendants-Appellees

BRIEF AMICUS CURIAE OF GUN OWNERS FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT

APPEAL FROM BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES ACTION DISQUALIFYING WYOMING'S CONCEALED CARRY PERMIT PROCESS AS AN ALTERNATIVE TO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM

D. Stephen Melchior
MELCHIOR LAW FIRM
2011 Central Avenue
Cheyenne, Wyoming 82001
(307) 637-2323

Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102
(703) 356-5070

Attorneys for *Amicus Curiae,* Gun Owners Foundation

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, it is hereby represented 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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John S. Miles
Counsel for Amicus Curiae
Gun Owners Foundation

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INTRODUCTION

The parties to this action, wherein the State of Wyoming is seeking review of certain administrative action by the federal Bureau of Alcohol, Tobacco Firearms, and Explosives ("BATF") and appropriate declaratory and injunctive relief, are in the process of submitting their briefs pursuant to this Court's Order on Initial Pretrial Conference, entered herein on June 15, 2006. Gun Owner's Foundation, a nonprofit organization dedicated to the correct construction and application of constitutions and statutes related to the right of citizens to keep and bear arms, has submitted a motion for leave to file this brief pursuant to Rule 29(b), Federal Rules of Appellate Procedure.

INTEREST OF THE AMICUS CURIAE

Gun Owners Foundation ("GOF") was established as a nonprofit corporation in the Commonwealth of Virginia in 1983. GOF engages in nonpartisan research, study, analysis and education regarding, *inter alia*, the ownership and use of firearms, 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 and the rights to own and use firearms. GOF is exempt from federal income tax as an organization described in section 501(c)(3) of the Internal Revenue Code, and is classified as a public charity.

GOF fulfills its educational/public interest litigation mission through a variety of projects, including filing briefs in federal and state legal actions presenting significant questions of law. GOF has filed *amicus curiae* briefs in other federal litigation involving constitutional or statutory issues, including briefs in United States district courts, United

States courts of appeal and the United States Supreme Court. This brief is intended to assist the Court with respect to its analysis of certain important questions concerning the administrative action taken by the BATF, with a particular focus on the question of whether the BATF exceeded its jurisdiction and authority in making its determination.

SUMMARY OF ARGUMENT

On its face, and as applied to a conviction of a misdemeanor crime of domestic violence expunged by Wyoming law (W.S. § 7-13-1501), the Wyoming concealed carry permit criminal background check provided for by Wyoming law (W.S. § 6-8-104) fully complies with 18 U.S.C. § 922(t)(3).

In compliance with part (A)(i) of 18 U.S.C. § 922(t)(3) — which requires presentation of a state permit to possess a firearm issued "not more than 5 years earlier by the State in which the transfer of a firearm is to take place" — W.S. § 6-8-104 authorizes the issuance of a permit to a Wyoming resident to possess a firearm which must be renewed every five years. And in compliance with part (A)(ii) of § 922(t)(3) — which requires verification that the information made "available" to a state official under the "law of the State" indicates that "possession of a firearm" by an applicant for the permit "would [not] be in violation of law — W.S. § 6-8-104 provides for an appropriate criminal background check.

According to BATF, however, the Wyoming background check falls short of 18 U.S.C. § 922(t)(3), because W.S. § 7-13-1501 does not provide for the complete

expungement of a Wyoming conviction of a misdemeanor crime of domestic violence, but only for an expungement that seals such a conviction so as not to be "available" to the Wyoming Attorney General who has the authority under W.S. § 6-8-104 to issue a concealed weapon permit. Thus, BATF has ruled that the state criminal background check provided for by W.S. § 6-8-104 does not "qualify" under 18 U.S.C. § 922(t)(3) as an alternative to the National Instant Criminal Background Check System that otherwise would be required before a federally licensed dealer may transfer a firearm.

By this ruling, BATF has exceeded its statutory jurisdiction and authority, having erroneously insisted that expungement of a conviction of state misdemeanor crime of domestic violence is governed by federal law. According to the "choice-of-law" provisions of both 18 U.S.C. §§ 921(a)(20) and (33), and 18 U.S.C. § 922(t)(3), the question whether such a conviction has been expunged is determined by the law of the "convicting jurisdiction," not by an overriding preference of a federal bureau. Additionally, by the very terms and purpose of 18 U.S.C. § 922(t)(3), BATF has no regulatory authority to impose any qualifications upon a state's criminal background check other than those specified in 18 U.S.C. § 922(t)(3). Indeed, if BATF has such authority to impose a federal expungement policy upon state officials acting pursuant to 18 U.S.C. § 922(t)(3), such authority would run afoul of the Tenth Amendment.

By its ruling that the Wyoming partial expungement policy is contrary to federal law, BATF has also acted arbitrarily and capriciously, not in accordance with 18 U.S.C.

§ 927 which provides that, unless there is a “direct and positive conflict” between federal and state law — such that “the law of the State ... cannot be reconciled” with federal policy — then the state law stands. In this case, the Wyoming partial expungement policy governing Wyoming convictions of misdemeanor crimes of domestic violence is not only **not** in conflict with federal policy, but more fully consistent with that policy than the complete expungement policy insisted upon by BATF. According to W.S. § 7-13-1501's standards of limited eligibility, procedural safeguards, and requisite findings, expungements of convictions of misdemeanor crimes of domestic violence are limited to those applicants who can affirmatively show that they would not be a danger to themselves or to society. Upon making a like finding related to public safety, pursuant to 18 U.S.C. § 925(c), the Attorney General of the United States may grant relief from firearm disabilities, not only with regard to domestic violence misdemeanants, but felons as well, and without the high standards of eligibility or procedural safeguards laid down in the W.S. § 7-13-1501. Without a doubt, then, the Wyoming expungement statute is in harmony with federal firearms relief disability policy and, according to 18 U.S.C. § 927, the Brady law and the Wyoming concealed carry permit process set forth in W.S. § 6-8-104 “consistently stand together.”

ARGUMENT

I. THE WYOMING CONCEALED CARRY PERMIT PROCESS COMPLIES WITH THE 18 U.S.C. § 922(t)(3) EXCEPTION TO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK OTHERWISE REQUIRED BY 18 U.S.C. § 922(t)(1).

This case concerns the interpretation and application of a statutorily-defined and mandated exception to the Brady Handgun Violence Prevention Act ("Brady Law").

Generally, the Brady Law requires a federally licensed firearms dealer ("FFL"), before completion of a transfer of a firearm, to contact the National Instant Criminal Background Check System ("NICS"). *See* Public Law 103-159, Section (b)(1) and (3), 107 Stat. 1539-1540 (1993); 18 U.S.C. § 922(t)(1) and (3). However, as explained in the House Report submitted in support of the Brady Law, the NICS check "would be inapplicable to firearm transfers" if:

> The transferee has, within the five years preceding the transfer and after having his or her **criminal background checked by a State or local government**, **received from** his or her **State of residence a permit** that allows him or her to **possess a firearm**. [House Report No. 103-344, 103d Congress, 1st Session, reprinted in 3 U.S. Code and Congressional and Administrative News, p. 1993 (1993) (emphasis added).]

This state permit exception to the NICS check is found in 18 U.S.C. § 922(t)(3), which reads:

> Paragraph (1) **shall not apply** to a firearm transfer between a licensee and another person if —
> (A)(i) such other person has presented to the licensee [FFL] a permit that — (I) allows [the transferee] to possess or acquire a firearm; and (II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

> (ii) **the law of the State** provides that such a permit is to be issued only after 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) (emphasis added).]

In compliance with part (A)(i) of this exception provision, Wyoming Code (W.S.) § 6-8-104(b) provides that the Wyoming Attorney General is authorized to issue a permit to "carry a concealed firearm" in the State of Wyoming, such permit being valid for a period of "five (5) years from the date of issuance." And, in compliance with part A(ii) of this exception provision, W.S. § 6-8-104(b)(iv) requires that, in order to obtain such a permit, an applicant must be "not ineligible to possess a firearm pursuant to 18 U.S.C. [§] 922(g) or W.S. § 6-8-102."[1] To that end, an applicant for a concealed weapon permit must furnish a "full set of fingerprints," and the sheriff of the county of the applicant's residence must conduct an appropriate criminal background check. W.S. § 6-8-104(e)(iii) and (f).

At issue in this case is only that part of the Wyoming Attorney General's background check concerning whether the applicant is "ineligible to possess a firearm pursuant to 18 U.S.C. § 922(g)," — more specifically whether the Attorney General's

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[1] Additionally, W.S. § 6-8-104(b) provides that the applicant must: (a) be a resident of the United States and a resident of the State for at least six months (with limited exceptions); (b) be 21 years of age; (c) be physically able to safely handle a firearm; (d) not be a convicted abuser of state or federal drug laws; (e) not be a "chronic[] or habitual[]" user of alcohol "to the extent that his normal faculties are impaired"; (f) have demonstrated familiarity with the safe use and care of a firearm; (g) not be "currently adjudicated to be legally incompetent"; and (h) not have been "committed to a mental institution." *See* W.S. § 6-8-104(b)(i), (ii), (iii), (v), (vi), (vii), (viii) and (ix).

background check is sufficient to ascertain whether, under 18 U.S.C. § 922 (9), a person is "ineligible" to possess a firearm because of a prior **Wyoming** conviction of a "misdemeanor crime of domestic violence ("MCDV")." *See* Plaintiff's Complaint ("Compl."), Introduction and ¶¶ 8-29.

There is no question that, if the person so convicted, pursuant to W.S. § 7-13-1501, had obtained an expungement of such conviction, the criminal background search mandated by W.S. § 6-8-104(e) and Wyoming Attorney General Regulation, Chapter 3, § 1(e) through (g), would not uncover a **Wyoming** conviction of a MCDV. According to W.S. § 7-13-1501(k) and (m)(i) and W.S. § 7-13-1401(j)(i), the record of that expunged conviction would **not** be made "available" to the Attorney General under W.S. § 6-8-104. Thus, assuming all other criteria have been met, the Attorney General could issue a permit to carry a concealed weapon to a person whose MCDV conviction has been expunged because, according to 18 U.S.C. § 922(t)(3)(ii), "the information available to [the Attorney General] does not indicate that possession of a firearm [by the applicant] would be in violation of law."

According to the relevant language of the Wyoming Code, and the implementing Attorney General regulations, a permit to wear or carry a concealed weapon issued by the Attorney General **on its face** satisfies the criteria set forth in 18 U.S.C. § 922(t)(3), and thus dispenses with the NICS check that otherwise would be required by 18 U.S.C. § 922(t)(1). Indeed, in the words contained in the House Report's "Section-by-Section

Analysis" of the Brady Law, the "background check requirements" of the NICS would be inapplicable," the person seeking transfer of a firearm, "having his or her criminal background checked by a State ... government." *See* House Report 103-334, reprinted in 3 U.S.C.C.A.N. 1992, 1995 (1993).

Notwithstanding the precise fit of the Wyoming permit law into the statutorily-defined and legislatively-designed exception to the NICS check, BATF has informed the Wyoming Attorney General that: (1) the state's permit process — insofar as it rests upon the expungement provision of Wyoming Code §7-13-1501(k) — "does not **qualify** as a ... NICS check alternative"; and (2) any transfer of a firearm by an FFL to a person on the basis of a Wyoming concealed carry permit, and not a NICS check, would be "inconsistent with the statutory language of the Brady Law and [a] threat[] to public safety." *See* Compl., Exhibit 1 (emphasis added).

The BATF ruling is completely erroneous. First, the BATF decision is "in excess of [its] statutory jurisdiction [and] authority," in violation of 5 U.S.C. § 706(2)(C). Second, the BATF decision is "arbitrary, capricious, an abuse of discretion [and] otherwise not in accordance with law," in violation of 5 U.S.C. § 706(2)(A).

II. BATF HAS EXCEEDED ITS STATUTORY JURISDICTION AND AUTHORITY BY ITS INSISTENCE THAT EXPUNGEMENT OF A CONVICTION OF A STATE MISDEMEANOR CRIME OF DOMESTIC VIOLENCE IS GOVERNED BY FEDERAL LAW.

At the heart of BATF's objection to the Wyoming MCDV expungement policy is its claim that Wyoming's "partial" expungement policy conflicts with what they see as the

federal "complete" expungement policy set forth in 18 U.S.C. §§ 921(33) and 922(g)(9). *See* Compl., Exhibit 2. Although BATF has conceded that "we must look to State law in determining" if a person has been convicted of a MCDV — including whether such a conviction has been pardoned, expunged or, set aside, or civil rights restored — BATF insists that it **only** "look[s] to the State procedures to see if the procedures meet [the Federal] standard." *See* Compl., Exhibit 5, p. 2. In other words, BATF's position is that state law only determines whether **procedurally** a person has been convicted of MCDV, **not** whether any specific conviction is **substantively** a MCDV. Thus, in this case, BATF's position is that Wyoming Code §7-13-1501 may provide only the **procedure** for the expungement of a MCDV, but may **not** define the **substantive** meaning of expungement, the latter being the exclusive province of Congress.

BATF clearly is mistaken, for two fundamental reasons.

A. The Federal "Choice of Law" Policy Embodied in 18 U.S.C. §§ 921(a)(33) and 922(g)(9) Dictates That Expungement of a Misdemeanor Conviction for Domestic Violence is Substantively Determined by State, Not Federal, Law.

As the United States Supreme Court recently observed, "[u]ntil 1986, federal law alone determined whether a state conviction counted, regardless of whether the State had expunged the conviction." Caron v. United States, 524 U.S. 308, 312 (1998). With the passage of the "Firearms Owners' Protection Act ("FOPA")" on May 19, 1986, "Congress modified [this rule] by adopting ... [18 U.S.C.] §921(a)(20) defin[ing]

convictions, pardons, expungements, and restoration of civil rights by reference to the law of the convicting jurisdiction." *Id.*, 524 U.S. at 313.

Four years prior to Caron, the Supreme Court had occasion to apply this new rule, determining that an act of a **state** restoring a person's civil rights did **not substantively** affect the person's conviction of a **federal** offense. *See* Beecham v. United States, 511 U.S. 368 (1994). In explanation of its ruling, the Court observed that the "choice-of-law" clause of 18 U.S.C. § 921(a)(20) "defines the rule for determining '[w]hat constitutes a conviction,'" namely "the law of the convicting jurisdiction." *Id.*, 511 U.S. at 371. Because the Court found that the law of the convicting jurisdiction determined whether a "person [has] a qualifying conviction on his record," it concluded that same law should determine whether that qualifying conviction had been "pardon[ed], expunge[d] [or] set aside" (*id):* "The effect of postconviction events is therefore, under the statutory scheme, just one element of what constitutes a conviction." *Id.*, 511 U.S. at 372.

Thus, in Beecham, the Supreme Court decided that the question whether Beecham, a federal felon, had been relieved of his disability from possessing or receiving a firearm under 18 U.S.C. § 921(g)(1) was **not** resolved on the basis of a general federal policy governing restoration of civil rights applicable to **all** persons "convicted of a crime punishable by imprisonment for a term exceeding one year." Rather, the Court decided that Beecham had not been relieved of his disability as a **federal** felon by a **state** decision to restore his civil rights, the state not being the "convicting jurisdiction."

The question in this case, however, is whether a **state** misdemeanant is relieved of his federal disability by the law of the "convicting jurisdiction" — *i.e.*, the **state —** or by **federal** law. Applying the Beecham analysis, Wyoming law — the law of the "convicting jurisdiction" — determines the "effect" of an expungement of a Wyoming conviction of a MCDV, because the expungement — being a "post-conviction event" — is, "under the [federal firearms] statutory scheme, just one element of what constitutes a [MCDV]." *See* Beecham, 511 U.S. at 372. Thus, whether or not a Wyoming misdemeanor conviction is a disqualifying MCDV, within the meaning of 18 U.S.C. §§ 922(g)(9) and 921(a)(33), is determined **not** by a general federal policy governing **all** MCDV convictions, but by the specific expungement process and standards of W.S. § 7-13-1501.

To be sure, the language of 18 U.S.C. § 921(a)(33) is not the mirror-image of that of 18 U.S.C. §921(a)(20), which was addressed in the Caron and Beecham cases, but BATF has correctly conceded that "the analysis used in section 921(a)(20) applies in the MCDV context contained in section 921(a)(33)." *See* Compl., Exhibit 5, p. 2, ¶ 1. While § 921(a)(33) does not contain the precise "choice-of-law" language that appears immediately following subsection (B) of § 921(a)(20), § 921(a)(33) does embrace the same "choice of law" policy in that it parenthetically refers to the "law of the applicable jurisdiction" in the body of the subsection addressing the issues of what constitutes a

"conviction," "expungement," "set aside," "pardon" and "restoration of civil rights." *See* 18 U.S.C. § 921(a)(33)(B)(ii).

Further, there is nothing in the legislative history of § 921(a)(33) indicating that Congress intended to embrace a "choice-of-law" policy different from the one Congress adopted 10 years earlier in § 921(a)(20). Rather, it appears that Congress — by its use of parallel language — simply extended the disqualifying reach of § 922(g)(1) from a person "who has been convicted of a crime punishable by imprisonment for a term exceeding one year" (18 U.S.C. § 921(a)(20)), to a person "who has been convicted in any court of a misdemeanor of domestic violence" (18 U.S.C. § 921(a)(33)) as well. *See* A. Nathan, "At the Intersection of Domestic Violence and Guns: The Public Interest Exception and the Lautenberg Amendment," 85 *Cornell L. Rev.* 822, 823-826 (2000).

While 18 U.S.C. § 921(a)(33) was adopted in the form of an extraneous amendment to the Omnibus Consolidated Appropriations Act of 1997, without any reference whatsoever to any findings or statement of purpose,[2] the sponsor of that amendment, Senator Frank Lautenberg (D-NJ), had originally designed the MCDV disqualification as a proposed addition to the federal firearms law to be applied in harmony with the existing felony disqualification contained in 18 U.S.C. §§ 921(a)(20) and 922(g)(1). *See* S. 1632, Section 4, 104th Cong., 2d Sess. (March 21, 1996).

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[2] *See* Section 658, p. 371, of Public Law 104-208, 110 Stat. 3009, 3009-371 (Sept. 30, 1996).

As noted above and as acknowledged by BATF in an assessment letter submitted in 1986 to the Committee on the Judiciary of the House of Representatives, the convicting jurisdiction "choice-of-law" rule embodied in 18 U.S.C. § 921(a)(20) was inserted into the federal firearms law ten years prior to the Lautenberg Amendment. *See* House Report 99-245, Assessment by the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, reprinted in 4 U.S.C.C.A.N., 1346 (1986) ("The bill provides that what constitutes a felony conviction would be determined by the law of the jurisdiction where the conviction occurred."). In that letter, BATF registered its objection[3] to this "choice-of-law" provision, as follows:

> This[bill] 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 Gun Control Act. [*Id.* at 1346 (emphasis added).]

In essence, BATF asserted that **state law** should **not** govern whether an expungement, pardon, or set aside should "eliminate the underlying conviction insofar as Federal law is concerned" and that any "person [who receives such a state expungement, pardon, or set aside] must still apply for and receive relief from Federal firearms disabilities." *Id.* at 1346.

By its enactment of 18 U.S.C. § 921(a)(20) in 1986, Congress rejected the objection made by BATF at that time. And this court should reject BATF's effort now to

[3] BATF's objection appears as the twelfth of thirteen "negative aspects" of the bill. *See* House Report 99-495, reprinted in 4 U.S.C.C.A.N., pp. 1344-1346 (1986).

impose its misinterpretation of the Lautenberg Amendment and its **spurious** claim that **federal, not state, law** should govern the question of relief from federal firearms disabilities.

B. BATF Has Neither Statutory nor Constitutional Authority to Determine Whether the Wyoming Concealed Carry Permit Process Qualifies as an Alternative to the NICS Check.

While the Brady Law makes available to BATF the NICS check as a preventive measure to stop violations of 18 U.S.C. § 922(g)(1) and (9),[4] it excepts from that process persons who have obtained a permit pursuant to a state-administered criminal background check. *See* 18 U.S.C. § 922(t)(3)(A)(ii) and House Report 103-344, reprinted in 3 U.S.C.C.A.N. 1995 (1993). However, the Brady Law does not, as claimed by BATF, grant any authority to BATF or any other federal official or agency to determine if any such alternative state-administered permit process "qualif[ies] as a ... NICS check alternative." *See* Compl., Exhibit 1. Rather, such qualification standards are set by the statutory criteria specified in 18 U.S.C. § 922(t)(3).

Indeed, the United States Department of Justice has promulgated no regulations authorizing BATF to review whether a state permit program "qualifies" as an exception to the NICS check. To the contrary, 27 C.F.R. §478.102(d) simply states that any permit program that complies with the language set forth in 18 U.S.C. § 922(t)(3) automatically

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[4] *See* Koog v. United States, 79 F.3d 452, 454 (5th Cir. 1996).

qualifies as an exception to the NICS check, provided only that "on or after November 30, 1998, the information available to such official includes the NICS." *See* 27 C.F.R. § 478.102(d)(1)(iii). Furthermore, BATF can point to no regulation defining "expungement," as that term is used in either 18 U.S.C. § 921(a)(20) or 921(a)(33); nor is there any regulation applying the BATF definition of "expunge" to the NICS alternative state criminal background check provided for in 18 U.S.C. § 921(t)(3).

To the contrary, the express language of 18 U.S.C. § 922(t)(3)(A)(ii) states that it is "the law of the State" that determines the process by which a state government official decides to issue a permit "to allow[] a person to possess or acquire a firearm." Although such process must be designed to ascertain whether the person seeking such a permit would be "in violation of law," state or federal, 18 U.S.C. § 922(t)(3)(A)(ii) does not lay down any requirement as to how such information is to be sought or the degree of effort required to obtain such information. Rather, it simply states that "the law of the State provides that such a permit be issued **only** after an authorized government official has verified that the **information available** to such officer does **not** indicate that possession of a firearm in such other person would be in violation of law." *Id.* (emphasis added).

Not only is there no statutory or regulatory authority for BATF to decide whether the Wyoming permit process qualifies as an alternative to a NICS check, but BATF's effort to coerce the Wyoming Attorney General and Wyoming legislature to enforce BATF's view of federal law concerning expungements would violate the Tenth

Amendment. While it may be constitutional for BATF to enforce either 18 U.S.C. § 922(g)(9) or 18 U.S.C. § 922(t)(1) against an individual, BATF "may not compel the States to enact or administer a federal regulatory program" to prevent violations of either prohibition. *See* New York v. United States, 505 U.S. 144, 169 (1992). Indeed, as the Supreme Court held in Printz v. United States, 521 U.S. 898 (1997), the federal government cannot "impress ... into its service," "conscripting" state officers, such as the Wyoming Attorney General, to administer federal policy, as BATF is attempting to do in this case. *See id.*, 521 U.S. at 908, 922, 925, 935.

III. THE BATF RULING THAT THE WYOMING EXPUNGEMENT POLICY IS CONTRARY TO FEDERAL LAW IS ARBITRARY, CAPRICIOUS, AND OTHERWISE NOT IN ACCORDANCE WITH LAW.

According to BATF, 18 U.S.C. § 921(a)(33) requires — before a conviction of a MCDV may be deemed to have been expunged — complete destruction of the record of conviction, "remov[ing] the fact of conviction for criminal justice purposes." *See* Compl., Exhibit 2, p. 2. BATF contends that this Wyoming expungement policy — that seals the record of conviction only from access to it "for purposes of restoring firearms rights" — is inconsistent with the expungement provision of 18 U.S.C. § 921(a)(33). *Id.*

In making this claim, BATF has conceded that its definition of expungement — requiring the complete erasure of the fact of a MCDV conviction — finds no support in either the firearms statute or BATF regulations. *See* Compl., Exhibit 2, pp. 2-3. Instead, BATF supports its position by references to the general meaning of expunge. *See*

Compl., Exhibit 2, p. 2. But the express language of 18 U.S.C. § 921(a)(33)(B)(ii) indicates that expunge is **not** to be understood in a general sense, but only in relation to "the purposes of this chapter." Indeed, that section specifically provides that if an "expungement ... expressly provides that the person may not ship, transport, possess or receive firearms," then such an expungement, while effective for other purposes, would not be effectual to restore the person's right to ship, transport, possess or receive firearms. Conversely, it follows that if an expungement, like the one provided for by W.S. § 7-13-1501(k), is for the express "purpose of restoring firearms rights that have been lost to persons convicted of misdemeanors," then such an expungement would be effectual in relation to restoration of those rights, even though not effectual for sentencing or other criminal justice purposes.

The only question that need be asked, then, is whether the Wyoming expungement policy is in "direct and positive conflict," such that "the law of the State ... cannot be reconciled" with the overall federal policy of keeping firearms out of the hands of a person who, because of a past conviction, poses a danger to others. *See* 18 U.S.C. § 927. After all, protection of the public from gun violence is the overarching federal purpose of both the Brady Law and 18 U.S.C. §§ 921(a)(33) and 922(g)(9). *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). A careful review of the Wyoming expungement

statute conclusively demonstrates that it serves precisely this federal purpose and, therefore, that the Brady Law and the Wyoming expungement statute "consistently stand together." *See* 18 U.S.C. § 927.

First, W.S. § 7-13-1501(a) places **three significant substantive limits upon a person's eligibility** for expungement of a MCDV:

> (i) At least one (1) year [must have] passed since the expiration of the terms of sentence imposed by the court, including any periods of probation or the completion of any program ordered by the court;
> (ii) Other than convictions arising out of the same occurrence or related course of events, the petitioner has not previously pleaded guilty or nolo contendere to or been convicted of a misdemeanor for which firearm rights have been lost; and
> (iii) The misdemeanor or misdemeanors for which the person is seeking expungement shall not have involved the use or attempted use of a firearm.
> [W.S. § 7-13-1501(a).]

In addition there are **several procedural protections**. First, W.S. § 7-13-1501(k) provides that any person "who has previously received an expungement of records of conviction under this section" may not "seek a second or subsequent expungement of records under this section."

Second, the person seeking expungement must file a petition with "the convicting court," and must serve a copy of the petition upon "the prosecuting attorney and the division of criminal investigation." W.S. § 7-13-1501(a) and (b). The prosecuting attorney, in turn, must "serve notice of the petition ... to any identifiable victims of the misdemeanors" who, upon filing an objection to the petition with the court, is entitled to "testify" against the petition. W.S. § 7-13-1501(c) and (e). The prosecuting attorney is

also required to "review the petition" and to file with the court either an "objection or recommendation" and, upon the filing of an objection, the court must conduct a hearing. W.S. § 7-13-1501(e). The court may, in its discretion "request a written report by the division of criminal investigation concerning the history of the petitioner." W.S. § 7-13-1501(d).

Third, the court, with or without a hearing, may either grant or deny the petition. Before entering an order of expungement, however, the Court must find that: (a) the petitioner is "eligible for relief"; (b) does "not represent a substantial danger to himself"; and (c) does not represent a substantial danger to "any identifiable victim or society." W.S. § 7-13-1501(g). While an order of expungement is appealable by the state, there is no provision for the petitioner to appeal if the petition is denied. *See* W.S. § 7-13-1501(h).

Fourth, the expungement order is limited, usable "only for the purposes of restoring firearm rights that have been lost to persons convicted of misdemeanors." Thus, a person who obtains such an expungement knows that, if he is subsequently convicted of a crime, he may face an "enhancement of penalties" based, in part, upon the expunged conviction. *See* W.S. §7-13-1501(k). Further, the persons knows that the "record of conviction [may] be used ... for [other] criminal justice purposes." *See* W.S. §§ 7-13-1501(m)(i) and 7-13-1401(j)(i). By granting a limited expungement — for restoration of

firearm rights only — Wyoming has left a trace of the expunged conviction and, thereby, the continuing deterrent effect of that conviction.

Unquestionably, then, the limited Wyoming expungement policy is **not** in conflict with the overall purpose of the federal firearms policy governing MCDV, whereas the BATF objection to that policy would only undermine the residual deterrent effect of the state's limited policy. Furthermore, the BATF objection is made in disregard of: (a) of the evidentiary burdens placed upon the person seeking expungement; (b) the opportunity of victims and the prosecuting attorney to be heard; and (c) the state's stringent eligibility standards, especially the one denying eligibility to a person convicted of a misdemeanor of domestic violence involving the use or attempted use of a firearm.

These are compelling reasons to find BATF's myopic reaction to the Wyoming statute to be arbitrary and capricious, an abuse of discretion, and not in accord with the ultimate purpose of 18 U.S.C. §§ 921(a)(33) and 922(g)(9) — to keep firearms out of the possession of persons who pose a significant threat to others. Indeed, 18 U.S.C. § 925(c), the foundational authority upon which a federal government official acts when an application is made to the United States Attorney General "for relief from disabilities imposed by federal laws with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms," states that such relief may be granted "if it is established to [the Attorney General's] satisfaction that the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be

likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." *See* 18 U.S.C. § 925(c).

Surely, under this standard, it would be arbitrary and capricious for the Wyoming Attorney General to deny relief to an applicant on the sole ground that a person's conviction for violation of a MCDV has not been completely "destroyed" without regard to whether a such complete destruction is related in any way with the public safety or public interest. *Compare* Compl., Exhibit 2, p. 2, Exhibit 3 and Exhibit 5, *with* Bagdonas v. Dept. of Treasury, 93 F.3d 422 (5th Cir. 1996). Likewise, it is arbitrary and capricious for BATF to disqualify the Wyoming process regarding expungement of a Wyoming conviction of an MCDV on the sole ground that it does not completely erase the conviction for all purposes without regard to the fact that the process is designed to grant an expungement only when a court finds that the "petitioner does not represent a substantial danger to himself, or any identifiable victim or society." *See* W.S. § 7-13-1501(k). Indeed, there is no rational basis for BATF to reject the Wyoming expungement policy with its high standards limiting eligibility and procedural safeguards, both of which are conspicuously absent in 18 U.S.C. § 925(c) governing federal relief from firearms disabilities. *Compare* W.S. § 7-13-1501(a) *with* 18 U.S.C. § 925(c).

In short, BATF's decision disqualifying the criminal background check of Wyoming's concealed carry permit process — on the ground that Wyoming's expungement policy governing convictions of MCDV's does not call for a complete

erasure of such convictions — does not "accord" with 18 U.S.C. § 927's preemption policy. Indeed, "unless there is a direct and positive conflict between" 18 U.S.C. §§ 921(a)(33), 922(g)(9) and 922(t)(3), on the one hand, and W.S. §§ 6-8-104 and 7-13-1501, on the other — such that the two cannot be "reconciled or consistently stand together" — then the state law should be given full effect. *See, e.g.,* Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 746 F. Supp. 1415, 1425-27 (E.D. Cal. 1990).

CONCLUSION

For the reasons stated, as well as for the reasons advanced herein by the plaintiff, the injunctive and declaratory relief sought by the plaintiff should be granted, and the BATF ruling disqualifying the Wyoming permit process as an alternative background check to the NICS check should be reversed, with instructions to BATF to notify all FFL's in Wyoming that the issuance of a permit under W.S. § 6-8-104(b) fully complies with 18 U.S.C. § 922(t)(3).

Respectfully submitted,

____
D. Stephen Melchior
MELCHIOR LAW FIRM
2011 Central Avenue
Cheyenne, Wyoming 82001
(307) 637-2323

____
Herbert W. Titus
William J. Olson
John S. Miles
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102
(703) 356-5070

Attorneys for *Amicus Curiae*, Gun Owners Foundation.