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EUGENE SCALIA

Trump's Nominee to be Secretary of the Department of Labor has Been Wall Street's Best Friend and a One-Man Financial Stability Wrecking Ball

INTRODUCTION

While most people will focus on labor issues narrowly construed when considering President Donald Trump's nomination of Eugene Scalia to be the next Secretary of Labor, another part of his record should also be considered: His role as champion of deregulating finance; gutting some of the most important financial rules; and unleashing the largest, most dangerous financial institutions on consumers, workers, investors, retirees, and the economy. These actions have significantly harmed financial reform, prevented financial regulators from protecting the country, endangered the financial system, and made economic crises and taxpayer bailouts more likely. The result is a much more fragile financial system, a much less prepared government, and a country exposed to yet another costly and cataclysmic financial crash.

While Mr. Scalia is entitled to choose his clients and zealously represent them, those choices should be considered when thinking about his fitness for high public office, particularly one that calls upon him to protect workers, retirees, and others.

Some of his most revealing choices in clients and causes are found in the area of financial reform. Indeed, three of the top five clients that Mr. Scalia has chosen to represent in court are the Chamber of Commerce, which routinely leads that assault on financial rules; the NASDAQ Stock Market, LLC; and UBS Financial Services, Inc. Therefore, this Report will focus on causes and cases he chose to advance on behalf of large and powerful financial corporations and financial industry trade associations to kill, gut, rollback, or weaken key financial rules intended to protect Americans from the fraud, abuse, and recklessness that pervade so much of our financial system.

These choices and actions clearly suggest that Mr. Scalia will not put the interests of hard-working Americans and retirees ahead of the rich and powerful corporations that employ them or provide them with retirement planning and advice. These choices and actions should be considered when determining the fitness of Mr. Scalia for high public office.

In this Report, we first review cases that Mr. Scalia has brought against investor protection, shareholder rights, and humanitarian regulation. We then analyze his work attacking rules designed to promote financial stability and transparency. Finally, we address cases in which Mr. Scalia has fought to limit workers' access to the court system.

MR. SCALIA'S WORK TO NULLIFY OR WEAKEN FINANCIAL REGULATION AND ACCESS TO THE COURTS

A. MR. SCALIA'S REPRESENTATION OPPOSING INVESTOR PROTECTION, SHAREHOLDER RIGHTS, AND EVEN HUMANITARIAN REGULATION.

One principal focus of Mr. Scalia's work targeting financial regulation is in the area of rules designed to protect investors from fraud, abuse, and conflicts of interest. His work has also targeted rules intended to promote and protect shareholder rights and even rules that seek to ameliorate human suffering in situations where the regulation of business and commerce intersects with social and humanitarian challenges.

1. Demolishing one of the most important investor protection rules in 40 years, the DOL's fiduciary duty rule: *Chamber of Commerce v. DOL*.

For decades, financial advisers have been allowed to recommend investments that put huge fees and commissions in their own pockets but saddle their retirement clients with high costs, poor returns, and excessive risks. The damage from these adviser conflicts of interest has been staggering: American workers and retirees have lost tens of billions of dollars of their hard-earned savings every year—and that's just from their individual retirement accounts.[1]

In April 2016, the DOL finalized a rule designed to prevent adviser conflicts of interest from draining away Americans' retirement savings. The new rule was fundamentally simple: It required all financial advisers to give advice about retirement assets that was in their clients' best interest. No longer would broker-dealers, insurance agents, and other advisers be allowed to take advantage of their clients attempting to save for a decent retirement. The rule also protected retirement savers by ensuring they would have the right to join in class actions in court to seek relief whenever advisers engaged in widespread violations of the rule. The final rule was issued after an extraordinarily thorough and thoughtful rulemaking process at the DOL that took years to complete. It fulfilled the letter and spirit of the federal law that Congress passed in 1974 (known as "ERISA") to ensure that retirement savings are protected by the highest standards of loyalty and care.

[1] See Better Markets, Comment Letter to New Jersey Bureau of Securities on Proposal re: Fiduciary Standard (Dec. 14, 2018), https://bettermarkets.com/sites/default/files/Reg%20BI%20-%20NJ%20letter%2012-14-18%20Final.pdf; Better Markets, Comment Letter to SEC on Proposal re: Regulation Best Interest (Aug. 7, 2018), https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20Reg%20BI%20%208-7-18%20Final.pdf; Better Markets, Comment Letter to Department of Labor on Proposal re: Definition of the Term "Fiduciary" (Mar. 17, 2017), https://bettermarkets.com/sites/default/files/DOL-%20CL-%20Definition%20of%20the%20Term%20Fiduciary-Proposed%20Delay%20on%20Applicability%20Date-%2020170317.pdf; Better Markets, Comment Letter to Department of Labor on Proposal re: Best Interest Fiduciary Duty (Sept. 24, 2015), https://bettermarkets.com/rulemaking/better-markets-second-comment-letter-dols-best-interest-fiduciary-duty-rule.

As soon as the rule was finalized, Mr. Scalia was the apparent leader of an all-out assault on the rule in multiple federal district and circuit courts of appeal, on behalf of the powerful trade associations that protect the business interests of the financial services industry. The allegations were wide-ranging, including claims that—

- The rule exceeded the DOL's authority under ERISA;
- The rule impermissibly created a private right of action for Individual Retirement Account owners and violated the Federal Arbitration Act;
- The rule was arbitrary and capricious because the DOL failed to give sufficient notice of some provisions that appeared in the final rule;
- The DOL's economic analysis in support of the rule was inadequate; and
- The rule even violated the First Amendment limits on the regulation of commercial speech.

Again and again, the courts not only upheld the rule in substance, but refused to stay or enjoin the rule pending the appellate process:

- *Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1 (D.D.C. Nov. 4, 2016) ("NAFA I") (granting summary judgment to the Department of Labor).[2]
- *Nat'l Ass'n for Fixed Annuities v. Perez*, 219 F. Supp. 3d 10 (D.D.C. Nov. 23, 2016) ("NAFA II") (granting motion for expedited ruling and denying plaintiff's motion for preliminary injunction);
- *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2016 WL 6948061 (D. Kan. Nov. 28, 2016) ("Market Synergy I") (denying plaintiff's motion for preliminary injunction);[3]
- *Chamber of Commerce v. Hugler*, 231 F. Supp. 3d (N.D. Tex. 2017) ("Chamber") (granting summary judgment to the Department of Labor);
- *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, No. 16-CV-4083-DDC-KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017) ("Market Synergy II") (granting summary judgment to the Department of Labor);
- *Chamber of Commerce v. Hugler*, No. 3:16-cv-1476-M, 2017 WL 1062444 (N.D. Tex. Mar. 20, 2017) ("Chamber II") (denying appellants' motion for injunction pending appeal);
- *Chamber of Commerce v. U.S. Dep't of Labor*, No. 17-10238, 2017 WL 1284187 (5th Cir. Apr. 5, 2017) ("Chamber III") (denying appellants' motion for injunction pending appeal and for expedited appeal);
- *Mkt. Synergy Grp., Inc. v. U.S. Dep't of Labor*, 885 F.3d 676 (10th Cir. 2018) (affirming the district court, upholding the rule, and rejecting all challenges).

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[2] Better Markets, with others, filed an amicus brief in this case arguing that the Department of Labor's rulemaking processing, including its decision to include fixed-index annuities in the coverage of the rule, reflected rational administrative decision-making, https://bettermarkets.com/sites/default/files/NAFA%20v.%20DOL%20-%20Amicus%20Brief%207-15-16%20Final%20for%20Filing_0.pdf.

[3] Better Markets, with others, also filed an amicus brief in this case supporting the Department of Labor's rule, https://bettermarkets.com/sites/default/files/Amicus%20Brief%20filed%20by%20Better%20Markets%20et%20al.%20in%20Market%20Synergy%20v.%20DOL%20%207-29-16.pdf.

However, Mr. Scalia, in an apparent forum-shopping maneuver, filed a case in Texas, presumably hoping to litigate his challenge to the fiduciary duty rule before a sympathetic court. While the federal district court in Texas disappointed him by firmly rejecting all of his legal challenges, Mr. Scalia ultimately succeeded in persuading a divided panel of judges on the Fifth Circuit—a notoriously conservative Court—to nullify the rule, over the strenuous dissent of the Chief Judge.

Contrary to the analysis of every other court to reach the merits, the Fifth Circuit issued a deeply flawed opinion, at the heart of which was the erroneous holding that in ERISA, Congress only meant to incorporate the old-fashioned common law conception of a fiduciary without adding any new and stronger legislative protections for the benefit of retirement savers. Although the decision cried out to be challenged and likely reversed, the Trump administration (presumably working in concert with the plaintiffs if not their attorneys) refused to seek rehearing before the entire Court (en banc), and the Court refused to allow intervention by other organizations seeking to defend the rule.

The upshot is plain: As a result of the judicial nullification of the DOL rule urged by Mr. Scalia, countless retirement savers who need honest, unbiased investment advice will continue on a daily basis to suffer the loss of their hard-earned savings to advisers with powerful conflicts of interest.

2. **Invalidating mutual fund governance rules designed to limit adviser conflicts of interest for the benefit of fund shareholders – *Chamber of Commerce v. SEC*.**

One of Mr. Scalia's most significant early cases against shareholder interests came in 2005, in *Chamber of Commerce v. Sec. & Exch. Comm'n*, 412 F.3d 133 (D.C. Cir. 2005). The Securities and Exchange Commission ("SEC" or "Commission") had promulgated a rule requiring mutual funds to have no less than 75% of its board comprised of independent directors, as well as an independent chairman, if they wished to engage in certain transactions presenting a heightened risk that the fund's adviser might gain at the fund's expense. The Commission had determined that this additional layer of protection was necessary in light of a series of enforcement actions involving late trading, inappropriate market timing activities, and misuse of nonpublic information about fund portfolios, all signaling a breakdown in mutual fund management controls.[4]

Basically, the SEC determined that too many mutual funds had conflicts of interest that caused them to enrich themselves at the expense of their shareholders. The SEC proposed this measure as a way to increase the likelihood that shareholder interests would be properly prioritized by independent directors.

Mr. Scalia, representing the Chamber of Commerce, filed suit challenging the rule on multiple grounds, claiming that the SEC lacked authority under the Investment Company Act to adopt the rule, that it had failed adequately to consider the costs imposed by the rule, and that it had given inadequate consideration to alternatives to the independent chairman condition. Although the three-judge panel of the D.C. Circuit rejected the first challenge, it accepted the others. The Court held that the narrow statutory duty to consider whether a rule will promote efficiency, competition, and capital formation

[4] *Chamber of Commerce*, 412 F.3d at 137.

actually calls upon the SEC to conduct a much broader analysis and to "determine as best it can the economic implications of the rule."[5] The Court ruled that the SEC's failure to quantify and analyze the costs of the conditions it was imposing under the rule ran afoul of this obligation. In effect, the Court read statutory language commanding an agency merely to "consider" a rule's potential effects on discrete factors to mean that the agency was required to perform a broad cost-benefit analysis of the rule.[6]

The Chamber decision was significant–and harmful–in at least two respects. First, it resulted in the nullification of a rule designed to address egregious and widespread abuses of shareholders in the mutual fund industry. Second, it became one of the cornerstone precedents used by the financial industry to relentlessly attack rules based on claims that the agency had failed to conduct an adequate cost-benefit analysis–even though such a requirement was not in the statute and should not have been deemed necessaary.[7] For years thereafter, this strategy gained enormous traction in the courts, leading to the nullification of numerous beneficial rules.

3. Prohibiting the SEC from regulating one of the most toxic investment products on the market – *American Equity Life Insurance Co. v. SEC.*

In *American Equity Inv. Life Ins. Co. v. SEC*, 613 F. 3d 166, 176-79 (D.C. Cir. 2010), Mr. Scalia represented a large insurance company engaged in the sale of fixed indexed annuities ("FIAs"), a hybrid financial product with both securities and insurance characteristics. The SEC had promulgated a rule subjecting FIAs to regulation as securities after determining that they were not "annuities" exempt from regulation under the Securities Act of 1933.

Predictably, Mr. Scalia attacked the rule by arguing that FIAs were in fact exempt from regulation by the SEC and further by asserting that the SEC had failed to conduct an adequate analysis of the effect of the rule on efficiency, competition, and capital formation (one of many examples where he used the *Chamber* decision described above to attack other rules). The D.C. Circuit rejected the first argument but accepted the latter. It essentially held that the SEC's economic analysis was insufficient because the agency had failed to assess the baseline level of competition and efficiency that existed under state law price-transparency and information-disclosure requirements.

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[5] See id. at 143.

[6] Given the significant flaws in, and the implications of, this decision by the three-judge panel, it is not clear why the SEC failed to appeal the decision to the full D.C. Circuit. Specifically, the decision contravened a rich vein of precedent on cost-benefit analysis, not to mention black letter principles of deference to administrative agencies. As the Supreme Court has held, "'a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And the D.C. Circuit has clarified that this point is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies," *Consumer Elecs. Ass'n v. F.C.C.*, 347 F.3d 291, 302 (D.C. Cir. 2003); indeed, "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency," *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir.1983).

[7] It is difficult to overstate the harm inflicted by this case and its progeny, which we detailed in a special report on the flaws of cost-benefit analyses at the SEC. BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC (2012), https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf.

Here again, the result of Mr. Scalia's advocacy was harmful on multiple levels. First, it led to the judicial nullification of an especially important investor protection rule, one that could have protected countless investors from the sale of FIAs, an investment product often associated with fraud and abuse.[8] Second, it continued to fortify the body of precedents used by the financial industry to attack rules on economic analysis grounds in accordance with the *Chamber* decision discussed above.

And third, it solidified the principle that an agency can unnecessarily raise the bar on itself in judicial review if it attempts more economic analysis than the law actually requires. The Court held that because the SEC conducted an economic analysis when it issued the rule, "with no assertion that it was not required to do so," the agency had to "defend its analysis before the Court upon the basis it employed in adopting that analysis."[9] Thus, to the extent an agency voluntarily undertakes more extensive cost-benefit analysis than the law requires, it can unnecessarily exposes itself to a heightened risk that its rules will be invalidated for failing to meet a standard that does not actually apply under the law.

4. <u>Invalidating proxy access rules designed to improve board performance and increase shareholder value – *Business Roundtable v. SEC*.</u>

Yet another of Mr. Scalia's attacks on financial regulation was *Business Roundtable v. SEC*, 647 F. 3d 1144 (D.C. Cir. 2011), frequently cited along with the *Chamber* case to support the argument that an agency has failed to conduct an adequate cost-benefit analysis. The SEC had promulgated a rule requiring public companies and mutual funds to include board candidates nominated by long-standing shareholders in their proxy materials. The aim of the rule was principally to improve board and company performance for the benefit of the company's shareholders.

Representing the Business Roundtable as well as the Chamber of Commerce, Mr. Scalia filed suit challenging the rule on a variety grounds tied to the central claim that the SEC had failed adequately to evaluate the economic consequences of the rule, including its costs and benefits. In an opinion marked by some vitriol towards the SEC, the D.C. Circuit agreed and vacated the rule "for having failed once again . . . adequately to assess the economic effects of a new rule."[10] The court explained that the SEC had "relied upon insufficient empirical data," and it contested the SEC's judgments regarding the most reliable studies on the issues presented. The Court faulted the SEC for relying "heavily upon two relatively unpersuasive studies" and, without explaining why the SEC's favored studies were unpersuasive, found that the SEC had "not sufficiently supported its conclusion."[11] In effect, the court dismissed pages of economic analysis and detailed consideration of opposing studies simply as inadequate. And in so doing, the Court, as urged by Mr. Scalia, substituted its own inexpert judgment for the expert analysis of the agency, in contravention of long-established principles of administrative law.

[8] *See* Letter from North American Securities Administrators Association to SEC on Proposal re: Index Annuities and Certain Other Contracts (Sept. 10, 2008).

[9] *Am. Equity Life Ins. Co.*, 613 F. 3d at 177.

[10] *Business Roundtable*, 647 F.3d at 1148.

[11] *Id.* at 1151.

The Business Roundtable decision was, as in many cases, doubly harmful. It nullified a rule the SEC deemed necessary and appropriate to enhance shareholder participation in the election of directors, ultimately for the benefit of investors. And, it became one of the most-often cited precedents in later cases–many brought by Mr. Scalia–targeting rules on the basis of supposedly faulty agency cost-benefit analysis. In fact, the misinterpretation of the securities laws reflected in the case contravened a well-established body of precedent on cost-benefit analysis, not to mention broader, black-letter principles of deference to administrative agencies. For example, as far back as 1950, the Supreme Court held that the duty to "consider" factors–just as the securities laws narrowly provide with respect to efficiency, competition, and capital formation–entails wide agency discretion: When statutorily mandated "considerations" are not "mechanical or self-defining standards," they "in turn imply wide areas of judgment and therefore of discretion."[12]

More specifically, the Supreme Court has held that an agency's duty to conduct cost-benefit analysis is not to be inferred without a clear indication from Congress: "Congress uses specific language when intending that an agency engage in cost-benefit analysis."[13] And one of the basic canons of judicial review of agency rules is that "the scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of an agency."[14] This is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies,"[15] and in fact, "cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency."[16] Fortunately, as explained below, some more recent decisions reflect a return to these principles.[17]

5. Challenging corporate disclosure rules designed to ameliorate human suffering – *Nat'l Ass'n of Mfrs. v. SEC*.

Mr. Scalia's advocacy on behalf of business interests also included an attack on the SEC's conflict minerals disclosure rule. In *Nat'l Ass'n of Mfrs. v. SEC*, 748 F. 3d 359 (D.C. Cir. 2014), the SEC had promulgated a rule requiring firms using "conflict minerals" to investigate and disclose the origins of those minerals. The rule, mandated by Congress, was intended to reduce violence and promote peace and security in the Democratic Republic of the Congo, an area of the world described by the Court as follows:

> For the last fifteen years, the Democratic Republic of the Congo has endured war and humanitarian catastrophe. Millions have perished, mostly civilians who died of starvation and disease. Communities have been displaced, rape is a weapon, and human rights violations are widespread.[18]

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[12] *Sec'y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950).

[13] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-512 & n.30 (1981).

[14] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[15] *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003).

[16] *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir.1983).

[17] A more thorough discussion of the Business Roundtable case, as well as the actually limited scope of the SEC's duty to conduct cost-benefit analysis, can be found in BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC (July 30, 2012).

[18] *Nat'l Ass'n of Mfrs.*, 748 F.3d at 362.

Because armed groups fighting in the region "finance their operations by exploiting regional trade in several kinds of minerals," the rule was based on the Congressional judgment that "supply-chain transparency would promote peace and stability by reducing the flow of money to armed groups."[19]

Mr. Scalia did not represent the plaintiffs/appellants in the case, but he did submit an amicus brief on behalf of the American Petroleum Institute and in support of the challengers. They alleged that the SEC acted arbitrarily and capriciously by not including a de minimis exception in the rule; that the rule's due diligence requirements conflicted with the statute; that the phase–in periods were arbitrary and capricious; that the SEC failed to adequately analyze the costs and benefits of the final rule; and that the rule violated the First Amendment by compelling companies to disclose that its products are not "DRC conflict free." The D.C. Circuit rejected all of those arguments, with the exception of the First Amendment challenge, remanding the case for further proceedings.

The NAM decision was largely a favorable outcome, as it represents a welcome judicial inclination to reject exaggerated and legally unfounded claims that the SEC and other agencies have failed to catalogue, quantify, and predict the costs and benefits of their rules to the satisfaction of the regulated industry. The Court's observations are noteworthy; it explained that

> An agency is not required to measure the immeasurable, and need not conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so.[20]

The Court identified two additional reasons why agencies like the SEC cannot be expected to perform cost-benefit analysis: It forces them to make an "apples-to-bricks" comparison whenever intangible benefits—such as peace and security—cannot be framed in terms of dollars and cents, and it also forces them to second-guess the judgments that Congress has already made about the costs and benefits of regulation.[21]

This was a major setback for some of the core arguments Mr. Scalia has been making for years on behalf of the clients he chose to represent.

6. **Challenging the ability of the SEC to address trading practices that harm investors – *New York Stock Exchange LLC v. SEC*.**

A recent and ongoing rule challenge involving Mr. Scalia is an attack on the SEC's pilot program designed to better understand the impact that trading fees and rebates are having on market integrity and the quality of trade execution that investors receive from their brokers. Mr. Scalia represents the NASDAQ Stock Market LLC in the case, one of ten major exchanges seeking to nullify the pilot.

[19] *Id.* at 364.

[20] *Id.* at 369.

[21] *Id.*

The current securities market structure involves a system of legalized kickbacks, in which brokers are paid to route their customers' orders to particular exchanges.[22] When brokers seek to take advantage of these kickbacks, rather than routing orders to the exchange that will provide best execution, their investor customers are harmed. And this harm is not theoretical—multiple credible studies have demonstrated that this practice, by reducing execution quality and enabling predatory trading behavior by high-frequency trading firms and other financial institutions, results in actual, concrete harm to investors.[23]

However, those studies have been, by necessity, limited in nature, and the actual impact of the current regulatory regime has been hotly contested. To resolve these issues, the SEC initiated a Transaction Fee Pilot Program, limited in duration and scope, that would assess what harms, if any, are caused by the current market structure and practices. The Pilot would do this by eliminating kickbacks for a limited number of stocks. This would provide the SEC with the data and information needed to establish the best possible regulatory regime for the securities markets, ensuring that investors have a level playing field while enabling exchanges to offer, and profit from, products and services that provide real value to the markets as a whole, rather than enabling predatory behavior.

In essence, this is the idealized version of agency rulemaking—a problem is identified by numerous market participants, academics and others confirm that there is a problem, some industry participants (who benefit from the current structure and practices) dispute the problem, and the SEC gathers information but determines that there is arguably insufficient data. Rather than moving forward with a proposed solution that might have unintended consequences and costs, the SEC sought to determine the precise impact of any change to the regulatory regime before promulgating a permanent rule.

But the pilot and any regulation that ultimately emerges from it pose a threat to almost all of the incumbent stock exchanges that profit from the current system, at the expense of ordinary investors. Hence the legal challenge. Mr. Scalia's representation is predictably focused on claims that the SEC did not do enough to identify and quantify the economic impact of this temporary program. In fact, however, the SEC fully assessed the economic impact of the rule on efficiency, competition, and capital formation to the best of its ability, which is all it is required to do under the statute. And it even assessed the broader costs and benefits of the pilot to the extent it could.[24]

Finally, to the extent that there existed some uncertainty as to the impact of a change to the current regulatory regime, the SEC's approach was intended to eliminate that uncertainty by collecting data via a pilot program carefully limited in time and scope. Oral argument in the D.C. Circuit is set for October 11, 2019.

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[22] Amicus Brief of Better Markets in *NYSE Arca, Inc. v. SEC*, No. 18-1293 (D.C. Cir. 2019) at 6, https://bettermarkets.com/sites/default/files/NYSE%20v.%20SEC%2C%2019-1042%20%28Final%20for%20Filing%29.pdf.

[23] Robert Battalio, Shane A. Corwin & Robert Jennings, C*an Brokers Have it All? On the Relation between Make-Take Fees and Limit Order Execution Quality*, 71 J. FIN. 2193, 2222 (2016); Katya Malinova & Andreas Park, *Subsidizing Liquidity: The Impact of Make/Take Fees on Market Quality*, 70 J. FIN. 509, 535 (2015).

[24] *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1221 (D.C. Cir. 1999) ("When, as in this case, an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, our role is more limited; we require only that the agency so state and go on to identify the considerations it found persuasive.")

B. MR. SCALIA'S REPRESENTATION OPPOSING RULES DESIGNED TO PROMOTE FINANCIAL STABILITY AND TRANSPARENCY.

In 2008, Wall Street precipitated the worst financial crisis since the stock market crash of 1929 and the ensuing Great Depression.[25] The crisis destroyed the jobs, savings, and homes of tens of millions of Americans; caused untold human suffering; and cost more than $20 trillion in lost gross domestic product. Its effects are still being felt today, despite proclamations from many politicians and policymakers that our economy–and everyone it it–is thriving.[26]

Congress and the President responded by enacting the sweeping financial reforms set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[27] Those reforms were designed to make our financial system, derivatives markets, and equity markets more crash-resistant, transparent, and fair. The financial regulatory agencies were tasked with proposing, finalizing, implementing, interpreting, and enforcing the rules required by the Dodd-Frank Act. Unfortunately, this lengthy and complex process provided market participants numerous opportunities to thwart financial reform, financial stability, and the reduction of dangerous and high-risk but lucrative practices and activities. Mr. Scalia often chose to represent those market participants, and he led a number of legal challenges to delay, gut, weaken, kill, or rollback entirely those reforms and rules.

1. Neutering the government's ability to prevent another financial crisis – *MetLife v. FSOC.*

One of the most damaging outcomes arising from Mr. Scalia's representation of corporate clients seeking to rollback financial regulation was the legal challenge to the designation of the insurance giant MetLife, Inc. by the Financial Stability Oversight Council ("FSOC") as a systemically significant nonbank. The case illustrates not only the destructive impact of his work, but also the strategic lengths to which he would apparently go to achieve success, as well as the luck he sometimes enjoyed in his "victories."

A core regulatory innovation in the Dodd-Frank Act was the creation of the FSOC.[28] Comprised of representatives from virtually every federal and state regulatory authority, the FSOC's core mission is to monitor all sectors of the financial markets, identify risks to the financial stability of the United States wherever they may arise, and respond with a variety of measures to mitigate those threats. At the very core of those reforms is the authority of the FSOC to identify nonbank financial institutions that could pose risks to our financial system and to designate them for prudential supervision by the Board of Governors of the Federal Reserve System ("Federal Reserve").[29]

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[25] *See* BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING (July 2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

[26] *See*, e.g., David Harrison, *Historic Asset Boom Passes by Half of Families*, WALL ST. J. (Aug. 30, 2019), available at https://www.wsj.com/articles/historic-asset-boom-passes-by-half-of-families-11567157400?mod=searchresults&page=1&pos=1 ("The bottom half of all U.S. households, as measured by wealth, have only recently regained the wealth lost in the 2007-2009 recession and still have 32% less wealth, adjusted for inflation, than in 2003, according to recent Federal Reserve figures.")

[27] Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

[28] *See* 12 U.S.C. § 5321 (providing for the establishment of FSOC).

[29] *See* 12 U.S.C. § 5323 (establishing the designation authority and the factors to be considered in the process).

This designation authority plays a uniquely important role in preventing another financial crash and economic crisis.[30] Unknown and unforeseen systemic risks arising from nonbank financial institutions were at the core of the 2008 crisis, as illustrated by the collapse of American International Group, Bear Stearns, Lehman Brothers; the run on money market funds; and other events. Ensuring that such nonbank financial institutions are subject to appropriate oversight is one of the FSOC's most important missions and preserving that authority is essential to protecting the American people from another devastating crisis.

FSOC is empowered to designate any financial firm "if the Council determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States."[31] Notably absent from this grant of authority is any requirement that FSOC conduct a cost-benefit analysis, or even that it consider the costs and benefits of designation and regulating nonbank systemic risks.

In accordance with this authority, on December 18, 2014, FSOC determined that the global insurance conglomerate MetLife, Inc., should be designated for enhanced prudential supervision, on the basis of its finding that "financial distress at MetLife could pose a threat to U.S. financial stability."[32] The designation followed an exhaustive and deliberative process spanning 17 months, including MetLife's submission of over 21,000 pages of information, over a dozen high-level meetings between MetLife and the FSOC, and an oral hearing.

On behalf of MetLife, Mr. Scalia promptly challenged the designation, filing a complaint in the United States District Court for the District of Columbia on January 13, 2015. He launched a wide variety of attacks purportedly predicated on the Dodd-Frank Act, the Administrative Procedure Act, and the U.S. Constitution, all leading to the assertion that the designation was contrary to law and arbitrary and capricious. MetLife first claimed that MetLife was not even eligible for designation by virtue of its foreign activities. It then paraded a host of other claims, alleging that FSOC acted prematurely in the absence of the Federal Reserve's anticipated prudential standards; failed to consider alternatives to designation; failed to assess MetLife's vulnerability to financial distress; failed to apply the statutory factors correctly; failed to consider the economic impact on MetLife of the designation; and violated the separation of powers and due process provisions in the Constitution. It was the proverbial kitchen sink.

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[30] BETTER MARKETS, FACT SHEET ON THE METLIFE V. FSOC DESIGNATION: OVERRULING FSOC'S DESIGNATION OF METLIFE WAS FLAWED AND WILL UNDERMINE FINANCIAL STABILITY (Apr. 15, 2016), https://bettermarkets.com/sites/default/files/MetLife%20Decision%20Fact%20Sheet%204-15-16%20Final.pdf; BETTER MARKETS, THE FINANCIAL STABILITY OVERSIGHT COUNCIL FACTSHEET: SAVING TAXPAYERS FROM THE NEXT AIG AND THE NEXT CRISIS (Nov. 2, 2015), https://bettermarkets.com/sites/default/files/Fact%20Sheet%20-%20The%20Financial%20Stability%20Oversight%20Council%20--%2011-2-2015.pdf; Better Markets, Letter to Senate Banking Committee on the Financial Regulatory Improvement Act of 2015 (May 19, 2015), https://bettermarkets.com/sites/default/files/Letter-%20Senate%20Banking%20Committee%20-%20Financial%20Regulatory%20Improvement%20Act%20of%202015%20-%205-19-15.pdf; *FSOC Accountability: Nonbank Designations, Senate Committee on Banking, Housing, and Urban Affairs* (Mar. 25, 2015) (statement of Dennis M. Kelleher, President & CEO Better Markets, Inc.), https://bettermarkets.com/sites/default/files/documents/Kelleher%20Testimony%203-25-15_1.pdf.

[31] 12 U.S.C. § 5323(a)(1).

[32] See FSOC, *Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc.* (Dec. 18, 2014) ("Public Basis") at 2, https://www.treasury.gov/initiatives/fsoc/designations/Documents/MetLife%20Public%20Basis.pdf.

Fortunately for Mr. Scalia and MetLife, the case was assigned to Judge Rosemary Collyer, a judge with an ideological bent decidedly in favor of MetLife's positions. On March 30, 2016, Judge Collyer predictably granted MetLife's motion for summary judgment.[33] The Court ruled against the FSOC on three specific grounds.

- First, the Court incorrectly ruled that the FSOC had failed to make a necessary threshold assessment of MetLife's vulnerability to material financial distress.
- Second, the Court incorrectly ruled that the FSOC had failed to quantify "the actual loss" that would arise from MetLife's future material financial distress, and, therefore, had failed adequately to assess whether such future distress could pose a threat to U.S. financial stability.
- Finally, the Court incorrectly ruled that the FSOC had failed to conduct a cost-benefit analysis, including the regulatory costs and burdens that designation would impose on MetLife.

The decision was deeply flawed, as none of the holdings can be reconciled with the statutory text of the Dodd-Frank Act, its underlying purposes, and firmly established precedents. FSOC noticed its appeal to the D.C. Circuit on April 20, 2016. Extensive briefing on the merits followed, including numerous amicus briefs from Better Markets and others arrayed on both sides of the important issues presented.[34] The appellate court heard oral argument on October 24, 2016, and the case lay essentially dormant through the November election and the inauguration of President Trump in early 2017.

However, beginning in April of 2017, the Administration embarked on what appeared to be a carefully choreographed plan, presumably in coordination with MetLife and its attorneys, to derail the appeal and prevent it from ever being decided on the merits by the D.C. Circuit. On April 21, 2017, while the appeal was pending, President Trump initiated a political process by issuing a memorandum directing his political appointee, the Secretary of the Department of the Treasury, to "conduct a thorough review of the FSOC's determination and designation processes under Section 113 [§ 5322] . . . of the Dodd-Frank Act," and to provide a written report to him within 180 days.[35] While the Memorandum never expressly references MetLife, the factors listed by the President in the Memorandum to be considered in the Treasury Department's initial 180-day review process bear a

[33] *See MetLife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219 (D.D.C. 2016).

[34] *See* Amicus Brief of Better Markets (June 23, 2016), *available at* https://bettermarkets.com/resources/better-markets-amicus-brief-metlife-v-fsoc. Better Markets also filed an amicus brief on the merits in the district court, an unusual step but a necessary and appropriate one given the historic importance of the issues presented. *See* Amicus Brief of Better Markets in the District Court, filed May 22, 2015, *available at* https://bettermarkets.com/resources/better-markets-amicus-brief-case-metlife-v-fsoc.

[35] *See* Presidential Memorandum for the Secretary of the Treasury, 2017 WL 142320 (Apr. 21, 2017) ("Memorandum"), at Section 1.

striking similarity to the holdings in the district court opinion as well as the arguments that MetLife advanced in its briefs.[36]

Confirming suspicions of coordination and political interference with the pending legal matter, on the next business day following issuance of President Trump's memorandum, MetLife filed a motion to hold the appeal in abeyance, arguing that the case should be stayed since the forthcoming report, six months in the offing, might prompt a change in the Administration's posture in the case, or at least "illuminate" the court's consideration of the issues presented.[37] Without basis or precedent, on May 4, 2017, President Trump's FSOC filed its response to MetLife's Motion, essentially capitulating to MetLife's position and the stay.

On May 8, 2017, Better Markets filed an amicus brief, which was accepted by the Court, arguing that MetLife was invoking an essentially unrelated political process to interfere with and delay an historic legal case of enormous public interest.[38] Better Markets emphasized that the political process MetLife sought to use to delay the appeal did not involve the parties to the legal proceeding, was highly uncertain in outcome, and would not in any case determine or moot the factual and legal issues presented in the appeal.

The Circuit Court nevertheless ultimately placed the case in abeyance pending release of the Treasury Department's report. That report was finally published on November 17, 2017, laying the groundwork for the appeal to proceed. The Court ordered supplemental briefing regarding the implications of the report, and on December 12, 2017, MetLife filed its brief arguing that the report fully supported MetLife's claims and warranted affirmance of the district court's opinion. Rather than file its own supplemental brief discounting the report and pressing ahead with the appeal, FSOC joined with MetLife in a motion asking the Court to dismiss the case, which the Court granted.[39]

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[36] The parallels between the factors set forth in the President's Memorandum and the district court's three core holdings are unmistakable. First, the district court held that FSOC failed to assess the likelihood that MetLife would experience material financial distress, 177 F. Supp. 3d at 233-36; similarly, the Memorandum requires Treasury to consider "whether evaluation of a nonbank financial company's vulnerability to material financial distress . . . . should assess the likelihood of such distress," Memorandum, Section 1, para. (c). Second, the district court held that in determining whether MetLife's distress could pose a threat to the financial stability of the United States, the FSOC failed to project the actual losses that would arise in the event of such distress, 177 F. Supp. 3d at 237-39; similarly, the Memorandum requires the Treasury Secretary to consider "whether any determination as to whether a nonbank financial company's material financial distress could threaten the financial stability of the United States . . . should include specific, quantifiable projections of the damage that could be caused to the United States economy, including a specific quantification of losses that would be likely . . . . ," Memorandum, Section 1, para. (e). And third, the district court held that FSOC failed to consider the costs of designation to MetLife, 177 F. Supp. 3d at 239-42; similarly, the Memorandum requires the Treasury Secretary to consider "whether these processes adequately consider the costs of any determination or designation on the regulated entity," Memorandum, Section 1, para. (f).

[37] *See MetLife, Inc. v. Financial Stability Oversight Council*, Case No. 16-5086 (D.C. Cir.), MetLife, Inc.'s Motion to Hold in Abeyance Pending the Secretary of the Treasury's Forthcoming Report on the Designation Process Motion (filed Apr. 24, 2017), at 1.

[38] *See* Brief Amicus Curiae of Better Markets, Inc. in Opposition to MetLife's Motion to Hold Appeal in Abeyance (May 8, 2017), https://bettermarkets.com/resources/motion-better-markets-inc-leave-file-brief-amicus-curiae-opposition-metlife%E2%80%99s-motion-hold.

[39] *See* Per Curiam Order of Dismissal, issued January 13, 2018.

As a result, and because FSOC failed to seek to vacate the lower court's decision on the merits as a condition of voluntary dismissal (as is typically done), the district court's error-ridden and dangerous ruling stands as a lasting and crippling interpretation of the FSOC's statutory designation authority. The harm is multi-faceted.

- First, by rescinding FSOC's designation of MetLife for enhanced regulation, the district court removed an important layer of protection that FSOC deemed necessary to protect our financial system from the destabilizing effects of financial distress at MetLife. In short, the considered judgment of the nation's leading financial market experts was judicially nullified.
- On a broader level, the decision threatens to severely hamper the ability of FSOC to exercise its designation authority regarding nonbank systemically significant firms in the shadow banking system. The result is that potentially no government body has the power or authority to establish these unique and essential safeguards against financial crisis. We once again face a significantly unregulated shadow banking system similar to the one that existed in the lead up to the crash in 2008. This will increase the likelihood of future financial crises, taxpayer bailouts, and economic misery.[40] Under the Court's ruling, FSOC will arguably be saddled with the duty to perform a number of essentially impossible analytical tasks as a predicate to designation, including (1) an assessment of a company's vulnerability to material financial distress; (2) a quantitative evaluation of the impact of such distress on financial stability; and (3) a cost-benefit analysis. Overcoming these obstacles could mire the FSOC in long, resource-intensive, and ultimately fruitless processes that will grind the designation mechanism to a halt and result in litigation over virtually all FSOC designation actions.
- Finally, by purporting to expand the circumstances under which an agency must conduct a cost-benefit analysis, contrary to plain statutory language and binding precedent, the decision could equip industry opponents of appropriate regulation with another weapon they can deploy against any attempt by a regulatory agency to promulgate meaningful rules—rules that are necessary for the protection of Americans' homes, jobs, and savings, as well as the long-term health of our markets and our economy.

2. **<u>Nullifying position limits designed to combat excessive speculation, price volatility, and instability in the commodities markets – *Int'l Swaps & Derivs. Ass'n v. CFTC*.</u>**

In an earlier challenge to a Dodd-Frank rule, Mr. Scalia represented two large financial trade associations in a lawsuit attacking the CFTC's position limits rule. *Int'l Swaps & Derivs. Ass'n v. CFTC*, 887 F. Supp. 2d 259 (D.D.C. 2012). His clients were the International Swaps and Derivatives Association (comprised of hundreds of firms participating in the privately negotiated derivatives industry) and the Securities Industry and Financial Markets Association (comprised of hundreds of securities firms, banks, and asset managers).

[40] For a full discussion of the implications of these actions, *see* Dennis M. Kelleher, The State of Financial Reform, at 6-8 (Nov. 2018), https://bettermarkets.com/sites/default/files/State%20of%20Financial%20Reform.pdf.

In the Dodd-Frank Act, Congress expanded the authority of the CFTC to set position limits on futures and options contracts, extending it more broadly to include limits on other derivatives or swaps contracts. The purpose of these reforms was to more effectively combat excessive speculation in these commodities and derivatives markets, thereby curbing the harmful price volatility and market instability that comes with such speculation.

While not well known, these markets play a critical role in the prices paid by hardworking families all day long, from their breakfast cereal and coffee in the morning to the gas in their car and the bread they eat at dinner. However, those markets have been distorted by financial institutions that line their pockets through excessive speculation. That speculation causes price spikes as well as boom-bust cycles, all of which harms consumers as well as physical producers and purchasers. Position limits are a key mechanism for addressing these market distortions and predatory behaviors.[41]

The CFTC adopted a new position limits rule in October 2011, and on behalf of his chosen clients, Mr. Scalia challenged the rule in December 2011. The principal allegation in the complaint was that the CFTC had failed to determine that the rule was "necessary and appropriate" before establishing the new limits. Mr. Scalia advanced other claims as well, including the familiar assertion that the CFTC had failed to conduct an adequate evaluation of the costs and benefits of the rule.

The U.S. District Court for the District of Columbia ruled in favor of Mr. Scalia and his clients and vacated the rule entirely. The Court rested its decision on the technical principle of administrative law known as the *Chevron* doctrine. It held that the Commodity Exchange Act was unclear as to whether the CFTC was required to make a finding of necessity before setting the new position limits. And, because the CFTC never acknowledged the ambiguities in the law (insisting that it was a clear Congressional mandate) and never exercised its own judgment regarding its meaning, the Court could not afford the agency the deference normally warranted when an agency interprets and applies an ambiguous statutory provision.

As a result of the decision, the issue of position limits—intended by Congress as an important prophylactic regulatory protection against instability and volatility in the commodity markets—has remained in a lengthy state of limbo. To this day, no position limits rule has been finalized.

3. Challenging the CFTC's effort to promote transparency and oversight of the derivatives markets – *Inv. Co. Inst. v. Commodity Futures Trading Comm'n*.

Mr. Scalia's decision to represent clients fighting against financial reform included an attack on a CFTC rule designed to improve regulatory oversight of the derivatives markets, which contributed significantly to the financial crisis. In *Investment Company Institute v. CFTC*, 720 F. 3d 370 (D.C. Cir. 2013), the CFTC had promulgated a rule requiring SEC-registered investment companies engaged

[41] *See* Better Markets, Comment Letter to CFTC on Proposal re: Position Limits for Derivatives (Mar. 28, 2011), https://bettermarkets.com/sites/default/files/documents/CFTC%20Position%20Limits%20CL%20As%20Submitted%20Hi%20Res.pdf; BETTER MARKETS, COMMODITY INDEX TRADERS AND BOOM/BUST IN COMMODITIES PRICES (2011), https://bettermarkets.com/sites/default/files/documents/Better%20Markets-%20Commodity%20Index%20Traders%20and%20Boom-Bust%20in%20Commodities%20Prices.pdf.

in derivatives trading beyond certain thresholds to also register as commodity pool operators under the purview of the CFTC.

The agency determined that in the aftermath of the financial crisis, it was important to limit the prior exemptions from such registration. It identified four reasons for the rule: It would align the CFTC's regulatory framework with the purposes of the Dodd-Frank Act, promote similar regulation of similarly-situated entities, improve accountability and increase transparency with respect to commodity pools, and facilitate data collection by the FSOC, charged with identifying risks to the financial stability of the United States.[42]

Representing the Investment Company Institute and the Chamber of Commerce, Mr. Scalia launched an assault on the rule with a number of claims, asserting that the CFTC had failed to justify changes in its prior regulatory approach, that it had failed to adequately consider the costs and benefits in accordance with the Commodity Exchange Act, that certain provisions in the rule were arbitrary and capricious, and that the CFTC had failed to provide adequate notice and opportunity for comment. The D.C. Circuit rejected all of these challenges and upheld the rule.

With respect to cost-benefit analysis, the Court acknowledged that the relevant statutory standard does not require rigorous, quantitative analysis:

> Where Congress has required 'rigorous, quantitative economic analysis,' it has made that requirement clear in the agency's statute, but it imposed no such requirement [in the Commodity Exchange Act].[43]

The Court further rejected the claim that the CFTC should have precisely quantified the benefits the rule would provide in terms of preventing another financial crisis, observing that "the law does not require agencies to measure the immeasurable."[44] The Court accepted the agency's qualitative consideration of costs and benefits, given the limited data available to the CFTC and the resulting uncertainties.[45] And the Court noted that since the derivatives rule under attack was in part designed to help close that very data gap, the challengers were attempting to place the agency in an untenable position:

> In essence, the appellants are challenging the very method for obtaining the data they want on the ground that CFTC has not yet obtained the data they want. But neither the APA nor the [Commodity Exchange Act] imposes such a catch-22 on CFTC.[46]

[42] *Inv. Co. Inst.*, 720 F.3d at 374.

[43] *Id.* at 379.

[44] *Id.*

[45] *Id.* at 379-80.

[46] *Id.* at 380.

Moreover, the Court rejected Mr. Scalia's claim that the CFTC had failed to address existing SEC oversight of registered investment companies, as well as his claim that the CFTC's cost-benefit analysis was flawed because it was "impossible to fully determine costs and benefits before promulgation."[47] Of course, this is the case with nearly every rule promulgated by an agency–it will almost always be impossible to fully assess the costs and benefits of any particular rule because there are any number of unknowns that could influence its ultimate impact.

This decision rejected yet another attack on financial reform intended to protect the American people from another devastating financial crash, and it marks another positive step toward the interpretation of economic analysis obligations that is more consistent with the law and sound public policy.

C. MR. SCALIA'S REPRESENTATION OPPOSING WORKERS' RIGHTS TO SEEK RELIEF IN COURT.

Access to the judicial system, with unbiased judges, transparent rules, and rights of appeal, is a bedrock principle of a country governed by the rule of law and equal justice under the law. For that right to have any meaning, access to the courts must be preserved. However, Mr. Scalia has repeatedly represented corporations fighting to ensure that they can evade meaningful liability by undermining class actions[48] and by forcing workers and others into secret, biased arbitration proceedings.[49]

Class actions, which allow for the aggregation of large numbers of claims without the cost-prohibitive requirement of formal joinder of each and every claimant to the lawsuit, are an essential part of the modern legal landscape. They help injured investors, consumers, and others hold wrongdoers liable for widespread harm that would otherwise go unremedied. The availability of class actions also serves as a deterrent to corporations that would otherwise be able to keep their ill-gotten gains; class actions thus reduce the incentive for those companies to routinely violate the law with impunity. Class actions have been used to hold tobacco companies accountable, protect consumers from anti-competitive credit and debit card "swipe" fees, and hold companies accountable for massive data breaches that expose the sensitive data of millions of consumers.

Needless to say, companies fight constantly to thwart class actions. Mr. Scalia has been involved in several notable cases seeking to deny class certification, and he has advanced arguments that would significantly hinder the ability of litigants to obtain meaningful relief through the use of class actions, enabling companies to continue to violate basic statutory rights without accountability to their victims.

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[47] Brief for Inv. Co. Inst. at 52.

[48] Better Markets recently filed an amicus brief explaining the importance of class actions to retail investors who are harmed when their brokers, in pursuit of legalized kickbacks from exchanges, violate their fiduciary duty to seek best execution for their clients' trades. Amicus Brief of Better Markets in *Ford v. TD Ameritrade*, No. 18-3689 (8th Cir. 2019), https://bettermarkets.com/sites/default/files/Better%20Markets%20Amicus%20Brief%20Ford%20v.%20TD%20Ameritrade.pdf. Better Markets has also sought to limit the technical obstacles that firms can raise once investors are in arbitration. *See* Amicus Brief of Better Markets in I*nteractive Brokers LLC v. Saroop*, No. 19-1077 (4th Cir. 2019), https://bettermarkets.com/sites/default/files/Interactive%20-%20Amicus%20Brief%20%204-19-19.pdf.

[49] BETTER MARKETS, THE DIRTY DOZEN – WHY MANDATORY ARBITRATION IS UNFAIR (Oct. 11, 2017), https://bettermarkets.com/newsroom/dirty-dozen-%E2%80%93-why-mandatory-arbitration-unfair.

1. **Defeating the right of injured workers to seek relief as a class – *Hohider v. United Parcel Serv., Inc.***

For example, in *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009), UPS employees sought to remedy UPS's alleged violations of the Americans with Disabilities Act ("ADA").[50] The plaintiffs claimed that they had sustained an injury "during the course of their employment with UPS, leaving them unable to return to their respective previous positions at the company without some form of permanent medical restriction."[51] However, UPS had a policy of refusing to offer any accommodation to employees who were injured and sought to return to work with a medical restriction, as required by the ADA.[52]

The important factual and legal issues raised by the litigation were never resolved on the merits. The plaintiffs moved for class certification but were opposed by Mr. Scalia on behalf of UPS. He argued that, notwithstanding an allegation of a company-wide policy of violating the ADA, susceptible to class-wide proof, the plaintiffs' claims were nevertheless unsuitable for class resolution because whether application of that policy was a violation of the ADA would be an individualized question. While the district court certified the class, the court of appeals, agreeing with Mr. Scalia's argument, reversed and held that a class could not be certified because the class would not meet the so-called "commonality requirement" of Federal Rule of Civil Procedure 23(b)(3). The plaintiffs eventually withdrew the lawsuit, leaving potentially thousands of UPS employees, injured on the job and unlawfully denied a reasonable accommodation by UPS, without meaningful redress.

2. **Forcing workers seeking fair pay out of court and into arbitration – *Cohen v. UBS Fin. Servs., Inc.***

In a similar vein, Mr. Scalia has represented clients fighting to deny plaintiffs access to the courts by seeking to enforce mandatory arbitration clauses. The Federal Arbitration Act ("FAA")[53] is a 1925 law that was originally intended to ensure that negotiated arbitration clauses entered into by commercial parties of relatively equal bargaining power were respected. However, in the modern era, banks, credit card companies, brokers, and others routinely insert fine-print clauses into lengthy account agreements that force consumers and investors to submit to arbitration if the firm harms them in any fashion. These forced arbitration clauses are not negotiated but instead drafted by the firm and handed to the customer or client on a take it or leave it basis, typically without the customer or investor even being aware of the provisions, which are buried in a long and complicated document.

Forced arbitration is no substitute for the right to seek relief in court. Arbitrators are typically biased in favor of industry—arbitrators are often from the industry or have a prior history of working on behalf of the industry, and they furthermore often seek to maintain an industry-friendly reputation to ensure they will continue to be selected by the industry to serve on arbitration panels. Compounding that

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[50] 42 U.S.C. § 12101, et seq.

[51] *Hohider*, 574 F.3d at 172.

[52] *Id.*

[53] 9 U.S.C. § 1, et seq.

problem, arbitrators are not required to follow the law, thus freeing them to arrive at decisions in favor of industry—decisions that are not even required to be explained and are virtually unappealable. And even when lawless and biased arbitrators do find the industry liable for wrongdoing, the compensation awarded is low and the misconduct is generally not exposed because arbitral decisions and awards typically are not made public.

Exemplifying Mr. Scalia's work to enforce arbitration clauses is his representation in *Cohen v. UBS Fin. Servs.*, Inc., 799 F.3d 174 (2d Cir. 2015). The plaintiff alleged that UBS routinely failed to pay overtime as required by Fair Labor Standards Act ("FSLA"), which governs wages, overtime, and other federal standards seeking to ensure that workers are paid fairly for their work (and which Mr. Scalia would be responsible for enforcing as Secretary of Labor). The plaintiff victim filed a putative class action to remedy those violations.[54] However, in this case, Mr. Scalia did not even have to address whether class certification was proper under the Federal Rules of Civil Procedure, because he argued that the fine-print forced arbitration clause in the plaintiffs' employment agreement compelled arbitration—an arguably even more insidious tool to avoid class-wide liability. The Second Circuit accepted Mr. Scalia's argument and compelled arbitration, defeating any chance that UBS's alleged violations of FLSA would be meaningfully deterred, as collective action is typically not available in arbitration.

CONCLUSION

The choices Mr. Scalia has made to represent financial firms relentlessly seeking to gut, weaken, or rollback financial reform should be considered by policymakers and the public as the confirmation process unfolds. His advocacy for those corporate interests has come at the expense of investors, consumers, the financial system, and the well-being of hardworking Americans, millions of whom are still suffering from the aftershocks of the last crash and facing much greater risk of another one due to the clients he chose, the arguments he advanced, and the tactics he used. The Department of Labor exists to protect the rights of Main Street workers and retirees, shielding them from unfair employment practices, dangerous working conditions, conflicted investment advice, and other forms of abuse, exploitation, or neglect at the hands of employers and others who seek to gain advantage at their expense. Yet Mr. Scalia's choices, actions, and outcomes clearly suggest that he will not put the interests of hard-working Americans and retirees ahead of the rich and powerful corporations that employ them or provide them with retirement planning and advice. All of this must be weighed when determining the fitness of Mr. Scalia to serve as the Secretary of Labor.

[54] *Cohen*, 799 F.3d at 176.

APPENDIX

THE STANDARD: COMMITMENT TO THE PUBLIC INTEREST AND THE CORE MISSION OF THE DEPARTMENT OF LABOR AND PROTECTING WORKERS AND RETIREES, NOT BUSINESSES.

The Constitution does not specify the qualifications necessary to serve as a cabinet member other than requiring appointment by the President with the "advice and consent" of the Senate.[55] In fact, the vetting process for cabinet nominees largely focuses on ensuring that the candidate is free of legal or ethical problems that would impede or prevent confirmation in the Senate. Hence, the White House Counsel's Office, working with a variety of investigative agencies, will thoroughly delve into Mr. Scalia's taxes, finances, personal conduct, past entanglements in civil or criminal matters, and even potential health issues.

But while Mr. Scalia may well pass these tests, that is not enough, as these criteria are simply bare minimums. In addition to basic standards of professional competence and personal rectitude, a cabinet secretary should have a demonstrated history of commitment to the public interest broadly understood as well as the particular mission of the department he or she will be heading.

The DOL's statutorily-mandated mission is clear:

> The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.[56]

In furtherance of these goals, the DOL is responsible for administering and enforcing dozens of federal laws and thousands of regulations. Its constituent agencies and offices are charged with ensuring that workers and retirees receive a wide range of employment-related protections, including, but hardly limited to–

- Standards governing minimum wages, overtime pay, leave, and child labor, under the Fair Labor Standards Act and the Family and Medical Leave Act;
- Standards established to ensure that workers have safe and healthy working conditions, under the Occupational Health and Safety Act;
- Standards that protect the interests of employees and their beneficiaries in pension and retirement plans under the Employee Retirement Income Security Act of 1974.

[55] U.S. Const. Art. II, § 2.

[56] 29 U.S.C. § 551.

The relationship between employer and employee is among the most consequential in life, touching on every aspect of a person's well-being. From the moment they enter the labor force, nearly every American depends on the DOL to ensure that they receive fair wages as mandated by law, can count on a safe work environment, and benefit from other protections against mistreatment by employers. The dependence of American workers on the DOL does not end once they leave the labor force, as the DOL ensures that companies fairly administer their retirement and pension plans.[57] Moreover, the Secretary of Labor should be expected to be the voice of the American worker in the cabinet, where other cabinet members may head departments with missions that more closely aligned with that of business—for example the Secretary of Commerce.[58] In short, Congress envisioned the DOL as a much-needed and tireless advocate for the American worker, seeking "to foster, promote and develop the welfare of the wage earners of the United States."[59]

Mr. Scalia's legal career and the clients and causes he has chosen to serve raise serious questions regarding his commitment to, or experience in pursuing, these goals. Indeed, his career has been spent in service of protecting and advocating for the interests of big business and industry, particularly financial institutions, and against the interests of the American public and American worker. For example, as Secretary of Labor, Mr. Scalia would be expected to shepherd through strong rules that protect American workers and retirees, even though such rules might impose somewhat higher costs on businesses. Yet, Mr. Scalia has fought against such rules in the past. And as Secretary of Labor, Mr. Scalia would be expected to hold companies accountable for their misconduct and mistreatment of workers and retirees through strong enforcement of the law. Yet Mr. Scalia has sought to shield large companies from liability for their wrongdoing. Mr. Scalia has aggressively fought for business interests, but the question is whether or not he can take positions directly contrary to that track record and serve as an effective advocate for workers, retirees, and others.

[57] *See generally* About Us, Department of Labor website, https://www.dol.gov/general/aboutdol.

[58] Indeed, the Department of Commerce was originally created as the Department of Commerce and Labor in 1903, before the Department of Labor was split into a separate Department in 1913, an implicit recognition that the American workers deserved their own independent advocate.

[59] 29 U.S.C. § 551.

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