ORAL ARGUMENT SCHEDULED FOR JANUARY 18, 2017

No. 16-5188

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

METLIFE, INC.,

Plaintiff-Appellee,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,

Defendant-Appellee,

BETTER MARKETS, INC.,

Intervenor-Appellant.

On Appeal from the United States District Court for the
District of Columbia, No. 15-cv-45 (RMC)

BRIEF OF INTERVENOR-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Circuit Rules for the United States Court of Appeals for the District of Columbia Circuit, Better Markets, Inc. ("Better Markets"), the intervenor-appellant in this case, hereby submits this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(1) The Plaintiff-Appellee in this matter is MetLife, Inc. ("MetLife").

(2) The Defendant-Appellee in this matter is the Financial Stability Oversight Council ("FSOC").

(3) The Intervenor-Appellant in this matter is Better Markets.

(4) A group of Public-Interest Organizations notified the Court of their intention to file a single amici curiae brief in this appeal. *See* Notice of Intention of Public-Interest Organizations to File an Amici Curiae Brief (D.C. Cir. filed Oct. 17, 2016). A number of amici appeared before the district court to brief the merits of MetLife's challenge to its designation by the FSOC, but none briefed the merits of Better Markets' motion to intervene and contingent application for an Order to Show Cause why portions of the record should not be unsealed, the only subject of this appeal. Amici who appeared before the district court on the designation's merits were: Scholars of Insurance Regulation, Professors of Financial Regulation and Administrative Law, Amici Economics Professors, National Association of Insurance

Commissioners, American Council of Life Insurers, Academic Experts in Financial Regulation, and Chamber of Commerce of the United States of America. Before moving to intervene, Better Markets also filed an amicus brief on the designation's merits. *See generally* Dkt., No. 15-cv-45 (D.D.C. filed Jan. 13, 2015).

(B) Rulings Under Review

The rulings under review in this appeal are the opinion and its accompanying memorializing order issued by the Hon. Rosemary M. Collyer of the United States District Court for the District of Columbia on May 25, 2016. *See* Op., No. 15-cv-45, ECF No. 113, 2016 WL 3024015 (D.D.C. May 25, 2016), reproduced at J.A. 21–33; Order, ECF No. 114 (D.D.C. May 25, 2016), reproduced at J.A. 34.

(C) Related Cases

There are no related cases, and the issue of the extensive sealing of the record in this case has never been before this Court. A separate appeal, No. 16-5086, was taken by the FSOC from the same district-court case, but that appeal is from the earlier opinion and memorializing order that resolved the merits of MetLife's challenge to the FSOC's designation. *See MetLife, Inc. v. Fin. Stability Oversight Council*, 2016 WL 1391569 (D.D.C. Mar. 30, 2016), reproduced at J.A. 81–113; Order, ECF No. 106, No. 15-cv-45 (D.D.C. Mar. 30, 2016). Better Markets appeared as an amicus but not a party in that appeal. The two appeals present no overlapping legal issues. Counsel is aware of no other cases in the District of Columbia or other federal

circuits that involve substantially the same parties and the same or similar issues.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, Better Markets states that it has no parent corporation and that there is no publicly held corporation that owns any stock in Better Markets. Better Markets is a nonpartisan, nonprofit, public-interest organization based in Washington, D.C., organized under section 501(c)(3) of the Internal Revenue Code. Through comments on proposed rules, strategic litigation, research, and public education, Better Markets advocates for rules in the financial system that prevent crashes, eliminate taxpayer bailouts of too-big-to-fail firms, promote fairness, enhance transparency, and put finance in service of the real economy.

Dated: October 17, 2016

/s/ Dennis M. Kelleher
Dennis M. Kelleher
Counsel for the Intervenor-Appellant

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

*** Authorities on which Better Markets chiefly relies are marked with asterisks.**

Page(s)

Statutes

Rules

GLOSSARY

Dodd-Frank Dodd-Frank Wall Street Reform and Consumer Protection Act

FSOC Financial Stability Oversight Council

STATUTES AND REGULATIONS

The pertinent statutes are regulations are:

12 U.S.C. § 5322(d)(5):

(5) Confidentiality

(A) In general

The Council, the Office of Financial Research, and the other member agencies shall maintain the confidentiality of any data, information, and reports submitted under this subchapter.

(B) Retention of privilege

The submission of any nonpublicly available data or information under this subsection and part B shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject.

(C) Freedom of Information Act

Section 552 of title 5, including the exceptions thereunder, shall apply to any data or information submitted under this subsection and part B.

12 U.S.C. § 5323(h):

(h) Judicial review

If the Council makes a final determination under this section with respect to a nonbank financial company, such nonbank financial company may, not later than 30 days after the date of receipt of the notice of final determination under subsection (d)(2), (e)(3), or (f)(5), bring an action in the United States district court for the judicial district in which the home office of such nonbank financial company is located, or in the United States District Court for the District of Columbia, for an order requiring that the final determination be rescinded, and the court shall, upon review, dismiss such action or direct the final determination to be rescinded. Review of such an action shall be limited to whether the final determination made under this section was arbitrary and capricious.

2 U.S.C. § 437g(a)(12)(A) (editorially reclassified at 52 U.S.C. § 30109(a)(12)(A)):

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 12 U.S.C. § 5323(h). This Court has jurisdiction under 28 U.S.C. § 1291, as this appeal is taken from a final order entered by the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

At issue in this case is a precious right enjoyed by every citizen—the right of access to judicial records—raised in the context of a historic legal challenge to federal regulatory authority. Congress established the Financial Stability Oversight Council ("FSOC") in the wake of the worst financial crisis since the Great Depression. Its mission is to mitigate the accumulation of systemic risk in our financial system to prevent such devastating crises, and its most important tool is the authority to designate nonbank institutions for enhanced supervision. The challenge to that authority by MetLife, Inc. ("MetLife") not only threatens to rescind a layer of necessary protection as to a nearly-trillion-dollar company but also casts into doubt the ability of the FSOC to exercise its critical authority in future cases.

These enormous stakes led Better Markets, Inc. ("Better Markets") to seek access to the record—more than two-thirds of which remains under seal—by moving to intervene and proposing a process by which the district court could ensure that the

record in that case was made as transparent as possible, while preserving any confidentiality justified by good cause that might override the public's presumptive right of access to judicial records. No such process was undertaken.

In the opinion and accompanying memorializing order from which this appeal is taken, the district court granted Better Markets' motion to intervene under Rule 24(b) of the Federal Rules of Civil Procedure but denied the relief that Better Markets sought in the form of an Order to Show Cause why portions of the record should not be unsealed. *See* Op., No. 15-cv-45, ECF No. 113, 2016 WL 3024015 (D.D.C. May 25, 2016), J.A. 21–33; Order, ECF No. 114 (D.D.C. May 25, 2016), J.A. 34. The motion and application for an Order to Show Cause were resolved on the papers without oral argument.

As reflected in the district court's docket, *see* J.A. 1–20, Better Markets filed its motion to intervene, supporting memorandum of law, and contingent application for an Order to Show Cause on November 19, 2015. MetLife opposed Better Markets' motion to intervene, while the government took no position. *See* Mem. of Points and Authorities in Supp. of Pl.'s Opp'n to Better Markets' Mot. to Intervene and Contingent Appl. for an Order to Show Cause, ECF No. 95, No. 15-cv-45 (D.D.C. filed Dec. 15, 2015) ("MetLife Opp'n"); Def.'s Resp. to Mot. to Intervene for Limited Purpose of Unsealing Record by Better Markets, Inc., ECF No. 96, No. 15-cv-45 (D.D.C. filed Dec. 15, 2015) ("FSOC Resp."). Better Markets thereafter

filed its reply memorandum. *See* ECF No. 98, No. 15-cv-45 (D.D.C. filed Jan. 8, 2016). The district court issued its opinion on the merits of MetLife's designation by the FSOC on March 30, 2016, first to the parties and then, when neither identified any portion of the opinion that it sought to redact, to the public on April 7, 2016. The district court issued the decision appealed here on May 25, 2016.

Better Markets' application for an Order to Show Cause attached a proposed Order, *see* J.A. 37–38, which read, in relevant part:

> ORDERED that counsel for the Plaintiff and the Defendant each shall, within ___ days from the date of this Order to Show Cause, complete a review of every document within the Joint Appendix and briefing that has been redacted in whole or in part and determine whether any portions thereof may be unredacted, and shall file new versions on the public docket; and it is further
>
> ORDERED that each party's counsel shall by the same date show cause why any document redacted in full or in part should remain so, by filing with chambers:
>
> > (A) a redaction log specifically identifying, with respect to each document that has been placed under seal in whole or in part—
> >
> > > (1) the particular justification(s) for the party's claim that the document or part thereof is properly redacted; and
> > >
> > > (2) the basis for the party's claim that the party's interest in redacting each such document in whole or in part outweighs the public's interest in having access to the record in this case; and
> >
> > (B) a copy of each original document, with the desired redaction highlighted, to facilitate review *in camera*.

Id.

At the time of Better Markets' motion to intervene, the briefing on the parties' cross-motions for summary judgment—and the corresponding Joint Appendix[1]—had been completed. The parties had filed their briefs and the Joint Appendix under seal, pursuant to a protective order they negotiated, which the district court so-ordered on June 11, 2015. *See* J.A. 39–45. They also filed redacted versions on the public docket. *See* J.A. 59–61 (FSOC opening brief with 2 redactions); *id.* at 62–72 (FSOC reply brief with 17 redactions); *id.* at 73–76 (final MetLife opening brief with 2 redactions totaling 16 lines of text); *id.* at 77–80 (final MetLife reply brief with 4 redactions); *id.* at 115–19 (Joint Appendix table of contents, showing more than two-thirds of its pages—more than 1,933—entirely withheld). The parties' final-form briefs featured fewer redactions than their initial filings. *Compare* ECF Nos. 84, 86, No. 15-cv-45, *with* ECF Nos. 22, 39, 60, 65, No. 15-cv-45; see also ECF No. 100, No. 15-cv-45 (D.D.C. filed Jan. 27, 2016) (filings that pare back some previous redactions).

[1] The FSOC had produced to MetLife the full Administrative Record, which totaled 86,111 pages, about a quarter of which were originally submitted by MetLife to the FSOC in the course of the designation process. *See* Certification of Administrative R., ECF No. 17, Attach. No. 1, No. 15-cv-45 (D.D.C. filed May 8, 2015). The Joint Appendix is a significantly smaller universe, something greater than 2,868 pages, though its exact page total is unknown, since the fully withheld Volume 16 has no page length specified in the Joint Appendix's table of contents. *See* J.A. 119. *N.B.*, in this brief, references to the "Joint Appendix" refer to the Joint Appendix filed with the district court, while citations to "J.A." refer to the appendix filed with this Court.

In the parties' final-form briefs that were filed along with the Joint Appendix, in addition to an unknown number of redacted citations, the parties made 90 publicly visible citations to pages of the Joint Appendix that were completely withheld from its public version, including quotations directly from documents that were entirely withheld.[2] Not until the district court's March 2016 opinion was unsealed in April was there an important filing on the docket that was fully accessible to the public.

Better Markets' memorandum in support of its motion to intervene contended, *inter alia*, that it met the standard for intervention, that the parties should be required to justify their sweeping redactions in light of the obvious public interest in this historic case, and that Dodd-Frank did not prevent the district court from verifying the propriety of the redactions.

MetLife argued that Better Markets' motion to intervene was untimely and

[2] MetLife's opening brief contains 74 citations to pages of the Joint Appendix that are entirely redacted, and its reply brief contains 12; the FSOC's opening brief contains 1 redaction, and its reply brief contains 3. About twenty percent of those citations follow the use of quotation marks, and at least some are not merely scare quotes. *See, e.g.*, MetLife Final Reply Br. in Supp. of Pl.'s Mot. for Summ. J. 22–23, ECF No. 86-2, No. 15-cv-45 (D.D.C. filed Sept. 30, 2015) ("In addition, FSOC fails to acknowledge that a central conclusion of this 24-year-old testimony was that the insurers failed simultaneously because of a common cause, *i.e.*, 'reckless practices of poorly controlled growth and risky high-yield investments'—*not*, as FSOC implies, as a result of another insurer's failure, much less contagion resulting from regulatory intervention. JA 1703.") (quoting from Volume 10 of the Joint Appendix, which is fully redacted, *see* J.A. 116).

that the relief sought did not share a common question of law or fact with the underlying case, in which MetLife sought an order to rescind the FSOC's designation of MetLife as a nonbank systemically important financial institution. *See* MetLife Opp'n 1–13. Both the government and MetLife opposed Better Markets' application for an Order to Show Cause, principally on the grounds that Dodd-Frank foreclosed the relief sought. *See id.* at 13–22; FSOC Resp. 9–14. The FSOC also argued that judicial records could not be identified as such before an opinion issued. *See id.* at 5–9. The district court granted the motion to intervene and denied the application for an Order to Show Cause. *See* J.A. 21–33. This appeal timely followed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review by this appeal are:

(1) When parties jointly negotiate redactions to judicial records, whether a district court abuses its discretion when it refuses to gather the information necessary to conduct the D.C. Circuit's balancing test for maintaining a challenged seal under *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), particularly by refusing to require the parties to identify which party seeks each redaction, the party's good-cause justification for each redaction, and why that justification outweighs the public's common-law right of access to judicial records.

(2) Whether the district court erroneously interpreted the confidentiality provision of Dodd-Frank, 12 U.S.C. § 5322(d)(5)(A) ("The Council . . . shall maintain

the confidentiality of any data, information, and reports submitted under this subchapter."), in holding that the provision applies not only to the Council but also to a federal district court, thereby superseding the balancing test for unsealing under *Hubbard*, and whether the district court erroneously applied that provision to documents, like the parties' briefs, that were never submitted to the Council.

(3) Whether a Joint Appendix, culled by the parties from the complete administrative record to comprise only those documents relevant to a dispositive motion, as required by the district court's rules, is a judicial record.

(4) Whether the district court erred in holding that permissive intervention for the purpose of challenging redactions to judicial records is "generally confined to intervenors who have 'a particularized interest in those records that was distinct from the generalized interest in judicial proceedings shared by all members of the public.' " J.A. 29 (quoting MetLife Opp'n 12).

SUMMARY OF ARGUMENT

The public's right of access to judicial records is a centuries-old cornerstone of the public's faith in the rule of law and the judiciary. Better Markets sought to exercise that right by intervening below in an effort to pare back the sweeping redactions to the record in this case, in which more than two-thirds of the Joint Appendix and numerous portions of the briefing remain hidden from public inspection. The district court denied the remedy Better Markets sought. But as the venerable

saying goes, *ubi jus ibi remedium*—there is no right without a remedy. The district court's legal errors and abuse of its discretion deprived Better Markets of a meaningful remedy by which to exercise its fundamental right.

In taking this appeal, Better Markets seeks first and foremost to rectify the errors below so that it may press its case for public access to this record in accordance with a reasonable vetting and balancing process, as intended by this Court in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980). This appeal also presents an ideal opportunity for this Court to clarify the contours of the remedy by which the public can vindicate its right to monitor the work of its government's third branch. Indeed, although the public's right of access is firmly established in this Circuit, the iterative, progressive construction of that right has been in some respects incomplete.[3] Accordingly, this Court's decision may serve the larger public interest by elucidating the scope of access to judicial records and the process—the remedy—by which the right of access may be pursued.

The merits of MetLife's suit are of enormous public importance—whether a nearly-trillion-dollar company will be subject to any federal oversight—but the pub-

[3] A few decades ago, the Supreme Court observed that the "common-law right of access to judicial records" is an "infrequent subject of litigation" and that "its contours have not been delineated with any precision." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). Despite the progress made since, more work remains for the case law to clarify the contours of both the right and its remedy.

lic's common-law right of access does not turn on whether a particular case generates headlines. Nor does it rest on how egregious and extensive the redactions are. Whether the right requires the lifting of a particular redaction turns on a court's careful weighing of the multifactor balancing test articulated by this Court in *Hubbard*.

But *Hubbard*'s promise is empty unless a court employs a rational process for evaluating the validity of each redaction: Factors cannot be weighed if they cannot even be identified. Accordingly, Better Markets suggested a fair and simple two-step process in its proposed Order to Show Cause. First, the parties would evaluate the existing redactions, pare back those that they could not justify with good cause, and file the less-redacted records on the public docket. Second, each party would submit a log of all the redactions it sought to maintain, which would permit the court to know for the first time the identity of each redaction's sponsor. The redaction log would specify both the good cause that the party believed justified the redaction—a claim of privilege or trade-secret protection, for example—and the basis for the party's contention that the multifactor balancing test tipped in favor of secrecy. This information is the bare minimum that a court would need to evaluate the validity of a redaction under the *Hubbard* framework.

As one of several explanations for its denial of Better Markets' application, the district court suggested that the application was moot because the court had already independently reviewed the record and determined that every redaction was

warranted. *See* J.A. 31–32 ("[T]his Court has reviewed the record and all of the briefs [and] concurs in the parties' judgment and finds that large parts of the administrative record and the briefs should be redacted from public view."). Even assuming that the district court had earnestly attempted such an arduous undertaking, it critically lacked the information necessary to do so rationally. The district court thus appeared to abuse its discretion by suggesting that it had already completed the *Hubbard* analysis and found all the redactions justified even though it did not know which party proposed them or what good cause that party believed justified them. That explanation is unreasoned and unreviewable. To ensure that the right of access clearly recognized in *Hubbard* is secured by a pragmatic remedy, this Court should hold that a district court abuses its discretion when it refuses to gather the minimum information necessary to conduct a reasoned evaluation of the validity of challenged redactions.

The district court's denial of Better Markets' application for an Order to Show Cause rested on numerous other legal errors. The district court's most limpid holding was that the confidentiality provision of Dodd-Frank, 12 U.S.C. § 5322(d)(5)(A) ("The Council . . . shall maintain the confidentiality of any data, information, and reports submitted under this subchapter."), foreclosed Better Markets' application. This holding suffers from two errors. First, even if the provision does apply to certain portions of the Joint Appendix such as MetLife's voluntary submissions because they comprise "data, information, and reports submitted" to the FSOC, it plainly

does not apply to other portions of the Joint Appendix or to the parties' briefs, which were not "submitted" to the FSOC under § 5322(d)(5)(A), yet featured myriad redactions that have not been otherwise justified. Second, the district court extrapolated significantly from the unambiguous language of the statute, reasoning that, although the text commands only the FSOC itself to maintain the confidentiality of submissions to it, the unwritten intent of Congress surely was also to bind a federal court from ever unsealing any such submissions. This muscularly purposivist interpretation finds no support in the statute's text, which expressly—and logically—limits its reach to the FSOC itself. The district court's and parties' reliance on *In re Sealed Case*, 237 F.3d 657, 666 (D.C. Cir. 2001), for their atextual gloss on the statute is misplaced; the improper, *unilateral disclosure by the agency* in that case is the opposite of the court-supervised process of vetting redactions that Better Markets sought below.

Aside from its overbroad and erroneous reliance on Dodd-Frank's confidentiality provision, the district court provided an alternative basis for rejecting Better Markets' application by suggesting that the Joint Appendix was not a judicial record. *See* J.A. 32 (approvingly citing the FSOC's argument). This implausible notion provides this Court with an opportunity adopt a narrow, administrable, and self-evident holding: A Joint Appendix, culled by the parties from the total administrative record to comprise only those portions of the administrative record on which a dispositive

motion relies (as defined by Local Civil Rule 7(n)(1) of the United States District Court for the District of Columbia), is a judicial record to which the right of public access applies. Indeed, many circuits define judicial records in a way that necessarily encompasses every Joint Appendix filed in the district court in a challenge to agency action.

The final error of the district court's opinion is its adoption of MetLife's unsupported, novel proposal that the public right of access to judicial records is enjoyed only by those few people or organizations who can show " 'a particularized interest . . . distinct from the generalized interest in judicial proceedings shared by all members of the public.' " J.A. 29 (quoting MetLife Opp'n 12 and identifying journalists as having such a particularized interest). No authority of this Circuit supports this bold proposition, which clashes with the plain language of Rule 24(b) of the Federal Rules of Civil Procedure, but which MetLife creatively inferred from the fact that intervenors in a handful of published decisions had their particular interests described in dicta. Moreover, this Court's rules expressly provide that *any* interested person may seek unsealing. *See* D.C. Cir. Rule 47.1(c). And they envision a compatible standard for those who seek to unseal material in the district court; indeed, sharply different standards for a threshold showing of interest would lead to anomalous results and significant judicial inefficiencies in which the court closest to the record may shirk its responsibility to adjudicate the merits of a request to unseal.

Moreover, the Supreme Court has cautioned that the media do not enjoy greater access rights than the public.

The decision below packed many errors into a few pages, attributable in part to some gaps in this Circuit's case law. This Court should correct those errors so that Better Markets may vindicate its right of access to judicial records in this case. In so doing, the Court can also provide clarity and guidance for the benefit of members of the public who challenge secrecy in future cases.

STANDARD OF REVIEW

"Though we review a district court's decision to seal (or not to seal) court records for abuse of discretion, the starting point in considering a motion to seal court records is a strong presumption in favor of public access to judicial proceedings." *EEOC v. Nat'l Children's Center, Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (citations and internal quotation marks omitted); *see also In re Nat'l Broad. Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981) ("Any denial or infringement of this 'precious' and 'fundamental' common law right remains subject to appellate review for abuse."). This Court reviews de novo the legal conclusions of the district court, including its interpretation of statutes and the Federal Rules of Civil Procedure and the question of whether a Joint Appendix is a judicial record. *See United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO GATHER THE INFORMATION NECESSARY TO CONDUCT THE BALANCING TEST OF *HUBBARD*.

The Supreme Court and this Court have long recognized the public's common-law right of access to judicial records. *See Nixon v. Warner Commc'ns*, 435 U.S. 589, 597–98 (1978); *Nat'l Children's Ctr.*, 98 F.3d at 1409 (recognizing the "strong presumption in favor of public access to judicial proceedings") (citing *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991)). This right of access is part and parcel of public oversight of our governmental institutions, one that "antedates the Constitution." *El-Sayegh*, 131 F.3d at 161.

The Supreme Court has described the right of access as satisfying "the citizen's desire to keep a watchful eye on the workings of public agencies." *Warner Commc'ns*, 435 U.S. at 597–98. And this Court has characterized public access to judicial records as "fundamental to a democratic state," in that such access "serves the important functions of ensuring the integrity of judicial proceedings in particular and of the law enforcement process more generally." *United States v. Hubbard*, 650 F.2d 293, 315 & n.79 (D.C. Cir. 1980); *see also SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013); *El-Sayegh*, 131 F.3d at 161. Such judicial transparency is an indispensable element of our democratic system of government and the rule of law.

This " 'precious' and 'fundamental' " right of public access, *In re Nat'l*

Broad., 653 F.2d at 613, like any right, is only as strong as the remedy by which it can be vindicated. *Hubbard* set forth the factors that courts in this Circuit must balance in determining whether the public's presumptive right of access to any particular judicial record is overcome by a showing of good cause from a competing interest, like the need to protect bona fide trade secrets or national security. In determining whether a good cause for secrecy outweighs the public's right of access to a judicial record, a court must weigh six factors: "(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced." *Johnson*, 951 F.2d at 1277 n.14 (citing *Hubbard*, 650 F.2d at 317–22).

This Court has summarized the circumstances in which a challenged seal may be maintained: Secrecy prevails only "if the district court, after considering the relevant facts and circumstances of the particular case, and after weighing the interests advanced by the parties in light of the public interest and the duty of the courts, concludes that justice so requires." *In re Nat'l Broad.*, 653 F.2d at 613 (internal quotation marks omitted). The district court is necessarily empowered with a significant amount of discretion in arriving at such a conclusion, but that discretion does not

extend to refusing to identify let alone balance these factors. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) ("Now that the Private Intervenors have challenged the contention that the unfiled discovery documents belong under seal, *the district court must require* [the seal's proponent] to make an actual showing of good cause for their continuing protection . . . ." (emphasis added)).

Better Markets contends that, where a seal or redaction is challenged, if a district court refuses to gather the minimum facts necessary to conduct an informed balancing test under *Hubbard*, it commits an abuse of discretion. Here, Better Markets, having been granted permissive intervention, applied for an Order to Show Cause why portions of the record should not be unsealed. Faced with a challenge to the extensive redactions, the district court was required to evaluate the suitability of those redactions "*after weighing the interests advanced by the parties*," *In re Nat'l Broad.*, 653 F.2d at 613 (emphasis added)—but how could it do so when the parties were not even asked to advance any interests that provided good cause for their redactions, let alone specify which of them had proposed each redaction?

Better Markets submitted a proposed Order to Show Cause that was straightforward and did not ask of the parties more than was minimally necessary to conduct a reasoned weighing of the *Hubbard* factors. The proposed Order requested from each party a "redaction log" that would inform the court about *who* proposed the

redaction, *where* in the record it was, *what* good cause justified the redaction, and *why* that interest outweighed the public's presumptive right of access. A more laborious proposal would have required the parties to brief all six *Hubbard* factors for each redaction proposed; Better Markets thought that its simpler proposal would conserve the parties' and court's resources by gathering the minimum information necessary, with the possibility of future briefing on specific questions if it would be helpful.

The district court's denial of Better Markets' application meant that the challenged redactions would all remain *even though the district court did not know which party proposed them*.[4] The third, fourth, and fifth *Hubbard* factors minimally require the identity of a redaction's proponent. And the other factors would be illuminated by the basic information sought in the proposed Order to Show Cause. A denial of the *particular* procedure proposed by Better Markets was surely within the district

[4] The FSOC acknowledged its identity as the proponent of several swaths of redactions, namely "the relatively small amount of redacted or withheld material in the Joint Appendix consisting of confidential information provided by state insurance regulators." FSOC Resp. 12. These may be appropriate and survive *Hubbard* balancing once it is undertaken. MetLife appeared to disclaim that it alone advocated any redactions: "Likewise, as to the third [*Hubbard*] factor, *both parties* oppose Better Markets' application for an order to show cause, which again weighs against disclosure." MetLife Opp'n 20 (emphasis added). Nevertheless, the record suggests that most of the redactions were made at the behest of MetLife, but neither the district court nor the public knows for certain. *See, e.g.*, FSOC Resp. 5 ("[T]he Council has, to a considerable extent, appropriately relied upon MetLife's assertions concerning the confidentiality of the materials withheld and agreed to maintain that confidentiality in these court proceedings . . . .")).

court's sound discretion; the district court could have developed its own mechanism for gathering the information necessary to engage in the *Hubbard* analysis. But its refusal to gather the most basic information necessary to evaluate the redactions' validity—not only the proponent's identity but also the interests served and their comparative weight relative to the public interest—was an abuse of discretion. *See Foltz*, 331 F.3d at 1131.

II. THE DISTRICT COURT MISCONSTRUED DODD-FRANK AS ELIMINATING THE PUBLIC'S RIGHT OF ACCESS TO JUDICIAL DOCUMENTS IN DESIGNATION CHALLENGES.

The district court's principal rationale for evading the *Hubbard* analysis was its misapplication of Dodd-Frank's confidentiality provision to documents that it does not cover and its misreading of the provision as binding the court rather than the FSOC. Both legal errors should be corrected.

A. Many of the redacted documents do not fall within the ambit of the Dodd-Frank confidentiality provision.

Neither MetLife nor the FSOC contended that Dodd-Frank's confidentiality provision applied to the parties' briefing or to the court's opinion. And for good reason: These documents were created in the course of litigation, long after the FSOC stopped receiving submissions that are colorably covered by the statutory command that the FSOC keep them confidential. Yet Better Markets' application for an Order to Show Cause concerned redactions not only to the Joint Appendix but also to the parties' briefing—redactions whose validity the district court refused to

test under *Hubbard* because of Dodd-Frank. To the extent that the district court was relying on the statute to refuse inquiry into the redactions to the briefing, it was committing the error of overbroad application of a narrow statute. The parties' briefing is plainly not "data, information, and reports submitted" to the FSOC in the course of its considering a designation. 12 U.S.C. § 5322(d)(5)(A).[5]

By the same token, much of the Joint Appendix comprises documents that fall outside the ambit of the narrow confidentiality provision. The Final Basis for Designation, for example, is a final agency action taken by the FSOC, not information submitted to the FSOC to inform its deliberations. To the extent that the Final Basis was quoting from reports or listing data covered by the confidentiality provision, redactions may be warranted. The same goes for the Proposed Designation, which was filed only under seal without a corresponding redacted, public version. Yet neither the public nor the district court knows whether the extensive redactions to the

[5] Perhaps § 5322(d)(5)(A) requires the FSOC to redact from its briefs direct quotations of data and information submitted to it in the course of its deliberations. If every last one of its briefs' redactions are such quotations, it would have reason to resist lifting the redactions, *though it should still be required to provide that explanation to the district court*. As discussed below, however, § 5322(d)(5)(A) binds only the FSOC and not a federal court, so, regardless of the nature of the information redacted from the briefs, the statute does not foreclose the unsealing of that information by the court, if warranted following the review and balancing process sought by Better Markets. Similarly, § 5322(d)(5)(A) plainly cannot justify the extensive redactions in MetLife's briefs without inquiry into their validity; MetLife is under no statutory obligation to "maintain the confidentiality of" documents submitted to the FSOC.

Final Basis as it appears in the Joint Appendix are all based on § 5322(d)(5)(A) or whether some serve other purposes, like ostensibly protecting MetLife's trade secrets. Other documents withheld from the public Joint Appendix do not, on their face, appear to have been submitted to the FSOC during its deliberation over designation. *See, e.g.*, J.A. 117 ("Memorandum Attached to Letter from Brian W. Smith, Mayer Brown & Platt to Jay B. Bernstein & Betsy Cross (Sept. 29, 2000) REDACTED IN FULL," a document that predates Dodd-Frank by ten years and is not among the volumes of MetLife's voluntary submissions).

B. The district court's hyper-purposivist interpretation of the Dodd-Frank confidentiality provision ignores its unambiguous text.

Dodd-Frank's confidentiality provision is twenty-five words in total: "The Council, the Office of Financial Research, and the other member agencies shall maintain the confidentiality of any data, information, and reports under this subchapter." 12 U.S.C. § 5322(d)(5)(A). The district court's decision effectively amended the statute with a few more: "And if a financial company challenges its designation in court, that court should also maintain the confidentiality of the submissions as though it were a member agency of the Council."

Better Markets' application for an Order to Show Cause was not a Freedom of Information Act request or subpoena directed at the FSOC. Instead, it was a request for a vetting process, directed to a federal district court. And that court is neither the Council nor the Office of Financial Research nor one of the "other member

agencies." *Id.* No recognized canon of statutory interpretation could shoehorn a federal district court into the unambiguous list of agencies covered by the provision on which the district court relied unless the plain language led to absurd results. *Expressio trium est exclusio alterius*, one might say.[6]

The FSOC itself seemed to understand this at times. *See* FSOC Resp. 5 ("Dodd-Frank limits *the Council's* ability to make such materials public.") (emphasis added); see also 12 C.F.R. § 1310.20(e)(1) ("*The Council* shall maintain the confidentiality of any data, information, and reports submitted under this part.") (parroting statute but with one rather than three subjects) (emphasis added). And yet the district court considered itself bound by the statute's command that the FSOC keep submissions confidential. The district court's opinion made no effort at parsing the plain language of the confidentiality provision. Instead, it draws the atextual conclusion that Congress, in its wisdom, must have *intended* to bind federal courts in § 5322(d)(5)(A), since to do otherwise would be "unthinkable," J.A. 31, as it could impose a marginal transparency cost on a decision to sue.

This muscular purposivism, in which a court re-writes unambiguous provisions in the laws that Congress passed, has fallen out of favor since the days when

[6] The venerable canon holds that Congress's express mention of *one* thing implies the exclusion of others. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*."). Surely that implication is triply strong when Congress mentions three things.

courts were quick to correct what they viewed as Congress's poor choices. *Compare Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (notwithstanding plain text, "we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers."), *with Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1991) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, *J.*, concurring in the judgment) (discussing the "venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity").

If, despite the unambiguous text of § 5322(d)(5)(A), this Court were inclined to follow the district court into the thicket of congressional intent, there are a number of reasons why Congress, which legislates against the background of the common law and existing statutes, would choose to apply the confidentiality provision only to the FSOC and its member agencies that engage in administrative decisionmaking, but not to federal district courts engaged in judicial review. First, the regulatory process does not inevitably lead to a judicial process. Review does not inexorably lead

to designation, nor does designation always prompt suit. The inference that confidentiality protections should apply differently in these different contexts is hardly surprising, let alone absurd. In expressly providing for challenges to designation, Congress plainly could have required that all confidential submissions to the FSOC remain sealed in court, but chose otherwise. Its choice should be respected. No part of the text or legislative history remotely suggests that Congress wanted to shield from the public all of the evidence on which challenges to the FSOC's designations would depend. Congress just wanted the FSOC to make fully informed decisions.

Second, the federal courts are experienced at and capable of safeguarding sensitive information like trade secrets. So a plaintiff that comes to court and challenges designation by the FSOC is not left without any protections, even though it cannot hide behind the blanket statutory requirement that the FSOC maintain submissions confidentially. There is no reason to suggest that Congress believed the federal courts incapable of protecting trade secrets in designation challenges just as in so many other kinds of suits. Indeed, Congress sought, in the very next subsection, to preserve the status quo in court cases. *See* § 5322(d)(5)(B) (submissions to the FSOC "shall not . . . affect, any privilege arising under Federal or State law (including the rules of any Federal or State court) to which the data or information is otherwise subject."). Congress is loath, for good reason, to interfere with the inherent supervisory powers of district courts to manage their dockets and make sealing decisions.

See, e.g., *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962) (supervisory powers are "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); *Warner Commc'ns*, 435 U.S. at 598 ("Every court has supervisory power over its own records and files . . . ."). Plainly, the straightforward text is not absurd.

The district court leans heavily on one decision, *In re Sealed Case*, 237 F.3d 657, 666 (D.C. Cir. 2001), for the proposition that when a statute requires an agency to preserve the confidentiality of administrative materials, the statute supersedes the D.C. Circuit's standard multi-factor inquiry. But a careful review of *Sealed Case* shows that it is the exact opposite situation from this case: There, as here, the Federal Election Commission was barred by statute from revealing confidential information. *See* 2 U.S.C. § 437g(a)(12)(A) (editorially reclassified at 52 U.S.C. § 30109(a)(12)(A)) ("Any notification or investigation made under this section *shall not be made public by the Commission or by any person* without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.") (emphasis added).[7] Nevertheless, the Commission went to

[7] This statute also demonstrates that when Congress wants to keep information confidential in all circumstances, it knows how to do so, by preventing its publication "by any person." The confidentiality provision of Dodd-Frank applies only to the FSOC and its member agencies, not "any person," which could at least plausibly apply as a textual matter to a federal district judge.

court with an unsealed petition that, by making public the investigation, plainly violated the statutory prohibition. *See Sealed Case*, 237 F.3d at 661 ("As part of the petition, the FEC included a number of exhibits providing information about the ongoing investigation."). Here, of course, the FSOC has resisted unsealing—it did not go to court and file unsealed documents that it was required to keep confidential.

The district court's reliance on *Sealed Case* is wholly misplaced. Indeed, even in *Sealed Case*, where the agency violated a statutory mandate that evinced "an extraordinarily strong privacy interest," this Court expressly left open the possibility that such a strong privacy interest could—even if "only rarely" —be outweighed by "the remaining five *Hubbard* factors." *Id.* at 666. Accordingly, *Sealed Case* by its own terms does not stand for the proposition for which it was cited by the district court, which is that such a "statute supersedes the multi-factor inquiry prescribed by the D.C. Circuit in *Hubbard*." J.A. 30.

Moreover, the district court had earlier held that the confidentiality provision of Dodd-Frank is not an absolute a bar to disclosure like the provision that governed the Federal Election Commission—and did so in the first place because MetLife argued that it was not an absolute bar. *See* Order Granting Mot. to Compel 2, Dist. Ct. ECF No. 93, No. 15-cv-45 (Dec. 8, 2015). Below, MetLife offered, in a footnote, an unpersuasive *ipse dixit* explanation of its incongruent positions: "Section 5322(d)(5)(A) does not prohibit the disclosure of materials in the agency record to a

nonbank SIFI seeking judicial review of FSOC's designation decision." MetLife Opp'n 15 n.2. So too the FSOC previously conceded that § 5322(d)(5)(A) is not an immutable shield that compels confidentiality in all cases and for all time. In defending against MetLife's Motion to Compel, the FSOC observed: "To be sure, the Council acknowledges that in some cases the protections described above [including § 5322] must yield to a party's need for information—or, in a record review case such as this one, to the Court's need for an administrative record sufficient for the Court to adjudicate a challenge to a federal agency decision." Def.'s Opp'n to Pl.'s Mot. to Compel Disclosure of Withheld and Redacted R. Materials 2, ECF No. 52, No. 15-cv-45 (D.D.C. filed July 20, 2015).

Dodd-Frank's confidentiality provision is just part of one factor to be weighed among others in the *Hubbard* analysis, since it bears on the extent to which the judicial record in question has previously been disclosed. In this case, the parties that are resisting unsealing may benefit in the *Hubbard* balancing analysis because the statute had required the FSOC to keep submissions confidential. But in no way should the confidentiality provision be misapplied to documents that were not submitted to the FSOC or be misconstrued to bind a federal court from exercising its supervisory powers.

III. A JOINT APPENDIX IS A JUDICIAL RECORD.

The district court was correct to state that the public's presumptive right of

access applies not to every document ever filed in a court but only to those that are "judicial records." Indeed, in its filings before the district court, Better Markets forthrightly acknowledged that "not all documents filed with courts are judicial records." *Am. Int'l Grp.*, 712 F.3d at 3; *but see Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994) (test of whether a document is a judicial record turns on whether it has been "filed with the court").

So what is a judicial record? This Court has stated generally that "what makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process." *El-Sayegh*, 131 F.3d at 163. This definition is good as far as it goes, but it leaves unanswered several important questions. A more concrete definition comes from the First Circuit, which identifies relevance to the merits as the touchstone of whether a document filed in court is a judicial record. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("[W]e rule that *relevant* documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies." (emphasis added)); *id.* at 408 ("Those documents which *play no role in the adjudication process*, however, such as those used only in discovery, lie beyond reach." (emphasis added)).

The context of this case facilitates the easy conclusion that the Joint Appendix is a judicial record. As the district court most experienced in handling challenges to

administrative agency actions, the United States District Court for the District of Columbia has devised a mechanism to help it sift and winnow through the unending haystack of the complete administrative record and get to the needles on which the case turns. That mechanism is the Joint Appendix, which comprises "those portions of the administrative record that are *cited or otherwise relied upon in any memorandum in support of or in opposition to any dispositive motion*." United States District Court for the District of Columbia Local Civil Rule 7(n)(1) (emphasis added). Tossing extra hay into the Joint Appendix is forbidden: "Counsel shall not burden the appendix with excess material from the administrative record that does not relate to the issues raised in the motion or opposition." *Id.* The Joint Appendix clearly plays a *critical* "role . . . in the adjudicatory process." *El-Sayegh*, 131 F.3d at 163.

A self-evident and highly administrable definition of judicial record is suggested by the text of this local rule: Any document included in the Joint Appendix is a document that the parties consider important enough to cite or otherwise rely on, and it thus constitutes a judicial record. Accordingly, in administrative challenges in the United States District Court for the District of Columbia, a Joint Appendix, in its entirety, is a judicial record. This Court need not go so far as the Third Circuit and find all documents "filed with the court" to be judicial records. *Pansy*, 23 F.3d at 781.

The modest approach suggested by Better Markets confers a number of advantages. It is easily administered and preserves judicial resources, since the parties do the heavy lifting by deciding what to include in the Joint Appendix. In addition, this definition neatly resolves the existential-chronological question of whether a judicial record can even be identified as such before a court renders a final decision. The FSOC theorized below that a judicial record cannot exist until the court's opinion issues, a suggestion that the district court cited in the course of its denial of Better Markets' application. *See* FSOC Resp. 6 ("[A] determination of which portions of the Joint Appendix constitute 'judicial records' will depend upon what materials the Court relies upon in its opinion ruling on the parties' dispositive motions."); J.A. 32 (appearing to endorse the government's theory).[8] On this view, the submissions relied on by the parties are Schrödinger's documents, either judicial records or not, but with a status unknowable until revealed, because a court like an electron may have different paths it travels at once, as it may reach one result for multiple reasons embodied in alternative holdings. And even after a decision issues, the status of some documents as judicial records may remain uncertain where their precise role in the court's resolution of the claims is unclear or unknowable: A court may be influenced

[8] MetLife did not advance this view of judicial records, presumably because it was pursuing the argument that Better Markets' motion to intervene was untimely as having come too late, an argument that is incompatible with the notion that judicial records are identifiable only after a final judicial decision.

by a portion of the record without actually pin-citing it.

The district court's decision on the merits to rescind the designation of MetLife underscores the folly in the approach suggested by the FSOC. The court ruled in MetLife's favor on about two and a half of the ten causes of action contained in MetLife's complaint, but discussed and rejected only one cause in favor of the government. *See generally* J.A. 81–113. On the FSOC's view, only those documents that are relevant to the three and a half causes of action reached in the court's opinion would be judicial records, at least for now. What happens if the government prevails on appeal? Are the documents that pertain to the other six causes of action back in play as possible future judicial records? Must the public await a decision on remand to know? The public's right of access to judicial records deserves better—and clearer—standards.

Judicial records can and should be identified contemporaneously and not only retrospectively. This Court's own rules confirm as much: "A party or any other interested person *may move at any time to unseal* any portion of the record in this court . . . ." D.C. Cir. Rule 47.1(c) (emphasis added). This provision would invite significant disappointment if resolution of every such motion were held in abeyance until after panel or en banc rehearing were denied so that the precise final reasoning of the Court became fixed as the key to unlock the mystery of what parts of the record constituted judicial records.

Where, in a district court, an enormous record contains copious irrelevant material, it may be prudent for a court to narrow the scope of its attention to those issues that are likely to be dispositive before searching the full haystack for the relevant needles (for example, deferring *Hubbard* balancing until after deciding a motion to dismiss). But here, the parties had already done that work. The Joint Appendix reflects their judgment, which they cannot now disown, that its contents are the most relevant, most important documents, on which they relied in arguing—and urged the court to rely in adjudicating—their case.

In sum, if the FSOC's theory that judicial records can be identified only retrospectively were correct, no party or intervenor could ever contest a sealing until final judgment and, perhaps, resolution of any appeals. Such a proposition would eviscerate the fundamental democratic right of public oversight of the judicial process. It would be akin to Congress's saying to the public: You may read the statutes we pass but you may not attend our floor debates or even later read committee transcripts about amendments that are voted down. This Court should reject such a restrictive and opaque theory. After all, the public's ability to monitor the judiciary depends just as much on knowing what was *not* decided as what was decided and the basis for each: Just imagine how incomplete a legal education would be if professors were allowed to teach only what a court discussed but not what it omitted.

It is unclear whether the district court's discussion of judicial records was

purely dicta or whether it was meant to provide alternative grounds for the denial of Better Markets' application for an Order to Show Cause. As demonstrated by both the district court's discussion and the FSOC's theory, however, significant confusion attends the question of what constitutes a judicial record, so this Court should clarify, at a minimum, that a Joint Appendix in an administrative case is a judicial record. An even better result would be to adopt the First Circuit's clear definition of judicial record as one that is submitted to a court and relevant to the proceedings, which is to say all documents filed with a court except those that "play *no* role in the adjudicatory process." *Standard Fin. Mgmt.*, 830 F.2d at 408 (emphasis added).

IV. THE DISTRICT COURT'S NOVEL STANDARD FOR INTERVENORS WHO SEEK UNSEALING LACKS ANY BASIS IN LAW.

The district court granted Better Markets' motion to intervene under Rule 24(b) of the Federal Rules of Civil Procedure, but in doing so it embraced a novel—and dangerous—new standard that MetLife had proposed for nonparties that seek access to records: "MetLife is right that this 'exception' is generally confined to intervenors who have 'a particularized interest in those records that was distinct from the generalized interest in judicial proceedings shared by all members of the public.' " J.A. 29 (quoting MetLife Opp'n 12). MetLife and the district court would transform the public's right of access into a private right of access available exclusively to those with a special interest.

But this holding cannot be reconciled with the plain language of Rule 24(b),

which provides that, where a common question of law or fact like the validity of a seal exists, "the court may permit *anyone* to intervene." Fed. R. Civ. P. 24(b) (emphasis added). MetLife's proposal, meanwhile, cited no authority that stands for the proposition that a particularized interest distinct from anyone else's is required. *See* MetLife Opp'n 11–13 (drawing the inference of such a requirement from the fact that this Court's few published opinions about interventions that sought unsealing involved would-be intervenors with identifiable interests in the sealed matter).

That this Court has not erected such a high bar to those who seek to vindicate the public's right of access to judicial documents is clear not only from the case law, which suggests nothing that resembles the district court's novel holding, but also from this Court's own rules: "A party *or any other interested person* may move at any time to unseal any portion of the record in this court, including confidential briefs or appendices filed under this rule." D.C. Cir. Rule 47.1(c) (emphasis added); *see also* D.C. Cir. Handbook of Practice and Internal Procedures § VII.H.

Although this Court's rules govern practice only before it and not before the United States District Court for the District of Columbia, its practice of referring unsealing efforts to the district court in the first instance strongly implies that the "any other interested person" standard for seeking unsealing is the proper and only one: "On appeals from the district court, the motion will ordinarily be referred to the district court, and, if necessary, the record remanded for that purpose . . . ." D.C. Cir.

Rule 47.1(c). If the district court and this Court had such different standards for those who seek unsealing, it would be anomalous to "ordinarily" refer such motions to the district court. Moreover, an obvious judicial inefficiency would arise if the court closest to the record first refused to entertain unsealing motions on the basis of insufficient special interest, only to then leave this Court to reach the merits for all those movants whose interest is "generalized . . . [and] shared by all members of the public." J.A. 29.

Supreme Court precedent further confirms that the district court's novel standard is erroneous. In the *Warner Communications* case, the headwaters for the case law on the public's right of access, the Supreme Court considered the analogous context of public access under the First Amendment, and rejected any distinction between the press and the public. "The First Amendment generally grants the press no right to information about a trial superior to that of the general public." *Warner Comm'cs*, 435 U.S. at 609. This was not a new idea. *See Estes v. Texas*, 381 U.S. 532, 589 (1965) ("[A] reporter's constitutional rights are no greater than those of any other member of the public."). Surely the same is true of the analogous common-law right of access to judicial records. The district court cited no authority or rationale for its novel proposition, quoting only the creative opposition brief of MetLife. *See* J.A. 29.

An interesting question arises about whether Better Markets, which prevailed

in its motion to intervene because the district court found Better Markets to have met the novel standard, has appellate standing to contest the district court's error. It does. At the outset, Better Markets plainly has appellate standing to pursue correction of the errors in the district court's denial of its application for an Order to Show Cause, so this appeal is properly before this Court, and Better Markets argued against MetLife's creative theory below. Moreover, under the doctrine that permits affirmance on any grounds supported by the record, MetLife may seek to have this Court affirm on the alternative grounds that the district court abused its discretion in finding Better Markets to have satisfied the requirements of permissive intervention.[9]

But even if an appellant must have appellate standing as to each issue it raises, Better Markets will suffer prejudice if the district court's novel standard for permissive intervention is permitted to stand: Even though this particular motion to intervene was granted, Better Markets is a "seasoned advocate," *id.*, whose next motion to intervene in the pursuit of transparency may be denied if held again to the novel standard. Better Markets was not aggrieved by the *result* below as to the motion to

[9] To be sure, the district court did not abuse its discretion in finding that Better Markets had a particularized interest that met the court's erroneous and novel standard for intervention: Better Markets had filed comment letters with the FSOC, wrote amicus briefs on the merits of designation before the district court and this Court, and engaged in extensive public advocacy around the need for a prudential regulator of nonbank systemically important financial institutions. *See generally* J.A. 29–30 and Better Markets' moving papers cited therein.

intervene, but it was aggrieved by the logic of the opinion, which will stand as adverse, persuasive authority in this district and around the nation, frustrating the efforts of Better Markets and others to promote transparency.

In this sense, Better Markets is in a position very much like those of prevailing parties who have nevertheless been granted certiorari by the Supreme Court. *See Camreta v. Greene*, 563 U.S. 692, 702 (2011) ("We have previously recognized that an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement."); *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332–36 (1980); *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939). In *Camreta*, a law-enforcement officer who prevailed in the judgment because of qualified immunity was nevertheless granted certiorari because of an adverse opinion about the constitutionality of his acts; he had no other basis for appellate standing. This live dispute satisfied Article III's case-or-controversy requirement, as does Better Markets' dispute with the district court's novel standard for permissive intervention, because the parties "have a sufficient 'interest in the outcome of a litigated issue' to present a case or controversy." *Camreta*, 563 U.S. at 703 (quoting *Roper*, 445 U.S. at 336 n.7) (brackets omitted).

Better Markets is a watchdog not only over the financial industry but also over the government agencies charged with protecting the public. Should another non-

bank challenge its designation in court and file judicial records with sweeping redactions, Better Markets will likely again seek to intervene in an effort to promote transparency and accountability. And Better Markets has sought to promote transparency within the federal agencies, including, for example, urging the Securities and Exchange Commission to adopt a PACER-like system for documents filed before its administrative law judges. *See* Cmt. Ltr. of Better Markets to SEC Re: Amendments to the Commission's Rules of Practice (File No. S7-19-15) (Dec. 4, 2015), https://www.sec.gov/comments/s7-19-15/s71915-7.pdf. The pursuit of transparency in the nation's markets and its court dockets is at the core of Better Markets' work, which will be hindered if the district court's clear error goes uncorrected. Accordingly, this Court should reach—and reverse—the novel "particularized interest" standard articulated by the district court.

CONCLUSION

For these reasons, the judgment of the district court should be reversed and its legal errors corrected, and this matter should be remanded with instructions that the district court gather the information necessary to evaluate the challenged redactions under *Hubbard*.

Respectfully submitted,

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Dated: October 17, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief for the appellant-intervenor complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,595 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, with 14-point Times New Roman font.

Executed this 17th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 17, 2016. I hereby further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: October 17, 2016

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