BETTER MARKETS

SPECIAL REPORT

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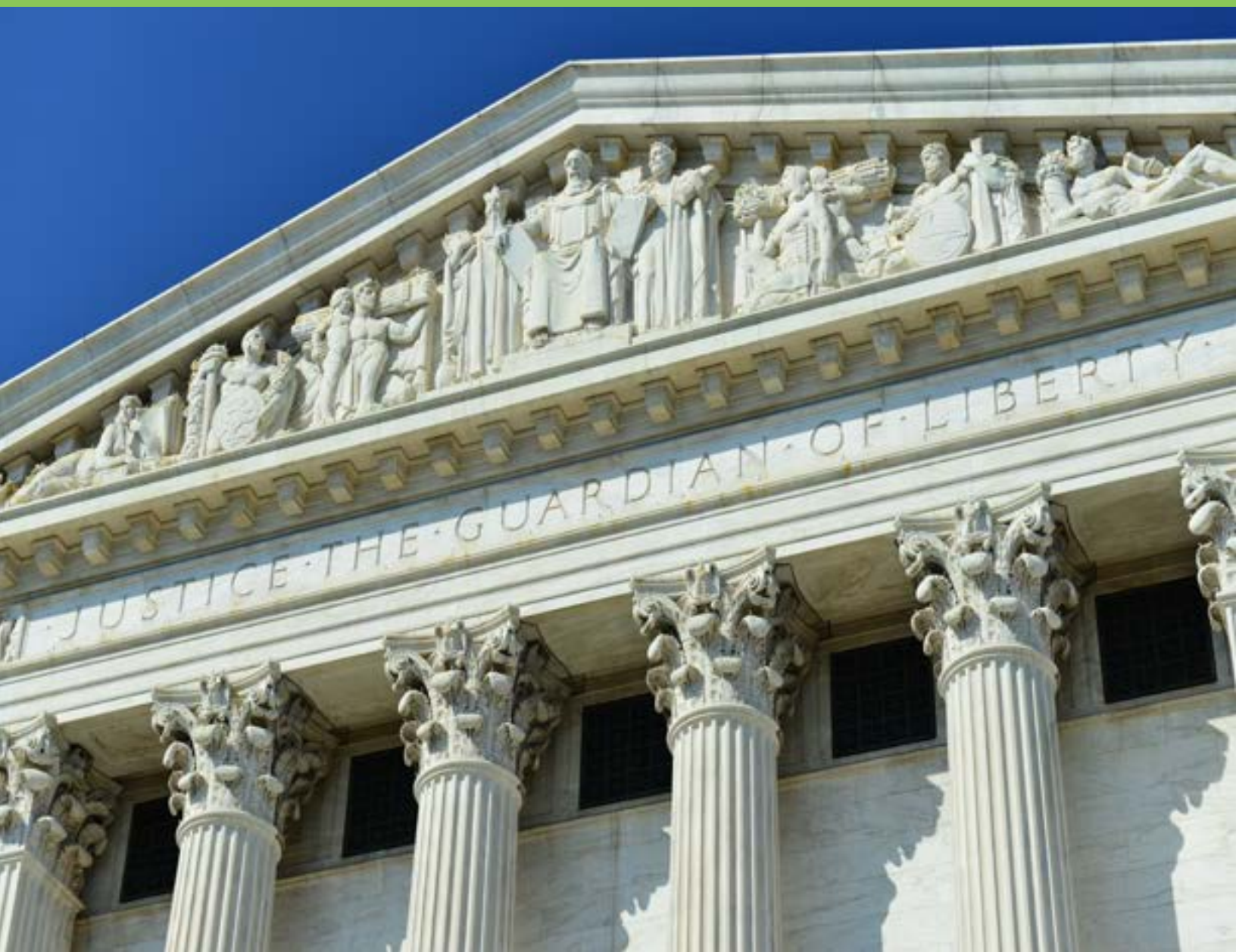
An Update on Supreme Court Cases Involving the Financial and Economic Security and Prosperity of the American People

A Report Card on the 2018-2019 Term and a Look Ahead to 2019-2020



INTRODUCTION

In August last year, Better Markets issued a report titled "Justice Kavanaugh: Good for Corporations, Bad for Your Wallet" ("August Report"). In it, we highlighted the enormous influence of the Supreme Court in the financial lives of all Americans and we examined the alarming prospect of having then-judge Kavanaugh confirmed as a Supreme Court Justice—a man with a judicial track record that has long favored corporate and business interests over individual investors, consumers, and government protections for hard-working Main Street families.

Following a controversial nomination process, Judge Kavanaugh was ultimately confirmed in early October of 2018, just as the Supreme Court's 2018-2019 term was getting underway. He quickly took his seat on the Court and served throughout the term. Accordingly, the time is now right for an update, one that reviews the Court's decisions on the economic and financial issues affecting all Americans during that term, evaluates Justice Kavanaugh's voting record in those cases, and looks ahead to review similar cases on the docket for the next term, which begins in early October 2019.

SUPREME COURT CASES AFFECT THE FINANCIAL AND ECONOMIC LIVES OF EVERY AMERICAN

As observed in our August Report, when people think of the Supreme Court, they tend to think of cases involving high-profile social policies, from immigration and health care to abortion rights and race discrimination. That's because those issues are so plainly consequential, controversial, and widely covered by the media. However, there is another category of important Supreme Court case that profoundly influences the well-being and quality of life of every American: disputes over financial regulation and economic rights and remedies. The bottom line is that anyone who has a savings or checking account, credit card, debit card, mortgage, student loan, car loan, retirement plan, college savings fund, brokerage account, or any other financial product or service—meaning every single American—has to care about the Supreme Court's decisions.

A. SUPREME COURT CASES HAVE A PROFOUND IMPACT ON WHETHER CONSUMERS AND INVESTORS ARE PROTECTED FROM FRAUD AND ABUSE AND WHAT THEY CAN DO WHEN BANKS, BROKERS, AND OTHER FINANCIAL FIRMS RIP THEM OFF.

Americans' financial lives are deeply influenced by a wide variety of cases that end up before the Supreme Court. Those cases help establish the speed limits and guardrails that protect the public against financial fraud and abuse; the remedies that investors and consumers will have—or won't have—when they are victimized by illegal and unscrupulous conduct; and even the weapons that regulators have at their disposal to protect investors and ensure that our financial markets are fair, stable, 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 of their income 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 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, boiler-plate account agreement that only attorneys can read and understand.

Another key question in some of these cases is whether those who are financially injured and wish to bring claims in court will 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 an injured consumer or investor will ever be able to seek relief before a judge or jury.

Will the agencies who 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 rule-making and enforcement authority? 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.

B. SUPREME COURT DECISIONS ARE ALSO IMPORTANT FOR INSTITUTIONAL REASONS: THEY REPRESENT THE FINAL STAGE OF APPEAL AND THEY HAVE AN ENDURING IMPACT.

The Supreme Court's cases are consequential for reasons related not just to the subject matter of finance and economics 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 decide which issues are the most consequential and pressing. 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 (Considerations Governing Review on Certiorari).

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 the 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 have enduring impact. Finally, each decision of the Court re-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 life-time tenure (subject only to the rarely-invoked impeachment process), meaning that they will sit on the Court for years, deciding cases in ways that perpetuate the rules established in earlier decisions.

ANALYSIS

A. THE SUPREME COURT'S DECISIONS DURING THE TERM JUST ENDED AND JUSTICE KAVANAUGH'S ROLE

The Court issued many significant decisions during the 2018-2019 term regarding finance, regulation, and economics, some of which we review here along with Justice Kavanaugh's role in those cases. Several general observations deserve mention at the outset:

The scorecard: Overall, investors and consumers did not fare well. With some exceptions, the Court's decisions represent a setback to the financial interests of investors and consumers. In some instances, the Court dismissed the case without resolving the questions presented, sending it back to the lower appellate court to first resolve an issue. 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 really make a 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—towards a more fully-formed body of law 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 literal 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. **SECURITIES FRAUD – *Lorenzo v. SEC* – Holding the line against securities fraud and rejecting technical defenses that would let countless scam artists off the hook.**

The Decision. Cases involving the interpretation of the securities laws are directly relevant to many issues surrounding financial regulation. For example, will antifraud laws and rules be read broadly to close loopholes and ensure that "all manner of fraud" is punished and deterred? Or will technical legal arguments win the day, immunizing fraudsters from liability? That was the issue in ***Lorenzo v. SEC*, 139 S. Ct. 1094 (2019)**, one of the bright spots in the Court's 2018-2019 term.

The SEC brought an enforcement action against a broker (Lorenzo) who had knowingly sent numerous investors blatantly false statements that were drafted by his supervisor. The case wended its way from the administrative forum into the courts, and the D.C. Circuit found Lorenzo liable. The Supreme Court affirmed, holding that while Lorenzo could not be held liable under the rule prohibiting false statements, because he technically did not "make" the statements he circulated to investors, *see* 17 C.F.R. § 240.10-5(b), his conduct nevertheless violated other prohibitions against fraudulent acts, because he employed a scheme to defraud or engaged in acts that would operate as a fraud or deceit, *see* 17 C.F.R. § 240.10-5(a) and (c).

The Court relied principally on three rationales for its decision: (1) Lorenzo's conduct clearly fell within the plain or "ordinary" meaning of the provisions against engaging in schemes to defraud; (2) the securities laws were designed to overlap to ensure maximum breadth, with conduct like false statements easily falling under the prohibition against schemes to defraud as well as the prohibition against false statements; and (3) Lorenzo's technical defenses would mean that those engaged in clearly fraudulent conduct might escape liability altogether, contrary to Congress's intent to "root out all manner of fraud in the securities industry," *Lorenzo*, 139 S. Ct. at 1104.

Fortunately, the majority clearly felt that the case was hardly a close call, noting that "it would seem obvious" that the wording of the rules against schemes to defraud were sufficiently broad to encompass "the dissemination of false or misleading information." *Id.* at 1101. As the Court observed, "we see nothing borderline about this case." *Id.* Nevertheless, Justices Thomas and Gorsuch dissented, illustrating how sharply divided the Court can be even on issues that would seem beyond reasonable dispute.

Justice Kavanaugh's Role. Justice Kavanaugh took no part in the consideration or decision of the case, as he was one of the three judges that sat on the panel when the case was before the D.C. Circuit.[1] But it is clear that he would have sided with the Supreme Court's dissenters and the extraordinarily narrow application of the securities laws that they espoused. We know this because when he sat on the D.C. Circuit and participated in the *Lorenzo* case, Kavanaugh wrote his own dissent, siding with Lorenzo and arguing that he could not be held liable for his fraudulent acts.

[1] Justices recuse themselves under a variety of circumstances, although they rarely explain their reasons. Unlike other federal judges, Supreme Court Justices are not subject to the Code of Judicial Conduct for United States Judges, although the Justices consult that code for guidance. The Justices are also guided by 28 U.S.C. § 455, which requires recusal in certain situations. *See generally* Chief Justice Roberts, 2011 Year-End Report on the Federal Judiciary (Dec. 31, 2011), *available* at https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

Why It Matters. Fortunately, the Supreme Court's majority opinion means that the SEC's ability to bring fraudsters to justice will not be hampered by an evasive, hyper-technical, and ultimately erroneous interpretation of the anti-fraud provisions in the securities laws and the SEC's rules. The decision closes a potentially enormous loophole and ensures that fraudsters will not be able to devise schemes in which they circulate false statements but escape liability because they are not technically the drafter or maker of those deceptions. And with more deterrence comes less fraud and less money taken from investors' pockets.

2. SECURITIES FRAUD – *Varjabedian v. Emulex Corp.* – Kicking the can down the road on tender offer fraud and hinting at new limits on the right of investors to seek relief in court.

The Decision. Another important case directly relevant to financial regulation was ***Varjabedian v. Emulex Corp.*, 888 F.3d 399 (9th Cir. 2018)**, which involved the application of a securities law provision prohibiting fraud in the tender offer process, a mechanism used for corporate takeovers.

Former shareholders of a company acquired in a tender offer filed a class action against the companies participating in the merger, alleging that the "recommendation statement" supporting the tender offer had omitted important information. Specifically, the shareholders claimed that the statement failed to include an analysis showing that the premium the shareholders would receive was actually below average relative to premiums in similar mergers. They alleged violations of Section 14(e) of the Securities Exchange Act of 1934, which prohibits any person from making untrue statements, omitting material information, or engaging in other fraudulent acts in connection with a tender offer.

The main issue presented was whether a violation of Section 14(e) requires proof of scienter (that is, an intent to violate the law) or simply proof of negligence, a less difficult standard to meet. The district court dismissed the case, holding that scienter was required, but the Ninth Circuit reversed, holding that negligence was sufficient. It relied primarily on the plain language of Section 14(e) and precedents holding that similar language in other provisions of the securities laws require only negligence.

Just a week after oral argument in April 2019, the Supreme Court surprisingly dismissed the writ of certiorari as "improvidently granted." *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019). This one-line disposition makes it difficult to understand exactly why the Court dismissed the case. Based upon the oral argument, however, some Court-watchers speculate that the Court would prefer to address a more fundamental question that was never briefed on the merits: whether there should even be a private right of action for violations of Section 14(e). Dismissal of the case would allow the Court to address that issue later after it is "squarely" presented and briefed, and this may explain the Court's action. Ronald Mann, Justices Pass on Opportunity to Define Liability for Inadequate Disclosures About Tender Offers, SCOTUSblog (Apr. 23, 2019), https://www.scotusblog.com/2019/04/justices-pass-on-opportunity-to-define-liability-for-inadequate-disclosures-about-tender-offers/.

Justice Kavanaugh's Role. Because the case was dismissed, the Court issued no opinion on the merits and we cannot know with certainty how Justice Kavanaugh would have voted or how he might have written a majority opinion, a concurrence, or a dissent. However, the oral argument provided some compelling evidence, revealing Justice Kavanaugh's hostility toward private rights of action, bordering on ridicule. Ronald Mann, Argument Analysis: Justices Debate Time Travel in Assessing

Liability for Inadequate Disclosures About Tender Offers (Apr. 16, 2019), https://www.scotusblog.com/2019/04/argument-analysis-justices-debate-time-travel-in-assessing-liability-for-inadequate-disclosures-about-tender-offers/. That in turn clearly suggests that had the Court decided the issues presented on the merits, Justice Kavanaugh would have favored setting a high bar when it comes to the intent standard, one that would make it as difficult as possible for the plaintiffs to have their day in court and prove their case.

Why It Matters. This case illustrates the impact of the Supreme Court even when the Justices decide *not* to decide a case: The important legal questions remain in limbo and the conflict among the circuit courts, which normally prompts the Court to accept the case for review, remains unresolved. Here, numerous circuits will continue to require that plaintiffs show scienter to establish tender offer fraud under Section 14(e), while at least some plaintiffs—those in the Ninth Circuit—will remain subject to the less stringent negligence standard. The Supreme Court skirted an opportunity to harmonize the law and to promote the interests of investors by holding that proof of negligence is sufficient to support Section 14(e) claims in all cases. Even more worrisome is what the dismissal portends about the Court's apparent desire to abolish the private right of action under Section 14(e). It appears that a majority of Justices on this Court may wish to do just that, thus preventing private plaintiffs from seeking relief in court no matter how badly they have been defrauded in connection with a tender offer.

3. ARBITRATION – *Henry Schein, Inc. V. Archer and White Sales, Inc.* – Shutting the courthouse door and forcing more parties into arbitration, a secretive, unfair, and ineffective dispute resolution process.

The Decision. Cases involving forced or mandatory arbitration clauses are almost always important, since they determine whether an injured investors, consumer, worker, or other contracting party will be allowed to seek meaningful relief in court or will be relegated to the arbitration process, which overwhelmingly favors industry defendants over individual claimants. Last term, the Supreme Court took a step backwards on this front in ***Henry Schein, Inc. v. Archer & White Sales Inc.,*** **139 S. Ct. 524 (2019).**

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. The plaintiff argued that the case wasn't covered by the arbitration agreement because it contained an exception for claims seeking injunctive relief. The district court sided with the plaintiff and denied the motion to compel arbitration and the Fifth Circuit affirmed.

Unfortunately, the Supreme Court reversed. In a unanimous decision, 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 thus rejected what had become known as the "wholly groundless" exception to forced arbitration. The Court relied principally on a strict interpretation of the 1925 Federal Arbitration Act ("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.

Justice Kavanaugh's Role. Justice Kavanaugh not only joined with the unanimous Court but also wrote the opinion, rejecting multiple alternative and reasonable interpretations of the FAA, as well as policy arguments based on the efficient resolution of disputes and the need to deter frivolous motions to compel arbitration. His approach is 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.

Why It Matters. Under the ruling, anyone victimized by wrongdoing—injured investors, consumers, small businesses, workers, and others—will have a 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.

4. ARBITRATION – *Lamps Plus, Inc. v. Varela* – Beating back class arbitration and further limiting the ability of those hurt by corporate negligence or misconduct to seek meaningful relief.

The Decision. In some cases, the core issue is not whether injured investors or consumers will have their day in court, but whether they will be able to seek relief through class arbitration, a more effective alternative to individual arbitration. That was the question in ***Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)**.

In 2016, a hacker stole tax information about 1300 employees of a company selling light fixtures. An employee who was subsequently a victim of identity theft (resulting in a fraudulent tax return) filed a class action against the company. The company sought to derail the court action and compel arbitration. The district court granted the motion to compel arbitration, but it allowed the arbitration to proceed on a class basis, meaning that the employees could join together to press their claims collectively and share the expense of arbitration. Still unhappy because it was faced with the prospect of a class arbitration, the defendant company filed an appeal, but the Ninth Circuit affirmed. It held that the arbitration clause in the arbitration agreement was ambiguous on the issue of whether class arbitration was permitted, so it applied the universally accepted principle of state contract law that ambiguous language should be construed against the drafter, in this case the defendant company. It therefore allowed the class arbitration to proceed.

The Supreme Court reversed, holding that an ambiguous arbitration agreement cannot support the inference that the parties consented to arbitrate on a class-wide basis. The key to the decision was the Court's refusal to apply the state-law rule that ambiguities in a contract should be construed against the drafter. The Court's rationale was that while state contract law generally does apply to the interpretation of arbitration agreements under the FAA, those principles of state law are preempted if they result in a fundamental alteration of the arbitration and undermine the central benefits of arbitration itself. Here, the Court found that allowing class arbitration in place of individual arbitration would result in just that type of fundamental alteration, in conflict with the FAA.

The Court's decision, written by Justice Roberts and joined by the other conservative Justices, was clearly driven by an ideological hostility to class action lawsuits and class arbitrations. Multiple strong dissents revealed the majority's bias and its departure from the law. For example, Justice Ginsberg laid bare the fundamentally misguided nature of the Court's long-standing jurisprudence under the FAA. First, she pointed out that the FAA was originally intended to support arbitration agreements between businesses of roughly equal bargaining power, yet she observed, the Court has in recent years "routinely deployed the law to deny to employees and consumers 'effective relief against powerful economic entities.'" *Id.* at 1420. Further, she explained, "when companies can 'muffl[e] grievance[s] in the cloakroom of arbitration, . . . the result is inevitable: curtailed enforcement of laws 'designed to advance the well-being of [the] vulnerable.'" *Id.* at 1422.

Justice Ginsberg also explained the critical need for employees and consumers to band together as a class in judicial or arbitral forums: "Employees and consumers forced to arbitrate solo face severe impediments to the 'vindication of their rights,'" as "'[e]xpenses entailed in mounting individual claims will often far outweigh individual recoveries.'" *Id.* at 1421. Accordingly, "'mandating single-file arbitration serves as a means of erasing rights, rather than enabling their 'effective vindication.'" *Id*. at 1421. And she exposed the fundamental flaw in the fictional premise that arbitration agreements can and should be enforced because the parties have consented: In the case at hand, she noted, consent cannot rationalize the imposition of individual arbitration on employees who "surely would not choose to proceed solo," *id.* at 1421, and more broadly, she observed, companies deny employees and consumers the right to sue in court "by inserting solo-arbitration-only clauses that parties lacking bargaining clout cannot remove," *id.* at 1422.

Justice Kagan exposed how the majority's bias against class actions drove the result and led the Court to stray from the law. First, she demonstrated that the better interpretation of the arbitration agreement at issue was that it did in fact permit class arbitration, a conclusion that would have ended the case in favor of the worker. Second, she showed that the majority erred by preempting the widely accepted and thoroughly neutral principle of state contract law that ambiguities are construed against the drafter—a finding that also would favor the worker and class arbitration. In a powerful concluding discussion of her dissent, Justice Kagan minced few words, explaining that the majority's disrespect for state law "would never have graced the pages of U.S. Reports save that this case involves . . . [ellipsis in original] class proceedings," *id.* at 1434-35, adding that "[t]he opinion likewise has more than a little in common with this Court's efforts to pare back class litigation." *Id.* at 1435. She concluded by observing that whatever the contract or state law actually requires, "the majority will prohibit class arbitration." *Id.* In effect, she accused the majority of foreclosing class procedures based on strongly held ideological preferences rather than the arbitration agreement itself and well-established principles of contract law that affect its interpretation.

Justice Kavanaugh's Role. Justice Kavanaugh joined with the majority opinion, without filing a separate opinion of his own.

Why It Matters. The decision is significant for three reasons. First, it means that class arbitrations will become even more rare, thus further limiting the ability of employees and consumers to obtain any relief when they have suffered a wrong at the hands of their employer or a firm that has sold them a product or service. Second, it also reveals another area in which the Court is sharply divided, affecting the financial well-being of all Americans. Finally, it exemplifies the willingness of the conservative members of the Court to pursue a result-oriented approach and run roughshod over the law when a policy objective near and dear to their hearts is at stake.

5. ARBITRATION – *New Prime Inc. v. Oliveira* – Respecting at least some limits on forced arbitration.

The Decision. In another important arbitration case last term, the Court sided with workers seeking their day in court. It enforced one of the few exceptions in the FAA, which places employment contracts for transportation workers outside the purview of the law. 9 U.S.C. § 1.

In ***New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019)**, a truck driver filed a class action against a trucking company alleging that although technically labeled "independent contractors," the drivers were de facto employees and therefore entitled to at least minimum wage. The trucking company asked the court to compel arbitration, seeking a more business-friendly forum, and the lower courts refused, holding that the contract, including its forced arbitration clause, was excluded from the FAA as a "contract of employment" for workers engaged in interstate commerce.

The Supreme Court unanimously affirmed, holding (1) that it is for a court to decide in the first instance whether the exception in Section 1 of the FAA applies, and (2) that the exception for "contracts of employment" covers not only traditional employment agreements but also agreements with independent contractors. The trucking company therefore failed in its attempt to force the truck drivers fighting for minimum wage out of court and into arbitration.

Justice Kavanaugh's Role. Justice Kavanaugh took no part in the consideration or decision of the case.

Why It Matters. The decision is a positive outcome on several levels, although its impact will be relatively narrow in scope. The Court enforced an explicit exception in the FAA for certain types of transportation workers; it interpreted "contracts of employment" broadly to cover independent contractor agreements; and it acknowledged that the arbitrability issue concerning the applicability of the FAA's exception for transportation issues must be decided by a court as a threshold matter. At least some workers will benefit, as they will be able to pursue their claims in court rather than forced arbitration, a shadowy and unfair process that rarely provides just compensation for wrongs suffered by investors, consumers, or workers.

6. STANDING – *Frank v. Gaos* – Whether a clear right to sue under the law is enough to get into court.

The Decision. The U.S. Constitution provides that the federal courts shall have the power to decide certain types of "cases" and "controversies." The Supreme Court has issued a long line of decisions interpreting this provision, holding that to meet the case or controversy requirement and to pursue a case in federal court, a plaintiff must show that it has suffered an actual or imminent injury that is fairly traceable to the conduct complained of and that can be redressed by a favorable ruling from the court. It 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 their case in court. And it applies to all types of cases that come before the courts, including those arising in the area of financial regulation.

In ***Frank v. Gaos*, 139 S. Ct. 1041 (2019)**, the plaintiffs filed a class action against Google, alleging that it had shared information about Google users with the hosts of webpages that the users visited, all in violation of the Stored Communications Act. The parties reached a settlement, under which Google would make certain disclosures about its information-sharing practices and pay $8.5 million. Most of those proceeds were to go to six *cy pres* recipients, non-profit organizations whose work was deemed to benefit class members indirectly, and none of the money was designated for class members.

Some members of the class objected to the settlement, arguing it was not fair, reasonable, and adequate under Fed. R. Civ. P. 23(e)(2) since it provided no direct relief to class members, only a *cy pres* award. The district court nevertheless approved the settlement and the Ninth Circuit affirmed. The Supreme Court granted cert. to decide whether a class action settlement providing a cy pres award but no direct relief met the standard. However, at the urging of the U.S. Solicitor General during the briefing phase on the merits, the Court determined that the case should be remanded for Ninth Circuit to determine if the plaintiffs in the underlying case actually had standing to sue.

The Court first observed that it always has the obligation to assure itself that litigants have standing under the "case or controversies" clause of Article III of the Constitution. And it noted that this obligation extends to cases where the court is called up to approve a class action settlement. Finally, the Court explained that the plaintiffs' standing in the case was surrounded by fresh doubts, because two years earlier, the Court had held that "Article III standing requires a concrete injury even in the context of a statutory violation," citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). *Frank*, 139 S. Ct. at 1045. In *Spokeo*, the Court had rejected the premise that a plaintiff automatically satisfies the "injury-in-fact" requirement of standing whenever a statute grants certain rights and authorizes people to sue to vindicate those rights.

Justice Kavanaugh's Role. Justice Kavanaugh joined with the majority. (Only Justice Thomas dissented. Interestingly, he argued that the Court should reach the merits, espousing the more generous view that a plaintiff seeking to vindicate a private statutory right need only plead an invasion of that right to establish standing. However, he also would have disapproved of the settlement since it afforded no relief directly to class members.)

Why It Matters. The case is another illustration of the monumental importance of the standing doctrine. If the lower court determines on remand that the plaintiffs lack standing, then they will be tossed out of court, after the case has run a lengthy course culminating in a settlement. The case also highlights the Court's stringent and at times counterintuitive application of standing principles. It would seem beyond dispute that where a statute creates a right or obligation, and further allows private parties to sue to enforce those rights and obligations, a plaintiff should not be required to establish any further type of injury for standing purposes. Yet the Court in Spokeo held differently, and if this case finds its way back before the Court, it may dismiss the plaintiffs' claims for lack of standing even if the lower court keeps the case alive.

7. TRANSPARENCY – *Food Marketing Institute v. Argus Leader Media* – Limiting the public's right to obtain information from the government under the Freedom of Information Act.

The Decision. Transparency in the financial system is another issue that can affect the interests of the American investor and financial consumer. The Freedom of Information Act ("FOIA") is a landmark statute that was designed to enhance the ability of any citizen to obtain records reflecting the operations of the government agencies responsible for protecting the public from a wide range of threats to health and safety, including financial predators. Cases construing the scope of FOIA and its exemptions arise in many contexts, but the resulting Supreme Court rulings generally apply in all areas, including the financial arena.

In ***Food Marketing Institute v. Argus Leader Media,* 139 S. Ct. 2356 (2019)**, a newspaper filed a FOIA request with the Department of Agriculture ("USDA") seeking data identifying the retail stores that participate in the food stamp program and setting forth the redemption data for each store. The USDA withheld the store-specific redemption data under FOIA Exemption 4, which shields from disclosure "trade secrets and commercial or financial information" that is "privileged and confidential." The paper sued to obtain the information and the district court agreed, holding in accordance with precedent that the exemption only applies if release of the confidential information is likely to cause substantial harm to the competitive position of the person from whom the information is sought, a finding which the evidence did not support. A trade association representing food retailers intervened in the case and appealed the district court's decision, but the Eighth Circuit affirmed, supporting more, not less, disclosure.

The Supreme Court reversed, broadening the exemption and making it easier to withhold information from the public. After first confirming that the association had standing to appeal, the Court rejected the "substantial competitive harm" test for withholding information as too stringent. Turning to the statutory language and the ordinary meaning of the term "confidential" when Congress enacted FOIA in 1966, the Court concluded that to withhold information under Exemption 4, it is only necessary to show (1) that the confidential business information is customarily kept private, and (2) that the party receiving the information provides some assurance that it will remain secret.

The Court rejected the "substantial competitive harm test," which originated in the D.C. Circuit. It discredited the D.C. Circuit's view that non-disclosure under an exemption must be "'justified by the legislative purpose which underlies the exemption.'" *Id.* at 2364. The Court admonished that

if a careful examination of the meaning and structure of the law itself" provides a "clear answer," judges must stop and render a decision without consulting the underlying purposes of the law. *Id.* The Court also disparaged the D.C. Circuit's reliance on legislative history, describing it as a "relic" from a bygone era. *Id.* And to the argument that the FOIA exemptions should be construed narrowly as a matter of policy, the Court countered that "'we have no license to give [statutory] exemption[s] anything but a fair reading,'" adding in effect that the privacy policies underlying the exemptions were just as important as the transparency policies supporting broad disclosure. *Id.* at 2366.

The dissent from Justice Breyer, joined by Justices Ginsburg and Sotomayor, argued strenuously that the test for withholding information under exemption 4 must include at least some threat of harm arising from release of the information. The dissenters challenged the majority's refusal to consider the policy of full disclosure underlying FOIA, arguing that the Court should weigh the well-established principle that the purpose or mandate of FOIA is "'broad disclosure of Government records'" and pointing out that "we have continuously held that FOIA's enumerated exemptions 'must be narrowly construed.'" *Id.* at 2368. Finally, the dissenters appropriately ridiculed the majority's tests as handy shields against disclosure: The first test (the information is customarily kept private) cannot suffice, since the whole point of FOIA is to gain access to information that businesses prefer to keep confidential and that the public cannot otherwise obtain because it is "customarily" kept private; and the second test (the information is shared with the government with an assurance of confidentiality) cannot suffice, since that essentially justifies non-disclosure simply by virtue of agreements or understandings that are commonly entered between businesses and government when information is shared.

Justice Kavanaugh's Role. Justice Kavanaugh joined with the majority.

Why It Matters. Cases defining the scope of every citizen's right to obtain information from the government arise in a variety of contexts, not limited to financial regulation cases. But the principles laid down by the Supreme Court in this and other areas will undoubtedly influence the degree of transparency in the financial arena and the ability of the public to access information regarding financial institutions and markets. In this instance, the Court's ruling will constrict the flow of business information under FOIA. Moreover, the case provides another example of the majority's adherence to a very literal mode of statutory interpretation, one that discounts the importance of the purposes underlying a law, the value of weighing sound policy in the process of statutory construction, and the role of legislative history.

8. ACCESS TO THE COURTS – *Home Depot v. Jackson* – Limiting the ability of corporate defendants to maneuver their way out of state court and into a more friendly federal court.

The Decision. Sometimes, a key question in a case is not just whether litigants can get into court at all, but whether they can choose the court they want to preside over the litigation. The interpretation of statutes and rules governing civil procedure come into play, and the Supreme Court weighs in on these important, albeit technical, issues as well.

In ***Home Depot v. Jackson*, 139 S. Ct. 1743 (2019),** Citibank sued an individual consumer in state court to collect a debt on a Home Depot credit card. The cardholder, George Jackson, responded by bringing a class action counterclaim against Home Depot and a product manufacturer (Carolina

Water), alleging that those companies were engaged in deceptive and unfair trade practices. Those counterclaim defendants attempted to remove the case from state to federal court, a typical strategy premised on the idea that class action defendants tend to benefit from a supposedly more neutral and friendly forum in federal court. The district court and the Fourth Circuit rejected their attempt to remove the case and remanded it back to state court.

The Supreme Court affirmed, holding that neither the general removal statute, 28 U.S.C. § 1441(a), nor the Class Action Fairness Act of 2005, allows a counterclaim defendant to remove a case to federal court. Five Justices joined in an opinion that focused on routine principles of statutory construction applied to the word "defendant," along with precedents, to conclude that only the party sued by the original plaintiff in a case has the right to remove a case from state to federal court.

Justice Kavanaugh's role. Justice Kavanaugh joined in Justice Alito's extensive and passionate dissent, along with Justices Gorsuch and Chief Justice Roberts. Sympathizing with corporate defendants in consumer class actions, the dissenters repeatedly cited to the purported bias that such defendants can face in state courts, "and with it the potential for crippling and unjust losses." *Home Depot*, 139 S. Ct. at 1752. They pointed to gaps in the Private Securities Litigation Reform Act of 1995, a statute designed to inhibit the use of class actions by investors and consumers. That law, the dissenters complained, had failed to prevent class action plaintiffs from pursuing their supposedly abusive claims in state court, thus evading the new statutory hurdles imposed on federal court actions. And they cited with approval Congress's effort to relax the requirements for removal of state cases to federal court. Accordingly, they lamented the majority's decision to limit the removal power to certain types of defendants, not any and all defendants. And in an ironic and almost comical twist, these conservative Justices found themselves straining to explain why, in this case, the straightforward mode of statutory interpretation to which they are usually so loyal was the wrong path to follow. They harped on the argument that the majority's textual analysis could not be justified in terms of what they saw as the underlying Congressional purpose at stake—making removal easier, not more limited. With a nod to their customary analytical approach, they conceded that "what finally matters is the text," but in the next breath they pleaded that "a good interpreter also reads a text charitably, not lightly ascribing irrationality to its author." *Id.* at 1755.

Why It Matters. The upshot of the holding is that some additional cases will be allowed to continue in state courts, in line with the preferences of counterclaim plaintiffs seeking relief and the advantages they perceive to be available in that more local forum.

9. DEFERENCE TO AGENCIES – *Kisor v. Wilkie* – Limiting judicial reliance on an agency's expertise and its interpretation of its own rules.

The Decision. One of the more technical yet important issues in administrative law is whether and to what extent courts must defer to an agency's interpretation of ambiguous statutes or rules. The resolution of that issue can have a huge impact on litigants in a multitude of cases, sometimes involving financial regulation. When courts discount the thoughtful judgment and analysis of an agency tasked with protecting the public interest, they have more leeway to rule in favor of industry advocates seeking to narrow the scope of rules designed to benefit investors and consumers.

In ***Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)**, a Vietnam war veteran sought disability benefits for post-traumatic stress disorder ("PTSD") in 1982. The Department of Veterans Affairs ("VA") denied his request, but he renewed it in 2006, based on a new psychiatric report. The VA then agreed that he suffered from PTSD, but it refused to extend the benefits retroactively to the date of his first application, based on a rule specifying what types of records were "relevant" to such retroactivity determinations. The Court of Appeals for the Federal Circuit affirmed, following the precedent in *Auer v. Robbins*, 117 S. Ct. 905 (1997), holding that courts should defer to an agency's reasonable reading of its own ambiguous regulations. The Federal Circuit concluded that the rule was ambiguous and therefore the court should defer to the VA's interpretation of the rule and its denial of Kisor's request for retroactive benefits.

The Supreme Court granted cert. for the express purpose of deciding whether to overrule the *Auer* doctrine. In a lengthy opinion written by Justice Kagan, accompanied by an extremely contentious concurrence from Justice Gorsuch, the majority decided not to overrule Auer but instead to clarify and narrow its application: "Auer retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. . . . The deference doctrine we describe is potent in its place, but cabined in its scope." *Id.* at 2408. The Supreme Court vacated the lower court's decision and remanded the case with instructions that the Federal Circuit re-evaluate its application of the *Auer* doctrine in light of the new guidelines set forth in the Court's analysis. Thus, whether or not Kisor will receive disability benefits covering a period of over 20 years hangs in the balance and hinges on how the Federal Circuit applies the new principles governing judicial deference to agency rule interpretations set forth by the Supreme Court.

Justice Kagan provided a painstaking analysis and defense of the *Auer* rule but also established more rigorous new guidelines that courts must follow when applying it in the future. She explained that the rule has a compelling logic: As the original drafter of a rule, an agency is in a better position to reconstruct its original meaning; an agency has advantages over courts in resolving ambiguities through the application complex policy judgments in substantive areas; and the rule promotes uniformity in the interpretation of ambiguous rules. She also explained why the principle of stare decisis "cuts strongly against" overruling Auer, since doing so would overrule a long line of precedents and cast doubt on many settled constructions of rules. *Id.* at 2422. Nor, she explained, had Kisor demonstrated any of the factors that might justify reversing a well-established precedent, such as its unworkability. *Id.* at 2418-2423.

Finally, Justice Kagan laid out new principles to govern the application of *Auer*: The rule must be genuinely ambiguous after all the traditional tools of statutory construction have been brought to bear; the agency's reading must fall within the bounds of reasonable interpretation; the interpretation must be the agency's official position; the interpretation must fall within the scope of the agency's substantive expertise; and the agency's reading must reflect a considered judgment, not a new interpretation adopted for convenience or one that creates unfair surprise. *Id.* at 2415-18.

In a lengthy separate opinion, Justice Gorsuch excoriated the majority for failing to simply overrule *Auer*, revealing his unbridled hostility toward the rule:

> The Court's failure to be done with *Auer*, and its decision to adorn *Auer* with so many new and ambiguous limitations, all but guarantees we will have to pass this way again. When that day comes, I hope this Court will find the nerve it lacks today and inter *Auer* at last. Until then, I hope that our judicial colleagues on other courts will take courage from today's ruling and realize that it has transformed *Auer* into a paper tiger.

Id. at 2426. Highlighting the weighty consequences that can follow from seemingly obscure principles of law, Justice Gorsuch pointedly observed that "Mr. Kisor is a marine who lost out on benefits for post-traumatic stress disorder when the court of appeals deferred to a regulation interpretation advanced by the Department of Veterans Affairs. The court of appeals was guilty of nothing more than faithfully following *Auer*." *Id*. at 2426.

Justice Kavanaugh's Role. Justice Kavanaugh wrote a brief concurrence agreeing with Justice Gorsuch's conclusion "that the *Auer* deference doctrine should be formally retired," adding that "[f]ormally rejecting *Auer* would have been a more direct approach. . . ." *Id.* at 2448.

Why It Matters. It may be, as Justice Gorsuch predicted, that the Auer doctrine is destined to be overruled in a future case. He may also be correct in suggesting that in the meantime, the federal courts will be much more aggressive in withholding deference to agency interpretations, given the multitude of new prerequisites that the majority established for such deference. In any case, the trend may well prove harmful in the long run because notwithstanding the negative impact it had on Kisor personally in this case, abandoning Auer will likely undermine the ability of agencies to draft, interpret, and apply rules in ways that maximize the protection of the public interest.

10. WHAT TYPES OF RULES ARE BINDING – *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* – The way a court classifies an agency's rule can determine how the rule is applied and enforced, thus determining important rights and remedies.

The Decision. Yet another area of administrative law that can determine the rights and remedies of a claimant is the distinction between legislative and interpretive rules. Those rule classifications can affect a variety of important issues, including whether the public has a right to comment on the rule in draft form, whether the agency must conduct a cost-benefit analysis when writing the rule, and the extent to which the rule is enforceable.

In ***PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019),** plaintiffs brought a class action alleging violations of the Telephone Consumer Protection Act ("TCPA") by a publisher that circulated unsolicited offers of free copies of its book, the "Physicians' Desk Reference." After the district court found in the defendant's favor, the Fourth Circuit reversed, holding that the district court was duty bound to follow an order from the FCC interpreting the TCPA. In the circuit court's view, that order defined illegal "solicitations" to include the offer of free goods or services, thus validating the plaintiffs' claim. The Supreme Court vacated and remanded for the Fourth Circuit to decide two threshold questions bearing on the proper resolution of the case.

One of those issues was whether the FCC order was a "legislative rule," which has the force and effect of law, or just an "interpretive rule," which merely advises the public of an agency's interpretation of the statutes and rules that it administers. If it were the latter, then it might not be subject to a different statute (the Hobbs Act), which required certain challenges to FCC orders to be brought in a federal court of appeals within 60 days of entry. That finding would allow the defendant publisher to challenge the binding effect of the order in the class action and argue for a different interpretation of the "unsolicited offers" that are prohibited under the law.

Justice Kavanaugh's Role. Justice Kavanaugh filed a separate concurrence in which he argued that the Court, rather than remanding the case, should proceed to hold that the Hobbs Act does not bar any defendant from arguing that the agency's interpretation of the applicable statute is wrong, and that the district court is free to independently interpret the TCPA, according to the usual principles of statutory interpretation.

Why It Matters. While the outcome of the case remains unknown, it illustrates the potentially dispositive impact that technical principles of administrative law can have on the rights and remedies of private parties. The Fourth Circuit's decision on remand will largely determine whether the plaintiffs' claims for damages arising from alleged violations of law will survive and proceed to judgment or be tossed out of court. Justice Kavanaugh's opinion is further evidence of his pattern of deciding cases in favor of business interests and defendants who seek to avoid accountability under the law. The issues ultimately decided in the case will undoubtedly come to bear in other cases where the issues are more squarely matters of financial regulation, affecting a wide swath of investors and consumers.

B. WHAT'S COMING UP IN THE SUPREME COURT'S 2019-2020 TERM: A SPECIAL FOCUS ON PROTECTING RETIREES AND CONSUMERS.

1. STANDING – *Thole v. U.S. Bank* – Can retirement savers sue to stop pension plan trustees from looting their accounts and threatening future benefits and a secure retirement?

Background. Cases defining the duties of those who manage pension and retirement plan can have a huge impact on a retirees' quality of life for years, if not decades. In ***Thole v. U.S. Bank, Nat'l Ass'n,* 873 F.3d 617 (8th Cir. 2017),** the plaintiffs were beneficiaries of a defined-benefit pension plan, a retirement plan that entitles its beneficiaries to a fixed, periodic payment upon retirement. 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. The alleged misconduct included investing in mutual funds owned by U.S. Bank so that U.S. Bank could benefit from inflated management fees. It also included following an obviously imprudent strategy of investing the entire plan portfolio in equities, which benefited U.S. Bank 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 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 is whether they have standing to seek either form of relief, in the absence of individual financial losses.

Why it Matters. The case is significant on multiple levels. First, it underscores the unique importance of retirement plans and Congress's decision to protect those funds by imposing the fiduciary duty on trustees—the highest duty of loyalty and care under the law—as a safeguard against mismanagement and theft. And it highlights Congress's judgment that plan participants should have the explicit right to bring suit to enforce those obligations. For employees who participate in a defined-benefit plan, their prospects for financial security in retirement hinge on prudent and loyal management of the plan—they have a real and tangible interest in ensuring that the plan is managed properly. And as pointed out by the plaintiffs/petitioners, private enforcement of ERISA is doubly important as a complement to the Department of Labor's enforcement program—a point that also applies to the role of private enforcement of the securities laws, which serves as an indispensable adjunct to the SEC's enforcement efforts.

The case also illustrates, yet again, the power of the standing doctrine. The Eighth Circuit's erroneous decision deprives these plaintiffs of the chance to seek two important forms of relief. Essentially, under the circuit 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 sustain 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.

And 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 would allow severe mismanagement and self-dealing by fiduciaries to continue indefinitely, as long as the plan maintains a minimum level of funding.

The lower court's ruling not only conflicted with decisions from at least three other circuit courts, which hold that violation of a plaintiff's rights under ERISA is sufficient to confer standing, but also ignored some important benefits of injunctive relief under ERISA. Injunctions serve important purposes beyond simply halting ongoing injurious conduct; they are also powerful tools for preventing

future violations and for seeking other remedial measures such as the replacement of fiduciaries who have engaged in illegal conduct. Yet the Eighth Circuit's ruling prevents any plaintiff from suing to stop glaring plan mismanagement that could lead to severe losses until after those losses are realized by individual beneficiaries, at which time it will likely be too late to restore the benefits to which beneficiaries are entitled.

2. FIDUCIARY STANDARDS – *Jander v. Retirement Plans Committee of IBM* – Can retirement plan managers escape liability for investing in overvalued company stock and causing significant plan losses?

Background. An employee stock ownership plan ("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*, 573 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, 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 ***Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. 2018)**, 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 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 surrounds what pleading requirements are necessary to sustain a claim under the "more harm than good" standard.

Why it Matters. 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, dismissal of the suit would be especially harmful. The plaintiffs essentially argue that IBM engaged in a long-term fraud—overvaluing a company 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 alleged 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 correction of the stock price would do more harm than later disclosure of the fraud, when the fraud would have caused even greater overvaluation, induced even more purchasers to invest in the inflated shares, and resulted in an even larger the drop in price once the fraud was inevitably revealed.

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, Fifth Third Bancorp. With the exception of the Second Circuit in this case, every court purporting to apply 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 has an opportunity to clarify the law in a way that better protects the rights and remedies of plan participants.

3. STATUTE OF LIMITATIONS – *Sulyma v. Intel Corporation Investment Policy Committee* – When does a retirement plan participant lose the right to seek damages for plan mismanagement due to the mere passage of time?

Background. Most crimes and other forms of misconduct or breach of duty 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 ***Sulyma v. Intel Corp. Inv. Policy Comm.,* 909 F.3d 1069 (9th Cir. 2018)**, Intel managed its employee retirement plan by following a strategy that resulted in higher fees and lower performance to the detriment of the plan participants. When he realized that his investment account was performing poorly relative to the market, Sulyma, an Intel employee, filed a class action suit against Intel on October 29, 2015, alleging various violations of ERISA related to Intel's management of the plan.

However, the district court determined that Sulyma's claims were too late, filed after ERISA's statute of limitations period had run. ERISA requires that a plaintiff bring claims within three years of when the plaintiff has "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. The district court agreed 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 1075. The defendants petitioned for cert. and the issue before the Supreme Court is 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 favoring the defendant).

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 on 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.

A statute of limitations that begins to run only once a plaintiff has "actual knowledge" of a violation of law means what it says—until a plaintiff actually knows, in fact, about the conduct constituting the breach, the statute of limitations does not begin to run. 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.

Congress deliberately chose "actual knowledge" as the standard to determine when the statute of limitations for ERISA begins to run, and that choice should 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.

4. STATUTE OF LIMITATIONS – *Rotkiske v. Klemm* – When is it too late to sue for violations of the Fair Debt Collection Practices Act?

Background. Another 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 is the issue presented in ***Rotkiske v. Klemm,* 890 F.3d 422 (3d Cir. 2018)**.

Rotkiske accumulated about $1,200 in credit card debt between 2005 and 2007. In 2008, his bank referred the debt for collection to defendant Klemm. Klemm filed suit against Rotkiske and attempted to serve Rotkiske at the address it had on file, but Rotkiske had since moved. Unable to locate Rotkiske, Klemm withdrew the complaint. However, Klemm later sued Rotkiske again and attempted service again at the same address, even though service at that address had previously failed. An unrelated person ostensibly accepted service. Having no knowledge of the lawsuit, Rotkiske never responded and a court entered a default judgment against him. Rotkiske found out about the lawsuit once he applied for, and was denied, a mortgage. Rotkiske sued the debt collector for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, including the act of obtaining a default judgment against an individual knowingly served at an incorrect address.

The Third Circuit dismissed the case as time-barred under the FDCPA's one-year statute of limitations. It held that while Rotkiske brought suit within one year of discovering the debt collector's alleged violations, the alleged violations themselves occurred more than one year prior to the filing of the lawsuit. The court was swayed by the literal wording in the statute and by what it viewed as the important policies underlying clear cut limitations provisions, including repose, certainty, and the elimination of stale claims. It thus refused to apply the so-called "discovery rule," unlike at least two other circuit courts, under which the statute of limitations begins to run only once the plaintiff discovers, or could have discovered, violations of the FDCPA. It therefore held that the lawsuit was time-barred. The plaintiff, Rotkiske, petitioned for cert. and the issue before the Supreme Court is whether the limitations period under the FDCPA is marked from the time the violations occurred or the time of their discovery.

Why It Matters. The Third Circuit's literal interpretation of the one-year statute of limitations for FDCPA claims puts 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 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 intended debt collectors to escape liability by engaging in conduct that prevents a consumer from discovering a violation of the FDCPA until a year after its occurrence.

This case illustrates the point. It was the debt collector's own actions—serving the wrong person at an address it had reason to believe was no longer Rotkiske's residence—that prevented Rotkiske from becoming aware of the FDCPA violations and filing a lawsuit within one year of their occurrence. Finding that an FDCPA lawsuit is barred in these circumstances would encourage debt collectors to engage in the sort of subterfuge and deceit that the FDCPA was explicitly designed to prevent.

CONCLUSION

The Supreme Court's most recent term, from 2018 to 2019, amply illustrates the many ways in which the Court's decisions profoundly influence the financial and economic well-being of all Americans. The ten Supreme Court decisions reviewed in this Report addressed a wide 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—

- Applied the securities laws broadly to hold an obviously culpable fraudster accountable, rejecting the evasive and technical statutory interpretations that would immunize many fraudulent actors seeking to exploit investors (*Lorenzo*);

- Ducked an opportunity to strengthen the protections against fraud in certain securities offerings by establishing a more realistic and less onerous intent standard, and even hinted that it might eliminate altogether the right of wronged investors to file private lawsuits seeking damages for such misconduct (*Varjabedian*);

- Sided with defendants seeking to minimize their liability by forcing lawsuits out of open court and into the murky, biased, and ineffective arbitration forum, and by limiting the ability of plaintiffs to efficiently band together in class arbitration where financial firms have engaged in widespread abuses (*Henry Schein and Lamps Plus*);

- Signaled that it would further impede access to justice by reaffirming the principle that to be heard in court, a plaintiff must first establish a specific concrete injury even where a statute clearly authorizes the plaintiff to file a lawsuit for violations of the law (Frank);

- Limited transparency by broadening the "commercial information" exemption in FOIA, thus making it easier for businesses and the government to shield financial information from public disclosure (*Food Marketing Institute)*;

- Preserved but limited the well-established principle that courts should respect and defer to an agency's interpretation of ambiguous rules, given their unique expertise in regulating industries and protecting the public—and in the process suggested that the Court will eventually do away with the Auer doctrine and give courts more leeway to substitute their judgement for that of regulators (*Kisor*).

In these cases and others, the Justices also displayed some of their fundamental differences in judicial philosophy, which often determines 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.

Finally, as predicted in our August Report, Justice Kavanaugh was true to form. Based on his votes, the opinions he authored, his questions and comments at oral argument, and his views as reflected in cases he heard while serving on the D.C. Circuit, it is clear that Justice Kavanaugh continues to side with business interests and against investors and consumers. He supported a narrow and technical reading of the securities laws; favored corporate defendants seeking to force plaintiffs out of court and into arbitration; signaled a desire to raise the standing hurdle and keep those seeking remedies for violations of law out of court; passionately disparaged class action litigation, especially in state court; and supported the elimination of the Auer doctrine requiring courts to respect agency rule interpretations.

The upshot is clear: 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 REVIEW OF OUR AUGUST 2018 REPORT

A. A SAMPLING OF CASES ON THE DOCKET.

In the August Report, we first highlighted a sampling of the cases on the Supreme Court's 2018-2019 docket addressing important financial regulation issues, including cases that would determine—

- Whether the laws and rules written to prevent securities fraud will be applied broadly to cover clear-cut cases of fraud or more narrowly, allowing wrongdoers to avoid accountability and to victimize investors with impunity;
- Whether aggrieved consumers, investors, and workers will have their day in court or be forced into a confidential, biased, and ineffective arbitration process;
- Whether federal law will preempt or stifle the rights of consumers seeking relief under state law;
- Whether the allocation of funds obtained through class action settlements serve the interests of the class members and the larger public interest.

The Court's 2018-2019 docket also included cases in the area of civil procedure (the power of removal to federal court), administrative law (the degree of deference that agencies deserve from courts), and even transparency (the scope of the exemptions under the Freedom of Information Act).

B. JUSTICE KAVANAUGH'S PRO-BUSINESS APPROACH TO FINANCIAL REGULATION.

In our August Report, we also examined Justice Kavanaugh's track record as a Judge on the United States Court of Appeals for the D.C. Circuit. We highlighted a number of cases in which he revealed his hostility towards administrative agencies charged with protecting the health, safety, and welfare of Americans, and his affinity for narrow statutory interpretations, which tend to favor those who seek to avoid accountability under the law. Here we briefly recap those decisions.

1. In ***PHH Corp. v. Consumer Financial Protection Bureau*, 839 F. 3d 1 (D.C. Cir. 2016)**, the D.C. Circuit held that the CFPB's structure violated the separation of powers doctrine because the Bureau (1) was headed by a single director, rather than by multiple directors, who (2) could only be removed for cause. According to Judge Kavanaugh's majority opinion, these features made the agency far too unaccountable to the President. His opinion was filled with hostility toward independent agencies charged with protecting consumers, along with baseless assessments of the alleged threat they pose to individual liberty and our system of government. Noticeably absent from his extensive analysis was any acknowledgement of the enormous benefit that executive branch agencies confer on investors, consumers, workers, and other Americans by protecting them from the relentless, ingenious, and harmful predatory actions by corporations, including many in the financial services industry. Fortunately, Judge Kavanaugh's decision on the structure of the CFPB was later reversed by the full D.C. Circuit Court sitting en banc (over Kavanaugh's strenuous dissent), in *PHH Corp. v. Cons. Fin. Protec. Bur.*, 881 F. 3d 75 (D.C. Cir. 2018).

2. In ***Lorenzo v. Securities and Exchange Commission*, 872 F. 3d 578 (D.C. Cir. 2017)**, the D.C. Circuit held that an investment banker had participated in a scheme to commit fraud where he knowingly disseminated fraudulent emails, written by his boss, to investors. The D.C. Circuit upheld the SEC's finding that while Lorenzo did not make false statements in violation of Rule 10b-5(b), *id*. at 583, he nevertheless violated separate prohibitions against participating in a scheme to defraud, in violation of subsections Rule 10b-5(a) and (c). Judge Kavanaugh disagreed, as he took a hyper-narrow view of the anti-fraud provisions in the securities laws and faulted the SEC for attempting "for decades" to expand the scope of primary liability under those laws. *Id.* at 601. And, even after acknowledging the dubious character of "securities brokers such as Frank Lorenzo," who Judge Kavanaugh conceded was perhaps really "guilty of negligence (or worse)," he nevertheless urged reversal of the sanction, without once mentioning the victims of Lorenzo's fraud. *Id.* at 602.

3. In ***Loan Syndications & Trading Association v. Securities and Exchange Commission,* 818 F.3d 716 (D.C. Cir. 2016)**, Judge Kavanaugh joined in a unanimous decision that carved out a loophole in the new risk retention requirements. Those rules were designed to ensure that those who assemble complex investments like mortgage-backed securities must retain some of the risk rather than just pocketing their fees and saddling investors with all of the downside if the investments fail. Unfortunately, the three-judge panel reversed the district court and held that companies that manage or assemble open-market "collateralized loan obligations" ("CLOs") cannot be regarded as "securitizers" under the Dodd-Frank Act. The court read the statute narrowly, refused to give deference to the SEC's interpretation of the law as required under *Chevron*, and accepted the classic industry fear-mongering about the supposedly adverse market impact of the rule, all without adequately accounting for the important purpose of the risk retention requirement: to help prevent another financial crisis. In short, at least for one type of CLO, the managers do not have to keep any "skin in the game" and Congress's additional incentive to select only quality loans for inclusion in those CLOs has been judicially nullified.

4. In some of his writings, Judge Kavanaugh has made clear his hostility to the *Chevron* doctrine, a well-established principle of administrative law. It provides that 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." ***Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.,* 467 U.S. 837 (1984)**. The application of this judicial doctrine has empowered independent agencies to issue many important rules and regulations with the confidence that they will survive judicial challenge, ultimately for the benefit of the public. As we pointed out in our report, Judge Kavanaugh seeks to narrow if not abolish the *Chevron* doctrine, which he views 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." Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016).

5. Closely related to Judge Kavanaugh's animosity towards *Chevron's* deference to administrative agencies is his fondness for the "major rules" or "major questions" doctrine. Based upon a series of cases, the major rules doctrine is a judicially created standard that requires unambiguous congressional authorization for an agency to adopt a "major rule," one that has vast economic or political significance. *Loving v. IRS*, 742 F. 3d 1013 (D.C. Cir. 2014). An important example of Judge Kavanaugh's embrace of the major rules doctrine is found in United States ***Telecommunications Association v. FCC*, 855 F. 3d 381 (D.C. Cir. 2017)**. This challenge to the Federal

Communications Commission's ("FCC's") net neutrality rule, which classified internet service providers as common carriers subject to the regulatory requirements of the Communications Act of 1934, was front page news for the first half of 2017. After previously upholding the rule, the D.C. Circuit was confronted with a petition for rehearing en banc, and Judge Kavanaugh split from the panel's denial of that petition. The case is significant not only because of Kavanaugh's adherence to the major rules doctrine, but also because it reflects the deeper attitudes that animate many of his rulings: a strong preference for minimal business and industry regulation, coupled with a steadfast refusal to be guided by clearly articulated policy considerations, even wise ones. In his dissent, for example, Judge Kavanaugh lamented the FCC's net neutrality rule because it "upended the agency's traditional light-touch regulatory approach to the internet." *Id.* at 425 (emphasis added).

C. THE SUPREME COURT'S HISTORIC ROLE IN FINANCIAL REGULATION.

In the concluding section of our August Report, we reviewed some of the Supreme Court's landmark cases in the area of financial regulation, spanning decades. We illustrated 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 towards 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" injury to specific 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 internal as well as external reporting did not warrant Chevron deference because the statute was unambiguous regarding its 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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