09-4083-cv(L)

& 09-4097-cv(CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BLOOMBERG L.P.,

Plaintiff/Appellee,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendant/Appellant,

and

THE CLEARING HOUSE ASSOCIATION L.L.C.,

Intervenor/Appellant

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither WLF nor AEF has a parent corporation or any stock owned by a publicly held company.

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly publishes monographs and other publications on these and other related topics. In particular, WLF has regularly appeared before this and numerous other federal and state courts to promote governmental transparency and accountability. *See, e.g., Pub. Citizen v. DOJ*, 491 U.S. 440 (1989); *Ctr. For Nat'l Sec. Studies v. DOJ*, 331 F. 3d 918 (D.C. Cir. 2003); *Washington Legal Foundation v. U. S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Washington Legal Foundation v. U. S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici agree with Appellee that the district court properly ordered disclosure of the documents requested in this case under the Freedom of Information Act (FOIA) but are filing separately because of their particular interest in the issues of governmental transparency and accountability raised here. In their effort to prevent disclosure of documents that would shed light on the Federal Reserve's secret lending practices, Appellants seek to drastically expand the contours of Exemption 4 of FOIA. Yet the documents in question are neither "privileged" nor "confidential" within the meaning of FOIA's Exemption 4 because their release would not result in "substantial competitive harm" to the borrowers. Moreover, the documents sought were prepared by the government, not the borrowers, and thus were not "obtained from a person" as required under Exemption 4. *Amici* are concerned that Appellant's efforts in this appeal to hide the Federal Reserve's lending practices behind a veil of secrecy will thwart governmental accountability at a time when the public is rightly scrutinizing the Federal Reserve's use of taxpayer money.

In accordance with Federal Rule of Appellate Procedure 29, all parties have consented to the filing of this brief.

STATEMENT OF THE CASE

The Federal Reserve System (the Fed) is comprised of the Board of Governors of the Federal Reserve System (the Board) and the Federal Reserve Banks (the Banks). The Board is the agency tasked with overseeing the federal government's central banking system, which exists primarily to promote stable prices, ensure moderate long-term interest rates, and provide financial services to major financial actors. *See* Joint Appendix (JA) at 172-84. The Board achieves its objectives in large part through loan programs administered by the Banks (including the Federal Reserve Bank of New York), which serve as the operating arm for the Fed and routinely lend money to private financial institutions. *Id.* The Board supervises and regulates the operations of the Banks, reviews and approves changes to interest rates charged by the Banks, and oversees the various loans administered by the Banks. *Id.* The Board is subject to FOIA, promulgates regulations to facilitate FOIA compliance, and employs designated personnel to respond to FOIA requests. *See* 12 C.F.R. §§ 261.12-17.

Appellee Bloomberg LP (Bloomberg) operates Bloomberg News, a financial news service with more than 2,200 employees in 145 bureaus around the world. *See* JA at 117. On May 20, 2008, Bloomberg reporter Mark Pittman submitted to the Board a FOIA request seeking certain loan records, including

"all securities posted between April 4, 2008 and May 20, 2008 as collateral" for loans received from the Fed's lending facilities during that time. Among other things, these records reveal the borrowers' names, the loan amounts, the collateral used for the loans, the dates of the loans, the valuations of the collateral, and the loan interest rates. *Id.* at 35-36.

Nearly seven months later, the Board formally denied Bloomberg's FOIA request. In a letter dated December 8, 2008, the Board informed Bloomberg that a thorough search had revealed some 231 responsive documents (the Remaining Term Reports), but that these documents would not be released because they were exempt from disclosure under FOIA. *Id.* at 60-64. Specifically, the Board contended that the Remaining Term Reports were (1) exempt from disclosure under FOIA's Exemption 4 as trade secrets or confidential commercial information, (2) exempt from disclosure under FOIA's Exemption 5 as inter- and intra-agency materials, and (3) not subject to FOIA whatsoever because the documents sought were housed by the Federal Reserve Bank of New York and thus did not constitute "agency records." *Id.*

On November 7, 2008, Bloomberg sued the Board for declaratory and injunctive relief, seeking to compel disclosure of the Remaining Term Reports. Following Bloomberg's November 25, 2008 amended complaint, the Board and

Bloomberg cross moved for summary judgment. Consistent with its earlier denial, the Board contended that the requested records were either exempt from disclosure under FOIA's Exemptions 4 and 5 or simply not subject to FOIA.

On August 24, 2009, the U.S. District Court for the Southern District of New York issued an order granting Bloomberg's summary judgment motion and denying the Board's. *See* Special Appendix (SA) at 47. Holding that the Remaining Term Reports constituted agency records that were not exempt from disclosure, the court concluded that the Board improperly relied on FOIA's Exemptions 4 and 5 to withhold the requested information from Bloomberg. Accordingly, the district court ordered the Board to produce the Remaining Term Reports to Bloomberg within five business days. *Id.*

In its order, the district court explained that the Remaining Term Reports were not covered by Exemption 4 because the Board failed to satisfy its burden of proving that disclosure of the requested information would "cause substantial harm to the competitive position of the borrowers." *Id.* at 31-42. The district court was unpersuaded by the Board's evidence purporting to show that the release of the Remaining Term Reports might stigmatize borrowers in the marketplace, concluding that such evidence failed to demonstrate the requisite "competitive harm from the affirmative use [by competitors] of the disclosed

information." *Id.* The district court also found that, because the Remaining Term Reports were generated by the Fed, not by the borrowers, they were not "obtained from a person" as required under Exemption 4. *Id.* Importantly, and consistent with binding Second Circuit precedent, the district court declined to adopt the Board's "program effectiveness" argument, which would expand the reach of FOIA Exemption 4 to prevent disclosure of any information if its release could undermine the "effectiveness" of a government agency's program. *Id.*

The district court subsequently stayed enforcement of its order pending the Board's emergency stay application to this Court. On September 9, 2009, two weeks after final judgment was entered, The Clearing House Association LLC (the Clearing House), an association of several leading national banks who claim that the district court's order will impair their ability to access emergency funds from the Fed, moved for leave to intervene in this case. *See* JA at 469. Over Bloomberg's objection, the district court granted the Clearing House's motion. *Id.* at 513.

On September 30, 2009, the Board and the Clearing House both filed their respective notices of appeal from the district court's order and judgment. That same day, the Board moved this Court for an emergency stay pending this appeal

and for an expedited briefing schedule. On October 6, 2009, over Bloomberg's objection, this Court granted a stay and authorized an expedited briefing schedule. On appeal, Appellants now abandon the Board's initial contentions that the documents sought are not agency records and that, even if they are, they are exempt from disclosure by FOIA's Exemption 5. Instead, Appellants rely solely on Exemption 4 as their legal basis for withholding the Remaining Term Reports.

SUMMARY OF ARGUMENT

This case goes to the very core of what the Freedom of Information Act (FOIA) stands for–ensuring an informed citizenry so that it may hold its government accountable. The Board insists that the Remaining Term Reports should remain forever hidden behind a veil of secrecy pursuant to FOIA's Exemption 4. But, as the district court properly found, the Board has utterly failed to meet its evidentiary burden to demonstrate that Exemption 4 applies to the kind of information sought here. Accordingly, the district court's well-reasoned order should be affirmed.

Exemption 4 of FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(2). This Court has held that information is

"privileged or confidential" if its disclosure would cause substantial harm to the competitive position of the person from whom the information was obtained. The Board claims that disclosure of the Remaining Term Reports will have a stigmatizing effect that could impair the borrowing banks' standing in the marketplace. This is not enough. The competitive harm required under FOIA is a ***competitor's*** affirmative use of proprietary information that could result in a commercial windfall for the ***competitor***, not the potential harm caused by a customer's unfavorable response in the marketplace. Because Exemption 4 was never intended to apply to the kind of reputational harm claimed here, the Board cannot meet its burden of showing substantial competitive harm.

Exemption 4 also requires that the information sought must be "obtained from a person." 5 U.S.C. § 552(b)(4). A "person" is defined as an "individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). The Board contends that because the Fed obtained certain information contained in the Remaining Term Reports from third party borrowers, all the information sought by Bloomberg was "obtained from a person" for FOIA purposes. But the borrowers here obviously did not provide the Fed with the approved loan amounts, the amount of collateral required for the loans, the dates of the loans, the valuations of the collateral, and

the loan interest rates–all of which are included in the Remaining Term Reports. And the fact that the Remaining Term Reports were themselves generated by the Fed, not by the borrowers, further undermines the Board's argument. It is long settled that information generated from within an agency by the government itself is not information "obtained from a person" under FOIA's Exemption 4.

The Board also urges this Court to go beyond the text of FOIA and insert a so-called "program effectiveness" prong into Exemption 4, claiming that disclosure of the Remaining Term Reports will somehow undermine the Board's interest in effectively performing its duties. But Congress did not include "program effectiveness" as a consideration when crafting Exemption 4, and this Court has expressly declined to recognize program effectiveness as a valid consideration under FOIA. More importantly, the program effectiveness theory has been rejected by the Supreme Court, which concluded that the theory, by allowing any agency to withhold information whenever it concluded that disclosure would not promote the "efficiency" of its operations, would eviscerate FOIA's policy of prompt disclosure. An expansion of Exemption 4 beyond its text would also violate FOIA's longstanding requirement that exemptions be narrowly construed.

Finally, the district court's decision is consistent with the principal policy

undergirding FOIA–enabling an informed citizenry to hold its government accountable. Here, release of the Remaining Term Reports would allow precisely the kind of public scrutiny of the Fed's activities that FOIA contemplates. As a result of the Fed's loans, the American taxpayer has essentially become an involuntary investor in the nation's leading banks. Given the unprecedented expenditure of taxpayer dollars, the public has a right to know the most basic details of these extraordinary transactions.

ARGUMENT

I. The District Court Correctly Held That The Board Failed To Establish The Requisite "Substantial Competitive Harm" Under Exemption 4.

FOIA favors complete disclosure of requested agency information unless the information sought falls into one of FOIA's clearly delineated exemptions. *See* 5 U.S.C. § 552(b). Appellants rely solely on Exemption 4 as their legal basis for withholding the Remaining Term Reports.[1] Exemption 4 exempts from

[1]Because Appellants have never claimed that the Remaining Term Reports are exempt from disclosure under FOIA's Exemption 8, the applicability of that exemption is not properly at issue in this appeal. Although Appellants' *amicus* raises at length the merits of that exemption, *see* Am. Bankers Assoc. Br. 10-19, any such argument has been waived by the Board. *See, e.g., Ryan v. DOJ*, 617 F.2d 781, 792 & n.38 (D.C. Cir. 1980) (refusing to allow an agency to invoke an exemption not previously raised and stating that "an agency must identify the specific statutory exemptions relied upon, and do so at least by the time of the district court proceedings").

disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(2). Under the test first established in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), and subsequently adopted by this Court in *Continental Stock Transfer & Trust Co. v. SEC*, 566 F.2d 373, 375 (2d Cir. 1977), information is "privileged or confidential" if its disclosure would have the effect either "(1) of impairing the government's ability to obtain information–necessary information–in the future, or (2) of causing substantial harm to the competitive position of the person from whom the information was obtained." *Continental Stock Transfer & Trust Co.*, 566 F.2d at 375. The Board has never suggested that disclosure of the Remaining Term Reports would somehow impair its ability to obtain similar information in the future. Rather, the Board argues that disclosure of the Remaining Term Reports would cause "substantial competitive harm" to the Fed's borrowers. But, as the district court correctly held, the Board failed entirely to meet its evidentiary burden below on this point. Simply put, the type of reputational harm claimed here by the Board is not the same "competitive harm" contemplated and required by *National Parks*.

The Board's "competitive harm" argument hinges entirely on its claim that the disclosure of the Remaining Term Reports will have a stigmatizing effect

that could impair the borrowing banks' standing in the marketplace, particularly if customers and investors draw adverse conclusions about the banks' creditworthiness and solvency. *See* Appellant's Br. at 19 ("[T]here is a 'stigma' associated with borrowing from the Reserve Banks that can fuel speculation and rumors that the borrowing entity is experiencing underlying financial problems–even if that is not the case."). But the competitive harm that matters under *National Parks* is a ***competitor's*** affirmative use of proprietary information that could result in a commercial windfall for the ***competitor***, not the potential harm caused by a customer's unfavorable response in the marketplace.

Indeed, the type of competitive injury required to merit application of FOIA's Exemption 4 is properly limited to "that which may flow from ***competitors***' use of the released information, not from any use made by the public at large or customers." *Ctr. to Prevent Handgun Violence v. U.S. Dep't of the Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997) (rejecting the Bureau of Alcohol, Tobacco, and Firearms's suggestion that releasing information would subject licensed gun dealers to "unwarranted criticism and harassment" as irrelevant to the competitive harm analysis) (emphasis in original). As the D.C. Circuit Court of Appeals has repeatedly emphasized:

The important point for competitive harm in the FOIA context . . . is

> that it be limited to harm flowing from the affirmative use of proprietary information ***by competitors***. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations . . . .

Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (quoting Mark Q. Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 2 WIS. L. REV. 207, 235-36 (1981) (emphasis and alteration in original)); *see also CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (rejecting a FOIA claim of confidentiality due to the risk of "unfavorable publicity" as "unrelated to the policy behind Exemption 4"); *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51-52 (D.C. Cir. 1981) (framing the inquiry as "whether release of the requested information, given its commercial value ***to competitors*** and the cost of acquiring it through other means," would create "a windfall ***for competitors***" that places the disclosing entity at a competitive disadvantage) (emphasis added).

The Board bore the burden below of establishing that those banks participating in the Fed's lending programs will likely suffer a substantial ***competitive*** injury if the Remaining Term Reports are released–in other words, that the information sought could be unfairly used by their ***competitors*** for

commercial gain. Instead of satisfying this burden, however, the Board merely proffered evidence that disclosure of the Remaining Term Reports could result in "a loss of public confidence" and "a loss of confidence by market analysts." *See* Appellant's Br. at 20. But, as the case law makes clear, this is precisely the sort of reputational harm that courts repeatedly have held is not entitled to the protections of Exemption 4.

As the district court rightly noted, "the risk of looking weak to competitors and shareholders is an inherent risk of market participation." SPA40-SPA41. To drastically expand Exemption 4 to now cover this obvious risk would violate FOIA's most basic requirement that its statutory exemptions be narrowly construed. *See DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989) (explaining that in light of FOIA's goal of promoting full agency disclosure, exemptions must be construed narrowly); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (emphasizing that FOIA's narrow exemptions "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."). In sum, the evidence submitted by the Board below does not even come close to establishing the sort of competitive injury required by *National Parks* and its progeny. Absent such evidence, Exemption 4 is applicable.

II. The District Court Correctly Held That The Remaining Term Reports Sought By Bloomberg Were Not "Obtained From A Person" Under Exemption 4.

To qualify for protection under Exemption 4, the information sought also must be "obtained from a person." 5 U.S.C. § 552(b)(4). Congress has defined a "person" for FOIA purposes as an "individual, partnership, corporation, association, or public or private organization *other than an agency*." 5 U.S.C. § 551(2) (emphasis added). It is long settled that information generated from within an agency by the government itself is not information "obtained from a person." *FOMC v. Merrill*, 443 U.S. 340, 360 (1979); *see also Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006) ("[M]aterials implicating Exemption 4 are generally not developed within an agency."). The Remaining Term Reports, which were created by the Fed and are housed at the Federal Reserve Bank of New York, are obviously not information "obtained from a person" within the meaning of 5 U.S.C. § 552(b)(4).

The Board contends that because the Federal Reserve Bank of New York obtained from third party borrowers certain information contained in the Remaining Term Reports, all the information sought by Bloomberg was "obtained from a person" for FOIA purposes. *See* Appellant's Br. at 40-48 (contending that "the loan amounts and dates in the Remaining Term Reports

were provided to Reserve Banks *by the borrowers*, and are therefore 'obtained from a person' under FOIA") (emphasis in original). In other words, the Board's position is that any government report that contains ultimate facts about a third party automatically falls within the zone of privacy recognized by Exemption 4. But this argument cannot withstand even the slightest scrutiny.

The borrowers here obviously did not provide the Federal Reserve Bank of New York with the approved loan amounts, the amount of collateral required for the loans, the dates of the loans, the valuations of the collateral, or the loan interest rates–all of which are included in the Remaining Term Reports sought by Bloomberg. *See* JA 35-36. To the contrary, this information was necessarily provided *to the borrowers* by the Fed. Presumably, borrowers seeking billions of dollars in emergency loans do not have the luxury of setting their own interest rates, fixing their own collateral requirements, or approving their own loan requests. As the district court aptly stated:

> The information in the Remaining Term Reports relates more to the FRBNY's decisions to lend than to the information provided by the borrowers. While the Remaining Term Reports certainly include information about the FRB's interactions with the borrowers, it is a *non sequitur* to say that information ***about*** a person is obtained ***from*** that person.

SA at 36 (emphasis in original). And the very fact that the Remaining Term

Reports were themselves generated by the Fed, not by the borrowers, further undermines this argument. *See, e.g., Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 405 (D.C. Cir. 1980) (confirming that the scope of Exemption 4 is "restrict[ed]" to information that has "not been generated within the Government"); *Buffalo Evening News, Inc. v. Small Bus. Admin.*, 666 F. Supp. 467, 469 (W.D.N.Y. 1987) ("I find that all of the information sought by plaintiff here has been generated by the defendant SBA in the course of its involvement with its borrowers . . . . [T]his information in no way implicates any of the financial information provided by the borrowers to the government.").

The Board's credibility on this issue is further undercut by its repeated insistence, to the district court below, that the Remaining Term Reports were protected from disclosure under Exemption 5. Of course, Exemption 5 covers only "intra-agency" and "inter-agency" communications, *not* information obtained from third parties. By invoking Exemption 5, the Board sought to maintain confidentiality over the internal records of *its own actions*. Indeed, in its own Statement of Material Facts Not In Dispute, the Board admitted that the Remaining Term Reports constituted inter-agency communications that "are distributed to high-level staff within [the Fed], and select staff at the FRBNY, on a need-to-know basis for use in formulating monetary policy and for Reserve

Bank oversight purposes." JA at 112. Now that the Board has abandoned its Exemption 5 argument, however, it insists that the Remaining Term Reports were "obtained from" the borrowers. If Exemption 4 is extended to prevent disclosure under these circumstances, the "obtained from a person" distinction will cease to have any meaning.

In this case, the district court correctly held that Exemption 4 did not apply to the Remaining Term Reports because the information contained in them was not "obtained from a person." The record below compels the conclusion that the approved loan amounts, the amount of collateral required for the loans, the dates of the loans, the valuations of the collateral, and the loan interest rates are not information "obtained" from the borrowers within either the spirit or the letter of Exemption 4. Accordingly, the strict requirements of Exemption 4 cannot be met.

III. The District Court Properly Declined To Adopt The "Program Effectiveness" Test, Consistent With This Court's Binding Precedent.

FOIA's Exemption 4 protects from disclosure only "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(2). This language has never changed. Yet the Board invites this Court to go beyond what Congress wrote and insert a

"program effectiveness" prong into Exemption 4, claiming that disclosure of the Remaining Term Reports "would undermine the Board's interest in effectively administering its statutory and regulatory responsibilities." *See* Appellant's Br. at 31. Curiously, the Board claims that the district court actually "erred" by declining to adopt this novel theory of FOIA exemption. *Id.* at 35 ("The district court erred in refusing to recognize the program effectiveness standard."); *id.* at 39 ("[T]he district court's summary rejection of the program effectiveness test cannot withstand analysis."). But this Court has *never* embraced the so-called program effectiveness theory and, when presented with the opportunity, has expressly declined to do so, dismissing the theory as mere "speculation."

Under the program effectiveness theory advanced by the Board, documents may be considered "confidential" if disclosure would detrimentally impact an agency's ability to fulfill its responsibilities. But nowhere does Exemption 4 state that records are "confidential" simply because their release might somehow impact the agency's ability to "fulfill its responsibilities." *See* 5 U.S.C. § 552(b)(2). Presumably, Congress knew how to exempt data from disclosure under FOIA in those circumstances where, it its view, secrecy would best serve the public interest. *See, e.g, DOJ v. Landano*, 508 U.S. 165, 179 (1993) ("Had Congress meant to create such a rule, it could have done so much

more clearly."). And it is Congress's view, not the Board's, that matters under FOIA.

The program effectiveness theory originated as dicta in a lone footnote in *National Parks*, in which the D.C. Circuit "express[ed] no opinion as to whether other governmental interests are embedded in [Exemption 4]," including "program effectiveness." 498 F.2d at 770 n.17. The idea was subsequently adopted by the First Circuit, *see 9 to 5 Org. for Women Office Workers v. The Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1 (1st Cir. 1983), and has received mixed treatment by the D.C. Circuit. *Compare Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 830 F.2d 278, 286 (D.C. Cir. 1987) ("*Critical Mass I*") (endorsing the "program effectiveness" theory) *with Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc) ("*Critical Mass II*") (overruling *Critical Mass I* and leaving ambiguous whether *Critical Mass I* 's endorsement of "program effectiveness" remains good law).

Outside the First and D.C. Circuits, however, no other U.S. Court of Appeals has ever endorsed the program effectiveness theory. And while this Court adopted the Exemption 4 test for "privileged or confidential" records as outlined in *National Parks*, it has explicitly stated that its "adoption did not

encompass the speculation regarding 'program effectiveness' in footnote 17 of *National Parks*." *Nadler v. FDIC*, 92 F.3d 93, 96 & n.2 (2d Cir. 1996). Although the district court in *Nadler* had relied on the program effectiveness theory to prevent disclosure under FOIA, this Court affirmed that decision on other grounds and expressly declined to recognize the program effectiveness exemption. *Id.* at 96. And with good reason.

The Board's proposed reading of Exemption 4 allows it to ignore the plain language of FOIA. If adopted, the program effectiveness theory of exemption would completely eviscerate FOIA's "judicially enforceable public right to secure . . . information from possibly unwilling official hands." *Dep't of Air Force*, 425 U.S. at 361. Rather than allow the "possibly unwilling official hands" of the government to decide which information should be withheld from the public, Congress carefully crafted nine statutory FOIA exemptions to reflect its determination of the specific categories of information that the government should be allowed to withhold. *Id.* at 361-62. "Program effectiveness" is not one of them. Simply put, the public's right to access vital information under FOIA should not be cabined by government officials' own self-serving estimations of their agencies' needs for "effectiveness." A contrary holding would empower bureaucrats to decide who can have information and who

cannot.

The Supreme Court agrees. Indeed, in the closely related context of FOIA Exemption 5, the Supreme Court squarely rejected the identical "program effectiveness" theory the Board urges here, concluding that such a novel exemption simply cannot be reconciled with FOIA's broad policy of disclosure:

> We must reject this analysis . . . . Such an interpretation of [FOIA] would appear to allow an agency to withhold any memoranda . . .whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or would otherwise not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest standard."

FOMC, 443 U.S. at 354. Such reasoning is even more persuasive in the context of Exemption 4, which, unlike Exemption 5, is primarily concerned with protecting the persons who supply information, *not* the governmental agencies that gather it.

FOIA exemptions must be construed narrowly. *See Tax Analysts*, 492 U.S. at 151. In refusing to adopt the program effectiveness theory, the district court applied the binding law of this circuit. Consistent with this Court's precedent and the Supreme Court's previous rejection of program effectiveness, the district

court below properly declined to extend Exemption 4 beyond its text: "In light of the strong presumption in favor of interpreting FOIA exemptions *narrowly*, not to mention the Court of Appeals' guidance that the program effectiveness test constitutes 'speculation,' this Court will not import or apply the program effectiveness test in this action." SPA38 (emphasis in original) (citations omitted). In sum, the program effectiveness doctrine is wholly inconsistent with the fundamental purpose of FOIA, and this Court should reject it.

IV. The District Court's Decision To Compel Disclosure Of The Remaining Term Reports Furthers The Important Policy Goals Of FOIA

This case goes to the very core of what the Freedom of Information Act stands for–ensuring an informed citizenry so that it may hold its government accountable. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (stating that FOIA's purpose is "to hold the governors accountable to the governed"). Consistent with Justice Brandeis's famous axiom that "sunlight is the best disinfectant," FOIA was designed to expose governmental activity to the light of day. *See Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis Brandeis, *Other People's Money: And How the Bankers Use It* 62 (Nat'l Home Library Found. ed. 1933)). Here, release of the Remaining Term Reports would allow precisely the kind of public scrutiny of the Fed's activities contemplated

by FOIA.

Disclosure of the Remaining Term Reports is also consistent with President Barack Obama's commitment to "usher in a new era of open Government." *See* President Barack Obama, *Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies,* Jan. 21, 2009, available at http://www.whitehouse.gov/the_press_office/ Freedom_of_ Information_Act/ ("The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."). Consistent with this commitment, Attorney General Eric Holder has cautioned that "[a]n agency should not withhold information merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Att'y Gen. Eric Holder, *Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies,* Mar. 19, 2009, available at http://www.usdoj.gov/ag/foia-memo-march2009.pdf. Indeed, as both President Obama and Attorney General Holder have recently emphasized, "[t]he Government should not keep information confidential . . . because of speculative or abstract fears." *Id.* But that is precisely what the Board is attempting to do here by withholding the Remaining Term Reports from Bloomberg under the auspices of Exemption 4.

In the wake of the greatest financial crisis in a generation, the Fed's decisions to inject capital and lend enormous sums of money to shore up the banking industry have received prominent national attention. As a result of the Fed's policies, the American taxpayer has essentially become an involuntary investor in the nation's leading banks. Given the unprecedented expenditure of taxpayer dollars, the public has a right to know the most basic details of these extraordinary transactions. FOIA is the sole mechanism by which the public can obtain the necessary information.

In the months since this lawsuit was commenced, many noted scholars, elected officials, journalists, and other commentators have expressed grave concerns over the increasing lack of transparency at the Fed. *See, e.g.*, Matthew Winkler, *Transparency and the Fed*, WALL ST. J. ONLINE, Sept. 18, 2009 ("Since its creation in 1913, the Fed has been the watchdog over our money. Now it's running interference for banks that borrowed our money, and went so far as to insist to a federal judge that the public shouldn't worry about what it does with our money."); Editorial, *FOIA and the Fed,* THE WASH. POST, Oct. 22, 2009 ("In policy terms, the question is whether it can ever be right to let a government agency finance private firms in secret indefinitely."); Ron Paul & Jim Demint, *Americans Deserve a Transparent Fed*, WALL ST. J. ONLINE, Nov. 19, 2009

("[T]he Federal Reserve has operated in the shadows, away from the prying eyes of Congress, journalists, and the American people."); J.D. Foster, Ph.D., *Transparency and Accountability at the Federal Reserve*, Heritage Foundation Backgrounder No. 2342, Nov. 20, 2009 ("The Fed's actions have led to deep, legitimate, and bipartisan concerns in many respects, including the nature of the Fed's novel transactions and the lack of transparency in which they were consummated."). The district court's decision below, if affirmed, will go a long way towards providing a much needed dose of transparency to this murky institution.

In contrast, the Board's proposed drastic expansion of the contours of Exemption 4 would reward secrecy and thwart governmental accountability at a time when it is most necessary for the public to have full access to the facts. "Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate." Daniel Patrick Moynihan, *Secrecy: A Brief Account of the American Experience* 105 (Comm. on Protecting and Reducing Govt. Secrecy 1997). Consistent with the vital policies undergirding FOIA, the Remaining Term Reports should finally be disclosed to the American public.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Cory Andrews, as counsel for *amici curiae* the Washington Legal Foundation and Allied Educational Foundation, hereby certify that this brief conforms to the requirements of Federal Rule of Appellate Procedure 32(a)(7)(c). Specifically, the foregoing brief is in 14-point proportionately spaced CG Times font. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 5782, excluding the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Cory L. Andrews
Cory L. Andrews

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2009, I served two copies of the foregoing brief upon the parties listed below via U.S. Mail, First Class postage prepaid. I further certify that, on this same day, I sent an electronic copy of the foregoing brief to each e-mail address listed below.

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