BETTER MARKETS

SPECIAL REPORT

JULY 30, 2021

THE SUPREME COURT'S 2020-2021 TERM

The Court Decides Cases Involving the Financial and Economic Security of the American People As the Court Itself Becomes the Focus of Possible Reform

INTRODUCTION

The past year has been a uniquely challenging time. As most Americans and people around the world struggled to survive the Covid-19 pandemic, businesses and government institutions alike were forced to adapt to a largely home-bound and Zoom-centric workforce. Through it all, the nine Justices of the U.S. Supreme Court and their staffs soldiered on with their work, evaluating an incessant stream of petitions for certiorari, hearing oral arguments, and issuing almost 70 merits opinions resolving a wide range of important disputes.

Some of those decisions addressed high-profile social policy issues surrounding the 2020 election, the Covid-19 pandemic, access to birth control, religious freedom, and criminal law. Other cases focused on less high-profile but vitally important financial and economic issues that will affect consumers, investors, and regulators for years to come. Those cases centered on the enforcement powers of the financial regulators, the requirements governing securities fraud class actions, the validity of bailout measures necessitated by the 2008 financial crisis, and the doctrine of standing, which determines who can even set foot in a federal court to have their grievances heard. This Spring, we also witnessed a renewed focus on the Court itself and how it operates, as the "Presidential Commission on the Supreme Court" commenced a series of hearings to examine a wide range of questions involving the size of the Court, the Justices' tenures, and even the Court's jurisdictional reach.

Many Court-watchers will tackle the job of evaluating the Court's decisions on the important social policy questions addressed this past year. Here, we train our focus on important decisions the Court handed down over the last 10 months in the financial and economic arena, which ultimately affect every American's bank balance, directly or indirectly. We also look ahead to a few of the key cases that the Court will consider next term, beginning on the first Monday of October 2021. Finally, we briefly highlight some of the issues surrounding the Court itself that are drawing renewed and increasing attention, including its transparency, its operations, and its makeup—the Justices who serve.

ANALYSIS

I.

A BRIEF REMINDER ABOUT THE ENORMOUS IMPORTANCE OF SUPREME COURT DECISIONS IN THE FINANCIAL AND ECONOMIC LIVES OF VIRTUALLY ALL AMERICANS

Though they may draw less attention than the headline-grabbing cases about immigration, abortion, gun rights, and even election law, the cases on the Supreme Court's docket addressing financial regulation and Americans' economic rights and remedies are critically important. In those cases, the Court is called upon to consider a broad range of issues in financial regulation as well as administrative and constitutional law:

- How strong and broad are the laws and regulations that are supposed to protect consumers and investors from predatory conduct in the financial markets?
- What tools do regulatory agencies have to punish and deter banks and other financial institutions that exploit their clients?
- How effectively does the law police unfair and anti-competitive behavior by companies that Americans rely on for important goods and services?
- What level of deference do courts owe to the legal interpretations, actions, and rules of the regulatory agencies?
- When can an injured consumer seek relief for fraud and abuse in court rather than in a woefully unfair, ineffective, and secretive arbitration proceeding?
- How is the constitutional doctrine of standing applied, a question that often determines whether a party can even get a federal court to address their grievances?
- What standards of care and loyalty should govern those who are entrusted to help manage whatever money a worker has been able to set aside for retirement?

The answers to these questions and others have a huge impact on how successfully Americans can save, spend, invest, and protect their hard-earned money, and ultimately how much—or how little—financial prosperity they can enjoy. The bottom line is that anyone who uses a financial product or service—a checking account, credit card, mortgage, student loan, car loan, retirement plan, college savings fund, or brokerage account—should care about the Supreme Court's decisions.

II.

SOME KEY DECISIONS AFFECTING FINANCIAL REGULATION AND CONSUMER AND INVESTOR PROTECTION

From October to July, the Court issued a number of important opinions that will affect the financial lives of countless Americans. Those decisions involved the sorts of protections that consumers and investors can expect from financial regulators; their ability to seek remedies in court as opposed to a biased and secretive arbitration forum; the level of deference that courts owe to agency rules; requirements governing class action lawsuits; and the doctrine of standing. Below is a brief look at several of these important decisions.

And because the denial of a petition for cert. also has enormous consequences, leaving a lower court's decision intact as the final determination in the case, below we also highlight some of the legal consequences arising from the Court's denials of petitions for cert.

A. Noteworthy Decisions on the Merits

1. **ENFORCEMENT REMEDIES – *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (decided Apr. 22, 2021) – The Court delivers a major blow to the FTC's ability to recover money for defrauded consumers.**

Background. In *AMG Capital Management, LLC v. FTC*, the Federal Trade Commission ("FTC") filed an enforcement action in federal court against a number of payday lenders that had defrauded borrowers out of over $1.3 billion through deceptive loan charges, in violation of Section 5 of the Federal Trade Commission Act ("Act"). The FTC sought an injunction and monetary relief under Section 13(b) of the Act. The District Court issued the injunction and ordered the defendants to pay $1.27 billion in restitution and disgorgement, specifically to be used for "direct redress to consumers."

The payday lender appealed, arguing that under the statute, the FTC had no authority to issue the restitution and disgorgement order. The Ninth Circuit affirmed, citing longstanding precedent that had interpreted Section 13(b) as "empower[ing] district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution." The payday lenders appealed again, this time to the Supreme Court, which decided to hear the case.

The Decision. The Supreme Court reversed, in a unanimous opinion written by Justice Breyer. It held that while Section 13(b) of the Act authorizes the issuance of injunctions, it does not authorize the FTC to seek, or a federal court to award, equitable monetary relief such as restitution or disgorgement. The Court relied on the "plain meaning" of Section 13(b), which provides only for injunctive relief without expressly referring to any monetary remedies. It also relied on the "language and structure" of the Act, including other provisions that allow a federal court to grant monetary relief—but only after the FTC has initiated a separate administrative enforcement proceeding and obtained a cease and desist order through that agency process, something the FTC typically does not do when an ongoing scheme to defraud calls for quick injunctive relief.

Much of the opinion was devoted to countering strong arguments *in favor* of the FTC's position. For example, the Court had to distinguish ample precedent holding that when a federal statute simply authorizes injunctive relief, it also confers on judges the inherent equitable authority to grant restorative monetary remedies. In fact, this principle has become firmly rooted in federal jurisprudence for decades, not only under the Act but also under the securities laws. The Court also acknowledged the extraordinary benefits that the FTC's approach had conferred on consumers, citing dozens of federal court actions in 2019 alone that obtained $723.2 million in consumer redress or disgorgement.[1]

Why It Matters. The decision represents a major blow to enforcement and consumer protection. In fact, the FTC and other regulatory agencies such as the Securities and Exchange Comission ("SEC"), rely heavily on disgorgement and restitution to force con artists and fraudsters to surrender billions of dollars in money stolen from their victims, and to direct the majority of those funds back to those victims. While the Court relied in part on the FTC's ability to seek restitution from a federal court under a separate process set forth in the Act, it also had to acknowledge the serious limitations of that process: It requires the FTC first to pursue a lengthy administrative enforcement action and obtain a cease and desist order, all subject to a stringent statute of limitations and a heightened intent standard.

The decision means that the victims of the payday lender in the case before the Court won't receive any money under the original restitution order, and they may face long delays in recovering their losses through other avenues, if that's possible at all. More generally, the Court's decision robs the FTC of a tried and true means of depriving wrongdoers of their ill-gotten gains and restoring losses to consumers, consigning the agency to a more arduous, time-consuming, and difficult enforcement process. In short, it makes it easier for companies to rip off consumers and keep the money.

The Court ended its opinion by observing that the FTC is free to seek additional authority from Congress to obtain monetary relief against wrongdoers in federal court.[2] This is a frustrating salve that courts offer when their flawed decisions lead to bad outcomes, and it's a gesture of little comfort to the victims of the payday lenders sued by the FTC—especially since there's ample authority showing that Congress already granted the FTC this authority. Finally, that this decision, which harms consumers and benefits unscrupulous companies, was unanimous, illustrates that the popularly understood conservative-liberal divide on the Court doesn't always hold, and that even the so-called liberal Justices are, at least at times, inclined to elevate the interests of powerful companies over the what's best for consumers.

2. DIVERSITY AND DEFERENCE TO AGENCIES – *Federal Communications Commission v. Prometheus Radio Project*, 141 S. Ct. 1150 (decided Apr. 1, 2021) – The Court leaves a threat to racial and gender diversity intact by deferring to an agency's flawed rulemaking.

Background. In *Federal Communications Commission v. Prometheus Radio Project*, the Federal Communications Commission ("FCC") conducted a periodic review of its ownership rules that limit the number of radio stations, TV stations, and newspapers that a single entity may own in a given

[1] 141 S. Ct. at 1347.

[2] *Id.* at 1352.

market. In a 2017 order, it repealed two of the rules and modified a third. It concluded that in light of technology, including the rise of cable services and the internet, the rules were no longer necessary to promote competition, localism, and viewpoint diversity. It also concluded that repeal or modification of the rules was not likely to harm minority and female ownership of media outlets.

Prometheus Radio Project, a non-profit advocacy group, along with several other public interest and consumer advocacy groups, petitioned for review of the FCC's action in the Third Circuit, arguing that the agency's decision was arbitrary and capricious under the Administrative Procedure Act ("APA"). The Third Circuit agreed in part, holding that the record—the evidence before the agency—did not support the FCC's conclusion that the rule changes would have a "minimal effect" on minority and female ownership. The FCC petitioned for cert., which the Supreme Court granted.

The Decision. The Supreme Court reversed in a unanimous opinion written by Justice Kavanaugh, thus leaving the FCC's rule changes intact, along with their potentially adverse impact on diversity in the world of media outlets. As to Prometheus's first argument that the FCC relied upon flawed or incomplete data regarding the likely impact on minority and female ownership, the Court found that while the record may have been "sparse," with "gaps" in the data, the agency was permitted to act on whatever "data it had." The Court emphasized that despite repeated requests from the FCC, no one submitted any additional data, evidence, or arguments regarding the potential impact of the rule changes on minority or female ownership levels.[3]

With respect to Prometheus's second argument that the FCC ignored countervailing and superior evidence that was in the record, the Court simply held that the FCC, rather than ignoring the data, had interpreted it differently than Prometheus had. Along the way, the Court recapitulated some of the canons of law surrounding the rulemaking process: Judicial review under the "arbitrary-and-capricious" standard is deferential; courts may not substitute their own policy judgments for that of the agency; and an agency's basic duty is simply to reasonably consider the relevant issues and reasonably explain the decision.[4]

Why It Matters. The decision is important on at least two levels. First, of course, it means that the FCC's rule changes remain intact, and whatever negative impact they may have on minority and female ownership of media outlets *will* take effect—an unfortunate outcome and one of undeniable importance as racial and gender equality deserve and receive ever-increasing attention.

Second, the Court's legal analysis of an agency's duty in the rulemaking process displays a distinctively hands-off approach. For example, the Court recited the familiar rule that the judicial review standard is "deferential" to the agency. And it explained that when an agency is confronted with a sparse and admittedly incomplete record, it need only do essentially the best it can; in the words of the Court, "The APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."[5] These are not novel principles in the realm of administrative law. However, the question they raise is whether this Court, now dominated by conservative jurists, will henceforth

[3] 141 S. Ct. at 1159.

[4] *Id.* at 1158

[5] *Id.*

embrace and apply them evenhandedly in all cases, or only when it suits their ideological objectives and preferred outcomes. In other words, for example, as regulated industries flock into federal court to challenge new and stronger consumer protections anticipated over the next four years, will the courts apply this deferential standard in keeping with the Supreme Court's holding in Prometheus, or put it aside, contrive a rationale for withholding that deference, and strike down those new rules?

3. ARBITRATION AND THE ROLE OF THE COURTS – *Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 19-963 (order issued January 25, 2021) – The Court dismisses without explanation, leaving intact a helpful Fifth Circuit decision on arbitration.

Background. This case arrived back on the Court's docket this term after it was heard by the Supreme Court in 2019 and then sent back or "remanded" to the Fifth Circuit. This second time around, the Court simply dismissed the case with a one-line order stating that certiorari was "improvidently granted." That leaves questions about the Court's thinking unanswered, but it at least preserves the Fifth Circuit's ruling that favors judicial, not arbitral, resolution of the meaning and scope of arbitration agreements.

In this case, a small, family-owned business that distributes and services dental equipment (Archer and White Sales, Inc.) filed suit in federal court against an equipment manufacturer and distributor (Henry Schein, Inc.) seeking injunctive relief and damages for violations of the antitrust laws. The defendant manufacturer sought to derail the court case and compel arbitration, relying on an arbitration agreement. But the plaintiff argued that the case wasn't covered by the arbitration agreement because it contained an exception for claims seeking injunctive relief, which were clearly being advanced in the case. The district court sided with the plaintiff, denied the motion to compel arbitration, and allowed the case to proceed in court. The Fifth Circuit affirmed and the Supreme Court granted cert.

The Decisions. In round one, the Supreme Court unanimously reversed and remanded in a decision that rejected the "wholly groundless" exception to forced arbitration.[6] This doctrine had allowed courts, where an agreement is obviously *not* subject to arbitration, to make that indisputable determination without submitting the agreement to arbitration at all—even if the agreement delegates the arbitrability decision to arbitration. This was an important protection because, among other things, arbitration offers very limited appeal rights. As a result, even a grossly incorrect decision by an arbitration panel about where the case should be heard leaves a party opposing arbitration with no recourse and forces them to undergo the arbitration process.

In an opinion written by Justice Kavanaugh, the Court held that if contracting parties have delegated issues of "arbitrability" to an arbitrator—in other words, the threshold question of whether the dispute is even subject to arbitration—then courts must compel arbitration of that threshold issue, even if it is obvious that the dispute is not subject to arbitration under the wording of the contract between the parties. The Court rejected multiple alternative and reasonable interpretations of the 1925 Federal Arbitration Act ("FAA"), as well as policy arguments based on the efficient resolution of disputes and the need to deter frivolous motions to compel arbitration. The Court remanded for the Fifth Circuit to determine if, in fact, the parties' agreement clearly delegated the issue of arbitrability to the arbitrator.

[6] *Henry Schein, Inc. v. Archer & White Sales Inc.*, 139 S. Ct. 524 (2019).

On remand, as directed by the Supreme Court, the Fifth Circuit analyzed whether the parties' agreement delegated to the arbitrator the question of whether the dispute was in fact subject to arbitration. It articulated the rule that "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." It concluded that there was no such clear and unmistakable evidence of intent in this case. Although the parties' incorporation of the AAA arbitration rules by reference provided some indication of delegation to the arbitrator, the explicit carve-out in the parties' agreement for actions seeking injunctive relief negated that intent in this case, one clearly involving an injunction.[7] Second, after determining that the district court, not the arbitrator, did have the authority to determine arbitrability, the Fifth Circuit also determined that the district court was correct in determining that the case was not in fact subject to arbitration.[8] This too followed from the plain language in the agreement exempting actions seeking injunctive relief from the compulsory arbitration clause.

Schein petitioned for cert. on the impact of the carve-out clause on the delegation. Archer cross-petitioned for cert. to challenge the Fifth Circuit's holding that the incorporation of the AAA rules could serve to establish delegation of arbitrability to the arbitrator in the first place. The Court granted cert. only on the first issue. After the case was fully briefed and argued, the Court essentially decided that it should not have granted cert. in the second round. In a "per curiam" order issued January 25, 2021, the Court simply stated that "The writ of certiorari is dismissed as improvidently granted."[9]

This cryptic result left everyone to speculate about the Court's thinking. In general, the Supreme Court dismisses a case as "improvidently granted" when it decides that it should not have granted cert. in the first place, thus leaving the lower court's decision in place. While the Court typically does not explain its reasons for dismissing a case as improvidently granted, it sometimes chooses this disposition "when the court discovers something after granting certiorari that makes the case a poor vehicle for resolving the question it had taken the case to answer."[10] For example, it may determine that one of the questions on which they granted cert. was in fact waived.[11] In *Schein*, while the Court granted cert. on one gateway question (whether the carve-out negated the delegation of arbitrability to arbitration), it denied cert. on the other closely related gateway question (whether incorporation of the AAA rules really suffices to delegate in the first place). The Court may have recognized that, by granting cert. on one issue but denying it on the other, it had artificially narrowed the scope of the case such that it would "couldn't sensibly say anything about this matter."[12] In any event, the outcome is positive, as it represents a rare victory for those opposing arbitration and seeking their day in court.

Why It Matters. The Court's dismissal of the case leaves intact the Fifth Circuit's ruling, which provides some protection for parties looking to avoid the biased, unfair, secretive, and unaccountable arbitration process. The Fifth Circuit held that the dispute at issue was not arbitrable, which represents

[7] *Archer and White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 281 (5th Cir. 2019).

[8] *Id.* at 281-84.

[9] *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 141 S. Ct. 656 (2021).

[10] Kevin Russell, *Practice Pointer: Digging Into DIGS*, SCOTUSBLOG (Apr. 25, 2019), https://www.scotusblog.com/2019/04/practice-pointer-digging-into-digs/.

[11] *Id.*

[12] Ronald Mann, *Justices Dismiss Arbitrability Dispute*, SCOTUSBLOG (Jan. 25, 2021), https://www.scotusblog.com/2021/01/justices-dismiss-arbitrability-dispute/.

a small victory for opponents of arbitration. It preserves the ability of courts to at least determine the threshold question of arbitrability unless an agreement "clearly and unmistakably" provides that arbitrability is itself to be decided by an arbitrator.[13]

4. STANDING AND SERVERABILITY – *California v. Texas*, 141 S. Ct. 2104 (decided June 17, 2021) – The Court invokes the legal doctrine of standing to end another assault on the Affordable Care Act.

Background. The requirement known as "standing" is a complex legal doctrine that determines whether a plaintiff will even be allowed to bring his or her case in federal court. Here, a dispute about standing arose in the context of another attack on the Affordable Care Act ("ACA"), a statute that profoundly affects the physical and financial health of millions of Americans. The focus of the challenge was on the individual mandate, which requires individuals to either obtain health insurance coverage or pay a "shared responsibility payment." In *National Federation of Independent Business v. Sebelius*,[14] the Supreme Court previously upheld the individual mandate, reasoning that while Congress lacked the authority under its power to regulate interstate commerce to require individuals to purchase health insurance, it did have the authority under its taxing power to impose a choice between buying health insurance or paying an alternative tax in a specified amount.

In 2017, Congress set the amount of the tax to zero but retained the remaining provisions of the ACA. Nevertheless, Texas and 17 other states, later joined by two individuals, filed suit to challenge the individual mandate, reasoning that because the "tax" for failing to procure health insurance had been reduced to zero, Congress's taxing power could not support the mandate. They further argued that because the mandate could not be severed from the rest of the ACA, the entire law was invalid. California, 15 other states, and the District of Columbia intervened in the case to help *defend* the ACA.

The district court ruled in the plaintiffs' favor, holding that they had standing to challenge the minimum coverage provision; that reducing the amount of the tax to zero rendered that provision unconstitutional; and that the provision was not severable from the rest of the law, thus nullifying the ACA in its entirety. The Fifth Circuit affirmed the district court's rulings with one exception, holding that the district court had failed to analyze the severability issue with sufficient thoroughness and remanding for that purpose. The states seeking to defend the ACA petitioned for cert. and the Court took the case.

The Decision. In an opinion written by Justice Breyer, and to the immense relief of the countless Americans who rely on the ACA, the Supreme Court held that the plaintiffs lacked standing to attack the minimum coverage provision and it vacated the Fifth Circuit's judgment. Once again, the Court illustrated the enormous impact that the doctrine of standing can have, declining to reach the merits in a case of vast potential consequence to the American people.

Under well-established constitutional principles, those bringing claims in federal court carry a substantial burden and must show that the action they challenge 1) threatens them with a concrete

[13] 935 F.3d at 279.

[14] 132 S. Ct. 2566, 2600 (2012).

"injury", 2) that is "fairly traceable" to the challenged conduct, and 3) likely to be "redressed" by a favorable judicial decision.[15]

Here, the *individual* plaintiffs claimed they suffered harm in the form of payments they make to purchase the minimum health coverage ostensibly required under the mandate. The Court rejected their standing argument since even if this type of harm satisfied the injury element of standing, the plaintiffs had failed the causation or "traceability" test: The Court observed that while the statute tells them to obtain coverage, it has no means of enforcement, as Congress set the penalty at zero. Therefore, "[in] a word, they have not shown that any kind of Government action or conduct has caused or will cause the injury the attribute to [the mandate]."[16]

The *state* challengers to the law claimed two forms of injury. First, they argued that the minimum coverage provision induces more individuals to enroll in Medicaid and other health insurance programs, and the states must pay a share of the costs of serving those enrollees. The Court rejected this theory, again because the mandate is unenforceable and would not credibly induce people to enroll. Moreover, the Court observed, those health programs offer other significant benefits that have nothing to do with the mandate. Thus, the Court concluded, "the States have not demonstrated that an unenforceable mandate will cause their residents to enroll in valuable benefits programs that they would otherwise forgo."[17]

Second, the states also contended that the mandate caused them to incur other, direct costs, including the costs of providing beneficiaries of state plans with information about their coverage and furnishing that information to the IRS. Yet again, the Court invoked lack of causation, observing that these informational requirements are imposed not by the challenged mandate but by separate statutory provisions. "The Government's conduct in question is therefore not 'fairly traceable' to enforcement of the 'allegedly unlawful' provision of which the plaintiffs complain—§ 5000A(a)."[18]

Justice Alito, joined by Justice Gorsuch, filed a lengthy and derisive dissent, arguing strenuously that for standing purposes, the Court should focus on the alleged costs imposed by the ACA as a whole, even though the plaintiffs' challenge focused just on the unconstitutionality of the mandate. Justice Alito embraced the notion that the mandate cannot be severed from the rest of the law, so an attack on the mandate was in essence an attack on the entire law and all that it entails, including the costs and burdens the law imposes for standing purposes. Justice Alito also accused the Court of repeatedly bending over backwards in past cases and in this one to save or preserve the ACA against repeated challenges. Because he concluded that the plaintiffs had standing, he proceeded to analyze the merits of the plaintiffs' claims as well as the severability issue. Not surprisingly, he concluded that the individual mandate was unconstitutional and that it could not be severed from the entirety of the law.[19] Justice Thomas filed a separate opinion in which he also expressed disdain for the Court's prior

---

[15] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

[16] 141 S. Ct. at 2114.

[17] *Id.* at 2119.

[18] *Id.*

[19] 141 S. Ct. at 2123-2140 (Alito J., dissenting).

opinions upholding the ACA, but he nevertheless reluctantly joined with the majority's analysis on the standing question.[20]

Why It Matters. The Court's decision leaves the ACA intact, a matter of enormous consequence for millions of Americans who depend on the law to obtain affordable health insurance. The decision also once again illustrates the power and importance of the standing doctrine, the gateway test for determining whether a plaintiff may advance their claims in a federal court. It applies to all types of cases, including those arising in the area of financial regulation. How stringently the Supreme Court interprets the requirements for standing can determine whether, and to what extent, litigants can challenge unlawful government action or seek redress for injuries suffered at the hands of businesses that engage in abusive practices. Too often, "standing" closes the courthouse door to plaintiffs with legitimate and important claims, including public interest organizations who may not be able to demonstrate the monetary or similarly concrete injury necessary for standing purposes.

Here the Court concluded that none of the plaintiffs had standing since they suffered no injury attributable to the ACA's entirely unenforceable requirement to buy health insurance—a conclusion that, in the Court's words, should not be "surprising."[21] One of the questions arising from this case is whether the Court, as charged by Justices Alito and Gorsuch, is distorting the standing doctrine to achieve an ideological goal—in this instance, preserving a statute on which so many Americans rely. If that's true, then advocates for financial reform and consumer protection will continue to harbor fears that in futures cases, the Court may adopt ideological readings of the law to achieve outcomes that are not so aligned with the broader public interest—that when faced with plaintiffs fighting for consumers and investors, the conservative majority will recalibrate its approach to standing to short circuit their claims and toss them out of court.

Finally, the principle of severability deserves mention. This too is an enormously important doctrine. Severability determines the breadth or scope of the Court's decisions. Thus, if the Court in this case had found standing, reached the merits, and declared the mandate unconstitutional, its approach to severability would have determined whether the ACA was invalidated in its entirety or whether the mandate was simply carved out of the law, leaving the bulk of the statute intact. Although severability did not come into play in this case, it will undoubtedly figure prominently in Supreme Court decisions down the road.

5. **CHALLENGE TO AGENCY STRUCTURE – *Collins v. Yellen (formerly Collins v. Mnuchin)*, No. 19-422 (decided June 23, 2021) – The Court holds that the removal restrictions protecting the FHFA director are unconstitutional but also narrows the remedy.**

Background. Litigants often take indirect routes to their ultimate goal and challenging the basic structure of an agency may succeed in invalidating an agency action that is otherwise legal. Here, shareholders with a stake in two of the nation's housing finance agencies—the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") (together, the "GSEs")—wanted to strike down an agreement entered in the aftermath of the 2008 financial crisis by attacking the structure of the agency that entered into the agreement.

[20] *Id.* at 2120-2123 (Thomas, J., concurring).

[21] *Id.* at 2115.

During the 2008 financial crisis, two pillars of the U.S. housing finance market, Fannie Mae and Freddie Mac, were on the verge of collapse and required a rescue by the U.S. Treasury. In July 2008, Congress passed the Housing and Economic Recovery Act of 2008 ("HERA"), which created a new entity, the Federal Housing Finance Agency ("FHFA"), to oversee and regulate the GSEs. HERA conferred extremely broad powers on the FHFA, among them the right to appoint itself as receiver or conservator of the GSEs. It also included a provision that insulated the FHFA from any court action to restrain the exercise of the powers or functions of the agency as a conservator or a receiver.[22]

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

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

The shareholders attacked the Agreement on multiple statutory and constitutional grounds. After a long progression through the federal courts, the Fifth Circuit validated the statutory claims for relief and also held that the structure of the FHFA violated the constitutional separation of powers principle, since it was headed by a single director only removable for cause. Nevertheless, the Fifth Circuit further held that the appropriate remedy was to sever the removal restriction from the rest of HERA, not to vacate and set aside the disputed Third Amendment.

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

[22] *See* 12 U.S.C. § 4617(f).

The Decision. A divided Supreme Court, issuing multiple opinions, first held that the statutory claims seeking to vacate the Third Amendment had to be dismissed. The Court relied on the expansive powers of the FHFA under HERA along with a provision expressly prohibiting any court from restraining or affecting the powers of the FHFA as a conservator. The Court explained that Congress gave the FHFA broad authority to act in whatever way it determined was in the best interest of the GSEs or the FHFA itself and "by extension, the public it serves." The Court considered the context in 2012, at which point the GSEs had been unable to make their required payments to Treasury (a commitment ultimately entered as a condition of their $200 billion bailout). Under those circumstances and the looming uncertainties, the Court viewed as reasonable the FHFA's decision to enter the Third Amendment on behalf of the GSEs to help ensure that the GSEs could continue operations and serve "the best interests of members of the public who rely on a stable secondary mortgage market."[23]

With respect to the constitutional issue presented, the Court held that HERA's "for-cause restriction on the President's removal authority violate[d] the separation of powers" doctrine. The opinion explained that the result followed from "a straightforward application" of the reasoning in *Seila Law*, which similarly declared the structure of the CFPB unconstitutional.[24] Like the CFPB, the FHFA was led by a single director, not a collective body such as a commission; and like the Dodd-Frank Act provision limiting removal of the CFPB director, HERA restricted the ability of the President to remove FHFA's director. Those removal limitations thus hampered the President's ability to see that the law was faithfully executed, impinging on his or her executive power under the Constitution.

Ultimately, the crux of the decision was the Court's holding that the proper remedy was not to set aside the Third Amendment as void and order all funds paid under that amendment restored to the GSEs. Instead, the Court voided the removal restrictions without invalidating the Third Amendment or the payments made thereunder.

Collins v. Yellen spawned four concurring opinions, at least in part, and one dissent. Justice Thomas filed a concurring opinion to emphasize that "the Court and the parties have glossed over a fundamental problem with removal-restriction cases such as these: The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract."[25] He also examined and dismissed each of the four theories of unlawful action presented by the shareholders. Justice Gorsuch also filed a concurring opinion to say that in fashioning the remedy, the Court should not draw a distinction between a director that was unconstitutionally insulated from removal versus one that was unconstitutionally appointed. Justice Gorsuch, therefore, would have set aside the director's *ultra vires* actions, *i.e.*, entering into the Third Amendment. In Justice Gorsuch's opinion, "[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects" because "[i]n the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property."[26]

---

[23] 141 S. Ct. at 1777.

[24] *Id.* at 1784.

[25] *Id.* at 1789.

[26] *Id.* at 1796-97.

Justice Kagen, joined by Justices Breyer and Sotomayor, wrote an opinion concurring in part and arguing that the Court went further than it needed to in explicating the presidential removal authority. She also argued that remand was not necessary, as the Fifth Circuit had already done the work necessary to deny the shareholders relief. Finally, Justice Sotomayor, joined by Justice Breyer, filed an opinion concurring in part and dissenting in part. She challenged the holding that the removal restriction was unconstitutional, drawing a sharp distinction between the facts before the Court and those in *Seila Law*. She noted that the director of the FHFA did not wield significant executive power and highlighted "a line of decisions spanning more than half a century" in which "this Court consistently approved of independent agencies and independent counsels within the Executive Branch."[27] In her view, "[n]ever before . . . has the Court forbidden simple for-cause tenure protection for an Executive Branch officer who neither exercises significant executive power nor regulated the affairs of private parties."[28]

Why It Matters. The decision is significant on at least four levels. First, it appropriately respected Congress's broad language in HERA and the legislature's intent that the FHFA have exceptionally broad authority to oversee the GSEs and shepherd them through a financial crisis of historic proportions. The Court similarly respected the explicit language insulating the FHFA from judicial actions that would restrain or affect the FHFA's powers as conservator. The decision thus affirms Congress's ability to fashion essential emergency responses in times of financial crisis that judges will respect. And the outcome respects the specific judgment of the FHFA that to protect the Treasury and ultimately the taxpayers, to preserve the stability of the financial system, and to ensure that the mortgage financing market can serve the needs of the American people, the Third Amendment was an appropriate step under the circumstances.

Second, the Court's holding that the FHFA's directorial removal restrictions were unconstitutional was not surprising in light of the similar holding as to the CFPB, set forth in *Seila Law*. An important unanswered question still lingering after the decision is whether the Court, if given the opportunity, will be inclined to broaden the holdings in this case and in *Seila Law* and extend them even to independent agencies that are run by commissions and headed by chairs who are also subject to removal restrictions.

Third, the decision reveals what some might see as a laudable pragmatism or restraint in the Court's decision on the appropriate remedy for the structural defect it found in the FHFA. Rather than upend the agency's actions, including specifically the Third Amendment that was at the heart of the case, the Court simply nullified the removal restrictions going forward. It relied in part on the fact that no FHFA director had been unconstitutionally appointed while presiding over the ongoing implementation of the Third Amendment. The Court hedged by noting that the claimants could conceivably be able to prove some form of compensable harm traceable to the unconstitutional removal restrictions in HERA, although whether and how the plaintiffs might meet this challenge remains to be seen on remand.

Finally, by striking down the removal restrictions governing the director of the FHFA, the Court cleared the path for President Biden to quickly remove the Trump-era appointee, Mark Calabria, whose term

[27] *Id.* at 1804.

[28] *Id.*

did not expire until 2024. That's a positive consequence of the Court's decision, a move that will enable the administration to halt Calabria's push to release the GSE's from conservatorship and privatize them, with potentially adverse consequences for the mortgage market.

6. **RECOVERY FOR SECURITIES FRAUD: *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (decided June 21, 2021) – The Court helps keep a class action for crisis-era fraud alive but edges closer to the dangerous notion that a fraudulent statement may be so generic that it can't support a class action for misrepresentation.**

Background. In the years just before the crisis exploded and began dismantling our economy, Goldman Sachs organized, promoted, and sold various types of complex securities tied to the residential mortgage market, including collateralized debt obligations ("CDOs"). Goldman became convinced that the residential mortgage market was headed for collapse, and it saw a rich profit opportunity. It assembled some mortgage-backed investments that were actually designed to fail, bet against those investments for its own account, and simultaneously foisted them onto countless unsuspecting investors who were persuaded to take the "long side" of the deal. The bank thus had a huge and undisclosed conflict of interest. When the mortgage market collapsed, Goldman reaped the rewards (which is why Goldman fared better than other large financial firms during the crisis), rewards which came directly at the expense of the clients to whom it sold the CDOs, who in turn suffered massive losses thanks to the collapse of the housing market.

Yet Goldman's duplicity didn't stop with investors. Goldman had built a significant part of its brand on its supposed ability to successfully manage its conflicts of interest, which allowed it to operate multiple lucrative lines of business. It proclaimed—not just to its investors but also to the public and to shareholders—that it had "extensive procedures and controls in place" to manage such conflicts of interest and by reassuring everyone that clients "always come first." This in turn, propped up Goldman's stock price. These soothing assurances were clearly false, as evidenced by Goldman's massively fraudulent and conflicted conduct.

When the truth came out and the bank's double-dealing was revealed, the stock price fell and its shareholders suffered losses. Many of those shareholders, including pension funds, have been struggling for years in the courts to hold the bank accountable for propping up its stock price with false assurances that it effectively managed its conflicts of interest.

The issue presented to the Supreme Court had nothing to do with the merits of the plaintiffs' claims. Instead, it centered on the vitally important threshold question of whether the case could be brought as a class action—the only realistic way that the thousands of injured shareholders will ever be able to secure compensation for the bank's plainly fraudulent claims about its handling of conflicts of interest. To beat back the shareholders' case, Goldman advanced the strained argument that its deceptive assurances, which concealed profound conflicts of interest, were too general or "generic" to have any impact on the bank's stock price by artificially propping it up.

The specific legal issues presented center on the impact of Goldman's misrepresentations on the bank's stock price. The resolution of this issue can determine whether the members of the putative

class of plaintiff shareholders can invoke the presumption of reliance that is so critical to class certification. In general, a claim for securities fraud requires proof that the plaintiff was aware of and acted in reliance on the alleged misrepresentation. That's a daunting challenge when a bank's misrepresentations are publicly disseminated, affecting the market price of the stock and harming countless investors. In recognition of this "unnecessarily unrealistic evidentiary burden" on securities fraud plaintiffs, the Supreme Court almost 35 years ago established a presumption that plaintiffs may invoke under certain circumstances: "an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction."[29]

The presumption is doubly valuable, since it not only allows a plaintiff to establish an essential element of securities fraud (reliance), it also helps a group of plaintiffs establish the predominance element necessary for class certification. The rules require that for class certification, questions of law or fact "must predominate" over individual issues.[30] The presumption allows class-action plaintiffs to prove reliance through evidence common to all members of the class, including, for example, that the misrepresentations were disseminated publicly into an efficient market. Indeed, without the presumption, class-action plaintiffs "ordinarily could not demonstrate that questions common to the class predominate over individual ones," thus preventing class certification and stopping the case in its tracks.

However, defendants like Goldman have the opportunity to rebut the *Basic* presumption at the early class certification stage by showing that the misrepresentation did not actually affect the market price of the stock in question. In this case, Goldman sought to do just that by arguing that its alleged misrepresentation about its conflicts of interest policy were too generic by their nature to have influenced the price of Goldman's stock. In the words of the Court, "If a misrepresentation had no price impact, then Basic's fundamental premise 'completely collapses, rendering class certification inappropriate.'"

The case went back and forth in the lower courts, with the district court rejecting Goldman's arguments and twice certifying the class. The Second Circuit also wrestled with the certification questions twice on appeal, ultimately agreeing that the class should be certified.

The Decision. As framed by the Supreme Court, the questions presented were 1) whether the generic nature of a misrepresentation is relevant to the impact it has on a stock price, and 2) whether, as the Second Circuit held, the defendants bear the burden of persuasion to prove a lack of price impact.

On the first question, the Court began by casting the issue as one on which the parties had largely come to agree. The Court removed any doubt by expressly holding that "The generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation maintenance theory."[31] However, the Court also decided to send the case back to the Second Circuit, since it wasn't convinced the lower court took the supposedly generic nature of Goldman's misrepresentations properly into account when it allowed the case to go forward.

[29] *Basic Inc. v. Levinson*, 108 S. Ct. 978 (1988).

[30] Fed. R. Civ. P. 23 (b)(3).

[31] 141 S. Ct. at 1958.

On the second issue, the Court squarely held in favor of the plaintiffs. Drawing on well-established precedent, including *Basic v. Levinson*, it explained that, contrary to Goldman's claim, the burden of persuasion on the issue of price impact always remains with the defendants. Once the plaintiffs have established the elements necessary to invoke the *Basic* presumption, the defendants "may rebut the presumption of reliance if they 'show that the misrepresentation in fact did not lead to a distortion of price.'"[32] But it is not sufficient for the defendants simply to satisfy a burden of *production* by adducing some shred of evidence in support of a lack of price impact. They must follow through by carrying the burden of persuasion and satisfying the trial court, if possible, that there was indeed no price impact.

Although the Court got it right on the second issue, Justice Barrett, who wrote the majority opinion, felt compelled to dampen the holding with the gratuitous observation that "the allocation of the burden is unlikely to make much difference on the ground."[33] The Court posited that the defendant's burden of persuasion will make a difference only when the trial court finds the "evidence in equipoise—a situation that should rarely arise."[34] This apparently wishful thinking by Justice Barrett is in part obvious and in part incorrect. True, the allocation of the burden of persuasion matters most in a close call. That is in fact a principal reason for the allocation of burden in the first instance, to deal with outcomes that are not decidedly in favor of one side or the other.

But in a securities class action, where the factual issues are complex and depend on both direct and circumstantial evidence, the allocation of the burden is likely to have more than just a rare or isolated impact. This case illustrates the point. If on remand, the Second Circuit is somehow inclined to think that the likelihood of price impact from Goldman's generic yet profoundly misleading statements is a close call, then the allocation of the burden of persuasion to the defendants will require the Second Circuit to conclude that price impact in fact occurred, allowing for class certification.

Justice Sotomayor concurred for the most part. However, she dissented from the majority's decision to remand the case to the Second Circuit. She persuasively argued that the Second Circuit had already properly considered the generic nature of Goldman's alleged misrepresentations, obviating the need for any remand and further litigation on the question. She also charged the majority with going out of its way to read the Second Circuit's opinion selectively to "create 'doubt'" on the issue.[35] Justice Gorsuch, joined by Justices Alito and Thomas, concurred as to the first issue but dissented as to the second, disputing the majority's holding that the defendant, rather than the plaintiff, bears the burden of persuasion on price impact.

Why It Matters. The Court's decision has multiple consequences. First, the remand back to the appellate court ensures further delay in a case that has already been litigated for years. That means an even longer wait before the case can be heard on the merits and the victims have any chance of recovery. Because class actions in securities law cases are so complex, banks like Goldman and other defendants with unlimited war chests can fight at every incremental step and either exhaust the

[32] *Id.* at 1959.
[33] *Id.* at 1963.
[34] *Id.*
[35] 141 S. Ct. at 1965 (Sotomayor, J., concurring)

plaintiffs or at least delay any payouts to the victims of their fraud. And here the delay was needless, as explained by Justice Sotomayor, as the Second Circuit had properly dealt with the generic nature of Goldman's misrepresentations and affirmed class certification.

Indeed, under the facts of this case, the price impact of Goldman's deceitful assurances about the management of its conflicts of interest should have been considered clear and compelling. As we argued in our amicus brief, given Goldman's history of mishandling its conflicts of interest even prior to the financial crisis, shareholders and potential investors would certainly have been influenced and comforted by Goldman's false assurances that it carefully controlled such conflicts.[36] After all, that presumably was Goldman's intent in making the statement to investors in the first place. Thus, the issue of price impact should have been put to rest without further ado.

In any event, the Court's mandate that lower courts consider the "generic" nature of what are undeniably material falsehoods threatens far-reaching harms. It will clearly provide defendants in securities fraud cases with another basis for challenging and evading class certification by relentlessly arguing that their statements, no matter how widely disseminated and materially false, had no impact on the price of their securities. As the Supreme Court itself has repeatedly recognized over the years, private actions to enforce the antifraud provisions in the securities laws provide an essential supplement to government actions. And in many cases, class actions represent the only way that a large number of injured plaintiffs can expect recovery and the only way to ensure meaningful accountability and deterrence among wrongdoers. Victims of securities fraud may suffer significant losses, but those losses are often not enough to justify the expense of a lawsuit, even a clearly meritorious one, which can run into vast sums. Class actions allow plaintiffs to aggregate a large number of claims, thus making it economically feasible to use the courts to hold fraudsters like Goldman accountable. Further encumbering an already difficult process with new defensive footholds represents an unwarranted setback for class actions.

The Court's holding not only fosters more prolonged litigation on the threshold question of class certification, it also increases the likelihood that, given the Supreme Court's fresh imprimatur, some trial courts will be inclined to find that the defendants' generic falsehoods did not affect price, handing those defendants a free pass for their culpable conduct. In short, this case will incentivize banks and others to develop all sorts of "generic" sales pitches and bromides to lure and comfort clients and investors while avoiding accountability for their deceptive pitches.

7. **STANDING AND STATUTORY RIGHTS OF ACTION – *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (decided June 25, 2021) – The Court declares that explicit statutory rights to sue for violations of law are not sufficient to confer standing.**

Background. The Fair Credit Reporting Act ("FCRA") regulates the credit reporting agencies that compile and disseminate, for a fee, personal information about consumers. It imposes a number of requirements on credit reporting agencies, requiring those agencies to take reasonable steps to ensure the accuracy of the information they collect on consumers and to provide clear disclosure

[36] Brief of Better Markets, Inc. as Amicus Curiae in Support of Respondents, 141 S. Ct. 1951 (2021), https://www.supremecourt.gov/DocketPDF/20/20-222/170888/20210304100303497_20-222%20Amicus%20Brief%20of%20Better%20Markets%20Inc.pdf.

of consumers' right to challenge inaccuracies in their credit reports. These are critically important consumer protections, because the information contained in credit reports has a serious impact on the lives of many consumers. Credit reports can determine whether an individual is able to get a job, buy a home, purchase a car, or achieve many other financial goals. However, consumers have very little control over the information that is collected about them and how it is disseminated. To strengthen consumer protections and ensure accountability, the FCRA created private rights of action to allow consumers to sue credit reporting agencies that violate the statute, including the accuracy requirement, providing for fixed statutory damages as well as punitive damages and attorneys' fees.

TransUnion is a credit reporting agency. In 2002, it began offering its business clients an enhanced service: a flag alerting the client that the consumer's first and last names were a potential match to the first and last names on a list of serious criminals, including drug dealers and terrorists, maintained by the Treasury Department's Office of Foreign Asset Control ("OFAC"). TransUnion did not conduct any other confirming research. As a result, many innocent individuals who just happened to have the same name as a criminal on the OFAC list had flags placed on their TransUnion credit reports falsely indicating they might be a terrorist or drug dealer. This resulted in violations of the FCRA requirement to use reasonable procedures to ensure the accuracy of credit files.

The plaintiff, Ramirez, was one of the individuals whose credit report was so flagged, which he discovered when he attempted to purchase a car but was denied for appearing to be a potential terrorist. Moreover, when Ramirez asked for his credit report from TransUnion, TransUnion sent him a report that failed to notify him of the OFAC flag, resulting in another FCRA violation. The next day, TransUnion sent him a letter informing him of the OFAC flag, but it failed to provide a summary of his rights under the FCRA, yet a third violation.

Ramirez exercised his statutory right to sue TransUnion over these violations and assembled a class of plaintiffs who were subjected to similar violations of the FCRA during the relevant period, including the inaccurate flagging based on false matches with the OFAC list. The class consisted of 8,185 individuals with misleading flags in their credit reports. The credit reports of 1,853 of those individuals were actually disseminated to third parties. The trial court ruled that all class members had standing, and following trial, a jury returned a verdict for the plaintiffs and assessed statutory and punitive damages of more than $60 million. The Ninth Circuit affirmed.

The Decision. In an opinion written by Justice Kavanaugh and joined by Justices Roberts, Alito, Gorsuch, and Barrett, the Court fortified its stringent view of standing, dramatically narrowing the number of class members deemed to have passed the standing test. Standing concerns whether a plaintiff has a sufficient interest in a matter to sue over it. The Supreme Court has previously explained that those bringing claims in federal court carry a substantial burden and must show that the action they challenge 1) threatens them with a concrete "injury in fact" 2) that is "fairly traceable to the challenged conduct, and 3) likely to be redressed by a favorable judicial decision."[37]

Kavanaugh's primary task in the opinion was to aggressively declare and defend the position that "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm

[37] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

under Article III"—in short, the notion that standing requires an injury-in-fact, not just an injury-in-law. Kavanaugh also advanced the archaic notion that courts should be guided in the "injury" analysis by whether the plaintiff has "identified a close historical or common-law analogue for their asserted injury."[38] Largely on that basis, he concluded that only the 1,853 individuals whose inaccurate reports were disseminated to third parties had suffered the type of concrete injury—the reputational harm traditionally associated with defamation— necessary for standing purposes.

As to the other class members, the Court held that the mere existence of a misleading OFAC alert in a consumer's credit file was insufficient to confer standing. And it discounted as too speculative the palpable risk of future harm that those class members clearly faced, arising from the distinctly possible if not likely dissemination of their inaccurate reports to third parties—the very purpose and intended fate of all credit reports. And as to all class members, the Court was utterly dismissive of their standing claims surrounding the other two violations of the FCRA.

In a strong dissent, Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, challenged the very premise of the majority's analysis, showing that Justice Kavanaugh's cramped view of standing could not be justified by the wording of the Constitution, the doctrine of separation of powers, or in particular, the historical antecedents of the standing doctrine. He pointed out that since the founding, courts could entertain claims without any showing of injury, provided the plaintiff was seeking to redress the violation of personal rather than public rights. And he cited more recent precedent holding that the injury required by Article III may arise "solely by virtue of statutes creating legal rights, the invasion of which creates standing."[39] Justice Thomas also challenged the unrealistic judgments of the majority, disparaging the notion that the risk of future harm from dissemination of the inaccurate reports was too speculative.

Justice Kagan also filed a dissent, joined by Justices Breyer and Sotomayor, expanding on Justice Thomas's argument and pointing out that the majority's separation-of-powers rationale behind the standing requirement was inverted in this case. She explained that if standing law was intended to ensure that courts "stay in their lane" and do not infringe on the other branches of government, then it needed a "rewrite," since the majority's decision effectively trampled on *Congress's* ability to create meaningful new rights and remedies for Americans.[40]

Why It Matters. As shown by this decision, the standing requirement can allow even clear and widespread violations of law to go unredressed. Here, TransUnion violated the rights of over 8,000 Americans, and yet it will only be held to account for its illegal conduct with respect to less than a quarter of them, despite the fact that Congress explicitly created a private right of action to redress those violations. As Justice Thomas observed in the closing portion of his dissent, despite rampant violations of the FCRA, "thanks to this Court," TransUnion "may well be in a position to keep much of its ill-gotten gains."[41]

---

[38] 141 S. Ct. at 2205.
[39] *Id.* at 2218.
[40] *Id.* at 2225.
[41] *Id.* at 2224.

The standing requirement already prevents much litigation in the public interest, because even if a defendant's conduct inflicts or threatens serious and widespread harm, plaintiffs can do nothing to rectify it in court unless they demonstrate that they personally suffer the precise type of harm that will satisfy the oppressive injury requirements. The decision in this case makes matters far worse. In an increasingly complex and challenging world, Congress needs to create new rights and private remedies that may not have existed at common law or that may not have a readily available common law analogue. Those legal rights are frequently accompanied by the enforcement mechanism of a private right of action. Yet the Supreme Court has seen fit to restrict Congress's freedom to devise such policy solutions, offending the separation of powers doctrine and undermining the ability of countless individuals to seek redress in court.

B. Cases in Which Petitions for Cert. Were Denied, Leaving Lower Court Decisions Intact.

By denying a petition for cert., the Court declines to review the appellate court's decision, thereby leaving it intact. Often unnoticed is the important impact that these denials can have on the parties to the case and on the evolution of the law more generally. Here are some examples from the past term.

1. ANTITRUST. The elements of unfair competition and who can claim damages. *National Football League v. Ninth Inning Inc.*, No. 19-1098 (9th Cir. Aug. 13, 2019) (Petition denied Nov. 2, 2020). The denial leaves in place the Ninth Circuit's decision affirming that the agreement at issue constituted an unreasonable restraint of trade.

2. ARBITRATION. The scope of mandatory arbitration clauses as to class arbitration. *Sterling Jewelers Inc. v. Jock*, No. 19-1382 (2d Cir. Nov. 18, 2019) (Petition denied Oct. 5, 2020). The denial leaves in place the Second Circuit's decision affirming an arbitrator's certification of a class.

3. ARBITRATION. A federal court's inherent authority to issue injunctive relief against arbitration. *Big Port Services DMCC v. China Shipping Container Lines Co.*, No. 20-128 (2d Cir. Mar. 5, 2020) (Petition denied Nov. 11, 2020). The denial leaves in place the 2nd Circuit's decision upholding the district court's injunction preventing Big Port Services from attempting to arbitrate, given prior rulings that there was no agreement to arbitrate between the parties.

4. ARBITRATION. Reverse preemption of the Federal Arbitration Act by state law relating to insurance. *Old Republic Home Protection Co. v. Sparks*, No. 20-237 (Okla. May 27, 2020) (Petition denied Dec. 7, 2020). The denial leaves in place the Oklahoma Supreme Court's decision holding that a forced arbitration clause in an insurance contract was unenforceable under Oklahoma law, and that the Federal Arbitration Act does not apply.

5. ARBITRATION. Preemption of state law under the Federal Arbitration Act. *Ommen v. Millman Inc.*, No. 20-249 (Iowa Apr. 3, 2020) (Petition denied Mar. 1, 2021). The denial leaves in place the Iowa Supreme Court's decision that the liquidator of an insolvent insurance company is bound by an arbitration agreement in a contract between the defunct insurance company and a service provider.

6. <u>DEFERENCE</u>. Deference to an agency's long-standing interpretations of law under the *Chevron* doctrine. *Szonyi v. Barr*, No. 19-1220 (9th Cir. Nov. 19, 2019) (Petition denied Oct. 5, 2020). The denial leaves in place the Ninth Circuit's decision, which deferred to the agency's interpretation of the law in denying the petitioner relief.

7. <u>PREEMPTION OF STATE LAW</u>. Preemption of state law in the area of creditors' rights and fraudulent transfers. *Deutshe Bank Trust Company Americas v. Robert R. McCormick Foundation*, No. 20-8 (2d Cir. Dec. 19, 2019) (Petition denied Apr. 19, 2021). The denial leaves in place a Second Circuit decision holding that state creditor-rights laws are preempted when a debtor files for federal bankruptcy.

8. <u>RETIREMENT PLANS</u>. The measure of withdrawal liability from multi-employer pension plans under ERISA. *National Retirement Fund v. Metz Culinary Management Inc.*, No. 19-1336 (2d Cir. Jan. 2, 2020) (Petition denied Oct. 5, 2020). The denial leaves in place the Second Circuit's decision potentially reducing the withdrawal liability of employers who withdraw from underfunded multiemployer pension plans.

9. <u>STANDING</u>. The standing of legislators to seek judicial relief based on claims their votes have been completely nullified. *Blumenthal v. Trump*, No. 20-5 (D.C. Cir. Feb. 7, 2020) (Petition denied Oct. 13, 2020). The denial leaves in place the D.C. Circuit's decision denying standing, fortifying the standing hurdle even for those seeking to challenge blatantly illegal government action.

10. <u>STATUTES OF LIMITATIONS</u>. The tolling of statutes of limitations in diversity cases. *Weatherly v. Pershing, L.L.C.*, No 19-1157 (5th Cir. Dec. 19, 2019) (Petition denied Oct. 5, 2020). The denial leaves in place the Fifth Circuit's decision holding that Florida's shorter statute of limitations applies, barring the claims.

III.

A BRIEF LOOK AHEAD TO THE OCTOBER 2021 TERM

The Supreme Court receives a steady and voluminous stream of petitions for cert., estimated at 10,000 a year. The Court must analyze each one of these petitions closely and then vote on whether to grant or deny them. That means either accepting, hearing, and deciding the case, or denying the petition and allowing the lower court's ruling to stand.

As it evaluates each petition for cert., the Court is guided by a few key factors, outlined in Rule 10 of the Court's rules. That rule opens with a statement that review of a case on the merits pursuant to a writ of cert. "is a not a matter of right, but of judicial discretion." The rule sets forth the "character of the reasons the Court considers." Foremost among them is that a U.S. court of appeals has entered a decision in conflict with the decision of another U.S. court of appeals on the same important matter. That is the classic and most frequently applied "conflict among the circuits test." The rule goes on to list cases similarly involving *state court* decisions that conflict with the decisions of other state courts or U.S. courts of appeal on important questions of federal law. The rule closes with the admonition, surprising to many, that a "petition for a writ of certiorari is rarely granted when the asserted error

consists of erroneous factual findings or the misapplication of a properly stated rule of law." Mistakes are not enough to warrant review; rather, it is conflicting decisions among the lower courts—assuming they involve important issues of federal law—that typically prompt the Court to accept cert.

Given the sheer number of petitions for cert. that are filed with each passing week, and the exacting standards that the Court applies as it sifts through them, only the most important cases involving the most problematic decisions from the lower courts are ultimately reviewed by the Court on the merits. So far, we know that next term, the Court will be deciding cases on policy issues surrounding, for example, abortion, the right to carry concealed guns, and affirmative action. We also know that the Court has accepted some important cases involving matters of financial regulation and Americans' economic well-being, which are reviewed briefly below. The Court will grant other petitions for cert. as time passes, and some of those cases will undoubtedly also center on financial regulation and related issues.

A. Cases in Financial Regulation Accepted for Decision Next Term

1. ***Badgerow v. Walters***, No. 20-1143 – The federal courts' role in arbitration cases.

This case addresses the scope of the federal courts' authority over certain types of arbitration awards. The core issue is whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the Federal Arbitration Act when the only basis for jurisdiction is that the underlying dispute involved a federal question. Mandatory arbitration clauses, prevalent in agreements with brokers and other financial firms, continue to plague consumers and investors who have suffered damages by forcing them into a forum that is biased in favor of industry, cloaked in secrecy, and missing key procedural protections, including the right of appeal. Often, a key issue is the role of the courts in determining whether arbitration is even required under the parties' contract, or come cases, whether an arbitration award should be confirmed by a court and enforced.

2. ***American Hospital Association v. Becerra***, No. 20-1114 – Deference to agency judgments.

This case involves the degree of deference that federal courts owe to agency decisions. The core issue is whether judicial deference under *Chevron U.S.A. v. Natural Resources Defense Counci*l is owed to the decision of the Department of Health and Human Services to lower Medicare drug reimbursement rates for certain hospitals. The degree of deference that courts owe to agencies can make the difference between a court upholding or striking down the rule or other agency action being challenged. This area of administrative law affects all types of cases, including those involving financial regulation and consumer and investor protection.

3. ***Hughes v. Northwestern University***, No. 19-1401 – Protections for retirement accounts.

This case involves the scope of liability under "ERISA," the federal statute designed to ensure that those who are responsible for managing and advising retirement plans are held to the highest fiduciary standard of loyalty and care. The core issue is whether allegations that a retirement plan paid or charged its participants fees that substantially exceeded fees for alternative investment products are sufficient to state a claim against the plan fiduciaries for breach of the duty of prudence under the

Employee Retirement Income Security Act of 1974.[42] What's at stake ultimately in these types of cases is the degree of protection that retirement savers will get for their hard-earned money—and their prospects for a decent retirement.

4. *Pivotal Software v. Tran*, No. 20-1541 – Procedures governing class actions under the securities laws.

This case involves the procedures that govern class actions in state court for violations of federal securities law. The core issue is whether the Private Securities Litigation Reform Act's discovery-stay provision applies to private actions under the Securities Act of 1933 filed in state courts or only to those filed in federal courts. Class actions for securities fraud and other violations are often the only realistic way that large groups of injured investors can seek damages for the harms they have suffered at the hands of issuers, advisers, and other promoters of securities offerings. The laws and procedures that apply to these cases can determine their prospects for success or failure.

IV.

SPOTLIGHT ON THE COURT'S TRANSPARENCY, OPERATIONS, AND MAKEUP

Our federal government is, of course, comprised of three co-equal branches, the legislative, executive, and judicial. All three branches are integral to the process of regulation and financial reform. Congress establishes its policy goals and grants agencies either the mandatory or discretionary authority to implement those goals through rulemaking and enforcement. After agencies promulgate rules, or take enforcement actions, those administrative acts are subject to judicial review. And the final arbiter of any issue subjected to judicial review in the federal courts is the Supreme Court.

Thus, as with the other two branches of government, the way the Court goes about its business and the Justices who serve on the Court are vitally important to the ultimate outcomes in this regulatory process. For example, in our prior reports, Better Markets has highlighted the potentially profound and adverse impact that the confirmation of conservative and pro-corporate Justices such as Kavanaugh and Barret threaten to have on the interests of consumers, investors, and public interest advocates appearing before the Court. In other words, the Court itself, as an institution, is a proper focus of public attention and concern.

A number of issues surrounding the operations and makeup of the Court are garnering heightened attention.[43] Some have resurged due to the highly charged and intensely politicized nominations of three Justices—Gorsuch, Kavanaugh, and Barret—during the Trump administration. Others have come to the fore due to changes the Court adopted during the pandemic. Calls for reform include enlarging the Court (some, for example, suggesting a Justice for each federal judicial circuit), establishing term limits, altering the scope of the Court's jurisdiction, and adopting a code of ethics. Below we briefly highlight a number of these important issues, not at this point to take sides but instead to make sure

[42] 29 U.S.C. § 1104(a)(1)(B).

[43] *See, e.g.*, Daniel Epps, *Perspective, Major Supreme Court Reform is Unlikely. But These Changes Would be a Good Start*, WASH. POST (Jul. 15, 2021), https://www.washingtonpost.com/outlook/supreme-court-reform-minor/2021/07/15/e34729d6-e417-11eb-8aa5-5662858b696e_story.html.

that members of the American public, and those who care about financial reform in particular, are aware of these important debates and have an opportunity to weigh for themselves the various calls for reform at the Court.

A. The General Debate Over Supreme Court Reform: The "Presidential Commission on the Supreme Court of the United States"

Overarching the debate over reform at the Supreme Court is the "Presidential Commission on the Supreme Court of the United States" ("Commission"). Spurred largely by heated and intensively politicized debates over possible expansion of the Court during the last presidential campaign (misleadingly labeled "court packing"), President Biden established the Commission by Executive Order signed on April 9, 2021.[44] The Commission has 36 members, representing an impressive collection of scholars and practitioners with expertise on the Supreme Court. With administrative support from the Executive Office of the President and the General Services Administration, the Commission's purpose is to hold approximately six public meetings over 180 days and produce a report for the President that includes the following material:

(i) An account of the contemporary commentary and debate about the role and operation of the Supreme Court in our constitutional system and the functioning of the constitutional process by which the President nominates and, by and with the advice and consent of the Senate, appoints Justices to the Supreme Court;

(ii) The historical background of other periods in the Nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform; and

(iii) An analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.

The Commission's website describes the scope of its mandate and some of the reforms it will examine as follows:

> The Commission's purpose is to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals. The topics it will examine include the genesis of the reform debate; *the Court's role in the Constitutional system; the length of service and turnover of justices on the Court; the membership and size of the Court; and the Court's case selection, rules, and practices*.[45]

To date, the Commission has convened three meetings, including an organizational meeting on May 19th and two substantive meetings on June 30th and July 20th, all of which were recorded and

[44] *See* Executive Order 14023, Establishment of the Presidential Commission on the Supreme Court of the United States, 86 Fed. Reg. 19569 (Apr. 14, 2021).

[45] See Presidential Commission on the Supreme Court of the United States, https://www.whitehouse.gov/pcscotus/ (last accessed July 27, 2021) (emphasis added).

made available on the Commission's website. Opinions about the Commission diverge widely, with some viewing it as incapable of leading to meaningful reform and others seeing it as a potentially productive first step.[46] In any case, those interested in the Supreme Court, the way it is structured, how it operates, and the scope of its jurisdiction can develop a better understanding of these issues by tracking the work of the Commission, whatever its ultimate work product or impact may be.[47]

B. Transparency: Public Access to Oral Argument.

Oral arguments are an important phase of the Court's decision-making process. They 1) help clarify important aspects of each case, including how the parties' arguments can be reconciled with prior decisions and what long-term implications a given decision might have; 2) provide some insight into the Justices' thinking about a case and how they might vote; and 3) reveal a good deal about how the litigants seek to press the strengths of their case while neutralizing or marginalizing the weaknesses of their arguments.

While oral arguments in the Supreme Court are in principle open to the public, real-time public access is actually quite limited. The Courtroom only seats about 439 people, and most of those spaces are set aside for various groups of what might be called insiders, including law clerks, members of the press, the Justices' guests, members of the Supreme Court bar, and various other school groups or guests of the litigants. Generally, only 50 public seats are available on a given day, on a first-come, first-served basis.[48] Most important, of course, the Court is located thousands or hundreds of miles away from the communities across the country where most Americans live and work.

Beginning in 2006, the Court began at least making the transcripts of oral arguments available to the public on its website later on the day of oral argument. Beginning with the 2010 term, the Court also began posting audio recordings of all oral arguments, but not until the Friday of each argument week. It wasn't until the pandemic struck last year that the Court actually made live audio of each oral argument available to the public. After closing the building in March of 2020, and postponing oral arguments originally set for April and May, the Court announced it would resume hearing oral arguments in May and would do so via remote telephone conference.[49] In addition, the Court announced that it would begin providing a live audio feed to several major media outlets which in turn would make the livestream of oral argument available to the public via a number of other media outlets. And it posted the audio recordings and transcripts of each argument later on the day of oral argument. This was the first time in history that the Court provided real-time audio broadcasts of

[46] Todd Ruger, *Lawmakers Weigh In On Proposals to Change the Supreme Court*, ROLL CALL (June 29, 2021), https://www.rollcall.com/2021/06/29/lawmakers-weigh-in-on-proposals-to-change-the-supreme-court/.

[47] On the subject of the Court's composition, Justice Breyer, now 82, is facing calls from some progressives to resign from the Court while Democrats still retain control of the Senate. Those supporting his resignation argue that President Biden's nominee to replace Justice Breyer would face more likely confirmation than he or she could in a potentially Republican-controlled post-election Senate. Justice Breyer has made no decision about the timing of his departure from the Court, citing only his health and "the court" as the principal determinants. *See, e.g.*, Ruth Marcus, *Ópinion: I've Urged Supreme Court Justices to Stick Around—But Never to Retire. Until Now.*, WASH. POST (June 15, 2021); *see also* Marissa Martinez, *Justice Breyer Says He Hasn't Decided on Retirement Plans*, POLITICO (July 15, 2021).

[48] See Amy Howe, *Courtroom access: The nuts and bolts of courtroom seating – and the lines for public access*, SCOTUSBLOG (Apr. 1, 2021), https://www.scotusblog.com/2020/04/courtroom-access-the-nuts-and-bolts-of-courtroom-seating-and-the-lines-to-gain-access-to-the-courtroom/.

[49] The last such major disruption in the Court's oral argument schedule was during the 1918 flu pandemic.

its oral arguments. The Court continued this same practice in October, as the new 2020-21 term began. Many have argued that this new and tested access to live audio feeds of oral argument should continue even after the pandemic and the social distancing that goes with it subsides.

This development has also renewed calls for the oral arguments to be broadcast via video—letting cameras in the Courtroom. The debate is not new: Bills in Congress providing for the use of video cameras in the federal courts have been floated since 1937, with more recent variants appearing this year.[50] A number of Justices, including Alito and Kagan, have even testified before Congress on the issue. Those favoring real-time video access to the Court argue that the American people, so profoundly affected by the Court's decisions, have a right to see and understand how the Court conducts its business.[51] Moreover, ensuring maximal transparency will engender public respect for the institution of the Court.[52] Those opposing video access express concern that airing oral arguments will alter the way judges approach questions, based on concerns about media coverage, and that it will promote distracting theatrics by counsel, thus undermining the substantive value of oral argument in the Court's decision-making process.

As it stands, nothing prevents the Court from amending its current policy against the use of audio/visual and photography in the courtroom in civil cases. And any limits on filming criminal cases, imposed by Fed. R. Crim. P. 53, could also be amended. Circuit courts now have the discretion to allow this practice; the 9th Circuit has done so (albeit requiring advance permission); and the public at large generally supports it.

Bills have recently surfaced in Congress. One bill, S. 807, the Cameras in the Courtroom Act of 2021, would provide that "The Supreme Court shall permit television coverage of all open sessions of the Court." Another, S. 818, Sunshine in the Courtroom Act of 2021, would provide that "the presiding judge of an appellate court of the United States may, at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." Both bills contain exceptions for situations where such coverage would violate litigants' due process rights. The Judicial Conference opposes S. 818, citing concerns in its letter that camera coverage in court can harm a citizen's right to a fair and impartial trial; intimidate litigants, witnesses, and jurors; and create security and privacy concerns for any number of participants in the trial process, including judges and other courthouse personnel.[53]

---

[50] *See* Josh Gerstein, *Senate Committee Approves Legislation to Put Supreme Court Hearings on Camera*, POLITICO, https://www.politico.com/news/2021/06/24/senate-supreme-court-hearings-on-camera-496067; *see also At Issue: Cameras in The Supreme Court: Should Supreme Court proceedings be televised?* ABA JOURNAL (1989).

[51] *See* Mitchell Jagodinski, *Biden's Court Reform Commission Hears From Experts on Term Limits and Judicial Review*, SCOTUSBLOG (Jul. 1, 2021) (citing Amy Howe's testimony before the Commission), https://www.scotusblog.com/2021/07/bidens-court-reform-commission-hears-from-experts-on-term-limits-and-judicial-review/.

[52] Project on Government Oversight, *Above the Fray: Changing the Stakes of Supreme Court Selection and Enhancing Legitimacy* (Jul. 8, 2021), https://www.pogo.org/report/2021/07/above-the-fray-changing-the-stakes-of-supreme-court-selection-and-enhancing-legitimacy/.

[53] Letter from the Judicial Conference of the United States to Senator Richard J. Durbin, Chair of the Committee on the Judiciary (June 23, 2021), https://fixthecourt.com/wp-content/uploads/2021/06/Letter-to-SJC-on-S-818_Durbin-Final.pdf; *see also* Madison Alder, *Judiciary Opposes Cameras in Courts Bill Ahead of Markup*, BLOOMBERG LAW (June 23, 2021), https://news.bloomberglaw.com/us-law-week/judiciary-opposes-cameras-in-courts-legislation-ahead-of-markup.

The debate is largely about who decides. Congressional action to mandate cameras in the federal courts would likely be challenged as a violation of the separation of powers doctrine and an intrusion on the Court's historic authority to decide how to conduct business in its own chamber.

C. The Way the Court Operates: The Shadow Docket.

When the Supreme Court issues a merits decision, it is the result of a lengthy process in which everyone's cards are "put on the table." The parties file briefs setting forth their strongest legal arguments. Non-parties with an interest in the case typically submit amicus curiae or "friend of the court" briefs, usually in support of one side or the other. Those briefs offer additional legal, factual, historical, or ethical considerations that help the Court decide the case. At oral argument, the Justices have a chance to seek clarification on important issues or to prod and test each of the parties' arguments. Finally, the Court issues an opinion that contains not only its judgment, but the reasoning and justification for its judgment. The Justices joining in the majority opinion are identified, while other Justices can write separately, in a concurring opinion expressing a different perspective that nevertheless supports the Court's judgment, or in a dissenting opinion that explains why the Court's judgment is wrong in their view.

Each of these aspects of the process is obviously important, but the most critical one for the functioning of the legal system is the opinion the Court issues. It is important to the litigants themselves, who have invested an enormous amount of time, effort, and resources into the case and who have enormous personal or financial interests at stake. Whether parties win or lose (and especially when they lose), they typically can walk away with the sense that their grievance was at least heard and that the Court grappled seriously with their arguments. That in turn bolsters the legitimacy of the Court.[54] The transparency of an opinion containing the reasoning behind the Court's judgment is also critical—lower courts need to understand what motivated the Court's judgment so they can faithfully apply it to future cases with materially similar facts, and similarly-situated parties need to understand how the law now works to order their affairs.[55] Finally, there is a measure of accountability in the Court's explaining its reasoning to the broader public. That process allows the public to access, understand, scrutinize, and praise or criticize that reasoning. This is an important check on the Court, since while the Court has the final judicial say on matters that come before it, it is not infallible.[56]

This is why there has been so much attention paid in recent years to the rise of the so-called "shadow docket." The shadow docket refers, broadly, to "to the body of orders issued by the Supreme Court outside the formal opinions in the 70 or so cases in which it hears oral argument each term."[57] As commentators have pointed out, the shadow docket has been around for as long as there has been a

---

[54] *See* To Be Fair: Conversations About Procedural Justice 75 (Emily LaGratta, ed. 2017) ("If people feel like they are going to be heard in court—not only the ability to speak, but also the expectation that the person they're speaking to is going to understand them and consider what they have to say fairly— then you've added legitimacy to the system."), https://www.courtinnovation.org/sites/default/files/documents/To_Be_Fair.pdf.

[55] William Baude, Opinion, *The Supreme Court's Secret Decisions*, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html.

[56] *Cf. Brown v. Allen*, 73 S. Ct. 397, 427 (1953) ("We are not final because we are infallible, but we are infallible only because we are final.").

[57] James Romoser, *Symposium: Shining a Light on the Shadow Docket,* SCOTUSBLOG (Oct. 22, 2020), https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/.

Supreme Court. Until recently, it has not generated much controversy because the orders issued in the shadow docket are usually not controversial: they typically involve "denying petitions for certiorari in un-controversial cases; denying applications for emergency relief in cases presenting no true emergency; granting parties additional time to file briefs; dividing up oral arguments; and so on."[58]

However, recently, the Supreme Court has used the shadow docket "more and more often to issue significant rulings that change the rights and responsibilities of millions of Americans, all without the daylight (including multiple rounds of briefing, oral argument, and lengthy opinions setting out principled reasons for the decision) that comes with plenary review."[59] In the past year alone, the Court has issued shadow docket rulings—with little or no explanation about the reasoning behind them—in controversial cases involving COVID restrictions on churches, the ongoing disenfranchisement of formerly incarcerated people in Florida, Donald Trump's border wall, and, most disturbingly, the removal of impediments to the Trump administration's grisly, last-minute capital punishment spree on its way out the door.[60] These results are typically achieved through emergency stays of lower court decisions issued after little briefing, and with virtually no explanation for why the stay was issued, or even who voted for or against the stay.[61] And while such stays are supposed to be temporary, often the order effectively disposes of the case (most obviously orders allowing an execution to proceed).[62] As Professor William Baude, who coined the term "shadow docket" in 2015 has explained, use of the shadow docket to dispose of important cases deprives the system of the benefits of issuing reasoned merits decisions on substantial cases:

> Because the Court issues no opinions in these cases, lawyers do not know what legal standards to apply when litigating the issue again in the future. Nor can we know what role each Justice played, the stance they took, or whether they are voting in principled and consistent ways. These procedural gaps also affect the lower courts, which are supposed to follow Supreme Court precedent. But because the lower-court judges don't know why the Supreme Court does what it does in such cases, they sometimes divide sharply when forced to interpret the court's non-pronouncements.[63]

[58] *The Supreme Court's Shadow Docket: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Committee on the Judiciary*, 116th Cong. 1-2 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law), https://www.justsecurity.org/wp-content/uploads/2021/02/Vladeck-Shadow-Docket-Testimony-02-18-2021.pdf.

[59] Steve Vladeck, *Shadow Dockets" Are Normal. The Way SCOTUS Is Using Them Is the Problem*, SLATE (Apr. 12, 2021), https://slate.com/news-and-politics/2021/04/scotus-shadow-docket-use-problem.html.

[60] Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, SLATE (Aug. 11, 2020), https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html; Lawrence Hurley, et al., *The "Shadow Docket": How the U.S. Supreme Court Quietly Dispatches Key Rulings*, REUTERS (Mar. 23, 2021). A recent Reuters survey reveals that use of the shadow docket was in full swing over the last 12 months in a string of important cases involving the election, the pandemic, and executions, exhibiting not only a lack of transparency but also an apparent bias. The Court favored emergency applications from the Trump administration and religious groups while denying all shadow docket petitions from private, non-religious groups. *See* Lawrence Hurley & Andrew Chung, *Analysis: U.S. Supreme Court's 'shadow docket' favored religion and Trump*, REUTERS (July 28, 2021).

[61] James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020), https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/.

[62] *Id.*

[63] William Baude, Opinion, *The Supreme Court's Secret Decisions*, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/03/opinion/the-supreme-courts-secret-decisions.html.

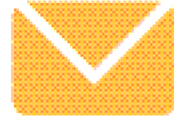
Ultimately, the Court's increasing use of the shadow docket to dispose of substantial cases is detrimental to the functioning of the legal system and the rule of law. And while it is beyond the scope of this Report to offer comprehensive solutions to the shadow docket problem, commenters have offered a number of potential reforms that are worth exploring, including:

- Having Congress codify the standards that apply to grants of emergency relief;
- Speeding up appeals in cases where government action has been enjoined;
- Giving the Supreme Court mandatory appellate jurisdiction over direct appeals of death penalty cases; and,
- Pushing the Court to issue explanations for substantial orders issued from the shadow docket, especially those changing the status quo, even if such explanations must necessarily be brief.

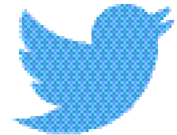
Support and Follow Us

Donations:
Visit our website
www.bettermarkets.com

Stay Informed with our
Financial Reform Newsletter:
sign up on our website

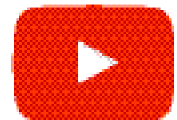


Follow the Fight:
@BetterMarkets



Current News:
/BetterMarkets

Watch:
/BetterMarkets



Connect:
/BetterMarkets

Better Banks

Better Businesses

Better Jobs

Better Economic Growth

Better Lives

Better Communities

Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street and make our financial system work for all Americans again. Better Markets works to restore layers of protection between hardworking Americans on Main Street and Wall Street's riskiest activities. We work with allies – including many in finance – to promote pro-market, pro-business and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements and more.

1825 K Street NW, Suite 1080 I Washington, DC 20006 I (202) 618-6464 I www.BetterMarkets.com

Copyright © 2021 Better Markets. All Rights Reserved.