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 *AMICUS CURIAE* OF BETTER MARKETS, INC. IN SUPPORT OF THE DEFENDANT-APPELLANT

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CERTIFICATION OF CONSENT FROM ALL PARTIES AND THE NEED FOR SEPARATE BRIEFING

In accordance with D.C. Circuit Rule 29(b), undersigned counsel for Better Markets, Inc. ("Better Markets") previously certified to this Court that counsel for all parties have consented the filing of the brief.[1] *See* Notice of Intention to Participate as Amicus Curiae, No. 16-5086 (D.C. Cir. filed June 3, 2016).

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for Better Markets certifies that this separate brief is necessary. Better Markets appeared as an *amicus curiae* in this action before the district court and provided unique and helpful analysis and argument that did not merely repeat the arguments of other *amici* or the parties. Better Markets has conferred with each of the other *amici curiae* who appeared before the district court, as well as with counsel for current and former members of Congress and counsel for former Chairmen of the Federal Reserve Board of Governors and former Secretaries of the Treasury who intend to appear as *amici* before this Court. These other *amici* each bring a distinctive perspective and a particular expertise—members of Congress can speak directly to the intentions embodied in the design of the Financial Stability Oversight Council, former regulators will discuss their execution of that design, and the academics helpfully engage with recent

[1] Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, Better Markets states that no counsel for a party authored this brief in whole or in part, and no person other than Better Markets or its counsel made a monetary contribution to fund its preparation or submission.

scholarship and empirical analysis.

Better Markets' briefs before the district court and this Court, by contrast, focus on the legal issues raised in MetLife's complaint and the errors in the district court's decision. This brief endeavors to minimize overlap with the opening brief filed by the FSOC and the *amici* who also favor reversal. For example, although Better Markets discussed legislative history at length in its brief before the district court, this brief eschews legislative history because it will be amply and authoritatively discussed by current and former members of Congress. As is typical of an *amicus*, Better Markets also places legal issues in a broader context where they may have repercussions far beyond the parties to this case. Better Markets also makes several unique arguments, not advanced by other *amici* or the FSOC, which may be helpful to this Court's resolution of the issues presented by this appeal.

Dated: June 23, 2016

/s/ Stephen W. Hall
Stephen W. Hall
Counsel for Better Markets

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Better Markets states that it has no parent corporation and that there is no publicly held corporation that owns any stock in Better Markets.

CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

All parties and *amici* appearing before the district court or who have noticed an appearance in this Court are listed in the brief of the Defendant-Appellant.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the brief of the Defendant-Appellant.

III. RELATED CASES

Reference to consolidated cases pending before this Court that challenge a related agency action appears in the brief of the Defendant-Appellant.

Dated: June 23, 2016

/s/ Stephen W. Hall
Stephen W. Hall
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GLOSSARY

AIG	American International Group, Inc.
CFTC	Commodity Futures Trading Commission
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act
FSOC	Financial Stability Oversight Council
SEC	Securities and Exchange Commission
SIFI	Systemically Important Financial Institution

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to the brief of the Defendant-Appellant, filed with this Court on June 16, 2016.

IDENTITY AND INTEREST OF BETTER MARKETS

Better Markets, Inc. ("Better Markets") is an independent, nonpartisan, non-profit organization that promotes the public interest in the financial markets. It was founded in the wake of the devastating 2008 crisis to support the overhaul of our financial regulatory framework so that financial titans—banks and nonbank institutions alike—would never again bring our economy to the brink of collapse. Focusing extensively on the rulemakings required by the Dodd-Frank Act, Better Markets has submitted over 175 comment letters to the FSOC, CFTC, SEC, and other financial regulators, advocating for swift and strong implementation of reforms in the securities, commodities, and credit markets. This advocacy promotes transparency, accountability, and oversight in the financial markets so that they serve the real economy without precipitating another crisis.

Better Markets has a keen interest in defending financial reform and the FSOC's authority. It has exhaustively studied the enormous costs of the 2008 crisis, which destroyed millions of jobs, triggered a tidal wave of home foreclosures, caused untold human suffering, and obliterated at least $20 trillion in gross domestic product. *See* BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING (2015), *available at* www.bettermarkets.com/costofthecrisis. Better Markets has also highlighted the critical role of the FSOC's designation authority in preventing a recurrence of that nightmare. For example, Better Markets accepted the Senate

Banking Committee's invitation to testify about the importance of the FSOC's designation authority to preventing financial crises.[2] Better Markets has repeatedly highlighted the need to shield the American economy from the risks posed by large and highly interconnected nonbank financial institutions.[3] Another interest in this appeal concerns the obligations of regulatory agencies under their organic statutes and under the Administrative Procedure Act, which Better Markets regularly analyzes, having defended rules of the SEC and CFTC multiple times as an *amicus*. Many of those submissions focused on the scope of an agency's obligation to conduct economic analysis, a theme of MetLife's arguments in this case.[4]

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[2] *See FSOC Accountability: Nonbank Designations: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs,* 114th Cong. (2015) (statement of Dennis M. Kelleher, President and CEO, Better Markets), *available at* http://www.banking.senate.gov/public/_cache/files/a4f38084-7f40-447c-9342-e37c9d6b18ad/23C6AE00CC53D93492511CC744028B5E.kellehertestimony32515.pdf.

[3] *See* Comment Letters from Better Markets to the FSOC on Authority to Designate Financial Markets Utilities as Systemically Important (Jan. 20, 2011 and May 27, 2011); Comment Letter from Better Markets to the FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (Dec. 19, 2011), collected comment letters *available at* http://www.bettermarkets.com/sites/default/files/FSOC_Comment_Letters.pdf.

[4] *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369–70 (D.C. Cir. 2014) (reflecting Better Markets' arguments in upholding the SEC's economic analysis of its disclosure rule on conflict minerals), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *ICI v. CFTC*, 720 F.3d 370, 377–80 (D.C. Cir. 2013) (reflecting Better Markets' arguments in upholding the CFTC's economic analysis of its registration rule for commodity-pool operators); *see also Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 387 (D.D.C. 2014)

The decision below directly undermines Better Markets' efforts to protect the public from devastating financial crises and the taxpayer bailouts that inevitably follow. Affirming the district court would hasten the next crisis and amplify its costs. MetLife itself may not trigger the next crisis, although the risk is real: A nearly trillion-dollar company is no longer subject to federal prudential regulation, contrary to the judgment of the nation's leading regulatory authorities. But the district court's reasoning, if upheld, would also invite the rescinding of the FSOC's other SIFI designations, including that of AIG, if the designated companies were to challenge their designations as arbitrary and capricious on the same grounds on which MetLife prevailed: The FSOC's contested Guidance was equally followed—or not—in each of the four designation decisions.

If left intact, the district court's decision will also critically impair the FSOC's ability to exercise its designation authority in the future, as the decision erects hurdles that make the FSOC's already daunting task nearly impossible. Even more broadly, the decision threatens to impose unjustifiable burdens on all agencies: If every statute with the word "appropriate" now requires its administering agency to conduct cost-benefit analysis before acting, the entire process of regulating our financial markets will suffer terrible setbacks. Unfinished rulemaking will slow to a

(citing Better Markets' description of the bailout funds channeled through AIG to its counterparties).

crawl, and virtually every agency action will become an easy target for litigation. In short, affirming the decision below will undermine regulators' ability to address new abuses and risks in our financial system—and to prevent the next crisis.

SUMMARY OF ARGUMENT

Judicial review of challenges to the FSOC's designations "shall be limited to whether the final determination . . . was arbitrary and capricious." 12 U.S.C. § 5323(h). The district court's sweeping decision could not have been further afield from the limited review Congress prescribed.

All three bases given by the district court for rescinding the designation of MetLife are erroneous. *First*, by conjuring a requirement of a threshold "vulnerability assessment" of whether MetLife was likely to experience distress, the district court substituted its judgment for the FSOC's about the meaning of the Guidance that the FSOC itself wrote. But an agency's interpretation of its own regulations carries the day so long as it is reasonable. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). The district court failed to consider this bedrock principle of administrative law. Under *Auer*, the FSOC's reasonable interpretation of its own Guidance, as made in the Final Determination, would have ended the case.

Even if no deference were due, the FSOC's interpretation of its own Guidance is far better than the district court's. The Guidance grouped the statutory considerations of 12 U.S.C. § 5323(a)(2) into six categories with this preface: "Each of the six categories reflects a different dimension of a nonbank financial company's potential to pose a threat to U.S. financial stability." 77 Fed. Reg. 21,637, 21,658 (Apr. 11, 2012) (codified at 12 C.F.R. § 1310 App. A, § II(d)(1)). The Guidance then divided the categories into two sets of three, a division from which the district court divined a firm commitment by the FSOC "to evaluate the likelihood of material financial distress" at MetLife. *MetLife, Inc. v. Financial Stability Oversight Council*, No. 15-cv-45, ECF No. 105 at 23 ("slip op.")[5] (D.D.C. Mar. 30, 2016) (alterations and internal quotation marks omitted). The district court did not acknowledge the prefatory sentence, instead scolding the FSOC for its "undeniably inconsistent" argument, *id.* at 20, that all six categories—and not just the first three—relate to a different dimension of the potential effects of a company's financial distress. But all six plainly do. For example, leverage, of the second "vulnerability" grouping, of course may affect a company's likelihood of experiencing distress. But leverage also concerns transmitting distress throughout the financial system, as the Guidance made plain in another passage unacknowledged by the district court: "Leverage can also amplify the impact of a company's distress on other companies, both directly, by increasing the amount of exposure that other firms have to the company, and indirectly, by increasing the size of any asset liquidation that the company is forced to undertake as it

[5] The district court's opinion has yet to be reported in the F. Supp. 3d but is available on Westlaw at 2016 WL 1391569. For ease of reference, this brief cites to the slip opinion, which is contained in the Joint Appendix. *See* J.A. 779–811.

comes under financial pressure." 77 Fed. Reg. at 21,659.

Second, the district court substituted its judgment for the FSOC's again by insisting that the FSOC's determination be even more quantitative than it was. The district court thought, for example, that the FSOC should have predicted the exact losses MetLife's counterparties would experience from MetLife's financial distress; the FSOC thought otherwise, relying on other calculations. Supplanting the judgment of the nation's expert financial regulators—about which metrics were helpful to consider and which would produce false precision—is the opposite of deferential arbitrary-and-capricious review, which "is narrow[;] a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Although the FSOC's choice to quantify some but not other metrics is framed by the district court as a "change in policy," slip op. 27, the "policy" from the Guidance is not a policy but an ample standard of scale—"sufficiently severe to inflict significant damage on the broader economy," 77 Fed. Reg. at 21,657. The Guidance thus envisions predictions about orders of magnitude, involving quantitative and qualitative assessments, but the district court inferred a firm commitment to decimal points. It demanded falsely precise computations that economic experts would never condone: One need only consider AIG's predicament in 2008 to see, for example, that *exposures*, which the FSOC did calculate, speak more directly to threats to the financial system than does an estimate of *losses*, which the FSOC did not calculate, to the umbrage of the district court. This choice belongs to the experts.

Third, the district court substituted its judgment for Congress's by imposing a cost-benefit-analysis requirement where Congress clearly did not. In doing so, the district court also substituted its judgment for this Circuit's by deciding that, under *Michigan v. EPA*, 135 S. Ct. 2699 (2015), any statute with the "textual hook" of "appropriate," slip op. 21, requires cost-benefit analysis. But this Circuit's post-*Michigan* decisions show that no such radical shift has taken place.

These errors compound the original mistake in the district court's holding about cost, which is that it failed to defer to the FSOC's authoritative interpretation that did not "deem[] appropriate" the inclusion of cost as a risk-related factor to consider. 12 U.S.C. § 5323(a)(2)(K). The FSOC did so in straightforward fashion in the Guidance by including not only the ten explicit considerations but also the eleventh catchall consideration in the six categories: "The Council has developed an analytic framework that groups *all relevant factors*, including the 10 statutory considerations, *and any additional risk-related factors*, into six categories: size, interconnectedness, substitutability, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny." 77 Fed. Reg. at 21,658 (emphases added). Even if it were remotely plausible to describe an unknown future regulatory cost to MetLife as a "risk-related factor" in the context of systemic risk to the nation's financial markets, the decision to exclude cost from the consideration is plainly reasonable and merits deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

The errors underpinning the district court's decision are significant and far-reaching. If affirmed, the district court's holdings would not only release MetLife from necessary enhanced supervision but also invite the rescinding of the other three SIFI designations, including AIG's. The considered judgment of the nation's foremost financial-regulation experts to subject MetLife to enhanced supervision and regulation is plainly neither arbitrary nor capricious.

ARGUMENT

I. THE GUIDANCE DOES NOT REQUIRE AN ANALYSIS OF THE LIKELIHOOD OF METLIFE'S EXPERIENCING FINANCIAL DISTRESS, WHICH IS ASSUMED UNDER THE FIRST DETERMINATION STANDARD.

The district court refused to credit the FSOC's reasonable understanding of its own Guidance. The phrase on which the district court rested its holding comes from the description of the second set of categories that the FSOC considers, which "seek to assess the vulnerability of a nonbank financial company to financial distress." 77 Fed. Reg. at 21,658. Does this language, as the district court held, commit the FSOC to "evaluating the likelihood of material financial distress" rather than assuming it? Slip op. 23 (alterations and internal quotation marks omitted).

The FSOC did not think so and cogently explained why in its Final Determination. The FSOC's interpretation of its own Guidance, as made in the Final Determination, "reflect[s] the agency's fair and considered judgment on the matter in question" and thus merits deference. *Auer*, 519 U.S. at 462. Even without deference, the FSOC's interpretation of its "vulnerability" assessments—that they concern not whether a company is likely to experience distress but whether that company's distress is likely to spread—is better than the district court's interpretation, which would take the Guidance far from the statutory standard of whether a company's "financial distress . . . could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1).

A. The FSOC's interpretation of its own Guidance merits *Auer* deference.

Academics may dispute whether a writer alone knows the true meaning of her work, but the case law leaves no room for debate: An agency's interpretation of its own regulations carries the day so long as it is reasonable. *See Auer*, 519 U.S. at 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." (internal quotation marks omitted)). The FSOC's interpretation of its Guidance, made in the Final Determination, is neither plainly erroneous nor inconsistent with the Guidance:

> The Interpretive Guidance does, as MetLife notes, state that three of those six categories—leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny—"seek to assess the vulnerability of a nonbank financial company to financial distress." MetLife suggests that the Council's consideration of these three categories requires a determination as to the likelihood or probability of a nonbank financial company's material financial distress. However, neither the Dodd-Frank Act nor the Interpretive Guidance requires or states that the Council will evaluate the probability or likelihood of material financial distress at a nonbank company. The Council instead stated its intent to assess how the 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. Additionally, as noted in the Interpretive Guidance and illustrated in the analysis herein regarding these three categories, an assessment of the vulnerabilities at MetLife relating to the company's leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny is relevant to an assessment of whether and how material financial distress at MetLife could be transmitted to other financial firms and markets and thereby pose a threat to U.S. financial stability.

Slip op. 20–21 (quoting Final Determination).

Remarkably, the district court did not in any way engage with the bedrock administrative-law requirement that courts defer to an agency's interpretation of its own regulation, focusing instead on the FSOC's argument that, in the alternative, any change in policy was explained. *See* slip op. 18–28 (disagreeing with the FSOC's interpretation of its own Guidance without mention of *Auer* or deference). In *Auer* itself, the agency's interpretation of its own regulation came by way of an *amicus* brief requested by the Supreme Court. Here, the FSOC's methodical Final Determination "reflect[s] the agency's fair and considered judgment on the matter in question" and "is in no sense a post hoc rationalization advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462 (alterations and internal quotation marks omitted).

Is the Final Determination consistent with the Guidance? Yes. The Guidance stated at the outset that "[e]ach of the six categories reflects a different dimension of a nonbank financial company's potential to pose a threat to U.S. financial stability." 77 Fed. Reg. at 21,658. Is it plainly erroneous? No. The Guidance nowhere commits to assessing the likelihood of—rather than assuming—financial distress. The Final Determination, Guidance, and statute all concur on this point. The district court should have deferred to the FSOC's reasonable interpretation of its own Guidance or, minimally, should have explained how its refusal to do so comports with *Auer*.

B. Even without deference, the FSOC's interpretation of its own Guidance is more persuasive than the district court's.

The FSOC's distinction between assessing the *likelihood* of financial distress occurring at a firm and assessing a firm's *vulnerability* to financial distress is a meaningful one, grounded in the statute and the division of labor among federal agencies. Consider a metaphor. A fire department has teams that specialize: In service of fire prevention, some personnel are responsible for electric fires, others for gas fires. Still others, led by a deputy marshal, are tasked with not prevention but containment, *i.e.*, stopping the citywide spread of fire no matter its source. The "spread-focused" deputy marshal's strategic inspections would focus in part on the "interconnectedness" of a building—for example, how many neighboring structures it touches. But the deputy marshal would also focus on a structure' vulnerability to fire because of its construction materials: That is, *assuming* a fire of any sort were to start in a building, would it simply smolder like a cement structure, posing little threat to neighbors, or would it burst into flames like a wooden house, spreading the fire to neighboring properties? The deputy marshal would focus on inspecting properties that were more interconnected *and* more vulnerable to bursting into flames, as both qualities make the spread of fire more likely. While other parts of the fire department worry about how fires start, the deputy marshal worries about how they spread.

The FSOC's broader mission is not unlike the "spread-focused" deputy marshal's: "The purposes of the Council are to identify risks to the financial stability of the United States . . . and to respond to emerging threats to the stability of the United States financial system." 12 U.S.C. § 5322(a)(1). The FSOC has a specialized focus, which is not about any one company's "material financial distress or failure" but about the risks to the whole system "that could arise from" such distress or failure. *Id.* MetLife was designated under the first designation standard, which requires the FSOC to consider whether "material financial distress at the nonbank financial company . . . could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). Likewise, the deputy marshal has to consider whether a fire at one building could burn down the whole town.

The Guidance follows this framework, grouping the statutory factors into six categories: "Each of the six categories reflects a different dimension of a nonbank financial company's potential to pose a threat to U.S. financial stability." 77 Fed. Reg. at 21,658. So, too, each of the deputy marshal's considerations is geared toward saving the city rather than any one building. "Three of the six categories—size, substitutability, and interconnectedness—seek to assess the potential impact of the nonbank financial company's financial distress on the broader economy." *Id.* This makes sense: If a fire breaks out in a large building that shares walls with many other buildings in a dense part of town, the risk of a devastating fire increases.

Now comes the crux of this appeal: "The remaining three categories—leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny of the nonbank financial company—seek to assess the vulnerability of a nonbank financial company to financial distress." *Id.* Does this passage of the Guidance mean that the FSOC actually did "commit to evaluating the likelihood of material financial distress at a target company"? Slip op. 23 (alterations and internal quotation marks omitted). It does not.

"Vulnerability" does not mean the likelihood of financial distress occurring in the first place. Instead, it denotes certain characteristics of a firm that will cause any distress that may occur there to spread from it to other parts of the financial system. The deputy marshal certainly was interested in the construction materials of a given building—not because wood structures are more likely to burn down but because wood structures are more likely to spread fire. The Guidance does not state that the FSOC will determine whether a company is *prone* to experiencing financial distress in the first place—the statute and Guidance both make abundantly clear that financial distress is to be assumed and then its systemic effects considered. Likewise, the deputy marshal does not go about calculating the probability of any particular fire's starting but instead assumes a fire and considers its spillover risks.

The district court held that the distinction between the two groups of considerations was "clear: 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 stability." *Id.* at 20. Not so. The rest of the Guidance confirms this. If leverage, for example, related only to the likelihood of a company's experiencing financial distress and not to the possibility of its financial distress spreading, the district court may have a point. But leverage plainly relates to the amplification and transmission of financial distress, like the higher and hotter flames of a wood house: "*Leverage can also amplify the impact of a company's distress on other companies*, both directly, by increasing the amount of exposure that other firms have to the company, and indirectly, by increasing the size of any asset liquidation that the company is forced to undertake as it comes under financial pressure." 77 Fed. Reg. at 21,659 (emphasis added).

Just as flame-retardant construction material can both make a structure more likely to survive a fire and make the fire's spread less likely, high leverage and liquidity risk and maturity mismatch can both make a company more likely to fail and make its distress more likely to spread through mass asset liquidations. Extending the metaphor, a sprinkler system can both make a structure more likely to survive a fire and make the fire's spread less likely, just as "existing regulatory scrutiny" can both make a company more likely to survive and less likely to inflict broader damage if it became distressed. *Id.* at 21,658.

The FSOC's consideration of three factors that can relate both to a company's ability to survive financial distress and to the effect that distress could have on the broader financial system was not, as the district court held, a "commit[ment] to evaluating the likelihood of material financial distress" occurring at MetLife. Slip op. 23 (alterations and internal quotation marks omitted). Far from a "facile distinction," *id.* at 22–23, the FSOC "was right all along," *id.* at 23, that its own choice of the word "vulnerability" concerned broader effects of assumed distress—not likelihood of distress occurring. Metaphorically, vulnerability concerns the structure's integrity because structural integrity matters greatly to containing—not just preventing—a fire.

In short, the FSOC did not commit to evaluating the likelihood of the occurrence of financial distress, and its approach is faithful to the statute, which charges the FSOC with considering whether "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 statute, like the Guidance, assumes financial distress and then considers whether it threatens broader harm. So when the FSOC designated MetLife as a SIFI, it considered whether distress there would spread because of its interconnectedness, leverage, and lack of supervision, just as the deputy marshal would carefully inspect the largest wooden building in town that borders dozens of other structures—and that had just ripped out its sprinkler system.

II. THE FSOC'S THOUGHTFUL MIX OF QUANTITATIVE AND QUALITATIVE ASSESSMENTS DOES NOT VIOLATE ITS OWN GUIDANCE.

The district court erred by substituting its judgment for the FSOC's about what metrics to analyze and how, insisting that the FSOC's consideration be even more quantitative than it was.[6] Parsing the FSOC's Guidance—incorrectly and without

[6] Paging through the Final Determination offers a powerful visual confirmation that the FSOC's final determination was rigorously quantitative. But because of extensive redactions, the public is left to imagine what further calculations informed the designation. The Joint Appendix filed in the district court remains more than two-thirds redacted. Better Markets, appearing here only as an *amicus curiae*, moved for permissive intervention in the district court for the limited purpose of applying for an Order to Show Cause why portions of the record should not be unsealed. The district court granted the motion to intervene but denied the application for an Order to Show Cause. *See* Op., No. 15-cv-45, ECF No. 113 (D.D.C. May 25, 2016). On June 22, 2016, Better Markets separately noticed an appeal of the final order that accompanied the opinion. *See* Notice, No. 15-cv-45, ECF No. 115.

due deference, to be sure—is at least close to the court's core competency with language. But usurping the judgment of the nation's expert financial regulators about which metrics were helpful to consider and which would produce false precision is in another ballpark altogether.

Although the FSOC's choice to quantify some but not other metrics is framed by the district court as a "change in policy," slip op. 27, the FSOC's approach was well within the capacious "policy" of the Guidance, not a departure from it. The Guidance targets levels of distress that are "sufficiently severe to inflict significant damage on the broader economy." 77 Fed. Reg. at 21,657. Where the Guidance envisions predictions about orders of magnitude, using a mix of quantitative and qualitative data, the district court discerned a rigid commitment to decimal points. Once again, the district court erred by failing to defer to the Guidance's own author.

The district court further erred on the merits by insisting on falsely precise computations that economic experts would never condone. The Guidance explained that, rather than use a "formulaic" approach, the FSOC would "us[e] quantitative and qualitative data relevant to each of the six categories," which is just what it did in considering the designation of MetLife. *Id.* at 21,658. In fact, the exact phrase, "quantitative *and qualitative*," appears *seven times* in the Guidance. *See id.* at 21,642, 21,645, 21,658, 21,660, 21,661 (emphasis added).

The FSOC's decision about when to use quantitative assessments and when to use qualitative assessments is a paragon of expertise-driven decision-making to which a court should be most deferential. When an agency's analysis "requires a high level of technical expertise," a court "must defer to the informed discretion of the responsible" agency. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (internal quotation marks omitted); *see also Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013) (a court "must accord substantial deference" to "predictive judgments" and "cannot substitute its judgment for the agency's, especially when . . . the decision under review requires expert policy judgments of a technical, complex, and dynamic subject"); *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983) (complex economic "analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency").

The additional calculations demanded by the district court reveal its fundamental misunderstanding about the nature of the complex, predictive judgments that the FSOC is charged with making. For example, the district court faulted the FSOC for failing to "project[] *what* the losses would be" to counterparties. Slip op. 25. But the FSOC had good reason for not attempting to project the precise counterparty losses that could result from MetLife's distress. For example, such a projection would require a series of untestable assumptions about the counterparties' recovery rate, the unpredictable nature of which the FSOC's brief captures well. *See* FSOC

Br. 46–49. These projections would appear precise—but that precision would be false in light of the many untestable assumptions that are baked into the exercise.

Moreover, counterparty losses do not speak as directly to financial stability as do other factors such as exposure. The AIG saga in 2008 confirms the FSOC's wisdom on this score. AIG had enormous interconnectedness in the financial system. Suddenly faced with financial distress when the bottom fell out of the mortgage market, AIG was unable to timely satisfy its contractual obligations. Many financial giants had massive exposures to AIG; their fear of AIG's lack of liquidity threatened to derail the financial markets and with them the broader economy. The public's bailout of AIG, ultimately to the tune of $182 billion, was passed on directly to its counterparties. *See* Mary Williams Walsh, *A.I.G. Lists Banks It Paid with U.S. Bailout Funds*, N.Y. TIMES, Mar. 16, 2009, at A1 (noting payments of $12.9 billion to Goldman Sachs, $6.8 billion to Merrill Lynch, $5.2 billion to Bank of America, $2.3 billion to Citigroup, $1.5 billion to Wachovia, nearly $12 billion each to Société Générale and Deutsche Bank, $8.5 billion to Barclays, and $5 billion to UBS).

An underappreciated fact of the AIG bailout, however, is that the government actually made a tidy profit of $22.7 billion when all was said and done, even while paying par value to counterparties. *See* Jeffrey Sparshott and Erik Holm, *End of a Bailout: U.S. Sells Last AIG Shares*, WALL ST. J., Dec. 11, 2012, *available at* http://www.wsj.com/articles/SB10001424127887323339704578172960483282372 ("the government will have a net positive return on its AIG bailout of $22.7 billion"). In other words, although AIG seized up in 2008, its longer-term fundamentals were solid enough that all of its counterparties would have eventually recovered all their money even without taxpayer backing (if, say, a private-sector consortium had spent $182 billion to acquire a 79.9% stake in the company, as the government did).

As economists are fond of noting, in the long run, all profits go to zero; so too, in the long run, counterparty losses may tend toward zero, since the recovery rate is a function of time. But that possibility of future recovery is hardly reassuring in a financial panic—what matters is whether the fear of loss inspires actions that spread the panic. Looking backward, it is clear that AIG's counterparties had massive exposure but no losses. Yet AIG's distress still would have caused mass calamity without the bailout. Looking forward, the FSOC was wise to quantify and focus on MetLife's counterparties' *exposures* while rebuffing MetLife's insistence that counterparty *losses* be precisely estimated.[7]

[7] In another tragic example from the most recent crisis, the Reserve Primary Fund experienced a catastrophic run beginning on September 19, 2008, due to losses on debt instruments issued by Lehman Brothers Holdings, Inc., even though Lehman-related assets made up only 1.2% of the fund's total assets. When the fund priced its securities just 3% lower, a massive run immediately ensued. Within two days, investors sought to redeem $40 billion from the fund. This required the fund to sell tens of billions of dollars in assets immediately so that it could pay for the flood of shareholder redemptions. This fire sale in turn depressed asset values, further weakening the fund. The run quickly spread to the entire prime money market fund industry, and during the week of September 15, 2008, investors withdrew approximately $310 billion (or 15%) of prime money market fund assets. The contagion was

The district court was wrong to supplant the wisdom of the nation's foremost financial-regulation experts on this issue with its own view of which metrics were appropriate to calculate. Nothing in Dodd-Frank or the Guidance required more calculations than the many that the FSOC made in its thorough consideration of whether financial distress at MetLife could pose a threat to the financial system.

III. THE FSOC DID NOT "DEEM" COST AN "APPROPRIATE" "RISK-RELATED" FACTOR, A DECISION THAT MERITS *CHEVRON* DEFERENCE, AND *MICHIGAN V. EPA* DOES NOT INSTRUCT OTHERWISE.

Three errors pervade the district court's "cost" holding. *First*, the district court compounded its "vulnerability" misunderstanding by concluding that regulatory costs could subject MetLife to "the risk of distress in the first place." Slip op. 32.

Second, the district court overlooked the FSOC's authoritative interpretation of the catchall statutory consideration. This interpretation folded not only the ten explicit considerations of the statute but also the eleventh catchall "risk-related factors" into the six groupings of the Guidance. As the agency charged with administering the statute, the FSOC's reasonable interpretation of the catchall risk-related factor is entitled to *Chevron* deference.

Third, the district court's effort to shoehorn the holding of *Michigan v. EPA*

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brought under control only after the government backstopped the entire $3.7 trillion money market fund industry. *See generally In re The Reserve Fund Securities and Derivative Litigation*, 673 F. Supp. 2d 182, 185–89 (S.D.N.Y. 2009).

into a very different statute is unpersuasive and contravenes the conscious choice of Congress in Dodd-Frank and the precedents of this Circuit, which remain good law.

A. MetLife's compliance costs are not "risk-related."

Set aside the questionable conclusion, made without any factfinding below, that regulations designed to stabilize an institution could actually threaten it with financial distress, supposedly arising from "billions of dollars in cost" from complying with regulations that were, at the time of the decision, not even proposed. Slip op. 32. The district court's conclusion that such costs are "risk-related" reflects its fundamental misunderstanding about the FSOC's purpose. As already demonstrated, the likelihood of distress occurring at any one company is not the FSOC's concern. The district court's finding that compliance costs are "risk-related" is just bootstrapping, built on its errant premise that the FSOC's Guidance—not even the statute—is interested in the likelihood of whether distress will visit a company, and not the risk of that distress spilling over into the financial system.

But Dodd-Frank requires the FSOC to focus on whether one company's distress, if it existed, "could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). The FSOC's brief captures well how none of the ten statutory considerations is remotely related to "the costs that designation may impose on the company, or any other effect of designation." FSOC Br. 51. Each instead relates to the risk that a company's distress will spread beyond its own balance sheet. The "risk" at issue is not a bad quarter or even bankruptcy for one company—the risk is another Great Recession, or worse. This risk is mitigated, not exacerbated, by subjecting MetLife and other SIFIs to federal prudential supervision and regulation.

B. The FSOC's interpretation of the catchall "risk-related factors" merits *Chevron* deference.

The district court misread the Guidance in consequential fashion: "FSOC reorganized the *ten* statutory factors into six 'categories' of consideration." Slip op. 7 (emphasis added). Not so: "The Council has developed an analytic framework that groups *all relevant factors*, including the 10 statutory considerations, *and any additional risk-related factors*, into six categories: size, interconnectedness, substitutability, leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny." 77 Fed. Reg. at 21,658 (emphases added). The phrase "any additional risk-related factors" is a clear reference to the catchall eleventh consideration of the statute: "any other risk-related factors that the Council deems appropriate." 12 U.S.C. § 5323(a)(2)(K).[8]

[8] In response to comments that urged the FSOC to conduct cost-benefit analysis as a general matter notwithstanding Congress's choice not to require it, the FSOC wrote that it "does not intend to conduct cost-benefit analyses in making determinations with respect to individual nonbank financial companies" because cost is not a statutory factor. 77 Fed. Reg. at 21,640. This statement confirms that the FSOC was aware of the possibility of considering cost and chose otherwise.

Accordingly, the eleventh catchall consideration was authoritatively interpreted to be subsumed within the six categories that the FSOC analyzed, a reasonable interpretation to which the district court was obligated by *Chevron* to defer. Even if the district court could plausibly view the cost of designation as a systemic "risk-related factor," it cannot superimpose that reading over the FSOC's different and reasonable interpretation. The statute expressly delegates that interpretive authority to the FSOC rather than a reviewing court: "factors that the *Council deems* appropriate." *Id.* (emphasis added).[9]

The FSOC did not deem cost to be an appropriate factor. Its decision, issued straightforwardly in its Guidance, merits deference under *Chevron*.

C. *Michigan v. EPA* did not hold that every statute with the word "appropriate" imposes a *sub silentio* requirement to evaluate cost.

Even if the FSOC's Guidance had not already authoritatively answered the

[9] Further evidence of the broad discretion Congress provided lies in its formulation of the FSOC's duty to "consider" the enumerated factors when making a designation. 12 U.S.C. § 5323(a)(2). Federal courts have long made clear that such an obligation simply to "consider" various factors, unaccompanied by more prescriptive standards, confers upon the agency "wide areas of judgment and therefore of discretion." *Sec'y of Agric. v. Cent. Roig Refining Co.*, 338 U.S. 604, 611 (1950); *see also New York v. Reilly*, 969 F.3d 1147, 1150 (D.C. Cir. 1992) ("Because Congress did not assign the specific weight the Administrator should accord each of these factors, the Administrator is free to exercise his discretion in this area.").

question of what additional risk-related factors were appropriate to consider, the district court's holding would still be unpersuasive. The FSOC's brief highlights the vast differences between the Clean Air Act, the statute at issue in *Michigan v. EPA*, which had no criteria other than "appropriate and necessary," and the FSOC's designation statute, which lists ten explicit criteria before adding the risk-related catchall. *See* FSOC Br. 50–55. The FSOC's brief also demonstrates that Congress well knew how to require consideration of cost in agency decision-making, which it did in neighboring provisions of Dodd-Frank. *See, e.g.*, 12 U.S.C. § 5512(b)(2). The district court was wrong to second-guess Congress's choice.

The district court mistook the Supreme Court's opinion about one phrase in the Clean Air Act for a radical shift in administrative law, leaving for dead in *Michigan*'s wake the longstanding precedents of this Circuit. *See* slip op. 28 n.22 ("[T]he proposition espoused in these cases may not survive *Michigan* . . . ."). But the basic premise "that an agency need not undertake [cost-benefit analysis] absent congressional command," *id.* at 28, remains good law in the D.C. Circuit. This errant understanding of *Michigan*'s reach may have resulted in part from its being insufficiently briefed, as each party provided only scant analysis in their reply briefs. *See* slip op. 29 n.23 ("both parties addressed the case in their reply briefs"); MetLife Reply Br., No. 15-cv-45, ECF No. 86, Attach. 2, at 29–30 (D.D.C. filed Sept. 30, 2015) (one paragraph discussing *Michigan*); FSOC Reply Br., No. 15-cv-45, ECF No. 84, Attach. 2, at 45–46 (D.D.C. filed Sept. 30, 2015) (two paragraphs discussing *Michigan*).

This Court's recent opinion in *Lindeen v. SEC*, No. 15-1149, 2016 WL 3254610, *9 (D.C. Cir. June 14, 2016), illustrates the stability of administrative law notwithstanding *Michigan*. The petitioners in that case challenged a regulation promulgated by the SEC for allegedly failing to conduct sufficient cost-benefit analysis. The Circuit upheld the regulation: "We do not require the Commission 'to measure the immeasurable' and we do not require it to 'conduct a rigorous, quantitative economic analysis *unless the statute explicitly directs it to do so*.' " *Id.* (quoting *Nat'l Ass'n of Mfrs.*, 748 F.3d at 369 (emphasis added). Dodd-Frank does not "explicitly direct[]" the FSOC to consider cost. Nor could it fairly be read to implicitly require consideration of cost, because Congress does not make important policy choices through such subtlety. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

That stability reigns in administrative law is no surprise, because *Michigan* itself was not as ambitious as the district court believed: "There are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost."

135 S. Ct. at 2705. The district court's decision, however, takes the *Michigan* molehill and makes a mountain, on the sole basis of the shared "textual hook" of one word: "appropriate." Slip op. 31. If affirmed, that holding would carve a cost-benefit requirement into every statute that anywhere mentions the word "appropriate," no matter how detailed the other statutory criteria or plenary the delegation of interpretive authority. That result, like the decision below, is untenable as a matter of law and logic.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,691 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this *amicus* 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 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 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: June 23, 2016

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