19-3438

To Be Argued By:
TOMOKO ONOZAWA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 19-3438

EVERYTOWN FOR GUN SAFETY SUPPORT FUND,

Plaintiff-Appellee,

—v.—

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

GEOFFREY S. BERMAN,
United States Attorney for the Southern District of New York,
Attorney for Defendant-Appellant.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2721

TOMOKO ONOZAWA,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 19-3438

EVERYTOWN FOR GUN SAFETY SUPPORT FUND,

Plaintiff-Appellee,

—v.—

BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

In this Freedom of Information Act ("FOIA") case, the district court erroneously ordered the United States Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to release information from its Firearms Trace System database. Congress, however, has repeatedly and clearly enacted statutory prohibitions on the public disclosure of information from the Firearms Trace System database. And FOIA's Exemption 3 states that FOIA does not apply to matters that have been specifically exempted from disclosure by statute —as the Firearms Trace System information has been.

While the district court held that the statutes prohibiting disclosure of that information were not effective because they did not specifically cite Exemption 3, that analysis disregarded Congress's clear and repeatedly expressed intent.

The district court further ordered ATF to produce the data, despite the agency's explanation that it could not do so without engaging in a time-consuming process to verify and clean up the data, a process not required by FOIA. While the district court concluded that merely pulling raw, unfiltered data was sufficient, ATF reasonably interpreted the FOIA request to seek data the agency had filtered for reliability. The agency had no obligation to undertake that task on Everytown's behalf.

Accordingly, the district court's judgment should be reversed.

Jurisdictional Statement

The district court had jurisdiction over this FOIA action under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The district court entered final judgment on August 21, 2019 (Joint Appendix ("JA") 422). On October 21, 2019, the government filed a timely notice of appeal. (JA 423). Accordingly, this Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court erred in holding that the contents of ATF's Firearms Trace System database are not exempt from disclosure under FOIA Exemption 3.

2. Whether the district court erred in holding that ATF's responses to the FOIA request would not require the agency to exceed its obligations under FOIA and create new records.

Statement of the Case

A. Procedural History

Plaintiff-appellee Everytown For Gun Safety Support Fund ("Everytown") commenced this lawsuit on March 15, 2018, seeking to compel ATF to disclose records responsive to Everytown's December 14, 2016, FOIA request. (JA 9–21). The parties filed cross-motions for summary judgment regarding the applicability of FOIA Exemption 3 to Everytown's FOIA request, and whether responding to the request would require ATF to create new records. (JA 44–45, 71–72). In an opinion and order dated August 19, 2019, the district court (Alison J. Nathan, J.) denied the government's motion and granted Everytown's motion (JA 396–421), and final judgment was entered on August 21, 2019 (JA 422). ATF timely filed a notice of appeal on October 21, 2019 (JA 423).

B. ATF's Firearms Trace System Database

ATF is a law enforcement agency within the United States Department of Justice. ATF is responsible for the enforcement of federal firearms laws, including the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921–930). (JA 47). The Gun Control Act established a licensing system for persons or entities referred to as Federal Firearm Licensees ("FFLs"), who are engaged

in manufacturing, importing, dealing, and collecting firearms. (JA 47).

The Attorney General has designated ATF the sole federal agency authorized to trace firearms. (JA 48). To do so, ATF maintains the Firearm Trace System database, which supports criminal investigations by federal, state, local, and foreign law enforcement agencies. (JA 48). The database is maintained at ATF's National Trace Center ("NTC"). (JA 48). In response to requests from law enforcement, the NTC provides ATF special agents and other law enforcement agencies with Firearms Trace Result Reports commonly referred to as "trace data." (JA 48).

"Tracing" a firearm is the systematic tracking of a recovered firearm from its manufacturer or importer, through its subsequent progression through the distribution chain, in order to identify an unlicensed purchaser. (JA 48). A firearm trace begins with a request from another law enforcement agency or in connection with ATF's own investigations. (JA 48). ATF typically receives trace requests submitted electronically through eTrace, an electronic system available to authorized law enforcement. (JA 49). Firearms for which traces are requested usually have been recovered at a crime scene or from the possession of a suspect, felon, or other person who is prohibited from owning the firearm. (JA 48). To conduct a trace, the requesting agency must provide the NTC with information about the firearm, including the type of gun (*e.g.*, pistol, revolver, or shotgun), the manufacturer, the caliber, and the serial number of the gun. (JA 48). The requesting

agency typically provides other associated information, like the location where the firearm was recovered, and information concerning the possessor of the firearm. (JA 48).

After receiving a trace request, NTC personnel contact the manufacturer or importer to find out when and to whom the manufacturer or importer sold the firearm being traced. (JA 49). When the NTC contacts an FFL manufacturer or importer requesting information about a particular gun or guns, ATF informs the licensee only about the firearm involved in the trace; the FFL is not informed of any circumstances relating to the alleged criminal conduct nor the identity of the law enforcement agency that recovered the firearm. (JA 48). In most instances, the manufacturer or importer has sold the firearm to an FFL wholesaler. (JA 49). NTC personnel then contact the FFL wholesaler to determine when and to whom the FFL wholesaler sold the firearm, usually to an FFL retailer. (JA 49). The tracing process continues as long as records allow and is considered successful when ATF can identify the first retail purchaser (a non-FFL) of the traced firearm. (JA 49). ATF's tracing process generally stops at the first retail purchaser because any non-FFL's subsequent disposition of the traced firearm is not subject to Gun Control Act recordkeeping or reporting requirements. (JA 49). The NTC forwards the firearms tracing results directly to the requesting law enforcement agency. (JA 49).

The "trace data" is maintained in the Firearms Trace System database, and includes the identification numbers of the FFLs involved in the sale or transfer of

the firearm, along with any information about the retail purchaser of the firearm. (JA 49). The Firearms Trace System database contains over 75 tables with a combined total of 800 columns/fields, not including subsystems and integrated or associated systems. (JA 56).

ATF prepares statistical reports utilizing trace data in the Firearms Trace System database to provide the public and law enforcement agencies with information about firearms recoveries. (JA 51). The statistical reports are prepared and created by specialists in ATF's Violent Crime Analysis Branch ("VCAB"). (JA 51–52). VCAB provides ATF and other federal, state, local, and international law enforcement agencies with crime gun, explosives, and arson intelligence information in statistical and visual formats. (JA 52). The statistical trace data provided by ATF, including these reports, help domestic and international law enforcement agencies solve firearms crimes, detect firearms trafficking, and identify trends with respect to intrastate, interstate, and international movement of crime guns. (JA 51). The agency publishes a limited number of aggregate statistical reports that ATF believes will provide helpful insights to the public without disclosing any law-enforcement or other sensitive material. (JA 51). Those public reports are available on the agency's website at https://www.atf.gov/resource-center/data-statistics. (JA 51).

Creating these reports requires tailored time-consuming and specialized queries, after which all of the raw data is reviewed and analyzed with statistical software run by an ATF employee. (JA 52). Part of the

analysis requires specialists to interact with various members of the NTC to ensure that the data extracted from the Firearms Trace System is valid and relevant. (JA 52). Each data set also requires at least six levels of filtering, after which VCAB employees must undertake a detail-oriented process of evaluating the data and filling in gaps by making educated assumptions or performing research on missing fields. (JA 52). For example, because not all fields within eTrace are required to be filled in, law enforcement personnel submitting tracing requests may leave many fields blank. (JA 52). If the VCAB analyst needs to narrow a data set based on the location of a recovered firearm, for example, and the location field for a specific trace entry was left blank, the analyst will have to evaluate other data fields associated with the same entry—perhaps the name of the law enforcement agency that submitted the underlying trace request—and make an educated assumption on where the firearm was recovered. (JA 52). Similarly, if an analyst needs to narrow a data set based on the date that a firearm was recovered, but the raw data query yields a blank recovery date field, the analyst will need to review the submission date of the tracing request or other associated fields to make an educated assumption about when the firearm was likely recovered. (JA 52).

After VCAB employees complete those analyses, they will insert the resulting statistics into applicable software to create a visual depiction of the data. (JA 52). After that, VCAB employees will subject each project to a multi-level review process to ensure that the data and the format in which it is presented is accurate. (JA 52). Furthermore, the analysts performing

the work maintain working papers and notes for each report they create, which document the methodology behind the analysis and are used by the reviewers as part of the validation process. (JA 52–53). Overall, the process requires significant amounts of time, as well as skill and expertise at interpreting and evaluating trace data to create accurate and responsive reports for public disclosure. (JA 53).

C. The Tiahrt Amendments

In a series of appropriations acts enacted since 2003, Congress has prohibited ATF from disclosing firearm trace information. (JA 55–56, 235–39). The statutory provision prohibiting the disclosure of trace information is often referred to as the "Tiahrt Amendment" or the "Tiahrt Rider" after its sponsor, former U.S. Representative Todd Tiahrt.

Section 644 of the Consolidated Appropriations Resolution of 2003 provided that "[n]o funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of 5 U.S.C. § 552," *i.e.*, FOIA, "with respect to records collected or maintained" pursuant to section 923(g)(7) of the Gun Control Act, "or provided by" a law enforcement agency in connection with the tracing of a firearm, "except that such records may continue to be disclosed to the extent and in the manner that records so collected, maintained, or obtained have been disclosed" under FOIA before the date of enactment. Pub. L. No. 108-7, 117 Stat. 11,

473–74 (2003) (JA 235);[1] *see City of Chicago v. U.S. Dep't of Treasury*, 423 F.3d 777, 779 (7th Cir. 2005) (noting that the Consolidated Appropriations Resolution of 2003 "contained a rider prohibiting the use of appropriated funds" to respond to FOIA requests seeking information from the Firearms Trace System database).

The prohibition on the release of trace data was broadened substantially in the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 2859–60 (2004). That Act provided:

> That no funds appropriated under this or any other Act with respect to any fiscal year may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms, and Explosives or any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of such section 923(g), to anyone other than a Federal, State, or local law enforcement agency or a prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution

---

[1] The 2004 version of the Tiahrt Amendment contained a near-identical prohibition. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3, 53 (2004); (JA 235).

> and then only such information as pertains to the geographic jurisdiction of the law enforcement agency requesting the disclosure and not for use in any civil action or proceeding other than an action or proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives, or a review of such an action or proceeding, to enforce the provisions of chapter 44 of such title, and all such data shall be immune from legal process and shall not be subject to subpoena or other discovery in any civil action in a State or Federal court or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce the provisions of that chapter, or a review of such an action or proceeding; . . . .

118 Stat. 2809, 2859–60; (JA 235).

Over the following years, the Tiahrt Amendment was reenacted several times with some changes, including the addition of exceptions and clarifications, but the prohibition on public disclosure of firearms tracing data has remained constant. *See* Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290, 2295–96 (2005); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1903–04 (2007); Omnibus Appropriations Act, 2009, Pub. L.

No. 111-8, 123 Stat. 524, 575 (2009); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3128–29 (2009); (JA 236–38).[2]

The most recent iteration of the Tiahrt Amendment is found in the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552 (2011). The 2012 Appropriations Act provides:

> That, during the current fiscal year and in each fiscal year thereafter, no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms and Explosives . . . ; and all such data shall be immune from legal process, shall not be subject to subpoena or other discovery, shall be inadmissible in evidence, and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based on the data, in a civil action in any State (including the District of Columbia) or Federal court or in an administrative proceeding other than a pro-

---

[2] The 2007 and 2011 prohibitions on the release of trace data were unchanged from the language in immediately prior years. *See* Pub. L. No. 112-10, 125 Stat. 38, 102 (2011); Pub. L. No. 110-5, 120 Stat. 1311, 121 Stat. 8, 44 (2007); (JA 236, 238).

> ceeding commenced by the Bureau of Alcohol, Tobacco, Firearms and Explosives to enforce the provisions of chapter 44 of such title, or a review of such an action or proceeding; . . . .

125 Stat. 552, 609–10; (JA 239).

D. Everytown's FOIA Request and ATF's Response

On December 14, 2016, Everytown submitted a FOIA request to ATF for aggregate statistical data related to traces of firearms used in suicide. Specifically, Everytown requested the number of firearms traced in 2012 and 2013, both nationwide and for each state, broken down by type of firearm, whether the suicide was attempted or completed, whether it was in the possession of the original buyer, whether it was recovered in the same state it was purchased, and how long it was traced after first purchase. (JA 24–25).

ATF denied the FOIA request by letter dated April 6, 2017, with two exceptions, on the ground that the request sought material that was exempt from disclosure under FOIA Exemption 3 and the 2012 Appropriations Act. (JA 28–30).[3] As explained by Charles J. Houser, the Chief of the National Trace Center Divi-

---

[3] The two exceptions were for the number of guns, by state, successfully traced and used in completed or attempted suicides. ATF notified Everytown that records responsive to those requests are publicly available on ATF's website. (JA 30).

sion in ATF, the agency publishes a number of statistical reports on its website annually, but to date, ATF has never prepared any aggregate statistical summaries of the data Everytown sought. (JA 57). Accordingly, responding to the FOIA request would require ATF to create new records. (JA 57). To respond to the FOIA request, which seeks statistical data for the years 2012 and 2013, the requested data pulls for each year would need to be assigned to two full-time VCAB analysts who would be tasked with creating new summaries. (JA 57). The process would entail the same steps ATF undertakes to create the statistical reports for annual publication: a one-hour query of the Firearms Trace System for the requested data; at least four dedicated working days per analyst to clean up the raw data pulled from the data queries; conducting comparative analyses of possessor and purchaser information, which is a time-consuming process depending on the comparative methodology used; and data product review and approval by a head analyst and the Chief of VCAB. (JA 52, 57).

In June 2017, Everytown appealed ATF's final determination of its FOIA request to the Department of Justice's Office of Information Policy (JA 19), which upheld ATF's denial of Everytown's FOIA request (JA 32–33). Everytown then brought this action.

E. The District Court's Order

In its August 2019 decision, the district court directed ATF to produce the records requested by the FOIA request. (JA 421). The district court first held that the 2012 Tiahrt Amendment does not qualify as

an Exemption 3 statute. Citing the OPEN FOIA Act of 2009, which provides that an Exemption 3 statute is one that, "if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph," 5 U.S.C. § 552(b)(3)(B), the district court held that "to enact a statute that qualifies as an Exemption 3 statute following the enactment of OPEN FOIA, Congress must include a clear statement identifying section 552(b)(3)." (JA 399–400). As the 2012 Tiahrt Amendment lacks such a specific citation, it "cannot qualify as an Exemption 3 statute." (JA 404). The district court further held Congress intended each version of the Tiahrt Amendment to "comprehensively replace its predecessor," and therefore that the versions of the Amendment predating the OPEN FOIA Act were no longer in effect. (JA 406–08). According to the district court, "[i]f Congress intended to ensure that no citation to section 552(b)(3) was required for reenactment of new versions of earlier statutes, it could have clarified that Congress was not required to include a clear statement rule in such circumstances," but "did not do so." (JA 408–09). The district court held that if "Congress wished to enact statutes that would exempt Firearms Trace Database data from disclosure following the enactment of the OPEN FOIA Act, it gave itself explicit instructions for how to do so," but failed to meet its own requirements. (JA 409). Thus, the district court concluded that because the 2012 Tiahrt Amendment "completely replaced" the pre-2009 versions of the Tiahrt Amendment but failed to refer to § 552(b)(3), ATF could no longer rely on the present

version of the Tiahrt Amendment and invoke Exemption 3 to withhold Firearms Trace System data from public disclosure. (JA 411).

Second, the district court held that ATF had not met its burden of showing that responding to the FOIA request would require the creation of new records. The district court noted that the Electronic Freedom of Information Act Amendments of 1996 (the "E-FOIA Amendments") obligate agencies to "make reasonable efforts to search for the [requested] records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." (JA 412 (citing 5 U.S.C. § 552(a)(3)(C))). The district court concluded that all ATF needs to do to respond to the FOIA request is to run an initial search and produce the "raw data entry counts" resulting from that initial data pull, which is required under the E-FOIA Amendments. (JA 420). The district court disregarded the detailed process described by ATF 's declarant—which includes the necessary steps of analyzing the raw data and conducting research or making educated guesses to determine whether an individual firearms trace is even responsive to the temporal and geographic parameters in Everytown's FOIA request (JA 51–53, 57–58)—and maintained that a "simple search" would yield "the requested numbers thereof." (JA 415).

This appeal followed.

Summary of Argument

This Court should reverse the district court's judgment. Everytown's FOIA request sought the disclosure

of firearms trace data maintained in ATF's Firearms Trace System database—data that Congress has clearly and repeatedly exempted from disclosure under FOIA in the Tiahrt Amendments. The plain language of the Tiahrt Amendments, including the most recent Amendment in 2012, makes clear Congress's intent to prohibit ATF from disclosing that data both for the terms of the appropriations acts of which they were a part, and going forward into the future. That intent is confirmed by the committee reports noting Congress's concerns that release of the data could compromise law enforcement interests. It is further confirmed by the history of the Amendments, which were enacted and then revised in response to judicial decisions requiring disclosure under FOIA, precisely to prevent such disclosure. The Tiahrt Amendments therefore prohibit disclosure under FOIA's Exemption 3. *See infra* Point I.A.

That conclusion is not changed by the Amendments' lack of an express reference to Exemption 3. While a 2009 amendment to FOIA purports to require such an express reference, the Supreme Court has held that despite such a requirement, a statute that clearly expresses Congress's intent must be given effect even if it lacks the express reference. The unmistakable import of the Tiahrt Amendments, both before and after 2009, bars FOIA disclosure, and Congress's choice not to use specific words referring to Exemption 3 does nothing to detract from the plain meaning of the words it did use. It would be illogical to conclude that, by using the same language that prior to 2009 had been held to qualify as an Exemption 3 statute, Congress meant to reverse course and no longer bar disclosure of the

Firearms Trace System data. Moreover, as other courts have ruled, the pre-2009 Tiahrt Amendments had prospective effect, and should be considered still valid at least insofar as they prohibit FOIA disclosure. *See infra* Point I.B.

Nor do the exceptions to the 2012 Tiahrt Amendment allow FOIA disclosure. Both the legislative history and the text of the relevant exception make clear that Congress enacted it to allow ATF to continue to publish periodic aggregate statistical reports that it had previously published—not to open up the Firearms Trace System database to FOIA requests. *See infra* Point I.C.

Lastly, the district court's judgment should be reversed for an independent reason: even if the firearms trace data sought by Everytown is not protected from disclosure under Exemption 3, FOIA does not require ATF to compile that data and create a new record in response to Everytown's request. At the time of the FOIA request, ATF had never prepared any statistical aggregate analyses reflecting the information sought by Everytown. The agency explained to the district court that compiling that data would involve extensive steps to ensure its quality and accuracy, thus responding to Everytown's request would entail the creation of a new record. While the district court concluded that the agency need do nothing more than a simple database search, and that Everytown's request should be read liberally to seek disclosure of data known to be inaccurate and unreliable, ATF reasonably read the request to seek correct data, and responding to that

request would mean creating a new record. FOIA does not require an agency to do so. *See infra* Point II.

ARGUMENT

Standard of Review

This Court reviews a district court's grant of summary judgment in a FOIA case *de novo*. *Center for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014). In a FOIA case, "the defending agency has the burden of showing that . . . any withheld documents fall within an exemption to the FOIA." *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). "Affidavits or declarations . . . giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden," and are "accorded a presumption of good faith." *Id.* (footnote and quotation marks omitted). Ultimately, "the agency's justification is sufficient if it appears logical and plausible." *ACLU v. DoD*, 901 F.3d 125, 133 (2d Cir. 2018).

POINT I

The Tiahrt Amendment Prohibits Disclosure of the Requested Data

Congress has clearly and repeatedly prohibited disclosure of Firearms Trace System data in a series of Tiahrt Amendments, enacted over nearly a decade. Its intent to preclude that disclose has been made plain not only by the statutes' text, but by their history as well, which demonstrates, as the Seventh Circuit has recognized, that Congress was specifically acting to

overturn judicial decisions requiring FOIA disclosure. And until the decision now under review, every court to consider the matter has held that the Tiahrt Amendments preclude disclosure of Firearms Trace System data under FOIA. In reaching the opposite conclusion, the district court here looked not to Congress's clear words or intent, but to the fact that the most recent Tiahrt Amendment does not actually cite FOIA's Exemption 3, as the OPEN FOIA Act purports to require. But that analysis is contrary to both the legislative intent and to the Supreme Court's holdings that one Congress cannot thwart the will of a future Congress by requiring specific language to accomplish its goals. The district court's judgment should therefore be reversed.

A. The Tiahrt Amendments Prohibit Disclosure of the Firearms Trace System Data

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In each of the Tiahrt Amendments, including the most recent one, in the 2012 Appropriations Act, Congress's intent to prevent disclosure is clear: "during the current fiscal year and in each fiscal year thereafter, no funds appropriated under this or any other Act may be used to disclose part or all of the contents of the Firearms Trace System database maintained by the [ATF] . . . ; and all such data shall be immune from legal process . . . ." 125 Stat. at 609–10; (JA 239). Congress thus clearly

expressed its intent to prohibit the disclosure Everytown now seeks, and that, in turn, means FOIA "does not apply" under Exemption 3.[4]

That intent is further demonstrated by the prior versions of the same prohibition on disclosure. (JA 235–38). The first iteration of the Tiahrt Amendment, which appeared in 2003, plainly expressed Congress's intent to exclude Firearms Trace System data from FOIA disclosure, at that time or in the future: "No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of 5 U.S.C. § 552 [i.e., FOIA] with respect to records collected or maintained pursuant to [the Gun Control Act] . . . in

---

[4] Exemption 3 states that FOIA

> does not apply to matters that are . . . specifically exempted from disclosure by statute (other than [5 U.S.C. § 552b]), if that statute—
>
> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or
>
> (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and
>
> (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(b)(3).

connection with . . . the tracing of a firearm." 117 Stat. at 473–74; (JA 235). The Rider was then changed in 2004 to say an agency may not "disclose to the public" the Firearms Trace System data, 118 Stat. at 53 (JA 235), and in 2005 and thereafter to say an agency may not "disclose" that data and to exempt it from "legal process" or "subpoena or other discovery"—thus omitting the reference to FOIA but broadening the effect of the rider to cover any type of disclosure. (JA 235–38). In all of its iterations, the Tiahrt Rider's text thus prohibited disclosure of Firearms Trace System data under FOIA, both for the term of the appropriations act it was part of and at all times in the future. As the Seventh Circuit has stated, Congress's "intent to bar access to the [Firearms Trace System] information is unmistakable," and the Tiahrt Rider, at least in the 2005 version and later, "qualifies as an Exemption 3 statute and substantively bars disclosure of the databases at issue." *City of Chicago v. ATF*, 423 F.3d at 782.

The legislative history further supports the conclusion that Congress unequivocally intended to bar the Firearms Trace System database from FOIA disclosure. In explaining the need for the 2003 Tiahrt Amendment, the House of Representatives Appropriations Committee expressed its concern that under FOIA, "information collected and maintained by ATF related to ongoing criminal investigations of firearms, arson or explosive offenses could be released, potentially compromising those cases." H.R. Rep. No. 107-575, at 20 (2002). In part because FOIA disclosure makes the information available to the public, disclosure "would not only pose a risk to law enforcement

and homeland security, but also to the privacy of innocent citizens." *Id.* The legislation was thus intended to "ensur[e] that no appropriated funds may be available to ATF to take any action under the FOIA with respect to such law enforcement records." *Id.*

Were there any doubt remaining about Congress's intent, it is dispelled by the fact that Congress strengthened the disclosure-prohibiting language in response to judicial decisions requiring disclosure under FOIA. In 2002, the Seventh Circuit affirmed a district court decision requiring FOIA disclosure of the Firearms Trace System data. *City of Chicago v. U.S. Dep't of Treasury*, 287 F.3d 628, 632 (7th Cir. 2002), *vacated*, 537 U.S. 1229 (2003). The Supreme Court granted certiorari. 537 U.S. 1018 (2002). Congress then enacted the original Tiahrt Amendment in February 2003, and the Supreme Court vacated the Seventh Circuit's decision and remanded the matter for consideration of the new statute's effects. 537 U.S. 1229 (2002). In January 2004, Congress enacted the 2004 Tiahrt Amendment. (JA 235). The Seventh Circuit concluded that the 2003 and 2004 Tiahrt Amendments were not Exemption 3 statutes, as they were "indirect" prohibitions on disclosure, effected through a restriction on appropriations, and thus created only a procedural rather than substantive hurdle. *City of Chicago v. U.S. Dep't of Treasury*, 384 F.3d 429, 432–33 (7th Cir. 2004), *vacated on reh'g*, 423 F.3d 777 (7th Cir. 2005).

Congress again responded, by enacting the 2005 version of the Tiahrt Rider, which specified that the

data is "immune from legal process" and "not . . . subject to subpoena or other discovery" in judicial or administrative proceedings. (JA 235). The Seventh Circuit then granted panel rehearing and held that Congress had "responded to our conclusion that this ban was merely about funding," and that "[t]he only reasonable explanation for Congress' action is that it intended to preclude disclosure of the information." *City of Chicago*, 384 F.3d at 782. "Congress' obvious intention in adding the 'immune from legal process' language to the funding restriction that existed under prior riders was to cut off access to the databases for any reason not related to law enforcement." *Id.* at 780. Thus, in light of the 2005 Rider's text, as well as the history of the litigation before it and Congress's deliberate response to the court's rulings, the Seventh Circuit concluded that the 2005 Rider must be viewed as an Exemption 3 statute that prohibits disclosure of the Firearms Trace System data. *Id.* at 781–82.

The same language the Seventh Circuit relied on in the 2005 Rider was repeated in all later versions, including the most recent, the 2012 Rider. (JA 235–39). Accordingly, Congress's intent to enact an Exemption 3 statute prohibiting FOIA disclosure of the Firearms Trace System data remains "obvious," "clear," and "unmistakable." 423 F.3d at 780–82.

B. The Tiahrt Amendments' Effect Is Not Changed Due to Their Lack of a Specific Citation to FOIA

Despite that clear and consistently expressed intent, the district court held that the 2012 Tiahrt

Amendment is not an Exemption 3 statute, and that it displaces all the previous versions of the Amendment even if they were Exemption 3 statutes. That was error.

As noted above, § 552(b)(3)(B) now provides that FOIA "does not apply to matters" that are "specifically exempted from disclosure by statute . . . , if that statute . . . if enacted after the date of enactment of the OPEN FOIA Act of 2009,[5] specifically cites to this paragraph," i.e., Exemption 3. The district court relied on that language to conclude that the post-2009 versions of the Tiahrt Amendment are not effective in preventing disclosure under FOIA because they do not "specifically cite[ ]" § 552(b)(3). (JA 404, 408–09).

But the Supreme Court has held that a statute that clearly expresses Congress's intent must be given effect, even if it fails to comply with a prior Congress's attempt to require an express reference to another statute, in light of the longstanding principle that one Congress cannot limit future Congresses' ability to enact legislation. Congressional enactments that purport to require future statutes to expressly refer to a particular provision in order to have effect are "less demanding" than their terms state. *Dorsey v. United States*, 567 U.S. 260, 273–74 (2012). "That is because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the

---

[5] The OPEN FOIA Act was section 564 of Pub. L. No. 111-83 (Oct. 28, 2009).

earlier statute but as modified. And Congress remains free to express any such intention either expressly or by implication as it chooses." *Id.* at 274 (citation omitted); *see id.* at 289 (Scalia, J., dissenting) (agreeing with majority that "express-statement requirements of this sort are ineffective" because "one legislature cannot abridge the powers of a succeeding legislature" (quotation marks omitted)); *see also United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (acknowledging "the centuries-old concept that one legislature may not bind the legislative authority of its successors"); *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) ("the will of a particular Congress . . . does not impose itself upon those to follow in succeeding years").

Thus, if " 'the plain import of a later statute directly conflicts with an earlier statute,' . . . 'the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other "magical password." ' " *Dorsey*, 567 U.S. at 274 (quoting *Lockhart v. United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring)); *accord Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (declining "to require the Congress to employ magical passwords in order to effectuate an exemption from" a previously enacted statute). To be sure, at least in some circumstances, an express-reference requirement may set forth an "important background principle of interpretation" that future Congresses are presumed to be aware of, and that requires courts "to assure themselves that ordinary interpretive considerations point clearly" to the conclusion that a future Congress is changing course. *Dorsey*, 567 U.S. at 274–75. But the "plain import" or "fair implication" of the later statute must control,

even if the later Congress did not use the "magical passwords" that the earlier Congress sought to require: an express-reference requirement "'cannot justify a disregard of the will of Congress as manifested either expressly or by *necessary implication* in a subsequent enactment.'" *Id.* (quoting *Great Northern Railway Co. v. United States*, 208 U.S. 452, 465 (1908); some quotation marks omitted).

In short, the district court here stated that Congress, in the OPEN FOIA Act, "gave itself explicit instructions" for how to enact a FOIA exemption, and the 2012 Tiahrt Amendment was unenforceable as a FOIA exemption because it failed to comply with those instructions. (JA 409). But that is impermissible: the 111th Congress that passed the OPEN FOIA Act was powerless to give "instructions" to the 112th Congress that passed the 2012 Tiahrt Amendment. The latter Congress was free to exempt the Firearms Trace System data from FOIA disclosure by whatever means it saw fit, and it unmistakably did so. The district court's insistence that a reference to § 552(b)(3)—that is, a "magical password"—solely determines Congress's intent to prohibit disclosure of certain records under FOIA (JA 411) places an unwarranted limit on Congress's power to perform its legislative function.

Moreover, in the context of this particular legislation, the district court's ruling makes little sense. Neither the district court nor Everytown appears to dispute that the Tiahrt Riders enacted before 2009 barred release of the Firearms Trace System data under FOIA. *See City of Chicago*, 423 F.3d at 780–82. Yet

their position is that by repeating the relevant language of the Tiahrt Rider, materially verbatim, in every version of the Rider enacted after 2009, Congress somehow intended to reverse course, changing what had been accepted as an Exemption 3 statute (as the Seventh Circuit had already held) into a statute that imposed no bar at all on FOIA disclosure. That is not only illogical, but it contradicts the presumption that Congress is "aware of . . . [a] judicial interpretation of a statute" and "adopt[s] that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *accord Forest Grove School District v. T.A.*, 557 U.S. 230, 239-40 (2009)—a presumption vindicated by the fact that, as the Seventh Circuit recognized, Congress was in actual fact paying heed to the developments in the *City of Chicago* litigation and responding as necessary. 423 F.3d at 782. Had Congress meant to abandon its own, and the Seventh Circuit's, understanding of the meaning of its words, it surely would have altered those words.

Furthermore, as the district court acknowledged, its decision in this case "is contrary to the decisions of other courts to have considered" whether, since 2009, the Tiahrt Amendment remains an Exemption 3 statute. (JA 409). Some of those decisions considered the OPEN FOIA Act and held that the Tiahrt Amendment still fell within the scope of Exemption 3,[6] while others

---

[6] *See, e.g.*, *Center for Investigative Reporting v. United States Dep't of Justice*, Case No. 17-cv-06557-JSC, 2018 WL 3368884, at *2, 9 (N.D. Cal. July 10, 2018) ("the Tiahrt Amendment is a statute of exemption within the meaning of Exemption 3" (quotation

did not address that argument,[7] but all of them relied —properly—on the clear intent of Congress in enacting the Tiahrt Riders. In several of these cases, the

---

marks omitted)), *appeal pending*, No. 18-17356 (9th Cir.); *P.W. Arms, Inc. v. United States*, No. C15-1990-JCC, 2017 WL 319250, at *4 (W.D. Wash. Jan. 23, 2017) ("'disclosure prohibitions set forth by Congress in the 2005 and 2008 appropriations bills are still effective prospectively and beyond those fiscal years as a permanent prohibition'"); *Abdeljabbar v. ATF*, 74 F. Supp. 3d 158, 174–76 (D.D.C. 2014).

[7] *See, e.g.*, *Caruso v. ATF*, 495 F. App'x 776, 778 (9th Cir. 2012) (Appropriations Act of 2010 was an Exemption 3 statute prohibiting disclosure of federal firearms licensee information); *Michael v. U.S. Dep't of Justice*, Civil Action No. 17-0197, 2018 WL 4637358, at *8 (D.D.C. Sept. 27, 2018) (Tiahrt Amendments that predate the 2009 FOIA Amendments "are still effective prospectively and beyond those fiscal years as a permanent prohibition"); *Reep v. U.S. Dep't of Justice*, 302 F. Supp. 3d 174, 183 (D.D.C. 2018) (ATF properly withheld Firearms Trace System data under Exemption 3); *Williams v. ATF*, Civil Action No. PWG-15-1969, 2017 WL 3978580, at *6 (D. Md. Sept. 8, 2017) (non-disclosure of firearms trace data "was proper under Exemption 3 as it is clearly prohibited by the Appropriations Act"); *Fowlkes v. ATF*, 139 F. Supp. 3d 287, 291–92 (D.D.C. 2015); *Smith v. ATF*, No. 13-13079, 2014 WL 3565634, at *6 (E.D. Mich. July 18, 2014) ("The prohibition on the expenditure of appropriated funds to disclose records from the [FTS] . . . ex-

courts relied on pre-2009 versions of the Tiahrt Amendment, explaining that their prohibitions of public disclosure of Firearms Trace System data "are still effective prospectively." *P.W. Arms, Inc.*, 2017 WL 319250, at *4 (concluding that "'disclosure prohibitions set forth by Congress in the 2005 and 2008 appropriations bills are still effective prospectively and beyond those fiscal years as a permanent prohibition'" (quoting *Abdeljabbar*, 74 F. Supp. 3d at 174–76); *see Michael*, 2018 WL 4637358, at *8 (D.D.C. Sept. 27, 2018); *Smith*, 2014 WL 3565634, at *5–6. The district court in this case, however, held that each of the successive appropriations riders supplanted the prior ones, and thus the 2012 Rider, as a non-Exemption 3 statute, supplanted the Exemption 3 nature of the pre-2009 Riders, despite their forward-looking language of permanent effect. (JA 407–09). But as noted above, it is illogical to conclude that Congress used identical language to achieve diametrically opposed results. *Cf. Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) ("[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning"). While certain parts of the later Riders did supplant their predecessors—in particular, Congress changed the exceptions to the

---

tends unilaterally to other existing laws, but also prospectively and beyond fiscal year 2008."); *Higgins v. U.S. Dep't of Justice*, 919 F. Supp. 2d 131, 145 (D.D.C. 2013) ("[t]he appropriations legislation on which [the ATF] relies explicitly bars disclosure of information maintained by the National Trace Center" (quotation marks omitted)).

prohibition of disclosure—the nondisclosure provisions remained essentially unchanged, and should therefore be interpreted as Congress intended, to have continuous and permanent effect.

Here, the 2012 Tiahrt Rider was intended to bar release of the Firearms Trace System data—repeating both the text and manifest intent of the previous Riders. By employing words of futurity, Congress consistently expressed its desire to keep the disclosure bar permanent. *See Auburn Housing Auth. v. Martinez*, 277 F.3d 138, 146 (2d Cir. 2002) (words of "futurity" indicate an intent to enact permanent legislation). In short, and as other courts have correctly recognized, while the details and, in particular, the exceptions vary from year to year, in every version of the Tiahrt Rider—including the 2012 Rider that remains in effect and was considered by the district court—Congress clearly expressed its continuing and unchanging intent to prevent disclosure of the Firearms Trace System data. (JA 235–39).

C. The Tiahrt Amendment's Exceptions Do Not Apply to FOIA Requests

Finally, although the district court did not reach this issue, the exceptions to the 2012 Tiahrt Rider do not change its applicability to Everytown's FOIA request. The relevant exception allows "publication of annual statistical reports" containing "statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations." (JA 239). The history and pur-

pose of that exception demonstrate that the "publication" of "annual . . . reports" Congress meant to allow did not include sporadic disclosure in response to a FOIA request. Rather, the exception was intended to allow ATF to continue publishing reports it had long published before the Tiahrt Amendments were enacted, reports that mirrored the two categories Congress described: "firearms traffickers and trafficking channels" and "firearms misuse, felons, and trafficking investigations." (JA 239).

After the original Tiahrt Amendments were passed in 2003 and 2004, its broad prohibition on using federal funds to disclose the contents of the Firearms Trace System database had been interpreted as a potential bar to a series of annual reports that ATF had previously published. As the House Report concerning the 2005 Appropriations Act explained, "the Committee is concerned that the previous language has been interpreted to prevent publication of a long-running series of statistical reports on products regulated by ATF." H.R. Rep. No. 108-576, at 30 (2004). Because that "was never the intention of the Committee," "new language" was added to the 2005 Rider to "make clear that those reports may continue to be published in their usual form as they pose none of the concerns associated with law enforcement sensitive information." *Id.* While the language of the 2005 Rider's exception differed from the current 2012 Rider, it was amended to its current form in the 2008 Rider—and, as the House Report for that year's version stated, Congress was acting on the same concern: "the Committee is concerned that the previous year's language has been interpreted to prevent publication of a long-running

series of statistical reports on products regulated by ATF. This was never the intention of the Committee, and the fiscal year 2008 language makes clear that those reports may continue to be published in their usual form as they pose none of the concerns associated with law enforcement sensitive information." H.R. Rep. No. 110-240 (2007).

Thus, the history of the Riders makes clear that the exception to the disclosure prohibition was intended to ensure that ATF could continue to prepare and publish its annual statistical reports—not to open up the Firearms Trace System database to FOIA requesters.

That intent is clear from the text of the exception as well, which, in its 2008 through 2012 versions, states in full:

> [T]his proviso shall not be construed to prevent: (A) the disclosure of statistical information concerning total production, importation, and exportation by each licensed importer (as defined in section 921(a)(9) of [Title 18 of the U.S. Code]) and licensed manufacturer (as defined in section 921(a)(10) of such title); (B) the sharing or exchange of such information among and between Federal, State, local, or foreign law enforcement agencies, Federal, State, or local prosecutors, and Federal national security, intelligence or counterterrorism officials; or (C) the publication of annual statistical reports on products regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives,

> including total production, importation, and exportation by each licensed importer (as so defined) and licensed manufacturer (as so defined), or statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons and trafficking investigations . . . .

(JA 236-39). That exception, in particular its subpart (C), does not authorize the publication of statistical aggregate data regarding "firearms misuse" as a standalone category. Rather, it authorizes the publication of data regarding two discrete subjects—"firearms traffickers and trafficking channels" and "firearms misuse, felons, and trafficking investigations." Those two categories mirror the titles of previous ATF publications: "Traffickers and Trafficking Channels," ATF, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, § 3-2 (June 2000), and "Firearms Misuse, Felons, and Trafficking Investigations," *id.* § 3-3.[8] Consistent with the intent stated in the 2004 and 2007 House Reports, it is clear from that context that Congress wanted to ensure that ATF could continue to publish these or similar reports at its discretion.

---

[8] *Available at* https://web.archive.org/web/20041016161552/http:/www.atf.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf, and http://everytown.org/wp-content/uploads/2014/08/Following-the-Gun_Enforcing-Federal-Laws-Against-Firearms-Traffickers.pdf.

In addition, Congress's choice of the word "publication" suggests that the release of information should be initiated by the agency—not in response to a FOIA request. *See* American Heritage Dictionary of the English Language (5th ed.) (defining "publish": "To prepare and issue (a book, music, or other material) for public distribution, especially for sale"; "To prepare and issue a work or works by (an author)"). And Congress's use of the phrase "annual statistical reports" further suggests that it meant to allow a yearly compilation of data by ATF—not a release of data in response to FOIA requests submitted by the public with unpredictable frequency. The text of the exception to the 2012 Tiahrt Rider therefore confirms what the legislative history states clearly: the exception was intended to allow the continuation of ATF's usual reports, not to permit FOIA requests like Everytown's.

POINT II

FOIA Does Not Require ATF to Create New Records as Requested by Everytown

The district court's judgment should be reversed for an independent reason: Everytown's requests would require ATF to create new records, rather than simply producing existing ones.

FOIA does not permit courts to compel an agency to produce anything other than responsive, non-exempt records. 5 U.S.C. § 552(a)(4)(B) (district court "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld" from plaintiff).

As the Supreme Court has stated, FOIA does not "require[] an agency to actually create records, even though the agency's failure to do so deprives the public of information which might have otherwise been available to it." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980); *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975) (FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create"). Similarly, FOIA does not require agencies to "produce or create explanatory material," *id.* at 161–62, to "answer questions," *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985), or to produce "answers to interrogatories," *DiViaio v. Kelley*, 571 F.2d 538, 542-43 (10th Cir. 1978).

As ATF explained to the district court, Everytown's FOIA request would improperly require the agency to do just that: generate new records and answer questions. The agency's declarant explained that ATF must take the following exhaustive steps to create the reports requested by Everytown: (1) run searches on the database to identify the relevant trace data; (2) clean up the raw data pulled from these searches by performing at least six levels of data filtering, a process that requires analysts to evaluate the data and fill in gaps by making educated assumptions based on other fields associated with the same entry, by performing research on missing fields, and by conducting comparative analyses of possessor and purchaser information; (3) inserting the resulting statistics into applicable software and creating a visual depiction of the data; and (4) subjecting the resulting product to multi-level

reviews to ensure the accuracy of the data and the format in which it is presented. (JA 52, 57–58). Indeed, another district court that considered a similar FOIA request for statistical aggregate data derived from the Firearm Trace System database described the same process—"the individual data elements in the database must be searched for and then extracted, compiled, analyzed, and manipulated using 'statistical software' to create statistical trace data suitable for publication"—as "necessarily entail[ing] the creation of a new record" which "the Court cannot compel [ATF] to do under the FOIA." *Center for Investigative Reporting*, 2018 WL 3368884, at *10.

The district court here was required to accord a presumption of accuracy and good faith to ATF's detailed explanation of the process for creating the records Everytown seeks. *Center for Constitutional Rights v. CIA*, 765 F.3d 161, 166 (2d Cir. 2014); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999); *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994). Instead, the district court relied on its own unsupported view that all ATF needed to do to respond to the FOIA request was to turn over the "raw entry counts" from its initial searches. (JA 419). The district court concluded that the work needed for ATF's analysts to create customized statistical reports responsive to the FOIA request was nothing more than "a simple search" that "will yield both the responsive database entries and the requested numbers thereof." (JA 415). But that conclusion is contradicted by the record, in which ATF explained the far more involved process

that would be required to accurately answer Everytown's request.[9]

The district court's response was, in substance, that it does not matter if the numbers in ATF's response are accurate or reliable: the court observed that the agency "offers no explanation for why" its response must be "'the correct number' of items in each category sought," which in turn would require the laborious cleanup and filtering described in the agency's declaration. (JA 415–16). Construing the FOIA request to seek accurate numbers was, the district court ruled, a violation of ATF's obligation to construe the request

---

[9] The district court cited the E-FOIA Act, concluding that it requires agencies to "sort," "'review,'" or engage in "'some manipulation'" of computerized data before disclosing it, and that processing does not result in the creation of a new record. (JA 414, 420). But the government does not dispute that some processing of computerized data is required. The necessary steps outlined by ATF's declarant go far beyond that processing, a point neither the district court nor Everytown appear to contest. *See National Security Counselors v. CIA*, 898 F. Supp. 2d 233, 271 (D.D.C. 2012) ("a FOIA request for a listing or index of a database's contents that does not seek the contents of the database, but instead essentially seeks information about those contents, is a request that requires the creation of a new record, insofar as the agency has not previously created and retained such a listing or index").

"liberally." (JA 417). But that obligation notwithstanding, an agency's interpretation of a FOIA request should be upheld when it is "reasonable." *Weisberg v. DOJ*, 745 F.2d 1476, 1488 (D.C. Cir. 1984); *see Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1253 (11th Cir. 2008) (focus of judicial inquiry is "whether [agency's] interpretation of, and efforts to fulfill, those [FOIA] requests were reasonable and adequate"). Construing a request for data to seek correct data, rather than data the agency knows will be incorrect unless it is examined and adjusted in accordance with its usual procedures for using that data, is certainly reasonable, as the district court conceded. (JA 417 ("ATF's interpretation of this request as seeking 'correct,' cleaned-up numbers is not necessarily unreasonable")). That is particularly true here because Everytown's FOIA request did not seek "raw data" or "the number of entries in the database corresponding to searches run using different sets of existing variables," as the district court asserted (JA 415, 416, 417, 420)—it sought "statistical data, aggregated on a nation-wide and state-by-state basis" (JA 10), and statistics that "document" the "number of [traced] guns that were used" in suicides (JA JA 24). Those words were reasonably read by ATF to mean data the agency actually believes is accurate, not data the agency knows to contain false hits and omissions.

Requiring an agency to interpret a FOIA request as seeking data known to be inaccurate could not conceivably further FOIA's "basic purpose . . . to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."

John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quotation marks omitted). To the contrary, given that data released by ATF in response to Everytown's request will be perceived by the public as the agency's official response, the interpretation adopted by the district court would affirmatively impede that purpose. ATF reasonably construed Everytown's request to seek data that has been cleaned up in accordance with the process the agency would normally follow in order to use or publish that data; and because that cleaned-up data has not been previously complied by the agency, it need not be disclosed under FOIA.

CONCLUSION

The judgment of the district court should be reversed.

Dated: New York, New York
February 3, 2020

Respectfully submitted,

GEOFFREY S. BERMAN,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellant.

TOMOKO ONOZAWA,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 9,305 words in this brief.

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York

By: TOMOKO ONOZAWA,
Assistant United States Attorney