19-3438

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

EVERYTOWN FOR GUN SAFETY SUPPORT FUND,

Plaintiff-Appellee,

—against—

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 PLAINTIFF-APPELLEE

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RULE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Everytown for Gun Safety Support Fund, a 501(c)(3) organization, states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

/s/ James Miller
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PRELIMINARY STATEMENT

More than 20,000 people die by firearm suicide in the United States every year, a figure that represents approximately two-thirds of all gun-related deaths in this country. Addressing the public health problems of both suicide and gun violence, therefore, necessarily requires an understanding of the problem of gun-related suicide. To enhance that understanding, Appellee Everytown for Gun Safety Support Fund ("Everytown") submitted the Freedom of Information Act ("FOIA") request at issue here, seeking production of several categories of statistical aggregate data about the firearms used in attempted or completed suicides. These records will shed light on how and when people who attempt or die by firearm suicide obtain the guns they use—information that public health experts agree is critical to suicide prevention.

Appellant Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has refused to provide the data Everytown requested, claiming that it is protected from disclosure by an appropriations rider known as the "Tiahrt Rider," which restricts ATF's ability to spend appropriated funds to disclose records from its Firearms Tracing System ("FTS") database. However, as the district court correctly held, the 2012 version of the Tiahrt Rider is not a valid withholding statute under FOIA because it does not comply with 5 U.S.C. § 552(b)(3) ("Exemption 3" or "FOIA Exemption 3"). As amended by the Open FOIA Act of 2009, Exemption 3 permits

the withholding of records "specifically exempted from disclosure by statute" only if that statute "specifically cites to this paragraph" of FOIA, if enacted after the Open FOIA Act. *See id*. The operative Tiahrt Rider, enacted more than two years after the Open FOIA Act, does not cite to this paragraph of FOIA—or any part of FOIA—and therefore cannot justify the denial of Everytown's FOIA request.

Unable to prevail on the plain text of the Tiahrt Rider, ATF deploys a sweeping new strategy on appeal, seeking to negate the Open FOIA Act. It now argues that the application of Exemption 3's criteria for withholding statutes, as written, infringes on the Article I power of future Congresses to pass withholding statutes. But it does not, and no court has ever so held. Simply put, Congress "remains free to repeal [FOIA], to exempt the [Tiahrt Rider] from [FOIA], to modify [FOIA], or to apply [FOIA] but as modified." *See Dorsey v. United States*, 567 U.S. 260, 274 (2012). ATF's authority in support of its novel argument concerns an entirely different statute with materially different language and effects.

Nor can ATF prevail by turning the question presented by this case into one of congressional intent. In fact, the clearest indication of Congress' intent is its omission of any reference to FOIA in the operative 2012 Tiahrt Rider. And this omission is telling: the two Congresses that passed versions of the Tiahrt Rider since the Open FOIA Act of 2009 also enacted or amended at least 16 separate provisions of the U.S. Code to include the very language they omitted from the Tiahrt Riders.

Moreover, even if the Tiahrt Rider were a withholding statute—which it is not—Everytown's request for statistical aggregate data related to firearms suicide fits into the Tiahrt Rider's exception for "statistical aggregate data" related to "firearms misuse." For this independent reason, ATF's refusal to comply with Everytown's FOIA request was improper and cannot stand.

Finally, ATF cannot escape its obligations under FOIA by claiming that Everytown's request calls for the creation of new records. That position is foreclosed by the Electronic Freedom of Information Act Amendments of 1996 ("E-FOIA"), which specifically require agencies to search and produce records from computerized databases like the one at issue here. ATF admits that it can run the searches that Everytown requested—using only two hours of technician time—and produce the requested raw data. Yet ATF insists that it should be allowed to graft on extraneous data validation processes that Everytown has not requested. Having thus interpreted the FOIA request to increase its burden beyond anything Everytown demanded, ATF contends that the request is so laborious as to excuse it from its obligations under FOIA. But that is not how FOIA works. As the district court correctly held, it is the requester that defines the scope of the request—and such requests must be construed liberally in favor of disclosure. The Court should not allow ATF to ignore this basic rule in an effort to undermine FOIA's underlying principles of disclosure.

Congress has for decades demonstrated careful stewardship of FOIA generally, and Exemption 3 in particular, most recently by adding a bright-line rule for withholding statutes in order to guide agencies, courts, and the public about the proper balance between government secrecy and transparency in cases falling under these statutes. ATF here invites this Court to upend this balance, by ignoring the Open FOIA Act, just as it seeks to elide the requirements of E-FOIA. ATF's refusal to provide the information sought is unwarranted by the law, unjustified by the record, and at odds with FOIA's foundational role in American democracy. That refusal should not be countenanced and the district court's thorough and well-reasoned decision should be affirmed.

STATEMENT OF THE CASE

Everytown is an independent, non-partisan 501(c)(3) organization dedicated to the prevention of firearm-related violence through original research and development of evidence-based policy solutions. On December 14, 2016, Everytown submitted a FOIA request to ATF seeking several categories of statistical aggregate data from ATF's FTS database concerning firearms used in suicides. Joint Appendix ("JA") 60–63. This database holds records, often referred to as "trace data," of ATF's attempts to identify the manufacturers, distributors, and retail purchasers of firearms later recovered by law enforcement. JA 47–49.

Everytown seeks disclosure of the aggregate number of results returned by ATF's FTS database across several variables, including: (i) the length of time between purchase and recovery; (ii) the type of gun used; (iii) the States where the purchase and recovery occurred; and (iv) whether the firearm was recovered from its original buyer. JA 24–25. Specifically, the request seeks "records containing aggregate trace data that document the following:"

> (1) Nationwide, the number of each firearm type (pistol, revolver, rifle, shotgun, other) that were used in a completed suicide and successfully traced in 2012 and in 2013.
>
> (2) Nationwide, the number of each firearm type (pistol, revolver, rifle, shotgun, other) that were used in an attempted suicide and successfully traced in 2012 and in 2013.
>
> (3) For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013.
>
> (4) For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that were in the possession of the original buyer.
>
> (5) For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that were in the possession of someone other than the original buyer.
>
> (6) For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that that [*sic*] were originally purchased in the same state in which they were recovered.
>
> (7) For each state, the number of guns that were used in a completed suicide and successfully traced in 2012 and in 2013 that were traced less than 3 months after first purchase; that were traced between 3 and 6 months after first purchase; that were traced between 6 and 12 months after first purchase; that were traced

between 1 and 2 years after first purchase; that were traced between 2 and 3 years after first purchase; and that were traced more than 3 years after first purchase.

(8) For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013.

(9) For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that were in the possession of the original buyer.

(10) For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that were in the possession of someone other than the original buyer.

(11) For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that that [sic] were originally purchased in the same state in which they were recovered.

(12) For each state, the number of guns that were used in an attempted suicide and successfully traced in 2012 and in 2013 that were traced less than 3 months after first purchase; that were traced between 3 and 6 months after first purchase; that were traced between 6 and 12 months after first purchase; that were traced between 1 and 2 years after first purchase; that were traced between 2 and 3 years after first purchase; and that were traced more than 3 years after first purchase.

Id.[1]

Everytown asks only for production of the number of records corresponding to each of the specified categories, unfiltered and unvarnished. *Id.*; *see also* Hr'g Tr. 48:18–20 ("[W]hat we would want the ATF to produce is the number of entries, and

[1] Records responsive to two parts of the request—specifically, Nos. 3 and 8—were made available online by the ATF and are not at issue in this litigation. *See* ATF Br. at 12 n.3.

we don't expect any cleaning [of the data].") (JA 385). That is, Everytown seeks anonymized statistical aggregate data, and not any records that would include personal identifying information or information specific to a particular law enforcement investigation.

ATF acknowledged below that the FTS database contains this data. JA 56 ¶ 29 ("All of the underlying 'raw data' associated with Plaintiff's FOIA request is housed in the Firearms Tracing System."). ATF further explained that such data is coded across "a combined total of 800 columns/fields," including fields capturing the criteria Everytown identified, such that ATF can readily produce the records Everytown requested. *See id.* (describing categories of coding within the database); *see also* Hr'g Tr. 31:25–32:1 (JA 368–69) (conceding feasibility of "raw search" for requested records); Hr'g Tr. 45:14–22 (JA 382) (same). In other words, ATF's trace database is organized using the very criteria Everytown identified, making production of the records requested here expedient. Though ATF insists on a variety of additional steps to "clean up the raw data," it concedes that a pair of analysts would each need only "one hour to query the Firearms Tracing System for the requested data." JA 57 ¶ 31. Everytown offered to pay the cost of producing the requested information. JA 25.

Nevertheless, on April 6, 2017, ATF denied Everytown's FOIA request on the basis of FOIA Exemption 3, 5 U.S.C. § 552(b)(3), citing the 2012 Tiahrt Rider. That provision states:

> 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 . . . , except to: (1) a Federal, State, local, or tribal law enforcement agency, or a Federal, State, or local prosecutor; or (2) a foreign law enforcement agency solely in connection with or for use in a criminal investigation or prosecution; or (3) a Federal agency for a national security or intelligence purpose; unless such disclosure of such data to any of the entities described in (1), (2) or (3) of this proviso would compromise the identity of any undercover law enforcement officer or confidential informant, or interfere with any case under investigation; and no person or entity described in (1), (2) or (3) shall knowingly and publicly disclose such data; 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 proceeding 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; except that this 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 such title) 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.

Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011) (Special Appendix ("SPA") 32) (the "2012 Tiahrt Rider"). Congress enacted the first version of the Tiahrt Rider in 2003, and several subsequent versions followed, with numerous modifications, prior to the passage of the current Tiahrt Rider.[2]

Everytown appealed ATF's denial to the Department of Justice's ("DOJ's") Office of Information Policy, which denied the appeal, also based on the 2012 Tiahrt Rider. *See* JA 32–33. Everytown filed its complaint on March 15, 2018. JA 9–21. On August 19, 2019, the district court granted summary judgment in Everytown's favor and ordered ATF to produce the requested information. SPA 1–27.

[2] *See* Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 (2003) (the "2003 Tiahrt Rider"); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004) (the "2004 Tiahrt Rider"); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2004) (the "2005 Tiahrt Rider"); Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat. 2290 (2005) (the "2006 Tiahrt Rider"); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007) (the "2008 Tiahrt Rider"); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524, 575–76 (2009) (the "2009 Tiahrt Rider"); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3128–29 (2009) (the "2010 Tiahrt Rider"); *see also* SPA 28–32 (collected Tiahrt Riders).

SUMMARY OF ARGUMENT

Everytown's FOIA request seeks statistical aggregate data concerning the use of firearms in attempted or completed suicides. ATF denied the request on the basis of FOIA Exemption 3, which requires, *inter alia*, that a proffered withholding statute enacted after the Open FOIA Act of 2009 specifically cite to Exemption 3. 5 U.S.C. § 552(b)(3)(B). ATF cites the 2012 Tiahrt Rider—a rider enacted more than two years after the Open FOIA Act—as its basis for invoking Exemption 3. But the 2012 Tiahrt Rider does not reference Exemption 3, and therefore does not qualify as a withholding statute. This should end the matter.

ATF attempts to complicate this straightforward analysis in several ways. First, in an effort to sidestep the 2012 Tiahrt Rider's non-compliance with Exemption 3, ATF blurs the boundaries of the successive Tiahrt Riders, and appears to assert, as it did below, that portions of the pre-2009 versions of the Tiahrt Rider retain the force of law. This argument fails because the 2012 Tiahrt Rider, like each version before it, is a comprehensive substitute for earlier riders. To conclude otherwise would mean that ATF is simultaneously subject to overlapping versions of the Tiahrt Rider. But that is clearly not the case.

ATF also insists, for the first time on appeal, that Exemption 3's specific citation requirement does not require that a withholding statute specifically cite to Exemption 3, notwithstanding the express language of FOIA. In support of this

proposition, ATF relies on *Dorsey v. United States*, 567 U.S. 260 (2012), which ATF claims applies because it precludes one Congress from binding another. But FOIA Exemption 3 is functionally and textually distinct from the statute at issue in *Dorsey*, and the analysis in *Dorsey* provides no support for jettisoning the plain text of FOIA. Indeed, subsequent authority has made clear that provisions like the one at issue here are in no way constitutionally infirm. The Supreme Court itself has strictly applied an express-reference provision in the Religious Freedom Restoration Act (RFRA) that is similar in both form and function to the pertinent language of FOIA Exemption 3. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 n.30 (2014).

Nor has ATF demonstrated that Congress either expressly or implicitly repealed the Open FOIA Act so as to render the 2012 Tiahrt Rider a withholding statute despite its noncompliance with the specific citation provision. This is especially so given Congress' inclusion of a specific cross-reference to FOIA in more than a dozen other statutes enacted contemporaneously. This powerful fact underscores ATF's failure to bear its heavy burden of demonstrating implied repeal of the Open FOIA Act.

Even if the Court were to hold that the 2012 Tiahrt Rider is a withholding statute despite lacking the withholding language Congress repeatedly included in other laws, the Tiahrt Rider would still not prevent disclosure here. This is because

the rider includes a carve-out for the publication of "statistical aggregate data" related to, *inter alia*, "firearms misuse," which includes the use of firearms in suicides.

Finally, ATF cannot duck its obligations by claiming that Everytown is seeking the creation of new records. It is not, and ATF readily admits that it could produce the requested records using automated database queries and as little as two hours of technician time. Instead, ATF invents a strawman, claiming it must undertake an elaborate process that it uses to create its own published reports, and then claims that this process goes beyond the reasonable efforts required by FOIA. But Everytown is seeking unvarnished records, not glossy professional reports, and has repeatedly said so. The district court properly rejected this argument, and its decision should be affirmed.

ARGUMENT

I. THE 2012 TIAHRT RIDER DOES NOT JUSTIFY ATF'S DECISION TO WITHHOLD THE REQUESTED RECORDS

A. The Plain Text of FOIA Exemption 3 Makes Clear that the 2012 Tiahrt Rider Does Not Qualify as a FOIA Withholding Statute

In opposing Everytown's FOIA request, ATF relies entirely on FOIA Exemption 3, despite the fact that the 2012 Tiahrt Rider plainly fails to meet the requirements for withholding under that exemption. FOIA Exemption 3 permits withholding of records that are "specifically exempted from disclosure by statute,"

but the statute must satisfy two distinct criteria to qualify under the exemption. 5 U.S.C. § 552(b)(3). Specifically, the putative withholding statute must:

> (A)(i) require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establish[] particular criteria for withholding or refer[] 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 cite[] to this paragraph***.

Id. (emphasis added). Congress added the second element to address the problem of pervasive "exemption creep" and to clarify the boundary between secrecy and disclosure. *See* 155 Cong. Rec. 25,119 (2009) (describing Open FOIA Act as intended to address the "growing number of so-called 'FOIA (b)(3) exemptions' in proposed legislation—often in very ambiguous terms—to the detriment of the American public's right to know"); *see also* Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009) (legislation containing Open FOIA Act). In this way, the Open FOIA Act works in concert with FOIA's guiding principles, which "strongly favor[] a policy of disclosure" and "require[] the government to disclose its records unless its documents fall within one of the specific, enumerated exemptions set forth in the Act." *See Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 355–56 (2d Cir. 2005). Consistent with these aims, FOIA exemptions are construed narrowly

with all doubts resolved in favor of disclosure, and the government bears the burden of establishing that any claimed exemption applies. *Id.*

The 2012 Tiahrt Rider does not satisfy the criteria in Section 552(b)(3)(B). Specifically, although the 2012 Tiahrt Rider was enacted two years after the Open FOIA Act of 2009, it does not contain any reference whatsoever to FOIA, much less "specifically cite[]" Exemption 3. *See* 2012 Tiahrt Rider, 125 Stat. at 609–10 (SPA 32). The district court was therefore correct when it found that the 2012 Tiahrt Rider is not a withholding statute under FOIA, because it does not contain the elements necessary to trigger Exemption 3. SPA 16.

ATF conceded this point below, acknowledging that "versions of the Tiahrt Amendment that were passed in 2010 and 2012 were 'enacted after the date of enactment of the Open FOIA Act of 2009,' and do not 'specifically cite to' 5 U.S.C. § 552(b)(3) ***as currently required***. . . ." ATF Summ. J. Br. at 14 (Dkt. 18) (emphasis added). This admission was not a misstatement or misunderstanding: instead, it expressly reflects DOJ policy, as contained in its Guide to the Freedom of Information Act and in the DOJ Office of Information Policy's specific guidance on

the Open FOIA Act of 2009.[3] In other words, both parties agreed below that statutes enacted after the Open FOIA Act must reference Exemption 3 in order to qualify for withholding under FOIA, and that the 2012 Tiahrt Rider is subject to—but does not satisfy—this requirement.

Try as it might, ATF cannot now change the language of the 2012 Tiahrt Rider to say something it does not. ATF's argument that the "plain language" of the 2012 Tiahrt Rider "makes clear Congress's intent to prohibit ATF from disclosing [trace] data" (*see* ATF Br. at 16, 19–23) ignores the obvious: disregarding Exemption 3's explicit criteria and omitting any mention of FOIA would be a truly bizarre way for Congress to express the intent to create a FOIA withholding statute, given the straightforward path that FOIA establishes for invoking Exemption 3. *See* 5 U.S.C. § 552(b)(3). The omission of Exemption 3 language from the 2012 Tiahrt Rider is even more telling when one considers that the 112th Congress enacted at least five

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[3] *See* U.S. Dep't of Justice Office of Information Policy, *Department of Justice Guide to the Freedom of Information Act: Exemption 3* at 4–5 (2020), https://perma.cc/YD6K-M9BV (last visited May 24, 2020) ("For any statute enacted after October 28, 2009, the text of Exemption 3 itself requires that the statute 'specifically cite' to Exemption 3 in order to qualify as a withholding statute."); *see also* U.S. Dep't of Justice Office of Information Policy, *OIP Guidance: Congress Passes Amendment to Exemption 3 of the FOIA*, https://perma.cc/T3TG-ZY23 (last visited May 18, 2020) ("If enacted after October 28, 2009, the statute must meet one additional requirement; it must specifically cite to Exemption 3 in order to qualify as a withholding statute.").

other pieces of legislation adding specific citations to FOIA paragraph (b)(3) to at least seven sections of the U.S. Code.[4]

ATF cannot avoid this result by arguing, as it did below, that older versions of the Tiahrt Rider remain in effect, at least as to the parts on which ATF relies for withholding. *See, e.g.*, ATF Br. at 17 (claiming that "the pre-2009 Tiahrt Amendments . . . should be considered still valid at least insofar as they prohibit FOIA disclosure"). This is because, as the district court correctly found, each successive version of the Tiahrt Rider is a comprehensive substitute for previous versions, meaning that only the 2012 version remains operative. SPA 10–16. In particular, each rider's repetition of "words of futurity" (*e.g.*, "during the current

[4] *See. e.g.*, Jumpstart our Business Startups Act, Pub. L. No. 112-106, § 106, 126 Stat. 306, 312 (2012) (amending 15 U.S.C. § 77f to shield certain regulatory disclosures by small businesses by adding statement that "[f]or purposes of section 552 of Title 5, United States Code, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552"); Food And Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, § 710, 126 Stat. 993, 1070 (2012) (amending 21 U.S.C. § 379, concerning confidentiality of certain information provided to the FDA, to add similar language); Moving Ahead For Progress In The 21st Century Act, Pub. L. No. 112-141, § 40231, 126 Stat 405, 854 (2012) (amending 29 U.S.C. § 1302, concerning minutes of Pension Benefit Guaranty Corporation meetings, to add similar language); FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 310, 126 Stat. 11, 64–65 (2012) (amending 49 U.S.C § 44703 and enacting 49 U.S.C. § 44735, concerning disclosure of various forms of aviation safety data, and including specific references to 5 U.S.C. § 552(b)(3) in both provisions); National Defense Authorization Act For Fiscal Year 2012, Pub. L. No. 112-81, §§ 1082 & 1091, 125 Stat. 1298, 1601, 1604 (2012) (enacting 10 U.S.C. §§ 2254a and 130e, concerning nondisclosure of critical infrastructure security information and military flight operations data, and adding citation to "section 552(b)(3) of title 5" to both provisions).

fiscal year and in each fiscal year thereafter") and of the statement that it applies to "funds appropriated under this or any other Act" indicates that each rider was intended as a comprehensive, standalone set of instructions for ATF's use of appropriated funds.[5] *See* SPA 12 (language of futurity indicates that each rider was meant "to provide specific, ongoing rules . . . that did not necessitate examining prior enactments"); *see generally* SPA 28–32 (collected Tiahrt Riders).

As the district court carefully explained, Congress made substantive changes to each rider such that ATF cannot simultaneously comply with all of them. *See, e.g.*, SPA 11–13 (comparing incompatible provisions of 2008 and 2010 riders). Indeed, even ATF acknowledges that "certain parts of the later Riders *did supplant their predecessors,*" ATF Br. at 29–30 (emphasis added), and it does not meaningfully dispute that these features taken together mean that each successive Tiahrt Rider "covers the whole subject of the earlier one and is clearly intended as a substitute" for earlier versions. *Branch v. Smith*, 538 U.S. 254, 273 (2003)

[5] Contrary to ATF's apparent suggestion, the Tiahrt Rider's language of futurity does not mean that provisions of earlier Tiahrt Riders survive to present as operative law. *See* ATF Br. at 30 (arguing that words of futurity indicate congressional "desire to keep the disclosure bar permanent"). Rather, ATF's cited authority stands for the simple proposition that language of futurity prevents an appropriations provision from automatically expiring at the conclusion of the fiscal year. *See Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 146 (2d Cir. 2002). It does not suggest that language of futurity can make an appropriations law immune to replacement by later-enacted substitutes.

(quotation marks omitted); *see also Force v. Facebook*, *Inc.*, 934 F.3d 53, 72 (2d Cir. 2019) (quoting *Branch*).

As is explained in a leading treatise on statutory interpretation, "[l]egislation which operates to revise the entire subject to which it relates gives strong implication of a legislative intent to repeal former statutory law." N. Singer & S. Singer, *Sutherland on Statutes and Statutory Construction* § 23:13, at 489–91 (7th Rev. Ed. 2014). Thus, as the Fourth Circuit has observed:

> It is a universally accepted rule of statutory construction that where a later act purports to cover the whole subject covered by an earlier act, embraces new provisions, and plainly shows that it was intended not only as a substitute for the earlier act but also to cover the whole subject involved and to prescribe the only rules with respect thereto, the later act operates as a repeal of the earlier act even though it makes no reference to the earlier act.

United States v. Lovely, 319 F.2d 673, 679–80 (4th Cir. 1963) (finding later law concerning disposition of state land was comprehensive replacement for earlier law). Here, each successive rider is a comprehensive substitute for the ones that came before it, and thus only the 2012 Tiahrt Rider—which is the last in time—remains operative.

Nor can ATF rely on a series of cases finding Exemption 3 satisfied by language from earlier Tiahrt Riders. *See* ATF Br. at 27–29. Many of these decisions simply ignore the effect of Exemption 3's specific citation requirement. *See, e.g., Caruso v. ATF*, 495 F. App'x 776, 778 (9th Cir. 2012). Of the decisions that do

acknowledge the Open FOIA Act, none consider Congress' intentions in structuring each Tiahrt Rider as a comprehensive substitute for earlier versions, or grapple with the problems inherent in ATF's suggested interpretation, which would yield multiple overlapping riders. *See, e.g., Abdeljabbar v. ATF*, 74 F. Supp. 3d 158, 175 (D.D.C. 2014). Many later decisions simply repeat the flawed reasoning of *Abdeljabbar*—a case in which the plaintiff did not file a brief in opposition to ATF's motion for summary judgment. *See id.* at 165; *see also, e.g.*, *Ctr. for Investigative Reporting v. U.S. Dep't of Justice*, No. 17-cv-06557-JSC, 2018 WL 3368884, at *8 (N.D. Cal. Jul. 10, 2018) (citing *Abdeljabbar*), *appeal pending*, No. 18-17356 (9th Cir.). In sum, these decisions offer little basis to conclude that any version of the Tiahrt Rider other than the 2012 Rider currently carries the force of law.

B. *Dorsey* Does Not Negate FOIA Exemption 3's Specific Citation Requirement

The government tries a new tack on appeal, arguing for the first time that Exemption 3's criteria for FOIA withholding, if applied according to their plain text, amount to unconstitutional efforts to "bind" future Congresses, citing *Dorsey v. United States*, 567 U.S. 260 (2012). *See* ATF Br. at 24–26. As an initial matter, ATF waived this argument by not raising it below, and by conceding that the 2012 Tiahrt Rider failed to specifically cite Exemption 3 "as currently required." ATF Summ. J. Br. at 14 (Dkt. 18); *see Tannerite Sports, LLC v. NBCUniversal News Grp., a division of NBCUniversal Media, LLC*, 864 F.3d 236, 252–53 (2d Cir. 2017)

(noting "well-established general rule that an appellate court will not consider an issue raised for the first time on appeal," particularly "where those arguments were available to the parties below and they proffer no reason for their failure to raise the arguments below" (internal quotation marks omitted)).

But even on the merits, ATF ignores that FOIA Exemption 3 operates in a fundamentally different way than did the statute at issue in *Dorsey*, and thus raises none of *Dorsey*'s concerns about binding Congress in derogation of its Article I power. Although ATF suggests that any law with an express-statement provision that applies to future legislation would violate the Constitution, *see* ATF Br. at 24–26, *Dorsey* holds only that such provisions impermissibly "bind" a future Congress when they impede the repeal or modification of earlier-enacted laws. *See Dorsey*, 567 U.S. at 274 (describing imperative that Congress "remain[] free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified").

Preventing new statutes from retroactively repealing statutory penalties is, of course, precisely what the 1871 savings statute at issue in *Dorsey* purported to do by its express terms:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. In essence, the feature of the 1871 savings statute that raised constitutional concerns was not its inclusion of the phrase "expressly provide," but its use of this standard to obstruct a future Congress from repealing or modifying earlier law.

FOIA Exemption 3, as modified by the Open FOIA Act, poses none of the entrenchment problems that the 1871 savings statute does. In passing the Open FOIA Act, Congress simply exercised its authority to better define the scope of Exemption 3 and to prescribe when it applies. It did not in any way preclude future legislation from repealing or modifying Exemption 3's criteria or how they function. Restated in *Dorsey*'s terms, Congress remains free to repeal or modify FOIA Exemption 3, or to exempt a later statute from it.

ATF's related attempt to characterize Exemption 3 as imposing an impermissible "magical password" requirement also falls short. *See* ATF Br. at 25–26. ATF relies principally on *Marcello v. Bonds*, 349 U.S. 302, 310 (1955), to suggest that such provisions violate Article I when strictly enforced. In fact, *Marcello* undercuts ATF, as it enforced the underlying statutory provision according to its plain text. *See id.* Specifically, in *Marcello*, the Supreme Court held that the Immigration and Nationality Act's hearing procedures displaced certain procedures under the Administrative Procedure Act (APA) because they "expressly" superseded

the APA as that statute required. *See id.*[6] Moreover, ATF takes *Marcello*'s statement about "magical passwords" out of context. To the extent the *Marcello* Court declined to require a "magical password," it did not do so because such requirements are *per se* invalid, but rather because the APA called for an "express" indication of congressional intent to supersede rather than a specific cross-reference. *See id.*

ATF's assertion that statutory cross-reference requirements cannot be applied as written also ignores more recent Supreme Court precedent vigorously enforcing precisely this type of provision. Two years after *Dorsey*, the Supreme Court applied an explicit cross-reference requirement in the Religious Freedom Restoration Act, to find that the Affordable Care Act's ("ACA's") contraceptive mandate was not exempt from RFRA. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Similar to FOIA and Exemption 3, RFRA "applies to all Federal law, and the implementation of that law . . . . unless such law *explicitly excludes such application by reference to this chapter*." 42 U.S.C. § 2000bb-3 (emphasis added).

Instead of striking down this requirement, as ATF's theory of *Dorsey* would suggest, the Supreme Court applied RFRA's "explicit[] . . . reference" requirement

[6] The APA provision at issue in *Marcello* stated in relevant part that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." *See* Pub. L. No. 79-404, § 12, 60 Stat. 237, 244 (1946).

with full force. In doing so, it rejected an argument that the ACA's legislative history—including a failed amendment to permit conscience-based opt-outs like what RFRA allows—provided a sufficient basis to exempt the ACA from RFRA notwithstanding the absence of an explicit cross-reference:

> [E]ven if a rejected amendment to a bill could be relevant in other contexts, it surely cannot be relevant here, because any "Federal statutory law . . . is subject to [RFRA] unless such law explicitly excludes such application by reference to [RFRA]." It is not plausible to find such an explicit reference in the meager legislative history on which the dissent relies.

Hobby Lobby, 573 U.S. at 719 n.30 (quoting 42 U.S.C. §2000bb-3(b)) (omission added, alterations in original). *Hobby Lobby* implicitly rejects ATF's assertion that specific cross-reference requirements impermissibly bind future Congresses.

The Seventh Circuit's decision in *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013), issued a year before *Hobby Lobby*, explained how RFRA's express-reference requirement complies with the constitutional principle articulated in *Dorsey*:

> Prospective application [of RFRA] is qualified by the rule that "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 earlier statute as modified." RFRA accounts for this principle too; the statute does not apply to a subsequently enacted law if it "explicitly excludes such application by reference to this chapter."

Korte, 735 F.3d at 671–73 (quoting *Dorsey*, 567 U.S. at 274; 42 U.S.C. § 2000bb-3(b)). In other words, the Seventh Circuit explained that RFRA's forward-looking

cross-reference requirement vindicated, rather than violated, the principle that one Congress cannot bind another, by codifying a mechanism by which a later Congress could exempt its legislation. So too here, where the elements of FOIA Exemption 3, including its specific citation requirement, provide the means by which Congress can decide whether or not to exempt records from FOIA. *See Long v. ICE*, 149 F. Supp. 3d 39, 54 (D.D.C. 2015) (applying Exemption 3's specific citation requirement, post-*Dorsey*, to hold that the Federal Information Security Modernization Act of 2014 is not a withholding statute).

Far from safeguarding Congress' authority, ATF's misreading of *Dorsey* would in fact undermine the legislative power, with significant ramifications for FOIA in particular. Adopting ATF's argument would set a constitutional limit on Congress' authority to legislate clear rules for courts and executive agencies. This would specifically frustrate the congressional intent underlying Exemption 3, which was to provide rules of decision for agencies to determine which records to withhold and for courts to adjudicate FOIA disputes. *See Ray v. Turner*, 587 F.2d 1187, 1219 (D.C. Cir. 1978) (Wright, C.J., concurring) (Congress intended Exemption 3 to "establish[] effective guidelines" for agency withholding, and "contain[] clear guidelines upon which a court could rely in reviewing the agency's refusal to disclose requested information."); *see also* S. Rep. No. 89-813, at 3 (1965) (purpose of FOIA was to eliminate malleable standards for disclosure and withholding

because "[i]t is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies").

ATF's misreading of *Dorsey* would also upend the careful balance that Congress sought to clarify and preserve by repeatedly refining Exemption 3's withholding criteria, most recently through the Open FOIA Act. Indeed, the Open FOIA Act's new criterion for Exemption 3 was specifically designed to clarify the exemption's scope, and to provide courts and litigants with an even clearer metric for determining when the exemption should apply. *See* 155 Cong. Rec. 16,234 (2009) ("This bill provides a safeguard against the growing trend towards FOIA exemptions *and would make all FOIA exemptions clear and unambiguous*, and vigorously debated, before they are enacted into law." (emphasis added)). To remedy these perceived problems, Congress added a bright-line rule for statutes enacted after the Open FOIA Act to qualify under Exemption 3.

Indeed, ATF's over-reading of *Dorsey* imperils all of Exemption 3's criteria, and not merely the bright-line rule added by the Open FOIA Act, since all Exemption 3 criteria set textual requirements for legislation to justify FOIA withholding. The first part of Exemption 3 provides that statutory provisions fall within the exemption only if those provisions "require[] that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establish[] particular criteria for withholding or refer[] to particular types of matters to be withheld." 5 U.S.C.

§ 552(b)(3)(A). This provision sets forth textual requirements that apply to later-enacted legislation in exactly the same way as the specific citation requirement set out in the second part of Exemption 3. ATF's argument that *Dorsey* requires such criteria to be effectively disregarded thus threatens to undo decades of congressional stewardship aimed at creating clear rules for both the government and the governed. That argument should be rejected.

C. Although Congress Remains Free to Repeal or Amend Exemption 3, the 2012 Tiahrt Rider Does Not Demonstrate a Clear and Manifest Intent To Do So

Because it cannot add language to the 2012 Tiahrt Rider or use *Dorsey* to ignore Exemption 3's unambiguous terms, ATF spends much of its brief arguing about Congress' supposed intent to prohibit disclosure under FOIA when it enacted the 2012 Tiahrt Rider. *See, e.g.*, ATF Br. at 19–20 (arguing that "Congress . . . clearly expressed its intent to prohibit the disclosure Everytown now seeks"). In essence, this is an argument that Congress intended the 2012 Tiahrt Rider to implicitly repeal the Open FOIA Act, creating a carve-out from Exemption 3 and functioning as a withholding statute despite failing to satisfy the specific elements of Exemption 3. *See* ATF Br. at 26 (arguing that Congress could create a FOIA withholding statute "by whatever means it saw fit, and . . . unmistakably did so").

While there is no dispute that Congress could repeal or amend Exemption 3 by implication if it wished to, ATF comes nowhere close to satisfying the demanding

standard of proof for an implied repeal. Implied repeal is strongly disfavored. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974) ("Appellees encounter head-on the cardinal rule . . . that repeals by implication are not favored." (internal quotation marks omitted)); *see also Dorsey*, 567 U.S. at 290 (Scalia, J., dissenting) ("Because the effect of such an exception [from the 1871 savings statute] is to work a *pro tanto* repeal of [the statute's] application to the defendant's case, the implication from the subsequently enacted statute must be clear enough to overcome our strong presumption against implied repeals."). As the Supreme Court recently explained:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both. A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. And in approaching a claimed conflict, we come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (internal citations, alterations, and quotation marks omitted). This is particularly so where the later statute is an appropriations rider, as it is here. *See Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) ("This Court's aversion to implied repeals is especially strong in the appropriations context." (quotation marks omitted)).

ATF cannot carry this "heavy burden" of showing an unmistakable congressional intent that the 2012 Tiahrt Rider would repeal the Open FOIA Act and

function as a withholding statute under Exemption 3. Indeed, the plain text of the 2012 Tiahrt Rider undermines this position: the statute omits any reference to FOIA. *See Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 960 F.2d 105, 108 (9th Cir. 1992) ("[I]f Congress intended to prohibit the release of the [records] under FOIA—as opposed to the expenditure of funds in releasing the [records]—it could easily have said so."). This omission forces ATF to make the awkward argument that Congress created a FOIA withholding statute by implicitly repealing elements of the very FOIA Exemption it was trying to invoke. This is a bizarrely complicated way for Congress to trigger Exemption 3, where all it had to do to achieve this result was insert a reference to FOIA paragraph (b)(3).

Moreover, ATF's position is powerfully undercut by the actions of the 112th Congress, which repeatedly passed other laws with specific citations to 5 U.S.C. § 552(b)(3) when it wanted to create FOIA withholding statutes. As noted above, *supra* note 4, the 112th Congress added specific citation provisions to at least seven separate U.S. Code sections, enacted or amended through at least five separate pieces of legislation passed around the same time as the 2012 Tiahrt Rider. Likewise, the 111th Congress—which passed the Open FOIA Act of 2009 about two months before it passed the 2010 Tiahrt Rider—added specific citation provisions to at least

nine different sections of the U.S. Code.[7] These sixteen post-Open FOIA Act withholding statutes with specific citations to FOIA paragraph (b)(3) demonstrate that Congress knew how to create Exemption 3 statutes when it wished to. Its conspicuous failure to include this FOIA withholding language in the 2012 Tiahrt Rider makes clear that it did not intend to do so here.

Indeed, the notion that the 111th Congress—whose intent ATF suggests informed the 112th Congress, *see* ATF Br. at 23—wanted the 2010 Tiahrt Rider to repeal the Open FOIA Act is, as a matter of law, significantly undermined by the fact that it had passed the Open FOIA Act only two months earlier. *See* 2010 Tiahrt Rider, Pub. L. No. 111-117, 123 Stat. 3034, 3128–29 (2009) (SPA 31); Open FOIA Act, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009). As this Court has recognized, the "cardinal rule" that repeal by implication is disfavored "is even stronger when the two acts were enacted close in time." *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002). Indeed, as a matter of both common

[7] *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 503, 124 Stat. 4137, 4207–08 (2011) (amending 10 U.S.C. §§ 613a(a) and 14014 to exempt various military selection boards from FOIA and adding to each provision that "[t]his prohibition is a statutory exemption from disclosure, as described in section 552(b)(3) of title 5"); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 748, 809, 922, 929I, 1103, 124 Stat. 1376, 1744, 1820, 1847, 1858–59, 2119 (2010) (amending several laws relating to securities regulation and whistleblower protections, including 7 U.S.C. § 26, 12 U.S.C. § 5468, 15 U.S.C. § 78u-6, 15 U.S.C. § 78x, 15 U.S.C. § 80a-30, 15 U.S.C. § 80b-10, and 12 U.S.C. § 248, to add specific references to 5 U.S.C. § 552(b)(3)).

sense and principles of statutory construction, it would be unreasonable to conclude that the most proximate Congress in both time and membership passed the Open FOIA Act only to ignore and repeal it by implication less than two months later—in a provision that does not so much as mention FOIA. This is far more than either the text or history of the post-2009 Tiahrt Riders can bear.

Furthermore, ATF cannot show that there is an irreconcilable conflict between the text of the 2012 Tiahrt Rider and FOIA. Because, of course, the text of the Tiahrt Rider does not refer to disclosure under FOIA. And the Tiahrt Rider will continue to prohibit the use of ATF's appropriated funds for non-FOIA disclosures by the ATF. For example, the ATF will still be prohibited from using its funding to produce reports containing individualized trace data. And in any case, Everytown offered to pay the cost of producing the requested information, JA 25, so ATF need not use any appropriated funds to disclose the requested data.

ATF cannot overcome these issues by relying on the legislative history of pre-Open FOIA Act Tiahrt Riders. For example, ATF leans heavily on a congressional report regarding the 2003 Tiahrt Rider, *see* ATF Br. at 21 (quoting H.R. Rep. No. 107-575 (2002)). ATF thus ignores that the 2003 Tiahrt Rider was not, in fact, an Exemption 3 withholding statute. *See City of Chicago v. U.S. Dep't of Treasury*, 384 F.3d 429, 432–33 (7th Cir. 2004), *vacated on reh'g on other grounds*, 423 F.3d 777 (7th Cir. 2005). Moreover, the Supreme Court recently questioned whether such

legislative history can *ever* carry the heavy burden of justifying implied repeal. *See Maine Cmty. Health Options*, 140 S. Ct. at 1326 (expressing doubt that floor statement and unpublished agency letter "could ever evince the kind of clear congressional intent required to repeal a statutory obligation through an appropriations rider"). What is more, "prior legislative history is a hazardous basis for inferring the intent of a subsequent Congress, in the same way that '*subsequent* legislative history is a hazardous basis for inferring the intent of an *earlier* Congress.'" *Waterkeeper All., Inc. v. U.S. EPA*, 399 F.3d 486, 508 (2d Cir. 2005) (emphasis in original) (quoting *Pens. Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650 (1990)). The hazard is particularly pronounced here, where pre-Open FOIA Act Tiahrt Riders were enacted against a different statutory backdrop for FOIA Exemption 3.[8] In the end, ATF's heavy reliance on the legislative history of pre-Open FOIA Act Tiahrt Riders simply underscores that its argument finds no support in Congress' post-Open FOIA Act activity.

Nonetheless, ATF contends that Congress' use of similar—but not Open-FOIA-Act-compliant—language across successive Tiahrt Riders confirms

[8] Moreover, the 2003 legislative history cited by ATF is irrelevant even on its own terms, because it concerns issues of privacy and the protection of law enforcement investigations, which are not implicated by Everytown's request for statistical aggregate data. *See* ATF Br. at 21–22; *see also* JA 27 (ATF FOIA response, failing to invoke separate FOIA exemptions for privacy and law enforcement investigations).

Congress' intent to enact an Exemption 3 statute in the 2012 Tiahrt Rider. ATF Br. at 23; *see also id.* at 16, 20–22, 26–27, 29. In support of this argument, ATF relies in large part on the Seventh Circuit's decision in *City of Chicago v. U.S. Department of Treasury*, 423 F.3d 777 (7th Cir. 2005), which interpreted a provision of the 2005 Tiahrt Rider describing "such data" as "immune from legal process." ATF Br. at 21–23, 26. But the 2005 Tiahrt Rider is no longer operative, and the Seventh Circuit considered its effect under a version of Exemption 3 that did not require the specific citation to FOIA that is now so clearly required. *See City of Chicago*, 423 F.3d at 781–82.[9] As such, that court had no occasion to consider whether a statute whose language omitted this requirement was nevertheless a withholding statute based upon the doctrine of implied repeal—the question presented here. Nor did *City of Chicago* consider that omission against the backdrop of Congress' repeated inclusion of qualifying Exemption 3 language in other statutes enacted around the same time. Simply put, the Seventh Circuit's opinion about whether this language would satisfy Exemption 3 under a different statutory framework has little bearing

[9] Moreover, the Seventh Circuit's view is not the only plausible reading of this language even in pre-Open FOIA Act Tiahrt Riders. The court in *City of New York v. Beretta U.S.A. Corp.*, 429 F. Supp. 2d 517 (E.D.N.Y. 2006), found that the phrase "such data shall be immune from legal process" was properly read as a reference not to *all* trace data, but *only* to the subset of data disclosed by ATF to law enforcement entities. *See id.* at 526.

on whether the 2012 Tiahrt Rider satisfies or repeals Exemption 3's contemporary standard.[10]

In the end, none of ATF's efforts to impute intent from the distant legislative past—whether through a 2003 committee report or by analogy to similar phrasing in the 2005 rider—come close to carrying ATF's "heavy burden" of establishing an implied repeal of the Open FOIA Act. The judgment of the district court should be affirmed.

II. THE RECORDS EVERYTOWN REQUESTED FALL WITHIN SUBPART C OF THE TIAHRT RIDER

Even if the 2012 Tiahrt Rider were a FOIA Exemption 3 withholding statute, which it is not, Subpart C of the Tiahrt Rider permits disclosure of the information Everytown requested.[11] Subpart C provides that, notwithstanding any other restriction in the rider, ATF may spend appropriated funds on:

> (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***

[10] The Supreme Court's decision in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019), to which ATF cites, ATF Br. at 29, is not to the contrary. That case concerned how to read a phrase that was repeated within the same code provision. *See id.* at 1512. It has no bearing on the situation here, where ATF attempts to ascribe meaning across separate statutes, enacted by separate Congresses, against an intervening change in the background statutory landscape.

[11] The district court found it unnecessary to decide this issue in light of its holding that the 2012 Tiahrt Rider does not satisfy Exemption 3. *See* SPA 9 n.2.

> statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms misuse, felons, and trafficking investigations.

Pub. L. No. 112-55, 125 Stat. 552, 610 (2011) (SPA 32) (emphasis added).

Everytown's request fits squarely within this provision because it seeks records containing "statistical aggregate data regarding . . . firearms misuse." *See* JA 24–25. The request seeks **"statistical"** records because the records at issue relate to or contain numerical information in ATF's FTS database, as opposed to qualitative information. *See Statistical*, Oxford Dictionaries, https://perma.cc/EJM7-478R (last visited May 21, 2020) ("Relating to the use of statistics"); *Statistics*, Oxford Dictionaries, https://perma.cc/C4HC-34RL (last visited May 21, 2020) ("The practice or science of collecting and analyzing numerical data in large quantities . . . ."). It seeks **"aggregate"** records because the records at issue concern a collection of multiple trace data together, rather than any individual trace results. *See Aggregate*, Oxford Dictionaries, https://perma.cc/6H63-3F62 (last visited May 21, 2020) ("Formed or calculated by the combination of several separate elements").[12] And it seeks data concerning **"firearms misuse"** because it targets data concerning firearms used in suicides. *See* JA 24–25. Because Everytown's request thus falls squarely within Subpart C, the

[12] ATF appears to concede that the data Everytown seeks is both statistical and aggregate. ATF Br. at 12 ("Everytown submitted a FOIA request to ATF for aggregate statistical data related to traces of firearms used in suicides.").

law allows ATF to "publish" it—*i.e.*, to engage in "the action of making something generally known"—by disclosure under FOIA. *See* JA 24–25; *Publication*, Oxford Dictionaries, https://perma.cc/S6US-JH2H (last visited May 21, 2020).

ATF attempts to resist this plain text on three grounds, but none provide a basis for withholding and none carry ATF's burden to prove that "the withheld material satisfies the criteria of the exemption statute." *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68, 72 (2d Cir. 2009) (internal quotation marks and citation omitted). First, ATF relies on legislative history concerning the 2005 and 2008 Tiahrt Riders to argue that Congress had in mind the publication of specific annual reports. ATF Br. at 31–33. But courts resort to legislative history only to resolve ambiguities, not to countermand unambiguous statutory text. *See, e.g., Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) ("[E]ven those of us who believe that clear legislative history can illuminate ambiguous text won't allow ambiguous legislative history to muddy clear statutory language.") (internal quotation marks omitted); *see also United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 27 (2d Cir. 2009).

It is also clear that the 2005 legislative history on which ATF relies has nothing whatsoever to do with Subpart C, given that Subpart C was not added until the 2008 Tiahrt Rider. *See* Pub. L. No. 110-161, 121 Stat. 1844 (2007) (SPA 29–30). Instead, the House Report excerpt on which ATF relies concerns language from a different exemption in the Tiahrt Rider that is not relevant here. *See* ATF Br. at

31 (citing H.R. Rep. No. 108-576 at 30 (2004) concerning portion of 2005 Tiahrt Rider permitting "disclosure of statistical information concerning total production, importation, and exportation by each licensed importer," which later became Subpart A). And the 2008 Tiahrt Rider's legislative history merely repeats the language from the 2005 legislative history, making it similarly unilluminating. *See* ATF Br. at 31–32 (citing H.R. Rep. No. 110-240 (2007)). Moreover, even taken at face value, nothing about these documents suggests that Subpart C was meant *only* to facilitate the publication of annual reports, broader statutory language notwithstanding.

Second, ATF suggests that Subpart C permits publication of data regarding only "two discrete subjects—'firearms traffickers and trafficking channels' and 'firearms misuse, felons, and trafficking investigations'"—rather than regarding "firearms misuse" standing alone. ATF Br. at 33. In support, ATF asserts that Subpart C's language matches the title of a report produced by ATF in 2000. *Id.* (citing ATF, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* at 20 (2000), https://perma.cc/EYX7-9GEQ (last visited May 25, 2020)). Of course, ATF provides no authority to support the proposition that the title of a report may override the plain text of Subpart C. In any event, "firearms misuse, felons, and trafficking investigations" is not even the title of the report, but rather merely a subheading on page 20. Moreover, as ATF's brief makes clear (albeit in a footnote), ATF publishes aggregated data on firearms misuse—including "the

number of guns, by state, successfully traced and used in completed or attempted suicides"—on its website. ATF Br. at 12 n.3; *see* JA 70 (ATF FOIA response letter, citing report titled *Categories Associated with Firearms Recovered and Traced in the United States and Territories*).

Finally, ATF argues that Subpart C's use of the word **"publication"** limits its scope to "the release of information . . . initiated by the agency—not in response to a FOIA request." ATF Br. at 34. As explained above, however, the plain meaning of "publication" includes "[t]he action of making something generally known." *See supra* at 35; *see also Publication*, The Am. Heritage Dictionary of The English Language, https://perma.cc/4TPW-7TTD ("Communication of information to the public"). Communication of information to the public, in turn, is the central purpose of FOIA. *See* 5 U.S.C. § 552(a) ("Each agency shall make available to the public information as follows. . . ."). Thus, while "publication" certainly encompasses the production of reports prepared by ATF of its own accord, it also includes public disclosure of information in response to FOIA requests.

In sum, even if the Court determines that the 2012 Tiahrt Rider qualifies as a FOIA Exemption 3 withholding statute, the records Everytown requested fall within the ambit of Subpart C, and should therefore be produced.

III. THE DISTRICT COURT CORRECTLY HELD THAT ATF FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT EVERYTOWN'S REQUEST REQUIRED THE CREATION OF RECORDS

Finally, ATF argues that, even if the Tiahrt Rider does not bar disclosure in this case, reversal is required because fulfilling Everytown's underlying request would compel it to create new agency records, in excess of the duties imposed upon it by FOIA. While Everytown of course agrees that FOIA "does not obligate agencies to create or retain documents," *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980), ATF has failed to demonstrate that responding to each subpart of the request here requires anything more than queries of ATF's electronic database. It is well established that the simple retrieval of targeted data from a database does not constitute the creation of records. And ATF's argument that it is entitled to withhold the numbers that Everytown seeks because fulfilling this request would entail a burdensome, multi-step process of data-cleaning, reformatting, and review is a red herring—Everytown's request requires none of this. The district court's conclusion that Everytown's request does not require record creation should accordingly be affirmed.

A. Everytown's Request Calls For the Disclosure of Information That Can be Extracted From the FTS Database in Only Two Hours

As discussed above, Everytown's FOIA request seeks "records containing aggregate trace data that document" the number of firearms recovered from

attempted or completed suicides, as filtered by several variables, including (i) the type of gun used; (ii) the State of use relative to the State of purchase; and (iii) whether the user was the original buyer.[13] JA 24–25; *see also supra* at 5–6. The data within the FTS database is coded based upon just these criteria, such that a simple, straightforward search will yield both the responsive database entries and the requested numbers. *See* JA 56 ¶ 29. Indeed, ATF admits not only that it is possible to extract data from the FTS database according to the combinations of criteria included in Everytown's request, but also that it would require only two hours of staff time. *See* JA 57 (estimating that "it will take each [of two] analyst[s] one hour to query the Firearms Tracing System for the requested data"); *see also* JA 379 (conceding at oral argument that raw data can be pulled from the FTS database); ATF Br. at 35 (conceding that ATF has the capability to "run searches on the database" to pull the relevant raw trace data).

Having conceded that the records contained in the FTS database can be queried to efficiently pull the raw data requested by Everytown, ATF does not even attempt to establish that the FTS database cannot also readily provide the aggregate numbers of those combinations. *See* JA 382 (conceding at oral argument that ATF

[13] For example, Everytown "request[s] that ATF provide [it] with records containing aggregate trace data that document . . . [n]ationwide, the number of each firearm type (pistol, revolver, rifle, shotgun, other) that were used in a completed suicide and successfully traced in 2012 and in 2013." JA 24–25.

had not "addressed" whether it could pull the number of entries in the database that were responsive to each request, but "would think" that it is feasible). Indeed, such a result would be belied both by everyday experience with computerized searches in 2020 and by ATF's own statements. For example, ATF specifically encourages law enforcement officials to access the FTS database through a platform called "eTrace" to, among other things, "generate statistical reports (*i.e.*, *number of traces*, top firearms traced, time-to-crime rates, age of possessors, etc.)." JA 205 (emphasis added). In any event, because FOIA requires the agency to "provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format," 5 U.S.C. § 552(a)(3)(B), ATF must query the FTS database according to the variables set forth by Everytown and provide the aggregate number of corresponding traces in the FTS database. The district court thus correctly found that "ATF has not . . . demonstrated that producing the raw data Everytown seeks would require ATF to create responsive records," and noted instead that ATF itself "indicated that it would take two of its analysts one hour to conduct the requested search, and . . . conceded that this search was required by FOIA." SPA 22–23.

B. Under the E-FOIA Amendments, the FTS Database Searches Necessary to Fulfill Everytown's Request Do Not Result in Record Creation

Whether querying the FTS database to produce the aggregate numbers Everytown requests constitutes record creation is a matter that is governed by the

1996 Electronic Freedom of Information Act Amendments, Pub. L. No. 104-231, 110 Stat. 3048 (1996), by which Congress updated FOIA to reflect the realities of information storage in the digital age. Specifically, E-FOIA defined "record" to include information stored "in any format, including an electronic format;" it also expanded FOIA's definition of "search" to mean "review, manually or by automated means." *Id*.; *see also* 5 U.S.C. §§ 552(a)(3)(D), (f)(2)(A). Thus, pieces of information stored in agencies' electronic databases are records that may be reviewed, not only by human eyes, but also by computerized means, as part of a search under FOIA. And, under E-FOIA, the agency must provide any responsive records found "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). Only if the process "would significantly interfere with the operation of the agency's automated information system" may the agency avoid its obligations to search for records stored in electronic form. 5 U.S.C. § 552(a)(3)(C). This statutory language is a clear reflection of the purpose behind E-FOIA: to require that "[g]overnment agencies . . . use new technology to enhance public access to agency records and information," E-FOIA § 2(a)(6), in order to "maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government." *Id*. at § 2(b)(4).

As a contemporaneous House Report states:

> Computer records found in a database rather than in a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of "search" in the bill, the review of computerized records would not amount to the creation of records. Otherwise, it would be virtually impossible to get records maintained completely in an electronic format, like computer database information, because some manipulation of the information likely would be necessary to search the records.

H.R. Rep. No. 104-795, at 22 (1996).

In passing E-FOIA, Congress thus recognized that evolving technology required changes in how we conceptualize records, searches, and record creation for purposes of FOIA. This modernization was intended to ensure that the law—the "core purpose" of which is to "contribut[e] significantly to public understanding of the operations or activities of the government," *United States Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (internal quotation marks and emphasis omitted)—did not become a dead letter in the new millennium. In recognition of E-FOIA's clear reform of agencies' electronic search obligations under FOIA, courts have made clear that "[e]lectronic database searches are . . . not regarded as involving the creation of new records." *People for the Am. Way Found. v. U.S. Dep't of Justice*, 451 F. Supp. 2d 6, 14 (D.D.C. 2006) (internal quotation marks omitted); *Schladetsch v. U.S. Dep't of Hous. & Urban Dev.,* No. 99-0175, 2000 WL 33372125, at *3 (D.D.C. Apr. 4, 2000).

Thus, E-FOIA supplanted the prior understanding of record creation, which was rooted in whether the agency maintained the pertinent information in the form requested, in favor of a burden-based limitation on electronic search obligations. *See* 5 U.S.C. § 552(a)(3)(C). Agencies are accordingly required to provide specific electronic data in response to FOIA requests, even if they had not previously grouped the data in the form requested. *See* 5 U.S.C. § 552(a)(3)(B) ("[A]n agency shall provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format.").

Courts addressing the issue have thus held that requiring an agency to produce a subset of information within a database—though the search process may entail reconfiguration of the underlying data—is not tantamount to record creation, but is simply an extension of FOIA's "reasonable . . . search" requirement, set forth in 5 U.S.C. § 552(a)(3)(C). *See Long v. ICE*, No. 17-cv-01097, 2018 WL 4680278, at *4 (D.D.C. Sep. 28, 2018) ("[N]either sorting a pre-existing database of information to make information intelligible, nor extracting and compiling data . . . as to any discrete pieces of information that [an] agency does possess in its databases, amounts to the creation of a new agency record." (omission and alternation in original) (internal quotation marks omitted)); *Kensington Research & Recovery v. U.S. Dep't of Hous. & Urban Dev.*, 620 F. Supp. 2d 908, 913 (N.D. Ill. 2009) (rejecting defendant agency's record creation argument where "the component parts [of the

record requested] continue to exist, likely stored in various electronic databases maintained by [defendant agency] and its affiliates"); *Schladetsch*, No. 99-0175, 2000 WL 33372125, at *3 ("Because [defendant agency] has conceded that it possesses in its databases the discrete pieces of information which [plaintiff] seeks, extracting and compiling that data does not amount to the creation of a new record," even though "the net result of complying with the request will be a document the agency did not previously possess[.]").

In light of the statutory text of E-FOIA, its legislative history, and subsequent case law, the district court appropriately recognized here that "[a]fter the E-FOIA Amendments, whether information in a database constitutes an agency record hinges not on whether the information is housed in the form requested, but whether generating the information requires the agency to engage in additional research or conduct additional analyses above and beyond the contents of its database." SPA 24.

ATF's citation to *National Security Counselors v. CIA*, 898 F. Supp. 2d 233, 271 (D.D.C. 2012), ATF Br. at 37 n.9, is not to the contrary. While that case held that "a FOIA request for a listing or index of a database's contents . . . requires the creation of a new record," Everytown has not requested a list or index—it seeks only statistical aggregate data, *i.e.*, the numbers of firearms meeting various criteria for

which the FTS database is specifically coded.[14] Indeed, *National Security Counselors* recognizes that an agency must make "reasonable efforts to search for the records in electronic form or format," and that "an agency need not conduct [a] search" for aggregate data *only* if the FOIA request "would require an unreasonably burdensome electronic search within the confines of an agency's automated information system[.]" 898 F. Supp. 2d at 271 n.26 (describing E-FOIA's adoption of the burden-based approach to electronic searching in 5 U.S.C. § 552(a)(3)(C)) (internal citation and quotation marks omitted). Because ATF has admitted that it could pull the relevant raw data in two hours' time, JA 57, and has not shown or even argued that it could not produce the numbers requested by Everytown, it has

[14] Furthermore, while *National Security Counselors*' holding that a request for a listing or index calls for the creation of a new record is not applicable here, it bears mention that this conclusion makes little sense given the court's explanation that "[s]orting a database by a particular data field . . . does not involve creating new records . . . [but] is just another form of searching." 898 F. Supp. 2d at 270; *see also* SPA 23–25 (discussion by the district court below distinguishing and disagreeing with *National Security Counselors*). Indeed, the D.C. district court "note[d] the perverse practical consequence[]" that an agency could be compelled under FOIA to produce the (more voluminous) records underlying a list or index, but not the summary documents themselves. *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 272. Of course, nothing in the language of E-FOIA supports this construction, and "[a] statute should be interpreted in a way that avoids absurd results." *S.E.C. v. Rosenthal*, 650 F.3d 156, 162 (2d Cir. 2011) (alteration in original) (internal citations and quotation marks omitted). Similarly, as the district court explained, the Northern District of California's decision in *Center for Investigative Reporting v. U.S. Dep't of Justice*, No. 17-cv-06557-JSC, 2018 WL 3368884, at *8 (N.D. Cal. Jul. 10, 2018) interpreted ATF's duty to produce statistical aggregate data too narrowly, in light of the text and legislative history of E-FOIA. SPA 23–25.

failed to demonstrate that Everytown's request for statistical aggregate data "would require an unreasonably burdensome electronic search"—the only basis that *National Security Counselors* provides for refusing to conduct a search in response to such a request. 898 F. Supp. 3d at 271 n.26.

C. ATF's Insistence That Everytown's Request Calls For "Cleaned Up" Data is a Baseless Pretext For Failing to Disclose Records, Contrary to the Purposes of FOIA and E-FOIA

Unable to make a good faith assertion that two hours spent querying its database and then reporting the total number of entries found amounts to "record creation," ATF attempts to recast Everytown's request as requiring the many additional, intensive steps necessary to create the kind of statistical reports that ATF annually publishes on its website. *See* JA 51–53. Thus, ATF contends that, in order to respond to Everytown's request, "experienced specialists" must perform "time-consuming and specialized queries," which would be subsequently "analyzed using statistical software," after which an ATF specialist must "evaluate the data and fill in gaps by making educated assumptions or perform[ing] research on missing fields," before "the resulting statistics are inserted into the applicable software and the visual depiction of the data is created," which would then be "subjected to a multi-level review process[.]" JA 51–53, 57. While this may be consistent with the form ATF prefers in presenting its annual reports, it is simply not what Everytown

has requested, and ATF has not shown why any steps beyond the initial two-hour search are necessary.

Indeed, ATF's insistence that it be allowed to "construe[] 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," ATF Br. at 39, is untenable. First, it has no basis in the text of Everytown's request, the scope of which was defined by Everytown as "records containing aggregate trace data that document . . . the number of [guns]," JA 24–25, a phrase indicating that Everytown sought the contents of the FTS database as-is, rather than some polished presentation that the agency might choose when issuing a public report including various statistics derived from the database. Second, as the district court correctly found, Everytown has explicitly and repeatedly rejected ATF's interpretation of its request during the course of this litigation, making clear that its request calls not for the exhaustive process that ATF proposed, but only for ATF to query the FTS database. *See, e.g.*, JA 385 ("[W]hat we would want the ATF to produce is the number of entries, and we don't expect any cleaning."); JA 388 ("We're asking for the searches to be run and to be provided with the results of those searches."). As the district court noted, ATF conceded in briefing and oral argument that this step "is required by FOIA and would not constitute record creation." *See* SPA 20, 22–23. Thus, in claiming that the search necessary to fulfill Everytown's request will result in record creation or

pose an unreasonable burden, ATF attacks a straw-man request, not the one that has actually been made.[15]

ATF, however, contends that its interpretation of the underlying request is entitled to deference. ATF Br. at 38.[16] But here, Everytown has consistently advised exactly what records are requested: numbers obtained through a simple querying of its database based upon the variables listed in its request. And, as the district court held, the request must be liberally construed in favor of disclosure. *See* SPA 21–22

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[15] Even with the multiple, unnecessary steps that ATF would insert into the search process, the total number of hours that ATF estimates it would take to fulfill Everytown's request—160, *see* JA 58—is not, under the caselaw, unreasonably burdensome. *See, e.g.*, *Pub. Citizen, Inc. v. Dep't of Educ.*, 292 F. Supp. 2d 1, 6 (D.D.C. 2003) (refusing to find manual search of 25,000 paper files unduly burdensome); *People for the Am. Way Found.*, 451 F. Supp. 2d at 15 (holding that PACER search of 44,000 files, requiring approximately 120 hours of work, was "not unduly burdensome"). Cases in which courts have permitted withholding on the basis of undue burden, by contrast, have entailed a markedly greater commitment of agency resources than that here claimed by ATF. *See, e.g.*, *Nat'l Day Laborer Org. Network v. ICE*, No. 16-cv-387, 2017 WL 1494513, at *15 (S.D.N.Y. Apr. 19, 2017) (search requiring review of between 436,000 and 1.3 million pages, over an estimated 436 to 1,300 weeks, was unduly burdensome).

[16] Of course, neither case cited by ATF for this proposition actually supports ATF's argument that it may seek to expand the scope of the request and then argue that, as expanded, the scope of the request is unreasonably burdensome. In *Weisberg v. Department of Justice*, the D.C. Circuit rejected the requestor's challenge to the limited scope of the FBI's search where the parties had conducted litigation "for almost five years" with the "consistent[] . . . understanding" that the request required the agency to search only a particular set of files. 745 F.2d 1476, 1489 (D.C. Cir. 1984). And in *Miccosukee Tribe of Indians of Florida v. United States*, the Eleventh Circuit found the EPA's interpretation of the requests to exclude documents the EPA deemed "publicly available" to be "unreasonable" and to "inaccurately depict[] what the Tribe really sought." 516 F.3d 1235, 1253 (11th Cir. 2008).

(citing *Immigrant Def. Project v. U.S. Immigration and Customs Enforcement*, 208 F. Supp. 3d 520, 532 (S.D.N.Y. 2016) and *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)). ATF, however, attempts to expansively interpret this request to require an in-depth search process, all in an effort to escape disclosure altogether by setting up arguments that the search either would be unreasonably burdensome or would result in the creation of records. But this effort is contrary to the law, for the "adequacy [of an agency's search for responsive records] is measured by the reasonableness of the effort in light of the specific request," *Neighborhood Assistance Corp. of Am. v. U.S. Dep't of Hous. & Urban Dev.*, 19 F. Supp. 3d 1, 8–9 (D.D.C. 2013), and "the agency must be careful not to read the request so strictly that the requester is denied information the agency well knows exists in its files[.]" *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985).

Indeed, were the Court to allow ATF to expand what has been requested for its own purposes, it would have serious implications for FOIA, including by permitting agencies to avoid disclosure by ignoring the obvious, basic searches that would adequately respond to requests and instead interpreting requests to require resource-intensive searches, which they then argue are unduly burdensome.[17] Here,

[17] Another serious implication flows from ATF's argument: the worse the condition in which records contained in agency databases are kept, the more likely it is that the agency will be able to escape disclosure obligations under FOIA by arguing that production will be too burdensome. As the district court correctly recognized, "potential input errors," such as duplicate or misfiled papers in a physical file

ATF has proposed a search many orders of magnitude beyond that which is required by the plain text of the underlying request and Everytown's confirmations below and before this Court as to what it seeks; ATF ought not, by doing so, be able to avoid its obligations under FOIA.

In sum, ATF has failed to demonstrate that a response to Everytown's request requires anything more than a simple, two-hour search of the FTS database. Under the E-FOIA Amendments and subsequent case law, such a search does not entail the creation of new records, and, therefore, is not a basis for ATF to avoid disclosure of the requested information. The district court opinion should be affirmed.

* * *

cabinet, cannot "serve as a basis to deny a FOIA request for a paper analog to" Everytown's request here, and "[t]he same conclusion applies with equal or greater force in the context of electronically stored data in a searchable database." SPA 24.

CONCLUSION

For the reasons set forth above, the well-reasoned opinion and judgment of the district court should be affirmed.

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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 13,222 words in this brief.

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