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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE,
ET AL.,

Petitioners,

v.

SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

No. 12-1398

Friday, March 22, 2013

Washington, D.C.

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

BEFORE:

CHIEF JUDGES TATEL AND BROWN, AND SENIOR
CIRCUIT JUDGE SENTELLE

APPEARANCES:

ON BEHALF OF THE PETITIONERS:

EUGENE SCALIA, ESQ.

ON BEHALF OF THE RESPONDENT:

WILLIAM K. SHIREY, ESQ.

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C O N T E N T S

ORAL ARGUMENT OF:

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P R O C E E D I N G S

THE CLERK: Case number 12-1398, American Petroleum Institute, et al., Petitioners v. Securities and Exchange Commission. Mr. Scalia for the Petitioners; Mr. Shirey for the Respondent.

JUDGE TATEL: Good morning.

ORAL ARGUMENT OF EUGENE SCALIA, ESQ.

ON BEHALF OF THE PETITIONERS

MR. SCALIA: Good morning. May it please the Court, Eugene Scalia representing Petitioners. I'd like to reserve four minutes for rebuttal.

JUDGE TATEL: Sure.

MR. SCALIA: The SEC has adopted a rule that it estimates will cost U.S. shareholders more than \$14 billion without determinable benefits for shareholders or others. It claims this rule was required by statute, but in fact, it was obligated to observe all its statutory responsibilities and authorities, including its duty to consider its rules with an eye to their effects on efficiency and competition in capital formation, and not to impose burdens on competition that were unnecessary. Moreover, it retained its authority to provide exemptions to what Congress had ordained in the statute when it was in the public interest. In failing to properly exercise these responsibilities and authorities in three different ways the Commission had violated the Exchange Act,

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1 and once again conducted itself in a way that was arbitrary
2 and capricious under the APA.

3 JUDGE SENTELLE: Is there a jurisdictional problem
4 here?

5 MR. SCALIA: We don't believe so, Your Honor.
6 Section 25(a) provides this Court jurisdiction over SEC
7 orders, and it's now well established that where review is
8 provided as to orders that includes rules. The *ICI* case from
9 1977 is the seminal case.

10 JUDGE SENTELLE: Now is that universally
11 established, or is that true only where statutory context
12 suggests that it includes --

13 MR. SCALIA: When there is --

14 JUDGE SENTELLE: What I'm asking --

15 MR. SCALIA: -- minimum ambiguity --

16 JUDGE SENTELLE: -- more specifically the --

17 MR. SCALIA: When there is minimum ambiguity then
18 review is appropriate of this Court, and *Oxfam* which opposed
19 jurisdiction didn't cite a single case where there was review
20 provided as to orders, and jurisdiction was denied. Now, they
21 do --

22 JUDGE TATEL: What about the statute?

23 MR. SCALIA: Yes. So, the question --

24 JUDGE TATEL: 25(a) and (d).

25 MR. SCALIA: Right. The question becomes --

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1 JUDGE TATEL: Yes.

2 MR. SCALIA: -- whether 25(b) --

3 JUDGE TATEL: Right.

4 MR. SCALIA: -- changes that, and the answer is no.

5 Remember, when the law was enacted in 1934 that term order
6 plainly included rules, because this Court's precedents make
7 that clear. Also, remember that rule of construction that
8 applies here, the Supreme Court said --

9 JUDGE TATEL: But wait, before you go into that,
10 when Congress passed 25(d), when it added it to the statute it
11 listed specific provisions of the statute from which rules
12 could be appealed under 25(d), right? It's unlike 25(a), it
13 was limited to certain provision.

14 MR. SCALIA: Yes.

15 JUDGE TATEL: And it did not include all provisions
16 of the statute.

17 MR. SCALIA: Your Honor, it included new provisions
18 that were being added at the time, and if --

19 JUDGE TATEL: But not all of them.

20 MR. SCALIA: I believe it included all that were
21 being added at the time.

22 JUDGE TATEL: I actually -- did you check? I looked
23 back and I, I mean, if that's the case that's a useful piece
24 of information, but I thought that they did not include them
25 all, you think that's not right?

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1 MR. SCALIA: I don't believe so, Your Honor.

2 JUDGE TATEL: Okay.

3 MR. SCALIA: But if I could add the following?

4 JUDGE TATEL: Yes.

5 MR. SCALIA: First, remember the context. The
6 Supreme Court has said that absent a firm indication that
7 Congress intended rules to be reviewed in District Court, they
8 will be reviewed in the Court of Appeals. 25(b) was a push
9 back to this Court's mistaken decision in *United Gas*.

10 JUDGE TATEL: Right.

11 MR. SCALIA: Congress was saying we do want a Court
12 of Appeals review, it would be backwards, we submit, to read
13 Congress' direction that it disagreed with *United Gas*, it
14 wanted review in the Court of Appeals as an indication instead
15 that it wanted review in the District Court. There are no
16 express provisions that I'm aware of directly review of SEC
17 rules in District Courts. Remember, in *Exportal*, one of this
18 Court's decision, the Court said when applying a *Florida Power
19 and Light* presumption once you get in the business of finely
20 calibrated questions of statutory interpretation the
21 question's been answered in favor of jurisdiction. Again,
22 where there's ambiguity there's jurisdiction. We concede,
23 this could have been cleaner, it could have been clearer, but
24 where there's ambiguity there's jurisdiction.

25 JUDGE TATEL: Tell us again, where is the ambiguity?

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1 What exactly is the ambiguity in the statute?

2 MR. SCALIA: Well, the uncertainty arises from the
3 fact that under all the other, the two other principle
4 securities laws administered by the SEC, orders covers rules.

5 JUDGE TATEL: But the statutes, those statutes are
6 different.

7 MR. SCALIA: They are different, but they're
8 different as a result of --

9 JUDGE TATEL: No, but what's the ambiguity in 25(a)
10 and (d)?

11 MR. SCALIA: Well, we --

12 JUDGE TATEL: Don't you think we have to find that
13 to be ambiguous before we can apply presumption for --

14 MR. SCALIA: The ambiguity resides in the fact that
15 we know what's done with rules under those particular
16 sections, but we don't know what's done with other rules. We
17 do know, however, that when this law was enacted in 1934 rules
18 were included within orders as that remains the case under the
19 other laws, and again, we submit it would be backwards to
20 interpret Congress' action in 1975 to indicate that it
21 suddenly wanted all other rules reviewed in the District
22 Court, whereas under the law as it existed to that time they
23 belonged to the Court of Appeals. That was a congressional
24 action favoring review of the Courts of Appeals.

25 In the *ICI* case, which is really the seminal case in

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1 this Court on how to interpret orders to include rules, it was
2 again a little bit messy, and the Court said well, the fact
3 that the statute refers to orders and regulations, but the
4 jurisdictional provision refers only to orders --

5 JUDGE TATEL: Then again that --

6 MR. SCALIA: -- may have been an inadvertence.

7 JUDGE TATEL: But that case didn't involve a statute
8 that had something comparable to 25(d).

9 MR. SCALIA: But respectfully, it had a similar
10 problem in the sense that there were separate references to
11 rules and regulations, I'm sorry, to rules and orders, but the
12 jurisdictional provision only talked about orders, and the
13 Court said well, it may be an inadvertence.

14 If I could add, finally, with respect to
15 jurisdiction and then move to the merits. The Supreme Court
16 and this Court have identified what are called sound policy
17 reasons for appellate jurisdiction, again, absent a firm
18 indication that Congress intended District Court jurisdiction,
19 in addition to the other reasons identified by the Court let
20 me emphasize the importance simply of expedition. We sought
21 expedition of this case because of the imminent, very
22 substantial costs affecting not just the industry but
23 shareholders. We believe that's a reason --

24 JUDGE TATEL: Yes. I totally share your concern
25 about us ruling, possibly ruling that there's no jurisdiction

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1 here, that doesn't make any sense. I got you on that. But we
2 do have to interpret this statute. I just have one more
3 jurisdictional question to ask you. The night when Congress
4 amended the Exchange Act in 1990 to add some provisions on
5 market volatility they actually went ahead and changed 25(b),
6 also, to allow those new, the regulations on notice to be
7 challenged here, but they didn't do it this time for Dodd-
8 Frank, right? This -- right? I mean --

9 MR. SCALIA: They didn't make that change, Your
10 Honor.

11 JUDGE TATEL: Is there any evidence, have you found
12 any evidence in the legislative record of Dodd-Frank that
13 Congress thought these appeals would come here?

14 MR. SCALIA: In Dodd-Frank, I have not --

15 JUDGE TATEL: Yes.

16 MR. SCALIA: -- although --

17 JUDGE TATEL: Yes.

18 MR. SCALIA: -- as I believe the SEC will tell you
19 it has always been expected by practitioners and the SEC --

20 JUDGE TATEL: Right.

21 MR. SCALIA: -- that this is the place, and the --

22 JUDGE TATEL: Right.

23 MR. SCALIA: -- confusion results from an error
24 committed by this Court. But Your Honor, as you said a moment
25 ago, it doesn't make sense --

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1 JUDGE TATEL: I agree.

2 MR. SCALIA: -- your words were something of that
3 nature.

4 JUDGE TATEL: That's what I said.

5 MR. SCALIA: And I think once we're in that --

6 JUDGE TATEL: It doesn't make sense.

7 MR. SCALIA: -- terrain, we're in --

8 JUDGE TATEL: Right.

9 MR. SCALIA: -- *Florida Power and Light* terrain
10 there's not a firm indication that Congress intended a
11 different approach here than under the two other statutes the
12 SEC administers.

13 If I could turn then first to the Commission's
14 exemptive authority, which is a long-standing authority the
15 Commission has to carve out what Congress has required. Judge
16 Brown, Judge Tatel, you each have sat on cases involving the
17 exemptive authority, 10 different rules adopted under the
18 Investment Company Act where the SEC changed what Congress
19 required in order to alleviate burden, so it's commonly used.
20 Moreover, if you look at A-65 in our brief you'll see that
21 Dodd-Frank actually prohibited use of the exemptive authority
22 as to some things, but not as to this particular provision of
23 the Act, so Congress isn't just presumed to have been aware,
24 it was aware and left the authority open to the Commission.
25 The reasons the Commission gave for not using the exemptive

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1 authority are the essence of arbitrary explanations. At page
2 A-8 they said an exemption wouldn't be consistent with the
3 language of the statute, they said it wouldn't be consistent
4 with the structure, being they were just talking about the
5 extractive industries provision. With all respect, exemptions
6 by definition are exemptions that change what Congress
7 provided. That rationale was one the SEC successfully opposed
8 in the *Schiller* case, yet here deploy it without
9 justification. The only other --

10 JUDGE TATEL: But wasn't -- the Commission didn't
11 accept your claim that there were countries clearly which
12 would have prohibited releasing this information, right? So,
13 it was operating on the assumption that at least at the moment
14 there were no such countries --

15 MR. SCALIA: Your Honor --

16 JUDGE TATEL: -- wasn't it?

17 MR. SCALIA: -- respectfully, no.

18 JUDGE TATEL: No?

19 MR. SCALIA: Under *Chenery* they cannot now defend
20 the rule on that ground. They based their --

21 JUDGE TATEL: I see. Your argument is that's not
22 what they said in the --

23 MR. SCALIA: No, their cost estimate --

24 JUDGE TATEL: -- in the -- I see.

25 MR. SCALIA: Their cost estimate, pages A-40, A-49,

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1 said that our concerns were warranted, they said they
2 concurred, there would be potentially billions in costs. At
3 page 35 of their own brief they say well, why are we being
4 criticized for our cost benefit analysis, we agreed with
5 Petitioners, they cannot defend this rule now by walking away
6 from their cost benefit analysis for the additional reason
7 that they had an obligation under this Court's precedence to
8 do, quote, as best they can, quote. If they're now saying
9 well, we didn't really believe it that becomes just another
10 reason to vacate and remand.

11 I want to briefly address the definition of project.
12 They rejected a very sensible definition we proposed that is
13 in and of itself a reason to vacate the rule. The definition
14 of project goes very directly to the competitive harm industry
15 members fear, which is that 90 percent of this market is
16 dominated by state owned oil companies that won't be subjected
17 to this requirement, and they'll be to, the more granular the
18 information published the better the competitive advantage
19 they get. The SEC didn't deny that, it said that its failure
20 to define project would reduce transparency and increase
21 costs, but still it rejected our definition for reasons that
22 simply don't make sense. In page 31 of our reply we put
23 together just a little chart showing it was eminently possible
24 to define project as we had proposed, and again, it's
25 indisputed, if you look at pages 42, 53, that's A-42, 53, that

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1 they would have saved cost further transparency, whereas
2 elsewhere in this adopting release they said we can't do
3 things that won't, we must do things that will further
4 transparency, yet here they refuse to do so.

5 Finally, with respect to -- well, nearly finally,
6 with respect to requiring public disclosure, we believe the
7 only acceptable interpretation of the statute was that filings
8 could be confidential but at minimum. There was room for
9 discretion here, the statute was ambiguous, when you look at
10 the text, when you look at the title which says that the
11 public availability results from SEC compilation, when you
12 look at the minerals provision, a neighboring provision of the
13 same statute makes companies explicitly file publicly. And
14 then you get so much reliance from the Commission on
15 legislative history, yet you have Senator Harden coming to the
16 floor saying we've made changes from prior bills, changes
17 which we've explained in our reply brief and our opening
18 brief, we've made changes to give utmost flexibility to avoid
19 burdening companies. But time and again the Commission
20 declined to exercise that discretion.

21 Finally --

22 JUDGE TATEL: Let me just ask you one question about
23 cost benefit analysis, generally, not with respect to the
24 exemption issue, but you rely very heavily on business round
25 table, isn't this -- the Commission says this case is

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1 different because here you have a command by Congress to issue
2 these regulations, so in a sense they argue Congress has
3 already made the, at least the benefit side of the analysis.

4 MR. SCALIA: Your Honor, that's wrong for a couple
5 of reasons. First of all, any reasonably informed rule-making
6 where there's a statutory duty to do a cost benefit analysis
7 looks at where their costs fall and the benefits fall.

8 JUDGE TATEL: So, do you think Congress could
9 have -- do you think the Commission could have concluded that
10 this is not, that the cost benefit analysis weighed against it
11 and not issued the regulations? Notwithstanding --

12 MR. SCALIA: No, they --

13 JUDGE TATEL: They couldn't do that, right?

14 MR. SCALIA: -- needed to do a regulation. But Your
15 Honor --

16 JUDGE TATEL: Right.

17 MR. SCALIA: -- they should have looked for example
18 at China, you read their brief they say this is about poor
19 countries heavily dependent on oil revenue, unstable
20 governments, risk of overthrow of the government and
21 terrorism, does that describe China? No.

22 JUDGE TATEL: So -- no.

23 MR. SCALIA: Does it describe --

24 JUDGE TATEL: So, you weren't saying -- I just want
25 to make sure I understand your argument. Your point is is

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1 that the cost benefit analysis was related to how the
2 regulation was written and its scope, right? Not to whether
3 they could issue it at all.

4 MR. SCALIA: Remember, they had an exemptive
5 authority, but we're not here to argue that they could have
6 used it to exempt --

7 JUDGE TATEL: Am I right about that?

8 MR. SCALIA: -- themselves from doing any rule.

9 But --

10 JUDGE TATEL: Okay.

11 MR. SCALIA: -- here they should have focused where
12 the costs were and examined where the --

13 JUDGE SENTELLE: But would you focus in on the
14 question?

15 MR. SCALIA: Okay.

16 JUDGE SENTELLE: Okay. And see if you can answer
17 that. If you're not saying it has to do with whether they
18 would have a regulation, it is how the regulation is applied,
19 or --

20 MR. SCALIA: It's how it's written, and so
21 specifically with respect to the exemptive authority, for
22 example, when they saw that the lion's share of costs, that
23 \$12.5 billion was focused on four countries they should have
24 said wow, what are the benefits of covering those four
25 countries?

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1 JUDGE TATEL: But again, it didn't, it wasn't
2 convinced that those countries in fact prohibited --

3 MR. SCALIA: Your Honor --

4 JUDGE TATEL: -- disclosure of documents.

5 MR. SCALIA: -- they can't go there under *Chenery*.

6 Moreover, if they're here to tell you that they did a bad cost
7 benefit analysis that becomes yet again a reason to vacate
8 their rule.

9 JUDGE TATEL: I see.

10 MR. SCALIA: Finally, with respect to the First
11 Amendment, this Court must reach it if it otherwise affirms
12 this rule. This is an exceptional statute that commandeers
13 corporate speech to force regime change in other nations.
14 They've not cited another regulation or statute that's ever
15 been like this, moreover, strict scrutiny applies except in
16 narrow circumstances, this is not commercial speech, they
17 concede that. I'd like to reserve the remainder --

18 JUDGE TATEL: What about -- just real quickly on the
19 First Amendment, I know the Commission doesn't cite it but you
20 do, what about our decision in *Full Value Advisors*? Doesn't
21 that -- what's the impact of that on your argument that
22 there's a First Amendment issue with respect to the
23 disclosures of the Commission --

24 MR. SCALIA: I think that --

25 JUDGE TATEL: -- as opposed to --

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1 MR. SCALIA: Right.

2 JUDGE TATEL: You understand the question. Yes.

3 MR. SCALIA: Your Honor, the Court there drew a very
4 clear distinction between information submitted to the Agency
5 for use by the Agency, they've told you we don't really use
6 this information, we just hand it over to the public. So,
7 it's a very different circumstance.

8 JUDGE TATEL: I see. Yes. Okay.

9 MR. SCALIA: If there are no further questions I'll
10 save the rest for rebuttal. Thank you.

11 JUDGE TATEL: Thank you.

12 ORAL ARGUMENT OF WILLIAM K. SHIREY, ESQ.

13 ON BEHALF OF THE RESPONDENT

14 MR. SHIREY: William Shirey for the Securities and
15 Exchange Commission. Your Honor --

16 JUDGE TATEL: Can you help us on jurisdiction?

17 MR. SHIREY: Yes. We don't have a great deal to add
18 beyond what Petitioners have identified. We would emphasize
19 that this is one of the rare situations where although it may
20 appear on the face of the statute that the text is clear, this
21 is one of those rare situations where resort to the statutory
22 history and the legislative history is necessary, I think, to
23 indicate that what may appear facially clear is in fact
24 ambiguous.

25 JUDGE TATEL: And how does the legislative history

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1 help you? I have the impression that it actually made it
2 harder for you here. Why don't you explain it.

3 MR. SHIREY: Here I think my emphasis would be on
4 the statutory history which is that --

5 JUDGE TATEL: Right.

6 MR. SHIREY: -- at the time that the Congress in
7 1975 added 25(b), and it did so as part of the National
8 Markets Reform Act, Congress was of the view based on this
9 Court's interpretation of the word order that orders did not
10 encompass rules and therefore that the 25(a) did not apply to
11 rules. The Court subsequently changed its view, and I think
12 clarified its view in *Investment Company Institute*, and then
13 ultimately that change should in no way be, 25(b) should in no
14 way be read into sort of somehow preventing the change from,
15 the Court from viewing order as having that more robust
16 meaning here, as well.

17 JUDGE TATEL: I don't understand your point. Well,
18 let me ask you this, when Congress -- let me just ask you to
19 say something about the discussion I was having with Mr.
20 Scalia about what happened in 1975. Were the provisions that
21 Congress included in 25(b) all of the newly added provisions
22 to the Exchange Act, or were there others that were not
23 included, do you know?

24 MR. SHIREY: Your Honor, I apologize, I don't
25 know --

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1 JUDGE TATEL: You don't know.

2 MR. SHIREY: -- off the top of my head.

3 JUDGE TATEL: And what's your reaction to the
4 consequences of what happened in 1990 when Congress added a
5 new provision to the Exchange Act, namely the one dealing with
6 market volatility, and then amended 25(b) to permit rules
7 issued under that to be challenged here, but that it didn't do
8 that with Dodd-Frank, what do we do with that?

9 MR. SHIREY: On the first issue of the 1990 --

10 JUDGE TATEL: Yes.

11 MR. SHIREY: -- changes, the legislative history is
12 sort of silent as to why --

13 JUDGE TATEL: I was talking about the statute.

14 MR. SHIREY: Right.

15 JUDGE TATEL: The statute, you agree they amended
16 25(b) to permit appeals here for market volatility
17 regulations, right?

18 MR. SHIREY: Right. Correct.

19 JUDGE TATEL: Okay. And they didn't do it for Dodd-
20 Frank.

21 MR. SHIREY: I think --

22 JUDGE TATEL: So, when we're trying to figure out
23 what this statute means, we're all searching for ambiguity,
24 right?

25 MR. SHIREY: Right.

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1 JUDGE TATEL: Okay. What does that, doesn't that
2 make finding ambiguity extremely difficult?

3 MR. SHIREY: I don't believe so, Your Honor,
4 because --

5 JUDGE TATEL: Tell me why.

6 MR. SHIREY: -- remember, 20 years had passed, an
7 interceding period, so I think it's --

8 JUDGE TATEL: Right.

9 MR. SHIREY: -- sort of hard to attribute what the
10 Congress did in 1990, particularly given that the legislative
11 history is, even in the 1990 is sort of silent, and it only
12 refers to this as a conforming amendment in 1990. So, I think
13 it's hard to impute anything to the Dodd-Frank Congress.

14 JUDGE TATEL: Do you --

15 JUDGE SENTELLE: Well, it's not a matter --

16 JUDGE TATEL: Sorry.

17 JUDGE SENTELLE: -- of imputation, what does the
18 statute say or do? This notion that we have to read the mind
19 of Congress is a bit alien. The fact that it's 20 years apart
20 I'm not sure why that has any significance. It all goes into
21 the same statute, and we have to construe that statute.

22 MR. SHIREY: Your Honor, I think the best answer is
23 by the time that the Dodd-Frank Congress acted in 2010, as Mr.
24 Scalia pointed it, it's been a well established practice under
25 the Exchange Act everyone understood. The expectation was

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1 that orders really do encompass rules and, you know, by that
2 point remember this Court had handed down three different
3 decisions in the securities law arena, and all of those
4 admittedly were not under the Exchange Act, but it was sort of
5 generally understood I think by the people who were thinking
6 about Dodd-Frank that of course Commission rules go to the
7 Court of Appeals in the first instance.

8 JUDGE TATEL: Is there anything in the legislative
9 history of Dodd-Frank that indicates that's what Congress
10 thought? In other words, that it knew it was legislating in
11 an environment where these challenged would come here?

12 MR. SHIREY: I am not aware of anything in the
13 legislative --

14 JUDGE TATEL: Right.

15 MR. SCALIA: -- history to that effect.

16 JUDGE TATEL: Yes, I couldn't find anything either,
17 so --

18 MR. SHIREY: Because as you know, Congress made no
19 changes to the jurisdictional provisions in Dodd-Frank with
20 respect to Section 25.

21 JUDGE TATEL: And what's your reaction to the *Oxfam*
22 argument that under your interpretation 25(b) becomes
23 superfluous?

24 MR. SHIREY: We don't think that's correct, Your
25 Honor.

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1 JUDGE TATEL: But why?

2 MR. SHIREY: Principally because as this Court has
3 talked about in its ripeness jurisprudence, when Congress
4 specifically identifies a provision as going to the Court of
5 Appeals, which it certainly has done in 25(b), there's a
6 heavier presumption that attaches against a finding of
7 ripeness in that instance, so there is still some value to
8 25(b). And remember, 25(b) dealt with critically important
9 changes in 1975, they were designed to really create a
10 national market system, so it was particularly imperative that
11 there be no finding of lack of ripeness in those cases.

12 JUDGE TATEL: Okay.

13 MR. SHIREY: Turning to the merits of the challenge
14 here, Your Honor, I think you put it exactly correctly, you
15 sort of hit the nail on the head, Judge Tatel, earlier when
16 sort of identified the fact that this was Congress. This is
17 really at the end of the day a congressional rule-making, it's
18 a congressionally mandated rule-making, Congress spoke to the
19 principle issues, whether it's the publication of the
20 information that comes in to the Commission that it ultimately
21 should be going out to the public in the same format
22 foreclosing this possibility of some kind of anonymized
23 aggregation that neither the legislative history or more
24 importantly the statute doesn't speak to. Just taking the
25 publication issue for a second, you have very issuer specific

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1 information that's coming in, you have the projects that has
2 to come in, that has to be identified, you have the business
3 unit of the company that comes in, the only use for that
4 information is to be provided to the public, so the idea that
5 somehow Congress left on the table the possibility of
6 anonymized aggregation when the entire purpose of this statute
7 is to provide transparency.

8 JUDGE TATEL: But remember, but you're looking at
9 the statutory language here, and as I understand it the
10 Commission's view is that this statute, that the use of the
11 word compilation is unambiguous, correct?

12 MR. SHIREY: The Commission did not say either way
13 whether the use of the word compilation --

14 JUDGE TATEL: Well, you are, you're taking that
15 position, correct? Aren't you? I thought --

16 MR. SHIREY: I am taking --

17 JUDGE TATEL: -- the Commission's position was that
18 this statute, the use of the word compilation and the fact
19 that the statute's a disclosure statute required the
20 Commission to issue, to release everything, and not to do a
21 compilation and deletion of other materials, right? That's
22 your position?

23 MR. SHIREY: Yes, Your Honor. Our --

24 JUDGE TATEL: That it's unambiguous.

25 MR. SHIREY: With respect to the -- it's unambiguous

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1 with respect to the view that the Petitioners have advanced,
2 which is that compilations somehow could be read to include an
3 anonymized aggregation. That view is outside of, is not a
4 reasonable interpretation of compilation.

5 JUDGE TATEL: Well, but the statute says to the
6 extent practical what role in the language, what role in the
7 statute does that language play?

8 MR. SHIREY: Well, Your Honor, as the Commission
9 explained in the adopting release it's the Commission's view,
10 and that the statute requires that actually compilation is
11 subject to a practicability determination, that it may
12 actually prove impracticable to do the compilation for some
13 reason or another, but that at the end of the day this is a
14 provision that was added, Section 13(q) was a provision that
15 was added to the Exchange Act. The Exchange Act is all about
16 the, or one of the principle purposes of the Exchange Act is
17 that annual reports, current reports, quarterly reports, that
18 those reports are made public.

19 JUDGE TATEL: Right. But when the Exchange Act
20 requires that elsewhere it actually says that. It says --

21 MR. SHIREY: No --

22 JUDGE TATEL: It does, it says disclosure. And this
23 statute says, this provision of it says to the extent
24 practical should do a compilation. And I understand your
25 argument that compilation could certainly include, you could

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1 interpret it to include, or you might be able to interpret it
2 to support what the Commission has done, but what I'm asking
3 you about is what in this language makes this unambiguous?
4 That's what I'm having trouble with.

5 MR. SHIREY: Your Honor, this Court and the Supreme
6 Court have instructed that one of the ways when you're at
7 *Chevron I* that you --

8 JUDGE TATEL: Yes.

9 MR. SHIREY: -- determine whether a statute is
10 unambiguous is you look at the structure and the design of the
11 statute, and here you have a statutory provision that provides
12 no use for the information that comes in other than providing
13 that information to the public. There is no independent use
14 that the Commission's identified with to do with this.

15 JUDGE TATEL: Right. But compiling it and
16 reordering it and maybe deleting some materials is not
17 inconsistent with that.

18 MR. SHIREY: Your Honor --

19 JUDGE TATEL: Is it?

20 MR. SHIREY: -- it is, if I may explain. There's
21 really two legs that 13(q) stands on, and it's identified in
22 Section 13(q)(2), there's the project level disclosures, and
23 the government level disclosures, okay? And what the statute
24 is designed to do is it's to provide transparency on both
25 ends, what resources are generating the funds, and where those

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1 funds are ultimately going to the government. If you were
2 to -- accepting Petitioners' argument about an anonymized
3 aggregation only gives you the second piece of that, because
4 their whole view is that you can just sort of anonymize the
5 payments that are paid to the government, but you lose that
6 first critical piece of the transparency here, that's the
7 project level disclosures, and projects by definition can't be
8 aggregated, you can't aggregate the Exxon/Mobil project with
9 the Shell project that maybe on the other, you know, sits on
10 the other side of take Turkmenistan, for instance.
11 Turkmenistan sits on one geological zone, okay? You can't in
12 any meaningful way determine where the resources, the payments
13 are coming from ultimately, what resource extraction activity
14 the payments are coming from in that sense. You really can't
15 anonymize or aggregate that information to provide the
16 transparency benefits.

17 JUDGE TATEL: What about the Petitioners' argument
18 that when you compare this language to the conflict minerals
19 section, which says each person described in paragraph two
20 shall make available to the public on the internet website the
21 information disclosed? See, there it says they shall make
22 available the information disclosed, whereas here it says the
23 Commission shall release the compilation to the extent
24 practical.

25 MR. SHIREY: Your Honor, I actually believe that

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1 Section 13(p) proves our case. You know, the Commission's
2 view is that annual reports are released to the public, those
3 are released to the public for investors. But both 13(q) and
4 13(p) Congress identified are not just for investors, they are
5 for investors according to Congress, but they're also for non-
6 investors. In the case of 13(p) it's individuals who are
7 consumers, where are consumers going to -- unlike investors
8 who are used to going through our EDGAR database on an issuer
9 by issuer basis and looking at annual reports, that's not the
10 case with consumers. So, consumers are going to go and look
11 on the webpage. The same holds true to the extent that one
12 views the -- the same is true of the compilation. The
13 compilation is the supplementary disclosure mechanism for non-
14 investors, for the folks who are, for instance in Nigeria, or
15 in Afghanistan who are looking to see how the, looking to see
16 what the transparency, or payment transparency disclosures are
17 for their particular country. So, it's just a different
18 target audience, but both are important to the disclosures
19 here.

20 If I may turn to the benefits here.

21 JUDGE TATEL: Okay.

22 JUDGE SENTELLE: How about turning to the
23 constitutional question.

24 MR. SHIREY: Certainly, Your Honor. Simply put the
25 information that's required to be disclosed here is not speech

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1 for purposes of the First Amendment.

2 JUDGE SENTELLE: Why not?

3 MR. SHIREY: It's simply factual data that does not
4 touch upon the --

5 JUDGE SENTELLE: Factual data can't be speech?

6 MR. SHIREY: Factual data in certain instances could
7 be, but not in this --

8 JUDGE SENTELLE: Do you have any authority for the
9 proposition that the First Amendment cannot protect factual
10 data?

11 MR. SHIREY: The First Amendment does, the First
12 Amendment does, there is no proposition for that, Your Honor.

13 JUDGE SENTELLE: Right.

14 MR. SHIREY: But there's also no proposition that it
15 does, and that's critical. For years it has been understood
16 and taken that information that's required to be disclosed to
17 the government that's objective non-ideological factual
18 information, such as this, that doesn't otherwise communicate
19 a view or require a person to express a belief that doesn't
20 otherwise isn't required to be communicated in an
21 inextricably, or intertwined manner with other protected
22 speech, and that doesn't somehow dampen or chill other values
23 of the First Amendment like associational speech, that has
24 never been subject to First Amendment scrutiny, and we submit
25 that that's the case here.

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1 JUDGE SENTELLE: What is your best authority that
2 that's not subjective to First Amendment decisions?

3 MR. SHIREY: Your Honor, we don't have any direct
4 authority --

5 JUDGE SENTELLE: That's what I thought.

6 MR. SHIREY: -- on point for that. But we also
7 don't have any authority that it is. But more important --

8 JUDGE SENTELLE: Well, shouldn't we start out on the
9 proposition that speech is speech and protected, unless we
10 have some reason for exempting that. The First Amendment
11 reads -- I realize that it's not popular to be absolutist on
12 First Amendment, but it reads pretty absolutely, so shouldn't
13 we start there, and then you have, if you're going to regulate
14 you have to back away?

15 MR. SHIREY: Two things, Your Honor. First of all,
16 again, this type of factual data that the government requires
17 a myriad regulatory programs just doesn't touch upon the core
18 values that the First, that the founders established the First
19 Amendment for. But even if one were to suppose that this
20 nonetheless somehow were subjected to some type of First
21 Amendment scrutiny it's critical to recognize that rational
22 basis review would be the most that's necessary. Take for
23 instance *Zauderer*, to be sure that was in the commercial
24 speech context, but there you actually have, notwithstanding
25 the fact that it was factual objective disclosure you actually

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1 have a greater First Amendment intrusion arguably because the
2 speech there was required to be made in the context of other
3 fully protected speech, commercial speech, you don't have any
4 of that here. So, it would be illogical to, even supposing
5 that one were to treat this as speech to impose anything other
6 than --

7 JUDGE SENTELLE: I don't get that even if one were
8 to suppose the part, this is speech. You've got the duty to
9 back out of it. I mean, pretty well establishes the speaker
10 has the right to tailor their speech, and I don't know that --

11 MR. SHIREY: Well --

12 JUDGE SENTELLE: -- I think *Hurley* says, it applies
13 not only to views or opinions, but the right of a speaker to
14 tailor his speech.

15 MR. SHIREY: Your Honor, even if one were to treat
16 this as speech, we still submit that rational, the *Zauderer*
17 while I know --

18 JUDGE SENTELLE: I just really don't get that --

19 JUDGE BROWN: Well --

20 JUDGE SENTELLE: -- I really don't get that lead in,
21 even if this were treated as speech. All right. If one
22 preaches this speech as speech what now is your government
23 interest in regulating it, which may back you into the
24 benefit, the ones you talked about awhile ago.

25 MR. SHIREY: Well, ultimately, Your Honor, the

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1 disclosures here are part of a broader package of foreign
2 policy programs that have long been established to provide
3 transparency to resource rich, for payments in resource rich
4 countries, and this is just another piece of that.

5 JUDGE SENTELLE: I didn't get a real clear answer to
6 what the governmental interest is that's protected by --

7 MR. SHIREY: Again --

8 JUDGE SENTELLE: -- or served by this intrusion on
9 free speech.

10 MR. SHIREY: It's a First Amendment, or it's a
11 foreign policy objective to promote transparency in resource
12 rich countries, Your Honor. That is a --

13 JUDGE SENTELLE: What's your closest parallel saying
14 that that is a sufficient interest to regulate speech?

15 MR. SHIREY: Two things, Your Honor. First, this
16 Court's recent decision, I believe in 2009 with *National*
17 *Manufacturer's Association*, where this Court talked in the
18 domestic arena, to be sure, talked about transparency being
19 important to help promote political accountability. As
20 Congress has long identified in the context of dealing with
21 the resource curse it is very important to U.S. foreign policy
22 to have established, democratic, legitimate governments that
23 don't for instance breed terrorism, that allow for stable
24 political alliances --

25 JUDGE SENTELLE: I don't see the connection between

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1 this and terrorism.

2 MR. SHIREY: The legislative history does discuss
3 this, I believe the 2008 Minority Report identifies that. But
4 in any --

5 JUDGE SENTELLE: How does it advance the war against
6 terrorism to compel this disclosure?

7 MR. SHIREY: Your Honor, I believe it's a, you know,
8 it's a long term answer in the sense that if you have failed
9 governments, ultimately, failed governments ultimately breed
10 political resistance within the country that ultimately leads
11 to --

12 JUDGE SENTELLE: Dictatorship, but how does that
13 breed terrorism? There have been dictatorships throughout
14 history, and pre-history that have not been terrorists.

15 MR. SHIREY: Your Honor, at the end of the day I
16 believe this is an area that is ripe for deference to
17 Congress, that's what the Supreme Court discussed in --

18 JUDGE SENTELLE: No. No. No, no. Governmental
19 interest on First Amendment regulation is not something where
20 we defer to Congress.

21 MR. SHIREY: Actually, Your Honor, I believe in
22 *Holder v. Humanitarian Law Project* the Supreme Court talked
23 about deference in the foreign policy arena, and also in this
24 Court's decision in *National Manufacturing Association v.* --
25 the last name has slipped me right now, but it's the 2009

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1 decision that Judge Garland wrote.

2 JUDGE SENTELLE: I don't remember either, so you're
3 in good --

4 MR. SHIREY: There is -- well, this Court talked
5 about deference to the common sense value judgments that
6 Congress makes.

7 JUDGE SENTELLE: But you have to first identify the
8 interest.

9 MR. SHIREY: And the interest is I believe very
10 clearly identified in the legislation itself, which is
11 promoting the Federal Government's foreign policy objective to
12 promote payment transparency.

13 JUDGE TATEL: I thought your -- did you have a
14 question?

15 JUDGE BROWN: No, go ahead.

16 JUDGE TATEL: I thought your strongest defense
17 wasn't that, but that it was that this is designed to provide
18 information to American investors.

19 JUDGE SENTELLE: Yes.

20 JUDGE TATEL: Isn't that, I mean, do you really want
21 to argue quite as strongly as you are about national security
22 given your emphasis that this statute is really most
23 defensible on the grounds of providing disclosure to American
24 investors?

25 MR. SHIREY: Your Honor --

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1 JUDGE TATEL: Isn't that --

2 MR. SHIREY: -- Congress certainly believed that
3 this information was important to investors, for that reason
4 Congress obviously put it in the Exchange Act, that stands to
5 reason. And that also provides a second basis for supporting
6 the disclosures here, because it is well established that
7 disclosures to investors are, do not invoke, or do not trigger
8 some kind of heightened First Amendment scrutiny, as a general
9 matter. If there are no --

10 JUDGE TATEL: Anything else?

11 MR. SHIREY: -- further questions --

12 JUDGE TATEL: Thank you.

13 MR. SHIREY: -- thank you.

14 JUDGE SENTELLE: Just one more minute.

15 JUDGE TATEL: Okay. Yes. Sure.

16 JUDGE SENTELLE: Just one more -- I cut you off.

17 Was there something that you wanted to say on benefits? Is
18 that okay if we ask you?

19 MR. SHIREY: Certainly. Again, this is a situation,
20 it's important to distinguish this from for instance the Proxy
21 Act's decision in *Business Roundtable*, or even the other cases
22 that this Court has heard that the Petitioner identifies
23 dealing with the benefit analysis. This is a statutory
24 provision that Congress has mandated, first of all, and it's
25 mandated in virtually an unprecedented fashion within the

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1 securities laws. If you look they have very carefully spelled
2 out not only what's to be disclosed, whether it's the issuers
3 project from which the payments came, whether it's the
4 business --

5 JUDGE SENTELLE: Could you quickly move to what the
6 benefit is that I cut you off on?

7 MR. SHIREY: Sorry. Ultimately at the end of the
8 day the benefit is to provide payment transparency, and also
9 to provide information to investors. I would --

10 JUDGE SENTELLE: The payment transparency sounds
11 part sounds kind of circular. Why are you compelling this
12 payment transparency because it promotes payment transparency?

13 MR. SHIREY: Well, I'm sorry, because it, well,
14 Congress has made the determination in the foreign policy
15 arena that will help --

16 JUDGE SENTELLE: Okay.

17 MR. SHIREY: -- promote the ultimate goal of
18 applicable accountability.

19 JUDGE SENTELLE: Sorry I prolonged you.

20 MR. SHIREY: It's all right.

21 JUDGE SENTELLE: Thank you.

22 JUDGE TATEL: So, what's the role then in your mind
23 of the cost benefit analysis? I mean, I hear you -- I mean,
24 yes, Congress did require it, but what's the role of the cost
25 benefit analysis then?

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1 MR. SHIREY: Well, Your Honor, first of all, I know
2 that cost benefit is sort of a nice formulation to use, but
3 the Commission's obligation here is slightly more specific.
4 The Commission's obligation here is to consider the rule's
5 impact on efficiency, competition, and capital formation. And
6 as this Court has instructed that requires the Commission to
7 consider as best it can what the economic implications of the
8 rule are, and here the Commission did that, ultimately
9 deferring to Congress' determination about the benefits
10 because the benefits were --

11 JUDGE TATEL: I see.

12 MR. SHIREY: -- difficult to quantify, or determine
13 with any precision. But ultimately at the end of the day the
14 Commission did use the cost analysis, and the competitive
15 effects to throughout the rule-making tailor provisions, not
16 the ones that Petitioners are complaining about, but other
17 provisions, such as limiting the, or not expanding the beyond
18 the statute's contours of the definition of commercial
19 development, taking a very reasonable approach to the
20 definition of diminimus, not requiring an accounting, any kind
21 of auditing of the disclosures here, so the cost benefit
22 analysis did play a role, Your Honor, it played a role in the
23 discretionary components of this rule-making which Petitioners
24 unfortunately have identified areas that really weren't up to
25 discretion, at least two of those areas, publication and the

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1 exemption.

2 JUDGE TATEL: Okay.

3 MR. SHIREY: Are there any more questions?

4 JUDGE TATEL: Thank you.

5 MR. SHIREY: Okay. Thank you.

6 JUDGE TATEL: How much time did Mr. Scalia have?

7 THE CLERK: Mr. Scalia had 30 seconds remaining.

8 JUDGE TATEL: Mr. Scalia, you can take a couple of
9 minutes, and I won't even include your answer to this question
10 in those couple of minutes.

11 ORAL ARGUMENT OF EUGENE SCALIA, ESQ.

12 ON BEHALF OF THE PETITIONERS

13 MR. SCALIA: Don't start yet.

14 JUDGE TATEL: I have one more jurisdictional
15 question for you. You make an effort in your, I think it's in
16 your brief, in a footnote in your brief to make a valiant
17 effort to suggest that 25(b) would not be superfluous, right?
18 That is in your brief, isn't it?

19 MR. SCALIA: Yes, Your Honor.

20 JUDGE TATEL: Yes.

21 MR. SCALIA: We refer to *Overton Park*.

22 JUDGE TATEL: Yes. And so, as I understand it your
23 argument is, is that 25(b) would still operate to bring to the
24 Appeals Court challenges to rules where there's an *Overton*
25 *Park* issue, right?

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1 MR. SCALIA: It would, Your Honor. And if I could
2 emphasize, this Court seeks to avoid treating statutory
3 language as superfluous or redundant because --

4 JUDGE TATEL: Right.

5 MR. SCALIA: -- it's trying to get at congressional
6 intent.

7 JUDGE TATEL: Right.

8 MR. SCALIA: Congress does not consciously enact
9 language that achieves nothing, and that's not what it did in
10 1975, it enacted language --

11 JUDGE TATEL: Wait, wait.

12 MR. SCALIA: -- to correct --

13 JUDGE TATEL: Let's go back to my question about
14 superfluous, 25(b). If we're looking for an explanation for
15 why a particular provision is not superfluous doesn't it have
16 to be something that there's some evidence that Congress
17 intended? In other words, to put it in the context of this
18 case is there any indication at all that what Congress
19 intended with 25(b) here was to bring cases, ensure that cases
20 here with *Overton Park* type issues got to the Court of
21 Appeals?

22 MR. SCALIA: Well, Your Honor, I think what's --
23 well, let me answer that, but then there's --

24 JUDGE TATEL: Yes.

25 MR. SCALIA: -- something I think is more important.

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1 Yes, there is indication that it continues to have effect. If
2 you look at 25(a)(5), which has to do with orders, there's a
3 provision that if more evidence is relevant go back to the
4 Agency. No such provision appears in 25(b), which is
5 consistent with our *Overton Park* explanation. But more
6 importantly, Your Honor, the question of congressional intent
7 is applied at the time of enactment, and we know Congress was
8 seeking to correct this Court's error in *United Gas*, at least
9 as to these new authorities. And with all respect, it would
10 seem backwards for this Court now to because Congress was
11 acting against an error of this Court for this Court to in a
12 sense reinstate within this realm the error of *United Gas*
13 because Congress when it enacted the 34 Act did make rules
14 reviewable as orders, this Court's decision created confusion
15 that Congress was trying in part to address. Congress can
16 proceed in stages, and I think, you know, that's what you have
17 here.

18 Finally, you did also ask, Your Honor, about the
19 1990 Act.

20 JUDGE TATEL: Right.

21 MR. SCALIA: That was a provision that also had to
22 do with the National Securities Markets Improvement Act, and
23 the market volatility concern there bore some relationship to
24 the concern of the '75 amendments, which I think, I believe
25 gives you some further explanation. I concede it's ambiguous,

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1 this Court --

2 JUDGE TATEL: Wait, what's the explanation? But
3 they did amend 25(b), right?

4 MR. SCALIA: That's right. And they were adding a
5 provision --

6 JUDGE TATEL: Yes.

7 MR. SCALIA: -- that had to do with market --

8 JUDGE TATEL: Right.

9 MR. SCALIA: -- volatility, which bore some
10 relationship to the provisions that had been added in 1975, so
11 it makes sense to treat them like the others. I certainly
12 agree with Mr. Shirey that by the time of Dodd-Frank it was
13 widely understood that rules could be reviewed as orders, and
14 again, it's only this Court's erroneous decision in *United Gas*
15 that created the confusion that we're trying to address now.
16 Have you had enough --

17 JUDGE TATEL: No.

18 MR. SCALIA: -- of jurisdiction, Your Honor?

19 JUDGE TATEL: Just one more question about the
20 superfluous thing and then you can have your two minutes on
21 the merits. Let's assume you're right about *Overton Park*,
22 wouldn't we, if we were being consistent in terms of our
23 interpretation of the statute, since we interpreted order to
24 mean rule if there was, you know, if there was no District
25 Court fact-finding required, wouldn't we do the same thing

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1 about rule and say that well, it just doesn't make sense to
2 have this Court hear an *Overton Park* type case, and so we're
3 going to interpret rule to mean, you know, anything that
4 doesn't require District Court fact-finding so those cases
5 would go to the District Court, which would leave 25(b)
6 superfluous.

7 MR. SCALIA: But I don't think that 25(b)
8 contemplates that --

9 JUDGE TATEL: Of course it doesn't.

10 MR. SCALIA: -- because it's directly --

11 JUDGE TATEL: That's my whole point.

12 MR. SCALIA: -- in this Court.

13 JUDGE TATEL: Of course it doesn't.

14 MR. SCALIA: But 25(b) is --

15 JUDGE TATEL: You just made my point.

16 MR. SCALIA: But --

17 JUDGE TATEL: It doesn't contemplate it either way,
18 right?

19 MR. SCALIA: 25(b) contemplates --

20 JUDGE TATEL: Yes.

21 MR. SCALIA: -- it hard wires review in this Court,
22 25(a) leaves it subject to the caveat that does exist --

23 JUDGE TATEL: Right. Yes, okay.

24 MR. SCALIA: -- for *Overton Park*.

25 JUDGE TATEL: All right. You can go ahead on the

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1 merits. You have two minutes.

2 MR. SCALIA: With respect to the First Amendment --

3 JUDGE TATEL: Yes.

4 MR. SCALIA: -- Judge Tatel, you asked about full
5 value, the Court there said what was important is that the
6 Commission not the public is the only audience. Effectively
7 here the only audience is the public, Judge Brown, you
8 authored that decision.

9 The other point the Court made with respect to
10 *Zauderer* was that *Zauderer* had never been applied outside the
11 context of correcting deceptive speech. *Zauderer* has no
12 application here whatsoever.

13 Finally, with respect to this purported fact opinion
14 distinction, in the *Riley* case Justice Brennan writing for the
15 Court said that *Tornino* (phonetic sp.) and *Wooley*, the leading
16 compelled speech cases, cannot be distinguished simply because
17 they involve compelled statements of opinion while here we
18 deal with compelled statements of fact, that's page 797 to 98
19 of *Riley*. The First Amendment issue here among other things
20 should function as a principle of constitutional avoidance in
21 construing what was required to be made public. Mr. Shirey
22 has referred to the conflict minerals provision, but remember,
23 that required publication on the website, something that was
24 absent here. We've also shown the changes that Congress made
25 to avoid a direct requirement to publish by the company.

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1 With respect to cost benefit analysis, with all
2 respect, it was remarkable for me to hear Mr. Shirey have to
3 be asked finally to address the cost of this rule, this is the
4 Agency assigned to protect shareholders, it adopted a rule
5 minimum 14 billion costs on U.S. shareholders to the
6 competitive advantage of foreign countries, and you saw how
7 little concern the Commission held with regard to that even at
8 this argument today. There were numerous ways beyond the
9 small ministerial changes that were identified to you by which
10 the Commission could have vastly reduced the costs here,
11 including, for example, grandfathering countries that
12 currently prohibited these kinds of disclosures.

13 For all of these reasons we respectfully submit this
14 rule should be vacated, and again, we urge the Court that we
15 have sought expedition, and we believe that's a reason that
16 jurisdiction belongs here, but at minimum we believe it's a
17 reason that --

18 JUDGE TATEL: Okay.

19 MR. SCALIA: -- would be valuable to all concerned
20 for the Court to address this as its schedule permits.

21 JUDGE TATEL: Okay. Thank you. The case is
22 submitted.

23 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

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



Paula Underwood

April 4, 2013

DEPOSITION SERVICES, INC.