No. 21-1131

In the United States Court of Appeals
For the Sixth Circuit

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

v.

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

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

REPLY BRIEF FOR APPELLANTS

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May 11, 2021

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I. THE GOVERNMENT NOW REJECTS THE VERY STATUTE ATF FIRST DEMANDED.

This case involves whether a Michigan statute, MCL 28.426, satisfies the federal criteria set out in 18 U.S.C. Section 922(t)(3). ATF claims that, while the Michigan statute *used to* qualify (after its last legislative amendment in 2005), it no longer qualifies as of 2019. ATF now views the same statute differently, not because of any statutory change, but rather because of how it believes state law is being "interpreted" and applied by the Michigan State Police ("MSP").

But as history reveals, the government's position is as wrong as it is disingenuous. In a twist of irony, it appears that ATF was the driving force behind Michigan's 2005 statutory amendment — requiring Michigan to enact the very language that ATF now claims to be insufficient to qualify under Section 922(t)(3).

The Michigan House "Legislative Analysis" of H.B. 4978 (the bill which would become the current MCL § 28.426(2) at issue here) recounts that Michigan's 2005 legislative change was needed because ATF had, in effect, required it to comply with Section 922(t)(3). As the Legislative Analysis explains, in 2002 the Michigan State Police were instructing "local law enforcement agencies ... that they are responsible for conducting ICE checks" as part of the CPL

permitting process, but that policy was considered insufficient by ATF because state law did not then require that an ICE check be performed. *Id.* at 1-2.

ATF rejected MSP's attempt to meet Section 922(t)(3)'s requirement through issuance of an administrative "policy," opining that "a written policy does not satisfy federal requirements, since it does not have the same effect as a state law or regulation." *Id.* at 2. In other words, ATF took the position in 2005 that the text of state law is all that matters, not MSP's policy.[1]

In response to ATF's position, "legislation [was] introduced ... [t]o align the state statute with the federal law," and to provide ATF with the "law or regulation" that it sought instead of merely a written opinion by the Michigan State Police. *See id.* at 2. Thus, H.B. 4978 required the completion both of a NICS check (28.426(2)(a)) and an ICE check (28.426(2)(b)).

After Michigan's 2005 legislative changes were enacted, ATF agreed in 2006 that the federal and state statutes were now aligned. Complaint for Declaratory and Injunctive Relief ("Complaint"), R.1, Page ID#7. But then, in

[1] The Michigan Legislative Analysis references "a May 20, 2005 letter addressed to the Department of State Police from the U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives," opining that "Michigan's law to purchase a pistol and carry a concealed weapon is not currently aligned with federal requirements." *Id.* at 1. For whatever reason, that letter was not made part of the administrative record below, and Plaintiffs learned of its existence only after the district court issued its opinion. Despite requests that the government produce the letter, it has not done so.

2019, ATF decided that the two statutes were no longer aligned — but not based on any change in statute or regulation by the legislature — *the source of law that in 2002 ATF claimed was all that matters*. Rather, ATF's 2019 decision was based on a new unwritten "policy" from "legal counsel" within the Michigan State Police — *the very same authority that ATF had rejected as irrelevant in 2002.*

To summarize: In 2002, ATF claimed that "a written [MSP] policy does not satisfy federal requirements, since it does not have the same effect as a state law or regulation." Legislative Analysis at 2. In 2019, ATF claimed exactly the opposite, in effect that "a state law ... does not satisfy federal requirements, since it does not have the same effect as ... a[n] [un]written [MSP] policy." *Id.* ATF was correct in 2002, but is wrong now — state law as enacted by the legislature, not policy as created by the Michigan State Police, is what matters for purposes of Section 922(t)(3) eligibility.

ATF now claims that MCL 28.426 is insufficient to meet the Section 922(t)(3) standard, even though *the text* unambiguously provides otherwise, even though *the Michigan legislature* unambiguously intended otherwise, and even though *two Michigan Attorneys General* have explicitly stated otherwise.

II. THE GOVERNMENT REJECTS THE ACTUAL STATUTORY TEXT.

It is axiomatic that the "starting point for any question of statutory interpretation is the language of the statute itself." *United States v. Coss*, 677 F.3d 278, 283 (6th Cir. 2012) (citation and punctuation omitted). Yet the federal government has never opined in this case as to whether the Michigan statute *on its face* qualifies under Section 922(t)(3). In fact, the government's brief fails to provide any analysis of the *text* of the Michigan statute, and in fact maligns Plaintiffs for their focus on the text.[2] *See* Govt. Br. at 11, 12, 14. Rather, the government relies exclusively on what it terms "state officials' interpretation of state law."[3] *See* Govt. Br. at 14. The government claims that "Michigan law, *as now interpreted by the Michigan State Police*, does not require the research necessary to determine whether a permit applicant has committed a disqualifying offense...." Govt. Br. at 18 (emphasis added).

[2] The court below merely asserted that ATF's interpretation was in line with the statutory texts, but never explained how that was so. Order Denying Plaintiffs' Motion for Summary Judgment ("Order"), R.25, Page ID#560-61.

[3] The government's brief claims only that ATF's challenged action was "based on the interpretation of Michigan law it was provided by Michigan officials...." Govt. Br. at 1. Apparently the text of the Michigan statute did not enter into the equation.

Of course, had the government's brief analyzed the text of Michigan law, it no doubt would have been forced to reach the same conclusion that ATF did in 2006 — that *of course* the Michigan statute counts under Section 922(t)(3).[4] Section 922(t)(3) — as interpreted by ATF — requires that state law provide for a *conclusive determination* by state officials that a permit applicant *is not prohibited* from possessing firearms. And, *word for word*, MCL § 28.426(2)(a) requires exactly that, requiring that a state official "has *determined* ... that the applicant *is not prohibited*." But even while the text of state law is clear and unambiguous, ATF reached the opposite conclusion — that MCL § 28.426(2)(a) does not meet the requirements of Section 922(t)(3), by permitting a so-called "interpretation" by the Michigan State Police to override the unambiguous text of state law.[5]

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[4] Indeed, the court below acknowledged that Michigan law contains a requirement for a determination of eligibility, and then noted that MSP was engaged in "non-compliance" with and "violations" of state law, before concluding that Michigan law should be viewed according to how it is followed instead of how it is written. Order, R.25, Page ID#552, 567, 553, 556.

[5] The government offers no response to the Tenth Circuit's persuasive holding in *Sundance Assocs. v. Reno*, 139 F.3d 804, 810 (10th Cir. 1998) that "we cannot overlook an interpretation that flies in the face of the statutory language." Rather, the government attacks Plaintiffs' reliance on this Court's similar statement in *Puckett v. Lexington-Fayette Urban County Government*, 566 Fed. Appx. 462, 466 (6th Cir. 2014), noting that the opinion is "unpublished" and claiming its legal analysis "has no bearing on this case" because the underlying facts are different. Govt. Br. at 24.

In fact, the government admitted exactly that to an Alabama district court, after ATF similarly rejected an unambiguous Alabama statute in favor of the *practices* by a few county sheriffs who refused to follow state law — claiming audaciously that Alabama law "***does not mean what its text says***." *Lee v. DOJ*, 5:20-cv-00632 (N.D. Al.), Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment at 23 (emphasis added). On the contrary, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Bureaucrats are not permitted to rewrite statutes by "interpreting" them in a way that conflicts with the unambiguous text.

The government appears to believe if it can distinguish *Puckett*, then the problem goes away, and ATF is free to defer to interpretations which contradict the plain language of statutes. But the statement in *Puckett* is hardly rare or groundbreaking; indeed, it is a basic principle of statutory interpretation that this Court has followed in numerous other cases. *See, e.g.*, *DaVita, Inc. v. Marietta, Mem. Hosp. Emple. Health Ben. Plan*, 978 F.3d 326, 341 (6th Cir. 2020) ("Deference to agency interpretation of a statute is in order only when such interpretation is 'not in conflict with the plain language of the statute.'"); *Garcia v. Secretary of Health & Human Servs.*, 46 F.3d 552, 557 (6th Cir. 1995) ("where [an] interpretation conflicts with the plain language of the governing statute, we will not hesitate to overturn that interpretation."). Tellingly, though disputing Plaintiffs' reliance on *Puckett*, the government never denies the its violation of this principle of statutory interpretation — deferring to an MSP "interpretation" which flies in the face of the text of MCL 28.426.

III. THE GOVERNMENT REJECTS LEGISLATIVE INTENT.

As explained above, it is hardly surprising that the Michigan legislature enacted a statute whose text clearly requires exactly what ATF required.[6] Likewise, there is no argument in this case that the Michigan legislature's intent in enacting MCL 28.426 was "'[t]o align the state statute ... with [] federal law.'" Order, R.25, Page ID#552. Indeed, the district court below acknowledged the legislature's intent (*id.*), but then permitted a so-called "interpretation" of the Michigan State Police to override both the text and that unambiguously expressed intent. Yet according to Michigan courts, "'[t]he controlling test as to the meaning of a statutory provision is always the legislative intent when fairly ascertainable.'" *Reinelt v. Pub. Sch. Emples. Ret. Bd.*, 87 Mich. App. 769, 775 (Mi. Ct. App. 1979). Likewise, this Court has explained that, where "the court can discern 'the unambiguously expressed intent of [the legislature],' then that construction of the statute controls." *Atrium Med. Ctr. v. United States HHS*, 766 F.3d 560, 566 (6th

[6] As such, a literal reading of the Michigan statute yields the result the legislature literally intended. *See Donovan v. Firstcredit, Inc.*, 983 F.3d 246, 254 (6th Cir. 2020) ("[i]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") (citation and punctuation omitted). *See also In re Arnett*, 731 F.2d 358, 360 (6th Cir. 1984) ("[t]he primary function of the courts in construing legislation is to effectuate the legislative intent.").

Cir. 2014). Disregarding this basic principle, the district court reached a decision contrary to the legislature's intent.

This odd conclusion would mean either (i) the Michigan legislature had no idea what it was doing when it drafted and enacted MCL 28.426, or (ii) it doesn't matter what the legislature enacted, because the Michigan State Police's opinion as to the meaning of state law is superior to the legislature's words and intent. Neither is true, and either requires reversal.

It is abundantly clear that the Michigan legislature was aware of the change it was making when it passed H.B. 4978. First, the text of MCL 28.426 is plain and clear, requiring precisely what ATF seeks — requiring that a state official "has *determined* ... that the applicant *is not prohibited*." (Emphasis added.) Second, as the court below noted, the intent of the bill was also plain and clear — "'[t]o align the state statute ... with [] federal law.'" Order, R.25, Page ID#552. Third, as the Legislative Analysis explains, it was ATF which had specifically asked for the statutory change made in H.B. 4978, in order to bring the Michigan statute into compliance with Section 922(t)(3). Fourth, H.B. 4978 was passed by both houses of the Michigan legislature without a single dissenting vote,[7] demonstrating that

[7] H.B. 4978 passed the House by a vote of 103-0 and the Senate by a vote of 37-0.

the meaning of the text and the purpose for its enactment were singularly bipartisan, clear to everyone, and agreed upon by all.

It is equally clear that the Michigan State Police does not possess legislative authority superior to the Michigan legislature. As Plaintiffs explained to the court below, Article IV, Section 1 of the Constitution of Michigan states that "the legislative power of the State of Michigan is vested in a senate and a house of representatives" — not in "MSP legal counsel." Article III, Section 2 provides that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." The Michigan State Police has the authority neither to override the provisions of a state statute, nor to overcome the clearly expressed intent of the legislature, by adopting a "policy" that does not follow the law.

IV. THE GOVERNMENT REJECTS PRIOR AUTHORITATIVE INTERPRETATIONS OF THE STATUTORY TEXT.

The text and the legislative intent favor Plaintiffs. The government's brief does not attempt to wrestle with these thorny issues, never explaining how the Michigan State Police might be permitted to override the unambiguously expressed words of the state statute or ignore the clearly expressed intent of the state legislature. Instead, the government's brief sets out to justify its reliance on the so-

called "changed interpretation" of state law by "state officials" within the Michigan State Police. Govt. Br. at 8-9.

Rather than address the words of or the intent behind the Michigan statute, the government picks a different battle. First, the government attacks Plaintiffs' reliance on the opinions of two prior Michigan Attorneys General — opinions that unsurprisingly are consistent with both the text of MCL 28.426 and the intent of the legislature which enacted it. Second, the government again attempts (but fails) to tie the current "interpretation" of the Michigan State Police to the current Michigan Attorney General — something the district court below declined to do.

A. The Government Discounts Prior Attorney General Opinions.

First, the government acknowledges the opinions of "two *prior* Michigan Attorney Generals [sic]" which support Plaintiffs' position, but claims that "there is nothing in the record to indicate that those prior Michigan Attorneys General set forth their interpretation in any formal opinion that is presently 'binding' on the Michigan State Police, as plaintiffs suggest."[8] Govt. Br. at 22. That is the most slender of reeds. Actually, the court below noted that Michigan Attorney General

[8] While the FBI 2019 Audit attempts to minimize the 2018 opinion of Michigan Attorney General Schuette by calling it an "informal opinion" providing only "recommend[ations] (Administrative Record Part 1, R.16-1, Page ID#104, Govt. Br. at 7, 22), the same cannot be said for AG Cox's letter, which was very formal, as part of the communications between ATF and Michigan discussing MCL 28.426's compliance with Section 922(t)(3).

opinions are "'binding on state agencies and officers.'" Order, R.25, Page ID#562. But more fundamentally, the question is not whether the MSP is legally *bound by* the opinions of prior Michigan Attorneys General. The question is where ATF should be looking to determine the meaning of state law. The government's argument appears to be that prior Attorney General opinions are entirely irrelevant, and that the best interpretation of MCL 28.426 is not what those two state Attorneys General have stated, but instead what some MSP "legal counsel" thinks.

The government's position brings to mind the often-quoted statement from the Eleventh Circuit that "there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). While certainly not binding on this Court, and even if not binding on the Michigan State Police, state Attorney General opinions as to the meaning of state law still are "'not something to be lightly cast aside'" — and certainly not to be cast aside in favor of an unwritten and informal opinion given by MSP "legal counsel." *See Schwab* at 1325. Since Michigan state courts have not yet weighed in on this issue, it would seem like the next best source of authority would be the statutory interpretation provided by two Michigan Attorneys General.

B. The Government Attempts to Link MSP's Policy to the Current Attorney General of Michigan.

Second, after seeking to minimize the importance of the opinions of prior Michigan Attorneys General, the government attempts to link the current MSP opinion to the current Michigan Attorney General, claiming that "[n]or is there any indication in the record that the Michigan State Police's interpretation is contrary to that of the current Michigan Attorney General." Govt. Br. at 22. In other words, the government relies on the logical fallacy of an "appeal to ignorance" — arguing that its conclusion must be true because there is no evidence that it is false. On the contrary, just as there is *no evidence* of a *contrary* opinion, there is similarly *no evidence* of a *harmonious* opinion between MSP and the current Michigan Attorney General.[9]

As Plaintiffs noted in their opening brief (Brief for Appellants ("Opening Br.") at 11), the court below expressly declined to blindly jump to this conclusion — that the current Michigan Attorney General was behind the MSP's actions — instead admitting that MSP's recent policy change was made "albeit, with rather vague reasoning," and that MSP was "awaiting further guidance" and "'waiting on an opinion from the new AG as to whether the new AG agrees with the process.'"

[9] Even if the current Michigan Attorney General was on board with MSP "legal counsel's" "interpretation," her opinion could not override the text of the statute and the intent of the legislature.

Order, R.25, Page ID#554-555. Indeed, the court noted that "caution [is] require[d] ... in attributing any position to Michigan...." Order, R.25, Page ID#566, n.23.

Despite the lower court's caution, the government boldly forges ahead, with the misleading claim that MSP was "acting pursuant to guidance from their 'legal counsel,' who had communicated with the newly elected Michigan Attorney General." Govt. Br. at 22. The government tries to make it sound as if the Michigan AG was thus somehow involved in MSP's decision, while failing to recount that, even after "MSP legal counsel spoke with their AG," MSP was still "waiting to receive an opinion and direction from their AG." Administrative Record Part 1, R.16-1, Page ID#113.[10] Indeed, even after the April 2019 exchange referenced by the government, it was clear that the AG's office was "not interested in having a call to discuss" (*id.*), in May 2019 MSP was "waiting on an opinion from the new AG as to whether the new AG agrees with the process" (*id.*, Page ID#111) and was "currently waiting on direction from the Michigan Attorney General" (*id.*, Page ID#123) and, even by the time of the FBI's June 2019 audit,

[10] The government also attempts to equate correlation with causation noting that, at some point "after a new Michigan Attorney General was elected," MSP changed its practice. Govt. Br. at 8, 17.

MSP was still "awaiting the new AG's opinion on the previous AG's decision" (*id.*, Page ID#103).

In sum, contrary to the government's innuendo, there is absolutely nothing about the MSP's decision that can be linked with or attributed to the current Michigan Attorney General. The court below declined to make that connection, and this Court likewise should decline the government's invitation to do so.

V. *MORGAN v. ATF* DOES NOT HELP THE GOVERNMENT.

The government's brief relies heavily on this Court's decision in *Morgan v. ATF*, 509 F.3d 273 (6th Cir. 2007) for its claim that "traditional federalism principle[s]" require ATF deference to MSP as to the meaning of state law. Govt. Br. at 15, 16, 21, 25. That case dealt with a federal firearms licensee who was denied renewal of his license by ATF, on the theory that the business would be in violation of local zoning ordinances. *Morgan* at 274-76. Rather than requiring ATF to make an independent interpretation and application of local ordinances, this Court permitted the agency to defer to the legal opinion of a local township attorney regarding the ordinance. *Id.* at 276. The government apparently believes that *Morgan* is a magic bullet for its case here, permitting ATF to defer to the so-

called "interpretation" of state law provided by Michigan State Police "legal counsel."[11]

A. The Government Is Not Following *Morgan*.

In reality, the government is using *Morgan* as thin cover for ATF's actions which are contrary to the principles set out by the *Morgan* court. In that case, this Court concluded that deference to local authorities was appropriate because the plaintiff "*has failed to offer a superior method of ascertaining* the meaning of Redford Township's zoning ordinance" than the explanation offered by "the Township legal opinion." *Morgan* at 276 (emphasis added). In stark contrast, Plaintiffs here have offered numerous "superior methods" to determine "the meaning of" MCL 28.426 instead of a MSP "legal counsel" opinion — namely, (i) the plain text of the statute, (ii) the expressed intent of the legislature, and (iii) the opinions of two Michigan Attorneys General.[12] Each of these sources is a higher

[11] In *Morgan*, ATF was permitted to defer to an opinion by a Township "interpret[ing] its own zoning laws." *Id.* at 276. Here, the government seeks to defer to MSP, a state agency which is responsible neither for *enacting* Michigan statutes nor *interpreting* their meaning, but instead is merely "the authority responsible in Michigan for *conducting background checks*...." Govt. Br. at 6, 12, 17, 20 (emphasis added).

[12] Plaintiffs also noted that the background checks for Michigan licenses to purchase follow a "'different protocol'" than issuance of CPLs, further confirming the clear requirement of MCL 28.426. *See* Opening Br. at 26-27.

source of authority as to the meaning of Michigan law than is "MSP legal counsel."

Indeed, the *Morgan* court specifically cautioned that the Township "legal counsel" opinion was "not as authoritative as a state court ruling," indicating that if a higher authority had previously interpreted the zoning ordinance, such opinion would have been given greater weight. In this case, no Michigan court has ruled on the question at issue. Thus, the next best place to look would be to see if the Michigan Attorney General had weighed in. As it just so happens, two Michigan Attorneys General have answered the specific question raised in this case, and their interpretation of Michigan law supports Plaintiffs. Yet the government has rejected these higher sources of elected authority, choosing instead to rely on the contrary opinion (informal, unwritten, and nonbinding) of unelected MSP "legal counsel" as somehow being the governing authority on the meaning of MCL 28.426. *Morgan* thus implicitly rejected the approach ATF has taken here.

B. The Government's Claims of Innocence Are Belied by ATF's Prior Actions.

The government claims that "ATF has *consistently deferred to states'* interpretations of their own laws, rather than attempt to interpret state laws in the first instance." Govt. Br. at 11 (emphasis added). That is not even close to correct. As noted in Section I above, in 2002 ATF explicitly *refused to defer* to the MSP's

policy requiring ICE checks, thereby requiring the 2005 statutory amendment to bring Michigan statute into harmony with Section 922(t)(3). It is simply insincere for the government to claim that the *Morgan* opinion requires ATF deference to MSP, when ATF previously refused to defer to MSP about the meaning of the very same statute.

In its repeated proclamations of innocence — that it is simply abiding by "traditional federalism principles" (*see* Govt. Br. at 11, 12, 14, 15, 16, 20, 21, 25), the government claims that it is improper to "contradict the state officials responsible for administering that state statute" (Govt. Br. at 21) — but that was exactly what ATF did in 2002 when it rejected MSP's policy and required that state law be amended.

The government claims that it cannot "'second-guess state and local interpretations'" of state law (Govt. Br. at 22) — but that was exactly what ATF did in 2002, disregarding MSP's "policy" to require ICE checks. The government claims that it "is irrelevant ...[t]hat the Michigan State Police lacks 'legislative authority' to enact laws in Michigan" (Govt. Br. at 21) — but apparently this same "lack[] [of] authority" was highly relevant to ATF in 2002, when the agency required that the legislature pass the statutory amendment that it did. The government claims that it would be "extraordinary" to come to the opposite

conclusion as MSP about the meaning of state law (Govt. Br. at 12, 21) — but ATF apparently didn't believe it was "extraordinary" in 2002 when it rejected MSP's view on state law. Each of the government's claims is belied by ATF's prior actions.

The government's actions in Alabama are likewise inconsistent with its professed policy of "deference." Just as the government refused to "defer[] to [MSP's] interpretation[]" in 2002, it refused to defer to Alabama state authorities (and the Alabama state statute) in 2019. *See Lee v. DOJ*, Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Lee Memorandum") at 25. Indeed, Code of Ala. § 13A-11-75(b) requires unambiguously that, "[p]rior to issuance or renewal of a permit, the sheriff shall contact ... the National Instant Criminal Background Check System, to determine whether possession of a firearm by an applicant would be a violation of state or federal law."

Not only is that requirement abundantly clear, but also the Alabama Attorney General agreed that local sheriffs must conduct a NICS check, and in fact wrote a letter to sheriffs in 2016 instructing that they must conduct NICS checks. Lee Memorandum at 26. Then, in 2017, "the Alabama Law Enforcement Agency (ALEA) reported it was 'reaching out to the sheriffs' in an attempt to obtain compliance with state law." *Id.* Yet once again, as was the case in Michigan in

2002, ATF refused to "defer" to those higher sources of authority as to the meaning of state law, choosing instead to focus on what it believed some local county sheriffs were *doing* in practice, and claiming that their failure to follow state law and run NICS checks controls *the meaning of* state law.

VI. THE GOVERNMENT FAILED TO ADDRESS A KEY ARGUMENT.

Both in their opening brief in this Court and in the district court below, Plaintiffs made the argument that even if the additional activities ATF demands (*i.e.*, a conclusive determination of eligibility) are required by MCL 28.426, they are *not* required by Section 922(t)(3). *See* Opening Br. at 7-8. As Plaintiffs noted, insofar as MCL 28.426 requires a conclusive "determination" that an applicant "is not prohibited," that statute actually goes further than Section 922(t)(3) requires. In comparison, Section 922(t)(3) uses far less stringent language than the Michigan statute, requiring only that state law mandate that officials "verif[y]" that the "information available" within NICS "does not indicate" a prohibiting record." *Id.* at 19 n.10, 20-21.

The government does not address this argument in its response brief. Instead, the government recounts in passing that ATF has *always* interpreted 922(t)(3) to require conclusive determination by state authorities. *See* Govt Br. at 4-5, 14. The government never explains why its interpretation of Section 922(t)(3)

is correct, or why Plaintiffs' interpretation is incorrect, but relies only on the longstanding nature of its position. Of course, when determining the meaning of a federal statute, longevity of an agency's interpretation does not control,[13] and the court must determine what the statute means.[14]

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[13] Curiously, the government claims in the alternative that its interpretation of Michigan law, and resulting decision to disqualify CPLs, is "entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)" because "ATF is the agency with 'expertise' in interpreting and applying federal firearms laws...." Govt. Br. at 19. Yet as this Court recently explained, the Supreme Court has been "clear, unequivocal, and absolute in saying that ... none of the Court's prior cases applied *Chevron* deference (***or any deference***) to an agency's interpretation of a criminal statute." *Gun Owners of Am., Inc., et al. v. Garland, et al.*, 2021 U.S. App. LEXIS 8713 at *16 (6th Cir. 2021) (emphasis added). Thus, the government is entitled to absolutely no deference in its interpretation of 18 U.S.C. Section 922 in this case.

[14] Indeed, the government's brief shows that it is still confused about what Section 922(t)(3) requires. As Plaintiffs have explained, the text of Section 922(t)(3) does not require state officials to *do* anything. Congress could have written Section 922(t)(3) to require ATF or the FBI to "audit" the practices of local officials, but it did not do so. Rather, Section 922(t)(3) *requires state law to require* state officials to do something. The government's brief waffles on this distinction, noting first that, "under § 922(t)(3), a state's law must *require officials to ... make* determinations," but then noting that "the Michigan State Police are not currently *making* final determinations...." Govt. Br. at 19 (emphasis added). *See also* Govt. Br. at 4-5 ("'If a State does not *disqualify* all individuals prohibited....'"); versus at 14 ("only if state law *requires* officials ... to ... determine"); versus at 15 ("'If a State does not *disqualify* all individuals prohibited....'") (emphasis added).

VII. THE GOVERNMENT DISCLAIMS ATF'S OWN CORRECTIVE MEASURES.

Finally, the government objects to Plaintiffs' challenge to the "corrective measures" demanded by ATF in its letter to the Michigan Attorney General. Govt. Br. at 9, 25-26. The government once again claims that these "corrective measures" were limited merely to "'curing' concealed pistol licenses that are issued *during the period*" that Michigan was allegedly out of compliance, and that the "corrective measures" are required only "to qualify those '*previously issued*' licenses as valid alternatives in the future." *Id.* at 26 (emphasis added). The government claims that "nothing obligates Michigan to take the corrective actions identified." *Id.*

Again, the government's position is belied by the text of the ATF letter. First, the "corrective measures" were not optional, but instead ATF's letter repeatedly made clear that Michigan "must" take such measures to regain compliance. Administrative Record Part 1, R.16-1, Page ID#192. Moreover, the "corrective measures" were not only demanded to gain compliance for "previously issued" CPLs, but to gain compliance *for any CPLs* — stating that "[u]nless these corrective measures are fully implemented, FFLs will be unable to accept ***Michigan CPLs*** as a NICS alternative." *Id.* (emphasis added).

By so vigorously arguing that ATF's letter does not really say what it so clearly says, it would seem that the government recognizes how bad that letter appears. Apparently, the government concedes that ATF did not have the authority to demand a textual "corrective measures" from Michigan as a condition of recognizing CPLs under Section 922(t)(3). Thus, the government presumably would not object to a declaration by this Court that ATF did not have the authority to do what the government claims it did not do.

CONCLUSION

The government in this case fashions itself something of a benevolent dictator, claiming to be doing nothing more than applying "traditional federalism principles" and deferring to the wishes of the states as to the meaning of their own laws. If only that were the case.

Here, MCL 28.426 was simply written, using clear, precise, and unambiguous language. The government rejects that language. The Michigan legislature enacted MCL 28.426 "to align the state statute with the federal law," a singularly bipartisan purpose which was clearly and specifically expressed. The government now rejects that purpose and the legislature's intent. Finally, not one but two Michigan Attorneys General have determined that the text of MCL 28.426

accomplishes exactly what the Michigan legislature set out to accomplish. The government rejects their opinions.

Instead, the government elevates the informal and unwritten opinion of a single, unnamed, unelected attorney holding the title "legal counsel" to the Michigan State Police, claiming that this person's opinion now has the formal status of "the law of the State" of Michigan. Affirming the government's theory would mean that the Michigan legislature is completely powerless to enact a state law which achieves Section 922(t)(3) eligibility for Michigan concealed pistol licenses, and would mean that Article IV Section 1 of the Michigan Constitution now reads "the legislative power of the State of Michigan is vested in ... MSP legal counsel."

In fact, in the next legislative session the legislature could further amend MCL 28.426, again making crystal clear that it really meant what it has already said, and instructing that the Michigan State Police are required to conduct background checks exactly as ATF instructs they be conducted. But according to ATF, that still would not be the law, unless Michigan "legal counsel" agreed, and unless the Michigan State Police complied.

This Court must reject that notion. 18 U.S.C. Section 922(t)(3) looks to what "the law of the State provides." Congress probably *could have* empowered

ATF to continuously survey the actual practices of every state, and render assessments of which states met the agency's standards. But that is not what Congress did in Section 922(t)(3). ATF has no authority to rewrite the federal statute, and this Court should rejects its attempts to do so.

The Michigan statute provides that state authorities must "determine" that a CPL applicant "is not prohibited." That language could not be more clear, yet, as icing on the cake, both legislative intent and two Attorney General opinions further confirm that this is "the law of the State." This Court should reject the government's invitation to rewrite the state statute based on how the state police implement the law. This Court should also declare that the Michigan concealed pistol licenses of hundreds of thousands of Michigan gun owners qualify for eligibility pursuant to Section 922(t)(3).

Respectfully submitted,

/s/ Robert J. Olson

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CERTIFICATE OF COMPLIANCE

IT IS HEREBY CERTIFIED:

1. That the foregoing Reply Brief for Appellants complies with the type-volume limitation of Rule 32(a)(7)(B)(i), Federal Rules of Appellate Procedure, because this brief contains 5185 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

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Dated: May 11, 2021

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Reply Brief for Appellants was made, this 11th day of May 2021, by the Court's Case Management/Electronic Case Files system upon all parties or their counsel of record.

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