No. 09-1163

IN THE
Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF PUBLIC CITIZEN, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, THE ELECTRONIC FRONTIER FOUNDATION, THE NATIONAL SECURITY ARCHIVE, AND OPENTHEGOVERNMENT.ORG AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

FOIA Exemption 2 applies to records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Does this exemption cover records that do not relate solely to internal employment matters if they are "predominantly internal" and their disclosure "would present a risk of circumvention of agency regulation"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, LAWS, AND LEGISLATIVE HISTORY

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations that support government transparency, rely on the Freedom of Information Act (FOIA) to receive records necessary for their work, and have significant expertise in how FOIA works in practice. *Amici* have noticed that, in recent years, agencies have increasingly relied on FOIA Exemption 2 to withhold records that are not related to personnel issues. *Amici* are concerned that the court of appeals' broad construction of Exemption 2 will increase the amount of information the government withholds under FOIA, undermining government transparency and the benefits to democracy that accompany it. *Amici* also fear that the court of appeals' decision will encourage agencies and lower courts to broadly construe other FOIA exemptions, hindering citizens' ability to hold their government accountable. *Amici* are more fully described in the attached appendix.

BACKGROUND

This FOIA case concerns requests for data showing the distances at which explosions at Naval Magazine Indian Island in Puget Sound, Washington, would be felt. Glen Milner, a resident of the region, filed the requests to determine whether he and his neighbors would be at risk in the event of such an explosion. Although the withheld

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[1]No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* made any monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief, and letters of consent are being submitted concurrently.

records contain mathematical formulas and arc maps, not personnel rules or employee practices, the Ninth Circuit concluded that they were exempt under FOIA Exemption 2, which applies to records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2).

The Ninth Circuit held that Exemption 2 encompasses two entirely distinct exceptions to FOIA's disclosure mandate: a "Low 2" Exemption that applies to the mundane employment matters that are described in the statutory text and a "High 2" Exemption that applies when a "personnel document" is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." Pet. App. 32, 39-40. According to the Ninth Circuit, the High 2 Exemption was derived from *Department of Air Force v. Rose*, 425 U.S. 352 (1976), in which this Court left open the question whether Exemption 2 applies "where disclosure may risk circumvention of agency regulation." Pet. App. 32 (quoting *Rose*, 425 U.S. at 369). The Ninth Circuit also indicated that its particular formulation of the High 2 test was adopted from *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074-75 (D.C. Cir. 1981) (en banc), in which, in considering whether Exemption 2 applied to portions of an ATF manual, the D.C. Circuit held that the exemption applies to "predominantly internal" records whose release would "significantly risk[] circumvention of agency regulations or statutes." Pet. App. 34, 39.

The Ninth Circuit concluded that the withheld records were sufficiently personnel-related because they were referenced in an agency manual as an item that personnel

should consult and because they were used by personnel in doing the jobs that were the subject of the manual. *Id.* at 40. The Ninth Circuit also concluded that the data were "predominantly internal"—and thus met the statutory requirement of being "solely" internal—"regardless of prior limited disclosure" outside of the Navy. *Id.* at 41. Finally, the Ninth Circuit determined that release of the data would risk circumvention of the law by protestors or terrorists who wanted to interfere with Navy activities. *Id.* at 45. Accordingly, it held the records exempt under the High 2 Exemption.

Judge William Fletcher dissented. Although he agreed that the Ninth Circuit should adopt *Crooker*'s High 2 test, he "strongly disagree[d]" with the majority's application of the "circumvention of agency regulation" prong of that test. Pet. App. 55. "Circumvention of agency regulation has a precise, and restricted, meaning," he explained. *Id.* "[U]nder *Crooker*, agency documents embodying 'personnel rules and practices' are exempt under Exemption 2 only when they are 'procedural manuals and guidelines used by the agency in discharging its regulatory function,' and only when their disclosure 'to the subjects of regulation' might result in the 'circumvention of agency regulations.'" *Id.* at 56 (quoting *Crooker*, 670 F.2d at 1066 (quoting *Rose*, 425 U.S. at 364)). Because the withheld records were not procedural manuals or guidelines whose disclosure would result in circumvention of agency regulations by the subjects of regulation, Judge Fletcher would have held that they were not exempt from disclosure. *Id.* at 60.

SUMMARY OF ARGUMENT

FOIA Exemption 2 exempts from mandatory disclosure agency records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Below, however, the Ninth Circuit held that a "High 2" exemption applied to materials that are not solely "internal," "personnel"-related, or related to "rules and practices."

The court of appeals' interpretation of Exemption 2 cannot be reconciled with the exemption's text, legislative history, structure, or purpose. It flies in the face of this Court's direction that FOIA exemptions be narrowly construed. And it risks turning the exemption into a catch-all used whenever an agency deems records "sensitive" but cannot find an applicable exemption under which to withhold them. This Court should make clear that there is no High 2 Exemption, and that Exemption 2 is limited to records pertaining solely to "routine" employment matters "with merely internal significance." *Rose*, 425 U.S. at 369.

ARGUMENT

FOIA was enacted in 1966 to amend the public disclosure section of the Administrative Procedure Act (APA), which had been "generally recognized as falling far short of its disclosure goals." *EPA v. Mink*, 410 U.S. 73, 79 (1973). To "permit access to official information long shielded unnecessarily from public view," FOIA replaced the "vague phrases" in the APA with nine specific exemptions. *Id.* at 79, 80. Congress explicitly made the exemptions exclusive, providing that nothing in the Act should be read to "authorize withholding of information or

limit the availability of records to the public, except as specifically stated." 5 U.S.C. § 552(d).

FOIA's nine exemptions were "plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Mink*, 410 U.S. at 79. Each FOIA exemption applies to a defined category of records. FOIA's exemptions are meant to be "narrowly construed," and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

The specific category of records covered by Exemption 2 is limited to records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). This language stemmed from "congressional dissatisfaction" with the sweeping language of the exemption in the public disclosure section of the APA for "'any matter relating solely to the internal management of an agency.'" *Rose*, 425 U.S. at 362 (quoting 5 U.S.C. § 1002 (1964)). As this Court has explained, "the wording of Exemption 2, 'internal personnel rules and practices,' was to have a narrower reach than the Administrative Procedure Act's exemption for 'internal management,' matters." *Id.*

"[T]he general thrust of [Exemption 2] is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." *Id.* at 369-70. But the decision below adopts a far broader standard, purporting to apply the exemption to "predominantly internal" materials whose release "may risk circumvention of the law," under a so-called "High 2"

Exemption. Pet. App. 47. Traditional tools of statutory construction, however, demonstrate that there is no High 2 Exemption. And even if there were, it would be limited to procedural manuals and guidelines the release of which would allow the subjects of regulation to circumvent that regulation.

I. There is No High 2 Exemption.

FOIA's plain language, legislative history, structure, and purpose all demonstrate that there is no High 2 Exemption. Exemption 2 covers only internal employment matters in which it can be presumed that the public has no interest.

1. Exemption 2 exempts matters "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). These words do not encompass "predominantly internal records" whose disclosure "would present a risk of circumvention of agency regulation." Pet. App. 34.

First, the "predominant internality" standard finds no support in the text, which states that records must relate "solely," not "predominantly," to internal personnel rules and practices to be withheld under Exemption 2. 5 U.S.C. § 552(b)(2). In adopting the "predominantly internal" standard, the Ninth Circuit relied on *Crooker*, in which the D.C. Circuit concluded that because "'relating' is potentially all-encompassing while 'solely' is potentially all-excluding" and it was "unlikely that Congress intended either extreme," "solely" should be "given the construction" of "predominantly." 670 F.2d at 1056 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1150-51 (D.C. Cir. 1975) (Leventhal, J., concurring)). But there is no

contradiction between the words "related" and "solely." Rather, "solely" modifies "related," explaining what the withheld matters must relate to in order to be exempt: They must relate solely, i.e., exclusively, to internal personnel rules and procedures. In deciding that records need only to be "predominantly" internal, the D.C. Circuit did not "construe" the word "solely"; it stripped the word of its plain meaning. Courts, however, "are not free to rewrite the statute that Congress has enacted." *Dodd v. United States*, 545 U.S. 353, 359 (2005). They "must give words their 'ordinary or natural' meaning." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (citation omitted). And "solely" means exclusively, not predominantly.

Likewise, the "risks circumvention of agency regulation" standard is nowhere to be found in the text of Exemption 2. Rather, the exemption refers to "internal personnel rules and practices." 5 U.S.C. § 552(b)(2). The word "personnel" connotes relationship to "the selection, placement, and training of employees and . . . the formulation of policies, procedures, and relations with employees or their representatives." *Websters Third New Int'l Dictionary* 1687 (1965). Thus, internal personnel rules and practices "would normally connote matters relating to pay, pensions, vacations, hours of work, lunch hours, parking, etc." *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc), *overruled by Crooker*, 670 F.2d 1051. "The statute's emphasis on personnel rules and practices suggests concern with conditions of employment and the like," *Hawkes v. IRS*, 467 F.2d 787, 797 (6th Cir. 1972), not with risk of circumvention of the law.

In its brief in opposition to the petition for certiorari (at 16-17), Respondent Department of the Navy contended that "the limitations in Exemption 2" come not from the words "personnel rules and practices" but "instead from other words and phrases in the statute, such as 'internal' and '[r]elated solely to'" (which, again, it interprets to require matters to be only "predominantly" internal, not "solely" internal). In other words, the Navy claimed that four of the eight words in the exemption—"personnel rules and practices"—are not meant to be limiting, and one—"solely"—should not be given its normal meaning. However, courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Based on its text, Exemption 2 should be limited to records relating solely to rules and practices concerning wholly-internal employment issues.

2. Instead of being grounded in Exemption 2's plain language, the High 2 Exemption purports to be derived from legislative history. Where the language of a statute is clear, however, "there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997). In any event, even the legislative history of FOIA counsels against interpreting Exemption 2 to include a High 2 Exemption.

Advocates of the High 2 Exemption rely on the 1966 House Report on FOIA, which states:

> Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or

> examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.

H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Courts that have adopted a High 2 Exemption have relied on the House Report's reference to "manuals of procedure for Government investigators or examiners." *See, e.g.*, *Crooker*, 670 F.2d at 1060; *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980).

Even if the plain language were open to interpretation, however, the House Report cannot be read as an interpretation of Exemption 2's text. *See* 1 Kenneth Culp Davis, Administrative Law Treatise § 5:30 (2d ed. 1978) ("[T]he House committee tried to change the meaning of the legislative language."). The Report states that the exemption covers records nowhere mentioned in the text (operating rules, guidelines, and manuals for investigators), while excluding other records (those relating to employee relations, working conditions, and routine administrative procedures) that fit within the statutory language.

In contrast to the House Report, the Senate Report indicates that the exemption applies only to trivial rules and practices relating to personnel issues. That report states:

> Exemption No. 2 relates only to the personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of

> parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965). In other words, the Senate and House Reports disagree on whether the exemption would apply to materials concerning employee relations and working conditions, or whether it encompasses procedural manuals, which have become the quintessential High 2 material. *See, e.g.*, *Rose*, 425 U.S. at 363 ("The House and Senate Reports on the bill finally enacted differ upon the scope of the narrowed exemption."); *Hawkes*, 467 F.2d at 796 ("The disagreement between the houses is total.").[2] This disagreement makes resort to legislative history to expand the statute beyond its plain language particularly inappropriate.

Moreover, in *Rose*, this Court's only previous case concerning Exemption 2, the Court relied on the Senate Report's interpretation of Exemption 2, rather than on the

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[2]In *Crooker*, the D.C. Circuit stated that the House Report's statement that Exemption 2 applies to manuals of procedure "is uncontroverted by the Senate Report" and thus that the reports do not disagree about whether such manuals are exempt under Exemption 2. 670 F.2d at 1061 & n.27. But the reason the Senate provided examples was to explain the type of records covered by the exemption. Accordingly, the report indicates that types of records that are *not* similar to use of parking facilities, regulation of lunch hours, and the like—such as manuals of procedure—are *not* covered by the exemption. Indeed, the D.C. Circuit had earlier stated that the reports were "[d]iametrically opposite," *Jordan*, 591 F.2d at 767, and that the "Senate Report interprets Exemption 2 as exempting only trivial 'housekeeping' matters in which it can be presumed the public lacks any substantial interest." *Id.*

House Report's. 425 U.S. at 367. The Court quoted extensively from *Vaughn v. Rosen*, 523 F.3d at 1142, in which Judge Wilkey explained that the D.C. Circuit was relying on the Senate Report for two primary reasons. First, Judge Wilkey wrote, "'Congress intended that Exemption 2 be interpreted narrowly and specifically,'" yet "'the House Report carries the potential of exempting a wide swath of information.'" *Rose,* 425 U.S. at 365 (quoting *Vaughn*, 523 F.3d at 1142). And second, the Senate Report was before both houses of Congress when they passed FOIA, but the House Report post-dated the Senate's vote on the bill and thus was only before the House. As Judge Wilkey explained, by changing the interpretation of Exemption 2 without amending the text, "'the House denied both the Senate Committee and the entire Senate an opportunity to object (or concur) to the interpretation written into the House Report (or voiced in floor colloquy).'" *Id.* at 366 (quoting *Vaughn*, 523 F.3d at 1142-43).[3]

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[3]Judge Wilkey further explained that there was "evidence to indicate that the House Committee considering the bill felt under some pressure to expand some of the exemptions," including Exemption 2, "to secure the bill against a threatened veto." *Vaughn*, 523 F.2d at 1142. "Since the House sponsors were unwilling or unable to narrow the exemptions on the House floor by amending the Senate Bill, they attempted instead to achieve their result indirectly through the Committee Report." *Id.*; *see* Freedom of Information, Executive Privilege, Secrecy in Government: Hearings on S. 1142 et al. Before Subcomms. on Admin. Practice & Procedure and Separation of Powers of the S. Comm. on the Judiciary, and Before Subcomm. on Intergovernmental Relations of the S. Comm. on Gov't Operations,

(continued...)

"For the reasons stated by Judge Wilkey," (and because it thought the House Report's focus was on circumvention of agency regulation, which was not an issue in *Rose*), the Court chose to rely on the Senate Report. 425 U.S. at 366-67. For those same reasons, and to provide a consistent approach to Exemption 2, the Court should consider the Senate Report the better interpretation of Exemption 2 here as well.

Other legislative history also supports a narrow construction of Exemption 2. In *Crooker*, the D.C. Circuit

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[3](...continued)
93d Cong. 122 (1974) (statement of Benny Kass, Attorney at Law) (statement of former counsel to House committee explaining that the reason "the House report is different" was because "we tried to compromise a number of the specific objections into the House report" under "an implied threat" of veto); 1 Kenneth Culp Davis, Administrative Law Treatise § 5:3 (2d ed. 1978) ("After the Senate committee had made its report and after the Senate had passed the bill, the House committee yielded to pressures to restrict the disclosure requirements, but instead of changing the bill it wrote the restrictions into the committee report, often contradicting the words of the bill and sometimes contradicting both those words and the Senate report."); *see also Hawkes*, 467 F.2d at 797 ("[T]he Senate interpretation was before the House when it voted to approve subsection (b)(2) in exactly the same form as had passed the Senate earlier. To adopt the statutory interpretation put forward in the House Report would be to allow a single house of the Congress to effectively alter the meaning placed on proposed legislation by the other house without altering a word of the text."); *cf. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 570 (2005) ("One need not subscribe to the wholesale condemnation of legislative history to refuse to give any effect to such a deliberate effort to amend a statute through a committee report.").

relied on an exchange between Representative John E. Moss, the principal sponsor of FOIA, and Assistant Attorney General Norbert Schlei to state that "the House hearings unequivocally reveal that Exemption 2 was intended to cover investigatory materials." 670 F.2d at 1059. However, although that exchange shows that Representative Moss *wanted* investigatory materials covered, it does not show that he believed that they, in fact, *were* covered by Exemption 2. When Representative Moss expressed his intent that Exemption 2 cover investigatory materials, Mr. Schlei explained that, to do so, "the word 'personnel' should be stricken" because it connotes "employee relations, employment management rules and practices of an agency." Federal Public Records Law (Part 1): Hearings Before Subcomm. of the Comm. on Gov't Operations on H.R. 5012 et al., 89th Cong. 29-30 (1965). Representative Moss responded that "[w]e will hope to seek a way of doing the job" without exempting too much in the process. *Id.* Thus, the full exchange demonstrates that, in the end, Representative Moss agreed that the exemption would need to be amended if he wanted it to cover investigative materials. No such amendment was ever made.

Other testimony at congressional hearings also expressed the opinion that certain procedural manuals *should* be exempt, but that they were not in fact covered by the language of Exemption 2. *See Crooker*, 670 F.2d at 1102-04 (Wilkey, J., dissenting) (quoting testimony). That members of Congress or government agency representatives expressed a desire for investigative manuals to be exempt from disclosure does not demonstrate that Congress thought it was enacting

language that would, in fact, exempt such records from release. To the contrary, the legislative history indicates that Representative Moss, at least, probably knew that Exemption 2 would not cover such records.[4]

3. The structure of FOIA's exemptions also demonstrates that Exemption 2 should be interpreted according to its plain language. Agencies invoke national security and law enforcement when they claim the High 2 Exemption, but FOIA *already has* exemptions intended to address national security and law-enforcement concerns: Exemption 1 applies to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and that "are in fact properly classified

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[4]*Crooker* also stated that "supporters of [FOIA] were not challenged in their claim that government investigatory manuals were protected under Exemption 2," 670 F.2d at 1061, but it cited only one statement by a member of Congress making such a claim —a statement by Representative Gallagher that "[i]ncome tax auditors' manual would be protected under No. 2." *Id.* (quoting 112 Cong. Rec. 13641, 13659 (1966) (remarks of Rep. Gallagher)). The other statements referred to by *Crooker* were simply general statements that FOIA involved a balance between the public's right to know and the government's need to keep certain information confidential. *See, e.g.*, *id.* (quoting 112 Cong. Rec. at 13655 (remarks of Rep. Dole)) (quoting Rep. Dole stating that "the bill takes into consideration the right to know of every citizen while affording the safeguards necessary to the effective functioning of Government"). That Congress believed FOIA, overall, involved a balance of different concerns does not shed light on what concerns Exemption 2 was intended to address.

pursuant to such Executive order." 5 U.S.C. § 552(b)(1). And Exemption 7 applies to "records or information compiled for law enforcement purposes" to the extent they meet one of six criteria, such as if they "could reasonably be expected to interfere with enforcement proceedings," or "would deprive a person of a right to a fair trial or an impartial adjudication." *Id.* § 552(b)(7).

Below, the court of appeals relied on Exemptions 1 and 7 to adopt a broad interpretation of Exemption 2, noting that Exemptions 1 and 7 cover a lot of predominantly internal information that could be used to circumvent the law, and concluding that Congress, therefore, must have intended for *all* internal information that could be used to circumvent the law to be exempt. "It would be incongruent if FOIA protected sensitive information when it is contained in a classified or law enforcement document," the Ninth Circuit stated, "but not when it is contained in a document developed predominantly for use by agency personnel." Pet. App. 36. But instead of indicating that Congress intended all predominantly internal records whose release could risk circumvention of the law to be exempt, Congress's decision to address only a subset of such records indicates just the contrary: It wanted only the precise records it specified to be exempt from disclosure.

Rather than furthering the goals of Exemptions 1 and 7, a broad construction of Exemption 2 undermines those exemptions by allowing agencies to circumvent their limits. Congress has amended both Exemptions 1 and 7 over the years to prevent abuse. Exemption 1, for example, originally applied to all records that were "specifically required by Executive order to be kept secret in the interests of the national defense or foreign policy," but was

amended in 1974 to apply only if the records were properly classified. *See* Freedom of Information Act Amendments, Pub. L. No. 93-502, § 2(A), 88 Stat. 1561 (1974). It would undermine this careful limitation on the national security exemption if, rather than having to show that a record met the strict criteria for classification, an agency only had to demonstrate that the record was mostly internal and might somehow be of use to someone who wanted to harm national security. As the dissent below explained, "[t]he majority's determination to expand Exemption 2 to protect information that the Navy has not seen fit to classify distorts Congress's careful balance." Pet. App. 64. Similarly, it would evade the limitations on Exemption 7 if agencies could withhold records for law enforcement reasons just by showing they were mostly internal and somehow risked aiding someone who wanted to break a law.

Exemption 7(E), in particular, indicates that there is no High 2 exemption. That exemption applies to law enforcement records whose release "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Below, the Ninth Circuit noted that the Senate committee report for S. 774 in the 98th Congress, part of which was passed by the 99th Congress as the Freedom of Information Reform Act, Pub. L. No. 99-570, § 1802, 100 Stat. 3207 (1986), which enacted Exemption 7(E)'s current language, stated that the exemption was "guided" by *Crooker*. S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983) (quoted by Pet. App. 27). The Ninth Circuit concluded, therefore, that "Congress has impliedly

approved of *Crooker*'s approach." Pet. App. 37. But if Congress had agreed with *Crooker*'s interpretation of Exemption 2, there would have been no need for Exemption 7(E). "Guidelines for law enforcement investigations or prosecutions" whose "disclosure could reasonably be expected to risk circumvention of the law" would *already* have been exempt under Exemption 2. And if such records were exempt under Exemption 2, then the language exempting those records in Exemption 7(E) would be superfluous. It is "a cardinal principle of statutory construction," however, "that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted).

Thus, rather than indicating that Congress approved of *Crooker*'s interpretation of Exemption 2, the 1986 amendments demonstrate that Congress believed that a subset of the records that would be encompassed in a High 2 Exemption should be exempt, but were not already. And it chose to exempt those records through Exemption 7(E) instead of Exemption 2. Indeed, although the Senate Committee Report cited by the decision below also proposed amending Exemption 2 to specifically cover "manuals and instructions to investigatory, inspectors, auditors, or negotiators, to the extent that disclosure of such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations," S. Rep. No. 221, at 44-45, Congress did not do so. Given that Congress specified in Exemption 7 which mostly internal records whose release would risk

circumvention of the law it wants to be exempt, this Court should not interpret Exemption 2 to cover all such records.

4. Finally, a broad interpretation of Exemption 2 undermines the basic thrust of FOIA, which is to promote "'a general philosophy of full agency disclosure.'" *Rose*, 425 U.S. at 360 (quoting S. Rep. No. 813, at 3). Congress carefully structured and limited FOIA's exemptions so as not to "obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id.* at 361. The High 2 Exemption, however, is nebulous and potentially far-reaching, requiring only that records be mostly internal and present "a risk" of being helpful to someone intent on evading a regulation or law.

Because of the clarity of FOIA's purpose, this Court has emphasized that FOIA's exemptions are to be narrowly construed. *See, e.g.*, *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *Rose*, 425 U.S. at 361. Here, Exemption 2 should be given its narrow—and natural—interpretation. The Court should hold that Exemption 2 only applies to wholly-internal, employment-related matters.

II. If There Were a High 2 Exemption, It Would Be Limited to Procedural Manuals and Guidelines Whose Release Would Allow the Subjects of Regulation to Evade That Regulation.

Even if FOIA included a High 2 Exemption that covered some records whose release risked circumvention of agency regulation, it would not cover the records at issue here. At most, High 2 would be limited to procedural

manuals and guidelines whose release would allow the subjects of regulation to evade that regulation.

To begin with, to be exempt under Exemption 2, records must be "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). If this language applies to any records besides those relating to personnel issues themselves (i.e., if there is a High 2 Exemption at all), it applies only to records instructing personnel on rules and practices that govern them. Thus, in *Crooker*, for example, the D.C. Circuit held that the portions of the ATF manual at issue were within the statutory language because they referred "to investigative techniques, in the form of prescribed rules and practices for agency personnel." *Crooker*, 670 F.2d at 1073.

Although the Ninth Circuit below paid lip service to the statutory language, it interpreted that language in a way that would cover all agency records. According to the Ninth Circuit, the withheld records are within Exemption 2's language because they were *referred to* in a manual for personnel as items personnel should consult and therefore were "one part of the internal policies and procedures that [Navy] personnel are bound to follow." Pet. App. 40. "The [withheld] data is indeed an integral part of the Navy's personnel practices," the court stated, noting that personnel used the data in performing the duties that were the subject of the personnel manual. *Id.* Exemption 2, however, does not apply to all records relied on, used, or referred to by personnel in figuring out how to do their jobs. That an employee uses a record, or is required to consult a record, does not make that record "related solely to . . . internal personnel rules and practices." 5 U.S.C. § 552(b)(2). At best, that a manual intended for agency

employees refers to the records demonstrates that they bear a tangential, attenuated relationship to personnel rules and practices. The statute, however, requires that they relate *solely* to such rules and practices. In the High 2 context (if it exists at all), this requirement must mean that the records establish the rules and practices themselves.

Moreover, if the High 2 Exemption exists, it is limited to records whose disclosure risks "circumvention of agency regulation." *Rose*, 425 U.S. at 369. Although the Ninth Circuit stated the requirement that records risk circumvention of regulation to be exempt, it did not apply that standard. To "circumvent" is to "manage to get around especially by ingenuity or stratagem." *Merriam-Webster's Collegiate Dictionary* 225 (11th ed. 2009). In other words, if it exists, the High 2 Exemption is limited to records that would aid someone in evading the law. *See Crooker*, 670 F.2d at 1975 (using "circumvent" and "evade" interchangeably). Here, however, the requested data would not help anyone to "get around" the law.

The legislative history confirms that, if it exists, the High 2 Exemption is far more limited than the Ninth Circuit's application of it. The legislative history relied on by courts that adopt a High 2 Exemption shows only some congressional concern about disclosing investigative manuals that would allow the subjects of investigation to avoid detection. The House Report, for example, demonstrates only an intent for the exemption to cover "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners." H.R. Rep. No. 1497, at 10. Likewise, the exchange between Representative Moss and Assistant Attorney General

Schlei on which *Crooker* relied shows only that Representative Moss wanted to exempt "manuals of procedure that are handed to an examiner—a bank examiner, or a savings and loan examiner, or the guidelines given to an FBI agent." Federal Public Records Law Hearings, at 29. And the one statement in congressional debate cited by *Crooker* as indicating that Exemption 2 covered more than employment-related issues referred specifically to "income tax auditors' manual[s]." 112 Cong. Rec. at 13659.

Similarly, although, as the Ninth Circuit noted, *Rose* left open the question whether Exemption 2 could apply to *some* records "where disclosure may risk circumvention of agency regulation," *Rose*, 425 U.S. at 369, *Rose* did not suggest that the exemption could apply to *all* such records. *Rose* simply noted that although most courts that considered the differences between the House and Senate Reports believed that the Senate Report was a better indicator of congressional intent, a few had relied on the House Report, but "only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." *Id.* at 364. Because the records at issue in *Rose* did not risk circumvention of agency regulation, *Rose* chose not to "consider in this case the applicability of Exemption 2 in such circumstances." *Id.* Thus, *Rose* left open the possibility that Exemption 2 might apply "only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural

manuals and guidelines used by the agency in discharging its regulatory function." *Id.*[5]

In line with the narrow possibility held out by the Court in *Rose*, *Crooker*, although holding (incorrectly) that "predominantly internal" materials whose "disclosure significantly risks circumvention of agency regulations or statutes" were exempt from disclosure, 670 F.2d at 1074, focused its analysis on investigative manuals whose release would allow people to evade detection. For example, in summarizing the legislative history, *Crooker* stated that the House history showed "that Exemption 2 was intended to shield internal instructions to law enforcement agents from mandatory disclosure." *Id.* at 1065. In its discussion of FOIA's structure, it stated that other parts of FOIA "reinforce[d] the conclusion that Congress was aware of the need to protect investigative techniques from disclosure." *Id.* at 1062. And in talking about case law from other circuits, Crooker divided the circuits based on how they exempted "law enforcement investigatory manuals." *Id.* at 1071.

Here, the Ninth Circuit's interpretation of the High 2 Exemption is far broader than any contemplated by FOIA's legislative history, *Crooker*, or *Rose.* The development of the High 2 Exemption has been like a game of telephone, with the desire to protect a small

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[5]In its brief in opposition (at 22), the Department of the Navy contended that "there is no textual basis" for limiting the "circumvention requirement" to the subjects of regulation. But given that there is no textual basis for the "circumvention requirement" at all, one cannot expect the limits on that fabricated requirement to be spelled out in the text.

category of records (investigative manuals whose release would risk evasion of the law) leading to the development of a test (whether the records are predominantly internal and would significantly risk circumvention of agency regulation) that courts have then used, out of context, to exempt records that bear no relation to the investigative manuals the test was developed to cover or, for that matter, to the text, legislative history, structure, or purpose of FOIA. If this Court holds that there is a High 2 Exemption, the exemption should be limited to instances in which withholding is "necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." *Rose*, 425 U.S. at 364.

III. The Court of Appeals' Construction of Exemption 2 Undermines FOIA's Structure and Threatens Government Transparency.

The decision below has broad implications for government transparency. Under FOIA, it is not the role of either agencies or the courts to determine which records should be exempt from disclosure. Congress has already so determined. Yet the decision below threatens to turn Exemption 2 into a catch-all for information that does not fall within one of FOIA's exemptions, but that agencies or courts think Congress should have exempted.

Indeed, one of the explanations given by the Ninth Circuit for adopting its broad interpretation of Exemption 2 was that it wanted the exemption to cover records that judges thought should be covered based on their "intuitive understanding of congressional intent," but that would not

fit within a narrower construction. Pet. App. 38-39. According to the court of appeals, a narrower construction of Exemption 2 caused "district courts to strain the logical limits of 'law enforcement.'" *Id.* at 39. "They regularly deny requests for disclosure of all kinds of internal documents, including those related to the military and national security, even if unrelated to investigations or prosecutions." *Id.* But the answer to district courts "strain[ing]" to apply a test to records to which it is inapplicable should not be to change the test to meet the judge's intuition; it should be to encourage judges to apply the test appropriately and reverse them when they misapply it.

Government agencies increasingly have turned to Exemption 2 to withhold information that they deem sensitive but that does not fall into any of the other exemptions. A memo circulated to the heads of executive departments and agencies by then-White House Chief of Staff Andrew Card on March 19, 2002, specifically mentioned Exemption 2 in encouraging agencies to give full consideration to all FOIA exemptions when processing FOIA requests containing "sensitive but unclassified information." *See* Mem. from Laura L.S. Kimberly, Info. Sec. Oversight Office, et al., attached to Mem. from Andrew H. Card, Jr., Chief of Staff, to the Heads of Executive Dep'ts & Agencies (Mar. 19, 2002), available at http://csrc.nist.gov/drivers/documents/guidance-homelandsec.html. And according to a study by Coalitions of Journalists for Open Government (CJOG) in 2007, while reliance on exemptions overall rose 83% from 1998 to 2006, reliance on Exemption 2 rose 344% during that same time period. *See* CJOG, *Still Waiting After all These Years*

(2007), available at http://www.cjog.net/documents/Still_Waiting_Narrative_and_Charts.pdf.

In this case, the dissent below found "reason to suspect that the Navy's reluctance to release the [withheld records] is not based on the danger to national security that might be posed if the arc maps were released to Milner and the general public, but rather on the political difficulties that might be created by their release." Pet. App. 62. The lower court's construction of Exemption 2 provides too much leeway for agencies to claim disclosure would lead to circumvention of agency regulation, when their real concern is with the political ramifications of release, not with national security or law enforcement.

Congress took national security, law enforcement, and other concerns into account in drafting FOIA and crafted specific exemptions to address those concerns. If records meet the standards for classification in the applicable executive order, for example, they can be classified and withheld under Exemption 1, 5 U.S.C. § 552(b)(1). As the dissent pointed out below, Exemption 1 is "specifically designed to allow government agencies to withhold information that might jeopardize our national security." Pet. App. 63. Allowing an agency to withhold records that are not properly classified on national security grounds undermines Congress's decision to place limits on Exemption 1.

Moreover, FOIA has an exemption designed specifically to accommodate congressional authorization for the withholding of records that do not fit within one of the other exemptions. Exemption 3 applies to records that another statute requires be withheld. 5 U.S.C. § 552(b)(3).

Thus, if Congress has concern about a sensitive record or category of records that is not already exempt under one of FOIA's exemptions, it can enact a statute specifically exempting those records from disclosure. Exemption 3 provides protection in cases in which Congress believes that records that do not fall within one of the other exemptions should be withheld, so that agencies and courts do not have to make that determination.

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The Ninth Circuit's broad construction of Exemption 2 threatens to vastly increase the amount of information the government can withhold under FOIA, thereby undermining FOIA's ability to fulfill its goals. Exemption 2 applies to records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). This Court should hold that the exemption is limited to internal employment issues "in which the public could not reasonably be expected to have an interest." *Rose*, 425 U.S. at 369-70.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Description of Individual *Amici Curiae*

Public Citizen is a nonprofit consumer advocacy organization that appears before Congress, administrative agencies, and courts on a wide range of issues, including government transparency. Public Citizen promotes government accountability by requesting agency records to inform the public about government activities, providing advice to people who seek access to information held by government agencies, and litigating to challenge unwarranted assertions of FOIA exemptions.

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has found FOIA an invaluable tool in protecting civil liberties, and has participated in numerous FOIA cases in this Court and other courts, both as direct counsel and as amicus curiae. The ACLU of Washington is a statewide affiliate of the national ACLU.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Many of CREW's actions flow from the principles that transparency is a cornerstone of

our democracy and that government accountability is achieved through government transparency. Toward this end, CREW frequently files FOIA requests to access and make publicly available government documents that reflect on or relate to the integrity of government officials and their actions.

The **Electronic Frontier Foundation** (EFF) is a donor-supported, not-for-profit membership organization that works to inform policymakers and the public about civil liberties issues related to technology, and to act as a defender of those liberties. In support of its mission, EFF frequently uses the FOIA to obtain and disseminate information concerning the activities of federal agencies.

The **National Security Archive** (the Archive) is an independent, nongovernmental research institute and library located at the George Washington University that collects and publishes declassified documents, concerning United States foreign policy and national security matters, obtained through the FOIA. As part of its mission to broaden access to the historical record of the U.S. government, the Archive is a leading user of the FOIA.

OpenTheGovernment.org is a coalition of more than 70 consumer and good government groups, journalists, environmentalists, library groups, labor groups, and others across the political spectrum united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.