BETTER MARKETS

– SUPREME COURT WATCH –

Upcoming Issues and Cases in the Supreme Court That Will Affect Americans' Financial Well-Being

Supreme Court decisions have an enormous impact on the financial lives of every American. While decisions involving hot-button issues such as abortion, gun control, and civil rights often make the headlines, the Court's decisions on economics and financial regulation largely determine how much money Americans can earn, spend, and save for retirement. The bottom line is that anyone with a job, mortgage, credit card, bank account or car loan should care about the Supreme Court's decisions—and the justices who sit on the Court. That's why Better Markets, as it did in 2019 and 2018, has released a comprehensive report on the Supreme Court, which also examines the latest nominee, Judge Amy Coney Barrett. Here is an overview of some questions and cases involving financial regulation that will come before the Court this term.

Legal issues before the Court. Although typically couched in technical legal terms, the disputes and issues presented to the Supreme Court involve basic concepts with real connections to peoples' financial lives.

- **Statutory interpretation.** Will the Court interpret statutes narrowly and based solely on their literal meaning or will it also take into account the purposes that Congress intended to serve so that all types of fraud and abuse by banks, brokers, payday lenders, and debt collectors are covered under the law?
- **Access to the courts.** Will the Court favor corporations that routinely insist on forcing consumers and investors into biased, ineffective, and secretive arbitration proceedings or will it give victims of fraud and abuse their day in court? And will it apply the "standing" requirements under the Constitution in a way that gives all litigants with real grievances the opportunity to prove their case before a judge or will it stringently interpret those requirements to lock the courthouse door?
- **Agency authority.** Will the Court vote to invalidate agency rules and take away the tools those agencies need to protect Americans from fraud and abuse in the financial markets—like the authority to force con artists to return what they've stolen—or will it respect agency expertise in the rule-writing process and preserve their enforcement authority?

Cases on the docket this term. Numerous cases on the docket this term involve these and other issues surrounding economics and financial regulation.

- ***Federal Trade Commission v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018)**—The Federal Trade Commission ("FTC") is a critical cop on the consumer protection beat, ensuring that companies abide by standards of fair play and full disclosure when selling their products and services. It often seeks court orders requiring wrongdoers to give back the ill-gotten gains they've taken from customers, known as "restitution" or "disgorgement" orders. In this case, a group of payday loan companies originated more than 5 million payday loans between 2008 and 2012. They used fine-print loan documents on their website 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. The FTC brought an enforcement action for violations of the Federal Trade Commission Act and won an order requiring the payday lenders to return approximately $1.27 billion to

consumers. The defendants claim that the law contains no authority for this type of order. The decision will once again determine if an agency has the authority to obtain restitution orders as the Court did last term in the *Liu* case upholding the authority of the Securities and Exchange Commission to seek disgorgement. *See Liu v. SEC,* 140 S. Ct. 1936 (2020). If the Court says no this time, then defrauded consumers will get less money back, con artists will face weaker deterrents against fraud and abuse, and other agencies may suffer the same fate, harming countless more consumers.

- **Henry Schein, Inc. v. Archer and White Sales, Inc., 935 F.3d 274 (5th Cir. 2019)**—Many, if not most, of the agreements that Americans have with their various financial service providers (banks, brokers, and insurance companies) include mandatory arbitration clauses prohibiting them from going to court if a dispute arises and forcing them instead into arbitration. Yet, arbitration is a biased and secretive forum where consumers rarely get fair compensation for their damages. Sometimes the first question is whether the dispute is even subject to the arbitration clause and whether a court or arbitration panel should decide that threshold issue. In this case, a small business distributor of dental equipment filed suit in federal court against an equipment manufacturer seeking damages and injunctive relief for violations of the antitrust laws. The defendant manufacturer sought to derail the court case and compel arbitration, relying on an arbitration agreement. Last term, the Supreme Court sided with the defendant and sent the case back to the Fifth Circuit to determine whether the agreement delegated the question of arbitrability to the arbitrators. The Fifth Circuit sided with the plaintiff, holding that it was appropriate for a court to decide the threshold question of arbitrability and that the claims weren't in fact subject to arbitration under the agreement. If the Supreme Court reverses the lower court, then we'll know that this Court will strive to force small businesses and consumers into arbitration if at all possible, dimming their prospects for meaningful relief.

- ***Texas v. United States*, 945 F.3d 355 (2019)**—The Supreme Court has restrictively interpreted the "standing" requirement of the Constitution (i.e., the requirement that litigants have a sufficient stake in the outcome of litigation or face sufficient injury), making it increasingly difficult for anyone other than the regulated industry to challenge laws, rules, and other government actions. In this case, two individuals and 18 states filed suit to challenge the individual mandate in the Affordable Care Act ("ACA") and ultimately to invalidate the entire statute. Their claim of "standing" under current law appears strained since in 2017 Congress set the tax for failure to procure health insurance at zero, and the law would therefore appear to inflict no injury on the claimants whatsoever. The Court will have to decide the standing issue before it reaches the merits, i.e., whether the ACA, with a zero tax enforcing the individual mandate, is still constitutional. Will the Court reject this challenge by holding that the plaintiffs suffer insufficient injury for standing purposes or will it deviate from its jurisprudence on standing and apply a more lenient test in a case supported by conservative causes and rife with political implications? In the long run, the Court can and *should* revise and relax the standing requirements, but now we'll see if this Court is at least consistent in its application of this powerful barrier to the courts.

- ***Collins v. Mnuchin*, 938 F.3d 553 (2019)**—Often litigants will challenge agency action by challenging the legitimacy of the agency itself. For example, a firm challenging a subpoena from the Consumer Financial Protection Bureau claimed that the entire agency was unconstitutional given its structure—a single director removable only for cause. Last term, the Supreme Court agreed in the *Seila Law* case (but fortunately also held that the removal restrictions could be severed from the law and voided, leaving the agency intact). *See Seila Law LLC v. CFPB,* 140 S. Ct. 2183 (2020. In this case, the same issue is before the Court as to the Federal Housing Finance Agency ("FHFA"), the agency that oversees Fannie Mae and Freddie Mac. Disgruntled shareholders wish to challenge the terms of the taxpayer bailouts entered by the FHFA on behalf of Fannie Mae and Freddie Mac during the financial crisis. Their strategy is to knock down the entire agency as unconstitutionally structured. An even deeper concern here is that the Court may seize this opportunity to reexamine the legitimacy of all independent agencies, even those with *multi-member commissions* subject to removal restrictions. This would have huge consequences since most financial regulatory agencies fit that mold and might be vulnerable.