No. 01-2167

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CITY OF CHICAGO,

Plaintiff-Appellee,

v.

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

Defendant-Appellant.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF *AMICUS CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLEE FOR AFFIRMANCE OF THE JUDGEMENT OF THE COURT OF APPEALS

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DISCLOSURE STATEMENT

In accordance with Fed. R. Civ. P. 26.1 and Cir. R. 26.1, *amicus curiae* the Reporters Committee for Freedom of the Press discloses that it is a voluntary, unincorporated association of reporters and editors. The Reporters Committee has no parent corporation and no stock, thus no publicly held corporation owns 10 percent or more of its stock.

In accordance with Cir. R. 26.1(b), *amicus* discloses that it has not been represented by the partners or associates of any law firm in this case, including any proceedings in the district court or before an administrative agency. *Amicus* is not using a pseudonym.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Congressional Reports:

Newspaper Articles:

Statutes and Rules:

Television News Reports:

Other:

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee's interest in this case is in preserving public access to federal government records, particularly those that may be used by the media to expose ATF actions related to the regulation of firearms to the light of public scrutiny. The Reporters Committee's participation in this case is desirable because of *amicus*' expertise in First Amendment and Freedom of Information Act litigation and because appellee City of Chicago's interest is limited to its use of the records for litigation, which may be at odds with the public's interest in the broader right of access intended by the Freedom of Information Act.

This brief is filed pending leave of this court and is unopposed by the parties in interest. A Motion for Leave to File as provided by Fed. R. App. P. 29(b) is submitted concurrently with this brief.

SUMMARY OF ARGUMENT

Amicus curiae urges this court to affirm its previous ruling that the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Trace and Multiple Sales data must be disclosed under the Freedom of Information Act ("FOIA").

The ATF Trace and Multiple Sales data at issue in this case are of vital importance to the

public's and news media's ability to scrutinize firearms policy. In the past, the news media have used FOIA access to this data to investigate and evaluate the implementation and effectiveness of firearms policy, and to provide a basis for public challenge to those policies.

Congress' refusal to fund FOIA requests for ATF Trace and Multiple Sales data in the Consolidated Appropriations Resolution of 2003 and the Consolidated Appropriations Act of 2004 is a thinly veiled attempt to insulate firearms policy from public scrutiny and legal challenge. However, the plain and unambiguous language of the appropriations resolutions does not remove the statutory right of access to the data provided by FOIA, but merely refuses to fund that right of access. Such a refusal by Congress in order to insulate its own firearms policies from challenge is unconstitutional viewpoint discrimination in violation of the First Amendment to the U.S. Constitution.

ARGUMENT

I. The ATF Trace and Multiple Sales data are of vital importance to the public's and news media's ability to scrutinize firearms policy

A. The public has a strong interest in knowing whether the ATF adequately regulates the sale of firearms

The purpose of the Freedom of Information Act is "to establish a general philosophy of full agency disclosure." S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965); see also *County of Madison v. U.S. Dept. of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1980). "The attention of Congress was primarily focused on the efforts of officials to prevent release of information in order to hide mistakes or irregularities committed by the agency." *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375, 385 (1980).

President Lyndon Johnson acknowledged Congress' intent to promote government accountability when he signed FOIA:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.

Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, Weekly Comp. Pres. Doc. 895 (July 4, 1966).

The U.S. Supreme Court has recognized lawmakers' intent that FOIA break down the wall of government secrecy and promote accountability. The Court held that FOIA was enacted "[t]o make crystal clear the congressional objective, to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (*Internal quotations omitted*).

Further, the Supreme Court has recognized that FOIA enables citizens to act as watchdogs, noting that the Act "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973). FOIA is crucial in promoting an informed citizenry — a virtue vital to a functioning democracy and to preventing government corruption. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). This view is consistent with the Court's interpretation of the "purpose" of FOIA in a case where records were denied. *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989).

FOIA serves the public's interest in government accountability, and enables the public to

evaluate the ATF's performance.

B. Journalists have used information from the Trace and Multiple Sales databases to uncover shortcomings in both the ATF's and other law enforcement agencies' operations

Reporters have used the Trace and Multiple Sales databases now being denied to identify shortcomings in federal and local law enforcement efforts (or lack of efforts) to control sales and resales of guns. Reporters have examined the identities of gun dealers and serial numbers of weapons to show the public how criminals get guns, how the ATF has and has not taken action to prevent that from happening, how local law enforcement agencies have sold weapons used in crime with little or no intercession by the ATF, and what crimes have been committed using these weapons.

For example:

CBS Evening News' Eye on America in 1999 used gun serial numbers and dealer information, now withheld by the ATF, to show that law enforcement agencies across the country sold or traded tens of thousands of their weapons — everything from handguns to machine guns — to gun dealers, who then resold them. From its copy of the ATF's firearms trace database released through FOIA, CBS showed that since 1990, more than 3,000 former police guns have been connected to crimes, including 293 homicides, 301 assaults and 279 drug-related crimes. The report relied heavily on comparatively up-to-date gun serial number, weapon type, and recovery location information that the ATF now refuses to release. This report won the Alfred I. Dupont Columbia University Award for Excellence in Broadcast Journalism. *Miami-Dade County's Restrictions on Selling Old Police Department Guns Being Violated by Contractors,*

CBS Evening News, Oct. 12, 1999, *available in* LEXIS, News Group File — All.

After the CBS series aired, law enforcement agencies in Miami, St. Louis, Irving, Tex., and Detroit stopped selling used police weapons. Rep. Rod Blagojevich, (D-Ill.) introduced legislation providing $10 million for new police firearms. To qualify for funds under his bill, a police department would have been required to destroy rather than sell its old guns. H.R. Rep. No. 3209, 106th Cong. 1st Sess. (1999).

In November 1999, *The Washington Post* showed how weapons sold by the Washington, D.C., Police Department ended up in the hands of criminals. Reporters used serial numbers and gun type information to demonstrate that the ATF had not traced the sale of police guns that ended up in the hands of criminals, that it was apparently unaware of the practice, and that its data on police gun sales was fragmentary and flawed. Barbara Vobejda et al., *Recycled D.C. Police Guns Tied to Crimes,* Wash. Post, Nov. 12, 1999 at A1. One day before the story ran, the District of Columbia's Metropolitan Police Department, in anticipation of the news story, announced that it would no longer sell its used weapons. Today the ATF is not providing the information used in that reporting.

The *Dayton Daily News* used serial numbers and names of dealers provided in the Multiple Sales and Trace database to show that in one year, more than 1,000 guns used in crimes across the nation came from Ohio and that the state ranked fifth among states supplying those guns. Nonetheless, the newspaper reported that ATF agents in Ohio were among those least likely to refer gun cases for prosecution and that, in a five-year period, the number of gun cases referred for prosecution had dropped by half. The reporters were able to follow sales by individuals with no criminal records to persons who used the guns to commit crimes. The series

won First Place for Investigative Reporting from the Inland Press Association (2000), and the Ohio Associated Press (2001). It was also given the Award of Excellence (First Place) from the Cincinnati Society of Professional Journalists for Enterprise/Database Reporting in 2001, and it won Second Place for Best Use of Public Records from the Ohio Society of Professional Journalists in 2001. Mike Wagner et al, *Ohio : The Gunrunner's Paradise,* Dayton Daily News, Dec. 10, 2000 at A1.

If current ATF policy had been in place denying weapon recovery locations, dealer identification numbers and gun serial numbers, the *Daily News* could not have written its series.

In 1999, when ATF still released names of gun dealers, Fox News in Chicago showed that one-tenth of the guns traced by local law enforcement authorities as possibly involved in crimes came from one gun shop, and that neither local authorities nor the ATF had been able to shut down a dealer who supplied illegal guns used in Chicago crimes. *The Gun Runners,* Fox News WFLD Chicago television broadcast, Nov. 10, 1999.

If the court allows this information to be withheld, reporters will not be able to do timely reporting about control of gun sales and the spread of weapons for criminal uses — reporting that in the past has triggered remedial measures. The public scrutiny of firearms policy has relied on ATF Trace and Multiple Sale database information remaining as widely available and accessible as possible. Blocking access to this data prevents public scrutiny of the implementation and effectiveness of firearms policy.

II. Because the appropriations measures do not amend the substantive provisions of FOIA, the measures do not remove the statutory right of access that FOIA provides

The Freedom of Information Act, 5 U.S.C. § 552, requires the records of federal agencies to be available to the public unless one of nine carefully delineated exemptions applies, thus creating a statutory public right of access to federal records. This court previously held that the ATF Trace and Multiple Sale records at issue in this case must be publicly available under FOIA. *City of Chicago v. U.S. Dept. of the Treasury*, 287 F.3d 628 (7th Cir. 2002).

The Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7, 117 Stat. 11, § 644 provides that:

> No funds appropriated under this Act or any other Act with respect to any fiscal year shall be available to take any action based upon any provision of 5 U.S.C. 552 with respect to records collected or maintained pursuant to 18 U.S.C. 846(b), 923(g)(3) or 923(g)(7), or provided by Federal, State, local, or foreign law enforcement agencies in connection with arson or explosives incidents or the tracing of a firearm, except that such records may continue to be disclosed to the extent and in the manner *474 that records so collected, maintained, or obtained have been disclosed under 5 U.S.C. 552 prior to the date of the enactment of this Act.

The Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (codified as amended at 28 U.S.C. § 530C), provides that:

> no funds appropriated under this or any other Act may be used to disclose to the public the contents or any portion thereof of any information required to be kept by licensees pursuant to section 923(g) of title 18, United States Code, or required to be reported pursuant to paragraphs (3) and (7) of section 923(g) of title 18, United States Code, except that this provision shall apply to any request for information made by any person or entity after January 1, 1998.

The plain meaning of both of these appropriations measures is that no appropriated funds may be spent to disclose ATF Trace and Multiple Sale database information collected under 18 U.S.C. 923(g). By their plain language, the appropriations measures do not, however, alter the

substantive right to access of such records provided by FOIA. They merely provide a Congressional refusal to pay for such access.

Had Congress so desired, it could have amended FOIA or enacted an Exemption 3 statute to remove the right to access ATF Trace and Multiple Sales records. *LAPD v. United Reporting Publishing*, 528 U.S. 32, 40 (1999). "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978)(*plurality opinion*). *See also Travis v. Reno*, 163 F.3d 1000, 1007 (7th Cir. 1998); *Center for National Security Studies v. U.S. Dept. Of Justice*, 331 F.3d 918, 934 (D.C. Cir. 2003).

However, Congress explicitly chose not to amend the substantive right of access under FOIA, and instead opted to merely deny funding to process such requests. "The Supreme Court has repeatedly instructed that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Precision Industries v. Qualitech Steel*, 327 F.3d 537, 544 (7th Cir. 2003)(*internal citations omitted*). The unambiguous wording of the appropriations measure here is a funding denial, not a denial of access or a FOIA exemption.

The U.S. Court of Appeals for the Ninth Circuit recognized this in *Cal-Almond, Inc. v. U.S. Dept. Of Agriculture*, 960 F.2d 105 (9th Cir. 1992). The Appropriations Act of 1988 provided that "[n]one of the funds provided in this Act may be expended to release information acquired from any handler under the Agricultural Marketing Agreement Act of 1937." *Id*. at 108. *Cal-Almond* requested the information under FOIA, and offered to pay for a copy or to copy it

with its own equipment, but the Department of Agriculture refused the request, citing the Appropriations Act. *Id*. at 107. The Ninth Circuit ordered the information released to the plaintiff, holding that "if Congress intended to prohibit the release of the list under FOIA -- as opposed to the expenditure of funds in releasing the list -- it could easily have done so." *Id*. at 108.

Repeal of a statute is especially disfavored when done within an appropriations measure. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The Supreme Court has recognized that

> both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress has carefully adopted to avoid this need.

Id. at 190-1. *See* House Rule XXI(2); Standing Rules of the Senate, Rule 16.4.[1] Congress may only amend substantive law in an appropriations measure when it does so clearly. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). In this case Congress has not clearly amended the right of access to ATF Trace and Multiple Sale data under FOIA. Congress has only clearly refused to fund that access.

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[1]The Consolidated Appropriations Resolution of 2003 is approximately 391 pages long. Pub. L. No. 108-7. The Consolidated Appropriations Act of 2004 is approximately 323 pages long. Pub. L. No. 108-199. The portions of the appropriations measures at issue in this case are a single paragraph in each of the measures. *Id.*

Appellant ATF advances three cases to support the counter-intuitive position that Congress nonetheless intended to substantively amend FOIA, when by its unambiguous language it merely removed funding. All three cases are distinguishable from this case.

In two of the cases, *United States v. Dickerson*, 310 U.S. 554 (1940), and *United States v. Will*, 499 U.S. 200 (1980), the substantive right that the Supreme Court allowed to be repealed by an appropriations measure was itself a grant of money. *Dickerson* involved re-enlistment bonus payments for men enlisted in the military. 310 U.S. at 554-5. *Will* involved cost-of-living salary increases for federal judges. 499 U.S. at 202. Where Congress grants a money benefit within a statute, the refusal to pay that money benefit by denying the appropriation is a clear indication of Congress' intent to repeal the granting statute. The right granted has itself been denied. This is not so in this case, where the right granted is access to government records. The appropriations measure does not remove that right of access, it just refuses to fund it. The U.S. Court of Appeals for the Fifth Circuit recognized this distinction in *Bean v. Bureau of Alcohol, Tobacco and Firearms*, 253 F.3d 234, 238-9 (5th Cir. 2001)(*rev'd on other grounds*, *United States v. Bean*, 537 U.S. 71 (2002)).[2] "In the case at bar, Congress is not merely promising money then changing its mind and not making it available." *Id.* "[M]erely refusing to allow the agency responsible for facilitating those rights to use appropriated funds to do its job under the statute is not the requisite direct and definite suspension or repeal of the subject rights." *Id.*

[2]The right at issue in *Bean* was the restoration of a felon's right to possess firearms. 253 F.3d at 236. The Supreme Court reversed on the grounds that because the ATF had not acted on the plaintiff's application, there was no actual adverse agency action as required by the statute to create a cause of action. 537 U.S. at 75-6. The Court explicitly rejected the idea of constructive denial under the firearms rights restoration statute. *Id*. In contrast, under FOIA the inaction of an agency is considered a constructive denial and an exhaustion of administrative remedies. 522 U.S.C. § (a)(6)(C).

The third case, *Robertson v. Seattle Audubon Society*, 503 U.S. at 434-5, involves a repeal of a substantive law by an appropriations measure that was clear and unambiguous, unlike the appropriations measure in this case. *Robertson* involved a dispute between environmentalists and the logging industry over logging in areas that were home to endangered wildlife protected by a federal statute. *Id*. Congress passed an appropriations measure that addressed the competing interests of the litigants and that explicitly held that actions directed by the appropriations measure were "adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases." *Id.* The Supreme Court ruled that although repeals of substantive law within appropriations measures are disfavored, because Congress had acted clearly it was permissible. *Id*. at 440.

In *Robertson*, Congress clearly and unambiguously held that the provisions of the substantive law were amended by the appropriations measure. In the instant case, Congress did not state that it was amending the substantive law in the appropriations measure. Congress instead clearly and unambiguously stated that it was merely not funding the exercise of the right under that law.

Because Congress could have chosen to amend the substantive right granted by FOIA, but instead explicitly chose to only deny funding, this court should hold that the appropriations measure does not amend the substantive right granted by FOIA to access ATF records.

III. Congress' refusal to fund responses to FOIA requests in order to insulate policy from challenge discriminates against a viewpoint in violation of the First Amendment to the U.S. Constitution

Congress' refusal to fund responses to FOIA requests for ATF Trace and Multiple Sales data is a thinly veiled attempt to insulate firearms policy from public scrutiny and legal challenge. By hiding this information from the public and news media, Congress has ensured that stories, such as the ones cited in this brief, that point out the failures of firearms policy and form a basis for challenges to it, cannot be told. When Congress acts to insulate its policies by denying the funding of public records requests to those who would challenge those policies, Congress violates the First Amendment by engaging in unconstitutional viewpoint discrimination.

The First Amendment prohibits Congress from discriminating against speech because of a speaker's message. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828 (1995). "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *RAV v. City of St. Paul*, 505 U.S. 377, 382 (1992). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829.

The Supreme Court has held that viewpoint discrimination may take the form of a denial of funding. *Id*. at 828. "[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Id*. Because of

the vital First Amendment principles involved, such a denial of funding cannot be justified on the basis of economic scarcity. *Id*. "[E]ven in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998).

Where Congress has created a statutory right to public information under FOIA, Congress may not then discriminate against those who would challenge Congressional policy by imposing a financial burden on them that is not imposed upon other FOIA requesters. This is the essential holding of the Supreme Court in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). *Velazquez* involved a provision of the Legal Services Corporation Act that prohibited attorneys funded by the act from attempting to challenge or amend welfare laws. *Id*. at 536-7. The Supreme Court struck the provision down as unconstitutional, ruling that:

> Congress was not required to fund an LSC attorney to represent indigent clients; and when it did so, it was not required to fund the whole range of legal relationships. The LSC and the United States, however, in effect ask us to permit Congress to define the scope of the litigation it funds to exclude certain vital theories and ideas. The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. *We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge*. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.

Id. At 548-9 (*emphasis added*).

As with the Legal Services Corporation Act in *Velazquez*, Congress was not required to enact the Freedom of Information Act, nor was it required to define the ATF Trace and Multiple Sales data as public records. But having done so, Congress may not now discriminate against

those who would use the records to challenge firearms policy by imposing a financial burden on their access. The government is forbidden from exercising viewpoint discrimination "even when the limited public forum is one of its own creation." *Rosenberger*, 515 U.S. at 829.

Because this case does not involve speech by the government, it is distinguishable from the Supreme Court's ruling in *Rust v. Sullivan*, 500 U.S. 173 (1991). *Rust* involved Deptartment of Health and Human Services regulations that prohibited recipients of federal funds under the Public Health Service Act from advocating abortion as a method of family planning. *Id*. at 178. Although it is not explicit in the *Rust* opinion, *Velazquez* explains that this restriction was not unconstitutional because the government was itself the speaker. 531 U.S. at 541. *Velazquez* held that "[i]t does not follow ... that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers." Id. at 542 *(quoting Rosenberger*, 515 U.S. at 834). FOIA does not amount to speech or expression by the government, so the restriction at issue in this case is unlike the restriction upheld in *Rust*. FOIA facilitates speech by the public by making government information available.

This case is also unlike the Supreme Court's ruling in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998). *Finley* involved language under the National Foundation on the Arts and Humanities Act directing those evaluating funding applications to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public" when granting NEA funds. *Id*. at 572. In upholding the requirements, the Court ruled that the language was "merely hortatory" and "d[id] not introduce considerations that, in practice, would effectively preclude or punish the expression of particular views." *Id*. at

580, 583. Further, the Court held that the considerations were "a consequence of the nature of arts funding" where there were more grant applicants than available grants. *Id*. at 585. In contrast, the appropriations measures in this case are not "merely hortatory" and are a direct and definite denial of funding of FOIA requests for the ATF Trace and Multiple Sales data.

The ATF Trace and Multiple Sales data at issue in this case have been used by the news media to expose problems with government firearms policies and to affect change within those policies. FOIA creates a statutory right of access to this data for precisely that purpose. While Congress could have chosen to amend FOIA in order to change that right of access, Congress clearly and unambiguously chose not to. Instead, buried within massive appropriations measures, is an elimination of funding for processing FOIA requests for the data. This Congressional denial of funding of the exercise of the statutory right of access under FOIA amounts to unconstitutional viewpoint discrimination and cannot be permitted. It violates principles of free speech and the purposes of FOIA, and it is an abuse of the appropriations process. If Congress wants to prohibit access to this information, it must amend FOIA or create an statute exempting the data that satisfies the requirements of Exemption 3.

CONCLUSION

For the aforementioned reasons, *amicus curiae* respectfully requests that this court hold that the restrictions on Freedom of Information Act access to ATF Trace and Multiple Sales data created by the Consolidated Appropriations Resolution of 2003 and the Consolidated Appropriations Act of 2004 constitute unconstitutional viewpoint discrimination, and affirm its previous ruling that the data must be disclosed. In the alternative, *amicus curiae* requests that this court allow appellee City of Chicago to exercise its right of access to the ATF Trace and Multiple Sales data under the Freedom of Information Act by paying for the release of the data.

Respectfully submitted,

By _____

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 4,614 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in Times New Roman 12-point font in the body of the brief and Times New Roman 11-point font in footnotes.

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Defendant-Appellant.
_____/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 2004, I caused two true and correct copies of the BRIEF OF *AMICUS CURIAE* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLEE FOR AFFIRMANCE OF THE JUDGEMENT OF THE COURT OF APPEALS to be mailed to the following recipients and 15 true and correct copies to be mailed to the clerk of the court via First-Class Mail in accordance with Fed. R. App. P. 25(a)(2)(B). In accordance with Cir. R. 31(e), a digital version of the brief in PDF format has been delivered to the clerk via the court's web page, and to the parties via electronic mail.

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MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLEE FOR AFFIRMANCE OF THE JUDGEMENT OF THE COURT OF APPEALS

The Reporters Committee for Freedom of the Press respectfully moves this court, pursuant to Fed. R. App. P. 29(b), for leave to file a brief *amicus curiae* in support of Plaintiff-Appellee, City of Chicago, for affirmance of the previous judgment of the Court of Appeals granting access to the ATF Trace and Multiple Sales data. The presented *amicus* brief is limited to addressing the question, remanded from the Supreme Court of the United States, of what effect, if any, the Consolidated Appropriations Resolution of 2003 has on this case, and the presumed additional question of what effect, if any, the Consolidated Appropriations Act of 2004 has on this case. The presented *amicus* brief will not re-address the Freedom of Information Act Exemption 6 and Exemption 7 issues previously decided by this Court. This motion is

unopposed by both appellant and appellee.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee's interest in this case is in preserving public access to federal government records, particularly those that may be used by the media to expose ATF actions related to the regulation of firearms, to the light of public scrutiny.

The Reporters Committee's *amicus* brief is desirable in this case for two reasons. First, this case involves a difficult question of interpretation of how a federal appropriations measure interacts with the Freedom of Information Act. The Reporters Committee's more than 30 years of experience in Freedom of Information Act and First Amendment litigation can provide valuable insight and guidance to the court in deciding this complicated issue.

Second, the interest of the appellee City of Chicago in this case is to obtain the ATF Trace and Multiple Sales data for use in litigation. The purpose of the Freedom of Information Act is to provide access to government records to the public in general. Because the City of Chicago's interest is limited to its use of the records in litigation, it does not fully represent the broader interest in public access. The Reporters Committee is well situated to represent that broader right of public access.

For the above reasons, the Reporter's Committee respectfully moves this court for leave to file a brief *amicus curiae*.

Respectfully submitted,

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Attorneys for Amicus Curiae Reporters Committee for Freedom of the Press

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 2004, I caused a true and correct copy of the forgoing Motion to be mailed to the following recipients and an original and three true and correct copies to be mailed to the clerk of the court via First-Class Mail in accordance with Fed. R. App. P. 25(a)(2)(B):

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