No. 25-

IN THE

Supreme Court of the United States

SCOT VAN OUDENHOVEN,

Petitioner,

v.

WISCONSIN DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the word "expunged" in 18 U.S.C. § 921(a)(33)(B)(ii) apply to all expungements under state law, or does an expungement under state law have to completely undo the effects of a conviction?

LIST OF PARTIES

Scot Van Oudenhoven, Petitioner

Wisconsin Department of Justice, Respondent

LIST OF RELATED CASES

- *Van Oudenhoven v. Wisconsin Department of Justice,* No. 2023AP70-FT, Supreme Court of Wisconsin. Decided June 24, 2025.

- *Van Oudenhoven v. Wisconsin Department of Justice,* No. 2023AP70-FT, Wisconsin Court of Appeals. Judgment entered June 4, 2024.

- *Van Oudenhoven v. Wisconsin Department of Justice,* No. 2022CV580. Circuit Court of Winnebago County, Wisconsin. Judgment entered January 6, 2023.

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OPINIONS BELOW

The Supreme Court of Wisconsin initially granted review of this case, but after oral argument issued a *per curiam* decision dismissing the review as improvidently granted. There was a concurring opinion by three of seven justices and two dissenting opinions by (a combination of) three of seven justices. The case is published as *Van Oudenhoven v. Wis. DOJ,* 2025 WI 25, 416 Wis.2d 547, 21 N.W.3d 742 (S.Ct. 2025). The opinions can be found at Appendix A, pages 1a-17a.

The opinion of the Wisconsin Court of Appeals has been published as *Van Oudenhoven v. Wis. DOJ,* 2024 WI APP 38, 413 Wis.2d 15, 10 N.W.3d 402 (Ct.App. 2024). The opinion can be found at Appendix B, pages 18a-44a.

The opinion of the Circuit Court of Winnebago County, Wisconsin has not been published. The opinion can be found at Appendix C, pages 45a48a.

STATEMENT ON JURISDICTION

Petitioner Scot Van Oudenhoven commenced this action pursuant to Wis.Stat. § 226.52, to challenge the denial by Respondent Wisconsin Department of Justice ("WDOJ") of the transfer of a handgun to Van Oudenhoven. WDOJ denied the transfer on the grounds that Van Oudenhoven had been convicted in 1994 of a misdemeanor crime of domestic violence, but his conviction was expunged in 2019. 18 U.S.C. § 921(33)(B)(ii) provides that a person is not considered to be convicted of an offense if the conviction has been expunged.

The Winnebago County, Wisconsin Circuit Court ruled against Van Oudenhoven and he timely appealed to the Wisconsin Court of Appeals, which affirmed. The Wisconsin Supreme Court initially granted review but on June 24, 2025, dismissed the case as improvidently granted. On August 29, 2025, Justice Barrett extended the time to file a petition for certiorari to November 21, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

FEDERAL STATUTE INVOLVED

This case involves the interpretation of 18 U.S.C. § 921(33)(B)(ii), which states, "A person shall not be considered to be convicted of [a misdemeanor crime of domestic violence] for the purposes of this chapter if the conviction has been expunged…."

PROCEEDINGS BELOW AND STATEMENT OF FACTS

On or about May 28, 2022, Van Oudenhoven attempted to purchase a handgun. The transfer of the handgun to Van Oudenhoven was denied by the WDOJ Crime Information Bureau Firearms Unit. Van Oudenhoven requested a review of the denial with the WDOJ Crime Information Bureau Firearms Unit. On June 22, 2022, the Deputy Director of the Unit sustained the denial. Van Oudenhoven administratively appealed the review. On August 1, 2022, the Administrator of the WDOJ Division of Law Enforcement Services affirmed the review. The stated reason for the denial and affirmances was that Van Oudenhoven had been convicted of a misdemeanor crime of domestic violence (as defined in federal law) and was therefore prohibited under 18 U.S.C. § 922(g)(9) from possessing a firearm.

Van Oudenhoven petitioned the circuit court for relief using established state law procedures. The circuit court affirmed, finding that the word "expunged" under federal law requires that a conviction be completely undone. The Wisconsin Court of Appeals affirmed and the Supreme Court of Wisconsin ultimately dismissed its review as improvidently granted.

Van Oudenhoven was convicted of battery in 1994 in Calumet County, Wisconsin Circuit Court, case # 1994CM113. The victim of the battery was the mother of Van Oudenhoven's child. On May 2, 2019, the Circuit Court of Calumet County entered an order expunging Van Oudenhoven's 1994 conviction.

ARGUMENT FOR GRANTING PETITION

I. The Decision of the Wisconsin Court of Appeals is Inconsistent with This Court's Prior Rulings

A person desiring to purchase a handgun in Wisconsin generally must undergo a background check conducted by the WDOJ. See Wis.Stat. § 175.35 and JUS 10.06. Pursuant to Wis.Stat. § 175.35(2g)(c), the WDOJ is to apply the criteria for eligibility to possess firearms listed in Wis.Stat. § 941.29. The WDOJ then "approves" or "disapproves" of the transfer of the firearm. In the present case, the WDOJ disapproved of Van Oudenhoven's attempt to purchase a handgun based on its conclusion that Van Oudenhoven has been convicted of a misdemeanor crime of domestic violence ("MCDV").

18 U.S.C. § 922(g)(9) generally prohibits possession of firearms by a person convicted of a MCDV. Van

Oudenhoven assumes arguendo that his 1994 conviction would count as a MCDV under federal law were it not for the expungement. The effect of the expungement is the crux of this case.

18 U.S.C. § 921(a)(33)(B)(ii) provides:

> A person shall not be considered to have been convicted of [a MCDV] for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Van Oudenhoven's expungement plainly states that Van Oudenhoven filed a Petition to expunge his conviction, and the Court granted the Petition and ordered, "The clerk is ordered to expunge the court's record of the conviction." There is no mention in the expungement regarding Van Oudenhoven's right (or lack thereof) to ship, transport, possess, or receive firearms. Clearly, Van Oudenhoven's conviction has been expunged. The WDOJ, however, takes the position (and the Wisconsin Court of Appeals agreed) that Van Oudenhoven's expungement does not count as an expungement for the purposes of 18 U.S.C. § 921(a)(33)(B)(ii).

Interpretation of a statute both begins with the statutory text and ends there as well if the text is

unambiguous. *Ohio Adjutant General's Dep't v.FLRA,* 598 U.S. 449, 465 (2023).

Congress did not define what it meant by the word "expunged." This Court, however, has analyzed the history of the exemption language and has discussed the meaning of the terms. In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, (1983), the Court considered the effect of a state conviction expungement on the federal felon in possession of a firearm statute (18 U.S.C. § 922(g)(1)). This was before the enactment of the exemptions in 18 U.S.C. § 921(a)(20) and (a)(33). *Dickerson* ruled that an expungement did not remove the federal prohibition on firearm possession, noting, "expunction under state law does not alter the historical fact of the conviction…." and "expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime…." 460 U.S. at 115. *Dickerson* went on to observe that expungement statutes in the states vary widely in their scope and effects. 460 U.S. at 121 ("Over half the states have enacted one or more statutes that may be classified as expunction provisions that attempt to conceal prior convictions or to remove some of their collateral or residual effects. These statutes differ, however, in almost every particular…. The statutes also differ in their actual effect.")

In response to *Dickerson*, Congress implemented the exception in 18 U.S.C. § 921(a)(20) (the "felon in possession" definition). *Logan v. United States*, 552 U.S. 23, 35 (2007), citing *McGrath v. United States*, 60F.3d 1005, 1008 (2d Cir. 1995) cert. denied, 1996 U.S. LEXIS 1074. Ten years later, Congress adopted the similarly-worded exemption at issue in the present case (found in 18 U.S.C. § 921(a)

(33)(B)(ii)). *Logan,* 552 U.S. at 36. In *Logan*, the Court noted, "Congress' decision to have restoration triggered by events governed by state law insured anomalous results. The several states have considerably different laws governing pardon, expungement, and forfeiture and restoration of civil rights." 552 U.S. at 34.

The Court announced a common understanding of "expungement," "set-aside," "pardoned," and "civil rights restored" as "Each term describes a measure by which the government relieves an offender of some or all of the consequences of his conviction. 552 U.S. at 32 [emphasis supplied]. The Court did not overrule its declaration from *Dickerson* that expungement does not alter the historical fact of conviction, alter the legality of the conviction, nor signify that the defendant was innocent.

Under a plain reading of 18 U.S.C. § 921(a)(33)(B)(ii), Van Oudenhoven should not be considered to be convicted of a MCDV. His conviction has been expunged and congress has provided that expunged convictions do not count. It is not the province of the judiciary to attempt to fill in perceived gaps in what Congress enacted. *Logan*, 552 U.S. at 35, FN 6 ("Enlargement of a statute by a court so that what was omitted, presumably by inadvertence, may be included within its scope transcends the judicial function.") When Congress said an expungement negates a conviction for purposes of MCDV consideration, we must assume it meant what it said.

The trial court in the instant case disagreed, with a one-sentence analysis:

> Hence, since the Wisconsin expungement procedure does not completely remove the

> consequence of the conviction, it appears to fall outside of the expungement exception to the firearm restriction. See 18 USC 922, and 18 USC 921. See also *Crank v. United States*, 539 F.3d 1236 (10th Cir 2008).

In Van Oudenhoven's administrative appeals, the WDOJ explained its disagreement with Van Oudenhoven's position:

> Prior to a court decision in December 2018, the Department of Justice took the position that individuals with an expunged conviction could possess a firearm. In December 2018, however, in *State v. Braunschweig*, 2018 WI 113, 384 Wis.2d 742, 921 N.W.2d 199, the Wisconsin Supreme Court wrote that '[e]xpunction … does not invalidate the conviction.' Id. ¶ 22 (emphasis added). As a result, a person whose conviction prohibited possession of a firearm before expungement remains prohibited from possessing a firearm after expungement.

The circuit court relied on Braunschweig for the proposition that expungement does not completely remove the consequence of the conviction. The issue in Braunschweig was whether a previous (expunged) conviction for operating while intoxicated ("OWI") would make a subsequent conviction a second one for sentencing purposes. The Supreme Court of Wisconsin said that it would count, because an expunged conviction is not an invalidated conviction and the Department of Motor Vehicles may keep its own traffic records even if court records have been expunged.

The Wisconsin Court of Appeals agreed with the Circuit Court. "Consistent with the meaning of "expunged or set aside" in 18 U.S.C. 921(a)(33)(B)(ii) and the effect of Wisconsin expungement espoused in *Braunschweig*, Van Oudenhoven's conviction was not completely removed of all effects and remains valid for purposes of denying him permission to purchase a firearm in Wisconsin under federal law." 2024 WI App. 38, ¶ 45.

The problem with the decisions of the courts below is that nothing in the federal statute requires that an expungement have the effect of invalidating the conviction. As this Court noted in *Logan*, expungement means merely a measure by which the government relieves an offender of some or all of the consequences of his conviction. And, expungement means something different from state to state and apparently never has the effect of completely undoing the conviction. It is erroneous to conclude that the expungement has to remove all consequences of a conviction, especially in light of *Dickerson's* conclusion that that is not what an expungement does.

The Wisconsin Court of Appeals' ruling might be more applicable in a different case, say one where a ***state law*** prohibits possession of a firearm for a conviction. But that is not the situation before the Court in the present case. The present question is whether an expunged conviction under ***state law*** for what would otherwise be a MCDV counts as an expungement under ***federal law***. It is important to note here that Wisconsin has no independent state-law analog for a MCDV. Either Van Oudenhoven's conviction counts as a MCDV under federal law or it has no effect at all on his right to possess firearms.

In effect, the Wisconsin Court of Appeals' decision writes into the federal statute language that Congress did not pass – that an expungement only negates a MCDV if the expungement has the effect of invalidating the conviction. If Congress sought that result, it surely knew how to say it. Instead, the federal statute contains a provision that makes Van Oudenhoven's conviction not count because it was expunged and because the expungement does not make an express exception for possession of firearms.

The WDOJ plainly said in its administrative record that the reason it denied the transfer was because of a federal prohibition. Because the federal statute contains an exception for expunged convictions, federal law is not dependent on the effect under state law of the expungement. The federal statute does not require that the state expungement have any particular effect on the conviction as a matter of state law. In fact, the federal statute applies equally to a conviction that was expunged or set aside. When Congress created the exception, it surely knew what the this Court said in *Dickerson* about state expungements: they vary widely in their effect and they do not undo the conviction.

Congress is presumed to know the state of the law when it passes a new law. *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 528 (1994) ("Congress is presumed to be aware of a[] … judicial interpretation of a statute and to adopt that interpretation when it … enacts a statute without change…."); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.") With the foregoing in mind, it is difficult to conclude that Congress meant something other

than an expungement described in *Dickerson* when it passed the exception.

The Wisconsin Court of Appeals relied largely on *Crank* for its conclusion that a state law expungement only counts for federal purposes if it completely removes the effects of a conviction. *Crank,* however, is inconsistent with *Logan* and *Dickerson.*

The *Crank* court concluded that when Congress wrote "expunged or set aside," it intended the words both to mean the same thing: "erase or destroy" and "annul or vacate." 539 F.2d at 1245. *Crank* came to that conclusion because the "unless" clause omits the phrase "set aside." And, *Crank* decided, unless the expungement erased all vestiges of a conviction, it was not an expungement for federal MCDV purposes. This conclusion, however, writes into the statute an unless clause that Congress did not create (i.e., that a pardon, expungement, or restoration of civil rights has the effect of undoing a conviction.)

The Wisconsin Court of Appeals' decision also improperly groups "expunged or set aside" into a single item. As a reminder, the statute's exception clause has four disjunctive options: 1) expunged; 2) set aside; 3) pardoned, and 4) civil rights restored. The *Logan* court supports that disjunctive listing when it says, "None of Logan's battery convictions have been expunged, set aside, or pardoned." 552 U.S. at 31. In addition, " [T]he words 'civil rights restored' appear in the company of the words 'expunged,' 'set aside,' and 'pardoned.' Each term describes a measure by which the government relieves an offender of some or all of the consequences of his conviction." *Id.* [Emphasis added].

The Wisconsin Court of Appeals treated "expunged or set aside" as a single term. 2024 WI App. 38, ¶ 24 ("We must now determine the meaning of 'expunged or set aside…. Therefore for a state conviction that has been expunged not to count as a 'conviction,' it must meet the meaning of 'expunged or set aside'…."). The Wisconsin Court of Appeals concluded, "[T]he plain meaning of 'expunged or set aside' is better described as 'a measure by which the government relieves an offender of … all of the consequences of his conviction,' rather than 'some' consequences." 2024 WI App. 38, ¶ 26 [emphasis in original].

The Wisconsin Court of Appeals' treatment of "expunged or set aside" as a single term inevitably resulted in the Court's defining the term to mean just "set aside." It is clear, however, that that is not what Congress intended. The unless clause only lists the pardon, expungement, or restoration of rights and it omits set aside. That is because "Set aside" means "To reverse, vacate, cancel, annul, or revoke a judgment, order, etc." *Black's Law Dictionary*, Sixth Ed. If a conviction is set aside, by definition the conviction cannot continue to have lingering effects (like preventing possession of a firearm).

On the other hand, an expungement, pardon, or restoration of rights ***can*** have such lingering effects, at least in Congress' view. If an expungement means the same as "set aside" and must completely negate a conviction, then including an expungement in the unless clause would have served no purpose. Clearly, Congress contemplated that there could be an expungement that would not completely undo a conviction.

II. There is a Split Among the Circuits

The 7th Circuit provides a different analysis. In *United States v. Erwin,* 902 F.2d 510 (7th Cir. 1990), the Court considered the language of 18 U.S.C. § 921(a)(20) (which contains the identical unless clause as 18 U.S.C. § 921(a)(33)). The Court concluded that the "unless" clause is an "anti-mousetrapping" rule. 902 F.2d at 512 ("If the state sends a felon a piece of paper implying that he is no longer 'convicted' and that all civil rights have been restored, a reservation in a corner of the state's penal code can not be the basis of a federal prosecution.") *Erwin* was followed in *United States v. Glaser*, 14 F.2d 1213 (7th Cir. 1994).

In the present case, the state issued Van Oudenhoven a document called an "Order on Petition to Expunge Court Record of Conviction." In it, the circuit court ordered "The clerk is ordered to expunge the court's record of conviction." *Id*. The Order says nothing about firearms. Under the *Erwin-Glaser* logic, because the State of Wisconsin gave Van Oudenhoven a piece of paper implying that his conviction had been erased, the State was required to tell him (if indeed it were so) that he could not possess firearms. Because the State failed to do so, the exception clause of 18 U.S.C. § 921(a)(33) applies and Van Oudenhoven is not "convicted" of the MCDV.

The 4th Circuit agrees with the 7th Circuit. *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991). In *McBryde,* Henry McBryde had been convicted of a felony in North Carolina and later was found in possession of firearms. He admitted he possessed firearms, but argued his predicate felony conviction did not apply because he

had had his civil rights restored by the State of North Carolina. 938 F.2d at 534. The 4th Circuit ordered McBryde's indictment dismissed because the restoration of rights did not include a provision saying McBryde could not possess firearms. 938 F.2d at 536.

CONCLUSION

Van Oudenhoven has shown that the denial of his firearm transfer on account of federal law is inconsistent with the plain meaning of the federal statute in question and further deepens a split among the Circuits. He requests that this Court take jurisdiction of this case and issue a writ of certiorari to the Court of Appeals of Wisconsin.

Respectfully Submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF WISCONSIN, FILED JUNE 24, 2025

SUPREME COURT OF WISCONSIN

2025 WI 25

SCOT VAN OUDENHOVEN,

Petitioner-Appellant-Petitioner,

v.

WISCONSIN DEPARTMENT OF JUSTICE,

Respondent-Respondent.

No. 2023AP70-FT
Decided June 24, 2025

REVIEW of a decision of the Court of Appeals
Winnebago County Circuit Court (Teresa S. Basiliere, J.)
No. 2022CV580

¶1 PER CURIAM. Scot Van Oudenhoven petitioned for review of a decision of the court of appeals, *Van Oudenhoven v. DOJ*, 2024 WI App 38, 413 Wis. 2d 15, 10 N.W.3d 402. After reviewing the record and the briefs, and after hearing oral arguments, we conclude this matter should be dismissed as improvidently granted.

By the Court.—The review of the decision of the court of appeals is dismissed as improvidently granted.

REBECCA FRANK DALLET, J., with whom ANN WALSH BRADLEY, C.J., and PROTASIEWICZ, J., join, concurring.

¶2 I join the court's decision dismissing this matter as improvidently granted. I write separately to emphasize that this court should explain its reasons for such dismissals and to explain why dismissing this matter is appropriate.

¶3 As Chief Justice Ann Walsh Bradley and I have previously written, public policy strongly favors providing an explanation when the court dismisses a case as improvidently granted. *See, e.g.*, *Amazon Logistics, Inc. v. LIRC*, 2024 WI 15, ¶¶4-5, 411 Wis. 2d 166, 4 N.W.3d 294 (Ann Walsh Bradley, J., concurring); *Winnebago County v. D.E.W.*, 2024 WI 21, ¶10, 411 Wis. 2d 673, 5 N.W.3d 850 (Dallet, J., dissenting). Failing to provide an explanation for the dismissal results in a lack of guidance for litigants and the public and may effectively negate the "numerous hours of work and sums of money spent seeking a decision on the merits." *Amazon Logistics*, 2024 WI 15, ¶5, 411 Wis. 2d 166 (Ann Walsh Bradley, J., concurring). The court's general practice, therefore, should be to provide an explanation for these dismissals.

¶4 Here, the court granted review to address whether under a federal law, 18 U.S.C. § 921(a)(33)(B)(ii), Van Oudenhoven is entitled to possess a firearm despite his 1994 conviction for a misdemeanor crime of domestic violence because the record of that conviction was expunged under WIS. STAT. § 973.015 (1993-94). After reviewing the administrative record, however, it appears

that this case may not squarely raise that issue. For that reason, I concur with the court's decision dismissing this matter as improvidently granted.

Appendix A

ANNETTE KINGSLAND ZIEGLER, J., with whom REBECCA GRASSL BRADLEY, J., joins, dissenting.

¶5 Before the court is a civil case in which Scot Van Oudenhoven asks this court to determine whether an expunction[1] order, which was issued in a separate criminal case and expunged a criminal conviction from 1994, qualifies as an expunction for purposes of a federal statute, 18 U.S.C. § 921(a)(33)(B)(ii). This question arose because the Department of Justice ("DOJ") denied a firearm purchase by Van Oudenhoven. The DOJ concluded that Van Oudenhoven had been convicted of a misdemeanor crime of domestic violence, *see* 18 U.S.C § 922(g)(9),[2] and, although the conviction had been expunged in the criminal case under Wisconsin law, the DOJ determined he was

1. There are two different words for the noun form of "expunge." This writing uses "expunction," but "expungement" is also used. *See* BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 346 (3d ed. 2011). To be clear, the two words mean the same thing. *See Expunction of record*, BLACK'S LAW DICTIONARY 725 (12th ed. 2024).

2. 18 U.S.C. § 922(g)(9) provides:

> (g) It shall be unlawful for any person—
>
> . . . .
>
> (9) who has been convicted in any court of a misdemeanor crime of domestic violence,
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

still prohibited from possessing a firearm, *see* § 921(a)(33)(B)(ii).[3] To be clear, the criminal case is not before the court. The matter before the court is a separate civil case regarding Van Oudenhoven's ability to purchase a firearm. No party disputes the validity of the expunction order; all parties agree that the expunction order cannot be collaterally attacked in this civil case.

¶6 Although this court granted Van Oudenhoven's petition for review to answer whether an expunction order issued pursuant to WIS. STAT. § 973.015 qualifies as an expunction for purposes of 18 U.S.C. § 921(a)(33)(B)(ii), received briefing on that singular question, and held oral argument, the court now dismisses this case as improvidently granted. I disagree with the court's decision to dismiss this case, as there is no basis for dismissal. The issue Van Oudenhoven raised in his petition for review is squarely presented, and addressing the issue would develop the law. The court should not dodge this issue that is properly presented. Accordingly, I dissent.

---

3. 18 U.S.C. § 921(a)(33)(B)(ii) provides:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

¶7 The background of this case is simple and uncontested by any party. Although this is a civil case involving the review of an agency's determination that Van Oudenhoven is prohibited by federal law from purchasing a firearm, some background regarding a separate criminal case is necessary to understand this matter. In September 1994, Van Oudenhoven was convicted of misdemeanor battery ("the 1994 battery conviction"). The victim was the mother of Van Oudenhoven's child. In May 2019, the circuit court ordered the clerk of court "to expunge the court's record of [Van Oudenhoven's] conviction" ("the 2019 expunction order"). *See* WIS. STAT. § 973.015. The validity of the 2019 expunction order is undisputed by the parties in this separate civil case, and the parties acknowledge it may not be collaterally attacked in this case.

¶8 In May 2022, Van Oudenhoven attempted to purchase a handgun. The purchase, however, was denied by the DOJ. The denial was based on the then-expunged 1994 battery conviction. The DOJ determined that 18 U.S.C. § 922(g)(9) precludes Van Oudenhoven from purchasing a firearm because, even though it was expunged under Wisconsin law, the 1994 battery conviction qualifies as a conviction for a misdemeanor crime of domestic violence under federal law. 18 U.S.C. §§ 922(g)(9), 921(a)(33)(B)(ii). The DOJ concluded that under § 921(a)(33)(B)(ii), an expunction order issued pursuant to WIS. STAT. § 973.015 does not expunge the conviction for purposes of federal law, even if the conviction is expunged under Wisconsin law.

¶9 In August 2022, Van Oudenhoven initiated this civil case by seeking judicial review of the DOJ's decision.

First, Van Oudenhoven argued that the DOJ does not have the authority to deny a firearm purchase due to a buyer's conviction for a misdemeanor crime of domestic violence under 18 U.S.C § 922(g)(9). Second, Van Oudenhoven argued that his conviction may not be considered a conviction for a misdemeanor crime of domestic violence because it was expunged by the 2019 expunction order. Specifically, he pointed to language found in 18 U.S.C. § 921(a)(33)(B)(ii), which provides, in pertinent part, that "[a] person shall not be considered to have been convicted of such an offense . . . if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored."

¶10 The DOJ, in response, argued that it has the authority to deny a firearm purchase due to a buyer's conviction for a misdemeanor crime of domestic violence under 18 U.S.C § 922(g)(9). The DOJ also argued that the 1994 battery conviction qualifies as a conviction for a misdemeanor crime of domestic violence. Even if expunged under Wisconsin law, the 1994 battery conviction was not expunged for purposes of federal law, specifically 18 U.S.C. § 921(a)(33)(B)(ii). The 2019 expunction order did not expunge Van Oudenhoven's conviction for purposes of § 921(a)(33)(B)(ii) because, as the DOJ put it, the order did not "wipe out all the consequences of [the] conviction."

¶11 The circuit court rejected Van Oudenhoven's arguments and embraced the arguments made by the DOJ. "At first blush," the circuit court explained, "it appears that [Van Oudenhoven's] expunged conviction should not preclude him from a firearm purchase." But the court concluded that "since the Wisconsin [expunction]

procedure does not completely remove the consequence of the conviction, [Van Oudenhoven's conviction] appears to fall outside of the [expunction] exception to the firearm restriction."

¶12 Van Oudenhoven appealed. On appeal, Van Oudenhoven raised the same two arguments he made before the circuit court. *See Van Oudenhoven v. DOJ*, 2024 WI App 38, ¶¶2, 11, 23, 413 Wis. 2d 15, 10 N.W.3d 402.

¶13 As to the first issue Van Oudenhoven raised on appeal, the court of appeals held that the DOJ is authorized to deny a firearm purchase due to a buyer's conviction for a misdemeanor crime of domestic violence. *Id.*, ¶¶11-19. Van Oudenhoven did not raise this issue in his petition for review before this court. Accordingly, this issue is not before us.

¶14 As to the second issue Van Oudenhoven raised on appeal, the court of appeals affirmed the circuit court, concluding that Van Oudenhoven's conviction is a conviction for a misdemeanor crime of domestic violence. His conviction, according to the court of appeals, was not "expunged" as that term is used in 18 U.S.C. § 921(a)(33)(B)(ii). *Id.*, ¶23. Relying heavily on a Tenth Circuit decision, *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008), the court of appeals determined the terms "expunged" and "set aside" in § 921(a)(33)(B)(ii) are "synonymous[]" such that in order for a conviction to be expunged for purposes of § 921(a)(33)(B)(ii), the expunction must "'completely remove all effects of the conviction at issue.'" *Van Oudenhoven*, 2024 WI App 38, 413 Wis. 2d 15, ¶¶27, 29, 33 (quoting *Crank*, 539

F.3d at 1245). The court of appeals held that the 2019 expunction order did not completely remove all effects of the 1994 battery conviction. *Id.*, ¶¶38, 44. In coming to this conclusion, the court of appeals relied on this court's decision in *State v. Braunschweig*, which determined that an expunction order pursuant to WIS. STAT. § 973.015 "does not invalidate [a] conviction." 2018 WI 113, ¶22, 384 Wis. 2d 742, 921 N.W.2d 199. The court of appeals concluded that the 2019 expunction order did not did not completely remove all effects of Van Oudenhoven's conviction because the order "merely remove[d] evidence of the conviction from court files." *Van Oudenhoven*, 2024 WI App 38, ¶43, 413 Wis. 2d 15.

¶15 In June 2024, Van Oudenhoven petitioned this court for review. Van Oudenhoven's petition provided the following statement of the issue presented: "[w]hether an [expunction order] under Wisconsin law qualifies as an '[expunction]' as that term is used in 18 U.S.C. § 921(a)(33)(B)(ii)." Before this court, neither party raises any issues regarding the validity of the 2019 expunction order.

¶16 While this court granted the petition for review, *Van Oudenhoven v. DOJ*, No. 2023AP70-FT, unpublished order (Wis. Nov. 12, 2024), received briefing on the question presented in Van Oudenhoven's petition for review, and held oral argument, the court will not issue a decision on the merits. The court, instead, dismisses the case as improvidently granted. The court errs in doing so.

¶17 Although this court rarely dismisses a case as improvidently granted, *Fond du Lac County v. S.N.W.*, 2021 WI 41, ¶2, 396 Wis. 2d 773, 958 N.W.2d 530 (Ann Walsh

Bradley, J., dissenting), there are times when dismissing a case as improvidently granted is proper. *See State ex rel. Davis v. Cir. Ct. for Dane Cnty.*, 2024 WI 14, ¶¶79, 81-82, 411 Wis. 2d 123, 4 N.W.3d 273 (Ziegler, C.J., dissenting). "Reasons for dismissing a case as improvidently granted include when the issues for which the court took the case are not squarely presented, or when deciding the case will not ultimately result in law development." *Halter v. Wis. Interscholastic Athletic Ass'n*, 2025 WI 10, ¶69, 415 Wis. 2d 384, 19 N.W.3d 58 (Ziegler, C.J., dissenting) (footnote omitted). In this case, however, there is no reason to dismiss the case as improvidently granted.

¶18 The question for which this court granted review to answer—whether the 2019 expunction order, the validity of which no party disputes, expunged the 1994 battery conviction for purposes of 18 U.S.C. § 921(a)(33)(B)(ii)—is squarely presented in this case. No party before this court disputes that fact. Answering the question properly raised in this case would develop the law on a question of statewide importance. Neither this court nor the United States Supreme Court has authoritatively established what is required for a conviction to be expunged for purposes of § 921(a)(33)(B)(ii). *See State v. Jennings*, 2002 WI 44, ¶18, 252 Wis. 2d 228, 647 N.W.2d 142 ("All state courts . . . are bound by the decisions of the United States Supreme Court on matters of federal law." (first citing *State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993); and then citing *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. 1970))). At this time, only a handful of courts across the country have addressed the question. *Crank*, 539 F.3d at 1245; *Jennings v. Mukasey*,

511 F.3d 894, 898-99 (9th Cir. 2007); *Bergman v. Caulk*, 938 N.W.2d 248, 251-52 (Minn. 2020); *Pa. State Police v. Drake*, 304 A.3d 801, 806-07 (Pa. Commw. Ct. 2023). Accordingly, there is no reason to dismiss this case as improvidently granted. "[W]hen issues that would develop the law are squarely presented, this court has a duty to address them." *Halter*, 415 Wis. 2d 384, 2025 WI 10, ¶69 (Ziegler, C.J., dissenting) (first citing *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶88, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting); then citing *Trump v. Biden*, 2020 WI 91, ¶¶110-12, 394 Wis. 2d 629, 951 N.W.2d 568 (Ziegler, J., dissenting); and then citing *Hawkins v. WEC*, 2020 WI 75, ¶32, 393 Wis. 2d 629, 948 N.W.2d 877 (Ziegler, J., dissenting)).

¶19 "When this court decides to dismiss a case as improvidently granted, customarily it does not offer an explanation for the dismissal." *Amazon Logistics, Inc. v. LIRC*, 2024 WI 15, ¶9, 411 Wis. 2d 166, 4 N.W.3d 294 (Rebecca Grassl Bradley, J., concurring).[4] Here the court does not give any explanation for the dismissal of a case that properly presents an issue of statewide importance, which is ready for a decision. Three Justices, however, concur with the court's decision to dismiss this matter as improvidently granted and provide an argument for why

4. *See also State v. Jackson*, 2023 WI 37, ¶¶4-11, 407 Wis. 2d 73, 989 N.W.2d 555 (Rebecca Grassl Bradley, J., concurring) (joined by Ziegler, C.J., and Hagedorn, J.) (explaining why this court should continue to follow its traditional approach); *Winnebago County. v. D.E.W.*, 2024 WI 21, ¶¶2-5, 411 Wis. 2d 673, 5 N.W.3d 850 (Rebecca Grassl Bradley, J., concurring) (joined by Ziegler, C.J., and Hagedorn, J.) (same).

this case should be dismissed. *See* concurrence, ¶4. What the concurrence offers, however, is more meager than munificent. The concurrence posits—without elaboration or support in the record—that "this case may not squarely raise [the] issue" the court granted review to address. *Id.* The concurrence seems to suggest that the validity of 2019 expunction order is before the court. *See id.* But as all parties acknowledge, the criminal case is not before us and the expunction order has not been challenged in any respect. The concurrence does not offer any rationale for why this case does not squarely present the issue raised in the petition for review; indeed, the concurrence notably uses the wiggle-word "may." *Id.* The concurrence provides no basis to dismiss this case as improvidently granted.

¶20 Although the concurrence seems to suggest that the 2019 expunction order is somehow invalid, no such suggestion can be found in any arguments made before this court. In fact, the parties stipulate and agree the 2019 expunction order is valid. The DOJ has disclaimed any argument regarding the validity of the 2019 expunction order. At oral argument, counsel for the DOJ made clear the DOJ is *not* arguing that the circuit court's 2019 expunction order is invalid. Counsel for the DOJ rebuffed suggestions from the bench that this court should address the validity of the 2019 expunction order. Instead, counsel for the DOJ insisted that this court address the question *actually before it*.

¶21 Moreover, the DOJ chose not to raise any issues with the 2019 expunction order before the circuit court, the court of appeals, or this court. When a party fails to

raise an argument before the circuit court, the argument is normally deemed forfeited and this court will not address it. *Tatera v. FMC Corp.*, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810. The court of appeals did not address the issue because "the DOJ [did] not challenge the validity of the [expunction order]." *Van Oudenhoven*, 413 Wis. 2d 15, 2024 WI App 38, ¶5 n.6. Generally, we do not "step out of our neutral role to develop or construct arguments for parties[.]" *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35 (citing *State v. Pal*, 2017 WI 44, ¶26, 374 Wis. 2d 759, 893 N.W.2d 848). It is particularly inappropriate to do so in this case: The DOJ's counsel expressly disclaimed any arguments regarding the validity of the 2019 expunction order at oral argument.

¶22 If the concurrence is somehow indicating this case should be dismissed as improvidently granted because the 2019 expunction order is invalid, such an argument would be wholly inappropriate because this civil case does not provide an avenue to collaterally attack the 2019 expunction order, which was issued in a separate criminal case. *See State v. Sorenson*, 2002 WI 78, ¶35, 254 Wis. 2d 54, 646 N.W.2d 354 (stating "a collateral attack is 'an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it'" (quoting *Zrimsek v. Am. Auto. Ins. Co.*, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (1959))). At oral argument, the DOJ conceded that the expunction order is not being collaterally attacked in this case, nor can it be so attacked in this separate

civil case. The validity of the 2019 expunction order is uncontroverted. As a result, this case cannot be dismissed as improvidently granted because of any insinuation that the 2019 expunction order is invalid.

¶23 As a practical matter, it is critical to address any issues regarding a circuit court's expunction order under WIS. STAT. § 973.015 in an appeal in the criminal case, not in a separate civil case. If expunction is ordered by a circuit court, and the order is not appealed by the state, "the court records for that case are destroyed by the clerk of court." *See State v. Allen*, 2017 WI 7, ¶9, 373 Wis. 2d 98, 890 N.W.2d 245. Supreme Court Rule (SCR) 72.06 provides:

> When required by statute or court order to expunge a court record, the clerk of court shall do all of the following:
>
> (1) Remove any paper index and nonfinancial court record and place them in the case file.
>
> (2) Electronically remove any automated nonfinancial record, except the case number.
>
> (3) Seal the entire case file.
>
> (4) Destroy expunged court records in accordance with the provisions of this chapter.

After the court records are destroyed, it is extremely difficult—if not impossible—to determine whether

expunction was properly or improperly ordered.[5] There is no reason be to believe that the 2019 expunction order was the subject of a direct appeal in the criminal case. And it would seem that pursuant to WIS. STAT. § 973.015, the judicial records regarding the criminal case are no longer available and have been destroyed. Accordingly, it would be quite inventive to argue that this case cannot be heard by this court because of some flaw in the 2019 expunction order.

¶24 Dismissing this case as improvidently granted leaves the court of appeals' opinion in place with statewide precedential effect because it is entirely untouched by this court. *See Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997) (stating published opinions of the court of appeals have statewide precedential effect). However, if it were the validity of the 2019 expunction order that causes this court to be unable to do its job and answer the question presented, the same would seem to hold true for the court of appeals. Such an argument would then call into question the validity of the court of appeals' decision, perhaps requiring summary reversal. There is no principle in law or in logic that would allow the court of appeals to answer the question presented in this case, but preclude this court from doing so. The concurrence's

5. Although court records of a conviction are destroyed following an expunction order, other entities may retain records regarding a defendant's conduct and conviction. *State v. Leitner*, 2002 WI 77, ¶41, 253 Wis. 2d 449, 646 N.W.2d 341 ("[W]e conclude that the words of WIS. STAT. § 973.015, as well as its legislative history, context, and purpose, point to the conclusion that the legislature intended § 973.015 to authorize the expunction of court records only, not other records, when the conditions set forth in § 973.015 are met.").

apparent suggestion that somehow this court should consider the validity of the criminal 2019 expunction order, in this separate civil case, is wholly without merit in this case.

¶25 Although this court granted Van Oudenhoven's petition for review to answer whether an expunction order issued pursuant to WIS. STAT. § 973.015 qualifies as an expunction for purposes of 18 U.S.C. § 921(a)(33)(B)(ii), received briefing on that singular question, and held oral argument, the court now dismisses this case as improvidently granted. I disagree with the court's decision to dismiss this case, as there is no basis for dismissal. The issue Van Oudenhoven raised in his petition for review is squarely presented, and addressing the issue would develop the law. The court should not dodge this issue that is properly presented. Accordingly, I dissent.

BRIAN K. HAGEDORN, J., dissenting.

¶26 This case presents a question of statutory interpretation perfectly fitting for this court's decision, and we should answer it. I respectfully dissent.

APPENDIX B — DECISION OF THE COURT OF APPEALS OF WISCONSIN, FILED JULY 31, 2024

COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2024

Samuel A. Christensen
Clerk of Court of Appeals

Appeal No. 2023AP70-FT
STATE OF WISCONSIN

Cir. Ct. No. 2022CV580

IN COURT OF APPEALS
DISTRICT III

SCOT VAN OUDENHOVEN,

PETITIONER-APPELLANT,

v.

WISCONSIN DEPARTMENT OF JUSTICE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County: TERESA S. BASILIERE, Judge. *Affirmed*.

Appendix B

Before Stark, P.J., Hruz and Gill, JJ.

¶1 GILL, J. Scot Van Oudenhoven appeals an order affirming a decision of the Wisconsin Department of Justice ("DOJ") denying his application to purchase a "handgun"[1] in Wisconsin. The DOJ reasoned that because Van Oudenhoven had been convicted of a Wisconsin crime related to domestic violence, the purchase would violate 18 U.S.C. § 922(g)(9), which states that an individual "who has been convicted in any court of a misdemeanor crime of domestic violence" cannot "possess or ... receive any firearm." The DOJ reached this conclusion even though Van Oudenhoven's relevant conviction was expunged under Wisconsin law pursuant to WIS. STAT. § 973.015(1m).

¶2 On appeal, Van Oudenhoven argues that the DOJ erroneously interpreted the applicable laws.[2] First,

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1. For purposes of WIS. STAT. § 175.35(2g)(c)4. (2021-22), the relevant Wisconsin statute, a "handgun" is defined as "any weapon designed or redesigned, or made or remade, and intended to be fired while held in one hand and to use the energy of an explosive to expel a projectile through a smooth or rifled bore." Sec. 175.35(1)(b) (2021-22). For purposes of 18 U.S.C. § 922(g)(9), a "firearm" is defined as either "(A) any weapon ... which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." 18 U.S.C. § 921(a)(3). Van Oudenhoven does not argue on appeal that his Wisconsin handgun fails to meet the definition of a firearm under federal law.

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

2. This is an expedited appeal under WIS. STAT. RULE 809.17.

Van Oudenhoven asserts that the DOJ did not have the authority to deny his handgun purchase under 18 U.S.C. § 922(g)(9). Second, Van Oudenhoven asserts that even if the DOJ had such authority, that statute did not apply to his misdemeanor conviction because the conviction was expunged. *See* 18 U.S.C. § 921(a)(33)(B)(ii) ("A person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] if the conviction has been expunged or set aside.").[3]

¶3 We conclude that federal law authorizes the DOJ to deny an individual's firearm purchase request in Wisconsin. Under federal law, which was the basis for denying Van Oudenhoven's purchase at issue in this case, the DOJ's authority to deny a firearm purchase in Wisconsin is conferred to it by the federal government under 28 C.F.R. §§ 25.2 and 25.6(g)(2) (2023).[4] The DOJ must deny a firearm purchase if the "receipt of a firearm by a prospective transferee would violate 18 U.S.C. [§]922 or state law." Sec. 25.6(g)(2). We further conclude that Van Oudenhoven was convicted of a misdemeanor crime of domestic violence as that term is defined by federal law. *See* § 922(g)(9); 18 U.S.C. § 921(a)(33)(A)(ii).

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3. Van Oudenhoven does not challenge the DOJ's decision on Second Amendment grounds or on jurisdictional grounds. *See* U.S. CONST. amend. II; 18 U.S.C. § 922(g)(9) (including an element that the firearm in question must have been shipped or transported in interstate or foreign commerce).

4. All references to the Code of Federal Regulations are to the 2023 version unless otherwise noted.

¶4 We also conclude that Van Oudenhoven's misdemeanor conviction was not "expunged or set aside" as those terms are used in 18 U.S.C. § 921(a)(33)(B)(ii). As other jurisdictions have articulated, the terms "expunged or set aside" in § 921(a)(33)(B)(ii) must be construed synonymously, thereby requiring the "state procedure to completely remove all effects of the conviction at issue." *See, e.g.*, ***Wyoming ex rel. Crank v. United States***, 539 F.3d 1236, 1245 (10th Cir. 2008). Consistent with our state supreme court's decision in ***State v. Braunschweig***, 2018 WI 113, 384 Wis. 2d 742, 921 N.W.2d 199, expungement pursuant to WIS. STAT. § 973.015(1m) does not "completely remove all effects" of a conviction because the underlying conviction remains valid. *See* ***Braunschweig***, 384 Wis. 2d 742, ¶22. Section 973.015(1m) "merely deletes the evidence of the underlying conviction from court records." ***Braunschweig***, 384 Wis. 2d 742, ¶22. We therefore affirm the circuit court's order upholding the DOJ's decision denying Van Oudenhoven's handgun purchase.

BACKGROUND

¶5 The relevant underlying facts are not in dispute. Van Oudenhoven was convicted in Calumet County case No. 1994CM113 of misdemeanor battery as an act of domestic violence against a woman with whom he shares a child. *See* WIS. STAT. §§ 940.19(1), 968.075(1)(a).[5] In 2019, the Calumet County Circuit Court granted Van

5. The relevant portions of these statutes have not changed since 1994.

Oudenhoven's petition for expungement of the conviction.[6] The order stated that the clerk of court "is ordered to expunge the court's record of the conviction."

¶6 In 2022, Van Oudenhoven attempted to purchase a handgun in Wisconsin. After searching Van Oudenhoven's record in a state database, the DOJ's Crime Information Bureau Firearms Unit ("Unit") denied the purchase based upon Van Oudenhoven's misdemeanor battery conviction. Van Oudenhoven sought review of that denial pursuant to WIS. ADMIN. CODE § Jus 10.08(2) (Aug. 2012),[7] and the director of the Unit sustained the earlier decision denying the handgun purchase.

¶7 Thereafter, Van Oudenhoven appealed the director's decision to the administrator of the DOJ's Division of Law Enforcement Services.[8] *See* WIS. ADMIN. CODE § Jus 10.09(1). The DOJ sustained the director's denial of the handgun purchase based on Van Oudenhoven's misdemeanor conviction. The DOJ reasoned

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6. It is unclear from the record why Van Oudenhoven's 1994 conviction was expunged in 2019 insomuch as "if a circuit court is going to exercise its discretion to expunge a record, the discretion must be exercised at the time of the sentencing proceeding." *See* ***State v. Matasek***, 2014 WI 27, ¶6, 353 Wis. 2d 601, 846 N.W.2d 811. However, the DOJ does not challenge the validity of the expungement, and we therefore will not address this issue further.

7. All references to WIS. ADMIN. CODE ch. Jus 10 are to the August 2012 register unless otherwise noted.

8. We refer to the administrator's decision as the DOJ's decision generally.

that WIS. STAT. § 175.35 and WIS. ADMIN. CODE ch. Jus 10 require the agency to "consider state and federal law when conducting a firearms restrictions search." According to the DOJ, under federal law, the agency was required to deny the purchase because Van Oudenhoven was convicted of a "misdemeanor crime of domestic violence" notwithstanding the fact that Van Oudenhoven's conviction was expunged under Wisconsin law. *See* 18 U.S.C. §§ 922(g)(9), 921(a)(33)(B)(ii). Relying on our supreme court's holding in ***Braunschweig***, the DOJ stated that while Van Oudenhoven's misdemeanor conviction was expunged, the conviction still counted under federal law so as to prohibit the purchase because the expungement did not invalidate the underlying conviction.

¶8 Van Oudenhoven filed a petition for judicial review in Winnebago County Circuit Court.[9] *See* WIS. STAT. § 227.52. Following briefing from the parties, the court sustained the DOJ's decision. This appeal follows.

DISCUSSION

¶9 "On a WIS. STAT. ch. 227 appeal, we review the decision of the agency, not the circuit court." ***Myers v. DNR***, 2019 WI 5, ¶17, 385 Wis. 2d 176, 922 N.W.2d 47. Unless we determine there is "a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, [we] shall affirm the agency's action." WIS. STAT.

9. Van Oudenhoven is a resident of Winnebago County. *See* WIS. STAT. § 227.53(1)(a)3. This appeal is venued in this court pursuant to WIS. STAT. § 752.21(2).

§ 227.57(2). The facts of this case are undisputed, so we address only questions of law—including federal and state statutory interpretation—which we review de novo, while affording "due weight" to "the experience, technical competence, and specialized knowledge of the agency involved." *See* § 227.57(10), (11); ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21; ***Doubek v. Kaul***, 2022 WI 31, ¶3, 401 Wis. 2d 575, 973 N.W.2d 756.

¶10 Statutory interpretation begins with the statute's language, which "is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

I. The DOJ has the authority to deny a Wisconsin-based firearm purchase that would violate 18 U.S.C. § 922.

¶11 We first conclude, contrary to Van Oudenhoven's arguments on appeal, that the DOJ is authorized by federal law to deny a Wisconsin-based firearm purchase due to a prospective buyer's conviction for a misdemeanor crime of domestic violence. As we will explain, the DOJ has been delegated by the federal government as the federal

law liaison for firearm purchases in Wisconsin. Here, the DOJ denied Van Oudenhoven's purchase pursuant to federal law, not state law.

A. Handgun purchases in Wisconsin under state law

¶12 At the state level, "[t]he purchase of handguns in Wisconsin is regulated by WIS. STAT. § 175.35, which provides the DOJ with authority to promulgate rules regarding the transfer of such firearms." *See* ***Moran v. DOJ***, 2019 WI App 38, ¶13, 388 Wis. 2d 193, 932 N.W.2d 430. Pursuant to that authority, a handgun dealer must obtain from a prospective handgun buyer a completed notification form, which the dealer then forwards to the DOJ. WIS. ADMIN. CODE § Jus 10.06(2)(a)1. After receiving the form, the DOJ must determine whether the purchaser is prohibited under state law from possessing a firearm. *See* ***Moran***, 388 Wis. 2d 193, ¶13; § Jus 10.06(2)(b), (c). To accomplish that task, the DOJ must search the purchaser's "state criminal history record and the national criminal history record maintained by the" Federal Bureau of Investigation (FBI). Sec. Jus 10.06(2)(a)(2), (b); WIS. ADMIN. CODE § Jus 10.03(11).

¶13 WISCONSIN STAT. § 175.35(2g)(c)4. requires the DOJ to notify a dealer after receiving information from the records search as follows:

> a. If the search indicates that the transferee is prohibited from possessing a firearm under [WIS. STAT. §] 941.29, the [DOJ] shall

> provide the firearms dealer with a unique nonapproval number....
>
> b. If the search indicates that the transferee is not prohibited from possessing a firearm under [WIS. STAT. §] 941.29, the [DOJ] shall provide the firearms dealer with a unique approval number.
>
> c. If the search indicates that it is unclear whether the person is prohibited under state or federal law from possessing a firearm and the [DOJ] needs more time to make the determination, the [DOJ] shall make every reasonable effort to determine whether the person is prohibited under state or federal law from possessing a firearm and notify the firearms dealer of the results as soon as practicable but no later than 5 working days after the search was requested.

Thus, § 175.35(2g)(c)4.a.-c. outlines the Wisconsin-specific standards for approving or denying a handgun purchase, which "turn[] upon whether the prospective purchaser is prohibited from possessing a firearm under ... § 941.29." *See* ***Moran***, 388 Wis. 2d 193, ¶14.

¶14 WISCONSIN STAT. § 175.35(2g)(c)4.c. also recognizes the DOJ's authority to deny a handgun purchase pursuant to federal law, although the statute does not specifically outline that authority. *See* ***Moran***, 388 Wis. 2d 193, ¶14. Instead, the DOJ's authority to deny a handgun—

specifically, a "firearm"— purchase under federal law is, of course, governed by federal law.

B. Firearm purchases in Wisconsin under federal law

¶15 The National Instant Criminal Background Check System (NICS) was established by the federal government pursuant to the Brady Handgun Violence Prevention Act. *See* 34 U.S.C. § 40901(b)(1); 28 C.F.R. § 25.2; ***Printz v. United States***, 521 U.S. 898, 902, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). The NICS, operated by the FBI, is used to determine "whether receipt of a firearm by a prospective transferee would violate [18 U.S.C. § 922] or State law." Sec. 40901(b)(1); § 25.2. Prior to selling a firearm to a potential buyer, a federal firearm licensee (FFL)[10] must contact the NICS Operations Center or a "Point of Contact" (POC) to search a database known as the NICS Index. *See* 28 C.F.R. § 25.6(b)-(d).

¶16 A POC is a "state or local law enforcement agency serving as an intermediary between an FFL and the federal databases checked by the NICS." 28 C.F.R. § 25.2. Since 1998, the DOJ has been the POC for Wisconsin handgun purchases. Therefore, in Wisconsin, an FFL must contact the DOJ to initiate an NICS background check for such purchases. *See* 28 C.F.R. § 25.6(d).

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10. An FFL is a "person licensed by the [Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF)] as a manufacturer, dealer, or importer of firearms." 28 C.F.R. § 25.2.

¶17 "Upon receiving a request for a background check from an FFL, a POC will," among other things, "[t]ransmit the request ... to the NICS." 28 C.F.R. § 25.6(e). The NICS will conduct a search of the NICS Index and notify the POC of the search results. Sec. 25.6(f). "POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems ...." Sec. 25.6(e).

¶18 "[B]ased on the response(s) provided by the NICS, and other information available in the state and local record systems, a POC will" "[n]otify the FFL that the transfer may proceed, is delayed pending further record analysis, or is denied." 28 C.F.R. § 25.6(g)(2). "Denied" means "denial of a firearm transfer based on a[n] NICS response indicating one or more matching records were found providing information demonstrating that receipt of a firearm by a prospective transferee would *violate 18 U.S.C. [§]922* or state law."[11] 28 C.F.R. § 25.2 (emphasis added).

¶19 In short, federal statutory and regulatory authority requires the DOJ, as the Wisconsin POC, to determine whether a handgun purchase would violate either state or federal law. Accordingly, pursuant to the plain language of 28 C.F.R. § 25.2, the DOJ was permitted to deny Van Oudenhoven's purchase if the purchase would violate 18 U.S.C. § 922. *See* ***Lynch v. Florida Dep't of Law Enf't***, 330 So.3d 140, 141 (Fla. Dist. Ct. App. 2021)

11. The record in this case does not include the NICS communication to the POC—i.e., the DOJ. *See* 28 C.F.R. § 25.6(f).

(explaining that Florida's POC must determine whether a potential firearm buyer is prohibited from purchasing a firearm under § 922(g)).

C. "[M]isdemeanor crime of domestic violence"

¶20 Here, as Van Oudenhoven implicitly concedes, his firearm purchase would have violated 18 U.S.C. § 922(g)(9), which states that an individual "who has been convicted in any court of a misdemeanor crime of domestic violence" cannot possess or receive any firearm.[12] A "misdemeanor crime of domestic violence," as that term is used in § 922(g)(9), is defined as an offense that is a misdemeanor under state law and has an element of "the use or attempted use of physical force ... by a person with whom the victim shares a child in common." 18 U.S.C. § 921(a)(33)(A)(ii).

¶21 Van Oudenhoven was convicted of battery as an act of domestic abuse. The police report underlying the conviction, which the DOJ reviewed when it denied the purchase, states that the victim and Van Oudenhoven had a child together at the time of the offense. *See* WIS. STAT. §§ 940.19(1), 968.075(1)(a)1.; ***Kaul***, 401 Wis. 2d 575,

12. Federal law dictates that a denial of a firearm purchase is appropriate where the "receipt of a firearm by a prospective transferee *would violate* 18 U.S.C. [§]922 or state law." 28 C.F.R. § 25.2 (emphasis added). Therefore, the question for the DOJ in this case was whether Van Oudenhoven's successful purchase of the firearm "would violate" § 922(g)(9). If Van Oudenhoven purchased the firearm, he would possess and receive the firearm, thus violating § 922(g)(9).

¶6 (whether the domestic violence element in 18 U.S.C. § 921(a)(33)(A)(ii) is satisfied "depends on the facts underlying the conviction, not the elements of the charged misdemeanor"). Further, the record demonstrates that Van Oudenhoven used or attempted to use physical force.[13]

¶22 Thus, the DOJ did not erroneously interpret the law when it determined that Van Oudenhoven used physical force against an individual with whom he shares a child, and, accordingly, barring certain exceptions that we address in the next section, he was clearly prohibited from possessing or receiving a firearm pursuant to 18 U.S.C. § 922(g)(9).

II. Van Oudenhoven is barred from possessing a firearm under federal law despite the expungement of his misdemeanor conviction for a crime of domestic violence.

¶23 The foregoing analysis does not end the inquiry, however, because

> [a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic

13. Wisconsin Stat. § 940.19(1) includes an element that an individual inflicts bodily harm to another with the intent to cause bodily harm to that person without the consent of the person. *See* Wis. Stat. § 940.19(1); Wis JI—Criminal 1220 (2015); ***Doubek v. Kaul***, 2022 WI 31, ¶7, 401 Wis. 2d 575, 973 N.W.2d 756 (whether the use of force element in 18 U.S.C. § 921(a)(33)(A)(ii) is met depends "'solely on whether the elements of the crime of conviction sufficiently match the elements' of the relevant federal statute, 'while ignoring the particular facts of the case'" (citation omitted)).

> violence] if the conviction has been *expunged or set aside*, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

See 18 U.S.C. § 921(a)(33)(B)(ii) (emphasis added). Van Oudenhoven's conviction in Calumet County case No. 1994CM113 was expunged in 2019, and the expungement certificate did not "expressly provide[]" that Van Oudenhoven was prohibited from possessing or receiving a firearm. Under these circumstances, Van Oudenhoven asserts that his misdemeanor conviction was "expunged or set aside"[14] under § 921(a)(33)(B)(ii). We agree with the DOJ, however, that Van Oudenhoven's conviction was not "expunged or set aside" as those terms are used in § 921(a)(33)(B)(ii).

A. "[E]xpunged or set aside"

¶24 We must now determine the meaning of "expunged or set aside" to ascertain whether Van Oudenhoven was prohibited from purchasing a firearm in Wisconsin. Van Oudenhoven first argues, without citation to any authority aside from 18 U.S.C. § 921(a)(33)(B)(ii), that "[b]ecause the federal statute contains an exception

14. Van Oudenhoven does not contend that he was "pardoned or has had civil rights restored." *See* 18 U.S.C. § 921(a)(33)(B)(ii).

for expunged convictions, federal law is not dependent on the effect *under state law* of the expungement. The federal statute does not require that the state expungement have any particular effect on the conviction as a matter of state law." This assertion has no basis in law. While the underlying misdemeanor crime of domestic violence, and any subsequent state procedures such as expungement, are defined by state law, federal law dictates what constitutes a "conviction" under § 921(a)(33)(B)(ii). *See* ***Logan v. United States***, 552 U.S. 23, 27-28, 128 S. Ct. 475, 169 L. Ed. 2d 432 (2007) (discussing ***Dickerson v. New Banner Inst., Inc.***, 460 U.S. 103, 114-15, 103 S. Ct. 986, 74 L. Ed. 2d 845 (1983), and the congressional amendments to § 921 made following that decision). Therefore, for a state conviction that has been expunged not to count as a "conviction," it must meet the meaning of "expunged or set aside" in § 921(a)(33)(B)(ii).

¶25 The terms "expunged" and "set aside" are not defined by federal statute. Van Oudenhoven contends that the United States Supreme Court in ***Logan*** "announced a common understanding of 'expungement,' 'set-aside,' 'pardoned,' and 'civil rights restored'" when the Court stated, "Each term describes a measure by which the government relieves an offender of *some or all of the consequences* of his [or her] conviction." *See* ***Logan***, 552 U.S. at 32 (emphasis added). Based on that language, Van Oudenhoven appears to assert that "expunged or set aside" means the government relieves a former offender of "some" of the consequences of his or her conviction.

¶26 We disagree that the Court in ***Logan*** was defining each term with specificity or that it stated an

expunged or set aside conviction only requires "some" of the consequences of a conviction to be vacated. Rather, the Court was simply identifying the general differences between those terms and a defendant who retains his or her civil rights and is "simply left alone." *See* ***id.*** at 32, 37 (concluding that an individual cannot have his or her civil rights "restored" if he or she was never deprived of them to begin with). In addition, and as we will explain, the plain meaning of "expunged or set aside" is better described as "a measure by which the government relieves an offender of ... *all* of the consequences of his conviction," rather than "some" consequences. *See* ***id.*** at 32 (emphasis added).

¶27 Courts interpreting 18 U.S.C. § 921(a)(33)(B)(ii) have consistently construed "expunged" and "set aside" synonymously so as to require the "state procedure to completely remove all effects of the conviction at issue" as a prerequisite to an individual being permitted to possess or receive a firearm. *See, e.g.*, ***Crank***, 539 F.3d at 1245; ***Jennings v. Mukasey***, 511 F.3d 894, 899 (9th Cir. 2007); ***Pennsylvania St. Police v. Drake***, 304 A.3d 801, 806 (Pa. Commw. Ct. 2023); ***Bergman v. Caulk***, 938 N.W.2d 248, 251 & n.3 (Minn. 2020). Although we are not bound by these authorities, *see* ***State v. Muckerheide***, 2007 WI 5, ¶7, 298 Wis. 2d 553, 725 N.W.2d 930, we find them useful to our analysis given the consistency with which courts have interpreted and applied § 921(a)(33)(B)(ii) and the various interpretative principles those courts have used in their analyses that comport with our principles in ***Kalal***.[15]

15. Van Oudenhoven does not provide an alternative meaning of 18 U.S.C. § 921(a)(33)(B)(ii). Instead, he merely contests the interpretation provided by the DOJ.

¶28 In particular, the United States Court of Appeals for the Tenth Circuit has reasoned that the terms "expunged" and "set aside" must be interpreted synonymously so as to "require a complete removal of the effects of a conviction" given: (1) the terms' respective plain meanings; and (2) the structure of the statute. *See* ***Crank***, 539 F.3d at 1245.

¶29 "First, the plain meaning of 'expunge' and 'set aside' are nearly equivalent." ***Id.*** at 1245. "Expunge" is defined as "[t]o remove from a record ...; to erase or destroy." *Expunge*, BLACK'S LAW DICTIONARY (11th ed. 2019); *cf. Expungement of record*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The removal of a conviction (esp. for a first offense) from a person's criminal record."). "Set aside" is defined as "[t]o annul or vacate (a judgment, order, etc.)." *Set aside*, BLACK'S LAW DICTIONARY (11th ed. 2019). The plain meanings of the terms "expunge"—as opposed to the "expungement of record"—and "set aside" indicate that the relevant state procedure must do more than delete the evidence of the underlying conviction. Rather, the plain meanings indicate that the state procedure must "completely remove all effects of the conviction at issue." ***Crank***, 539 F.3d at 1245.

¶30 In addition, one of the few federal expungement statutes, 18 U.S.C. § 3607, dictates expungement for certain controlled substance offenses.[16] Under § 3607, qualifying

16. While the connection between 18 U.S.C. §§ 921(a)(33)(B)(ii) and 3607 may seem attenuated at first glance, § 3607 appears to be the only federal statute authorizing expungement of a conviction, as opposed to expungement of records. *See* ***United States v. Lucido***, 612

individuals found guilty of a controlled substance offense may apply to a court to "enter an expungement order." Sec. 3607(c). "The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings." ***Id.*** "[A] conviction that is the subject of an expungement order under [§ 3607(c)], shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." Sec. 3607(b). The law also provides that any records of the conviction are destroyed. Sec. 3607(c). Consequently, federal expungement in the controlled substance context completely removes the effects of a conviction, which comports with the plain meanings of "expunged" and "set aside" described above.

¶31 Second, regarding the statute's structure, the first portion of 18 U.S.C. § 921(a)(33)(B)(ii) lists "four state actions that would remove firearm disability: expunging, setting aside, pardoning, or restoring civil rights." ***Crank***, 539 F.3d at 1245. The second portion of the statute (the "unless" clause) clearly parallels the first portion of the statute; however, it addresses only expunging, pardoning, and restoring civil rights. *See* ***id.*** Thus, "[t]he absence of the term 'set aside' [in the second portion] suggests that

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F.3d 871, 874 (6th Cir. 2010); ***United States v. Glaser***, 14 F.3d 1213, 1218 (7th Cir. 1994). There are at least two other federal expungement statutes; however, neither relate to expunging convictions. *See* 34 U.S.C. § 12592(d) (instructing the director of the FBI on the "expungement of [DNA] records"); 21 U.S.C. § 844a(j) (listing the "[e]xpungement procedures" related to civil penalties for the possession of small amounts of controlled substances).

Congress felt that 'expungement' in the 'unless' clause covered both 'set asides' and 'expungements.'" ***Id.***

¶32 We find further support for ***Crank***'s interpretation in the manner in which 18 U.S.C. § 921(a)(33)(B)(ii) states that "[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] if the conviction *has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored*." (Emphasis added.) The emphasized portion contains two types of situations where a prior conviction does not preclude a firearm purchase. The first type of situation involves a conviction that was "expunged or set aside." The second type of situation involves an offense for which an individual was "pardoned or has had [his or her] civil rights restored."

¶33 The United States Supreme Court has concluded that the restoration of civil rights means that an individual has regained "the rights to vote, hold office, and serve on a jury." ***Logan***, 552 U.S. at 28, 37 (defining "civil rights restored" as that term is used in 18 U.S.C. § 921(a)(20)). A pardon is defined as "[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime." *Pardon*, BLACK'S LAW DICTIONARY (11th ed. 2019). Hence, given the plain meanings described, the first portion of the emphasized language involves a conviction itself, while the second portion involves the effects of a conviction. Given the structure of § 921(a)(33)(B)(ii), the plain meanings of "expunged" and "set aside," and Congress's use of "expungement" in 18 U.S.C. § 3607, we agree with the Tenth Circuit's analysis in ***Crank*** that

those terms must be interpreted to mean the same thing—namely, the state procedure in question must "completely remove all effects of the conviction at issue." *See* ***Crank***, 539 F.3d at 1245.

¶34 Van Oudenhoven argues in his reply brief, for the first time, that Congress did not intend for "an expungement [to] be a 'complete removal' of the effects of a conviction" because, pursuant to the "unless" clause, a "'complete removal' would ... be incomplete if it retained a firearms prohibition." "This court need not address arguments that are raised for the first time on appeal, or ... raised for the first time in the reply brief." ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396.

¶35 Even addressing the merits of Van Oudenhoven's argument, the "unless" clause acts as an exception to the first clause. The flaw in Van Oudenhoven's reasoning is apparent when considering pardons and the restoration of civil rights. Both of those terms in 18 U.S.C. § 921(a)(33)(B)(ii) require the effects of a conviction to be withdrawn, including a prohibition on an individual's right to possess or receive a firearm. If Van Oudenhoven's interpretation were correct, the applicability of the "unless" clause would contradict the plain meanings of "pardoned" and "civil rights restored" because the post-conviction actions would not restore an individual's right to possess or carry a firearm.

¶36 Pursuant to 18 U.S.C. § 921(a)(33)(B)(ii), an individual can be pardoned under state law—i.e., have his or her punishment or other legal consequences of a

crime "completely nullified"—and that individual will not be prohibited under 18 U.S.C. § 922(g)(9) from receiving or possessing a firearm barring the applicability of the "unless" clause. *See* § 922(g)(9). Similarly, an individual can have his or her civil rights restored under state law and not be prohibited under § 922(g)(9) from receiving or possessing a firearm. As noted above, "civil rights" in this context refers to the restoration of the right to vote, to hold office, and to serve on juries. *See* ***Logan***, 552 U.S. at 28. Barring the applicability of the "unless" clause, "[i]f these are restored, then a conviction does not carry federal firearms disabilities."[17] ***Buchmeier v. United States***, 581 F.3d 561, 564 (7th Cir. 2009).

¶37 An individual can have his or her conviction expunged or set aside under state law and not be prohibited under 18 U.S.C. § 922(g)(9) from receiving or

17. For example, in Wisconsin, the restoration of civil rights following the completion of a felony sentence restores the right to vote and to serve on juries. *See* WIS. STAT. § 304.078; ***Moran v. DOJ***, 2019 WI App 38, ¶38 & n.13, 388 Wis. 2d 193, 932 N.W.2d 430 (stating that restoration of civil rights does not include the ability to hold public office). However, the restoration of civil rights pursuant to Wisconsin law does not lift the restriction on possessing or carrying firearms. *See* WIS. STAT. § 941.29(1m). Thus, assuming for purposes of this example that civil rights restoration under Wisconsin law meets the definition of civil rights restoration provided in 18 U.S.C. § 921(a)(33)(B)(ii), an individual who completes his or her felony sentence has had his or her civil rights restored, however, the "unless" clause still bars the defendant from possessing or carrying firearms. *See also* 78 Wis. Op. Att'y Gen. 22-23 (1989) (concluding that a pardon under Wisconsin law does not contain a firearm prohibition unless otherwise stated).

possessing a firearm unless expressly provided otherwise. In other words, the terms expunged, set aside, pardoned, and restoration of civil rights all, by definition, require state action that removes the prohibition on an individual from possessing or receiving a firearm under federal law. Any of those state procedures would become incomplete if they contained a prohibition on an individual from possessing or receiving a firearm under federal law. The "unless" clause does not alter the plain meanings in the first clause, and Van Oudenhoven's interpretation would strip those terms of their plain meanings.[18]

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18. Some jurisdictions have held that the "unless" clause is a "notice" or "anti-mousetrapping" provision, meaning that "a state may not employ language in discharging" a former offender "into the misapprehension" that his or her "rights have been restored to a degree that will permit him [or her] to possess firearms." *See* ***United States v. Erwin***, 902 F.2d 510, 512-13 (7th Cir. 1990) (interpreting the "unless" clause in 18 U.S.C. § 921(a)(2)). Under this reasoning, "[e]ven if a state deems a person 'convicted' for purposes of its domestic law, if it sends a document that seems to restore all civil rights the conviction does not count for federal purposes unless the document warns the person about a lingering firearms disability." ***Buchmeier v. United States***, 581 F.3d 561, 566 (7th Cir. 2009).

To the extent that Van Oudenhoven argues that the circuit court's order expunging his misdemeanor conviction misled him to believe that his conviction was completely removed as if there had been no judgment, we disagree. The court's order simply stated what WIS. STAT. § 973.015 states; that is, the records of his misdemeanor conviction were removed. Further, Van Oudenhoven does not contend that he had his civil rights restored—he was convicted of a misdemeanor, not a felony, and could not have had his civil rights revoked to begin with.

B. Wisconsin expungement

¶38 Wisconsin's expungement law does not completely remove the effects of the conviction in question. Therefore, an expunged conviction does not constitute an "expunged or set aside" conviction under 18 U.S.C. § 921(a)(33)(B)(ii). WISCONSIN STAT. § 973.015(1m) governs expungement in Wisconsin and states, in relevant part:

> [W]hen a person is under the age of 25 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum period of imprisonment is 6 years or less, the court may order at the time of sentencing that *the record be expunged* upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition....

(emphasis added); *see also* ***Braunschweig***, 384 Wis. 2d 742, ¶19. "[W]hen expunction is ordered, the clerk of court seals the case and destroys the court records." ***Braunschweig***, 384 Wis. 2d 742, ¶19.

¶39 Our state supreme court recently articulated in ***Braunschweig*** that, unlike vacatur, *see* WIS. STAT. § 973.015(2m),[19] which "removes the fact of conviction"

19. WISCONSIN STAT. § 973.015(2m) is applicable only to a conviction for an individual who "was a victim of trafficking for the purposes of a commercial sex act." ***Id.***

and acts as if "there had been no judgment," Wisconsin's expungement of a conviction merely deletes the evidence of the underlying conviction from court records" and "*does not invalidate the conviction*," ***Braunschweig***, 384 Wis. 2d 742, ¶¶21-22 (emphasis added; citation omitted). In other words, § 973.015 permits removing a conviction from a person's criminal court record, *see Expungement of Record*, BLACK'S LAW DICTIONARY (11th ed. 2019), but it does not completely remove the effects of a conviction. Thus, "a conviction, even though expunged, remains 'an unvacated adjudication of guilt.'" ***Braunschweig***, 384 Wis. 2d 742, ¶¶18, 25 (citing the definition of "conviction" in WIS. STAT. § 340.01(9r)).

¶40 Furthermore, WIS. STAT. § 973.015 does not prevent Wisconsin's executive branch from "maintaining case information" which "may assist [the branch] in identifying suspects, determining whether a suspect might present a threat to officer safety, investigating and solving similar crimes, anticipating and disrupting future criminal actions, [and] informing decisions about arrest or pressing charges." ***Braunschweig***, 384 Wis. 2d 742, ¶28 (quoting ***State v. Leitner***, 2002 WI 77, ¶40, 253 Wis. 2d 449, 646 N.W.2d 341). Applying the Wisconsin expungement statute, the court in ***Braunschweig*** held that an expunged second offense for operating while intoxicated constitutes a prior conviction under WIS. STAT. § 343.307(1). ***Braunschweig***, 384 Wis. 2d 742, ¶2.

¶41 Faced with a similar expungement law, the United States Court of Appeals for the Ninth Circuit held that an expungement under California law did not satisfy

the meaning of "expunged" in 18 U.S.C. § 921(a)(33)(B)(ii). *See* ***Jennings***, 511 F.3d at 896. In ***Jennings***, an FFL sought to renew his license. The ATF denied his application after concluding that his expungement for a misdemeanor domestic assault in California still constituted a conviction. ***Id.***; *see also* 18 U.S.C. § 923(d)(1)(B) (prohibiting a prospective firearm seller from becoming an FFL if the seller is prohibited from transporting, shipping, or receiving firearms under 18 U.S.C. § 922(g)).

¶42 In rejecting the FFL's argument that his conviction was "expunged" under 18 U.S.C. § 921(a)(33)(B)(ii), the court articulated that expungement under California law did "not render the conviction a legal nullity. Instead, it provides that ... the defendant is 'released from all penalties and disabilities resulting from the offense.'" ***Jennings***, 511 F.3d at 898 (citation omitted). According to the court, the expungement law still requires the ex-offender to disclose the conviction "in any questionnaire or application for public office [or] for licensure by any state or local agency." ***Id.*** at 898-99 (alteration in original; citation omitted). The court concluded that the expungement law did not meet the definition of "expungement" for purposes of § 921(a)(33)(B)(ii), and the FFL was properly denied license renewal. ***Jennings***, 511 F.3d at 899.

¶43 Like California's expungement law analyzed in ***Jennings***, an expungement under Wisconsin law does not "expunge[] or set aside" a conviction as those terms are used in 18 U.S.C. § 921(a)(33)(B)(ii) because the statute merely removes evidence of the conviction from court files. This conclusion is evident in the circuit

court's order granting Van Oudenhoven's expungement petition, wherein the court instructed the clerk of court "to expunge the court's record of the conviction." Moreover, the executive branch is permitted to access those records to determine, among other things, whether an individual is allowed to purchase a handgun in Wisconsin. *See* WIS. ADMIN. CODE §§ Jus 10.06(2), 10.03(11).

¶44 It follows, then, that Van Oudenhoven's Wisconsin expungement did not "completely remove all effects" of his misdemeanor conviction or "render the conviction a legal nullity." *See* ***Crank***, 539 F.3d at 1245; ***Jennings***, 511 F.3d at 898 (citation omitted). Van Oudenhoven's conviction remains an "unvacated adjudication of guilt," *see* WIS. STAT. § 340.01(9r), and, accordingly, the DOJ was able to access his records and deny his application to purchase a handgun in Wisconsin. In short, the DOJ did not erroneously interpret WIS. STAT. § 973.015 or 18 U.S.C. § 921(a)(33)(B)(ii).

CONCLUSION

¶45 The DOJ is authorized by the State of Wisconsin to determine whether an individual is prohibited from purchasing a handgun in Wisconsin. Similarly, the DOJ is authorized by the federal government to determine whether an individual is prohibited from purchasing a firearm in Wisconsin. Under this latter authorization, the DOJ was permitted to deny Van Oudenhoven's handgun purchase because the "receipt of a firearm by [Van Oudenhoven] would violate 18 U.S.C. [§]922," despite the fact that his misdemeanor conviction was expunged

under Wisconsin law. *See* 28 C.F.R. § 25.6(g)(2). Consistent with the meaning of "expunged or set aside" in 18 U.S.C. § 921(a)(33)(B)(ii) and the effect of Wisconsin expungement espoused in ***Braunschweig***, Van Oudenhoven's conviction was not completely removed of all effects and remains valid for purposes of denying him permission to purchase a firearm in Wisconsin under federal law. We therefore affirm the circuit court's decision upholding the DOJ's decision to deny Van Oudenhoven's purchase.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

APPENDIX C — ORDER OF THE CIRCUIT COURT OF WISCONSIN, BRANCH I, WINNEBAGO COUNTY, FILED JANUARY 6, 2023

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH I

WINNEBAGO COUNTY

Case No.: 22CV580

SCOT VAN OUDENHOVEN,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF JUSTICE,

Respondent.

ORDER

FACTS

The relevant facts of the case at bar are undisputed. The petitioner was convicted on September 15, 1994, of misdeameanor battery, case no. 94CM119, in Calumet County, Wisconsin.

The court record supports that the victim was the Petitioner's girlfriend and they had a child in common.

Appendix C

On May 2, 2019, the Circuit Court "ordered the clerk ... to expunge the court's record of the conviction". (Respondent's brief Dkt 10:3.) " ... the petitioner attempted to purchase a handgun" (Pet brief pg 1) which " ... was denied by the DOJ Crime Information Bureau Firearms Unit." (Pet brief pg 2). Petitioner sought a review of the denial of the gun purchase, and the Deputy Director upheld the denial. The petitioner further appealed to the DOJ Division of Law Enforcement Service which affirmed the previous decision. (see Pet brief pg 2).

The issue on appeal of review of the agency's decision is whether an expunged conviction for battery meets the defense of expungement ii 18 USC 921 (a)(33)(B)(ii).

18 USC 922 provides:

(d) It shall be unlawful of any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person, including as a juvenile.

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

DECISION

The court is persuaded that the Petitioner's conviction meets the definition of misdeameanor crime of domestic violence. Wisconsin law defines battery as "whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without

the consent of the person so harmed ... See Wis. Stat 940.19(1). Furthermore, Wisconsin provided for a crime to be domestic abuse the victim would have to have be a current or former spouse or an adult with whom the offender resides or have a child in common. See Wis. Stat. 968.075."

In the case at bar, it appears quite clear that the Petitioners criminal convictions in which the mother of his child was the victim and the conviction of battery falls within the meaning of domestic violence conviction as set forth in 18 USC 922(d)(9).

18 USC 921 (a) (33) (B)(ii) provides a person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the laws of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provide that the person may not ship, transport, possess, or receive firearms ...

(The court notes that the DOJ brief stated prior to Wisconsin Supreme Court decision in *State v. Braunschweig*, 384 Wis. 2d 742, the state allowed for gun purchases in cases where the court expunged the record.)

At first blush, it appears that the Petitioner expunged conviction should not preclude him from a firearm purchase. However, the DOJ argues that the federal

court has held "that congress inferred both terms expunged and set aside equivalency to require that a state procedure completely removes the effect of the conviction." Respondent Brief citing Wyoming ex rel. *Crank v. United States*, 539 F.3d 1236 (10th circuit 2008).

The DOJ argues that Wisconsin expungements do not meet the expungement as set forth in the code sec 18 USC 921(a)(33)(11). The court relying upon Wisconsin Supreme Court decision of *State v. Braunschweig* 384 Wis 2d 742, that a conviction although removed from the record is still a conviction does not meet the definition of expungement as interpreted by the Federal Courts. Hence, since the Wisconsin expungement procedure does not completely remove the consequence of the conviction, it appears to fall outside of the expungement exception to the firearm restriction. See 18 USC 922, and 18 USC 921. See also *Crank* 539 F3.d 1236.

IT IS HEREBY ORDERED:

1) The Decision of the DOJ is upheld.