BETTER MARKETS

SPECIAL REPORT

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Economic and Financial Issues Before the Supreme Court *and the* Impact of Judge Amy Coney Barrett

A Look Ahead to 2020-2021 *and a* Review of 2019-2020 Term

INTRODUCTION

Supreme Court decisions often grab the front-page headlines and lead the news broadcasts, but when they do, they almost always relate to high-profile, highly controversial social issues like abortion, gun rights, the death penalty, gay marriage, racial justice, and similar policy questions. Those are extraordinarily important issues, and they deserve the attention they receive. However, the Court's cases relating to *economic and financial issues* also profoundly affect the quality of life of every American. They too should be covered by the media and better understood by the public, and those are the goals of this Report.[1]

The Supreme Court's decisions on economic and financial issues—and the way in which the lower courts interpret and apply them—affect every American with a job, mortgage, credit card, bank account, car loan, student loan or any other financial product or service. For example, can debt collectors call hardworking Americans at all hours of the day and night? If a single mom is ripped off by a bank or credit card company, does the company have to "disgorge" or give up the money it took or does it get to keep it? Will everyone have access to the courts as an effective way to recover losses when they are financially exploited or will they be forced into an unfair, ineffective, and secretive arbitration proceeding? And will federal financial agencies have the power to protect financial consumers and investors or will Wall Street's biggest banks be allowed to neuter those agencies?

Two examples vividly illustrate the importance of these questions and how the Court resolves them. In the *Liu* case decided just this past term (and described below), scam artists brazenly defrauded investors out of nearly $27 million with promises that their money would go to the construction of a cancer treatment center. *Liu v. S.E.C.*, 140 S. Ct. 1936 (2020). In fact, the perpetrators diverted the money primarily to their personal bank accounts or to marketing efforts designed to lure in more victims and more money. The Securities and Exchange Commission ("SEC") brought an enforcement action seeking, among other things, to force the defendants to return their ill-gotten gains, but the defendants claimed that the SEC had no such authority under the securities laws. The case wended its way to the Supreme Court, which fortunately got it right—albeit with limits—and upheld the ability of the SEC to ask for "disgorgement" from con artists. Yet if the Court had gone the other way and invalidated that critical enforcement tool, then those victims would face little chance of recovering any of their investments. The scale of harm would also have been much greater, as the SEC routinely relies on the disgorgement remedy to recover billions of dollars in securities fraud cases for the benefit of victims—more in fact than it collects in fines and penalties. And the wrong decision would have emboldened countless scam artists and predators who, with far better odds of keeping whatever they might steal, would undoubtedly have victimized other investors.

In another case decided last term, *Seila Law*, the Court was asked to declare the structure of an entire agency unconstitutional because it was headed by a single director who could not be removed at the whim of the President, but only "for cause." *Seila Law LLC v. Consumer Financial Protection*

[1] This is the third in a series of annual reports issued by Better Markets to illustrate the importance of economic and financial cases that come before the United States Supreme Court: Better Markets, Special Report: An Update On Supreme Court Cases Involving The Financial And Economic Security And Prosperity Of The American People (Oct. 4, 2019), https://bettermarkets.com/sites/default/files/Better_Markets-Brett_Kavanaugh_Report_Oct-2019%20%28003%29.pdf; Better Markets, Judge Kavanaugh: Good For Corporations, Bad For Your Wallet (Aug. 28, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Kavanaugh%20Report.pdf.

Bureau, 140 S. Ct. 2183 (2020). The case threatened the very existence of one of the most effective consumer protection agencies ever established, the Consumer Financial Protection Bureau ("CFPB"), which since its founding in 2011 has returned over $11 billion to 25 million consumers harmed by unscrupulous financial firms. In one sense, the Supreme Court got it wrong, agreeing with the challenger that the agency structure violated the Separation of Powers doctrine in the Constitution. Yet in another sense, the Court made the right call, since it also held that the remedy was simply to eliminate the removal restrictions—or "sever" them from the rest of the law—not abolish the agency in its entirety. If the Court had erred on that issue, chaos would have ensued and a true champion of consumer protection would have been dismantled—all to the delight of payday lenders and other firms that take advantage of Americans every day.

Thus, the Court's decisions on economic and financial questions have a huge impact on every wallet and pocketbook in America and on how all Americans can save, spend, invest, and protect their hard-earned money. They ultimately determine how much—or how little—financial protection and prosperity they can enjoy. The bottom line is that anyone who uses any type of financial product or service—which is almost every American—should care about the Supreme Court's decisions.

But the impact on individuals is not all that is at stake. The Court's continuing trend toward conservatism, if not right-wing extremism, poses a threat to the entire framework of regulatory agencies that Congress has established over the past 100 years to protect Americans' health, safety, and financial well-being. In the second half of the 20th century, conservatives and Corporate America have funded efforts to promote the notion that the federal administrative agencies, like the SEC and others that oversee our financial markets, fundamentally conflict with our system of government under the Constitution, which is comprised of three branches. Adherents to this view contend that these agencies represent a dangerous, unelected, and unaccountable fourth branch of government that wields too much power. They pejoratively refer to them collectively as the "administrative state."[2]

These attacks on regulatory agencies suffer from many flaws, both conceptual and pragmatic, as reflected in a body of literature and case law defending the so-called "administrative state."[3] Perhaps most compelling is the incontrovertible evidence that administrative agency regulation of our industries and markets has for decades vastly improved the lives of all Americans in virtually every sphere of activity, from protecting and improving the environment; to shielding consumers from dangerous foods and products; to safeguarding investors from fraud, abuse, and predatory conduct at the hands of banks, brokers, and insurance companies. The important point here is that decisions in many critically important future Supreme Court cases—including those impacting the economic

[2] *See, e.g.,* Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv. L. Rev. 421 (1987), *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=12236&context=journal_articles; Christopher DeMuth, *Can the Administrative State be Tamed?*, 8 J. Legal Analysis 121 (2016), *available at* http://ccdemuth.com/wp-content/uploads/2015/05/Can-the-Administrative-State-Be-Tamed-May-2015-Update.pdf.

[3] For a sampling of those who oppose this assault on regulation, *see* Jack Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018), *available at* https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1595&context=faculty_scholarship; Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. REG.549 (2018), *available at* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1521&context=yjreg; Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev.1 (2017) *available at* https://scholarship.law.columbia.edu/faculty_scholarship/954.

and financial issues of all Americans—will be shaped, in part, by where the justices stand in this fundamental debate.

With President Donald Trump's recent nomination of Amy Coney Barrett, a judge who has served on the United States Court of Appeals for the Seventh Circuit for just three years, the Supreme Court is once again at the center of public and media attention. As with Justice Brett Kavanaugh's nomination and subsequent confirmation,[4] the choice has huge implications. Her well-known conservative leanings and her technical and narrow reading of the law—fully, publicly, and proudly aligned with her mentor, Justice Antonin Scalia—will undoubtedly and decisively tilt the Court to the right. The Court will be in control of a 6-3 conservative majority, an imbalance far more likely to generate stridently conservative opinions that favor entrenched corporate interests over individual interests, without whatever moderation a 5-4 split might engender.

In the context of cases involving economic issues and financial regulation, that conservative dominance portends more decisions that favor the already wealthy, the Wall Street banks, the Chamber of Commerce, and the other corporate interests that often exploit individual investors and consumers. Those decisions will erode the authority and effectiveness of the regulatory agencies charged with protecting Americans from fraud, abuse, and conflicts of interest at the hands of financial predators and criminals. And they will even undermine the stability and integrity of the financial markets, increasing the likelihood of future financial and economic crises, which inflict so much financial pain and misery on the vast majority of Americans.

In this report, we explore the following topics:

I. The attributes of the Supreme Court that make its decisions so important and lasting;
II. The types of financial and economic cases that affect the lives of all Americans;
III. Special concerns surrounding the war on regulation through the courts;
IV. The judicial approach of Judge Amy Coney Barrett;
V. Important cases involving financial regulation that the Court will be addressing between now and next July;
VI. Important decisions involving financial regulation that the Court issued last term;
VII. Appendices
    A. Cases Involving Economics and Financial Regulation that Are Subject to Pending Petitions for Certiorari;
    B. The Supreme Court's Historic Role in Financial Regulation.

[4] *See* Better Markets, Judge Kavanaugh: Good For Corporations, Bad For Your Wallet (Aug. 28, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Kavanaugh%20Report.pdf.

I.

SUPREME COURT DECISIONS: THE FINAL STAGE OF APPEAL IN IMPORTANT CASES THAT ESTABLISH ENDURING PRINCIPLES OF LAW

The Supreme Court's cases are consequential for reasons related not just to the subject matter but also to the nature of the Court as an institution, the way it operates, and the role it plays.

The decisions are important by definition. The vast majority of cases reviewed by the Supreme Court are selected in the Court's discretion. The justices themselves decide which issues are the most consequential, urgent, and worthy of review. A conflict among the lower circuit courts is one principal reason the justices will accept a case, but the importance of the issue presented is always a factor they weigh. *See* Sup. Ct. R. 10.

The decisions are final. The Supreme Court is a court of last resort and the parties have no further avenues for appeal. The losing party, and society as a whole, must accept the outcome and adapt to the rule established in the case, except to the extent that Congress decides to legislate in response to the Court's decision on an issue not controlled by the Constitution.

The decisions are binding across the country and on other branches of government. Unlike the federal district courts and 13 circuit courts of appeal around the country, the Supreme Court's decisions are not limited in geographic scope. They become the law of the land, applicable to all individuals, private companies, and other branches of government.

The decisions endure for decades. Each decision of the Court shapes the law for years to come. The Court itself adheres to the doctrine of stare decisis, meaning that the Court rarely, and only for compelling reasons, deviates from the rule of law set down in earlier decisions. And each justice has lifetime tenure (subject only to the rarely invoked impeachment process), meaning that he or she will sit on the Court for years, deciding cases in ways that perpetuate the rules established in earlier decisions or sometimes changing direction and establishing new precedents that in turn influence the law for years.

The decisions have an impact on multiple levels. Supreme Court decisions have an impact on at least three levels. They of course resolve specific disputes, with typically enormous life consequences for the parties involved. They also lay down general principles in the substantive area of law concerned, which will govern many futures cases and affect many other lives. Finally, and even more broadly, they help define how the Court will read and apply Constitutional and statutory provisions in general, something determined by the judicial and ideological attitudes of the justices who have been picked to serve on the Court.

II.

SUPREME COURT DECISIONS: HOW THEY AFFECT THE FINANCIAL AND ECONOMIC LIVES OF EVERY AMERICAN

Americans' financial lives are deeply influenced by a wide variety of cases that end up before the Supreme Court. Those cases help establish the rules of the road and guardrails that protect the public against financial fraud and abuse; the remedies that investors and consumers will have—or won't have—when banks and brokers rip them off through illegal and unscrupulous conduct; and even the tools that regulators have at their disposal to protect investors and ensure that our financial markets are fair and transparent. And some cases affect the degree of transparency in the financial markets and in the operations of the agencies that oversee those markets.

Will the financial rules of the road actually punish and deter fraud or instead declare open season on investors and consumers? Cases involving the laws and rules governing the financial markets (including securities, banking, and commodities) affect every American. Those cases ultimately determine how far financial firms can go to put your money in their pockets and how much legal authority the cops on the beat have to protect you from fraud, abuse, and conflicts of interest. More tangential, but still relevant to virtually all Americans, are cases involving antitrust, taxes, and bankruptcy. Those court decisions help determine how much money American workers and savers lose when the markets for products and services are not fair and competitive; how much money they get to keep after taxes; and how much relief they can expect if they are overcome with debt and are forced to seek a fresh start in bankruptcy.

Will harmed investors and consumers be able to seek justice in open court, or will they be forced into a secret and unfair arbitration proceeding? Another critically important type of case helps determine whether investors and consumers can fight back when they have been subjected to fraud and abuse by their broker, banker, or insurance agent. One key question often presented in these cases is whether those harmed by financial firms will be forced into arbitration, a secretive and often biased dispute resolution process operated or dominated by industry that has proven to be woefully ineffective for investors and consumers. Or, will they instead be allowed to have their claims heard in a neutral and open courtroom subject to procedural rights and the opportunity to appeal—something most Americans expect until they discover that they have waived their right to go to court under an arbitration clause buried in a long, boilerplate account agreement that only attorneys can understand.

Another key question in some of these cases is whether those who suffer harm and wish to bring claims in court can have their cases heard at all under the so-called "standing" requirements rooted in the U.S. Constitution, as interpreted by the Supreme Court: Have they suffered (or are they threatened with) the type of concrete and imminent injury that entitles them to be heard in court? How stringently the Supreme Court interprets the requirements for standing can determine whether litigants even have the opportunity to present their case to a judge or jury.

<u>Will the agencies that serve as the cops on the Wall Street beat have the tools they need to effectively police the markets, or will they be neutered with limited rulemaking and enforcement authority?</u> This area of the law may appear technical, complicated, and far removed from the day-to-day concerns of most Americans, yet the Supreme Court's decisions governing the agencies that oversee the financial markets profoundly affect Americans' financial well-being. For example, these cases determine whether agency rules designed to protect investors and consumers will be nullified or diluted through court challenges brought by industry, and whether an agency will have the power and authority to enforce the law to the fullest possible extent against financial firms and individuals who engage in illegal or abusive practices.

At the center of these administrative law issues is the *Chevron* doctrine, which for the past 35 years has required courts to defer to an agency's reasonable interpretations of statutory provisions that are ambiguous, requiring the application of special expertise and experience. In many cases, it allows agency rules and actions to withstand judicial scrutiny as courts defer to the agency's judgments, as long as they are permissible under the statutory language. The *Chevron* doctrine, as discussed further below, is now squarely in the sights of conservative judges and justices who view it as an indefensible shift of power from the legislative branch to the executive branch and the "administrative state."

III.

THE ASSAULT ON FINANCIAL REGULATION THROUGH THE COURTS: SPOTLIGHT ON CHEVRON AND THE "MAJOR RULES" DOCTRINE

An especially critical area in which the Supreme Court has an impact on the economic well-being of Main Street Americans is through its decisions on administrative law, particularly those addressing the degree of authority granted to the regulatory agencies tasked with protecting the public interest in the financial markets.

For over 100 years, the federal government has increasingly relied on administrative agencies to help regulate a wide range of industries and markets and to protect the health, welfare, and financial security of all Americans. This evolution has been appropriate and necessary, as our society has steadily grown in size and complexity, calling for detailed rules that Congress itself could not conceivably research, write, and implement. Moreover, agencies are staffed with professionals who have the necessary expertise, both legal and technical, to implement Congress's delegated authority and achieve its objectives.

By all credible measures, this model of administrative regulation has proven to be an enormous success. In the financial realm, for example, the advent of securities regulation through the SEC in the 1930s set the stage for the growth of robust equity markets that ushered in decades of economic prosperity in America. And the financial crisis of 2008 demonstrated vividly, painfully, and conclusively that de-regulation of the financial system leads to financial and economic chaos and catastrophe.

Nevertheless, regulated industries constantly seek to limit the scope of new rules and to nullify or scale them back once they are in place. They wage this fight in all three branches of government, and when their lobbying efforts fail in Congress or during the agency rulemaking process, they resort to the federal courts to nullify or weaken agency rules. This has been the pattern in the financial services industry, and it has intensified over the last 20 years, with the filing of innumerable lawsuits challenging the rules of the SEC, the Commodity Futures Trading Commission, the CFPB, and other agencies.

Invoking their right to seek judicial review under the landmark Administrative Procedure Act of 1946, 5 U.S.C. § 551 *et seq.*, regulated industries typically claim that in promulgating the rule under attack, the agency acted beyond its statutory authority, made irrational or "arbitrary and capricious" judgments about the appropriate way to write the rule, or failed to abide by the procedural requirements of the Administrative Procedure Act that require public notice and an opportunity for comment on proposed rules. Another frequently deployed weapon used by industry to attack agency rules over the last two decades has been cost-benefit analysis: the argument that the agency was duty-bound to conduct an exhaustive and quantitative analysis of the costs and benefits of a rule but failed to do so or did so incorrectly.[5]

Here we focus on two particularly important principles of administrative law that will largely determine how the federal courts decide cases involving attacks on agency rules and other actions: the *Chevron* doctrine and the "major rules" doctrine. They will loom large in the Supreme Court in the years to come, as a number of justices have signaled a desire to revisit and reshape them.

A. Chevron

In *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that where Congress creates an agency and grants it regulatory authority to address a particular problem, courts should defer to an agency's statutory interpretation where the statute is silent or ambiguous with respect to the issue at hand, provided the agency's approach "is based on a permissible construction of the statute."[6] This commonsense, longstanding principle is sound for multiple reasons. It respects Congressional intent, since it aligns with Congress's decision to delegate the job of regulating to the agency in the first instance. And from a practical perspective, it sensibly recognizes that agencies have more expertise on the regulatory challenges presented and are therefore better equipped than judges to interpret the law in a way that promotes sound regulatory choices.

However, industry-friendly advocates have long sought to weaken this bedrock principle of administrative law, hoping to undermine the ability of agencies to regulate in the public interest free from heavy-handed, second-guessing from the judiciary. Justice Kavanaugh in particular is hostile to the *Chevron* doctrine, and joined by Justice Neil Gorsuch, he can be expected to seek to abolish

[5] Better Markets, Setting The Record Straight On Cost Benefit Analysis And Financial Reform At The SEC (July 30, 2012), *available at* https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf; Better Markets, Update: Recent Trends In The Law Governing Cost-Benefit Analysis (Dec. 29, 2017), *available at* https://bettermarkets.com/resources/update-recent-trends-law-governing-cost-benefit-analysis-securities-and-exchange.

[6] *Chevron*, 467 U.S. at 843.

the principle or at least narrow its application. Justice Kavanaugh has attacked the *Chevron* doctrine as "an atextual invention by courts" that is in many ways "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch."[7] Indeed, Justice Kavanaugh has gone so far as to decry *Chevron* as a doctrine that "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[8] Ironically, Justice Kavanaugh has not acknowledged or discussed the massive shift of unreviewable power to the courts and judges like himself, who will unilaterally determine all issues of statutory interpretation and congressional intent, if the *Chevron* doctrine is overruled.

Critics of *Chevron* and the regulatory agencies frame their criticism in terms of the federal bureaucracy being "undemocratic" and "unaccountable," but these arguments carry little weight. While the career staff at regulatory agencies are, indeed, not elected, the staff's work invariably reflects the policies of agency leadership, and the agency leadership is accountable to the President who is ultimately accountable to the American people. When an administration changes following an election, the policy outcomes at the agencies also change. And if there is any doubt that elections matter to the work of regulatory agencies, one need only compare the actions of the financial regulatory agencies under the Obama and Trump administrations, where the dramatic shift in policy is clear: today, the agencies are de-regulating the industries they oversee and shutting down enforcement.[9]

Moreover, the substantive and procedural requirements surrounding agency rulemaking serve to corral all administrative agencies. For example, before promulgating a rule, agencies are required by law to first issue a proposal and then accept and review public comments on it. There is no similar requirement for Congress or the courts. And Congress can always overturn agency rules, either through use of the Congressional Review Act or by simply passing new legislation. The ultimate irony of the "pro-democratic" façade of the anti-*Chevron* campaign is that, to the extent it succeeds, it shifts power from the regulatory agencies to the courts, which are by design the least democratically accountable institutions in the federal government.

B. The Major Rules Doctrine

A second and distinct line of attack on the authority of regulatory agencies is the so-called "major rules" doctrine. Based upon a series of Supreme Court cases, the major rules doctrine is a judicially created standard that requires especially clear congressional authorization for an agency to adopt a "major rule," one that has vast economic or political significance.[10] Under this approach, the very legislative ambiguity that supports the exercise of agency discretion under *Chevron* actually prohibits the agency from exercising its discretion with respect to major rules; Congress must unambiguously authorize the agency to adopt a major rule.

[7] Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

[8] *Id.*

[9] *See* Better Markets, Special Report, Ten Years Of Dodd-Frank And Financial Reform; Obama's Successes, Trump's Rollbacks, And Future Challenges 29-58 (July 21, 2020), *available at* https://bettermarkets.com/sites/default/files/images/BetterMarkets_DoddFrankReport.pdf.

[10] *Loving v. IRS*, 742 F. 3d 1013 (D.C. Cir. 2014).

One commenter has provided an especially apt statement of the core problem with the major rules doctrine: "By requiring detailed and specific congressional directives before agencies are authorized to write rules regarding emerging problems, conservative judges substitute their own policy preferences for those of the legislative and executive branches."[11]

In short, this judge-made doctrine has no sound statutory or constitutional basis, and if expanded, would seriously undermine the ability of regulatory agencies to respond to pressing, modern problems, even where Congress has given an agency a broad grant of authority to do just that.

IV.

JUDGE AMY CONEY BARRETT: A DEVOTEE OF JUSTICE SCALIA'S TEXTUALIST JURISPRUDENCE AND A LIKELY ALLY OF CORPORATIONS OVER CONSUMERS

On September 26, 2020, amid considerable controversy, President Trump nominated Amy Coney Barrett to fill the vacancy on the Supreme Court created by the recent passing of Justice Ruth Bader Ginsburg. Evaluating Judge Barrett's judicial temperament and philosophy poses a challenge insofar as she has served as a judge on the United States Court of Appeals for the Seventh Circuit for a comparatively short time, just under three years. However, there are clear indications that she will read the law narrowly and readily apply a number of legal doctrines—such as standing and *Chevron*—in ways that deny relief to consumers and undermine the ability of agencies to promulgate strong rules and punish and deter fraud and abuse in the financial markets.

The first clue—in addition, of course, to the fact that it was President Trump who chose to elevate her to the Court for a decades-long tenure—is that the Chamber of Commerce and other business groups have voiced strong support for her nomination,[12] as even in her short time on the federal bench she has consistently sided with corporations and embraced legal doctrines that make it more difficult to hold corporations accountable for their misconduct. Below, we briefly review a few additional sources of insight in an effort to develop a more concrete sense of how she is likely to rule on cases involving financial regulation if she is confirmed to the Court: her decisions as an appellate court judge; her academic writings; and her avowed devotion to the judicial approach to the law embraced by the late Justice Antonin Scalia.

[11] *See* Rena Steinzor, *The Major Rules Doctrine—A "Judge-Empowering Proposition,"* American Constitution Society Expert Forum (Oct. 4, 2018), https://www.acslaw.org/expertforum/the-major-rules-doctrine-a-judge-empowering-proposition/.

[12] Press Release, Chamber of Commerce, U.S. Chamber Supports President Trump's Nominee Barrett for Supreme Court (Sept. 26, 2020), https://www.uschamber.com/press-release/us-chamber-supports-president-trump-s-nominee-barrett-supreme-court.

A. Decisions

One important way in which courts can make it difficult to hold corporations accountable is through narrow, hyper-technical interpretations of broad, remedial statutes, crafting loopholes for companies to engage in behavior that Congress clearly intended to prohibit. For example, in *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), AT&T repeatedly spammed the plaintiff with text message survey questions for AT&T customers. But the plaintiff was not an AT&T customer, was on the "Do Not Call" registry, and had not consented to receiving messages from AT&T. The Telephone Consumer Protection Act ("TCPA") prohibits companies from texting a cell phone using an "automatic telephone dialing system," defined as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." *Id.* at 465.

In an opinion written by Judge Barrett, the Seventh Circuit denied relief to the plaintiff. As she recognized, the statutory definition left something to be desired in terms of grammatical clarity. *Id.* at 460 ("the wording of the provision that we interpret today is enough to make a grammarian throw down her pen"). She also acknowledged that there were at least four possible readings of the statute, including one, and plausibly two, that would have imposed liability on AT&T. And because the TCPA is a remedial statute, aimed at preventing unwanted contacts of exactly the sort that the plaintiff experienced, one would expect a court to adopt a generous reading of the law, the one that furthers its underlying remedial purposes and fulfills Congress's intent. *See* P*hysicians Healthsource, Inc. v. A-S Medication Sols.*, LLC, 950 F.3d 959, 967 (7th Cir. 2020). Instead, Judge Barrett, writing for the court, engaged in a mechanical parsing of the statutory text in an effort to find the supposedly "best" grammatical meaning, turning the act of judging essentially into an exercise in sentence diagramming.

Courts can also benefit companies, at the expense of consumers, by throwing up procedural roadblocks to prevent meaningful redress in court for illegal conduct. In her short time on the bench, Judge Barrett has also engaged in this practice. For example, mandatory arbitration clauses in consumer and employment contracts force consumers into unfair, biased, and secretive proceedings in which they can be expected to recover little, if anything, even where violations of the law are clear.[13] For decades, courts, invoking the 1925 Federal Arbitration Act, have increasingly enforced mandatory arbitration clauses to a degree Congress never intended.[14] In *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020), Judge Barrett fell in line with this jurisprudence, forcing GrubHub drivers who argued that GrubHub violated the Fair Labor Standards Act into an arbitration process that will almost certainly be stacked against them. *See Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020).

Another procedural hurdle erected by courts is the requirement of "standing," the notion that, in order to bring a lawsuit in federal court, a plaintiff must have suffered or be threatened with a concrete

[13] Better Markets, The Dirty Dozen: Why Mandatory Arbitration Is Unfair (Oct. 11, 2017), https://bettermarkets.com/newsroom/dirty-dozen-%E2%80%93-why-mandatory-arbitration-unfair.

[14] Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created A Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99 (2006).

form of injury. This requirement has been increasingly used by courts to deny litigants access to the courts, even where a plaintiff has been subject to clearly unlawful conduct. Judge Barrett has also contributed to this flawed jurisprudence. In *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019), a debt collector sent a letter to the plaintiff that misinformed her about how to dispute the debt. That misinformation was a clear violation of the Fair Debt Collection Practices Act. Nevertheless, Judge Barrett, following *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1544 (2016), held that the plaintiff did not have standing because she did not suffer sufficiently concrete harm from this clearly illegal conduct.

Some might argue that Judge Barrett was only following binding Supreme Court precedent. But circuit court judges almost always have leeway when they apply Supreme Court precedent. Moreover, as a Supreme Court justice, Judge Barrett would be creating precedent, not following it, and her opinions in *Casillas* and other standing cases reveal no trace of lament about the often harsh impact of the standing doctrine on those seeking redress in court. *See also Carello v. Aurora Policemen Credit Union*, 930 F.3d 830 (7th Cir. 2019) (per Judge Barrett's opinion, denying standing to a blind "tester" who sued a credit union for its website's noncompliance with the Americans with Disabilities Act); *but see Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722 (7th Cir. 2020) (per Judge Barrett's opinion, in a case challenging the construction of the Obama's presidential library on public lands, both denying and recognizing a variety of standing claims, but dismissing on the merits.)

B. Scholarship and Interpretive Approach

Judge Barrett produced a significant amount of scholarship as a professor at Notre Dame Law School from 2002 to 2017, but it largely focuses on modes of constitutional and statutory interpretation and the doctrine of stare decisis (the duty of courts to follow precedent), rather than issues surrounding administrative law, standing, or financial regulation and economics.

However, we know that Judge Barrett clerked for Justice Antonin Scalia and became a devoted disciple of his legal philosophy, including textualism and originalism. In Judge Barrett's words, textualism "maintains that the statutory text is the only reliable indication of congressional intent. The defining tenet of textualism is the belief that it is impossible to know whether Congress would have drafted the statute differently if it had anticipated the situation before the court."[15] To be sure, most judges interpreting a statute start with the text and feel bound by it to a significant degree.[16] Where textualists differ is their insistence that, in Barrett's words, it is "impossible" to glean any evidence of Congressional intent from outside of the text, and as Scalia would insist, any attempt to do so is illegitimate.[17] Thus, textualists rely solely on the ordinary meaning of the law and shun resort to

[15] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 112 (2010).

[16] *See* Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 Geo. Wash. L. Rev. 857, 859 (2017) ("There is a difference between believing that statutory text should be an important factor—even the most important factor—in statutory interpretation, and believing that statutory text is the law. Believers in the former view may call themselves textualists, as Justice Kagan recently did in the *Scalia Lecture* at Harvard Law School.").

[17] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Indeed, Scalia was notorious for refusing to join any portion of an opinion that relied on legislative history. See Jonathan R. Siegel, *Justice Scalia's Textualist Legacy*, SCOTUSBlog (Nov. 14, 2017), https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/amp/.

other sources that may shed further light on the meaning of a statute such as Congressional intent, legislative history, the problem the law was intended to solve, or the fundamental fairness of various readings of the statue.[18]

However, statutory language is often ambiguous, confusing, and even internally inconsistent, particularly in long, complex statutes. In these cases, the practical result of the textualist's refusal to consider external evidence to shed light on the statutory text is a hypertechnical, formalistic parsing of words and phrases, in a way that often misses the forest for the trees and that, if blindly followed, undermines Congressional intent.

A case exemplifying this interpretive tension is *King v. Burwell*, 576 U.S. 473, 483, (2015), which upheld a key provision of the Affordable Care Act ("ACA") over Justice Scalia's dissent. The ACA mandates that everyone obtain health insurance. It also provides for exchanges through which people can buy insurance. These exchanges were expected to be set up and run by individual states, but for states that failed to set up an exchange, the federal government did so on their behalf.[19] The ACA established subsidies for people who purchased insurance on the exchanges. One provision of the ACA, which establishes the formula for determining the amount of a subsidy, provides that subsidies are available to individuals who purchase insurance through "an Exchange established by the State."[20]

Viewed in isolation, this provision might seem to provide that subsidies are not available to individuals who purchase insurance through a federal exchange. However, as the majority on the Supreme Court recognized, when you read various other provisions of the law, this interpretation falls apart. It is clear from any reasonable reading of the ACA as a whole that subsidies are available to anyone who purchases insurance through any exchange, even if the exchange was set up by the federal government on behalf of a state that refused to do so.[21] Ultimately, the statutory scheme of the ACA, and numerous other provisions, would make little sense if the subsidies provision were read to mean that subsidies are not available for insurance purchased on a federal exchange. Therefore, the majority on the Court attributed the seemingly anomalous provision as one of "more than a few examples of inartful drafting."[22]

In a caustic dissent, which Judge Barrett has praised,[23] Scalia argued that the majority's line of reasoning, which examined the entirety of the statute to determine the meaning of a poorly worded and confusing portion, "reflects the philosophy that judges should endure whatever interpretive

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[18] Judge Barrett, like Justice Scalia, is also a proponent of originalism, the idea that constitutional text should be interpreted according to what its public meaning was at the time it was adopted, i.e. what the Framers thought the provisions meant when they drafted it. Originalism is a close cousin of textualism, but focuses on interpretations of the constitution rather than statutes.

[19] *King*, 576 U.S. at 482-83.

[20] *Id.* at 486.

[21] *Id.* at 486-93 (explaining how the statutory scheme renders the phrase "Exchange established by the State" obscure).

[22] *Id*. at 475.

[23] Heidi Przybyla, et al., *Trump Court Pick Amy Coney Barrett's Past Critiques on Obamacare Face Scrutiny*, NBC News (Sept. 26, 2020), https://www.nbcnews.com/politics/supreme-court/trump-scotus-pick-amy-coney-barrett-s-past-critiques-obamacare-n1241191.

distortions it takes in order to correct a supposed flaw in the statutory machinery."[24] Scalia's textualist approach, however, would have a judge take four words of a statute that spans some 900 pages, parse the meaning of those four words in isolation, and let that interpretation of those four words unravel the statutory scheme.[25] Essentially, in the interests of supposed *fealty* to a statute, Scalia would have let four words *betray* the overriding meaning and purpose of a duly enacted statute. This illustrates how a rigid textualist approach to statutory interpretation, endorsed by Judge Barrett, can endanger the continued viability of complex statutes intended to deal with complex modern problems.

These attitudes reinforce the concern that as a Supreme Court justice, Barrett will indeed adopt narrow and technical readings of the law, including remedial statutes that Congress has passed to solve specific problems or inequities in society, such as fraud and abuse in the financial markets. Her writings further bolster these concerns. For example, in *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 122 (2010), she explored how the "substantive canons" of statutory construction, including the principle that remedial statutes should be interpreted broadly (a canon she expressly challenged), can conflict with the courts' duty to be "faithful agents" of Congress. Presumably, according to Barrett, when a court resorts to the "remedial statute" canon to interpret statutory text, it is not being a "faithful agent" of Congress.

Finally, her interpretive approach to the law also suggests that she will be less inclined to accord *Chevron* deference to an agency's interpretation of a law. That deference is only warranted if a court finds that a statute is ambiguous in the first instance, thus calling for the application of agency expertise. Judges like Barrett, who read the text of statutes literally and without resort to evidence of Congressional intent and purpose, may be more likely to hold that a given statute is at least clear enough, requiring no deference to the agency's reading under *Chevron*.[26]

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[24] *King v. Burwell*, 576 U.S. 473, 515 (2015) (Scalia J., dissenting).

[25] It is perhaps ironic that Justice Scalia, in the name of "textualism," focused so myopically on a single line of text and ignored the reams of other text that made clear his interpretation made little sense.

[26] *See* Evan Bernick, Notice and Comment, J*udge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, Yale J. on Reg. (July 3, 2018), *available at* https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/.

V.

THE UPCOMING 2020-2021 TERM:
IMPORTANT CASES ON FINANCIAL REGULATION THE SUPREME COURT WILL DECIDE IN THE COMING YEAR

1. **RESTITUTION IN FEDERAL TRADE COMMISSION ACTIONS – *Federal Trade Commission v. AMG Capital Management, LLC,* 910 F.3d 417 (9th Cir. 2018) – Does the FTC have the authority to order restitution from a payday lender who conned millions of desperate borrowers out of more than a billion dollars?**

Background. This case will again determine what enforcement remedies are available to federal agencies charged with protecting the public from fraud and abuse. As discussed below, last term the Court held in the *Liu* case that the SEC has the authority to seek disgorgement of ill-gotten gains from fraudsters who have stolen from their investors, subject to certain limitations. In this case, a similar question is presented: Does the FTC have the authority under its statute to order disgorgement, or restitution, from a payday lender who used misleading fine print in loan agreements on its website to bleed billions of dollars from millions of borrowers?

In *Federal Trade Commission v. AMG Capital Management,* 910 F. 3d 417 (9th Cir. 2018), a group of payday loan companies (headed by defendant Scott Tucker) originated more than 5 million payday loans between 2008 and 2012. They used fine-print loan documents on their website portal that misled borrowers into thinking they would pay far less in interest and fees than they would actually end up paying after becoming locked in a series of loan renewals. *Id.* at 423-24. The FTC brought an enforcement action alleging that Tucker's business practices violated Section 5 of the Federal Trade Commission Act ("FTC Act") prohibition against "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The district court found in the FTC's favor, enjoined Tucker from further lending activity, and ordered Tucker to pay approximately $1.27 billion in equitable monetary relief to the Commission. The district court instructed the Commission to direct as much money as practicable to "direct redress to consumers." *Id.* at 422.

The defendants appealed. With respect to the restitutionary relief, they argued that the district court had no authority to order restitution because the FTC statute only provides for district courts to enter injunctions, without any reference to other forms of equitable relief such as restitution.

The Ninth Circuit affirmed on both the finding of liability and the relief ordered. With respect to restitution, the court relied upon ample precedent establishing that Section 13 of the FTC Act gives district courts the authority to "grant ancillary relief necessary to accomplish complete justice, including restitution." *Id.* at 426 (quoted authority omitted). The court also rejected the appellants' argument that the Supreme Court's decision in *Kokesh* established that restitution or disgorgement must be treated as a penalty for all purposes and therefore cannot be categorized as "equitable relief" under the FTC Act, noting that the Supreme Court expressly stopped short of such a broad holding. *Id.* at 427.

One of the judges on the three-member panel, Judge O'Scannlain, issued a special concurrence arguing that while the result was in accord with the Ninth Circuit's precedents, the court's reading of Section 13 was no longer tenable in light of the text and structure of the statute coupled with the Supreme Court's *Kokesh* decision. Judge O'Scannlain contended that the FTC Act only authorized injunctions, not ancillary monetary relief, and that the court should rehear the case en banc and relinquish that interpretation of the law. *Id.* at 429.

The issue presented for the Supreme Court's consideration is "whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), empowers a district court to award equitable monetary relief in a civil enforcement action brought by the Federal Trade Commission."

Why it matters. The decision will be consequential on several levels. First, of course, it will determine whether the borrowers who were victimized by the appellants' fraudulent payday loan enterprise will see at least some of their money put back in their pockets. It also will affect the FTC's future ability to deter fraudulent schemes and seek the return of illegal proceeds. Restitution is a powerful enforcement tool, especially for the FTC which is limited by statute in its ability to bring civil penalties. Without it, the agency will be far less effective at protecting the public from unscrupulous actors under its jurisdiction. The decision is also bound to shed light on which justices are inclined to read remedial statutes broadly to effectuate their purposes and which justices prefer to read such statutes in the narrowest possible way.

2. **ARBITRATION – *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 935 F.3d 274 (5th Circ. 2019) – Will claims for unfair competition be forced into arbitration, a secretive, unfair, and ineffective dispute resolution process?**

Background. This case is now back on the Court's docket after it was heard by the Supreme Court and then sent back or "remanded" to the Fifth Circuit. A small business distributor of dental equipment (Schein) filed suit in federal court against an equipment manufacturer (Archer and White) seeking damages and injunctive relief for violations of the antitrust laws. The manufacturer sought to derail the court case and compel arbitration, relying on an arbitration agreement. But the plaintiff argued that the case wasn't covered by the arbitration agreement because it contained an exception for claims seeking injunctive relief, which were being advanced in the case. The district court sided with the plaintiff, denied the motion to compel arbitration, and allowed the case to proceed in court. The Fifth Circuit affirmed.

Unfortunately, the Supreme Court reversed and remanded. *Henry Schein, Inc. v. Archer & White Sales Inc.*, 139 S. Ct. 524 (2019). In a unanimous decision, written by Justice Kavanaugh, the Court held that where contracting parties have delegated issues of "arbitrability" to an arbitrator—in other words, the threshold question of whether the dispute is even subject to arbitration—then courts must compel arbitration of that threshold issue, even if it is obvious that the dispute is *not* subject to arbitration under the wording of the contract between the parties. The Court rejected multiple alternative and reasonable interpretations of the 1925 Federal Arbitration Act ("FAA"), as well as policy arguments based on the efficient resolution of disputes and the need to deter frivolous motions to compel arbitration.

The Court thus rejected what had become known as the "wholly groundless" exception to forced arbitration. The Court relied principally on a strict interpretation of the FAA, which it read to mean that agreements to arbitrate are to be enforced exactly as written. The Court repeatedly observed that it is not for the courts to "rewrite," "redesign," or "graft our own exceptions onto" the statutory text—notwithstanding the willingness of several federal circuit courts around the country to embrace the "wholly groundless" exception to forced arbitration. *Id.* at 530-31. Justice Kavanaugh's approach was consistent with a characteristic adherence to strict construction of statutory language, at least where it favors the status quo and the entrenched interests of businesses over individuals.

However, the Court remanded the case to the Fifth Circuit to decide whether or not the contract at issue "in fact delegated the arbitrability question to an arbitrator," something the Fifth Circuit did not address in its ruling based on the wholly groundless exception. 139 S. Ct. at 531. On remand, the Fifth Circuit again sided with the plaintiff and held that the plaintiff's claims were not subject to mandatory arbitration for two reasons. First, as directed by the Supreme Court, it analyzed whether the parties' agreement delegated to the arbitrator the question of whether the dispute was in fact subject to arbitration. It set forth the rule that "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." It concluded that there was no such clear and unmistakable evidence of intent, particularly in light of the carve-out which clearly provided that actions seeking injunctive relief—which this was—were not subject to arbitration at all under the agreement. *Archer and White Sales, Inc. v. Henry Schein, Incorporated*, 935 F.3d 274, 281 (5th Cir. 2019).

Second, after determining that the district court did have the authority to determine arbitrability, the Fifth Circuit also determined that the district court had correctly decided that the case was not in fact subject to arbitration. This too followed from the plain language in the agreement exempting actions seeking injunctive relief from the compulsory arbitration clause. *Id.* at 283. The question now before the Supreme Court is whether the Fifth Circuit properly applied the applicable law, as clarified in round one, when it determined that the parties did not delegate to the arbitrators the threshold question of arbitrability and that the dispute was not in fact subject to arbitration.

Why it matters. Notwithstanding their sometimes convoluted procedural posture, cases involving forced or mandatory arbitration clauses are almost always important to everyday Americans, since they determine whether an injured consumer, investor, worker, or other contracting party will be allowed to seek meaningful relief in court or will be forced into the arbitration process, which overwhelmingly favors industry defendants over individual claimants. In a sense, this threshold question about who hears the case determines whether the claimants have a realistic chance at winning meaningful relief for their economic injuries.

The Supreme Court's previous ruling in the case has already weakened the rights of claimants to have their day in court, and its decision this term will determine precisely how damaging it proves to be. If the Court reverses the Fifth Circuit again, anyone victimized by wrongdoing—injured consumers, investors, small businesses, workers, and others—will have an even harder time challenging the application of forced arbitration agreements, even where those agreements are clearly inapplicable and the dispute should clearly be resolved in court. At a minimum, those victims will be forced to go through the delay and expense of first trying to persuade an arbitrator that their claims belong in court, not in arbitration, with the outcome uncertain in any event. These burdens and risks will in turn discourage more victims from pursing their claims at all. And less accountability means more fraud, abuse, and predatory conduct by financial firms at the expense of everyday Americans.

3. <u>**STANDING – *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) –The question of standing looms again over a case of huge importance to the American people**</u>.

<u>**Background.**</u> The requirement known as "standing" is a complex legal doctrine that determines whether a plaintiff will even be allowed to bring his or her case in federal court. Here, a dispute about standing arises in the context of an attack on the Affordable Care Act ("ACA"), a statute that profoundly affects the physical and financial health of virtually every American. The focus of the challenge is on the individual mandate, which requires individuals to either obtain health insurance coverage or pay a "shared responsibility payment." In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 574 (2012), the Supreme Court previously held that while Congress lacked the authority to require individuals to purchase health insurance, it did have the authority under its taxing power to impose a choice between buying health insurance or paying an alternative tax in a specified amount. In 2017, Congress set the amount of the tax to zero but retained the remaining provisions of the ACA.

In this case, two individuals and 18 states filed suit to challenge the individual mandate, as amended, and ultimately to invalidate the entire statute. The district court ruled in their favor, holding that the plaintiffs had standing to challenge the minimum coverage provision; that reducing the amount of the tax to zero rendered that provision unconstitutional; and that the provision was not severable from the law, thus nullifying the ACA in its entirety. The Fifth Circuit affirmed the district court's rulings with one exception, holding that the district court had failed to analyze the severability issue with sufficient thoroughness and remanding for that purpose. The states seeking to defend the ACA petitioned for certirorari ("cert."), and the Supreme Court took the case.

As is often the case, the critical threshold question before the Court was whether the plaintiffs had standing in the first instance to challenge the individual mandate. Under current law, those bringing claims in federal court carry a substantial burden and must show that the action they challenge threatens them with a concrete "injury in fact" that is "fairly traceable to the challenged conduct and likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). California, seeking to defend the ACA, argued in its brief that neither the individual plaintiffs nor the petitioning states had standing under this test to challenge the mandate. It contended that the individuals suffer no harm from the mandate because it no longer obligates them to do anything: If they elect not to procure health insurance, they suffer no consequences whatsoever, facing only a tax that Congress has set at zero. While the individuals claimed that they value compliance with their legal obligations and continue to purchase health insurance because Section 5000A theoretically obligates them to do so, the defenders of the law argued that such self-imposed burdens arising from subjective perceptions about the law are hardly sufficient to constitute the type of concrete injury required under standing law.

The *state* challengers to the law claimed two forms of injury. First, they argued that the minimum coverage provision, even though unenforceable, induces more individuals to enroll in Medicaid and other health insurance programs, which costs the states money. They also contended that the challenged provision increases their administrative and paperwork costs, since it causes some state employees to purchase health insurance, triggering the states' obligation to send those employees various forms and to process information about their enrollments through in-house management systems. But California responded that the states offered no credible basis for believing that the unenforceable mandate would likely have those effects; nor is the claim plausible on its face, since such health coverage decisions would seem to be shaped by considerations quite apart from a provision in the law that has no real force or effect at all.

Why it matters. Any ruling on the merits will obviously be significant, as the validity of the ACA and the health and well-being of millions of Americans is at stake. The threshold procedural issue of standing also matters. Standing, i.e., whether a litigant has a sufficiently concrete stake in a case to invoke the jurisdiction of the court, is an extremely important legal doctrine, as it determines in the first instance whether any person seeking to litigate a claim can move forward with his or her case in court, and it applies to all types of cases, including those arising in the area of financial regulation. How stringently the Supreme Court interprets the requirements for standing can determine whether, and to what extent, litigants can challenge unlawful government action or seek redress for injuries suffered at the hands of businesses that engage in abusive practices.

4. CHALLENGE TO AGENCY STRUCT URE – *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) – Another challenge to agency structure may invalidate important emergency measures the government was forced to take during the financial crisis.

Background. Litigants often take indirect routes to their ultimate goal and challenging the basic structure of an agency may succeed in invalidating an agency action that is otherwise legal. Here, shareholders with a stake in the nation's housing finance agencies want to strike down an agreement reached during the 2008 financial crisis by attacking the structure of the agency that entered the agreement.

During the 2008 financial crisis, two pillars of the U.S. housing market, Fannie Mae and Freddie Mac (the "GSEs") were on the verge of collapse and required a rescue by the U.S. Treasury. In July 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), which created a new entity, the Federal Housing Finance Agency ("FHFA"), to oversee and regulate the GSEs. HERA conferred extremely broad powers on the FHFA, among them the right to appoint itself as receiver or conservator of the GSEs. It also included a provision that insulated the FHFA from any court action to restrain or affect the exercise of the powers or functions of the agency as a conservator or a receiver. 12 U.S.C. § 4617(f).

On September 6, 2008, FHFA became the conservator for the GSEs and on their behalf negotiated a series of agreements with Treasury to secure massive infusions of capital, totaling nearly $200 billion, in exchange for dividends and other benefits from the GSEs. Ultimately, the GSEs had difficulty fulfilling their dividend obligations under the agreements, so in 2012, they entered another agreement with Treasury (the "Agreement") which in effect lightened the burdens on the GSEs but also required them to pay quarterly dividends to Treasury equal to their net worth—however much or little that might be.

Thus began a long litigation saga, as multiple groups of disgruntled shareholders in the GSEs launched multiple legal challenges to the Agreement, complaining that it deprived them of benefits they would otherwise receive had the GSEs been allowed to accrue capital for their benefit as shareholders. One of those cases has arrived at the Supreme Court generating multiple petitions for cert. and raising issues surrounding the scope of the government's authority under HERA, standing, and the constitutionality of the FHFA based upon its structure.

In *Collins v. Mnuchin*, 938 F.3d 553 (2019), the shareholders attacked the Agreement on multiple statutory and constitutional grounds. After a long progression through the federal courts, the Fifth Circuit issued an en banc decision in which three separate majorities of judges held, as relevant here, that the structure of the FHFA violated the constitutional Separation of Powers principle, since it was headed by a single director only removable for cause. Nevertheless, the Fifth Circuit further held that the appropriate remedy was to declare the removal provision unconstitutional, not to invalidate the Agreement.

In keeping with this administration's general hostility toward administrative agencies, the government did not ask for review of the decision invalidating the structure of the FHFA on constitutional grounds, focusing solely on other issues arising from the Fifth Circuit's decision in favor of the shareholders. For their part, the shareholders seeking to invalidate the Agreement were not satisfied with the Fifth Circuit's ruling invalidating the structure of the FHFA because they deemed the court's remedy—severance—insufficient. Rather than mere severance of the for-cause limitations on removal of the FHFA director, they are seeking to nullify the actions taken by the unconstitutionally structured agency:

> While the Fifth Circuit correctly held that FHFA's insulation from at-will presidential removal power unconstitutionally dilutes the President's Article II authority, the court failed to carry out the Article III responsibilities that follow from that finding. "When a plaintiff with Article III standing challenges the action of an unconstitutionally insulated officer, that action must be set aside." Yet a bare 9-7 majority of the en banc Fifth Circuit refused to vacate the action of the unconstitutionally structured FHFA that grievously harmed the Petitioners before it—the so-called "Net Worth Sweep" whereby FHFA, as conservator of Fannie Mae and Freddie Mac, transferred to the federal government the entire economic interest in those highly profitable companies held by private shareholders. This decision was both highly consequential and erroneous.

Shareholders Petition for Cert., at 7 (citations omitted).

Why it matters. The Supreme Court already dealt a blow to independent agencies with its decision in *Seila Law*, discussed below, holding that the CFPB's similar structure of a single director removable for cause was unconstitutional. The Court may follow suit and invalidate the structure of the FHFA as well. As in the CFPB case, the more pressing question will be severability. More broadly, the decision in this case may reveal more about the Court's inclination to revisit other important precedents, including *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and reexamine the legitimacy of independent agencies headed by commissions, not just single directors—as urged by Justice Clarence Thomas in his concurrence in *Seila Law*.

VI.

THE 2019-2020 TERM:
IMPORTANT SUPREME COURT DECISIONS ON FINANCIAL REGLUATION OVER THE PAST YEAR

The Court issued a number of significant decisions during the 2019-2020 term regarding finance, regulation, and economics. Several general observations deserve mention at the outset of our review:

The scorecard: The results are mixed. The Court's decisions often represent a setback to the financial interests of investors and consumers, but not always. And in some instances, the Court remands the case back to the lower court to address specific questions, without resolving the core issues presented. These outcomes prolong the process and create uncertainty for everyone. Investor and consumer interests hang in the balance while the case wends its way back down through the courts—and potentially back up to the Supreme Court.

Don't be fooled: Even seemingly narrow and technical decisions can make a significant difference in people's lives. Although every case that prompts the Court to exercise its discretion and accept the case for review—to "grant cert."—is important in some sense, not all of them will have the same depth and breadth of impact. Nevertheless, even decisions that appear narrow in scope or technical in nature can have a lasting and important influence, as they form part of the judicial progression—the stepping stones, in effect—toward a fully-formed body of laws or rules that can ultimately have sweeping consequences.

Looking ahead: Some decisions reveal starkly different judicial approaches to interpreting the law. Some of the Court's decisions are significant not only because of the way they shape a particular area of law, but also because of what they reveal about the general approach to legal analysis that the justices favor: Are they reading and applying statutes in a narrow and mechanical way, or are they also considering the legislative intent underlying the law and the purposes it was designed to serve? The answers to these questions indicate how the majority will likely decide future cases—and whether they will protect the rights and interests of everyday Americans against the financial firms and their lawyers who push for technical applications of the law.

1. **STANDING – *Thole v. U.S. Bank*, 140 S. Ct. 1615 (2020) – Can retirement savers sue to stop pension plan trustees from looting their accounts before they suffer a reduction in benefits? The Supreme Court says no and leaves workers and retirees without a remedy.**

Background. Cases defining the duties of those who manage pension and retirement plans can have a huge impact on a retiree's quality of life for years, if not decades. But sometimes the doctrine of standing can prevent these cases from even being litigated.

In *Thole v. U.S. Bank, Nat'l Ass'n*, 140 S. Ct. 1615 (2020), the plaintiffs were participants in a defined-benefit pension plan, a retirement plan that entitled them to a fixed, periodic payment upon retirement for life. The plan was managed by their employer, U.S. Bank. They filed a class action alleging that U.S. Bank engaged in a variety of misconduct, in violation of its fiduciary duty under the Employee Retirement Income Security Act ("ERISA") to act solely in the best interest of the plan beneficiaries. They alleged abuses included investing in mutual funds owned by U.S. Bank so that U.S. Bank could benefit from inflated management fees. They also alleged that the fiduciaries had followed an imprudent strategy of investing the entire plan portfolio in equities, which benefited U.S. Bank and its shareholders by allowing it to increase its operating income, but which backfired horribly when the equities market crashed in the early stages of the financial crisis.

As a result of this pattern of misconduct, the plan incurred huge losses and became grossly underfunded. The plaintiffs sought to recover plan losses *and* enjoin further violations of the law, some of which were still ongoing during the litigation. However, although the plan was underfunded at the initiation of the lawsuit, while the case was pending, U.S. Bank made voluntary contributions to the plan so that it became overfunded. The Eighth Circuit held that the plan participants lacked standing to seek injunctive relief, e.g. a court order compelling the defendants to stop violating the law, or to recover losses, unless they could establish individual financial injury, an element the court found absent because the plan was no longer underfunded. The plaintiffs petitioned for cert. and the issue before the Supreme Court was whether they had standing to seek relief in the absence of individual financial losses.

The Supreme Court affirms the Eighth Circuit and dismisses based on the petitioners' lack of standing. In a relatively short and dismissive majority opinion written by Justice Kavanaugh, the sharply divided Court held that the petitioners lacked standing because they suffered no injury. Even though the fiduciaries' mismanagement had cost the plan $748 million, the petitioners had nevertheless received "all of their monthly benefits so far" and would continue to do so for the rest of their lives regardless of the outcome of the lawsuit. 140 S. Ct. at 1619.

Justice Sotomayor, joined by Justices Ginsberg, Breyer, and Kagan, wrote a powerful dissent comprehensively refuting the majority's analysis on numerous legal and policy grounds: "[T]he Court determines that pensioners may not bring a federal lawsuit to stop or cure retirement plan mismanagement until their plans are on the verge of default." *Id.* at 1623. "Only by overruling, ignoring, or misstating centuries of law could the Court hold that the Constitution requires beneficiaries to watch idly as their supposed fiduciaries misappropriate their pension funds." *Id.* at 1637.

The dissent explained that under ERISA, all assets of an employee benefit plan are held in trust for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries. *Id.* at 1624. Accordingly, under the statute and the common law of trusts, the petitioners as plan participants have an "equitable interest" in the financial integrity of the plan, and that gives them a sufficiently concrete stake in the plan to confer standing. *Id.* at 1625-26. When the trustees or managers of the plan breach the high standards ERISA imposes on them, the participants have the right to protect their interests through suits to enjoin violations, remove the offending trustees, and seek restitution and disgorgement. *Id.* The loss of hundreds of millions of dollars through mismanagement is a sufficient injury to their equitable property interest, regardless of whether they have yet suffered a decline in their contractually entitled benefit payments or whether there is some form of insurance or backstop that might prevent such a reduction. They also set forth numerous alternatives grounds for standing, including the right to enforce the fiduciaries' duty of loyalty and prudence, and the right to sue on the plan's behalf, especially where the plan fiduciaries clearly will not do so since they would be the defendants. *Id.* at 1632-33.

The dissenters also countered the majority's notion that even if the plan were mismanaged into collapse, the Pension Benefit Guaranty Corporation ("PBGC") stands by to cover "'vested pension benefits up to a certain amount and often in full.'" *Id.* at 1634-35 (quoting majority opinion). But as Justice Sotomayor noted, the "purpose of ERISA and fiduciary duties is to prevent retirement-plan failure in the first place." *Id.* at 1635 (emphasis added). Justice Sotomayor delivered a sobering reminder that after two unexpected financial crises in "barely more than a decade," virtually any employer is subject to instability and possible failure. And she explained that no other parties can adequately substitute for these private rights of action, and that relying on the PBGC is a mistake, as it is suffering from a severe deficit of over $51 billion, threatening potentially dramatic reductions in retirement benefits for workers and retirees over the next several years. *Id.* at 1635. Further, she added, the employers and shareholders have no reason to bring suit since they either committed or profited from the misconduct, and the Department of Labor cannot monitor every plan in the country or even win the same relief that private plaintiffs may secure under ERISA.

Why it matters. As Justice Sotomayor wrote in her dissent, "It is hard to overstate the harmful consequences of the Court's conclusion" in terms of the threat it poses to the retirement security of millions of Americans, *id.* at 1635:

> With ERISA, 'the crucible of congressional concern was misuse and mismanagement of plan assets by plan administrators.' In imposing fiduciary duties and providing a private right of action, Congress 'designed' the statute 'to prevent these abuses in the future.' Yet today's outcome encourages the very mischief ERISA meant to end. After today's decision, about 35 million people with defined-benefit plans will be vulnerable to fiduciary misconduct. . . . Indeed, the Court holds that the Constitution forbids retirees to remedy or prevent fiduciary breaches in federal court until their retirement plan or employer is on the brink of financial ruin.

Id. at 1635-36 (citations omitted).

The case also illustrates, yet again, the power of the standing doctrine, a rule of law that constantly looms over litigants as a potential lock on the courthouse door, no matter how strong a case may be on the merits. The Court's erroneous decision deprives these plaintiffs of the chance to seek two important forms of relief. First, under the Supreme Court's ruling, pension plan beneficiaries cannot bring a lawsuit to recover plan losses from breaches by an ERISA fiduciary, no matter how massive the losses and no matter how clear the breaches, *until* they sustained actual losses in their retirement savings—which is the very thing that ERISA was designed to prevent. Thus, fiduciaries can pillage millions of dollars from ERISA plans for themselves with impunity, unless and until the theft results in actual pension reductions for individual beneficiaries.

Second, the Court's holding that the plaintiffs lacked standing to pursue an injunction means that plaintiffs cannot maintain claims under ERISA to prevent ongoing and future violations, no matter how willful the misconduct, unless they first suffer the individual financial harm that ERISA was adopted to prevent. The ruling in essence will allow severe mismanagement and self-dealing by fiduciaries to continue indefinitely, so long as the plan maintains a minimum level of funding.

2. **DISGORGEMENT IN SEC ENFORCEMENT ACTIONS – *Liu v. S.E.C.*, 140 S. Ct. 1936 (2020) – The Court affirms the SEC's authority to seek disgorgement of the profits from a fraudulent scheme, but it sets boundaries.**

Background. The ability of the government to force scam artists to give back or "disgorge" the money they have taken from investors has long been one of the SEC's most powerful enforcement tools. It is a well-established and long-standing remedy that the SEC has used routinely and effectively for over 40 years, recovering billions of dollars of ill-gotten gains over the years. Disgorgement is an especially powerful tool because it serves two purposes: It's an effective *remedial measure* since the SEC typically seeks to use the funds to reimburse victims, and it's a strong *deterrent* because it prevents wrongdoers from keeping the money they took and benefiting from their illegal conduct. When used in conjunction with fines and penalties, it helps ensure that crime does not pay.

In *Liu v. S.E.C.*, 140 S. Ct. 1936 (2020), the defendants/petitioners conducted a massive and brazen fraud, raising nearly $27 million from about 50 foreign investors seeking visas under an immigrant investor program. They misled their investors into believing that their money would go to the construction of a cancer treatment center. In fact, they diverted the money primarily to their personal bank accounts or to marketing efforts designed to lure in more victims and more money. The SEC brought an enforcement action against the scam artists in May 2016, and the federal district court issued, among other relief, an order requiring them to disgorge or give back nearly $27 million in ill-gotten gains. On appeal, the Ninth Circuit affirmed, after which the Supreme Court decided to hear the case.

The defendants, desperate to throw off the disgorgement order and reduce their liability, seized on a technical legal argument based upon the Supreme Court's earlier decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). In Kokesh, the Supreme Court held that the SEC must bring cases seeking disgorgement within five years of the fraud. In the Court's view, disgorgement has some of the characteristics of a penalty and is therefore covered by the general statutory provision setting a five-year period in which cases seeking fines and penalties must be filed. Liu argued to the Supreme Court that disgorgement is a penalty for *all* purposes; that it therefore does not fall under the securities law provision authorizing the SEC to seek "equitable" relief; and that the disgorgement order against them was therefore invalid.

On January 22, 2020, Better Markets, joined by two consumer protection organizations, filed an amicus (or "friend of the court") brief in the Supreme Court. Better Markets, the Center for Responsible Lending, and the National Consumer Law Center advocated strongly in favor of the SEC's position, arguing that disgorgement is a long-standing, fundamentally fair, and extraordinarily useful tool that the SEC (and other agencies) need in their fight against fraud. In our amicus brief, we advanced several arguments against the defendants' position:

- Disgorgement has been recognized in federal and state courts as an "equitable remedy" for over 150 years, and its core purpose is to serve justice by requiring bad actors to return what they have taken unlawfully from others. It therefore falls squarely under the securities law provision expressly authorizing the SEC to seek "equitable relief."

- Nothing in the *Kokesh* decision changes that fact. There, the Court narrowly limited its holding to the proposition that disgorgement is like a penalty solely for purposes of the 5-year statute of limitations. It did not find that disgorgement had lost its equitable character once and for all.
- The reasoning in *Kokesh* did not fundamentally change the character of disgorgement. The Court held that disgorgement had punitive characteristics because it serves the broader public interest, not the claims of individual investors; it is used to deter illegal conduct; and sometimes the money recovered ends up in the general Treasury, like a fine or penalty, instead of reimbursing injured investors. But many equitable remedies, like injunctions and others, share these same traits yet no one questions their status as forms of equitable relief.
- As to the disgorgement order, the lower courts applied an appropriate formula, holding that the scammers should in fairness be required to give back all the funds taken, less any amount returned to investors. The lower courts refused to offset any "legitimate expenditures" for the business, since none of the expenditures were legitimate.
- Finally, a ruling from the Supreme Court in favor of the defendants would strike a terrible blow against the SEC, which must have the ability to seek disgorgement as well as penalties to effectively deter securities fraud. It would lead to more securities fraud and fewer victims recovering their losses. Furthermore, an adverse decision would threaten the enforcement powers of other agencies, like the Federal Trade Commission, that rely heavily on the right to seek disgorgement under similar statutory provisions, to deter and redress all types of consumer fraud.

For all of these reasons, we argued that the Supreme Court should affirm the Ninth Circuit's decision, leave the disgorgement order against the defendants in place, and protect and preserve the SEC's authority to seek disgorgement in future cases.

The Supreme Court sides with investors, but places limits on the disgorgement remedy. Fortunately, the Court sided with the SEC (and the amici) and held that disgorgement is equitable relief that the SEC may seek and federal courts may award under the securities laws, provided it does not exceed a wrongdoer's net profits and is awarded for victims. The opinion was nearly unanimous, as only Justice Thomas dissented.

The opinion written by Justice Sotomayor first canvassed almost 200 years of case law clearly showing, as Better Markets and others pointed out, that an order requiring a wrongdoer to return unlawful profits "has been a mainstay of equity courts," whether under the name of "disgorgement," an "accounting," or "restitution." Thus, the statutory authority to award "equitable relief," 78 U.S.C. § 78u(d)(5), encompasses disgorgement. As the Court explained, its holding reflects the foundational principle that "it would be inequitable that [a wrongdoer] should make a profit out of his own wrong." 140 S. Ct. at 1943.

However, to the chagrin of many who believe the SEC needs the strongest and broadest possible enforcement tools, the balance of the Court's opinion was devoted to outlining three limitations that must apply to disgorgement so it is not transformed into a penalty outside the ambit of a court's equitable power. In each case, the Court remanded the issue to the Ninth Circuit for resolution, but provided guidance suggesting that these are not hard and fast rules but principles that should be applied in a case-by-case analysis as to the appropriate scope of a particular disgorgement order.

First, the Court observed that disgorgement orders must generally "require the SEC to return a defendant's gains to wronged investors for their benefit, since the statute provides for equitable relief that is "appropriate or necessary for the benefit of investors." *Id.* at 1948. But it did not rule out scenarios in which disgorgement orders may direct funds to the Treasury for other purposes, such as compensating whistleblowers or supporting the activities of the Inspector General's office, especially if it is not possible to disburse funds to the victims of the fraud. It left it to the Ninth Circuit to determine if the disposition of the funds in this case is permissible and whether such uses would be in keeping with the statutory requirement.

Second, the Court observed that disgorgement generally is not to be imposed on mere affiliates through joint and several liability. *Id.* at 1949. However, the Court also noted that it is permissible to impose collective liability on partners who are each "engaged in concerted wrongdoing." *Id*. And it recited facts regarding the roles of the petitioners (a husband and wife team) in the fraud, suggesting that joint and several liability would be appropriate in this case—ultimately a matter for the Ninth Circuit to resolve.

Finally, the Court stated that disgorgement awards may not generally exceed net profits, i.e. the gains "made upon any business or investment, when both the receipts and payments are taken into the account." *Id.* at 1950. Courts must therefore deduct legitimate expenses from the awarded amount. Here too, however, the Court acknowledged an exception to this general principle, which holds that "when the 'entire profit of a business or undertaking' results from the wrongdoing, a defendant may be denied "inequitable deductions . . . ." *Id.* (citations omitted). These principles also were left to the Ninth Circuit to apply to the facts surrounding the petitioners' scam.

Justice Thomas dissented, articulating the extremely narrow and extreme view that the appropriate test was whether disgorgement was traditionally a remedy recognized by the English courts of chancery "at the time of the founding." Therefore, because he viewed disgorgement as a creature of 20th century case law, he felt that it could not be considered permissible "equitable relief" within the meaning of the securities laws.

Why it matters. The Court's decision will, depending upon the ultimate outcome following remand, likely mean that the victims of the Liu scam will get at least some portion of their money back. More broadly, it will preserve a critical enforcement tool for the SEC, enabling it to deter countless future scams and put billions of dollars back in the pockets of the victims of the securities frauds that are perpetrated.

However, the decision is also likely to create new challenges for the SEC as it attempts to recover funds stolen from investors through securities scams. Although the exact implications of the decision won't be clear pending further proceedings in the courts below, in accordance with the Supreme Court's guidance, the agency will have to more closely analyze all three factors as it seeks disgorgement in future cases: what proceeds from a fraudulent scheme, if any, should be deducted from a disgorgement order as "legitimate" expenses; to what extent will the funds be restored to the investor victims or at least devoted to other purposes that the Ninth Circuit considers "appropriate or necessary for the benefit of investors;" and whether the defendants were actively participating in the scheme in ways that warrant the imposition of joint and several liability.

3. **STATUTE OF LIMITATIONS – *Rotkiske v. Klemm*, 140 S. Ct. 355 (2019) – The Court strictly applies the one-year statute of limitations in the Fair Debt Collection Practices Act ("FDCPA") and a debt collector's violation of the law goes unchallenged.**

Background. Another seemingly technical but important issue that arises in cases involving statutes of limitations is whether the clock begins to run from the violation itself or from the time the violation was discovered. That was the issue presented in *Rotkiske v. Klemm*.

In 2009, a debt collector named Klemm & Associates sued Kevin Rotkiske to collect $1,200 in unpaid credit card debt. The suit violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, since the debt was stale and therefore no longer collectible under state law. Nevertheless, Klemm forged ahead and served the complaint at an address where he knew Rotkiske no longer lived, and an unrelated person accepted service. Having no knowledge of the lawsuit, Rotkiske never responded and a court entered a default judgment against him. Rotkiske only found out about the lawsuit years later after he applied for a mortgage that was denied. Within one year after learning that Klemm had sued him unlawfully, Rotkiske filed a claim against Klemm for violations of the FDCPA.

The Third Circuit dismissed the case as time-barred under the FDCPA's one-year statute of limitations. It held that while Rotkiske had brought suit within one year after *discovering* the debt collector's unlawful collection action, the lawsuit was too late because he filed it more than one year after the violations *occurred*. The court relied on the literal wording in the statute and it refused to apply the so-called "discovery rule," unlike other circuits which have held that the statute of limitations begins to run only once the plaintiff discovers, or should have discovered, the violation.

The Supreme Court strictly applies the one-year statute of limitations. In an opinion written by Justice Thomas, the Supreme Court affirmed the Third Circuit, holding that the one-year statute of limitations in the FDCPA begins to run when the violation occurs, not when the debtor discovers the violation and first knows he has a claim against the debt collector. The Court based its decision on the plain language of the statue: "Here, the text of § 1692k(d) clearly states that an FDCPA action 'may be brought . . . within one year from the date on which the violation occurs.'" 140 S. Ct. at 360.

The Court refused to read into the FDCPA's statute of limitations a general discovery rule, noting that Congress had expressly adopted a discovery rule in other statutes but declined to do so in the FDCPA. The Court was therefore unwilling to second guess what it saw as Congress's deliberate policy judgment. More significantly, the Court also refused to address Rotkiske's claim that the Court should apply an equitable, fraud-specific discovery rule, which delays the statute of limitations period when the debtor is unaware of the violation as a result of the debt collector's deceptive conduct. That would have fairly applied here since Klemm deliberately served Rotkiske at an address it knew was invalid, apparently hoping that Rotkiske would be unaware of the suit, take a default judgment, and lose the opportunity to challenge the judgment with the passage of the one-year limitations period. The Court rejected this claim simply because, in its view, Rotkiske had failed to preserve the issue before the Third Circuit or raise it in his petition for cert. to the Supreme Court.

Justice Ginsberg was the lone dissenter, and her opinion illustrates how a seemingly clear-cut legal issue can be far more nuanced than it appears. She argued that under prior decisions, "the ordinarily applicable time trigger does not apply when fraud on the creditor's part accounts for the debtor's failure to sue within one year of the creditor's violation," adding that such a "fraud-based discovery rule operates as a statutory presumption 'read into every federal statute of limitation.'" *Id.* at 363 (citations omitted). And she highlighted the allegations that clearly supported the application of such a rule:

> But Rotkiske was disarmed from asserting that defense in Klemm's suit, for he never received notice of the suit and therefore had no opportunity to defend against it. For the same reason, he was stopped from raising an FDCPA claim challenging Klemm's suit within the one-year limitations period. By knowingly arranging for service of the complaint against Rotkiske at an address where Rotkiske no longer lived, and filing a false affidavit of service, Rotkiske alleges, Klemm engaged in fraud. Such fraud, I would hold, warrants application of the discovery rule to time Rotkiske's FDCPA suit from the date he learned of the default judgment against him.

Id. at 362.

More generally, Justice Ginsberg explained the pattern of deception by debt collectors known as "sewer-service":

> Rotkiske alleged that Klemm engaged in "sewer service"—intentionally serving process in a manner designed to prevent Rotkiske from learning of the collection suit. Klemm did so, according to Rotkiske, in order to ensure that Klemm's untimely suit would result in a default judgment that would remain undiscovered until time to oppose that judgment, and to commence an FDCPA suit, ran out. Though Rotkiske did not allege that "sewer service" is itself a practice independently proscribed by the FDCPA, such service is nonetheless a fraudulent abuse that should trigger the fraud-based discovery rule.

Id. at 365. Finally, Justice Ginsberg refuted the view that Rotkiske had failed to adequately raise the issue before the Third Circuit and in his petition for cert. *Id.*

Why it matters. While some commentators believe the decision is of limited significance, given Rotksiske's failure to preserve his fraud-based discovery argument to the justices' satisfaction, the decision nevertheless has an impact on several levels. First, the decision leaves Rotkiske without any remedy under a consumer protection law: He cannot sue for a debt collector's violation of the law based on the court's strict reading of the statute of limitations provision. The outcome essentially rewards the deceptive conduct of the debt collector.

Second, the Court's inflexible interpretation of the one-year statute of limitations for FDCPA claimsputs consumers at a severe disadvantage, contrary to the intent of the FDCPA, which is a remedial, pro-consumer statute. While some violations of the FDCPA will be apparent immediately (such as cases involving direct abuse and harassment by creditors), the violation of many important protections will not be apparent for years. For example, the FDCPA prohibits a debt collector from communicating about a debt in collection with any third-party, and because that violation obviously involves communication to a third-party, the consumer may not be aware of that type of violation. The FDCPA also prevents the use of *deceptive* tactics in connection with collecting a debt, and deceptive conduct is, by definition, intended to conceal the truth and to prevent consumers from discovering the illegal conduct. The discovery rule properly recognizes that Congress could not have possibly intended for debt collectors to escape liability by engaging in conduct that prevents a consumer from finding out about a violation of the FDCPA until a year after its occurrence.

Finally, and more broadly, it further entrenches the view that statutes are to be read strictly, without the application of recognized exceptions even where the facts provide a compelling basis in the interest of fairness. While the decision leaves open the possibility that the fraud-based discovery rule could still apply to FDCPA lawsuits (assuming future litigants properly preserve the issue), it is also indicative of a literal, text-only approach to reading statutes.

4. **ARBITRARY AND CAPRICIOUS – *Department of Homeland Security v. Regents of the University of California,* 140 S. Ct. 1891 (2020) – The Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program was arbitrary and capricious under the Administrative Procedure Act.**

Background. Challenges to agency action are often based on the claim that the agency's rule or other decision was "arbitrary and capricious" under the Administrative Procedure Act ("APA"). That can mean that the agency has failed to consider the relevant factors; considered inappropriate factors; drawn irrational conclusions from the evidence in the administrative record; or failed to adequately explain its action. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Last term, the Supreme Court applied these traditional bedrock principles of administrative law to overturn an immensely controversial decision by the Department of Homeland Security to rescind the DACA immigration program.

In 2012, the DHS, under President Barack Obama's administration, issued a memorandum announcing an immigration relief program known as the "Deferred Action for Childhood Arrivals" or DACA. It allowed unauthorized immigrants who arrived in the U.S. as children to seek a two-year forbearance from removal from the country. Those granted relief also became eligible for work permits and other benefits. Hundreds of thousands of immigrants, who became known as Dreamers, have taken advantage of the program.

The Trump administration vowed to bring an end to DACA. In September 2017, acting on the opinion of the Attorney General, DHS terminated the DACA program, with limited exceptions for DACA recipients whose benefits were set to expire within six months. Groups of plaintiffs, including individual DACA recipients and a number of states, challenged the termination in three federal district courts, on grounds that the decision was arbitrary and capricious under the APA and violated the Due

Process clause of the Fifth Amendment. The district courts ruled in the plaintiffs' favor on various grounds. After the Ninth Circuit affirmed in one of those cases, the Supreme Court granted cert.

The Supreme Court holds that the DHS repeal of DACA was arbitrary and capricious. Justice Roberts issued the Court's 5-4 opinion, joined with respect to the APA issues by Justices Ginsburg, Breyer, Kagan, and Sotomayor. The Court rejected the due process claims but held that the decision was arbitrary and capricious under the APA.

First, the Court observed that judicial review of agency action is limited to "the grounds that the agency invoked when it took the action." 140 S. Ct. at 1907. The Court thus declined to consider the post-hoc rationalizations for the decision that were offered by the succeeding Secretary of DHS nine months after the September 2017 decision to rescind the program was made.

Second, at the heart of the opinion was the Court's conclusion that DHS had failed to consider important aspects of the problem, specifically whether forbearance would have been appropriate and whether various reliance interests had arisen under the DACA program, possibly warranting accommodation and certainly deserving consideration. As Justice Roberts wrote:

> We do not decide whether DACA or its rescission are sound policies. 'The wisdom' of those decisions 'is none of our concern.' We address only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action. Here the agency failed to consider the conspicuous issues of whether to retain forbearance and what if anything to do about the hardship to DACA recipients. That dual failure raises doubts about whether the agency appreciated the scope of its discretion or exercised that discretion in a reasonable manner.

Id. at 1916 (citations omitted).

Why it matters. The decision is important on multiple levels. It first means that the DACA program survives pending further action by DHS, with enormous implications, both financial and otherwise, for the DACA participants and their families. While the Trump administration intends ultimately to end the program and seeks to curtail it as much as possible in the wake of the Court's decision, the decision nevertheless provides relief.

It also reaffirms the continued vitality of the procedural requirements that federal agencies must observe under the APA, and it provides encouraging evidence that at least the Roberts Court is willing to hold administrative agencies accountable for the way in which they make their decisions and justify their actions.

As Justice Roberts explained:

> Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 65 L.Ed. 188 (1920). But it is also true, particularly when so much is at stake, that

> "the Government should turn square corners in dealing with the people." *St. Regis PaperCo. v. United States*, 368 U.S. 208, 229, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961) (Black, J., dissenting). The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

Id. at 1909-10.

The closely divided decision, the recent passing of Justice Ginsburg, and the likely addition of Judge Barrett to the Court all fuel concern that in future cases, especially controversial ones, the Court will be less inclined to invoke these principles of administrative law to hold agencies accountable.

5. <u>STATUTE OF LIMITATIONS – *Intel Corporation Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020) – The Court reads the statute of limitations in favor of class action plaintiffs seeking to recover for mismanagement of their retirement plan</u>.

<u>Background</u>. Most civil and criminal claims are subject to a "statute of limitations." Those provisions specify a number of years after which prosecutors and plaintiffs can no longer file criminal cases or civil lawsuits to hold the wrongdoers accountable. Cases involving statutes of limitations can have a huge impact, sometimes eliminating any possibility of recovery by plaintiffs who have clearly suffered wrongs.

In *Intel Corporation Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020), Intel managed its employee retirement plan, and following the 2008 financial crisis, "the committee increased the funds' shares of alternative assets, such as hedge funds, private equity, and commodities. These assets carried relatively high fees. And as the stock market rebounded, Sulyma's funds lagged behind others such as index funds." 140 S. Ct. at 744. Sulyma, an Intel employee, filed a class action suit against Intel in October of 2015, "alleging primarily that the committee and other plan administrators (petitioners here) had breached their fiduciary duties by overinvesting in alternative assets." *Id.*

However, the district court determined that Sulyma's claims were too late, filed after ERISA's statute of limitations period had ended. ERISA requires that a plaintiff bring claims within three years after the plaintiff has acquired "actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). Intel argued that the plaintiff had "actual knowledge" of the alleged violations more than three years before filing suit on October 29, 2015, because Intel had sent fact sheets, disclosures, and other notices to Sulyma in 2010, 2011, and 2012, which revealed the transactions allegedly in violation of ERISA. But Sulyma testified in his deposition that he did not remember reviewing the disclosures during his tenure, and he was unaware while working at Intel that the monies that he had invested through the Intel retirement plans had been invested in hedge funds or private equity. The district court accepted Intel's interpretation of actual knowledge and granted summary judgment, holding that, as a matter of law, the employee had "actual knowledge" of the transactions when Intel sent the various disclosure documents, regardless of whether the plaintiff had actually read those documents or had in fact become aware of the transactions.

The Ninth Circuit reversed, holding that ERISA's "actual knowledge" test required Intel to show that the plaintiff "was actually aware of the nature of the alleged breach more than three years" before filing suit, a standard not satisfied by Intel's merely sending documents containing certain facts to the plaintiff. *Sulyma*, 909 F.3d at 1071. The defendants petitioned for cert. and the issue before the Supreme Court was whether the limitations period is marked from the investors' actual knowledge that imprudent investments occurred (an outcome that would favor the plaintiffs), or whether the investors' constructive knowledge is sufficient (an outcome that would favor the defendant).

The Supreme Court reads the statute to mean what it clearly says. In a unanimous opinion written by Justice Alito, the Supreme Court affirmed the Ninth Circuit's decision and held that Sulyma's mere receipt of certain information did not necessarily mean he had gained "actual knowledge" of the investment allocations. The statute of limitations had not necessarily run, and his claims were not time barred. The Court based its analysis squarely on the principle that "We must enforce plain and unambiguous statutory language" in ERISA, as in any statute, "according to its terms," 140 S. Ct. at 776, and it relied upon the dictionary definition of "actual." This contrasts with a "constructive knowledge" standard, in which the plaintiff is deemed, as a matter of law, to have "known" a particular fact based on the occurrence of some other event, such as the mailing of a statement to the plaintiff containing that fact, without regard to whether the plaintiff in fact read that statement. The Court found it notable that Congress made a decision in Section 1113 to omit language suggesting that the time period could also run from constructive or imputed knowledge, or knowledge that a person could reasonably be expected to acquire. *Id.* at 777.

The Court also rejected Intel's argument based on the purpose of the statute of limitations, explaining that its reading of the term would undermine protections for beneficiaries with claims for breach of fiduciary duty. "Petitioners may well be correct that heeding the plain meaning of § 1113(2) substantially diminishes the protection that it provides for ERISA fiduciaries, but by the same token, petitioners' interpretation would greatly reduce § 1113(1)'s value for beneficiaries, given the disclosure regime that petitioners themselves emphasize." *Id.* at 778. Finally, the Court cautioned that the opinion did not foreclose various methods of proving actual knowledge, including inferences from circumstantial evidence. Ultimately, the Court properly read an unambiguously broad, protective provision of a law properly to provide the protection Congress intended.

Why it matters. When the statute of limitations has expired, defendants escape liability for even clear violations of the law. Therefore, overly restrictive application of a statute of limitations can incentivize a wrongdoer to conceal its conduct until the statute of limitations has expired. Here, Congress's deliberate choice to mark the beginning of the limitations period from the point in time when the plaintiff has "actual knowledge of the breach or violation" is critical. The district court in this case, and at least one other Court of Appeals, have erred in ignoring that choice and applying a more stringent standard for plaintiffs seeking to bring a lawsuit.

Congress deliberately chose "actual knowledge" as the standard to determine when the statute of limitations for ERISA begins to run, and that choice must be given effect. Retirement plan documents and disclosures can be inscrutable. A rule requiring ERISA participants to review, absorb, and fully understand these opaque and complex documents would make it far easier for companies to violate ERISA with impunity and place an unnecessary burden on plaintiffs, a hurdle that Congress did not intend. The Court properly recognized this and came to the correct conclusion.

6. **SEPERATION OF POWERS – *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) – The Court holds that the removal limits on the director of the Consumer Financial Protection Bureau are unconstitutional but severable.**

Background. The creation of the CFPB, first conceived by Senator Elizabeth Warren, was one of the landmark reforms included in the Dodd-Frank Act. Its purpose is to broadly protect consumers from fraud, abuse, and unfair practices in the market for financial products and services, from credit cards to mortgage loans. It has been an extremely successful agency; as the Supreme Court noted, it has obtained over $11 billion in relief for more than 25 million consumers. 140 S. Ct. at 2193.

Congress also provided that the CFPB would be led by a single director appointed for a five-year term, rather than a multi-member board or commission. And it further provided that the director could only be removed by the president for "inefficiency, neglect, or malfeasance in office." *Id.* at 2191. Finally, it established an independent funding mechanism through the Federal Reserve, outside the annual appropriations process. In this case, a California debt collection law firm challenged an investigative demand issued by the CFPB by arguing, among other things, that these aspects of the CFPB violated the constitutional Separation of Powers doctrine, invalidating the agency's investigative demand.

The district court rejected that argument and the Ninth Circuit affirmed. The Supreme Court granted cert. and because the U.S. government agreed that the agency was unconstitutionally structured, the Court took the unusual step of appointing an amicus curiae to defend the judgment below. And it requested argument on an additional related issue: If the CFPB's structure violates the Separation of Powers, can the CFPB director's removal protection be severed from the rest of the Dodd-Frank Act? Persuading the Supreme Court to accept the case was a critical step in a relentless campaign by the financial services industry and its allies, who abhor the level of accountability that the CFPB has brought to the financial markets.

The Supreme Court holds that the removal restrictions are unconstitutional but severs them from the law, minimizing the damage. In an opinion written by Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, and Kavanaugh, the Court held that the structure of the CFPB, i.e. a single director removable by the president only for cause, violated the Separation of Powers principle embodied in the Constitution, which vests the executive power in the president. See Art. II, § 1, clauses 1 and 3. The Court side-stepped its own precedents upholding the constitutionality of independent agencies with removal restrictions, attempting to distinguish the CFPB because the CFPB director is not a member of bipartisan, multi-member commission with staggered terms. However, notwithstanding the determination that the CFPB's structure is unconstitutional, the Court held that the pertinent provisions of the Dodd-Frank Act were severable, meaning the CFPB continues to exist as an agency, albeit with the director removable at will. 140 S. Ct. at 2207-11.

As Justice Roberts explained:

> The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the

> President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in Free Enterprise Fund, the Dodd-Frank Act contains an express severability clause.

140 S. Ct. at 2209.

Why it matters. The decision is significant on several levels. It illustrates, for example, how major cases have humble beginnings. Here a law firm suspected of illegal activity attempted to fend off an investigation by launching a constitutional attack on an agency's structure. It is also important largely because of what the case did *not* do. By virtue of the Court's severability holding, the Court left the CFPB fully intact, except for the removal limitations. Justice Roberts hinted briefly at the chaos that would have ensued had the Court struck down the agency in its entirety:

> Petitioner assumes that, if we eliminate the CFPB, regulatory and enforcement authority over the statutes it administers would simply revert back to the handful of independent agencies previously responsible for them. But, as the Solicitor General and House of Representatives explain, that shift would trigger a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-finance arena. One of the agencies whose regulatory authority was transferred to the CFPB no longer exists. The others do not have the staff or appropriations to absorb the CFPB's 1,500-employee, 500-million-dollar operations. And none has the authority to administer the Dodd-Frank Act's new prohibition on unfair and deceptive practices in the consumer-finance sector. Given these consequences, it is far from evident that Congress would have preferred no CFPB to a CFPB led by a Director removable at will by the President.

Id. at 2210.

The decision nevertheless will have repercussions for the CFPB itself, making it less independent from the sitting president, whose commitment to consumer protection may be—and currently is—profoundly different and weaker than the architects of the CFPB would have hoped and envisioned. Moreover, the decision has implications for other agencies. For example, the Social Security Administration and the FHFA have similar structures. In particular, the FHFA's similar single director structure—the director can only be fired "for cause"—is at risk. The FHFA is a regulatory agency whose oversight consists of Fannie Mae, Freddie Mac, and federal home loan banks, and uncertainty surrounding the leadership of the agency would undoubtedly affect the oversight of the government sponsored entities and the mortgage financing market.

Finally, the decision reveals the deep-seeded hostility that some justices on the Court harbor toward the so-called "administrative state." For example, Justice Thomas issued a concurrence, joined by Justice Gorsuch, arguing in part that the Court should revisit *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the bedrock decision allowing for the creation of independent agencies. Specifically, Justice Thomas warned that *Humphrey's Executor* "poses a direct threat to our constitutional structure and, as a result, the liberty of the American people"—an unusually hyperbolic claim given that *Humphrey's Executor* is over 80 years old and has not, as of yet, ushered in the downfall of the Republic. Were the Court to overturn that precedent, it would prove broadly harmful to financial regulation, as most of the financial regulatory agencies are independent agencies. It is as yet unclear how much appetite there is in the Court to overturn such a longstanding precedent that underpins much of the current financial regulatory structure.

7. **FIDUCIARY STANDARDS – *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020) – The Supreme Court punts the ball and remands the case, so employees alleging mismanagement of their retirement plan will wait to see if retirement plan managers can escape liability.**

Background. Sometimes the Court declines to address the issues presented by the parties, sending the case back to the lower court to decide issues that were not addressed or resolved below. The result can leave parties hanging, delaying resolution of important questions. That's what happened in *Jander*, a case involving a complex but important legal question about the scope of the duty owed by fiduciaries who manage employee stock ownership retirement plans, or "ESOPs."

An ESOP is an employee retirement plan that primarily invests in the stock of the retirement saver's employer. ESOP plans are typically administered by company insiders, and thus present unique compliance challenges under the securities laws and ERISA. Under ERISA, plan administrators have a fiduciary duty to manage plans prudently. This would ordinarily require, for example, that administrators sell stock if they know that stock is overvalued. However, in the case of an ESOP, plan administrators' knowledge that a stock is overvalued typically will come from their status as insiders with access to nonpublic information, and selling the stock on the basis of that information could itself be a violation of securities laws.

For a time, this conflict led courts to grant ESOP plan administrators a presumption that their fund management complied with their duty of prudence, which could only be overcome if the company were facing dire circumstances and the administrators continued to invest in the company. However, the Supreme Court rejected this approach in *Fifth Third Bancorp v. Dudenhoeffer*, 579 U.S. 409 (2014), holding that administrators of ESOP plans are not entitled to a presumption that their management complies with the duty of prudence. Instead, the Court held, a plan beneficiary can state a claim that an ESOP fiduciary violates its duty "by failing to act on the basis of nonpublic information," provided the plaintiffs "plausibly allege an alternative action" the fiduciary could have taken that was consistent with the securities laws and that a prudent fiduciary "would not have viewed [such action] as more likely to harm the fund than help it." *Id.* at 428-29.

In *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020), the plaintiffs were employees of IBM, which managed an ESOP for their benefit. They filed a class action alleging that the defendants violated the duty of prudence because they knew or should have known that a particular division of the company was overvalued, a fact that was shielded from public disclosure through accounting violations, thus artificially inflating the stock price. Eventually this overvalued division was sold at a loss, causing a significant decline in IBM's stock price and losses to the ESOP. In their complaint, the plaintiffs alleged that the defendants should have made an "early corrective disclosure" of the accounting violations and the resulting overvaluation of the corporate division that was sold. The district court dismissed the suit, but the Second Circuit reversed. It held that the plaintiffs had plausibly alleged that a prudent fiduciary could not have determined that early corrective disclosure would have done more harm than good, and that the plaintiffs therefore had stated a claim that the defendants had violated their duty of prudence. The defendants petitioned for cert., and the issue before the Supreme Court surrounded what pleading requirements are necessary to sustain a claim under the "more harm than good" standard.

<u>The Supreme Court punts and remands</u>. The specific question presented in the case concerned what it takes to plausibly allege an alternative action "that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." 140 S. Ct. at 594. It asked whether *Dudenhoeffer's* "'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time." *Id.* (quoting Pet. for Cert. at i).

In their briefing on the merits, however, the petitioners (fiduciaries of the ESOP at issue here) and the Government (presenting the views of the Securities and Exchange Commission as well as the Department of Labor) focused their arguments primarily upon other matters. The petitioners argued that ERISA imposes no duty on an ESOP fiduciary to act on inside information. And the Government argued that an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would "conflict" at least with "objectives of " the "complex insider trading and corporate disclosure requirements imposed by the federal securities laws . . . ." *Id.* at 594-95 (quoting *Dudenhoeffer*, 573 U.S. at 429). The Court explained that because the Second Circuit did not address these issues, they would decline to do so, and they did not reach a decision on the merits.

<u>Why it matters</u>. ERISA's fiduciary duties are workers' first line of defense to ensure that their hard-earned retirement savings are not squandered through mismanagement or self-dealing by plan administrators. When fiduciaries violate those duties, it is critical that workers have a meaningful way to redress those violations, both for the sake of the harmed employees and as a deterrent against future violations by other fiduciaries. Thus, ensuring that the fiduciary standard remains strong and effective is necessary to protect retirement savers.

On the facts of this case, ultimate dismissal of the suit would be especially harmful. The plaintiffs essentially argue that IBM engaged in a long-term fraud—overvaluing a corporate division and concealing that overvaluation through accounting subterfuge despite IBM's public disclosure obligations under the securities laws. The defendants essentially respond that it was prudent not to disclose IBM's corporate fraud earlier, because such disclosure would have driven down IBM's stock price with certainty, whereas the harm from later disclosure remained uncertain. However, as the Second Circuit noted, the disclosure upon sale of the corporate division was inevitable. Moreover, the plaintiffs allege that IBM stock traded in an efficient market, in which the price reflects all public information about a stock. Accordingly, a prudent fiduciary could not have determined that earlier disclosure of the fraud and subsequent correction of the stock price would do more harm than later disclosure of the fraud, when the fraud would have caused even greater overvaluation, more purchasers would have invested in the inflated shares, and the drop in price would have been even greater once the fraud was inevitably revealed.

Once finally resolved, this case will determine whether the plaintiff employees have a viable claim for breach of fiduciary duty by their ESOP plan administrators, which caused them harm. It is also an occasion for the Supreme Court to clarify, and give meaning to, the test set forth in *Fifth Third Bancorp*.

With the exception of the Second Circuit in this case, every court relying on *Fifth Third Bancorp* has dismissed complaints alleging violations of the duty of prudence by ESOP plan fiduciaries. They have done so by interpreting *Fifth Third Bancorp* as setting a high bar and requiring a plaintiff to show, at the motion to dismiss stage, that no prudent fiduciary could have considered the alternative action more helpful than harmful. This cannot be what the Supreme Court intended in *Fifth Third Bancorp*, since its holding was expressly intended to overturn a regime that the Supreme Court thought made it essentially impossible for ESOP plan fiduciaries to allege a violation of a fiduciary's duty of prudence. The Supreme Court should clarify that, at the motion to dismiss stage, a plaintiff need only plausibly allege that the average prudent fiduciary would have thought the alternative action (early disclosure) would be unlikely to do more harm than good.

VII.

CONCLUSION

The Supreme Court's most recent term amply illustrates the many ways in which the Court's decisions profoundly influence the financial and economic well-being of all Americans. The decisions reviewed in this Report address a range of issues that will ultimately affect the amount of money that investors, consumers, workers, and retirees can keep in their wallets or recover from wrongdoers who have subjected them to financial fraud and abuse. For example, the Court—

- Held that retirement savers have no standing to sue to recover losses or to enjoin pension plan trustees from looting their accounts before they suffer a reduction in benefits. (*Thole*).
- Affirmed the SEC's authority to seek disgorgement of the profits from a securities fraud but sets boundaries that may limit future recoveries in SEC enforcement actions. (*Liu*)
- Read a statute of limitations in the Fair Debt Collection Practices Act narrowly to deny relief, notwithstanding abusive and deceptive conduct by a debt collector. (*Rotkiske*)
- Held that the Department of Homeland Security's decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program was arbitrary and capricious under the Administrative Procedure Act because the agency failed to consider important factors before implementing the new policy, re-affirming one of the core tenets of administrative law. (*Department of Homeland Security*)
- Read a statute of limitations in ERISA to require actual knowledge of facts that start the clock on the limitations period, in favor of class action plaintiffs seeking to recover for mismanagement of their retirement plans (*Intel*).
- Held that the structure of the CFPB, with a single director subject to removal restrictions, violated the Separation of Powers doctrine in the Constitution, but refrained from invalidating the entire agency because the removal limits were severable. (*Seila Law*)

In these cases and others, the justices also displayed some of their fundamental differences in judicial temperament, which often determine the outcome of a case and whether consumers and investors will be fairly compensated for fraud and abuse at the hands of financial firms or thrown out of court and deprived of a remedy. They show that when the Court stubbornly clings to a narrow, technical reading of a law and refuses to weigh its underlying purposes and evidence of Congressional intent, investors and consumers should hold on tight to their wallets.

The cases reviewed in this Report that the Court will hear in the upcoming term will undoubtedly have similar importance in determining the financial fate of countless Americans. And the many cases in which petitions for cert. are still pending, which the Court may decide to hear, present a wide range of important financial issues, including—

- Judicial deference to agency interpretations of the law under *Chevron*;
- Standing;
- Mandatory arbitration;
- Preemption of state law;
- Arbitrary and capricious agency rulemaking;
- Statutes of limitations;
- Unfair competition;
- Fiduciary duties under ERISA for those who manage retirement plans.

Even more broadly, and especially if Judge Barrett is confirmed, the upcoming term will almost certainly further align the Court with those who rail against the "administrative state," thereby imperiling beneficial regulation in virtually every sphere of American life.

The upshot is clear, as it was in our prior two reports: The Supreme Court and the justices who serve on it are of immense consequence in the financial lives of every American. We should all be paying close attention.

Appendix A

CASES RELATING TO ECONOMICS AND FINANCIAL REGULATION SUBJECT TO PENDING PETITIONS FOR CERTIORARI

- Standing requirements applicable to receivers in dealing with the claims of investors and third parties. *Zacarias v. Janvey*, No. 19-1402; *Rupert v. Zacarias*, No. 19-1411 (third parties)
- The standing of legislators to seek judicial relief based on claims their votes have been completely nullified. *Blumenthal v. Trump*, No. 20-5.
- A federal court's inherent authority to issue injunctive relief against arbitration. *Big Port Service DMCC v. China Shipping Container Lines Co.*, No. 20-128.
- Application of the presumption of reliance in securities fraud cases. *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, No. 20-222.
- Reverse preemption of the Federal Arbitration Act by state law relating to insurance. *Old Republic Home Protection Co. v. Sparks*, No. 20-237.
- Arbitrary and capricious rulemaking by the Federal Communications Commission. *Federal Communications Commission v. Prometheus Radio Project*, No. 19-1231.
- Deference to an agency's long-standing interpretations of law under *Chevron*. *Szonyi v. Barr*, No. 19-1220.
- Removal of cases to federal court. *BP P.L.C. v. Mayor and City of Baltimore*, No. 19-1189.
- The tolling of statutes of limitations in diversity cases. *Weatherly v. Pershing, L.L.C.*, No 19-1157.
- The elements of unfair competition and who can claim damages. *National Football League v. Ninth Inning Inc.*, No. 19-1098.
- Preemption of state law under the *Federal Arbitration Act. Ommen v. Millman Inc.*, No. 20-249.
- The scope of mandatory arbitration clauses as to class arbitration. *Sterling Jewelers Inc. v. Jock*, No. 19-1382.
- Breach of fiduciary duty under ERISA for excessive fees. *Hughes v. Northwestern University*, No. 19-1401.
- Preemption of state law in the area of creditors' rights and fraudulent transfers. D*eutsche Bank Trust Company Americas v. Robert R. McCormick Foundation*, No. 20-8.
- The measure of withdrawal liability from multi-employer pension plans under ERISA. *National Retirement Fund v. Metz Culinary Management Inc.*, No. 19-1336.

Appendix B

THE SUPREME COURT'S HISTORIC ROLE IN FINANCIAL REGULATION

Here are some of the Supreme Court's landmark cases in the area of financial regulation, spanning decades and further illustrating the profound impact that this third branch of government has had—and continues to have—on Americans' financial well-being. In some cases, the Court has interpreted the law broadly with an eye toward its remedial investor protection purposes, while in others it has cut back on financial regulation to the public's detriment.

1. In ***S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946),** the Court held that sale and leaseback agreements covering Florida orange groves, coupled with service contracts for the cultivation and sale of the fruit, were "investment contracts" and therefore securities subject to the registration requirements of the Securities Act of 1933. The Court established a broad yet simple test to determine whether an investment contract is a security: "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Id.* at 301. Guiding the Court's decision was its desire to create a definition that could fulfill "the statutory purpose of full and fair disclosure," regardless of the particular form an investment might take: "It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 299. Thus, in *Howey*, the Court relied heavily on the remedial purposes of the law and established a broad test to maximize investor protection. Thanks to this broad statutory interpretation, countless investment scams have been subject to the provisions of the securities laws.
2. In ***J.I. Case v. Borak*, 377 U.S. 426 (1964)**, the Court held that a private right of action should be implied under Section 14(a) of the 1933 Act for false or misleading proxy solicitation materials. Under the circumstances, the Court said, it was "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433. This case and others that followed were profoundly important in allowing defrauded investors to seek meaningful recovery and to supplement the deterrent effect of the SEC's enforcement program.
3. In ***Shearson/American Express v. McMahon*, 482 U.S. 220 (1987)**, the Supreme Court held that claims under Section 10(b) of the Exchange Act, the core anti-fraud provision in the securities laws, can be forced into arbitration under pre-dispute, mandatory arbitration agreements between brokers and their clients. The Court reached this decision based on the policy favoring arbitration reflected in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, even though the securities laws contain clauses expressly voiding any waiver of compliance with those laws. The Court chose to view those anti-waiver provisions as applicable only when an arbitration agreement interferes with a party's substantive rights, rather than applying broadly to the procedural issues of where and how those rights could be vindicated. Widely recognized as one of the most important securities laws decisions ever issued by the Supreme Court, *Shearson* has done incalculable damage by forcing millions of investors with claims for fraud and abuse at the hands of brokers and others into a biased, industry-run arbitration process that affords little relief.

4. In ***Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)**, the Supreme Court held that a wildlife conservation organization was unable to challenge a regulation under the Endangered Species Act of 1973, which set a limit on the international geographic reach of the Act. The Court found that even if there was a threat to certain species of wildlife, there was no showing of "actual or imminent" injuries to particular litigants who might "someday" wish to visit the foreign countries in question and be deprived of the opportunity to observe the endangered animals. *Id.* at 564. The Court famously articulated the three hurdles that litigants must overcome to establish a constitutionally sufficient case or controversy and to press their claims in court:

   > Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

   Id. at 560-61 (emphasis added) (cited authorities omitted). *Lujan* and subsequent decisions from the Court have made it extremely difficult for litigants, especially those seeking to challenge government action and protect the public interest, to survive motions to dismiss and have their claims heard by a federal court.

5. In ***Watters v. Wachovia Bank,* N.A., 550 U.S. 1 (2007)**, the Supreme Court held that federal authority over national banks preempted Michigan from imposing licensing, registration, and inspection requirements upon national banks and their operating subsidiaries engaged in mortgage lending. This and other holdings effectively preclude the states from acting to protect consumers and investors from illegal and fraudulent conduct in many areas subject to federal regulation. The *Watters* case provides a dramatic illustration of the potential impact such decisions can have: Had the states been permitted a greater role in policing the mortgage lending market in the years leading up to the 2008 financial crisis, they may have curtailed the massive flow of subprime mortgages that ultimately fueled the crisis, possibly mitigating its severity and duration. The scope of federal preemption may prove to be an increasingly important issue. State attorneys general have begun not only challenging many of the Trump administration's de-regulatory measures in court, but also promising to strengthen state-level financial rules to fill the vacuum caused by the federal retreat from investor and consumer protection. Dechert LLP, Activist States Move Forward with Fiduciary Standards for Broker-Dealers and Investment Advisers, April 4, 2018, https://www.jdsupra.com/legalnews/activist-states-move-forward-with-72055/.

6. In ***Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017)**, the Court held that the SEC could not recover ill-gotten gains from securities frauds dating back more than five years. This decision upended decades of SEC enforcement practice by holding that a five-year statute of limitations applied to SEC actions to recover ill-gotten gains through the disgorgement remedy. The Court reversed the Ninth Circuit and found that although widely regarded as a remedial device, disgorgement had taken on a punitive rather than a compensatory character and should

therefore be subject to the statutory limitations period applicable to penalties. The decision imposes an enormous new limitation on the SEC, since it means that the agency cannot recover illicit profits reaped from fraudulent schemes more than five years prior to the enforcement action. This deadline is particularly unrealistic, as many frauds are complex, hidden from detection, and once identified take years to investigate and prosecute.

7. In ***Digital Realty Trust v. Somers*, 138 S. Ct. 767 (2018)**, the Court held that whistleblowers who report corporate wrongdoing internally but not to the SEC are not protected by the anti-retaliation provisions in the securities laws. The Court found that the SEC's expansive reading of the law that offered protection for exclusively internal reporting did not warrant *Chevron* deference because the statute was unambiguous regarding its more limited applicability. The decision is likely to discourage whistleblowers with uniquely valuable information about illegal conduct from coming forward at all, thus undermining the core purposes of the statutory whistleblower provisions. The inhibiting effect of the decision will ultimately harm investors and financial markets more broadly, as illegal schemes go completely undetected or are caught by regulators in far later stages, after significant harm has been done.

8. In ***Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018)**, the Court held that the SEC's administrative law judges ("ALJs"), who preside over the majority of the Commission's enforcement actions, are "officers of the United States" subject to the Constitution's Appointments Clause. The Court granted Lucia a new hearing—even though he had been found liable for fraud under the Investment Advisers Act by the ALJ *and* the Commission—because the presiding ALJ had not been appointed in accordance with the Constitution (that is, by the President, a court, or the Commission itself). *Id.* at 2055. The *Lucia* decision cast a great deal of uncertainty over countless SEC enforcement actions already decided by ALJs who were never appointed in accordance with the constitution.

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