Appeal No. 18-17356

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CENTER FOR INVESTIGATIVE REPORTING,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California, San Francisco
Case No. 3:17-cv-06557-JSC
Magistrate Judge Jacqueline Scott Corley

RESPONSE OF PLAINTIFF-APPELLANT THE CENTER FOR INVESTIGATIVE REPORTING TO THE GOVERNMENT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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INTRODUCTION

The Court should deny the petition for rehearing and rehearing *en banc* for two simple but important procedural reasons: the Government forfeited the argument that it now raises for the first time and the panel's opinion did not conflict with an existing appellate opinion. For these procedural reasons alone, the Government's petition is deficient and should be denied on its face.

If the Court considers its substance, it should also deny the petition because the Government's arguments on the merits are wrong and would create an overly sweeping precedent. The Government argues that the OPEN FOIA Act's express-reference provision violates the principle that a Congress may not bind successive legislatures by creating an improper Congressional entrenchment. That argument fails on its face as the OPEN FOIA Act is, by definition, not an entrenchment statute, as it permits Exemption 3 to apply to any context Congress chooses. *See* 5 U.S.C. § 552(b)(3). But if the Court were to accept the Government's argument, its ruling would logically imply that all statutes with express-reference provisions are unconstitutional and ineffective. That would invalidate not only OPEN FOIA but also, for example, the Religious Freedom and Restoration Act ("RFRA"), as well as numerous other statutes whose constitutionality and validity have long been taken for granted. *See* RFRA, 42 U.S.C. § 2000bb-3(b) (Rule of Construction: "Federal statutory law adopted after November 16, 1993, is subject to this chapter

unless such law explicitly excludes such application by reference to this chapter."); *see, e.g.*, National Emergencies Act, 50 U.S.C. § 1621(b) (containing a similar express-reference provision); War Powers Resolution, 50 U.S.C. § 1547(a)(1) (same); Federal Vacancies Reform Act, 5 U.S.C. § 3347 (same); *see also* J. Roberts & E. Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Calif. L. Rev. 1773, 1782–83 (2003) ("Roberts/Chemerinsky") (explaining rule that statutes of legislative entrenchment are unconstitutional). Congress has declined to enact a new Tiahrt Rider to correct any purported imbalance with FOIA, and it is not the role of the court to legislate in Congress's place.

For all these procedural and substantive reasons, the panel should deny the petition for rehearing and rehearing *en banc*.

ARGUMENT[1]

I. THE GOVERNMENT FORFEITED THE "ENTRENCHMENT" ARGUMENT BY NEVER ASSERTING IT BEFORE NOW.

The Court should deny the petition for the simple reason that the Government forfeited its main argument—that the OPEN FOIA Act violates the doctrine of legislative entrenchment—by raising it now for the first time. That is the most prudent course here because the parties never addressed this issue in the briefing before the current petition and there has been no opportunity to develop the parties' respective arguments fully.

As a general rule, "[a]n appellate court will not consider issues not properly raised before the district court. Furthermore, on appeal, arguments not raised by a party in its opening brief are deemed waived." *Sophanthavong v. Palmateer*, 365

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[1] The parties appear to agree on one point: the panel's decision that CIR's FOIA request did not require the creation of a new record. The Government's petition does not question the panel's holding that using a query to search existing records in a government database does not create a new record. *See* Pet. at 10–16; *cf. Ctr. For Investigative Reporting v. United States Dep't of Just.*, 982 F.3d 668, 691–92 (9th Cir. 2020) ("*CIR v. DOJ*") (rejecting the Government's new-record argument as seeking to "render FOIA a nullity in the digital age"). Nor would the Government have a procedural basis to do so, as neither the dissent in this Court's decision nor the recent Second Circuit decision offered opinions on the issue of whether producing search results from the Firearms Tracing System database amounted to creation of a new record. *See CIR v. DOJ*, 982 F.3d at 693–97 (Bumatay, J., dissenting); *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 984 F.3d 30, 44 (2d Cir. 2020) ("we need not address the parties' arguments regarding record creation"). Accordingly, the holding on database queries stands unchallenged.

F.3d 726, 737 (9th Cir. 2004) (cleaned up). This Court exercises its discretion to reach forfeited arguments in three "limited circumstances": 1) "when there are 'exceptional circumstances' why the issue was not raised" previously, 2) "when the new issue arose while the appeal was pending because of a change in the law," and 3) "when the issue presented is purely one of law and the opposing party will not suffer prejudice as a result of the failure to raise the issue." *Club One Casino, Inc. v. Bernhardt*, 959 F.3d 1142, 1153 (9th Cir. 2020) (citation omitted).

None of those exceptions applies. First, the Government identified no exceptional circumstances that excuse its failure to raise the argument before now. As the panel majority explained, "the first—and only—mention of legislative entrenchment came at oral argument," and the "government admitted it had not made this argument" before the district court or on appeal. *CIR v. DOJ*, 982 F.3d at 685. The Government did not attempt to excuse this omission, merely calling it "regrettable." Pet. at 13. In *Sharemaster v. SEC*, 847 F.3d 1059, 1070 (9th Cir. 2017) this Court observed: "The general waiver rule applies even to non-lawyers… who proceed *pro se* in the face of a complicated statutory scheme." The Government is at the opposite extreme of the spectrum from a *pro se* litigant, and its sophistication and vast legal resources weigh heavily against allowing it to press a brand-new argument on a rehearing petition.

Second, the Second Circuit's later decision in *Everytown,* 984 F.3d 30 (2d Cir. 2020), does not qualify as a change in the law that would justify rehearing, because this Court is not bound by that Circuit's ruling.

Third, CIR will suffer prejudice if the petition is granted. As the Supreme Court has recognized, delay interferes with the press's "traditional function of bringing news to the public promptly." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976). A rehearing would delay the release of information that is important to a national debate. Additionally, allowing the Government a third bite at the apple would prolong this litigation and offend traditional notions of "fairness and judicial efficiency." *United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991).

II. THE GOVERNMENT HAS NOT MET THE CRITERIA FOR REHEARING EN BANC.

A rehearing may be appropriate where there is (A) a conflict with mandatory authority and it is "necessary to secure and maintain uniformity of the court's decisions," or (B) the proceeding involves questions of "exceptional importance" such as "an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(A)–(B).

First, the panel's opinion did not conflict with any mandatory authority: no Supreme Court or earlier Ninth Circuit decision governed this case. As the panel observed, this case presented an issue of first impression within the Circuit. *CIR v.*

DOJ, 982 F.3d at 685–86. Nor does the Government argue this basis for rehearing. *See* Pet. at 10.

Second, the Government frames this as an issue of exceptional importance that conflicts with a decision of another Circuit, *see* Pet. at 10, while omitting and avoiding a critical element of the standard: the panel's decision did not conflict with the authoritative decisions of other United States Courts of Appeals that *had addressed* the issue at the time. *See* Fed. R. App. P. 35(b)(1)(B); *cf.* 9th Cir. R. 35-1 (conflict must be with *existing* opinion of another court of appeals). The panel issued its decision on December 3, 2020. *CIR v. DOJ*, 982 F.3d 668. The Second Circuit decided *Everytown* on December 23, 2020, three weeks later. *See Everytown*, 984 F.3d 30.

Accordingly, there was no "authoritative decision" that another circuit had addressed, and no "existing opinion," in conflict on December 3, 2020.[2] Furthermore, no split exists as to the central issue in this petition ("legislative entrenchment"), as the parties did not brief *Dorsey v. United States*, 567 U.S. 260 (2012), which the Second Circuit cited in *Everytown* and which the panel dissent and the petition have focused on. The panel's decision does not preclude this Court from considering the issue, if properly *briefed*, in a future case.

In any event, harmonizing the decision of this Court and the later Second Circuit decision would be appropriate, if at all, not by this Court but by the United States Supreme Court should the Government seek review of this decision.

III. THE 2009 OPEN FOIA ACT IS NOT AN ENTRENCHMENT STATUTE BECAUSE IT DID NOT FORECLOSE LATER CONGRESSES FROM CREATING ADDITIONAL EXEMPTION-3 STATUTES.

Even if the Government had not forfeited it, the Government's entrenchment argument fails on the merits. The Government argues that the 2009 OPEN FOIA Act's requirement that a withholding statute cite to Exemption 3 amounts to "legislative entrenchment," "contraven[ing the] Supreme Court precedent" of *Dorsey*. Pet. at 9 (citing *CIR v. DOJ*, 982 F.3d at 694–695).

But the OPEN FOIA Act is not a legislative entrenchment. Its terms *do not* preclude a future Congress from "repeal[ing] the earlier statute, [] exempt[ing] the current statute from the earlier statute, [] modify[ing] the earlier statute, or [] apply[ing] the earlier statute but as modified." *Cf. Dorsey*, 567 U.S. at 274. Nor does it fall into *any* of the entrenchment categories that leading scholars recognize. *See* Roberts/Chemerinsky at 1777–79. OPEN FOIA leaves Congress free to make the firearms data at issue here exempt from disclosure under Exemption 3 of

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[2] As the panel addressed, the Seventh Circuit's 2005 decision in *City of Chicago v. U.S. Department of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 423 F.3d 777, 780 (7th Cir. 2005), does not conflict with the ruling here: that decision predated the 2009 OPEN FOIA Act. *See* 982 F.3d at 684 n.5; *cf.* Pet. at 12.

FOIA, which allows withholding of information based on statutory mandates. 5 U.S.C. § 552(b)(3). That is because Congress created a *rule of construction* for interactions between other statutes and the OPEN FOIA Act to determine when statutes mandated withholding.

While *Dorsey* correctly articulated the rule that Congress cannot limit the power of a later Congress, the OPEN FOIA Act does not do so, and only a perverse interpretation of OPEN FOIA, violating canons of statutory interpretation, can support the Government's argument.

IV. THE GOVERNMENT VIOLATES CANONS OF STATUTORY CONSTRUCTION IN ARGUING THAT THE 2008 TIAHRT RIDER SHOULD LIMIT THE EXPRESS LANGUAGE OF THE 2009 OPEN FOIA ACT.

The Government effectively asks this Court to apply the supposed legislative intent of the 2005 and 2008 Tiahrt Riders, superseding the *explicit statutory language* of the 2009 OPEN FOIA Act. This disregards the Supreme Court's instructions that federal courts must interpret and apply FOIA in accordance with the statute's plain text and structure. *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362–63 (2019).

All parties, the majority, and the dissent agree that the 2012 Tiahrt Rider is the operative Rider. The panel held that the 2012 Tiahrt Rider, identical to the 2010 Rider, is the "only operative Rider because the 2010 Rider impliedly repealed

the 2005 and 2008 Riders in full." *CIR v. DOJ*, 982 F.3d at 679.[3] The relevant language of the 2012 Rider is identical to the pre-OPEN FOIA 2008 Tiahrt Rider, which means the 2012 Rider replaced the 2008 Rider. *Id.* at 681–85; *see also* Pet. at 6.[4]

Despite this, relying on anachronistic inferences of intent, the Government states OPEN FOIA "doesn't apply or isn't relevant," because Congress *in 2005 and 2008* intended the 2012 Tiahrt Rider to be exempt from OPEN FOIA. *See* Pet. at 13–14 (emphasis added). But to make its point, the Government's argument rests on legislative history of the *separate 2008* Consolidated Appropriations Act, to argue that the *2012* Consolidated Appropriations Act created a "necessary implication" of an Exemption-3 statute. Pet. at 12. But no necessary implication exists. The Government suggests that a court should fix Congress's mistake by nullifying OPEN FOIA and subordinating *its express legislative intent* to an anachronistic implied intent of the 2012 Tiahrt Rider.

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[3] To determine this, the panel reviewed the district court decisions the Government relied on and determined that there was little more than shallow judicial inertia behind those earlier decisions. *See CIR v. DOJ*, 982 F.3d. at 679 n.3. The panel properly noted that, in many cases, the plaintiff proceeded *pro se*; it criticized other decisions for "blindly follow[ing]" a case litigated *pro se* or "otherwise gloss[ing]over the OPEN FOIA Act and the implied repeal issue." *Id.*

[4] The dissent did not object to this understanding. It cites only the 2012 Tiahrt Rider and does not invoke earlier iterations of the Rider. *See CIR v. DOJ*, 982 F.3d at 694–96 (Bumatay, J., dissenting).

Moreover, the Government's legislative-history arguments rest on no specific history in Committee reports or even floor debates. *See id.* at 11–12. Instead, the Government infers intent from a tradition of similar language from earlier Congresses, even though that tradition showed increasing favor toward disclosing firearms information. *See id.* (discussing evolution of the Rider's language).

Even worse, the Government proposes an interpretation that would itself amount to entrenchment. The Government invokes its favored *earlier* legislation as providing the basis for neutralizing or nullifying *later* legislation it disfavors. It argues that the *2008* Tiahrt Rider, with its "futurity" language, bound Congress by limiting Congress's ability create rules of construction in the *2009* OPEN FOIA Act. In other words, the Government's argument that the 2008 Tiahrt Rider supersedes the 2009 OPEN FOIA Act would turn the *2008 Tiahrt Rider* into a legislative entrenchment. *Cf. Dorsey*, 567 U.S. at 274. That is hypocritical and paradoxical.

The Government further claims "the majority gave no consideration to clear evidence that Congress intended the Tiahrt Rider to remain a 'statute of exemption,'" but the panel's thorough discussion proves otherwise. *See* Pet. at 10; *cf. CIR v. DOJ*, 982 F.3d at 679–86. Unlike the panel's analysis, the Government's argument is unsupported. The Government provides no specific statutory text or

even legislative history as "evidence" of Congress's intent. *See* Pet. at 12. The Government cites *City of Chicago*, an irrelevant 2005 Seventh Circuit case that predated the OPEN FOIA Act of 2009. *See id.* It otherwise argues that, by enacting the same language through 2012, Congress did not depart from a "longstanding understanding" that the Tiahrt Rider is an exemption statute. *See id.*

But the "longstanding understanding" from a 2005 ruling does not supersede the express Congressional direction in a 2009 statute. Even the case on which the Government relies for this amorphous criterion of "longstanding understanding," *Lorillard v. Pons*, backfires on the Government. *See id.* (citing *Lorillard*, 434 U.S. 575, 580 (1978)). *Lorillard* stated that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." 434 U.S. at 580. Congress must be presumed to be even *more* aware of *its own* rules of construction for the interplay of other statutes with OPEN FOIA. The 2012 Tiahrt Rider must be interpreted in light of the OPEN FOIA Act of 2009.

Just as the statutory text provides the clearest purpose of OPEN FOIA, Congress's subsequent application of OPEN FOIA reflects its interpretation. Congress has passed several laws since 2009 citing OPEN FOIA, exempting specific data from disclosure, both before and after passage of the 2012 Tiahrt

Rider.[5] Congress should be presumed to have taken the OPEN FOIA statutory exemption requirement into account when passing the 2012 Tiahrt Rider. A judicial interpretation of amorphous "purpose" that ignores Congress's express purpose as stated in the text of the statute raises separation of powers concerns. *See Rojas v. Fed. Aviation Admin.*, 989 F.3d 666, 695 (9th Cir. 2021) (Bumatay, J., dissenting in part).

V. CONGRESS HAS NOT ENACTED A NEW TIAHRT RIDER DESPITE YEARS OF OPPORTUNITY TO CORRECT ANY PERCEIVED IMBALANCE WITH OPEN FOIA.

Should Congress determine the courts misinterpreted its intent, it can correct the record. Congress has had years to enact a new Tiahrt Rider citing OPEN FOIA, but Congress has not done so. *See* Pet. at 6. Congress passed an appropriations bill in December 2020, after the panel published its opinion. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020). Congress could have amended the Rider if it disagreed with the panel's analysis. After all, as the Government points out, that is what precisely what Congress did after the Seventh Circuit decided *City of Chicago*, thus making its intent "unmistakable."

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[5] *See, e.g.*, Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010), passed the year after OPEN FOIA, with several sections citing to the relevant OPEN FOIA provision, some of which were subsequently repealed; Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014, Pub. L. No. 113-254, 128 Stat. 2898, with a section citing to the provision; the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015), with a section about cybersecurity citing to the provision.

Pet. at 4–5. But Congress did not do that here, leaving the 2012 Tiahrt Rider—with no reference to OPEN FOIA—in effect for the last nine years.

This Court need not wreck OPEN FOIA or violate canons of statutory construction by ignoring OPEN FOIA's express terms to cure what the Government implicitly believes to be Congress's error in failing to cite to OPEN FOIA in the 2012 Tiahrt Rider. If Congress made a mistake in the 2012 Tiahrt Rider, it can remedy its error in the next Tiahrt Rider. *See Rojas*, 989 F.3d at 695 (Bumatay, J., dissenting in part) ("[W]e can never let perceived legislative purpose eclipse the ordinary meaning of statutory text. If a statute has a clear and natural reading, as is the case here, we are stuck with that meaning—even if we believe Congress might disagree with the outcome in a particular case.").

VI. THE GOVERNMENT'S ARGUMENT WOULD DISRUPT THE APPLICATION OF NUMEROUS LAWS ACROSS A WIDE RANGE OF TOPICS.

The Government's recharacterization of express-reference statutes as "entrenchment" is extreme and would undermine numerous statutes involving express-reference provisions. The Supreme Court has enforced nearly identical provisions within other federal statutes without indicating that they are infirm. For example, just two years after *Dorsey*, the Supreme Court applied an "explicit reference" requirement in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 n.30 (2014), within the Religious Freedom Restoration Act ("RFRA") that is

nearly identical in both form and function to the language in the OPEN FOIA Act. Because of the express-reference requirement, the Court concluded the Affordable Care Act's ("ACA's") contraceptive mandate was not exempt from RFRA. *See id.*

Just like OPEN FOIA, RFRA "applies to all Federal law, and the implementation of that law… unless such law *explicitly excludes such application by reference to this chapter*." 42 U.S.C. § 2000bb-3 (emphasis added). *Hobby Lobby* therefore precludes the Government's argument as applied to statutes like RFRA and FOIA that require specific triggering provisions. For if the Government's argument were correct, then RFRA and a host of other statutes would be neutered alongside the OPEN FOIA Act. *See, e.g.*, National Emergencies Act, 50 U.S.C. § 1621(b) (containing express-reference provisions like those in FOIA and RFRA); War Powers Resolution, 50 U.S.C. § 1547(a)(1) (same); Federal Vacancies Reform Act, 5 U.S.C. § 3347 (same).

Other federal courts, including at least one Circuit, have agreed that an explicit-reference requirement vindicates rather than violates the principle that one Congress cannot bind another. *See Korte v. Sebelius*, 735 F.3d 654, 671–73 (7th Cir. 2013) (quoting *Dorsey*, 567 U.S. at 274; 42 U.S.C. § 2000bb- 3(b)) ("RFRA accounts for this principle too; the statute does not apply to a subsequently enacted law if it 'explicitly excludes such application by reference to this chapter.'"); *see also Long v. ICE*, 149 F. Supp. 3d 39, 54 (D.D.C. 2015) (applying OPEN FOIA's

citation requirement, post-*Dorsey*, to hold that the Federal Information Security Modernization Act is not a withholding statute).

Critically and on a broader level, the Government's misapplication of the entrenchment doctrine also threatens Congress's Article I authority by contravening Congress's ability to tell the courts what its statutes mean. *See generally* 2A Norman Singer and Shambi Singer, Sutherland Statutory Construction § 46:3 (7th ed.) (updated Nov. 2020) ("Courts generally discuss the primacy of expressed legislative will and intent in terms of the idea that they are guided by what the legislature said in a statute"). Under well-established principles of statutory construction, Congress has the power to provide clear rules for courts and executive agencies to use in applying its legislation, as it did in the OPEN FOIA Act. *See Ray v. Turner*, 587 F.2d 1187, 1219 (D.C. Cir. 1978) (Wright, C.J., concurring) (explaining that Congress intended Exemption 3 to "establish[] effective guidelines" for agency withholding, and "contain[] clear guidelines upon which a court could rely in reviewing the agency's refusal to disclose requested information."). Adopting the Government's expansive interpretation of *Dorsey* would improperly limit Congress' ability to ensure that courts apply its statutes as it intended.

VII. THE TIAHRT RIDER'S LANGUAGE SUPPORTS THE MAJORITY'S CONCLUSION THAT THE INFORMATION CIR SEEKS IS SUBJECT TO DISCLOSURE.

Finally, the Government invokes the dissent to argue that the panel incorrectly applied Exception (C) of the Tiahrt Rider, which permits "the publication of annual statistical reports… *or* statistical aggregate data….," Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011) (emphasis added). The Government argues Exception (C) authorizes only the release of reports, limited to "ATF's publication of prepared, formal documents," not the kind of statistical aggregate data CIR has requested. Pet. at 14–16 (citing *CIR v. DOJ*, 982 F.3d at 699 (Bumatay, J., dissenting)). That argument misconstrues the statutory language of the 2012 Rider, which expressly authorizes "the *publication of*… statistical aggregate *data*…." Pub. L. No. 112–55, 125 Stat. at 610 (emphasis added).

First, the *publication* of any information is "making something publicly known." *CIR v. DOJ*, 982 F.3d at 687 (citing Oxford English Dictionary Online); *see also* Black's Law Dictionary (11th ed. 2019) ("the act of declaring or announcing to the public"). Releasing the requested data to The Center for Investigative Reporting—*or any other requester*, indeed makes it available to the public. Similarly, throughout other appropriations statutes, Congress has used "publication" to refer to the action of making something public, not just

government agency reports. For instance, the 2021 Appropriations statute repeatedly uses "publication" as a synonym for making something "available to the public"; it also distinguishes reports from other types of information and data. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 at 2104 ("PUBLICATION.—The Secretary shall make [reports] publicly available on the website of the Department of Agriculture); *id.* at 2117 ("PUBLICATION…the Secretary shall make publicly available…a list"); *id.* at 2192 ("PUBLICATION.—Each final determination of the Copyright Claims Board shall be made available…."); *see also id.* at 2104 (reports), 2251–52 (report), 2252 (guidance), 2269 (petitions by private parties for rulemaking), 2301 (information), 2396 (geospatial data), 2804–05 (various types of information, including numbers of notifications, amounts of expenditures and fees, and numbers of certain payments), 2805 (same).

Second, as the panel correctly recognized, the Government's preoccupation on the first half of Exception (C) which discussed "reports" ignores the second half's clear requirement of the release of "data":

> [R]eading the word "publication" to reference only the "formalized, prepared release of information" because the Tiahrt Rider contemplates the "publication" of "reports," Dissenting Op. at 698–99, is itself a misadventure in contextual analysis. Such a reading ignores that the Tiahrt Rider also permits publication of "statistical aggregate data."

CIR v. DOJ, 982 F.3d at 689. Congress expressly distinguished between "reports" and "data" in drafting Exception (C), so the two are manifestly different—showing a clear requirement for disclosure of both distinct types of information. *See* 125 Stat. at 610.

CONCLUSION

The Government admits to "regrettabl[y]" forfeiting its main argument. Even so, the panel questioned the Government at oral argument on entrenchment, rejected the argument, and laid out its reasoning over twenty pages in favor of disclosure. *CIR v. DOJ*, 982 F.3d at 674–93. The Second Circuit's later disagreement should have no bearing on this well-considered opinion. For these reasons, the Government's petition for rehearing and rehearing *en banc* should be denied.

Dated: May 3, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because it contains 4089 words (excluding exempted matter) according to the count of Microsoft Word and has been prepared in 14-point Times New Roman, a proportionally spaced font.

Dated: May 3, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 3, 2021.

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.

Dated: May 3, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 18-17356

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