No. 25-612

In the

Supreme Court of the United States

SCOT VAN OUDENHOVEN,

Petitioner,

v.

WISCONSIN DEPARTMENT OF JUSTICE

Respondent.

On Petition for Writ of Certiorari to the
Wisconsin Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Two federal courts of appeals have held that the word "expunged" in 18 U.S.C. § 921(a)(33)(B)(ii) applies only to expungements under state law that undo the effects of a conviction. Did the Wisconsin court of appeals err in following these federal courts' interpretation of 18 U.S.C. § 921(a)(33)(B)(ii)?

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INTRODUCTION

Federal law bars those convicted of a misdemeanor crime of domestic violence from possessing a firearm. A conviction, however, does not count if it "has been expunged or set aside." 18 U.S.C. § 921(a)(33)(B)(ii). The Wisconsin court of appeals followed decisions from the Ninth and Tenth Circuits in holding that the term "expunged" requires the expungement to completely erase the effects of the conviction, which does not occur under Wisconsin law for even a valid expungement. Following that federal authority is the opposite of creating a split of authority or acting inconsistent with this Court's precedent. Van Oudenhoven relies on cases dealing with a different issue: whether restorations of civil rights provided adequate notice that the right to possess a firearm was not restored. In addition, Van Oudenhoven's expungement order appears to have been issued in violation of Wisconsin law, which provides another reason to deny this petition.

STATEMENT OF THE CASE

I. Van Oudenhoven was convicted of misdemeanor battery against the mother of his child, the record of which was later expunged.

On September 15, 1994, Van Oudenhoven was convicted of misdemeanor battery under Wis. Stat. § 940.19(1), case no. 94-CM-119 in Calumet County Circuit Court. (R. 8:15.) The police report indicated that he and the victim "have a baby (four weeks old together)." (R. 8:41.)

Roughly 25 years later, in 2019, the Wisconsin circuit court ordered, under Wis. Stat. § 973.015, "the clerk . . . to expunge the court's record of the conviction." (R. 10:3.)

II. The Wisconsin Department of Justice blocks Van Oudenhoven's attempt to purchase a firearm due to his conviction.

The Wisconsin Department of Justice is a Point of Contact under 28 C.F.R. § 25.2 for handgun transfers in the state, meaning it conducts the background check on behalf of the federal government and informs the seller whether the potential buyer is prohibited from possessing a firearm.

In May 2022, Van Oudenhoven attempted to purchase a firearm, but the Department denied the purchase. (R. 8:7, 10.) Van Oudenhoven appealed the denial through Department's administrative process. (R. 8:7.) The Department sustained the denial because a misdemeanor battery conviction when the victim is the mother of the perpetrator's child qualifies as a misdemeanor crime of domestic violence. (R. 8:2.) It then explained that an expunged conviction did not restore the right to possess a firearm because a Wisconsin expungement does not invalidate the underlying conviction. (R. 8:2–3 (citing *State v. Braunschweig*¸ 921 N.W.2d 199, ¶ 22 (Wis. 2018).)[1]

[1] The effect of a Wisconsin expungement is an issue of state law not before this Court. *State v. Braunschweig* held that an expungement does not invalidate the conviction but merely

III. The Wisconsin courts, following federal authority, affirm the Department's decision.

A. The Wisconsin trial court affirms the Department.

The Wisconsin circuit court affirmed the Department's denial of the firearm purchase, first determining that Van Oudenhoven's conviction was a misdemeanor crime of domestic violence. App. 46a–47a. It then held that "since the Wisconsin expungement procedure does not completely remove the consequence of the conviction, it appears to fall outside the expungement exception to the firearm restriction." App. 48a.

B. The Wisconsin court of appeals, relying on federal precedent, affirms the Department.

The Wisconsin court of appeals affirmed in a published opinion. *Van Oudenhoven v. DOJ*, 10 N.W.3d 402 (Wis. Ct. App. 2024), App. 18a–44a. The court began by noting that "[c]ourts interpreting 18 U.S.C. § 921(a)(33)(B)(ii) have consistently construed 'expunged' and 'set aside' synonymously," and required that "the 'state procedure . . . completely remove all effects of the conviction at issue' as a prerequisite to an individual being permitted to

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has the effect of "expunging the record." 921 N.W.2d 199, ¶ 19 (quoting Wis. Stat. § 973.015(1m)(b)). It contrasted expungement vacatur, which "unlike expunction, removes the fact of conviction." *Id.* ¶ 21.

possess or receive a firearm." *Id.* ¶ 27 (citing cases), App. 33a.

The court, following the Tenth Circuit's decision in *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10th Cir. 2008), held that the meanings of "expunge" and "set aside" are nearly identical and noted that "expunge" and "expungement of record" had different definitions. "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," but must instead remove all the effects of the conviction. *Van Oudenhoven*, 10 N.W.3d 402, ¶ 29, App. 34a. In addition, a federal expungement statute—18 U.S.C. § 3607(b)—expressly states that it removes all effects of the conviction, "which comports with the plain meanings of 'expunged' and 'set aside' described above." *Id.* ¶ 30, App. 35a.

The structure of the federal statute, the Wisconsin court of appeals reasoned, also supported this interpretation. Section 921(a)(33)(B)(ii) provides that four types of actions can negate a conviction: "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." 18 U.S.C. § 921(a)(33)(B)(ii). The exception applies "unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* The fact that this second list does not mention set asides "suggests that

Congress felt that 'expungement' in the 'unless' clause covered both 'set asides' and 'expungements.'" *Van Oudenhoven*, 10 N.W.3d 402, ¶ 31 (quoting *Crank*, 539 F.3d at 1245), App. 35a–36a.

C. The Wisconsin Supreme Court dismisses the case as improvidently granted.

After briefing and oral argument, the Wisconsin Supreme Court dismissed the case as improvidently granted. App. 1a. ¶ 1. Three justices stated that they decided to join the dismissal order because the court had "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." App. 2a ¶ 4. These justices thought that "[a]fter reviewing the administrative record," this case "may not squarely raise that issue." App. 2a ¶ 4. As the dissent noted, based on the oral argument, the concurrence "seems to suggest that the 2019 expunction order is somehow invalid." App. 12a ¶ 20.

Van Oudenhoven then petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for two reasons.

First, the Wisconsin court of appeals merely followed the interpretation of "expunged" used by every federal court to look at the issue. As a result, there is no split of authority for this Court to resolve or inconsistency with this Court's precedent. The Fourth and Seventh Circuit cases Van Oudenhoven relies on deal with a different issue—whether a restoration of civil rights expressly stated that the right to possess a firearm was not being restored.

Second, even if there were a reason to take this case, this case presents a bad vehicle to address the question Van Oudenhoven presents. The Wisconsin supreme court was concerned that Van Oudenhoven's expungement order was issued in violation of Wisconsin law, based on the existing Wisconsin statutory limitations on courts granting expungement.

I. There is no split of authority or conflict with this Court's precedent.

The federal courts of appeals to address the question presented here all agree with the interpretation adopted by the Wisconsin court of appeals here. Van Oudenhoven attempts to rely on inapposite federal cases but cannot show any conflict because they dealt with a different issue.

A. The Wisconsin court of appeals followed the federal courts' interpretation.

While Van Oudenhoven tries to paint the Wisconsin court of appeals' decision as inconsistent with this Court's precedent, it merely follows the interpretation of every federal court to look at the issue. Federal law provides that someone "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*." 18 U.S.C. § 921(a)(33)(B)(ii). In defining "expunged or set aside," federal courts hold "that Congress intended both terms equivalently to require that a state procedure completely remove the effects of the conviction in question." *Crank*, 539 F.3d at 1245; *Jennings v. Mukasey*, 511 F.3d 894 (9th Cir. 2007).

In the Tenth Circuit case, the State of Wyoming challenged ATF's interpretation of the term "expunged" in section 921(a)(33)(B)(ii). *Crank*, 539 F.3d at 1238–39. The court, conducting a de novo review of the ATF interpretation, began by noting that "[t]here are two possible interpretations for the phrase 'expunged or set aside.'" *Id.* at 1244. One was that "that are two possible interpretations for the phrase," while the other was that Congress "intended the two terms to have the same meaning and used separate terms merely to avoid potential issues of terminology created by the varying language used in the different laws of the States." *Id.* at 1245. The court concluded that "Congress intended both terms equivalently to require that a state procedure

completely remove the effects of the conviction in question." *Id.*

The court offered two plain language reasons for its interpretation. First, Black's Law Dictionary indicated that both terms "require a complete removal of the effects of a conviction." *Id.* Second, the structure of the statute "suggests that Congress intended the terms to be interpreted equivalently." *Id.* The first part of subsection 921(a)(33)(B)(ii) lists four state actions that remove disability: expunging, setting aside, pardoning, or restoring civil rights. *Id.* The second part, however, only uses three terms: pardoning, expunging, or restoring civil rights. *Id.* This showed that Congress intended the term "expunging" to include both expunging and setting aside, and thus held that they both have the same meaning. *Id.*

The Tenth Circuit relied on the Ninth Circuit's *Jennings* decision, in which a firearms licensee challenged the ATF's denial of his renewal application based on a misdemeanor crime of domestic violence that had been expunged under California law. 511 F.3d at 896. The Ninth Circuit relied on a California decision that held the relevant statute "does not, properly speaking, 'expunge' the prior conviction." *Id.* at 898 (quoting *People v. Frawley*, 98 Cal. Rptr. 2d 555, 559 (Cal. Ct. App. 2000)). The California "statute does not purport to render the conviction a legal nullity" and "is ineffectual to avoid specified consequences of a prior conviction." *Id.* (quoting *Frawley*, 98 Cal. Rptr. 2d at 559). As a result, the

Ninth Circuit held that the relief the dealer obtained under California law "did not expunge his conviction for purposes of 18 U.S.C. § 922(g)(9)." *Id.* at 899.

Other state courts have followed suit. The Minnesota Supreme Court looked to Black's Law Dictionary, which defines "expunge" as "[t]o remove from a record, list, or book; to erase or destroy." *Bergman v. Caulk*, 938 N.W.2d 248, 251 (Minn. 2020) (alteration in original) (quoting Black's Law Dictionary (10th ed. 2014)). The court then examined whether a trial court sealing order "removed, erased, or destroyed Bergman's conviction." *Id.* at 252. The court held that "the sealing of judicial records under inherent authority simply does not reach those records that are held in the executive branch." *Id.* Thus, "the expungement that took place in 2007 under the district court's inherent authority did not remove, erase, or destroy the executive branch records of Bergman's prior domestic assault conviction," and the "expungement by inherent authority does not by itself satisfy the federal meaning of expungement." *Id.* The Pennsylvania Commonwealth Court also held that an expungement must remove all the effects of a conviction. *Pennsylvania State Police v. Drake*, 304 A.3d 801, 807 (Pa. Commw. Ct. 2023) ("We agree with the *Crank* Court's reasoning and hold that, under Section 921(a)(33)(B)(ii) of the FGCA, the terms 'expunged' and 'set aside' are synonymous.").

Van Oudenhoven cites no authority going the other way, instead relying on cases deciding a

different issue. Pet. 12–13 (citing *United States v. Glaser*, 14 F.3d 1213 (7th Cir. 1994); *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991) *United States v. Erwin*, 902 F.2d 510 (7th Cir. 1990)). His reliance on Seventh and Fourth Circuit cases do not help him, as those cases involved a different term in 18 U.S.C. § 921(a)(20)(B)'s definition of "felony conviction," specifically when a person "has had [his] civil rights restored . . . under such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." Cases applying this different language in section 921(a)(20) don't show a conflict of authority with other courts' interpretation of the distinct language at issue here.

Instead, these cases decided whether a restoration of civil rights expressly provided that the person could not possess firearms. In *Erwin*, the Seventh Circuit held that "[w]hen state law deems a person convicted, that is dispositive for federal purposes," and "a federal court [need not] disregard the state's definition of a conviction just because the state has restored any one civil right." *Erwin*, 902 F.2d at 512. The court explained that civil rights restoration language in section 921(a)(20) applies only when "the state sends the felon a piece of paper implying that he is no longer 'convicted' and that all civil rights have been restored." *Id.* (emphasis omitted). In contrast, when "the state sends no document granting pardon or restoring rights, there is no potential for deception, and the question becomes whether the particular civil right to carry guns has been restored by law." *Id.* at 513. *Glaser* and *McBryde* also involved questions of

whether a state's restoration of civil rights had sufficiently excluded the right to possess a firearm. *Glaser*, 14 F.3d at 1216–19; *McBryde*, 938 F.2d at 535–36.

This case does not involve a restoration of rights document at all, let alone the question of whether it was sufficiently clear in restricting the restoration of the right to possess firearms. And even if those Seventh and Fourth Circuit cases applied here, Van Oudenhoven received no document purporting to restore his civil rights or saying he was no longer convicted. Instead, he obtained an order stating that the court's record of conviction would be expunged. At the time he received that order in 2019, the Wisconsin supreme court had made clear that the expungement of his record of conviction did not remove the fact of conviction and any attendant consequences. *Braunschweig*, 921 N.W.2d 199, ¶¶ 21–22. Under state law, he is still considered convicted, therefore the exception in section 921(a)(33)(B)(ii) does not apply.

There is no split of authority for this Court to resolve.

B. The Wisconsin court of appeals' decision does not conflict with this Court's precedent.

The Wisconsin court of appeals also did not ignore this Court's precedent when following two federal circuit courts of appeals. Van Oudenhoven relies on

Logan v. United States, 552 U.S. 23 (2007), but that case does not support his position.

In dicta, *Logan* characterized the phrase "conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" in section 921(a)(20) as involving actions that relieve an offender "from some or all of the consequences of his conviction." 522 U.S. at 26, 28 (citation omitted). Van Oudenhoven contends that this Court's use of the word "some" means that an expungement need not wipe away all effects of a conviction. But this Court did not say that the word "some" covered all four categories—nor could it when some of the actions relieve all consequences—or that the reference to "some" applied to expungement.

Rather, as the Wisconsin court of appeals noted, "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.'" *Van Oudenhoven*, 10 N.W.3d 402, ¶ 26 (quoting *Logan*, 552 U.S. at 32), App. 33a. In any event, the passage Van Oudenhoven attempts to rely on was not relevant to the case's holding because none of the convictions at issue "ha[d] been expunged or set aside." *Logan*, 552 U.S. at 26. Instead, the issue was whether Logan's civil rights had been restored. *Id.* at 30.

Van Oudenhoven also tries to use *Logan* to argue that Congress intended to cover expungements of records when it enacted 18 U.S.C. § 921(a)(20),

and then ten years later enacted 18 U.S.C. § 921(a)(33)(B)(ii). He relies on *Logan* for the proposition that Congress changed these provisions in response to *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which held that "[w]hether one has been 'convicted' within the language of the gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State." *Id.* at 111–12. *Dickerson* held that because the federal statute had no exception for convictions expunged under state law, the federal prohibition still applied. *Id.* at 115.

Logan, however, did not address the meaning of an expungement. Instead, it merely recognized that Congress in "the Firearms Owners' Protection Act (FOPA), 100 Stat. 449, . . . amended § 921(a)(20) in response to *Dickerson*'s holding that, for purposes of federal firearms disabilities, state law did not determine the present impact of a prior conviction." *Logan,* 552 U.S. at 27–28. It did so by providing that that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." 18 U.S.C. § 921(a)(20)(B). Notably, however, this language is not in section 920(a)(33).

Logan merely recognized that Congress overruled *Dickerson* on whether federal or state law governed what constitutes a conviction, not what type of court order counts as an expunged conviction under the federal law. Notably, *Logan*'s recitation of the

statutory history does not deal with expungements at all.

Thus, *Logan* and *Dickerson* simply did not involve the interpretation of the term "expunged," and thus the Wisconsin court of appeals (along with the Ninth and Tenth Circuits and the Minnesota supreme court) did not disregard this Court's precedent.

II. Van Oudenhoven's expungement order appears to have been issued in violation of Wisconsin law.

The Wisconsin supreme court dismissed this case as improvidently granted, apparently based on the concern that Van Oudenhoven expungement order was inconsistent with state law. The basic problem is that Wisconsin's expungement statute requires that the court order the expungement at the time of sentencing, but Van Oudenhoven's expungement was ordered in 2019, roughly 25 years after his 1994 conviction.

At the time of his conviction, Wisconsin law provided that "[w]hen a person is under the age of 21 at the time of the commission of an offense . . . for which the maximum penalty is imprisonment of one year or less in the county jail, the court may order *at the time of sentencing* that the record be expunged upon successful completion of the sentence . . . ." Wis. Stat. § 973.0115(1) (1993–94). Current law likewise provides that "the court may order *at the time of sentencing* that the record be expunged upon successful completion of the sentence . . . ." Wis. Stat.

§ 973.015(1m)(a)1. Van Oudenhoven's expungement appears to have been issued well after the time of sentencing.

While the Department as an agency performing background checks cannot look behind convictions or expungements, there very well could be issues with the legality of the expungement here that could cloud or affect any analysis of the issue presented, should the expungement order ultimately be vacated. This provides yet another reason for this Court to deny the petition.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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