UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUN OWNERS OF AMERICA, INC. and GUN OWNERS FOUNDATION, Plaintiffs, v. **BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,** Defendant.	**Civil Action No. 21-2919 (ABJ)**

PLAINTIFFS' MOTION TO LIFT PROTECTIVE ORDER

Plaintiffs Gun Owners of America, Inc. and Gun Owners Foundation ("Plaintiffs"), by and through counsel, hereby file this Motion to Lift the Court's Protective Order initially entered by the Court on September 18, 2023 and since then continued "temporar[ily]" by the Court's order of October 30, 2023.[1]

This case concerns a Freedom of Information Act ("FOIA") request Plaintiffs submitted nearly four years ago to Defendant Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF" or "Defendant"), seeking records about a secret government surveillance program which unlawfully and unconstitutionally monitors and records the firearm purchases of American citizens who are perfectly eligible to purchase and possess firearms. As part of its document production in this case, Defendant negligently left certain information unredacted, and then demanded Plaintiffs claw back (return) the information that had been voluntarily transmitted to them.

[1] Pursuant to LCvR 7(m), counsel for Plaintiffs conferred with counsel for Defendant, who opposes this Motion.

Relying on the asserted "implied power" of courts "to issue a temporary protective order for inadvertently produced FOIA materials," this Court granted Defendant's requests, issuing first an order to "sequester" (Sept. 18, 2023 Minute Order) and subsequently a protective order (ECF #30) that "plaintiffs and their counsel" "shall sequester" and "shall not disseminate, disclose, or use for any purpose those records or the content of those records." *Id.* at 4.

Thus, for the past 17 months, Plaintiffs – members of the press – have been prohibited from printing the news, while Plaintiffs' lawyers have been prohibited from communicating with their clients, advocating for their clients' interests, or even accessing portions of their own attorney work product. Further, this Court has denied Plaintiffs' repeated requests (ECF ##25, 28, 33) to consider the basis of its order, declining to hold a closed hearing or to consider the document production *in camera*. Thus, this Court has prohibited Plaintiffs and their lawyers from speaking and printing the news without knowing the content of the speech or news being prohibited. Meanwhile, this Court has not resolved Defendant's December 2023 Motion for Summary Judgment or otherwise issued a final judgment in the case which Plaintiffs would be able to appeal.[2]

Then, on February 11, 2025, Defendant filed a Notice of Supplemental Authority (ECF #35), notifying the Court of a recent decision of the U.S. Court of Appeals for the D.C. Circuit.

[2] Plaintiffs do not repeat in this motion the lengthy procedural history of this case, or their statutory and constitutional arguments explaining why courts do not have the implied power to "claw back" inadvertent FOIA productions, or prevent members of the press from reporting on the substance of government misconduct. As Plaintiffs explained, the NICS Monitoring Program underlying Plaintiffs' FOIA request violates several provisions of federal law requiring the destruction of NICS records within 24 hours of approval, and prohibiting the creation of federal registries of gun owners. *See* ECF #28 at 11–14 (citing 118 Stat. at 95; 18 U.S.C. §§ 922(t)(2)(C), 926(a); 34 U.S.C. § 40901). Moreover, the protective order Defendant seeks is a presumptively unconstitutional prior restraint on quintessential speech and press activity protected under the First Amendment. ECF #28 at 18–22 (collecting cases). And finally, even prior to the D.C. Circuit's recent repudiation of courts' authority to bar dissemination or use of inadvertently produced FOIA materials, Plaintiffs identified a number of courts which questioned the existence of such authority in the first place. *Id.* at 4–8 (collecting cases).

That decision is directly on point to the facts of this case, and clearly explains that this Court lacks authority to enter a protective order like the one currently in place. Nevertheless, rather than concede defeat, Defendant doubles down, asking this Court to continue its order against Plaintiffs and their counsel while further briefing occurs. ECF #35 at 2. Because the D.C. Circuit's opinion governs and forecloses the protective order in place here, this Court should deny Defendant's Motion for Summary Judgment and lift its protective order.

ARGUMENT

Recently in *Human Rights Defense Center v. U.S. Park Police*, 2025 U.S. App. LEXIS 1586 (D.C. Cir. Jan. 24, 2025), a panel of the D.C. Circuit unanimously reversed a district court's "invoc[ation] off its inherent authority to manage judicial proceedings as justification to issue a clawback order for erroneously produced" FOIA records. *Id.* at *2. Specifically, the D.C. Circuit rejected the notion that a court has authority to "bar [Plaintiffs] from disclosing, disseminating, or making use of the accidentally produced" materials. *Id.* at *9. Notably, the reversed district court decision in large part formed the basis of this Court's order, and Defendant's case for a protective order. ECF #30 at 2; ECF #20 at 6 (citing *Hum. Rts. Def. Ctr. v. U.S. Park Police*, 2023 U.S. Dist. LEXIS 151815 (D.D.C. Aug. 29, 2023)).

But as the D.C. Circuit explained, a district court's creation of a "non-statutory remedy" for "inadvertent disclosures [is] not a valid exercise of inherent judicial authority" or necessary to "manage judicial proceedings." *Hum. Rts. Def. Ctr.*, 2025 U.S. App. LEXIS 1586, at *3. Rather, as the Court explained, "FOIA does not provide for the compelled return or destruction of inadvertently produced information," and there is no "'implied' or inherent judicial power to create a mechanism for doing so." *Id.* at *16. The Court continued, reiterating that "'inherent power 'is not to be indulged lightly, lest it excuse overreaching '[t]he judicial Power actually granted to

federal courts by Article III...." *Id.* at *17 (citation omitted). Finding "no support" for the notion that a plaintiff simply "fil[ing] suit in federal court to enforce" FOIA empowers a court "to limit the effects of" an agency's production error, the D.C. Circuit noted that such power "cannot be squared with the terms of FOIA and the structure of its disclosure process." *Id.* at *18, *19; *see also* at *20 (noting that such provision "could have been but was not included in FOIA").[3]

The D.C. Circuit's decision could not be more on point and directly controlling of the outcome of this case. But Defendant speculates otherwise. In an attempt to narrow the D.C. Circuit's repudiation of inherent "clawback" authority, Defendant points to the D.C. Circuit's expression of "no opinion" on information "subject to any independent legal prohibition on disclosure such as applies to *classified documents*...." ECF #35 at 2 (emphasis added) (quoting *Hum. Rts. Def. Ctr.*, 2025 U.S. App. LEXIS 1586, at *20-21). Defendant thus likens "information that is 'specifically exempted from disclosure by statute'" to *classified information* not at issue here. *Id.* Defendant's position fails for at least four reasons.

First, and most obviously, classified information is nothing like information which a statute provides merely may be withheld. Defendant has not invoked Exemption 1, nor has it claimed that disclosure or use of unredacted information "could harm national security" in any way. *N.Y. Times Co. v. DOD*, 2021 U.S. Dist. LEXIS 160910, at *8 (S.D.N.Y. Aug. 25, 2021). In contrast to classified information, which "remains classified notwithstanding 'any unauthorized disclosure of identical or similar information,'" *Hum. Rts. Def. Ctr.*, 2025 U.S. App. LEXIS 1586, at *21

[3] Although Plaintiffs have raised serious First Amendment questions about this Court's protective order (ECF ##22, 28, 33), the D.C. Circuit did not need to "reach that issue because our non-constitutional analysis is dispositive." *Hum. Rts. Def. Ctr.*, 2025 U.S. App. LEXIS 1586, at *21.

(citation omitted), statutorily exempted but inadvertently released material is not entitled to similar continued secrecy.[4]

Second, even to the extent that classified information, which is not at issue here, could be likened to "information specifically exempted from disclosure by statute," that does not support the sweeping protective order that is currently in place. Indeed, Exemption 3 redactions appear on only 38 of the 115 pages of Defendant's production at issue, and even then apply to only a *portion* of each of those pages. Defendant offers no colorable theory for its apparent desire to continue the protective order as to *all* the pages and *all* the redacted information.

Third, Defendant ignores the constitutional basis of the D.C. Circuit's decision. The D.C. Circuit held that a clawback order barring plaintiffs "from disclosing, disseminating, or making use of the accidentally produced" material "was not an exercise of Article III courts' well-established authority to manage judicial proceedings." *Hum. Rts. Def. Ctr.*, 2025 U.S. App. LEXIS 1586, at *9, *16. In so holding, the D.C. Circuit explained that a "court's invocation of an inherent power must … 'either be [1] documented by historical practice' or [2] 'supported by an irrefutable showing that the exercise of an undoubted authority would otherwise be set to naught.'" *Id.* at *17. As to the first prong, the D.C. Circuit noted the government's failure to show "any documented historical practice of permitting the government to claw back information it accidentally disclosed in a FOIA production" – a broad statement which applies here. *Id.* And as to the second prong, the D.C. Circuit held that a clawback order is "not necessary to enable the exercise of one of [the] 'undoubted authorit[ies]' … 'necessary to the exercise of all others.'" *Id.*

[4] Nevertheless, throughout this litigation, Plaintiffs have maintained that they have no interest in vast portions of the unredacted information that Defendant claims is contained in the production, including social security numbers, birth dates, personal information of ATF employees, confidential sources, file numbers and codes, etc. *See* ECF #33 at 22-24.

at *18. In other words, a clawback order "is of a different species" compared to such basic, implied necessities as "admit[ting] members to the bar, disciplin[ing] bar members, punish[ing] contempt of court," and so on. *Id.* Properly understood, the D.C. Circuit's entire decision was grounded in construing what Article III permits. *See id.* at *16. The Court's "non-constitutional analysis" therefore referred to its decision not to decide a *First Amendment* question. *Id.* at *21.

And fourth, even if the D.C. Circuit's decision did not directly foreclose this Court's protective order (it does), the panel's decision expressly did not address the significant constitutional hurdles this Court still would need to address to maintain its order. Indeed, because its inherent-authority analysis "was dispositive," the D.C. Circuit did not analyze whether "the First Amendment prevents the district court from barring the use or dissemination of FOIA-exempt material a FOIA requester lawfully obtained due to the government's mistake." *Id.* at *21. But had it done so, all authorities would have pointed to a finding of unconstitutionality. Indeed, Judge Moss has described "ordering a news organization and a journalist to return materials to a government agency, which they obtained through no unlawful or improper action," would be an "extraordinary step." *100Reporters v. U.S. Dep't of State*, 602 F. Supp. 3d 41, 84 (D.D.C. 2022) (refusing to take such a step). And, at most, "[p]rior restraints are permitted 'only in exceptional cases,'" none of which reach the mere disclosure of unredacted, *non-classified* FOIA materials. *Bd. of Trs. of Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472, 474 (D.D.C. 1991); *see also* ECF #28 at 19 (collecting cases). Defendant would be hard-pressed to identify any historical example of a court *preventing the media from reporting the news*.

CONCLUSION

The D.C. Circuit has squarely rejected the notion that a court holds the "inherent authority" to impose limitations on the use, dissemination, or reporting of inadvertently disclosed FOIA

materials, and this Court's "temporary" invocation of such authority has lasted for 17 months. Plaintiffs respectfully request that the protective order be lifted, and that Defendant's Motion for Summary Judgment be denied.

Respectfully submitted,

March 12, 2025

/s/ Stephen D. Stamboulieh
Stephen D. Stamboulieh
Stamboulieh Law, PLLC
P.O. Box 428
Olive Branch, MS 38654
(601) 852-3440
stephen@sdslaw.us
DC District Court Bar# MS0009

Robert J. Olson
(D.C. Bar No. 1029318)
William J. Olson, P.C.
370 Maple Avenue West, Suite 4
Vienna, VA 22180-5615
703-356-5070 (telephone)
703-356-5085 (fax)
rob@wjopc.com (e-mail)

George L. Lyon, Jr. (D.C. Bar No. 388678)
Bergstrom Attorneys
4000 Legato Road, Suite 1100
Fairfax, VA 22033
202-669-0442, fax 202-483-9267
gll@bergstromattorneys.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Stephen D. Stamboulieh, hereby certify that on March 12, 2025, I have caused the foregoing document or pleading to be filed with this Court's CM/ECF system which generated a notice and delivered the document to all counsel of record.

By: Stephen D. Stamboulieh
Stephen D. Stamboulieh

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GUN OWNERS OF AMERICA, INC., et al., Plaintiffs, v. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, Defendant.	)	Civil Action No. 21-2919 (ABJ)

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion to Lift Protective Order, and the entire record herein, it is hereby:

ORDERED that Plaintiffs' Motion is GRANTED.

SO ORDERED:

Dated: _____

_____
AMY BERMAN JACKSON
United States District Judge