No. 09-1163

In the Supreme Court of the United States

GLENN SCOTT MILNER, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Exemption 2 of the Freedom of Information Act, 5 U.S.C. 552(b)(2), exempts from disclosure technical explosive and ammunition safety maps used by Navy personnel for the safe handling and storage of ordnance at Naval Magazine Indian Island.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26-64) is reported at 575 F.3d 959. The opinion of the district court (Pet. App. 4-25) is not published in the *Federal Supplement* but is available at 2007 WL 3228049.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2009. A petition for rehearing was denied on December 22, 2009 (Pet. App. 65). The petition for a writ of certiorari was filed on March 22, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Naval Magazine Indian Island (NMII) is located in Port Hadlock, not far from the City of Port Townsend, Washington, and has been used as a military arse-

nal since before World War II. The mission of NMII is the storage and transhipment of ammunition, weapons, weapon components, and explosives in support of the Navy, United States Joint Forces, the Department of Homeland Security, other federal agencies, and allied forces. The Navy is responsible for all operations on NMII, including law enforcement, security, force protection, and explosives safety. Pet. App. 4-5, 28.

The Navy's procedures for storage and movement of explosives and ammunition ashore is generally governed by a manual known as OP-5.[1] But site-specific and ordnance-specific information is needed to direct NMII personnel in how to apply the general practices and procedures set out in the OP-5 Manual. Accordingly, as part of the Navy's explosives safety program, the Navy has developed what is known as Explosive Safety Quantity Distance (ESQD) information, which reflects measurements of the effects of a detonation of certain quantities of certain explosives or ammunition at varying distances. ESQD information is typically expressed as mathematical formulas, and also illustrated by "arc

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[1] OP-5 is "[t]he Navy's primary set of regulations for explosives safety at naval facilities" and is formally titled "Ammunition and Explosives Ashore Safety Regulations for Handling Storing and Production Renovation and Shipping, NAVSEA OP 5." C.A. E.R. 72. OP-5 states that its "[d]istribution [is] authorized to U.S. Government agencies and their contractors for administrative and operational use. Requests for this (document) must be made to the Naval Ordnance Safety and Security Activity." *Ibid.* It also states a "Warning" that "[t]his (document) contains data whose export is restricted by the Arms Export Control Act (title 22 USC SEC 2751 et seq) or Executive Order" and that "[u]nlawful export is punishable by severe criminal penalties." Finally, it provides a "Destruction Notice," which directs unauthorized recipients to "[d]estroy (this document) by any method that will prevent disclosure of the contents." *Ibid.*

maps," in which the center of the arc is the source of the explosion and the arc's periphery the maximum area over which the force of the explosion would project should it occur. See Pet. App. 5-6, 29.

In particular, ESQD information developed specifically for NMII and the types of ordnance stored at and moved through NMII is used by Navy personnel at NMII to establish minimum separation distances for various quantities of explosives. Those separation distances are used to afford reasonable safety to persons and property both for static purposes (*i.e.*, in the design, arrangement, construction, and loading of storage bunkers) and for operational purposes (*i.e.*, to identify the lowest risk locations for loading and unloading ordnance, and to identify lower-risk paths through the facility for the movement of a given load of explosives or ammunition). See Pet. App. 5-6, 29. It is the site-specific and ordnance-specific ESQD information that is at issue here.

The Navy evaluates public requests for ESQD information on a case-by-case basis and does not release the information to the general public if it determines that the release might pose a serious threat of death or injury to any person. Pet. App. 5. On occasion, the Navy has disclosed sensitive ESQD information pertaining to NMII to local first responders to support emergency preparedness. *Ibid.* Petitioner agrees, however, that none of the documents at issue in this case has been disclosed outside the Navy. Pet. C.A. Reply 19.[2]

2. Petitioner submitted a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking:

[2] In addition, there may in the past have been certain inadvertent or unauthorized disclosures of ESQD information for NMII. See C.A. Supp. E.R. 37-38; *id.* at 41-42 (paras. 4-7).

> [A]ll documents on file regarding [ESQD] arcs or explosive handling zones at the ammunition depot at Naval Magazine Indian Island. This would include all documents showing impacts or potential impacts in the explosive handling zones to the ammunition depot and the surrounding areas.
>
> [A]ll maps and diagrams of the ammunition depot at Indian Island which would show ESQD arcs or explosive handling zones; and
>
> [All] documents regarding any safety instructions or operating procedures for Navy or civilian maritime traffic within or near the explosive handling zones or ESQD arcs at the ammunition depot at Indian Island.

Pet. App. 29-30 (brackets in original); see also *id.* at 6-7.[3]

The Navy identified a total of 17 document packages (totaling approximately 1000 pages) responsive to petitioner's request. Most of these documents were ultimately released to petitioner, but 81 documents were withheld, in whole or in part, based on the Navy's conclusion that the disclosure of the ESQD information could threaten the safety and security of NMII and the surrounding community. Pet. App. 7, 30.[4]

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[3] Petitioner submitted two FOIA requests, but the court of appeals and the district court agreed that the two requests were substantially identical. See Pet. App. 6 & n.1, 29 n.1.

[4] Under FOIA, any "reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of portions which are exempt." 5 U.S.C. 552(b) (2006 & Supp. II 2008). Some of the documents provided to petitioner had ESQD information redacted. See Pet. App. 7.

3. Petitioner filed suit in the Western District of Washington under FOIA to compel the Navy to disclose the withheld ESQD information. Pet App. 7-8, 30. As relevant here, the Navy argued that the information was protected from disclosure under FOIA Exemption 2, 5 U.S.C. 552(b)(2).[5] Pet. App. 8, 30. That exemption provides that the duty to disclose "does not apply to matters that are—(2) related solely to the internal personnel rules and practices of the agency." 5 U.S.C. 552(b)(2). On cross-motions for summary judgment, the district court upheld the Navy's withholding of ESQD information. Pet. App. 4-25.

a. Central to the court's holding was the Navy's demonstration through its declarations that the ESQD information could be used by terrorists, saboteurs, or other lawbreakers to identify the location and quantity of—and thus exploit the vulnerabilities of—dangerous explosives, ordnance, or ammunition stored at NMII. Pet. App. 9, 30, 45-46. The Commanding Officer of NMII, Commander George N.T. Whitbred IV, explained in his declaration in support of the Navy's motion for summary judgment:

> [B]ecause of the varying nature of th[e] potential threat, we are particularly careful to scrutinize requests of ESQD arc information or arc maps and make determinations regarding the release of such information on a case-by-case basis. * * * However, ESQD information is not released to the general public if a determination is made that the re-

[5] The Navy also argued that the withheld information was exempt from disclosure under Exemption 7(F), 5 U.S.C. 552(b)(7)(F), but neither the district court nor the court of appeals majority reached that issue, see Pet. App. 25, 30, 46 n.8, 47.

> lease might pose a serious threat of death or injury to any person—either inside or outside the installation boundaries.

C.A. E.R. 75.

Commander Whitbred explained that ESQD arcs were created as part of the Navy's overall safety program for the storage and handling of explosives to ensure that NMII is "operated, to the utmost extent possible, as a safe and secure facility providing ordnance logistics to a wide array of military and federal entities." C.A. E.R. 73-74, 77. Because of the numerous bunkers and other facilities scattered throughout the base (*id.* at 75-77, 86), ammunition and explosives must be stored and handled so that a fire or explosion in one area will not "set off" an explosion in another, triggering a "sympathetic detonation" or chain reaction (*id.* at 76). See Pet. App. 29. Thus, the Navy's concern is that "a terrorist or other lawbreaker would employ this same concept (in reverse) to create maximum damage with minimum outlay of effort." C.A. E.R. 76-77. Commander Whitbred explained how this reverse-engineering would work and the damage it could cause:

> [A]rmed with this information, a lay person with a rudimentary knowledge of mathematics could easily determine: the precise location of ordnance magazines[;] the types of items stored in them; which locations to target for maximum damage to personnel, critical infrastructure and disruption of loading and off-loading of ships; the mission capability of the installation; the installation's battle group capability and operational sustainability; the location of personnel and the precise numbers of personnel required to

> load and offload a ship[;] * * * [and] the quantities of materials stored.

Id. at 73.[6]

Commander Whitbred concluded:

> [B]ased on my training and experience, I believe *strongly* that release of the sensitive ESQD information involved in this case would jeopardize the safety and security of the storage, transportation and loading of ammunitions and explosives; that it would create a serious threat to the base and its surrounding communities, and it would do little or nothing to promote the purpose of democratic oversight which is at the heart of the Freedom of Information Act.

C.A. E.R. 77; see Pet. App. 46.

Petitioner submitted a declaration stating that the ESQD arcs for NMII were a matter of legitimate public concern because an explosion on Indian Island could potentially affect citizens who might happen to be in the

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[6] Responding to the petitioner's assertion that ESQD information for the nearby Bangor submarine base had been released, Commander Whitbred explained that NMII is not a single-weapon facility like the submarine base, and the "difficulty of monitoring and protecting" a changing mix of explosives "is concomitantly more complex." C.A. E.R. 76. Although the record does not reflect the circumstances under which the Bangor ESQD information was released, it appears it was not pursuant to FOIA, but rather in conjunction with a citizen suit under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* In any event, the release of the Bangor ESQD information is immaterial as such because "release of certain documents waives FOIA exemptions *only for those documents released.*" *E.g.*, *Mobil Oil Corp.* v. *United States EPA*, 879 F.2d 698, 701 (9th Cir. 1989).

surrounding waters.[7] He also noted instances in which ESQD information had been disclosed by the Navy—such as for the Bangor submarine base, and the disclosure of NMII ESQD information to first responders—and contended that such disclosures belied the Navy's safety concerns. C.A. E.R. 23-25.

b. The district court agreed with the government that the ESQD information was appropriately withheld under the so-called "high 2" component of Exemption 2, articulated in the en banc D.C. Circuit's decision in *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (1981).[8] Under the test in *Crooker*, documents are exempt from disclosure if they are "predominantly internal" and disclosure would significantly risk circumvention of an agency regulation or statute. *Id.* at 1073-1074.

The district court began its Exemption 2 analysis by determining that although the Ninth Circuit had not expressly adopted the *Crooker* test, the test developed in the Ninth Circuit's case law "bears more than a passing resemblance to the *Crooker* test." Pet. App. 20. Applying the *Crooker* test, the district court found no dispute that the ESQD information was compiled for "predominantly internal" purposes because it was used to design, array, and construct ammunition storage facilities, and to organize ammunition operations. *Id.* at 19-21; see C.A. Supp. E.R. 54 (petitioner's admission in the district court that ESQD information was compiled "for

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[7] There is an in-water restricted area at the ordnance pier on Indian Island. See 33 C.F.R. 334.1230.

[8] The distinction between what some courts have termed the "high 2" and "low 2" applications of Exemption 2 is explained in detail below. See pp. 12-15, *infra*.

the sole purpose of obtaining internal administrative approval of construction projects").

As to the second prong of the *Crooker* test, the district court held that disclosure of the ESQD information "would significantly risk circumvention of law." Pet. App. 21. The court added that "when the government interest is particularly weighty—such as where concerns about national security are justified"—it is appropriate for a court to defer to the agency's expertise in assessing the risks from disclosure. *Id.* at 22 (citing *Center for Nat'l Sec. Studies* v. *United States Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (finding significant authority "counseling deference in national security matters")), cert. denied, 540 U.S. 1104 (2004).

The court therefore deferred to Commander Whitbred's risk assessment. Pet. App. 23. It also noted that petitioner failed to "offer any evidence truly disputing the Navy's risk assessment"; rather, he offered only his own personal opinion that the Navy's concerns about the risk from disclosure "cannot be taken seriously." *Ibid.* The district court concluded that release of the ESQD information "could cause the information to lose its utility in keeping people and property safe from harm in the event of an explosive incident"; "could provide essentially a roadmap to wreak the most havoc possible to those persons bent on causing harm"; and would "provide the proverbial fox a virtual map to the chicken coop." *Ibid.* Accordingly, because disclosure of these "predominantly internal" documents would significantly risk circumvention of law, the court held that they were exempt from disclosure. *Id.* at 21, 23, 25.

4. The court of appeals affirmed, with Judge William Fletcher dissenting. Pet. App. 26-64. The majority and dissent agreed that *Crooker* articulated the proper test

for the "high 2" component of Exemption 2: information is exempt from disclosure if "predominantly internal" and if disclosure would present a serious risk of circumvention of law. *Id.* at 34, 39-40, 47; *id.* at 55 (W. Fletcher, J., dissenting). They also agreed that *Crooker* properly described the balance intended by Congress in enacting FOIA, between the public's right to know and the countervailing need to withhold sensitive information when necessary to conduct safe, efficient, and effective government operations. *Id.* at 33-39; *id.* at 55 (W. Fletcher, J., dissenting). Moreover, the majority and dissent recognized that *Crooker* (which had relied heavily on the Ninth Circuit's decision in *Hardy* v. *Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (1980)) was fully consistent with the Ninth Circuit's post-*Hardy* caselaw, and further agreed that adopting the *Crooker* test would bring Ninth Circuit law into formal harmony with the post-*Crooker* decisions of the other courts of appeals. Pet. App. 33-36, 39; *id.* at 55 (W. Fletcher, J., dissenting).

The majority and dissent disagreed only on the application of this test. Compare Pet. App. 40-47 with *id.* at 55-60 (W. Fletcher, J., dissenting). The majority explained that the ESQD information was used by Navy personnel in conjunction with the Navy's OP-5 Manual to govern operations at NMII, and therefore ESQD information was "one part of the internal policies and procedures that NMII personnel are bound to follow when handling and storing explosive ordnance." *Id.* at 40. ESQD information was "an integral part of the Navy's personnel practices"; was "used for * * * instructing agency personnel on how to do their jobs"; was "certainly not written to regulate the public"; and "ha[s] absolutely no legal or enforcement ramifications whatso-

ever on the citizens of the Puget Sound region." *Id.* at 40, 41, 42. The court held that the information was therefore "predominantly internal," *id.* at 42, and did not lose that character simply because of "limited disclosure for official purposes," *id.* at 41.

As to the circumvention-of-law prong, the court of appeals held that the Navy's declarations (see pp. 5-7, *supra*) were to be accorded "substantial weight," Pet. App. 46, and that they established a significant risk that the ESQD information, if released to the public, could be used by saboteurs or terrorists to pin-point an attack on the munitions depot so as to wreak the most havoc possible, *id.* at 45. "[D]isclosure of the ESQD data would quickly render those documents obsolete for the purpose for which they were designed." *Ibid.* (internal quotation marks and citation omitted). The ESQD information is "created as a planning tool to prevent catastrophic detonations; disclosing [it] would make catastrophe more likely." *Ibid.* The majority noted that "[t]he dissent does not apparently dispute that this risk exists; it concludes only that risking sabotage of military explosives is not the sort of 'circumvention of law' that should concern us." *Ibid.* Taking the contrary view, the majority concluded that disclosure of this "predominantly internal" information "would present a serious risk of circumvention of law," *id.* at 47, and Exemption 2 therefore protected it from disclosure.

Judge Fletcher dissented only as to "the majority's application of the part of *Crooker* that deals with * * * the circumvention requirement." Pet. App. 55 (internal quotation marks and citation omitted). In Judge Fletcher's view, *Crooker*'s "circumvention" requirement was limited to individuals or entities directly regulated by the agency in question. *Id.* at 58 ("In all of the reported

cases dealing with the issue, Exemption 2 applies only to documents whose release would facilitate circumvention of agency regulation *by a regulated person or entity*."). Here, he said, "[t]he Navy is not acting as a regulatory or law enforcement agency," and the ESQD information "do[es] not regulate anyone or anything outside the Navy itself." *Ibid.*

Judge Fletcher also concluded that Exemption 7(F) did not apply. Pet. App. 60-62. But acknowledging that disclosure could be "as dangerous as Commander Whitbred claims," Judge Fletcher expressed a willingness "to remand to the district court * * * to give the Navy an opportunity to classify" the documents and "thereby to qualify them under Exemption 1." *Id.* at 63.[9]

ARGUMENT

The decision of the court of appeals aligns the Ninth Circuit with the standard invoked by every court of appeals to consider an Exemption 2 case in recent decades. The court of appeals correctly applied that standard, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals correctly described and appropriately adhered to the consensus understanding of the so-called "high 2" application of Exemption 2.

a. This Court addressed the scope of Exemption 2 in *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). There, law review editors sought case summaries of honor and ethics hearings at the Air Force Acad-

[9] The majority, by contrast, found that classification of ESQD information would be impractical, because some individuals (such as first responders) might need the information in the future but lack the necessary security clearances to see it. See Pet. App. 41.

emy. The government argued that Exemption 2 protected the information from disclosure because the disciplinary case summaries were of only internal significance and "the public could not reasonably be expected to have an interest" in them. *Id.* at 369-370. Finding that "the nature of [the Air Force Academy's] instruction—and its adequacy or inadequacy—is significantly related to the substantive public role" of the institution, the Court held that the documents were not protected from disclosure by Exemption 2. *Id.* at 368-369.

Rose confirmed that one function 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 369-370. This purpose has been labeled the "low 2" component of Exemption 2. But *Rose* recognized that Exemption 2 might also apply—as several courts of appeals had held—to "situation[s] * * * where disclosure may risk circumvention of agency regulation." *Id.* at 369. That aspect of Exemption 2 was not, however, applicable on the facts of *Rose*. See *id.* at 364 ("We need not consider * * * the applicability of Exemption 2" in cases "where knowledge of administrative procedures might help outsiders to circumvent agency regulations or standards.") (citation omitted).

After *Rose*, the courts of appeals recognized that *Rose* left open the development of a "high 2" aspect of Exemption 2. See, *e.g.*, *Caplan* v. *Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978) (noting that *Rose* "was careful to qualify" its holding so as to leave open the possibility of a "high 2" form of Exemption 2 covering situations presenting risks of circumvention); *Hardy* v. *Bureau of Alcohol, Tobacco &*

Firearms, 631 F.2d 653, 656 (9th Cir. 1980) (similar, adopting *Caplan* analysis); *Crooker* v. *Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1066 (D.C. Cir. 1981) (en banc) (similar); *Kaganove* v. *EPA*, 856 F.2d 884, 888 (7th Cir. 1988), cert. denied, 488 U.S. 1011 (1989) (similar); Pet. App. 32 n.2 (noting that *Rose* "explicitly left open" the "high 2" issue).

b. The benchmark case developing the "high 2" component is the D.C. Circuit's en banc decision in *Crooker*. Relying on FOIA's text and history—and persuaded by the fact that "every other circuit considering the issue [had on some basis] barred the mandatory release" of materials carrying a risk of law circumvention—the *Crooker* court concluded that "the words 'personnel rules and practices' encompass not merely minor employment matters," as *Rose* recognized, but also "other rules and practices governing agency personnel, including significant matters like job training for law enforcement personnel." *Crooker*, 670 F.2d at 1056, 1074.

Crooker drew on similar holdings from the Second and Ninth Circuits concluding that Exemption 2 protected "law enforcement materials" where disclosure would risk circumvention of regulation. See 670 F.2d at 1056 (citing *Hardy*, 631 F.2d at 656; *Caplan*, 587 F.2d at 547). *Crooker* echoed *Caplan* and *Hardy* in describing the particular materials at issue in all three cases—ATF training manuals—as law-enforcement-related. But the D.C. Circuit recognized that Exemption 2's statutory text ("related solely to * * * internal personnel rules and practices") did not limit the exemption to law enforcement material. *Crooker* also noted the interpretational tension in Exemption 2 between the "potentially all-encompassing" term "related" on the one hand, and the "potentially all-excluding" term "solely" on the

other. *Ibid.* (quoting *Vaughn* v. *Rosen*, 523 F.2d 1136, 1150-1051 (D.C. Cir. 1975) (Leventhal, J., concurring)). *Crooker* gave meaning to both by adopting a standard of "predominant internality." *Id.* at 1074. Thus, a document falls within Exemption 2 if (1) it is "predominant[ly] internal[]," and (2) its "disclosure [would] significantly risk[] circumvention of agency regulations or statutes." *Ibid.*

c. *Crooker*'s two-pronged test is a bedrock of Exemption 2 jurisprudence. See, *e.g.*, Pet. App. 39 ("*Crooker* has become the authoritative case on Exemption 2."); *id.* at 55 (W. Fletcher, J., dissenting) ("I agree that we should adopt the reasoning of the D.C. Circuit articulated in *Crooker.*"); *Audubon Soc'y* v. *United States Forest Serv.*, 104 F.3d 1201, 1203-1204 (10th Cir. 1997) (citing *Crooker* as the proper formulation of the "'high 2' approach[] adopted in four circuits"); *Kaganove*, 856 F.2d at 888-889 (relying exclusively on *Crooker* as the definitive resolution of the "high 2" issue "left open in *Rose*").

Petitioner claims (Pet. 2) that there is discord in the courts of appeals regarding the application of Exemption 2 in this regard. That is not so. No appellate decision has challenged the fundamental soundness of the *Crooker* test. See, *e.g.*, *NTEU* v. *United States Customs Serv.*, 802 F.2d 525, 530-531 (D.C. Cir. 1986) (Exemption 2 applies "[w]here disclosure of a particular set of documents would render those documents operationally useless, * * * whether or not the agency identifies a specific statute or regulation threatened by disclosure"; schemes used by the Customs Service to evaluate the qualifications of job applicants are covered by Exemption 2 because disclosure would give an unfair advantage to applicants in possession of the schemes); *Kaganove*,

856 F.2d at 889 (agency's employee promotion rating plan was covered by Exemption 2 because disclosure would frustrate the document's objective); *Schiller* v. *NLRB*, 964 F.2d 1205, 1207-1208 (D.C. Cir. 1992) (same regarding agency's litigation strategy for Equal Access to Justice cases); *Massey* v. *FBI*, 3 F.3d 620, 622 (2d Cir. 1993) (Exemption 2 covers symbols identifying confidential informants because "internal agency information may be withheld if * * * the government demonstrates that disclosure of the material would risk circumvention of lawful agency regulations.") (internal quotation marks and citation omitted); *Elliott* v. *USDA*, 596 F.3d 842, 850 (D.C. Cir. 2010) (Exemption 2 covers blueprints for buildings on a government research campus because disclosure and potential public dissemination would present a risk to national security and bioterrorism laws), petition for cert. pending, No. 09-10585 (filed Apr. 16, 2010).

d. Petitioner contends that *Crooker* misinterprets Exemption 2. None of the reasons petitioner gives for rejecting the nearly 30-year-old decision in *Crooker*, and the many decisions following it, has merit.

i. Petitioner first suggests that *Crooker*'s interpretation of Exemption 2 is a "significant departure from the plain language of the Exemption," which he apparently contends is limited to the terms and conditions of employment. Pet. 2; see Pet. 11. Petitioner is mistaken. The *Crooker* opinion carefully demonstrates that its test is fully consistent with the language of Exemption 2. 670 F.2d at 1055-1056. In particular, *Crooker* recognizes that as a textual matter, "the words 'personnel rules and practices' encompass not merely minor employment matters, but may cover other rules and practices governing agency personnel, including significant matters." *Id.* at 1056. The limitations in Exemption 2 come in-

stead from other words and phrases in the statute, such as "internal" and "[r]elated solely to." *Ibid.* If anything, it is petitioner's proposal that contradicts the plain language of Exemption 2 by atextually limiting it to "trivial materials," Pet. 9.

Moreover, Congress has approved the *Crooker* analysis by codifying parts of its test verbatim into a related exemption, Exemption 7(E), 5 U.S.C. 552(b)(7)(E). See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. N, § 1802(a), 100 Stat. 3207-48. The Act's legislative history expressly states that the amendment was modeled after "the 'circumvention of the law' standard that the D.C. Circuit established in its en banc decision in *Crooker* v. *BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2)." S. Rep. No. 221, 98th Cong., 1st Sess. 25 (1983). As the Seventh Circuit concluded, "*Crooker* accurately expresses congressional intentions" regarding Exemption 2 "[b]ecause Congress saw fit to codify the very language of *Crooker*, and because nothing in the legislative history of the Reform Act suggests the slightest disagreement with that case's holding." *Kaganove*, 856 F.2d at 889; see Pet. App. 37 (also recognizing the Congressional imprimatur on *Crooker*).

To be sure, ordinarily "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Massachusetts* v. *EPA*, 549 U.S. 497, 530 n.27 (2007) (citation omitted). But where, as here, Congress amends one part of a balanced and integrated set of statutory provisions (Exemption 7(E)) in light of its understanding of how another pre-existing part (Exemption 2) functions, Congress is properly understood to endorse both the newly enacted provision and the complementary understanding of the pre-existing provi-

sion. Cf. *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-163 (2008) (adhering to *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994)—which rejected a private right of action for aider and abettor liability under 15 U.S.C. 78j(b) and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5—in light of "Congress' amendment to the [Securities Exchange] Act [in the wake of *Central Bank*] restoring aiding and abetting liability in certain cases but not others").

ii. Petitioner also contends (Pet. 10-11) that the *Crooker* test will "swallow FOIA itself" because "[t]here is little data that does not have some potential impact on an agency's operation, and thus could be used to help a potential wrongdoer interfere." That misunderstands the *Crooker* test and ignores its circumscribed application over the past three decades. A document is exempt from disclosure only "if disclosure *significantly* risks circumvention of agency regulations or statutes." *Crooker*, 670 F.2d at 1074 (emphasis added). Indeed, the D.C. Circuit took account of petitioner's very concern and explained: "We add the word 'significantly' to stress the narrow scope of our construction of Exemption 2; in all cases in which the Government relies on Exemption 2, it remains the Government's burden to prove the 'significant risk.'" *Ibid.*

Here, the Navy offered detailed declarations supporting its position, see pp. 5-7, *supra*, and both courts found that the Navy compellingly established the risk posed by release of the ESQD information, see Pet. App. 23, 45-46. Petitioner relied solely on his personal opinion, and he offered no expert of his own to contradict Commander Whitbred's risk analysis. Petitioner's quarrel (Pet. 15-17 & n.3) with the lower courts' conclusion

that the record established the requisite level of risk is misplaced, and that fact-bound objection would not in any event merit this Court's attention.

Moreover, the history of this case further undercuts petitioner's predictions about the scope of withholding. Notwithstanding Exemption 2, the Navy disclosed a large amount of material in response to petitioner's request. See p. 4, *supra*. Some of that material likely would have satisfied the other requirements of the *Crooker* test, but because it did not pose a significant risk of circumvention, and did not fall within any other exemption, it was released. For the same reason, petitioner's hypotheticals—about the "hours of the Navy museum gift shop" or the cost and purveyors of "baked beans" (Pet. 11) or "report[s] disclosing corruption" (Pet. 16-17)—are exaggerated. Such information ordinarily would not be expected to pose a "significant risk of circumvention," though (as always) the inquiry would be a factual one on which the government would bear the burden of proof, see Pet. App. 31, 45-46.

iii. Petitioner further objects (Pet. 19-20) that *Crooker* lacks a "balancing" of the sort required under some other FOIA exemptions. But nothing in Exemption 2's text or history calls for balancing. Nor is it true that FOIA exemptions invariably require a balancing test. See, *e.g.*, *FBI* v. *Abramson*, 456 U.S. 615, 631 (1982) (explaining that Exemption 7, 5 U.S.C. 552(b)(7), is "a scheme of categorical exclusion; [Congress] did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis"). Instead, Exemption 2 requires the government to demonstrate a significant risk of circumvention from disclosure in a case such as this. That requirement inherently accommodates the presumptive public interest in disclosure and the over-

riding concern that disclosure not pose a substantial risk to the government's functioning. See *Crooker*, 670 F.2d at 1074 ("Congress has done the necessary balancing and enacted FOIA to represent the 'cross-currents' of concern.").

2. The court of appeals correctly applied *Crooker* to the explosives maps and other ESQD information at issue in this case. That application was specific to the facts of this case and does not merit review.

a. The ESQD information at issue was "predominantly internal," as the court of appeals majority and dissent agreed. See Pet. App. 42 n.4. It is information specific to NMII that is used in conjunction with the Navy's general rules and practices (the OP-5 Manual) to direct personnel in the placement and movement of ordnance to reduce the risk of a catastrophic explosion. ESQD information is directed to and used by Navy personnel in the discharge of their duties; it does not regulate the public or constitute secret law applied to the public. See *id.* at 40-42.

Petitioner contends (see, *e.g.*, Pet. 29) that "internal personnel rules and practices" is a concept limited to "law enforcement" materials. There is no basis in the statute's text for such a limitation. See Pet. App. 35-36. And petitioner's contention is entirely inconsistent with *Crooker* and its progeny that have applied Exemption 2 to such materials as job application and promotion procedures, litigation strategy documents, and research facility blueprints. See pp. 15-16, *supra*.

Nor would limiting Exemption 2 to "law enforcement" materials comport with FOIA's larger structure. The statute's exemptions express a "concern[] with the disclosure of sensitive materials," Pet. App. 36, but separately provide an exemption (Exemption 7) that ex-

pressly addresses law enforcement materials, see *id.* at 36-37. Limiting Exemption 2 to "law enforcement" would "incongruent[ly]" protect sensitive information only when contained in law enforcement records, but not when that same information was found in documents developed predominantly for internal agency use. *Id.* at 36 (citing *Crooker*, 670 F.2d at 1065 ("It would be inconsistent to no small degree to hold that Exemption 2 would not bar the disclosure of investigatory techniques when contained in a manual restricted to internal use, but that Exemption 7(E) would exempt the release of such techniques if contained in an 'investigatory record.'")); see *Abramson*, 456 U.S. at 628 ("There is nothing to suggest, and no reason for believing, that Congress would have preferred a different outcome simply because the information is now reproduced in a non-law-enforcement record.").

b. i. The Navy also established that disclosure of the ESQD information would in fact significantly risk circumvention of law. Commander Whitbred's declaration and other materials vividly illustrate how ESQD information, if disclosed, could be used by terrorists, saboteurs, or other lawbreakers to exploit the risks that attend the storage and handling of ordnance, and intentionally cause the very sort of catastrophe that ESQD information is developed to avoid. See pp. 5-7, *supra*; Pet. App. 45-46.

The district court and court of appeals both correctly determined that the Navy's declarations carried "substantial weight." Pet. App. 46; see *Winter* v. *NRDC*, 129 S. Ct. 365, 377 (2008) ("We 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'") (quoting *Goldman* v. *Weinberger*, 475 U.S. 503,

507 (1986)). And because petitioner "d[id] not offer any evidence truly disputing the Navy's risk assessment," the courts below quite properly rejected his bare personal opinion that the Navy's risk assessment "cannot be taken seriously." Pet. App. 23. Even if it were not overwhelmingly supported by the record, that case-specific risk assessment would not merit reexamination in this Court.[10]

ii. Petitioner (Pet. 16-17) and the dissent below (Pet. App. 58) contend that the "circumvention" requirement must be limited to individuals or entities actually regulated by the agency in question. Like petitioner's other arguments for limiting Exemption 2, there is no textual basis for that contention.

Petitioner's contention fails to account for the elemental principle of FOIA law that disclosure to one is disclosure to all. See *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004) ("[D]isclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all."); *id.* at 174 ("[O]nce there is disclosure, the information belongs to the general public."). Moreover, FOIA requires responsive material to be provided "in any form or format requested * * * if the record is readily reproducible by the agency in that form or format." 5 U.S.C. 552(a)(3)(B). The ESQD information exists in electronic format, and there would be no way to control its dissemination or even know who obtained it after it was released. Indeed, if the Navy re-

[10] Petitioner's insinuation (Pet. 20) that Commander Whitbred invoked Exemption 2 here because petitioner is "an anti-war activist" is without foundation. See *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991) ("We generally accord Government records and official conduct a presumption of legitimacy.").

ceived several similar requests, 5 U.S.C. 552(a)(2)(D) might require it to post its explosives maps on its "electronic reading room" website for all comers. See Office of Info. & Privacy, U.S. Dep't of Justice, *FOIA Counselor Q&A "Fequently Requested" Records*, FOIA Post, July 25, 2003, http://www.justice.gov/oip/foiapost/2003foiapost28.htm (discussing conditions triggering 5 U.S.C. 552(a)(2)(D) obligation).

The principle underlying the non-circumvention basis for applying Exemption 2 is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." *Crooker*, 670 F.2d at 1053. That risk of circumvention is present whether it is posed by the FOIA requester himself, or instead arises from the uncontrollable dissemination of the information. See, *e.g.*, *Elliott*, 596 F.3d at 850 (sustaining withholding under Exemption 2 of blueprints for buildings on a government research campus because their disclosure and dissemination would present a serious risk to national security and bioterrorism laws).[11]

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[11] Numerous other cases apply Exemption 2 based on the risk of circumvention by persons obviously not subject to regulation by the agency in question. See, *e.g.*, *James* v. *United States Customs & Border Prot.*, 549 F. Supp. 2d 1, 8-9 (D.D.C. 2008) (hackers misusing computer codes to access sensitive government computer systems); *Los Angeles Times Commc'ns, LLC* v. *Department of the Army*, 442 F. Supp. 2d 880, 889, 902 (C.D. Cal. 2006) (al Qaeda members targeting private contractors identified in a database of serious incident reports in Iraq); *Gordon* v. *FBI*, 388 F. Supp. 2d 1028, 1036 (N.D. Cal. 2005) (air terrorists using sensitive information about the preparation of "no fly" lists); *Institute for Policy Studies* v. *Department of the Air Force*, 676 F. Supp. 3, 5 (D.D.C. 1987) (enemy military personnel exploiting a low frequency groundwave emergency network program designed to survive a nuclear attack).

Nor, where the orderly internal functioning of an agency's personnel is at stake, is there a meaningful difference between a malefactor who would upset the agency by frustrating its activity in the regulatory domain and one who would instead upset the agency by frustrating its activities in the physical domain (the risk that Commander Whitbred explained in this case).

In any event, this issue concerns the precise scope of one prong of the test for one aspect of a single FOIA exemption. Such a fine point of law does not, absent other considerations not present here, command this Court's attention.

3. Contrary to petitioner's assertion (Pet. 1-2, 22-30), there is no conflict among the circuits on the "high 2" component of Exemption 2. As the Ninth Circuit observed, by formally adopting the *Crooker* standard, it brought itself into complete alignment with not only the D.C. Circuit, but also several other Circuits. See Pet. App. 39 (citing *Massey*, 3 F.3d at 622 (2d Cir.); *Abraham & Rose, P.L.C.* v. *United States*, 138 F.3d 1075, 1080 (6th Cir. 1998); *Kaganove*, 856 F.2d at 889 (7th Cir.); *Audubon Soc'y*, 104 F.3d at 1203-1204 (10th Cir.)).[12] Indeed, we are aware of no appellate decision that rejects *Crooker*.

The circuit split petitioner claims is illusory—or at least is very stale. Two cases petitioner cites as not em-

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[12] *Abraham & Rose* and *Audubon Society* each rejected the government's Exemption 2 claim because the court determined the information at issue was not "sufficiently related to a personnel rule or practice." *Abraham & Rose*, 138 F.3d at 1081; see *Audubon Soc'y*, 104 F.3d at 1204 ("[T]he maps are not sufficiently 'related to internal personnel rules and practices.'"). But neither court rejected the *Crooker* framework; to the contrary, both cases cited *Crooker* approvingly. See *Abraham & Rose*, 138 F.3d at 1080; *Audubon Soc'y*, 104 F.3d at 1203-1204.

bracing a "high 2" component of Exemption 2 concerned nontrivial information whose disclosure would not have risked circumvention of law, and so could not in any event have been withheld under Exemption 2. See *Sladek* v. *Bensinger*, 605 F.2d 899, 902 (5th Cir. 1979) ("[W]e have concluded that disclosure of the sections of the [Drug Enforement Administration] manual requested by Sladek would not impede law enforcement efforts."); *Stokes* v. *Brennan*, 476 F.2d 699, 702 (5th Cir. 1973) ("[T]here is no support in fact for the government's contention that disclosure of this entire [Occupational Safety and Health Administration] manual and associated documents would allow an employer to anticipate the matters which compliance officers would or would not cover in their investigations."). Another case petitioner cites fully sustained the government's withholding of material, in part under Exemption 2, and in part on other theories. See *Cox* v. *Levi*, 592 F.2d 460, 463 (8th Cir. 1979). And two other cases petitioner cites were remanded for further factual development, leaving it unclear whether those courts of appeals' views of Exemption 2 were outcome-determinative. See *Hawkes* v. *IRS*, 467 F.2d 787, 796-797 (6th Cir. 1972); *Kuehnert* v. *FBI*, 620 F.2d 662, 667 (8th Cir. 1980).

At all events, every one of those cases predates *Crooker*, and some even predate *Rose*. No post-*Crooker* decision from those courts has rejected *Crooker*. Indeed, the Fifth and Eighth Circuits have apparently had no occasion to decide any Exemption 2 case since *Crooker*. The Sixth Circuit has decided four Exemption 2 cases since *Crooker*, and three affirmed the government's invocation of the Exemption. See *Rugiero* v. *United States Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001), cert. denied, 534 U.S. 1134 (2002); *Jones* v.

FBI, 41 F.3d 238, 244-245 (6th Cir. 1994); *Kiraly* v. *FBI*, 728 F.2d 273, 276 n.6 (6th Cir. 1984). The fourth decision would have rejected any Exemption 2 claim on the facts. See *Abraham & Rose*, 138 F.3d at 1080-1082 (discussed at note 12, *supra*). There is every reason to believe that those courts, if confronted with a meritorious case, would adopt *Crooker*'s analysis and join every other court of appeals to consider the question in recent decades. Unless and until they do otherwise, this Court's intervention is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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