No. 19-3438

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EVERYTOWN FOR GUN SAFETY SUPPORT FUND,
Plaintiff-Appellee,

v.

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

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF AMICI CURIAE THE MUCKROCK FOUNDATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, DANA AMIHERE, MEREDITH BROUSSARD, STEPHEN DOIG, AND JEFF SOUTH IN SUPPORT OF APPELLEE AND AFFIRMANCE

Dated: June 9, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the MuckRock Foundation and the Reporters Committee for Freedom of the Press state that they have no parent corporations. They have no stock, and therefore, no publicly held company owns 10% or more of their stock.

Dated: June 9, 2020

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae consist of two media and media-related organizations and four individual data journalists and professors of journalism.[1,2] Collectively, *amici* have deep experience with the technical aspects of working with structured data, including databases, and with government transparency processes, including the Freedom of Information Act. As such, *amici* have a significant interest in a strong right of access to records held in government databases. Brief statements of the expertise of organizational and individual *amici* follow.[3]

The MuckRock Foundation is a journalism and government transparency non-profit that has helped thousands of requesters around the United States better file, share, and understand Freedom of Information requests. This work has often involved obtaining and analyzing federal databases, including data on the government's 1033 program that led to reforms of this program. They often work with agency FOIA personnel and IT departments to help craft requests for data that

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

[2] Pursuant to Fed. R. App. P. 29(a)(2), *amici curiae* certify that all parties have consented to the filing of this brief.

[3] Biographies of individual *amici* are provided solely for identification purposes.

protects privacy and reduces the burden on agency staff while providing key insights into government operations.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

Dana Amihere is the data editor at Southern California Public Radio (KPCC/LAist). She's a designer, developer and data journalist who has previously worked for The Dallas Morning News, The Baltimore Sun and Pew Research Center. She has worked with government databases to report on education, homelessness and inequality in the criminal justice system. She is currently helping manage data for a statewide news collaborative, the California Reporting Project, which aims to uncover police misconduct through records obtained under the state's new transparency law.

Meredith Broussard is an Associate Professor at the NYU Arthur L. Carter Journalism Institute. She is the author of Artificial Unintelligence: How Computers Misunderstand the World (MIT Press 2018) and "Big Data in Practice: Enabling

Computational Journalism Through Code-Sharing and Reproducible Research Methods." Her research focuses on the use of data analysis in investigative reporting.

Stephen K. Doig is a senior faculty member of the Walter Cronkite School of Journalism at Arizona State University, where he teaches the principles of data journalism to students and professionals. Before joining ASU in 1996, he spent 20 years as an investigative reporter and editor at the Miami Herald, specializing in analysis of public-record data sets for stories that won numerous awards, including the Pulitzer Prize for Public Service.

Jeff South is a retired professor from Virginia Commonwealth University who specializes in data journalism. Working with the Society of Professional Journalists, the International Center for Journalists and other groups, he has conducted data workshops across the United States and around the globe. In 2014, South served as a Fulbright Scholar in China, teaching data journalism and visualization to journalism students and professionals

SUMMARY OF ARGUMENT

This is a case about how far the right of the public to "know what their government is up to," *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989), extends in the digital age, when federal agencies increasingly store information in powerful, searchable databases instead of filing cabinets. Appellee Everytown for Gun Safety Support Fund ("Everytown") argues that agencies are required to search databases for responsive records—a position that is consonant with the purpose, history, and interpretation of the FOIA. The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), on the other hand, argues that database searches that produce aggregate results are beyond the scope of the FOIA because they entail the creation of new records.

The ATF's position appears to be based on an incorrect understanding of how databases function. Electronic databases are different from other methods of data storage in that they store information in a highly structured format, designed to be queried in many ways. Although information in a database can be extracted in an almost limitless number of arrangements, each of these arrangements involves access to the same, existing data. Because there is no meaningful technical distinction between searches for "raw" data and "aggregate" data, there is no reason for this Court to create a legal distinction between the two.

The ATF's position also appears to rest on a misunderstanding of the undue burden rule. Under this rule, which is a judicially-created doctrine that grants leeway to agencies above and beyond what is contained in the text of the FOIA, agencies are not required to conduct searches that would place an unreasonable burden on their operations. However, the rule does not allow agencies to invent extra work to establish an undue burden. The ATF effectively advocates for the creation of a special standard for aggregate data requests that would allow them to consider time spent cleaning up, filling in, reviewing, and even visualizing data. The Court should reject this position and apply the traditional undue burden test, under which Everytown's request is clearly reasonable.

Finally, the Court should consider the implications of the ATF's position for both the policy and the implementation of the FOIA. The ATF's arguments directly contravene the presumption of openness that has historically been at the heart of the FOIA. Moreover, the ATF's proposed rule, which would artificially distinguish between "raw" and "aggregate" data, would impede the administration of the FOIA and unnecessarily burden requesters, agencies, and courts alike. *Amici*, therefore, urge this Court to affirm the lower court's decision and interpret the FOIA in way that supports access to records stored in electronic databases.

ARGUMENT

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") Firearms Tracing System ("FTS") is available to about 23,000 law enforcement agencies—federal, local, domestic, and overseas. Joint Appendix ("JA"), Docket Nos. 28–29, at 369. Yet it is not available to the public—at least according to the ATF. Specifically, the ATF argues that it is exempt from disclosing information from the FTS to appellee Everytown for Gun Safety Support Fund ("Everytown") under both the Tiahrt Amendment and the "new records doctrine," a rule stating that agencies are not obligated to create new records in responding to FOIA requests. *Amici* address only second issue: does querying data from an electronic database require the creation of a new record? The ATF argues that it does.

The ATF's argument misapprehends both the relevant jurisprudence and the reality of how databases are structured and used. Both legally and practically, there is no meaningful difference between a query that extracts disaggregate data from a database and one that extracts aggregate data. Furthermore, the ATF's attempt to rely on the time it would take to clean up, analyze, visualize, and review the requested information to justify its refusal to disclose said information ignores that there is already a perfectly serviceable test that determines when an agency may refuse to release records in response to overly complex requests: the undue burden

test. Finally, the ATF's interpretation of the FOIA would have consequences that contravene the purpose of both the FOIA and the E-FOIA Amendments.

I. Retrieving aggregate data from an electronic database does not require the creation of a new record.

The law dictates—and the ATF recognizes—that electronic databases are records systems for purposes of the FOIA and that agencies are obligated to search for and produce non-exempt records stored in such databases. *See* Brief for Defendant-Appellant ("ATF Br."), Docket No. 27, at 37 n.9. The ATF nevertheless argues that in this case extracting information from the FTS would constitute the creation of a new record, especially because Everytown requested "aggregated" data. *Id.* at 38. The ATF's attempt to define the aggregation of data as a separate, analytical step, rather than part and parcel of the search of a records system, is neither representative of how electronic databases function nor consonant with the governing case law.

A. There is no meaningful technical distinction between searching data in a database and retrieving aggregate data.

Electronic databases make information easier to access and compile than ever. However, the same capabilities that make databases so useful also make them unlike traditional records storage systems such as paper files. Thus, databases do not always fit neatly into the structure of traditional FOIA requests. Traditionally, when a requester makes a FOIA request to an agency, the agency will see if it has any

records responsive to that request. If it does not, the parties and *amici* agree, the agency does not have the obligation to create a new record. *See NLRB v. Sears, Roebuck & Co.*,421 U.S. 132, 161–62 (1975).

Databases are different. Databases do not contain records in a fixed structure the way filing cabinets or even other electronic formats do. Rather, records in a database—at least a relational database like the one at issue in this case[4]—are more like the sides of a Rubik's Cube. In this analogy, each colored square is a piece of data that can be combined and recombined into an almost infinite number of configurations. Of course, a relational database is usually much more complex—and more elegant—than a plastic toy. Fortunately, unlike a Rubik's Cube that is intended to present a puzzle, databases are designed to make searching and manipulating data as painless as possible.

A database is generally, although not always, composed of tables of information. Each table has rows, columns, and values, much like a printed table.

[4] The FTS database at issue in the present case is, to the best of *amici*'s knowledge, built in Oracle, a relational database management system. *See* RAND Corporation, *Strategies for Disrupting Illegal Firearms Markets*, 15 n.3 (2008), available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2008/RAND_TR512.pdf [https://perma.cc/N46A-KK8U] ("Since 1998, FTS has run on an Oracle® database and application platform . . . ."); John Foley, *ATF's Gun Tracing System is a Dud*, InformationWeek (Mar. 13 2013), https://www.informationweek.com/applications/atfs-gun-tracing-system-is-a-dud/d/d-id/1109062 [https://perma.cc/Z4US-2SVN] ("[FTS] pulls together information from a variety of sources, mostly Oracle databases.").

However, in a relational database, related information—such as the gun make, model, location, crime, and date recovered—is often distributed across several separate tables. In order to view this distributed data as a coherent whole, a user generally must enter a query. In the Structured Query Language ("SQL") used in Oracle, the query used to retrieve data is called a SELECT statement.[5] A SELECT statement may be entered manually as a text string or through a graphical interface. In either case, the SELECT statement locates and combines individual data points and presents them to the user in a tabular format. Like rotating the sides of a Rubik's Cube, each query assembles the data in a different combination. Type in a new query, the squares of the Rubik's Cube get moved around and recombined, and the user sees a new result. Just as one would generally not pry the sides off a Rubik's Cube and view them in a scattered heap, a user would generally not view the contents of a relational database without running a SELECT statement.

SELECT statements are almost infinitely customizable. A user can retrieve all of the information in a table, or across multiple tables, with a single command. A user can also SELECT specific rows, columns, or values, down to a single point of

[5] There are other types of queries that instruct a database management system to insert, update, or delete data from a database, or to alter the structure of the tables, rows, columns, or other data structures that make up the database. Such queries are beyond the scope of FOIA, as they would require agencies to create, alter, or destroy records. For the purpose of this brief, *amici* use the term "query" to refer exclusively to queries that select information without changing the structure or contents of the database.

data. A user can reorder data and perform numerous transformations, extracting sums, averages, and other statistical information. All of these operations use the same SQL syntax. Thus, contrary to the ATF's arguments, there is no meaningful technical distinction between queries that retrieve "raw data" or "the number of entries in [a] database" and those that retrieve "statistical" or "aggregated" data. *See* ATF Br. at 38. Rather, both require the same basic operation with only minor syntactical differences.[6] No matter how you twist and turn the Rubik's Cube, you are still seeing the same colored squares—just in different configurations.

B. The Court should not create an artificial legal distinction between searching data in a database and retrieving aggregate data.

It is well-established that electronic database searches do not involve the creation of new records. *See Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 321 (D.C. Cir. 1982) ("Although accessing information from computers may involve a somewhat different process than locating and retrieving manually-stored records, these differences may not be used to circumvent the full disclosure policies of the FOIA."); *Schladetsch v. Dep't of Hous. & Urban Dev.*, No. 99-0175, 2000 WL

[6] To the extent that the ATF argues that aggregation of FTS data cannot be conducted in Oracle using SQL statements and requires specialized statistical software, *see* ATF Br. at 6-7, *amici* agree with Everytown that the ATF has failed to sustain its burden to demonstrate that this is the case, Brief for Plaintiff-Appellee ("Everytown Br."), Docket No. 36, at 38-40. *See Long v. ICE*, No. 17-CV-01097, 2018 WL 4680278, at *6-7 (D.D.C. Sept. 28, 2018) (denying summary judgment where agency failed to explain in detail how responding to request for records stored in database would require "the creation of new data points").

33372125, at *3 (D.D.C. Apr. 4, 2000) ("Electronic database searches are thus not regarded as involving the creation of new records."). As the House Report on the E-FOIA Amendments of 1996 stated, "[c]omputer records found in a database rather than in a file cabinet may require the application of codes or some form of programming to retrieve the information. Under the definition of 'search' in the bill, the review of computerized records would not amount to the creation of records." H.R. Rep. No. 104-795, at 22 (1996). As explained above, there is no technical reason to distinguish between searches that retrieve individual data points and searches that retrieve aggregate data. The ATF nevertheless implicitly asks the Court to distinguish such searches on legal grounds, arguing that the latter constitutes creation of a new record.[7]

[7] In the court below, the ATF made two arguments that, while underdeveloped, are concerning to *amici*. First, the ATF asserted that producing the records requested by Everytown "would require an ATF employee to exercise judgment in selecting the search criteria." JA 57. This is equally true of any electronic search, aggregate or not. To suggest that any judgment on the part of a FOIA analyst results in the creation of a new record is to suggest that the FOIA is wholly inapplicable to databases—a position the ATF has not taken. In any event, Everytown's requests clearly state which database fields should be searched and how the resulting data should be aggregated. This requires no more independent judgment than searching an email database for a keyword, which the ATF expressly recognized as a required search under the FOIA. JA 376-77.

Similarly, the ATF asserted that it "has never prepared any annualized reports summarizing the specific statistical summaries sought [by Everytown]." JA 57. By this the ATF seems to suggest that it is only obligated to produce the results of database queries that it has previously conducted and saved in a fixed format. This

While it is true that agencies are only required to produce records, not "answer questions disguised as a FOIA request," *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985), *aff'd*, 808 F.2d 137 (D.C. Cir. 1987); *Frank v. Dep't of Justice*, 941 F. Supp. 4, 5 (D.D.C. 1996), that rule is not implicated here. Unlike in *Hudgins* and *Frank*, where the agencies in question would have had to do legal or factual research, all that is required of the ATF here is to execute a SELECT statement (or the equivalent operation in a graphical interface) that retrieves aggregate data from the FTS—the same operation that ATF would be required to conduct to search for individual data points in the FTS. Rather than ask the Court to hold that certain SELECT functions are or are not required under the FOIA, *amici* propose a simpler rule: that the retrieval of data contained within a database constitutes access to a prior existing record and not the creation of a new record—regardless of the configuration in which it is retrieved.

Indeed, other courts have already acknowledged that the new records doctrine does not apply to retrieval of aggregate information contained within a database. *See Schladetsch*, 2000 WL 33372125, at *3 ("Because HUD has conceded that it

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is simply incorrect as a matter of law. *See Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454, 456 (D.D.C. 1977) ("[T]hat the net result of complying with the request will be a document the agency did not previously possess is not unusual in FOIA cases."). Additionally, such a rule would burden agencies because it would require them to keep a record of every search ever completed in order to determine whether a particular request seeks "new" records – or, as is more correct, existing records in a configuration that has not yet been extracted from a database.

possesses in its databases the discrete pieces of information which Mr. Schladetsch seeks, extracting and compiling that data does not amount to the creation of a new record."). True, some courts have also held the opposite. *See Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 271 (D.D.C. 2012); *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 451–52 (D.D.C. 2014), *aff'd sub nom.*, *Tereshchuk v. Bureau of Prisons, Dir.*, No. 14-5278, 2015 WL 4072055 (D.C. Cir. June 99, 2015). *Amici* respectfully submit that these decisions are based on a misunderstanding of how databases work. These decisions attempt to distinguish between producing a "listing or index" of the contents of a database and "the records themselves." *Nat'l Sec. Counselors*, 898 F. Supp. 2d at 271. However, as explained above, all database queries return a "listing"—or to use more precise language, a result set—of the contents of a database. To say that agencies must produce the contents of a database but not a given result set is like saying they must produce the pieces of a Rubik's Cube, but not if it is configured into a cube.[8]

[8] *Amici* recognize that, in some cases, a FOIA requester may seek and be entitled to the contents of a database as single record, or what is sometimes called a "data dump." If an agency determines that the contents of an entire filing cabinet are responsive to a request, it can (and should) produce those records without searching each file folder. Likewise, if the contents of an entire database are responsive, the agency can (and should) produce the database without executing a query. This in no way undermines the conclusion that, in the present case, the ATF is obligated to conduct a search of the FTS and produce the specific aggregate data Everytown has requested.

II. Everytown's FOIA request does not constitute an undue burden on the ATF and should therefore be granted.

The ATF argues that, because of the "exhaustive" steps required to produce the requested records, it should be excused from searching the FTS for responsive records. ATF Br. at 35. It further argues that, at least where the responsive records consist of aggregate data from a database, a reviewing court should consider not just the effort required to conduct a search for the responsive records, but the effort to clean up, fill in, review, and even produce visualizations of the responsive data—even if the requester has asked for no such things. *Id.* at 35–36, 38.

But there is no need for this Court to craft a new test for aggregate data requests. Rather, the Court should apply the traditional undue burden test, which already allows agencies to avoid requests that require "'an unreasonably burdensome search.'" *Am. Fed'n of Gov't Emps., Local 2782 v. Dep't of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990) (quoting *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978)). Based on the facts below and the ATF's own admissions, Everytown's request is not an undue burden and should, therefore, be granted.

A. The undue burden test applies to searches of electronic databases.

The undue burden test is a judicially-created rule that allows agencies to avoid expending unreasonable amounts of time and effort on overly-broad FOIA requests. *See* Stephanie Alvarez-Jones, *"Too Big to FOIA": How Agencies Avoid Compliance with the Freedom of Information Act*, 39 CARDOZO L. REV., 1055, 1064 (2018). The

undue burden test dates back to at least 1978, before the widespread use of electronic databases. *See Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978) (declining to require "unreasonably burdensome" search, even though responsive records might exist). The undue burden test considers the effort required to search for and, in some cases, redact and format responsive records—and no more. *See Long v. ICE*, 149 F. Supp. 3d 39, 55–56 (D.D.C. 2015); *Public.Resource.org v. IRS*, 78 F. Supp. 3d 1262, 1266 (N.D. Cal. 2015). The agency bears the burden of providing an explanation as to why a search would be burdensome. *Ruotolo v. Dep't of Justice*, 53 F.3d 4, 9 (2d Cir. 1995).

At its core, the FOIA exists to keep citizens informed, to combat corruption, and to hold government actors accountable. *See, e.g.*, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The FOIA also carries a presumption of disclosure, which requires an agency seeking to withhold information to show a specific identifiable harm to an interest protected by an exemption. S. Rep. No. 114-4 at 3–4 (2016). The undue burden test in conjunction with the presumption of disclosure allows for a balance between promoting transparency and sufficient consideration as to whether a FOIA request will strain government resources.

Courts have applied the undue burden test to requests for records stored in electronic formats as well, including those stored in databases. *See Long*, 149 F. Supp. 3d at 55; *Ayuda, Inc. v. FTC*, 70 F. Supp. 3d 247, 275 (D.D.C. 2014). Congress

enacted the E-FOIA Amendments of 1996 to allow technology to enhance FOIA's original purpose. Under the E-FOIA Amendments, agencies are required to conduct reasonable searches for electronic records "except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). Courts have interpreted this language in line with the traditional undue burden test, noting that it is "intended simply to preclude requestors from forcing unusual requests that would impose unreasonable or additional burdens on an agency's data system, personnel, or resources." *TPS, Inc. v. Dep't of Def.*, 330 F.3d 1191, 1195 (9th Cir. 2003). In other words, the assistance of technology does not lower the threshold of what is considered an undue burden. As they did in the era of paper-only files and manual searches, agencies that seek to characterize an electronic search as an undue burden must demonstrate the amount of time and labor needed to search the records. *See Wolf v. CIA*, 569 F. Supp. 2d 1, 9 (D.D.C. 2008).

B. Everytown's FOIA request does not impose an undue burden.

To determine whether a FOIA request for records in a database constitutes an undue burden, courts look to the amount of time it would take to search for, compile, and (where appropriate) redact and format the data. *See Long*, 149 F. Supp. 3d at 56. These determinations are made on a case-by-case basis, and courts have examined requests across a wide spectrum. *See, e.g., Dayton Newspapers, Inc. v. Air Force*,

35 F. Supp. 2d 1033, 1034–35 (S.D. Ohio 1998) (concluding that 51 work-hours was a "small price to pay" for the information sought); *cf. Project on Predatory Lending v. Dep't of Justice*, 325 F. Supp. 3d 638, 656 (W.D. Pa. 2018) (finding that a search producing 1.45 million pages of documents for review, with an estimated time of 460 years of review, would be unduly burdensome).

The amount of work that Everytown's request requires does not even approach what courts have found unreasonable. In *Dayton Newspapers*, a newspaper company brought a FOIA request compelling production records from databases containing medical malpractice information from the United States Air Force and Department of the Army. 35 F. Supp. 2d at 1034–35. The government argued that the because the databases involved individuals' information, and therefore implicated their privacy rights, heavy redactions would need to be made to the database, constituting an undue burden. *Id.* at 1035. The court found no undue burden, noting that the fifty-one hours required to produce and redact information was a "small price to pay." *Id.*

Here, the ATF estimates that the amount of time needed to gather the data requested by Everytown is a mere two hours. *See* JA 57 (noting that it would take two analysts one hour each to search for Everytown's requested data). The ATF does not provide any estimate of the time it would take to redact the data—indeed, it does not even argue that redactions are necessary. Nor does it provide an estimate of the

time it would take to format the responsive records, if any. What it instead does is recount the time it would take to perform a host of operations that fall outside the boundaries of the undue burden test: cleaning up data, filling in missing values, and producing data visualizations.[9] In a case involving traditional paper records, there would be no basis for considering these task—none of which Everytown has requested—when determining the burden on the ATF. *Amici* therefore respectfully urge the Court to reject ATF's attempt to include these estimates simply because Everytown is seeking aggregate data.

III. The ATF's position conflicts with both the purpose and administration of the FOIA.

The FOIA is an integral part of having an open, transparent government. It has been described as "one of the most important legal tools citizens and reporters

[9] *Amici* note that even the ATF's inflated estimate falls within the bounds of reason. The ATF asserts that Everytown's request entails additional steps that would bring the total time needed to 160 hours. *See* JA 58. Courts have deemed similar requests reasonable. *See, e.g.*, *People for Am. Way Found. v. Dep't of Justice*, 451 F. Supp. 2d 6, 15 (D.D.C. 2006) (finding a database search requiring around 120 hours of work was reasonable and not unduly burdensome). Indeed, cases where a FOIA request was found unduly burdensome frequently involve time frames of an entirely different magnitude. *See, e.g.*, *Project on Predatory Lending*, 325 F. Supp. 3d at 656 (finding undue burden where request required review of approximately 1.45 million pages of documents); *Ayuda*, 70 F. Supp. 3d at 255 (finding review that would take more than 8,000 hours unduly burdensome); *Nat'l Day Laborer Org. Network v. ICE*, No. 16-CV-387, 2017 WL 1494513, at *15 (S.D.N.Y. Apr. 19, 2017) (finding undue burden where request required between 436 and 1300 weeks of work); *Pinson v. Dep't of State*, No. 12-01872, 2015 WL 4910190, at *3 (D.D.C. 2015) (finding request expected to take 44,886 hours unduly burdensome).

have for furthering government transparency." EFF, *History of FOIA*, https://www.eff.org/issues/transparency/history-of-foia (last accessed May 29, 2020). The three branches of the federal government have clearly and repeatedly reminded each other that the mandates of the FOIA are not to be taken lightly. The ATF's interpretation of its responsibilities contravenes this history of openness.

The ATF's interpretation of the law would have practical consequences as well. The ATF's proposed rules would require technical knowledge that would be difficult for both FOIA requesters and federal agencies to understand and predict, requiring courts to make difficult factual determinations about the structure and content of agency databases. *Amici* respectfully ask the Court to consider these impacts when deciding this case.

A. The ATF's position contravenes the presumption of disclosure.

In his first day of office in 2009, President Obama issued a Memorandum on Transparency and Open Government urging agencies that the FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails." *Memorandum on the Freedom of Information Act*, 74 Fed. Reg. 4683, 4683 (Jan. 26, 2009). Recognizing that agencies are servants of the public, he called on them to adopt a presumption in favor of disclosure "to renew their commitment to the principles embodied in FOIA." *Id.* President Obama said that the agencies had an obligation to work "in a spirit of cooperation" with FOIA requesters, noting that

unnecessary bureaucratic hurdles have no place in the "new era of open Government." *Id.* Some of the key benefits of the presumption of disclosure include ensuring proactive responses to information requests, as well as reducing disputes with requesters and avoiding litigation. Center for Effective Government, *Best Practices for Agency Freedom of Information Act Regulations* (2013), https://www.foreffectivegov.org/sites/default/files/info/foia-best-practices-guide.pdf.

This principle is exemplified in the text and legislative history of the E-FOIA Amendments of 1996. The plain text of the statute establishes that the purposes of the Amendments are to:

> (1) foster democracy by ensuring public access to agency records and information; (2) *improve public access to agency records and information*; (3) ensure agency compliance with statutory time limits; and (4) maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government.

Electronic Freedom of Information Act Amendments of 1996, PL 104–231, 110 Stat 3048, § 2 (1996) (emphasis added). This purpose is confirmed by the legislative history. A report from the House Government Reform and Oversight Committee discussed the rise of the use of computers and electronic records and stated that "FOIA's efficient operation requires that its provisions make clear that the form or format of an agency record constitutes no impediment to public accessibility." H.R. Rep. No. 104-795, at 11. Courts have likewise confirmed that the E-FOIA

Amendments were intended to ensure the public has access to electronic records. *See, e.g.*, *People for Am. Way Found.*, 451 F. Supp. 2d at 14 (identifying the broad goal of the E-FOIA Amendments as encouraging the use of technology in providing access to records).

The ATF's interpretation of the new records doctrine goes against this presumption of disclosure. By creating an artificial distinction between "existing" and "new" records in databases—based solely on whether certain functions are used in the query to retrieve the data—it attempts to shield the information that, if it existed in paper format, the ATF itself acknowledged would be subject to a FOIA request. JA 378. As described above, there is no technical or legal reason for this. Aggregate data from a database should be subject to traditional FOIA principles, including the presumption of disclosure, just like other agency records.

B. The ATF's interpretation of the new records doctrine would place unnecessary burdens on requesters, agencies, and courts.

The FOIA creates a public right of access to records held by government agencies. It is in all parties' interest, then, to make the rules governing that right of access as clear and predictable as possible. Under *amici*'s interpretation of the FOIA, searches for records in databases—including records consisting of aggregate data—must be carried out by agencies so long as the information already exists in the database and querying the database does not constitute an undue burden. This is a simple, bright-line rule that does not turn on the type of database or the functions

used in the query. There is no expectation that FOIA requesters know how the agency's data is structured and no need for agencies and courts to create legal rules based on questionable legal distinctions.

The ATF's interpretation, on the other hand, would require FOIA requesters to become database experts. FOIA requesters would need to understand the inner workings of an agency database in order to determine whether a query seeks to access existing records or create new records. This is a difficult task, and one that the drafters of the FOIA and the E-FOIA Amendments never contemplated that requesters should bear. The ATF's interpretation, if given the force of law, could very well deter potential requesters from making any requests for records from government databases at all because the technical rules are too hard to understand or follow.

The other possibility is that agencies end up being inundated with unfounded FOIA requests because requesters are unable to make the assessment for themselves. Agencies would need to make factual determinations about what types of queries are permitted based on the structure and contents of individual databases. These determinations would be subject to appeal and eventually litigation, putting the burden on courts to make factual determinations about the structure of agency databases to resolve disputes. Such an outcome would be detrimental to the entire FOIA process.

CONCLUSION

For the reasons stated above, *amici* respectfully urge this Court to AFFIRM the decision below and hold that retrieving aggregate data from a database does not constitute the creation of a new record.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Fed. R. App. P. 32(g), I hereby certify that:

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(b) and Second Circuit Local Rule 29.1(c) because it contains 5,652 words as calculated by the word count feature of Microsoft Office 365, exclusive of sections exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* the Muckrock Foundation, The Reporters Committee for Freedom of the Press, Dana Amihere, Meredith Broussard, Stephen Doig, and Jeff South in Support of Appellee and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on June 9, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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