No. 09-1163

American Bar Association
www.supremecourtpreview.org

In The Supreme Court of the United States

GLEN SCOTT MILNER,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE NAVY,

Respondent.

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

PETITIONER'S BRIEF ON THE MERITS

David S. Mann
Counsel of Record
Keith P. Scully
Brendan W. Donckers
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
(206) 621-8868
mann@gendlermann.com

Attorneys for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

FOIA Exemption 2 exempts from disclosure documents "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The judicially created "High 2" exemption applies to materials that are not related solely to internal employee relations, but that are "predominantly internal" and their disclosure "would present a risk of circumvention of agency regulation." Does High 2 exceed the scope of FOIA Exemption 2?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

A. Indian Island 4

B. ESQD Data 5

C. Milner's FOIA Request and Response 6

D. Proceedings Below 7

SUMMARY OF THE ARGUMENT 10

ARGUMENT 13

A. FOIA Exemption 2 Allows Agencies to Withhold Only Routine Internal Employee Relations Matters That Are of No Public Interest 13

1. The Goal of FOIA Is To Open Agency Action to the Light of Public Scrutiny. 13

2. High 2 Conflicts with the Plain Language of Exemption 2. 14

3. The Legislative History Behind Exemption 2 Does Not Support High 2. 19

4. The Policy Concerns that Informed *Crooker* Were Resolved by Congress in Its 1986 Amendment to Exemption 7. 30

B. Even If the Court Finds Room for a High 2 Exemption the Court Should Sharply Limit the Exemption................. 36

CONCLUSION 39

TABLE OF AUTHORITIES

Page

Cases

14 Penn Plaza, LLC. v. Pyett,
___ U.S. ____, 129 S. Ct. 1456 (2009) 15

Audubon Soc. v. U.S. Forest Service,
104 F.3d 1201 (1997)... 19

Caplan v. Bureau of Alcohol, Tobacco & Firearms,
587 F.2d 544 (2nd Cir. 1978)............................... 30, 32

Chevron U.S.A. v. Echazabal,
536 U.S. 73 (2002).. 24

Connecticut Nat. Bank v. Germain,
503 U.S. 249 (1992).. 15

Crooker v. Bureau of Alcohol, Tobacco & Firearms,
670 F.2d 1051 (D.C. Cir. 1981)........................passim

Dep't of the Air Force v. Rose,
425 U.S. 352 (1976)..passim

Eldred v. Ashcroft,
537 U.S. 186 (2003).. 26

Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.,
541 U.S. 246 (2004) 17

Environmental Protection Agency v. Mink,
410 U.S. 73 (1973) 14, 20

FBI v. Abramson,
456 U.S. 615 (1982) 14, 32

Hardy v. Bureau of Alcohol, Tobacco and Firearms,
631 F.2d 653 (9th Cir. 1980) 30, 32

Jordan v. U.S. Dep't of Justice,
591 F.2d 753 (D.C. Cir. 1978) 18, 19, 23, 34

Kaganove v. U.S. EPA,
856 F.2d 884 (7th Cir. 1988) 33

Milner v. U.S. Dep't of the Navy,
2007 WL 3228049 (W.D.Wash. 2007) 1

Milner v. U.S. Dep't of the Navy,
575 F.3d 959 (9th Cir. 2009) ....passim

National Transportation Employees Union v. U.S. Customs Service,
802 F.2d 525 (D.C. Cir. 1986) 38

NLRB v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978) 13

Piper v. Chris-Craft Industries, Inc.,
430 U.S. 1 (1977) 30

Ratzlaf v. U.S.,
510 U.S. 135 (1994) 20

Rose v. Dep't of Air Force,
495 F.2d 261 (2nd Cir. 1974) 16

Schiller v. NLRB,
964 F.2d 1205 (D.C. Cir. 1992) 38

Scripps-Howard Radio v. FCC,
316 U.S. 4 (1942) 30

U.S. Dep't of Justice v. Tax Analysts,
492 U.S. 136 (1989) 14

Vaughn v. Rosen,
523 F.2d 1136 (D.C. Cir. 1975) ....passim

Statutes

28 U.S.C. § 1254(1) 1

5 U.S.C. § 1002 (1964) 14, 20

5 U.S.C. § 552 3

5 U.S.C. § 552(a)(3) 6

5 U.S.C. § 552(a)(4)(B) 1

5 U.S.C. § 552(b).. 2, 13

5 U.S.C. § 552(b)(1) 6, 35

5 U.S.C. § 552(b)(2) ....passim

5 U.S.C. § 552(b)(3) 7, 35

5 U.S.C. § 552(b)(7) (1966)...................................... 25

5 U.S.C. § 552(b)(7)(E) 33

5 U.S.C. § 552(b)(7)(F) 7

5 U.S.C. § 552(c)... 14

Other Authorities

132 Cong. Rec. H9462-68 (daily ed. (Oct. 8, 1986)). 34

132 Cong. Rec. S13648, 13660-13661 (daily ed. (Sept. 25, 1986)) 34

Davis, K., Administrative Law Treatise, § 3A.31 (1970 Supp) at 174-176 23

Davis, K., Pierce, R., Administrative Law Treatise, § 5.8 (1994) 35

Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947).................. 32

H. Rep. No. 89-1497 (1966) 20

House Hearings on H.R. 5012, at 29-30 28

New Webster's Dictionary of the English Language (1981) 18, 19

Pub. L. No. 99-570, 100 Stat. 3207 33

S. Rep. No. 89-813 (1965) 20

S. Rep. No. 98-221 (1983) 33, 34

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (Pet. App. 26-64) is reported at *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959 (9th Cir. 2009). The decision of the United States District Court for the Western District of Washington (Pet. App. 4-25) is available at *Milner v. U.S. Dep't of the Navy*, 2007 WL 3228049 (W.D.Wash. 2007).

JURISDICTION

The District Court had jurisdiction under 5 U.S.C. § 552(a)(4)(B). The Court of Appeals issued a decision affirming the District Court on August 5, 2009. Petitioner Milner's motion for reconsideration en banc was denied by the Court of Appeals by order entered on December 22, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

5 U.S.C. § 552(b) of the Freedom of Information Act ("Exemption 2") provides in pertinent part:

(b) This section [providing for public access to government documents] does not apply to matters that are:

. . .

(2) related solely to the internal personnel rules and practices of an agency;

STATEMENT OF THE CASE

The Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), allows citizens to access government documents unless one of nine narrowly-tailored and strictly-construed exemptions applies. Exemption 2 exempts from disclosure only those documents "related solely to the internal personnel rules and practices of an agency." Glen Milner requested maps showing how far an explosion would travel from the U.S. Navy's Naval Magazine Indian Island into the surrounding public waters, property and community. The Navy refused to release the maps. The Ninth Circuit upheld the Navy's refusal based on the judicially-created "High 2" reading of Exemption 2.

The High 2 exemption allows an agency to withhold documents that are not related solely to internal employee relations, but that are "predominantly internal" and their "disclosure presents a risk of circumvention of agency regulation." This case presents the question of whether the High 2 exemption exceeds the scope of FOIA Exemption 2 and whether Navy maps and data showing the extent of a possible explosion and its effects on private and public property are exempt from disclosure under FOIA Exemption 2. 5 U.S.C. § 552(b)(2).

A. Indian Island

The Navy maintains non-nuclear explosives in three Naval Magazines located in different parts of the country. Naval Magazine Indian Island ("Indian Island") is an ammunition and explosives depot located very near the communities of Port Hadlock and Port Townsend in the Puget Sound area of Washington. Indian Island is a small island sandwiched between the densely populated mainland and inhabited Marrowstone island, including the community of Nordland. Indian Island is connected to both the mainland and Marrowstone Island via a public highway. J. App. 6-7, 71-72. Although the grounds of Indian Island itself are restricted, civilian boaters occasionally enter along beaches to collect clams, and Native Americans have treaty rights to collect shellfish in the area. J. App. 6-7. Fort Flagler State Park is a few hundred feet from the north end of the island. *Id.* The water between the island and mainland is part of the Puget Sound, and open to boating.

The Navy does not hide the presence of Indian Island, nor does it deny that explosives are stored there. J. App. 54. The Navy has released a map of the island, including the specific locations of ammunition storage buildings. J. App. 71.

B. ESQD Data

The Navy creates and maintains Explosive Safety Quantity Distance (ESQD) data for explosives storage facilities. An ESQD is the distance an explosion is expected to expand should a particular explosive or combination of explosives detonate. J. App. 57-59. ESQD data is created specifically for safety reasons: "Explosive Quantity-Distance requirements and explosives standards are designed to provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property owners reasonable safety from serious injury or destruction from fires or explosions . . ." J. App. 58.

ESQD data is shared externally; as part of its safety preparations, the Navy "sometimes share[s] ESQD information" with civilians if their FOIA "request supports a legitimate government purpose[.]" J. App. 59. For some facilities, including nearby submarine base Naval Base Kitsap-Bangor (Subbase Bangor), naval commanders release the data pursuant to the "legitimate government purpose" of a FOIA request. J. App. 59. Nationwide, other military commanders recognize that local citizens need to know the blast radius so that they can keep themselves safe. J. App. 60. *See also,* ER 0054-0057. The Navy has released numerous documents relating to ESQD arcs and their calculations, including some on the Navy's website,

and ESQD arc maps for Subbase Bangor. *Id.* Indian Island previously shared ESQD data with "first responders" at both Jefferson County and the City of Port Townsend. J. App. 59. A previous version of the ESQD map for Indian Island showing the blast radius of the items stored in each of the buildings at Indian Island was published in a local newspaper. ER 0058; J. App. 52.

C. Milner's FOIA Request and Response

Glen Milner is a Puget Sound resident who wanted information on the risk of harm Indian Island posed to nearby communities, including boaters that recreate in the waters surrounding Indian Island. ER 0050-0052. Mr. Milner filed a FOIA request under 5 U.S.C. § 552(a)(3), to find out what areas were within the blast radius of Indian Island, should an accident occur. ER 0051; ER 0059-0061. With this knowledge, he could know whether nearby homes were at risk; whether he could safely boat near Indian Island; or whether, should he see a fire break out, he should leave the area.

The Navy refused to release ESQD maps and data for Indian Island claiming they were exempt from disclosure under FOIA Exemptions 1, 2, 3 and 7(F).[1] ER 0052. Indian Island's Commanding

---

[1] Exemption 1 is for classified national security documents. 5 U.S.C. § 552(b)(1). The Navy has abandoned the claim that Exemption 1 applies to Indian Island records, since the documents in question are not classified.

Officer decided that granting Mr. Milner's request "would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act." J. App. 62-63.

D. Proceedings Below

A divided panel of the Ninth Circuit affirmed an unpublished district court decision and upheld the Navy's withholding of the ESQD maps and data under the High 2 exemption. *Milner v. U.S. Department of the* Navy, 575 F.3d 959 (9th Cir. 2009). According to the Ninth Circuit, FOIA Exemption 2 contains two separate exemptions – "Low 2" and "High 2." *Id.* at 963. Quoting from this Court's opinion in *Dep't of the Air Force v. Rose,* 425 U.S. 352, 363 (1976), the Ninth Circuit found that "Low 2" applies to materials concerning "mundane employment matters such as parking facilities, lunch hour, and sick leave, which are not of 'genuine and significant public interest.' " 575 F.3d at 963. The court found that the High 2 exemption covered "more sensitive government information." *Id.* The court held that the High 2 exemption applies to documents

---

Exemption 3 covers information exempted by other statutes. 5 U.S.C. § 552(b)(3). The Navy similarly abandoned its claim that the requested documents were covered under Exemption 3. Exemption 7(F) covers "records or information compiled for law enforcement purposes" that if disclosed "could reasonably be expected to endanger life or physical safety of any individual." *Id.*, § 552(b)(7)(F).

that are "predominantly internal and [their] disclosure presents a risk of circumvention of agency regulation." *Id.* at 968. While citing *Rose* also as authority for High 2, the Ninth Circuit "formally endorsed" the D.C. Circuit's analysis and conclusion in *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 670 F.2d 1051 (D.C. Cir. 1981) (en banc).

Turning to the merits, the Ninth Circuit found that the ESQD data and maps were "predominantly internal" because: they are required by Navy operational requirements; Navy personnel are "bound to follow" them when handling and storing explosives; and they are "used by its personnel" when designing explosive storage facilities and organizing ammunition operations. 575 F.3d at 968. The Ninth Circuit ignored entirely that one of the most important purposes behind the ESQD data is to "provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property owners reasonable safety from serious injury or destruction from fires or explosions . . ." J. App. 58. Instead, the court found that the ESQD data and maps are not "written to regulate the public," and "[n]othing about the data *could* be codified in any logical way to regulate public behavior, and the Navy has not attempted to do so." 575 F.3d at 969. Consequently, the court concluded that the information was "predominantly internal." *Id.* (emphasis in original). The Ninth Circuit concluded also that release of the ESQD maps and data might "risk circumvention of

agency regulation" by "point[ing] out the best targets for those bent on wreaking havoc." *Id.* at 971. The court failed to mention that the Navy fully acknowledges that it stores explosives at Indian Island or that the Navy has released maps showing the location of ammunition storage buildings. The court failed also to cite any Navy regulation or law that release of the data would circumvent.

The dissent, authored by Judge William Fletcher, agreed both with the Ninth Circuit's adoption of High 2 and the reasoning in *Crooker*, and with the court's determination that the ESQD data and maps were "predominantly internal." 575 F.3d at 976. Judge Fletcher "strongly disagree[d]," however, with the majority's determination that release of the ESQD maps and data would "risk circumvention of agency regulation." *Id.* Judge Fletcher explained that *Crooker* and the "consistent line of cases" decided after *Crooker* confirmed that High 2 "applies only to documents whose release would risk circumvention *by a regulated person or entity." Id.* at 978 (emphasis in original). Judge Fletcher concluded that High 2 did not protect the ESQD data because "[t]he Navy is not acting as a regulatory or law enforcement agency and the arc maps do not regulate anyone or anything outside the Navy itself." *Id.*

The Ninth Circuit rejected a request for a rehearing en banc, and Mr. Milner timely petitioned

for a writ of certiorari. This Court granted Certiorari on June 28, 2010.

SUMMARY OF THE ARGUMENT

The Court should hold that there is no High 2 exemption to FOIA and that Exemption 2 is limited solely to routine internal employee relations matters that are of no public interest.

Congress created FOIA with a general philosophy of full agency disclosure of information unless the information is exempt under one of nine clearly delineated exemptions. FOIA's exemptions are to be narrowly construed, and plain language must be given its ordinary meaning. Exemption 2 allows agencies to withhold material "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). In *Rose*, this Court concluded that Exemption 2 was not designed to authorize withholding of material where there is genuine public interest. Instead, Exemption 2 applies only to routine matters with "merely internal significance." *Rose*, 425 U.S. at 370. Because it was irrelevant to the case, the Court expressly declined to rule whether Exemption 2 might also exempt nontrivial materials, the release of which might risk circumvention of agency regulation. *Id*. at 369.

Despite the narrow plain language of Exemption 2, and this Court's narrow reading of the exemption in *Rose*, some circuits seized upon this

Court's dictum and created a High 2 reading of Exemption 2. In this case, the Ninth Circuit formally adopted, and expanded upon, the D.C. Circuit's formation of the High 2 exemption in *Crooker* and ruled that a government agency could keep secret any document that is "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner*, 575 F.3d at 968. This judicially-created High 2 reading of Exemption 2 is a significant departure from the plain language of Exemption 2, and represents a departure even from the dictum in *Rose*.

The failure to adhere to FOIA's plain language has far-reaching implications. The slippery slope of the High 2 exemption is patent. It is too easy for agencies to determine that almost all materials are "predominantly internal" so long as they were produced by the agency for agency use. Moreover, there is little data that does not have some potential impact on an agency's operation, and could thus be used to help "circumvent" agency operations. The Ninth Circuit's decision below represents the capstone of judicial expansion of Congress's narrow wording in Exemption 2. Although lip service is still paid by most courts to the words "internal personnel," the application of the High 2 exemption far exceeds the "routine matters" and "no public interest" standards set by this Court in *Rose*. In this case the Ninth Circuit has sanctioned nondisclosure of maps showing how far an explosion will go into the surrounding community, regardless of its

complete lack of application to any personnel issues other than that it was used by government employees. Moreover, the maps do not "regulate" the affected community, nor is the Navy acting as a regulatory or law enforcement agency while implementing the maps. The Ninth Circuit's adoption and expansion of High 2 creates the vague and undefined exemption FOIA was enacted to eliminate.

The plain language of Exemption 2 limits withholding solely to routine internal employee relations matters. The High 2 exemption conflicts with the plain language, is not supported by the legislative history, represents outcome-based judicial legislation and is unnecessary in light of other express statutory exemptions. *Milner v. U.S. Department of the Navy* should be reversed. This Court should hold that there is no High 2 exemption to FOIA and that Exemption 2 is limited solely to routine internal employee relations matters that are of no public interest.

ARGUMENT

A. FOIA Exemption 2 Allows Agencies to Withhold Only Routine Internal Employee Relations Matters That Are of No Public Interest

1. The Goal of FOIA Is To Open Agency Action to the Light of Public Scrutiny.

Congress created FOIA with a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Rose,* 425 U.S. at 360-61 (internal quotations omitted). FOIA's goal is therefore "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Id.* at 361 (internal quotation omitted). Its purpose "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).

FOIA's policy of full disclosure precludes judicial creation of new exemptions. Agencies may withhold requested documents only if they fall under one of nine enumerated exemptions from mandatory disclosure. 5 U.S.C. § 552(b). These exemptions "must be narrowly construed." *Rose*, 425 U.S. at 361. As this Court has noted, FOIA's exemptions

were "explicitly made exclusive, and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973) (citing 5 U.S.C. § 552(c)). Indeed, the narrow wording of each exemption was explicitly designed by Congress to counteract the "vague phrases" that had turned its predecessor, Section 3 of the Administrative Procedures Act, 5 U.S.C. § 1002 (1964), into more of "a withholding statute than a disclosure statute." *Mink*, 410 U.S. at 79. "Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); *see also*, *FBI v. Abramson*, 456 U.S. 615, 630 (1982) ("FOIA exemptions are to be narrowly construed"). The nine exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361.

2. High 2 Conflicts with the Plain Language of Exemption 2.

This case should start and end with the plain language of the statute. As this Court has often repeated, "[C]ourts 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 canon is also the last: judicial inquiry is complete." *Connecticut Nat.*

Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal citations and quotations omitted). *Cf., 14 Penn Plaza, LLC. v. Pyett*, ___ U.S. ____, 129 S. Ct. 1456, 1465, n. 6 (2009) (House Report that contradicts the plain language cannot be used to cloud clear statutory text.). Exemption 2 to FOIA is short. Exemption 2 provides that an agency may exempt from mandatory disclosure only records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Nothing in this short statement supports defining Exemption 2 to cover records that are "predominantly internal" and whose release "would risk circumvention of agency regulation."

The Court first considered Exemption 2 in its 1976 opinion in *Rose*, 425 U.S. 352. *Rose* concerned a request by law review editors for case summaries of Air Force Academy honors and ethics hearing summaries. The Air Force withheld their release under Exemption 2. While disciplinary hearing summaries clearly were "personnel" related, the Court ordered their release, finding that there was a strong public interest in the operation of the Academy's Honors and Ethics Codes as they affected the training of future Air Force officers and therefore elevated the requested hearing summaries into something more than the types of internal personnel matters covered by Exemption 2. As the Court explained, the high level of public interest "differentiate(s) the summaries from matters of daily routine like working hours, which, in the words of

Exemption Two, do relate 'Solely to the internal personnel rules and practice of an agency.' " *Id.* at 369 (quoting from Court of Appeals opinion, *Rose v. Dep't of Air Force,* 495 F.2d 261, 265 (2nd Cir. 1974)).

In *Rose,* this Court held that Exemption 2 "is not applicable" to matters subject to "a genuine and significant public interest." 425 U.S. at 369. To the contrary, the "thrust of the exemption 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. Consistent with *Rose*, Exemption 2 should be limited to routine employee relations matters. The "routine matters" test set forth in *Rose* accurately encompasses the plain language of the statute. A government agency should not have to spend government resources responding to frivolous requests; the purpose of FOIA is to shed a light on the workings of government of significance to citizens. But there is nothing in the plain language of Exemption 2 suggesting that it was intended to shield anything other than solely internal employee relations matters into which the public could not have a legitimate reason to inquire.

Statutory construction must begin with the words used by Congress and assume that the ordinary meaning of the words used express the legislative purpose. *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.,* 541 U.S. 246,

252 (2004). The *Crooker* court violated this basic tenet by both substituting words and adding new words. The High 2 exemption, as articulated by the D.C. Circuit in *Crooker*, and now adopted by the Ninth Circuit, substitutes the phrase "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), with a new two-prong test: "predominantly internal," the release of which "risks circumvention of agency regulation." Neither prong of this new test is supported by the language of Exemption 2.

After first correctly noting that the statutory phrase "'relating solely to' limits Exemption 2 to matters that are truly internal, and not of legitimate public interest," the *Crooker* majority proceeded to substitute "related solely to" with "predominantly" internal. 670 F.2d at 1056. The court's reasoning was that "solely" was too restrictive, or "potentially all-excluding."[2] *Crooker*, 670 F.2d at 1056-57. Relying on the concurring opinion in *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975), *Crooker* attempted to justify its substitution by breaking the phrase "related solely to" down into two separate words, "related" and "solely" and defining each in isolation, thereby producing a seeming contradiction. 670 F.2d at 1056 (citing *Vaughn*, 523 F.2d at 1150-51 (Leventhal, J., concurring). But no such

---

[2] As the dissent in *Crooker* characterized it, "predominantly" is a "much more malleable word that enables a court to support whatever result it finds desirable." 670 F.2d at 1095 (Wilkey, J., dissenting).

contradiction exists. Read together, "related solely to" is not contradictory. "Solely" is a modifier of "related" and serves to "emphasize the limited scope" of the exemption. *See Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc).[3] Moreover, "solely" is a profoundly different word than "predominantly." "Solely," the word actually used in 5 U.S.C. § 552(b)(2), means "exclusively or only" or "wholly" or "merely." *New Webster's Dictionary of the English Language* (1981). "Predominantly," on the other hand, means "prevalent over others." *Id.* In context, a document is "solely" internal if it is exclusively, wholly or merely internal.[4] But a "predominantly" internal document needs only be more internal than not.[5] Congress's words were plain – in order for materials to fit within the narrow meaning of Exemption 2, they had to be materials related "solely" or "only" or "merely" to internal personnel matters.

---

[3] In *Jordan* the D.C. Circuit court addressed a request by Georgetown law students for documents related to the exercise of prosecutorial discretion used by the U.S. Attorney's office. The Department of Justice withheld release pursuant to Exemption 2. The D.C. Circuit agreed with this Court's narrow reading of Exemption 2 in *Rose* and rejected the Department's claim that this Court had implied that Exemption 2 might cover documents where "disclosure may risk circumvention of an agency regulation."

[4] This Court used "merely internal" in its opinion in *Rose*. 425 U.S. at 369-70.

[5] Changing "solely" to "predominantly" is no different than changing "beyond a reasonable doubt" to "preponderance of the evidence."

There is similarly no basis supporting the addition of the "risk of circumvention" prong of High 2 to the plain words of Exemption 2. To the contrary, Exemption 2 is limited to "internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The term "internal," meaning "of or pertaining to the inside or inner part," *New Webster's Dictionary of the English Language* (1981), modifies "personnel," meaning "the body of persons engaged or employed in any occupation." *Id.* "[P]ersonnel rules or practices of an agency" logically refers to "those rules and practices that concern relations among employees of an agency, as distinct from rules and practices that might relate to, or have a more direct impact upon, members of the public." *Jordan,* 591 F.2d at 763. *Cf.*, *Audubon Soc. v. U.S. Forest Service,* 104 F.3d 1201, 1204 (1997) ("proper inquiry is not whether the maps showing locations of endangered spotted owls relate to the 'agency practices,' but whether they relate to the "*personnel* practices of the Forest Service") (emphasis in original).

This case should start and end with the plain language of the statute. The plain language of Exemption 2 limits the exemption solely to internal routine rules and practices that concern agency employee relations.

3. The Legislative History Behind Exemption 2 Does Not Support High 2.

The purpose of reviewing legislative history is to clarify the meaning of an ambiguous statute – not to create further ambiguity. *Ratzlaf v. U.S.,* 510 U.S. 135, 147-48 (1994). The plain language of Exemption 2 is unambiguous and limited solely to internal routine employee relations matters. To the extent legislative history is necessary, or even at all relevant, it supports the plain language and not High 2. Nowhere in the legislative history is there any support that, by saying "related solely to the internal personnel rules and practices," what Congress actually meant was "predominantly internal and its disclosure presents a risk of circumvention of agency regulation." *Milner,* 575 F.3d at 968.

As this Court first discussed in *EPA v. Mink*, 410 U.S. at 79-80, FOIA was adopted as a replacement for Section 3, the "public disclosure" section, of the Administrative Procedures Act, 5 U.S.C. § 1002 (1964) which was "generally recognized as falling far short of its disclosure goal and came to be looked upon more as a withholding statute than a disclosure statute." 410 U.S. at 79 (citing, S. Rep. No. 89-813, at 5 (1965); H. Rep. No. 89-1497, at 5-6 (1966)). In *Rose*, the Court focused more specifically on Exemption 2 and recognized that it was "traceable to congressional dissatisfaction" with the former APA Section 3 exemption for "any matter related solely to the internal management of an agency." 425 U.S. at 362

(citing 5 U.S.C. § 1002 (1964)). As the Court explained, "the sweep of that wording led to withholding by agencies from disclosure of matter 'rang(ing) from the important to the insignificant.' " *Id.* (citing H. Rep. No. 89-1497 at 5).[6] As a result, the Court concluded that "legislative history plainly evidences the congressional conclusion that 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." 425 U.S. at 363.

After confirming congressional intent to narrow withholding of internal personnel matters, the Court next turned to the contradictory Senate and House reports. 425 U.S. at 363. According to the Senate Report:

> Exemption No. 2 relates only to the internal 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.

---

[6] *See, e.g., Vaughn,* 523 F.2d at 1149-1150 (The FOIA was meant to abolish the old "internal management exception, which apparently operated as a license for bureaucratic secrecy[.]") (Wilkey, J.); i*d.* at 1149-50 (Leventhal, J., dissenting).

S. Rep. No. 89-813. The House Report, on the other hand, takes a broader stance and provides that Exemption 2 applies to:

> 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 present law.

H. Rep. No. 89-1497.

In deciding between the two Reports, the Court noted first that "[A]lmost all courts that have considered the difference between the Reports have concluded that the Senate Report more accurately reflects the congressional purpose." *Id.* at 363. This Court agreed and concluded that the narrower Senate version is the more authoritative and controlling. The Court then unequivocally endorsed and quoted extensively from the D.C. Circuit's 1975 opinion in *Vaughn*, including specifically *Vaughn*'s analysis that the Senate Report was prepared prior to both houses passing the legislation and thus available to both, while the House Report was prepared *after* the Senate had already passed the

Senate Bill and thus was not available to the Senate. 425 U.S. at 364-66 (quoting *Vaughn,* 523 F.2d at 1142).[7] The Court agreed with *Vaughn* that the "recognized principal purpose of FOIA" required choosing the interpretation "most favoring disclosure" and that therefore the Senate Report controlled. 425 U.S. at 366-67.

---

[7] As one noted commentator described:

> After the bill had passed the Senate on the basis of a committee report that was reasonably faithful to the words of the bill, the House committee was subjected to pressures to restrict the disclosure requirements. It yielded to the pressures. But it did not change the bill. Instead, it wrote the restrictions into the committee report. These restrictions differ drastically from the bill as passed by the Senate; they often contradict the words of the bill, and they sometimes contradict both the statutory words and the Senate Committee report."
>
> "I believe (a) that statements in the House committee report that contradict the bill and depart from the understanding of the Senate committee are not the law, and (b) that inserting such statements into a committee report, instead of changing the bill, is a clear abuse."

Davis, K., Administrative Law Treatise, § 3A.31 (1970 Supp) at 174-176.

Contrary to this Court's decision to rely on the Senate Report, and contrary to its earlier decisions in *Vaughn* and *Jordan*, the D.C. Circuit in *Crooker* implicitly gave greater weight to the House Report in order to fit Department of Alcohol, Tobacco and Firearm's training manuals within Exemption 2's narrow language. According to *Crooker*, the House Report's statement that Exemption 2 covers matters such as "manuals of procedure for Government investigators or examiners – is uncontroverted by the Senate Report." *Crooker*, 670 F.2d at 1061. In other words, since the Senate Report did not expressly state that investigative manuals were *not* included within Exemption 2, it somehow confirms that they were. This interpretation, of course, directly conflicts with one of the fundamental rules of statutory construction – *Expressio unius est exclusio alterius* – expressing one item of an associated group excludes others left unmentioned. *Chevron U.S.A. v. Echazabal,* 536 U.S. 73, 80 (2002). The Senate Report identifies a list of "examples" of "internal personnel rules and practices of an agency" to include "personnel's use of parking facilities, or regulations of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 89-813. If the Senate had intended "internal personnel rules and practices of an agency" to extend to documents wholly unrelated to routine employee relation matters, and include items such as manuals for investigators or examiners, it could have said so. The Senate's silence was far from quiet acceptance. Instead, as recognized in *Vaughn* and accepted by

this Court, the House Report was a post hoc effort to change the meaning of the plain words of the statute.

The *Crooker* majority placed even greater significance on the belief that FOIA contained certain "cross-currents" where it mandated a broad policy of full disclosure, but acknowledged that "full disclosure must be tempered in order to protect 'the operation of our Government.' " 670 F.2d at 1058. This "cross-current" was derived from a single statement in the Senate Report:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, …(i)t is also necessary for the very operation of our Government to allow it to keep certain material, *such as the investigatory files of the Federal Bureau of Investigation.*

Id. (quoting S. Rep. No. 89-813 at 3.) (emphasis added). But this "cross-current" – the need to keep materials such as FBI investigative materials secret – was addressed in FOIA's original 1966 version of Exemption 7. The 1966 version of Exemption 7 exempted from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. § 552(b)(7) (1966). In other words, the "cross-current" identified by the *Crooker* majority was also recognized by Congress and subsequently addressed.

There was no need for the court to expand Exemption 2 based on a claimed "cross-current."

Crooker's "cross-current" and its implication that agencies and courts are free to expand the stated exemptions in order to support the "operation of government" is at significant odds with the overriding legislative history behind FOIA and this Court's recognition that FOIA strongly favors disclosure:

> (W)e have repeatedly stated that '(t)he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.' Thus, faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure.

Rose, 425 U.S. at 366 (quoting *Vaughn*, 523 F.2d at 1142) (internal citations omitted).

The *Crooker* court turned next to testimony at congressional hearings in order to find support for a High 2 exemption. This Court has repeatedly stated that where an ambiguity in the statutory text is sufficient to warrant turning to legislative history, "the authoritative source" lies in the Committee Reports. *Eldred v. Ashcroft*, 537 U.S. 186, 209, fn. 16 (2003). The *Crooker* majority focused

attention on a statement made by Congressman Moss during one House hearing that Exemption 2 was intended to cover documents such as "manuals of procedure" for bank examiners or guidelines for FBI agents. *Crooker*, 670 F.2d at 1059. Congressman Moss made that statement in response to a concern raised by an assistant attorney general, Mr. Schlei, that Exemption 2 did not go far enough. The exchange between Congressman Moss and Mr. Schlei is worth repeating, however, because it does not support the creation of High 2:

> Mr. Moss: What this was intended to cover was instances such as the 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.
>
> Mr. Schlei: Ah! Then the word "personnel" should be stricken. Because "personnel" I think connoted certainly to use the employee relations, employee management rules and practices of an agency. What you meant was materials related solely to the internal rules and practices of any agency for the guidance of its employees – something like that.
>
> I do agree that there should be protection for the instructions given to

> FBI agents and bank examiners; people who, if they are going to operate in expectable ways, cannot do their jobs. Their instructions have to be withheld.
>
> But I think that word "personnel" does not do the job well enough, Mr. Chairman. I am sure it can be done.
>
> Mr. Moss: We will hope to seek a way of doing the job without exempting internal rules and practices.
>
> Mr. Schlei: I suppose that would cover quite a lot of ground, Mr. Chairman.
>
> Mr. Moss: Because I am afraid that we would there open the barn door to everything.
>
> Mr. Schlei: Well it is one of those things, Mr. Chairman, that just shows how hard it is to cover the whole Government with a few words. There are a number of problems.
>
> Mr. Moss: Oh, we recognize the difficulty and the complexity, but we are perfectly willing to work at it.

Crooker, 670 F.2d at 1059, fn. 24 (quoting House Hearings on H.R. 5012, at 29-30.)

Far from supporting the High 2 expansion, this exchange demonstrates the opposite – it demonstrates first that Congressman Moss recognized that leaving the word "personnel" out would "open the barn door" of the exemption. More importantly, it demonstrates that Congressman Moss recognized that the actual words of the statute did not cover investigative material and that additional "work" would be necessary. But no additional work was done. The House passed the Senate Bill without amendment. The House's knowledge that Exemption 2 in the Senate Bill did not exempt manuals and guidelines, but failure to amend the language demonstrates acceptance of the Senate Report and a narrow reading.

Contrary to the D.C. Circuit's analysis in *Crooker*, now formally adopted by the Ninth Circuit, the Legislative History does not support the creation or expansion of High 2. By adopting a High 2 interpretation, the D.C. Circuit and Ninth Circuit have done precisely what Congressman Moss was concerned with – removed the term "personnel" from the statute and "open[ed] the barn door" to a broad use of Exemption 2 to cover both personnel and non-personnel matters of substantial public interest.

4. The Policy Concerns that Informed *Crooker* Were Resolved by Congress in Its 1986 Amendment to Exemption 7.

Courts must be "wary against interpolating … notions of policy in the interstices of legislative provisions." *Piper v. Chris-Craft Industries, Inc.,* 430 U.S. 1, 26 (1977) (quoting *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942)). The underlying issue at stake in *Crooker* was the court's concern over the release of the Bureau of Alcohol, Tobacco and Firearms' manual "Surveillance of Premises, Vehicles and Persons." *Crooker*, 670 F.2d at 1053. The D.C. Circuit was not alone in this concern: other circuits that have adopted High 2 have done so initially in the context of a manual of investigative procedures for law enforcement. *See, e.g., Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2nd Cir. 1978) (request for ATF training manual on "Raids and Searches" withheld under Exemption 2); *Hardy v. Bureau of Alcohol, Tobacco and Firearms,* 631 F.2d 653 (9th Cir. 1980) (request for ATF training manual on "Raids and Searches" withheld under Exemption 2). Certainly, as a matter of policy it is no surprise that the ATF did not want the general public, including those regulated by the ATF, to know how the agency conducted surveillance operations. Unfortunately, these training manuals were not "solely" or "merely" "internal personnel rules or practices." 5 U.S.C. § 552(b)(2). The manuals did not control how the

ATF dealt with its internal employees, but instead concerned how ATF personnel dealt with the regulated public. Under a plain language reading of Exemption 2, because these manuals were not "related solely to internal personnel rules and practices of the agency," they did not fall within FOIA's numerated narrow exemptions.

Perhaps, therefore, it is not a surprise that the D.C. Circuit felt obligated to support the ATF's position and read a second level of exemption into the plain language of Exemption 2. While the outcome – protecting against the release of law enforcement training materials – may have been desirable, *Crooker* was, in fact, little more than judicial legislation.[8] As Justice Frankfurter explained:

> [T]he courts … are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of the words used by the

---

[8] Indeed, as the dissent in *Crooker* pointed out, the *Crooker* plurality exceeded its bounds and crossed into judicial legislation by "attempt[ing] to perform the omitted legislative act and work out a compromise which it thinks years after the event might have been acceptable to both houses." 670 F.2d at 1093 (Wilkey, J., dissenting).

> legislature. To go beyond is to usurp a power which our democracy has lodged in its elected legislature… A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-maker might wisely suggest, construction must eschew interpolation and evisceration.

Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 533 (1947) (quoted in, *FBI v. Abramson*, 456 U.S. at 633 (O'Connor, J., dissenting). But this is precisely what the *Crooker, Caplan* and *Hardy* courts did: the courts added terms to an express and unambiguous statute based on a belief that this is what Congress would have done if it had thought about it. The plain and express language of Exemption 2 does not include the "High 2" exemption created by *Crooker* and now endorsed in *Milner*.

More importantly, the original policy concern driving the courts' creation of High 2 no longer exists. In 1986 Congress expressly recognized the policy behind *Crooker*, and the need for an explicit exemption for law enforcement materials, the release of which might risk circumvention of law. Congress amended FOIA specifically codifying the *Crooker* holding into Section 7(E). 5 U.S.C.

§ 552(b)(7)(E).[9] *See*, *Kaganove v. U.S. EPA*, 856 F.2d 884, 888-89 (7th Cir. 1988).

The Ninth Circuit found Congress's 1986 amendments "illustrative" as evidence that *Crooker* was an accurate statement of congressional intent. *Milner*, 575 F.3d at 966. To the contrary, while Congress accepted the outcome of *Crooker,* and recognized amendment was necessary, it amended only Exemption 7 – the law enforcement exemption.[10] The Senate originally proposed amendments to both Exemption 2 and Exemption 7. Citing *Crooker,* the Senate Report discussed amending Exemption 2 to add language specifically:

> including such materials as (A) manuals and instructions to investigators, inspectors, auditors or negotiators, to the extent that disclosure of such manuals and

---

[9] Exemption 7(E) provides that FOIA does not apply to matters that constitute: "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information…(E) would disclose techniques and procedures 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).

[10] The 1986 FOIA Reform Act was enacted as part of the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, 100 Stat. 3207. The only related and relevant committee report is that of the Senate Judiciary Committee from three years earlier reporting on a series of FOIA amendments the Senate passed in the 98th Congress. S. Rep. No. 98-221 (1983).

> instructions could reasonably be expected to jeopardize investigations, inspections, audits or negotiations, and (B) examination materials used solely to determine individual qualifications for employment, promotion or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process.

S. Rep. No. 98-221 at 20-21, 44-45 (1983). But the 1983 Senate Bill did not pass the House. Instead, the 1983 Senate bill was re-introduced in 1986 and ultimately adopted by both Houses in the 1986 FOIA Reform Act. Notably, the Senate's proposed amendment to Exemption 2 was not included in the 1986 FOIA Reform Act. Instead, Congress limited its *Crooker*-based amendments solely to expanding Exemption 7.[11] The expansion of Exemption 2, as proposed by the Senate in 1983, was not introduced in the 1986 amendments.[12] This legislative history does not support further expansion of Exemption 2 by the courts. To the contrary, when Congress deemed it necessary to amend FOIA in response to *Crooker* and *Jordan*, it specifically did not follow the

---

[11] The 1983 Senate Report confirmed that the Senate was expanding Exemption 7 to address *Jordan* and *Crooker*. S. Rep. 98-221 at 24-25 (1983). *See also* 132 Cong. Rec. H9462-68 (daily ed. (Oct. 8, 1986)) (Kindness statement confirming amendments expand exemption 7(E) and 7(F)).

[12] 132 Cong. Rec. S13648, 13660-13661 (daily ed. (Sept. 25, 1986)).

courts' lead and amend Exemption 2. It amended only Exemption 7.

Consequently, since Congress amended Exemption 7 to address the policy issues raised by *Crooker*, the judicially-created High 2 reading for Exemption 2 is no longer necessary.[13] Moreover, the High 2 reading of Exemption 2 is unnecessary to protect the interests of government, given the protections afforded by other exemptions. For example, other FOIA exemptions protect the national security interest tenuously asserted by the Navy here. Exemption 1 allows an agency to protect any document it believes will endanger our nation's defense by classifying it. 5 U.S.C. § 552(b)(1). Similarly, Exemption 3 protects documents that are exempt from disclosure by statute. 5 U.S.C. § 552(b)(3).

---

[13] As Professors Davis and Pierce recognized in their 1994 Administrative Law Treatise:

> In the FOIA Reform Act of 1986, Congress eliminated the need for courts to choose between assisting criminals and distorting the meaning of the second exemption. It amended the seventh exemption to include "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

Davis, K., Pierce, R., Administrative Law Treatise, § 5.8 (1994) (emphasis added).

B. Even If the Court Finds Room for a High 2 Exemption the Court Should Sharply Limit the Exemption

If the Court agrees that a narrow reading of the plain language of Exemption 2 does indeed allow for a second, "High 2," exemption, the Court should sharply limit the scope of the exemption so as to be consistent with its dictum in *Rose*.

First, the Court should limit the scope of High 2 to documents that are "related solely" to internal personnel rules and practices. *Supra* at 17-18. In this case, for example, while the ESQD maps and data are indeed used by agency personnel, they are not "related solely" to internal matters. Indeed, as Indian Island's Commander Whitbred fully agrees, "Explosive Quantity-Distance requirements and explosives standards are designed to provide the inhabitants of nearby communities, the personnel of Department of Defense shore activities and adjacent public and private property owners reasonable safety from serious injury or destruction from fires or explosions . . ." J. App. 58. The Navy has also recognized that explosions may expand beyond the boundaries of Indian Island, and that civilian emergency responders need to know how far a disaster might spread. As Commander Whitbred confirms: "[w]e sometimes share ESQD information with local municipalities, if the request supports a legitimate government purpose such as

emergency response preparedness." J. App. 59. Indeed, "we have shared ESQD information with 'first responders' at both Jefferson County and the City of Port Townsend." *Id.* Thus, because the ESQD maps and data are certainly a matter of significant public interest, are provided to outside agencies, and describe events that will extend well beyond the boundaries of Indian Island should a disaster occur, they cannot, by definition, be "solely related to internal personnel" matters. The ESQD maps and data do not fit within even High 2 if High 2 exists.

Second, the Court should require agencies to demonstrate that release of the solely internal personnel materials will risk circumvention of an agency regulation by a person or entity subject to regulation by the agency in question. *Rose*, 425 U.S. at 364. In *Rose*, this Court recognized that previous courts had relied on the House Report and allowed agencies to withhold documents under Exemption 2:

> where necessary to prevent the circumvention of agency regulations that might result from disclosure *to the subjects of the regulation* of the procedural manuals and guidelines *used by the agency in discharging its regulatory function.*

425 U.S. at 364 (emphasis added). The Ninth Circuit's decision in *Milner*, however, goes far

beyond this Court's dicta and extends the High 2 exemption regardless of whether the agency conducts regulatory functions or whether the agency regulates individuals or entities other than its own employees. As discussed by Judge Fletcher's dissent below, courts since *Crooker* have steadily increased the applicability of High 2 to cover matters outside traditional law enforcement. *See* 575 F.3d at 977-978. Examples range from withholding of "crediting plans" used to evaluate job candidates where the release would compromise the application process, *National Transportation Employees Union v. U.S. Customs Service*, 802 F.2d 525, 529-531 (D.C. Cir. 1986), to withholding documents containing an agency's litigation strategies where release would compromise the agency's ability to defend itself, *Schiller v. NLRB*, 964 F.2d 1205, 1207-08 (D.C. Cir. 1992). Each of these cases, however, address the situation raised in this Court's *Rose* dicta – where the release would risk circumvention by a "regulated" person or entity where the agency is serving a regulatory function.

In this case, however, while non-Navy citizens are certainly affected by the Navy's implementation of its ESQD maps, neither Glen Milner nor any other person or entity, other than Navy personnel, are "regulated" by the ESQD maps. Nor is the Navy acting as a regulatory or law enforcement agency while implementing the ESQD maps. *See*, *Milner*, 575 F.23d at 978 (Fletcher, J., dissenting). The Ninth Circuit has far expanded the High 2

exemption beyond that contemplated by this Court. If there is a High 2, it must be sharply limited.

CONCLUSION

FOIA was enacted to promote full agency disclosure of information unless the information is specifically exempt under one of nine clearly delineated and narrow exemptions. Neither the plain language nor legislative history supports a High 2 reading and it should be eliminated. The Court should confirm that FOIA Exemption 2 is limited solely to minor or routine internal employment matters of no public interest. The Court should reverse the Ninth Circuit.

Respectfully submitted,

David S. Mann
Counsel of Record
Keith P. Scully
Brendan W. Donckers
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 715
Seattle WA 98101
(206) 621-8868
mann@gendlermann.com
Attorneys for Petitioner