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**NOTICE OF MOTION**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

**PLEASE TAKE NOTICE** that on October 19, 2023, at 1:30 PM, or at such other date as may be ordered, at the courtroom of the Honorable Edward M. Chen, Plaintiff John Lindsay-Poland will and hereby does move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment against Defendants United States Department of Justice and Bureau of Alcohol, Tobacco, Firearms and Explosives (together, the “Government”) on the sole claim, violation of the Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A). Plaintiff seeks summary judgment on the grounds that there is no issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law. The motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declaration of John Lindsay-Poland, the arguments of counsel, and all other matters properly considered by the Court.

**REQUESTED RELIEF**

Plaintiff requests that the Court grant Plaintiff’s Cross-Motion for Summary Judgment and order the relief proposed in the accompanying [Proposed] Order and Judgment.

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1 **STATEMENT OF ISSUES**

2 1. Whether the 2012 Tiahrt Rider fails to satisfy the Freedom of Information of Act’s  
3 requirement that any withholding statute expressly cite to the Freedom of Information Act, and thus  
4 cannot serve as a basis for withholding the records sought by Mr. Lindsay-Poland.

5 2. Whether Mr. Lindsay-Poland’s request for aggregate trace data in his capacity as a  
6 member of the media falls within the 2012 Tiahrt Rider’s exception permitting the release of  
7 statistical aggregate data under binding Ninth Circuit law.

8 3. Whether the 2012 Tiahrt Rider, which grants ATF broad discretion to release  
9 statistical aggregate data, fails to satisfy the Freedom of Information of Act’s requirement that any  
10 withholding provision mandate non-disclosure of the records sought.

11 **PRELIMINARY STATEMENT**

12 This Court should grant summary judgment in Mr. Lindsay-Poland’s favor because binding  
13 Ninth Circuit precedent requires the Government to produce the records at issue in this case.

14 ∴ ∴ ∴

15 Mr. Lindsay-Poland is a member of the media who seeks to inform the public about the  
16 transnational gun violence currently plaguing Mexico and Central America. Mr. Lindsay-Poland  
17 requested statistical aggregate data on the illegal transfer of firearms to Mexico and Central  
18 America (the “Requested Records”) to inform his upcoming reporting on the subject. The  
19 Government denied Mr. Lindsay-Poland access to the Requested Records and Mr. Lindsay-Poland  
20 brought this action to enforce his right to access the Requested Records under the Freedom of  
21 Information Act.

22 The Freedom of Information Act prohibits the Government from denying Mr. Lindsay-  
23 Poland access to government records unless the Government can satisfy one of nine  
24 Congressionally-created exemptions. *See generally* 5 U.S.C. § 552(b)(1)–(9). This case solely  
25 involves Exemption 3, which permits the Government to withhold records on the basis of certain  
26 statutes (“withholding statutes”) that satisfy particular requirements. *See* 5 U.S.C. § 552 (b)(3).  
27 “Exemption 3 relieves an agency of its obligation to disclose material ‘specifically exempted from  
28 disclosure by statute,’ but only if that statute (1) ‘requires that the matters be withheld from the

1 public in such a manner as to leave no discretion on the issue’ or ‘establishes particular criteria for  
 2 withholding or refers to particular types of matters to be withheld,’ *and* (2) ‘if enacted after the date  
 3 of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.’”<sup>1</sup> *Center for*  
 4 *Investigative Reporting v. U.S. Dep’t of Justice*, 14 F.4th 916, 926 (9th Cir. 2021) (quoting 5 U.S.C.  
 5 § 552(b)(3)) (emphasis supplied). In its Motion for Summary Judgment, the Government solely  
 6 argues (at 8–19)<sup>2</sup> that it can withhold the Requested Records because the 2012 Tiahrt Rider  
 7 qualifies as a withholding statute and prohibits the release of the Requested Records.

8 The Government’s purported basis for denying Mr. Lindsay -Poland access to the Requested  
 9 Records fails for three independent reasons.

10 *First*, the 2012 Tiahrt Rider does not qualify as a withholding statute because it does not  
 11 satisfy Exemption 3’s Express Citation Requirement. The Express Citation Requirement requires  
 12 that any statute enacted after October 28, 2009 expressly cite to Exemption 3 in order to qualify as  
 13 a withholding statute. *Center for Investigative Reporting*, 14 F.4th at 926. The 2012 Tiahrt Rider  
 14 plainly does not cite Exemption 3. Thus, the Government cannot withhold the Requested Records  
 15 on the basis of Exemption 3.

16 *Second*, the Requested Records fall within the 2012 Tiahrt Rider’s exception for the release  
 17 of “statistical aggregate data regarding firearms traffickers and trafficking channels, or firearms  
 18 misuse, felons, and trafficking investigations.” *See* Pub. L. No. 112–55, 125 Stat. 552, 609–10.  
 19 And under binding Ninth Circuit precedent, the 2012 Tiahrt Rider does not prohibit the release of  
 20 statistical aggregate data to representatives of the public such as members of the media. *Center for*  
 21 *Investigative Reporting*, 14 F.4th at 934–35. Because Mr. Lindsay -Poland established that he is a  
 22 member of the media in both his request for the Requested Records (the “FOIA Request”) and his  
 23 Declaration, the Government is allowed to release the Requested Records and thus must make them  
 24 available to Mr. Lindsay -Poland under the Freedom of Information Act.

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 26 <sup>1</sup> We refer to the first component of Exemption 3 as the “Withholding Requirement” and the  
 27 second component of Exemption 3 as the “Express Citation Requirement.”

28 <sup>2</sup> Parenthetical citations refer to the Memorandum in Support of Defendants’ Motion for  
 Summary Judgment, ECF 32–1.

1           *Third*, the 2012 Tiahrt Rider is not even a withholding statute with respect to statistical  
2 aggregate data because ATF has boundless discretion to release such data to the public. Congress  
3 has made clear that a statute cannot qualify as a withholding statute for purposes of Exemption 3 if  
4 the statute merely provides “general benchmarks for secrecy” and does not mandate nondisclosure.  
5 *See Church of Scientology of California v. U.S. Postal Serv.*, 633 F.2d 1327, 1330 (9th Cir. 1980).  
6 The question of whether a statute grants sufficient agency discretion to remove matters from the  
7 scope of Exemption 3 is answered on a provision-by-provision basis. *See U.S. Dep’t of Justice v.*  
8 *Julian*, 486 U.S. 1, 9 (1988) (finding information in presentence reports beyond “confidential  
9 sources, diagnostic opinions, and other information that may cause harm to the defendant or to third  
10 parties” to not qualify under Exemption 3). The statistical aggregate data provision does not  
11 “require[] that [statistical aggregate data] be withheld from the public” and does not “establish[]  
12 particular criteria for withholding [statistical aggregate data] or refers to particular types of  
13 [statistical aggregate data] to be withheld.” *See* 5 U.S.C. § 552(b)(3)). Because Congress  
14 determined that statistical aggregate data need not stay within the four walls of ATF, such data is  
15 not exempt from disclosure under Exemption 3.

16           The Government critically concedes (at 14 n.2) that *Center for Investigative Reporting*  
17 binds this Court, and that the 2012 Tiahrt Rider does not bar ATF from releasing statistical  
18 aggregate trace data to members of the media. The Government instead argues—for the first time  
19 since Mr. Lindsay-Poland submitted his FOIA Request—that this binding precedent does not apply  
20 here because Mr. Lindsay-Poland is not a member of the media and did not request statistical  
21 aggregate data.<sup>3</sup> The Government is wrong on both fronts. The indisputable facts set forth in Mr.  
22 Lindsay-Poland’s Declaration establish that Mr. Lindsay-Poland is a member of the media who  
23 gathers information and disseminates it to the public at large. Moreover, the Requested Records  
24 seek statistical aggregate data because every request seeks summary data reflecting multiple data  
25 points. Therefore, under binding Ninth Circuit precedent, the Government cannot legally withhold

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26           <sup>3</sup> The Government has never previously raised Mr. Lindsay-Poland’s status as a member of  
27 the media in its rejection of his FOIA Request, its denial of Mr. Lindsay-Poland’s administrative  
28 appeal, or even in its Answer to his Complaint in this action, let alone as a basis for denying his  
FOIA Request. *See infra* at 4–6.

1 the Requested Records.

2 **STATEMENT OF FACTS**

3 ***Mr. Lindsay-Poland is a member of the media who helps the public understand the illegal flow***  
 4 ***of firearms across America’s southern border.***

5 Mr. Lindsay-Poland is a journalist, researcher and analyst with over three decades of  
 6 experience covering Mexico and Central America. Decl. of John Lindsay-Poland (“LP Decl.”) ¶¶  
 7 3–4. Mr. Lindsay-Poland currently serves as the Coordinator of Stop U.S. Arms to Mexico. LP  
 8 Decl. ¶ 3. He previously was an editor and staff writer for Panamá Update (1992–1999), Puerto  
 9 Rico Update (2000–2005), Colombia Update (2006–2011) and Latin America Update (2011–  
 10 2014). LP Decl. ¶ 4. Mr. Lindsay-Poland regularly travels to the region and analyzes open-source  
 11 intelligence sources to better understand security and human rights issues affecting the region. LP  
 12 Decl. ¶ 5. Over the course of his career, Mr. Lindsay-Poland has published over 75 articles, reports  
 13 and press releases on the region based on his fact-gathering. LP Decl. ¶ 9. He has also been quoted  
 14 in several leading publications. LP Decl. ¶ 10. His articles have appeared in outlets such as *The*  
 15 *L.A. Times* and he has been quoted in outlets such as *Reuters*. LP Decl. ¶¶ 9d, 10a. His reporting  
 16 and analyses focus on transnational gun violence caused by the flow of firearms from the United  
 17 States to Mexico and Central America. LP Decl. ¶¶ 3–8.

18 ***Mr. Lindsay-Poland requested that ATF provide aggregate trace data pertaining to the illegal***  
 19 ***flow of firearms to Mexico and Central America for his upcoming reporting.***

20 On March 22, 2021, Mr. Lindsay-Poland requested aggregate statistical data on traced  
 21 firearms recovered in Mexico and Central America (the “FOIA Request”). Siple Decl. Ex. A, ECF  
 22 33–1. In his FOIA Request, Mr. Lindsay-Poland put the Government on notice that he was making  
 23 the request “as a representative of the news media” and cited *Center for Investigative Reporting v.*  
 24 *U.S. Dep’t of Justice*, 14 F.4th 916 (9th Cir. 2021). See Siple Decl. Ex. A, ECF 33–1. He also  
 25 supplied the Government with examples of his prior reporting, citing his prior research reports, op-  
 26 eds, films and website. Siple Decl. Ex. A, ECF 33–1. Mr. Lindsay-Poland also requested a fee  
 27 waiver because the Requested Records will contribute significantly to the public’s understanding  
 28 of the operations or activities of the government. Siple Decl. Ex. A, ECF 33–1 (citing 5 U.S.C. §

1 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k)).

2 Consistent with his past practice, Mr. Lindsay-Poland intends to use the Requested Records  
3 for his upcoming reporting and a collaborative study on the flow of illegal firearms to Mexico and  
4 Central America. LP Decl. ¶ 6. Mr. Lindsay-Poland has relied heavily on similar records in  
5 producing his prior reporting, making aggregate trace data available to the public on numerous  
6 occasions throughout his career. LP Decl. ¶ 3, 7. For example, his February 17, 2022 report in  
7 *Univision* on violence in Mexico utilized firearm trace data. LP Decl. ¶ 9a & Ex. A. Similarly, his  
8 December 17, 2018 *Arizona Star* op-ed similarly utilized ATF trace data. LP Decl. ¶ 9f & Ex. F.

9 ***The Government applied out-of-circuit case law to deny Mr. Lindsay-Poland's request.***

10 On December 14, 2021, ATF denied Mr. Lindsay-Poland access to the Requested Records.  
11 Siple Decl. Ex. C, ECF 33–3. The Government stated that it denied Mr. Lindsay-Poland access to  
12 the Requested Records on the basis of *Everytown for Gun Safety Support Fund v. ATF*, 984 F.3d  
13 30 (2d Cir. 2020). Siple Decl. Ex. C, ECF 33–3. However, the Government now acknowledges  
14 that *Everytown* is not binding in the Ninth Circuit and that *Center for Investigative Reporting* binds  
15 this court. Siple Decl. ¶ 10.<sup>4</sup>

16 In denying Mr. Lindsay-Poland's FOIA Request, the Government never challenged Mr.  
17 Lindsay-Poland's status as a member of the media. *See* Siple Decl. Ex. C, ECF 33–3. The  
18 Government also did not make a determination in response to Mr. Lindsay-Poland's fee waiver  
19 request.

20 ***Mr. Lindsay-Poland brought this action to compel disclosure of the Requested Records after the***  
21 ***Government denied his administrative appeal.***

22 After ATF denied his FOIA Request, Mr. Lindsay-Poland timely appealed the  
23 Government's denial on March 14, 2022, once again citing to *Center for Investigative Reporting v.*  
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25 <sup>4</sup> The Siple Declaration contains multiple conclusions and statements of law. *See* Siple Decl.  
26 ¶¶ 7–10, 24, 28, 29. But under this Court's rules, “[a]n affidavit or declaration may contain only  
27 facts . . . and must avoid conclusions and argument.” L. R. 7-5. Mr. Lindsay-Poland therefore  
28 objects to the inclusion of these statements in the Siple Declaration, except to the extent these  
statements solely reflect Mr. Siple's *understanding* of the law. For the avoidance of doubt, Mr.  
Lindsay-Poland does not concede the validity of any such conclusions or statements of law in the  
Siple Declaration.

1 *U.S. Dep't of Justice*, 14 F.4th 916 (9th Cir. 2021). *See* Siple Decl. Ex. D, ECF 33–4. The  
 2 Government denied his appeal, citing again solely to *Everytown for Gun Safety Support Fund v.*  
 3 *ATF*, 984 F.3d 30 (2d Cir. 2020) and again not questioning Mr. Lindsay-Poland’s status as a  
 4 member of the media. Siple Decl. Ex. E, ECF 33–5. Mr. Lindsay-Poland then sued to challenge  
 5 the Government’s decision to withhold the Requested Records. Compl., ECF 1.

## 6 ARGUMENT

### 7 **I. The 2012 Tiahrt Rider Is Not A Valid Basis To Deny Mr. Lindsay-Poland Access To** 8 **The Requested Records Because It Does Not Satisfy Exemption 3’s Express Citation** 9 **Requirement.**

10 The Freedom of Information Act grants the public a legally enforceable right to access  
 11 government records, subject to nine exemptions. *See generally* 5 U.S.C. § 552(b)(1)–(9). “Because  
 12 FOIA’s purpose is to encourage disclosure, its exemptions are to be narrowly construed.” *Carter*  
 13 *v. U.S. Dept. of Commerce*, 307 F.3d 1084, 1088 (9th Cir. 2002) (citing *Julian*, 486 U.S. at 8). If  
 14 a member of the public requests information that does not fall within any of the nine exemptions,  
 15 the agency must release the information to the public. *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437  
 16 U.S. 214, 221 (1978).

17 The Government solely invokes Exemption 3 as a purported basis for withholding the  
 18 Requested Records. As relevant here, “Exemption 3 relieves an agency of its obligation to disclose  
 19 material specifically exempted from disclosure by statute, but only if that statute . . . specifically  
 20 cites to [Exemption 3].” *Center for Investigative Reporting*, 14 F.4th at 926.<sup>5</sup> Congress added  
 21 Exemption 3’s Express Citation Requirement because it thought “statutory exemptions should be  
 22 clear and unambiguous, and vigorously debated before they are enacted into law.” 155 Cong. Rec.  
 23 S3164, S3175–S3176 (March 17, 2009) (statement of Sen. Leahy on behalf of himself and Sen.

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24 <sup>5</sup> While the express citation requirement only applies to statutes enacted after 2009, the  
 25 Government solely invokes (at 1) the 2012 Tiahrt Rider as a purported withholding statute. It is  
 26 beyond dispute that the 2012 Tiahrt Rider wholly replaced and repealed earlier versions of the 2012  
 27 Tiahrt Rider. *See Center for Investigative Reporting*, 14 F.4th at 927 (“We conclude that the 2012  
 28 [Tiahrt] Rider—which enacted the language of the 2010 Rider without any alteration—is the only  
 operative Rider.”); *accord Everytown for Gun Safety Support Fund v. ATF*, 984 F.3d 30, 37 (2d  
 Cir. 2020) (holding the 2012 Tiahrt Rider impliedly repealed earlier-enacted versions of the 2012  
 Tiahrt Rider).

1 Cornyn). Accordingly, the 2012 Tiahrt Rider can only qualify as a withholding statute if Congress  
2 explicitly cited to Exemption 3 in the text of the 2012 Tiahrt Rider.<sup>6</sup> Congress declined to do so.  
3 *See* Pub. L. No. 112–55, 125 Stat. 552, 609–10. Therefore, the Government cannot use Exemption  
4 3 to withhold the Requested Records.

5 The Government’s argument (at 9) that the Freedom of Information Act impermissibly  
6 entrenches Congress by attempting to bind future Congresses is unavailing. The Freedom of  
7 Information Act, as amended by the Open FOIA Act of 2009, does not impair Congress’s ability  
8 to enact future legislation. In enacting the Open FOIA Act of 2009, Congress merely redefined the  
9 universe of statutes that satisfy Exemption 3, something that Congress has done before. For  
10 example, Congress amended Exemption 3 in 1976 “to eliminate from Exemption 3 those statutes  
11 that granted administrative agencies such [broad] discretion with respect to the disclosure or  
12 nondisclosure of material within their possession” following the Supreme Court’s decision in  
13 *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975). *Consumer Prod. Safety Comm’n v. GTE*  
14 *Sylvania, Inc.*, 447 U.S. 102, 121 n.18 (1980). Congress’s bipartisan addition of the Express  
15 Citation Requirement in 2009 was just another effort by Congress to refine the contours of  
16 Exemption 3.

17 The Freedom of Information Act also does not present any of the Supreme Court’s concerns  
18 regarding entrenchment. Congress could have easily enacted the 2012 Tiahrt Rider as a  
19 withholding statute simply by citing to Exemption 3, as Congress has done on several occasions  
20 before.<sup>7</sup> Congress also remains free to amend or repeal Exemption 3’s Express Citation

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21 <sup>6</sup> At least in its public statements, the Government appears to share this plain reading of  
22 Exemption 3. *See* DEP’T OF JUSTICE, *Congress Passes Amendment to Exemption 3 of the FOIA*  
23 (Mar. 10, 2010), <https://www.justice.gov/oip/blog/congress-passes-amendment-exemption-3-foia>  
24 (“If enacted after October 28, 2009, the statute must meet one additional requirement; it must  
25 specifically cite to Exemption 3 in order to qualify as a withholding statute.”).

26 <sup>7</sup> *See, e.g.*, Jumpstart Our Business Startups Act, Pub. L. No. 112–106, § 106, 126 Stat. 306,  
27 312 (2012) (amending 15 U.S.C. § 77f to shield certain regulatory disclosures by small businesses  
28 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 21<sup>st</sup> 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);

1 Requirement. But nothing on the face of the 2012 Tiahrt Rider amends or repeals any provision of  
2 the Freedom of Information Act. *See* Pub. L. No. 112–55, 125 Stat. 552, 609–10.

3 The only way the 2012 Tiahrt Rider can override the Freedom of Information Act is by  
4 meeting the high bar for an implied repeal. *See Maine Cmty. Health Options v. United States*, 140  
5 S.Ct. 1308, 1323 (2020) (stating that “repeals by implication are not favored” and are a “rarity”  
6 (quotations and citations omitted). “[T]he only permissible justification for a repeal by implication  
7 is when the earlier and later statutes are irreconcilable.” *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred*  
8 *Int’l, Inc.*, 534 U.S. 124, 141–42 (2001). Even where an irreconcilable conflict exists between two  
9 statutes, Congress’s intent to displace the earlier statute “must be clear and manifest.” *Epic Sys.*  
10 *Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018) (quotations omitted). The bar is even higher in the  
11 context of the 2012 Tiahrt Rider because the “[Supreme] Court’s aversion to implied repeals is  
12 especially strong in the appropriations context.” *Maine Cmty. Health Options*, 140 S.Ct. at 1323  
13 (quotations omitted).<sup>8</sup>

14 There is no irreconcilable conflict between the 2012 Tiahrt Rider and the Freedom of  
15 Information Act because the two enactments comfortably coexist. A court will “give effect to two  
16 statutes that overlap, so long as each reaches some distinct cases.” *J.E.M. Ag Supply, Inc.*, 534 U.S.  
17 at 144; *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (“It is not enough to  
18 show that the two statutes produce differing results when applied to the same factual situation, for  
19 that no more than states the problem.”). Here, the Freedom of Information Act governs the contours

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20 FAA Modernization and Reform Act of 2012, Pub. L. No. 112–95, § 310, 126 Stat. 11, 64–65  
21 (2012) (amending 49 U.S.C § 44703 and enacting 49 U.S.C. § 44735, concerning disclosure of  
22 various forms of aviation safety data, and including specific references to 5 U.S.C. § 552(b)(3) in  
23 both provisions); National Defense Authorization Act For Fiscal Year 2012, Pub. L. No. 112–81,  
24 §§ 1082 & 1091, 125 Stat. 1298, 1601, 1604 (2011) (enacting 10 U.S.C. §§ 2254a and 130e,  
25 concerning nondisclosure of critical infrastructure security information and military flight  
26 operations data, and adding citation to “section 552(b)(3) of title 5” to both provisions); *see also*  
27 *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014) (“[W]e presume that  
28 Congress is aware of existing law when it passes legislation.”) (quotations omitted).

<sup>8</sup> While the Ninth Circuit did not ultimately reach the government’s claim of entrenchment  
in *Center for Investigative Reporting*, it did note that the Government’s entrenchment argument  
requires identifying an “irreconcilable conflict” between the 2012 Tiahrt Rider and the Freedom of  
Information Act as well as overcoming “the Supreme Court’s ‘especially strong’ aversion to  
implied repeals of standalone laws through appropriation riders.” *Center for Investigative*  
*Reporting*, 14 F.4th at 945 n.7 (quoting *Maine Cmty. Health Options*, 140 S.Ct. at 1323).

1 of Exemption 3 while the 2012 Tiahrt Rider—which does not mention the Freedom of Information  
2 Act once—still governs the release of trace data outside of the FOIA context. *See* Pub. L. No. 112–  
3 55, 125 Stat. 552, 609–10 (expressly addressing disclosure of firearm trace data in the context of  
4 discovery and subpoenas, but not mentioning the Freedom of Information Act). The Supreme  
5 Court’s recent decision in *Epic Systems* reinforces the principle that there is no irreconcilable  
6 conflict where the later statute does not clearly and manifestly address the precise subject of the  
7 earlier statute. *Epic Systems* addressed a purported conflict between the National Labor Relation  
8 Act’s protection of “concerted activities” and the Federal Arbitration Act’s mandatory enforcement  
9 of class action waivers, which the employees claimed was a prohibition on concerted activity. *Epic*  
10 *Sys. Corp.*, 138 S.Ct. at 1617. The Supreme Court refused to find an irreconcilable conflict between  
11 the statutes, reasoning that the NLRA’s protection of “concerted activities” did not show a “clear  
12 and manifest” intent to cover the subject matter of the FAA. *Id.* at 1624. The 2012 Tiahrt Rider—  
13 which fails to mention the Freedom of Information Act—similarly does not express a “clear and  
14 manifest” intent to repeal a portion of the Freedom of Information Act.

15       When measured against the high bar for establishing that the 2012 Tiahrt Rider impliedly  
16 repealed the Freedom of Information Act, the Government’s arguments fall far short. The  
17 Government argues (at 10) that Congress intended to disregard the Freedom of Information Act  
18 simply because the 2012 Tiahrt Rider limits the release of some data. But the Government’s  
19 argument improperly conflates Congress’s intent to restrict the release of some data in certain  
20 circumstances with Congress’s intent to alter the statutory regime governing the release of data.  
21 “Before holding that the result of the earlier consideration has been repealed or qualified, it is  
22 reasonable for a court to insist on the legislature’s using language showing that it has made a  
23 considered determination to that end.” *See Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S.  
24 102, 134 (1974). Congress used no such language in the 2012 Tiahrt Rider. Moreover, Congress  
25 added Exemption 3’s Express Citation Requirement in 2009 to serve as an *additional* requirement  
26 alongside the Withholding Requirement, intending to *narrow* the category of statutes that would  
27 have otherwise satisfied Exemption 3 prior to its addition in 2009. But the Government’s argument  
28 (at 10) that satisfaction of the Withholding Requirement is also sufficient to undo the Express

1 Citation Requirement would render the Express Citation Requirement a nullity in every case. “The  
2 [G]overnment’s interpretation thus violates the cardinal principle of interpretation that courts must  
3 give effect, if possible, to every clause and word of a statute.” *United States v. Corrales-Vazquez*,  
4 931 F.3d 944, 950 (9th Cir. 2019) (quotations omitted).

5 Unable to meet the “clear and manifest” standard for finding an implied repeal, the  
6 Government tries to argue (at 9) that Congress can repeal its earlier acts “by implication,” citing  
7 *Dorsey v. United States*. But the Government’s reliance on *Dorsey* is misplaced because a careful  
8 reading of that decision reveals that *Dorsey* did not establish a general standard for implied repeals,  
9 and instead only addressed the standard for interpreting a particular statute on repealing penalties  
10 from 1871. *Dorsey* addressed the application of a 1871 savings statute “setting forth an important  
11 background principle of interpretation” “that a new criminal statute that ‘repeal[s]’ an older  
12 criminal statute shall not change the penalties ‘incurred’ under that older statute ‘unless the  
13 repealing Act shall so expressly provide.’” *Dorsey v. United States*, 567 U.S. 260, 272–74 (2012).  
14 Importantly, *Dorsey* relied on the Supreme Court’s prior holding in *Great Northern Railway*  
15 *Company* that the 1871 savings statute’s express statement requirement may yield to later  
16 enactments when required by “implication.” *Id.* at 274 (citing *Great Northern Ry. Co. v. United*  
17 *States*, 208 U.S. 452, 465 (1908)). But *Great Northern Railway Company* got to that result by  
18 adding a critical step to its statutory analysis of the 1871 savings statute that does not apply here at  
19 all. *Great Northern Railway Company* first held that the 1871 savings statute is “to be treated as if  
20 incorporated in and as a part of subsequent enactments, and therefore ***under the general principles***  
21 ***of construction requiring, if possible, that effect be given to all the parts of a law***, the section must  
22 be enforced unless, either by express declaration or necessary implication, arising from the terms  
23 of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the  
24 provisions of [the savings statute].” *Great Northern Ry. Co.*, 208 U.S. at 465 (emphasis supplied).  
25 In other words, the Supreme Court interpreted the 1871 savings statute as if Congress made its  
26 language a part of all future legislation, and only then called for applying “general principles of  
27 construction” to that combined statutory text. From those general principles of construction arose  
28 *Great Northern Railway Company*’s “necessary implication” standard for interpreting the 1871

1 savings statute, which bound the Supreme Court in *Dorsey*. But that unique statutory scheme is  
2 not relevant to answering the question of whether the 2012 Tiahrt Rider impliedly repealed the  
3 Express Citation Requirement contained in another statute. *Dorsey*'s limited applicability to the  
4 1871 savings statute at issue in that case is reinforced by the fact that the Supreme Court has since  
5 reaffirmed that Congress must express a "clear and manifest" intent to impliedly repeal a prior  
6 statute. See *Epic Sys. Corp.*, 138 S.Ct. at 1624.

7 The Government further misconstrues *Dorsey v. United States* (at 9) by suggesting that  
8 courts should always look to the "fair implication" of the later statute regardless of its compliance  
9 with the earlier one. But the quoted language is only applicable where "the plain import of a later  
10 statute directly conflicts with an earlier statute." *Dorsey*, 567 U.S. at 274 (quoting *Lockhart v.*  
11 *United States*, 546 U.S. 142, 149 (2005) (Scalia, J., concurring)). As explained above, there is no  
12 direct conflict between the Freedom of Information Act and the 2012 Tiahrt Rider, let alone a "clear  
13 and manifest" one.

14 Finally, the 2012 Tiahrt Rider's legislative history further rebuts the Government's  
15 interpretation. The Government contends (at 11) that Congress uses the same language to  
16 accomplish the same objective and the reenactment of substantially similar Tiahrt Riders before  
17 and after Congress added the Express Citation Requirement sought to accomplish the same  
18 objective. But the objective had changed by 2012 due to Congress' addition of the Express Citation  
19 Requirement in 2009. Unlike in the years preceding 2009, Congress in 2012 needed to repeal or  
20 modify the Express Citation Requirement in order to bar disclosure under the Freedom of  
21 Information Act. By using the same language as *before* 2009—which could not have possibly  
22 intended to undo a not-yet-enacted statute—Congress could not have intended to undo the Express  
23 Citation Requirement.

1     **II. Mr. Lindsay-Poland’s Request For Statistical Aggregate Trace Data Falls Within the**  
 2     **Aggregate Data Exception To The 2012 Tiahrt Rider Under Binding Ninth Circuit**  
 3     **Law.**

4     Congress ensured that the 2012 Tiahrt Rider does not apply to the publication of “annual  
 5     statistical reports” or the release of “statistical aggregate data.” The 2012 Tiahrt Rider states that  
 6     it shall not be construed to prevent:

7             the publication of [1] annual statistical reports on products regulated by [ATF], including  
 8             total production, importation, and exportation by each licensed importer (as so defined) and  
 9             licensed manufacturer (as so defined), or [2] statistical aggregate data regarding firearms  
               traffickers and trafficking channels, or firearms misuse, felons, and trafficking  
               investigations.

10     Pub. L. No. 112–55, 125 Stat. 552, 609–10. Only the second exception, or the Aggregate Data  
 11     Exception, is relevant here.<sup>9</sup>

12             Applying the plain text of the 2012 Tiahrt Rider, the Ninth Circuit ruled in a binding  
 13     decision that disclosing “statistical aggregate data” to “representatives of the public” such as  
 14     members of the media falls within the Aggregate Data Exception because it will likely result in its  
 15     publication. *See Center for Investigative Reporting*, 14 F.4th at 935 (“[I]f ATF turns over  
 16     information to a ‘representative of the public,’ such as a reporter, it in effect makes that information  
 17     generally known to the public.”). When members of the media request information, they are  
 18     serving as “‘representative[s] of the public’ through which individuals and entities commonly  
 19     distribute information to the public.” *Id.* at 934 (citing *Courthouse News Serv. v. Planet*, 750 F.3d  
 20     776, 786 (9th Cir. 2014) (“We have observed that the news media, when asserting the right of  
 21     access, are surrogates for the public.” (internal quotations and citations omitted))). While members  
 22     of the media such as Mr. Lindsay-Poland are one category of representatives of the public, the  
 23     Ninth Circuit’s binding holding applies to all “representatives of the public.” *See Center for*  
 24     *Investigative Reporting*, 14 F.4th at 935 (referring to reporters as one example of “representative[s]”  
 25     \_\_\_\_\_

26     <sup>9</sup> While the Government refers (at 3) to this entire provision as the “publication exception,”  
 27     this provision contains two distinct exceptions: one for “annual statistical reports” and one for  
 28     “statistical aggregate data.” *See* Pub. L. No. 112–55, 125 Stat. 552, 609–10. To avoid any  
    confusion, we refer to the relevant exception for statistical aggregate data as the Aggregate Data  
    Exception.

1 of the public” who make “information generally known to the public.”). The thrust of the inquiry  
2 is whether the release of the information to the requester will eventually result in that information  
3 becoming “generally known to the public.” *Id.*

4 This Court’s determination as to whether Mr. Lindsay-Poland represents the public is not  
5 limited to the administrative record before ATF. Instead, this Court’s “review of agency access  
6 decisions under FOIA . . . is de novo, requiring no deference to the agency’s determination or  
7 rationale regarding disclosures.” *Louis v. U.S. Dep’t of Labor*, 419 F.3d 970, 977 (9th Cir. 2005);  
8 *see also Powell v. U.S. Dep’t. of Justice*, 584 F. Supp. 1508, 1515 (N.D. Cal. 1984) (considering  
9 submission of additional declarations in the district court proceedings to determine validity of  
10 exemption).

11 The indisputable facts before this Court establish that Mr. Lindsay-Poland is a member of  
12 the media. The Freedom of Information Act defines a member of the media as “any person or  
13 entity that gathers information of potential interest to a segment of the public, uses its editorial  
14 skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5  
15 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Center for Investigative Reporting*, 14 F.4th at 935 (looking  
16 to analogous language in Section 552(a)(4)(A)(ii)(III) of the Freedom of Information Act for  
17 definition of publication). Examples of the “distinct work” that would qualify someone for this  
18 status include “a newspaper article,” “a substantive press release or editorial comment,” or even  
19 “editorial comments . . . in interviews with newspapers.” *Cause of Action v. FTC*, 799 F.3d 1108,  
20 1122 (D.C. Cir. 2015); *see also Am. Small Bus. League v. U.S. Small Bus. Admin.*, 2022 WL  
21 2047557, at \*13 (N.D. Cal. June 7, 2022). For example, in *American Small Business League*, the  
22 court found an organization qualified as a representative of the news media when it showed through  
23 declarations that it “published press releases via its own website and through other publishers” and  
24 that members of its organization “regularly publish opinion pieces and appear in the press to  
25 present” on the organization’s findings. *Id.* at \*14. Mr. Lindsay-Poland routinely gathers  
26 information based on his open source research and extensive travel to Mexico and Central America.  
27 LP Decl. ¶ 5. He then regularly disseminates his findings in substantive press releases, reports and  
28 articles. LP Decl. ¶¶ 5–9. He has published over 75 articles, reports and press releases and has

1 been quoted in publication such as *Reuters*. LP Decl. ¶ 9. Moreover, the fact that Mr. Lindsay-  
 2 Poland plans to use the Requested Records in his upcoming reporting is precisely the type of  
 3 conduct that the Ninth Circuit has said constitutes publication. *Center for Investigative Reporting*,  
 4 14 F.4th at 934 (finding disclosure to constitute publication in part because “the record reveals that  
 5 the requested data will play a role in [the requester’s] upcoming ‘project’ on gun violence”).

6 The Government’s two attempts to avoid this binding precedent are unavailing.

7 *First*, the Government relies on Section 552(a)(4)(A)(vii) to argue (at 17) that this Court’s  
 8 review of Mr. Lindsay-Poland’s status as a member of the media is limited to the record before  
 9 ATF. But the Government is applying the wrong provision. Section 552(a)(4)(A)(vii) solely  
 10 governs judicial review of fee waiver requests. *See* 5 U.S.C. § 552(a)(4)(A)(vii) (“***In any action***  
 11 ***by a requester regarding the waiver of fees under this section***, the court shall determine the matter  
 12 de novo: Provided, That the court’s review of the matter shall be limited to the record before the  
 13 agency.”) (emphasis supplied).<sup>10</sup> Section 552(a)(4)(B) is the provision that governs the scope of  
 14 review of actions challenging withholding determinations. *See* 5 U.S.C. § 552(a)(4)(B). That  
 15 provision calls for de novo review and contains no such limiting language. *Compare* 5 U.S.C. §  
 16 552(a)(4)(A)(vii), *with* 5 U.S.C. § 552(a)(4)(B). Congress’s conspicuous omission of language  
 17 limiting the scope of judicial review with respect to withholding determinations strongly suggests  
 18 such review is not limited to the record before the agency. *See Salinas v. U.S. R.R. Ret. Bd.*, 141  
 19 S. Ct. 691, 697–98 (2021) (absence of language limiting judicial review present in neighboring  
 20 provision suggests no such limitation exists); *see also Russello v. United States*, 464 U.S. 16, 23  
 21 (1983) (“Where Congress includes particular language in one section of a statute but omits it in  
 22 another section of the same Act, it is generally presumed that Congress acts intentionally and  
 23 purposely in the disparate inclusion or exclusion.”) (internal quotation marks and brackets omitted).

24 The Government further compounds its error by suggesting (at 16) that the pleading  
 25 standard and burden of proof of a fee waiver action governs this action challenging the

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26 <sup>10</sup> This is not an action regarding Mr. Lindsay-Poland’s fee waiver request, to which ATF has  
 27 not responded. *See* Siple Decl. Ex. 2, 33–2 (failing to address Mr. Lindsay-Poland’s fee waiver  
 28 request pursuant to Section 552(a)(4)(A)(iii)). For the avoidance of doubt, Mr. Lindsay-Poland  
 reserves all arguments with respect to his fee waiver request in the event ATF denies it.

1 Government’s withholding determination. But once again, the Government is looking at the wrong  
2 section of the Freedom of Information Act. *See supra* at 14. In actions challenging an agency’s  
3 withholding determination, *the agency* bears the burden of “proving” that Exemption 3 applies,  
4 and therefore must prove that Mr. Lindsay-Poland is not a member of the media. *See Carter*, 307  
5 F.3d at 1088 (“An agency may avoid disclosure only if it proves that the documents fall within one  
6 of nine exceptions.”); *Am. Civil Liberties Union Found. v. U.S. Dep’t of Justice*, 418 F.Supp.3d  
7 466, 481 (N.D. Cal. 2019) (“The exemptions to FOIA are to be narrowly construed . . . and the  
8 burden of proving their applicability rests with the government.”); 5 U.S.C. § 552(a)(4)(B) (“[T]he  
9 burden is on the agency to sustain its action” withholding records.). The Ninth Circuit’s  
10 consideration of analogous statutory language found in the Freedom of Information Act’s fee  
11 waiver provisions to help shed light on the meaning of the 2012 Tiahrt Rider does not transform  
12 this action over withheld records into a fee waiver action.

13 The Government does not even attempt to meet its burden needed to prove that Exemption  
14 3 does not apply to Mr. Lindsay-Poland. The Government offers no evidence of its own concerning  
15 Mr. Lindsay-Poland’s status as a member of the news media. As explained *supra*, Mr. Lindsay-  
16 Poland’s Declaration nevertheless removes any doubt that he is a member of the news media. *See*  
17 *supra* at 13–14.

18 Moreover, this is the first time the Government has raised the argument that Mr. Lindsay-  
19 Poland is not a member of the media, despite Mr. Lindsay-Poland putting the Government on notice  
20 of this fact in his FOIA Request. *See Siple Decl. Ex. A*, ECF 33–1. In fact, the Government denied  
21 Mr. Lindsay-Poland’s administrative appeal solely on the basis of the Second Circuit’s *Everytown*  
22 decision, not the Ninth Circuit’s binding decision in *Center for Investigative Reporting*. *See Siple*  
23 *Decl. Ex. C*, ECF 33–3. Having failed to inform Mr. Lindsay-Poland that it was denying his FOIA  
24 Request on the basis that he was purportedly not a member of the media, the Government cannot  
25 turn around and fault him for not supplementing the administrative record below on that very  
26 issue.<sup>11</sup>

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27 <sup>11</sup> ATF’s boilerplate statement in its May 17, 2021 Acknowledgement Letter that Mr. Lindsay-  
28 Poland was a “non-media, non-commercial requester pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(III)”  
and thus “entitled to two free hours of search time and up to one hundred pages of duplication

1           *Second*, the Government asserts (at 18–19) that Mr. Lindsay-Poland’s request for datasets  
 2 broken down by ZIP code seeks non-aggregate data because certain ZIP codes contain only a single  
 3 Federal Firearm Licensee (FFL). But the Government misconstrues the FOIA Request and  
 4 misapplies relevant Ninth Circuit law. The FOIA Request at issue seeks, “[f]or each country, and  
 5 each year, the number of firearms recovered and traced to a federal firearms licensee from each: a)  
 6 state, b) county, and c) ZIP code.” Siple Decl. Ex. A, ECF 33–1 (emphasis supplied). Thus, this  
 7 FOIA Request seeks a “number” that combines data spanning over a 365 day period for a given  
 8 source country. Even if a small minority of ZIP codes contain a single FFL as the Government  
 9 suggests, the Requested Record would simply tally the number of traces to that FFL over an entire  
 10 year. This meets the plain definition of aggregate, which “refers to a summary form of information  
 11 ‘formed by the collection of units or particles into a body, mass, or amount.’” *Center for*  
 12 *Investigative Reporting*, 14 F.4th at 933 (quoting Merriam-Webster Online Dictionary).<sup>12</sup> Data  
 13 associated with a single FFL is not any less aggregate than data that is associated with a single year.

14       **III. The 2012 Tiahrt Rider Is Not A Withholding Statute With Respect To Statistical**  
 15       **Aggregate Data.**

16           As previously discussed, the 2012 Tiahrt Rider fails Exemption 3’s Express Citation  
 17 Requirement and Mr. Lindsay-Poland’s FOIA Request falls within the 2012 Tiahrt Rider’s  
 18 Aggregate Data Exception. But the 2012 Tiahrt Rider is not a valid basis to deny access to statistical  
 19 aggregate data for the additional reason that it does not meet the requirements for a withholding  
 20 statute with respect to such data. A withholding statute must either “require[] that the matters be  
 21 withheld from the public in such a manner as to leave no discretion on the issue” or “establish[]

22 \_\_\_\_\_  
 23 without charge” pursuant to 28 C.F.R. § 16.10(d)(4) could not have put Mr. Lindsay-Poland on  
 24 notice that ATF was withholding the Requested Records on that basis. *See* Siple Decl. Ex. B, ECF  
 25 33–2. The May 17, 2021 Acknowledgement Letter predated ATF’s withholding determination by  
 26 over half a year. *See* Siple Decl. Ex. C, ECF 33–3. Mr. Lindsay-Poland was also under no  
 27 obligation to administratively appeal that fee status determination because he did not request it. As  
 28 noted *supra* at note 10, Mr. Lindsay-Poland had requested a fee waiver under an entirely different  
 provision, Section 552(a)(4)(A)(iii), to which the Government failed to respond.

<sup>12</sup> In the context of this FOIA Request, FFLs, states, counties and ZIP codes all relate to  
 “trafficking channels” and thus satisfy the requirement that the data relate to “firearms traffickers  
 and trafficking channels, or firearms misuse, felons, and trafficking investigations.” *See* Pub. L.  
 No. 112–55, 125 Stat. 552, 609–10. The Government does not appear to contest this point.

1 particular criteria for withholding or refers to particular types of matters to be withheld.” 5 U.S.C.  
2 § 552(b)(3)(A). The purpose of this language, which was modified in 1976, was “to eliminate from  
3 Exemption 3 those statutes that granted administrative agencies such [broad] discretion with respect  
4 to the disclosure or nondisclosure of material within their possession” following the Supreme  
5 Court’s decision in *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975). *Consumer Prod. Safety*  
6 *Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 121 n.18 (1980). Thus, “statutes setting forth very  
7 general benchmarks for secrecy ‘in fact delegate to administrators the entire burden of identifying  
8 the problems disclosure might generate’ and thus ‘do not satisfy subsection (B)’s requirement that  
9 Congress have articulated ‘particular criteria.’” *Church of Scientology*, 633 F.2d at 1330 (quoting  
10 *Am. Jewish Cong. v. Kreps*, 574 F.2d 624, 629 (D.C. Cir. 1978)).

11 The question of whether Congress granted an agency sufficient discretion to remove an  
12 enactment from Exemption 3 is answered on a provision-by-provision basis. *See Julian*, 486 U.S.  
13 at 9 (finding information in presentence reports beyond “confidential sources, diagnostic opinions,  
14 and other information that may cause harm to the defendant or to third parties” to not qualify under  
15 Exemption 3). Here, Congress determined that statistical aggregate data, among other categories  
16 of information, should be treated differently by excluding such data from the general non-disclosure  
17 regime of the first part of the 2012 Tiahrt Rider. That calls for a separate analysis of whether  
18 statistical aggregate data must be withheld from the public.

19 The 2012 Tiahrt Rider plainly does not require that statistical aggregate data be withheld  
20 from the public. Congress permitted ATF to publish such data. *See Pub. L. No. 112–55*, 125 Stat.  
21 552, 609–10. Nor does the 2012 Tiahrt Rider provide agencies with “particular criteria” for  
22 determining when to release such data. The 2012 Tiahrt Rider instead grants ATF broad discretion  
23 to release statistical aggregate data, only requiring that the data be “regarding firearms traffickers  
24 and trafficking channels, or firearms misuse, felons, and trafficking investigations.” *See Pub. L.*  
25 *No. 112–55*, 125 Stat. 552, 609–10. This “general benchmark[] for secrecy” does not satisfy  
26 Exemption 3. *See Church of Scientology*, 633 F.2d at 1330.

## 27 CONCLUSION

28 The Government’s Motion for Summary Judgment should be denied and Mr. Lindsay-

1 Poland's Cross-Motion for Summary Judgment should be granted.  
2  
3

4 Dated: July 31, 2023

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

JOHN LINDSAY-POLAND,  
  
Plaintiff,  
  
v.  
  
UNITED STATES DEPARTMENT OF  
JUSTICE; and BUREAU OF ALCOHOL,  
TOBACCO, FIREARMS AND EXPLOSIVES,  
  
Defendants.

Case No. 3:22-cv-07663-EMC  
  
**[PROPOSED] ORDER**  
  
Date: October 19, 2023, 1:30 PM  
Location: Via Zoom  
  
Judge: Hon. Edward M. Chen

1 AND NOW, this \_\_\_ day of \_\_\_\_\_, 2023, upon consideration of Plaintiff John  
2 Lindsay-Poland’s Cross-Motion for Summary Judgment, and all papers filed in support and in  
3 opposition to that motion, it is ORDERED that the Motion is GRANTED for the following reasons:

4 *First*, the 2012 Tiahrt Rider is not a valid basis to deny Mr. Lindsay-Poland access to the  
5 requested records because it does not satisfy Exemption 3’s express citation requirement, which requires  
6 that any withholding statute expressly cite to Exemption 3 in order to serve as a valid basis for  
7 withholding access to requested records, *see* 5 U.S.C. § 552(b)(3)(B);

8 *Second*, Mr. Lindsay-Poland’s request for statistical aggregate data falls within the aggregate  
9 data exception to the 2012 Tiahrt Rider because he requested records containing statistical information  
10 that combines multiple data points over a year-long period, *see Center for Investigative Reporting v.*  
11 *U.S. Dep’t of Justice*, 15 F.4th 916, 933 (9th Cir. 2021); and

12 *Third*, the 2012 Tiahrt Rider is not a withholding statute with respect to statistical aggregate  
13 data because it fails to require that statistical aggregate data be withheld from the public, *see Church of*  
14 *Scientology of California v. U.S. Postal Serv.*, 633 F.2d 1327, 1330 (9th Cir. 1980).

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16 \_\_\_\_\_  
17 Hon. Edward M. Chen  
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