

# 19-3438

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## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EVERYTOWN FOR GUN SAFETY SUPPORT FUND,  
*Plaintiff-Appellee,*

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS  
AND EXPLOSIVES,  
*Defendant-Appellant.*

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On Appeal from the United States District Court for the Southern District of New  
York, No. 18-CV-2296 (Nathan, J.)

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### **BRIEF OF *AMICI CURIAE* THE BRADY CENTER TO PREVENT GUN VIOLENCE AND GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEE EVERYTOWN FOR GUN SAFETY SUPPORT FUND AND AFFIRMANCE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Brady Center to Prevent Gun Violence and Giffords Law Center to Prevent Gun Violence state that neither has a parent corporation and that no publicly held corporation has a 10% or greater ownership interest (such as stock or partnership shares) in either organization.

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

The Brady Center to Prevent Gun Violence (“Brady”) is a nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. It is named after Jim Brady, the former White House Press Secretary, who suffered paralyzing injuries during an assassination attempt through use of a gun against President Ronald Reagan, and his wife Sarah Brady, who was a tireless advocate for gun violence prevention. Brady has a substantial interest in this case. For over forty years, Brady has advocated for strong gun violence prevention policies, many of which are informed and supported by analysis of the Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives’ firearms trace data. ATF’s Firearms Trace System database contains crucial information about the origin and ownership history of guns used in the perpetration of crimes that enables researchers to pinpoint patterns and sources of guns recovered by law enforcement, and enables policymakers and law enforcement agencies to develop sound strategies to reduce gun crime. Consequently, ensuring that federal law is not construed to unduly restrict access to firearms trace data is vital to Brady’s mission of facilitating effective policies to combat gun violence.

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<sup>1</sup> This brief was neither authored nor funded by any party or person other than *amici* and their counsel. *See* Fed. R. App. P. 29; 2d Cir. L. R. 29.1. All parties to this appeal have consented to the filing of this brief.

Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a nonprofit organization dedicated to researching, writing, enacting, and defending laws and programs shown to reduce gun violence. The organization, formerly known as the Legal Community Against Violence, was founded more than twenty-five years ago following a rampage by a shooter with a gun at a San Francisco law firm that left eight people dead and six wounded. It was renamed Giffords Law Center in October 2017, after joining forces with the gun safety organization founded by former Congresswoman Gabrielle Giffords, herself a survivor of an assassination attempt by a shooter. Like Brady, Giffords Law Center has a substantial interest in ensuring that the public has access to firearms trace data maintained by ATF. That data is essential for research that will facilitate effective, evidence-based policies to reduce gun violence. Those are exactly the types of policies that Giffords Law Center develops and defends, and which are at the core of its mission.

## INTRODUCTION

Gun violence is an epidemic in the United States, with over 100,000 people shot every year, almost 40,000 fatally.<sup>2</sup> Public health professionals agree that gun

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<sup>2</sup> There are approximately 115,000 non-fatal firearm injuries in the United States each year. See University of California Davis Health, *Facts and Figures*, <https://perma.cc/J6NM-KU4E> (last visited June 1, 2020). In 2018—the most recent year for which the Centers for Disease Control and Prevention (“CDC”) has published data—39,740 people died of gun-related injuries. See CDC, Web-based Injury Statistics Query and Reporting System (WISQARS): Fatal Injury Reports,

violence is a public health crisis, demanding rigorous study that can produce evidence-based policies to address it.<sup>3</sup> Unfortunately, researchers lack key data to perform this research, especially when it comes to studying illegal flows of guns within the country. The information that would enable such research is contained in a database maintained by Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), known as the Firearms Trace System (“FTS”) database. Since 2003, ATF has shielded information in the FTS database from public release, relying on a misguided and now outdated legal theory.

In 1999, ATF released information from the FTS database, commonly known as “trace data.” Trace data shows, for firearms recovered by law enforcement, the progression of a firearm from manufacturer or importer to wholesaler, then distributor and dealer, and finally first retail purchaser. When ATF released this data in 1999, it showed that a single firearms dealer in Milwaukee, Wisconsin—Badger Guns and Ammo—led the entire country in the number of guns sold that were later connected to or recovered from a crime.<sup>4</sup> That put Badger in the national spotlight,

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<https://webappa.cdc.gov/sasweb/ncipc/mortrate.html> (submit request for data showing all firearm-caused fatalities in 2018).

<sup>3</sup> See *Gun Violence Is a Public Health Crisis*, American Public Health Association (2018), <https://perma.cc/MZ44-T2DX>.

<sup>4</sup> See Daniel W. Webster & Jon S. Vernick, *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* 137 (John Hopkins Univ. Press 2013).

and just days after the information became public, Badger announced it would no longer sell certain handguns favored by criminals, “known as ‘junk guns’ or ‘Saturday Night Specials.’”<sup>5</sup>

Badger’s decision had a profound effect. Researchers later discovered, again using trace data, that Badger’s change of policy led to a 71% decrease in new Saturday Night Specials recovered by law enforcement in Milwaukee, and a 44% decrease in new guns recovered in Milwaukee that had indicia of illegal gun trafficking.<sup>6</sup>

Unfortunately, though, the story does not end there. In 2003, Congress attached an amendment known as the Tiahrt Rider to an annual appropriations bill, which limited when ATF was allowed to publicly release trace data. With the Tiahrt Rider as cover, Badger changed course. In the years that followed, researchers found (using a more limited dataset from the Milwaukee Police Department) a 203% increase in the number of guns originally sold by Badger and recovered by Milwaukee police during law enforcement activity.<sup>7</sup>

This anecdote is just one among many that illustrate how trace data can be

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 138. Among those injured by firearms sold by Badger were six police officers. See Dan Simmons, *How the Nation’s Most Notorious Crime-Gun Store Cleaned Up Its Act*, Wash. Post, Oct. 17, 2015, <https://perma.cc/2MCJ-UQ2J>.

used to analyze, understand, and combat pipelines of guns for criminal activity. Besides pressuring Badger to change its sales practices, the data enabled researchers to understand how a single actor could affect the supply of guns for criminal activity throughout an entire city. Such research has wide-ranging implications for the regulations that policymakers consider enacting, and the strategies that law enforcement implement, to reduce illegal flows of guns, and ultimately the violent crime committed through the use of guns.

Trace data-based research on firearms all but dried up, however, after enactment in 2003 of the first Tiahrt Rider. ATF no longer released the data publicly, and academic researchers could, for the most part, no longer access it. Gun violence proliferated. By 2016, the United States had the second-most gun deaths of any country in the world.<sup>8</sup> This translates to more than 100 firearm deaths per day.<sup>9</sup> Moreover, gun murders, which account for almost 40% of all gun deaths, increased 32% between 2014 and 2017.<sup>10</sup>

ATF insists its hands are tied and that it must continue to block trace data from researchers who seek to use that information to combat the gun violence epidemic.

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<sup>8</sup> Laura Santhanam, *There's a New Global Ranking of Gun Deaths. Here's Where the U.S. Stands*, PBS, Aug. 28, 2018, <https://perma.cc/39CE-AD2S>.

<sup>9</sup> *See id.*

<sup>10</sup> John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, Pew Research Center, Aug. 16, 2019, <https://perma.cc/KR8N-SPF9>.

Not so. ATF is relying on a mistaken and outdated interpretation of the Tiahrt Rider.

In 2009, Congress passed the OPEN FOIA Act to clarify the criteria under which a statute qualifies as a FOIA Exemption 3 statute to limit FOIA disclosure. The Act amended FOIA to require that for any statute enacted after October 28, 2009 to constitute an Exemption 3 statute, it must include an express citation to the exemption.<sup>11</sup> Since 2009, Tiahrt Riders have twice been enacted *without any such citation*. Thus, under a plain reading of the 2012 Tiahrt Rider—the currently operative version—the Rider does not exempt trace data from disclosure in response to FOIA requests. Instead, the Rider prevents ATF's release of trace data for other purposes, such as in response to civil discovery requests. As described in Section II, this is a sensible balance that Congress reached, and importantly, allows academic researchers to study trace data.

## ARGUMENT

- I. Information Contained in ATF's FTS Database Is Critical to the Study of Illicit Gun Markets and the Development of Successful Supply-Side Strategies to Prevent Gun Crime.**
  - A. Before the 2003 Tiahrt Rider, Academic Researchers Routinely Conducted Research Using ATF Trace Data That Educated Policymakers and Law Enforcement Agencies on How to Combat Illicit Gun Markets.**

Although firearms tracing has existed since the late 1960s, law enforcement

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<sup>11</sup> See 5 U.S.C. § 552(b)(3)(B).

agencies did not systematically submit recovered firearms to ATF for tracing until the 1990s. Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 277 (2001). This change in law enforcement procedure resulted from the federal government's concerted effort to increase the volume of trace requests, in order to create a comprehensive database of traced firearms recovered during criminal law enforcement efforts. *Id.* at 278. Such a database would "provide a statistical basis for understanding the supply side of the gun-violence problem." *Id.* As the database expanded with trace information in the 1990s, and before the 2003 Tiahrt Rider, the United States Department of Justice ("DOJ") often supported research using this data, including by funding academic studies. *See, e.g.*, Dep't of Justice, National Institute of Justice Awards in Fiscal Year 1997 (June 1998), at 12 (describing \$499,990 grant from DOJ to researchers to "improve understanding of illegal firearms markets targeting juveniles, to understand the utility of firearms tracing, and to identify requirements to more effectively trace firearms").<sup>12</sup>

*Amici curiae* have identified at least 23 studies, shown in the list attached to this brief, that rely on ATF trace data made available before the 2003 Tiahrt Rider. Four of those studies are highlighted below, and show how trace data-based research

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<sup>12</sup> Available at <https://books.google.com/>.

can improve law enforcement's and policymakers' understanding of illicit gun markets, and suggest concrete policies to reduce gun crime and gun deaths.

**1. Researchers at Harvard University Used Trace Data from the ATF Database to Understand Youth Offenders' Access to Firearms in Boston, and How Those Supply Pipelines Could Be Stopped.**

In the mid-1990s, researchers at Harvard University wanted to learn the sources of firearms used by juveniles in Boston, Massachusetts. David M. Kennedy, Anne M. Piehl & Anthony A. Braga, *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 *Law & Contemp. Probs.* 147 (1996). Although it was illegal for those under age twenty-one to buy handguns in the state and for those under age eighteen to buy long guns and ammunition, the Boston Police Department had witnessed an “epidemic of youth gun violence.” *Id.* at 148. Conflicting theories abounded over where juveniles were obtaining guns. Some believed the “guns were being ‘run’ up from Southern states with lax gun laws” as part of “large-scale gun-running operation[s].” *Id.* at 169. Others thought they were being “supplied by very small episodic diversions such as straw purchasers<sup>13</sup> who dealt only one or two guns at a time, often infrequently.” *Id.* Still others

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<sup>13</sup> A straw purchaser is “a person who buys a gun on someone else’s behalf while falsely claiming that it is for himself.” *Abramski v. United States*, 573 U.S. 169, 171–72 (2014).



supposed that juveniles obtained guns through theft or home burglaries, or rented them through an illicit market. *Id.*

To find the answer, Harvard researchers turned to trace data from the ATF database for guns recovered between 1991 and 1995 in Boston—an “enormously rich resource.” *Id.* at 170. Based on their analysis of the available trace data, they learned that:

- “Contrary to the belief of most in the local law enforcement community,” 34% of the guns recovered from youth offenders were first purchased at a retail store in Massachusetts. *Id.* at 172.
- “The next largest source state was Georgia, with eight percent.” *Id.* And “[n]o other southern state broke five percent, and all Southern states combined add up to only thirty-one and a half percent.” *Id.*
- “[S]lightly more than a quarter of traceable guns were recovered when they were less than two years old<sup>14</sup>. . . . At the opposite extreme, a total of thirty-one percent of traceable guns were ten years old or older.” *Id.* This metric, known as “time-to-crime,” is an indicator of whether a gun was originally purchased from a dealer by someone with the intent to sell it illegally. *See id.* at 174. Guns with a faster “time-to-crime”

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<sup>14</sup> In other words, the guns were recovered by law enforcement less than two years after they were first sold by a retail dealer.

are more likely to have been initially purchased with the intent to sell the gun illegally. Consequently, the high number of guns recovered from juveniles with low “time-to-crime” numbers suggested that youth offenders were purchasing a significant number of guns through illicit markets. *See id.* at 173–74.

- “More than eighty percent of the firearms recovered from youth were handguns.” *Id.* at 171.
- Certain handguns—semiautomatic pistols of particular calibers from particular manufacturers—were especially overrepresented among youth offenders. *Id.*
- There were significant differences between the types of guns recovered from youth and adult offenders, indicating youth and adult offenders relied on different sources for their firearms. Moreover, the research suggested that “the illicit market that supplies guns to youths is peculiarly open to enforcement attention.” *Id.* at 176. Because youth offenders tended to use certain types of firearms (*e.g.*, newer guns that were recently purchased from a dealer), law enforcement could enact strategies to specifically target the flow of guns to juveniles.

Notably, the trace data from the ATF database allowed researchers to identify answers that had eluded prior studies. For example, the Harvard researchers debunked an earlier study concluding that juveniles typically obtained their guns from burglary and theft. *See id.* at 152, 177. That erroneous conclusion had been drawn from survey data alone, which “could reveal little about the original source of guns bought on the street” and had required the researchers to make several inferences about the sources of guns used by juveniles. *Id.* at 152. Trace data, however, disproved the earlier survey research. *Id.* at 177–78.

It didn’t stop there. The Harvard researchers—in conjunction with federal, state, and local officials—used these findings to develop policy proposals to disrupt the illicit gun market. *Id.* at 178. These proposals included (1) prioritizing investigations into the types of guns that had faster time-to-crime metrics, and thus were more likely to be part of an organized trafficking operation; (2) identifying and investigating firearms dealers and first purchasers associated with multiple crime guns; and (3) overlaying gang data onto the trace data, to determine whether certain gangs relied on distribution chains from specific states, first purchasers, or dealers. *See id.* at 179–80.

**2. The Journal of the American Medical Association Published a Study That Showed That a One-Handgun-Per-Month Law Enacted in Virginia Reduced the Number of Crime Guns That Flowed to Neighboring States.**

In 1996, two Brady researchers sought to determine whether a 1993 Virginia

law limiting handgun purchases to one gun per individual purchaser in a 30-day period affected the illegal movement of firearms across state lines. *See* Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (1996). Virginia passed the law in response to its “growing reputation as a principal supplier of guns to the illegal market in the northeastern United States.” *Id.* at 1759. Indeed, “ATF reported that 41% of a sample guns seized in New York City in 1991 were traced to Virginia gun dealers.” *Id.* The purpose of the Virginia law was to disrupt traffickers’ strategy of purchasing multiple guns in Virginia in a short time period and then selling them at a higher price in a neighboring state with more restrictive gun laws. *Id.*

The researchers analyzed firearms trace data, which they obtained from the ATF database through a FOIA request, for 14,606 firearms originally purchased before and after the law went into effect. *Id.* They found that:

- Before the new Virginia law was enacted, 27% of firearms recovered *anywhere in the United States* could be traced to Virginia. This rate dropped to 19% after the law was enacted. *Id.*
- Before the new Virginia law, 34.8% of firearms recovered *in the north-east corridor* (New York, New Jersey, Connecticut, Rhode Island, and Massachusetts) were traced to Virginia. This rate dropped to 15.5% after the law was enacted. *Id.*

The research showed that Virginia’s law restricting the purchase of handguns to one transaction per month disrupted the illegal movement of guns across state lines. *Id.* In effect, Virginia’s new law removed a linchpin of the economic model for gun traffickers—the ability to purchase and re-sell large numbers of guns with high street values quickly and in a cost-efficient manner. *Id.* at 1761.

**3. Researchers Used Trace Data From the ATF Database to Study the Types of State Licensing and Registration Requirements Most Likely to Reduce the Use of Guns in Crimes.**

In 2001, researchers wanted to determine the effect of licensing and registration on the availability of guns for use in crime. Daniel W. Webster, Jon S. Vernick & Lisa M. Hepburn, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 *Inj. Prevention* 184 (2001). Although federal law already required an instant background check of any person purchasing a firearm at a licensed dealer, researchers sought to determine whether additional measures adopted by certain states were effective. *Id.* at 184. For example, some states required prospective purchasers to be fingerprinted, submit applications for review by law enforcement, and wait a period of weeks before purchasing (known as “permit-to-purchase” requirements). *Id.* Some states also required registration of guns. *Id.*

To answer their question, researchers relied on trace data for firearms recovered from crimes occurring in 25 cities that they obtained from the ATF database.

*Id.* at 186. They discovered that:

- In states with permit-to-purchase and mandatory registration requirements, the percentage of crime guns recovered from *in-state* sources was less than half that of states without those laws, after accounting for confounding variables. *Id.* at 188.
- Among the states described in the bullet above (which had enacted permit-to-purchase and mandatory registration requirements), the percentage of crime guns recovered from in-state sources was even *lower* for those states with longer waiting periods, greater discretion given to law enforcement as whether to grant applications, and required fingerprinting. *Id.*
- If a state had enacted permit-to-purchase or mandatory registration requirements, its proximity to states with lenient gun laws increased the number of crime guns recovered from out-of-state sources. *Id.*

As a result, the study concluded that these additional state policies, *on top of background checks*, were effective, although those effects could be diminished by a state's proximity to another state with less stringent gun laws. *Id.* at 189.

**4. Researchers Used Trace Data From the ATF Database to Propose Strategies for Law Enforcement to Identify Problematic Dealers and Purchasers.**

In 2003, a group of researchers “aim[ed] to assist law enforcement agencies in analyzing the dynamics of illegal markets in firearms . . . and to develop problem-solving interventions designed to help enforce laws against illegal selling, possession and use of firearms.” Glenn L. Pierce et al., *The Characteristics and Dynamics of Crime Gun Markets: Implications for Supply-Side Focused Enforcement Strategies*, Final Report to the National Institute of Justice (Sept. 11, 2003).<sup>15</sup> The study primarily focused on one aspect of the illegal gun market: “close-to-retail diversions,” or the diversion of guns that were recently purchased from firearms dealers. *Id.* at 2. Below are some of the study’s key findings, which were based on analysis of 1999 trace data:

- “Crime gun traces are highly concentrated among a few federally licensed retail dealers.” *Id.* at 3.
- “Active dealers who make many multiple sales of handguns are more likely to be associated with fast time-to-crime guns.” *Id.* at 4.
- “Active dealers with a large number of National Instant Criminal Background Check System (NICS) gun purchase denials are more likely to be associated with fast time-to-crime guns.” *Id.* at 4.

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<sup>15</sup> Available at <https://www.ncjrs.gov/pdffiles1/nij/grants/208079.pdf>.

- Firearms that sit in a dealer’s inventory for more than two years are more likely to be used in a crime shortly after their first retail sale. *Id.* at 4. The authors noted that such guns are more likely to “be sold at a discounted price to facilitate a sale.” *Id.* at 44.
- “Traced crime guns are usually not recovered in the possession of the original retail purchasers.” *Id.* at 4.
- “Traced crime guns are disproportionately [fast time-to-crime] guns. A large majority of these new guns have changed hands at least once before recovery in crime.” *Id.*
- “Purchasers with two or more crime gun traces are more likely to be associated with fast time-to-crime guns.” *Id.*
- “Crime gun possessors tend to be younger than the retail purchasers of the crime gun. Both distributions tend to be disproportionately young.” *Id.*
- “The crime guns purchased by individuals with a large number of crime gun traces to the purchaser’s home zip code are more likely to be fast time-to-crime guns.” *Id.*
- “Semi-automatic pistols have the fastest time-to-crime of all gun types.” *Id.*



Again, this research informed law enforcement strategy. The researchers created a framework for prioritizing investigations. They found that a dealer may warrant further investigation by law enforcement where: (1) 11 or more crime guns were traced to the dealer in a year; (2) the dealer made 51 or more sales of *multiple* guns at the same time; or (3) the dealer sold guns with a shelf life greater than 2 years. *Id.* at 5. In addition, a purchaser may warrant further scrutiny where: (1) more than 1 crime gun was traced to that purchaser; (2) more than 25 traces originated from the purchaser's home zip code, and (3) the individual purchased multiple firearms at the same time. *Id.* Notably, the researchers explained that such analysis must be continually refreshed with new data:

[I]ndicators of the type we have suggested here need to be used and re-examined on an ongoing basis by federal, state, and local law enforcement. We focused on one aspect of the illegal markets in guns that holds the most immediate promise for focused enforcement based on strategic analyses of firearms trace data—close-to-retail diversions of guns. We understand that the important pathways of gun trafficking for particular types of offenders at any given moment may not be important in a year's time.

*Id.* at 64.

**B. ATF's Withholding of Trace Data Since 2003 Has Created a Dearth of National Research on Illicit Gun Markets, and Severely Hindered Research into Supply-Side Strategies to Combat Gun Violence.**

In a report released this year, the RAND Corporation synthesized all available

scientific evidence on the effects of 18 types of firearm policies. *See* RAND Corporation, *The Science of Gun Policy* 329 (2d ed. 2020)<sup>16</sup>. The RAND report lamented that key scientific research is missing from the literature on gun violence prevention because of ATF’s withholding of trace data under its reading of the Tiahrt Rider. Particularly, RAND noted that:

- “To assess whether licensing or permitting laws reduce violent crime through disrupting illegal firearm trafficking, causal inference could be strengthened by examining crime gun trace data and changes in homicide rates. . . . However, a series of provisions attached to Bureau of Alcohol, Tobacco, Firearms and Explosives appropriations (commonly known as the Tiahrt Amendments) has denied most researchers access to firearm trace data since 2003 . . . .” *Id.* at 151.
- “[W]aiting periods may provide law enforcement with opportunities to investigate possible straw purchases (in which a lawful buyer makes the purchase on the behalf of a prohibited buyer) under the theory that it is less difficult to intercept a weapon prior to delivery. To assess whether waiting periods disrupt illegal firearm trafficking or transfers

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<sup>16</sup> Available at [https://www.rand.org/pubs/research\\_reports/RR2088-1.html](https://www.rand.org/pubs/research_reports/RR2088-1.html).

through this mechanism, causal inference could be strengthened by examining crime gun trace data in addition to changes in homicide or violent crime rates. . . . However, a series of provisions attached to Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) appropriations (commonly known as the Tiahrt Amendments) has denied most researchers access to firearm trace data since 2003, making it currently infeasible to conduct this type of analysis.” *Id.* at 168.

- “To assess whether required reporting of lost or stolen guns reduces violent crime by disrupting illegal firearm trafficking, causal inference could be strengthened by examining crime gun trace data, as well as changes in homicide or violent crime rates. . . . However, a series of provisions attached to ATF appropriations (commonly known as the Tiahrt Amendments) has denied most researchers access to firearm trace data since 2003, making it currently infeasible to conduct this type of analysis at a national level.” *Id.* at 194.

One of the RAND report’s key recommendations was to provide researchers access to ATF trace data. *Id.* at 346. It explained that the lack of access to the ATF’s FTS database “is a problem that has . . . worsened since [the 2004 National Research Council study first] identified it as a critical shortcoming for research on

gun policy.” *Id.* at 345. And it described why ATF trace data was so useful when it was released:

[P]rior to 2003, [trace data] provided important insights into how criminals obtain their weapons; whether states with more-restrictive gun laws create shortages of guns for those who may be prohibited from purchasing them; how guns move between states with less- and more-restrictive gun laws; the characteristics of gun sales likely to be associated with diversion to prohibited possessors; and other valuable, actionable, policy-relevant information.

*Id.* (citations omitted).

Furthermore, RAND explained why the very limited access that researchers currently have to trace data is simply insufficient. ATF picks and chooses certain summary statistics to release on its website, *see Data & Statistics*, ATF, <https://perma.cc/G984-SY5F>, but those high-level statistics (*e.g.*, the number of pistols recovered in all of California in 2018) reveal just a tiny fraction of what’s contained in the over 75 tables and 800 columns/fields in ATF’s database, *see Joint Appendix 56*. These summary statistics lack the “case-level details” that researchers need. *See RAND Corporation, supra*, at 345–46. In addition, although individual law enforcement agencies have at times allowed researchers to study ATF trace data to which an agency has access (concerning their jurisdiction), those studies have been rare, and rely on severely limited datasets. *See id.* As ATF itself has admitted, the unique value of the trace data lies in its broad coverage:

The analysis of a large number of individual traces from many similar jurisdictions helps identify consistent crime gun patterns that may not be apparent from information in a single trace or traces from a single jurisdiction or State. With information about patterns and trends, more violent criminals can be arrested more efficiently, more focused regulatory enforcement can be undertaken, and more gun crime and violence can be prevented.

Dep't of the Treasury, ATF, Crime Gun Trace Reports 1 (July 2002),

<https://perma.cc/P54V-JMEP>.

## **II. Releasing ATF Trace Data in Response to FOIA Requests Is Required Under the OPEN FOIA Act and 2012 Tiahrt Rider.**

ATF misreads the 2012 Tiahrt Rider<sup>17</sup> as preventing release of its trace data in response to FOIA requests. But there is no conflict between ATF releasing trace data in response to a FOIA request to assist researchers and law enforcement to address the epidemic of gun violence and, at the same time, adhering to the statutory framework enacted by Congress.

The 2012 Tiahrt Rider allows ATF to disclose trace data in response to FOIA requests, while still restricting ATF from releasing trace data through other means, such as in response to civil discovery requests. *See* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10

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<sup>17</sup> As described in Everytown for Gun Safety's Brief (at 12), the 2012 Tiahrt Rider is the operative provision.

(2011).<sup>18</sup> When Congress enacted the OPEN FOIA Act in 2009, it expressly amended FOIA to clarify the scope of FOIA Exemption 3, and to provide a bright-line rule for when the exemption applies: when a statute expressly provides that it is an Exemption 3 statute by citing the relevant statutory provision. *See* Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, § 564, 123 Stat. 2142, 2184 (2009) (legislation containing Open FOIA Act). Subsequent to enactment of the OPEN FOIA Act, Congress twice enacted new versions of the Tiahrt Rider—in 2010 and 2012—*without* any citation to FOIA Exemption 3. The unambiguous meaning of the 2012 Tiahrt Rider is all the more apparent when compared to the at least 30 sections of the U.S. Code that *do* include an express citation to Exemption 3. *See* 6 U.S.C. §§ 623, 1504; 7 U.S.C. §§ 26, 950cc, 3319k, 2020, 8401; 10 U.S.C. §§ 130e, 613a, 2254a, 14104; 12 U.S.C. §§ 248, 5468; 15 U.S.C. §§ 77f, 78u-6, 78x; 16 U.S.C. § 824o-1; 19 U.S.C. §§ 1333, 1677f; 21 U.S.C. § 379; 29 U.S.C. § 1302; 42 U.S.C §§ 241, 247d-7e, 262a, 300jj-52, 1320a-7n, 1306c, 1395m-1; 49 U.S.C. §§ 1114, 30172, 44703, 44735; 50 U.S.C. §§ 3033, 4820.

ATF wants to take this Court on an excursion beyond the Tiahrt Rider’s plain meaning. But the Supreme Court has cautioned against the “casual disregard of the rules of statutory interpretation” when it comes to interpreting FOIA exemptions.

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<sup>18</sup> The Tiahrt Rider also includes other prohibitions and requirements related to firearms but unrelated to trace data, as described in Section II.B.

*Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). Rather, “a court’s proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.” *Id.* “Indeed, [the Supreme Court] has repeatedly refused to alter FOIA’s plain terms on the strength only of arguments from legislative history.” *Id.*

In this case, the plain language of the relevant statutes is all the Court need consult: ATF trace data is not exempt from FOIA disclosure, and can be used in public health research. The balance Congress struck when enacting the Tiahrt Amendment in 2012, allowing trace data to be released under FOIA but not for certain other purposes, is reflected in the statutory framework. And, to the extent the legislative history matters, Congress’s intent is clear—it enacted the 2010 Tiahrt Rider just *49 days* after it enacted the OPEN FOIA Act, but did not include a citation to Exemption 3. Two years later, it enacted the 2012 Tiahrt Rider, again without any citation to Exemption 3.

**A. Congress Enacted the OPEN FOIA Act to Prevent Agencies from Interpreting Ambiguous Statutes, Like the Tiahrt Rider, As Exemptions to Their FOIA Obligations.**

ATF contends that the “[t]he 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.” Br. of Def.-Appellant at 16.

Congress's failure to include in the 2012 Tiahrt Rider an explicit reference to Exemption 3 is not some mere wording choice as ATF suggests. The lack of the explicit reference serves as an unambiguous statement that the Tiahrt Rider does not qualify as an excluding statute for purposes of FOIA.

ATF's attempt to override that unambiguous statute by its characterization of a contrary congressional intent is meritless. Indeed, even absent the clear requirement for Exemption 3 statutes to explicitly reference the exemption, the canons of statutory construction would not support ATF's reading in light of the various Exemption 3 statutes that Congress has enacted. As the Supreme Court has said, "[a] familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Thus, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see generally Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391–92 (2015) (citing numerous cases for "[t]he interpretive canon that Congress acts intentionally when it omits language included elsewhere . . ."). Congress's failure to include the reference to FOIA Exemption 3 as required by that statute speaks loudly that no such



exemption was intended for FOIA requests. *Cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (“If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words ‘aid’ and ‘abet’ in the statutory text. But it did not.”).

Thus, the failure of the 2012 Tiahrt Rider to exempt ATF trace data from FOIA disclosure is clear from its text. The significance of that unambiguous statute is all the more apparent when compared to the instances in which Congress has enacted Exemption 3 statutes by including the required citation to the Exemption. For example, Congress enacted an Exemption 3 statute to preclude disclosure through FOIA of information shared with the federal government related to cyber threat indicators and defensive measures. 6 U.S.C. § 1504(d)(3)(B). Congress specified there that such information “shall be . . . withheld, without discretion, from the public under section 552(b)(3)(B) of title 5,” which is the required provision missing from the Tiahrt Rider. Congress has followed the requirements of the OPEN FOIA Act on numerous other occasions to preclude release of information under Exemption 3 with similar required language. *See, e.g.*, 6 U.S.C. § 623(a), (e) (precluding disclosure through FOIA of “vulnerability assessments, site security plans, and other security related information” developed as part of the Chemical Facility Anti-Terrorism Standards program); 7 U.S.C. § 3319k(b)(7)(B) (precluding disclosure

through FOIA of “technical data or scientific information” that reveals “vulnerabilities of existing agriculture and food defenses against biological, chemical, nuclear, or radiological threats”); 16 U.S.C. § 824o-1(d) (precluding disclosure through FOIA of “[c]ritical electric infrastructure information”); 49 U.S.C. § 30172(f)(3) (precluding disclosure through FOIA of whistleblower information kept by the Department of Transportation); *see also* U.S. Code citations, *supra* at page 22.

These Exemption 3 statutes confirm that the unambiguous meaning of the 2012 Tiahrt Rider is that it does not preclude release of trace data under FOIA. Congress knows how to enact statutes that exempt information from FOIA disclosure as required by 5 U.S.C. § 552(b)(3)(B). Congress has done so on several occasions. Congress did not do so in the 2012 Tiahrt Rider.

Moreover, Congress passed the OPEN FOIA Act in 2009 to avoid just the sort of argument that ATF is making in this case. Congress was concerned that agencies were relying on ambiguous language within technical bills to claim that they were exempt from releasing records in response to FOIA requests. In the OPEN FOIA Act, Congress clarified that, for any statute passed after October 28, 2009 to qualify as an Exemption 3 statute, it must explicitly cite Exemption 3. When Senator Patrick Leahy introduced the OPEN FOIA Act on the Senate floor, he explained:

The OPEN FOIA Act simply requires that when Congress provides for a statutory exemption to FOIA in new legislation, Congress must state its intention to do so explicitly

and clearly . . . The bedrock principles of open Government lead me to believe that (b)(3) statutory exemptions should be clear and unambiguous.

155 Cong. Rec. S3175 (daily ed. Mar. 17, 2009) (statement of Sen. Leahy). The OPEN FOIA Act aligns with FOIA’s “‘basic policy’ . . . in favor of disclosure.” *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978).

The 2010 Tiahrt rider was passed by Congress on December 16, 2009, just 49 days after it enacted the OPEN FOIA Act on October 28, 2009. Yet Congress did not include a FOIA Exemption 3 citation in that Rider. *See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3128–29 (2009)*. Two years later, when Congress enacted the 2012 Tiahrt Rider, again it did not enact a statute that conformed with the requirements to qualify as a FOIA Exemption 3 statute. *Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011)*.

**B. The 2012 Tiahrt Rider Has Other Applications.**

The Tiahrt Rider has other applications and is not somehow rendered inoperative by reading it according to the unambiguous text. Specifically, in addition to the restrictions on releasing ATF trace data in response to civil discovery requests, the Rider prohibits the federal government from requiring a federal firearms dealer to conduct a physical inventory of its business. *See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10, 633*

(2011); *see also* Congressional Research Service, In Focus: Firearms-Related Appropriations Riders 2 (Nov. 22, 2019). It also requires the federal government to destroy any identifying information submitted during a background check of a firearms purchaser within 24 hours, if the firearm transfer was allowed to proceed. *See id.*

Consequently, correctly reading the 2012 Tiahrt Rider according to its unambiguous text and the explicit statutory framework of FOIA preserves the proper scope of the Amendment and the OPEN FOIA Act. And importantly, it will once again provide researchers and policymakers access to crucial data to facilitate necessary responses to address a dire public health crisis.

### CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

Dated: June 2, 2020

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**List of Research Relying on ATF Trace Data  
Released Before 2003 Tiahrt Rider<sup>19</sup>**

Americans for Gun Safety Foundation, *Selling Crime: High Crime Gun Stores Fuel Criminals: A Study of Gun Stores with Over 200 Crime Gun Traces (1996-2000)* (2004), <https://perma.cc/YNF9-QFVF>

Brendan T. Campbell, et al., *From Gunstore to Smoking Gun: Tracking Guns That Kill Children in North Carolina*, 39 J. Pediatric Surgery 1874 (2004)

Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277 (2001)

Philip J. Cook et al., *Underground Gun Markets*, National Bureau of Economic Research Working Paper No. 11737 (Nov. 2005), <https://perma.cc/LZ3P-FM6Z>

David M. Kennedy et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 Law & Contemp. Probs. 147 (1996)

Christopher S. Koper, *Purchase of Multiple Firearms As a Risk Factor for Criminal Gun Use: Implications for Gun Policy and Enforcement*, 4 Criminology & Pub. Pol'y 749 (2005)

Christopher S. Koper, *Crime Gun Risk Factors: Buyer, Seller, Firearm, and Transaction Characteristics Associated with Gun Trafficking and Criminal Gun Use*, 30 J. of Quantitative Criminology 285 (2014)

Glenn L. Pierce et al., *Characteristics and Dynamics of Illegal Firearms Markets: Implications for Supply-Side Focused Enforcement Strategy*, 21 Just. Q. 391 (2004)

Jeffrey A. Roth & Christopher S. Koper, *Impact Evaluation Of The Public Safety And Recreational Firearms Use Protection Act Of 1994*, The Urban Institute (1997), <https://perma.cc/F38E-BETL>

Jon S. Vernick et al., *Effects of Maryland's Law Banning Saturday Night Special Handguns on Crime Guns*, 5 Inj. Prevention 259 (1999)

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<sup>19</sup> Several of the listed studies use additional datasets in conjunction with the ATF trace data.

Julius Wachtel, *Sources of Crime Guns in Los Angeles, California*, 21 *Policing: An Int'l J. of Police Strategies & Mgmt.* 220 (1998)

Daniel W. Webster et al., *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 *Inj. Prevention* 184 (2001)

Daniel W. Webster et al., *Effects of A Gun Dealer's Change in Sales Practices on the Supply of Guns to Criminals*, 83 *J. Urb. Health* 778 (2006)

Daniel W. Webster, *Effects of Undercover Police Stings of Gun Dealers on the Supply of New Guns to Criminals*, 12 *Inj. Prevention* 225 (2006)

Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 *J. Urb. Health* 525 (2009)

Daniel W. Webster et al., *Temporal Association Between Federal Gun Laws and the Diversion of Guns to Criminals in Milwaukee*, 89 *J. Urb. Health* 87 (2012)

Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 *JAMA* 1759 (1996)

Garen J. Wintemute, *Research Letter: Relationship Between Illegal Use of Handguns and Handgun Sales Volume*, 284 *JAMA* 566 (2000)

Garen J. Wintemute et al., *The Life Cycle of Crime Guns: A Description Based on Guns Recovered from Young People in California*, 43 *Annals of Emergency Med.* 733 (2004)

Garen J. Wintemute et al., *Risk Factors Among Handgun Retailers for Frequent and Disproportionate Sales of Guns Used in Violent and Firearm Related Crimes*, 11 *Inj. Prevention* 357 (2005)

Garen J. Wintemute, *Disproportionate Sales of Crime Guns Among Licensed Handgun Retailers in the United States: A Case–Control Study*, 15 *Inj. Prevention* 291 (2009)

Garen J. Wintemute, *Firearm Retailers' Willingness to Participate in an Illegal Gun Purchase*, 87 *J. Urb. Health* 865 (2010)

Mona A. Wright et al., *Factors Affecting a Recently Purchased Handgun's Risk for Use in Crime Under Circumstances That Suggest Gun Trafficking*, 87 J. Urb. Health 352 (2010)

## CERTIFICATE OF COMPLIANCE

In compliance with Federal Rules of Appellate Procedure 29(a)(4)(G), 29(a)(5), 32(a)(5)(A), 32(a)(7)(B)(i) and Local Rules 29.1(c) and 32.1(a)(4)(A), this amicus brief uses a proportionally spaced typeface, 14-point Times New Roman font, and contains 6,874 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned relied on the word count feature of Microsoft Word 2016 in preparing this certificate.

Dated: June 2, 2020

/s/ Michael D. Fields  
Michael D. Fields



**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of June 2020, I served a true and correct copy of the foregoing Brief of *Amici Curiae* Brady and Giffords Law Center on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h).

Dated: June 2, 2020

/s/ Michael D. Fields  
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