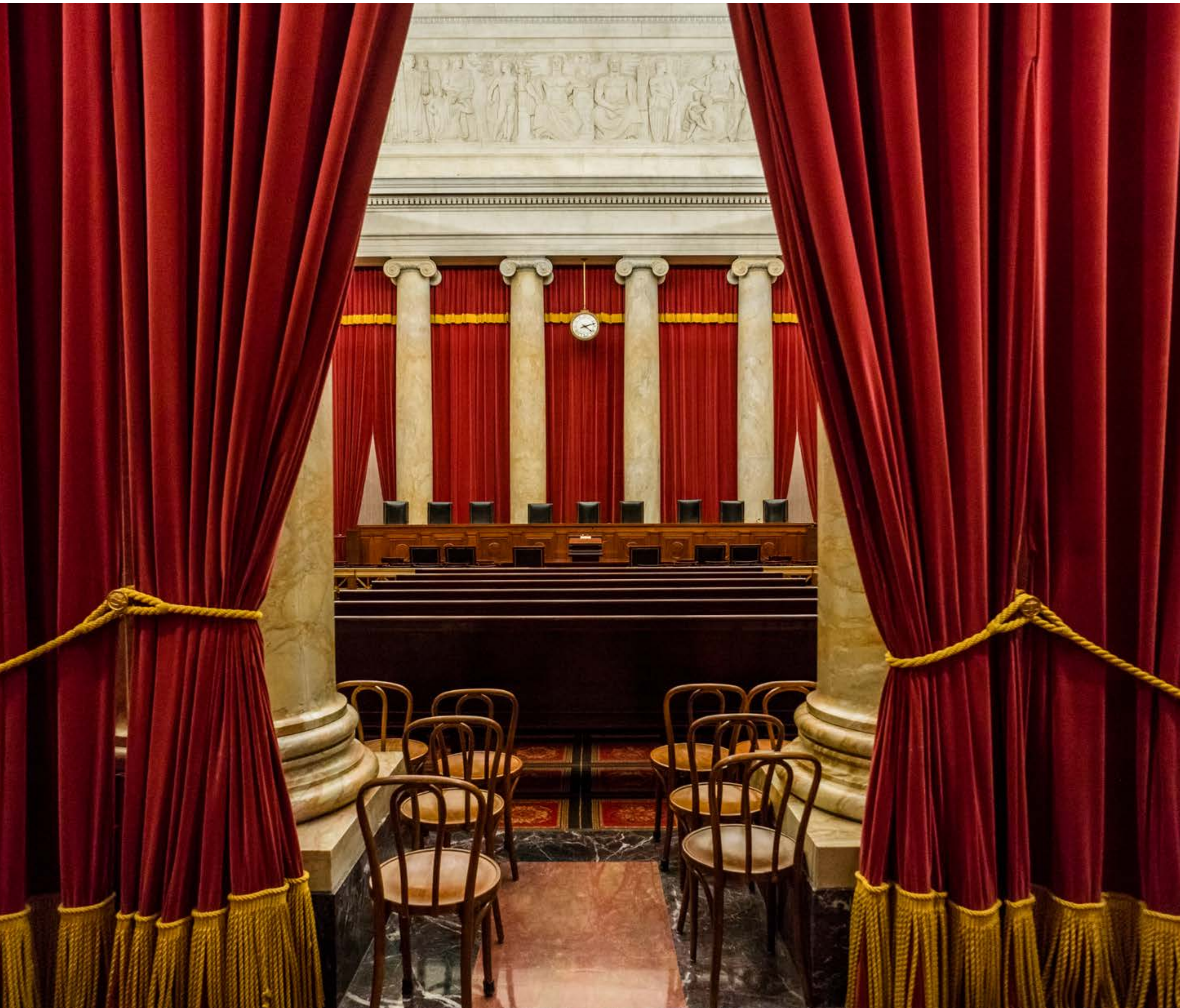
BETTER MARKETS

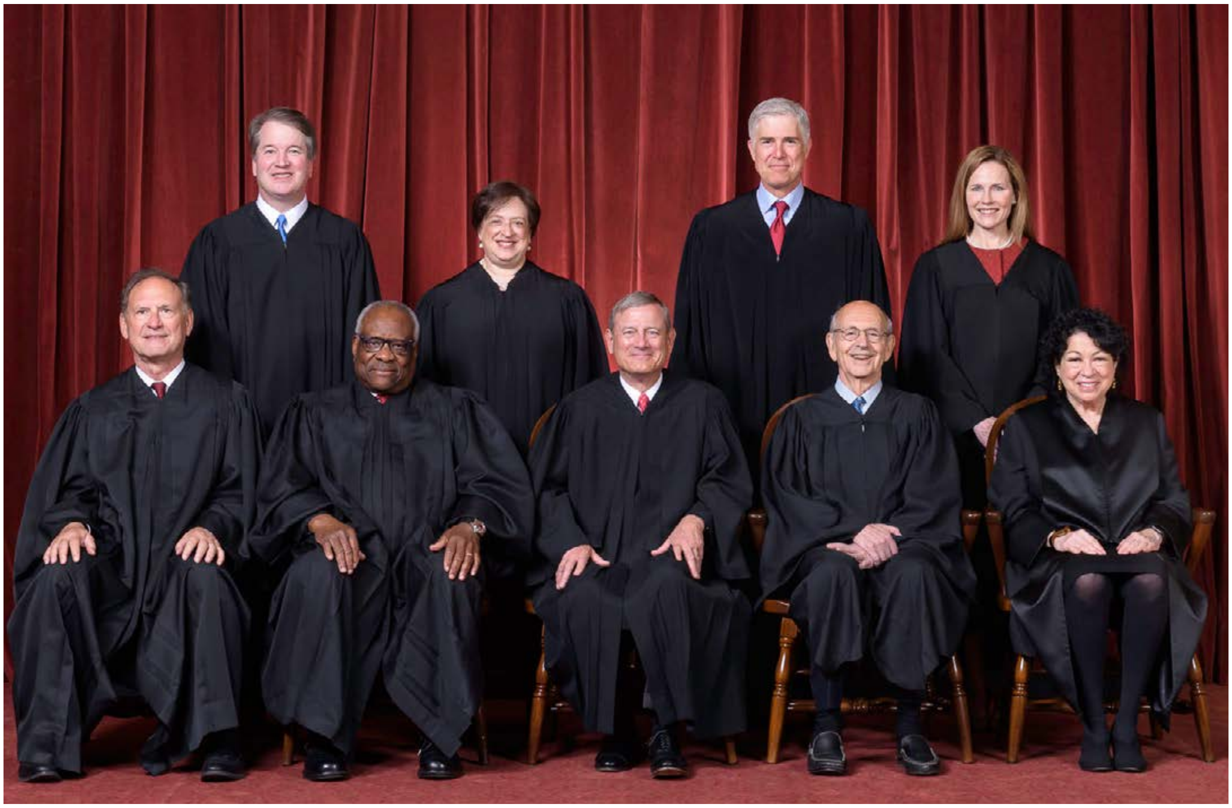
SPECIAL REPORT

OCTOBER 21, 2021

THE SUPREME COURT'S 2021-2022 TERM

A Review Of The Cases Affecting Every American's Financial Well-Being; A Look Back At Justice Kavanaugh's Track Record; And An Update On The Court's Transparency Challenges





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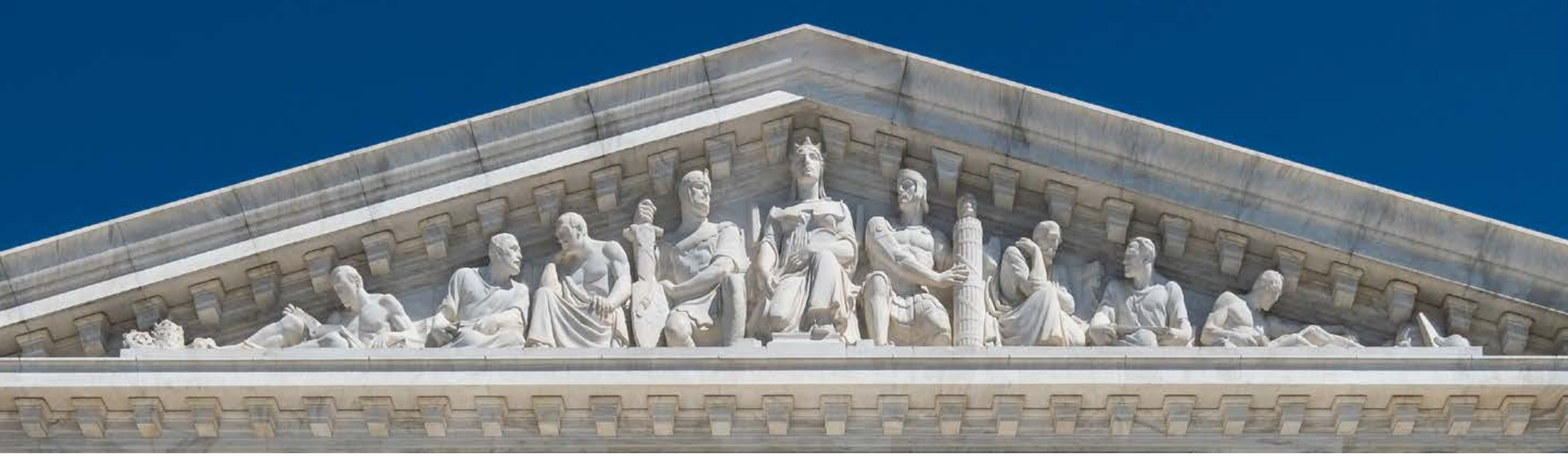
The Supreme Court

as Composed October 27, 2020 to Present

Front row, left to right: Associate Justice Samuel A. Alito, Jr., Associate Justice Clarence Thomas, Chief Justice John G. Roberts, Jr., Associate Justice Stephen G. Breyer, and Associate Justice Sonia Sotomayor. **Back row, left to right:** Associate Justice Brett M. Kavanaugh, Associate Justice Elena Kagan, Associate Justice Neil M. Gorsuch, and Associate Justice Amy Coney Barrett.



INTRODUCTION

On Monday, October 4, 2021, the Supreme Court embarked on what the New York Times has called a "momentous" new term.[1] In part, of course, that's because the Court has agreed to hear a number of cases that will have an unusually profound impact on controversial social policy questions: For example, are recent state-level attempts to effectively ban abortion constitutional; what is the scope of the right to carry guns in public; and where is the appropriate dividing line between church and state?

But the Court's docket is also significant because, as always, it includes cases addressing profoundly important financial and economic issues, those that directly affect the ability of every American to earn, save, invest, and spend their money without being victimized by predatory businesses and financial firms. These cases also have the potential to either erode or shore up the regulatory framework that helps stabilize our financial system and prevent financial crises like the one that overwhelmed our economy beginning in 2008. These are, in short, the cases that help determine how well Americans can meet their basic life needs, establish and maintain a decent standard of living, and pursue the American Dream.

These controversies call upon the Court to address issues such as the authority of the financial regulators to protect the public, the scope of the laws written to combat financial fraud and promote financial stability, and the seemingly technical yet often dispositive requirements of "standing." That Constitutionally rooted doctrine determines who can even set foot in a federal court to have their grievances heard. And this term, a number of the cases on the Court's docket will address the ability of investors, consumers, and small businesses wronged by predatory business practices to seek meaningful recovery in court, not just a token award from an arbitration panel in an amount that rarely comes close to full compensation for the damages sustained. These financial and economic cases have been the focus of Better Markets' Supreme Court coverage in a series of reports we have issued over the last several years.[2]

[1] Adam Liptak, *Abortion Leads Charged Docket in Court Return*, N.Y. Times (Oct. 4, 2021), https://www.nytimes.com/2021/10/03/us/politics/supreme-court-new-term.html.

[2] Better Markets, Special Report: The Supreme Court's 2020-2021 Term (Jul. 30, 2021), https://bettermarkets.org/wp-content/uploads/2021/09/BetterMarkets_Supreme_Court_Review_July2021.pdf; Better Markets, Special Report: Economic and Financial Issues Before the Supreme Court and the Impact of Judge Amy Coney Barrett (Oct. 8, 2020), https://bettermarkets.org/sites/default/files/images/BetterMarkets_Supreme_Court_Review_Oct2020.pdf; Better Markets, Special Report: An Update on Supreme Court Cases Involving the Financial and Economic Security and Prosperity of the American People (Oct. 4, 2019), https://bettermarkets.org/wp-content/uploads/2021/07/Better_Markets-Brett_Kavanaugh_Report_Oct-2019-003.pdf; Better Markets, Judge Kavanaugh: Good for Corporations, Bad for Your Wallet (Aug. 28, 2018), https://bettermarkets.org/analysis/kavanaugh-report/.

In our reports, we have also highlighted the importance of the Justices themselves, sounding alarms specifically about the nomination and confirmation of Justices Kavanaugh and Barrett, two demonstrably conservative and singularly pro-business additions to the Court. Our concerns have recently gained striking prominence with the unusual spate of public statements from a number of the Justices straining to dispel the notion that they render their decisions based on political or ideological preferences rather than different analytical approaches to the law—protests that strike some observers as simply confirming the point.[3]

And along with controversy about the ideological make-up of the Court comes renewed concern about its operational transparency. While the Court has made forward progress by continuing the pandemic-era practice of providing live audio streams of oral arguments, its "shadow docket" has received renewed and mounting criticism for generating important decisions on a rushed basis, without the benefit of full briefing and oral argument, and with meager explanations, if any.[4] Meanwhile, the "President's Commission on the Supreme Court of the United States" continues to hold meetings, gather testimony from a long list of Court experts, and assemble its report on possible Court reforms, which is due in mid-November.

In this Report, we continue our tradition of highlighting the importance of the Court's decisions, the ideologies of its Justices, and the transparency of its operations. Keying off of our July report, and with a consistent focus on issues in financial regulation and related areas, we examine the following topics:

I. **The Court's Role:** We review the types of financial issues brought before the Court that can make an enormous difference in Americans' economic lives, and we briefly revisit the unique aspects of the Supreme Court as an institution that make its decisions so consequential and lasting.

II. **The Cases:** We recap the Court's decisions on financial regulation from the prior term, showing the largely negative impact they had on regulators and investors; flag key cases the Court will decide in the months ahead; and list the noteworthy and still-pending petitions for certiorari ("cert.") that, if granted, will generate yet more important decisions in the realm of finance, economics, and administrative law.

III. **The Justices:** We look back on Justice Kavanaugh's votes and opinions in financial and economic cases, finding unfortunately that he has exhibited much of the pro-business, anti-consumer, and anti-agency slant we feared at the time of his nomination and confirmation to the Court.

IV. **The Transparency Challenges:** Finally, we briefly update some of the issues we raised in our July report concerning the transparency challenges the Court faces, with a focus on the "shadow docket" and its increasingly frequent role in generating rushed and opaque decisions on matters of enormous consequence.

[3] Adam Serwer, *By Attacking Me, Justice Alito Proved My Point*, The Atlantic (Oct. 12, 2021), https://www.theatlantic.com/ideas/archive/2021/10/alito-supreme-court-texas-abortion/620339/; Dahlia Lathwick, *The Broader Problem With Amy Coney Barrett Promising the Court Isn't Partisan*, Slate (Sept. 15, 2021), https://slate.com/news-and-politics/2021/09/amy-coney-barrett-nonpartisan-supreme-court.html; *cf.* Sara Burnett, *Clarence Thomas criticizes judges for veering into politics*, AP (Sept. 16, 2021) (citing Justice Thomas's criticism that some in the judiciary have veered into the role of legislators and politicians and his fear that the court may have become "the most dangerous" branch).

[4] *See, e.g.*, Claire Hanson, *Supreme Court Order on Texas Abortion Ban Puts "Shadow Docket" in the Spotlight*, U.S. News (Sept. 3, 2021).

ANALYSIS

I. THE COURT'S ROLE — A Brief Reminder About The Enormous Importance Of The Court's Decisions In Americans' Financial And Economic Lives.

Although they may draw less attention than the headline-grabbing cases about abortion, gun rights, and immigration, the cases on the Supreme Court's docket addressing financial regulation and Americans' economic rights and remedies are fundamental to the quality of life we can attain. 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, rules, and other actions 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 persuade a federal court to entertain their grievances?
- What standards of care and loyalty should govern those retirement plan administrators 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.

And there's more to it than the inherent importance of the issues the Court decides. The Court is the last stop in the judicial process and its decisions are final. In addition, the Court's decisions are national in scope and they endure for decades, unless Congress intervenes on a matter not governed by the Constitution or until the Court has the occasion and the inclination to overrule one of its prior decisions. But that is a rare occurrence under the doctrine of stare decisis, which, at least until today, has long obligated the Court to "stand by things decided" absent the most compelling reasons.

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. THE CASES — Key Decisions From The Last Term; Important Merits Cases To Be Decided This Term; And Pending Petitions For Cert.

A. <u>Key Decisions From The Last Term</u>

During its previous term, from October 2020 to July 2021, 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; the level of deference that courts owe to agency rules; the ability of investors to seek remedies in court as opposed to a biased and secretive arbitration forum; the doctrine of standing, which determines who can seek relief in a federal court; the validity of bailout measures necessitated by the 2008 financial crisis; and requirements governing class action lawsuits, the only vehicle that can afford meaningful relief to a large group of fraud victims. Below is a brief look at several of these important decisions. More detail about each one of these cases can be found in our July Report.

In sum, the Court produced mixed but largely negative results with respect to financial regulation, administrative law, and standing. In terms of setbacks, the Court—

- took a very effective enforcement tool—disgorgement or restitution—out of the hands of the Federal Trade Commission, reducing the likelihood of recovery for victims of fraud (*AMG Capital Management, LLC v. FTC*);
- opened the door for banks and other financial firms to argue that their fraudulent statements were too "generic" to have mattered to investors (*Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*);
- held that even where Congress has expressly created a private right to sue for statutory violations, plaintiffs must still separately satisfy the standing requirements to a court's satisfaction, thwarting Congress's intent to facilitate private enforcement of the law (*TransUnion LLC v. Ramirez*);
- affirmed the Federal Communications Commission's decision to repeal rules that help ensure minority and female ownership of media outlets (*FCC v. Prometheus Radio Project*);
- held that the structure of the Federal Housing Finance Agency was unconstitutional (while fortunately limiting the remedy and refusing to invalidate important crisis-era bail-out agreements the agency had struck) (*Collins v. Yellen*);

On the more positive side, the Court—

- left intact a Fifth Circuit decision that protects the role of the courts in deciding whether disputes must go to arbitration as a threshold matter (*Henry Schein, Inc. v. Archer & White Sales, Inc.*); and

- invoked the doctrine of standing—too often used to exclude meritorious claims from the federal courts—to end another attempt to invalidate the Affordable Care Act (*California v. Texas*).

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 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 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 disgorgement or restitution. 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).

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 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. 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.

2. **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 financial 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 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 that 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 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. To beat back the shareholders' case, defeat the presumption of reliance, and prevent class certification, 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 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. In an opinion written by Justice Barrett, the Supreme Court **first** held 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."[5] 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. **Second**, the Court held squarely in favor of the plaintiffs on the issue of evidentiary burdens. 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.'"[6] 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. The case generated a number of concurring and dissenting views.

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. This outcome is particularly lamentable, since as we argued in our Amicus brief,[7] given

[5] *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. at 1958.

[6] *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. at 1959.

[7] Better Markets, *Better Markets Supports Goldman's Shareholders In Supreme Court Amicus Brief* (March 25, 2021), https://bettermarkets.org/newsroom/better-markets-supports-goldman-s-shareholders-supreme-court-amicus-brief/.

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.[8] After all, that presumably was Goldman's intent in making the statements to investors in the first place. Thus, the issue of price impact should have been put to rest without further ado.

Second, 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. 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. Further encumbering an already difficult process with new defensive footholds represents an unwarranted setback for class actions. **Finally,** the Court's holding will also 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.

3. **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. Among other things, it requires those agencies to take reasonable steps to ensure the accuracy of the information they collect on consumers and to provide clear disclosure 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. 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 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 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 credit for appearing to be a potential terrorist. Ramirez exercised his statutory right to sue TransUnion over a number of related violations and assembled a class of plaintiffs. 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

[8] 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.

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. Justice Kavanaugh declared 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 under Article III"—in short advancing 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."[9] 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.

In a strong dissent, Justice Thomas, joined by Justices Breyer, Sotomayor, and Kagan, challenged 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 cited 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." [10]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.

Why It Matters. As shown by this decision, the standing requirement can allow even clear and widespread violations of law to go without redress. 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, TransUnion "may well be in a position to keep much of its ill-gotten gains," thanks to the Court's decision.[11] The standing requirement already prevents much litigation in the public interest, because even if a defendant's conduct inflicts or threaten 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 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 develop such policy solutions, offending the separation of powers doctrine and undermining the ability of countless individuals to seek redress in court.

[9] *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2205.

[10] *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2218.

[11] *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2224.

4. **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 market. In a 2017 order, 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 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.[12] 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.[13]

Why It Matters. The decision is important on at least two levels. **First**, of course, it means that the FCC's rule changes are 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, "[t]he APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies."[14] 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 embrace and apply them evenhandedly in all cases, or only when it suits their ideological objectives and preferred outcomes.

[12] *Federal Communications Commission v. Prometheus Radio Project*, 141 S. Ct. at 1159.

[13] *Federal Communications Commission v. Prometheus Radio Project*, 141 S. Ct. at 1158.

[14] *Federal Communications Commission v. Prometheus Radio Project*, 141 S. Ct. at 1158.

5. CHALLENGE TO AGENCY STRUCTURE – *Collins v. Yellen*, 141 S. Ct. 1761 (decided June 23, 2021) – The Court holds that the removal restrictions protecting the FHFA director are unconstitutional but also narrows the remedy.

Background. During the 2008 financial crisis, two pillars of the U.S. housing finance market, Fannie Mae and Freddie Mac ("GSEs"), 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.[15]

In September of 2008, FHFA became the conservator for the GSEs, which were in dire financial straits, and on their behalf negotiated a series of agreements with Treasury so they could secure massive infusions of capital, totaling nearly $200 billion. 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.

The disgruntled shareholders of the entities complained that the Agreement deprived them of economic benefits and 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. The case found its way to the Supreme Court.

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 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 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 they could continue operations and serve "the best interests of members of the public who rely on a stable secondary mortgage market."[16]

Second, 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

[15] *See* 12 U.S.C. § 4617(f).

[16] *Collins v. Yellen*, 141 S. Ct. at 1777.

Seila Law, which similarly declared the structure of the CFPB unconstitutional.[17] 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.

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, and protection from court challenges, so that it could effectively oversee the GSEs and shepherd them through a financial crisis of historic proportions. **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. **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 did not expire until 2024.

6. **ARBITRATION AND THE ROLE OF THE COURTS – *Henry Schein, Inc. v. Archer & 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. 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 unfortunately rejected the "wholly groundless" exception to forced arbitration.[18] 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

[17] *Collins v. Yellen*, 141 S. Ct. at 1784.

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

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. On remand, and based on the carve-out for claims seeking injunctive relief, the Fifth Circuit did indeed determine **first** that the issue of arbitrability was for the court to decide, since the parties had not "clearly and unmistakably provide[d] otherwise," and **second**, that the district had correctly concluded the dispute was not subject to arbitration since it involved injunctive relief.

The case returned to the Supreme Court, but after it 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 on January 25, 2021, the Court simply stated that "The writ of certiorari is dismissed as improvidently granted,"[19] without further explanation.

<u>Why It Matters</u>. The Court's dismissal of the case leaves intact the Fifth Circuit's ruling, which provides some protection for parties seeking to avoid the biased, unfair, secretive, and unaccountable arbitration process. The Fifth Circuit decision reaffirms the ability of courts to at least determine the threshold question of arbitrability unless an agreement between the parties "clearly and unmistakably" delegates that issue to an arbitrator.

7. **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.**

<u>Background</u>. In the Affordable Care Act ("ACA"), Congress imposed an individual mandate, which required individuals to either obtain health insurance coverage or pay a "shared responsibility payment." In a prior case, *National Federation of Independent Business v. Sebelius*,[20] the Supreme Court 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 essentially affirmed and the states seeking to defend the ACA petitioned for cert. and the Court took the case.

<u>The Decision</u>. In an opinion written by Justice Breyer, the Supreme Court held that the plaintiffs lacked standing to attack the minimum coverage provision and it vacated the Fifth Circuit's judgment. Under Article III of the Constitution, as interpreted by the Court, those bringing claims in federal court

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

[20] 132 S. Ct. 2566, 2600 (2012).

carry a substantial burden and must show that the action they challenge 1) threatens them with a concrete "injury" 2) that is caused by or "fairly traceable" to the challenged conduct, and 3) that is likely to be "redressed" by a favorable judicial decision.[21] The Court rejected all of the plaintiffs' standing arguments.

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, observing 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 they attribute to [the mandate]."[22] 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. 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. 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.

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 go to federal court to 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. A lingering concern among Court watchers is that in futures cases, the Court may adopt ideological readings of the law on standing to achieve outcomes that are not aligned with the broader public interest—that when faced with plaintiffs fighting for consumers and investors, the conservative majority will re-calibrate its approach to standing to short circuit their claims and toss them out of court.

B. Important Cases In Financial Regulation To Be Decided This Term.

This term, the Court has agreed to hear three important cases in the areas of arbitration, administrative law, and financial regulation. Specifically, they address the federal courts' authority to entertain challenges to arbitration awards; the degree of deference that courts owe to agency rules and decisions; and the pleading requirements facing plaintiffs who allege that their retirement plan administrators have allowed overpriced and poor-performing investments to remain among their plan options.

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

[22] *California v. Texas*, 141 S. Ct. at 2114.

1. **SUBJECT MATTER JURISDICTION FOR CONFIRMATION OF ARBITRATION AWARDS – *Badgerow v. Walters*, 975 F.3d 469 (5th Cir. 2020) (S. Ct. Docket No. 20-1143) (oral argument set for November 2, 2021) – Which courts (state or federal) have jurisdiction when parties seek to vacate or confirm an arbitration award?**

Background. In *Badgerow v. Walters*, the plaintiff, Denise Badgerow, was a financial advisor who was terminated after raising concerns about workplace harassment and reporting violations of the federal securities laws, SEC regulations, and FINRA rules to her employer. Subject to an agreement requiring FINRA arbitration of any claims arising from her employment, she initiated arbitration asserting violations of state and federal rules and statutes. That arbitration complaint was subsequently dismissed with prejudice by the arbitration panel. Badgerow then filed suit in Louisiana state court seeking to vacate the arbitration decision on the ground that it was procured by fraud. Her employer removed the case to federal court and moved to confirm the arbitration panel's dismissal. Badgerow then moved to remand the case back to state court for lack of subject matter jurisdiction in the federal court.

The Lower Court Decisions. In a previous case, *Vaden v. Discover Bank*, 556 U.S. 49 (2009), the Supreme Court held that a federal court, in determining whether it has subject matter jurisdiction to review a petition to *compel* arbitration under Section 4 of the Federal Arbitration Act ("FAA"), may "look through" the petition to decide whether the parties' underlying dispute gives rise to federal question jurisdiction. In so holding, the Court focused on the particular language of Section 4, which is not repeated elsewhere in the Act. After *Vaden*, a circuit split arose over whether the same "look-through" approach that applies to motions to compel arbitration also applies to motions to *confirm* or *vacate* an arbitration award under Sections 9 and 10 of the FAA. In 2020, in the case of *Quezada v. Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837 (5th Cir. 2020), a divided panel of the Fifth Circuit held that the "look-through" approach applies under Sections 9 and 10. After examining the circuit split, the Fifth Circuit agreed with those courts that applied the "look-through" approach to establish jurisdiction because "'[t]he [FAA] was enacted as a single, comprehensive statutory scheme,'" and "this principle of uniformity dictates using the same approach for determining jurisdiction under each section of the statute"—even if each provision uses different language.[23] When Badgerow appealed her case to the Fifth Circuit, it declared itself "bound" by its earlier decision in *Quezada*.[24]

Badgerow then filed a petition for cert. arguing that federal courts should not take a unique clause in Section 4 of the FAA and judicially write it into other sections where Congress did not see fit to place it. Without applying the "look-through" rule, a federal court would lack subject matter jurisdiction over Badgerow's attempt to vacate the arbitration award or the firms' attempt to confirm the award, and her claim would remain in state court as she intended.

Why It Matters. As we have pointed out, mandatory arbitration is typically an unfair method of dispute resolution for consumers, employees, and other individuals.[25] Arbitration panels are biased in favor of the big companies that are repeat players in the process. There is also little real accountability, as written opinions fully explaining panel decisions are rare, awards are typically not made public, and there is very limited opportunity for an appeal, even in cases where the panel obviously got it wrong. Yet, any individual hoping to challenge any aspect of forced arbitration in federal court is likely to be out of luck, as a series of Supreme Court decisions interpreting the FAA requires that

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[23] *Quezada v. Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d at 842.

[24] *Badgerow v. Walters*, 975 F.3d at 474.

[25] Better Markets Blog, Forced Arbitration: Taking Away Your Rights and Your Money (June 11, 2019), https://bettermarkets.org/newsroom/forced-arbitration-taking-away-your-rights-and-your-money/.

federal courts be extremely deferential to arbitration. Thus, individuals like Badgerow may view the state court forum as more hospitable to claims seeking to challenge and vacate an arbitration award. If large financial firms are able to remove even more cases concerning arbitration, like Badgerow's, to the arbitration-friendly forum of federal court, it will be even more difficult to challenge the unfair, biased decisions of arbitration panels.

2. **CHEVRON DEFERENCE – *American Hospital Assoc. v. Becerra,* 967 F.3d 818 (2020) (S. Ct. Docket No. 20-1114) (oral argument set for November 30, 2021) – How much deference will the Court afford to an agency's interpretation of the law?**

Background. As part of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Congress expanded Medicare by providing that hospitals would be separately reimbursed for certain outpatient drugs and setting forth a methodology for deciding the amount of that reimbursement in statute. The reimbursement rate was set based on one of two alternative payment methodologies. If the Department of Health and Human Services ("HHS") has collected certain "hospital acquisition cost survey data," HHS sets the reimbursement rate equal to the "average acquisition cost for the drug," and "may vary" that rate "by hospital group."[26] If HHS has not collected the "hospital acquisition cost data," it must set a reimbursement rate equal to the "average price for the drug," which is "calculated and adjusted by [HHS] as necessary for purposes of this paragraph." Prior to 2018, HHS did not have acquisition cost survey data, so it used the average price formula.[27]

In 2018, under its authority to vary the rate of its reimbursements "by hospital group," HHS began reimbursing most so-called "Section 340B hospitals," whose mission is to provide care to impoverished and underserved communities, at a reduced rate, because those hospitals pay substantially less for drugs than other hospitals. According to the D.C. Circuit, prior to the HHS reduction in reimbursement rates for Section 340B hospitals, the higher reimbursement meant that some customers of those hospitals (often underserved individuals) ended up paying higher out-of-pocket costs for drugs, in some cases paying more than it cost the hospital to obtain the drug.[28] HHS's change ultimately cut reimbursement to those hospitals by 28.5% and imposed upon them a $1.6 billion annual revenue loss.[29]

The Lower Court Decisions. The plaintiffs, including hospitals and hospital associations, filed suit in the Federal District Court for the District of Columbia, which agreed that HHS's actions amounted to an administrative repeal of the express limitations Congress imposed on HHS's authority. A split panel of the D.C. Circuit Court reversed. While all three judges agreed that judicial review of HHS's "adjustments" was not precluded by 42 U.S.C. 1395l(t)(12), the majority nevertheless decided that the HHS's statutory authority to make adjustments to reimbursements was ambiguous and, in light of the extensive justifications offered by HHS for the rate cut, deferred to HHS's decision to adjust the rate, all in accordance with *Chevron*.[30]

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[26] 2 U.S.C. 1395l(t)(14)(A)(iii)(I).

[27] *American Hospital Assoc. v. Becerra*, 967 F.3d at 821.

[28] *American Hospital Assoc. v. Becerra*, 967 F.3d at 829.

[29] *American Hospital Assoc. v. Becerra*, 967 F.3d at 821-22.

[30] In her dissent, Judge Pillard decried the ultimate impact of the agency's approach (and the panel's decision): "The net effect of HHS's 2018 and 2019 OPPS rules is to redistribute funds from financially strapped, public and nonprofit safety-net hospitals serving vulnerable populations—including patients without any insurance at all—to facilities and individuals who are relatively better off." *American Hospital Assoc. v. Becerra,* 967 F.3d at 840.

Why It Matters. The outcome of this case is of most direct concern to the hospitals whose bottom line is affected by how much Medicare reimbursement they receive for drugs, the Medicare administrators trying to prevent waste of taxpayer dollars, and the customers who may have to pay more or less for drugs as a result of the decision. However, for those concerned about financial regulation and the Supreme Court's approach to statutory interpretation and *Chevron* deference, the implications are broader, if less obvious.

Under *Chevron*, a court first asks whether "Congress has directly spoken to the precise question at issue."[31] And, if the statute does not foreclose the agency's understanding, then the court defers to the agency's reasonable interpretation of the law.[32] In this case, the essential dispute centered on whether the statute actually gave HHS the leeway to adopt the reimbursement formula in dispute, or whether Congress had foreclosed that approach. Therefore, the Supreme Court's decision should at a minimum shed light on how the Justices interpret the law and to what extent they weigh not only the literal wording of the statute and its overall framework but also its underlying purposes.

And if the Court finds that Congress did leave room for HHS's reading of the law, then it will have to assess the reasonableness of HHS's approach and determine how much deference to afford the agency's choices. On those issues, we may gain further insight into the Justices current thinking about the *Chevron* deference doctrine. We can expect to see some Justices, notably Kavanaugh and Goresuch, rail against that long-standing principle of administrative law, portraying it as an indefensible element of the "administrative state" and an usurpation of legislative authority.

In reality, *Chevron* deference is an important and valuable principle governing judicial review of agency rules and decisions. In the modern, complex world, expert regulators responsible for implementing often ambiguous statutory text need a certain degree of flexibility to properly do their jobs. Moreover, regulators are in a better position than courts to make the complex policy decisions and tradeoffs that are required to regulate in highly complex, technical fields such as finance. If courts begin to second guess the policy choices made by regulators with significant technical expertise, largely on the basis of briefs written by armies of high paid corporate lawyers, it will become more difficult for regulators to act in the public interest. They will be more inclined to temper their regulatory approach in favor of industry in hopes of more successfully navigating the judicial review process. And where they nevertheless adhere to the public interest, they face a greater chance of judicial second-guessing and nullification of their rules.

3. **ERISA LIABILITY FOR MISMANAGMENT OF DEFINED CONTRIBUTION PLANS – *Hughes v Northwestern University*, 953 F.3d 980 (2020) (S. Ct. Docket No. 19-1401) (oral argument set for December 6, 2021) – Will retirement savers be able to move forward with their claims that retirement plan fiduciaries breached their fiduciary duties by offering a confusing array of overpriced and underperforming investment options?**

Background. The Employee Retirement Income Security Act of 1974 ("ERISA") is the primary law enacted to help ensure that those who administer retirement plans act solely in the interest of the plan participants and beneficiaries. Among the fiduciary duties it imposes is the duty of prudence, and specifically the duty to monitor plan investment options and remove those that do not serve the interests of the participants and beneficiaries.

[31] *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 104 S. Ct. 2778.

[32] *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 104 S. Ct. 2778.

In this case, the plaintiffs were participants in a defined contribution plan established by Northwestern University, the administrator and fiduciary of the plan. They alleged breach of the administrators' fiduciary duty of prudence because the plan included a dizzying array of investment funds—hundreds in fact—some of which carried excessive recordkeeping and management fees. They alleged that the administrator failed adequately to monitor the investments and remove those that eroded more of the participants' retirement savings.

The Lower Court Decisions. The District Court dismissed the plaintiffs' lawsuit for failing to state a claim. The Seventh Circuit affirmed, largely on the ground that the plan included at least some prudent selections among its hundreds of options, thus excusing the alleged dereliction of duty. According to the Seventh Circuit, Northwestern did not breach its fiduciary duty by offering its beneficiaries poor-performing and expensive investment options, because it also offered its beneficiaries investment options that were better on both counts.[33] The Seventh Circuit also misapplied the applicable pleading standard, drawing inferences in favor of the defendants and accepting their explanations for their choices—even though, at the motion to dismiss stage, all of the allegations of the plaintiff are to be accepted as true and all inferences are to be drawn in the plaintiff's favor. It will be up to the Supreme Court to decide whether allegations that a defined-contribution retirement plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence under ERISA.

Why It Matters. At stake in *Hughes* is the ability of retirement savers to protect their hard-earned money from mismanagement by plan fiduciaries that include overpriced and underperforming investment options in their retirement plans. As we pointed out in the joint amicus brief we filed in this case,[34] an administrator does not meet the stringent fiduciary standard by simply offering up a huge variety of options and leaving it to the participants (who will almost always lack the financial sophistication and expertise of the financial professionals who administer ERISA plans) to fend for themselves in trying to avoid the many expensive and poorly performing choices. The Seventh Circuit's reasoning introduces an element of *caveat emptor* to ERISA plans that Congress specifically intended to eliminate—retirement plan participants and beneficiaries are entitled to have a fiduciary safeguard their assets and protect them from expensive and substandard investments that will siphon off their retirement savings.

The data shows that such costly investments, even with seemingly modest excessive fee rates, can dramatically reduce retirement savings over the long term. The evidence also shows that private lawsuits, expressly authorized under ERISA, have proven to be an effective means of curbing such fiduciary breaches and bringing fees down across the industry. If the Supreme Court affirms dismissal of the complaint in this case, these particular victims of fiduciary misconduct will suffer irreparable harm; and more broadly, other retirement plan participants sustaining similar forms of harm will have higher hurdles to overcome to obtain relief. Such an outcome would also relax the incentives that fiduciaries need to ensure compliance with the high fiduciary standard embodied in ERISA.[35]

[33] *See Hughes v Northwestern University*, 953 F.3d at 988 ("Assuming plaintiffs' allegations are true, they fail to show an ERISA violation. Under the plans, no participant was required to invest in the Stock Account or any other TIAA product. Any participant could avoid what plaintiffs consider to be the problems with those products (excessive recordkeeping fees and underperformance) simply by choosing from hundreds of other options within a multi-tiered offering system.")

[34] https://bettermarkets.org/newsroom/better-markets-joins-amicus-brief-urging-us-supreme-court-help-protect-americans-retirement/.

[35] On the Court's docket is another case of importance in financial regulation, specifically addressing the rules governing class actions for violations of the securities laws. *Pivotal Softward v. Tran*, No. 20-1541. 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

C. Pending Petitions For Cert.

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. 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, the Court ultimately reviews the merits of only the most important cases involving the most problematic decisions from the lower courts.

Below are the pending petitions for cert. in financial regulation, administrative law, and related areas. The Court will ultimately decide which ones to accept and which to deny. As the term unfolds, the Court will also undoubtedly entertain other petitions for cert., and some of those cases will likely center on financial regulation.

1. Spotlight On Arbitration

The Court's docket typically features a large number of petitions for cert. and merits cases involving mandatory arbitration. That is certainly true this term. They arise as consumers and investors who have suffered harm at the hands of unscrupulous firms struggle to find legal avenues that would free them from the ubiquitous fine-print forms depriving them of the right to bring their claims in court and forcing them into a biased and secretive arbitration forum. Since the 1980s, the Court has displayed an infatuation with arbitration and has steadily expanded the scope of the Federal Arbitration Act far beyond the original intent of that 1925 law. A review issued by the American Constitution Society ("ACS") aptly frames the point:

> The last few decades of the FAA's development in the Supreme Court can be characterized as an absurd, pro-arbitration lovefest. The Court's interpretations of the FAA since the 1980s generally have no basis in the history or text of the statute, and are instead motivated by the Court's wholly manufactured strong federal interest in favor of arbitration and docket-clearing.[36]

This characterization is certainly true in the area of securities regulation. In a pair of decisions dating back to 1987 and 1989, the Court made clear that disputes arising under the 1934 Exchange Act and the 1933 Securities Act could be forced into arbitration.[37] In so doing, the Court swept aside explicit provisions in those statues voiding any "condition, stipulation, or provision" purporting to waive compliance with those laws or any rules thereunder.[38] Since then, the Court has steadily expanded the scope of mandatory arbitration in securities cases and other areas, allowing it to extinguish class actions and class arbitrations; stretching it beyond contract disputes to statutory and other types of

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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. The case is being held in abeyance, apparently in anticipation of settlement, according this September 2 docket entry: "The case is removed from the argument calendar for Tuesday, November 9, 2021, and the briefing schedule is held in abeyance. The parties are directed to provide further updates to the Court concerning settlement proceedings."

[36] Imre S. Szalai, *The Supreme Court's Arbitration Docket*, Am. Const. Soc. (last accessed Oct. 14, 2021), https://www.acslaw.org/analysis/acs-supreme-court-review/the-supreme-courts-arbitration-docket/.

[37] *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriquez de Quijas v. Shearson/American Express Inc*., 490 U.S. 477 (1989).

[38] 15 U.S.C. § 78cc(a); 15 U.S.C. § 77n.

claims; and expanding its preemptive effect on state law. As Justice O'Connor declared decades ago: "The Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."[39]

The flaws in the typical arbitration system are abundant. It has simply failed to fulfill its promised role as a fair, expedient, and inexpensive method of redress. On the contrary, through the common use of fine-print contracts, it is sprung on unsuspecting investors who in any case have no bargaining power to contest such clauses. It is unfairly skewed toward firms, as panels tend to favor industry. And even a "win" for the investor typically means a monetary award that falls well short of investor harms and attorneys' fees. Some forms of damages available in court are in fact precluded in arbitration. The process also suffers from a lack of transparency. Typically, there's limited discovery so it's hard for consumers to pry key evidence loose from the firms. Furthermore, there is no publicly issued award explaining the outcome to serve as a guide for other investors and a deterrent against further abuses.

The arbitration process also deprives investors of a meaningful right of appeal. In court, if the judge errs, an appeal is available to challenge the lower court's ruling, including its findings of fact and conclusions of law. However, under the Federal Arbitration Act, arbitrations may only be overturned in the rare case where an investor can show, for example, that corruption, misconduct, or a material "miscalculation of figures" occurred. By contrast, mistakes of law— even egregious ones—are not among the enumerated grounds for appealing an arbitration award. Finally, arbitration does not actually provide investors with the often-touted benefit of an "inexpensive" forum for dispute resolution. Firms are invariably represented by seasoned attorneys, forcing investors to retain their own experienced counsel and incur substantial expense.[40]

The scope of the harm is astonishing. Again, the ACS review aptly describes the pervasive use of mandatory arbitration provisions affecting millions of Americans and virtually very law in the country:

> America's system of private arbitration now involves more than sixty million American workers and more than 826 million consumer arbitration agreements (more than every man, woman, and child in America), and more than eighty percent of America's largest companies have used arbitration for consumer and employment disputes in recent years. With this expansive system of arbitration currently in place and the willingness of courts to compel arbitration where meaningful consent is lacking, corporate America and parties with disproportionate bargaining power can unilaterally and easily remove themselves from the traditional justice system through the use of arbitration clauses. The average person in America has lost access to the courthouse, and in its place, a virtually unregulated, unreviewable, expansive system of privatized justice now exists.[41]

[39] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[40] Better Markets, *The Dirty Dozen: Why Mandatory Arbitration Is Unfair* (Oct. 11, 2017), https://bettermarkets.org/newsroom/dirty-dozen-why-mandatory-arbitration-unfair-0/.

[41] Imre S. Szalai, *The Supreme Court's Arbitration Docket*, Am. Const. Soc. (last accessed Oct. 14, 2021), https://www.acslaw.org/analysis/acs-supreme-court-review/the-supreme-courts-arbitration-docket/.

With this background in mind, we list the numerous petitions for cert. now before the Court involving arbitration issues, followed by snapshots of other petitions for cert. presenting a variety of legal questions in the area of financial regulation that the Court may agree to hear:[42]

- *Branch Banking & Trust Company v. Sevier County Schools Federal Credit Union*, No. 21-365 - Whether the Federal Arbitration Act displaces a state common-law rule forbidding companies from adding an arbitration requirement to their standard form contract with customers unless the contract already includes a dispute-resolution clause.
- *Fast Auto Loans v. Maldonado*, No. 21-31 - Whether California's McGill rule, under which agreements for individualized arbitration are invalidated when a plaintiff seeks public injunctive relief, is preempted by the Federal Arbitration Act.
- *Morgan v. Sundance*, No. 21-328 - Whether the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violates the Supreme Court's instruction in *AT&T Mobility LLC v. Concepcion* that lower courts must "place arbitration agreements on an equal footing with other contracts."
- *NC Financial Solutions of Utah, LLC v. Virginia*, No. 21-111 - Whether a state attorney general who is not a signatory to an arbitration agreement may bring claims that are covered by the agreement and seek individualized relief on those claims on behalf of persons who are signatories to the agreement and thus would be required to arbitrate if they brought those claims themselves.
- *Postmates, LLC v. Rimler*, No. 21-119; *Postmates, LLC v. Santana*, No. 21-420; and *Uber Technologies v. Gregg*, No. 21-453 - Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under the California Labor Code Private Attorneys General Act.
- *Robertson v. Intratek Computer*, No. 20-1229 - (1) Whether mandatory compelled arbitration of claims under 41 U.S.C. § 4712 disrupts the administrative scheme set up by Congress to remedy and enforce violations of 41 U.S.C. § 4712; and (2) whether Congress intended to prohibit enforcement of mandatory employment arbitration agreements in 41 U.S.C. § 4712, even if the statute does not expressly refer to arbitration, when it (a) expressly provided for a federal trial in the remedy and enforcement section and (b) expressly prohibited waiver of any rights and remedies provided as a condition of employment.
- *SNH SE Ashley River Tenant, LLC v. Arredondo*, No. 21-196 - Whether the Federal Arbitration Act preempts the South Carolina Supreme Court's arbitration-specific approach to construing comprehensive powers of attorney to preclude an agent's power to agree to arbitrate future claims.

2. The Scope Of The SEC's Authority

- *Alpine Securities Corp. v. Securities and Exchange Commission*, No. 21-82 - Whether the Security and Exchange Commission's assertion of independent authority to interpret and enforce the Bank Secrecy Act contravenes Congress's decision to entrust enforcement of the Bank Secrecy Act's comprehensive anti-money-laundering regime to the Treasury Department, a politically accountable executive agency.

[42] The short summaries of the pending petitions for cert. in this section of our Report are drawn from SCOTUSblog, www.scotusblog.com, a very valuable resource on the Supreme Court.

3. Agency Structure

- *Axon Enterprise v. Federal Trade Commission,* No. 21-86 - (1) Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the Commission's cease-and desist orders; and (2) whether, on the merits, the structure of the Federal Trade Commission, including the dual-layer for-cause removal protections afforded its administrative law judges, is consistent with the Constitution.

4. Class Actions

- *Central Payment Co., LLC v. Custom Hair Designs by Sandy*, *LLC,* No. 21-51 - Whether a class may be certified under Rule 23 of the Federal Rules of Civil Procedure when the class claims turn on materially different contractual rights and obligations between the defendant and each class member.

5. ERISA And Retirement Plan Protections

- *Gannett Co. v. Quatrone*, No. 20-609 - Whether a plaintiff adequately pleads breach of the duties of prudence and diversification solely by alleging that fiduciaries permitted participants in a defined contribution plan to choose, from an adequately diversified menu of investment options, to invest in an undiversified single-stock fund.
- *Black v. Pension Benefit Guaranty Corp.*, No. 21-495 - (1) Whether the Employee Retirement Income Security Act permits the termination of a distressed pension plan through an agreement between Pension Benefit Guaranty Corporation and the plan administrator; (2) whether termination through such an agreement, which avoids a hearing, violates the participants' constitutional rights to due process; and (3) whether, if ERISA and due process allow for termination by agreement, the termination's substantive legality is to be judged under the standards in 29 U.S.C. § 1342(c), or whether it is enough that the conditions in Section 1342(a) to "institute" proceedings may exist.

6. Transparency Under The Freedom of Information Act

- *Jobe v. National Transportation Safety Board*, No. 21-469 - Whether Exemption 5 of the Freedom of Information Act — which provides that federal agencies need not release privileged "inter-agency or intra-agency memorandums or letters" — includes an unwritten "consultant corollary," under which documents prepared by private, outside consultants are deemed "intra-agency memorandums or letters"; and (2) whether any "consultant corollary" in FOIA Exemption 5 could ever render "intra-agency" the communications between an agency and (1) employees of a private, regulated company with an economic interest in the agency's actions; or (2) the representative of a foreign government.
- *Rojas v. Federal Aviation Administration*, No. 21-133 - Whether the 9th Circuit, in a sharply divided en banc decision, erred by adopting the consultant corollary and holding that "intra-agency memorandums or letters" in Freedom of Information Act's Exemption 5 (5 U.S.C. § 552(b)(5)) encompasses documents prepared by APTMetrics, a private, outside consultant.

7. The Scope Of Agency Authority Over Vastly Significant Issues

- *Westmoreland Mining Holdings, LLC v. Environmental Protection Agency*, No. 20-1778 - (1) Whether the Environmental Protection Agency may employ 42 U.S.C. § 7411(d) to impose standards of performance on existing stationary sources that are regulated under the 'hazardous air pollutants' program of 42 U.S.C. § 7412; and (2) whether 42 U.S.C. § 7411(d) clearly authorizes the EPA to decide such matters of vast economic and political significance as whether and how to restructure the nation's energy system.

III. THE JUSTICES: A Look Back On Justice Kavanaugh's Votes And Opinions In Financial And Economic Cases.

In 2018, when Justice Kavanaugh was awaiting confirmation to the Supreme Court, Better Markets issued a report analyzing then-Judge Kavanaugh's judicial record to determine what his elevation to the Supreme Court might mean for the health of the American financial system, as well as the wallets of individual Americans and their families[43]. Ultimately, Kavanaugh's judicial record at the time indicated he would be a pro-business, anti-consumer, anti-investor Supreme Court Justice who would leave investors and consumers more vulnerable to fraudulent, predatory, and anti-competitive behavior among all manner of financial service providers, including brokers, banks, payday lenders, and others. As we explained in 2018, Kavanaugh's record indicated he would, among other things:

- Make it more difficult for agencies to issue strong rules to protect the public from Wall Street greed by narrowing (or eliminating) the longstanding principle that judges should defer to agencies' reasonable interpretations of statutes and rules;
- Make it more difficult for agencies to punish and deter misconduct by limiting their ability to pursue meaningful remedies;
- Make it more difficult for those who are harmed by Wall Street to obtain meaningful relief in the courts.

Those concerns were well-founded based on then-Judge Kavanaugh's record. However, past performance does not necessarily determine future results, and some perhaps believed that his ascendency to the high Court would temper what was widely regarded as his conservative and ideological judicial temperament. With Justice Kavanaugh having served three full terms on the Court, it is now worth reviewing his record thus far. All in all, as more fully detailed below, Justice Kavanaugh has performed as Better Markets predicted—he favors limiting the authority and independence of the regulatory agencies; weakening agencies' enforcement tools; forcing consumers into mandatory arbitration; and shutting off access to the federal courts with restrictive standing requirements. To the extent Justice Kavanaugh is perceived as becoming more moderate or centrist, that may be attributable more to a concern for optics and a preference for a more measured turn to the ideological right than a lack of commitment to ultra-conservative jurisprudence.

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[43] Better Markets, *Judge Kavanaugh: Good For Corporations, Bad For Your Wallet* (Aug. 28, 2018), https://bettermarkets.org/sites/default/files/Better%20Markets%20Kavanaugh%20Report.pdf.

A. Chipping Away At Judicial Deference To Regulatory Agencies

When Congress passes a comprehensive statutory regime, whether it is the Securities Act of 1933 or the Dodd-Frank Act of 2010, that is the beginning, not the end, of the policy-making process. Regulatory agencies must implement those laws by interpreting ambiguous statutory terms. To this end, regulatory agencies are directed by and staffed with professionals who are experts in their fields with extensive knowledge acquired from years of interpreting, applying, and enforcing the statutes enacted by Congress. As a result, they are best positioned to make the difficult and complex policy decisions that are required to implement broad statutory frameworks. The Supreme Court recognized long ago in the seminal case of *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*[44] that to fulfill congressional intent and serve the public interest, courts should defer to the best judgment of the expert agencies where Congress has not "directly spoken" to the issue at hand. This principle, which has often been affirmed and applied, has for decades given regulatory agencies the ability to make difficult policy choices without being second-guessed by comparatively inexpert judges.

In *Auer v. Robbins*,[45] the Supreme Court extended the concept of *Chevron* deference beyond agency interpretations of law to interpretations of regulations promulgated by the agency itself. The Supreme Court recognized the common sense proposition that where an agency promulgates a regulation, its own interpretation of ambiguous provisions should also receive deference from a court "unless plainly erroneous or inconsistent with the regulation."[46] However, *Auer* deference has long been seen as a "front-door entry point for a larger broadside attack on other deference doctrines," principally by more conservative and industry-adjacent jurists who perceive advantages for businesses subject to the judgments of the courts rather than the expert staff at the agencies.[47]

In *Kisor v. Wilkie*,[48] a Vietnam war veteran sought disability benefits for PTSD in 1982. The Department of Veterans Affairs ("VA") denied his request, but he renewed it in 2006, based on a new psychiatric report. The VA then agreed that he suffered from PTSD, but it refused to extend the benefits retroactively to the date of his first application, based on a rule specifying what types of records were "relevant" to such retroactivity determinations. The Court of Appeals for the Federal Circuit affirmed, following the precedent in *Auer*, holding that courts should defer to an agency's reasonable reading of its own ambiguous regulations. The Federal Circuit concluded that the rule was ambiguous and therefore the court should defer to the VA's interpretation of the rule and its denial of Kisor's request for retroactive benefits.

The Supreme Court granted cert. for the express purpose of deciding whether to overrule the *Auer* doctrine. In a lengthy opinion written by Justice Kagan, the majority decided not to overrule *Auer* but instead to clarify and narrow its application. The Supreme Court vacated the lower court's decision and remanded the case with instructions that the Federal Circuit re-evaluate its application of the *Auer* doctrine in light of the new guidelines set forth in the Court's analysis.

[44] 467 U.S. 837 (1984).

[45] 519 U.S. 452 (1997).

[46] *Auer v. Robbins*, 519 U.S. at 461 (internal quotation marks omitted).

[47] *See* Daniel E. Walters, *A Turning Point in the Deference Wars*, The Reg. Rev. (Jul. 9, 2019), https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars/. One of the principal arguments against *Auer* deference has been that it provides a perverse incentive to agencies to write vague rules, safe in the knowledge that later interpretations will still receive deference from courts. However appealing that argument might seem in the abstract, in reality scholars have conducted an empirical examination of agency behavior in light of *Auer* deference and found no evidence of agencies writing more vague rules post-*Auer*. Daniel E. Walters, *The Empty Case for Overturning Auer*, The Reg. Rev. (Dec. 11, 2018), https://www.theregreview.org/2018/12/11/walters-empty-case-overruling-auer-deference/.

[48] 139 S. Ct. 2400 (2019).

However, Justice Kavanaugh joined a contentious concurrence from Justice Gorsuch arguing strenuously that *Auer* should be overruled. Justice Kavanaugh also penned his own concurrence, in which he argued that, in most cases, the question of whether *Auer* is still good law will be academic because

> If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation.[49]

This essentially amounts to an invitation to lower courts to ignore that the Supreme Court *expressly* declined to overrule *Auer*. Deference doctrines such as *Auer* do require a court to use tools of construction to determine whether the relevant text is "genuinely ambiguous" and whether the agency's reading is "reasonable."[50] However, the exercise is not about attempting to determine the "best" interpretation of the text (or, more accurately, the judges' own subjective view of the "best" interpretation).[51] That is not deference; that is a court substituting its own judgment for that of the agency—precisely what the deference doctrines are supposed to prevent. In other words, if lower courts adopt the approach Kavanaugh is urging, then *Auer* would be effectively overruled. Even more troublingly, Justice Kavanaugh apparently believes this is an appropriate approach for *Chevron* deference as well.[52]

B. Undermining The Independence Of Regulatory Agencies

When Congress establishes an agency to enforce federal law, it sometimes gives the leadership of that agency protection by inserting a provision allowing removal only "for cause," usually "inefficiency, neglect, or malfeasance."[53] This measure of independence is particularly important for agencies responsible for financial regulation, such as the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the prudential banking regulators, since those agencies must deal with complex, highly technical issues that affect some of the largest and most powerful institutions in the country. If the leaders of these agencies can be fired simply for going against the prevailing political and business-driven winds, the ability of those agencies to meaningfully protect Americans from a wide variety of abuses and to preserve the stability of our financial system would be impaired. Accordingly, the ability of Congress to establish independent agencies has been well-recognized since at least 1935, when the Supreme Court decided *Humphrey's Executor v. United States*.[54]

However, when Congress established the CFPB as an independent agency headed not by a commission but by a single director removable only for cause, the industry and its allies argued that this structure was unconstitutional, in spite of *Humphrey's Executor*, due to the absence of a multi-member commission that would limit the autonomy of a single director. The issue came before the D. C. Circuit in *PHH Corp. v. Consumer Financial Protection Bureau*.[55] Then-Circuit Judge Kavanaugh

[49] *Kisor v. Wilkie*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring).

[50] *Kisor v. Wilkie*, 139 S. Ct. at 2415.

[51] *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 969 (2005) ("*Chevron* requires a federal court to defer to an agency's construction, even if it differs from what the court believes to be the best interpretation, if the particular statute is within the agency's jurisdiction to administer, the statute is ambiguous on the point at issue, and the agency's construction is reasonable.").

[52] *Kisor v. Wilkie*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring).

[53] *See Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

[54] 295 U.S. 602 (1935).

[55] 839 F. 3d 1 (D.C. Cir. 2016).

wrote the opinion in which he concluded that the CFPB's structure, a single director removable for cause, was unconstitutional—a decision that was later overturned by an en banc panel of the D.C. Circuit. When the same issue came before the Supreme Court in *Seila Law LLC v. Consumer Financial Protection Bureau*,[56] then-Justice Kavanaugh unsurprisingly voted with the majority that struck down the CFPB's structure as unconstitutional. Justice Kavanaugh also voted in *Collins v. Yellen*[57] to hold that the structure of the Federal Housing Finance Agency, another independent agency with a single director removable only for cause, was unconstitutional.

Whether Justice Kavanaugh would ultimately vote to overrule *Humphrey's Executor* and imperil the effectiveness of independent agencies with a commission structure remains to be seen. He did not join Justice Thomas's concurring opinion in *Seila Law* calling on the Court to revisit *Humphrey's Executor*. However, in his opinion PHH Corp., when he was still on the D.C. Circuit and thus bound by *Humphrey's Executor*, he displayed extreme hostility towards independent agencies of all types:

> The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government. They exercise enormous power over the economic and social life of the United States. Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.[58]

Moreover, while the majority opinion Justice Kavanaugh joined in *Seila Law* distinguished the multimember commission at issue in *Humphrey's Executor* from the single director structure at the CFPB, nothing in that opinion signals that *Humphrey's Executor* is safe. Indeed, Justice Thomas's concurrence argues that in the majority opinion "the Court has repudiated almost every aspect of *Humphrey's Executor*."[59] The hostility Justice Kavanaugh displayed towards independent agencies on the D.C. Circuit remains intact, and he may yet have an opportunity to further undermine them.

C. Weakening Agencies' Enforcement Tools.

Even the strongest laws and rules can only protect the public if an agency is actually empowered to impose real, meaningful consequences on companies and individuals that violate those rules. When courts unnecessarily limit the ability of regulatory agencies to enforce the law, the deterrent effect of the law is weakened and fraudsters can more readily victimize investors while avoiding liability. This too is an area in which Justice Kavanaugh demonstrated a pro-business bias on the D.C. Circuit, which he has brought to the Supreme Court.[60]

During Justice Kavanaugh's tenure, the Supreme Court has taken up two major cases involving the ability of regulatory agencies to deter wrongdoers and help their victims by seeking disgorgement of ill-gotten gains. In *Liu v. SEC*,[61] the Court addressed whether disgorgement, an equitable remedy, was available to the SEC to force fraudsters to return the money they unlawfully took from investors.

[56] 140 S. Ct. 2183 (2020).

[57] 141 S. Ct. 1761 (2021).

[58] PHH Corp. v. Consumer Financial Protection Bureau, 839 F. 3d at 6.

[59] *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part).

[60] Better Markets, *Judge Kavanaugh: Good For Corporations, Bad For Your Wallet* (Aug. 28, 2018), https://bettermarkets.org/sites/default/files/Better%20Markets%20Kavanaugh%20Report.pdf.

[61] 140 S. Ct. 1936 (2020).

The resulting opinion, penned by Justice Sotomayor and joined by Justice Kavanaugh, was a mixed result for the SEC and investors. Crucially, it preserved the SEC's ability to seek disgorgement to force fraudsters to return their ill-gotten gains.[62] At the same time, however, the Court also placed limits on the SEC's ability to obtain disgorgement, holding that it is permissible provided it does not exceed a wrongdoer's net profits and is awarded for the benefit of victims. This will create additional hurdles for the SEC as it seeks to recover as many ill-gotten gains from wrongdoers as possible in the future. [63]

If there was hope that Justice Kavanaugh's vote to preserve the disgorgement remedy for the SEC might signal a more measured approach to assessing agencies' enforcement powers, that hope was dashed this past term with the Court's opinion in *AMG Capital Management, LLC v. FTC*.[64] That case involved payday lenders that defrauded consumers to the tune of $1.27 billion. The FTC, having long sought equitable monetary remedies such as disgorgement and restitution to prevent fraudsters from obtaining a windfall through malfeasance, successfully obtained a court order directing the defendants to return their ill-gotten gains. However, the Supreme Court, in an opinion joined by Justice Kavanaugh, held that the FTC did not have the authority to obtain such monetary relief under its organic statute.[65] This represented a major setback to the ability of the FTC to quickly and efficiently end a fraudulent scheme and provide redress to harmed consumers—in 2019 alone, the FTC obtained $723.2 million in disgorgement or restitution.[66] Ultimately, the Supreme Court, including Justice Kavanaugh, has made life easier for fraudsters and more difficult for victims.

D. Closing The Courthouse Door: Forcing Plaintiffs Into Mandatory Arbitration

Agency enforcement is not the only way that wrongdoers can be held accountable. Many statutes include a private right of action—either express or implied—that allows individuals aggrieved by violations of the law to bring a lawsuit to recover damages. However, corporations that rip off consumers and investors have scores of lawyers devising ways to limit their liability and even prevent victims from setting foot in court. A primary strategy is reliance on mandatory arbitration clauses, which force individuals out of court and into secretive and biased arbitration proceedings. Thus far, Justice Kavanaugh has used his seat on the Supreme Court to help keep private litigants out of court, preventing them from obtaining meaningful relief while shielding corporations from accountability for illegal conduct.

The first majority opinion Justice Kavanaugh penned for the Supreme Court was in *Henry Schein, Inc. v. Archer & White Sales Inc.*[67] That case involved a mandatory arbitration clause governed by the Federal Arbitration Act ("FAA"). That 1925 statute was intended to ensure that bargained-for arbitration clauses between merchants were given effect, but the Supreme Court has steadily and massively expanded its application to cover all manner of disputes.[68] In *Henry Schein*, the Court focused on

[62] Better Markets, *Economic And Financial Issues Before The Supreme Court and The Impact of Judge Amy Coney Barrett* 24-25 (Oct. 8, 2020), https://bettermarkets.org/sites/default/files/images/BetterMarkets_Supreme_Court_Review_Oct2020.pdf.

[63] Better Markets, *Economic And Financial Issues Before The Supreme Court and The Impact of Judge Amy Coney Barrett* 24-25 (Oct. 8, 2020), https://bettermarkets.org/sites/default/files/images/BetterMarkets_Supreme_Court_Review_Oct2020.pdf.

[64] 141 S. Ct. 1341 (2021).

[65] Better Markets, The Supreme Court's 2020-2021 Term 4-5 (Jul. 30, 2021), https://bettermarkets.com/sites/default/files/dcuments/BetterMarkets_Supreme_Court_Review_July2021.pdf.

[66] Better Markets, The Supreme Court's 2020-2021 Term 4-5 (Jul. 30, 2021), https://bettermarkets.com/sites/default/files/dcuments/BetterMarkets_Supreme_Court_Review_July2021.pdf.

[67] 139 S. Ct. 524 (2019).

[68] Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and A Proposal for Change*, 53 Ala. L. Rev. 789, 826 (2002).

the “wholly groundless” exception to forced arbitration. The “wholly groundless” exception provided that, even if a contract delegated the issue of arbitrability to an arbitrator, a court would not order arbitration if it was obvious that a particular dispute was not subject to arbitration in light of the parties’ agreement.[69] The rule served a critical gatekeeping function, protecting litigants from being forced to submit obviously non-arbitrable disputes to arbitration, where there is likely to be a pro-industry (and a pro-arbitration) bias, and where the opportunity to review even clearly erroneous decisions is severely limited. Nevertheless, Justice Kavanaugh, writing for a unanimous Court, rejected the “wholly groundless” exception.

Justice Kavanaugh’s ruling means that anyone victimized by wrongdoing—injured investors, consumers, small businesses, workers, and others—will have a harder time challenging the application of forced arbitration agreements, even where those agreements are clearly inapplicable and the dispute should clearly be resolved in court. At a minimum, those victims will be forced to go through the delay and expense of first trying to persuade an arbitrator that their claims belong in court, not in arbitration, with the outcome uncertain in any event. These burdens and risks will in turn discourage more victims from pursing their claims at all. And less accountability means more fraud, abuse, and predatory conduct by financial firms at the expense of everyday Americans.

E. Closing the Courthouse Door, Part Two: Establishing Restrictive Standing Requirements

As mentioned above, when Congress creates a comprehensive statutory scheme to protect individuals from corporate fraud and other types of malfeasance, it often establishes a private right of action to allow individuals to bring lawsuits to remedy violations of the statute. Even where an agency has jurisdiction to enforce the law, enabling so-called “private attorneys general” to hold violators accountable is a critical tool for deterring noncompliance and obtaining relief for injured consumers. However, the Supreme Court has restricted the ability of parties to privately enforce the law by invoking the standing requirements, thus shielding violators from the very liability that Congress intended. Even though these lawsuits are explicitly authorized by statute, the Supreme Court nevertheless may throw them out, holding that the plaintiff, although clearly covered by the terms of the law, is not faced with a sufficiently concrete injury to satisfy the standing requirements.

Justice Kavanaugh has been at the forefront of this trend since joining the Court, authoring two opinions dismissing otherwise meritorious lawsuits on standing grounds. The first of these was *Thole v. U.S. Bank, Nat’l Ass’n*,[70] in which the plaintiffs, beneficiaries of a defined-benefit pension plan (i.e. a retirement plan that entitles its beneficiaries to a fixed, periodic payment upon retirement for life), alleged a pattern of mismanagement and abuse by U.S. Bank (both the plan manager and their employer) that caused large losses to the plan. According to the lawsuit, U.S. Bank, among other things, invested in mutual funds owned by U.S. Bank so it could benefit from inflated management fees. It also allegedly followed a clearly imprudent strategy of investing the entire plan portfolio in equities. That decision benefited U.S. Bank and its shareholders by allowing it to increase its operating income, but it backfired horribly when the equities market crashed in the early stages of the financial crisis. These actions violated the fiduciary duty for plan managers established by ERISA to act solely in the best interest of the plan beneficiaries. Ultimately, U.S. Bank’s alleged misconduct cost the plan $748 million, leaving it grossly underfunded.

[69] *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. at 528.

[70] 140 S. Ct. 1615 (2020).

In a cursory opinion, Justice Kavanaugh dismissed the suit on standing grounds. According to Justice Kavanaugh, the plaintiffs had not suffered any injury because, as beneficiaries of a defined-benefit pension plan, they were guaranteed a specific amount of money, and had not (yet) seen any adverse impacts from U.S. Bank's mismanagement of the plan inasmuch as they were still receiving their benefits in full.[71] This tortured holding essentially said that defined-benefit plan beneficiaries have no standing to sue to stop egregious plan mismanagement up until the point that the plan fails and they lose a significant portion, if not all, of their pension income. It further ignored that one of the fundamental purposes of "ERISA and fiduciary duties is to prevent retirement-plan failure in the first place."[72] Essentially, Justice Kavanaugh's opinion delivers a blow to the ability of retirement savers to protect their retirement income through court actions seeking injunctions and damages.

Unfortunately, Justice Kavanaugh was back at it this past term, with a similarly flawed opinion in *TransUnion LLC v. Ramirez*.[73] This case (discussed above) involved the Fair Credit Reporting Act ("FCRA"), which governs credit reporting and, among other things, requires that credit reporting agencies make reasonable efforts to ensure the information they report on individuals is accurate. The statute expressly provides a private right of action for violations.

TransUnion offered a product to its business clients that cross-checked the names of individuals seeking credit against the Office of Foreign Asset Control's list of "specially designated nationals," i.e. individuals who American companies are generally not allowed to do business with because they are major criminals who threaten America's national security. Unfortunately, TransUnion allegedly failed to account for the fact that, in a world with 7 billion people, there will be some duplication of names: It conducted no additional due diligence to ensure that the people they flagged as major international criminals were in fact major international criminals. The plaintiff, Sergio Ramirez, found this out when he was unable to purchase a car because he was flagged by TransUnion as a terrorist. Compounding the problem, when TransUnion sent Ramirez his credit report, they failed to apprise him of his rights as required by the FCRA—another violation for which the FCRA provides a private right of action.[74]

Ramirez brought suit on behalf of himself and other individuals whose FCRA rights were violated in similar ways. The argument for standing was straightforward. The FCRA imposes certain legal obligations on credit reporting agencies such as TransUnion and allows individuals to enforce those obligations in court. TransUnion violated its legal obligations, in the process invading Ramirez's legal rights and entitling him to seek relief in court.[75]

Nevertheless, in an opinion for a 5-4 majority, Justice Kavanaugh limited the ability of those whose well-established, statutory legal rights were violated to hold TransUnion accountable for its misconduct. For Justice Kavanaugh, suffering a clear violation of a Congressionally-established legal right is not enough to confer standing. Plaintiffs also are required to establish some separate form of "concrete" harm to establish Article III standing. Accordingly, only those class members who had their credit reports *disseminated* had standing to sue, since they essentially stood in the shoes of plaintiffs alleging

[71] *Thole v. U. S. Bank N.A*, 140 S. Ct. at 1618.

[72] *Thole v. U. S. Bank N.A*, 140 S. Ct. at 1635 (Sotomayor, J., dissenting).

[73] 141 S. Ct. 2190 (2021).

[74] *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2200-02.

[75] *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777 (1946) ("Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

common law defamation. Moreover, Justice Kavanaugh held, for the Court, that *no* class member had standing to challenge TransUnion's failure to provide legally sufficient disclosures.[76]

In his dissent, Justice Thomas challenged the very premise of Justice Kavanaugh's analysis, showing that his 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."[77] 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 penned a dissent, pointing out that the typical separation-of-powers and judicial restraint rationales for the standing doctrine, which Justice Kavanaugh trotted out in his opinion, were actually inverted in this case, since the Court was now directly infringing on Congress's ability to create new statutory rights.[78]

F. Conclusion

All in all, Justice Kavanaugh has performed largely as feared thus far in his tenure on the Supreme Court. That is bad news for the American public, at least those who are not able to profit from corporate malfeasance, abuse, and fraud. As predicted, Justice Kavanaugh has endeavored to protect big businesses from accountability by undermining the ability of agencies to apply their expertise in writing and applying rules; by limiting agencies' ability to meaningfully enforce the law; and by keeping individuals who have been aggrieved by illegal conduct out of court, where they might find meaningful relief and impose meaningful consequences on those who violate the law.

IV. THE TRANSPARENCY CHALLENGES — An Update, With A Focus On The Shadow Docket.

In our July 30th report on the Supreme Court, we highlighted three significant developments relating to the Court's transparency challenges and its modes of operation. They included the Court's laudable and pandemic-related decision to provide the public with live audio of each oral argument; the establishment of the "President's Commission on the Supreme Court" to explore a number of Court reforms; and rising concerns about the Court's increasing use—and apparent abuse—of the "shadow docket."

On two of these three fronts, recent developments have been unremarkable and generally positive. With respect to the core transparency question of access to the Court's proceedings, while the Court will continue to prohibit public attendance at oral argument, it will also continue its practice announced last Spring of providing live audio broadcasts of the arguments, at least through the December session.[79]

[76] *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2208-14.

[77] *TransUnion LLC v. Ramirez*, 141 S. Ct. at 2218 (Thomas, J., dissenting).

[78] TransUnion LLC v. Ramirez, 141 S. Ct. at 2225 (Kagan, J., dissenting).

[79] *See* Supreme Court, Press Release Regarding Live Audio for Upcoming Oral Argument Sessions (Sept. 29, 2021), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-29-21.

And with respect to the President's Commission, established by an April 9, 2021 Executive Order, that body has continued its series of public and virtual meetings at which a wide array of experts offer their views on a similarly wide array of issues surrounding the Court. They include the confirmation process for Justices; the composition of the Court and its possible expansion; term limits for the Justices; the case selection and review process, including the handling of the shadow docket; and the transparency of the Court's operations.[80]

The shadow docket, on the other hand, has recently been the subject of intense controversy, sparked largely by the September 1st order in which the Court declined to stay the Texas law (S.B. 8) that in effect bans all abortions in the state after six weeks of pregnancy. The Court's order, reflecting the views of a five-member majority, is only a page and a half, but it triggered a torrent of four short and extraordinarily passionate dissents written and joined, in various combinations, by the remaining four Justices.[81]

In part, those dissents focused on the outrageous aspects of the merits: That a blatantly unconstitutional law, already inflicting enormous harm, remained intact because the Texas state legislature had deliberately contrived a statutory enforcement mechanism that would stymie judicial review. In the words of Justice Sotomayor in her dissent, confronted with a "flagrantly unconstitutional law" that was "engineered" to evade judicial scrutiny, a majority of Justices "opted to bury their heads in the sand."[82]

Equally scathing and perhaps even more relevant here were criticisms based on the deeply flawed process underlying the majority's cursory order. Justice Roberts, for example, lamented that the Court was asked to address important and novel questions "in the course of two days, without the benefit of consideration by the District Court or Court of Appeals," and to do so "without ordinary merits briefing and without oral argument."[83] In her dissent, Justice Kagan echoed these concerns and additionally noted that the majority "barely bothers to explain its conclusion." And tellingly, Justice Kagan broadened her criticism to encompass the entire shadow docket: "In all these ways, the majority's decision is emblematic of too much of this Court's shadow-docket decision making—which every day becomes more unreasoned, inconsistent, and impossible to defend."[84]

In recent months, other high-profile shadow docket decisions have garnered attention. In August, it blocked the federal moratorium on evictions during the pandemic[85] and let stand a Texas court ruling that required the Federal government to restart a Trump-era immigration policy known as "Remain in Mexico."[86] And on November 25, 2020, it enjoined New York's COVID limits on in-person religious services.[87]

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[80] *See generally* https://www.whitehouse.gov/pcscotus/; *see also* Better Markets, *Special Report: The Supreme Court's 2020-2021 Term* (Jul. 30, 2021), https://bettermarkets.org/wp-content/uploads/2021/09/BetterMarkets_Supreme_Court_Review_July2021.pdf.

[81] *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021).

[82] *Whole Woman's Health v. Jackson*, 141 S. Ct. at 2498 (Sotomayor, J., dissenting).

[83] *Whole Woman's Health v. Jackson*, 141 S. Ct. at 2497 (Roberts, J., dissenting).

[84] *Whole Woman's Health v. Jackson*, 141 S. Ct. at 2500 (Kagan, J., dissenting).

[85] Adam Liptak & Glenn Thrush, *Supreme Court Ends Biden's Eviction Moratorium*, N.Y. Times (Aug. 26, 2021), https://www.nytimes.com/2021/08/26/us/eviction-moratorium-ends.html.

[86] Mark Sherman, *Supreme Court Orders "Remain in Mexico" Policy Reinstated*, N.Y. Times (Aug. 24, 2021), https://apnews.com/article/mexico-courts-immigration-us-supreme-court-a3fe33081fa2909c17e8c08a2c37f818.

[87] Adam Liptak, *Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order*, N.Y. Times (Nov. 26, 2020), https://www.nytimes.com/2020/11/26/us/supreme-court-coronavirus-religion-new-york.html.

While many of the Court's orders issued under the rubric of the shadow docket are unremarkable, experts have increasingly criticized the marked increase in its use in resolving important issues in important cases. A long list of increasingly common and troubling attributes have been cited:

- **Frequency:** In both absolute terms and relative to merits cases, the Court is handing down far more (and far more important) rulings on the shadow docket, including significantly more grants of emergency relief.
- **Breadth of impact:** We are seeing far more grants with statewide or nationwide consequences, and more stays of district-court injunctions that have allowed policies that both district courts and circuit courts believed to be unlawful to go back into effect.
- **Divisiveness:** The rulings are dividing the Court uniformly on ideological lines, with more public dissents regarding both grants and denials of relief, along the Justices' ideological lines.
- **Procedural infirmities:** The orders are characterized by limited briefing; lack of oral argument; no identification of how justices voted; lack of reasoning or explanations; the flouting of settled procedural constraints; analytical inconsistency; lack of plenary review even where that is possible; and treatment as precedent, even where the outcomes are unexplained.[88]

This approach to judicial decision-making is problematic on multiple levels. It inevitably leads to poorer quality outcomes, given the haste and lack of full briefing and argumentation on the issues presented. More broadly, it erodes the legitimacy of the Court as an institution worthy of the public's trust. In a fundamental way, it violates the basic precepts of open and rational decision-making expected of other governmental institutions. In the rulemaking process, for example, agencies must gather input from the public on the pros and cons of the proposed rule; they must draw rational conclusions based on the accumulated record; and they must publicly explain the reasoning that led to the final rule. At least in the context of the shadow docket, the Court appears to be increasingly straying from these precepts. A number of possible remedies present themselves, ranging from making the shadow docket procedures more clear and rigorous to alleviating pressure on the Court by reducing the number of matters that must be handled on an emergency basis. While the President's Commission is reportedly divided on many of the possible changes under consideration, we will nevertheless read its forthcoming November report with interest and with the hope that it sheds useful light, especially with respect to the shadow docket.

[88] *See* Stephen I. Vladeck, *Clearing Up Some Misconceptions About The Supreme Court's "Shadow Docket"—And Its Critics*, Presentation, Notre Dame Law School & Amer. Const. Soc. (Oct. 8, 2021).

CONCLUSION

The Supreme Court plays a huge yet underappreciated role in Americans' financial lives. As our report shows, its decisions have an enormous impact on the ability of anyone with a financial product or service to meet their needs and build wealth. Protections against financial predators—from the big Wall Street banks to the shadowy payday lenders—are critical, as is access to meaningful remedies in court when financial wounds are inflicted. The Court's last term illustrates the impact, as the Court took a vital enforcement and compensatory tool—restitution—out of the hands of the Federal Trade Commission; opened the door for banks to lie to the public and then defend themselves by arguing that their deceptions were too general to matter; and limited Congress's ability to create private rights of actions for violations of consumer protections laws.

The term just underway also promises to be consequential, as the Court will decide whether a whistleblower who got nothing from an arbitration panel can challenge that decision in a state court; whether there will be a fresh assault on the administrative agencies we rely on for so many protections; and whether retirement savers will have their day in court against a retirement plan fiduciary who cost the participants money by offering overpriced and underperforming investments. These decisions become lasting precedents, and they affect not only the parties before the Court but also the rights and remedies available to everyone in future financial disputes.

While some may think that the Court's task is simply applying the law to the facts in a given case, it's vastly more complicated. That's why the outlook and temperament of the sitting Justices is so important and why we have focused on the implications of having Justice Kavanaugh and Justice Barrett join the Court. Our report confirms fears that Justice Kavanaugh would favor limiting the independence of regulatory agencies, forcing consumers into mandatory arbitration, and shutting off access to the federal courts with restrictive standing requirements. In due course, we also plan to review the track record of Justice Barrett in deciding financial and economic cases.

While the Court has largely enjoyed freedom from scrutiny about the way it operates, such a vitally important branch of our federal government should be held to a high standard of transparency. Our report briefly casts light on some issues of mounting concern surrounding the shadow docket—the mechanism the Court uses to decide urgent and important issues but often without the argumentation, deliberation, and explanation that those issues warrant.

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 and operations and should spend some time with this report.

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