[ORAL ARGUMENT NOT SCHEDULED]

No. 16-5086

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

METLIFE, INC.,

Plaintiff-Appellee,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,

Defendant-Appellant.

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

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* members of Congress represents that both parties have been sent notice of the filing of this brief and have consented to the filing.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376 (2010). Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the financial crisis that precipitated the passage of Dodd-Frank, as well as the legislative plan that Congress put in place to avoid similar financial crises in the future. *Amici* are thus particularly well-situated to provide the Court with insight into the authority Congress conferred on the Financial Stability Oversight Council (FSOC) to identify and designate Systemically Important Financial Institutions (SIFIs), the manner in which FSOC was supposed to exercise that authority, how FSOC's designation authority

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

intersects with Dodd-Frank's overall regulatory scheme for minimizing systemic threats to national financial stability, and the limited scope prescribed for judicial review of such determinations.

Because of their participation in the drafting of Dodd-Frank and experience with oversight of the financial sector, *amici* know that FSOC was established to play a critical role in the law's comprehensive plan for preventing another crisis like the Great Recession of 2008. Specifically, FSOC, a broad-based expert body composed of all agency heads regulating the financial sector, was tasked with identifying nonbank entities that have the same potential as the large, interconnected bank holding companies to threaten the financial stability of the United States. Under the structure Congress put in place to prevent future financial crises, FSOC designation renders SIFIs subject to heightened scrutiny and regulation by the Federal Reserve Board of Governors (Fed), similar to the prophylactic regime for large, interconnected bank holding companies that was strengthened by Dodd-Frank. By identifying such entities before they threaten the nation's financial stability and by subjecting them to heightened scrutiny, the new plan was designed to prevent problems before they occur, thereby avoiding another financial crisis like the one that devastated so many Americans. Further, *amici* know that the district court's decision misunderstands the overall structure of this statute and how it was designed to strengthen the framework of federal and state financial regulation. If

upheld on appeal, that decision would fundamentally undermine Congress's legislative plan by making it difficult, perhaps impossible, for FSOC to play the role Congress intended it to play—one in which it will use the federal and state government's combined financial regulatory expertise to make the predictive judgments necessary to target potential causes of a catastrophic financial crisis before it occurs. *Amici* therefore have a strong interest in preserving the regulatory scheme that Congress put in place when it enacted Dodd-Frank.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* members of Congress who are signatories to this brief and any other *amici* who had not yet entered an appearance in this case as of the filing of Appellant's brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellant.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellant.

Dated: June 23, 2016

By: /s/ Elizabeth Wydra
Counsel for Amici Curiae

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GLOSSARY

EPA	Environmental Protection Agency
FDIC	Federal Deposit Insurance Corporation
FSOC	Financial Stability Oversight Council
SIFI	Systemically Important Financial Institution

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to Appellant's Brief filed with this Court on June 16, 2016.

INTEREST OF *AMICI CURIAE*

Amici are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the financial crisis that precipitated Dodd-Frank's passage, as well as the legislative plan that Congress put in place to avoid similar crises in the future.

Because of their service in Congress and their participation in the drafting of Dodd-Frank and overseeing financial regulatory policy for the nation, *amici* know that Congress created FSOC to play a critical, albeit limited, role in preventing another crisis like the Great Recession of 2008. Specifically, FSOC, a uniquely broad-based expert body composed of all federal financial regulatory agency heads, as well as representatives of state regulatory agencies and individuals with relevant subject matter expertise, was created to identify nonbank financial companies that, like large, interconnected bank holding companies, could pose a threat to the nation's financial stability. Under Dodd-Frank's legislative plan, once FSOC designates a company as a systemically important financial institution (SIFI), that company is subject to regulation by the Federal Reserve Board of Governors (Fed).

By identifying such entities before they threaten the nation's financial stability and by subjecting them to heightened scrutiny by the Fed, Dodd-Frank helps to prevent problems before they occur, thereby minimizing the risk of another catastrophic financial crisis like the 2008 shock to the national and global economy.

Because of their role in drafting and passing Dodd-Frank and overseeing the financial sector, *amici* have a strong interest in preserving the regulatory scheme that Congress put in place when it enacted Dodd-Frank and ensuring that FSOC can perform its function as Congress intended—that is, use the federal and state governments' combined financial regulatory expertise to make predictive judgments about which nonbank financial companies require Fed supervision and appropriate prudential standards. By doing so, FSOC can help ensure that these entities are subject to *ex ante* regulation that will obviate the need for the sort of massive *ex post* bail-outs and other drastic *ad hoc* responses that proved necessary to contain the 2008 financial crisis. The district court's decision, if upheld, would fundamentally undermine this legislative plan.

Amici submit this brief to address, in particular, the district court's conclusions that FSOC must make a threshold determination that a nonbank financial company is financially vulnerable before it can designate it and that it must consider the costs to the entity of designation. As Dodd-Frank's text makes clear, while Congress provided FSOC with detailed guidance about the types of factors it

should consider in making designations, it nowhere required it to make a threshold vulnerability determination or to engage in cost-benefit analysis. Congress would not have included such requirements because they hamstring FSOC's ability to play its part in the overall statutory scheme—to identify systemically important nonbank financial institutions and render them subject to Fed prudential regulation and supervision (*i.e.*, a regime of heightened scrutiny and prophylactic regulation similar to that long administered by the Fed for bank holding companies) in order to prevent them from falling into material financial distress.

Amici also submit this brief to underscore that Congress recognized the technical difficulty of such complex predictive judgments, and that is why Congress vested the responsibility to make these determinations in FSOC, an expert body broadly representative of the financial regulatory community, and imposed structural and procedural safeguards on the designation process. Given FSOC's unique expertise, Congress deliberately limited judicial review to ensure that courts would not second-guess FSOC's expert determinations or substitute their own judgments for those of FSOC. That is exactly what the district court did here when it required FSOC to engage in analyses not required by the statute.

A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

In 2010, Congress enacted Dodd-Frank in response to the devastating financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, and caused millions of families to lose their homes, *see* S. Rep. No. 111-176, at 39; *see also id.* ("it is the millions of American families, who did nothing wrong, who have suffered the most. Indeed, the financial crisis has torn at the very fiber of our middle class").

Recognizing that "[t]his devastation was made possible by a long-standing failure of our regulatory structure to keep pace with the changing financial system and prevent the sort of dangerous risk-taking that led us to this point," *id.* at 40; *see id.* at 43 (noting "[g]aps in the regulatory structure"), Congress enacted Dodd-Frank to provide a "direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy," *id.* at 2. Among other things, Congress recognized that the absence of an effective regulatory regime for nonbank entities was a critical part of the problem that led to the Great Recession. *See, e.g.*, *id.* at 3 (the "'existence of one regulatory scheme for insured institutions and a much less effective regulatory scheme for non-bank entities created the conditions for arbitrage that permitted the development of risk and harmful products and services outside regulated entities'" (quoting Sheila Bair, Chairwoman, Fed. Deposit Ins. Corp. (FDIC))); *Regulatory Perspectives on the Obama Administration's Financial Reg-*

ulatory Reform Proposals, Part II: Hearing Before the H. Comm. on Fin. Servs., 111th Cong. 75 (2009) (Ben Bernanke, Chairman, Fed), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg53248/pdf/CHRG-111hhrg53248.pdf ("The current financial crisis has clearly demonstrated that risks to the financial system can arise not only in the banking sector, but also from the activities of other financial firms—such as investment banks or insurance organizations—that traditionally have not been subject, either by law or in practice, to the type of regulation ... applicable to bank holding companies.").

Congress extensively studied the problem and established a comprehensive program of financial regulation that would ensure effective regulation of all entities, banks and nonbanks, whose financial distress could threaten the nation's financial stability. *See* S. Rep. No. 111-176, at 3 ("witnesses at Committee hearings relating to the financial crisis and financial reform have made the case for the type of framework established in this title to promote U.S. financial stability"). As a critical component of that program, Congress created the Financial Stability Oversight Council ("FSOC" or "Council"), a council "comprised of key regulators [that] would monitor emerging risks to U.S. financial stability ... and require nonbank financial companies to be supervised by the [Fed] if their failure would pose a risk to U.S. financial stability." *Id.* at 2. Congress empowered FSOC to "determine that a U.S. nonbank financial company shall be supervised by the Board of

Governors and shall be subject to prudential standards ... if the Council determines that material financial distress at the U.S. nonbank financial company ... could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). The idea was to encourage prudent risk-taking across the financial sector, ensuring that if entities seek to profit from taking financial risks, they will also protect against the possibility that those risks could harm the U.S. economy. Recognizing that FSOC was an expert body, broadly representative of the financial regulatory community and thus uniquely well-equipped to make the highly complex determinations with which Congress entrusted it, Congress also provided that FSOC's determinations should be subject to highly deferential "arbitrary and capricious" review in court. *Id.* § 5323(h).

Pursuant to the authority that Congress gave it in Dodd-Frank, FSOC spent 17 months analyzing MetLife, Inc. ("MetLife") and reviewing thousands of pages of materials MetLife submitted. On September 2, 2014, FSOC voted, 9-0, to approve a proposal to designate MetLife; one member voted present. *See* Minutes of FSOC 5-7 (Sept. 4, 2014), https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/September%204%202014%20(Minutes).pdf. On December 18, 2014, following written and oral hearings requested by MetLife, FSOC issued its final determination to designate MetLife as a nonbank SIFI by a vote of 9-1, with the head of every major federal financial regulatory agency and the Secretary

of the Treasury voting in the affirmative. *See* Minutes of FSOC 4-6 (Dec. 18, 2014), https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/December%2018,%202014%20Meeting%20Minutes.pdf. As a result of that designation, MetLife would be subject to Fed supervision and to prudential standards similar to the prophylactic regulatory regime long prescribed for bank holding companies, albeit tailored by the Fed for the different business models of FSOC-designated SIFIs. As FSOC explained, because MetLife "is a significant participant in the U.S. economy and in financial markets, is interconnected to other financial firms through its insurance products and capital markets activities, and for the other reasons described below, material financial distress at MetLife could lead to an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy." Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc. 2 (Dec. 18, 2014) [hereinafter MetLife Basis], https://www.treasury.gov/initiatives/fsoc/designations/Documents/MetLife%20Public%20Basis.pdf.

Notwithstanding FSOC's extensive review of MetLife and its role in the broader financial system, the district court held that FSOC's designation of MetLife was invalid on the grounds that, among other things, "FSOC violated its own Guidance by failing to assess MetLife's vulnerability to material financial dis-

tress," Joint Appendix ("JA") at 797, and FSOC erred when it "refused to consider the costs of its [designation] to MetLife," *id.* at 806.

Amici submit this brief to explain that the district court's conclusions are inconsistent with Dodd-Frank's text and fundamentally misunderstand its structure and operational design—in particular, the role that FSOC is empowered to play, in conjunction with the Fed, in preventing another calamitous financial meltdown like the one the nation just experienced. The district court's decision, if upheld, would fundamentally undermine the program that Congress put in place when it enacted Dodd-Frank to try to prevent such financial crises from occurring in the future.

Contrary to the district court's conclusions, when FSOC designated MetLife, it followed the procedures and considered the criteria Congress laid out in the statute. Following the extensive review described above, FSOC determined that material financial distress at MetLife could pose a threat to the nation's financial stability and thus designated it a SIFI so that the Fed could provide heightened prudential regulation and supervision of MetLife, using specific measures to help reduce such a threat. The additional requirements that the district court would impose on FSOC—requirements that are not warranted by Dodd-Frank itself—would meaningfully hamstring FSOC's ability to play the critical role Congress assigned it.

As Congress recognized, it was critical to guard against collapses of institutions that could threaten the nation's financial stability. Thus, the appropriate

question was not whether any entity was likely to experience financial distress; rather, it was whether there would be a significant impact on the broader economy *if* the entity were to experience such distress. Likewise, Congress provided substantial guidance about the factors FSOC should consider in making its designations, and those factors all looked to the effect on the broader economy of financial distress at the given entity. None suggested, let alone required, that FSOC consider costs to the designated entity. This was no oversight. Indeed, such consideration is essentially impossible given that it is the Fed, not FSOC, which Dodd-Frank charges with designing and implementing the specific regulatory requirements appropriate for each designated SIFI. Thus, FSOC cannot know at the time it designates an institution what prudential standards the Fed will impose. Finally, the district court's decision to impose extra-statutory requirements on FSOC, enabling it to substitute its own policy judgments for that of FSOC's expert regulators, is not only inconsistent with Dodd-Frank's text and structure, it is also at odds with the intentionally limited judicial review prescribed in the statute.

ARGUMENT

I. THE DISTRICT COURT'S OPINION WOULD UNDERMINE THE LEGISLATIVE PLAN CONGRESS ESTABLISHED IN DODD-FRANK TO ENSURE EFFECTIVE REGULATION OF BOTH BANK AND NONBANK INSTITUTIONS THAT CAN THREATEN THE NATION'S FINANCIAL STABILITY

The express goal of Dodd Frank was to "promote the financial stability of the United States." S. Rep. No. 111-176, at 2; *see id.* (Dodd-Frank is a "direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy"). To achieve that goal, Dodd-Frank established FSOC and authorized it to designate *nonbank* financial companies for supervision by the Fed and enhanced prudential standards similar to the Fed-administered prophylactic regime for large, interconnected bank holding companies, albeit tailored to the individual circumstances of the designated companies. 12 U.S.C. § 5323. As relevant here, Dodd-Frank provides that FSOC "may determine" that a "nonbank financial company" should be so designated if FSOC concludes that either (1) "material financial distress" at the company "could pose a threat to the financial stability of the United States" or (2) the "nature, scope, size, scale, concentration, interconnectedness, or mix of the activities" of the company "could pose a threat to the financial stability of the United States," *id.* § 5323(a)(1); *see id.* § 5323(a)(2) (ten factors FSOC should consider in designating a company). The statute also sets out procedural requirements that FSOC must follow before making a designation. *Id.* § 5323(e);

see id. § 5323(d) (FSOC must review its previous determinations on at least an annual basis); *see also* Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637 (Apr. 11, 2012) (codified at 12 C.F.R. pt. 1310) (three-stage process for the designation of nonbank institutions).

Once FSOC has designated a nonbank financial company for supervision by the Fed and application of enhanced prudential standards, the Fed will adopt specific standards after a public notice and comment proceeding. *See* 12 U.S.C. §§ 5323, 5365; Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations, 79 Fed. Reg. 17, 240, 17, 245 (Mar. 27, 2014) (codified at 12 C.F.R. pt. 252). Significantly, the Fed has discretion to modify the standards so that they are appropriate to the specific company. 12 U.S.C. § 5365(a)(2)(A), (b)(3); *see* Insurance Capital Standards Clarification Act of 2014, Pub. L. No. 113-279, § 2, 128 Stat. 3017 (2014).

The district court concluded that "FSOC violated its own Guidance by failing to assess MetLife's vulnerability to material financial distress," JA 797, and FSOC erred when it "refused to consider the costs of [designation] to MetLife," *id.* at 806. The district court's analysis misunderstands Dodd-Frank's two-stage regulatory structure, and its conclusions, if upheld, would undermine the regime Congress put in place to prevent another catastrophe like the financial crisis of 2008.

A. FSOC Appropriately Considered Whether Financial Distress at MetLife Could Threaten the Nation's Financial Stability, Not MetLife's Likelihood of Financial Distress

As *amici* know from their involvement in Dodd-Frank's enactment, FSOC is supposed to make its designation determinations based on whether financial distress at a given institution could threaten the nation's financial stability, not based on any assessment of how likely that institution is to experience financial distress. The text of the statute makes this clear, providing that FSOC may designate an entity if it "determines that material financial distress at the U.S. nonbank financial company ... could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). This language does not require FSOC to consider whether the institution is likely to experience material financial distress; rather, it asks FSOC to assume that the institution is experiencing material financial distress and then determine whether the existence of that distress could threaten the broader national economy. *See id.* § 5322(a)(2)(H) (requiring "supervision by the [Fed] for nonbank financial companies that may pose risks to the financial stability of the United States *in the event of their material financial distress or failure*" (emphasis added)). Significantly, Congress could easily have written the statute to require FSOC to assess a company's likelihood of distress—for example, it could have asked FSOC to determine if the company "is, or is likely to be, unable to pay its obligations," as it did in a different provision of Dodd-Frank, 12 U.S.C.

§ 5383(c)(4)(D)—but it did not do so. That decision reflects an essential element of the plan Congress put in place when it enacted Dodd-Frank.

Congress's decision not to require FSOC to determine an entity's likelihood of financial distress reflects Congress's considered judgment that requiring such a determination would hamstring FSOC's ability to fulfill its responsibility under the law, namely, to identify nonbank financial companies that require enhanced supervision to ensure that they do not threaten the nation's financial stability if they experience material financial distress in the future. *See, e.g.*, Statement of Daniel K. Tarullo, Member, Fed, before S. Comm. on Banking, Hous., & Urban Affairs 4 (July 23, 2009), http://www.banking.senate.gov/public/_cache/files/a915ab53-be05-457e-8dc6-bf12d25d9d6f/23C6AE00CC53D93492511CC744028B5E.tarullotestimony72309.pdf ("Financial institutions are systemically important if the failure of the firm to meet its obligations to creditors and customers would have significant adverse consequences for the financial system and the broader economy."); *id.* at 5 ("Judging whether a financial firm is systemically important is thus not a straightforward task, especially because a determination must be based on an assessment of whether the firm's failure would likely have systemic effects during a *future* stress event, the precise parameters of which cannot be fully known."). After all, one of the lessons of the Great Recession, as *amici* know from their study of that crisis and their deliberations about how best to prevent similar crises in the

future, is that even independent experts can find it difficult to assess in advance whether the financial sector or any given financial entity is vulnerable to financial distress, as well as the impact such distress can have on the broader economy. Significantly, "the markets generally considered AIG Financial Products ('AIGFP') an extremely low risk counterparty because its parent company was rated AAA," S. Rep. 111-176, at 30, yet the collapse of AIG precipitated the 2008 financial crisis, *see, e.g.*, Dep't of the Treasury, *Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation* 21 (2009) [hereinafter *Treasury Proposal*] ("The *sudden failures* of large U.S.-based investment banks and of American International Group (AIG) were among the most destabilizing events of the financial crisis." (emphasis added)); Statement of Ben S. Bernanke, Chairman, Fed, before S. Comm. on Banking, Hous., & Urban Affairs 3 (Sept. 23, 2008) ("Lehman's default was combined with the *unexpectedly rapid collapse* of AIG, which together contributed to the development last week of extraordinarily turbulent conditions in global financial markets." (emphasis added)); 156 Cong. Rec. S2259 (daily ed. Apr. 14, 2010) (Sen. Dodd) (the "bill [leading to Dodd-Frank] extends oversight to dangerous nonbank financial companies, such as AIG, that could pose a risk to our financial stability, as it did").

Against that background, when the Treasury Department first proposed an oversight council to designate companies as systemically important, it explained

that "[a]ny financial firm whose combination of size, leverage, and interconnectedness could pose a threat to financial stability *if it* failed ... should be subject to robust consolidated supervision and regulation." *Treasury Proposal*, *supra*, at 21 (emphasis added); *see id.* at 23 ("In identifying Tier 1 F[inancial] H[olding] C[ompanie]s, the [Fed] should analyze the systemic importance of a firm *under stressed economic conditions*." (emphasis added)). Thus, Congress established FSOC as an "early radar system" or "warning system," 156 Cong. Rec. S2614 (daily ed. Apr. 26, 2010) (Sen. Dodd), to help address the risk of low-probability, high-impact events—the very type of events that contributed to the 2008 financial crisis. Congress concluded that identifying a nonbank institution that posed a systemic risk to our financial system *before* distress at that institution materialized was the only way to "promote the financial stability of the United States," S. Rep. No. 111-176, at 2, and avoid the need for the sort of *ad hoc*, massive, taxpayer-funded bailouts that were necessary in 2008. *See, e.g.*, 155 Cong. Rec. H14420 (daily ed. Dec. 9, 2009) (Rep. Kanjorski) (nonbanks can be designated if they are "so large, interconnected, or risky that their collapse would put at risk the entire American economic system, even if those firms currently appear to be well-capitalized and healthy"); *see also* Daniel Schwarcz & Steven L. Schwarcz, *Regulating Systemic Risk in Insurance*, 81 U. Chi. L. Rev. 1569, 1570 (2014) (AIG's "receipt of $180 billion from the federal government amounts to the largest bailout

of a private company in history"); 155 Cong. Rec. H14440 (daily ed. Dec. 9, 2009) (Rep. Frank) (FSOC designation authority established with AIG in mind).

As *amici* well appreciate from their work on Dodd-Frank, the experiences of the 2008 financial crisis made clear that the stakes were too high to allow such entities to escape heightened supervision, regardless of how likely financial distress might appear at a given time. *See, e.g.*, *Perspectives on Systemic Risk: Hearing Before the H. Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 70-71 (2009) (Managed Funds Association) (regulator must have "the ability to be forward-looking to prevent potential systemic risk problems" and "[a]n attempt to specifically define the regulator's authority must avoid unintentionally creating gaps in authority that would prevent the systemic risk regulator from being able to fulfill its mandate to protect the financial system in the future"). Indeed, the Treasury Department's reform proposal recognized that it was complacency about the likelihood of financial firms' failures, and potential associated costs to the economy, that led to the 2008 financial crisis. *See Treasury Proposal*, *supra*, at 2 (noting that "[y]ears without a serious economic recession bred complacency among financial intermediaries and investors" and there was "exaggerated expectations about the resilience of our financial markets and firms").

Implicitly recognizing that Dodd-Frank itself imposes no obligation on

FSOC to consider MetLife's vulnerability to financial distress, the district court nonetheless held that FSOC could not designate MetLife without first concluding that it was vulnerable to financial distress. The district court justified its imposition of this extra-statutory requirement on the ground that FSOC's own Guidance required it to do so. JA 797.[2] According to the district court, FSOC's Guidance "divided six categories of analysis into two distinct groups. The first group (size, substitutability, and interconnectedness) was meant 'to assess the potential impact of the nonbank financial company's financial distress on the broader economy. The second group (leverage, liquidity risk, and maturity mismatch) was meant 'to assess the vulnerability of a nonbank financial company to financial distress.' ...

[2] The district court also concluded that FSOC violated its own Guidance because "[i]n its Guidance, FSOC stated that a nonbank financial company could only threaten U.S. financial stability 'if there would be an impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy,'" JA 802, and FSOC did not "abide by that standard," *id.* This misreads the Guidance and the statute. FSOC plainly applied the correct standard, concluding that "[i]n light of MetLife's size, leverage, interconnectedness with other large financial firms and financial markets, provision of products that may be surrendered for cash at the discretion of institutional and retail contract holders and policyholders, and impediments to its rapid and orderly resolution, material financial distress at MetLife could have significant adverse effects on a broad range of financial firms and financial markets, and could lead to an impairment of financial intermediation or financial market functioning that could be sufficiently severe to inflict significant damage on the economy." MetLife Basis, *supra*, at 15. The district court faults FSOC for making "assumptions" (JA 803), but the court ignores that FSOC's role is to make predictive judgments, and the court's role was to respect those judgments unless they were "arbitrary and capricious." *See infra* at 27-30. The district court's decision to substitute its judgment for that of FSOC is at odds with the legislative plan Dodd-Frank established.

FSOC intended the second group of analytical categories to assess a company before it became distressed and the first group to assess the impact of such distress on national financial security." *Id.* at 19-20 (internal citations omitted). The district court's conclusion that this grouping mandated a threshold vulnerability determination is plainly wrong.

Read as a whole, FSOC's Guidance makes clear that FSOC will apply the requirements set out in the statute itself, that is, it will determine whether financial distress at a company, if it were to occur, could threaten the nation's financial stability. The Guidance's first paragraph makes this explicit, stating that "[u]nder the first standard, the Council may subject a nonbank financial company to supervision by the Board of Governors and prudential standards if the Council determines that 'material financial distress' at the nonbank financial company could pose a threat to the financial stability of the United States." 12 C.F.R. pt. 1310, App. A. Elsewhere the Guidance underscores that the question is "*how* a nonbank financial company's material financial distress or activities could be transmitted to, or otherwise affect, other firms or markets, thereby causing a broader impairment of financial intermediation or of financial market functioning." *Id.* (emphasis added).

Nowhere in the Guidance did FSOC state that it intended to add an additional requirement beyond the ones contained in the statute itself. This absence is particularly significant given that the Guidance provides detailed information about

the process by which FSOC would make its designations. Tellingly, the categories that the district court concluded indicated FSOC's intent to examine the entity's vulnerability to financial distress were simply a means of organizing the factors set out in the statute. *Id.* To be sure, the Guidance stated that some of those categories "assess the vulnerability of a nonbank financial company to financial distress," *id.*, but as FSOC explains in its brief, the risks that can make a company vulnerable to distress can also cause its distress to pose a threat to the broader economy, FSOC Br. 28-29; *see, e.g.*, 12 C.F.R. pt. 1310, App. A ("[l]everage can also amplify the impact of a company's distress on other companies"). In other words, the district court erroneously understood "vulnerability" to require an assessment of the likelihood of a company's distress; in fact, as used in the Guidance, "vulnerability" referred to the impact that financial distress at an institution would have on the company. *Id.* Thus, FSOC's Guidance made clear that it would consider whether, in the event that a given entity were to experience material financial distress, that distress could make it vulnerable to the *type of failure that has systemic consequences* for the economy as a whole and thus whether financial distress at those entities would threaten the nation's financial stability—the precise test set out in Dodd-Frank.

It would be stunning for FSOC to have so obliquely imposed an additional requirement on its designation process, especially an additional requirement that

would undermine the "legislative plan" that Congress established when it enacted Dodd-Frank. *See King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan"). As discussed above, Congress created FSOC to ensure that nonbank entities that might appear financially sound can be designated for heightened regulation *before* they experience financial distress and thus threaten the nation's financial stability. *See* 156 Cong. Rec. S3064 (daily ed. May 4, 2010) (Sen. Boxer) ("We create an early warning system with a financial stability oversight council to make sure we see trouble coming before it hits."); *id.* S4067 (daily ed. May 20, 2010) (Sen. Kerry) ("The Financial Reform Act creates [FSOC] to identify and address systemic risks posed by large, complex companies, products, and activities before they threaten the stability of the economy."); *id.* S2773 (daily ed. Apr. 29, 2010) (Sen. Dodd) (FSOC "will allow us to observe what is occurring on a regular basis so we can spot these problems before they metastasize and grow into, as we have seen, problems that created as much harm for our economy as the present recession has"). After all, as the Great Recession taught, seemingly healthy institutions can defy widely held expert forecasts, collapse quickly, and then threaten economic damage on a catastrophic scale. As *amici* know, Dodd-Frank was enacted to prevent such consequences.

B. FSOC Appropriately Considered the Factors Specified in Dodd-Frank in Its Designation Determination and Correctly Did Not Add the Costs to MetLife to Those Factors

As discussed earlier, FSOC is authorized to designate a nonbank financial company as a SIFI if "material financial distress" at the company "could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). Dodd-Frank also provides a list of ten factors FSOC should consider in determining whether that standard is met, *id.* § 5323(a)(2), and confers the discretion to consider "any other risk-related factors that the Council deems appropriate," *id.* § 5323(a)(2)(K). In all of this detailed guidance, there is not even a suggestion, let alone an explicit requirement, that FSOC should consider costs in making its designations.

The absence of cost as a factor for FSOC designation determinations was not an oversight. On the contrary, as *amici* know from their experience drafting Dodd-Frank, it was integral to the regulatory structure Dodd-Frank established. Under Dodd-Frank, FSOC's role is to identify systemically important nonbank financial institutions and designate those appropriate for regulation similar to that provided for large, interconnected bank holding companies. It is the Fed that subsequently determines what regulatory measures are appropriate for each institution, and implements those measures. *See* 12 U.S.C. § 5323; *see also Treasury Proposal* 21 ("Our legislation will propose to give the Council the . . . responsibility for refer-

ring emerging risks to the attention of regulators with the authority to respond."). Thus, it would be impossible for FSOC to determine the costs of the prudential standards that the Fed will ultimately impose at the time it makes a designation, as MetLife itself essentially acknowledges, *see* JA 82-83 (consequences "for MetLife, its shareholders, and its policyholders" would largely "[d]epend[] on the prudential standards that the Board ultimately promulgates for designated insurers"); *see also* Governor Daniel K. Tarullo, Speech at the National Association of Insurance Commissioner's International Insurance Forum: Insurance Companies and the Role of the Federal Reserve (May 20, 2016), https://www.federalreserve.gov /newsevents/speech/tarullo20160520a.htm (discussing the types of regulations the Fed expects to impose on designated nonbank SIFIs); *cf. id.* (noting that "by constructing a separate consolidated approach to capital for systemically designated insurance firms, compliance costs for these firms should be considerably lower than if they had to conform to the bank holding company capital regime").[3] Indeed, it is unclear whether FSOC would have been able to designate the very enti-

[3] Requiring FSOC to engage in cost-benefit analysis would also undermine FSOC's ability to make the sort of predictive judgments about which nonbank financial institutions "could pose a threat to the financial stability of the United States," 12 U.S.C. § 5323. Tellingly, an earlier version of Dodd-Frank authorized FSOC to designate companies if financial distress "*would* pose a threat to the financial stability of the United States." H.R. 4173, 111th Cong. § 113 (as passed by the Senate, May 27, 2010) (emphasis added). Congress's decision to use the word "could" rather than "would" indicates its plan that FSOC designate entities even in the absence of certainty that their material financial distress would threaten the nation's financial stability.

ties that gave rise to the 2008 financial crisis, entities like AIG, if it were required to engage in cost-benefit analysis, *see* JA 806-10, especially if it required quantification in the manner that the court elsewhere held was required, *see, e.g.*, *id.* at 803 (faulting FSOC for failing to project "*what* the losses would be, *which* financial institutions would have to actively manage their balance sheets, or *how* the market would destabilize as a result"); *id.* at 804 (dismissing FSOC's conclusions because they were not "actually quantified").

Despite the absence of any express requirement to consider cost in the text of the statute, the district court held that the Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), required FSOC to consider cost. In *Michigan*, the Supreme Court held that a statute that empowered the Environmental Protection Agency (EPA) to regulate power plants only if "regulation is appropriate and necessary," 42 U.S.C. § 7412(n)(1)(A), required EPA to consider the costs of regulation because "'appropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'" 135 S. Ct. at 2707 (citing *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom. Michigan*, 135 S. Ct. 2699). According to the district court, "[t]he same textual hook in 12 U.S.C. § 5323(a)(2)(K) ('appropriate') would thus require FSOC to consider the cost of designating a company for enhanced supervision,

provided that cost is a 'risk-related' factor." JA 809. According to the district court, cost is a "risk-related" factor because "risk" "refer[s] both to the risk of destabilizing the market and the risk of distress in the first place." *Id.* at 810. This, too, is wrong.

As the Supreme Court made clear in *Michigan*, its conclusion that cost-benefit analysis was required depended on the specific statutory scheme it was considering in that case. *See Michigan*, 135 S. Ct. at 2707 ("Read naturally *in the present context*, the phrase 'appropriate and necessary' requires at least some attention to cost." (emphasis added)). The Supreme Court did not hold, or even suggest, that cost-benefit analysis is always required whenever a statute uses the term "appropriate." To the contrary, the Court made clear that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost.'" *Id.* at 2707. This is plainly such a setting.

Unlike the statute at issue in *Michigan v. EPA*, which simply asked the agency to conduct a study and then consider whether regulation was "appropriate and necessary" in light of the results of that study, Dodd-Frank sets out ten specific factors that FSOC should consider in determining whether the statutory standard is satisfied; all of those factors address the underlying question whether financial distress at a company could threaten the financial stability of the United States. None has to do with the costs to the company of designation. Similarly, although Con-

gress authorized FSOC to consider "other risk-related factors" that it "deems appropriate," 12 U.S.C. § 5323(a)(2)(K), cost to the company is not a "risk-related" factor because it is unrelated to whether financial distress at the company could threaten the financial stability of the United States.

Moreover, there is absolutely no merit to the district court's conclusion that cost is "risk-related" because the term "risk" "refer[s] ... [to] the risk of distress in the first place," JA 810. Even if the district court were correct that FSOC's guidance requires a threshold vulnerability determination (which it does not, *see supra* at 17-20), that does not change the statutory standard, which plainly does not require consideration of the nonbank financial company's likelihood of financial distress, *see supra* at 12-17. Given that Congress did not view "risk" as entailing the "risk of distress," there is no basis for the district court's conclusion that cost is a "risk-related" factor under the statute. In short, where Congress has provided significant, specific guidance about what factors an agency should consider, the mere inclusion of the word "appropriate" in the statute cannot be read to mandate consideration of costs, especially where, as here, such consideration would be both infeasible and at odds with the regulatory structure Congress put in place.

Significantly, as *amici* know, Congress's explicit requirement of cost-benefit analysis in other provisions of Dodd-Frank further demonstrates that Congress did not intend to require it here. For example, the statute requires a "cost-benefit anal-

ysis" of a certification program for financial counselors, 12 U.S.C. § 5493(d)(7)(A)(i)(IV), and it requires the Consumer Financial Protection Bureau to consider the "potential benefits and costs to consumers and covered [companies]" of proposed consumer protection regulations," *id.* § 5512(b)(2)(A)(i); *see id.* § 5330(b)(2)(A) (requiring FSOC to "take costs to long-term economic growth into account" in its recommendation to primary regulators). Given that Congress carefully determined when cost-benefit analysis would—and would *not*—be appropriate, it would undermine Congress's legislative plan to require cost-benefit analysis in a context when Congress made the considered decision not to require it. *Cf.* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L.J. 882, 886 (2015) (critiquing "efforts to impose judicially reviewed, quantified CBA on independent financial agencies").

Congress wanted FSOC to make the complex and predictive judgments about when financial distress at a nonbank entity might threaten the financial stability of the United States so as to ensure that there was adequate regulation of such entities to prevent another financial crisis like the one the nation had just experienced. Requiring FSOC to factor into its analysis the possible costs of the regulation on the entity itself would hamstring FSOC's ability to ensure that there could be adequate Fed regulation of the very systemically important nonbank entities whose insufficient regulation led to the Great Recession.

II. THE DISTRICT COURT IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THE AGENCY'S NOTWITHSTANDING CONGRESS'S DECISION TO ESTABLISH HIGHLY DEFERENTIAL REVIEW FOR FSOC DETERMINATIONS

As *amici* know, Congress recognized that FSOC would need to make complex, predictive judgments about which entities might pose a threat to the nation's financial stability. To ensure that FSOC was equipped to make such assessments, Congress provided that its membership would include representatives from every major federal agency with jurisdiction over financial regulation, along with representatives from similar state agencies. Congress also required a supermajority vote before FSOC designated any entities. 12 U.S.C. § 5323(a). By doing so, Congress ensured that FSOC would have the expertise in financial regulation necessary to make these complex judgments without being subject to parochial bias. *See, e.g.*, *Establishing a Framework for Systemic Risk Regulation: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 25 (2009) (Mary L. Schapiro, Chairwoman, Securities and Exchange Commission) ("a council will be much better equipped to make an expert judgment across the many different types of financial institutions that we have in this country about which ones are systemically significant and important"); *id.* at 38 ("making a determination about what is a systemically important institution ... is something a council, a diverse perspective and diverse expertise on different types of financial institutions, I think will be pretty well-suited to do based on an analysis of data, examination reports, infor-

mation from counterparties and so forth"); *id.* at 39-40 (Sheila C. Bair, Chairwoman, FDIC) (Council "would benefit from the multiplicity of views that would be on the council"); *cf. Regulatory Perspectives on the Obama Administration's Financial Regulatory Reform Proposals, Part II: Hearing Before the H. Comm. on Financial Services*, *supra*, at 77 (Ben S. Bernanke, Chairman, Fed) ("[j]udging whether a financial firm is systemically important is thus not a straightforward task").

Given FSOC's extensive expertise and experience and the types of judgments it would be required to make, Congress provided that judicial review of FSOC's judgments would be limited, subject only to "arbitrary and capricious" review. 12 U.S.C. § 5323(h). Such review, as Congress knew, is "narrow" and deferential to the agency's conclusions. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It does not permit "a court ... to substitute its judgment for that of the agency." *Id.*; *see Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Instead, the court must uphold the agency action unless the challenger can "show [it] is not a product of reasoned decisionmaking." *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016).

As *amici* know, Congress knows how to require more searching judicial review when it deems such review appropriate, *see, e.g.*, 5 U.S.C. § 552(a)(4)(B) (in

case involving withheld agency records, "the court shall determine the matter de novo"), but it did not do so here precisely because of the highly technical and predictive judgments FSOC was asked to make. *See, e.g.*, *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1035 (D.C. Cir. 2001) ("[a]gency determinations based upon highly complex and technical matters are entitled to great deference." (internal quotations omitted) (quoting *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1051-52 (D.C. Cir. 2001))). As this Court has noted, courts should be "particularly loath to second-guess [an] agency's analysis" when "an agency is making 'predictive judgments about the likely economic effects of a ruling.'" *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1216 (D.C. Cir. 2013) (quoting *Nat'l Tel. Coop. Ass'n v. FCC*, 563 F.3d 536, 541 (D.C. Cir. 2009)).

The district court, while correctly stating Dodd-Frank's highly deferential standard, failed to apply it. Instead, it substituted its own judgment for that of FSOC, second guessing its judgments about how financial distress at MetLife could affect the financial stability of the nation and adding its own requirements on top of those Congress required. In enacting Dodd-Frank, Congress engaged in careful and substantial study of the 2008 financial crisis, what precipitated it, and what sorts of regulations could prevent another financial crisis from occurring in the future. It entrusted FSOC with the significant responsibility of acting as an "early radar system," 156 Cong. Rec. S2614 (daily ed. Apr. 26, 2010) (Sen. Dodd),

to determine what nonbank entities warranted heightened supervision. FSOC has used that authority sparingly, designating just four nonbank financial companies, including MetLife and AIG, as SIFIs. *See Financial Stability Oversight Council*, U.S. Treasury Dep't, https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx (last visited June 1, 2016). By substituting its own judgment for that of FSOC, the district court undermined not only the statutory scheme that Congress put in place in Dodd-Frank, but also the nation's ability to prevent another financial crisis.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 23rd day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on June 23, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 23rd day of June, 2016.

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