Nos. 10-543, 10-660

IN THE

MAR 2- 2011

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.

THE CLEARING HOUSE ASSOCIATION L.L.C.,
Petitioner,

—v.—

FOX NEWS NETWORK, LLC, and THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Solicitor General agrees that the Second Circuit erred in issuing two categorical and important interpretations of Exemption 4 of the Freedom of Information Act ("FOIA")—specifically, that (1) commercially sensitive third-party information is not "obtained from a person" once subject to "executive action"; and (2) a federal agency cannot withhold such information on the basis that its disclosure would harm the effectiveness of its programs.

The Second Circuit's erroneous rulings, if permitted to stand, will harm numerous federal programs and third parties that participate in those programs, by eliminating FOIA Exemption 4 protection over the commercially sensitive final terms on which third parties and federal agencies transact with each other.

As the Solicitor General recognizes, the Second Circuit openly split with the D.C. and First Circuits in holding that FOIA Exemption 4 does not protect a federal agency's interest in the effectiveness of its programs, and effectively split with the D.C. Circuit and numerous district courts over whether Exemption 4 protects the final terms of agency commercial transactions with third parties (*e.g.*, line-item pricing information in federal contracts, government royalty rates, and transaction-level details of government-issued insurance, loans, and bonds).

Despite recognizing that the Second Circuit erred on important questions of FOIA law, the

Solicitor General recommends that this Court deny certiorari on grounds unrelated to the merits—that is, because the Dodd-Frank Act creates a new disclosure regime for future Discount Window lending. Though all parties agree that the Act's enactment does not moot this appeal, the Solicitor General believes that the Court should not grant certiorari *in this case*, because this new regime means that the Federal Reserve Board will not be confronted with specific FOIA requests for post-enactment Discount Window lending data.

The Solicitor General's recommendation is short-sighted and unpersuasive, because this Court does not decide whether to grant certiorari based on whether the *specific factual situation* leading to the decision below will recur, but on the breadth and importance of the *legal rulings* rendered in that decision. The time for this Court to review the Second Circuit's important (and erroneous) rulings is now, and not in some hoped-for "future case." This circuit split is between the two most important circuits on issues of FOIA law: the Second Circuit (the media and financial capital of the country) and the D.C. Circuit (the leading circuit on FOIA law).

As a practical matter, it is difficult to correct erroneous circuit court rulings interpreting the FOIA. In the Second Circuit, going forward, any FOIA requester will be able to bind an agency to that Circuit's erroneous law, under the threat of attorney's fees and costs if the requester must force compliance through court action. And, even if the agency contests the FOIA request in federal court, it

is unlikely that courts in the Second Circuit would stay any adverse ruling to allow for further appeals.

The Second Circuit itself, recognizing the importance of the legal issues presented here, stayed its rulings to allow for this Court's review, even after the enactment of the Dodd-Frank Act. But, if this Court denies certiorari, "future cases" likely will become moot before affected parties can seek certiorari.

I. THIS CASE IS THE IDEAL VEHICLE FOR CORRECTING THE SECOND CIRCUIT'S ERRORS IN INTERPRETING IMPORTANT PROVISIONS OF THE FOIA.

A. The Dodd-Frank Act Did Not Moot this Appeal.

All Respondents agree that the Dodd-Frank Act did not moot this appeal. (*See* Brief for the Federal Respondent ("SG Br.")[1] at 9, 10, 17; Fox Br. at 19; Bloomberg Br. at 2.) Indeed, Section 1103(b) of the Dodd-Frank Act expressly states that nothing in its new disclosure provisions is "meant to affect any pending litigation or lawsuit filed under [FOIA] on or before the date of [the Act's] enactment."

Instead, Bloomberg and Fox contend that the Act either "effectively mooted" this appeal or

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[1] References to the Solicitor General's brief, The Clearing House's petition in support of certiorari ("Clearing House Br."), and the appendix are to those filed in *The Clearing House Association L.L.C.* v. *Bloomberg*, No. 10-543.

confirmed that the requested information is commercially "stale." (Bloomberg Br. at 2; Fox Br. at 20.) Not so. Tellingly, while requiring the Federal Reserve Board to disclose transaction-level details of *emergency* lending that took place prior to the Act, Congress specifically did *not* require release of pre-enactment *Discount Window* lending data. This differentiation confirms the Board's longstanding and express promise to banks that the details of their Discount Window lending would be kept confidential.

When this same "staleness" argument was raised below, the Second Circuit chose *not* to resolve the appeal on this ground. In fact, the Second Circuit did not question the "plausible" and "forcefully made" arguments by The Clearing House and the Federal Reserve Board that disclosure of the Discount Window information would "harm the banks that borrowed" and "the banking system as a whole." (15a.)

B. The Dodd-Frank Act Does Not Lessen the Importance of the Second Circuit's Novel and Categorical FOIA Rulings.

The Solicitor General recognizes that the Second Circuit ruled "categorical[ly]" that third-party confidential information ceases to be "obtained from a person" once reflected in an agency's "executive action." (SG Br. at 11-12.) The Solicitor General further agrees that the Second Circuit split with the D.C. and First Circuits in rejecting the "program effectiveness" test. (*Id.* at 14-15.) Thus,

like the Second Circuit, which stayed its mandate in both *Bloomberg* and *Fox* based on the reasonable probability that four justices would grant certiorari, the Solicitor General "does not intend to suggest that the questions presented [in The Clearing House's petition] are unimportant or that they would not warrant this Court's review in an appropriate case." (*Id.* at 18.)

Instead, after spending almost seven pages explaining why the Second Circuit's categorical FOIA rulings are wrong, the Solicitor General concludes, perfunctorily, that this case may not be the proper vehicle for this Court's review. The Solicitor General does so by reasoning that "the specific issue" in this case—*i.e.*, whether a FOIA requester is entitled to Discount Window lending data—"will not recur for post-enactment loans covered by the Act." (SG Br. at 17.) Thus, the Solicitor General suggests that this Court await a "future case" to "correct the court of appeals' errors." (*Id.* at 18.)

This suggestion is unpersuasive. *First*, the Solicitor General cites no authority for its statement that certiorari is not appropriate unless the specific factual "context" giving rise to the appeal will recur. (SG Br. at 11.) This omission is not surprising, because this Court's exercise of its certiorari review turns *not* on the recurrence of the *specific facts* leading to the rulings on appeal, but the likely impact of those legal rulings *in other contexts*. This principle is demonstrated time and again in FOIA law, where the Court has granted certiorari to review legal rulings in cases involving non-recurring requests for unique documents. *See, e.g.*, *U.S. Dep't*

of State v. *Washington Post Co.*, 456 U.S. 595, 596, 598 (1982) (certiorari granted to review "construction of 'similar files' language" of Exemption 6 in case concerning "documents indicating whether [two Iranian nationals] hold valid U.S. passports"); *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 164 (2004) (certiorari granted "to resolve a conflict in the Courts of Appeals over the proper interpretation of Exemption 7(C)" in case involving 11 death-scene photographs).

Second, it is not clear when or even if there will be the right "future case" that would allow this Court to correct the Second Circuit's errors. (SG Br. at 18.) An erroneous circuit court ruling in FOIA law—particularly one that binds the Nation's financial and media capital—presents unique concerns. Under 5 U.S.C. § 552(a)(4)(B), any FOIA requester that resides in the Second Circuit—soon to become the FOIA capital of the U.S.—will be able to bind a federal agency to that court's law. (*See* Clearing House Br. at 6.) Agencies thus will yield to FOIA requests initiated in the Second Circuit, for fear of being saddled with "attorney fees and other litigation costs" should their decision to withhold information be overturned by a federal district court. 5 U.S.C. § 552(a)(4)(E)(i). Finally, any adverse district court ruling would be unlikely to reach this Court, because of the difficulty of obtaining a stay at the district court level to battle controlling precedent. Thus, FOIA cases would become moot long before they could reach this Court.

II. THE SECOND CIRCUIT'S ERRONEOUS "OBTAINED FROM A PERSON" RULING WILL HAVE FAR-REACHING EFFECTS.

A. The Second Circuit Ignored a Long Line of Cases Protecting from Disclosure the Confidential Terms on Which Third Parties Transact with Federal Agencies.

The Solicitor General agrees that the Second Circuit ruled "categorical[ly]" that information "ceases to be information 'obtained from a person' if that information is reflected in the 'agency's own executive actions.'" (SG Br. at 11-12 (quoting 10a).) Indeed, the Solicitor General recognizes that, except for one case erroneously decided by the Western District of New York, district courts have "held that information similar to the identifying information at issue here was 'obtained from a person' within the meaning of Exemption 4." (*Id.* at 12.) The Solicitor General similarly acknowledges that "the D.C. Circuit has applied Exemption 4 to line-item pricing in government contracts even though the prices resulted in part from government action." (*Id.* at 13.) These cases simply cannot be reconciled with the Second Circuit's "categorical" "obtained from a person" ruling.

Fox and Bloomberg primarily argue in opposition that, in some of these other cases, the transacting third parties supplied commercial or financial information in the *application* process leading to the consummated transaction. (*See* Fox Br. at 30-31; Bloomberg Br. at 18-19.) Their

proffered "distinction" is one without a difference, because these courts have indisputably protected from disclosure the *final* terms on which the third parties transacted with the agency, including:

- The *final* terms of line-item prices in government contracts;
- The *final* terms of Export-Import Bank insurance and credit extensions;
- The *final* terms of Treasury bond issuances, including purchaser names and details of bond amounts, coupons, and maturity dates; and
- The *final* terms of National Institutes of Health royalty rates. (*See* Clearing House Br. at 22-26.)

In case there were any doubt about the likely impact of the Second Circuit's ruling, one lower court has *already* applied the Second Circuit's erroneous "obtained from a person" ruling to require the Treasury Department to disclose the name of a commercial bank that applied for funding through an important Treasury lending program. *See Fox News Network, LLC* v. *U.S. Dep't of the Treasury*, --- F. Supp. 2d ----, 2010 WL 3705283 (S.D.N.Y. Sept. 3, 2010). Following *Bloomberg*, this court did not address the Treasury Department's argument that disclosure likely would "'result in substantial competitive harm to the [applicant's] position in the market.'" *Id.* at *36. Instead, the court ordered disclosure on the sole basis that the requested information was not "obtained from a person," because it "'did not come into existence until [Treasury] made the decision to approve the loan

request.'" *Id.* at *37 (quoting *Bloomberg*, 601 F.3d at 148 (alteration in original)).

Finally, no party disputes that the Second Circuit's ruling will have nationwide effects, because FOIA vests jurisdiction in, among other venues, "the district court of the United States in the district in which the complainant resides, or has his principal place of business." 5 U.S.C. § 552(a)(4)(B). (*See* Clearing House Br. at 6.) Thus, every federal agency will be subject to Second Circuit law when a FOIA requester resides or does business in that Circuit, throwing into doubt decades of agency practices protecting the confidentiality of sensitive details concerning completed commercial transactions. On this basis, the Solicitor General successfully petitioned this Court for certiorari in *FCC* v. *AT&T*, arguing that an erroneous ruling from the Third Circuit would "throw[] longstanding FOIA practices and procedures into doubt on a government-wide basis." (Brief for the Petitioner at 28, *FCC* v. *AT&T*, No. 09-1279.) The same is true here.

B. The Second Circuit's Error is Plain and Should be Corrected Now.

The Second Circuit's "obtained from a person" ruling rested "on the mistaken premise that information provided to the government ceases to be information 'obtained from a person' if that information is reflected in the 'agency's own executive actions.'" (SG Br. at 12 (quoting 10a).) The premise is wrong because, as all parties here agree, an agency can withhold information *in its entirety* if, as here, it consists of exempt and non-

exempt data that are "inextricably intertwined." (*See* Clearing House Br. at 27-28 & n.13.)

Instead, Bloomberg argues that, "at most," The Clearing House seeks review over an incorrect "factual determination." (Bloomberg Br. at 20.) But the Second Circuit here broadly held, as a matter of law, that information is no longer "obtained from a person" so long as it is the product of "executive action." (12a.) This is precisely the kind of categorical ruling that merits this Court's review and correction.

III. THIS COURT SHOULD CORRECT THE SECOND CIRCUIT'S ERRONEOUS REJECTION OF THE "PROGRAM EFFECTIVENESS" TEST ADOPTED BY THE D.C. AND FIRST CIRCUITS.

A. The Second Circuit Created a Clear Circuit Split on an Important Question of Federal Law.

The Second Circuit openly rejected the "program effectiveness" test "adopted by the First and District of Columbia Circuits." (13a.) The Solicitor General acknowledges this split (*see* SG Br. at 7, 10, 14-15); so too do Bloomberg and Fox (*see* Bloomberg Br. at 21-22; Fox Br. at 21).

Fox nonetheless contends that this clear split is "shallow and stale" because the D.C. and First Circuits' adoption of the "program effectiveness" test have stood for over three decades and because there is a "dearth" of cases applying this test. (Fox Br. at 21-22.) Bloomberg further argues that the issue has

not sufficiently "percolated" at the appellate level, because "only three Circuit Courts have addressed the issue." (Bloomberg Br. at 26.)

Both Fox and Bloomberg are wrong. That the D.C. and First Circuit decisions endorsing the "program effectiveness" test are longstanding supports this Court's grant of certiorari. There is no "dearth" of law; only *settled* law applying these tests to discrete government programs that depend on assuring third parties that details of their transactions will remain confidential.

For this reason, Bloomberg's suggestion that this Court should await additional Circuit decisions is meritless, particularly when this split is between the two most important Circuits on FOIA law. *See, e.g.*, *Nat'l Assoc. of Greeting Card Publishers* v. *U.S. Postal States Serv.*, 462 U.S. 810, 820 (1983) (grant of certiorari "[b]ecause of the inconsistencies in the holdings of the Second and District of Columbia Circuits").

B. The Clearing House has "Standing" to Correct the Second Circuit's Erroneous Rejection of the "Program Effectiveness" Test.

Fox also erroneously maintains that The Clearing House lacks "standing"[2] to correct the

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[2] Neither the Solicitor General nor Bloomberg (which unsuccessfully challenged The Clearing House's standing in the District Court) challenge The Clearing House's standing. Only Fox does so, in a footnote that recycles its arguments—rejected by the Second Circuit—suggesting that The Clearing House

(footnote continued)

Second Circuit's erroneous rejection of the "program effectiveness" test. (Fox Br. at 24.) Unlike the cases cited by Fox, The Clearing House is not *raising* an interest that the government has not itself asserted. The Federal Reserve Board has consistently taken the position, at both the administrative and judicial levels, that disclosure of the requested information would harm its lending programs and its statutory missions. The Solicitor General endorses this position on the merits now (*see* SG Br. at 14-17), and presumably would do so again if this Court accepts certiorari.

Moreover, unlike the *exclusive* government interests at issue in Fox's cases, the program effectiveness test is not "designed to protect interests of the government *only*." *Sears, Roebuck & Co.* v. *Gen. Servs. Admin.*, 384 F. Supp. 996, 1004 (D.D.C. 1974) (emphasis added). This test merges

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(footnote continued)
must name those members who borrowed from the Discount Window, and that The Clearing House failed to particularize the harm from disclosure of the requested information. Fox's first argument fails, because, in a declaration provided to the Second Circuit, The Clearing House stated—unequivocally—that certain of its members *have* borrowed from the Discount Window during the time periods covered by Fox's request. *See Bldg. & Constr. Trades Council of Buffalo, N.Y. & Vicinity* v. *Downtown Dev.*, 448 F.3d 138, 145 (2d Cir. 2006) (no requirement that an association "'name names'" in order "properly to allege injury in fact to its members."). Fox's second argument fails, because the record contains detailed assertions of the harm likely to befall borrowing institutions should the requested documents be disclosed. (*See* Clearing House Br. at 9-11.)

Exemption 4's twin aims of protecting both the interests of "the Government and the individual," *Nat'l Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974), because third parties have an interest in advancing—and continuing to benefit from—the government programs threatened by disclosure of their sensitive commercial information.

C. The Second Circuit Erred in Rejecting the "Program Effectiveness" Test.

The Solicitor General agrees that the program effectiveness test furthers Exemption 4's purposes "by protecting sensitive commercial or financial information about participants in government loan, grant, and licensing-type programs where disclosure would demonstrably undermine the basic objectives of those programs." (SG Br. at 15.) The Solicitor General also agrees that the Second Circuit "mistakenly concluded" that this test was "the 'functional equivalent' of the 'public interest' standard for withholding under Exemption 5," which was rejected by this Court in *FOMC* v. *Merrill* due to concerns that are not present here. (SG Br. at 16.)

Fox and Bloomberg make no reasoned efforts to refute these points, quoting primarily from *Merill*, and the Second Circuit's erroneous reliance on it, without explaining how the program effectiveness test represents the same kind of unbounded expansion asserted by the agency in *Merrill*. (Fox Br. at 34-35; Bloomberg Br. at 22-23.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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