ORAL ARGUMENT NOT YET SCHEDULED
Case 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. 14-0045 (RMC) (Hon. Rosemary M. Collyer, District Judge)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE, URGING AFFIRMANCE

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Dated: August 22, 2016

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Parties and *Amici.* All parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Certificates as to Parties, Rulings, and Related Cases filed by the parties, except for Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF), which are filing this *amicus curiae* brief in support of Plaintiff/Appellee.

Rulings Under Review. References to the ruling at issue appear in the Briefs for Appellant and Appellee.

Related Cases. Counsel for WLF and AEF are unaware of any related cases before this Court or any other court.

/s/ Richard A. Samp
Richard A. Samp

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Circuit Rule 29(b), Fed.R.App.P. 26.1, and Circuit Rule 26.1, the undersigned counsel states that *amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) are non-profit corporations. Neither has a parent corporation, and no publicly-held company has a 10% or greater ownership interest in either WLF or AEF.

Pursuant to Circuit Rule 26.1(b), WLF and AEF describe their general nature and purpose as follows. WLF is a public-interest law firm and policy center that regularly appears in this Court in cases raising public policy issues. AEF is a charitable foundation dedicated to promoting education in diverse areas of study, such as law and public policy.

/s/ Richard A. Samp
Richard A. Samp

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GLOSSARY

AEF	Allied Educational Foundation
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act
FSOC	Financial Stability Oversight Council
IRS	Internal Revenue Service
NCRI	*National Council of Resistance of Iran v. Dep't of State*
SEC	Securities and Exchange Commission
SIFI	Systemically Important Financial Institution
WLF	Washington Legal Foundation

INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] It devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law.

In particular, WLF has appeared regularly in this and other federal courts in support of efforts to require procedural fairness in proceedings conducted by federal administrative agencies. *See, e.g., Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *Timbervest LLC v. SEC*, No. 15-1416 (D.C. Cir., dec. pending).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici curiae agree with Appellee MetLife, Inc. and the district court that the Financial Stability Oversight Council (FSOC) departed arbitrarily and capriciously from its own rules and regulations when it designated MetLife as a nonbank

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[1] Pursuant to Fed.R.App.P. 29(c)(5), *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. All parties have consented to the filing of this brief.

systemically important financial institution (SIFI). *Amici* write separately to focus on the procedurally improper manner in which FSOC arrived at its decision.

The Due Process Clause of the Fifth Amendment requires that the federal government operate in a procedurally fair manner. That requirement applies just as strongly to the operations of federal administrative agencies as it does to proceedings in federal courts.

WLF and AEF are deeply troubled that FSOC "designated" MetLife as a SIFI without affording MetLife an adequate opportunity to discover in advance FSOC's rationale for doing so or even to examine the evidence on which FSOC intended to rely. They are further troubled by FSOC's failure to adhere to basic separation-of-powers principles: the very same officials who were urging that MetLife be designated were the ones who made the designation decision. WLF and AEF are concerned that permitting federal officials to operate in this procedurally unfair manner undermines essential due process protections.

STATEMENT OF THE CASE

The facts of this case are set out in detail in Appellee's brief. *Amici* wish to highlight several facts of particular relevance to the issues on which this brief focuses.

Section 113(e) of the Dodd-Frank Act, 12 U.S.C. § 5323(e), states that if

FSOC proposes to designate a nonbank financial institution as a SIFI, it must provide the institution with written notice, an explanation of the basis for the proposed determination, and "an opportunity for a written or oral hearing before the Council to contest the proposed determination." Regulations adopted to implement § 113(e) elaborate on the adjudicative procedures that FSOC must employ before making a final designation. In particular, the regulations require that if FSOC is even *considering* issuing a "proposed determination," it must first provide the affected company: (1) written notice that it is considering doing so; (2) an opportunity to submit written materials for the purpose of contesting consideration; and (3) "[n]otice when the Council deems its evidentiary record regarding such nonbank financial company to be complete." 12 C.F.R. § 1310.21(a).

The regulations also state that if the company in question requests an evidentiary hearing

> [T]he Council shall fix a time (not later than 30 days after the date of receipt by the Council of the request) and place at which such nonbank financial company may appear ... for a nonpublic evidentiary hearing at which the nonbank financial company may submit written materials (or, at the sole discretion of the Council, oral testimony and oral argument) to contest the proposed determination.

12 C.F.R. § 1310.21(c)(2).

Pursuant to those regulations, FSOC notified MetLife in July 2013 that it was being considered for designation as a nonbank SIFI. MetLife responded by submitting numerous materials that, it contended, demonstrated that FSOC was not authorized to make the designation because MetLife did not satisfy the criteria for designation established by the Dodd-Frank Act and implementing rules.

In September 2014, FSOC issued its "proposed determination," accompanied by an explanation of the basis for its proposal. MetLife responded by requesting an oral hearing (which occurred in November 2014) and submitting additional materials identifying flaws in FSOC's analysis. Throughout this period, MetLife repeatedly requested (without success) that FSOC provide it with access to the administrative record.[2] FSOC also rejected MetLife's request for access to nonpublic versions of FSOC's prior decisions designating two other companies, American International Group, Inc. (AIG) and Prudential Financial, Inc., as nonbank SIFIs. These nonpublic decisions were FSOC's only precedents

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[2] FSOC took the position that the proposed determination provided MetLife with sufficient information about the agency's reasoning. FSOC continued to deny MetLife access to portions of the administrative record even after MetLife filed this lawsuit. Even then, it sought to withhold or redact nearly 2,000 pages from the record. MetLife finally gained access to all of those additional documents only after it moved to compel production and the district court granted its motion. MetLife did not, of course, have access to the administrative record while the issue of whether MetLife ought to be designated was being adjudicated before FSOC.

regarding the designation of insurance companies.

FSOC issued its final determination (that MetLife should be designated as a nonbank SIFI) in December 2014. The final determination relied on new methodologies and evaluation criteria that had not been included or explained in the proposed determination. For example, apparently recognizing that MetLife had successfully refuted its prior explanations regarding why financial distress at MetLife could cause MetLife to undertake a fire sale of its assets, FSOC unveiled for the first time its "Monte Carlo" simulation, which presumed that MetLife would irrationally sell assets in a random order. By waiting until after MetLife's statutorily mandated hearing to explain this new theory, FSOC denied MetLife an opportunity to respond.

In marked contrast to adjudicatory proceedings conducted by most other federal administrative agencies, FSOC's proceedings were not structured so as to separate investigative, prosecutorial, and adjudicative functions. Instead, as documented by MetLife and confirmed by FSOC, the agency relied on the same staff and principals to investigate MetLife, respond to its requests for access to record materials, prepare the proposed determination, review MetLife's submissions, evaluate its challenges to the proposed determination, and decide whether to adopt a final determination to designate MetLife. Appellee Br. 10.

MetLife's lawsuit challenging the designation asserted, among other things, that FSOC's structure and designation process violated due process and the separation of powers. On March 30, 2016, the district court granted MetLife's motion for summary judgment and rescinded the designation. JA 779-813. It determined that FSOC had arbitrarily and capriciously deviated from the evaluation criteria established by the Dodd-Frank Act, its implementing regulations, and FSOC's own "Final Rule and Interpretive Guidance." In light of that determination, the court had no need to reach other arguments raised by MetLife in its summary judgment motion, including that the procedures employed by FSOC in arriving at its final determination violated due process and the separation of powers.

In its opening brief filed in this Court, MetLife has renewed its due process and separation-of-powers arguments. Appellee Br. 59-64. The brief asserts that those arguments provide an independent basis for affirming the judgment below.

SUMMARY OF ARGUMENT

As this Court has recognized, "No clause in our nation's Constitution has as ancient a pedigree as the guarantee that '[n]o person ... shall be deprived of life, liberty, or property without due process of law.' U.S. CONST. amend V." *Ass'n of American Railroads v. U.S. Dep't of Transportation*, 821 F.3d 19, 27 (D.C. Cir.

2016) (citing due process lineage dating back to Magna Carta). The Court added: "One theme above all others has dominated the Supreme Court's interpretation of the Due Process Clause: fairness." *Ibid.*

Under any plausible definition of "fairness," FSOC conducted an unfair proceeding that cannot withstand scrutiny for due process. FSOC purported to grant MetLife a hearing, but that proceeding lacked many of the attributes commonly associated with a fair hearing. FSOC failed to provide MetLife, until long after the hearing, with an administrative record. Nor did it inform MetLife of the economic-simulation model it would be employing in determining how MetLife might respond to financial distress. Each of those failures deprived MetLife of the ability to present a case that was fully responsive to FSOC's concerns.

The Due Process Clause imposes constraints on governmental decisions that deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause. FSOC's decision to designate MetLife as a SIFI quite clearly deprives MetLife of property interests. The designation imposes significant regulatory burdens on MetLife, and complying with those burdens will be extremely expensive. MetLife possesses a property interest in the funds it will be forced to pay in the course of its compliance efforts; it also possesses a property

interest in not opening its books and records to review by bank examiners, and having to set aside office space for the examiners at company headquarters. It thus can demand that FSOC provide it with due process of law before determining that it is a nonbank SIFI and subject to new, unwanted regulatory burdens.

In determining how much process is due someone in danger of losing a liberty or property interest, the Supreme Court has focused on three principal factors: (1) the nature of the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation, and whether such risk can be reduced if additional procedural safeguards are employed; and (3) the Government's interest, including its interest in avoiding the additional expense and administrative burden that adopting new procedural safeguards would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Consideration of those three factors demonstrates that the hearing provided to MetLife did not satisfy FSOC's due process obligations. First, the private interests at stake are significant; the immediately effective regulatory burdens imposed on any nonbank SIFI are substantial, and are expected to be even more massive once FSOC regulation fully kicks in. Second, a serious risk of an erroneous designation exists whenever, as here, the property owner is not informed either prior to or at the time of the hearing of: (a) the evidence the Government is

considering; and (b) economic models the Government may employ in demonstrating a need for designation. A property owner deprived of such information will be unable to prepare potentially meritorious rebuttals. Third, FSOC had no substantial interest in failing to provide the requested information in time for its use at the November 2014 hearing. It could have provided the information to MetLife at very little cost. Moreover, no more than a handful of nonbank designation proceedings arise each year, so FSOC would not face any appreciable administrative burden were it required to supply the same information in all other similar proceedings.

Both this Court and the Supreme Court have long recognized that the government, in order to comply with due process hearing requirements, must provide the affected property owner with advance notice of the evidence upon which it intends to rely in its decision-making process. *Nat'l Council of Resistance of Iran v. Dep't of State* ["*NCRI*"], 251 F.3d 192, 209 (D.C. Cir. 2001); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 288 n.4 (1974). FSOC's failure to provide the requisite information until long after MetLife's November 2014 hearing violated MetLife's due process rights.

FSOC also violated MetLife's due process rights by failing to respect the separation of powers. In conducting these proceedings, FSOC made no effort to

separate investigative, prosecutorial, and adjudicative functions. Rather, the agency relied on the same staff and principals to undertake all those functions. The very individuals tasked with putting together the case that MetLife should be designated a nonbank SIFI also made the decision to approve the designation.

Just this year, the Supreme Court applied "the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome'" to overturn a ruling in a civil proceeding in which one of the judges had, 30 years previously while serving in a state executive-branch position, authorized Pennsylvania to file charges in related criminal proceedings. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905-06 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Court explained, "[T]he Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id.* at 1905.

Those same due process concerns are still implicated when the government decisionmaker is an administrative agency, not an Article III court. *See, e.g., Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962). The Due Process Clause grants MetLife the right to an unbiased decisionmaker. When the government personnel advising FSOC members on whether to designate MetLife are the very same individuals tasked with building the case in favor of designation, it can

confidently be asserted, "as an objective matter," that there exists "an unconstitutional potential for bias." *Williams*, 136 S. Ct. at 1905 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)). FSOC's failure to assign separate personnel to perform prosecutorial and adjudicative functions is far outside the norm among federal administrative agencies, which generally ensure that those functions are strictly separated.

ARGUMENT

I. THE FINANCIAL STABILITY OVERSIGHT COUNCIL VIOLATED METLIFE'S DUE PROCESS RIGHTS BY CONDUCTING AN ADJUDICATION THAT LACKED NUMEROUS SAFEGUARDS DEEMED ESSENTIAL TO FAIR DECISIONMAKING

A well-accepted precept of due process jurisprudence is that the government must provide a hearing before "an individual is finally deprived of a property interest." *Mathews*, 424 U.S. at 333. The Supreme Court elaborated:

> The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society." The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Ibid (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The adjudication conducted by FSOC failed to provide MetLife a full and fair

opportunity to be heard "at a meaningful time and in a meaningful manner," because it lacked many of the attributes commonly associated with a fair decision-making process.

A. FSOC's Designation of MetLife as a Nonbank Systemically Important Financial Institution Deprived MetLife of Property Interests Within the Scope of the Due Process Clause

The protections of the Due Process Clause are limited to those who can demonstrate, as an initial matter, that they are threatened with deprivation of "life, liberty, or property" by the government. Given MetLife's extensive documentation of the regulatory burdens imposed on it by FSOC's designation, one might assume that there would be no dispute that MetLife has demonstrated the requisite property interest.

However, in opposing MetLife's due process claims in the district court, FSOC repeatedly disputed that point. For example, its opposition to MetLife's cross-motion for summary judgment stated (at 69): "MetLife still fails to identify a protected liberty or property interest of which it was deprived by its designation, as is necessary to invoke the protections of due process. ... Designation under Section 113 imposes no penalty, and MetLife has no liberty or property interest in never being designated."

FSOC's argument is based on the mistaken premise that the government

deprives an individual of a property interest only if it exacts a "penalty" or otherwise directly seizes an identifiable property interest belonging to the individual. As an initial matter, FSOC mistakenly disregards the fact that designated companies are assessed tens of millions of dollars in annual regulatory fees to fund the Federal Reserve's supervision. 12 U.S.C. § 5345; *see also id.* § 248(s). In any event, courts have routinely recognized that a regulated entity's expenditures necessitated by new regulatory burdens qualify as due process "property interests," even if no expended funds are transferred directly to the government. *See, e.g., General Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010) ("protected property rights" include "costs of compliance" with EPA regulations, as well as "damages associated with noncompliance"); *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991) (state court order granting prejudgment attachment of real estate implicates due process rights, even though the attachment was for the benefit of third parties, not the government, and even though it amounted to only a partial impairment of property rights). *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 547-550 (1998) (Kennedy, J., concurring in judgment) (regulatory burdens imposed on coal company by Coal Industry Retiree Health Benefit Act implicate due process rights); *id.* at 554 (Breyer, J., joined by Stevens, Souter, and Ginsburg, J., dissenting) (agreeing with Justice Kennedy regarding applicability of

the Due Process Clause)[3]; *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) (airline had protectable due process interest in continued operations, which would be interrupted by government efforts to suspend its participation in government transport program).

MetLife has identified numerous immediate regulatory consequences (and associated costs) for any company designated as a nonbank SIFI. Those consequences and costs are more than sufficient to establish that FSOC's designation threatens MetLife's property rights and thus implicates the Due Process Clause.

B. FSOC's Hearing Was Inadequate Because It Failed to Provide MetLife with a Meaningful Opportunity to Be Heard

As noted above, the Due Process Clause required FSOC, before designating MetLife as a nonbank SIFI, to provide MetLife with an opportunity to be heard "at a meaningful time" and "in a meaningful manner." FSOC failed on both scores. Its November 2014 hearing did not provide MetLife an opportunity to be heard in a *meaningful manner* because it hid from MetLife thousands of documents on which it intended to rely, and disclosed neither how it intended to weigh the criteria to be

[3] The four Justices who joined the plurality opinion in *Eastern Enterprises* took no position on the due process issue and instead ruled against the federal government on Takings Clause grounds. *Id.* at 538 (plurality).

used in determining whether MetLife should be designated a nonbank SIFI, nor the economic-simulation model it would be employing in determining how MetLife might respond to financial distress. Without this information, MetLife could not meaningfully respond at the November 2014 hearing to FSOC's rationale for its designation decision—because it did not know what that (undisclosed) rationale was.

Nor did the November 2014 hearing occur at a *meaningful time*. If FSOC was physically unable to disclose relevant documents by that date, it should have delayed the hearing until after it was in a position to disclose them. Moreover, if (as apparently occurred) MetLife's presentation at the November 2014 hearing made FSOC realize that it would need to overhaul its economic modeling, it should have continued the hearing until after the overhauled analysis was disclosed to MetLife—thereby providing MetLife with a meaningful opportunity to respond later. The Due Process Clause was designed to prevent the sorts of gamesmanship in which FSOC engaged here: waiting to see what responses MetLife came up with, and then changing the rules of the game so that MetLife's response could be deemed inadequate under the new rules.

1. The Three *Mathews v. Eldridge* Factors All Support a Finding that FSOC's Hearing Was Constitutionally Inadequate

The Supreme Court recognized in *Mathews v. Eldridge* that there is no one-size-fits-all formula for determining the extensiveness and timing of the due process hearing to which an individual is entitled before the government may deprive him of life, liberty, or property. Rather, "due process is flexible and calls for such procedural protections as the particular situation demands." 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Court stated that the demands of due process in any given case should be measured based on three considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved, and the fiscal and administrative burdens that the additional and substitute procedural requirements would entail.

Id. at 335. Consideration of those three factors tips the balance strongly in MetLife's favor; those factors indicate that the hearing provided by FSOC was inadequate to satisfy due process requirements.

First, the private interests affected by FSOC's decision to designate MetLife are significant. Indeed, MetLife disclosed at the November 2014 hearing that

because the increased capital requirements and other regulatory burdens accompanying designation are so substantial, it had retained a firm to evaluate the possibility of breaking up the company in the event of designation. This was not simply an idle threat. In January 2016, MetLife announced that it is divesting the vast majority of its U.S. retail insurance operations in response, in part, to its designation. Appellee Br. 14. The Due Process Clause requires a more formal pre-deprivation hearing when the government's potential deprivation of property rights will have a particularly significant impact on an individual. *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970) (due process requires a trial-like evidentiary hearing before the government may suspend the payment of welfare benefits, in light of the significant impact of a suspension).

Second, the meager hearing rights granted to MetLife substantially increased the risk that FSOC would err in determining whether MetLife's designation was permissible under the Dodd-Frank Act. When an administrative agency is seeking to determine issues of historical fact (*e.g.*, what assets does an insurance company own?), the risk of error is likely quite low and, consequently, the need for elaborate hearing procedures is reduced. But the nature of the inquiry here is altogether different: FSOC is being asked to make predictions regarding the likelihood of future events lacking any precedent. The Dodd-Frank Act permits FSOC to

designate a company as a nonbank SIFI if and only if it "determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of 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). Given the inherent imprecision of such predictions, the risk of erroneous deprivation is large. But that risk can be reduced by sharing with the affected company FSOC's reasoning for predicting a potential threat to "the financial stability of the United States" and providing the company with an opportunity to respond to that reasoning.

As MetLife has demonstrated, FSOC did not undertake those risk-reducing measures. Instead, it failed to inform MetLife, either prior to or at the time of the hearing, regarding: (1) the evidence it was considering (including thousands of pages of correspondence between FSOC and state insurance regulators); and (2) the economic models it planned to employ in demonstrating a need for designation. For example, FSOC failed to reveal its "Monte Carlo" simulation, an economic model that FSOC did not disclose until it issued its final determination in December 2014. The "Monte Carlo" simulation was FSOC's effort to demonstrate why economic distress at MetLife could cause MetLife to undertake a fire sale of its assets. Had FSOC disclosed this economic model in a timely manner, MetLife

could have explained to FSOC why the simulation made no economic sense because it presumed that MetLife would irrationally sell assets in a *random order*.

Other crucial items that FSOC withheld from MetLife included the nonpublic versions of FSOC's prior decisions designating two other companies, AIG and Prudential, as nonbank SIFIs. MetLife repeatedly requested access to these documents because they were FSOC's only precedents regarding the designation of insurance companies. As such, they would have provided MetLife with valuable information regarding the criteria applied by FSOC in determining whether an insurance company should be designated; MetLife could have used that information to demonstrate why its situation did not satisfy the designation criteria established in the AIG and Prudential cases or to distinguish its case on the facts. By denying MetLife access to those precedents, FSOC denied MetLife the opportunity to make such a demonstration—and thereby increased the likelihood of an erroneous designation decision.[4] In sum, the second *Mathews* criterion—whether additional hearing procedures would have reduced the risk of an erroneous designation decision—strongly favors MetLife.

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[4] Any assertions by FSOC that confidentiality concerns prevented it from releasing these documents ring hollow. Such concerns did not prevent FSOC from sharing the nonpublic version of its MetLife designation decision with numerous individuals outside the agency, as part of FSOC's effort to recruit them to file *amicus curiae* briefs with this Court in support of FSOC.

Third, FSOC can point to no government interest that would have been compromised by providing MetLife with more extensive hearing rights. Certainly, turning over the administrative record in advance of the November 2014 hearing would not have imposed a severe administrative burden on FSOC. FSOC did not assert any confidential claim with respect to the great majority of those documents; it simply chose to delay their release until it produced an administrative record during the district court proceedings. While FSOC asserted confidentiality claims with respect to a relatively small number of documents, the district court rejected those claims and ordered production—and FSOC has not appealed from that order.

Thus, each of the three *Mathews* factors indicates that, under the Due Process Clause, MetLife was entitled to a more "meaningful" hearing than the one provided by FSOC in November 2014.

2. Due Process Case Law Has Repeatedly Recognized the Types of Hearing Rights Being Asserted by MetLife

In asserting a due process right of access to important documents and information in advance of the November 2014 hearing, MetLife is not pressing a novel due process claim. Rather, both this Court and the Supreme Court have repeatedly held that the due process right to a "meaningful" hearing includes a right of pre-hearing access to evidence on which the government may base its

decision and the criteria the government will apply in making that decision.

In *Bowman Transportation*, the Supreme Court stated categorically, "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies *so that he may rebut it*. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." 419 U.S. at 288 n.4 (emphasis added). Thus, for example, FSOC violated due process rights when it withheld its "Monte Carlo" simulation until after the November 2014 hearing, thereby foreclosing any opportunity for MetLife to rebut the economic assumptions underlying that simulation.

Similarly, the Supreme Court unanimously overturned on due process grounds a rate determination issued by a public utilities commission, because the commission's determination relied on economic data that it did not share with the telephone company at or before its administrative hearing. *Ohio Bell Tel. Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292 (1937) (Cardozo, J.). The Court explained:

> The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record. ... The Commission cut down [on permissible rates] upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of

> the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut them. The response was a curt refusal. ... This is not the fair hearing essential to due process. It is condemnation without trial.

Id. at 300.[5]

This Court held in *NCRI* that an organization's due process rights were violated when the federal government deprived it of property rights without disclosing, in advance of the organization's hearing, the administrative record on which the government intended to rely. *NCRI*, 251 F.3d at 205, 209. While acknowledging that some of the documents could be withheld for national security reasons, the Court held:

> [T]he Secretary [of State] has shown no reason not to offer the designated entities notice of the administrative record which will in any event be filed publicly, at the very latest at the time of the court's review. We therefore require that as soon as the Secretary has reached a tentative determination that the designation is impending, the Secretary must provide notice of those unclassified items upon which he proposes to rely to the entity to be designated.

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[5] In cases in which it has rejected due process challenges to the adequacy of the government's hearing, the Supreme Court has placed significant reliance on findings that the individual was aware of the precise basis of the government's claims prior to the hearing and thus had a full and fair opportunity to rebut the claims. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 654 (1985) ("[W]hat is important is that the Board's recommendation [that the appellant attorney be reprimanded for a deceptive advertisement] put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio. Appellant does not contend that he was afforded no opportunity to respond to the Board's recommendation.").

Id. at 209.

In proceedings before the district court, FSOC sought to distinguish *NCRI*, asserting that the interference with property and liberty interests in *NCRI* was more extreme than it is here. FSOC Dist. Ct. Opp. Br. at 70. The effort to distinguish *NCRI* is unavailing. Although the designation in that case interfered with the ability of Iranian members of the organization to enter the United States, the Court expressed doubt that the interference implicated any due process liberty interests because aliens have no constitutional right to enter the United States. 251 F.3d at 204. Instead, the Court based its holding that the organization's claims implicated due process rights on a relatively minor property interest: a single U.S. bank account that was potentially subject to seizure. *Ibid*. The property interests placed at issue by FSOC's designation are vastly greater. Moreover, nothing in the Court's decision suggested that its holding—that the government was required to release all unclassified portions of the administrative record in advance of the organization's administrative hearing—was limited to those cases in which the threat to an entity's liberty or property interests was especially dire.[6]

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[6] *Cf. Ryskamp v. Commissioner of IRS*, 797 F.3d 1142, 1151 (D.C. Cir. 2015) (IRS abused its discretion under federal tax law when, in advance of an administrative hearing, it failed to provide the taxpayer with an explanation of the criteria it would apply in evaluating the taxpayer's appeal, thereby providing him with inadequate "guidance as to how to proceed" at the hearing.).

3. MetLife's Challenges to the Vagueness of FSOC's Criteria Are Well Taken

MetLife has cogently explained how FSOC's standardless approach to the designation issue—*e.g.*, the vagueness of the criteria it claimed to be applying—denied MetLife its due process right to a meaningful hearing by denying it "fair notice of the standards against which it was being judged." Appellee Br. 62.

In the district court, FSOC responded to this argument by asserting that due process vagueness concerns are of very limited applicability outside the criminal-law context. FSOC Dist. Ct. Opp. Br. at 73 (stating that "MetLife ignores the forgiving standard of review for vagueness challenges in the civil context, where a statute will be voided only if so vague and indefinite as really to be no rule or standard at all.") (citations omitted). FSOC's response misapprehends the nature of MetLife's challenge to the vagueness of FSOC's decision criteria. MetLife is not raising a void-for-vagueness challenge to the constitutionality of § 113 of the Dodd-Frank Act. Rather, MetLife contends that by failing to disclose (in advance of the November 2014 hearing) how it intended to weigh the various statutory and regulatory factors against one another in arriving at a designation decision, FSOC deprived MetLife of a meaningful opportunity to explain why a designation would

be unwarranted.

Indeed, the Supreme Court has repeatedly stressed that the principal vice of overly vague government regulations is that they permit government officials too much discretion to "pursue their personal predilections" regarding how to enforce the law. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). That concern is well illustrated by the FSOC's approach to the designation process. By declining to specify in advance the thresholds it would apply to designate MetLife—going so far as to deny MetLife full access to its decisions in the only two prior cases involving designation of insurance companies—FSOC was able to remove all obstacles to its apparently preordained goal of designating MetLife as a nonbank SIFI. This approach allowed FSOC to wait to see MetLife's responses to the initial determination, and then change the rules of the game so that MetLife's responses could be deemed inadequate under the new rules. As *Kolender* makes clear, the Due Process Clause was designed to prevent that sort of gamesmanship.

II. FSOC VIOLATED METLIFE'S DUE PROCESS RIGHTS BY FAILING TO RESPECT THE SEPARATION OF POWERS

FSOC compounded its due process violations by failing to respect the separation of powers. In conducting these proceedings, FSOC made no effort to separate investigative, prosecutorial, and adjudicative functions. As a result, the

very individuals tasked with putting together the case that MetLife should be designated a nonbank SIFI also made the decision to approve the designation. That decision-making scheme created an unacceptable potential for bias, in violation of the Due Process Clause.

The Supreme Court has made clear that an individual need not introduce evidence that government decisionmakers were subjectively biased, in order to demonstrate a due process violation. Rather the Court applies an "objective" standard to the bias issue;[7] and "when the same person serves as both accuser and adjudicator in a case," there exists "an unconstitutional potential for bias." *Williams*, 136 S. Ct. at 1905.

Thus, *Williams* overturned a Pennsylvania Supreme Court ruling in a civil proceeding in which one of the judges had, 30 years previously while serving as a state prosecutor, authorized the Commonwealth to file death-penalty charges against the same individual in related criminal proceedings. *Id*. at 1905-07. The Court held that there existed an unconstitutional potential for bias and thus that it was irrelevant whether the judge was actually biased against the individual: "The

[7] Under that objective standard, "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" *Williams*, 136 S. Ct. at 1905 (quoting *Caperton*, 556 U.S. at 881).

objective risk of bias is reflected in the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.'" *Id.* at 1905-06 (quoting *Murchison*, 349 U.S. at 136).[8]

The Supreme Court has recognized that the due process requirement of "a fair trial in a fair tribunal" "applies to administrative agencies as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). *Withrow*, which addressed bias claims against a Wisconsin medical board, explained the applicable due process principles as follows:

> Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness. In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Id. at 47.

In *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988), this

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[8] *Williams* cannot be distinguished on the ground that, although it was a civil proceeding, it might be classified as quasi-criminal in nature. Williams was convicted of murder in 1986 and sentenced to death; the criminal case ended in 1990 when the Pennsylvania Supreme Court denied his appeal. The case that came to the Pennsylvania Supreme Court in 2014 (and to the U.S. Supreme Court in 2016) was a collateral challenge to his conviction. But the U.S. Supreme Court gave no indication that its due process holding was influenced by the quasi-criminal aspects of the case; indeed, in articulating its objective, "unconstitutional potential for bias" due process standard, it relied exclusively on *Caperton*, a civil case. *Caperton* involved due process/bias claims arising from a state-court decision in a tort action.

Court interpreted *Withrow* as authorizing commissioners who head a federal administrative agency to adjudicate administrative claims filed against an individual by agency staff personnel, even though the commissioners may have initially authorized the investigation and prosecution of the claims. The Court explained:

> "It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law." ... In short, we believe that [the petitioner] has failed to heed *Withrow*'s message that a due process challenge directed broadly to combinations of purposes or functions in the modern administrative state "assumes too much." ... [A]cceptance of [the petitioner's] broad due process attack would ... accede precisely to what the Supreme Court has twice warned against, namely a sweeping due process challenge that "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity."

Blinder, 837 F.2d at 1106-07 (quoting *Withrow*, 421 U.S. at 56, 49-50).

Blinder suggests that no due process "bias" concerns would arise were FSOC to operate as do similar federal administrative agencies (*i.e.*, agencies headed by a multi-member council/commission). At such agencies, the commissioners play a role not only in adjudicating administrative claims filed against an individual by agency staff personnel but also in initially authorizing the investigation and prosecution of the claims. But the organization of each of those

agencies is different from the organization of FSOC in a crucial respect. Each of those agencies strictly adheres to separation of powers when assigning duties to agency personnel. Thus, personnel assigned to provide advice to agency commissioners/members when rendering adjudicative decisions as well as personnel assigned to issue preliminary adjudicative decisions (*i.e.*, administrative law judges) are strictly separated from personnel whose job it is to investigate claims and to press those claims before the agency's commissioners/members.

In contrast, FSOC maintains no such separation. Thus, when deciding whether to designate MetLife as a nonbank SIFI, the 15 members of FSOC were being advised by the very same agency personnel whose function it was to build the case that MetLife should be designated. Such blurring of investigative, prosecutorial, and adjudicative functions is unconstitutionally unacceptable because it creates "an unconstitutional potential for bias," *Williams*, 136 S. Ct. at 1905, in agency decisionmaking. *See FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 102 (D.C. Cir. 1977) (FTC "and the other regulatory agencies have two separate functions to perform, investigative and adjudicative. It is also recognized that the regulatory agencies have an obligation to keep those roles separate insofar as is possible, in order to insure the judicial fairness of adjudicative proceedings.").

In *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962), this Court

overturned an SEC order on due process/bias grounds because one of the commissioners who participated in the SEC vote, while serving as an SEC employee before becoming an SEC commissioner, had participated in the investigation and prosecution of the case. The Court stated that "the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function," and that to allow an individual to participate in those dual roles "would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed." *Id*. at 265, 266-67.

The Supreme Court "has stated from its first due process cases [that] *traditional practice* provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (emphasis added). The traditional practice among federal administrative agencies is to maintain a strict separation of investigatory and adjudicatory personnel. FSOC has ignored that traditional practice. *Amici* urge the Court to conclude that FSOC's failure to adhere to that traditional practice, or to substitute a practice that equally preserves the separation of powers, is constitutionally unacceptable.

CONCLUSION

Amici curiae WLF and AEF request that the Court affirm the judgment of the district court.

Respectfully submitted,

/s/ Richard A. Samp

Richard A. Samp
Mark S. Chenoweth
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: August 22, 2016

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation and Allied Educational Foundation. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of *amici curiae* is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 6,873, not including the certificate as to parties, table of contents, table of authorities, glossary, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

August 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the brief of *amici curiae* Washington Legal Foundation and Allied Educational Foundation with the Clerk of the Court of the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
Richard A. Samp