

09-3795-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

FOX NEWS NETWORK, LLC,

Plaintiff-Appellant,

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF *AMICUS CURIAE* THE CLEARING HOUSE
ASSOCIATION L.L.C. IN SUPPORT OF DEFENDANT-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for The Clearing House Association L.L.C. (the “Clearing House”) hereby certifies that the Clearing House is not a subsidiary of any other corporation. The Clearing House is a limited liability company and as such has no shareholders. Rather, each member holds a 10% limited liability interest in the Clearing House.

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IDENTITY AND INTEREST OF AMICUS CURIAE

This appeal, along with the companion appeal in *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, Nos. 09-4083-cv(L), 09-4097-cv(CON) (2d Cir.), presents the question of whether the Freedom of Information Act (“FOIA”) requires the Board of Governors of the Federal Reserve System (the “Board”) to disclose the names, amounts of and collateral pledged for emergency loans made by Federal Reserve Banks (“FRBs”) to financial institutions during the current financial crisis. The Clearing House is a party in the *Bloomberg* appeal, and submitted its principal brief to this Court on November 6.

Pursuant to Federal Rule of Appellate Procedure 29(a) and (b), the Clearing House submits this *amicus* brief in the instant *Fox* appeal on the reasons why this Court should affirm the judgment of the District Court (Alvin K. Hellerstein, *Judge*) below, including (a) to preserve the critical role confidentiality plays when FRBs provide emergency loans to financial institutions, and (b) the substantial competitive harm that likely would befall such institutions and the economy generally if the Board is forced to disclose institution-specific information about such emergency borrowing on an almost real-time basis.

Members of the Clearing House¹ are among the world's principal participants in the international banking and payment systems. Clearing House members have utilized FRB emergency lending facilities with the understanding that the Board would not disclose bank-specific information, including borrower identities and loan amounts, concerning their individual borrowings. That expectation of confidentiality is critical to borrowing institutions because customers, counterparties, and other market participants likely will interpret such emergency borrowing as a sign of financial weakness—with potentially catastrophic consequences for borrowers, including the risk of bank runs, even when a bank remains financially sound.

The Clearing House has a substantial interest in protecting against the public disclosure of its members' highly confidential information,² and supports the grounds for affirmance advanced by the Board in the instant appeal.

¹ The members of the Clearing House are: ABN Amro Bank N.V.; Bank of America, N.A.; The Bank of New York Mellon; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

² The Clearing House fully concurs with the Board's argument that the borrowers' names, loan amounts, and collateral information were "obtained from" the borrowers. *See* Board Br. at 40-45. In reaching that conclusion, Judge Hellerstein correctly observed that, when determining whether information is "obtained from" a person within the meaning of FOIA Exemption 4, courts "look past formalities to ensure that even indirect disclosure does not jeopardize a person's privacy." (SPA 21.) *See* Clearing House Br. at 49-51, filed Nov. 6, 2009, in docket nos. 09-4083-cv(L), 09-4097-cv(CON).

First, applying the correct legal standards under FOIA, the District Court properly recognized that the Board's un rebutted evidence, consisting of detailed declarations by senior Board and FRB officials, showed that borrowing institutions likely will suffer substantial competitive harm if information about their borrowing is publicly disclosed.

Second, the District Court correctly held that FOIA Exemption 4, which authorizes government agencies to withhold records containing "commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4), protects the Board's interest in effectuating its emergency lending programs and in carrying out its statutory mandate to oversee the Nation's central banking system.

PRELIMINARY STATEMENT

Since August 2007, in response to the worst financial crisis since the Great Depression, the Board has authorized or expanded the FRBs' ability to provide loans through the Discount Window and emergency lending programs (the "Fed Lending Programs") to financial institutions, including members of the Clearing House. These programs were vital to stabilizing the Nation's financial system, and the Board and the FRBs have released extensive information to the public about these programs, including about the terms of, and eligibility for, such loans and the amounts of aggregate lending.

Because the FRBs act as lenders of last resort when providing funding through the Fed Lending Programs, banks, other market participants and regulators have recognized that borrowers' use of such emergency lending programs can mark them, often unfairly, with a "stigma" of financial weakness. In fact, public disclosure that an institution has borrowed from a lender of last resort, such as an FRB, has had severe adverse consequences for individual borrowers, including sparking bank runs. In the early 1990s, for example, rumors that Citibank was borrowing at the Discount Window sparked runs at some of its Asian offices. More recently, in September 2007, Northern Rock plc, a large British bank, suffered a bank run after the BBC reported that Northern Rock had obtained emergency funding from the Bank of England.

To avoid these serious risks, the Board and the FRBs have maintained a longstanding policy of not disclosing information about individual borrowers. The Board's policy of protecting the confidentiality of borrowers who use the Discount Window has been in existence since the early 20th century, when the Discount Window lending program was put in place. Outside the United States, central banks similarly do not disclose the identities of financial institutions that obtain short-term funding through government lending facilities.

Fox News Network, LLC, ("Fox") seeks to upset the Board's longstanding policy (and the settled expectations and understandings of Clearing

House members and other borrowers) against public disclosure of information about individual bank borrowing through the Fed Lending Programs. In response to Fox's FOIA request, the Board withheld a number of reports (the "Reports")³ containing highly confidential information provided to FRBs by borrowing institutions regarding loans obtained through the Fed Lending Programs. Specifically, the Reports list, among other things, (1) the names of the borrowing institutions; (2) the amount of the loans; (3) the duration of the loans; and (4) the type of lending program involved. (A 29-32; A 46-49.)

The District Court correctly ruled below that the Board had properly withheld the Reports under FOIA Exemption 4. The Board provided the District Court with extensive declarations from senior Board and FRB officials explaining that public disclosure of the individual borrowing of financial institutions (including Clearing House members) likely would result in substantial competitive harm to those institutions, and would undermine the effectiveness of the Fed Lending Programs.

³ The Board also withheld some transmittal e-mails containing cumulative responsive information, certain draft collateral monitoring procedures, some reports containing names and loan amounts of PDCF borrowers prepared by the FRBNY and sent to the Board, and less than a page of information on the value of collateral pledged by borrowers for certain kinds of loans. (A 32-45; A 157-58 ¶ 19; A 179-81.)

Notwithstanding the substantial evidence introduced by the Board below, Fox asks this Court to override the unrebutted testimony of experienced Board and FRB officials. In so doing, Fox seeks a ruling that will impair the ability of Clearing House members to protect the confidential information that they have provided (and will provide in the future) to the FRBs in connection with the Fed Lending Programs. Making matters worse, by seeking to impose disclosure obligations on the Board not faced by other central banks outside the United States, Fox asks this Court to restrict the Board's and the FRBs' ability to respond to future financial crises—in the near and longer term—to the detriment not only of U.S. banks, but of the U.S. economy. At bottom, Fox urges this Court to take the chance—to hope—that disclosure of individual bank borrowing will not have serious consequences for banks and the economy generally.

The FOIA requires the Board to respond to a request within 20 days—and, in the case of expedited processing, within half that time. If Fox prevails here, interested third parties, such as news organizations, market analysts, and investors, would file numerous and successive FOIA requests at minimal cost. As a result, in the future, Clearing House members and other financial institutions may elect not to participate in Fed Lending Programs for fear that prompt public disclosure (within 20 days, if not sooner) of their participation will have adverse competitive consequences for them, up to and including the risk of bank runs.

Because the District Court correctly rejected Fox’s efforts to rewrite FOIA and thereby to upset the Board’s longstanding policy of protecting borrower confidentiality, the judgment of the District Court should be affirmed.

BACKGROUND

1. The Fed Lending Programs

A. The Discount Window⁴

The Discount Window is an indispensable source of short-term funding for depository institutions.⁵ Authorized by the Federal Reserve Act,⁶ which was passed in 1913, the Discount Window “is a mechanism by which the twelve Federal Reserve Banks lend funds on a short-term basis, secured by collateral, to eligible depository institutions within their respective districts.” (A 127 ¶ 6.) The Discount Window serves, essentially, as a “back-up source of liquidity for institutions that may not have access to ordinary, market sources of funding on a short term basis.” (A 138 ¶ 23.)

⁴ “Courts in general have long taken judicial notice of facts of common knowledge relating to banks and banking procedure.” *Kaggen v. IRS*, 71 F.3d 1018, 1021 (2d Cir. 1995).

⁵ A “depository institution” is defined by statute under 12 U.S.C. § 461(b)(1)(A).

⁶ Specifically, “[s]ections 10B and 13 of the Federal Reserve Act authorize the Federal Reserve Banks to extend discount window credit to depository institutions in the form of discounts and advances.” James A. Clouse, *Recent Developments in Discount Window Policy*, 80 Fed. Res. Bull. 965, 965 (1994).

Precisely because the Discount Window can serve an emergency-lending function (thereby signaling an institution's inability to fund itself), depository institutions traditionally have been reluctant to access this lending facility. Indeed, "[s]ince the mid-1980s, depository institutions have become quite reluctant to turn to the discount window because of concerns that their borrowing might become known to private market participants—even though the Federal Reserve treats the identity of borrowers in a highly confidential manner—and that such borrowing might be viewed as a sign of weakness." Cheryl L. Edwards, *Open Market Operations in the 1990s*, 83 Fed. Res. Bull. 859, 859 (1997).⁷

Banks have, in other words, recognized that a "stigma" of financial weakness may attach to their use of the Discount Window, even if there is no factual basis for such a loss of confidence. (A 137-38 ¶ 22.) That "stigma" can damage, if not destroy, an institution by triggering a "sudden outflow of deposits (a 'run'), a loss of confidence by market analysts, a drop in the institution's stock price, and a withdrawal of market sources of liquidity." (A 138 ¶ 22.)

During periods of financial distress, the stigma from borrowing from a lender of last resort often intensifies because market participants have heightened

⁷ See also James A. Clouse, *Recent Developments in Discount Window Policy*, 80 Fed. Res. Bull. 965, 965 (1994) ("[C]hanges became evident during the 1980s in the willingness of healthy institutions to turn to the discount window. Many banks apparently became more reluctant to turn to the window for fear of provoking market concerns about their financial condition.").

concerns about the condition of financial institutions. (A 138 ¶ 24.) The effects of that stigma were evidenced in the early 1990s when, for instance, rumors that Citibank was borrowing at the Discount Window sparked runs at some of its offices in Asia. (A 140 ¶ 27.) During this period, when many banks were failing, banks willingly paid higher rates in the private federal funds market rather than turn to the Discount Window. (A 138-39 ¶ 24.) The same was true following the financial crisis triggered by the 1998-1999 Russian debt default. (*Id.*)⁸

B. The Current Economic Crisis and the Expansion of Government Emergency Lending Programs

In August 2007, the U.S. economy began to experience a serious financial crisis. By 2008, this crisis changed the face of the global financial services industry.⁹

During the current financial crisis, many of the traditional sources of funding and liquidity became unavailable and banks experienced intense pressure to meet short-term liquidity needs. In August 2007, the Board reacted by enabling greater use of the Discount Window. The Board reduced the rate on Discount

⁸ See also Brian F. Madigan & William R. Nelson, *Proposed Revision to the Federal Reserve's Discount Window Lending Programs*, 88 Fed. Res. Bull. 313, 319 (2002) (observing that, during the early 1990s, “many banks, even healthy institutions, were concerned that their borrowing would be viewed by other market participants as a sign of financial weakness.”).

⁹ See Clearing House Br. at 11 & n.8, filed Nov. 9, 2009, in docket nos. 09-4083-cv(L), 09-4097-cv(CON).

Window loans and extended term financing for as long as 30 days. (A 128 ¶ 6.) In March 2008, the Board extended term financing for as long as 90 days. (*Id.*)

Nevertheless, according to Board Chairman Ben Bernanke, banks remained concerned about the stigma of using the Discount Window:

[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.

Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks Via Satellite at the Federal Reserve Bank of Atlanta Financial Markets Conference: Liquidity Provision by the Federal Reserve (May 13, 2008).¹⁰

Banks in other countries also were concerned about the stigma of using central banks’ emergency lending facilities. As the Governor of the Bank of England observed:

A key lesson that central banks around the world have taken from the recent turmoil is that, in stressed conditions, any bank that is seen to come to the central

¹⁰ Available at <http://www.federalreserve.gov/newsevents/speech/bernanke20080513.htm>.

bank to borrow—whether in regular standing facilities¹¹ against high-quality collateral or against wider collateral in a discount window or support operation—can become stigmatised in the market.

Treasury Committee, *The run on the Rock, 2007-08*, H.C. 56-1, ¶ 106 (“House of Commons Report”).¹²

During this time, the Board followed its longstanding practice, based on decades of experience, of not disclosing information concerning individual depository institutions’ use of the Discount Window—a practice in turn relied on by depository institutions, including Clearing House members, when accessing the Discount Window. Brian Madigan, Director of the Board’s Division of Monetary Affairs, specifically advised the District Court that, except for the extraordinary programs for Bear Stearns and AIG, the financial problems of which were well known, “neither the Board nor the [FRBs] publicly disclose the names of borrowers at the [Discount Window]” or “other information that could lead to the identification of borrowers by counterparties, market analysts, news media organizations, or the public at large.”¹³ (A 137 ¶ 21.) Indeed, the FRBs’ public

¹¹ A “standing facility” is a U.K. lending facility that is similar to the Discount Window. *See* House of Commons Report ¶ 82 (“The ‘discount window’ is similar to the UK ‘standing facility’ . . . , but accepts a much wider range of collateral.”).

¹² Available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasury/56/56i.pdf>.

¹³ Susan E. McLaughlin, Senior Vice President in the Markets Group at the Federal Reserve Bank of New York (“FRBNY”), similarly advised the District

Discount Window website states that “the Federal Reserve does not publish information about individual institutions’ borrowings.”¹⁴

The Board’s practice of not disclosing the names of Discount Window borrowers was informed by its extensive central banking experience. Specifically, when testifying before the Senate Banking Committee in February 2009, Chairman Bernanke explained that “[h]undreds of years of central banking [experience]” taught that disclosing borrower names would pose a risk “that the market will say that there’s something wrong with them, that there’s a stigma of some kind, and the[banks] will refuse to come to the window in the first place.”¹⁵ The Semi-Annual Monetary Policy Report to the Congress: Hearing Before the S. Comm. on

Court that there is an “explicit understanding” among the FRBNY and depository institutions that information about their Discount Window borrowing “will not be disclosed by the [FRBNY] or its agents.” (A 102 ¶ 19.)

¹⁴ Frequently Asked Questions, Discount Window Lending Programs, *available at* <http://www.frbdiscountwindow.org/dwfaqs.cfm#ps10>.

¹⁵ Similarly, the U.K. Chancellor of the Exchequer (who serves a role comparable to the U.S. Secretary of the Treasury) informed the House of Commons that, though there had been “‘interest in how much support the Bank of England is giving’” to financial institutions like Northern Rock, “‘in common with other central banks, it does not provide details of any operations because it believes that doing so would undermine its ability to provide such support.’” House of Commons Report ¶ 360; *see also* Documentation for the Bank of England’s Operations Under the Sterling Monetary Framework, Art. 16.3(a) (Oct. 2009) (permitting the Bank of England to make “general disclosure” regarding the Sterling Monetary Framework, its analogue to the Discount Window, provided “that such general disclosure does not identify or name the Participant”), *available at* <http://www.bankofengland.co.uk/markets/money/documentation/090925full.pdf>.

Banking, Housing & Urban Affairs, 111th Cong. (Feb. 24, 2009) (statements of Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys.).

During the financial crisis, the Board also introduced several new programs to make short-term funding more accessible or available to depository and other institutions. In December 2007, the Board implemented the “Term Auction Facility,” or “TAF,” a form of Discount Window lending “which provides longer than overnight (‘term’) funding to depository institutions that are eligible for primary credit through an auction mechanism.” (A 129 ¶ 9.)

In 2008, the Board created a number of special credit and liquidity facilities (“SCLFs”) to provide greater liquidity for both depository and non-depository institutions.¹⁶ Because these forms of borrowing are associated with accessing funds from a lender of last resort, such borrowing carries a stigma similar to borrowing from the Discount Window. (A 103 ¶ 20; A 139 ¶ 26; A 187

¹⁶ These SCLFs included: the Primary Dealer Credit Facility (“PDCF”), the Term Securities Lending Facility (“TSLF”), and the Term Securities Lending Facilities Options Program (“TOP”), which were designed to provide greater liquidity to “primary dealers,” *i.e.*, designated banks and securities broker-dealers with which the FRBNY trades U.S. government and other securities (A 130-31 ¶¶ 11, 12); the Asset Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (“AMLF”), which was designed to provide liquidity to money-market funds (A 128 ¶ 7); and the Commercial Paper Funding Facility (“CPFF”), which allowed the FRBNY to provide liquidity to U.S. issuers of commercial paper (A 129 ¶ 8).

¶ 17.) Accordingly, the FRBs and borrowers treat information about such borrowing as confidential. (A 91 ¶ 32; A 102 ¶ 19; A 123 ¶ 15; A 186-87 ¶ 15.)

2. The Harm to Financial Institutions From Disclosure of Their Use of Emergency Lending Facilities

The longstanding concern of the Board and financial institutions about the stigma associated with accessing emergency government lending facilities is rooted in years of experience. That experience shows that when rumors of a financial institution’s actual or imagined weakness circulate—rumors that are triggered when, among other things, an institution turns to a lender of last resort—adverse consequences follow.¹⁷

In August 2007, a major U.K. clearing bank became “the centre of intense scrutiny” after the market learned that it had used the Bank of England’s standing facilities. House of Commons Report ¶ 105. Although the clearing bank’s use of those facilities was reportedly not related to its liquidity needs, “investors and the media searched for signs of weakness following the start of the turmoil in the capital markets,” causing a “sharp fall in the company’s share price.” *Id.* ¶¶ 105, 139.

¹⁷ This Court may take judicial notice of facts during any point in the proceeding. *See Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL-CIO v. City of New York Dep’t of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) (“[J]udicial notice may be taken at any stage of the proceeding.”) (quoting Fed. R. Evid. 201(f)).

In September 2007, a BBC report that U.K. bank Northern Rock plc had received emergency financial support from the Bank of England precipitated a run on Northern Rock. *Id.* ¶¶ 1, 147. The bank run began on the evening of September 13, following, “in the Chancellor of the Exchequer’s words, ‘the fairly dramatic news that a fairly well-known bank had gone to the Bank of England for help’ and the run accelerated the following day.” *Id.* ¶ 149. A U.K. Treasury Committee report concluded that the run “was largely triggered by the announcement of the Bank of England’s support operation,” demonstrating that the “level of stigmatisation” associated with the lending facility called its efficacy into doubt. *Id.* ¶ 213.¹⁸

Large U.S. financial institutions have recently experienced runs of a similar sort, confirming that their survival also can turn on public confidence in them. During the recent financial crisis, no less than six major U.S. financial

¹⁸ Though the Bank of England and Northern Rock planned to formally announce this operation after it had taken place, the BBC—through a leak—reported this event first. House of Commons Report ¶ 147. The Chief Executive of Northern Rock lamented this leak, explaining that, “[h]ad the leak not happened and had we been able to announce on the Monday the facility with the Bank of England in a measured fashion, with full communication plans in place, undoubtedly there would have been some concern—a lot of concern—to many of our customers but we think it would have been considerably less than it was in the way that it came about.” *Id.* ¶ 148.

institutions failed or nearly failed following rumors or reports of their financial weakness.¹⁹

Countrywide Financial. In August 2007, depositors rushed to withdraw funds from Countrywide Financial amid public speculation about the home-mortgage lender's financial health. *See* James R. Hagerty & Lingling Wei, *Countrywide Seeks Deposits to Fund Loans – Company to Expand Bank Arm in Latest Bid To Combat Credit Crunch*, Wall St. J., Sept. 19, 2007, at A4. At Countrywide branches, depositors reportedly besieged bank representatives, “demanding to get their money out” in scenes “conjuring those grainy black-and-white images of Depression-era bank runs.” Sebastian Mallaby, *A Market Run on Rationality*, Wash. Post, Aug. 20, 2007, at A15. Investors, too, discontinued purchasing Countrywide's commercial paper (*i.e.*, short-term debt), causing the bank to suffer “the bond-market equivalent of a bank run.” *Id.*

¹⁹ Financial institutions were not the only ones affected by investor reactions to negative reports. Money-market funds (essentially short-term mutual funds that invest in highly liquid securities) also experienced investor runs during the financial crisis. *See* Diana B. Henriques, *Treasury to Guarantee Money Market Funds*, N.Y. Times, Sept. 20, 2008. In September 2008, the collapse of prominent money-market fund Reserve Primary Fund “prompted panic in the world of money-market funds,” leading investors to pull more than \$200 billion out of such funds within two weeks. Diya Gullapalli, *Investing in Funds: A Monthly Analysis—Low Yields Join Credit Worries as Big Issues for Money Funds*, Wall St. J., Mar. 2, 2009, at R1.

Bear Stearns. In March 2008, when rumors of Bear Stearns’s illiquidity surfaced, Bear Stearns’s counterparties “expressed increased concern regarding maintaining their ordinary course exposure” to the company and “a significant number of counterparties and lenders [became] unwilling to make [even] secured funding available to Bear Stearns on customary terms, which resulted in a sharp deterioration in Bear Stearns’s liquidity position.” JPMorgan Chase & Co., Form S-4, at 27 (Apr. 11, 2008). One strategist analogized the counterparty “run” at Bear Stearns to the depositor run at Northern Rock. *See* Kate Kelley, Greg Ip & Robin Sidel, *Fed Races to Rescue Bear Stearns in Bid to Steady Financial System: Storied Firm Sees Stock Plunge 47%; J.P. Morgan Steps In*, Wall St. J., Mar. 15, 2008, at A1.

IndyMac. In July 2008, the third-largest bank failure in U.S. history occurred after errant comments about IndyMac’s solvency prompted depositors to withdraw 1.3 billion dollars’ worth of funds in 11 days. *See* Damian Paletta & David Enrich, *Crisis Deepens as Big Bank Fails—IndyMac Seized in Largest Bust in Two Decades*, Wall St. J., July 12, 2008, at A1. The Director of the Office of Thrift Supervision attributed that failure to comments made by a Senator, who, in the words of the OTS Director, gave the bank a “heart attack” after raising concerns about its solvency. *Id.*

Lehman Brothers. In September 2008, Lehman Brothers filed for bankruptcy after public speculation about its subprime exposure “spooked” investors and creditors. Lorraine Woellert & Yalman Onaran, *Fuld Blames Lehman’s Fall on Rumors, “Storm of Fear,”* Bloomberg News, Oct. 6, 2008. Lehman’s CEO attributed the firm’s collapse to a “‘lack of confidence’” and a “‘storm of fear enveloping the entire investment-banking field and our financial institutions generally.’” *Id.* “With [its] stock price in free fall and the cost of buying protection against Lehman defaulting on its bonds skyrocketing, it [was] clear that Lehman [was] not immune to the kind of panic that can put a financial institution, which depends on confidence, at risk.” Jenny Anderson & Ben White, *Wall St.’s Fears on Lehman Bros. Batter Markets,* N.Y. Times, Sept. 10, 2008.

Washington Mutual. In September 2008, depositors’ reactions to reports about Washington Mutual’s subprime exposure triggered the largest bank failure in U.S. history. Depositors “withdrew \$16.7 billion, leaving [Washington Mutual] without the money it needed to stay in business.” Binyamin Appelbaum, *Wachovia Is Sold As Depositors Flee,* Wash. Post, Sept. 30, 2008, at A1. That event made clear that a depositor run “can destabilize even a large bank.” Binyamin Appelbaum, *Investors Flee From Banking Stocks; National City, Wachovia Plummet,* Wash. Post, Sept. 27, 2008, at D1.

Wachovia. In September 2008, Wachovia was “forced from existence,” in part, by “fleeing depositors” who lost confidence based on speculation about the bank’s survival. Binyamin Appelbaum, *Wachovia Is Sold As Depositors Flee*, Wash. Post, Sept. 30, 2008, at A1. Like Washington Mutual, the company “was ultimately laid low not by its mortgage losses but by a lack of cash. The bank basically foundered because people lost confidence in its ability to survive.” *Id.* As FDIC Chairman Sheila C. Bair observed: ““As the markets become more skittish, financial markets are all about confidence[;] even the strongest institutions can be subject to traditional runs.”” *Id.*

These recent failures or near-failures evidence a well-documented phenomenon. Banking history is replete with instances of financially sound institutions failing because the public lost confidence in them. In 1984, for instance, Continental Illinois—the nation’s seventh-largest bank at the time—failed after rumors circulated about its financial health. *See* Federal Deposit Insurance Corporation, *History of the Eighties—Lessons for the Future: An Examination of the Banking Crises of the 1980s and Early 1990s* (Dec. 1997), Volume I, at 247 (“Among the factors that caused the run to start and made stopping it difficult, rumor was prominent.”).²⁰ Those rumors triggered a run on the bank that continued even after the Comptroller of the Currency stated that he

²⁰ Available at http://www.fdic.gov/bank/historical/history/235_258.pdf.

was unaware of any significant changes in the bank's operations that would substantiate the rumors. *Id.*

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT DISCLOSURE OF THE REPORTS LIKELY WOULD CAUSE SUBSTANTIAL COMPETITIVE HARM TO BORROWING INSTITUTIONS.

A. The Board Produced Specific and Unrebutted Evidence that Disclosure Likely Would Cause Substantial Competitive Harm to Borrowing Institutions.

The Board, as the District Court correctly held, established that the disclosure sought by Fox likely would result in substantial competitive harm to borrowing institutions. The Board did so by submitting unrebutted declarations from senior Board and FRB officials who have extensive experience with Discount Window and other forms of emergency lending. *See* Board Br. at 19-24. Those declarations detailed the specific harms likely to befall institutions should information about their borrowing be disclosed, citing instances when institutions either were harmed by rumors of Discount Window borrowing or paid higher rates in the private federal funds market to avoid such harm. *See id.* at 23-24.

The Board's evidence fully accords with the views and experiences of Clearing House members. Indeed, recent examples of institutional failures or near-failures only confirm what the Board already showed, as evidenced most recently by the run on Northern Rock after the public learned that it had received

emergency government support. *See supra* at 15. And, during the current financial crisis, no less than six major financial institutions failed or nearly failed following rumors or reports of their financial weakness: depositors rushed to withdraw funds from Countrywide Financial, IndyMac, Washington Mutual, and Wachovia amid fears over their financial health; customers withdrew funds and counterparties discontinued dealings with Bear Stearns after rumors of its illiquidity circulated; and Lehman Brothers filed for bankruptcy as investors and creditors lost confidence in the firm. *See supra* at 16-19. These are but recent examples of a well-documented phenomenon: Rumors of financial weakness—even unfounded rumors—can devastate a financial institution, as was evident during the 1984 Continental Illinois bank run. *See supra* at 19-20.

Fox cites no facts contradicting the extensive sworn declarations of senior Board and FRB officials introduced below.²¹ Instead, Fox quibbles with the

²¹ In response, Fox cited just *three* instances (A 234-44) in which borrowing institutions disclosed limited information about their use of certain Fed Lending Programs. But those instances failed to rebut the Board's declarations because (1) the disclosures occurred in year-end 10-K releases, not within days when financial institutions borrowed from the FRBs; (2) the disclosures were made on the borrowers' terms—that is, at a moment when the borrowers were able to assess the market's likely reaction to the disclosure, and take steps, if necessary, to head off or quickly dispel unfounded rumors of their financial weakness; (3) to the extent institutions disclosed amounts actually borrowed, they listed their borrowings *in the aggregate*; and (4) in all events, Fox's declarations were silent on the impact of the disclosures on the institutions, including their competitive position. *See* Clearing House Br. at 41-42, filed Nov. 6, 2009 in docket nos. 09-4083-cv(L), 09-4097(CON); Board Br. at 28-30.

District Court’s reference during oral argument to a “broader interpretation” of the deference traditionally afforded the government on issues of national security, suggesting that the District Court somehow drew an improper analogy between the Board’s efforts to stabilize the economy during a time of economic crisis and the government’s efforts to safeguard national security. Fox Br. at 28.

But Fox takes no issue with the standard actually *applied* by the District Court when ruling on the issue of competitive harm—*i.e.*, that substantial competitive harm would “likely” befall borrowing institutions should the requested documents be disclosed. (SPA 25.) Indeed, Fox acknowledges that the Board need only show “[a]ctual competition and the *likelihood* of substantial competitive injury.” Fox Br. at 37 (quoting *Gulf & W. Indus., Inc. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979) (emphasis added)).

Fox also claims that the information it seeks is “stale.” Fox Br. at 39-42. Not so. Fox did not seek information that was, for instance, 5 or 10 years old; rather, Fox seeks records up to and including the date of its first request and within three weeks of the date of its second request (which sought expedited processing). (A 169-71; A 172.1-172.3.) And, the Board continues to produce Reports that reflect borrowing from the Fed Lending Programs. If this Court somehow finds Exemption 4 inapplicable on “staleness” grounds, the Board would be required to

disclose similar information in real time in response to the next such FOIA request if no other exemption applies.

The risk that their identities and the extent of their borrowing will be disclosed would dissuade Clearing House members and other *prospective* borrowers from using the Fed Lending Programs in the future. The fear of being stigmatized is so prevalent that banks have historically avoided using the Discount Window despite the Board's policy of not disclosing their identities. *See supra* at 7-13. Prospective borrowers likely would turn away from the Fed Lending Programs altogether, undermining the programs' objectives, if their identities and details of their borrowing could be revealed through a FOIA request within days of such borrowing. *See* 5 U.S.C. § 552(a)(6)(A)(i) ("Each Agency . . . shall determine within 20 days . . . after the receipt of any [FOIA] request whether to comply with such request"); *id.* § 552(a)(6)(E)(i) (requiring agency to promulgate regulations "providing for expedited processing" of certain requests); 12 C.F.R. § 261.13(e) ("The time for response to requests shall be 20 working days," subject to certain exceptions); *id.* § 261.13(c)(2) ("In response to a request for expedited processing, the Secretary shall notify a requester of the determination within ten calendar days of receipt of the request.").

B. Competitive Harm Need not Result from a Competitor’s Affirmative Use of Confidential Information.

The Board demonstrated below that the harm likely to result from disclosure is very real—and potentially catastrophic. *See supra* at 20. Fox nonetheless argues that Exemption 4 does not protect against this harm because such harm would be inflicted by “customers, investors and other market participants,” rather than by the borrowers’ competitors. Fox Br. at 36.

But the Board’s evidence showed that the harm would be *both* from competitors and from customers, outside lenders, market analysts, and others. (A 103 ¶ 22; A 188 ¶ 18; A 139 ¶ 25.) *See also* Board Br. at 25.

In any event, this Court, in *Nadler v. FDIC*, 92 F.3d 93 (2d Cir. 1996), rejected the rigid construction of “competitive harm” that Fox advances. In *Nadler*, plaintiffs—two community associations and their Congressman—claimed that the harm resulting from disclosing detailed commercial and financial terms of a joint-venture agreement was not “of a type” protected by Exemption 4, because the threatened harm was “political,” rather than “competitive,” in nature. *Id.* at 96. This Court disagreed, holding that the “fact that this harm would result from active hindrance by the Plaintiffs rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four.” *Id.* at 97.

This Court had followed the same approach in *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863 (2d Cir. 1978), concluding that

competitors, release of line-item pricing information “would permit its commercial *customers* to bargain down (‘ratchet down’) its prices more effectively”; “[*b*]oth of the reasons McDonnell Douglas advanced for claiming its line item prices were confidential commercial or financial information are indisputable”) (emphasis added); *see also Gen. Elec. Co. v. Dep’t of Air Force*, --- F. Supp. 2d ---, 2009 WL 2749359, at *7 (D.D.C. Aug. 28, 2009) (“Regarding customer leverage, . . . this circuit has expressly found such leverage to have the potential to be substantially competitively harmful and therefore a basis for nondisclosure.”) (citing *McDonnell Douglas*, 180 F.3d at 305, 307).

Accordingly, this Court should affirm the District Court’s holding that the Board’s un rebutted evidence demonstrated that disclosure of individual bank borrowing from the Fed Lending Programs likely would result in substantial competitive harm to such borrowers.

II. THE DISTRICT COURT CORRECTLY HELD THAT EXEMPTION 4 PROTECTS THE BOARD’S INTEREST IN EFFECTUATING THE PURPOSES OF ITS LENDING PROGRAMS.

The District Court also correctly found that disclosure of the Reports “would undermine the Board’s mandate to provide stability to markets, especially during a financial crisis,” because borrowers would fear being stigmatized by accepting “publicly disclosed loans.” (SPA 28.)

Fox submitted *no* evidence—none—contradicting the Board’s showing that disclosing borrower identities would discourage institutions from using the Discount Window and other emergency lending programs. That evidence is confirmed by decades of industry and Board experience with the Discount Window. *See supra* at 7-9. If the Board were forced to breach its longstanding promise of confidentiality, financial institutions would turn away from the Discount Window and other lending programs, defeating the Board’s statutory objectives and specific goal of injecting liquidity into the financial system to counteract the credit crisis. This result would restrict the Board’s ability to manage financial crises, contrary to Congress’ intent when enacting Exemption 4.

Fox argues, instead, that the District Court was not entitled to safeguard these objectives because Exemption 4 does not protect the government’s interest in effectuating its programs. Fox Br. at 42-46. Fox’s position is a solitary one. The First Circuit, in *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983), recognized that the legislative purposes identified in *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), extended beyond a rigid application of the two-part test it fashioned. Instead, *National Parks* meant to give voice to “Congress’ purpose to protect information which would be particularly helpful to agency officials in carrying out their mandate.” *9 to 5*, 721

F.2d at 10. The First Circuit therefore deferred to the Board’s “legitimate governmental interest of efficient operation,” explaining that the government should not be “disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities.” *Id.* at 11. The D.C. Circuit has agreed. *See Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (noting that prior panel had “adopted the First Circuit’s conclusion that [Exemption 4] also protects a governmental interest in administrative efficiency and effectiveness”).

Other courts have applied Exemption 4 to protect analogous government programs from the harm that could result from disclosing information confidentially supplied by third parties. *See Clarke v. U.S. Dep’t of Treasury*, Civ. No. 84-1873, 1986 WL 1234, at *1, 2 (E.D. Pa. Jan. 28, 1986) (disclosure by Treasury Department of bondholder data including names of bondholders, coupon and maturity dates “would harm the national interest because investors would be less likely to purchase government bonds in the future if they knew the details of their purchases would be subject to public disclosure.”); *Comstock Int’l (U.S.A.), Inc. v. Export-Import Bank of the U.S.*, 464 F. Supp. 804, 808 (D.D.C. 1979) (“disclosure would significantly impair [the Export-Import Bank’s] ability to promote United States exports” because “potential loan applicants might seek financing outside the United States because of their unwillingness to subject

themselves to the possible risk of disclosure.”); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 30 (D.D.C. 2000) (“There is a risk that foreign purchasers may seek financing outside of the United States, and thus would purchase non-U.S. goods if subjected to the risk of disclosure of their confidential commercial or financial information. This would interfere with the Bank’s ability to promote U.S. exports”); *Africa Fund v. Mosbacher*, No. 92 Civ. 289, 1993 WL 183736, at *7 (S.D.N.Y. May 26, 1993) (deferring to uncontradicted declarations “that explain why disclosure of documents such as those plaintiff seeks would interfere with the export control system”).

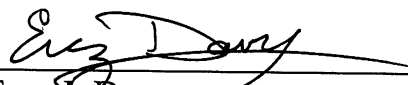
This Court should follow the rationale of these cases here. In doing so, the Court would be keeping its observation that agency promises of confidentiality, though “perhaps not binding upon the courts in their construction of the FOIA,” are “certainly entitled to the court’s careful consideration.” *Am. Airlines*, 588 F.2d at 871. “[C]areful consideration” is warranted here because Clearing House members and other financial institutions have relied on the Board’s longstanding practice not to disclose information about their borrowing. *See supra* at 7-13.

This Court should therefore affirm the District Court’s holding that Exemption 4 protects the Board’s interest in effectuating the purposes of its lending programs.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) because the brief contains 6,884 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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09-3795-cv

Fox News v. Board of Governors of the
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ANTI-VIRUS CERTIFICATION

Case Name: Fox News Network LLC v. Board of Governors of the Federal Reserve System

Docket Number: 09-3795-cv

I, Ramiro A. Honeywell, hereby certify that the Amicus Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 12/10/2009) and found to be VIRUS FREE.

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