No. 21-1131

In the United States Court of Appeals
for the Sixth Circuit

DONALD J. ROBERTS, II, AND GUN OWNERS OF AMERICA, INC.,
Plaintiffs-Appellants,

v.

U.S. JUSTICE DEPARTMENT, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, AND REGINA LOMBARDO, in her official capacity as Acting Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR APPELLANTS

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, Michigan 48192
(734) 281-7100

ROBERT J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
Counsel for Appellants
*Attorney of Record

March 22, 2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-1131 Case Name: Roberts v. U.S. Justice Department

Name of counsel: Robert J. Olson

Pursuant to 6th Cir. R. 26.1, Donald J. Roberts, II and Gun Owners of America, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on March 22, 2021 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Robert J. Olson
370 Maple Ave. W., Ste 4
Vienna, VA 22180-5615

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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Appellants request oral argument because this case involves important questions regarding the proper construction of an unambiguous federal statute, 18 U.S.C. § 922(t)(3), part of The Brady Handgun Violence Prevention Act. The requirements of this statute have been met by the State of Michigan since its statute's inception in 2005, until the Defendants unilaterally substituted their own policy objectives for the text itself. Such a departure from the statutory text adversely affects many thousands of gun owners in this Circuit, and millions more nationwide, denying them the statutory advantages conferred upon them by Congress when purchasing a firearm from a federally licensed dealer using a state issued firearms permit. Appellants believe oral argument would materially aid the Court in considering the issues raised in this appeal.

JURISDICTIONAL STATEMENT

Appellants seek review of the district court's December 17, 2020 Judgment denying their motion for summary judgment, granting summary judgment to the government, and dismissing Appellants' complaint. The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Appellants filed their notice of appeal timely on February 8, 2021.

STATEMENT OF THE ISSUES

1. Whether the district court erred by holding that MCL § 28.426 no longer qualifies under 18 U.S.C. § 922(t)(3) to exempt holders of Michigan Concealed Pistol Licenses from the National Instant Criminal Background Check System when purchasing firearms from federally licensed firearms dealers.
2. Whether the district court erred by disregarding the text of an unambiguous state statute, instead "interpreting" the "law of the State" based on the "practices and interpretations of state officials."
3. Whether the district court erred by reliance upon the perceived "purpose" of a federal statute, and the presumed congressional "intent" underlying its passage, to uphold agency action that violates the plain text of the statute.

STATEMENT OF THE CASE

Background

As part of the Brady Handgun Violence Prevention Act ("Brady Act") Congress required that, before a federally licensed firearms dealer ("FFL") may transfer a firearm to a non-FFL, he first must run a background check through the FBI's National Instant Criminal Background Check System ("NICS" or "NICS check") and, subsequently, may not transfer a firearm to a customer reported to be among certain categories of persons federally prohibited from obtaining or possessing firearms ("prohibited persons"). *See* 18 U.S.C. § 922. However, an exception to this requirement is provided in subsection 922(t)(3), which provides that a NICS check is not required if the transferee possesses a qualifying state firearms permit:

> (3) 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 a permit that —
> (I) allows such other person 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).]

The NICS system became operational on November 30, 1998. *See* 18 U.S.C. § 922(t). Between 1998 and 2005, ATF took the position that the Michigan statute providing for a "concealed pistol license" ("CPL") did not qualify as a Section 922(t)(3) "Brady alternate."[1] *See* Complaint for Declaratory and Injunctive Relief ("Complaint"), R.1, Page ID#11-15. However, in 2005, Michigan changed its law "[t]o align the state statute with [] federal law" (Order, R. 25, Page ID#552), adopting MCL 28.426(2) which requires, in pertinent part, that:

> A county clerk shall not issue a license to an applicant under section 5b unless both of the following apply:
> (a) The department of state police, or the county sheriff under section 5a(4), has determined through the federal national instant criminal background check system that the applicant is not prohibited under federal law from possessing or transporting a firearm.
> (b) If the applicant is not a United States citizen, the department of state police has verified through the United States Immigration and Customs Enforcement databases that the applicant is not an illegal alien or a nonimmigrant alien.

After this change to the Michigan statute, on February 7, 2006 then-Attorney General of Michigan Mike Cox wrote to ATF, requesting confirmation that the Section 922(t)(3) exemption now would apply to the new Michigan CPL statute.

[1] The term "Brady alternate" is not used in federal law or by the parties, but the district court adopted this term and, for purposes of clarity, Plaintiffs use it as well. *See* Order Denying Plaintiffs' Motion for Summary Judgment ("Order"), R.25, Page ID#549.

See Order, R.25, Page ID#552. On March 24, 2006, ATF replied in agreement with the Michigan Attorney General's assessment, and issued an "Open Letter to Michigan Federal Firearms Licensees" stating that Michigan CPLs would be considered Brady alternates. Exhibit A to Complaint ("Exhibit A"), R.1-4.

The Michigan statute has not changed in any way since its 2005 adoption. However, beginning in March of 2019, ATF came to believe that the practices of Michigan officials implementing the Michigan statute had changed and — according to ATF — the statute itself no longer met the requirements of the Section 922(t)(3). *See* Plaintiffs' Motion for Summary Judgment ("Plaintiffs' MSJ"), R.17, Page ID#417. Based on an FBI audit and ATF follow-up investigation (*see id.*) ATF concluded that, although Michigan State Police ("MSP") officials were running NICS checks as required by state law, they were not performing follow-up investigations and "making determinations" as to a person's eligibility (Order, R.25, Page ID#553) whenever NICS would produce an unclear or potentially disqualifying record.

In the ensuing months, state and federal officials attempted to resolve the concerns of the FBI and ATF, which involved approximately 50 "potentially disqualified" persons who may have been granted CPLs, out of many hundreds of thousands of CPL holders statewide. *See* Administrative Record Part 1, R.16-1,

Page ID#123-126; Order, R.25, Page ID#554-556; Defendants' Cross-Motion for Summary Judgment ("Defendants' Cross-Motion"), R.21, Page ID#460-461. The MSP offered to "'gather relevant records that could potentially constitute a federal prohibition, and refer that information to NICS,'" but asked "'that NICS may make and enter the final determination under federal law.'" Plaintiffs' MSJ, R.17, Page ID#432-433. In response, federal officials refused to perform this task, instead mandating that Michigan officials must do so. Believing itself to lack both the authority and expertise to make such determinations as to the application of federal law, Michigan declined to do so. *See* Administrative Record Part 1, R.16-1, Page ID#95-109.

On March 3, 2020, ATF issued a "PUBLIC SAFETY ADVISORY TO ALL MICHIGAN FEDERAL FIREARMS LICENSEES" ("Michigan PSA" or "PSA"), "rescinding" its 2006 Open Letter and stating that, going forward, Michigan CPLs no longer would be considered Brady alternates. *See* Exhibit B to Complaint ("Exhibit B"), R.1-5. The stated basis for ATF's decision was that CPLs were being issued to a subset of persons "without a determination by Michigan officials as to whether the applicant is prohibited under Federal law from possessing or transporting firearms." *Id.*, Page ID#33.

The facts giving rise to this case are simple and undisputed.[2] Plaintiffs are a law-abiding Michigan resident who is eligible to purchase and possess firearms, and a nonprofit organization, dedicated to protecting and preserving the right to keep and bear arms, which represents thousands of similarly situated gun owners in this district and statewide. In March of 2020, Plaintiff Roberts attempted to purchase a firearm from a federal firearms dealer using his Michigan CPL, but was refused by the dealer on the basis of ATF's Michigan PSA.

Proceedings Below

This litigation followed. In the district court below, Plaintiffs raised several arguments in support of their claims.[3]

First, Plaintiffs argued that the Michigan statute on its face qualifies under Section 922(t)(3). MCL 28.426(2)'s language unambiguously not only requires a full NICS check, but also requires state authorities to "determine" that a person "is not prohibited." This makes the Michigan language more than broad enough to encompass either party's interpretation of what is required of Michigan authorities

[2] *See* the parties' joint Statement of Undisputed Facts, Plaintiffs' MSJ, R.17, Page ID#411-413; Defendants' Cross-Motion, R.21, Page ID#447-449.

[3] Plaintiffs' Count 3 alleged a violation of the APA's notice and comment requirement, but Plaintiffs do not appeal on this issue, and thus do not include it in this Statement of the Case. Count 4 was dismissed by joint stipulation of the parties. *See* Joint Stipulation of Dismissal of Count Four Without Prejudice, R.19.

by federal law, even including the additional activities[4] ATF "interprets" Section 922(t)(3) to now require and wants the state to perform here. *See* Plaintiffs' MSJ, R.17, Page ID#420. Plaintiffs argued that any "interpretation" of state law by the MSP, or their practices issuing CPLs, is irrelevant when determining if the text of MCL 28.426(2) meets the requirements of Section 922(t)(3).

Rather, a court need only examine the text of the Michigan statute to determine that CPLs qualify as Brady alternates. According to Congress, the text of the state statute controls, not the opinions or practices of state officials. And in its 2006 letter acknowledging CPL eligibility, ATF admitted that the *text* of the Michigan statute qualifies under Section 922(t)(3).[5]

Second, Plaintiffs argued that the current practices of Michigan state authorities are sufficient for Section 922(t)(3) eligibility even if they are not performing additional activities mandated by ATF — *even if those additional*

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[4] These additional activities include "to *investigate* and *gather information outside the NICS system*," to "make legal determinations about the potentially disqualifying record," and to "create" and "add new prohibiting records into NICS" for future use. Plaintiffs' MSJ, R.17, Page ID#420, *cf*. Defendants' Cross-Motion, R.21, Page ID#459.

[5] Indeed, ATF argues that its interpretation of Michigan and federal law has not changed, which must means ATF continues to acknowledge that the text of Michigan law qualifies under Section 922(t)(3). Rather, ATF's complaint is with how the MSP has been implementing Michigan law.

activities are required by MCL 28.426(2) . Plaintiffs argued that, *even if* state law requires a conclusive "determination" a person "is not prohibited," these additional activities are nevertheless not required by Section 922(t)(3), which simply requires state officials to "verify" that information already "available" within the NICS system does not "indicate" ineligibility.

In other words, regardless of how the requirements of Michigan law are read, MSP actions are sufficient to satisfy the federal requirement, because they do not transfer a firearm to a person the NICS system rejects. The fact that the Michigan statute may go further than required by federal law does not empower ATF to demand the state enforce its own additional requirements, or commandeer state resources to make it happen.6

Third, Plaintiffs argued that ATF's Michigan PSA was arbitrary and capricious. Plaintiffs noted that, while ATF alleged a public safety crisis requiring it to take immediate action, the agency had provided no evidence that even one prohibited person has ever used a CPL to acquire a firearm. ECF #7 at 21. Additionally, Plaintiffs explained how ATF had been entirely uncooperative,

[6] Plaintiffs argued that these additional requirements by ATF commandeer local authorities to enforce federal law (especially ATF's demands to *create and add* new prohibiting records to NICS for *future* use by the FBI — something that has nothing to do with determining *current* eligibility for a CPL).

refusing the simple task of helping Michigan in the NICS process, making final determinations as to federal eligibility for "a mere 50 ... potentially disqualifying records." Plaintiffs' MSJ, R.17, Page ID#433. Rather than agree to help the state with a few dozen nuanced background checks, ATF took the nuclear option, nixing Section 922(t)(3) eligibility for many hundreds of thousands of law-abiding CPL holders across the state.

Fourth, Plaintiffs challenged the retrospective "corrective measures" demanded in a letter to the Michigan Attorney General, which ATF mandated must be fulfilled before it again would recognize *any* CPLs as Brady alternates. Plaintiffs' Combined Reply to Defendants' Brief in Opposition ("Reply"), R.23, Page ID#518-520. Plaintiffs noted that these "corrective measures" are not found anywhere in Section 922(t)(3) and, in fact, some of them do not relate in any way to eligibility for a CPL (such as requiring Michigan to refer criminal cases to ATF for prosecution). *Id.* By imposing these additional, atextual policy demands upon Michigan, Plaintiffs argued that ATF had violated the anti-commandeering and Tenth Amendment principles elucidated by the Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997). *Id.*, Page ID#522 n.5.

After the parties briefed their cross motions for summary judgment, the district court issued an opinion and order without argument on December 17, 2020,

denying Plaintiffs' Motion for Summary Judgment, granting Defendants' Motion for Summary Judgment, and dismissing Plaintiffs' Complaint. Order, R.25, Page ID#571.

The District Court's Decision

The district court determined, as a threshold matter, that deference to the agency's position was inappropriate under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), since this case involves statutory interpretation appearing in an ATF "public safety advisory" and thus "lack[s] the force of law." Order, R.25, Page ID#559-560. Rather, the court announced that it would "'look to the statute's text and design, including whether the regulation is consistent with the congressional purpose.'" *Id.*, Page ID#560.

First, the court determined ATF's position to be "consistent with the text, design, and purpose of the Brady Act," finding the phrase "the law of the State" as used in Section 922(t)(3) to include not only the state statute, but also "'a binding custom or practice of a community,' 'a rule of conduct or action prescribed . . . or formally recognized as binding or enforced by a controlling authority,' and 'the whole body of such customs, practices or rules.'" Order, R.25, Page ID#560-561.

Such an understanding, the court noted, "would seem to include the practices and interpretations of state officials charged with executing or implementing a

statute." *Id*., Page ID#561. While admitting that the state statute's text had not changed, the court noted that "Michigan's position changed" with respect to conducting follow-up investigations and determinations for NICS checks. *Id.*, Page ID#567. The district court did not speculate[7] as to the underlying source of MSP's policy change, noting only that the guidance to stop doing investigations and determinations was provided by "MSP legal counsel." *Id*., Page ID#554. Based on that, the court concluded that the Michigan statute should be understood according to the practices of the MSP in issuing CPLs.

Second, the court determined that the ATF PSA was "consistent with the ... purpose of the Brady Act," which is "'to ensure that individuals not authorized to possess firearms are unable to purchase them.'" Order, R.25, Page ID#560 (citing *Nat'l Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 133 (D.C. Cir. 2000)). According to the court, Section 922(t)(3) cannot be interpreted by reference to the text of the Michigan statute alone, because to do so would lead to "absurd result[s]" and "allow states to feign compliance with the Brady Act by enacting statutes that they had no intention of enforcing...." *Id.*, Page ID#562. Rather, the

[7] In contrast, Defendants below had speculated that the MSP change in course "*appeared* to be" and "*apparently*" and "*possibly*" was done in conjunction with the AG's office, which had recently changed hands. Reply, R.23, Page ID#525-526.

court concluded, statutory text is "part of the relevant 'law of the State,' though it is not the *only* such law." *Id.*, Page ID#563. The court rejected the authorities cited by Plaintiffs (Reply, R.23, Page ID#523), claiming that although other courts have used the approach advocated by Plaintiffs — looking only to the text of state law to determine "'the law of the State'" — those opinions did not foreclose the court from rummaging elsewhere. Reply, R.23, Page ID#523.

Third, the court concluded the challenged action was not "arbitrary and capricious." Order, R.25, Page ID#564. Discounting Plaintiffs' point that ATF had found no evidence that any prohibited person had ever used a Michigan CPL to obtain a firearm, the court nevertheless concluded that ATF "cannot excuse Michigan's noncompliance" under the statute. *Id.*, Page ID#566. Likewise, the court rejected the fact that federal authorities easily could have performed the tasks they demanded of Michigan (thereby resolving the federal/state dispute and sparing Michigan CPL holders), concluding that "federal authorities were not required to go the extra step." *Id.*

Finally, the court rejected Plaintiffs' contention that the challenged action violates the Tenth Amendment and the anti-commandeering principles from *Printz v. United States*, 521 U.S. 898 (1997) by making state officials "investigate and gather information," "make legal determinations" and — most importantly —

create and "add new prohibiting records into NICS" for future use by the FBI. Order, R.25, Page ID#563. The court reasoned that Section 922(t)(3) "merely offer[s] a path by which states could qualify permits" as Brady alternates, but does not force them to take any action. *Id*., Page ID#564. For similar reasons, the court approved of the atextual "corrective measures" demanded of Michigan before ATF would again agree to recognize CPLs as Brady alternates. *Id.*, Page ID#569. The court noted that it even would have approved of a requirement[8] that states must revoke certain *previously issued* permits, claiming that "[i]t seems quite unlikely that Congress expected states to allow convicted felons or other prohibited persons to keep their permits." *Id*., Page ID#562 n.19.

SUMMARY OF ARGUMENT

This case turns on whether M.C.L. § 28.426 qualifies as a "Brady alternate" pursuant to 18 U.S.C. Section 922(t)(3). That is a simple, straightforward legal inquiry, and requires this Court to analyze only the text of the two statutes, neither of which is unclear or ambiguous in any way.

Section 922(t)(3)(ii) requires that "the law of the State provides that such a permit is to be issued only after an authorized government official has verified that

[8] ATF has expressly disclaimed the authority under Section 922(t)(3) to require states to revoke their own previously issued permits. *See* Plaintiffs' MSJ, R.17, Page ID#437.

the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law...." M.C.L. § 28.426, in turn, "provides" for exactly this requiring that, prior to issuing a permit, the state police "has determined through the federal national instant criminal background check system that the applicant is not prohibited under federal law...." Indeed, the Michigan statute was written by the legislature in response to Section 922(t)(3), precisely to meet that federal standard.

Section 922(t)(3) looks only to whether "the law of the State [of Michigan] provides" for a certain requirement, which it obviously does. The local practices by Michigan authorities certainly are relevant to their compliance with *state* law, but that is solely the concern of state authorities, not the federal government. A state's compliance with its own laws is irrelevant for purposes of Section 922(t)(3) eligibility which, again, requires only an examination of the text of state law, not an investigation into the policies of state officials.

The court below, however, was not content with examining the statutory text alone. Rather, the court concluded that such an inquiry would not lead to a result which fulfills the "purpose" and "intent" of the Brady Act, which purportedly is *only* to prevent prohibited persons from obtaining firearms. Of course, as Plaintiffs pointed out, if Congress had intended such an airtight system,

it never would have created an exception in Section 922(t)(3), but instead would have required background checks *in every case*. The court, like ATF, seems to have assumed that the statute's text somehow fails to live up to Congress' purpose for enacting it. The court thus sanctioned ATF's rewriting of the text to better serve its perception of congressional intent, a function constitutionally prohibited to the executive and judicial branches.

The court also concluded that "the law of the State" of Michigan means something more than what the state legislature passed and the governor signed, and "would seem to include the practices and interpretations of state officials charged with executing or implementing a statute." On the contrary, this Court has made clear that, reliance on "practices and interpretations" by local officials cannot be used to "directly contradict the statute and ordinances."

According to the district court, looking only to the text of the Michigan statute to determine "the law of the State of Michigan" would lead to "absurd results," because it would allow legislatures to pass facially valid laws, and then not follow them. This is a dim view of the motives of state governments. In order to counter "absurd results," the court's decision transforms an informal opinion from an unelected and unaccountable state police lawyer into "the law of the State" of Michigan, in contravention of (i) the state statute's plain text, (ii) the formal

opinions of at least two state Attorneys General, (iii) and the expressly stated intent of the legislative branch.

In fact, when the Michigan legislature adopted the current statute, it did so "to align the state statute with federal law," and yet the court below went out of its way to find that the two statutes in fact are not aligned. This begs the question as to who is in charge of "the law of the State" of Michigan, if clear statutory text can be overridden by a state police "practice" to not follow the law. Under this stricture, the Michigan legislature is powerless to trigger Section 922(t)(3) eligibility for state permits, or to override executive annulment of state law.

In a case involving a similar situation to here, currently pending in district court in Alabama, the government advanced to argument that **"Alabama law does not mean what its text says**." This bizarre statement should come as quite a shock to lawyers and judges alike, who apparently have been operating for centuries under the mistaken assumption that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). If that is no longer the case, then this Court has about 250 opinions to overrule.

Of course, the simpler option would be to conclude that the Michigan statute obviously means what it clearly says, and thus that it requires of state officials

exactly what is, in turn, required of it by Section 922(t)(3). In spite of the "practices and interpretations" by the Michigan state police, Michigan CPLs qualify as Brady alternates. This Court should restore the ability of hundreds of thousands of law-abiding gun owners across the states to use their permits to acquire firearms as Congress intended.

STANDARD OF REVIEW

For each of the issues below, the applicable standard of review is *de novo*. The standard of review for summary judgment is *de novo*. *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 490 (6th Cir.2002); *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). The standard of review for an issue of statutory interpretation is *de novo*. *United States v. Miller*, 734 F.3d 530, 539 (6th Cir. 2013); *United States v. White*, 846 F.3d 170, 174 (6th Cir. 2017)

ARGUMENT

In order for a state permit to be considered a Brady alternate, 18 U.S.C. Section 922(t)(3) requires, in pertinent part, that "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...." As

the district court noted, ATF regulations require that "'the information available to such official includes the NICS.'"9 Order, R.25, Page ID#549.

Likewise, as the court noted, "[i]n 2005, Michigan added a NICS check requirement of its own through the enactment of M.C.L. § 28.426." Order, R.25, Page ID#551. Indeed, that state statute requires that, prior to the issuance of a CPL, an official "'has determined through the federal national instant criminal background check system that the applicant is not prohibited under federal law....'" As the court noted, the purpose of this change was "[t]o align the state statute ... with [] federal law." *Id.*, Page ID#552. Thus, both federal regulation and state law require a NICS check prior to the issuance of a CPL.

Plaintiffs, Defendants, and the court below all agreed that the Michigan statute means what it says — it "requires MSP to conduct a NICS background check and determine" eligibility. Order, R.25, Page ID#552. *See* Defendants' Cross-Motion, R.21, Page ID#459. Moreover, as the district court below noted, Michigan authorities within the executive branch are in "'non-compliance with the

[9] For purposes of this case, Plaintiffs have not disputed that "the information available" means a NICS check, because Michigan law requires authorities to conduct a NICS check. *See* Reply, R.23, Page ID#516; Plaintiffs' MSJ, R.17, Page ID#419 n.4.

[Michigan] background check requirement,'" because "MSP [is] not making determinations consistent with M.C.L. § 28.426."10 Order, R.25, Page ID#553.

It is irrelevant whether MSP officials are applying state law to the satisfaction of ATF, because federal law looks only to what the law of the state (*i.e.*, laws passed by the legislative branch) requires, not whether executive branch officials follow those requirements in every instance. *See* Plaintiffs' MSJ, R.17, Page ID#419, 438.

I. THE COURT BELOW ERRED BY LOOKING AT THE "PRACTICES AND INTERPRETATIONS OF STATE OFFICIALS" TO OVERRIDE THE UNAMBIGUOUS TEXT OF MCL § 28.426.

Below, Plaintiffs argued that 18 U.S.C. Section 922(t)(3)'s focus on "the law of the State" means a court need look only to the text of the Michigan statute to determine if it meets Section 922(t)(3)'s requirements, and "not to the way the

[10] Plaintiffs concede for purposes of Argument I that MSP is not following Michigan law, as interpreted by ATF to require a definitive "determination" by state authorities that a person "**is not prohibited**" from having a CPL. Regardless, MSP's actions nevertheless are sufficient to satisfy the requirements of Section 922(t)(3), which requires only that Michigan officials "verif[y]" that the "information available" within NICS "**does not indicate**" a prohibiting record. As Plaintiffs have explained, MSP's actions are fully satisfy the federal requirement. *See* Plaintiffs' MSJ, R.17, Page ID#416.

state statute is being administered."[11] Plaintiffs' MSJ, R.17, Page ID#427-432; Order, R.25, Page ID#559. This approach requires a simple and straightforward analysis.

18 U.S.C. Section 922(t)(3) is unambiguous in the requirement that it creates, and MCL § 28.426 is unambiguous in that it meets that requirement, as ATF has for years agreed. In fact, MCL § 28.426 arguably goes even further than Section 922(t)(3) requires. Specifically, while Section 922(t)(3) requires only that a state official "verif[y]" that "information *available*" does not "*indicate*" a prohibition, MCL § 28.426 requires officials to conclusively "*determine*[] ... that the applicant *is not prohibited*...." Emphasis added.

Thus, *arguendo*, even if the court below was correct in its interpretation of Section 922(t)(3) — that Michigan officials must go beyond "the information available" in NICS to conduct follow-up investigations and make legal

[11] Indeed, in a decision affirmed by the Tenth Circuit, a district court in *Wyoming ex rel. Crank v. United States*, 2007 U.S. Dist. LEXIS 107992 (D. Wy. 2007) noted that "[t]he relevant 'law of the state' [] is Wyoming's CCW permitting statute." *See Wyoming ex rel. Crank* at *41. The district court below rejected Plaintiffs' reliance on this and other authorities which looked to state statutes to determine "the law of the State," because the particular "interpretive issue raised here" was not before the Wyoming court, and because that court did not explicitly conclude that "'the law of the State' exclusively means the language of the state statutory provision alone." Order, R.25, Page ID#563.

determinations about ambiguous records they uncover[12] — then MCL § 28.426 more than covers this duty by requiring a definitive determination that a person "is not prohibited." In other words, whether Section 922(t)(3) is read narrowly (as Plaintiffs read it) or broadly (as the lower court read it), MCL § 28.426 qualifies either way.

The government, as it must, admits that the text of Michigan law *on its face* meets the requirements of Section 922(t)(3). Indeed, that was ATF's conclusion in its 2006 Open Letter. However, the government now curiously argues that "Michigan law *has* changed ... through the interpretation made by Michigan legal counsel...." Defendants' Cross-Motion, R.21, Page ID#469. In other words, according to the government, *but for* the *application* of MCL § 28.426 pursuant to the legal view of a state attorney as to how the statute operates, CPLs still would qualify under Section 922(t)(3).

The district court rejected Plaintiffs' "interpretation [as] neither textually nor substantively sound" because "'the law of the State' does not refer to statutory law alone." Order, R.25, Page ID#561. Rather, the court claimed that "M.C.L. § 28.428 is part of the relevant 'law of the State,' though it is not the *only* such law."

[12] *See* Order, R.25, Page ID#560-561 (the court below never expressly stated what "the text" of Section 922(t)(3) requires, but it did adopt ATF's position that "state officials may have to do more than simply run a NICS check.").

Id., Page ID#563 (emphasis original). According to the court, it was permissible to determine "the law of the State" of Michigan by looking *beyond the statutory text* to "a binding custom or practice," a "rule of conduct or action prescribed ... or formally recognized as binding," or "the whole body of such customs, practices or rules." *Id.*, Page ID#561 (quoting various dictionary definitions).

The court thus concluded that the "law of the State" of Michigan "would seem to include the practices and interpretations of state officials charged with executing or implementing a statute." Order, R.25, Page ID#561. And, "given recent changes to Michigan's CPL process" (*Id.*, Page ID#556) whereby MSP will no longer "mak[e] determinations consistent with M.C.L. § 28.426" (*Id.*, Page ID#553), the court concluded that Michigan state law had "changed" and that ATF's PSA was justified. *Id.*, Page ID#564.

There are at least four problems with the court's use of MSP "practices and interpretations" to determine "the law of the State" of Michigan.

A. MCL § 28.426 Is Not Ambiguous.

First, while it may be appropriate to look at rules, practices, or customs to inform as to the meaning of an ambiguous state statute, the court below never

found MCL § 28.426 to be ambiguous.13 Actually, the court noted just the opposite, explaining that MCL § 28.426 clearly "requires MSP to conduct a NICS background check and determine" eligibility. Order, R.25, Page ID#552, 567. Since MCL § 28.426 is not ambiguous, there was no justification for the court to look at rules, practices, or customs to determine "the law of the State" of Michigan.14

In reality, the lower court never relied on state practices to determine the meaning of MCL § 28.426. In fact, as the court explained, MSP's current practices show "'non-compliance'" and are "not ... consistent with M.C.L. § 28.426."15 Order, R.25, Page ID#553. Rather, the court relied on MSP "practices" to elevate those practices over the statutory text itself.

This Court has previously rejected such an approach. In *Puckett v. Lexington-Fayette Urban County Gov't*, 566 Fed. Appx. 462 (6th Cir. 2014), this

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[13] As the court pointed out, its analysis was not grounded in *Chevron* deference justified by statutory ambiguity. Order, R.25, Page ID#560.

[14] *See, e.g., Beacon Journal Publ. Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 601 (6th Cir. 1997) ("Arbitrators commonly utilize past practice or industry customs to interpret the meaning of ambiguous, or even general, terms and clauses in a contract"); *cf. Independence Township v. Reliance Bldg. Co.*, 175 Mich. App. 48, 54 (1st Dist. Ct. App. 1989) ("where a contract is not ambiguous, evidence of custom and practice in an industry is not admissible.").

[15] *See also* Order, R.25, Page ID#556 (calling MSP's actions "violations" of state law).

Court affirmed a district court's rejection of the plaintiffs' arguments as "unavailing because the representations and *custom and practice* relied on by Plaintiffs *directly contradict the statute* and ordinances." (Emphasis added.) *See also Sundance Assocs. v. Reno*, 139 F.3d 804, 810 (10th Cir. 1998) ("we cannot overlook an interpretation that flies in the face of the statutory language."). In other words, it was plain error for the court below to conclude that MCL § 28.426 means one thing, but then to use the "practices and interpretations of state officials" to conclude that MCL § 28.426 means something else entirely.[16]

B. The Court Elevated "MSP Legal Counsel" Advice Over Binding Guidance from Two Michigan Attorneys General.

Second, while the district courts relied on dictionary definitions discussing use of "*binding*" state customs and practices (Order, R.25, Page ID#561 (emphasis

[16] In *Lee v. DOJ*, 5:20-cv-00632 (N.D. Al.), ATF argued that if a *single* Alabama sheriff *flatly refuses to follow* the state statute, the court should find that "**Alabama law does not mean what its text says**." Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, ECF #26 at 23 (emphasis added). In that case, the government faulted Plaintiffs for "look[ing] exclusively to the text of Alabama law" to determine its meaning, "while ignoring the evidence of the meaning of Alabama law — the actual practice of Alabama sheriffs...." *Id.* at 2. This was the essence of the court's conclusion in this case — that because the Michigan statute at issue is not perfectly implemented, **MCL § 28.426 does not mean what its text says**. On the contrary, the Supreme Court has explained that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

added)) to determine the contours of "the law of the State," there was nothing binding about what the court actually relied on. Instead, the court relied on an *informal* opinion provided by "MSP legal counsel" (*Id.*, Page ID#554), an opinion which had "changed course" from prior *official* guidance (*Id.*, Page ID#555) and which was admittedly temporary in nature, with MSP "*awaiting* further guidance" and "*waiting on an opinion from the new AG* as to whether the new AG agrees with the process." *Id.*, Page ID#554-556 (emphasis added).

Even after citing a Michigan Court of Appeals decision[17] for the proposition that Michigan Attorney General opinions are "binding on state agencies and officers," (Order, R.25, Page ID#561-562) the court disregarded the views of two Michigan Attorneys General as to what the state statute means, including a 2018 "opinion of the Michigan Attorney General" which advised "that the MSP make and enter determinations...." *Id.*, Page ID#555; *see also* Administrative Record Part 1, R.16-1, Page ID#110; Defendants' Cross-Motion, R.21, Page ID#460. Likewise, a 2006 AG opinion "'stipulated' that Michigan CPL issuance would entail ... [a] determination" of eligibility. Order, R.25, Page ID#552, 567. In other words, **two** different Michigan Attorneys General have spoken as to this precise

[17] *Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen.*, 370 N.W.2d 328 (Mich. Ct. App. 1985).

issue and **twice** have adopted the interpretation of the Michigan statute that ATF and the lower court believe is required to satisfy Section 922(t)(3).[18] Yet the court ignored two examples of "binding" guidance, and instead looked to informal "MSP legal counsel" advice as overriding both.

C. The Court Ignored Other Contrary Evidence of the Meaning of MCL § 28.426.

Third, while the district court stated that it should rely on evidence of "practices and interpretations of state officials" to determine the meaning of state law, the court looked only to what *some* state officials thought, *ignoring other* state officials. Indeed, the court acknowledged that issuance of CPLs in Michigan operates differently than for issuance of "licenses to purchase" a pistol ("LTP"),[19] with "the Michigan official charged with training local law enforcement" on issuance of LTPs "'contin[uing] ... to conduct research according to federal law ...' even as MSP followed a different protocol." Order, R.25, Page ID#556. The court

[18] Neither the agency nor the court pointed to any evidence that either of these existing AG opinions has been overruled or revoked, the court admitting that MSP's recent change in policy was made "albeit, with rather vague reasoning," and that MSP was "awaiting further guidance" and "waiting on an opinion from the new AG as to whether the new AG agrees with the process." Order, R.25, Page ID#554-556.

[19] A Michigan LTP enables a person to purchase a handgun, whereas a CPL enables its holder to both purchase and carry a handgun. *See* Order, R.25, PageID#549-551.

did not offer a reason for this difference, noting that "[i]t remains unclear why exactly Michigan officials would offer different guidance for substantially identical duties." *Id.*, Page ID#556 n.13. Likewise, the court provided no justification as to why it chose to rely only on the practices of MSP in issuing CPLs (which do not strictly follow the state statute) as being "the law of the State," while ignoring the state's practices in issuing LTPs (which do follow the statute).

D. The Court Permitted MSP Legal Counsel to Usurp Legislative and Executive Authority.

Fourth, by permitting an informal MSP legal counsel opinion to define the contours of "the law of the state" of Michigan, the lower court permitted bureaucrats within the executive branch of Michigan government to override the statute enacted by the legislative branch. *See* Reply, R.23, Page ID#525. The government advanced that position below, claiming that "Michigan officials have reinterpreted state law ... State law has thereby changed." Defendants' Cross-Motion, R.21, Page ID#455. On the contrary, as Plaintiffs argued, unelected bureaucrats within MSP do not have (i) the powers reserved to the legislature to enact statutes, (ii) the power reserved to the courts to interpret and apply the law, or (iii) the power reserved to elected executive branch officials to enforce the law.

Reply, R.23, Page ID#525.[20] Rather, Article IV, Section 1 of the Constitution of Michigan states that "the legislative power of the State of Michigan is vested in a senate and a house of representatives" — not in "MSP legal counsel." Article III, Section 2 provides that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Not only does an attorney within the MSP have no legislative authority, but his opinion is also not "the law of the State" because it is not law at all.

Not only did the Michigan legislature pass MCL § 28.426 which goes above and beyond the requirements in Section 922(t)(3), but also the legislature's stated intent for enactment was "[t]o align the state statute ... with [] federal law."[21] Order, R.25, Page ID#552. But the court's decision below, concluding that "the law of the State" of Michigan does not comport with Section 922(t)(3) because of

[20] *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

[21] Ordinarily, a court "may resort to a review of congressional intent or legislative history only when the language of the statute is not clear." *Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002). Of course, in this case both the statute and the legislative intent are in harmony.

its application by state officials, permitted an unelected MSP lawyer to thwart both the statutory text and the expressed intent of the legislature.

E. Conclusion.

In order to reach its holding that "the law of the State" of Michigan is different from the text of MCL § 28.426 and thus does not meet the requirements of Section 922(t)(3), the district court ignored:

> (i) the plain text of MCL § 28.426;
> (ii) the opinions of two state Attorneys General;
> (iii) the practices and customs underlying the issuance of LTPs;
> (iv) the stated intent of the legislative branch when it enacted MCL § 28.426;
> (v) the Michigan constitutional structure under which the MSP has no legislative authority and certainly no authority to make "the law of the State" of Michigan; and
> (vi) persuasive authorities from other courts.[22]

II. THE COURT BELOW USED THE PURPORTED "STRUCTURE" AND "PURPOSE" OF THE BRADY ACT TO OVERRIDE THE TEXT OF THE BRADY ACT.

The court below relied on a 2013 decision of this Court for the proposition that courts are to "'look to the statute's text and design, including whether the regulation is consistent with the congressional purpose.'" Order, R.25, Page ID#560 (*quoting S. Rehab. Grp., P.L.L.C. v. Sec'y of Health & Human Servs.*, 732 F.3d 670, 685 (6th Cir. 2013). *See also* Defendants' Cross-Motion, R.21, Page

[22] *See* Reply, R.23, Page ID#523.

ID#466; Reply, R.23, Page ID#530. The Brady Act's "purpose," as the court explained it, is "'to ensure that individuals not authorized to possess firearms are unable to purchase them.'" Order, R.25, Page ID#560.

S. Rehab Group does not apply here, as it involved the application of *Chevron* deference and the interpretation of *ambiguous* terms in a statute. On the other hand, this Court has explained that if, from the text, "the court can discern 'the unambiguously expressed intent of Congress,' then that construction of the statute controls." *Atrium Med. Ctr. v. United States HHS*, 766 F.3d 560, 566 (6th Cir. 2014). Indeed, Plaintiffs know of no case where this Court has ever approved of using a perceived "purpose" of a statute as justification for departing from the clear text of that statute. On the contrary, recent pronouncements from this Court are that when "the plain text of the statutes provides the answer, we need not examine the structure," and that "'our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.'" *Martinez v. Larose*, 968 F.3d 555, 561 n.5 (6th Cir. 2020) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)).[23]

[23] Similarly, the Eleventh Circuit has made clear that it will not "interpret a statute contrary to the plain meaning of its words if doing so would, in the court's view, better further the purpose it thinks Congress had in mind.... As the Supreme Court recently reminded us, 'law depends on respect for language.' ... We interpret

Congress does not simply emote broad and generalized purposes, leaving it to bureaucrats to divine the specifics and fill in the blanks. Rather, Congress enacts statutes that are to be interpreted according to their text. Moreover, "the purpose [of a statute] must be derived from the text, not from extrinsic sources such as legislative history *or an assumption about the legal drafter's desires*." A. Scalia and B. Garner, Reading Law, *Thompson West* (2012) at 56 (emphasis added). Moreover, "purpose ... cannot be used to contradict text or to supplement it." *Id.* at 57. On the contrary, "the limitations of a text — what a text chooses not to do — are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose." *Id.* at 57-58.

Believing that the so-called "purpose" of a congressional act is a legitimate starting point for statutory interpretation (even when facing unambiguous text), the court below never appeared to examine the text itself, but immediately proceeded

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and apply statutes, not congressional purposes. ... ('[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.') ... In any event, '[t]he best evidence of that [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President.'" *Gordon v. Novastar Mortg., Inc. (In re Hedrick)*, 524 F.3d 1175, 1187-1188 (11th Cir. 2008) (emphasis added) (internal citations omitted).

to find that ATF's interpretation was "consistent with the text, design, and purpose of the Brady Act, and [] therefore persuasive." Order, R.25, Page ID#560. In doing so, the lower court used the ATF's view of the "purpose," "structure," "design," and "intent" of the Brady Act (i) to make Section 922(t)(3) mean something that it clearly does not say; (ii) to sanction ATF's atextual "corrective measures" that find no basis in the statute; and (iii) in dicta to approve of the adoption of an atextual requirement that even ATF has disclaimed it has the authority to require.

A. The Court Used the Brady Act's "Purpose" to Rewrite Its Text.

First, the district court used the purported "purpose" of the Brady Act to alter the meaning of Section 922(t)(3). In its opinion, the court adopted ATF's position that "§ 922(t)(3) requires MSP to determine whether ... a CPL applicant is prohibited...." Order, R.25, Page ID#559. The court claimed that "[t]he text requires state officials to 'verify' that the information available does not indicate that possession of a firearm by the permit holder would be unlawful." *Id.*, Page ID#560.

On the contrary, the text of Section 922(t)(3) does not *require state officials* to do anything. Rather, the text of Section 922(t)(3) *requires state law to require* state officials to do something. This is a subtle yet critical distinction. Section

922(t)(3) requires as a condition of eligibility that "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" a prohibition.

The lower court claimed that the "purpose and design of the Brady Act support this interpretation," because otherwise "absurd result[s]" would occur, whereby "states [could] feign compliance with the Brady Act by enacting statutes that they had no intention of enforcing.... Congress could not have intended such a helpless regime." Order, R.25, Page ID#562. In other words, the court's conclusion was that it could not interpret Section 922(t)(3) as written, because to do so might lead to a result that the court did not believe Congress would have "intended."

Rather, the court chose to "interpret" Section 922(t)(3) to mean something that it does not say, and to require something that it does not require — in order to effect the "result" that the court believed appropriate. On the contrary, courts are to interpret statutes as written, leaving it to Congress to change the statute if it does not lead to the desired results. *See Puerto Rico v. Franklin Cal. Tax-Free Trust.*, 136 S. Ct. 1938, 1949 (2016) ("our constitutional structure does not permit [the Courts] to 'rewrite the statute that Congress has enacted.'").

B. The Opinion Below Allowed ATF to Pursue the Alleged "Purpose" of the Statute Absent any Statutory Authority.

Second, the court below used the alleged "purpose" of the Brady Act to uphold "the four 'corrective measures' that BATF outlined in a letter to Michigan Attorney General Dana Nessel."[24] Order, R.25, Page ID#568. Plaintiffs had argued "that these corrective measures require Michigan officials to take actions that exceed the scope of § 922(t)(3) and thus commandeer Michigan resources." *Id.*, Page ID#568. The court rejected these arguments, finding that "[i]t would seem *well within BATF's discretion* to ensure that such CPLs are not possessed by prohibited persons...." *Id.*, Page ID#569 (emphasis added).

Once again, however, the question is not whether ATF's actions, considered holistically, are consistent with the perceived "purpose" of the Brady Act — to keep prohibited persons from obtaining firearms. Rather, the question is whether Section 922(t)(3) grants ATF the authority to demand "corrective measures." It

[24] The court noted that Plaintiffs had not included in their Complaint a reference to this "separate document that is not referenced nor included [sic] in the PSA," but nevertheless proceeded to rule on the merits of Plaintiffs' claims. Order, R.25, Page ID#569. Yet that document, ATF's letter to the Attorney General, was not made public until it was included as part of the administrative record on which ATF claims to have relied. Moreover, this letter lays out the agency's justifications for the PSA, which rejected Michigan CPLs as a Brady alternate. So ATF's letter certainly would seem to be part of the "agency action" challenged here. Either way, Plaintiffs would be happy to amend their Complaint to explicitly reference this document.

most certainly does not. As noted in Section I above, Section 922(t)(3) does not require state officials to *do* anything; rather, it looks only to what state law *requires of* state officials. On the other hand, each of ATF's "corrective measures" requires specific and direct action by Michigan officials:

(1) requiring that the state "ensure" NICS checks (including additional research and determinations) "are" conducted;
(2) requiring that NICS checks "be completed ... on all individuals previously issued CPLs;"
(3) requiring the state to "revoke[]" CPLs "previously issued" to prohibited persons; and
(4) requiring the state to "refer[] cases" of prohibited persons in possession "to the local ATF field office" for prosecution.[25]

Each of these "corrective measures" requires Michigan authorities *to do something*. *None* of them involves what "the law of the State provides." And what's more, the second, third, and fourth "corrective measures" involve *retroactive* tasks that have nothing to do with the eligibility for (or Brady alternate status of) CPLs MSP will issue in the future.

[25] Order, R.25, Page ID#568. Because the FBI audit found 50 potentially prohibited individuals with potential misdemeanor crimes of domestic violence, the government would (or should) already know these individuals' identities and could, if it wanted, perform the investigations and determinations it has sloughed off onto Michigan here. Indeed, if the public safety justification for the PSA were as significant as ATF alleges, one would think that the agency would have been eager to follow up on these leads.

Certainly, the court below believed that ATF's "corrective measures" were good ideas, in order to fulfill the "purpose" of keeping guns out of the hands of prohibited persons. But as ATF noted in 1998, "'rationality is not enough. [ATF] need[s] authority.'" Administrative Record Part 2, R.16-2, Page ID#260 n.2. Nothing in Section 922(t)(3) provides ATF with that authority and, thus, the district court's decision to uphold the agency's "corrective measures" on the basis of their perceived merit was clearly erroneous.

C. The Court's Ruling Would Permit ATF to Make Any Demands Which Fulfill the Alleged "Purpose" of the Brady Act.

Third, the district court used the presumed "purpose" of the Brady Act to opine that ATF has an expansive authority *that the agency has expressly disclaimed*. Below, Plaintiffs argued that if the *only* "purpose" of the Brady Act was to create an "airtight" system and prevent prohibited persons from obtaining firearms, then Congress would never have enacted an exception in Section 922(t)(3), which allows state permits to be used *for five years* without a NICS check. *See* Reply, R.23, Page ID#530. As Plaintiffs noted, Congress obviously was aware it would be entirely possible for a person to become prohibited subsequent to obtaining a state permit, but nevertheless continue to use that permit

(potentially for years) to obtain firearms without a NICS check.[26] *Id.*, Page ID#530.

In response to Plaintiffs' argument, the court doubled down. Rather than acknowledge that the Brady Act likely involved a compromise between competing "interests" and "purposes," the court instead opines that ATF should be allowed to require states — as a condition of Section 922(t)(3) eligibility — to revoke previously issued permits if a person later becomes prohibited. Order, R.25, Page ID#562 n.19. The court claims that "[i]t seems quite unlikely that Congress *expected* states to allow convicted felons or other prohibited persons to keep their permits," and that ATF is "not require[d] to ignore the *intent* of Congress...." *Id.*, Page ID#562 n.19 (emphasis added).

But as Plaintiffs noted below, *not even ATF subscribes to such an expansive view of its power*. Plaintiffs' MSJ, R.37, Page ID#437. Rather, a 1998 ATF memorandum addressed this exact proposal to require states to adopt a "'mechanism designed to identify and revoke permits that have been issued to persons who become subsequently disqualified.'" Administrative Record Part 2, R.16-2, Page ID#257-258. However, ATF concluded that "[t]he condition

[26] Michigan law has a revocation procedure if a CPL holder becomes prohibited (MCL § 28.428), but some states do not.

proposed ... is *not found in the law*." *Id.*, Page ID#256 (emphasis added). Indeed, while ATF acknowledged that "[t]here may be rational policy reasons" to rewrite Section 922(t)(3) to impose additional requirements on states, "'rationality is not enough. [ATF] need[s] authority.'" Administrative Record Part 2, R.16-2, Page ID#260 n. 2. ATF continued, the alleged problem "appears [to be] an inevitable result of the law, and not something that ATF can address through the regulations." *Id.*, Page ID#262.

In its fidelity to the perceived congressional "purpose" in the Brady Act, the court below abandoned all pretense that its decision was based in any way on the text of Section 922(t)(3). Rather, the court concluded that ATF has broad authority to take virtually any action to keep prohibited persons from obtaining firearms, rejecting even the agency's position that it is bound by the statutory text. This was clear error.

CONCLUSION

For the reasons stated above, the district court's decision should be reversed, and this Court should declare that Michigan CPLs qualify as Brady alternates pursuant to 18 U.S.C. Section 922(t)(3).

Respectfully submitted,

/s/ Robert J. Olson

ROBERT J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON
HERBERT W. TITUS
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

Counsel for Appellants
*Attorney of Record

KERRY L. MORGAN
PENTIUK, COUVREUR & KOBILJAK, P.C.
2915 Biddle Avenue, Suite 200
Wyandotte, Michigan 48192
(734) 281-7100

CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief for Appellants complies with the type-volume limitation of Rule 32(a)(7)(B)(i), Federal Rules of Appellate Procedure, because this brief contains 8390 words, excluding the parts of the brief exempted by Rule 32(f).

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) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ Robert J. Olson
Robert J. Olson
Counsel for Appellants

Dated: March 22, 2021

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief for Appellants was made, this 22nd day of March 2021, by the Court's Case Management/Electronic Case Files system upon all parties or their counsel of record.

/s/ Robert J. Olson
Robert J. Olson
Counsel for Appellants

ADDENDUM
DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

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