

— SUPREME COURT WATCH —

Senators Must Probe How a Justice Amy Coney Barrett Might Impact Americans' Financial Lives

As the confirmation hearings approach for Judge Amy Coney Barrett—President Trump's pick to replace Justice Ruth Bader Ginsburg on the Supreme Court—the lion's share of attention is likely to be on her positions about hot-button issues, such as abortion, gun control, and civil rights. However, if confirmed, Judge Barrett will also be frequently called upon over the course of her lifetime tenure to decide cases involving economic and financial issues. As we explain in our most recent update on the Supreme Court, those cases may not grab headlines, but they have a real-world impact on the financial well-being of all Americans.

She will help decide how much you pay at the pump and in the grocery store, how easy it is for fraudsters to steal your money, and even how much money you will have in retirement. Her decisions will also affect the ability of regulatory agencies to do their jobs protecting the American people from all sorts of threats, including fraud, abuse, and predatory practices at banks, brokers, and insurance companies.

It is critical that Senators considering Judge Barrett's nomination thoroughly explore her stance on these issues. This is especially important since her record is so limited—she has only been a judge for three years and her academic writings have not focused on economic and financial issues or administrative law. Here are just a few of the questions that need to be answered:

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

All indications are that Judge Barrett is on the wrong side of these issues, and that as a Supreme Court Justice, she would favor Wall Street and other corporate interests over individual consumers, investors, and everyday Americans. She is a judge in the mold of Justice Antonin Scalia, who favored narrow interpretations of law and limited regulation. And her writings and decisions bolster these fears. Consider some examples:

- **Barrett favors a flawed approach to statutory interpretation that could make it easier for predators to flout the law.** Judge Barrett favors a "textualist" approach to statutory interpretation. According to textualists, it is

illegitimate to consider any source, except the words of the statute itself, when determining what a statute means. They follow this path even when the words of a statute are confusing, inconsistent, or otherwise ambiguous, which is often the case with modern, complex statutes. This focus solely on the words on the page to the exclusion of any other sources (such as the purpose of the statute, indications of congressional intent or fair outcomes), even when those words are ambiguous, often leads to a hyper-technical parsing of provisions that undermines the remedial purposes of a law.

Judge Barrett's decision in *Gadelhak v. AT&T Servs., Inc.* illustrates the point. The Telephone Consumer Protection Act of 1991 ("TCPA") was passed to protect consumers from harassment by telemarketers, and it did so by prohibiting use of an "automatic telephone dialing system" to contact a consumer without the consumer's consent. In *Gadelhak*, AT&T repeatedly spammed the plaintiff with text messages, without the plaintiff's consent. The case turned on whether the term "automatic telephone dialing system" applied to AT&T's conduct. Judge Barrett's opinion acknowledged that there were four plausible readings of the TCPA (passed long before text messages were a common mode of communication), at least one of which would have imposed liability on AT&T. But rather than looking at the underlying purposes of the statute, she focused solely on which of the four plausible interpretations was most grammatically correct, and she predictably rested on one that insulated AT&T from any liability for the harassment. This sort of approach to statutory interpretation is great for companies, which can hire armies of lawyers to pore over statutes to find ambiguous or confusing provisions to exploit, but it is terrible for consumers, who are robbed of the statutory protections Congress intended.

- **Barrett would restrict access to the courts by readily enforcing mandatory arbitration clauses and erecting the "standing" barrier.** Investors and consumers ripped off or abused by payday lenders, debt collectors or banks and brokers should have the right to seek relief for their damages in court. But they often face two legal obstacles that prevent them from even getting through the courthouse door. Financial firms routinely include mandatory arbitration clauses in their contracts that force clients with claims against the firms into arbitration, a biased and secretive forum where clients stand little chance of recovering meaningful relief. And courts also increasingly dismiss cases because in their view, the plaintiffs lack standing—they haven't suffered the right kind of "injury" to justify federal court jurisdiction.

Judge Barrett has displayed an inclination to invoke both of these legal barriers to restrict access to courts and make it more difficult to hold wrongdoers accountable. For example, in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020), drivers for GrubHub brought a lawsuit alleging the company engaged in persistent and wide-ranging violations of the Fair Labor Standards Act. Judge Barrett authored an opinion that forced the drivers out of court and into arbitration, an industry-dominated forum where claimants typically lose or receive far less than their damages. Similarly, in *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019), a debt collector conveyed misleading information to the plaintiff in violation of the Fair Debt Collection Practices Act. Nevertheless, Judge Barrett authored an opinion tossing the suit out, arguing that the consumer did not have standing because she had not been sufficiently harmed by the misconduct.

A great deal is at stake with this nomination. For years to come, it will influence the Court's decisions on a host of economic and financial questions and ultimately determine how well Americans are able to save, spend, invest, and protect their hard-earned money. The bottom line is that anyone who uses any type of financial product or service—which is almost every American—should care about the Supreme Court's decisions. The members of the Senate must take a very close look at where Judge Barrett stands on these issues.

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