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

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND NINETEEN NEWS MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 5 U.S.C. § 552(b)(2), which allows a government agency to keep secret only documents related solely to the internal personnel rules and practices of an agency, must be strictly construed to preclude the "High 2" expansion created by some circuits but rejected by others.

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STATEMENT OF INTEREST[1]

Amici curiae, described fully in Appendix A, are The Reporters Committee for Freedom of the Press and nineteen news media organizations — ALM Media, LLC, the American Society of News Editors, The Associated Press, Bloomberg L.P., Cable News Network, Inc., the Citizen Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, the First Amendment Coalition, the First Amendment Project, the National Press Club, the National Press Photographers Association, Newspaper Association of America, The Newspaper Guild – CWA, NPR, Inc., the Radio Television Digital News Association, The Society of Professional Journalists, Tribune Company and The Washington Post.

This case concerns an issue critical to the public and the media: whether the government may broadly exceed the scope of Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(2), (hereinafter "Exemption 2") in withholding a wide range of documents. As initially conceived, Exemption 2 was intended to cover documents relating only to trivial internal personnel rules and practices of an agency. However, in application, it has been contorted to such a disturbing extent that agencies consistently cite Exemption 2 to withhold any document that

[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than *amici* made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been duly filed with the Clerk.

could potentially fall into the "wrong hands" and be used to commit any number of speculative harms. This erroneous expansion of Exemption 2 has led to unchecked discretion on the part of federal agencies in processing requests under the federal Freedom of Information Act, 5. U.S.C. § 552 *et seq*. (hereinafter "FOIA").

As detailed herein, *amici* highlight how the administrative interpretation of Exemption 2 has transformed it back into the failed access law Congress intended it to replace. Further, *amici* highlight how, for the public good, the media and public interest groups utilize public record data regarding the storage and handling of hazardous materials and infrastructure data.

Should this Court uphold the lower court's ruling and give expansive reading to Exemption 2, the media and ultimately the public stand to lose the benefit of assessing the risks and dangers in their communities. Indeed, if the lower court ruling stands, federal agencies will be given wide discretion to withhold virtually any record under any imaginative public safety threat scenario.

SUMMARY OF ARGUMENT

FOIA's broad disclosure requirements were intended to replace the public access provisions of § 3 of the Administrative Procedure Act, 5 U.S.C. §1002 (1964), which imparted such wide discretion in agency officials to withhold documents from the public that it became known more as a withholding statute than one of disclosure. *See* H.R. Rep. No. 89-1497, at 4, 6 (1966) (hereinafter "House Report").

Exemption 2 by its plain language exempts only those materials "related solely to the internal personnel rules and practices of an agency." However, as set forth in more detail below, it has been expanded by agency interpretation and adopted by lower courts to over time cover more than just trivial matters of internal procedure to also include almost any record whose disclosure could enable some unidentified party to commit a hypothetical crime at some undefined future time. Hence, in what has come to be known as the "High 2" exemption, agency officials have again been handed the wide and unchecked discretion they formerly had under 5 U.S.C. §1002 (1964). This power has indeed been seized upon by executive officials who have over the last decade encouraged agencies to use the "High 2" exemption in the broadest ways imaginable.

At the heart of what materials are properly covered under Exemption 2 is the debate over what Congress intended when it passed FOIA. However, even assuming *arguendo* that the more expansive reading given Exemption 2 in the House Report has any weight, the government has expanded the purported "High 2" exemption well beyond its logical limits. Clearly, Exemption 2 cannot be construed in a way that equates it to the very statutory language FOIA was intended to replace and strengthen. Upholding the lower court's ruling will, unfortunately, have such a result.

Additionally, *amici* submit this brief to highlight the critical public value documents such as those at issue in this case have and how they are frequently used by the media and other interested citizen groups to ensure that the hazardous materials and infrastructure in their communities is being properly stored and maintained. *Amici* present numerous examples of how such documents are used in aiding journalists in performing their constitutionally protected watchdog role and how disclosure of such documents often results in safer communities. The public and the media stand to lose access to such vital records if this Court upholds a broad interpretation of Exemption 2.

The creation and expansion of the "High 2" exemption has choked off information of critical public interest. In today's world, the public has an acute interest, as the government obviously does as well, in issues such as terrorism and homeland security that are, unfortunately, an ongoing and important concern. However, singular focus over what the shadow criminal can possibly do with government provided information (assuming such information is even truly necessary or enabling) only serves to deprive the public with the means to adequately assess whether government is in fact taking the proper steps to ensure its safety. As *amici* highlight, it is often only when failures are publicly exposed that they are corrected. Contrary to government assertions, upholding the lower court's ruling, sanctioning the ever expanding "High 2" exemption and keeping the public ignorant of the potential threats that surround them makes us all less safe.

ARGUMENT

I. Federal Agencies' Overbroad Reading of Exemption 2 of the federal Freedom of Information Act Erroneously Adopted by Some Circuits Reduces FOIA to the Withholding Statute it was Specifically Enacted to Replace.

A. As originally conceived, FOIA Exemption 2 was intended to protect a limited class of records from disclosure.

FOIA was enacted to amend and strengthen the weak public disclosure provisions of § 3 of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964)—a law Congress recognized continually failed to provide any meaningful access to federal agency records and often was cited by agencies as a basis to deny records requests. As its legislative history documents:

> Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," or "required for good cause to be held confidential." S. Rep. No. 89-813, at 3 (1965) (hereinafter "Senate Report").

The same Senate Report goes on to observe further that FOIA's predecessor law only made records "available to persons properly and directly concerned…." *Id.* at 5. Because of such limiting clauses, characterized as a "lack of standards," it was easy for records custodians to withhold documents on virtually any arbitrary basis. *Id.* "It would require almost no effort for any official to think up a reason why a piece of information should be withheld…." *Id*.

The accompanying House Report agreed, finding that the law "has been used as an authority for withholding, rather than disclosing, information" and that "[h]istorically, Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy." House Report at 4, 6.

FOIA was enacted to reverse this disturbing situation and "establish a general philosophy of full agency disclosures unless information is exempted under clearly delineated statutory language…." Senate Report at 3. Indeed, as this Court has long held, "[d]isclosure, not secrecy, is the dominant objective of the Act" and FOIA "represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (hereinafter "Rose"). In short, FOIA is designed to impose a heavy burden on the government to justify non-disclosure while also preventing the Executive Branch from exercising whimsical discretion that potentially places politics before law.

To this end, Congress specifically exempted nine classes of information from disclosure under FOIA. Exemption 2 provides that FOIA does not apply to records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). The language of Exemption 2 is intended to rein in similar but exceedingly broad language found in the former § 3 of the Administrative Procedure Act, which stated that records reflecting "any matter relating solely to the internal management of an agency" need not be disclosed. 5 U.S.C. § 1002

(1964); House Report at 4. This language was used, for example, to justify withholding core FOIA information about government expenditures on employee salaries because of the tenuous link such information had to a matter of internal management. *See* House Report at 6.

As has been frequently observed by a number of courts, the controversy over what materials can be lawfully withheld under Exemption 2 stems largely from the differing descriptions of its intended scope as set forth in the Senate and House Reports, and consequently, which report is controlling.

The Senate Report stated:

> 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. Senate Report at 8.

The House Report, taking a broader view, stated Exemption 2 covers:

> Matters related solely to the internal personnel rules and practices of an agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law. House Report at 10.

As such, the Senate Report has come to be viewed as supporting the "Low 2" exemption reading for trivial internal documents deemed of no interest to the public while the House Report has been offered as support for the purported existence of the "High 2" exemption that claims to cover a much broader sweep of documents.[2]

This Court has never adopted the House Report's view of what is covered under Exemption 2. Rather, in *Rose*—this Court's only prior decision discussing Exemption 2—it relied solely on the Senate Report's narrower view of Exemption 2 noting that at that time virtually all courts "have concluded that the Senate Report more accurately reflects the congressional purpose." *Rose*, 425 U.S. at 363. Leaving open the question of whether a "High 2" exemption even exists, this Court noted that in the few cases where lower courts relied on the House Report, those decisions "have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function." *Id*. at 364.

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[2] *Amici* note that whether 5 U.S.C. § 552(b)(2)—considering its plain language, purportedly conflicting legislative history and the additional exemptions found in FOIA—should properly be construed to include a "High 2" exemption lies at the root of the instant controversy. As that issue is more directly addressed by other filings with this Court in this matter it is not given primary treatment here. However, for those additional reasons cited in the papers supporting Petitioner, *amici* agree that a "High 2" statutory construction of Exemption 2 is in clear error and belies both the statute's unambiguous language as well as Congressional intent to narrowly limit Exemption 2 to only those matters commonly now referred to as "Low 2" exemptions.

B. Courts have permitted agencies to erroneously expand Exemption 2 coverage in ways Congress never intended.

To be sure, despite this Court's acknowledgment that the Senate Report represented the majority view, some lower courts, including the U.S. Court of Appeals for the Ninth Circuit in the decision below, have gone wildly astray in applying and expanding the purported "High 2" exemption. It has gone beyond an application to procedural manuals and guidelines in connection with law enforcement, regulatory functions. Furthermore, "High 2" has been extended to apply to third parties at large (sometimes rather selectively) instead of only to those classes of persons subject to agency regulation.

As the brief summary that follows shows, the broad agency reading of Exemption 2's scope has in some circuits clearly returned to the arbitrary and overbroad language found within 5 U.S.C. § 1002 (1964) that FOIA was intended to rectify. Such has occurred despite this Court's finding that FOIA was intended to scale back the scope of the prior version of Exemption 2. The "legislative history plainly evidences…Exemption 2…was to have a narrower reach than the Administrative Procedure Act's exemption for 'internal management' matters." *Rose*, 425 U.S. at 363. Much of the impetus behind this gradual retreat stems from improper agency actions challenged before the U.S. Court of Appeals for the District of Columbia, precedent upon which the Ninth Circuit relied heavily in the present case.

In line with Congressional intent to narrow the class of Exemption 2 documents, the D.C. Circuit initially rejected agencies' notion of a "High 2." *See Jordan v. Dep't of Justice*, 591 F.2d 753, 771 (D.C. Cir.

1978). Just three years later, the D.C. Circuit subsequently reversed course and recognized that ATF surveillance training manuals could be withheld under a "High 2" exemption. *See Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074-75 (D.C. Cir. 1981). In so holding, the *Crooker* court began to chip away at the intended narrow construction of Exemption 2.

Aside from recognizing "High 2," the *Crooker* court went on to disregard the plain language of the law stating that only "solely" internal matters are exempt, believing the term "solely" to be too restrictive. *See id*. at 1056-57. Instead, the court substituted its own language—holding that matters need only be "predominantly" internal—for Exemption 2 to apply. *See id*. at 1074. Thus was born a rewrite of Exemption 2 where nontrivial agency documents could now be withheld if: (1) they are predominantly internal and (2) significantly risk circumvention of agency regulations or statutes. *See id*. In so doing, the *Crooker* court noted that it was adopting this Court's "language in Rose," language that specifically highlighted that the House Report stated any purported "High 2" exemption was applicable to those individuals subject to agency regulation. *Id*. at 1066, 1074 (*quoting Rose*, 425 U.S. at 364).

The second prong of this "High 2" exemption was further weakened when the D.C. Circuit held that the release of information need not necessarily result in circumvention of a specific statute or regulation in order to gain "High 2" protection. Rather, the second prong of the "High 2" test could be satisfied if disclosure of a document would render it "operationally useless." *See Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 802 F.2d 525, 530-31 (D.C. Cir.

1986); *Schiller v. Nat'l Labor Relations Bd.*, 964 F.2d 1205, 1208 (D.C. Cir. 1992).

Additionally, the D.C. Circuit has held that when an agency in fact grounds its decision to withhold documents on the basis that disclosure would result in circumvention of the law, "[j]udicial willingness to sanction a weak relation to 'rules and practices' may be greatest…." *See Schwaner v. Dep't of the Air Force*, 898 F.2d 793, 796 (D.C. Cir. 1990).

Finally, courts that accept a "High 2" reading have also incredibly extended its reach to documents that are not even directly related to law enforcement purposes. This limitation was of course what was originally contemplated in the broader Exemption 2 language of the House Report when it stated "[o]perating rules, guidelines, and manuals of procedure for Government *investigators* or *examiners*" were exempt from disclosure. House Report at 10 [emphasis added].

For example, in *National Treasury*, the court upheld the refusal to disclose "crediting plan" documents used to evaluate applicant qualifications for agency positions. *Nat'l Treasury*, 802 F.2d at 531. "High 2" has also been used to uphold an agency's refusal to disclose blueprints of an agency building on the speculative grounds that doing so could compromise the security of agency property. *See Elliott v. Dep't of Agriculture*, 596 F.3d 842 (D.C. Cir. 2010).

While any construction of Exemption 2 adopting a "High 2" component is wrong, those courts that have nonetheless done so have stretched its reach beyond any reasonable construction of its purported intent as described in the House Report and by this Court in *Rose*. In this matter, unfortunately, the decision below only serves to further distort "High 2" in direct opposition to FOIA's broad presumption of disclosure and the requirement to narrowly construe its exemptions. *See Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989).

The records at issue in this matter are known as Explosive Safety Quantity Distance ("ESQD") data. Such information, displayed either in mathematical formula or arc map display, is used to determine how to safely store ammunition to minimize explosive chain reactions and to estimate the maximum area over which an explosion may reach should such an event occur. *See Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 962 (9th Cir. 2009); Pet. App. 29. This information is certainly of the utmost public concern given that local residents such as Mr. Milner have a grave interest in knowing what potential impact an explosion would have on the local community and whether the Navy is safely storing ammunition caches.

The Ninth Circuit's decision below seizes upon the D.C. Circuit's ever-expanding view of "High 2" and manages to take it even further. First, the court adopted the predominantly internal reading of "High 2" and found that it applies to more than law enforcement materials. *See id.* at 968; Pet. App. 39-40. Second, as noted in Judge William Fletcher's dissent, the majority has also abandoned precedent under the second prong of the "High 2" test requiring that a circumvention of the law "must be by a person or entity that is subject to regulation by the agency in question." *See id*. at 976; Pet. App. 55.

Instead, the majority applies "High 2" to the hypothetical criminal and citizen-protestor that one day could potentially find ESQD arc map data useful in planning a criminal act or disrupting Navy protocols. *See id.* at 971; Pet. App. 45. As Judge Fletcher correctly observes, the "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.* at 978; Pet. App. 58. The logical extension of the majority's expansive view of "High 2" would allow the government to withhold virtually any document for which it can articulate even the most tenuous reason why the information could be used to violate the law or foment some ill-defined turmoil.

Amici, of course, agree that the Navy should be taking steps to adequately safeguard munitions to ensure the security of its personnel and local residents. This is exactly why Mr. Milner — a life-long resident of the Puget Sound area who for some 20 years has been researching, publishing and speaking on the topic of explosive hazards — has such a keen interest in the records. *See id.* at 972; Pet. App. 48. Mr. Milner wants to make sure residents are aware of the dangers posed by the installation and that the Navy is doing everything reasonably possible to minimize any risk. As discussed in Section II, the media has an identical interest, is in fact often instrumental in the security process, and has uncovered gross mishandling and misuse of hazardous materials that would have otherwise likely gone unexposed. The Navy's hypothetical security concerns, and for that matter any government agency making similar claims, are simply not properly addressed through the invocation of "High 2." Indeed, Exemption 2 was never intended to have any reach beyond the trivial matters described in the Senate Report.

In some cases, courts have rightfully recognized the folly of accepting hypothetical concerns that a release of information can play some role in an unwanted outcome as a basis for Exemption 2 protection. The U.S. Court of Appeals for the Tenth Circuit refused to apply a "High 2" exemption to a request for Mexican spotted owl "management territory" maps. *See Audubon Soc'y v. U.S. Forest Serv.*, 104 F.3d 1201, 1204 (10th Cir. 1997). The Forest Service had claimed that disclosure of the maps would make it easier for people to locate and harm the endangered owls. *See id.* at 1203. Prior to its ruling in *Milner*, the Ninth Circuit itself found that maps detailing the nesting sites of northern goshawks were not internal agency documents under Exemption 2 despite claims that revealing the locations jeopardized the birds' safety. *See Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1082 (9th Cir. 1997).

Courts have also refused to apply a "High 2" exemption to a request by an environmental group for inundation maps for areas below the Hoover and Glen Canyon Dams. *See Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp.2d 1313 (D. Utah 2003). The Bureau of Reclamation had claimed that the maps could aid terrorists as they showed how a dam compromise would impact local communities and critical infrastructure. *See id.* at 1315-16. While finding that portions of the maps were properly exempt under FOIA exemption 7(F), 5 U.S.C. § 552(b)(7)(F), the *Living Rivers* court specifically held that the application of a "High 2" exemption to such records was improper. *See id.* at 1317-18, 1322. The *Living Rivers* court recognized that other exemptions within FOIA dealing with law enforcement and national security adequately address government safety concerns for which Exemption 2 is improper.

C. The Ninth Circuit's decision has twisted Exemption 2 into a statute that now provides unbridled discretion to withhold government information of critical importance to the media and public.

With the Ninth Circuit's ruling below, we have alas come full circle. FOIA's legislative history explicitly notes Congress' dissatisfaction with the lack of standards within 5 U.S.C. § 1002 (1964) to prevent agencies from arbitrarily refusing to disclose records or not doing so when it was deemed politically expedient. Loopholes within the law allowing officials to deny records requests when: (1) not in the "public interest;" (2) there was "good cause" to withhold; or (3) a request was made by a person not deemed "properly and directly concerned," opened the door wide for abuse.

The decision below demonstrates clearly that Exemption 2's continuing mutation has reverted it back to all that was deemed unacceptable under 5 U.S.C. § 1002 (1964). The Senate Report noted that under the prior law it would require minimal effort to concoct possible scenarios why a record should be withheld. *See* Senate Report at 5. Exemption 2's expansion under *Milner* to non-law enforcement records and to persons beyond those subject to agency regulation sanctions government articulations of: (1) attenuated chains of events; (2) possible, however improbable, disaster scenarios; and (3) implicit claims that without agency disclosure criminals would otherwise not commit an act or acquire similar information that would aid in its commission.

It also bears mentioning that it is highly questionable whether criminals even need government provided documents to aid them if they are truly intent on committing a crime. Researchers have demonstrated that the deliberate and systematic planning in which sophisticated criminals often engage can be done wholly independent of government provided material using similar information found in the public domain. *See* Joseph D. Jacobson, *Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level*, 9 Envtl. Law. 327 (2003). Indeed, the causal link between disclosure and catastrophe has been greatly exaggerated, all to the detriment of the public's right of access under FOIA.

Without question the Ninth Circuit's reading of Exemption 2 in *Milner* provides massive cover to withhold documents on speculative grounds and invites agencies to do so. This potential power has not gone unexercised. The Department of Justice issued notice in 2001 that agencies should "avail themselves of the full measure" of "High 2" to protect against any potential terrorist harm. U.S. Dep't of Justice, Office of Information and Privacy, *FOIA Post* (Oct. 15, 2001).[3] In a 2002 memorandum to all executive agency and department heads, then White House Chief of Staff Andrew Card specifically encouraged officials to apply Exemption 2 to "sensitive" information. *See* Memorandum from Andrew H. Card, Jr., to The Heads of Executive Dep'ts and Agencies (Mar. 19, 2002) (attaching accompanying Memorandum from Laura L.S. Kimberly, et al. to Departments and Agencies (Mar. 19, 2002)).[4]

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[3] *Available at*: http://www.justice.gov/archive/oip/foiapost/2001 foiapost19.htm.

[4] *Available at*: http://www.dod.gov/pubs/foi/dfoipo/docs/cbrn_wh_ memo.pdf.

Further, exactly as under 5 U.S.C. § 1002 (1964), the lower court's reading of Exemption 2 allows government to decide who has a proper interest in a record to justify its release. In *Milner*, first responder third parties were deemed proper parties for disclosure. But potential "*first victims"* of an explosion and a requester with extensive knowledge of explosive hazards who by all appearances seems to have only the safety of the community in mind are refused the same information.

The court below has sanctioned the Navy's decision to decide what parties can receive documents and what parties cannot. One can easily see how such a process allows the government to hide documents under Exemption 2 from those individuals it deems antagonistic (i.e., the media) to their interests. All of this is of course all the more confounding and indicative of improper agency discretion under Exemption 2 considering that Mr. Milner was "properly concerned" enough to obtain ESQD arc maps from the Navy for its Bangor, Washington installation where disclosure apparently was in the public interest. *See Milner* 575 F.3d at 974; Pet. App. 52.

For the reasons cited above, this Court must hold Exemption 2 to be governed by the Senate Report interpretation lest it become nothing more than a recycled version of the law Congress specifically intended to rescind with the broad disclosure provisions of FOIA.

II. The Ninth Circuit's expansion of the "High 2" exemption to FOIA will substantially hinder journalists' ability to serve their constitutionally protected "watchdog" function and ensure hazardous materials and critical infrastructure are being properly maintained.

The continual expansion of Exemption 2 is a severe impediment to journalists (as well as various public interest stakeholders) who depend on FOIA to enable their "watchdog" function of monitoring government facilities and activities that put the public at risk. What follows are examples of how journalists and community organizations have effectively used the types of records at issue for the public good that the lower court's expansion of Exemption 2 could make exempt—namely records related to chemical facilities, transportation infrastructure, nuclear weapons and biological agents.

A. Hazardous Chemical Records

In January 2007, Carl Prine, a reporter for the *Pittsburgh Tribune-Review* and a former U.S. Marine who served in Operation Iraqi Freedom, used records obtained under FOIA to aid in uncovering massive nationwide security lapses along rail lines and at facilities where hazardous chemicals are stored. *See* Carl Prine, *Terror on the Tracks*, Pittsburgh Tribune-Review, Jan 14, 2007.[5] Prine primarily relied on records obtained from the Federal Railroad Administration that detailed failures in how railroads and chemical plants conducted counter-terrorism and worker training. *See id.*

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[5] *Available at*: http://www.pittsburghlive.com/x/pittsburghtrib/news/specialreports/s_487117.html.

With the data on rail and chemical facilities in hand, Prine embarked on a national tour, eventually gaining access to 48 chemical plants along with rail lines that service such plants. *See id*. Prine was able to access hazardous material shipments or locomotives controlled by twelve rail lines. He was able to climb on trains, photograph derailing levers, look inside signal boxes and walk around hazmat train cars for an hour without ever being challenged by workers or police units that stood by idly. *See id*.

Prine used the deficiency reports he obtained from the government to investigate 12 facilities in the Atlanta, Georgia region. There he was again able to climb upon unguarded caches of lethal insecticides, flammable petroleum distillates and acetone, a chemical that can trigger vapor cloud explosions. *See id*. Prine found additional security lapses at a Marietta plant where he was able to access thousands of pounds of acrylic acid and railcars containing toluene diisocyanate, a chemical that will seek out the moisture of the human body and cause severe burns or death. *See id*.

Prine uncovered similar lapses in western states. Of the twenty three west coast railroads and chemical facilities listed in the deficiency reports, Prine was able to access eighteen. *See id*. Again Prine had ready access to caustic substances such as muriatic acid, fluorosilicic acid and ninety tons of deadly chlorine gas. *See id*. According to Environmental Protection Agency "Worst Case Scenario" documents Prine obtained through FOIA, a catastrophic chlorine gas attack at the plant in question could stretch as far as fourteen miles and threaten approximately 900,000 people. *See id*. Officials at that plant vowed to increase security patrols as a result of Prine's reporting. *See id*.

Similarly, upon hearing of Prine's travels in and around Las Vegas, the Nevada Homeland Security Commission opened an investigation into the safety of its chemical facilities. *See id*. "Closing gates, making sure workers and guards and police are aware of our chemicals, that's important," said Commission Supervisor Larry Casey. *Id*.

Mr. Prine's work has not gone unnoticed in Congress. In pushing for safety reforms on our nation's rails, Representative Edward J. Markey called Prine's 2007 expose a "scathing indictment of the state of rail security in our country." Press Release, Rep. Edward Markey, *House Committee Approves Markey Amendment to Re-Route Security-Sensitive Materials Around High Population and Urban Areas* (Mar. 13, 2007).[6] Prine's reporting was also cited in testimony before the U.S. House of Representatives regarding the failure to adequately protect our nation's rails. *See Rail and Mass Transit Security: Industry and Labor Perspectives Before H. SubComm. On Transportation Security and Infrastructure Protection*, 110th Cong. 6 (statement of John Murphy, Director, Teamster's Rail Conference).[7]

Had Prine not had access to government documents, it is uncertain whether any reform actions would have occurred to address ongoing haphazard

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[6] *Available at*: http://markey.house.gov/index.php?option=com_content&task=view&id=2686&Itemid=141.

[7] *Available at*: http://homeland.house.gov/SiteDocuments/20070213174649-30260.pdf.

security, often ignored by the very agencies ordered to safeguard them, that leaves large parts of America's industrial and transportation sectors vulnerable to attack.

In a similar investigation, *The Washington Post* reviewed government hazardous materials response plans, which are public records, to determine the number of high-risk facilities in the Washington, D.C. metropolitan area and whether government officials were adequately prepared in the event of a disaster. It was discovered that 607 local facilities use thousands of pounds of "extremely hazardous" chemicals. *See* Stephen Fehr, *With Toxic Risk, Plans Vary; Some Localities Are More Ready Than Others to Deal With Major Hazard,* The Washington Post, Oct. 10, 1999 at C01.

The District of Columbia's emergency preparedness director at the time, Peter, G. LaPorte, told the *Washington Post* he ordered an overhaul of the city's response plan after he learned from a reporter that the then-current emergency response plan did not comply with federal regulations. *Id.*

In subsequent *Washington Post* reporting resulting from its initial investigation, reporters found that the emergency plan prepared by the city concluded that a 10-minute leak in one of the hoses that feeds chlorine from tankers to the wastewater treatment unit at Blue Plains Sewage Treatment Plant in Southwest Washington could spread a toxic plume of deadly chlorine one-third of a mile around the plant. In total, the plant housed between 180 and 630 tons of liquid chorine—enough to create a poisonous plume more than 30 miles long. *See* Eric Lipton, *Plant Warnings Go Unheeded; City Ignores Lapses in*

Handling Toxic Chemical at Blue Plains, The Washington Post, Nov. 5 1999 at A01.

Investigations further revealed that "the D.C. agency assigned to ensure worker safety at Blue Plains had found a range of serious safety violations in the plant's chlorine facility in 1996—and never conducted a second inspection to determine whether the problems had been corrected." *See* Eric Lipton, *Urgent Repairs Begin at D.C. Plant; Blue Plains Faces Investigations into Chlorine Safety,* Nov. 6, 1999 at A01.

Reporters also found that city documents showed that problems persisted with the plant's outdated chlorine leak sensors. Top officials at the Water and Sewer Authority told the newspaper that "they had been unaware of such safety lapses at Blue Plains before being asked about them by *The Post*." *See* Eric Lipton, *Plant Warnings Go Unheeded; City Ignores Lapses in Handling Toxic Chemical at Blue Plains,* The Washington Post, Nov. 5 1999 at A01.

As a result of these follow-up investigations, repairs began at the Blue Plains plant the day following *The Post's* story, including replacing four of the plant's seven chlorine leak sensors, adding new emergency breathing equipment, repairing the audible alarm system, and increasing plant security. *See* Eric Lipton, *Urgent Repairs Begin at D.C. Plant; Blue Plains Faces Investigations into Chlorine Safety,* Nov. 6, 1999 at A01.

The Water and Sewer Authority also announced a schedule for replacing the highly toxic liquid chlorine at the Blue Plains facility with a safer chemical while also installing a $2.6 million security system. *See* Linda Wheeler, *Blue Plains Details Safety Plans;*

Chemical to Replace Toxic Chlorine Sooner Than Expected, The Washington Post, March 3, 2000.

B. Transportation Infrastructure Records

Last year, *The Philadelphia Inquirer* reported that Amtrak inspection records revealed that 47.4 percent of its Philadelphia area bridges received marks of "poor" or worse, noting such defects as decaying stone walls, eroded support piers, deteriorated metal plates, worn girders and missing rivets. *See* Paul Nussbaum, *Amtrak Bridges in Region Troubled*, The Philadelphia Inquirer, Sept. 20, 2009, at A1. Amtrak only released the documents after the newspaper threatened to file a lawsuit to obtain the records. According to the newspaper, Amtrak refused to release the documents because, among other reasons, they were internal documents and terrorists could strike Amtrak bridges if they were to discover where bridges were most vulnerable. *See* Paul Nussbaum, *Lawsuit Threat Got Amtrak to Disclose*, The Philadelphia Inquirer, Sept. 20, 2009, at A15.

The article was a wake-up call for lawmakers. Senator Arlen Specter immediately called upon Amtrak to explain how it would address the problems uncovered by the newspaper and upon the Obama administration to allocate federal stimulus package funds for repairs. *See* Paul Nussbaum, *Specter Seeks Funds to Fix Bridges*, The Philadelphia Inquirer, Sept. 22, 2009, at B1.

In 2003, Jonathan D. Salant, a reporter for The Associated Press, accessed federal transportation data to find that 28 percent of the nation's highway bridges are considered deficient, including more than two-thirds of the bridges in the District of Columbia—the highest percentage in the country *See*

Jonathan D. Salant, *28 Percent of U.S. Bridges Called Unsafe,* The Associated Press, July 8, 2003.[8]

In 2005, reporter Dani Dodge of the *Ventura County Star* in California also analyzed Federal Highway Administration data to find that "[t]wenty-eight of Ventura County's 485 bridges are considered 'structurally deficient'" and that "[b]ringing just 15 of those bridges up to standard would cost $50 million." Likewise, Dodge's analysis found that 71 of the county's bridges are "functionally obsolete." Transportation officials called the situation "a public safety issue." *See* Dani Dodge, *County's Aging Bridges at the Breaking Point: Transportation Chief Says Public Safety Could Be Jeopardized,* Ventura County Star*,* Feb. 20, 2005.[9]

Finally, following the collapse of the Interstate 35W bridge in Minneapolis in August 2007, that killed 13 people and wounded more than 100, the U.S. Department of Homeland Security—despite the critical importance of such records—responded by sending letters to state officials nationwide, cautioning against the public disclosure of any bridge records that might expose a structure's vulnerabilities to terrorists. *See* Scott Albright, *Safe and Secure?: In the Wake of the Minneapolis Bridge Collapse, Some States have Tightened Control of Inspection Records*

[8] *Available at:* http://community.seattletimes.nwsource.com/archive/?date=20030708&slug=bridges08.

[9] *Available at:* http://www.vcstar.com/news/2005/feb/20/countys-aging-bridges-at-the-breaking-point/#ixzz0xRggN9Pa.

that Could Foretell the Next Disaster, The News Media & The Law, Vol. 31, No. 4, Fall 2007, at 4.[10]

While some states clamped down on access to full inspection reports, even those with more restrictive policies continued to allow access to—and affirmatively post on their state websites—the numerical rating system data accumulated by the Federal Highway Administration in a national database. *See id*. at 5.

Minnesota went further, however, with the state transportation department publicly disclosing detailed and annotated bridge inspection reports within weeks after the collapse, according to Dan Browning, a veteran reporter with the Minneapolis *Star Tribune* who covered the collapse. *See id*.

Jeanne Aamodt, a Minnesota transportation department spokeswoman at the time, stated that the near overwhelming volume of media and citizen requests, nationally and internationally, concerning the bridge collapse was a primary impetus leading to the agency's decision to make the bridge inspection reports available online. *See id*. at 6

Barbara Forsland, an attorney with the Minnesota state department of transportation who at the time acted as the agency's data practices compliance officer, said that in 2005 the agency reviewed all information in its control cognizant that the state public records laws, the Minnesota Government Data Practices Act, features exemptions related to homeland security. *See id*. Forsland worked with state

[10] *Available at:* http://www.rcfp.org/news/mag/31-4/cov-safeands.html.

engineers to determine which Minnesota bridges should be designated "highly critical" based on the bridge's likely uses and vulnerabilities in the event of a terrorist attack or similar emergency. *See id.*

Of the bridges that were dubbed "highly critical," Forsland said, only documents pertaining to access and connection characteristics of the bridges were deemed necessary to withhold from public disclosure. *See id.*

During the 2005 review of Minnesota transportation records focusing on homeland security issues, Forsland said the state determined that annotated bridge inspection reports would be unlikely to give terrorists any advantages they couldn't also gain from simply walking up to a bridge. *See id.*

"Because bridges are exposed structures, they are visible, and even an inexperienced person can physically observe the bridge's structure," Forsland said. *Id.* "So that's why we felt that we only needed to limit access to a few specific elements of the design." *Id.*

These examples represent only a handful of the wealth of reporting on bridge deficiencies throughout the country. Investigative Reporters and Editors, a nonprofit group that supports and protects the rights of investigative journalists, maintains a comprehensive list of investigative journalism stories from across the nation that have used public data to report on pervasive bridge infrastructure problems nationwide.[11]

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[11] *Available at*: http://www.ire.org/inthenews_archive/bridgecollapse.html.

C. Nuclear Facility Records

In 2008, the nonprofit organization Tri-Valley Communities Against a Radioactive Environment (Tri-Valley CAREs) used FOIA to request site plans for the proposed "modernization project" of the Lawrence Livermore National Laboratory Tritium Facility in Livermore, California, a national nuclear weapons development and research facility. In response, the laboratory produced redacted blueprints that Tri-Valley CAREs used in a public meeting to inform the public of the scale and scope of the increase in tritium at the facility.

The site plans were also used by the organization's guest public health specialists to analyze the public health impact posed by the facility and to develop Tri-Valley CAREs' public comment during the National Environmental Policy Act scoping process on the "Complex 2030 Programmatic Environmental Impact Statement," and used to develop the group's comment at the public hearing on that same statement. *Comments on the Final Complex Transformation SPEIS,* Tri-Valley CAREs , Nov. 21, 2008.[12]

In August, 2010, the Salt Lake City *Deseret News* obtained Air Force audit agency reports through FOIA showing that Utah's Hill Air Force Base failed to account for more than 100 nuclear-related parts during recent inventories, exposing the base to potential "undetected theft." *See Hill AFB's Handling of Nuke Items Criticized,* The Associated Press, Aug.

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[12] A*vailable at:* http://www.trivalleycares.org/new/finalspeisletter.html.

10, 2010.[13] The unaccounted for nuclear weapon assets were valued at more than $2.6 million. *See id.* The report also indicated that "when Hill officials found discrepancies in inventory data, they simply changed codes on forms, without verifying actual conditions." *Id.* According to the obtained documents, inspectors also found "some nuclear-related items being stored in containers marked with codes for other parts, which could lead to shipping the wrong item." *Id.*

These findings were especially disturbing in light of a 2008 incident in which Hill Air Force Base officials mistakenly sent nuclear missile parts to Taiwan instead of helicopter batteries. As a result of the recent audit, Hill officials agreed to the auditors' recommendations to "improve training, rewrite procedures, rearrange warehousing to segregate nuclear-related items and instruct workers to be more vigilant in handling materials." *Id.*

Much like the Lawrence Livermore National Laboratory blueprints, the audit reports from Hill Air Force Base were redacted to protect national security concerns; specifically, the Air Force declined to identify exactly what type of nuclear weapons parts had been mishandled. However, under the Ninth Circuit's expansion of the "High 2" exemption, even the redacted audits deemed safe for release by the Air Force could arguably be withheld from public release.

D. Biological Agent Records

Tri-Valley CAREs has also used FOIA to request documents related to experiments with biological

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[13] *Available at*: http://www.sltrib.com/sltrib/home/50071185-76/hill-nuclear-auditors-items.html.csp.

agents at the Lawrence Livermore National Laboratory. Through documents released under FOIA, it was revealed that the lab had been conducting unauthorized experiments in which scientists had been producing highly resistant strains of Yersinia pestis (commonly known as "plague") and anthrax in violation of the law. *See* Marylia Kelley, *Lab Caught Conducting Illegal Restricted Bio-Experiments*, Citizen's Watch Newsletter, Apr./May 2009.[14] Furthermore, the documents revealed that in 2005 five individuals were exposed to anthrax that highlighted a lack of adequate security and response procedures during the event. *See id*. The lab was ultimately fined $450,000 in relation to the incident. *See id*.

But all of this may have never been uncovered had Tri-Valley not sued to enforce its FOIA rights and fight withholdings based on Exemption 2, among other exemptions. "The Dept. of Energy and the Lab withheld these documents until we filed federal litigation under FOIA to obtain them," said Kelley, who characterized the lawsuit as a "stunning example of the government covering up unclassified information because it is embarrassing." *Id*.

It is clear the types of documents the government claims should be shielded under a "High 2" exemption in this case contain the exact information the public needs to assess the dangers in their local communities and effect positive change. This Court cannot allow journalists and the public to be kept in the dark about such incredible potential risks.

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[14] *Available at*: http://www.trivalleycares.org/new/cwaprmay09.html.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the U.S. Court of Appeals for the Ninth Circuit and hold that FOIA's broad presumption of disclosure along with the narrow reading that must be given to its exemptions necessarily requires a strict construction of Exemption 2 paralleling the scope of the trivial matters outlined in the Senate Report.

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APPENDIX A

Descriptions of *amici*:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

ALM Media, LLC publishes over thirty national and regional magazines and newspapers, including The American Lawyer, the New York Law Journal, Corporate Counsel, and the National Law Journal as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's The Recorder, for example, has been published in Northern California since 1877; the New York Law Journal was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media. ALM Media, LLC is privately owned, and no publicly held corporation owns 10 percent or more of its stock.

With some 500 members, The American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press ("AP") is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and has staff in 321 locations worldwide. AP news reports in print and electronic formats of every kind, reaching a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 116 countries.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,500 professionals in 145 bureaus around the world. Bloomberg News publishes more than 6,000 news stories each day, and The Bloomberg Professional Service maintains an archive of more than 15 million stories and multimedia reports and a photo library comprised of more than 290,000 images. Bloomberg News also operates as a wire service, syndicating news and data to over 450 newspapers worldwide with a combined circulation of 80 million people, in more than 160 countries. Bloomberg News operates cable and satellite television news channels broadcasting worldwide; WBBR, a 24-hour business news radio station which syndicates reports to more than 840 radio stations worldwide; Bloomberg Markets and Bloomberg BusinessWeek Magazines; and Bloomberg.com which receives 3.5 million individual user visits each month.

Cable News Network, Inc. (“CNN”), a division of Turner Broadcasting System, Inc., a Time Warner-Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news Web sites in the United States; CNN Newsource, the world’s most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University’s Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated association hosted at Harvard Law School, a non-profit educational institution.

Dow Jones & Company, Inc. is the publisher of The Wall Street Journal, a daily newspaper with a national circulation of over two million, WSJ.com, a news website with more than one million paid subscribers, Barron’s, a weekly business and finance magazine, and through its Dow Jones Local Media Group, community newspapers throughout the United States. In addition, Dow Jones provides real-time financial news around the world through Dow Jones Newswires as well as news and other business and financial information through Dow Jones Factiva and Dow Jones Financial Information Services.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television stations, newspapers, local news and information Web sites, and licensing and syndication. The company's portfolio of locally-focused media properties includes: 10 TV stations (six ABC affiliates, three NBC affiliates and one independent); daily and community newspapers in 13 markets; and the Washington, D.C.-based Scripps Media Center, home of the Scripps Howard News Service.

The First Amendment Coalition is a non-profit public interest organization dedicated to defending free speech, free press, and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

The First Amendment Project ("FAP") is a non-profit organization based in Oakland, California, dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,500 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events including news conferences, luncheons, and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism.

Newspaper Association of America ("NAA") is a non-profit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild - CWA is a labor organization representing more than 30,000 employees of newspapers, news magazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America. As America's largest communications and media union, representing over 700,000 men and women in both private and public sectors, CWA issues no stock and has no parent corporations.

NPR, Inc. is an award winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

The Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

Tribune Company operates broadcasting, publishing and interactive businesses, engaging in the coverage and dissemination of news and entertainment programming. On the broadcasting side, it owns 23 television stations, a radio station, a 24-hour regional cable news network and "Superstation" WGN America. On the publishing side, Tribune publishes eight daily newspapers -- Chicago Tribune, Hartford Courant, Los Angeles Times, Orlando Sentinel (Central Florida), The (Baltimore) Sun, The Daily Press (Hampton Roads, Virginia) The Morning Call (Allentown, Pa.), and South Florida Sun-Sentinel. Tribune Company is a privately held company.

The Washington Post is a leading newspaper with nationwide daily circulation of over 623,000 and a Sunday circulation of over 845,000.

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