

# BETTER MARKETS

## – AN UPDATE ON SUPREME COURT CASES INVOLVING THE FINANCIAL AND ECONOMIC SECURITY AND PROSPERITY OF THE AMERICAN PEOPLE –

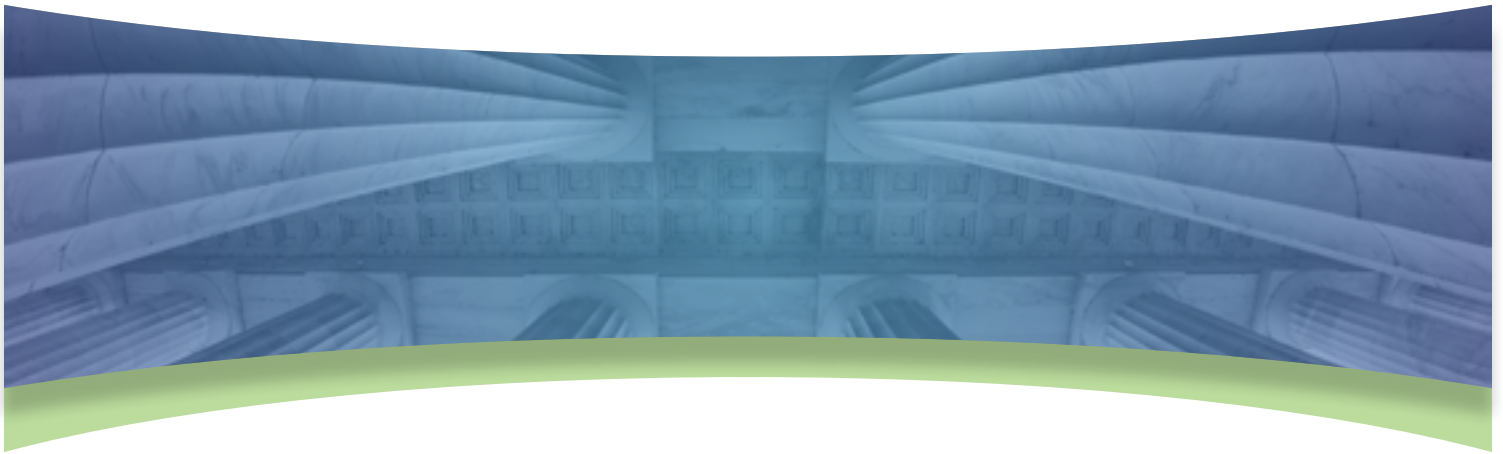
### A Report Card on the 2018-2019 Term and a Look Ahead to 2019-2020

In August last year, Better Markets issued a report titled “Justice Kavanaugh: Good for Corporations, Bad for Your Wallet” (“August Report”). In it, we highlighted the enormous influence of the Supreme Court in the financial lives of all Americans and we examined the alarming prospect of having then-judge Kavanaugh confirmed as a Supreme Court Justice. In the aftermath of the Court’s 2018-2019 term, and as the Court embarks on a new term, Better Markets has issued an update, one that reviews the Court’s most recent decisions on the economic and financial issues affecting all Americans, evaluates Justice Kavanaugh’s voting record in those cases, and looks ahead to review similar cases on the docket for the new term just getting underway.

The bottom line is that anyone who has a job, bank account, credit card, mortgage, car loan, student loan, retirement plan, brokerage account, or any other financial product or service—meaning every single American—should care about the Supreme Court’s decisions. Those cases determine whether the law is interpreted broadly to crack down on financial predators; whether the agencies who serve as the cops on the Wall Street beat will have the tools they need to police the financial markets effectively; and whether investors and consumers subjected to fraud and abuse will be allowed to seek justice in open court or instead forced into a shadowy and biased arbitration forum that offers paltry relief.

Sadly, this Court consistently favors businesses, financial firms, and others who seek to avoid accountability for their abusive practices over the interests of investors, consumers, workers, and retirees. During the October 2018-2019 term, the Court—

- Applied the securities laws broadly to hold an obviously culpable fraudster accountable, rejecting the evasive and technical statutory interpretations that would immunize many fraudulent actors seeking to exploit investors (*Lorenzo*);
- Ducked an opportunity to strengthen the protections against fraud in certain securities offerings by establishing a more realistic and less onerous intent standard, and even hinted that it might eliminate altogether the right of wronged investors to file private lawsuits seeking damages for such misconduct (*Varjabedian*);
- Sided with defendants seeking to minimize their liability by forcing lawsuits out of open court and into the murky, biased, and ineffective arbitration forum, and by limiting the ability of plaintiffs to efficiently band together in class arbitration where financial firms have engaged in widespread abuses (*Henry Schein and Lamps Plus*);



- Signaled that it would further impede access to justice by reaffirming the principle that to be heard in court, a plaintiff must first establish a specific concrete injury even where a statute clearly authorizes the plaintiff to file a lawsuit for violations of the law (*Frank*);
- Limited transparency by broadening the “commercial information” exemption in FOIA, thus making it easier for businesses and the government to shield financial information from public disclosure (*Food Marketing Institute*);
- Preserved but limited the well-established principle that courts should respect and defer to an agency’s interpretation of ambiguous rules, given their unique expertise in regulating industries and protecting the public—and in the process suggested that the Court will eventually do away with the *Auer* doctrine and give courts more leeway to substitute their judgement for that of regulators (*Kisor*).

In these cases and others, the Justices also displayed some of their fundamental differences in judicial philosophy, which often determines the outcome of a case and whether consumers and investors will be fairly compensated for fraud and abuse at the hands of financial firms or thrown out of court and deprived of a remedy. They show that when the Court stubbornly clings to a narrow, technical reading of a law and refuses to weigh its underlying purposes and evidence of Congressional intent, investors and consumers should hold on tight to their wallets.

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

Our report also reviews some of the financial regulation cases on the 2019-2020 docket, which will have an especially broad impact on the rights and remedies of retirement savers.

The upshot is clear: The Supreme Court and the Justices who serve on it are of immense consequence in the financial lives of every American. We should all be paying close attention.