No. 10-543

IN THE

Supreme Court of the United States

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Petitioner,

—v.—

BLOOMBERG L.P. and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF OF AMERICAN BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

Amicus Curiae American Bankers Association (ABA) respectfully submits this motion pursuant to Supreme Court Rule 37.2(b) seeking leave to file the attached brief in support of Petitioner the Clearing House Association, L.L.C., and states as follows:

The ABA is the principal national trade association of the banking industry in the United States. Its members are located in each of the 50 States and the District of Columbia. ABA members hold a substantial majority of domestic assets of the banking industry of the United States.

The ABA and its members support the Clearing House Association's petition because they have a direct interest in the outcome of this case. FOIA provides the framework within which the public may request the release of information from the various agencies of the federal government, including the agencies and departments that have been tasked with the oversight and regulation of the nation's banking industry. The Second Circuit's opinion interprets FOIA in a manner that, if allowed to stand, could serve as precedent to compel the public release of heretofore confidential documents or information in the possession of federal bank regulators. This result is at odds with the purpose of the exemptions to disclose that were enacted as an integral part of FOIA and, if allowed to stand, the precedent could prove damaging to both the public interest and the interest of ABA's members.

The proposed amicus brief by the ABA meets the standards for acceptance set by Rule 37 as it will draw the Court's attention to relevant matter not already brought to the Court's addition by the parties. The ABA brief summarizes in a sufficient fashion the reasons behind the confidential treatment of sensitive Federal Reserve documents and the deleterious impact that the release of such materials could have upon the public's confidence in individual banking institutions.

All parties, with the sole exception of Bloomberg, L.P., have consented to the filing of an amicus by the ABA.

Wherefore, amicus American Bankers Association seeks the Court's leave to file the attached brief in support of Petitioner the Clearing House Association L.L.C.

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INTRODUCTION[1]

L. William Seidman, the former Chairman of the Federal Deposit Insurance Corporation (FDIC), once observed that "[o]ur whole financial system runs on confidence and not much else when you get down to it... [w]hat we've learned is that when confidence erodes, it erodes very quickly."[2] Recent events have amply demonstrated the essential truth of Chairman Seidman's remarks. Over the past 24 months the nation has watched as the number of bank failures has climbed to levels not seen since the thrift and banking crisis of the late 1980's. In 2009 alone, the FDIC was appointed receiver for 140 insured depository institutions.[3] Yet despite the increase in the number of failures within the

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[1] Pursuant to Rule 37.2(a), all counsel of record received notice of intent to file the amicus brief at least 10 days prior to its filing. Counsel for The Clearing House Association and the Solicitor General have consented to the filing of this amicus. Counsel for Bloomberg, however, does not consent. Counsel certifies that no counsel for any party authored this brief either in whole or in part, and no person or entity, other than ABA and its members, made a monetary contribution to the preparation or submission of the brief.

[2] Lohr, Steve, *When A Big Bank Went Under, U.S. Presence Stemmed the Panic*, New York Times (February 18, 1991). Available at http://www.nytimes.com/1991/02/18/business/when-a-big-bank-went-under-us-presence-stemmed-the-panic.html

[3] FDIC, *Bank Failures In Brief*; http://www.fdic.gov/bank/historical/bank/2009/ (retrieved on December 15, 2010).

banking industry, the public's fundamental confidence in the depository institutions with which they entrust their funds has remained intact.

Unlike the Great Depression of the 1930's or earlier bank "panics," the country has largely been spared images of frightened depositors lining up outside of financial institutions in order to withdraw their money, despite the troubled economy. This reassuring evidence of the public's belief in the fundamental resiliency of our nation's banking system should not be the cause for complacency, however. Maintaining public confidence in our nation's banking institutions is just as important now as it has been in the past. In the isolated instances where depositor or investor confidence in an institution has eroded, the correctness of Chairman Seidman's observations has been validated.

Very recent history amply demonstrates that, despite the existence of federal deposit insurance and other systemic protections, bank "runs" can still occur; depositors and investors will still flee institutions that they believe to be moribund, in most cases making the eventual collapse of the institution inevitable.[4] Bank runs have played a

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[4] Of the ten largest banks/thrifts (based on asset size) to either receive FDIC open bank assistance or to be placed in receivership, depositor runs occurred at five institutions:

- Washington Mutual Bank (the largest institution handled by the FDIC to date),
- Continental Illinois National Bank & Trust (open bank assistance)

(continued...)

role in two of the three largest failures in our history – IndyMac Bank in California and Washington Mutual in the state of Washington. Both collapses were precipitated in part by a loss of public confidence, fueled by negative press reports, which resulted in massive withdrawals of funds by depositors. Both failures are of recent vintage, each occurring in 2008.

While depositor runs are thankfully rare even in these financially difficult times, it is nevertheless appropriate to consider the potential fallout that can result when agencies of the federal government are compelled to disclose documents and information that may, in the public's mind, be used

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(...continued)

- IndyMac Federal Savings Bank
- First Republic Bank – Dallas N.A. (open bank assistance),
- Bank of New England N.A.

See, FDIC's *Historical Statistics on Banking (HSOB); OTS Fact Sheet on Washington Mutual Bank,* available at http://files.ots.treas.gov/730021.pdf; Grind, Kirsten, *The Downfall of Washington Mutual,* Puget Sound Business Journal (September 25, 2009), available at http://seattle.bizjournals.com/seattle/stories/2009/09/28/story1.html?page=1; Federal Deposit Insurance Corporation, *Managing The Crisis: the FDIC and RTC Experience* at 547, 598 (1998), available at http://www.fdic.gov/bank/historical/managing/history2-04.pdf and http://www.fdic.gov/bank/historical/managing/history2-06.pdf; Federal Deposit Insurance Corporation, *History of the Eighties—Lessons for the Future: An Examination of the Banking Crisis of the 1980s and Early 1990s,* at 375 (1997), available at http://www.fdic.gov/bank/historical/history/337_378.pdf.

to infer the health, prospects, and borrowing activities of specific financial institutions. Bank regulators are in a unique and powerful position to shape the public's perception of the institutions that they regulate, and the process of effective bank supervision depends in part upon the ability of the regulators and the institutions that they regulate to engage in a frank exchanges of information that are, by any reasonable commercial standard, confidential. Ill-considered disclosures or statements by a regulator can shake the public's confidence in even a robustly healthy bank, or place that institution at a competitive disadvantage vis-à-vis its peers, with unfortunate consequences.

This case is significant in that the decision below challenges the long-standing presumption that the *Freedom of Information Act* (FOIA) does not require banking regulators to disclose confidential regulatory information about a financial institution under its supervision. As discussed herein, the Court should grant the Clearing House Association's petition for a writ of certiorari so it may reverse the Second Circuit's decision, which will undermine the clear and longstanding policy exempting sensitive bank regulatory materials from disclosure under FOIA.

In submitting this amicus, the ABA acknowledges that Congress has not been idle with regard to setting the parameters for *future* disclosures by the Federal Reserve (and the Reserve Banks) of Discount Window borrowing and other

similar transactions. Under the recent *Dodd–Frank Wall Street Reform and Consumer Protection Act*[5], the Federal Reserve will be required in the future to disclose the identities of banks that borrow from the Discount Window, along with other transaction level details of their borrowing. The ABA submits that review should nevertheless be granted because (1) the recent legislation does not moot the current dispute, (2) the issue is still ripe as the Second Circuit's construction of FOIA may be used to undermine the long-standing presumption against disclosure of sensitive documents in future litigation, and (3) the *Dodd-Frank* amendments do not abate the potential harm to the industry that could result from the present disclosures.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry. The ABA's headquarters are located in Washington, DC. Its members, located in each of the fifty states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The ABA and its members support the Clearing House Association's petition because they

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[5] Pub. L. No. 111 – 203, § 1103, 124 Stat. 1376 (2010).

have a direct interest in the outcome of this case. FOIA provides the framework within which the public may request the release of information from the various agencies of the federal government, including the agencies and departments that have been tasked with the oversight and regulation of the nation's banking industry. The Second Circuit's opinion interprets FOIA in a manner that, if allowed to stand, could serve as precedent to compel the public release of heretofore confidential documents or information in the possession of federal bank regulators. This result is at odds with the purpose of the exemptions to disclosure that were enacted as an integral part of FOIA and, if allow to stand, the precedent could prove damaging to both the public interest and the interest of ABA's members.

ARGUMENT

The ABA strongly concurs with the arguments articulated by the Clearing House Association in support of its petition. The ABA agrees that the disclosure of documents that reveal the identity of institutions that borrowed from the "emergency" lending facilities offered by the Federal Reserve and the Federal Reserve Banks during the recent financial crisis should be shielded from disclosure under FOIA.

In crafting FOIA, Congress made it very clear that it did not intend for the statute to be used to compel the release of documents or information in the possession of a bank regulator that have the

potential to destabilize a financial institution or will frustrate the implementation of federal programs that are designed to promote and protect the safety and soundness of the financial system.

A. FOIA Should Not Be Interpreted In A Manner That Will Undermine The Acknowledged Purpose Of Exemption 8.

At the time of the passage of the *Freedom of Information Act* in 1966, Congress was fully cognizant of what a loss of public confidence could do - and do very quickly – to a depository institution. Mindful that opening up the process of regulating financial institutions to the public would create unacceptable risks for banking industry and make effective supervision of the banking system much more difficult, Congress enacted exemptions to FOIA that excuse the disclosure of information in the government's possession that has the potential to destabilize a financial institution or chill the necessary candor and cooperation that should exist between a bank and its regulators.

Exemption 8 of FOIA protects from disclosure information that is "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[6] Courts construing this provision have identified two major reasons for excluding this category of documents from routine

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[6] 5 U.S.C. § 552(b)(8) (2006).

public disclosure: to preserve the public's confidence in banking institutions that could be eroded by a disclosure of regulatory documents, and to ensure the continued candor and cooperation of banks with their regulators. The United States Circuit Court for the District of Columbia Circuit concluded that

> [T]he primary reason for adoption of Exemption 8 was to insure the security of financial institutions. Specifically, there was concern that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks.... Furthermore, a secondary purpose in enacting Exemption 8 appears to have been to safeguard the relationship between the banks and their supervising agencies. If details of the bank examinations were made freely available to the public and to banking competitors, there was concern that banks would cooperate less fully with federal authorities.

Consumers Union of United States, Inc. v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978)(footnotes omitted).[7] The D.C. Circuit

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[7] *See,* H. Rep. No. 1497, 89th Congress, 2nd Session, House Committee on Government Operations (May 9, 1966) (S. 1160) at 32 ("This exemption is designed to insure the security and integrity of financial institutions, for the sensitive details

(continued...)

subsequently expanded upon its discussion in *Consumers Union* when it stated that "(i)t is clear from the legislative history that the exemption was drawn to protect not simply each individual bank but the integrity of financial institutions as an industry." *Gregory v. Federal Deposit Insurance Corporation*, 631 F.2d 896, 898 (D.C.Cir.1980) (citations omitted).[8]

(...continued)
collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm").

[8] *See Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin.*, 290 F. Supp. 2d 124, 135-36 (D.D.C. 2003) (affirming that two purposes of Exemption 8 are "to safeguard public confidence . . . which could be undermined by candid evaluations of financial institutions" and "to ensure that [banks] continue to cooperate . . . without fear that their confidential information will be disclosed"); *Feinberg v. Hibernia Corp.*, No. 90-4245, 1993 WL 8620, at *4 (E.D. La. Jan. 6, 1993) (noting Exemption 8's dual purpose of protecting operation and condition reports containing frank evaluations of investigated banks, and protecting relationship between financial institutions and supervisory government agencies) (non-FOIA case); *Atkinson v. FDIC,* No. 79-1113, 1980 WL 355660, at *1 (D.D.C. Feb. 13, 1980) (recognizing Exemption 8's purposes of protecting security of financial institutions and "promot[ing] cooperation and communication between bank employees and examiners"), *appeal dismissed*, No. 80-1409, 1980 WL 355810, at *1 (D.C. Cir. June 12, 1980); *Berliner, Zisser, Walter & Gallegos v. SEC*, 962 F. Supp. 1348, 1353 (D. Colo. 1997) (delineating Exemption 8's "dual purposes" as "protecting the integrity of financial institutions and facilitating cooperation between [agencies] and the entities regulated by [them]"). S*ee also Fagot v. FDIC*, 584 F. Supp.
(continued...)

Courts construing Exemption 8 have treated it as a broad and all-inclusive exclusion from disclosure. The D.C. Circuit has opined that "if Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not [the courts'] function, even in the FOIA context, to subvert that effort." *Consumers Union of United States, Inc.,* 589 F.2d at 533. As another court has stated, "Exemption 8 was intended by Congress -- and has been interpreted by courts -- to be very broadly construed," *Pentagon Fed. Credit Union v. Nat'l Credit Union Admin.*, No. 95-1475, 1996 U.S. Dist. LEXIS 22841, at *11 (E.D. Va. June 7, 1996).

Consistent with this broad construction, courts have extended the coverage of Exemption 8 to protect a wide variety of agency materials that are "related to" but do not technically qualify as "reports of examination."[9] For example, the Fifth Circuit has held that Exemption 8 also protects agency materials that are only indirectly related to a bank examination such as an "Order of Investigation" – a strictly internal agency document that formally commences an administrative investigation by the

(...continued)
1168, 1173 (D.P.R. 1984) (recognizing purposes of Exemption 8 in protecting information containing frank evaluations which might undermine public confidence and relationship between financial institutions and supervisory agencies), *aff'd in pertinent part & rev'd in part*, 760 F.2d 252 (1st Cir. 1985) (unpublished table decision).

[9] *Atkinson*, 1980 WL 355660, at *1-2.

agency into unsafe practices or violations of law or regulation at an institution.[10]

Indeed, a number of decisions regarding the disclosure of sensitive regulatory documents or information outside of a FOIA setting have considered (and been guided by) the desire to protect the stability of depository institutions and the effectiveness of the regulatory process enunciated by Congress in its adoption of Exemption 8. For example, in *In re: Verrazzano Towers,* the court declined to enforce a third-party litigation subpoena directed to the FDIC seeking to compel the release of "all orders, directives, correspondence, memoranda" relating to the Flushing Savings Bank and its involvement with mortgages, joint ventures and other land dealings. Recognizing that while FOIA had "no direct application" to the enforcement of a subpoena in litigation, the court was nevertheless persuaded that the disclosure of documents that reflect the regulation and operation of a financial institution raised the same policy concerns addressed by Congress's adoption of Exemption 8, and declined to compel the production:

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[10] *Abrams v. U.S. Dept. of Treasury*, 243 Fed. Appx. 4, 6 (5th Cir. 2007) (rejecting plaintiff's argument that Order of Investigation must directly relate to content of bank examination report, finding instead that "statute never mentions contents, and only requires that a matter be related to the Report in order to be exempt from production").

> [T]he rationale behind exemption 8 is clearly analogous to any policy supporting the official information privilege claimed by the FDIC. It is presumed that revelation under FOIA of information in the possession of federal banking agencies such as the FDIC might produce harmful results for the banking industry and the supervising agencies. It then seems clear that disclosure of the same types of records to private parties in the course of litigation could have similar undesired effects.

In re Verrazzano Towers, 7 B.R. 648, 652 (Bankr.E.D.N.Y. 1980). *See also, In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983) (citing Exemption 8 as support for conclusion that agency's questioning of bank employees is to be shielded from civil discovery).

While it is true that Exemption 8 was not raised administratively as a bar to disclosure in this case, the ABA respectfully submits that it makes very little sense to compel the release agency documents under FOIA that would create the same potential for the type of harm that Congress expressly sought to avert when it adopted Exemption8.[11] There is a sufficient similarity

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[11] The ABA submits that the District Court in *Fox News Network v. Board of Governors of the Federal Reserve System,* correctly analyzed the situation when it concluded that the disclosure of Federal Reserve materials could potentially cause

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between the type of information that would be conveyed by the Federal Reserve's Remaining Term Report and a Report of Examination prepared by a chartering authority to support such a conclusion: both capture confidential aspects of bank operations, and both are treated by analysts and the industry as providing a measure of the financial health of an institution. It would be paradoxical to compel the release of sensitive documents belonging to a federal banking regulator based on an analysis of FOIA Exemptions 4 or 5 when the disclosure could clearly cause the very harm that Congress expressly sought to prevent when it adopted Exemption 8.

B. The Transactions In Question Were Undertaken Based On The Well-Settled

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great harm and a loss of public confidence in the banking industry:

> The Board's concerns, that rumors are likely to begin and runs on banks are likely to develop, cannot be dismissed. Similarly, the Board's concern is real that disclosure would reveal proprietary trading information of borrowers, their trading strategies and the size and nature of their portfolios of assets. The national economy is not so out of danger, and the frailty of banks so different now than when their Discount Window borrowing began, as to make the Board's concern academic.

639 F. Supp. 2d 384, 401 (S.D.N.Y. 2009), *vacated and remanded*, 601 F.3d 158 (2d Cir. 2010).

Expectation That They Would Remain Confidential.

The ABA also concurs with the Clearing House Association's argument (at 6) that the Court should grant review because the Second Circuit's decision will disrupt the Federal Reserve's "long-established procedures" which establish that Discount Window borrowing will remain confidential. *Cf. Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 11 (1974) (grant of certiorari to analyze "the impact of the FOIA upon long-established procedures of the Renegotiation Board"). Indeed, the institutions that availed themselves of the Federal Reserve lending facilities did so in reliance upon the government's long-standing assurance that the transaction would remain confidential. [12] For these institutions, there is an element of surprise and unfairness in the Second Circuit's decision.

The reason for this policy of treating Discount Window transactions as confidential is easily explained: while healthy financial institutions frequently borrow from Federal Reserve Banks for ordinary operational reasons, there is nevertheless a stigma attached to borrowing from the Discount Window or other similar facility. The stigma arises

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[12] *See* Brian F. Madigan & William R. Nelson, *Proposed Revision to the Federal Reserve's Discount Window Lending Program*, 88 Fed. Res. Bull. 313, 315 (2002)(The Federal Reserve has long held "information about borrowing by individual banks in the strictest confidence.").

from the fact that Federal Reserve Banks act as "lenders of last resort" to depository institutions and primary dealers that are unable to secure funding from market sources on a short term basis. Because of the stigma associated with accessing the Discount Window, banks have been reluctant to access this lending facility. [13]

The equitable necessity for honoring the Federal Reserve's assurances of confidentiality is easy to understand; many institutions that entered into Discount Window transactions during the relevant period covered by this case would not have done so absent the Federal Reserve's longstanding assurance of confidentiality.

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[13] Federal Reserve Chairman Ben Bernanke has stated that the reluctance of banks to seek necessary funding from the Discount Window has hampered the effectiveness of the program, and that reluctance stems from the "stigma" associated with having to borrow from the Federal Reserve:

> [T]he efficacy of the discount window has been limited by the reluctance of depository institutions to use the window as a source of funding. The "stigma" associated with the discount window, which if anything intensifies during periods of crisis, arises primarily from banks' concerns that market participants will draw adverse inferences about their financial condition if their borrowing from the Federal Reserve were to become known.

Bernanke, Ben, *Remarks Via Satellite at the Federal Reserve Bank of Atlanta Financial Markets Conference: Liquidity Provision by the Federal Reserve* (May 13, 2008) available at http://www.federalreserve.gov/newsevents/speech/bernanke20080513.htm.

Finally, the ABA acknowledges that Congress has not been idle with regard to setting the parameters for *future* disclosures by the Federal Reserve (and the Reserve Banks) of Discount Window borrowing and other similar transactions. Under the recent *Dodd–Frank Wall Street Reform and Consumer Protection Act*[14], the Federal Reserve will be required in the future to disclose the identities of banks that borrow from the Discount Window, along with other transaction level details of their borrowing. The disclosure is subject to a two-year waiting period after the borrowing occurs.

The ABA submits that review should nevertheless be granted. First, the *Dodd-Frank* amendments to the Federal Reserve's disclosure procedures do not moot this appeal as they expressly carve out litigation initiated prior to the enactment of the statute. Second, the issue is still ripe as the Second Circuit's construction of FOIA may be used to undermine the long-standing presumption against disclosure with respect to other types of documents or information in the possession of the regulators, not just information pertaining to the details of Discount Window transactions. Third, the *Dodd-Frank* amendments do not abate the potential harm to the industry that could result from the present disclosures. As noted by the Clearing House Association in its brief (at 4, 11-12), disclosure of the borrowing patterns of individual

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[14] Pub. L. No. 111 – 203, § 1103, 124 Stat. 1376 (2010).

banking institutions during the recent financial crisis may cause depositors and the investing public to draw inferences—whether justified or not—that could affect their confidence in the current financial condition of the affected institutions.

CONCLUSION

For the foregoing reasons, the ABA urges the Court to grant the Clearing House Association's petition for a writ of certiorari.

Respectfully submitted,

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