No. 02-322

In The Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO,
FIREARMS AND EXPLOSIVES,

Petitioner

v.

CITY OF CHICAGO

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR CAMDEN COUNTY, NEW JERSEY, WAYNE COUNTY, MICHIGAN, THE CITY AND COUNTY OF SAN FRANCISCO, AND THE CITIES OF BERKELEY, CINCINNATI, CLEVELAND, JERSEY CITY, PHILADELPHIA, ST. LOUIS, WEST HOLLYWOOD AND WILMINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici Camden County, New Jersey, Wayne County, Michigan, the City and County of San Francisco, and the cities of Berkeley, Cincinnati, Cleveland, Jersey City, Philadelphia, St. Louis, West Hollywood, and Wilmington are all charged with myriad responsibilities to sustain and improve the quality of life in their communities, including safeguarding their citizens from violent crime. Each *amicus,* on behalf of its citizens, is pursuing a multi-pronged approach to curbing gun violence. As such, *amici* are interested in the information regarding the tracing and multiple purchases of firearms that respondent City of Chicago has requested be released by petitioner United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) from ATF's Trace and Multiple Sales Databases.

The effectiveness of ATF's enforcement efforts regarding firearms is of particular importance to *amici* because they work with ATF on an ongoing basis and depend on its assistance in their own law enforcement efforts. ATF encourages localities to participate with it in various nationwide firearm initiatives, such as the Youth Crime Gun Interdiction Initiative (YCGII), which, *inter alia*, "seeks to determine the illegal sources of guns for youths by analyzing trace data to detect patterns in the local supply of crime guns." J.A. 27; Pet. Br. 8. That initiative requires that participating localities agree to have all crime guns recovered in their jurisdictions traced by ATF. *Ibid*.

Disclosure of the withheld information from the Trace and Multiple Sales Databases would further the public

[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

interest in demonstrating how well ATF is conducting its gun trace and monitoring functions, and how well it is compiling data to develop a picture of the nation's crime gun distribution channels. For example, information from the Trace Database showing which firearm dealers do not provide information to ATF that is adequate to complete a trace to a retail purchaser, in what circumstances such trace failures occur, and ATF's response, would reveal important factors that contribute to ATF's effectiveness. That information would, in turn, inform how *amici* may better improve their effectiveness in combating gun violence, including with respect to those *amici* responsible for enforcing state laws regulating licensed firearm dealers who operate in their jurisdictions and those *amici* who have enacted their own local firearm dealer laws.

As part of their efforts to curb gun violence, several *amici* are currently pursuing public nuisance claims against certain firearm industry members, similar to respondent's civil lawsuit. *See* Pet. App. 2a. Some of the *amici* have also requested the data at issue here under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and ATF has similarly refused to disclose the data to them. Like respondent, and as shown more fully below, these *amici* are entitled under FOIA to the information requested, should they seek to use it in connection with their claims that the methods of gun distribution of certain industry members directly result in widespread accessibility of handguns to persons prohibited by law from possessing them, including felons and juveniles. Moreover, in connection with all their efforts to address gun violence in their jurisdictions, *amici* have a legitimate interest in ascertaining the degree to which ATF is fulfilling its statutory role of regulating firearm industry licensees, and the data about changes in crime gun patterns over time will assist *amici* in making such evaluations.

As a more general matter, the information at issue in this case is relevant to the national debate regarding whether current federal firearm laws and the resources devoted to enforcing them are adequate, or whether additional laws or efforts are needed in this area – a

debate that is of particular significance to *amici* and their law enforcement efforts. Chief executives of the law enforcement offices of some of the *amici* submitted sworn declarations in support of respondent's summary judgment motion in the instant action, attesting to the fact that disclosure of the information requested in this case could not reasonably be expected to interfere with law enforcement proceedings.

Given the extent of their law enforcement duties and responsibilities, *amici* have a strong interest in the proper resolution of the questions presented in this case.

SUMMARY OF ARGUMENT

I. Disclosure of the information withheld by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) will directly serve the public interest by revealing ATF's effectiveness in tracing firearms that have been involved in criminal activity and in monitoring the sales of multiple firearms to unlicensed individual purchasers within a short period of time. The court of appeals correctly held that ATF failed to establish that the withheld information in its Trace and Multiple Sales Databases was exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

A. ATF treats FOIA Exemption 7(A) as a blanket exemption that allows it to withhold, for a five-year period, whatever information in its databases is, in ATF's view, "sensitive," in order to avoid what ATF believes would be "premature" release. But Congress specified in Exemption 7(A) that "records or information compiled for law enforcement purposes" need not be disclosed by federal agencies "only to the extent" that they "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). ATF's sweeping policy of a five-year withholding period for a variety of different types of information in its Trace Database does not meet that standard.

ATF's attempt to characterize its policy as a "categorical" rule akin to those approved in earlier cases is inconsistent with more recent precedent. In *United States Department of Justice v. Landano*, 508 U.S. 165 (1993), the Court rejected arguments strikingly similar to those made by ATF in this case. *Landano* made clear that an agency's claim of a categorical law enforcement exemption under the FOIA must be supported by a particularized showing that each of the various types of information withheld could characteristically be expected to cause the harm addressed by the exemption. *Landano*'s tailoring requirement is reinforced by a separate provision of the FOIA that authorizes an agency to withhold information about the existence of law enforcement records pertaining to a criminal investigation only so long as there is a pending investigation and the subject is unaware of it. *See* 5 U.S.C. § 552(c)(1).

B. ATF falls far short of making the particularized showing that *Landano* requires to support its Exemption 7(A) claim. Although ATF claims that disclosure of the existence of firearm traces could reasonably be expected to interfere with enforcement proceedings, ATF's evidence does not indicate that to be so. First, the Trace Database information does not reveal whether an investigation is pending with regard to any trace. Second, ATF's withholding of information identifying all firearm manufacturers, importers, wholesalers, and retailers is not justified in the vast majority of traces where those entities are informed by ATF of the existence of the trace during the course of the trace. Third, ATF presents no evidence that the disclosure of any of the various types of information withheld could reasonably be expected to interfere with an enforcement proceeding for the entire five-year withholding period. ATF's evidence establishes that traces are completed within one year and even the more complicated investigations involving the Multiple Sales Database are completed within two years. Finally, ATF did not tender admissible evidence to support its claim that any failure to maintain the confidentiality of trace requests for five years

would mean that local law enforcement agencies would no longer request traces. The record evidence from chief executives of major metropolitan police departments is to the contrary. The Court found remarkably similar arguments to be inadequate in *Landano*.

That is not to say that ATF could not justify withholding some types of Trace Database information under a categorical Exemption 7(A) claim. Instead of making the required particularized showing for a narrower category of information such as in cases involving undercover agents, however, ATF has rested on an overbroad and unreasonable five-year policy that does not "comport[ ] with 'common sense and probability.'" *Landano*, 508 U.S. at 175.

II. ATF also cannot sustain its withholding of various categories of names and addresses of individuals in the Trace and Multiple Sale Databases under FOIA Exemption 7(C). That exemption allows the withholding of law enforcement records "only to the extent" that production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Exception 7(C) applies only if the public interest served by disclosure is outweighed by personal privacy interests.

A. Disclosure of the withheld names and addresses in the Trace Database will serve the public interest by allowing the public to determine whether the fifty percent of ATF traces which successfully identify the retail purchaser are concentrated on crime guns that are sold to particular purchasers, by particular retailers, recovered in particular geographic areas, or recovered from particular individuals. Similarly, disclosure of the names and addresses of retail purchasers in the Multiple Sales Database would allow the public to determine whether ATF is able to detect, in a timely manner, multiple purchases by the same unlicensed individual within a short time period at different dealers.

The public interest outweighs ATF's claims of personal privacy. As for retail purchasers' names and addresses, ATF claims a privacy interest based on federal

statutes limiting the disclosure of purchaser information by state and local law enforcement agencies. ATF does not suggest, however, that nongovermental, commercial retailers are prevented from making public the names or addresses of their customers, thus undermining the claimed privacy interest. ATF's claim of a generic personal privacy interest for the names and addresses of the people from whom crime guns are recovered, their associates, and the recovery locations, rests on a blanket claim for exempting information merely because it is included in a record compiled for law enforcement purposes. Congress tailored the FOIA law enforcement exemptions to preclude such a blanket claim. To the extent there may be any privacy interest in any of the various categories of withheld names and addresses, that concern can be readily addressed through the FOIA's segregability provision. *See* 5 U.S.C. § 552(b).

ARGUMENT

Major metropolitan areas in this country suffer a significant level of loss of life and personal injury to their citizens due to gun violence. In addition, gun related violence imposes added financial costs on their health care systems and redevelopment efforts, as well as an unacceptable quality of everyday life on those who live in fear of such violence. Combating gun violence is a responsibility shared by law enforcement and government officials at the federal, state, and local levels.

Disclosure of the withheld information in this case will directly serve the public interest and support efforts to curb gun violence in a variety of ways. The various types of information requested by respondent City of Chicago to be disclosed from the Trace and Multiple Sales Databases maintained by petitioner Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) are precisely those that Congress intended to be released under the Freedom of

Information Act (FOIA), 5 U.S.C. § 552. The information will serve the public interest by revealing the effectiveness and efficiency of ATF's efforts to trace firearms that have been used in criminal activity by identifying the manufacturer, importer, wholesaler, retailer, and retail purchaser, who previously possessed a particular crime gun, and the agency that recovered the gun. The information will reflect, *inter alia*, the number of crime gun traces that ATF has conducted involving particular firearm dealers, the timeframe within which ATF traced multiple sales to particular dealers, the geographical distribution of ATF's trace efforts, ATF's success rate in locating the sources of crime guns, and the timeliness of ATF's traces.

The information will allow the public to assess whether the rate of failed firearm traces is higher with regard to certain purchasers or locations, manufacturers, importers, wholesalers, retailers, or requesting agencies, and whether ATF's crime gun tracing efforts are successfully ensuring that federally licensed dealers whose guns end up being used in crimes are maintaining proper paperwork to ensure successful gun traces. The information also will allow the public to determine whether ATF's means of compiling data about multiple sales allows it to identify, in a timely manner, purchasers involved in multiple sales from more than one dealer. All of that information is relevant to determining the efficacy of ATF's current efforts to combat gun crime and is important to the *amici*'s own law enforcement efforts, including civil lawsuits that various of the *amici* have brought against certain gun manufacturers and dealers, alleging that they are creating a public nuisance through their methods of gun distribution that disproportionately lead to criminal use. The lower courts correctly held that ATF failed to demonstrate that it is entitled to withhold this requested information from the public.

I. ATF DID NOT ESTABLISH THAT THE WITHHELD INFORMATION IN THE TRACE DATABASE MEETS THE STANDARDS FOR NONDISCLOSURE UNDER FOIA EXEMPTION 7(A)

The "heart of ATF's claim to withhold information is Exemption (7)(A)." Pet. App. 25a. ATF treats FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), as a broad exemption that authorizes the withholding of whatever law enforcement investigative information is, in ATF's view, "sensitive." Pet. Br. 31, 34, 35 n.18, 38, 39. ATF claims a blanket right to withhold such "sensitive" information for five years, because, in its view, any disclosure before the expiration of five years would be "premature." ATF does not make clear what distinguishes "sensitive" law enforcement information from "nonsensitive" law enforcement information and does not present a rationale to support the five-year withholding period as necessary to prevent "premature" release. ATF's withholding policy cannot be reconciled with the text, structure, history, or purpose of the FOIA, or with this Court's precedents.

A. Exemption 7(A) Is Limited To Preventing Interference With Enforcement Proceedings And Does Not Support A Blanket Five-Year Exemption For The Various Types Of Trace Database Information Withheld, Notwithstanding ATF's "Categorical" Claim

1. FOIA Exemption 7 sets forth the criteria that must be met in order for a federal agency to withhold law enforcement records or information. Exemption 7 includes six subsections that each establishes a different exemption tailored to a particular need of law enforcement. The detailed nature of Exemption 7 reflects the special attention and care that Congress gave to determining the appropriate standards to address the particularly important concerns of law enforcement – concerns that the *amici*

cities and counties share – regarding safeguarding the integrity of the law enforcement process as well as the officers, witnesses, and others who are involved in that process.

Exemption 7 provides that, notwithstanding the FOIA's compelled disclosure of government records and information, the FOIA does not require the disclosure of "records or information compiled for law enforcement purposes, *but only to the extent that* the production of such law enforcement records or information" satisfies one of the statutory exemption criteria. 5 U.S.C. § 552(b)(7) (emphasis added). By using the phrase "but only to the extent," Congress made clear that Exemption 7 does not exempt from disclosure any records or information based on the mere fact that they were compiled for law enforcement purposes, or solely because a law enforcement agency views them as "sensitive."

The statute's history confirms that Congress intended for the six statutory exemptions to preclude any effort by agencies to apply a blanket exemption for all criminal investigative materials. When the FOIA was enacted in 1966, "Exemption 7 permitted nondisclosure of 'investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 (1989) (quoting Pub. L. No. 89-487, § 3(e)(7), 80 Stat. 251). Congress narrowed that exemption significantly, when, in 1974, it enacted Exemptions 7(A) through 7(F), thereby revising the statute to require a federal agency "to demonstrate that a record is 'compiled for law enforcement purposes' *and* that disclosure would effectuate one or more of the six specified harms." *John Doe Agency*, 493 U.S. at 156 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 221-222 (1978)). That narrowing of the law enforcement exemption responded to concerns that Exemption 7 as originally enacted was being applied too broadly by some courts to allow withholding of anything that was put in a law enforcement investigative file. *See John Doe Agency*, 493 U.S. at 156 & n.7.

Congress limited the first law enforcement exemption, Exemption 7(A), to records or information, the production of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A).[2] Exemption 7(A) does not address concerns, unrelated to enforcement proceedings, that relate to release of records that could reveal confidential sources, national security intelligence investigations, law enforcement investigative techniques and procedures, or information that could endanger the safety of an individual. Other exemptions not invoked by ATF in this case specifically address such concerns. *See* 5 U.S.C. §§ 552(b)(7)(B), (D)-(F). Thus, the statute's text, structure and history make clear that Exemption 7(A) does not authorize a blanket exemption for all law enforcement information that is involved in an investigation that could possibly lead to an enforcement proceeding.

2. ATF nonetheless insists that it is entitled to withhold a variety of information related to firearm manufacturers, wholesalers, retailers, retail purchasers, requesting agencies, firearms, and firearms recovery contained in the Trace Database because its withholding policy constitutes a "categorical" determination that

[2] When Exemption 7(A) was first added to the FOIA in 1974, a federal agency was required to establish that disclosure of a law enforcement record "would" interfere with enforcement proceedings. 5 U.S.C. § 552(b)(7)(A) (1976). In 1986, Congress amended Exemption 7(A) to require that a federal agency establish only that release of the record or information "could reasonably be expected" to interfere with enforcement proceedings. Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207-48. That amendment and similar amendments to some of the other law enforcement exemptions were intended to "clarify the degree of risk of harm from disclosure which must be shown to justify withholding records." S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983). The amended standard "recognizes the lack of certainty in attempting to predict harm, but requires a standard of reasonableness in that process, based on an objective test." *Id*. at 24.

Exemption 7(A) applies to such information.[3] ATF relies on Congress's 1986 amendment of FOIA Exemption 7(A), *see* note 2, *supra*, as a validation of its expansive view of its "categorical" claim of exemption. Pet. Br. 36-37. ATF also claims (Pet. Br. 35-36) that its "categorical" exemption is akin to the sort approved by the Court in *Robbins Tire* under Exemption 7(A) (statements of witnesses whom the agency intended to call at an upcoming hearing), and in *United States Department of Justice v. Reporters Committee,* 489 U.S. 749 (1989), under Exemption 7(C) (criminal "rap sheets").

This Court was presented with, and unanimously rejected, a strikingly similar argument advanced by the federal government in *United States Department of Justice v. Landano*, 508 U.S. 165 (1993). *Landano* "concern[ed] the evidentiary showing that the Government must make" to establish the applicability of FOIA Exemption 7(D), the law enforcement exemption governing confidential

[3] All of the information in the Trace Database is withheld by ATF under Exemption 7(A) for at least one year after the trace is requested. J.A. 32-33.

ATF withholds nine data elements in the Trace Database for five years under Exemption 7(A): (1) the code that identifies the agency that requested tracing assistance from ATF; (2) the requesting agency's name; (3) the requesting agency's city; (4) the requesting agency's zip code; (5) the serial number of the firearm; (6) the importer of the firearm; (7) the full number that identifies each federally licensed firearm dealer; (8) any "invalid dealer number" which identifies a governmental firearm dealer who need not be licensed; and (9) the date of the retail purchase of the firearm. J.A. 34 & n.2, 35-39, 41-44.

ATF withholds additional data elements in the Trace Database for five years under Exemption 7(A) that it also withholds indefinitely on privacy grounds under Exemption 7(C). With regard to the person who possessed the firearm at the time it was recovered, his associates, and the retail purchaser of the firearm, the data withheld consists of 11 elements comprising the person's name and address. *Id*. at 40-41 & n.6, 45-46 & n.9. With regard to the location where the firearm was recovered, seven elements comprising the address are withheld. *Id*. at 39-40 & n.5.

sources. Like Exemption 7(A) at issue here, and Exemption 7(C) at issue in *Reporters Committee*, Exemption 7(D) had been amended in 1986 to require that the federal agency demonstrate that disclosure "could reasonably be expected" to cause the harm identified in the exemption. The United States relied on that legislative history and the decisions in *Robbins Tire* and *Reporters Committee* to claim a blanket confidential source exemption under Exemption 7(D) for records pertaining to anyone who provided information to the FBI during the course of a criminal investigation. *See United States Dep't of Justice v. Landano*, No. 91-2054 (O.T. 1992), Brief for Petitioners at 23-24, 34 (Feb. 1993). The Court rejected that claim, and in doing so addressed the proper application of *Reporters Committee*, as well as the relevance of the 1986 statutory amendment.

The Court found that the legislative history of the 1986 amendment to Exemption 7(D) offered "no persuasive evidence that Congress intended for the [FBI] to be able to satisfy its burden in every instance simply by asserting that a source communicated with the [FBI] during the course of a criminal investigation." *Landano*, 508 U.S. at 178. And the Court explained that, in *Reporters Committee*, it had upheld the categorical exemption from disclosure of "rap sheet" information because "the release of such information *invariably*" met the Exemption 7(C) standard. 508 U.S. at 177. The Court thus concluded that, in order to support such a categorical exemption, a federal agency has to identify "certain circumstances" that "characteristically support" the inference that the agency is claiming. *Ibid*. The Court noted that circumstances such as the character of the crime, and the source's relation to the crime, could be relevant to justifying a more narrowly defined category. What *Landano* demands, however, is a "particularized" showing by a federal agency that certain identified circumstances characteristically support the inference drawn by the agency with regard to particular types of information being categorically covered by a FOIA law enforcement exemption. *Id*. at 180.

The opinion on which ATF repeatedly relies (Pet. Br. 37, 48), *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64 (D.C. Cir. 1986), is not to the contrary. *Crooker* recognized that a categorical exemption claim (which it described as "generic") was permissible under *Robbins Tire* but, presaging *Landano*, emphasized that such an exemption is distinct from a blanket exemption. The court made clear that, "[i]f the government chooses to rely on generic determinations, its definitions of the relevant categories of documents must be sufficiently distinct to allow a court to grasp 'how each . . . category of documents, if disclosed, would interfere with the investigation.' The hallmark of an acceptable *Robbins* category is thus that it is *functional*; it allows the court to trace a rational link between the nature of the document and the alleged likely interference." 789 F.2d at 67 (quoting *Campbell v. Department of Health & Human Servs*, 682 F.2d 256 (D.C. Cir. 1982)). The court of appeals ruled that ATF's showing in that case was inadequate because it had not made a presentation that would allow a court "to comprehend how each withheld document or category of documents, if disclosed, would interfere with an ongoing investigation." *Ibid*.

In sum, it is clear that ATF's labeling of its policy as a "categorical" determination does not insulate it from scrutiny under the FOIA exemption standards.[4]

3. *Landano*'s requirement that categorical claims under the FOIA's law enforcement exemptions be tailored to particular circumstances and supported by evidence that indicates disclosure would characteristically cause

[4] Also, as in *Landano*, regardless of whatever force there is to ATF's policy arguments against disclosure, the Court is "not free to engraft [a federal agency's] policy choice onto the statute that Congress passed." *Landano*, 508 U.S. at 181. The wisdom of that limitation is particularly apparent here, where Congress has responded to law enforcement concerns about FOIA exemptions in the past and is currently considering various reform proposals. *See* Pet. Br. 38-39 n.20.

the claimed harm, is reinforced by a separate provision of the FOIA regarding interference with enforcement proceedings. Congress made clear in Section 552(c)(1) that, before the existence of law enforcement records pertaining to a criminal investigation can be withheld on the basis that disclosure would reveal the pendency of an investigation or proceeding, there must be "reason to believe" that "the subject of the investigation or proceeding is not aware of its pendency." 5 U.S.C. § 552(c)(1)(B)(i). Congress also specified that a federal agency may continue to withhold such information only during "such time as that circumstance continues," *i.e.,* so long as the subject is unaware of the pendency of the investigation or proceeding, and disclosure could reasonably be expected to interfere with enforcement proceedings. *Ibid*.

In light of that neighboring provision, Exemption 7(A) cannot be read to allow a blanket exemption for a variety of types of information, without regard to whether an investigation is closed, *see* page 16, *infra*, or whether the information relates to traces about which the subject is aware, *e.g.,* when the subject of the investigation is a dealer who already has been informed of the trace of the firearms involved, *see* pages 16-17, *infra*. That more specific provision also undermines ATF's policy that it can rely on concern about disclosure of an investigation to continue to withhold information for five years, without regard to whether the circumstances regarding awareness of the trace have changed.

B. ATF Failed To Establish That The Various Types Of Trace Database Information Withheld Under Exemption 7(A) Could Characteristically Be Expected To Interfere With Enforcement Proceedings If Disclosed In Less Than Five Years

1. Congress made unambiguously clear that, under the FOIA, "the burden is on the agency to sustain its action" of withholding records or information. 5 U.S.C. § 552(a)(4)(B). The United States claims that ATF met

that burden through the submission of a declaration by an ATF official that sets forth the reasons for ATF's withholding policies. ATF's principal argument for withholding under Exemption 7(A) the various types of information requested relating to particular firearm manufacturers, wholesalers, retailers, retail purchasers, requesting agencies, firearms, and firearms recovery is that disclosure of the existence of the trace could reasonably be expected to interfere with whatever ongoing investigations there may be related to a trace. *See* Pet. Br. 38, 41, 42.[5]

But ATF's showing falls far short of FOIA's requirement that a claim of a categorical exemption be supported by a particularized showing that each of the various types of information withheld could characteristically be expected to interfere with enforcement proceedings if disclosed. *See Landano,* 508 U.S. at 175-176. Allowing ATF to avoid such a showing in this case exacts a significant toll on the public interest because *amici* cities and counties and their taxpayers are prevented from assessing the effectiveness of ATF's law enforcement strategies regarding gun violence in their communities.

There are numerous examples of why disclosure of the various types of Trace Database information withheld could not characteristically be expected to interfere with any enforcement proceedings as ATF claims including, but not limited to, the following.

a. First, it is not reasonable to infer from the facts set forth by ATF that disclosure of any of the withheld information would allow a target of an investigation, or

[5] The federal government appears, in essence, to be seeking deference to the declaration of an ATF official. *See* Pet. Br. 5 n.4, 34-35, 40-46, 49; J.A. 18-58. But that same declaration also justified the withholding of all Multiple Sales Database information for two years under Exemption 7(A), *see* J.A. 47-49, and the withholding of a variety of names and addresses indefinitely under Exemption 6. *See* J.A. 57. The United States no longer advances either argument in this Court. *See* Pet. 34 n.17; *id*. at 20 n.11.

anyone else, to learn that a criminal investigation is pending involving a particular firearm. The Trace Database reflects only the fact that a trace of a firearm was conducted – a standard operating procedure with respect to all crime guns in many jurisdictions, including Chicago, and in all jurisdictions that join certain initiatives of ATF. *See, e.g.*, J.A. 27. The Trace Database information does not indicate "whom law enforcement is investigating, or whether an investigation of any type is ongoing or contemplated with respect to a particular person or a particular gun." J.A. 84; *see id*. at 86, 88. Indeed, ATF states that the database information is inadequate to allow ATF, itself, to determine what traces relate to firearms involved in pending criminal investigations because ATF is not informed about the status of investigations by local law enforcement agencies. J.A. 24-25, 29.

Moreover, even if one could infer from the trace information that a criminal investigation was pending, ATF's evidence does not support its withholding of *all* of the information at issue. ATF's evidence establishes that approximately twenty-five percent of the traces included in the database were requested by ATF itself. Pet. Br. 7 (920,655 out of the approximately 1.2 million traces in the Trace Database were requested by state and local law enforcement agencies). Whether those federal matters have been closed is known to ATF. J.A. 150-151. That category of closed cases could be disclosed forthwith without raising any concern whatsoever about interference with enforcement proceedings.

b. Similarly, ATF's withholding of all information identifying firearm manufacturers, importers, wholesalers, and retailers in all circumstances is not justified on this record. Those entities are all informed by ATF of the existence of a trace during the course of the trace and ATF does not claim that such businesses must keep that knowledge confidential. J.A. 88, 171-172, 212. Therefore, ATF's disclosure to the public of the same information cannot reasonably be expected to interfere with enforcement proceedings.

The only exception to that practice of notifying retail dealers apparently is when a trace has been labeled "do not contact." That code "alerts ATF that in conducting the trace it should not contact a particular retail dealer to advise that a firearm he recently sold is being traced because, *inter alia*, the dealer may be suspected of being involved in criminal activity." Pet. Br. 35 n.18. Although such information may support an appropriately tailored categorical exemption, *see* page 22, *infra*,[6] respondent City of Chicago does not seek any "do not contact" information in recognition of the legitimate law enforcement interests at issue in avoiding interference with such matters. *See* J.A. 215; *see also* J.A. 89-90 (discussing another code ATF uses when it needs to protect against specific dealers learning of a gun trace); J.A. 90-91 (discussing method that ATF uses to ensure that the database does not reveal the identity of the law enforcement agency that requests "particularly sensitive" traces).

c. Consider next the duration of ATF's withholding policy of Trace Database information under Exemption 7(A). Throughout its brief, the government defends the withholding of the Trace Database information by relying on examples of what could happen if the information were released contemporaneously with the trace itself being conducted or during the very initial steps of an investigation. *See*, *e.g.*, Pet. Br. 18, 41, 43-44. It does not present an argument that would reasonably support an inference that the disclosure of any of the various types of information could reasonably be expected to interfere with an enforcement proceeding if released four years, or even two or three years, after the trace is initiated.

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[6] In some instances where the dealers are already aware of gun traces that then lead to an investigation, ATF continues to inform dealers of future traces so as to avoid raising suspicion by the dealer that he is under investigation. J.A. 89. Release of information about the existence of such a trace in those circumstances could not reasonably be expected to interfere with any enforcement proceedings.

ATF's own evidence indicated only that "firearms traces may take many weeks or months to complete," and did not suggest that a trace could take even as long as a year. J.A. 33. Rather, ATF's evidence confirms that traces are completed well within one year. According to ATF, the delay caused by its one-year withholding period for the rest of the Trace Database information "allows law enforcement personnel sufficient time to complete the trace process." J.A. 33; *see* J.A. 21 (federal law requires that federally licensed dealers respond within 24 hours to trace inquiries about crime guns).

ATF's only justification for withholding additional information in that same Trace Database for another four years is that members of the public would be able to use it to "trace firearms used in crimes and interfere with law enforcement investigations." J.A. 34. But that argument rests on an unspoken assumption that investigations relating to traces may continue for another four years. ATF states, however, that the "one-year withholding period for all trace data also protects against the possibility of interference with a recently-opened investigation." J.A. 33. Moreover, ATF explains that its two-year withholding policy regarding the Multiple Sales Database provides an adequate "cushion" to protect against interference with "trafficking-related investigations" or studies of "multiple sales patterns" among licensed dealers. J.A. 48. And ATF explains that investigations involving the Multiple Sales Database "require *more* time to develop than investigations concerning a trace." J.A. 48 n.12 (emphasis added).

ATF provides no explanation as to why the FOIA would allow the remainder of the Trace Database to be withheld for another three or more years despite the fact that, according to ATF's own evidence, traces are completed within one year and adequate time has elapsed to allow completion of related investigations before the end of two years. *Cf.* J.A. 34, 170 (explaining that blanket five-year withholding is consistent with the statute of limitations for the Gun Control Act). Thus, ATF's showing does not demonstrate that it would be fair to infer that release

of the remainder of the Trace Database information after two, three, or four years could characteristically be expected to interfere with enforcement proceedings. The unduly broad sweep of ATF's five-year policy for withholding Trace Database information under Exemption 7(A) appears even more unreasonable in light of the fact that the United States is no longer defending ATF's policy of withholding information in the Multiple Sales Database for two years under Exemption 7(A). *See* Pet. Br. 34 n.17. The latter database no doubt generates leads for investigations that are more complex and attenuated than those related to traces where the criminal activity involving a gun has already been uncovered.

d. ATF also claims that, if it does not maintain the confidentiality of trace requests from local law enforcement agencies, including the identify of the requesting agency which ATF withholds for five years, such agencies will no longer request traces. J.A. 46. But ATF proffered only unsworn letters regarding concern by members of certain organizations with law enforcement memberships that made conclusory claims of possible harm. Respondent, however, submitted sworn declarations from several law enforcement officers of major metropolitan police departments attesting to the fact that disclosure of the requested database information would not interfere with enforcement proceedings, thereby undermining the reasonableness of petitioner's unsupported assumptions or inferences to the contrary. *See* J.A. 62 (declaration of Deputy Superintendent of Chicago Police Department) ("it is difficult to imagine a scenario where the disclosure of the raw data itself concerning what companies sold the gun and what individual made the initial purchase from which gun dealer would threaten our investigation"); *ibid*. (noting that such information is frequently provided to the press "in the immediate wake of a crime with no adverse consequences"); J.A. 66 (declaration of Camden County Prosecutor) (release of database information, including data accumulated based on Camden County's inquiries, will not "impede ongoing criminal investigations" in the

county); J.A. 69 (declaration of Deputy Chief of Headquarters Bureau, City of Detroit Police Department) (public release of database information "unlikely to cause interference with law enforcement activities"); J.A. 110 (declaration of President, Board of Police Commissioners for City of St. Louis) (release of ATF database information "unlikely to cause interference with law enforcement activities").

Respondent also submitted evidence that past disclosures of ATF's Trace Database information had not interfered with enforcement proceedings. *See* J.A. 79 (identifying ATF's specific disclosure of all of its gun trace information to major metropolitan newspaper which "agreed to enter all of the information into a computer database for ATF to use"); J.A. 76-77, 93-101 (describing release of entire database to petitioner's *amicus* without adverse effect on enforcement proceedings); J.A. 84 (describing unusual nine-year investigation of firearms trafficking that was not adversely affected by ATF's disclosure of trace data); J.A. 86-87 (describing other complicated investigations where release of trace data did not interfere with enforcement proceedings). Therefore, it is particularly unreasonable and contrary to common sense for ATF to insist that it must withhold, for five years, any information identifying the agency that requests a trace, even that agency's zip code, when executive officers of major local law enforcement departments made clear, as declarants below, that disclosure of the raw data involved in this case could not reasonably be expected to interfere with their enforcement proceedings. To the contrary, disclosure would significantly assist them in their efforts to curb gun violence in their communities.[7]

[7] Nor can the United States invigorate its anemic evidence in this case by its invocation (Pet. Br. 46) of memoranda of understanding between ATF and police departments regarding the confidentiality of Trace Database information, all of which were entered into *after* the district court's decision. *Ibid*. Moreover, to the extent those cities' entry

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2. The Court found remarkably similar claims to be inadequate in *Landano*. For example, the FBI argued there that Exemption 7(D)'s protection of confidential sources applied to all witnesses who provided information to the FBI during a criminal investigation "because of the risk of reprisal or other negative attention inherent in criminal investigations," even though "reprisal may not be threatened or even likely in any given case." 508 U.S. at 176 (quoting declaration of FBI Special Agent). The Court recognized that "many, or even most, individual sources will expect confidentiality" when providing information to the FBI, but refused to hold that the government could categorically withhold all sources of information because "the Government offer[ed] no explanation, other than ease of administration, why that expectation should always be presumed." *Id*. at 176.

In addition, the *Landano* Court specifically addressed the FBI's invocation of Exemption 7(D) to justify withholding of information based on the agency's assertion that it was "'convinced' that the willingness of other law enforcement agencies to furnish information depends on a 'traditional understanding of confidentiality.'" 508 U.S. at 176 (quoting declaration of FBI Special Agent). The Court found that that justification was even "less persuasive" than the claimed inference about all information sources being at risk of reprisal. The Court indicated that there was "no argument * * * that disclosure ordinarily would affect cooperating agencies adversely or that the agencies otherwise would be deterred from providing even the most

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in such agreements was actively encouraged by ATF in order to bolster their FOIA claim, *see* Br. in Opp. 26 n.11, Congress previously encountered and disapproved of a similar agency tactic to avoid the FOIA's disclosure requirements over 30 years ago. *See* H.R. Rep. No. 1419, 92d Cong., 2d Sess. 15-16 (1972) (condemning an agency practice of soliciting requests for confidentiality from persons as "entirely inconsistent with" and a "flagrant abuse[ ] of" FOIA: "the committee knows of no agency that has the specific statutory authority to extend blanket exemption, let alone to solicit the exemption of confidentiality").

nonsensitive information." *Ibid.*; *see also ibid.* (rejecting as "conclusory" the suggestion in declaration by FBI Special Agent regarding expectations of other law enforcement agencies).

That is not to say that ATF could not justify withholding some types of Trace Database information under a categorical Exemption 7(A) claim. There may well be particular types of information in the Trace Database that share certain common characteristics that would indicate that disclosure of all of that same type of information could reasonably be expected to interfere with enforcement proceedings in some demonstrable manner. For example, information relating to traces that involve undercover law enforcement officers may very well be such a category. *See* Pet. Br. 42-43. Also, as noted above, pages 16-17, information relating to do-not-contact traces involving dealers who are suspected of criminal activity may be such a category.[8]

But ATF failed to make a "particularized" showing that certain identified circumstances support the inference that all of the various types of information that ATF labels "sensitive" can be withheld for five years because release of any of it before expiration of that time could characteristically be expected to interfere with enforcement proceedings. Indeed, ATF's sweeping five-year policy does not "comport[] with 'common sense and probability.'" *Landano*, 508 U.S. at 175 (*quoting Basic Inc. v. Levinson*, 485

[8] Interestingly, the government now states, however, that "nothing in the record suggests that the 'do not contact' traces as a group are more sensitive from a public disclosure perspective than other firearm traces (including traces related to homicides and other violent crimes in which the dealer is not a suspect)." Pet. Br. 35 n.18. Yet, in cases of homicides and other violent crime, the identity of the licensed firearm manufacturers, importers, wholesalers, and even retailers who possessed the firearm at some past date is generally wholly irrelevant to the elements of the crime that must be proven and, thus, to the investigation or prosecution of the offense. Thus, the logic of ATF's "sensitive" categorization is far from clear and undermines the reasonableness of inferences based on such categorization.

U.S. 224, 246 (1988)). The withholding by ATF of the requested information on such an overbroad and unreasonable basis is all the more significant here where disclosure of the Trace Database information would serve the important public interest in *amici* and others being able to assess the effectiveness of ATF's law enforcement efforts regarding the tracing of crime guns.

II. ANY PERSONAL PRIVACY INTEREST UNDER FOIA EXEMPTION 7(C) IN THE CATEGORIES OF NAMES AND ADDRESSES WITHHELD IS OUTWEIGHED BY THE PUBLIC INTEREST SERVED BY DISCLOSURE AND COULD, IN ANY EVENT, BE PROTECTED UNDER THE FOIA'S SEGREGABILITY PROVISION

ATF expressly states that it "has not invoked Exemption 7(C) with respect to manufacturers, dealers, or importers" in the databases. Pet. Br. 10-11 n.6. Therefore, none of the arguments discussed below regarding public interest, personal privacy interests, or segregability, affect, in any way, the lower courts' conclusion that ATF must release all of the information about firearm manufacturers, importers, wholesalers, and retailers in the Trace Database. The same is true for the information in the Trace Database regarding the agency that requests a trace and the information about manufacturers, importers, and dealers in the Multiple Sales Databases (which relates to purchases by a single individual of more than one gun within five days, *see* 18 U.S.C. § 923(g)(3)(A)). Therefore, regardless of the Court's resolution of the personal privacy claim under Exemption 7(C), and regardless of any further order or remand regarding segregability to address any personal privacy concerns, the court of appeals' judgment ordering release of all of the information about manufacturers, importers, wholesalers and retailers should be affirmed.

Further, it is significant to note that petitioner's extensive Exemption 7(C) argument (*see* Pet. Br. 19-34) regarding the withholding of names and addresses of retail gun purchasers has no relevance to approximately

fifty percent of the traces in the Trace Database. That is because, according to ATF, only "[a]pproximately one-half of the trace requests in any given year successfully identify the first retail purchaser of the firearm." Pet. Br. 7. Therefore, release of the other half of the traces, *i.e.,* the half in which no retail purchaser is identified, would not implicate any purchasers' privacy interests.

As for the retail purchaser information that is, in fact, included in the Trace and Multiple Sales Databases, ATF failed to demonstrate that disclosure of names and addresses of the purchasers would constitute an unwarranted invasion of personal privacy to support withholding the information indefinitely under Exemption 7(C).[9] The same is true for the names and addresses of the possessors of recovered guns and their associates, as well as the addresses of the recovery locations, all of which ATF also withholds indefinitely on personal privacy grounds. In any event, any personal privacy interest can easily be addressed under the FOIA's segregability provision, as the district court found.

A. Disclosure Of The Withheld Names And Addresses Would Serve The Public Interest By Revealing ATF's Effectiveness In Tracing Crime Guns And Monitoring Multiple Sales

1. FOIA Exemption 7(C) allows the withholding of "records or information compiled for law enforcement

[9] Throughout the course of the litigation below, all of the information in the Multiple Sales Database was withheld by ATF under Exemption 7(A) for two years based on a purported likelihood of interference with enforcement proceedings. J.A. 47-49. The Solicitor General, however, "has not sought review of the court of appeals' holding that information contained in the Multiple Sales Database is not protected by Exemption 7(A)." Pet. Br. 34 n.17. Thus, all that remains of the policy of withholding information in the Multiple Sales Database is the withholding of the names and addresses of retail purchasers under Exemption 7(C). J.A. 56.

purposes, but only to the extent" that production of those materials "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Whether an invasion of personal privacy is unwarranted for purposes of Exemption 7(C) depends on whether the public interest served by release outweighs any personal privacy interest. *See United States Dep't of Defense v. FLRA*, 510 U.S. 487, 495 (1994). The determination whether disclosure of government records or information serves the public interest under Exemption 7(C) depends on whether the disclosure serves "to open agency action to the light of public scrutiny," *Reporters Committee*, 489 U.S. at 774 (quoting *Department of the Air Force v. Rose,* 425 U.S. 352, 372 (1976)), or "sheds light on an agency's performance of its statutory duties." 489 U.S. at 773.

The disclosure of the various categories of names and addresses withheld by ATF on privacy grounds would directly advance the public oversight goal of the FOIA. Disclosure would be a means of ensuring federal agency accountability as the FOIA intended, especially to *amici* cities who, as representatives of their taxpayers, allocate resources to participate in ATF initiatives aimed at curbing gun violence, and are charged with ensuring that such resource allocations are fiscally responsible.

The fifty percent success rate of ATF's crime-gun traces presents a prime example of how disclosure of the various categories of names and addresses in the Trace Database would open ATF's actions to public scrutiny. Disclosure of the results of successful traces, including the names of retail purchasers, the addresses where traced guns were recovered, the names and addresses of the person from whom the gun was recovered, his associates, and the recovery location, would reveal whether ATF's successful traces are concentrated on crime guns that are sold to particular purchasers, are recovered in particular geographic areas, or are recovered from particular individuals. Such disclosure also would allow the public to determine whether failed traces are concentrated on

particular retailers, and to identify the number of failed traces and crime guns connected to each retailer.

Such information bears directly on the effectiveness and efficiency of ATF's operations and whether patterns exist indicating that the effectiveness relates to outside factors (*e.g.,* certain purchasers or retailers repeatedly involved in crime gun traces that fail) or to internal factors (*e.g.*, delay or other circumstances affecting requests regarding guns recovered in certain geographic areas or from certain individuals). Disclosure of the names and addresses of individuals possessing crime guns could also be used to evaluate whether ATF is vigorously enforcing federal firearm laws. J.A. 102. Similarly, disclosure of the names and addresses of retail purchasers in the Multiple Sales Database would allow the public to determine whether ATF is able to detect, in a timely manner, multiple purchases by the same purchaser within a short time period from different dealers.

2. The various ways in which disclosure of the withheld names and addresses would serve the public interest in revealing the effectiveness and efficiency of ATF's firearm tracing and monitoring distinguish this case from the "names and addresses" cases cited by the United States. Pet. Br. 21, 28. In *Department of Defense*, the Court found that the relevant public interest served by disclosure of the list of names and addresses at issue there was "negligible, at best," because the list did not reveal anything about what the *government* was doing. 510 U.S. at 497; *see also Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997). The only asserted public interest in those cases was that disclosure would allow the FOIA requester to contact the listed people and provide them with information. That interest could not satisfy the standards of Exemption 7(C).

The public interest served by disclosure in this case is entirely different. It is not based on intended contact with listed persons. Rather, it is based on what information the

names and addresses, considered along with the rest of the database information, reveal as to how ATF is tracing crime guns and monitoring multiple sales.

B. Any Personal Privacy Interest Is Outweighed By The Public Interest And Could, In Any Event, Be Addressed Through Redaction

1. Petitioner compares the personal privacy interests at stake for gun purchasers listed in the Multiple Sales Database to cases in which the names and addresses at issue were those of people who had submitted that information only to the government, and to cases where only a limited class of government officials had access to the information. Pet. Br. 23. The instant case is quite different, however, with regard to the retail gun purchasers listed in both the Trace and Multiple Sales Databases because those purchasers disclosed their names and addresses to a nongovernmental, commercial actor – the firearm retailer from whom they purchased the firearm.

As is the case with regard to almost any retail purchase of a significant value, many gun purchasers submit their names and addresses to a retailer through the use of checks, credit cards, and documentation that confirm their personal identity and address for credit purposes. Petitioner does not suggest that the FOIA or the federal firearm statute on which it relies to claim a privacy interest, *see* Pet. Br. 24-26 (discussing 18 U.S.C. §§ 923(g)(3)(B) and 926(a)), prevents disclosure by a retailer of the name or address of a gun purchaser, including a purchaser of a gun that is later involved in a crime or an investigation. Thus, like other retail customers, gun purchasers' names and addresses can be disclosed or sold by a retailer to another entity to use as it sees fit (*e.g.,* to send advertisements from a manufacturer of gun locks, promotional materials from an owner of a firing range, or advocacy materials regarding firearm regulations). That

fact undermines any claim that the same privacy concern articulated in *Department of Defense* and *Bibles* is present here, namely the fear that release of the agency's mailing list would open the listed people to unsolicited mail and telephone calls. Here, there can be no such expectation of privacy against such conduct by purchasers who disclose that information in a commercial transaction that already allows for such intrusions. And, as petitioner acknowledges, even purchasers who would avoid such disclosure during commercial transactions are nonetheless on notice that their names and addresses will be provided to state and local authorities and ATF in certain circumstances. *See* Pet. Br. 22.

Petitioner also relies on several lower court decisions to invoke a generic privacy interest in not being associated with a criminal investigation as a basis for the withholding of information about all persons who are included in the Trace Database. *See* Pet. Br. 25-28. As amply demonstrated above, however, the FOIA does not support a blanket exemption for information merely because it is included in a record compiled for a law enforcement investigation and ATF did not demonstrate any basis for a categorical exemption for all individual information in Trace Databases. *See* pages 10-13, 24-25, *supra*. ATF acknowledges that the inclusion of a person's name in the Trace Database cannot reasonably give rise to an inference of criminal involvement because "the Trace Database contains the names and addresses of many individuals who have not been adjudged guilty of any wrongdoing and may not even be the subjects of investigative interest." Pet. Br. 27; J.A. 54-55.

2. Finally, to the extent there may be any personal privacy interest in any of the various categories of names and addresses in either the Trace or Multiple Sales Databases, that concern can be readily addressed through the FOIA's segregability requirement. Congress made unambiguously clear that "[a]ny reasonably segregable portion

of a record shall be provided to any person requesting such record after deletion of the portions which are exempt" under any of the law enforcement exemptions in Section 7, including Exemption 7(C). 5 U.S.C. § 552(b).

The district court here found that "the identity of specific individuals and weapons in the database are reasonably segregable from the other information" withheld by ATF. Pet. App. 27a-28a. Indeed, the court found that "ATF could easily 'delete' the portion which it avers is sensitive, which here is limited to the identity of persons and weapons found in the database, while maintaining the integrity of the remainder of the requested information." *Id*. at 28a. The court also found that ATF could easily delete portions of names so that only initials, or the first and last letters of names, remain, and that it could easily delete portions of addresses so that only the street names or even partial zip codes remain. *See id.* at 29a. Such means of deleting portions of the records protect any reasonable personal privacy interests. At the same time, they may provide sufficient information to enable their use to serve the public interests discussed above, *i.e.,* identifying whether a person listed in one record is the same as the person listed in another record, and whether a particular address is in the same geographic vicinity as another, to facilitate assessment of the effectiveness of ATF's tracing and monitoring efforts.

Such redaction of the database information in this case would be consistent not only with the FOIA's segregability provision, but also with ATF's own prior practice in responding to FOIA requests regarding the databases where it has redacted information through similar limiting queries, as the district court recognized. Pet. App. 29a-30a. Thus, at most, ATF's Exemption 7(C) privacy argument would not warrant withholding of the records in their entirety, but merely deletion of specified portions of the information.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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