No. 09-1163

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

REPLY BRIEF FOR PETITIONER

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SUMMARY OF REPLY

As this Court explained in *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), the Freedom of Information Act, 5 U.S.C. § 552, was enacted in 1966 as a complete overhaul of the "public disclosure" section of the APA. 5 U.S.C. § 1002 (1964) ("Section 3"). Section 3 was widely recognized as falling far short of its disclosure goal because it allowed agencies almost unbridled discretion to decide what documents to make available to the public. Congress ignored requests by agencies and the Department of Justice to leave discretion in place and instead tipped the balance sharply in favor of disclosure by replacing the former "vague phrases" in Section 3 with nine concrete specific exemptions, and requiring agencies to release documents that did not fit within the exemptions.

The Navy seeks a return to pre-FOIA days by urging this Court to ignore the plain language of Exemption 2, 5 U.S.C. § 552(b)(2), and instead turn Exemption 2 into a catchall general exemption that would restore the same unbridled discretion that existed prior to FOIA. The Navy seeks to expand exemption 2 to allow agencies to withhold "a wide range of information concerning internal rules and practices where disclosure would significantly risk circumvention of agency functions and where other FOIA exemptions are unavailable." Resp. Br. at 51.

But it is the role of Congress to balance the need for release of government documents with legitimate needs for withholding documents, not federal

agencies or the courts. The Navy's argument that Exemption 2 should provide a catchall authorization to legislate new exemptions for a "wide range" of materials that are acknowledged to be of substantial public interest starkly illustrates how far from the actual statute this course of judicial lawmaking has strayed.

ARGUMENT

FOIA Exemption 2 Allows Agencies to Withhold Only Routine Internal Employment Related Matters That Are of No Public Interest

A. The Interpretation Urged by the Navy Conflicts with the Plain Language of Exemption 2

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). The Ninth Circuit in *Milner v. U.S. Department of the Navy,* 575 F.3d 959 (9th Cir. 2009), adopted the D.C. Circuit's reasoning and concluded that Exemption 2 extends beyond mere, or trivial, employment rules and practices to all information that is both "predominantly internal" and the "disclosure of which would present a risk of circumvention of agency regulation." 575 F.3d at 965, *citing Crooker v. Bureau of Alcohol, Tobacco*

and Firearms, 670 F.2d 1051, 1073-75 (D.C. Cir. 1981).

The Navy now abandons *Crooker's* analysis (while defending the decision as "pathmarking"). The Navy instead embarks on an entirely new dissection of the statutory language to present a novel, even broader, interpretation of the plain language of Exemption 2. Resp. Br. at 20-22. The Navy urges an overwhelming expansion of Exemption 2 to capture "materials that are maintained by an agency for the internal use of its personnel, so long as those matters are directly related to internal rules and practices that an agency establishes to guide its personnel in the performance of various agency functions." *Id.* at 21. Moreover, the Navy also asks the Court to allow federal agencies rather than Congress to decide when materials can be withheld based on an "agency's need." *Id.*

The Navy's construction of Exemption 2 rests on two faulty premises. First, it asks this Court to redefine the phrase "personnel rules and practices of an agency" to rules and practices that "guide the manner in which agency personnel discharge their official duties and perform governmental functions." *Id.* at 20-21. But this interpretation converts the commonly understood and most natural use of the phrase "personnel rules and practices" from rules and practices *governing* "personnel" to all rules and practices *used* by personnel. Under the Navy's reading, every single department in a company could be called a "personnel department" because it

contains personnel, and every agency in the government could be called the Office of Personnel and Management because it contains personnel who are managed.

As defined by *Webster's,* "personnel" refers to "1. a body of persons employed in an organization or place of work … 3. See personnel department." *Webster's Unabridged Dictionary*, *Second Edition*, 1446 (2001). [P]ersonnel department" is defined by *Webster's* to mean "the department in an organization dealing with matters involving employees, as hiring, training, labor relations, and benefits. Also called human resources department." *Id.* Because the term "personnel" is synonymous with "employee" "personnel rules and practices" plainly refers to employee relations rather than rules and practices used by employees to conduct government functions. The Navy turns the common meaning of "personnel rules and practices" on its head.

Second, while referring to *Crooker* as "pathmarking," Resp. Br. at 13, the Navy abandons *Crooker's* expansion of the phrase "related solely to" to "predominately related to," and now further contorts and expands the meaning of the phrase. Instead of "solely" meaning "exclusively," the Navy argues "solely" means, in effect, "directly." Resp. Br. at 21. The Navy provides no support for its creative rewriting of these common words.[1] By changing "solely" to "directly" the Navy's reading changes the

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[1] "Solely" means "exclusively or only," or "merely." *Webster's*, 1815. "Direct" or "directly" means "absolute or exact" or "precisely." *Id.*, 559.

limiting phrase "related solely to" to an expansive phrase meaning "associated" or "connected" with. Resp. Br. at 21. The Navy's effort writes "solely" out of the statute and concludes that not only are "personnel rules and practices" exempt from disclosure, but all matters directly associated or connected with the Navy's broad reading of "rules and practices" are exempt. The Navy's interpretation directly conflicts with the terms of the statute. "Solely" is a modifier of "related" and serves to "emphasize the limited scope" of the exemption. *Jordan v. U.S. Department of Justice*, 591 F.2d 753, 763 (D.C. Cir. 1978) (en banc).

A proper narrow reading of the plain meaning of "related solely to the internal personnel rules and practices of an agency" limits the exemption to matters related exclusively to internal rules and practices that concern agency employee relations. 5 U.S.C. § 552(b)(2). *Rose*, 425 U.S. at 362-63. This case should start and end with the plain language of the statute.

B. Congress's 1966 Enactment of FOIA Made Sweeping Changes to Its Predecessor, Section 3 of the APA

The Navy attempts to bolster its flawed "plain language" argument first with the astonishing assertion that in enacting FOIA in 1966, Congress "chose" to accept judicial interpretations of the former Section 3 of the APA. 5 U.S.C. § 1002 (1964). Resp. Br. at 22-27. This argument is contrary to a

substantial body of both legislative history and caselaw confirming that Congress's 1966 enactment of FOIA was a complete overhaul of former Section 3.

It is true that where Congress chooses to "copy" the "same" or "verbatim" language in a new statute Congress intends to incorporate previous judicial interpretations of the copied language. *See, e.g., Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 130 S. Ct. 1605, 1616 (2010) (Congress "copied verbatim" the pertinent portions of one statute into another). But here Congress did not copy Section 3 into the 1966 enactment of FOIA. In a clearly stated intent to reverse the expansive interpretation of the prior Section 3, Congress wrote an entirely new statute and made significant word changes to those APA sections that carried over into FOIA.

As this Court recognized in *Rose*, the "principal source for the bill ultimately enacted as [FOIA] was S. 1666, 88th Cong., 1st Sess. (1963)." 425 U.S. at 375, n. 14; *see also*, S. Rep. No. 813, 89th Cong., 1st Sess. at 4 (1965) ("S. Rep. No. 89-813"*)*. S. 1666, titled "A Bill to Clarify and Protect the Right of the Public to Information," was premised on the recognition that significant change to Section 3 was necessary. *See* 109 Cong. Rec. 19,530 (1963) (Statement of Sen. Ervin). *See also*, *Freedom of Information: Hearings on S. 1666 Before the Subcomm. on Admin. Practice and Procedure of the Senate Judiciary Comm.,* 88th Cong., 1st Sess. at 35-37 (Sen. Ervin); *id.*, at 48-49 (Sen. Metcalf) (1963) ("*1963 Senate Hearings*").

As this Court discussed in *EPA v. Mink,* 410 U.S. 73, 79-80 (1973), FOIA was adopted as a replacement for Section 3, 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; H.R. Rep. No. 1497, 89th Cong., 2d Sess. at 5-6 (1966) ("H.R. Rep. No. 89-1497"). *See also* S. Rep. No. 1219, 88th Cong., 2d Sess. at 9-11 (1964) ("S. Rep. No. 88-1219").[2]

More than just general dissatisfaction with the entire Section 3 of the APA, Congress also recognized the need to tighten specific exemptions. In *Rose*, the Court recognized that Exemption 2 was "traceable to congressional dissatisfaction" with the former 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.'" 425 U.S. at 362 (citing S. Rep. No. 89-813 at 5). 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

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[2] As the Senate Report for S. 1666 explained, the intent of S. 1666 was to replace Section 3 of the APA in its entirety due to its failure to achieve public disclosure. S. Rep. No. 88-1219 at 9.

[APA's] exemption for 'internal management' matters." 425 U.S. at 363.

The Navy's assertion that Congress intended the same "broad understanding" of the old "internal management" exemption to carry over into Exemption 2's exemption for matters "related solely to the internal personnel rules and practices of an agency" flies in the face of FOIA's statutory history as recognized in *Rose*. Resp. Br. at 26. Congress did not simply copy Section 3's "internal management" exemption into FOIA. Exemption 2 was not meant to reinstate the "internal management" section of the APA, it was meant to replace it.

C. Legislative History Does Not Support High 2

The Navy cites three "key issues" that it erroneously claims demonstrate Congressional intent that Exemption 2 extends beyond its plain language. Resp. Br. at 30-40.

1. First, there is no legislative history supporting the Navy's assertion that Congressional intent changed when the wording for the precursor to Exemption 2 was changed from "internal *employment* rules and practices" to "internal *personnel* rules and practices." Resp. Br. at 30-34. To the contrary, the change from "employment" to "personnel" was nothing more than a change from one synonym to another.

According to the 1964 Senate Report, the amendment that changed "employment" to

"personnel" – Amendment 9 – involved simply "redrafting of the three exceptions which are to govern subsection (b) in order that the exceptions in the various subsections have some uniformity of order." S. Rep. No. 88-1219 at 5. In the original version of S. 1666, the exemption for internal employment matters applied only to subsection 3(b) which required publication of agency opinions, orders, and rules in the federal register. Subsection 3(c), which addressed other agency records, did not include an exemption for either employment or personnel documents. The amendments reported out of committee as S. 1666 added the "internal personnel rules and practices" (Exemption 2) as well as five additional exemptions to Subsection 3(c). S. Rep. No. 88-1219 at 6 (Amendment 16), and 13-14 (describing Subsection 3(c)). The change of the word "employment" to "personnel" occurred during the "renumber[ing]" and "rephras[ing]" of the exceptions. *Id*. The Committee provided no explanation for the changed word. Contrary to the Navy's argument that the change reflected a rejection of the common understanding of "personnel rules and practices" as meaning trivial employment matters, Resp. Br. at 30, the Committee confirmed that the exemption applied only to such trivial matters:

> Certain rules, interpretations, and statements of policy may not affect the public. For example, rules as to personnel's use of parking facilities or regulation of lunch hours, statements of

> policy as to sick leave, and the like may be adopted by an agency and not be required to be published in the Federal Register.

S. Rep. No. 88-1219 at 5.

The Navy's reliance on the 1963 testimony of Assistant Attorney General Schlei as support for any significance in the change from "employment" to "personnel" is also misplaced. Resp. Br. at 31-32. Indeed, Schlei himself recognized the two words as interchangeable. Schlei testified that with respect to "agency instructions to its investigators as to the means to be employed to detect violation," "the bill would permit withholding of internal agency instructions to its staff only to the extent that they relate 'solely to the internal employment rules and practices of any agency.'" *1963 Senate Hearings* 201-202.[3]

In fact Schlei repeated the same concern with the term "personnel" during his 1965 House testimony as he had in his 1963 testimony when the bill used the word "employment." Schlei confirmed his understanding that "personnel" referred to "employee relations, employment management rules and practices of any agency." *Federal Public Records Law: Hearings on H.R. 5012 Before a Subcomm. of*

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[3] This was but one of Schlei's nine criticism of S. 1666. *1963 Senate Hearings* 194-203. It was clear that Schlei was swimming against the tide of Congress's determination to overhaul disclosure law in FOIA. Schlei was satisfied with, and opposed to amending, Section 3. *Id.,* 205.

the House Comm. On Gov't Operations, 89th Cong., 1st Sess. Pt. 1 at 29-30 (1965) ("*1965 House Hearings*"); Pet. Br. at 27-28. Thus, the very individual on whose testimony the Navy so heavily relies for its argument that the two words have different meanings instead recognized that "employment" and "personnel" were synonyms.

Finally, the Navy argues that Senator Long's statement that "Congress, wouldn't want to do anything that would seriously hurt the law-enforcement provision of any agency" supports the proposition that the change from "employment" to "personnel" has significance. Resp. Br. at 32, *quoting 1963 Senate Hearings* at 166.[4] But Senator Long's statement was made in response to testimony from FTC Chairman Dixon, concerning the FTC's law enforcement and investigative functions and his concern over the premature release of private complaints and investigative files. *1963 Senate Hearings* 161-166. Dixon did not mention either "employment rules and practices" or "personnel rules and practices." *Id*. Further, true to Senator Long's word, the Senate did address Dixon's concerns over the law enforcement provisions of agencies by creating Exemption 7. *See* S. Rep. No. 88-1219 at 14, 17.

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[4] By referencing Senator Long's statement after its reference to Mr. Schlei's concern, Resp. Br. at 32, the Navy implies that Senator Long's comment was in response to Mr. Schlei. To the contrary, Senator Long's statement was made the day before Mr. Schlei testified.

2. The Navy's second "key lesson" from the drafting history – that the House legislative history "repeatedly emphasized" that Exemption 2 "applies when disclosure would risk circumvention of the very agency functions to which the records relate" – fails for at least two reasons. Resp. Br. 30, 33-38.

a. First, the legislative history does not demonstrate "repeated" emphasis. Despite its lengthy and sometimes confusing description of the legislative history, the Navy points to only three actual points of evidence: (1) the colloquy between Representative Moss and Mr. Schlei during the 1965 House hearings; (2) a citation to a portion of this colloquy in the 1966 House Report; and (3) a brief statement from a single House member during open floor debate.

Petitioner has already demonstrated that the dialogue between Representative Moss and Mr. Schlei is helpful to the Navy's argument. Pet. Br. at 27-29. Schlei, who remained generally hostile to the creation of FOIA,[5] confirmed his opinion that use of the term "personnel" connoted "employee relations, employment management rules and practices of an agency." *1965 House Hearings* 29-30. Congressman Moss recognized further work would be needed if the language was to

[5] Contrary to Congress's intent of sharply limiting agency discretion, Mr. Schlei summed up his 1965 testimony by stating that H.R. 5012, 89th Cong., 1st Sess. (1965), "can result in a valid enactment only if it leaves undisturbed the inherent authority of the executive branch to govern the disclosure or nondisclosure of its records." *1965 House Hearings* at 7.

cover the type of investigative materials Schlei wanted to have exempt.[6] But FOIA was enacted without the additional work required to support the outcome desired by either Schlei or the Navy.

The second line of "evidence" pointed to by the Navy is the House Report. H.R. Rep. No. 89-1497. As discussed by this Court in *Rose*, 425 U.S. at 363, Pet. Br. at 22-23 and fn. 7, and Public Citizen Amici Br. at 8-14, the House Report should not be relied on as legislative history for Exemption 2. Senate Bill S. 1160, 89th Cong., 1st Sess. (1965), passed the Senate based on the language in the Senate Report which was faithful to the plain words of the bill, and in particular Exemption 2. S. 1160 then went to the House where it passed without amendment. The House Report with its contradictory interpretation for Exemption 2 was written *after* the Senate's passage of S. 1160. Because S. 1160 then passed the House without amendment, the Senate was never afforded the opportunity to consider or debate the "intent" added by the House. Davis, K., Administrative Law Treatise, § 3A.31 (1970 Supp) at 174-76 ("statements in the House committee report that contradict the bill and depart from the understanding of the Senate committee are not the law, and … a clear abuse."); Davis, K., Administrative Law Treatise, § 5.30 (2d ed.

[6] Schlei specifically raised concerns over "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." *1965 House Hearings* at 29-30.

1978)("[T]he House Committee tried to change the meaning of the legislative language").

While the House Report states that Exemption 2 applies to "[o]perating rules, guidelines and manuals of procedure for Government investigators or examiners ... ," the report references only the dialogue between Congressman Moss and Mr. Schlei. *Id*. at 10, *citing 1965 House Hearings,* at 29-30. But as demonstrated in Petitioner's Brief, the Moss-Schlei colloquy supports the conclusion that additional work was needed on Exemption 2's language if it was to apply to the broad range of topics addressed in the House Report.[7] Pet. Br. at 27-29.

The Navy relies finally on a comment by a single member of Congress during the 1966 House floor debates on S. 1160. Resp. Br. at 37, *citing* 112 Cong. Rec. 13,659 (1966). While Representative Gallagher did state (in one sentence) that he believed "[i]ncome tax auditors' manuals would be protected under [Exemption] No. 2," he provided no background or support for that observation. This Court has repeatedly eschewed reliance on passing statements of one member made from the floor. *Garcia v. U.S.*, 469 U.S. 70, 76 (1984).

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[7] The Navy's repeated assertion, Resp. Br. 39-40, that the House Report's description of Exemption 2 is consistent with the Senate's earlier Senate Report because the Senate changed the word "employment" to "personnel" and because the Senate intended to make Exemption 2 consistent with the old internal agency management exemption in the APA's Section 3 fails for the reasons discussed above. *Supra* at 5-11.

Thus, all the Navy has are three slender and unconvincing points – one colloquy with Representative Moss that ends with Representative Moss agreeing that the language would need to be changed in order to have the effect sought by Mr. Schlei; the 1966 House Report which courts and commentators have discounted as not authoritative; and a stray comment from one member during a floor debate. These three points fall far short of supporting the Navy's claim that the "House of Representatives repeatedly emphasized that Exemption 2 applies when disclosure would risk circumvention of the very agency functions to which the records relate." Resp. Br. at 30.

b. Even if the Navy were correct that the Representative Moss-Schlei colloquy, the House Report, and statement of Representative Gallagher did indicate intent beyond the plain language of Exemption 2, these three points would demonstrate only an intent to exempt from release manuals of law enforcement investigators, such as FBI manuals, IRS audit manuals and manuals for bank or savings and loan inspectors. None of the history cited by the Navy supports its broad request that this Court extend Exemption 2 to all documents – including those not used by investigators or inspectors – that an agency believes might result in the circumvention of agency regulations.

3. The Navy asserts that nothing in the 1965 Senate Report's "carefully worded sentence" contradicts the "otherwise uniform understanding that Exemption 2 applies when disclosure would risk

circumvention of the very governmental function addressed in the agency records." Resp. Br. at 31.[8] To the contrary, there is no support that the Senate's "carefully worded sentence" is anything other than a carefully worded description of what the Senate believed it was adopting in S. 1160. Nor is there support for the Navy's proposition that there was a "uniform understanding" that Exemption 2 applied to more than employment relations rules and practices.

In asserting a "uniform understanding" the Navy's historical analysis ignores that the Senate kept the same language and intent for Exemption 2 through both its 1963 bill and the final 1965 bill. As discussed above, the Senate's 1964 Report on S. 1666 stated in unambiguous terms that the intent of the section allowing an exemption from publishing matters "related solely to internal personnel policies and practices" was to exempt "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. 88-1219 at 5. There is no evidence that the Senate considered, before passing S. 1666, any other examples of "personnel rules and practices."

Senator Long reintroduced FOIA in 1965 as S. 1160. 111 Cong. Rec. 2,780 (1965). While the

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[8] 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." S. Rep. No. 89-813 at 8.

location of the FOIA exemptions moved,[9] the 1965 version of S. 1160 carried precisely the same language for what became Exemption 2 as contained in the 1963 bill S. 1666. 111 Cong. Rec. 26,821 (1965) (§ 3(e)(2)). Similarly, the 1965 Senate Report contained the identical statement of intent for the "personnel rules and practices" exemption as that used by the Senate in 1964. According to the 1965 Senate Report: "Exemption No. 2 relates only to 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." S. Rep. No. 89-813 at 8.

Contrary to the Navy's assertion, there is no evidence that the Senate ever considered, much less adopted, a different meaning for Exemption 2 prior to the full Senate's passage of S. 1160 on October 13, 1965. 111 Cong. Rec. 27,055 (1965).[10] Indeed, the examples of trivial employee relations matters identified in the Senate's 1965 Senate Report are the same as those in its 1964 Report.

The Navy's argument that the examples provided in the Senate Report are not exhaustive and could include internal manuals unrelated to employee

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[9] The 1965 version of S. 1160 relocated the exemptions that had been previously scattered between subsections 3(a), 3(b) and 3(c) into a new subsection, 3(e) specifically titled "exemptions."

[10] The Navy incorrectly implies both through the order of its discussion, Resp. Br. at 34-36, and in its text, that the 1966 House Report was issued *before* the 1965 Senate Report or the Senate's 1965 passage of S. 1160.

relations is also unsupported. Resp. Br. at 40. The Senate Report specifically limited the type of "personnel matter" to matters such as "personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, *and the like*." S. Rep. No. 89-813 at 8 (emphasis added). The term "and the like" rebuts the Navy's unsupported notion of an open-ended list. There is no basis to depart conceptually from or expand the type of examples provided. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 (2010) *citing Russell Motor Car Co. v. U.S.,* 261 U.S. 514, 519 (1923) ("[A] word may be known by the company it keeps").

There is no evidence the Senate ever considered that Exemption 2 might apply even to investigative manuals or procedures, much less the broad range of materials unrelated to enforcement or agency investigations urged here by the Navy.

D. The Concerns Addressed by the 1966 House Report and Policy Concerns that Informed *Crooker* Were Resolved by Congress in Its 1986 Amendment Adding to Exemption 7(E)

As demonstrated in Petitioner's Brief, the specific concern in *Crooker* – release of law enforcement manuals that instructed federal investigators how to conduct their investigations – was addressed and specifically resolved by Congress's 1986 addition of Exemption 7(E). 5 U.S.C. § 552(b)(7)(E). Pet. Br. at 35. Despite Congress's failure to extend *Crooker's*

holding into Exemption 2 and create a new exemption for non-law enforcement or investigative materials, the Navy encourages this Court do so instead. Resp. Br. 42-47. The Court should decline for at least three reasons.

1. First, Congress's decision to amend one subsection of FOIA to explicitly cover some records does not create an implication that Congress intended another section to impliedly cover the same or even a broader category of records. The Navy's reliance on *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 143 (2000) is misplaced. Resp. Br. at 43. While this Court confirmed in *Brown & Williamson* that "implications of a statute may be altered by the implications of a later statute," it confirmed also that "[t]his is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." 529 U.S. at 143 (internal quotes omitted).

Here Exemption 2 is narrowly limited to "matters related solely to personnel rules and practices of an agency" – matters that were trivial, of no public interest, and therefore too burdensome to produce. After judicial interpretation expanded the narrow language to cover non-employment related materials of significant public interest, such as manuals for investigators, Congress acted to specifically incorporate those materials into a different new FOIA exemption. Thus, the far stronger implication is that Congress meant precisely what it said in both the original Exemption 2 and the new

Exemption 7(E). Exemption 2 is limited to trivial employment related matters and Exemption 7(E) applies to investigative manuals, policies and files. If Congress was satisfied with *Crooker's* creation of a High 2 exemption, it would not have had any need to enact Exemption 7(E) to protect against the disclosure of the law enforcement manuals protected by the High 2 judicial expansion of the statute.

2. Second, the addition of subsection (E) to Exemption 7 demonstrates Congress's commitment that FOIA exemptions be construed narrowly and limited to their plain language. As explained in Petitioner's Brief, while in 1983 Congress initially proposed amending both Exemptions 2 and 7 in response to *Crooker,* upon reintroduction in 1986 during the 99th Congress, the proposed amendment to Exemption 2 was not included. Pet. Br. at 33-35. Instead, Congress elected to amend only Exemption 7 in order to address "some confusion created by" *Jordan* as well as be "guided by the 'circumvention of the law' standard from *Crooker."* 132 Cong. Rec. 29,620 (1986) (Statement of Rep. Kindness). Thus, Exemption 7(E) was added to exempt from disclosure "techniques and procedures" or "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).

By amending only Exemption 7 to add subsection (E), Congress cleanly consolidated the various exemptions for law enforcement or investigatory reports and procedures under one exemption,

thereby eliminating "the need for courts to choose between assisting criminals and distorting the meaning of the second exemption." Davis, K., Pierce, R., Administrative Law Treatise, § 5.8 (1994).

3. Third, Congress's 1986 decision to respond to *Jordan* and *Crooker* by adding subsection 7(E) and not amending Exemption 2 is consistent with the original legislative history. As discussed above, even if the House Report written after the Senate voted on the bill is accepted, the only argument that can be gleaned from the House history was a concern over the protection of "instructions to FBI agents and bank examiners;" "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners);" and "income tax auditors' manual[s]." *See*, *1965 House Hearings* 30 (Statement of Rep. Moss); H.R. Rep. No. 89-1497 at 10 and fn. 14, and 112 Cong. Rec. 13,659 (1966) (statement of Rep. Gallagher). *Supra* at 12-15. By adding Exemption 7(E) to include such investigative instructions, manuals, policies and procedures, the 1986 Congress addressed the concerns of the earlier House Report. Trivial "personnel" or employment related matters are exempt under Exemption 2, and investigative files, and investigative manuals, guidelines, policies, and instructions are exempt under Exemption 7.

E. Congress Struck a Balance in FOIA and Mandated Full Agency Disclosure Unless the Information Sought Falls Within One of the Narrow Exemptions

The Navy takes issue with Petitioner's invocation of FOIA's presumption of disclosure and argues instead that the Court should strike a "workable balance" between public disclosure and an agency's claimed need for secrecy. Resp. Br. 48-51. The Navy ignores that it is Congress that struck the balance in FOIA.[11] "The Act's broad provisions favoring disclosure, coupled with the specific exemptions, reveal and present the 'balance' Congress has struck." *John Doe Agency v. John Doe Corp.,* 493 U.S. 146, 152-153 (1989).[12] The Navy, by selectively

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[11] The Navy quotes *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), for the proposition that "public disclosure is not always in the public interest." Resp. Br. at 49. The Navy's quotation, however, leaves out the important remainder of the sentence from *Sims*. In full, the Court explained: "Congress recognized, however, that public disclosure is not always in the public interest *and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U.S.C. § 552(b)."* (Emphasis added). The full sentence confirms that while Congress recognized that some documents should be withheld, it was Congress that struck the balance and created the nine narrow exemptions.

[12] The "workable balance" discussed by the Court in *John Doe* was limited clearly to the Court looking to the "reasons for the exemption from the disclosure requirements in determining whether the Government has properly invoked a particular exemption." 493 U.S. at 157.

quoting and adding emphasis to words taken out of context from *Rose*, attempts to insert both judicial and agency discretion in expanding FOIA's exemptions beyond the narrow exemptions created by Congress. *Compare* Resp. Br. at 49-50 *with Rose*, 425 U.S. at 360-362. This Court has made abundantly clear that the "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act" and that the "exemptions are explicitly made exclusive … and must be narrowly construed." 425 U.S. at 361, *quoting EPA v. Mink*, 410 U.S. at 79 (1973).

While refusing to accept that the exemptions must be narrowly construed in favor of disclosure, the Navy argues that an exemption for trivial and routine employee relations matters that are of no public interest does not fit Congress's scheme. Resp. Br. at 51. But this argument ignores that this is precisely what Congress did. Indeed, as this Court recognized in *Rose*, "the 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." 425 U.S. at 369. *See also* S. Rep. No. 88-1219 at 5 (confirming that the precursor to Exemption 2 in § 3(b)(2) of S. 1666 applied to trivial internal personnel matters such as use of parking facilities, lunch hours, sick leave and the like); S. Rep. No. 89-813 at 8. Congress was not solely focused on matters of national security or federal investigations. It was focused also, through Exemption 2, on eliminating

the unnecessary burden of compiling and producing trivial matters of little or no public interest.

The heart of the Navy's policy discussion is its assertion that Exemption 2 should be construed as a broad catchall exemption that grants agency discretion because "[n]one of FOIA's other exemptions address Exemption 2's rationale for withholding the internal rules and procedures for agency personnel."[13] Resp. Br. at 53. Consequently, the Navy seeks discretion to apply Exemption 2 "*generally* whenever the government can establish a significant risk" of circumvention. *Id.* at 53 (emphasis in original). The Navy seeks this discretionary catchall based on its belief that existing exemptions might be too narrow, and enacting new exemptions pursuant to Exemption 3 would be too burdensome on Congress. *Id.* at 52-54. But that is not how Congress constructed FOIA nor how this Court has interpreted it. Congress elected to retain the authority to exempt specific materials pursuant to Exemption 3. Rather than relieve Congress of the supposed burden of enacting new statutory exemptions, the Navy seeks to usurp Congressional power and replace it with agency discretion.

Indeed, the broad agency discretion urged now by the Navy is no different than the complaint of

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[13] In making this assertion the Navy changes Exemption 2's plain language from "internal personnel rules and practices of an agency" to its preferred, but unsupported, "internal rules and procedures for agency personnel." *Supra* at 3-4.

Assistant Attorney General Schlei that House Bill H.R. 5012 would "leave nothing" to executive discretion[14] – a plea that was rejected when Congress approved the identical Senate Bill S. 1160 without major amendment in 1966. Congress removed agency discretion when it replaced Section 3 of the APA with FOIA. If, as the Navy appears to concede, the ESQD data and maps sought by Milner do not fit within Exemption 2 without the judicially legislated High 2 expansion that cannot be sustained under a proper reading of the Act, they must be released.

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[14] As Mr. Schlei testified:

> The bill would reserve to the President authority to classify as "secret" information in two designated areas – national defense and foreign policy. However, even in those two areas, the bill seeks to prohibit non-disclosure except as the President, by Executive order identifies the matters which he has determined must be kept secret and specifically requires that they be withheld. Otherwise, however, H.R. 5012 attempts to leave nothing to Executive discretion.
>
> I respectfully submit, Mr. Chairman, that this approach is impossible and can only be fatal to this committee's undertaking….
>
> 1965 House Hearings at 5.

CONCLUSION

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,

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