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

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF APPELLEE

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

As required by Circuit Rule 28(a)(1), counsel for *amicus curiae* Cato Institute certify as follows: Except for the Cato Institute, all parties, intervenors, and *amici* that have appeared in this Court are listed in the Appellant's Brief. The rulings at issue and related cases also appear in the Appellant's Brief.

Certificate of Counsel under Circuit Rules 29(c)(4) and 29(c)(5)

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the Cato Institute certifies that it has no parent corporation, and no publicly held company has 10% or greater ownership in the Cato Institute. All parties have consented to this brief.

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TABLE OF CONTENTS

COMBINED CERTIFICATES i
TABLE OF AUTHORITIES iii
GLOSSARY iv
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
I. FSOC IMPERMISSIBLY IGNORED THE QUESTION OF WHETHER DESIGNATING METLIFE AS A SIFI COULD UNDERMINE STABILITY 3
A. The Purpose of Federal Agencies Is to Implement Policies Set Forth in Their Authorizing Statutes 4
B. Lack of an Explicit Mandate to Undertake a Formal Cost-Benefit Analysis Does Not Free FSOC to Undermine the Purpose of Dodd-Frank......
C. Appellant's Focus on "Cost" Is a Red Herring 6
D. Administrative Discretion to Consider Appropriate Factors Requires Consideration of Cost 8
II. WEAKENING A SIFI UNDERMINES FSOC'S PURPOSE OF PROMOTING MARKET DISCIPLINE 9
CONCLUSION 11
CERTIFICATE OF COMPLIANCE 12
CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

* Authorities upon which we chiefly rely are marked with an asterisk.

Page(s)

Cases

Chevron USA, Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984) 7

* *Michigan v. EPA*, 135 S. Ct. 2699 (2015) 8, 9

* *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001).............................. 6-7

Statutes

12 U.S.C. § 5322 9

* 12 U.S.C. § 5323(a) 4, 5, 7, 9, 10

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)...4

Other Authorities

156 Cong. Rec. E1294 (Jun. 30, 2010) (statement of Rep. Eshoo).........................10

156 Cong. Rec. E1262 (Jun. 30, 2010) (statement of Rep. Etheridge) 10

Attorney Gen.'s Comm. On Admin. Procedure, Final Report (1941).......................4

Gara Afonso & João Santos, *What Do Bond Markets Think about "Too-Big-to-Fail" Since Dodd-Frank?,* Federal Reserve Bank of New York: Liberty Street Economics (Jul. 1, 2015, 7:00 PM), http://nyfed.org/2bbVWtp 10-11

President Barack Obama, Remarks at Signing of Dodd-Frank (Jul. 21, 2010).......10

GLOSSARY

Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act
FSOC	Financial Stability Oversight Council
SIFI	Systemically Important Financial Institution

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato's Center for Monetary and Financial Alternatives was established in 2014 to reveal the shortcomings of today's monetary and financial-regulatory systems and to identify and promote alternatives more conducive to a stable, flourishing, and free society. Toward those ends, Cato publishes books and studies, conducts conferences, issues the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts.

This case is important to Cato because it shows how administrative agencies, when unmoored from the statutory text they are bound to enforce, act as a free-floating and unaccountable fourth branch of government.

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[1] No one other than the *amicus* and its counsel wrote this brief in whole or in part. The cost of its preparation was paid solely by *amicus*.

SUMMARY OF ARGUMENT

The Financial Stability Oversight Council (FSOC), a creature of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank," the "Dodd-Frank Act," or the "Act"), is an agency and therefore exists to serve the purposes of the Act that authorizes its existence and its exercise of delegated power. Its authority to designate certain entities as systemically important financial institutions (SIFIs) and to subject them to the increased oversight and regulation such designation demands is legitimate only insofar as it promotes the stated goal of Dodd-Frank. The primary goal FSOC was established to promote is the stability of the U.S. financial system.

In failing to consider whether designating MetLife as a SIFI would promote or frustrate this goal, FSOC failed in its essential duty. Untethered from its purpose in promoting financial stability, the designation of an entity as a SIFI becomes arbitrary and capricious.

Although Dodd-Frank does not demand that FSOC conduct a formal cost-benefit analysis in determining whether to designate a company as a SIFI that does not free FSOC from considering whether the designation would move the financial system toward stability. The risk that the designation would in fact weaken the company is a relevant factor to the question of whether designation is appropriate

and therefore must be part of FSOC's consideration. An agency action that undermines the purpose of the statute is not a reasonable action.

FSOC's focus on the word "cost" misconstrues the true issue, which is whether an agency must consider the effects of its actions, including most notably whether the action would frustrate rather than promote its stated goals. The answer is yes, an agency, to be acting reasonably and within its delegated authority, must always consider whether its actions promote or instead undermine the goals it was established to meet. In this case, FSOC explicitly refused to consider this question.

Furthermore, FSOC also undermined the purpose of Dodd-Frank in promoting market discipline by ignoring the question of whether weakening MetLife through designation could open the door to a future bailout.

For these reasons, FSOC's failure to consider cost as part of its deliberations rendered its final decision arbitrary and capricious.

ARGUMENT

I. FSOC IMPERMISSIBLY IGNORED THE QUESTION OF WHETHER DESIGNATING METLIFE AS A SIFI COULD UNDERMINE STABILITY

A. The Purpose of Federal Agencies Is to Implement Policies Set Forth in Their Authorizing Statutes

The U.S. government has only three branches: legislative, executive, and judicial; there is no fourth branch. Federal agencies are but agents of the constitutionally-created branches. Indeed, "[i]t is well recognized that the purpose

of Congress in creating or utilizing an administrative agency is to further some public interest or policy which it has embodied in law." Attorney Gen.'s Comm. On Admin. Procedure, Final Report 2 (1941). As a federal agency, FSOC exists to further the "public interest or policy" that Congress "embodied in law" when it drafted Dodd-Frank. Before taking action, FSOC must therefore consider whether the action would further this public interest or instead frustrate it. Because FSOC failed to undertake even this threshold analysis, its action in designating MetLife as a SIFI must be vacated.

B. Lack of an Explicit Mandate to Undertake a Formal Cost-Benefit Analysis Does Not Free FSOC to Undermine the Purpose of Dodd-Frank

The purpose of Dodd-Frank is to "promote the financial stability of the United States by improving accountability and transparency in the financial system, to end too big to fail, to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices[.]"Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). Appellant, suffering from an acute case of missing the forest for the trees, argues that because the word "cost" does not appear in Section 113 of the Act, 12 U.S.C. § 5323(a), it can toss cost to the wind, ignoring the fact that cost may very well undo the entire purpose of the Act itself. It is true that Section 113 includes no provision expressly mandating that FSOC conduct a

formal cost-benefit analysis. But FSOC is focusing on the wrong question. The question is whether Appellant's actions promote or instead frustrate the purpose of the legislation. No regulation can be considered reasonable that does not promote the interest that Congress explicitly set forth in its legislation.

It is axiomatic that if FSOC has determined that "material financial distress at" MetLife "could pose a threat to the financial stability of the United States," 12 U.S.C. § 5323(a)(1), an action that could *weaken* MetLife would contravene Dodd-Frank's mandate to promote financial stability. By ignoring the possibility that increased regulation could weaken MetLife, Appellant assumes that its regulation should be measured only by its intended positive impact. This is a grave oversight. While opinions may differ on the size of the impact and at what level the impact would be sufficient to prompt material financial distress for Appellee, it is indisputable that at some point the cost of a regulation becomes insupportable. Such designation would be incompatible with its purpose of promoting financial stability.

FSOC did not even reach this question, effectively taking the position that any burden, no matter how great, cannot bear on whether MetLife is designated a SIFI. FSOC erred in its failure to recognize the possibility that increased regulation could have an adverse impact on MetLife's ability withstand distress. Because the purpose of the regulation is to maintain stability, a complete failure to consider

whether the burden of the regulation could compromise that purpose was unreasonable.

C. Appellant's Focus on "Cost" Is a Red Herring

Any first year-law student will tell you that *expressio unius est exclusio alterius*. And so Appellant has argued, stating that "[e]lsewhere in Dodd-Frank, Congress explicitly mandated consideration of costs…Congress declined to do so in the statutory provision at issue here." Brief for Appellant at 52, Metlife, Inc. v. Fin. Stability Oversight Council, No. 16-5086 (D.C. Cir. Jun. 16, 2016). It is true that Section 113 of Dodd-Frank includes no provision expressly mandating that FSOC conduct a formal cost-benefit analysis. It is equally true that several other provisions in the same Act do include such mandates. But this focus on the word "cost" obscures the issue. FSOC need not conduct a formal cost-benefit to consider whether designating MetLife as a SIFI would undermine the purpose of Dodd-Frank.

The question, as discussed *supra*, is whether designating MetLife as a SIFI would promote the goals of Section 113 of Dodd-Frank, and of the Act as a whole. Whereas cost may be an inappropriate, or even impermissible, factor for an agency to consider in some instances, it is not only permissible but necessary in the present instance. To illustrate why we turn to *Whitman v. Am. Trucking Ass'n, Inc.*, in which the Supreme Court found that the Environmental Protection Agency was

prohibited from considering cost because such consideration would undermine the purpose of the authorizing statute. 531 U.S. 457, 465 (2001). In that case, the agency was instructed by the relevant statute to set air quality standards "'the attainment and maintenance of which . . . are requisite to protect the public health[.]'" *Id.* (ellipses in original). This statutory instruction, the court reasoned, restricted the agency's authority to consider factors beyond the public health, including economic cost, when setting the relevant air quality standards. *Id.* at 468. That is because compromising air quality in the interest of cost would undermine the purpose of the legislation.

FSOC has been given the task of identifying potential "threat[s] to the financial stability of the United States." 12 U.S.C. § 5323(a)(1). FSOC's failure to consider the potential harm its regulation might cause to MetLife would be analogous to a failure by the EPA to consider whether a regulation under the Clean Air Act might actually impair air quality rather than improve it. Even the very deferential *Chevron USA, Inc. v. Nat'l Res. Def. Council* does not permit such an absurd interpretation. 467 U.S. 837, 844 (1984) (regulations are entitled to "controlling weight" only if they are not "arbitrary, capricious, or manifestly contrary to the statute.")

In determining whether FSOC must consider cost when designating an entity as a SIFI, the relevant question is not whether Dodd-Frank includes an express

mandate to consider "cost." The relevant question is whether the designation would promote or damage the nation's financial stability. This question was entirely ignored by FSOC, rendering its designation of MetLife as a SIFI an arbitrary and capricious decision.

D. Administrative Discretion to Consider Appropriate Factors Requires Consideration of Cost

Unlike other regulations that apply to all firms within an industry, reforming the contours of the industry as a whole, SIFI designation is a tool designed to be used sparingly on a small number of organizations. Even that sub-set of organizations is hand-picked, applying only to financial companies that both meet a set of defined criteria and are also expressly designated by a supermajority of FSOC, including the chair. In compiling the list of factors that FSOC must consider when determining whether to designate a non-bank as a SIFI, Congress built in the flexibility such a tailored regulatory action requires. Because Congress could not have foreseen every circumstance that might bear on whether a SIFI designation was appropriate, the statute expressly delegates to FSOC the discretion to consider "any other risk-related factors that the Council deems appropriate."

As the Supreme Court recognized in *Michigan v. EPA*, although the term "[appropriate] leaves agencies with flexibility, an agency may not entirely fail to consider an important aspect of the problem when deciding whether regulation is appropriate." 135 S. Ct. 2699, 2707 (2015) (internal quotation marks omitted). The

use of the term "appropriate" in the list of factors in Section 113 provides FSOC with the flexibility to consider whether the cost of compliance could weaken MetLife. 12 U.S.C. § 5323(a)(2). Its inclusion in the list of factors that FSOC must consider is in fact essential to the structure of a statute that mandates a fact-specific determination applicable to individual organizations. Because prompting such financial distress could result in harm to U.S. financial stability, it is eminently "an important aspect of the problem" and therefore one FSOC "may not entirely fail to consider." *Michigan*, 135 S. Ct. at 2707.

II. WEAKENING A SIFI UNDERMINES FSOC'S PURPOSE OF PROMOTING MARKET DISCIPLINE

FSOC's failure to consider the effect of SIFI designation on MetLife also threatened another of Dodd-Frank's stated goals and one of the express reasons that FSOC was established. In addition to "identify[ing] risks to the financial stability of the United States" and "respond[ing] to emerging threats to the stability of the United States financial system[,]" FSOC's purpose is "to promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the Government will shield them from losses in the event of failure[.]" 12 U.S.C. § 5322. Weakening MetLife risks undermining this goal as well.

An entity that is designated as a SIFI has, by definition, been deemed important to the nation's financial system by FSOC. The checklist of

considerations FSOC must review in determining whether to designate a non-bank as a SIFI presents the litany of risks the entity may pose if it faced material distress: counterparties it could not pay; households, businesses, and state and local governments it could not lend to; liquidity it could not provide; underserved communities it would leave credit-less. 12 U.S.C. § 5323(a)(2). As envisioned by the supporters of Dodd-Frank, the purpose of SIFI designation is to put an end to government-funded bailouts. *See, e.g.,* President Barack Obama, Remarks at Signing of Dodd-Frank (Jul. 21, 2010); 156 Cong. Rec. E1294 (Jun. 30, 2010) (statement of Rep. Eshoo); 156 Cong. Rec. E1262 (Jun. 30, 2010) (statement of Rep. Etheridge).

Under Dodd-Frank's rationale, the SIFI designation functions as a bulwark against instability only if it is reinforced with heightened prudential standards and federal oversight. To the extent that compliance with the heightened prudential standards required of SIFIs would both weaken an entity and set it up for bailout, the SIFI designation would have failed on two fronts: harming an important institution and damaging market discipline by rescuing shareholders.

Even if SIFI designation itself did not weaken MetLife, there are data that show that far from improving market discipline, placing an entity under Federal Reserve oversight in fact weakens discipline, leading the market to expect a bailout if the entity becomes distressed. Gara Afonso & João Santos, *What Do Bond*

Markets Think about "Too-Big-to-Fail" Since Dodd-Frank?, Federal Reserve Bank of New York: Liberty Street Economics (Jul. 1, 2015, 7:00 PM), http://nyfed.org/2bbVWtp. Whether FSOC ultimately found these data to be persuasive, or whether they militated in favor of or against SIFI designation does not matter. Because a possibility exists that designating MetLife as a SIFI could impair market discipline it was incumbent on FSOC to at least consider the question of whether SIFI designation of MetLife would promote or frustrate Dodd-Frank's stated goals. Instead it failed to even ask the question.

CONCLUSION

For the foregoing reasons, and those stated by the Appellee, the court below should be affirmed.

Respectfully submitted this 22nd day of August, 2016,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,364 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. Rule 32(a)1.
2. This 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 2013 in Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 22, 2016, I filed the foregoing brief with this Court by causing a true digital copy to be electronically uploaded to the Court's CM/ECF system and by causing nine true and correct copies to be delivered by FedEx next business day delivery to the Court. Service on counsel was achieved via the CM/ECF system.

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