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)

REPLY BRIEF OF INTERVENOR-APPELLANT

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SUMMARY OF ARGUMENT

On a Monday morning in late October 2016, a standing-room-only crowd watched a panel of this Court conduct oral argument about the rescinding of the FSOC's designation of MetLife as a nonbank financial institution that could threaten U.S. financial stability. Attendees who relied on the district court's assurances that its designation-rescinding decision was fully comprehensible were blindsided when MetLife's counsel emphasized at length the conclusions of a study by Oliver Wyman:

> For example, Oliver Wyman's scenario 2 was AIG, which was a highly publically observe failure that took over place over several months before the federal government intervened. That was scenario 2. Nobody thinks scenario 2 would adversely affect broader markets. Scenario 3 if you look at Joint Appendix 1187, you'll see the piece of assets sales which MetLife told FSOC was totally implausible it's far faster than had ever been seen from insurance company. So we were willing to give some margin, some benefit of the doubt to be protective. That Oliver Wyman scenario 3 analysis still showed that MetLife could meet this totally unreasonable demand on its assets and still not adversely affect the economy.

Hr'g Tr. A29–A30, No. 16-5086 (D.C. Cir. Oct. 24, 2016) (addended hereto) (errors in original). Despite its now-undeniable importance to the merits, the Wyman study was and remains entirely sealed off from public viewing. "Nobody thinks that scenario 2 would adversely affect broader markets," *id.*, because, perhaps, nobody can read about scenario 2.[1]

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[1] Most of the oral argument bore only a tenuous relationship to the district court's

Yet both appellees' briefs confidently declare that the public has everything it needs to fully understand this momentous case. The FSOC suggests that the question presented in this appeal is whether redactions are permitted "where those redactions did not impede the public's ability to monitor the proceedings or understand the court's decision." FSOC Br. 2. MetLife, for its part, contends that the "public has ample means of evaluating the agency's and the district court's decisions in this case, as well as the parties' arguments in both the district court and this Court." MetLife Br. 23; *see also id.* ("Thus, both the district court's reasoning and *the parties' arguments are fully accessible* to the public." (emphasis added)). Such sweeping assurances, alongside the incontrovertible fact that more than two-thirds of the Joint Appendix remains wholly sealed, were always untenable, but they became Orwellian after MetLife presented oral argument in open court about the Wyman study. As far as the undersigned can determine, never before has a party presented oral argument about a sealed document in open court while insisting that the document remain sealed because the public can nevertheless fully follow the argument without accessing the document.

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opinion, which concerned principally a parsing of the FSOC's guidance and an extension of *Michigan v. EPA*, 135 S. Ct. 2699 (2015). *See* J.A. 81–113. Instead, MetLife's counsel, beyond the sealed Wyman study's importance, pressed claims the district court eschewed, arguing that the FSOC is unconstitutional under due-process and separation-of-power theories and that the FSOC's analysis suffered from flawed analogies about stress-testing banks and domino theories. *See generally* Hr'g Tr. A13–A41.

The appellees' core argument for affirmance boils down to "trust us." This is particularly true of their assertions—still untested[2]—that every last word redacted below is justified and must remain redacted to avoid calamitous consequences. *See, e.g.*, FSOC Br. 9; MetLife Br. 12–13. Better Markets' proposed alternative, rejected below, was simply "trust but verify": Gather the necessary information, including the identity of a redaction's proponent and its good-cause justification, and then independently vet the redactions' validity. Only with such basic information could a court possibly conclude that "the parties' redactions to . . . the record were *narrowly tailored*." FSOC Br. 17–18 (emphasis added). The remedy by which the public's right of access is vindicated must provide for sufficient information for *reasoned* sealing decisions. The district court below abused its discretion in refusing to gather even the identity of each redaction's proponent let alone the private interests in secrecy that purportedly outweigh the public interest in disclosure.

Yet that minimal step is exactly what is required by *Foltz v. State Farm Mutual Automobile Insurance Co.*, 331 F.3d 1122 , 1131 (9th Cir. 2003) ("Now that the Private Intervenors have challenged the . . . seal, *the district court must require* [the seal's proponent] to make *an actual showing of good cause* . . . ." (emphases

[2] Untested assertions of confidentiality often prove unfounded when independently evaluated. *See, e.g.*, *United States v. HSBC Bank, USA, N.A.*, Order at 3, ECF No. 70, No. 12-cr-763 (E.D.N.Y. Mar. 9, 2016) ("This is not sensitive or proprietary business information.").

added)), and *In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981) (a court evaluates redactions' validity "*after weighing the interests advanced by the parties*" (emphasis added)). Neither appellee even acknowledges either of these cases in their opposition briefs, an astounding omission.

Despite their failure to provide the essential information, both appellees urge this Court to affirm under *United States v. Hubbard*, 650 F.2d 293, 317–22 (D.C. Cir. 1980), *see* MetLife Br. 20–28; FSOC Br. 18–22, even though the district court expressly avoided *Hubbard*—"the Court does not reach [the *Hubbard*] framework," J.A. 27. This Court should not affirm under *Hubbard* where the district court did not reach it and the necessary information to conduct its balancing test remains unavailable. Instead, this Court should hold that a district court abuses its discretion when it refuses to gather the necessary information to engage in a reasoned analysis of a challenged seal's validity.

The appellees' atextual construction of Dodd-Frank's confidentiality provision fails. The statute itself could not be clearer about whom it governs: "*The Council, the Office of Financial Research, and the other member agencies shall maintain* the confidentiality of any data, information, and reports submitted." 12 U.S.C. § 5322(d)(5)(A) (emphasis added). MetLife rewrites the statute: "Congress itself has already determined that the 'data, information, and reports' submitted to FSOC must be kept 'confidential[],' " by *any* person, even a federal court, or so the argument

goes. MetLife Br. 3 (selectively quoting § 5322(d)(5)(A)). The false premise of the appellees' hyper-purposivist argument is that without re-writing § 5322(d)(5)(A), nothing prevents wholesale, helter-skelter unsealing, as though federal courts were incapable of identifying and protecting trade secrets.

The balancing process proposed by Better Markets would enable the district court rationally to protect valid confidentiality interests while vindicating the public's right of access under *Hubbard*, with § 5322(d)(5)(A) as one factor among many to consider. *In re Sealed Case*, 237 F.3d 657 (D.C. Cir. 2001), does not instruct otherwise. Because of its unique posture, *Sealed Case* answered the question not of "whether court records should be sealed" but of "*whether the FEC has the authority to file information concerning an ongoing investigation on the public record*." *Id.* at 666 (emphasis added). Better Markets' application for an Order to Show Cause—and this appeal—ask the former question; the latter question would arise only if the FSOC unilaterally violated confidentiality like the FEC had. Nothing in *Sealed Case* remotely suggests that a judicial record, properly sealed when filed, could not later be unsealed by a court.

The FSOC newly contends that FOIA provides the exclusive remedy for Better Markets. *See* FSOC Br. 11–14. This argument is waived and wrong. Does the FSOC really mean to argue that the parties' *briefs* may be reached by FOIA? *See* 5 U.S.C. § 551(1)(B) (FOIA does not apply to "the courts of the United States"). The

cases that the FSOC cites for its incorrect proposition that FOIA is the sole recourse for public access to the briefs and Joint Appendix concerned documents sought that were *not* judicial records. And the appellees' invocations of neighboring provisions reinforce rather than undermine the conclusion that § 5322(d)(5)(A) should be given its plain meaning.

The appellees indefensibly insist that the Joint Appendix—the parties' own selection of documents they deem relevant—is not a judicial record. But this Circuit instructs that a document's status as a judicial record depends on "the role it plays in the adjudicatory process." *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997). The role of the Joint Appendix cannot be overstated: "Indeed, the meaning and legal import of a judicial decision is a function of the record upon which it was rendered." *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 906 (D.C. Cir. 1996). Better Markets' opening brief suggests a clear, self-evident, and readily administrable standard, in keeping with these principles, for this Court to adopt: A Joint Appendix, comprising by definition only those portions of the total administrative record that are relevant to the merits, is a judicial record.

This Court should also reach and reverse the district court's novel "particularized interest" standard for seal-challenging intervenors, which lacks any basis in law. MetLife, which creatively proposed the standard and whose brief below was the only "authority" cited by the district court, does not even attempt to defend it. Nor does

MetLife address the persuasive analogy between the Supreme Court's practice of granting certiorari to parties that prevailed in judgment but suffered a grievous harm in the holding. Either on that basis or on its own motion to preserve the integrity of this Circuit's case law, this Court should reach and reverse the district court's baseless holding on intervention.

Finally, Better Markets adopts the compelling argument, made by amici curiae, that the First Amendment applies in civil cases, and Better Markets will be prepared to present oral argument thereon. Just as there is good reason that the First Amendment has been found to apply civilly in every circuit to consider the question, so too there is good reason that only half the circuits have reached it: To force the issue's resolution by an appellate court, a party that seeks unsealing would have to disclaim reliance on the common law and seek only constitutional relief. This Court should reach the issue to free parties from such a difficult bind. If neither appellee is willing to argue that the First Amendment does not apply in civil cases, this Court should appoint amicus curiae to do so and join the excellent argument of amici.

ARGUMENT

I. ALL QUESTIONS IN THIS APPEAL ARE REVIEWED DE NOVO.

Better Markets' opening brief acknowledged that a district court's decision about a particular redaction, *i.e.*, the result of its *Hubbard* balancing, would be re-

viewed by this Court for abuse of discretion. *See* Appellant's Br. 13. But Better Markets also uncontroversially contended that this "Court reviews de novo the legal conclusions of the district court." *Id.* Because the district court avoided *Hubbard* altogether, *see* J.A. 27, every important question in this appeal is a legal question reviewed de novo. This is true of statutory interpretation, of whether a Joint Appendix is a judicial document, of whether the novel "particularized interest" standard for intervention has any basis in law, of whether the First Amendment secures public access to judicial records in civil cases, and of whether a district court is required to gather sufficient information to conduct *Hubbard* balancing. Despite these purely legal questions, both appellees perfunctorily urge that the standard of review in this appeal is exclusively one of abuse of discretion. *See* MetLife Br. 13 ("abuse of discretion"); FSOC Br. 10 ("only for abuse of discretion"). This misdirection is immaterial, however, because, when only legal questions are presented, the standards merge: a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

II. THE DISTRICT COURT'S FAILURE TO GATHER SUFFICIENT INFORMATION FOR REASONED BALANCING UNDER *HUBBARD* IS ERROR.

Neither appellee responds whatsoever to the imperatives of *Foltz*, 331 F.3d at 1131 ("Now that the Private Intervenors have challenged the . . . seal, *the district*

court must require [the seal's proponent] to make *an actual showing of good cause* . . . ." (emphases added)), or *National Broadcasting*, 653 F.2d at 613 (a court evaluates redactions' propriety "*after weighing the interests advanced by the parties*" (emphasis added)). This omission is especially telling in view of Better Markets' identification of *National Broadcasting* as an authority on which it chiefly relies. *See* Appellant's Br. vi.

The district court expressly avoided the *Hubbard* analysis: "[T]he Court does not reach [the *Hubbard*] framework." J.A. 27. Yet both appellees urge this Court to affirm under *Hubbard*. *See* MetLife Br. 20–28; FSOC Br. 18–22. Doing so would be a profound mistake. This Court, like the district court and the public, lacks sufficient information about the redactions—who proposed each, what good cause justifies it, and why that justification outweighs the public's interest in the record of this historic case—to engage in *Hubbard*'s balancing test. The parties' conclusory, blanket arguments about all of the diverse documents in the Joint Appendix starkly illustrate how inappropriate it would be to affirm under *Hubbard*. *See* MetLife Br. 12–13 ("the *Hubbard* analysis is *the same for all* of the redacted materials" (emphasis added)); FSOC Br. 9 ("The only portions of the record that currently remain under seal contain 'data, information, and reports' submitted to the Council in confidence by MetLife and various state insurance regulators."). How can this be, when, as Better Markets showed, *see* Appellant's Br. 18–20, many of these redacted documents

were apparently never "submitted" to the Council? 12 U.S.C. § 5322(d)(5)(A). How can the *Hubbard* analysis be the same for a sealed document never quoted in the briefing as for a sealed document quoted directly in an unsealed brief, when one factor is prior public access? *See* Appellant's Br. 5 n.2. How, indeed, can MetLife's valid property interests be exactly "the same" as the FSOC's valid confidentiality interests regarding state regulators? These generic and conclusory statements are insufficient. *Hubbard* itself requires "a more particularized rationale." *Hubbard*, 650 F.2d at 297.[3]

Instead of following the appellees' wayward shortcut, this Court should hold that a district court abuses its discretion when it refuses to gather the minimal information necessary to engage in a reasoned analysis of a seal's validity. The appellees barely acknowledge this self-evident conclusion. MetLife urges that there is "no au-

[3] The FSOC's reliance, *see* FSOC Br. 22, on a Fifth Circuit case that permitted "implicit" factfinding to affirm a challenged seal is telling. *See Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 455 (5th Cir. 2015). Obviously, *Test Masters* is wholly incompatible with *Hubbard*'s requirement of a "more particularized rationale." 650 F.2d at 297. It is also easily distinguished—the seal there concerned just one contempt hearing rather than a 2800-page Joint Appendix with scores of diverse documents, and unsealing there would have served to gratify the "improper purposes" of one party's spite. *See Test Masters*, 799 F.3d at 454–55. The FSOC's contention that "implicit" balancing would suffice under *Hubbard* demonstrates disappointingly little regard for the public's "precious and fundamental" right of access. *Nat'l Broad.*, 653 F.2d at 613 (internal quotation marks omitted). This Court should demand better.

thority for the proposition that a court must know the identity of the party that proposed a particular redaction in order to apply the *Hubbard* analysis." MetLife Br. 25 (citing *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 n.14 (D.C. Cir. 1991) ("(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") (two of *Hubbard*'s factors)). MetLife splits hairs by contending that it is irrelevant who "initially proposed a particular redaction[;] the salient fact for purposes of this Court's analysis is that *both* parties object to disclosure of any of the redacted material." MetLife Br. 25. This gossamer distinction is not advanced in *Hubbard* itself; it just happens that that appeal followed a blanket unsealing order, so that there were no proponents of redactions and only objectors, the opposite posture of this appeal. *See* 650 F.2d at 298–302. MetLife offers no rationale for caring only about the disclosure-objector and ignoring the seal-proponent. More to the point, *Hubbard* balancing requires assessing "the strength of the property and privacy interests," *Johnson*, 951 F.2d at 1277 n.14, which interests inherently depend on who asserts them. Property interests belong to *someone*; anonymous interests can hardly be called "particularized." *Hubbard*, 650 F.2d at 297.

In any event, MetLife's assertion that both parties object to any disclosure is overstated. While the FSOC joins MetLife in urging an atextual construction of Dodd-Frank's confidentiality provision, it has not objected to any paring back of

redactions other than to state regulators' submissions. Instead, the FSOC has merely consented to MetLife's proposals. *See* FSOC Resp. 5 ("[T]he Council has, to a considerable extent, appropriately relied upon MetLife's assertions concerning the confidentiality of the materials withheld . . . .").

In the end, *Hubbard* requires a balancing of multiple factors, and balancing those factors necessarily requires identifying them first. The district court abused its discretion by refusing to gather the fact needed to do so rationally.

III. DODD-FRANK'S CONFIDENTIALITY PROVISION DOES NOT BIND A FEDERAL COURT OR SUPERSEDE *HUBBARD*.

The appellees' atextual construction of Dodd-Frank's confidentiality provision is unpersuasive. The statute is crystal clear about whom it governs, despite appellees' efforts to muddy the waters. *Compare* 12 U.S.C. § 5322(d)(5)(A) ("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."), *with* MetLife Br. 3 ("Congress itself has already determined that the 'data, information, and reports' submitted to FSOC must be kept 'confidential[],' " by even a federal court, or so the appellees argue). Accordingly, there is no basis for ignoring the unambiguous language of Dodd-Frank, attempting to divine congressional intent, and warping the statute into a broader command of secrecy in order to achieve "co-existence" or a "harmonious whole" with judicial review. MetLife Br. 19–20 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,

133 (2000), and *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). In modern statutory interpretation, unambiguous text prevails.

The premise of the appellees' atextual argument is that confidentiality is an all-or-nothing game, that without Dodd-Frank there is nothing to prevent the wholesale unsealing of MetLife's deepest trade secrets or state regulators' most sensitive assessments. But of course this premise is false: Federal courts are adept at safeguarding trade secrets, regulators' confidences, and the like, even without a statutory command to do so. The process proposed by Better Markets would enable the district court to balance such valid confidentiality interests against the public's right of access. Such reasoned balancing is nowhere close to "unthinkable." J.A. 31. There are many reasons why, far from absurd, the plain text of § 5322(d)(5)(A) furthers Congress's purposes. *See* Appellant's Br. 22–24.

The appellees, like the district court, do not attempt to reconcile their construction with the statute's text. MetLife in particular does not once in its argument quote the entirety of § 5322(d)(5)(A)—the "Council" as the subject of the sentence is omitted from every quotation, even as MetLife occasionally acknowledges the FSOC as the subject of the subsection. *See* MetLife Br. 1, 3, 5, 11, 12, 14, 15, 16, 17, 18, 19, 20, 24, 27. Neither appellee has any answer to the *expressio trium est exclusio alterius* argument in Better Markets' opening brief. *See* Appellant's Br. 21

& n.6. Each appellee instead attempts to draw support from the next two subsections—which actually reinforce the plain text of the confidentiality provision.

MetLife proposes that § 5322(d)(5)(B) bolsters its case because it "works in tandem with" the previous subsection to secure secrecy. MetLife Br. 16. Quite the contrary. If § 5322(d)(5)(A) were the categorical prohibition against disclosure that MetLife urges, it would render § 5322(d)(5)(B) mere surplusage. After all, subsection (B) concerns court action: Submission "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)." 12 U.S.C. § 5322(d)(5)(B). If subsection (A) were really the absolute bar to court-supervised disclosure that the appellees urge, what meaning is there to subsection (B)? What work does it do? It would be utterly superfluous: Under the appellees' and district court's reading of subsection (A), no one may ever access any document previously submitted to the FSOC, so no company would ever need to defend itself by invoking a privilege under state or federal law, the very privileges that subsection (B) preserves. Accordingly, this Court should interpret subsection (A) by its unambiguous terms, rather than the appellees' strained construction, so as not to render superfluous subsection (B). *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)).

The FSOC, for its part, tosses a new argument into the mix by contending that FOIA, made applicable to submissions by 12 U.S.C. § 5322(d)(5)(C), provides the exclusive remedy for Better Markets. *See* FSOC Br. 11–14. The FSOC failed to raise this argument below and no exceptional circumstances excuse that failure, so it is waived. *See, e.g.*, *First E. Corp. v. Mainwaring*, 21 F.3d 465, 467 (D.C. Cir. 1994) ("We are presented with no 'exceptional circumstances,' however, that would warrant departure from our general rule that a party waives an argument by failing to raise it below.") It is also wrong. The FSOC cannot credibly claim that litigation briefs may be reached through FOIA, which applies to agencies but—expressly—not to courts. *See* 5 U.S.C. § 551(1)(B). The FSOC misreads the case law by suggesting that, even for judicial records, any case embraces "the 'principle that a statutory disclosure scheme preempts the common law right' of access to public records." FSOC Br. 13 (quoting *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 936 (D.C. Cir. 2003)). The cases that the FSOC cites for its incorrect proposition that FOIA is the sole recourse for public access to the briefs and Joint Appendix concern documents sought that are *not* judicial records. *See Nat'l Sec. Studies*, 331 F.3d at 936 (plaintiff sued to seek "executive records" of arrests); *El-Sayegh*, 131 F.3d at 163 (withdrawn plea agreement is not a judicial record); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 607 (1978) (where public had full access to judicial records via transcripts, Presidential Records Act was the sole mechanism for *audio recordings*

in "concededly singular case").

The FSOC makes one additional textual argument—that Congress could have used even stronger language to indicate that a federal court was not bound by Dodd-Frank's confidentiality command to the "Council, the Office of Financial Research, and the other member agencies." 12 U.S.C. § 5322(d)(5)(A). "If Congress intended to permit the disclosure of confidential information during judicial proceedings, it could have said so expressly." FSOC Br. 15 (citing only 15 U.S.C. § 57b-2(d)(1)(C)).

This is a particularly weak argument for ignoring the statute's unambiguous text. FSOC points to an unrelated provision, in another title, enacted thirty years earlier, to suggest what the 2010 Congress "could have" done. But the FTC's confidentiality scheme is far more comprehensive than the FSOC's in Dodd-Frank. *Compare* 15 U.S.C. § 57b-2 (2,486 words), *with* 12 U.S.C. § 5322(d)(5) (109 words). And unlike Dodd-Frank's command to the FSOC, the FTC's confidentiality command is phrased in the passive and lacks a *subject*: "All information . . . *shall be considered confidential* when so marked . . . ." 15 U.S.C. § 57b-2(c)(1) (emphasis added). It was accordingly necessary to clarify that the command did not apply to a court. *See* 15 U.S.C. § 57b-2(d)(1)(C).

Moreover, "could have" cuts more strongly in the opposite direction: If Congress intended to bind a federal court, it could have (indeed, should have) done so in

explicit terms, especially considering separation-of-powers principles. The statute from *Sealed Case* illustrates Congress's ability to broadly limit disclosure when it so intends: In the Federal Election Campaign Act, Congress barred not only the FEC but also "any person" from making public an investigation, 52 U.S.C. § 30109(a)(12)(A), an argument to which neither appellee responds.

Finally, does § 5322(d)(5)(A), as the district court held, "supersede[]" or "eliminate[]" *Hubbard* under the holding in *Sealed Case*? J.A. 30. Not according to *Sealed Case*'s own terms. Nowhere does it use these words to refer to *Hubbard*, repeated though they are in the district court's decision and appellees' briefs. In fact, *Sealed Case* expressly leaves open the possibility that the *Hubbard* test could tip toward disclosure even in the face of a much stronger statutory command than exists here. *See* 237 F.3d at 666; *compare* 52 U.S.C. § 30109(a)(12)(A) ("shall not be made public by the Commission or *by any person*" (emphasis added)), *with* 12 U.S.C. § 5322(d)(5)(A) ("The Council . . . shall maintain the confidentiality of any data, information, and reports submitted under this subchapter."). Because of its "[a]typical" posture, with a federal agency openly defying its authorizing statute, *Sealed Case* answered the question not of "whether court records should be sealed" but of "*whether the FEC has the authority to file information concerning an ongoing investigation on the public record*." 237 F.3d at 666 (emphasis added). Better Markets'

application for an Order to Show Cause as well as this appeal raise the former question; the latter question would arise only if the FSOC unilaterally violated confidentiality like the FEC plainly did. Nothing in *Sealed Case* suggests that a judicial record, appropriately sealed when filed like the documents at issue here, could not later be unsealed by a court, as Better Markets requests. *Sealed Case* is simply inapposite.

If *Sealed Case* stood for the far-reaching proposition urged by the district court and appellees, then this Court would have no choice but to *sua sponte* order sealing of *all* the partially redacted documents that the FSOC has jointly filed in both the district court and this Court. Why? Because unlike the Federal Election Campaign Act, which permits publicizing an investigation "with[] the written consent of the person" investigated, 52 U.S.C. § 30109(a)(12)(A), Dodd-Frank contains no exception for consent, imposing on the FSOC an ironclad, exception-free requirement that it "shall maintain the confidentiality," 12 U.S.C. § 5322(d)(5)(A). In keeping with their atextual impulses, both MetLife and the FSOC concoct a consent exception, *see* MetLife Br. 15; FSOC Br. 16, but none appears in the statute. On the appellees' reading of *Sealed Case* and their assertion that every document in the Joint Appendix falls under § 5322(d)(5)(A), every such document filed publicly by the FSOC violates Dodd-Frank, regardless of MetLife's consent. The absurdity of this conclusion underscores the folly of misreading *Sealed Case* to foreclose *Hubbard* balancing.

IV. A JOINT APPENDIX IS A JUDICIAL DOCUMENT.

The appellees incorrectly insist that the Joint Appendix is not a judicial record, but even their insistence is inconsistent: MetLife chose not to present this argument below for tactical reasons, *see* Appellant's Br. 29 n.8, and therefore waived it, *see Mainwaring*, 21 F.3d at 467; although the FSOC preserved the argument below, it does not reassert the argument on appeal. Even if properly before this Court, the contention that a Joint Appendix is not a judicial record is indefensible. Better Markets' opening brief supplies a clear, self-evident, and readily administrable standard that this Court should adopt: A Joint Appendix, comprising only those portions of the total administrative record that are relevant to the merits (as required under the district court's rules), is a judicial record. This holding follows inexorably from *El-Sayegh*'s instruction that a document's status as a judicial record depends on "the role it plays in the adjudicatory process." 131 F.3d at 163; *see also id.* (a document is not a judicial record where it plays "*no role in any* adjudicatory function" (emphasis added)). The role of the Joint Appendix is plainly critical, foundational, central: "Indeed, the meaning and legal import of a judicial decision is a function of the record upon which it was rendered." *Wash. Legal Found.*, 89 F.3d at 906.

MetLife's waived argument on appeal is that any part of the Joint Appendix uncited by the district court's designation opinion is not a judicial record. Better Markets addressed this extensively in its opening brief, albeit in anticipation of the

argument that the FSOC alone made below. *See* Appellant's Br. 26–32. MetLife now leans heavily on *SEC v. American International Group* ("*AIG*"), 712 F.3d 1, 3 (D.C. Cir. 2013), for the proposition that there must first be a "judicial decision" and that judicial records are only those that the decision "relied on." The documents sought in *AIG* were created *after* a judicial decision (approval of a consent decree) and had no relevance to any future judicial function that might rely on them. "A judicial decision is a function of *the underlying record*, and if a document was never part of that record, it cannot have played any role in the adjudicatory process." *Id.* at 4 (emphasis added). Here, of course, the Joint Appendix *is the underlying record* on which the court's decision rested. And the court's decision was just as much a decision to reach four causes of action as it was a decision to avoid the other six. The entire Joint Appendix, not just those few portions cited, is a judicial record—and was a judicial record when filed because it was relevant to the merits of a forthcoming decision.

MetLife misses the mark in suggesting that *AIG* requires a judicial decision before a document may become a judicial record. When this Court said that "the concept of a judicial record assumes a judicial decision," *id.* at 3 (internal quotation marks omitted), it did not require that the decision have already been issued but that one was expected—*i.e.*, assumed. *See Assume*, THESAURUS.COM ("expect" is a top synonym of "assume"), http://www.thesaurus.com/browse/assume. No decision was

expected in *AIG*. MetLife further contends that the First Circuit's highly administrable standard of relevance to the merits "likewise requires an after-the-fact determination of whether a document is relevant to the court's ultimate decision on the merits." MetLife Br. 32. Not so. The First Circuit's standard is not "relevant to the court's ultimate decision," as MetLife put it, but "relevant." *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"—upon filing, not upon some later decision's pin-citing them.).

The ability to identify judicial records contemporaneously is confirmed by this Court's rules, to which MetLife offers no reply. *See* D.C. Cir. Rule 47.1(c) ("A party or any other interested person may move *at any time* to unseal any portion of the record in this court . . . ." (emphasis added)). It is further buttressed by venerable precedent. *See Bridges v. California*, 314 U.S. 252, 268–69 (1941) (delays in public access, even those "limited in time" still have a "censorial quality" because they deny an opportunity to "anyone who might wish to give his views on a pending case . . . , just at the time his audience would be most receptive"); *see also In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984) ("the presumption of access normally involves a right of contemporaneous access"); *In re Reporters Comm. for*

Freedom of the Press, 773 F.2d 1325, 1353 (D.C. Cir. 1985) (Skelly Wright, *J.*, dissenting) (extolling "the importance of assuring a *contemporaneous* presumptive right of access").

V. THIS COURT SHOULD REACH AND REVERSE THE DISTRICT COURT'S NOVEL, UNSUPPORTED INTERVENTION STANDARD.

This Court should also reach and reverse the district court's novel "particularized interest" standard for seal-challenging intervenors, which lacks any basis in law. MetLife, represented by able counsel, is adept at arguing in the alternative: A, but if not A then B, and if not B then surely C. Yet MetLife's only response to Better Markets' thorough repudiation of the district court's novel standard is that reversing would constitute an advisory opinion. *See* MetLife Br. 32–33. In short, MetLife, which creatively divined the standard from between the lines of the case law and whose brief below was the only "authority" cited by the district court, *see* J.A. 29, does not even rise in defense of its own creation. Nor does MetLife address whatsoever the persuasive analogy between this appeal and the Supreme Court's long and recent history of granting certiorari to parties that prevailed in judgment but suffered a grievous harm in the holding. *See Camreta v. Greene*, 563 U.S. 692, 702 (2011); *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, 242 (1939). Better Markets is, as neither appellee contests and the district court found, "a seasoned advocate," whose ongoing

work on behalf of the public interest will be materially harmed by this novel standard. J.A. 29. Either on that basis or on its own motion, to preserve the integrity of the case law in this Circuit, this Court should reach and reverse the district court's erroneous intervention holding. *Cf. United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("appellate courts . . . may on their own motion notice errors . . . if errors are obvious, or seriously affect fairness, integrity, or public reputation of" the judiciary).

VI. THIS COURT SHOULD HOLD THAT THE FIRST AMENDMENT APPLIES IN CIVIL CASES.

Better Markets adopts the First Amendment argument of amici curiae and will be prepared to present oral argument in support of it. In addition to complementing Better Markets' arguments about the legal errors of the district court, amici also make the compelling case that this Court should concur with every other circuit to have reached the question and find that the public enjoys a First Amendment right of access to judicial records in civil cases. *See* Amici Br. of Campaign for Accountability et al. 2–16. As the amici demonstrate, there is a widespread and growing consensus among the circuits that the First Amendment applies not only in criminal but also in civil cases. *See id.* at 4–8 (canvassing such decisions in the Second, Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits, as well as several in the United States District Court for the District of Columbia).

Indeed, no circuit has dissented. *See In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 9–10 (D.D.C. 2009) ("other Circuits have . . . uniformly held that

the public has a First Amendment right of access to civil proceedings and records”). And for good reason: The First Amendment’s application to civil cases follows inexorably from the Supreme Court’s discussion of the underlying transparency values. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565, 570–72, 580 n.17 (1980); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 385 n.15 (1979). Amici also effectively explain why the briefs and Joint Appendix meet the two-pronged test of history and logic for applying the First Amendment, *see* Amici Br. 9–13, and why the sealing below fails under the First Amendment, *see id.* at 13–16.

The FSOC’s response to this powerful argument begs the question: “Better Markets does not have a First Amendment right of access to the redacted portions of the record [because:] This Court has never held that the First Amendment creates a right of access to judicial records in civil cases . . . .” FSOC Br. 22. The FSOC also contends that if a First Amendment right exists, “ ‘it does not exceed . . . the traditional common law right.’ ” *Id.* (quoting *Reporters Comm.*, 773 F.2d at 1339); *but see Wash. Post v. Robinson*, 935 F.2d 282, 288 n.7 (D.C. Cir. 1991) (“[W]e reach the constitutional issues raised in the appeal because of the different and heightened protections of access that the First Amendment provides over common law rights.”). Even if the FSOC is correct and the rights are coterminous, however, strict-scrutiny review of a constitutional right’s application is a far cry from the deferential abuse-of-discretion review afforded to common-law sealing decisions. *See In re Wash.*

Post Co., 807 F.2d 383, 390 (4th Cir. 1986) (common-law right is reviewed for abuse of discretion whereas First Amendment right is reviewed to ensure redactions are narrowly tailored to a compelling interest).

MetLife, for its part, responds only with a footnote, urging this Court not to reach the First Amendment. *See* MetLife Br. 21 n.4 (citing *Eldred v. Reno*, 239 F.3d 372, 378 (D.C. Cir. 2001)). *Eldred* is readily distinguishable from this case. There, "the plaintiffs conspicuously failed to adopt the argument of the amicus, [so] the Government was not alerted to any need to argue this point." 239 F.3d at 378. And despite the *Eldred* majority's qualms with the issue's having been raised only by an *amicus*, it still addressed the question. *See id.* at 378–80. Judge Sentelle, in dissent, explained why the Court could and should reach an *argument* raised only by an amicus where that argument, as here, pertained to an *issue* preserved by an appellant (the issue of whether the extensive sealing below is permissible):

> That the amicus argues more convincingly in appellants' favor on the issue raised by the appellants than they do themselves is no reason to reject the argument of the amicus. Indeed, our Circuit Rules provide that an amicus brief "must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court." . . .
>
> Our Circuit Rule [is] in good company in allowing amici to make additional arguments that address issues which the parties have raised but not argued in the same fashion. The Supreme Court has approved precisely that approach [i]n *Teague v. Lane*, 489 U.S. 288[, 300] (1989) . . . .

Id. at 383–84 (Sentelle, *J.*, dissenting) (citations omitted).

Judge Sentelle's logic is particularly powerful here, where litigation incentives and the constitutional-avoidance canon could keep this Court from deciding this important question unless a litigant takes a huge risk. Below, Better Markets' noted this Court's agnosticism on the First Amendment's application, and so based its application on the common law. *See* Amici Br. 8 n.4. Had it been exclusively interested in establishing new case law rather than paring back the sweeping redactions to the record below, Better Markets could have rolled the dice and based its application only on the First Amendment and disclaimed the common law. But this Court should not put seal-challengers in such a bind or effectively permanently defer the important question of whether the First Amendment applies in civil cases. This is especially true considering that the question is an easy one to answer affirmatively.

The Court should reach the First Amendment for two additional reasons. First, where this Circuit might apply both the common law and First Amendment, it begins its analysis with the latter. *See Robinson*, 935 F.2d at 288 n.7. This established practice counsels confronting rather than avoiding the First Amendment, reversing the traditional constitutional-avoidance doctrine. Second, if the First Amendment applies, it renders impossible the appellees' atextual construction of Dodd-Frank: If the public has a constitutional right to access civil judicial documents, then a court

must avoid even a plausible statutory construction that conflicts with the constitutional right.[4] See *DeBartolo Corp. v. Fla. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems"). Especially given that a majority of circuits apply the First Amendment to civil cases and that designated companies may sue not only in the District of Columbia but also in any home-office district court, *see* 12 U.S.C. § 5323(h), an embrace of the atextual reading of § 5322(d)(5)(A) in this Circuit would lead to a balkanized meaning of the statute and inevitable forum-shopping.

This Court should issue an order that requires the appellees to indicate whether they will argue against the First Amendment's civil application, perhaps with a supplemental brief. If they decline, this Court should appoint amicus curiae to join the argument put forward by amici so that the Court has a robust presentation of these

[4] MetLife offers the curious but unsupported contention that it has "constitutional . . . rights to judicial review" in addition to a statutory right. MetLife Br. 20. It further contends that the common law or First Amendment rights of access should thus be curtailed to avoid "rais[ing] serious constitutional concerns." *Id.* (citing *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) ("the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government")). Obviously, MetLife has a statutory right to sue and seek the rescinding of its designation. But a *constitutional* right? Not even close—the Constitution permits the Congress to abolish every federal court but the Supreme Court, so depriving every non-original-jurisdiction federal case of judicial review is, however inadvisable and contrary to many statutes, *constitutionally* permissible. *See* U.S. CONST. art. III, § 1. The only constitutional right at stake here is the public's right of access under the First Amendment.

issues to finally decide this important question.

CONCLUSION

For these reasons, the opinion and order of the district court should be reversed, and this matter should be remanded with instructions that the district court gather the information necessary and then evaluate the challenged redactions under *Hubbard*.

Respectfully submitted,

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Dated: November 30, 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 6,992 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 30th day of November, 2016.

/s/ Dennis M. Kelleher
Dennis M. Kelleher

Counsel for Intervenor-Appellant

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 November 30, 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: November 30, 2016

/s/ Dennis M. Kelleher
Dennis M. Kelleher

Counsel for Intervenor-Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

- - - - - - - - - - - - - - - - - - x
METLIFE, INC., :
Appellee, :
v. : No. 16-5086
FINANCIAL STABILITY OVERSIGHT COUNCIL, :
Appellant. :
- - - - - - - - - - - - - - - - - - x

Monday, October 24, 2016

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES SRINIVASAN AND MILLETT, AND SENIOR CIRCUIT JUDGE RANDOLPH

APPEARANCES:

ON BEHALF OF THE APPELLANT:

MARK B. STERN, ESQ.

ON BEHALF OF THE APPELLEE:

EUGENE SCALIA, ESQ.

C O N T E N T S

ORAL ARGUMENT OF: PAGE

Mark B. Stern, Esq.
On Behalf of the Appellant 3, 41

Eugene Scalia, Esq.
On Behalf of the Appellee 13

1 P R O C E E D I N G S

2 THE CLERK: Case Number 16-5068, MetLife, Inc.
3 versus Financial Stability Oversight Council Appellant, Mr.
4 Stern for the appellant, Mr. Scalia for the Appellee.

5 ORAL ARGUMENT OF MARK B. STERN, ESQ.

6 ON BEHALF OF THE APPELLANT

7 MR. STERN: May it please the Court, I'm Mark
8 Stern for the Financial Stability Oversight Council. After
9 an elaborate process that took about a year and half, the
10 Council determined that the material distress, financial
11 distress at MetLife could threaten the nation's financial
12 stability.

13 Now it's undisputed that that is a relevant
14 statutory standard and it's also undisputed that MetLife
15 considered each of the specified factors that are laid out
16 in the statute to inform the Council's determination.

17 Now when the District Council set aside the
18 collective determination of the nation's chief financial
19 regulators, which by the way is a non-delegable
20 determination that has to be made by a two-thirds vote. The
21 Court cited two departures from the Council's own guidance
22 and one departure from what the Court believed was required
23 by the statute. And the departures from the guidance were,
24 the Court's view, that the Council was required to determine
25 the likelihood that, or at least consider rather, consider

1 the likelihood that MetLife itself would experience material
2 financial distress and it also found that the Council had
3 failed to predict with adequate specificity the ways in
4 which material distress at MetLife could destabilize the
5 economy.

6 The statutory departure that the Court identified
7 was a failure to do a cost benefit analysis.

8 JUDGE SRINIVASAN: Can we start with the first
9 issue you raised about the departure from the guidance on
10 the question of likelihood that the company would fall into
11 financial distress. Is it your view that the guidance just
12 cannot be read that way or is it your view that the guidance
13 need not be read that way and the Council later on flushed
14 out that it need not be read that way and wouldn't?

15 MR. STERN: We don't actually think that it can be
16 read that way and we think that there is a mention of
17 vulnerability in the statute that the District Council
18 relied on. But what the Council specifically said was it
19 wasn't adding any new factors that weren't set out in the
20 statute itself. And it explained that there were, that this
21 category, you know, that it described as being sort of
22 related to vulnerability. Sort of indicated what the
23 factors were and then it's not controverted that it applied
24 all of those factors.

25 Now the Council at no point --

1 JUDGE SRINIVASAN: So if the argument is that it
2 can't be read that way, which is the more aggressive
3 position, can I just ask you to address there's versions of
4 it, but in your brief I guess there's an addendum that has
5 the guidance in it. And if we look at the portion that
6 talks about leverage and it's the addendum page 17, under
7 the heading leverage, the first sentence is, leverage
8 captures a company's exposure or risk in relation to its
9 equity capital. Leverage amplifies a company's risk of
10 financial distress in two ways and then it goes on to
11 discuss two ways, the subsequent two sentences.
12 And then subsequently, it says leverage can also
13 amplify the impact of the company's distress on other
14 companies. So that part of it clearly is speaking to ripple
15 effects for the broader economy.
16 MR. STERN: Right.
17 JUDGE SRINIVASAN: On the sentences before that,
18 the first and the second, how do you read those sentences in
19 support of your conclusion that the guidance cannot be read
20 to speak to likelihood that a company will fall into
21 distress?
22 MR. STERN: What the Council is trying to
23 determine is not whether but how distress will affect an
24 institution in this case, MetLife, and how it's going to
25 affect that institution is relevant because in turn, as Your

1 Honor suggests, leverage, you know, liquidity, maturity,
2 mismatch, all of those things are ultimately relevant to the
3 determination that the Council is required to make, which is
4 if there is financial distress, material or financial
5 distress at a company, will that distress have like a
6 destabilizing include that material or financial distress
7 have a destabilizing impact. That's the only ultimate
8 question.
9 JUDGE SRINIVASAN: So that's definitely right or
10 it seems that you have the strongest position in that
11 respect to the sentence that follows first and second. And
12 the sentences that are first and second, it sounds to me
13 like what you're saying is those don't go to the likelihood
14 that the company will fall into financial distress, those go
15 to the implications for the company if there is financial
16 distress.
17 MR. STERN: Yes, that's how the Council has
18 understood this throughout. It did it in its previous
19 determinations, made clear throughout this process that
20 that's what it was doing. It provided MetLife with a
21 proposed designation which made clear how it was analyzing
22 it. There's no sort of argument here that MetLife that in
23 some way was prejudiced by the Council's understanding of
24 its guidance. You have to make all the arguments, present
25 all the evidence. It argued to the Council that the Council

1 should consider its likelihood of material distress and
2 understood that that isn't what the Council was doing, the
3 Council responded to that and you know there's the
4 discussion of it in its final determination.
5 But that's consistent both with the overarching
6 statute and everything that the Council has ever done and
7 there is a reason for that. Because the idea that you could
8 predict, I mean among other things, the idea that you could
9 predict the likelihood that a particular entity is going to
10 experience material financial distress is not what Congress
11 had in mind.
12 Congress was reacting to events like the collapse
13 of AIG. If you would have had to scroll back to 2005 and
14 predict whether it was likely that AIG was going to
15 experience material financial distress, probably the only
16 people who would have said that were the guys in the big
17 (indiscernible) who sort of were out ahead of everybody.
18 Nobody else was thinking that. And the idea that you could
19 predict with any kind of specificity what losses would be
20 and who would experience them.
21 Again, AIG is instructive. I mean AIG down to
22 its last weekend was increasing its estimates of its
23 liquidity shortfall, thereby sort of repeatedly doubling
24 over the course of days what it was. So that the idea that
25 sort of the Council looking into the indefinite future is

1 going to make a prediction about the financial health --
2 JUDGE RANDOLPH: It did make a prediction. The
3 prediction was there's 100 percent chance it's going to fail
4 and now this is, so we'll just take a look at what the
5 consequences are. That's a prediction isn't it?
6 MR. STERN: No, Your Honor, I mean certainly the
7 Council never predicted that there's 100 percent chance that
8 MetLife is going to fail. What the Council took as an
9 assumption and that's what the statute --
10 JUDGE RANDOLPH: That's what the assumption is.
11 MR. STERN: Well, the working assumption is that
12 it's facing imminent insolvency, that's set out both in the
13 final determination and the guidance. So the question is if
14 you're in that position, how is that likely to affect you
15 and if you are a highly leveraged company, if you've got a
16 mismatch between what money you think you owe and the money
17 you think you've got in terms of your ability to liquidate
18 your assets, if you were engaged in certain kinds of
19 transactions. All of those things are going to make you
20 more likely to have an effect on the broader market than if
21 you are, you know, have little leverage, you know, and are
22 highly liquid.
23 And then size and interconnectedness are of course
24 crucial. I mean these things are all related.
25 JUDGE MILLETT: Can I ask, where you think in the

1 Council's final determination are the best pages where it
2 applied vulnerability in the way that you are describing it
3 here?
4 MR. STERN: Gosh, the best pages.
5 JUDGE MILLETT: Because at least in the executive
6 summary to start they lay out vulnerability but then they
7 seem to only talk about transmission which I felt was the
8 second half of the test. And so I'm trying to see where
9 they're clearly embracing this under (indiscernible) and
10 vulnerability.
11 MR. STERN: Yes, I mean I think a whole bunch of
12 the like, I mean, the Council talks about leverage at JA-
13 554, and it talks about --
14 JUDGE MILLETT: Could you start on JA-390, so I'm
15 just starting with the executive summary. But they talk
16 about vulnerability and then all these factors are relevant
17 and here they're talking about leverage, liquidity risk and
18 maturity mismatch. So your three vulnerability factors a
19 relevant to assessment of whether and how material financial
20 distress at MetLife could be transmitted to other financial
21 firms and markets. And that seemed to me the second half of
22 this analysis because first we see how bad it's going to
23 affect you, what kind of wherewithal do you have as a
24 company to survive this. And if it's not good what, the
25 second inquiry is what effect is whatever you're having to

1 do going to have, how is it going to be transmitted?
2 MR. STERN: Yes, I mean --
3 JUDGE MILLETT: So that's why I'm confused.
4 MR. STERN: -- yes, no, I mean I think that the
5 thing is that they're both true. I mean these are all, I
6 mean, as the Council explained it was that these are
7 interrelated factors and Congress understood them to be
8 interrelated factors. So you know, your leverage, you know,
9 the kinds of businesses you engage in go to your
10 vulnerability, you know, in the sense that how is it, like
11 what are you likely to do. You know what problems what will
12 you be facing and then those feed also directly into the
13 questions of your size, your interconnectedness, who are you
14 dealing with, you know, what it will be, the impact.
15 But you know the Council goes through, I mean it's
16 indicated what --
17 JUDGE SRINIVASAN: I thought what Judge Millett
18 was getting at is that there's a sequence. The sequence is
19 distress could come up along three points in the continuum.
20 The first would be likelihood that the company is going to
21 fall into distress and MetLife's position is that has to be
22 considered. Your position is no, that doesn't have to be
23 considered. In fact, the guidance doesn't talk about
24 considering that at all.
25 The second step is in conditions of distress, how

1 does it affect the company? And then the third is, if it
2 affects the company then what are the outward ripple effects
3 of that for the broader market.
4 So on the second part of that continuum, the
5 question is where in the executive summary is that second
6 part addressed and --
7 MR. STERN: That I would have to look back to see
8 what I can tell you is that there is no dispute that
9 MetLife, rather the Council, considered all the factors that
10 it deemed relevant that it sort of grouped as being sort of
11 the more inward looking. And it looks at those factors not
12 because it's trying to predict whether any institution is
13 going to fail under certain circumstances. You know there
14 may be lots of institutions that are going to fail and that
15 could be very unfortunate for the stockholders of those
16 institutions --
17 JUDGE SRINIVASAN: Well how do you read this
18 sentence, because on that same page on that paragraph, the
19 one that Judge Millett is looking at on JA-390, there is
20 after a semicolon it talks about what Section 4.3.3 is going
21 to describe. Section 4.3.3 describes how MetLife Securities
22 lending activities result in a liquidity risk and a maturity
23 mismatch that could cause the company to rapidly liquidate
24 invested collateral to produce the necessary liquidity to
25 return cash collateral to securities lending counterparties.

1 And when it talks about the company do you read that to mean
2 likelihood that the company is going to fall in distress?
3 Do you read it to mean likelihood or consequences for the
4 company in conditions of distress or do you read it to go to
5 the third part which implications for the broader market?
6 MR. STERN: Well, both. I mean what it's saying
7 is that if you have leverage and that if people can demand
8 money from you sort of based on all sorts of financial
9 instruments, and particularly if you have, you know, a
10 hundred billion dollars, you know, or 90 billion just in the
11 capital, you know, markets alone that would fall into that
12 category.
13 Then when you are in trouble what you may do is to
14 try to liquidate your assets and then that in turn flows
15 into the way you're going to affect the broader market. So
16 that there's an increase, are you the sort of company that
17 will need to liquidate assets? Is the way you're doing
18 business sort of getting you there, and then what will the
19 result be if you're an enormous interconnected company. But
20 that's going to have a big effect on the broader market.
21 You know if you're not, you know, like that, you know, you
22 may be in trouble. But it's not going to have enormous
23 reverberations throughout the entire economy.
24 JUDGE SRINIVASAN: Yes.
25 MR. STERN: I see that my time is up.

DW

1 JUDGE SRINIVASAN: Do you have anymore, Ray?
2 JUDGE RANDOLPH: No.
3 JUDGE SRINIVASAN: Pat, do you have any questions?
4 JUDGE MILLETT: No.
5 JUDGE SRINIVASAN: Thank you.
6 MR. STERN: Thank you, Your Honor.
7 ORAL ARGUMENT OF EUGENE SCALIA, ESQ.
8 ON BEHALF OF THE APPELLEE
9 MR. SCALIA: Good morning, may it please the
10 Court.
11 JUDGE SRINIVASAN: Mr. Scalia.
12 MR. SCALIA: Eugene Scalia, representing MetLife.
13 All MetLife asks in this case is that FSOC be held to the
14 standards articulated by the Supreme Court in the State Farm
15 decision and applied by this Court for decades. Including
16 that it adhere to its own standards, that it based its
17 decision on evidence and applied expertise, rather than
18 implausible speculation and ipse dixit, that it respond to
19 significant evidence and argument in the record, and that it
20 consider the impact of its action, including superior
21 alternatives to that course of action, and finally, that it
22 accord due process.
23 On the topic of its standards, let me begin with
24 vulnerability but also talk about how it also departed from
25 its own standards when it came to the exposure analysis.

1 First, Judge Srinivasan, in addition to those passages that
2 you pointed out in the fun ruling sort of guidance that
3 seemed to be concerned about the occurrence of financial
4 distress, I understand would also mention and I don't have
5 the same pagination as you do, but later there are
6 references, for example to how well the company quote, is
7 matching the re-pricing and maturity of its assets and
8 liabilities. Is matching. How is it doing it currently?
9 Because maturity mismatch is one potential onset of
10 financial distress in a generally bad economic environment.
11   It also talks, this is page 26 in our appendix,
12 also discusses whether there is regular reporting to state
13 regulators. Well, that naturally goes the question of
14 whether the state regulators are on the job and able to
15 discern conditions that could be indications of the likely
16 onset of distress. Whether there are reporting obligations,
17 is going to be far less helpful once a company already is
18 there. Even more importantly though, if I could emphasize
19 the dog that doesn't bark.
20   The premise, the starting point of this final
21 designation is as Judge Randolph said, total failure. That
22 was an easy thing to say in the final rule of interpretive
23 guidance. We are going to assume an onset of absolutely
24 totally debilitating financial distress and it's actually
25 remarkable that Mr. Stern has cited you to Joint Appendix

1 454 because at that page there is an assumption actually of
2 deep insolvency and on the same page, FSOC goes on to assume
3 something even worse than a deep insolvency.
4 Judge Millett, this is on part relevant to some of
5 the questions that you had, because they actually never even
6 do their own made for litigation inquiry regarding
7 vulnerability to vulnerability. They just plunge MetLife to
8 whatever depths are necessary without any serious
9 examination of how it got there. And again on the question
10 of what was said in the final rule and interpretative
11 guidance, they said they were going to look at two things
12 and some of your questions picked up on this. Transmission
13 to third parties, vulnerability of MetLife. But on those
14 pages that we were looking at 390 to 391, those are
15 conflated and all they talk about is three different times
16 they talk about transmission to third parties or impact on
17 third parties. That second prong vulnerability of MetLife
18 is just gone from that analysis.
19 I also want to note that what FSOC did was it told
20 state regulators it was going to examine MetLife's
21 vulnerability to financial distress and on that basis sought
22 thousands of pages of documents from it that went to
23 MetLife's stability and soundness, such as stress tests
24 going back to 2007. What happened --
25 JUDGE MILLETT: Can I ask you something? Is your

1 view that the statute itself requires the Council to find an
2 actual likelihood of falling into financial distress or that
3 that's entirely a product of the guidance?
4 MR. SCALIA: We believe that that's the best
5 interpretation of the statute. But --
6 JUDGE MILLETT: And then what statutory, okay so
7 can you help me with the statutory language, because I'll
8 just flag a couple of things for you. One is in 5322 when
9 they set out the purposes and duties of a Council in
10 (a)(1)(H) I think.
11 MR. SCALIA: That's correct.
12 JUDGE MILLETT: They phrase it as terms of
13 companies that may pose risks in the event of their
14 financial distress or failure and that obviously the money
15 language most folks are talking about in 5323(a)(1) emphasis
16 is on could pose. Neither of those are posing a threat to
17 the financial stability because of their material financial
18 distress. It's all in the event of or could it pose and
19 hypothesizing language like that, which doesn't seem to me
20 as a textual matter in the statute but it's by the guidance
21 right now in the statute itself to command a specific
22 finding that they are likely to fall into financial
23 distress, let alone the repercussions of it. What text do
24 you --
25 MR. SCALIA: The Council, of course the Council --

1 JUDGE MILLETT: -- how am I misreading that in the
2 text?
3 MR. SCALIA: -- read the statute as we do would be
4 our first submission on that.
5 JUDGE MILLETT: All right. But I just --
6 MR. SCALIA: When you look at the statutory
7 factors, several of them go to the likelihood of the onset
8 of financial distress, if you're highly leveraged in a bad
9 market, you're more likely to experience financial distress.
10 JUDGE MILLETT: Well that could go either way,
11 right?
12 MR. SCALIA: It could go to both.
13 JUDGE MILLETT: Okay. So it doesn't compel.
14 MR. SCALIA: But it certainly does go to that.
15 JUDGE MILLETT: Well, but it depends on what
16 question, I mean looking at leverage itself doesn't at least
17 to me, answer the question of are we asking are they really
18 leveraged so that they are likely to go in distress or if
19 bad economic times come, what kind of internal financial
20 wherewithal do they have to withstand that in a way that
21 doesn't take others down with it? And so what in the text
22 compels because I thought said the statute requires them to
23 do it.
24 MR. SCALIA: Look, I wouldn't say there's an
25 explicit statutory compulsion and I admit it would be a

1 closer question, but we think it’s unreasonable under
2 Chevron Step 2 for this agency to --
3 JUDGE MILLETT: Okay.
4 MR. SCALIA: -- embark on the process of
5 designating a company and settling for the enormous costs if
6 there is no real foreseeable possibility that it will
7 experience financial distress in the horizon over which they
8 have the opportunity to review.
9 JUDGE MILLETT: But you agree we’re all in Chevron
10 Step 2 language on what this you know --
11 MR. SCALIA: I don’t think there’s an explicit
12 statutory command that directly states it. But I think
13 there is no permissible --
14 JUDGE MILLETT: So I think that means you agree
15 we’re in Chevron Step 2?
16 MR. SCALIA: I agree that, I would say that read
17 as a whole it is unreasonable to view the statute and read
18 as a whole the clear statutory command is that you need to
19 consider whether this company is reasonably likely to --
20 JUDGE MILLETT: So is that Chevron Step 1 or 2?
21 MR. SCALIA: I would characterize it as Chevron
22 Step 1 on balance. But it’s certainly Chevron Step 2 it’s
23 just totally an unreasonable ascending agency on a fool’s
24 errand.
25 JUDGE MILLETT: What do you with in the event of

1 language? Or may pose --

2 MR. SCALIA: I think it still begs the question is

3 that event going to come about? The language in 5323 is the

4 more specific to this enterprise and I think it's stronger

5 for us.

6 But if I could also mention, if I could turn to

7 the other respectively stated party from their standards

8 which is their exposure analysis, because there they have

9 departed from their own standards not only as stated in the

10 final rule of interpretive guidance where they said they

11 would consider whether exposures were significant enough to

12 materially impair. They restated that standard in the

13 designation itself and yet never applied their own tests.

14 MetLife came forward with expert evidence that its

15 third party exposures were not significant enough to

16 materially pair it. For example we --

17 JUDGE SRINIVASAN: No, no, they did incant that

18 language in the conclusion.

19 MR. SCALIA: They incanted it, exactly.

20 JUDGE SRINIVASAN: On both with respect to both of

21 their routes.

22 MR. SCALIA: And wherever they cite in their brief

23 that's exactly what they're doing, they're invoking a term.

24 But they never applied the test and they simply paid no heed

25 to evidence we showed that there wouldn't be material

1 impairment.

2 I want to talk for a moment just about the stress
3 testing. What we did was we said let's look at other
4 federal models that some of these member agencies use to
5 test the fortitude of a company and we showed that the
6 impact of a MetLife on the major banks and the major banks
7 are central to their analysis. We said the impact of a
8 MetLife failure on the major banks, even assuming virtually
9 a total loss, would be for example, 1/73 of the impact of an
10 adverse economic event that they withstood under the stress
11 test. So we said FSOC if this bank can withstand the stress
12 test, surely it won't be materially impaired by MetLife's
13 failure where we show --

14 JUDGE SRINIVASAN: Okay. So can I just ask you a
15 question, a context sitting question about this? So this
16 deals with the way that the FSCO in the guidance defined how
17 it was going to apply the threat standard and it says that a
18 threat to the financial stability exists if there would be
19 an impairment of financial intermediation or of financial
20 market functioning that would be sufficient severe to
21 inflict significant damage on the broader economy. So we're
22 talking about the application of that verbiage.

23 MR. SCALIA: Although there is other verbiage
24 throughout both the final rule and interpretative guidance
25 and the designation decision that talks about impacts on the

1 counterparties.
2 JUDGE SRINIVASAN: Yes.
3 MR. SCALIA: The theory is domino effect and they
4 never applied the domino theory, they just added it up and
5 said well that's a lot of exposure without taking the
6 account of federal stress test rules which showed there
7 wouldn't be a significant impact without taking account of
8 federal rules regarding collateral. We tried to explain to
9 them, just context, the CEO of this company told the Council
10 this was the biggest threat to the company in its history,
11 getting designated.
12 And so one thing we said look at your federal
13 banking rules regarding collateral, treat collateral in the
14 same way here as you treat it under the federal banking
15 rules and our exposure is dropped by 30 billion dollars.
16 But FSOC said we're not going to use federal rules regarding
17 how collateral is treated. So Mr. Stern talked about how
18 hard the task before FSOC was. But when a task is hard, you
19 use these expert federal models that existed elsewhere. You
20 certainly respond to the evidence on stress testing, on the
21 analogy that we drew to fines the Government imposed and how
22 much larger they were than a MetLife failure. It's not that
23 the Government had a bad argument, it ignored us.
24 JUDGE SRINIVASAN: But so is your argument that
25 it's arbitrary and capricious, for example, on stress tests

1 not to conduct the stress test analysis that you put
2 forward? It's arbitrary and capricious because it conflicts
3 with the guidance or is your argument that it's just
4 arbitrary and capricious not to take that into account
5 because it's an obvious thing that should have been taken
6 into account?
7 MR. SCALIA: Plain old State Farm is significant.
8 JUDGE SRINIVASAN: Okay. So we're talking about
9 the second category --
10 MR. SCALIA: Significant evidence argument in the
11 record that they didn't acknowledge a response. They just
12 ignored it and that was just garden variety arbitrary and
13 capricious particularly in a context where its federal rules
14 and where they said you know we need guidance. Another
15 place that they did it was with respect to simply their
16 treatment of the state insurance expertise that Congress
17 placed on that body.
18 The state, impotent state insurance experts on
19 FSOC said they dissident, they said this is totally
20 improbable and they laid out in detail why it was that state
21 regulators would intervene, how they always do that and FSOC
22 ignored that again. So it's claiming deference to
23 expertise, but it ignored --
24 JUDGE MILLETT: Can I just ask you one thing on
25 the stress test, how do stress test measure impact on others

1 as opposed to the ability of the company itself again, its
2 own internal wherewithal?
3 MR. SCALIA: The stress test that is conducted by
4 the fed against the banks hypothesizes an economic impact on
5 a bank and hit sit really hard, a severely adverse scenarios
6 and says how did that bank withstand it? What we did is we
7 said let's impose, let's look at the impact on that bank of
8 a MetLife failure compares to the adverse economic impact
9 the fed found that bank withstood. So we didn't suggest
10 that stress test be done on MetLife, we said let's compare
11 the impacts and survivability and we said MetLife's impact
12 is minuscule compared to what you, the federal government,
13 said that bank can withstand. How can you now turn around
14 and tell us that we're a threat to a material impair that
15 very same bank?
16 If I could talk --
17 JUDGE MILLETT: Well isn't the question that's
18 asked the impact of a MetLife failure or your failure, at a
19 time of already a severe downturn in the economy as opposed
20 to a healthy economy?
21 MR. SCALIA: I'm sorry?
22 JUDGE MILLETT: So it's not just that MetLife is
23 an island onto itself facing financial distress and everyone
24 else is having rosy days. The assumption for the analysis
25 here is we kind of have to assume things are really going

1 badly and MetLife is at least on the brink of insolvency or
2 severe financial failings and the rest of their partners, or
3 those that they interconnect with are themselves facing
4 maybe not as far down the road as MetLife is hypothesized to
5 be, but facing a severe economic downturn. And so how does
6 a stress test capture that sort of double whammy?
7 MR. SCALIA: Well, they certainly did set the
8 stage to make it much easier for themselves by drawing all
9 those adverse assumptions. But the short answer, Your
10 Honor, is they just never responded to the analogies that we
11 drew to assess what --
12 JUDGE MILLETT: Did your stress test, your
13 analogy, your evidence analyze it on those terms? Or did it
14 look at stress tests in ordinary financial times and then
15 that context for some reason a single failure of MetLife
16 with everything else going along normally, what impact it
17 would have?
18 MR. SCALIA: We did not, what we compared was a
19 total loss of MetLife exposure, which was unreasonable, for
20 reasons we elsewhere explained.
21 JUDGE SRINIVASAN: Right.
22 MR. SCALIA: With an adverse economic environment
23 that was severely adverse that the banks can withstand. We
24 didn't put another context around the MetLife impact on the
25 counterparty.

1 On the other hand, they never even considered the
2 evidence, they didn't respond in any way. Under Chenery
3 (phonetic sp.) they're just out on that issue. Another
4 issue they're out on that I do want to speak before I sit
5 down, is the asset liquidation scenario.
6 Those 84 pages of the designation can be put aside
7 for a simple reason. They all assume the entire asset
8 liquidation scenario assumes that MetLife won't act to stop
9 and that the states won't act to stop the return of
10 shareholder, the return of policies. The scenario they
11 hypothesized was that MetLife was in such terrible shape
12 that millions of policyholders are demanding their policies
13 back and yet nonetheless --
14 JUDGE MILLETT: It's not just policyholders,
15 right? There's a lot of people that hold that the way
16 MetLife system is set up, a lot of people hold a lot of
17 money on MetLife. It's not just life insurance policies
18 that are going to get turned in. That was, I mean I don't
19 think that's quite fair for their analysis. It was much
20 more comprehensive given sort of short term debt that
21 MetLife holds.
22 MR. SCALIA: Those enormous --
23 JUDGE MILLETT: And other investments.
24 MR. SCALIA: -- Your Honor those enormous numbers
25 they generated for the asset liquidation were predominately

1 from insurance liabilities. And it’s totally, it disregards
2 the state regulatory system. It disregards the state --
3 JUDGE MILLETT: They didn’t disregard it, they
4 analyzed it and they said look no one state regulator and
5 the whole point is that they’re doing their own little
6 pockets of what these businesses do and that there’s nobody
7 looking at MetLife as a whole and what that impact is going
8 to be.
9 MR. SCALIA: But Your Honor, MetLife also had its
10 deferral authority that would have enabled it to stop the
11 outflow and what FSOC said was that MetLife might not
12 exercise that, because it would send a negative signal which
13 is a preposterous response, the deferral of power is
14 required by state law. If your policy holders are coming to
15 you by the millions to end their policies by you’re not
16 going to be worried about sending --
17 JUDGE MILLETT: What if it’s not policyholders?
18 What if it’s people who hold debt?
19 MR. SCALIA: But Your Honor I’m getting at a
20 slightly different point which how irrational it was for
21 them to assume that MetLife wouldn’t defer because it didn’t
22 want to send a negative signal, a death knell had already
23 been sent under the scenario 3, which MetLife told them was
24 totally implausible, MetLife was not writing business
25 anymore. If you called and tried to get a MetLife policy

1 they'd say we don't do that anymore. And again, the average
2 Joe policyholder is banging down the doors to return his
3 life insurance policy.
4 FSOC said that in that circumstance, MetLife
5 wouldn't exercise deferral even though MetLife said we would
6 have a fiduciary duty to do so. In every other insurance
7 failure that's been examined either there was deferral
8 exercised or state intervention. And Judge Millett, with
9 respect to the efficacy of state intervention, you know,
10 with all respect, it wasn't FSOC that had the expertise on
11 that. It was the state insurance regulators. And there
12 were about 10 different letters submitted by state insurance
13 regulators who said we do this regularly and it works very
14 well. And the non-insurance experts on FSOC just speculated
15 that well maybe it wouldn't work here. But that's not
16 grounded in expertise. They essentially engaged in a flight
17 from the expertise that Congress put on that body.
18 JUDGE SRINIVASAN: Can I ask you to address a
19 broader question which is the statute has provisions that
20 deal with banks, bank holding companies and then it has
21 provisions that deal with non-financial companies. And as
22 to the former it occasions the Federal Reserve's authority
23 anytime there is 50 billion dollars in assets period,
24 without worrying about a lot of the things that we've been
25 talking about this morning. Because it assumes that there's

1 an interconnectedness and ripple effect and things of that
2 nature that justify the added regulatory burden.
3 If the FSCO goes through the analysis and
4 determines that a company like MetLife has a similar scale
5 of interconnectedness and it's similarly significant in the
6 overall economy, then doesn't the fact that the statute
7 speaks in terms of 50 billion automatically occasioning
8 Federal Reserve authority suggest that a lot of the things
9 we've been talking about this morning may be things that the
10 FSOC could have looked at but that they weren't out of
11 bounds for not looking at them?
12 MR. SCALIA: Judge Srinivasan, I agree there were
13 other ways that this agency could have approached the
14 designation of the non-banks. We're not asking you to
15 ordain that there was one specific way that it could be
16 done. What we're asking you to rule is that they set it out
17 doing it in a particular way and then they did it in an
18 unreasonable way they disregarded evidence, they didn't even
19 respond to really important evidence, for example.
20 With respect to your question, more broadly, banks
21 and insurance companies are different and that's precisely
22 why having assets significantly in excess of 50 billion
23 dollars when you're not a bank doesn't pose the same kinds
24 of concerns that might in the bank and briefly banks are
25 much more connected within the financial system. And

1 they're very prone to runs, one of the difficulties Judge
2 Millett that we had with this run scenario they hypothesized
3 is that it's a creature of the banking world where people
4 have their money in a bank because they want ready access to
5 their money, whereas if you buy a life insurance policy for
6 a completely different reason.
7 MetLife hired a firm to examine the historical
8 insurance failures and they reflected an extremely different
9 pattern than the failure of a bank and in these analyses
10 that Oliver Wyman did, the expert firm, it actually
11 significantly increased the distress at MetLife and the
12 asset sales were going on far beyond any historical model.
13 For example, Oliver Wyman's scenario 2 was AIG,
14 which was a highly publically observe failure that took over
15 place over several months before the federal government
16 intervened. That was scenario 2. Nobody thinks scenario 2
17 would adversely affect broader markets. Scenario 3 if you
18 look at Joint Appendix 1187, you'll see the piece of assets
19 sales which MetLife told FSOC was totally implausible it's
20 far faster than had ever been seen from insurance company.
21 So we were willing to give some margin, some
22 benefit of the doubt to be protective. That Oliver Wyman
23 scenario 3 analysis still showed that MetLife could meet
24 this totally unreasonable demand on its assets and still not
25 adversely affect the economy. Remembering again that if the

1 state regulators do what they said they would do, what they
2 historically do, what they're required by law to do, you
3 would never be in that asset liquidation scenario.
4 JUDGE RANDOLPH: Can I ask you, I'd like before
5 you sit down, one of the points you made as I understand it
6 is that the Council never considered the impact of
7 designation on MetLife. That the amicus brief filed by the
8 academic experts points out that there is an executive order
9 outstanding, issued by President Clinton and requiring the
10 costs of regulation to be considered.
11 My question is does that executive order apply to
12 this Council which is made of various individuals?
13 MR. SCALIA: I don't know if it applies by its
14 terms, it is an unusual body. What I would --
15 JUDGE RANDOLPH: It's got executive officers.
16 MR. SCALIA: It does. I believe the majority of
17 its voting members are indeed executive officers, now some
18 of them are independent agencies.
19 JUDGE RANDOLPH: Right.
20 MR. SCALIA: So you have a difference there when
21 it comes to the executive order. But what I would like to
22 emphasize about that is first of all, again the Chenery
23 Doctrine, which is so fatal to so much of what FSOC would
24 like to argue now. They gave one reason for not considering
25 the impact on MetLife in broader economy of what the CEO

1 stood before these powerful regulators and said was the
2 biggest threat in the company's history. They gave one
3 reason, and here's what it was.
4 They said well statutory sections A through J are
5 the mandatory factors to consider. You're asking us to
6 consider the adverse effects on MetLife in the broader
7 economic under the catchall at K. They said well we're not
8 going to consider it under the catchall at K because it's
9 not one of the mandatory factors at A through J. I mean
10 that is just the quintessence --
11 JUDGE MILLETT: I don't think that's what they
12 said. I think they said it's not looking at the same
13 concerns, it was sort of the, you know, words known by the
14 company it keeps so that they wanted to make sure that when
15 they talked about other risk related factors down there,
16 that it would have the same face and it would face the same
17 types of risks as the factors that were before it. Isn't
18 that exactly more how they did it?
19 MR. SCALIA: That's their position now.
20 JUDGE MILLETT: Right. They didn't say it wasn't
21 one of those other factors.
22 MR. SCALIA: They did. When you read that
23 paragraph --
24 JUDGE MILLETT: What page is that?
25 MR. SCALIA: -- they gave, I don't have the

1 immediate page in front of --

2 JUDGE MILLETT: Sorry.

3 MR. SCALIA: -- me, I apologize, but I can find it

4 quickly. They gave this all of one paragraph and in it

5 their emphasis was on what the statute required and they

6 said because it wasn't statutory required they weren't going

7 to examine it. And again that makes hash out of a catchall.

8 I also want to emphasize that we were not asking

9 for a quantitative cost benefit analysis in the manner, even

10 of the executive order, Judge Randolph. All we were saying

11 was because the statute is meant to be protective of

12 designated companies, you ought to consider whether this

13 will be protective or harmful and they said well it's not a

14 statutorily mandated factor so we're not going to want to

15 consider it.

16 JUDGE RANDOLPH: But I mean is as MetLife's

17 argument on that score that the designation itself will

18 enhance the possibility that MetLife will go into financial

19 distress?

20 MR. SCALIA: What we explained was that it would

21 make MetLife less profitable, weaker. It would harm the

22 company and we didn't say it would drive it to bankruptcy.

23 JUDGE MILLETT: The designation or the prudential

24 standards that the Board would impose?

25 MR. SCALIA: At the time that we were before FSOC

1 until literally the last day they were required to apply
2 capital standards that were the same as those applied at
3 banks and that’s what we analyzed it under and those capital
4 standards are extremely adverse for an insurance company.
5 JUDGE MILLETT: When you say they, are you talking
6 about the Board or the Council?
7 MR. SCALIA: The Fed. But under any regime the
8 capital standards apply to FSOC are required to be higher
9 than those otherwise applied which means as a matter of law,
10 once you’re designated you have to have capital standards
11 higher than the great majority of your competitors.
12 JUDGE MILLETT: My understanding is that the Board
13 when someone is designated that makes an individualized and
14 it’s okay, you don’t need to hunt for it. That’s fine. I
15 don’t want to distract you. The Board then makes an
16 individualized study and it may well, you’re probably right
17 in predicting there’s certainly a good chance that it will
18 impose those same requirements that it has out there. My
19 question to you is more of a procedural one. If the problem
20 is the consequences of the regulations themselves, do you
21 have an opportunity, my assumption is you do, have an
22 opportunity to challenge whatever regulatory plan the Board
23 devises for MetLife and if so, I assume you’ll be perfectly
24 free to raise this cost argument there once we have an
25 actual regulatory program in front of us to look at.

DW

1 MR. SCALIA: Two part answer.
2 JUDGE MILLETT: Yes.
3 MR. SCALIA: As the law is now, because there was
4 a Congressional amendment that very day, as the law is now,
5 once you're designated, you must have higher capital
6 standards which automatically makes you less profitable.
7 As the law was until literally the day of
8 designation, those capital standards also had to be the
9 heightened standards applicable to a bank. There are other
10 things that fall immediately from designation. You are
11 subject to fed oversight which is among the most intrusive
12 forms of regulation in the federal government. When we
13 prevailed in this case before the District Court it resulted
14 in approximately a dozen federal bank examiners who had been
15 on our property for months to have to leave and yet,
16 remarkably, the federal government argues in its brief that
17 our constitutional interest weren't even implicated in this
18 case. So there are a number of things that fall from
19 designation.
20 Your Honor, it's JA-390, 391, I'm sorry, I didn't
21 have it.
22 JUDGE MILLETT: Okay. I'm sorry to have
23 distracted you in that.
24 MR. SCALIA: I also want to briefly mention --
25 JUDGE MILLETT: So that was the executive summary

1 where they did that.
2 MR. SCALIA: Your Honor, that's what's disturbing
3 about it. They gave one paragraph to our argument that you
4 are going to harm this company. The CEO stood before these
5 very powerful federal regulators, and said this is one of
6 the greatest threats we face and they said that the impact
7 of their actions was not of their concern, which is so
8 extraordinary for a regulator to say we're not really going
9 to worry ourselves whether we adversely affect you or
10 whether we even further the purposes of the statute. That's
11 just garden variety --
12 JUDGE SRINIVASAN: So on that part of it --
13 MR. SCALIA: -- arbitrary and capricious.
14 JUDGE SRINIVASAN: -- for the purposes of the
15 statute, I guess as I understood what is going on is to the
16 extent that your argument is the designation occasions
17 consequences that are adverse to the company, Congress
18 viewed designation to be part of a cure. And it just seems
19 a bit odd to say that the cure that Congress deemed
20 warranted actually occasions the harm that Congress was
21 trying to avert.
22 MR. SCALIA: It would be --
23 JUDGE SRINIVASAN: Because Congress already
24 decided what should happen. It might have been wrong or it
25 might have been short sided, but from the agency's

1 perspective, isn't the agency stuck with what Congress says
2 should happen in these circumstances?
3 MR. SCALIA: Well Your Honor, suppose I'm right,
4 suppose I'm right.
5 JUDGE SRINIVASAN: Yes.
6 MR. SCALIA: And in an even more severe case where
7 designation will indeed cause deep financial distress, cause
8 failure, radiate out and adversely affect the economy.
9 Would Congress have wanted the Council to consider that?
10 Absolutely. But their answer was it's none of our business.
11 It's none of our business to concern ourselves with the
12 impact of ration, which is wrong.
13 A related point, one of the reasons you look at
14 impact and you look at cost is in order to consider better
15 alternatives. And we've got the same kind of answer on
16 alternatives and this was just a couple of sentences and you
17 might ask me where and I might have to look and I apologize,
18 but it's hard to find, to suffice it to say.
19 I mean this is again, just heartland State Farm.
20 You consider the impacts to assess where their alternatives
21 are superior and one of MetLife's repeated points to FSOC
22 was for asset managers who manage trillions more in assets,
23 five trillion, three trillion, we said you're taking this
24 activities based approach, we'd ask that you take this
25 activities based approach for us and in fact initially FSOC

1 had been looking at company by company designation for asset
2 managers. But now it's shifted toward activities based
3 approach and MetLife said we'd like the same. And FSOC just
4 said well we're not going to consider that for you because
5 we're not considering that for you. That was the their
6 response, which is just heartland arbitrary and capricious,
7 that sprang in turn from a process where the same people who
8 had investigated and were now prosecuting the case against
9 us, were also involved in adjudicating it. Which in turn
10 manifested itself and I think there were some --
11 JUDGE RANDOLPH: Were they involved in the
12 formulation of the regulations and the guidance too?
13 MR. SCALIA: They were. This staff --
14 JUDGE RANDOLPH: Is that argument a due process
15 argument or a separation of power?
16 MR. SCALIA: It's both, Your Honor. The cases
17 tend to focus a bit more on due process.
18 JUDGE RANDOLPH: I noticed that the government, or
19 not the government, the Council invokes a state court
20 decision of the Supreme Court of the United States, the
21 Withrow (phonetic sp.) case, which I take it has nothing to
22 do with the separation of powers.
23 MR. SCALIA: That's correct, Your Honor. And
24 there are other important differences from Withrow. All
25 Withrow said was you look at whether there's a risk of bias

1 and some mixing and blending by itself isn't enough. But we
2 have more here. We have the fact that the record was
3 withheld from MetLife. So there was secret evidence that we
4 didn't even get to see until we were --
5 JUDGE MILLETT: I just want to ask one predicate
6 question. That sure sounds like a due process argument that
7 you're making now, not a separation of powers one. What is
8 the protected property interest?
9 MR. SCALIA: Well and Judge Millett, they argue
10 there's not. It's many fold. MetLife has paid millions in
11 assessments to the government as a designated entity that's
12 required, I believe it's under Section 5330. As I
13 mentioned, it immediately became subject to fed supervision.
14 There were about a dozen federal bank examiners on its
15 premises for months or maybe a year after it got designated.
16 That is obviously a direct constitutional interest. To me,
17 it's remarkable that the government would have told you that
18 we had no constitutional interest in avoiding paying
19 millions in assessments, in avoiding being subject to
20 federal supervision, in avoiding having bank examiners on
21 its property.
22 But again that comes to how cavalier FSOC was
23 towards the consequences of what it was doing to this great
24 American company. They also withheld from us their own
25 precedence.

1 They would not give us the approved designation
2 decision or the AIG decision, even though obviously we would
3 have wanted to pour over those to see how we could better
4 frame our arguments and yet when it came to litigation in
5 the District Court they very quickly provided their decision
6 against us to their emike (phonetic sp.) so their emike
7 could file briefs. That's not fair and it reflects this
8 prejudice, this lack of balance that was an out grove of the
9 kinds of concerns that Withrow recognized are indeed very
10 substantial.
11 JUDGE WILKINS: You're separation of powers
12 argument I understand that there's statutory requirements
13 that were imposed upon you once there was designation.
14 Those weren't imposed by the Council. Did the Council
15 impose any regulations on you through its designation
16 distinct from what the statute already put in place?
17 MR. SCALIA: What the Council did, Your Honor, is
18 triggered duties and burdens that occur as a matter of law
19 through designation.
20 JUDGE MILLETT: Congress said when they made a
21 designation --
22 MR. SCALIA: These things follow and indeed they
23 did.
24 JUDGE MILLETT: -- these things will happen. But
25 the things that followed were imposed by Congress?

1 MR. SCALIA: But they were direct impacts on
2 MetLife that certainly implicated its constitutional
3 interest in not having to pay assessments and not having to
4 yield some of its property to a bevy of bank examiners and
5 the like.
6 So talking about due process and simply my point
7 there is that Withrow talks about something more than just
8 this mix, and we certainly had something more in this case.
9 Unless there are any further questions, I just
10 would like to emphasize again, we're in the heartland of
11 State Farm, arbitrary and capricious review. You've heard
12 from Mr. Stern that these are challenging decisions to make.
13 All the more reason to call upon existing federal rules
14 which would have informed what they were doing, like rules
15 about collateral.
16 All the more reason to give weight to the
17 insurance expertise that Congress put on this body. FSOC
18 cannot disregard the insurance expertise that Congress put
19 on this body and then turn around and claim deference to
20 judgments it made that were primarily about the insurance
21 industry.
22 Finally, what FSOC did was conducted this
23 assessment in a manner that was not even handed so that
24 measures that ordinarily are protective and are recognized
25 as such both by the federal government and the states, was

1 suddenly turned into risk factors, including when the states
2 intervene or when MetLife exercised its deferral authority.
3 JUDGE MILLETT: And is --
4 MR. SCALIA: For all these --
5 JUDGE MILLETT: I'm sorry.
6 MR. SCALIA: Yes?
7 JUDGE MILLETT: Just to clarify one thing going
8 out of here. For all the reasons you've given do you say
9 that they all are both Chevron Step 1 reading the statute in
10 a way that you would say is reasonable and workable or is
11 this all your State Farm Chevron Step 2 and it's just a
12 failure of appropriate analysis?
13 MR. SCALIA: Virtually all State Farm Chevron Step
14 2, Your Honor. We are not here making a tall claim that no
15 insurance companies can be designated. We're simply saying
16 that in this case, they made some very rudimentary errors
17 that time again this Court have recognized would result in
18 vacating and importantly under the National Fuel Gas Supply
19 decision of this Court, the failure of any part of their
20 analysis is sufficient to doing the whole because they said
21 they were relying on all parts and not resting on different
22 components alternatively. Thank you.
23 JUDGE SRINIVASAN: Thank you. Mr. Stern, we'll
24 give you back three minutes to start.
25 ORAL REBUTTAL OF MARK B. STERN, ESQ.

1 ON BEHALF OF THE APPELLANTS
2 MR. STERN: Thank you, Your Honor. There are a
3 lot of things said, a lot of those are addressed point by
4 point in our reply brief, sort of and probably in more
5 detail than I could hope to accomplish now. The --
6 JUDGE RANDOLPH: Your reply brief doesn't deal
7 with the, I mentioned to Mr. Scalia the academic experts
8 amicus brief, you reply brief doesn't deal with that at all,
9 does it?
10 MR. STERN: I'm sorry, Your Honor, was this the
11 point about the requirement to take the cost benefit?
12 JUDGE RANDOLPH: Well it's also that risk
13 regulation necessarily involves an evaluation of the
14 likelihood of the risk occurring.
15 MR. STERN: Your Honor, that's not what the risk
16 is.
17 JUDGE RANDOLPH: And there are ample authorities,
18 they cite Federal Reserve rules, they cite other agency
19 rules that take that into account.
20 MR. STERN: I mean, Your Honor, nobody thinks that
21 all the 30 banks that are subject to Federal Reserve
22 regulation under Dodd-Frank are all likely to fail. I mean
23 that's not why we have these regulations.
24 JUDGE RANDOLPH: That's not the question. The
25 question is whether they can take I not account he

1 likelihood of failure?
2 MR. STERN: Your Honor, that's whether they could
3 take into account or whether they needed to take it into
4 account. And again if you look at AIG which is really you
5 know I think sort of the quintessential example of what
6 Congress had in mind was it recognized that there were
7 institutions that dealt heavily in the capital markets that
8 nobody had predicted were --
9 JUDGE RANDOLPH: I know now you made that
10 argument. But the reason I said could is because I
11 understood your opening argument to mean or to say that it
12 was impossible to do any kind of predictive judgment.
13 MR. STERN: I do think that it's very, very hard.
14 JUDGE RANDOLPH: Did the Council ever say that?
15 MR. STERN: Yes. I mean the Council does --
16 JUDGE RANDOLPH: That it was impossible?
17 MR. STERN: -- talk about that and it talks about
18 2008 and it cites all of, I mean and it explains the
19 background of this and says that once a financial crisis
20 develops how it's going to proceed is extremely difficult to
21 predict. And what the Council did was not to say this for
22 sure will happen one way or the other, I mean nobody can do
23 that. Like what it said is these are the ways in which it
24 could happen and this is an institution that you know we
25 can, like there's a dispute about whether there is 183

1 billion dollars of exposure. MetLife says no that's 90
2 billion dollars of exposure because there would be recovery
3 regs to which the Council said look we're not saying that
4 there's going to be 183 billion dollars of losses on the
5 part of your counterparties.
6 What we're saying is this is a measure of how
7 large and interconnected you are and if you think that 90
8 billion dollars of losses is the right figure, that's an
9 extraordinarily high figure. I mean it's hard to know who
10 other than, I mean MetLife is the quintessential example of
11 what Congress would have had in mind when it asked Dodd-
12 Frank. I mean, you know this is it.
13 JUDGE MILLETT: Can you address some of their
14 concerns about at least an exposure of transmission channel
15 and that part of the analysis, the lack of, as they said,
16 concrete analysis of what the impact is going to be on other
17 companies. Such as using stress tests or such as using what
18 they called CCAR testing, those types of things. There
19 wasn't much, it was sort of, it's very big and it reaches
20 into an awful lot of industries with an awful lot of money
21 on the line and so therefore it's going to satisfy the
22 exposure channel without anything more concrete?
23 MR. STERN: No, I think, I mean the Council's
24 discussion is a whole lot more specific than that. I mean,
25 you know, I know the length of the decision alone doesn't

1 tell you whether it's a good and comprehensive decision.
2 But you know, I've actually read through his 341 pages a few
3 times, and it's got, it is really --
4 JUDGE MILLETT: Yes, but when you get to the
5 exposure channel pages which I've also read, there isn't a
6 lot of concreteness there about the impact. It seems to be
7 a determination, maybe this is defensible or not that's what
8 I'm asking you that, look this is so big, so much money and
9 they are exposure sort of tentacles reach in so many
10 different, so deep and so far in so many places with so much
11 money that we just conclude that there is bound to be the
12 type of impact that would cause severe financial distress --
13 MR. STERN: Well they could cause it.
14 JUDGE MILLETT: -- on the economy. Is that what
15 they need to do or do they need to, they make a reasonable
16 enough sounding argument that you can't just say we're
17 really big and we're in a lot of areas. You really have to
18 look at how it's going to impact the companies and when you
19 look at the companies by companies that they're interacting
20 with, they can withstand it.
21 MR. STERN: Well, but the issue isn't whether any
22 one company would go under. I mean we discuss in our reply
23 brief that the problem with AIG was not as we know that its
24 specific counterparties were going to necessarily fail if
25 AIG went under. It was the extent to which AIG was going to

1 contribute to and the failure of AIG, was going to
2 contribute to a really scary economic situation and you
3 don't have to.
4 JUDGE MILLETT: But you've already begged into the
5 question you're asking in the first place, a pretty scary
6 economic situation and that is that everybody in the economy
7 is facing a severe downturn and that MetLife, a company of
8 that size is on the brink of insolvency. So I don't think
9 taking that assumption and then trying to analyze its
10 consequences, in analyzing those consequence, you're not
11 specific enough when you say well, it's really, really a bad
12 situation here so we assume bad things are going to happen.
13 MR. STERN: Well I mean I just, I'd prefer the
14 Court to, I mean we give a lot of cites, particularly in our
15 reply brief and I mean in the end the determination has to
16 speak for itself. And we think that the determination goes
17 into, doesn't just say you're in a lot of places, you've got
18 tentacles. It describes in detail the kinds of
19 transactions, the securities lending program, the guaranteed
20 investment contracts, multiple other financial instruments
21 in the capital markets. It talks about who the
22 counterparties are. I mean it sort of walks through --
23 JUDGE SRINIVASAN: So what about the testing that
24 they point out could have been done but wasn't done. Is
25 your response to that kind of testing including the stress

1 test, is your response to that that it would have been
2 counterproductive to do it and there was a problem or is it
3 just that we could have done it and maybe it would have been
4 illuminating but we just didn't have to?
5 MR. STERN: Well I mean I think, there are a
6 couple of answers. We note in our reply brief that the
7 Council did conduct some tests that are sort of analogous,
8 the stress tests. But again the point of the stress test is
9 to predict just like are you going, I mean it's sort of
10 takes us full circle. I mean the point of the stress test
11 is are you going to fail. And that's not the inquiry.
12 JUDGE SRINIVASAN: No, I thought the point of the
13 stress test was to assess what happens in the event that the
14 failure comes about. Doesn't it go to the way that the
15 institution reacts in that situation also?
16 MR. STERN: Well, I think there are two different
17 arguments that were being made. One is that the Council
18 should have conducted a stress test and the other is that
19 there were stress tests done on banks and that the banks
20 wouldn't, and that even banks that did a lot of business
21 with MetLife weren't, weren't failing the stress test. And
22 again the point is not whether any one institution would
23 fail, and under that theory what you would have, is since
24 only one bank in the June stress test came away with
25 anything less than a total clean bill of health. What

1 that's telling you is, is essentially MetLife is that the
2 Council couldn't designate anybody, you know, and you know
3 it's sort of an apples and oranges kind of question. We
4 aren't looking to see whether a particular bank would go
5 under. What we're looking at is sort of a whole series of
6 events with lots of different counterparties, lots of third
7 parties and you know MetLife sort of poo-poos (phonetic sp.)
8 the impact on third parties. But that's absolutely crucial
9 because as the Council explained those third parties don't
10 necessarily know the risk, the exposure of MetLife's own
11 counterparties. You've got a freezing up sort of the entire
12 flow once things start to go downhill. And again it's
13 just --
14 JUDGE MILLETT: It starts to sound like the asset
15 liquidation channel is driving everything here. That all
16 this analysis of what they have, what they're going to do,
17 how much they're going to have to call in, who is going to
18 call in other things on them. All of that analysis seems to
19 make it essentially foreclose, it's hard to imagine how
20 anything could ever when it has, when it satisfies the asset
21 liquidation factor isn't going to necessarily satisfy the
22 exposure transmission channel because, golly gee, there's
23 really nothing more to look at because we've just found that
24 they have a lot of, a huge amount of money, a lot of
25 exposure. It just doesn't seem like that has any rigor to

1 that.

2 MR. STERN: I mean I've got to think that through,

3 Judge Millett. But whether or not that's true, I don't

4 think there's anything sort of --

5 JUDGE MILLETT: Well they have to file, I mean

6 according to the Council they have to meet both prongs of

7 that test.

8 MR. STERN: No, I don't think that's true.

9 JUDGE MILLETT: As it would --

10 MR. STERN: No that's not right.

11 JUDGE MILLETT: Well, at least they're telling us

12 they relied on determinations --

13 MR. STERN: No, no, they were --

14 JUDGE MILLETT: -- under both prongs.

15 MR. STERN: Right. But I mean if you look, I mean

16 if in the end one looks at this and goes gee, the exposure

17 channel really is most informative in that it tells me about

18 the problem of asset liquidation. And let's just assume

19 that that was a conclusion. There is nothing wrong with

20 that. You know, the question is did MetLife apply factors

21 in the statute to make the determination? It did respond to

22 sort of the various sort of pieces of information, you know,

23 that were put forth. I'd like to say that in terms of cost

24 benefit analysis which the theory of the cost benefit keeps

25 changing a little bit, is it a cost, is that a cost benefit

1 to MetLife or is it a cost benefit to the overall sort of
2 point of the statute --
3 JUDGE RANDOLPH: Did that executive order apply to
4 this case?
5 MR. STERN: I don't know the answer, Your Honor,
6 but if it's an executive order, I mean I'm familiar with the
7 executive order that applies to regulations. This isn't, I
8 mean this determination is not a regulation, so I don't know
9 if --
10 JUDGE RANDOLPH: Well the guidance is in a way and
11 one wonders whether the guidance was in compliance with the
12 executive order and should be construed that way.
13 MR. STERN: I mean the guidance is specifically not
14 a regulation. I mean it makes that very clear. So I don't
15 think that the executive order by its terms would apply.
16 JUDGE RANDOLPH: The regulation is an
17 interpretation of the statute. The guidance is an
18 interpretation of the regulation and the decision here is an
19 interpretation of the guidance.
20 MR. STERN: I don't think that actually the
21 guidance is an interpretation of the regulation. I mean
22 it's really just explaining how the Council is going to
23 proceed. It makes very clear that it's not adding anything
24 to the statute and nor of course is it taking away anything
25 from the statute. And the arguments about the impact, what

1 the Council itself said in the pages that were being cited
2 is look we, like the process of the Federal Reserves like
3 prudential regulations and what they're going to say and by
4 the way, they haven't established what the capital
5 requirements may be. And they're supposed to by statute
6 tailor these requirements for insurance companies. This is
7 all sort of out there and it's the Federal Reserve Board
8 that does this, it's not the Council.
9 JUDGE MILLETT: And will that be subject to
10 challenge once it's issued?
11 MR. STERN: Absolutely Your Honor. I mean they're
12 regulations. I mean what the Council simply said is look
13 our job in this is to make a determination. Federal Reserve
14 regulations if they are in fact counterproductive, because
15 the statute, look, is quite clear, you're not supposed to be
16 counterproductive. If the Federal Reserve regulations were
17 and I'm not obviously suggesting that they are or will be,
18 but if they were, they would certainly be subject to
19 challenge.
20 JUDGE SRINIVASAN: Okay.
21 MR. STERN: Thank you very much.
22 JUDGE SRINIVASAN: Thank you, counsel. The case
23 is submitted.
24 (Whereupon, at 10:36 a.m., the proceedings were
25 concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Diane Wilson

October 28, 2016

Date

DEPOSITION SERVICES, INC.