ORAL ARGUMENT NOT YET SCHEDULED

No. 13-5137

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION,
Plaintiff-Appellant,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* PROJECT ON GOVERNMENT OVERSIGHT, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND OPENTHEGOVERNMENT.ORG IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*. Except for the following, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Appellant: No *amici* appeared in the district court. Project On Government Oversight (POGO), Citizens for Responsibility and Ethics in Washington (CREW), and OpenTheGovernment.org appear in this Court as *amici curiae* in support of the Plaintiff-Appellant.

Rulings Under Review. References to the rulings under review appear in the Brief for Appellant.

Related Cases. This case has not previously come before this Court or any other court. Counsel is not aware of any other related cases pending before this Court or any other court within the meaning of the D.C. Circuit Rule 28(a)(1)(C).

/s/Brian Wolfman
Brian Wolfman

CORPORATE DISCLOSURE STATEMENT

Amici Project On Government Oversight, Citizens for Responsibility and Ethics in Washington, and OpenTheGovernment.org are non-profit organizations that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public. The general purposes of the *amici* organizations are to advocate for the public interest on a range of issues, including government transparency. More detailed information about each organization is in the addendum to the brief.

/s/Brian Wolfman
Brian Wolfman

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GLOSSARY

FINRA	Financial Industry Regulatory Authority
FOIA	Freedom of Information Act
PIABA	Public Investors Arbitration Bar Association
SEC	Securities and Exchange Commission
TARP	Troubled Asset Relief Program

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellant.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court ruled that the Securities and Exchange Commission (SEC) is not required to release records requested under the Freedom of Information Act (FOIA) concerning the method of selecting and disqualifying arbitrators used in securities disputes brought before a self-regulatory organization, the Financial Industry Regulatory Authority (FINRA). The court relied on FOIA's exemption 8, which covers records "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). *Amici* submit this brief to highlight three erroneous facets of the district court's decision.

First, the district court took statements from this Court's exemption 8 precedents out of context, wrongly concluding that this Court uses different principles of construction for exemption 8 than for the other FOIA exemptions. This reading resulted in the district court's application of exemption 8 to records that do not relate to an "examination, operating, or condition report" and to some records that relate to no report of any kind.

Second, the district court relied on a recent amendment to the Securities and Exchange Act to bolster its view that exemption 8 should be read particularly broadly. The recent amendment, however, is legally irrelevant. Moreover, it was enacted with the express purpose of narrowing the reach of exemption 8 to ensure

greater public accountability for the SEC.

Third, the district court failed to recognize that allowing withholding of records like the ones at issue here would effectively permit the SEC to invoke exemption 8 to protect nearly all of its records, because almost all SEC records will relate in some way to its regulatory activities. Exemption 8's text requires more than a relationship between records and the agency's regulatory oversight function; it requires records to be "related to examination, operating, or condition reports," words that the district court failed to give any effect.

INTEREST OF *AMICI*[1]

Amici are organizations that advocate for openness in government, have significant experience using FOIA to obtain records necessary for their work through requests and in litigation, and routinely testify before Congress concerning government transparency. *Amici* are particularly qualified to assist the Court in understanding the practical consequence of the district court's interpretation of exemption 8. *Amici* also provide expertise concerning the impact of recent changes to the Securities and Exchange Act that increase the SEC's disclosure obligations, as they testified and presented materials for Congress's consideration urging it to pass the amendment. More detailed information about each organization is set forth in the addendum. PIABA consents to the filing of this brief. The SEC consents to the filing of this brief, without agreeing to its necessity or its contents.

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici* or its counsel made a monetary contribution to preparation or submission of this brief.

BACKGROUND

In the securities industry, disputes arise between customers using brokerage firms to make investments and the broker-dealers providing investment services. Common customer claims include unauthorized trading, negligence, omission of facts, unsuitable recommendations, breach of fiduciary duty, and fraud. 108 Am. Jur. *Trials* 313 § 6 (2008). In the securities context, these types of customer claims are almost always subject to arbitration, rather than litigation in court. *Id*. Most customers with individual claims are required to arbitrate their disputes by contract; other disputes are arbitrated at the customer's unilateral election where the broker-dealer is a member of a self-regulating organization (e.g., FINRA, discussed below) or exchange (e.g., the New York Stock Exchange) whose rules require brokers to submit to arbitration. *Id.*

FINRA is the largest self-regulatory organization in the securities industry. Through its subsidiary, FINRA Dispute Resolution, Inc., it administers nearly all securities arbitrations, a majority of which are between public investor-customers and broker-dealers. *Id*. §§ 6, 7 (reporting that 68% of FINRA cases are filed by investors). FINRA conducts around 3,100 arbitrations each year. *Id*. § 6.

Consumer claims against broker-dealers subject to FINRA arbitration are governed by FINRA's Code of Arbitration Procedure for Customer Disputes ("Customer Code"). *See* FINRA – Rules and Regulations, *Code of Arbitration Procedure for Customer Disputes*, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096. The Customer Code enumerates, among other things, the process of selection and disqualification for

arbitrators in any given dispute. *See id*. §§ 12400-12407. FINRA uses a randomized process for selecting a list of arbitrators for a dispute, from which the parties are entitled to strike a certain number of candidates and must rank the remaining arbitrators in order of preference. *See id.* §§ 12400, 12402, 12403. FINRA then appoints the highest ranked arbitrators from a combined list. *See id.* §§ 12402, 12403. The parties have the right to request removal of an arbitrator if "it is reasonable to infer…that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration." *Id.* at § 12407. FINRA may also disqualify an arbitrator on its own. *Id.*

Public Investors Arbitration Bar Association (PIABA) is a bar association for attorneys who represent public investors in securities arbitrations. JA 33 (Jacobson Decl. ¶ 4). PIABA submitted a FOIA request to the SEC, which oversees FINRA arbitrations (JA 26 (Lever Decl. ¶ 2)), for "[d]ocuments relating to audits, inspections, and reviews" conducted by the SEC in connection with (1) "the arbitration selection process" of FINRA; (2) the "appointment of replacement arbitrators in the event that an arbitrator is stricken as part of the list selection process or removed for cause"; (3) "FINRA's policies, procedures, and processes in deciding causal challenges to an arbitrator's appointment": (4) "FINRA's internal policies and procedures regarding arbitrator selection, appointment, and replacement"; and (5) "FINRA's pre-approval background check on arbitrator

applicants."[2] JA 12-13. The SEC denied PIABA's request, citing FOIA's exemption 8. JA 14-15; *see* 5 U.S.C. § 552(b)(8). PIABA administratively appealed the denial, and the SEC affirmed its initial decision. JA 16-21. PIABA then challenged the SEC's decision to withhold the requested records in the district court. The district court granted summary judgment to the SEC, concluding that exemption 8 covered all requested records. *See* JA 59.

ARGUMENT

I. The district court misapplied this Court's precedents.

It has been over two decades since this Court has had occasion to consider exemption 8. In the three cases in which the Court has interpreted that provision, the central question was whether to limit exemption 8's application based on legislative history. In rejecting each proposed limitation, this Court repeated its conclusion that Congress drafted broad language in exemption 8 and that a statute's unambiguous text controls unless the application would lead to an unreasonable result.

In the decision below, however, the district court took these statements out of context and relied on them to extend exemption 8's application beyond its plain meaning to shield almost all information shared between regulated financial

[2] PIABA withdrew its original request for one additional category of records related to a public arbitrator pilot program at FINRA. Dist. Ct. Doc. 7, Joint Status Report at 2 n.1.

institutions and their regulators. This misuse of precedent is at war with FOIA's fundamental interpretive canon: the presumption in favor of disclosure that mandates exemptions be construed narrowly. These errors caused the district court to apply exemption 8 to records that do not relate to "examination, operating, or condition reports" as required by exemption 8 and therefore to authorize the withholding from PIABA records that the public has a right to receive under FOIA.

A. Contrary to the district court's decision, this Court has never applied special rules of statutory construction to exemption 8.

FOIA was designed to "permit access to official information long shielded unnecessarily from public view." *Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1262 (2011) (quoting *EPA v. Mink*, 410 U.S. 73, 79 (1973)). The Supreme Court has consistently explained that the "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force v. Rose*, 425 U.S. 351, 361 (1976). As a result of Congress's goal of maximum transparency, the Supreme Court has consistently held that the exemptions "must be narrowly construed," and it has never limited this construction to certain exemptions. *Id.* Likewise, this Court has always followed the bedrock principle of narrowly construing FOIA exemptions. *See Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 813 (D.C. Cir. 2008); *Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Like the Supreme Court, nothing in this Circuit's case law construing exemption 8 renders

it an exception to that rule.

Exemption 8 applies to records "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). In its first consideration of exemption 8, *Consumers Union of United States, Inc. v. Heimann*, this Court considered a request for records that were directly related to an examination of banks, but which contained information about banks' compliance with Truth-In-Lending-Act regulations, rather than their financial security. 589 F.2d 531, 532-33 (D.C. Cir. 1978). The plaintiff argued that only records related to examination, operating, or condition reports that contained information about the financial security of the regulated institution could be withheld under exemption 8, relying on legislative history suggesting that Congress was particularly concerned that releasing reports with negative financial information to the public could cause a run on the banks. *Id.* at 534. In rejecting the plaintiff's argument, this Court invoked a plain reading of the statutory provision and noted that exemption 8's language was "broad [and] all inclusive." *Id.* at 534. This statement, however, referred only to the Court's conclusion that "examination, operating, or condition reports" includes all such reports as a categorical matter and that such a reading was not an unreasonable result even in light of the legislative history. *Id.* at 534-35.

Two years later, this Court revisited exemption 8 in *Gregory v. FDIC*. 631 F.2d 896 (D.C. Cir. 1980). There, the plaintiffs requested financial reports concerning banks that were prepared for FDIC's use, but which concerned two banks that were closed and no longer in business. *Id.* at 898. Again, this Court rejected the plaintiff's argument that a harm requirement should be read into exemption 8 and cited the statutory text's plain, categorical meaning, rejecting any notion that based on the legislative history the categorical exemption yielded an unreasonable result. *Id.* at 898-99.

In both *Consumers Union* and *Gregory*, the Court did not have occasion to decide whether certain reports constituted "examination, operating, or condition reports"; in each case, it was clear that the requested records concerned or constituted such reports. Rather, in both cases, the dispute concerned whether the reports and related materials are exempt, or whether the exemption applies only to materials the release of which would cause the kind of financial instability that was Congress's animating concern in enacting exemption 8. In each case, the Court concluded that the plain meaning of exemption 8 did not require a finding of potential harm and that materials related to examination, operating, or condition reports are categorically exempt.

A decade after *Consumers Union* and *Gregory*, the Court considered exemption 8 one last time, in *Public Citizen v. Farm Credit Administration*, 938

F.2d 290 (D.C. Cir. 1991). There, the plaintiff contended that "financial institution" as used in exemption 8 meant depository institutions only, arguing that this limitation was in keeping with Congress's central concern about preventing a run on banks. *Id.* at 291. The plaintiff's reading would not have included the National Consumer Cooperative Bank, a non-depository institution that provided credit to nonprofit cooperatives. *Id.* Consistent with its prior decisions, the Court gave "financial institution" its plain meaning, which included both depository and credit granting institutions, rather than depart from the text by limiting the exemption to institutions for which the release of records might cause a particular harm. *Id.* at 292-93. This Court likewise rejected on plain-meaning grounds an interpretation of exemption 8 that would limit its scope to records relating to institutions the withholding agency in question actually regulates. *Id.* at 293.

As this Court has noted repeatedly, the language of exemption 8 is categorical. It exempts from mandatory disclosure records related to all examination, operating, or condition reports about financial institutions prepared for use by their regulators. Thus, the Court has consistently rejected arguments to constrain exemption 8's reach by imposing non-textual requirements such as showing a particular kind of harm will likely result from release of the records or a focus on Congress's purported central concern in enacting the exemption. In so doing, the Court has repeatedly explained that the plain language of the exemption

must control when the text does not produce an unreasonable result.

Never, however, has the Court concluded that exemption 8 is presumed to have a broad construction rather than a narrow one. Nor has this Court rejected in the exemption 8 context the presumption in favor of disclosure that mandates a narrow construction of all FOIA exemptions. *See Consumers Union*, 589 F.2d at 533 ("We are well aware of the fact that exemptions to the FOIA must be narrowly construed."). Rather, the same statutory-construction principles govern exemption 8 as govern the other exemptions to disclosure. *See id.*

B. The district court read exemption 8 more broadly than its plain meaning.

After a near complete hiatus over the past few decades, the district court has recently decided a spate of exemption 8 cases. This resurgence is not surprising. In light of the 2008 financial crisis and resulting calls for stricter regulation of financial markets, the public has a renewed interest in the workings of agencies that police financial institutions.

Correspondingly, agencies have invoked exemption 8 more frequently. For instance, the Department of Treasury, which invokes exemption 8 more than any other agency, used exemption 8 fewer than 100 times per year prior to 2008. *See* FOIA.gov, www.foia.gov.data (last visited Nov. 8, 2013) (select "Create an Advanced Report" hyperlink; select "Exemptions" from dropdown menu; select "All Agencies" from dropdown menu; select "All Available Years"; select "Create

Report" hyperlink) (reporting that Department of Treasury invokes exemption 8 more frequently than any other agency in each of the last five fiscal years); U.S. Dep't of Justice, Annual FOIA Reports, *available at* http://www.justice.gov/oip/reports.html (providing every agency's annual FOIA report from 1998 to the present). In 2008, however, it invoked exemption 8 to withhold records 230 times; in 2009, 306 times; and, in 2010, 280 times. DOJ, Annual FOIA Reports. The pattern for the SEC is similar. From 1998 to 2007 the SEC invoked exemption 8 fewer than 40 times per year; in 2008, 2009, and 2010, the average jumped to 75 times per year. *See id.*

Many of the district court's cases show the public's keen interest in agencies engaged in oversight of financial institutions in the wake of the financial crisis. For example, one recent case considered a request for information about the Federal Reserve's decision to provide emergency financing to Bear Stearns based on its evaluation of the potential effect of a Bear Stearns bankruptcy on the economy. *McKinley v. FDIC*, 744 F. Supp. 2d 128, 133 (D.D.C. 2010) ("*McKinley I*"). Another concerned a request for information about the Department of Treasury's decision to distribute funds to a particular bank under the Troubled Asset Relief Program (TARP), which was the primary mechanism for bank bailouts triggered by the financial crisis. *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d. 13, 18 (D.D.C. 2011). Despite the public's strong interest in understanding

these oversight decisions, in nearly all of the cases, the district court allowed the agency to use exemption 8 to withhold the requested records from the public.[3]

These decisions follow a troubling pattern in which the district court has used language from this Court's decisions to extend exemption 8's scope beyond records "related to an examination, operating, or condition report." 5 U.S.C. § 552(b)(8). In *McKinley I*, for example, the court allowed the agency to withhold records that were not related to any identifiable report at all, but which the court concluded would compromise the agency's "ability to gather such information in furtherance of its mission to regulate our nation's banking system…[which is] precisely what exemption 8 is designed to avoid." 744 F. Supp. 2d at 144. The court justified this expansive application of exemption 8 by relying not on its text, but instead on this Court's statement, taken out of context, that exemption 8 is "particularly broad." *Id.* at 143. The reasoning is inconsistent with this Court's prior decisions prohibiting use of legislative history to alter the meaning of exemption 8, particularly where, as in *McKinley I*, a reading of the statutory language would resolve the dispute.

The district court in *Judicial Watch* made the same leap. There, the plaintiff sought information that would shed light on whether TARP money had been

[3] In the one case in which the district court denied summary judgment to the agency, it did so because the agency provided inadequate information in its *Vaughn* index. *See McKinley v. FDIC*, 756 F. Supp. 2d 105, 115 (D.D.C. 2010).

distributed to a particular bank because certain members of Congress appeared to have a special interest in it. 796 F. Supp. 2d. at 20. Citing *McKinley I*, the court concluded that the agency need not identify an actual examination, operating, or condition report to which the requested records related. *Id.* at 38. It was enough "that the FDIC obtained the information it relayed to the defendant through its monitoring of the condition of the financial institutions it regulates." *Id.* Indeed, the court went further, explaining, after an *in camera* inspection, that the records "all contain information obtained by the FDIC from [the bank]," and thus were properly withheld under exemption 8. *Id.*

The district court further distanced itself from exemption 8's text in *McKinley v. Board of Governors of the Federal Reserve System*, 849 F. Supp. 2d 47 (D.D.C. 2012) ("*McKinley II*"). There, the plaintiff requested records concerning the potential impact on financial markets of the failure of the American International Group (AIG) and Lehman Brothers. *Id.* at 52. The district court did not even consider whether the records relate to a report of some kind; instead, it considered as relevant only whether the records contained "information obtained from supervised financial entities." *Id.* at 66.

The decision below follows this erroneous pattern. First, citing the cases discussed above, the court declared that the agency need not identify any actual "examination, operating, or condition report" to which the withheld records relate.

JA 46. Instead, the court said, exemption 8 covers "any documents received by a financial regulatory agency in the course of exercising its regulatory responsibilities." *Id.* (internal quotation omitted).

But Congress did not say that exemption 8 covers "any records containing information received by agencies regulating financial institutions." It did not even say that exemption 8 covers "all records relating to reports about financial institutions." Instead, Congress exempted only records related to "examination, operating, or condition reports." 5 U.S.C. § 552(b)(8). The exemption does not cover all regulatory materials or even all reports. Rather, it covers a precise subset of reports. An interpretation that applies exemption 8 to any type of report, much less any type of regulatory material, would render the words "examination, operating, or condition" surplusage. Neither this Court nor the Supreme Court has adopted that interpretation, nor could it consistent with the exemption's text and time-honored canons of statutory construction.

II. The post-Dodd-Frank amendment was intended to cabin agency secrecy, not enlarge it.

The decision below erred in another key respect. After noting that the parties agreed that FINRA is a "financial institution" for the purposes of exemption 8, and thus the only dispute is whether the records relate to an "examination, operating, or condition report," the district court nonetheless engaged in a lengthy discussion of a recent amendment to the Securities and Exchange Act that altered the definition

of "financial institution." JA 54-59. Not only is the recent amendment irrelevant to this case, given that the parties agree that FINRA is a "financial institution" under exemption 8, but the district court appeared to use the amendment to bolster a broad reading of exemption 8, allowing the SEC extraordinary withholding authority. *See id.* at 58-59 (concluding that, after this amendment, "there is no escaping the conclusion that Congress has left no room for a narrower interpretation" of exemption 8 (internal quotations omitted)).

The district court's invocation of the amendment, however, is inconsistent with its legislative history. That history demonstrates that Congress enacted the amendment to enhance the SEC's obligations to *disclose* records to the public in light of a perceived need for more public scrutiny of financial markets, not to expand SEC's withholding authority. The decision below acknowledged that history, but, as we now explain, did not heed it.

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Pub. L. No. 111–203, 124 Stat. 1376 (2010). Section 929I amended the Securities and Exchange Act to provide that:

> the [SEC] shall not be compelled to disclose records or information obtained pursuant to [15 U.S.C. § 78q(b)], or records or information based upon or derived from such records or information, if such records or information have been obtained by the [SEC] for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities.

Shortly after Dodd-Frank's enactment, the SEC invoked section 929I to withhold

records that Fox Business Network requested under FOIA concerning Ponzi schemes devised by Bernard Madoff and Alan Stanford. 156 Cong. Rec. H6953 (daily ed. Sept. 23, 2010) (statement of Rep. Barney Frank). Government watchdog groups, including the *amici* here, wrote to then-Senator Christopher Dodd and then-Representative Barney Frank, highlighting problems with FOIA administration at the SEC and noting that the SEC Office of the Inspector General found the SEC's release rate "significantly lower when compared to all other federal agencies." 156 Cong. Rec. S6890 (daily ed. Aug. 5, 2010) (quoting the SEC's OIG). The letter urged Congress to "curtail the SEC's broad authority to withhold critical information from the public" and explained that "the need for greater transparency in our financial system is all too apparent." *Id.* at S6889, S6890.

These criticisms over the SEC's FOIA withholdings—in particular those related to the Madoff and Stanford Ponzi schemes—prompted congressional hearings before the House Committee on Financial Services. *Legislative Proposals to Address Concerns Over the SEC's New Confidentiality Provision*, *Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 5 (2010) ("Hearing") (statement of Rep. John Campbell). At the hearing, there was wide agreement that section 929I allowed the SEC to operate under too much secrecy.

Representative Edolphus Towns, the chairman of the House Oversight and

Government Reform Committee and the eventual sponsor of the House bill repealing Section 929I, explained that the provision "is too broad [because i]t allows the SEC to keep secret virtually any information it obtains under its examination authority." Hearing at 6. Darrell Issa, Ranking Member of the House Oversight and Government Reform Committee, advocated for Congress to "unring the bell" by "undo[ing] what happened in the Dodd bill." *Id.* at 7, 8. Even the Chair of the SEC conceded that the provision was "overly broad." *Id.* at 16 (statement of Mary Schapiro); *see also id*. at 25 (Schapiro: "I think it is a fair argument that 929I as drafted is broader than it needs to be to protect the information we believe needs to be protected."). Angela Canterbury, Director of Public Policy for *amicus* the Project On Government Oversight, testified at the hearing that Section 929I would make it harder for outside groups to hold the SEC accountable for its regulatory failures. "If these shortcomings are kept hidden from the public, the media, and other outside stakeholders, the SEC will be shielded from external pressure to improve the agency's oversight of its regulated entities." *Id.* at 60.

At the hearings, proposals to repeal Section 929I were entertained, and shortly thereafter an amendment to the Securities and Exchange Act ("post-Dodd-Frank amendment") was enacted. *See* Application of the Freedom of Information Act to Certain Statutes, Pub. L. No. 111–257, 124 Stat. 2646 (2010) (codified at 15 U.S.C. § 78x(e)). This bill repealed section 929I and, in its place, provided: "For

purposes of [FOIA], … any entity for which the Commission is responsible for regulating, supervising, or examining under this title is a financial institution.'' *Id.*

In promoting this bill, floor statements in the House and the Senate demonstrate that Congress was united in its purpose to narrow the SEC's withholding authority. Senator Patrick Leahy, sponsor of the Senate version of the post-Dodd-Frank amendment, was "troubled by the sweeping interpretation that the [SEC] ha[d] expressed, to date, that these [Dodd-Frank] exemptions would shield from public scrutiny all information provided to the Commission in connection with its broad examination and surveillance activities." 156 Cong. Rec. S7299 (daily ed. Sept. 21, 2010). He then urged that the post-Dodd-Frank amendment be passed to "clarify this matter and eliminate overly broad FOIA exemptions." *Id.*

Representative Towns, who introduced the companion bill in the House, explained that the bill would repeal the Dodd-Frank provision that "allow[ed] the SEC to avoid disclosing virtually any information it obtains under its examination authority," and that the new provision protected the SEC's interests "without compromising the goals of transparency and accountability." 156 Cong. Rec. H6954 (daily ed. Sept. 23, 2010). Representative Frank, Chairman of the House Financial Services Committee, then characterized the bill as "an amendment substantially narrowing [the Dodd-Frank exemption]." *Id.* at H6953.

Representative Spencer Bachus, Ranking Member of the House Financial Services Committee, characterized the hearing as having "yielded a bipartisan agreement that the section [929I] needed to be tailored more narrowly." *Id.* He added: "We can all agree that the agency that presided over the collapse of some of the largest financial institutions on Wall Street and allowed Bernie Madoff to perpetrate the largest financial fraud in American history must be fully transparent in its operations, and that any statutory departures from that general rule of openness must be narrowly defined because they should be accountable to the American people…." *Id.* at H6954.

The language of the post-Dodd-Frank amendment significantly narrows the SEC's authority to withhold records. Whereas Section 929I constituted an SEC-specific authority to withhold essentially all materials obtained for any purpose from regulated financial entities, the post-Dodd-Frank amendment returns the inquiry to the exemption 8 default, which allows withholding only of records related to an "examination, operation, or condition report." *Compare* Dodd-Frank § 929I (exempting records obtained "for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities") *and* 5 U.S.C. § 552(b)(8) (exempting records "related to an examination, operating, or condition report"). In addition to repealing the SEC's blanket withholding authority, the post-Dodd-Frank amendment's only function

was to ensure that institutions regulated by the SEC would be considered financial institutions. *See* 15 U.S.C. § 78x(e).

It can scarcely be doubted that the post-Dodd-Frank amendment was intended to provide more transparency about the SEC's operations. The bill itself was introduced as "[a] bill…to provide for certain disclosures under…the Freedom of Information Act," not a bill to allow the SEC to keep more regulatory information from the public. 156 Cong. Rec. S6889 (daily ed. Aug. 5, 2010). As one of its sponsors explained, it was meant to "ensure that the Freedom of Information Act, FOIA, remains an effective tool to provide public access to critical information about the stability of our financial markets." *Id.* (statement of Sen. Patrick J. Leahy). The district court's use of the post-Dodd-Frank amendment to bolster its broad reading of exemption 8 was misplaced, and this Court should say so for the reasons *amici* have provided.

III. Allowing the withholding of the records at issue here would render Exemption 8 a blanket withholding statute for financial regulatory agencies.

As we have explained, exemption 8 does not cover all records related to the oversight of financial institutions. Its plain language limits its application to a defined category of records: those related to "examination, operating, and condition reports." Many of the records at issue here are, by the SEC's own admission, not related to any sort of report, much less an "examination, operating,

or condition report." Rather, as the SEC's declaration states, "some of the potentially responsive documents may relate to particular complaints received by the SEC from arbitration participants." JA 28 (Lever Decl. ¶ 8). The notion that exemption 8 might cover consumer-provided information and the SEC's investigation of individual consumer complaints stretches exemption 8's text past its breaking point. If these types of records are covered, then nearly all SEC records can be shielded from public view. The district court itself acknowledged the breadth of its decision: "This may mean, as the plaintiff cautions, that 'Exemption 8 applies to everything the SEC scoops up in the course of its interaction with FINRA.'" JA 59.

Exactly this type of concern was raised at the House Financial Services Committee's hearing on the post-Dodd-Frank amendment. A representative from a watchdog organization posed a hypothetical: "[B]y way of example, if the SEC is investigating something or is cooperating, and writes a supervisory letter, a year later if no action has been taken, say-say the SEC doesn't like the formula that a credit rating agency uses and suggests changes. Will the public see that supervisory letter?" Hearing at 40 (statement of Rick Blum, Coordinator, Sunshine in Government Initiative). Chairman Frank replied: "Mr. Blum, nothing in what we have been talking about suggests that would be protected." *Id.* at 40 (statement of Rep. Barney Frank).

Congress has chosen its language carefully when exempting certain information from FOIA's disclosure mandates. *See Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978) ("Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests."); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 937 (D.C. Cir. 2003) ("Congress has provided a carefully calibrated statutory scheme, balancing the benefits and harms of disclosure."). Previously, this Court has properly refused to engage in broad ranging inquiries about whether release of the records would "do more harm than good," but, rather, has insisted on limiting exemptions to their text. *See Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252, 260 n.23 (D.C. Cir. 1982). Likewise, the Court here should reverse the district court's decision, which would allow exemption 8 to swallow FOIA's disclosure mandate for financial institutions, and give exemption 8's text and purpose its intended effect.

CONCLUSION

The district court's decision granting summary judgment to the Securities and Exchange Commission and denying summary judgment to the Public Investors Arbitration Bar Association should be reversed.

Respectfully submitted,

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December 2, 2013

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: the type face is fourteen-point Times New Roman font, and the word count is 6673.

/s/Brian Wolfman
Brian Wolfman

CERTIFICATE OF SERVICE

I certify that on December 2, 2013, I caused the foregoing to be filed through the Court's ECF system, which will serve notice of the filing on counsel for all parties.

/s/Brian Wolfman
Brian Wolfman

ADDENDUM

The foregoing brief is submitted on behalf of the following organizations:

The **Project On Government Oversight (POGO)**, founded in 1981, is a nonpartisan independent watchdog that champions good government reforms. POGO investigates corruption, misconduct, and conflicts of interest in the federal government, and in doing so it relies on the Freedom of Information Act. POGO had found that in many cases, the nondisclosure of government records has to do with hiding corruption, intentional wrongdoing, or gross mismanagement by the government or other entities doing business with the government. POGO staff have testified several times before Congress on government secrecy and accountability, and in particular on FOIA, including regarding the amendment to Dodd-Frank repealing an overly broad exemption for the SEC and clarifying the use of Exemption 8. In addition, POGO has objected to the lack of transparency and accountability at the Financial Industry Regulatory Authority, and has raised concerns about the government's inadequate oversight of industry-funded self-regulatory organizations. POGO strongly believes that sunshine is the best disinfectant, and that we must empower citizens with information and tools to hold the federal government and regulated industries accountable. POGO does not have a parent company, and is not a publicly-held company with 10 percent or greater ownership interest. POGO is a non-profit, non-partisan corporation, organized

under section 501(c)(3) of the Internal Revenue Code.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Toward this end, CREW frequently files Freedom of Information Act requests to access and make publicly available government documents that reflect on, or relate to, the integrity of government officials and their actions. CREW does not have a parent company, and is not a publicly-held company with 10 percent or greater ownership interest. CREW is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.

OpenTheGovernment.org is a Washington, D.C.-based non-partisan coalition of journalists, consumers, good- and limited-government groups, environmentalists, librarians, and others whose mission is to increase government transparency to ensure that policies affecting our health, safety, security, and freedoms place the public good and well-being above the influence of special interests, and to promote democratic accountability. OpenTheGovernment.org takes a multi-prong approach to accomplishing its mission through public education, advocacy, and collaboration with government agencies to decrease

secrecy. OpenTheGovernment.org is a project of the Fund for Constitutional Government, which does not have a parent company, and is not a publicly-held company with a 10 percent or greater ownership interest. The Fund for Constitutional Government is a non-profit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code.