BETTER MARKETS

SPECIAL REPORT

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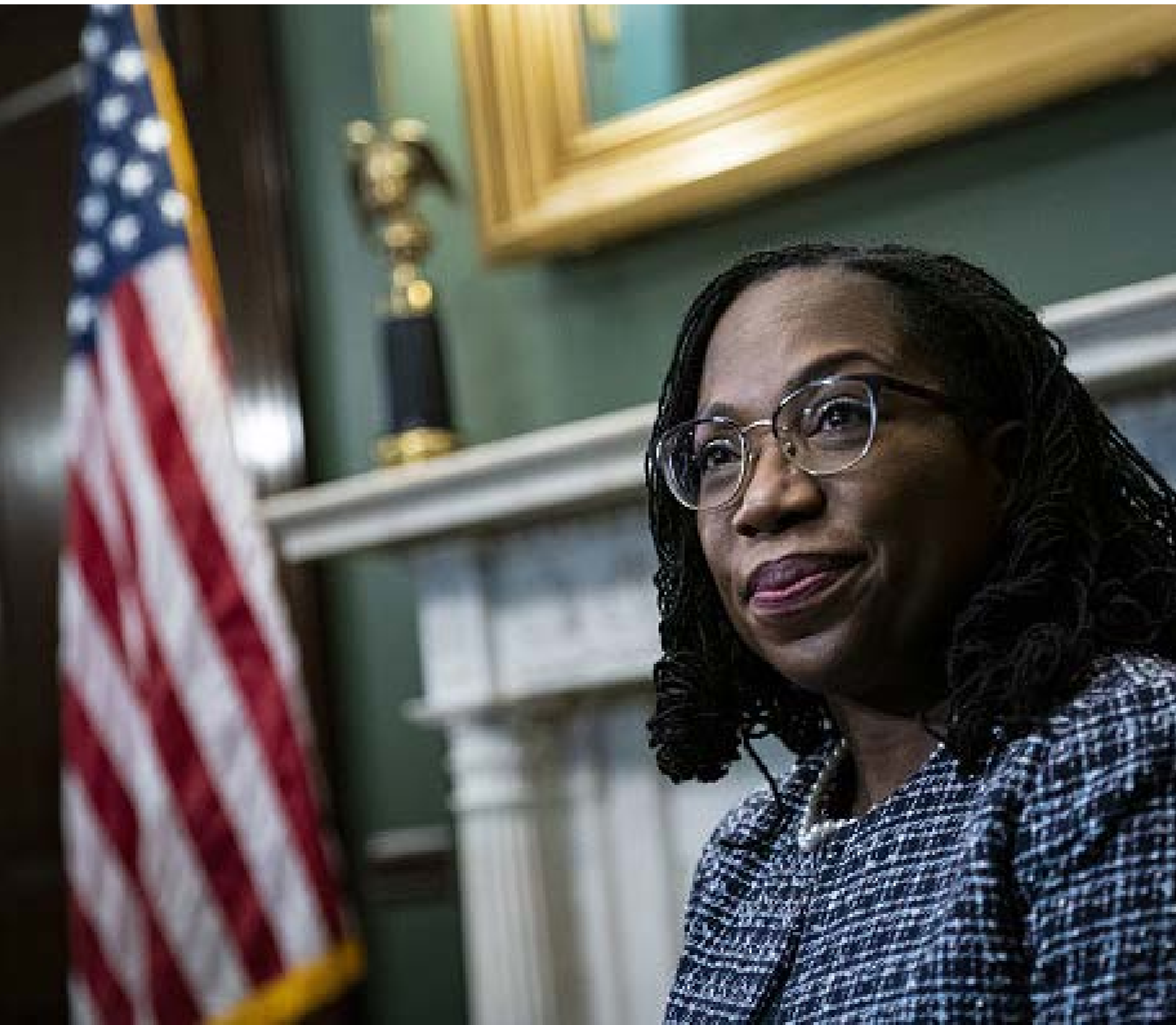
If Confirmed to the Supreme Court, Judge Ketanji Brown Jackson Will Help Improve the Financial Lives of American Consumers and Investors



INTRODUCTION

President Biden's nomination of Judge Ketanji Brown Jackson to fill Justice Breyer's soon to be vacant seat on the United States Supreme Court is good news for every American who is struggling to earn, save, and invest enough money to meet their basic needs, achieve a decent standard of living, and plan for a safe and secure retirement. To accomplish these goals, virtually everyone must rely on a bewildering array of financial products and services offered by banks, brokers, credit card issuers, advisers, insurance companies, and other financial firms. But too often, the deck is stacked against the consumer and investor when they interact with Wall Street.

That's why the court system—and above all the Supreme Court—is such a vital branch of our government. It's the last resort, the place where Americans must be able to turn when they have been victimized by financial predators or let down by the regulatory agencies that are supposed to serve as the financial market watchdogs. And the Justices who sit on the Court make a huge difference in how cases are decided, often establishing new and long-lasting principles of law.[1]

The Supreme Court is such a vital branch of our government. It's the last resort, the place where Americans must be able to turn when they have been victimized by financial predators or let down by the regulatory agencies that are supposed to serve as the financial market watchdogs.

Just as we sounded alarms about the anti-consumer, anti-regulatory, and pro-corporate ideological orientations of President Trump's appointments to the Court, we now highlight the impressive attributes of Judge Jackson. They show that while Judge Jackson alone cannot fundamentally alter the ideological composition of the Court, she can at least hold back the recent tide of conservative judicial thinking. Based on Judge Jackson's character, intellect, and experience, we expect that she will be an exemplary Justice, one who gives everyday American consumers and investors a fair hearing and a fighting chance when they are pitted against a powerful and too often predatory financial system that enriches itself at the expense of the real economy.

Once confirmed, Justice Jackson is likely to play a vital, and perhaps at times decisive, role in better protecting investors and consumers from fraud and abuse; making sure that regulators have the authority they need to make our financial markets more fair and less prone to crippling instability; and giving injured consumers and investors meaningful remedies in court, not just the mock justice that comes with forced arbitration.

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[1] Better Markets has issued a series of reports highlighting the Court's important decisions in financial regulation and profiling some of its most recent appointees. *See* Better Markets, *Special Report: The Supreme Court's 2021-2022 Term* (Oct. 21, 2021), https://bettermarkets.org/wp-content/uploads/2021/10/BetterMarkets_Supreme_Court_UpcomingTerm_2021-2022.pdf; 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 this two-part report, we first briefly review the types of Supreme Court decisions that help shape our financial system and profoundly affect Americans' economic lives. We then shine a light on Judge Jackson's background and the much-needed perspective she is likely to bring to the cases before the Court.

I. THE SUPREME COURT PLAYS A HUGE ROLE IN SHAPING AMERICANS' FINANCIAL LIVES.

When people think of the Supreme Court, they tend to think of cases involving high-profile and controversial social policies, from abortion rights to gun control. However, there is another category of important Supreme Court cases that profoundly influences the well-being and quality of life of every American: disputes over financial regulation and economic rights and remedies. The bottom line is that anyone who has a savings or checking account, credit card, debit card, mortgage, student loan, car loan, retirement plan, personal loan, college savings fund, publicly traded stock, or any other financial product or service has to care about the Supreme Court's decisions. That means they also have to care about who sits on the Court.

Some cases that come before the Court directly shape financial regulation. They determine how the securities laws, banking laws, and other financial statutes are interpreted and applied. They also define the scope of the legal authority that agencies have to regulate the industry and protect consumers and investors from fraud, abuse, and conflicts of interest. Other cases present more general legal issues that apply not only in the realm of financial regulation but more broadly. Those decisions also can have a profound impact on the way the Court addresses disputes that affect Americans' wallets. They raise these types of questions:

- **Administrative law** – Has an agency exceeded its authority? Has an agency failed to comply with the procedural requirements applicable to rulemaking under the Administrative Procedure Act (APA), including issuing public notice and giving all stakeholders an opportunity to comment? And how much deference should courts afford to the judgments that agencies have made in the rulemaking process?
- **Standing** – Have plaintiffs seeking relief suffered (or are they threatened with) the type of concrete and imminent injury that entitles them to be heard in federal court at all?
- **Class action litigation** – What hurdles must a group of aggrieved parties surmount before they can band together and bring their claims in court on a collective basis—often the only way many types of injury can be meaningfully redressed.
- **Arbitration** – Will those harmed by corporate misconduct be forced into arbitration, a secretive and biased process dominated by industry that has proven to be woefully ineffective for investors and consumers, or will they instead be allowed to have their claims heard in a neutral and open courtroom subject to procedural rights and the opportunity to appeal?
- **Separation of Powers** – Is a regulatory agency structured in a way that violates Constitutional requirements, potentially threatening the validity of its past actions and orders and its viability going forward?

- **Transparency** – Has an agency adequately responded to public requests seeking access to government documents, or is it improperly invoking exemptions to withhold information?

For decades, the Supreme Court has been issuing landmark decisions that address these questions and define, directly or indirectly, the scope of the financial laws, the powers of the regulators to write rules and enforce the law, the transparency and stability of our financial system, and the rights and remedies that consumers and investors rely on when they have been victimized. Here are just a handful of examples; some have advanced the cause of investor protection and market integrity while others represent major setbacks.

- **DEFINING SECURITIES BROADLY** – In ***SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946)**, the Court established a broad yet simple test to determine whether an investment contract is a security: "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." The Court relied heavily on the remedial purposes of the law and established a broad test to maximize investor protection. Thanks to this statutory interpretation, countless investment scams have been subject to the provisions of the securities laws. As a direct result, the SEC has had the authority to regulate those offerings and punish violators; many schemes undoubtedly never saw the light of day given the threat of federal regulation and enforcement.
- **GIVING INVESTORS THE RIGHT TO SUE FOR FRAUD** – In ***J.I. Case v. Borak*, 377 U.S. 426 (1964)**, the Court held that a private right of action should be implied under Section 14(a) of the Securities Act of 1933 for false or misleading proxy solicitation materials. The Court explained that it was "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." This case and others that followed were profoundly important in allowing defrauded investors to seek meaningful recovery for violations of the securities laws and to supplement the deterrent effect of the SEC's enforcement program.
- **REQUIRING JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS** – In ***Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)**, the Court held that courts should defer to an agency's statutory interpretation where the statute is silent or ambiguous with respect to the issue at hand, provided the agency's approach "is based on a permissible construction of the statute." The application of this judicial doctrine has empowered independent agencies to issue many important rules and regulations with the confidence that they will survive judicial challenge, ultimately for the benefit of the public. Yet Justice Kavanaugh and others have attacked the *Chevron* doctrine as a pernicious shift of power from the legislative branch to the supposedly unaccountable agencies. The assault on *Chevron* is expected to continue in the Supreme Court, and it has profound implications for all agencies, not only those that oversee the financial markets.
- **ALLOWING WALL STREET TO FORCE INVESTORS INTO ARBITRATION** – In ***Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987)**, the Supreme Court held that claims under Section 10(b) of the Securities Exchange Act of 1934, the core anti-fraud provision in the securities laws, can be forced into arbitration under pre-dispute, mandatory arbitration agreements between brokers and their clients. The Court reached this conclusion based on the policy favoring arbitration reflected in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, even though the securities laws contain clauses expressly voiding any waiver of compliance with those laws. Widely recognized as one of

the most important securities law decisions ever issued by the Supreme Court, *Shearson* has done incalculable damage by forcing millions of investors with claims for fraud and abuse at the hands of brokers and others into a biased, industry-run arbitration process that affords little relief.

- **SETTING UP HIGH HURDLES FOR ACCESS TO THE COURTS** – In ***Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)**, the Supreme Court held that a wildlife conservation organization was unable to challenge a regulation under the Endangered Species Act of 1973, which set a limit on the international reach of the Act. The Court found that even if some species of wildlife were threatened, the plaintiffs had failed to show "actual or imminent" injuries to particular litigants who might "someday" wish to visit the foreign countries in question and be deprived of the opportunity to observe the endangered animals. The Court famously articulated the three hurdles that litigants must overcome to establish a constitutionally sufficient case or controversy and to press their claims in court: an actual or threatened concrete injury, a causal connection between the injury and the challenged conduct, and a likelihood that the injury will be redressed by a favorable decision. Due to this decision and others, countless parties, including organizations seeking to defend and promote the public interest, have been thrown out of court and left with no judicial recourse.

In more recent years, the Court has issued dozens of additional decisions that have shaped, for better or worse, the contours of financial regulation and administrative law, some of which are briefly described in Appendix A. During the current term, the Court has already issued a significant merits decision in financial regulation. On January 24, 2022, the Supreme Court sided with retirement savers in ***Hughes v. Northwestern University*, 142 S. Ct. 737 (2022)**. In *Hughes*, the plaintiffs alleged that they suffered losses because their retirement plan administrators offered a confusing array of over 200 investment options, failed to monitor those offerings, and failed to remove the imprudent ones with excessive fees. The district court and the Seventh Circuit tossed the case out of court, holding in part that the plan fiduciaries were absolved because they included at least some prudent investment options among the many available choices. Better Markets joined with AARP and other groups in an amicus brief[2] urging the Supreme Court to reverse the lower court's decision, restore the plaintiffs' claims, and give them a chance to prove their case at trial.

The Supreme Court agreed, holding that retirement plan fiduciaries have an ongoing duty to monitor investment options and remove those that are overpriced or otherwise imprudent. The Court further held that offering some prudent alternatives from which investors could choose did not excuse breach of that duty. For now, the Court has helped reaffirm the high standard that retirement plan administrators must follow under the Employee Retirement Income Security Act of 1974, the law written to protect Americans' retirement savings. Other merits cases relating to financial regulation are pending on the Court's docket, including those listed on Appendix B.[3]

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[2] Brief of Amici Curiae AARP: AARP Foundation; Better Markets, Inc.; Consumer Federation of America; National Employment Law Project; and Pension Rights Center Supporting Petitioners and Urging Reversal, *Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022), https://bettermarkets.org/sites/default/files/documents/Hughes_v_Northwestern_University_%20Amicus_Brief.pdf.

[3] As we have observed in our prior reports on the Supreme Court, additional cases involving financial regulation will likely appear on the Court's docket as some of the pending petitions for cert. are granted. And even the denial of a petition can have significant implications, as it leaves a lower court ruling intact. *See, e.g.*, Ivan Moreno, *Citi Can't Get High Court Review of Madoff Money Suit*, LAW360 (Feb. 28, 2022) (reporting that the Supreme Court declined to review a Second Circuit ruling that allowed suits against banks on behalf of Madoff victims to proceed).

It is clear that the Supreme Court and the Justices who serve on it have had, and continue to have, a profound impact on the scope and strength of the laws and regulations governing our financial system. The steady evolution of the Court toward Wall Street-friendly jurists threatens to undermine that vital regulatory framework, exposing investors to greater harm and undermining the stability of our markets and ultimately our entire financial system.[4] That's why the nominee to replace Justice Breyer is so important. As we show below, Judge Jackson is an excellent choice.

II. JUDGE JACKSON'S BACKGROUND, QUALIFICATIONS, AND JUDICIAL TEMPERAMENT WILL GIVE EVERYDAY AMERICANS A BETTER CHANCE AT JUSTICE BEFORE THE COURT.

As a Supreme Court nominee, Judge Jackson will now undergo the intense scrutiny that comes with the Senate confirmation process, following the already thorough vetting that President Biden and his team have brought to bear. The list of intellectual and character traits that will become the focus of attention throughout the process is familiar. Some naturally generate consensus: intellect, education, and experience. Others breed intense and sometimes bitter debate: judicial philosophy and ideology. They all matter, especially the latter, as judicial philosophy and ideology inevitably inform and shape the way each member of the Court approaches the task of deciding cases and meting out justice, with enormous consequences not only for the parties before the Court but also for countless individuals and businesses bound by the Court's precedents in future dealings and disputes.

The Supreme Court and the Justices who serve on it have had, and continue to have, a profound impact on the scope and strength of the laws and regulations governing our financial system.

Judge Jackson has sterling credentials under all of the applicable metrics. Based on her background, character, work experience, and judicial track record, it is clear that she will add a valuable perspective and judicial approach to the Supreme Court. With respect to Judge Jackson's judicial track record, not many of her decisions involve financial regulation directly. However, that body of cases nevertheless provides insight into how Judge Jackson approaches some of the basic legal issues that often control outcomes in financial and economic disputes: statutory interpretation, administrative law, transparency in government, the standing doctrine, and others.

In sum, Judge Jackson's background and judicial track record, some of which we canvass briefly below, suggest that in deciding cases, "Justice" Jackson will —

- Be meticulous and thorough.
- Interpret statutes faithfully and with due consideration for Congressional intent and important public policy goals.
- Reflect a belief that robust regulation, rather than being a presumptive evil, plays a necessary and beneficial role in society, protecting the public from many types of harm.

[4] Better Markets, *The Cost of the Crisis: $20 Trillion and Counting* (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.

- Acknowledge the importance of the *Chevron* doctrine, which sensibly requires courts to follow clear congressional language where it exists but also to defer to agencies' expertise and their reasonable interpretations of ambiguous statutory provisions.
- Hold the government, and regulatory agencies in particular, accountable if they fail to adhere to the substantive and procedural requirements applicable to the rulemaking process under the APA, including rational rulemaking, notice, and an opportunity for public comment.
- Apply the rule of law equally, as much to the powerful and privileged as to the ordinary citizen.
- Enforce the laws, such as the Freedom of Information Act, that seek to promote transparency in government.
- Display sensitivity to the plight of litigants and the real-world consequences of her votes and decisions.

An overriding takeaway is that Judge Jackson won't strain to reach a particular result that she might prefer, but rather will faithfully apply the law to the facts. Her background and her track record as a district court judge and appellate court judge show that Judge Jackson is compassionate and always attuned to the real-world impact that judicial decisions can have on litigants. But they also show that she is above all deeply devoted to applying the law fairly and consistently. Thus, as one would expect, the outcomes in her cases vary, not always reaching a result favoring what one might call a progressive view. Every case hinges on the facts, not just the law, and her decisions reflect an objective approach dedicated to justice under the unique circumstances in every case.

A. Judge Jackson's Background

Judge Jackson will markedly increase diversity in the composition of the Supreme Court, as she will be the first Black woman ever to serve. This will bring a valuable perspective to the decision-making process at the Court. Just as greater diversity in all facets of life, from the corporate boardroom to the corridors of government, is now rightly regarded as an essential step in promoting racial and gender equality and fostering better outcomes in business and governance, so too can it enhance the judicial process.

In addition to the highest level of personal integrity, Judge Jackson has an outstanding legal mind, graduating magna cum laude from Harvard College in 1992 and cum laude from Harvard Law School in 1996. She served in multiple judicial clerkships, initially in federal district court, then in the First Circuit, and finally as a law clerk for Justice Stephen Breyer during the Supreme Court's 1999-2000 term, an experience that helped shape her judicial philosophy.

Following positions at several prominent law firms, Judge Jackson served from 2003 to 2005 as assistant special counsel to the United States Sentencing Commission, established to address widespread disparities in federal sentencing. She then served as a Federal public defender from 2005 to 2007, assembling a record of impressive victories. Not since Justice Thurgood Marshall, who retired in 1991, has the Court had a Justice with significant criminal defense experience.[5] Following nomination

[5] *See* Jack Queen, *How Jackson Would Shake Up High Court as 1st Ex-Defender*, LAW360 (Mar. 1, 2022).

by President Obama, Judge Jackson served as vice chair of the U.S. Sentencing Commission from 2010 to 2014. While she was there, the Commission worked to mitigate the harsh sentences for drug crimes by amending the Federal Sentencing Guidelines.

In 2013, Jackson was confirmed by voice vote in the Senate to serve on the United States District Court for the District of Columbia. As a trial court judge from 2013 to 2021, Jackson had a close and first-hand view of how the law affects peoples' lives in the most concrete ways. She issued nearly 600 opinions of which only 14 were reversed on appeal.[6] She took her seat on the D.C. Circuit in June 2021, less than a year ago.

B. Judge Jackson's decisions.

Here we briefly review some of the Judge Jackson's most notable decisions, which provide helpful insight into how she approaches the law, particularly in cases involving the public interest and government accountability.[7]

Upholding beneficial regulation.

- **REJECTING CHALLENGES TO A LABELING RULE.** In ***American Meat Institute v. U.S. Department of Agriculture***, 968 F. Supp. 2d 38 (D.D.C. 2013), Judge Jackson rejected the meat packing industry's attempt to block a U.S. Department of Agriculture rule requiring companies to identify animals' country of origin. Judge Jackson dismissed the suit, finding that contrary to plaintiff's assertions that the rule made labels less accurate, the rule rationally required the disclosure of more information than was previously required, and it was therefore not arbitrary and capricious under the APA. She also held that requiring more detailed labeling did not exceed the Department's statutory authority, because Congress did not unambiguously preclude the Department from requiring more detailed country of origin information. By thus rejecting the meat packing industry's interpretation of the statute, Judge Jackson upheld a rule benefiting the public.

Enforcing the APA and other federal statutes, often in the interest of the consumers, workers, and the disadvantaged.

- **REQUIRING AGENCY COMPLIANCE WITH THE LAW AND PROMOTING ACCESS TO BENEFICIAL PHARMACEUTICALS.** In ***Depomed v. Department of Health and Human Services***, 66 F. Supp. 3d 217 (D.D.C. 2014), Judge Jackson ruled that the Food and Drug Administration violated the APA when it failed to grant pharmaceutical company Depomed market exclusivity for its orphan pain medication, Gralise. The case revolved around the Orphan Drug Act, which Congress passed in 1983 to incentivize pharmaceutical companies to manufacture drugs for rare diseases. By providing

[6] *See* Alliance for Justice, *Ketanji Brown Jackson Fact Sheet* (Mar. 30, 2021), https://www.afj.org/document/judge-ketanji-brown-jackson-fact-sheet/.

[7] Our review of Judge Jackson's decisions draws from a number of sources in addition to the cases, including these: Amy Howe, *Profile of a Potential Nominee: Ketanji Brown Jackson*, SCOTUSBLOG (Feb. 1, 2022), https://www.scotusblog.com/2022/02/profile-of-a-potential-nominee-ketanji-brown-jackson/; Jimmy Hoover, *6 Judge Ketanji Brown Jackson's Opinions to Read Now*, LAW360 (Feb. 25, 2022); Jimmy Hoover, *Ketanji Brown Jackson No "Rubber Stamp" for Gov't Agencies*, LAW360 (Mar. 3, 2022); *Ketanji Brown Jackson*, WIKIPEDIA (Mar. 2, 2022), https://en.wikipedia.org/wiki/Ketanji_Brown_Jackson.

for a 7-year period of exclusivity, the act helps prevent drugmakers from abandoning medications that ordinarily would not be broadly marketable or profitable. Jackson conducted a *Chevron* analysis and concluded that the Orphan Drug Act unambiguously required the FDA to grant exclusivity once it had designated Gralise as treatment for a rare disease. The FDA, she held, had simply a "ministerial role" in ensuring that Gralise was afforded exclusivity. Jackson followed the long-standing *Chevron* doctrine, now under attack by conservative judges and Justices, which requires judicial deference to agencies but also requires courts to follow unambiguous statutory language where Congress has clearly spoken to the issue presented.

- **HOLDING AN AGENCY ACCOUNTABLE FOR VIOLATING THE ADA.** In ***Pierce v. District of Columbia***, 128 F. Supp. 3d 250 (D.D.C. 2015), Judge Jackson ruled that prison employees and contractors in the District of Columbia had discriminated against William Pierce, a deaf man serving a 51-day sentence for assault. She found that the defendants never tried to determine what accommodations he would need to communicate with others and "largely ignored his repeated requests for an interpreter." Instead, she wrote, the employees and contractors "figuratively shrugged and effectively sat on their hands with respect to this plainly hearing-disabled person in their custody, presumably content to rely on their own uninformed beliefs about how best to handle him and certainly failing to engage in any meaningful assessment of his needs." The case illustrates Judge Jackson's commitment to appropriately broad interpretations of remedial statutes such as the Americans with Disabilities Act, intended to help disadvantaged individuals.[8]

- **HOLDING AN AGENCY ACCOUNTABLE UNDER THE APA FOR INTERFERING WITH FUNDING FOR A PUBLIC INTEREST ORGANIZATION.** In ***Policy & Research, LLC v. United States Department of Health & Human Services***, 313 F. Supp. 3d 62 (D.D.C. 2018), Judge Jackson rejected the decision of the Department of Health and Human Services to prematurely terminate statutory grants to organizations dedicated to preventing teen pregnancy. The Trump administration had shortened some organizations' 5-year grants without explanation, despite their clear eligibility. Rejecting the agency's argument that termination of the grants was "committed to agency discretion" and therefore unreviewable, Jackson ruled that HHS's early termination of the funding was a reviewable "agency action" under the APA. She further held that the agency's cursory early termination of already-awarded grants to eligible organizations, without notice or an opportunity to be heard, was arbitrary and capricious. The case demonstrates that while deference to agencies can be an important principle, judges must still step in to ensure that agencies cannot, arbitrarily and without explanation, deprive people and organizations of their statutory rights.

- **NULLIFYING EXECUTIVE BRANCH ATTEMPTS TO UNDERMINE WORKERS' RIGHTS.** In ***American Federation of Government Employees,*** *AFL-CIO v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018), Judge Jackson invalidated provisions of three executive orders issued by former President Trump that would have (1) limited the timeframe for collective bargaining and the issues that could be collectively bargained; (2) limited the amount of time federal employees could spend on union activities and what employees could do with that time; and (3) made it easier to terminate purportedly underperforming employees. Jackson concluded that the executive orders infringed

[8] *See also Equal Rights Center v. Uber Technologies*, 525 F. Supp. 3d 62 (D.D.C. 2021), in which Judge Jackson denied Uber's motion to dismiss allegations that their wheelchair accessible service was significantly less reliable than its standard service, a discrepancy that would violate the ADA.

on the statutory right of federal employees to collectively bargain, in violation of the Federal Service Labor-Management Relations Statute, which evinces a strong federal public policy in favor of unions. While the D.C. Circuit reversed Jackson's holding that she had the power to review the union's claims (holding that the unions first had to exhaust an administrative process before seeking judicial relief), the holding demonstrates Jackson's willingness, as appropriate, to give weight to the broad public policy purposes underlying statutes.

- **HOLDING AN AGENCY ACCOUNTABLE UNDER THE APA FOR TRAMPLING IMMIGRANTS' RIGHTS.** In ***Make The Road New York v. McAleenan***, 405 F. Supp. 3d 1 (D.D.C. 2019), Judge Jackson enjoined an agency rule that would have expanded the category of non-citizens subject to expedited deportation. Jackson found that the U.S. Department of Homeland Security had violated the APA because the rule was arbitrary and capricious and the agency failed to seek public comment before issuing it. Judge Jackson recognized that soliciting public input on agency rules is a vital APA requirement that helps protect against arbitrary and capricious government actions.

- **HOLDING AN AGENCY ACCOUNTABLE UNDER THE APA FOR UNDERMINING WORKERS' RIGHTS.** In February 2022, Judge Jackson authored her first D.C. Circuit opinion for a unanimous panel in ***American Federation of Government Employees v. Federal Labor Relations Authority***, 25 F.4th 1 (D.C. Cir. 2022). The Federal Service Labor-Management Relations Statute requires federal employers to engage in collective bargaining when there is a change to conditions of employment, including changes to personnel policies, practices, and matters affecting working conditions. Previously, the Federal Labor Relations Authority (FLRA), which oversees compliance with the statute, had interpreted this to require collective bargaining for any change that was more than *de minimis*; in 2020, the FLRA changed the standard so it required collective bargaining only when the change had a "substantial impact" on workplace conditions. Through Judge Jackson's opinion, the appellate court ruled that the FLRA's new threshold for collective bargaining was not sufficiently supported or reasoned and thus was arbitrary and capricious in violation of the APA.

Separation of Powers

- **"PRESIDENTS ARE NOT KINGS."** In ***Committee on Judiciary, United States House of Representatives v. McGahn***, 415 F. Supp. 3d 148 (D.D.C. 2019), Judge Jackson upheld congressional subpoena power in a showdown between Congress and the Trump administration. The Judiciary Committee sought to compel White House counsel Donald McGahn to testify in its impeachment inquiry into then-President Trump, but Trump, claiming a broad executive privilege, ordered McGahn not to comply with the subpoena. In a lengthy opinion, Jackson ruled for the Committee, holding that senior presidential aides had to comply with a congressional subpoena to testify before an authorized committee. Jackson rejected the immunity claim, holding that "with respect to senior-level presidential aides, absolute immunity from compelled congressional process simply does not exist," a conclusion that was "inescapable precisely because compulsory appearance by dint of a subpoena is a legal construct, not a political one, and per the Constitution, no one is above the law." In often-quoted language, Judge Jackson stressed that one of the primary lessons from "American history is that Presidents are not kings." White House employees, she continued, "work for the People of the United States," and "take an oath to protect and defend the Constitution of the

United States"; the president cannot block them from appearing to testify. Judge Jackson's ruling in this case demonstrates a commitment to accountability and transparency, including for the most powerful people.[9]

Government Transparency

- **REJECTING AGENCY ATTEMPTS TO SHIELD DOCUMENTS FROM THE PUBLIC.** In ***McKinley v. Federal Deposit Insurance Corp.***, 268 F. Supp. 3d 234 (D.D.C. 2017), Judge Jackson rejected attempts to shield agency documents from public release under the Freedom of Information Act (FOIA). In 2015, the plaintiff sought records from the FDIC regarding the solvency of Citi and the possible placement of Citi into receivership. The FDIC identified responsive records but refused to turn them over, citing a variety of FOIA exemptions. However, as Judge Jackson pointed out, an agency cannot simply summarily cite FOIA exemptions when refusing to turn over responsive documents—it must provide a court with at least enough information to allow the court to come to a rational conclusion about the agency's assertion. In a win for transparency, Judge Jackson held that the FDIC's cursory reliance on certain FOIA exemptions, with little or no analysis to allow a court to evaluate the application of the exemptions, failed to meet this standard.

But not always ruling in favor of individual rights or progressive causes.

- **REJECTING CLASS CERTIFICATION IN A SUIT FOR BANK MISCONDUCT.** In ***Parker v. Bank of America***, N.A., 99 F. Supp. 3d 69 (D.D.C. 2015), Judge Jackson rejected class certification for homeowners claiming injury at the hands of Bank of America. After the financial crisis, the plaintiff obtained a mortgage modification from Bank of America, but the bank failed to implement it for two years, during which time the plaintiff received foreclosure notices, demands for payments, and threats to report his delinquency to credit agencies. The plaintiff sought to certify a class of similarly situated individuals suffering similar harm as a result of Bank of America's failure to implement mortgage modifications. Judge Jackson held that the plaintiff failed the commonality element of class certification because the modification contracts differed, plaintiff could not demonstrate that all members of the class had a valid modification, and there was no showing that Bank of America had conducted a "post-modification review" that resulted in widespread, improper denials of modifications.

- **DECLINING TO REVIEW ENVIRONMENTALLY DAMAGING AGENCY ACTION.** In ***Center for Biological Diversity v. McAleenan***, 404 F. Supp. 3d 218 (D.D.C. 2019), Judge Jackson respected Congress's decision to foreclose judicial review. Congress, in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), had provided that the Attorney General may waive the applicability of certain environmental and other statutes that might impede the construction of border barriers, and the Attorney General did so with respect to Trump's border wall (regarded as an "ecological disaster"). Environmental groups challenged the action. Judge Jackson, following the clear command of Congress, held that she had no ability to review the Trump administration's

[9] After an involved back and forth between the district court and the D.C. Circuit, the case was ultimately dismissed after McGahn agreed to testify.

waiver of environmental laws to facilitate the construction of its border wall, and that there were no relevant constitutional infirmities in the IIRIRA.

- **UPHOLDING A RULE IMPOSING NEW RESTRICTIONS ON UNION ELECTIONS.** In ***American Federation of Labor & Congress of Industrial Organizations v. National Labor Relations Board***, 471 F. Supp. 3d 228 (D.D.C. 2020), Judge Jackson upheld a rule of the National Labor Relations Board mandating certain pre- and post-election requirements for elections of employee representatives. The plaintiffs challenged the rule because it represented a departure from a prior 2014 rule and because the agency had ignored relevant statistics in the rulemaking process. Citing *Chevron* and recognizing that the scope of arbitrary and capricious review is narrow, Judge Jackson held that the agency explicitly recognized it was changing course (and that the court does not have to be convinced the new direction is "better" than the old one). And she ruled that the agency had adequately explained its reasoning, quoting *Vermont Yankee* for the proposition that a court should not require an agency to explore "every alternative device and thought conceivable by the mind of man."

- **REJECTING CONSUMER PROTECTION CLAIMS ON STANDING GROUNDS.** In ***Consumers for Auto Reliability & Safety v. Federal Trade Commission***, No. 17-CV-0540 (KBJ), 2021 WL 4050876, at *1 (D.D.C. Sept. 6, 2021), Judge Jackson rejected consumer protection claims based on the standing doctrine. The plaintiffs challenged a Federal Trade Commission action that allowed used car dealers to sell cars subject to open recalls and to advertise them as "safe" provided they made certain disclosures. Plaintiffs argued that no cars with open recalls could be safe. Judge Jackson held that individual members of the plaintiff organization lacked standing. Although they asserted "concrete and particularized injuries" in their concern for potential death or injury, they did not show that the agency orders plausibly increased the risk of that harm. The decision illustrates the difficulties those who would litigate to protect the public interest face under the Supreme Court's unduly burdensome standing jurisprudence that Judge Jackson, as a district court judge, was obligated to follow.

Collectively, these decisions show that Judge Jackson decides cases with scrupulous attention not only to what the law says but also to what the law was intended to achieve. She respects the role of government and regulation in protecting the public but at the same time holds government accountable for adherence to the limits Congress has imposed in the APA and elsewhere. And she applies the law fairly, without regard to the status or power of those before the court.

CONCLUSION

Judge Jackson has the intellect, character, and experience to serve as an outstanding Supreme Court justice for years to come. She will bring not only a remarkable resume but also much needed diversity to the Court. In addition, she will bring a judicial approach that respects the value of regulation, the need to protect the public interest, compassion for the underdog, and above all, a commitment to judging every party and every claim equally under the law. These qualities will help balance the outlook of the Justices currently serving on the Court. And that will prove especially beneficial to all Americans seeking to improve their financial lives in the face of an enormously powerful, often predatory, and relentlessly litigious financial services industry.

Appendix A

Important Supreme Court Decisions Involving Financial Regulation and Administrative Law

1. **INCREASING PLEADING BURDENS.** In ***Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005)**, the Court held that plaintiff investors cannot make the required showing that their losses were caused by the wrongdoer's misstatement or omission simply by alleging that a security's price was inflated at the time of purchase because of the misrepresentation, thus increasing the already heavy pleading requirements applicable to private actions for securities fraud.

2. **PREEMPTING STATE LAW.** In ***Watters v. Wachovia Bank*, N.A., 550 U.S. 1 (2007)**, the Court held that federal authority over national banks preempted a state from imposing licensing, registration, and inspection requirements upon national banks and their operating subsidiaries engaged in mortgage lending. This and other holdings effectively precluded states from acting to protect consumers and investors from illegal and fraudulent conduct in many areas subject to federal regulation.

3. **RESTRICTING ENFORCEMENT REMEDIES.** In ***Kokesh v. SEC*, 137 S. Ct. 1635 (2017)**, the Court held that the SEC could not recover ill-gotten gains from securities frauds dating back more than five years, dealing a major blow to the SEC's ability to recover ill-gotten gains from fraudsters.

4. **UNDERMINING WHISTLEBLOWERS.** In ***Digital Realty Trust v. Somers*, 138 S. Ct. 767 (2018)**, the Court held that whistleblowers who report wrongdoing internally but not to the SEC are not protected by the anti-retaliation provisions in the securities laws, undermining the successful whistleblower program's incentives and protections.

5. **INVALIDATING ADMINISTRATIVE LAW JUDGE APPOINTMENTS.** In ***Lucia v. SEC*, 138 S. Ct. 2044 (2018)**, the Court held that the SEC's administrative law judges, who preside over the majority of the Commission's enforcement actions, are "officers of the United States" subject to the Constitution's Appointments Clause, forcing the SEC to offer new hearings to some administrative respondents.

6. **BROADLY READING THE ANTI-FRAUD PROVISIONS.** In ***Lorenzo v. SEC*, 139 S. Ct. 1094 (2019)**, the Court held that while a fraudster who circulated blatantly false emails to prospective investors could not be held liable under the rule prohibiting false statements, his conduct nevertheless violated other overlapping prohibitions against fraudulent acts, as he employed a scheme to defraud or engaged in acts that would operate as a fraud or deceit.

7. **REQUIRING ARBITRATION OF ARBITRABILITY.** In ***Henry Schein, Inc. v. Archer & White Sales Inc.*, 139 S. Ct. 524 (2019)**, the Court held that where contracting parties have delegated issues of "arbitrability" to an arbitrator—in other words, the threshold question of whether the dispute is even subject to arbitration—then courts must compel arbitration of that threshold issue, even if it is obvious that the dispute is not subject to arbitration under the wording of the contract between the parties.

8. **LIMITING ACCESS TO INFORMATION UNDER FOIA.** In ***Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019)**, the Court broadened an exemption in FOIA, which allows for the withholding of "trade secrets and commercial or financial information," thus constricting the public's access to information.

9. **LIMITING JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS OF ITS OWN RULES.** In ***Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)**, the Court declined to overrule the *Auer* doctrine but substantially narrowed it, thus further undermining reliance on agency expertise.

10. **APPLYING A STRINGENT STATUTE OF LIMITATIONS.** In ***Rotkiske v. Klemm*, 140 S. Ct. 355 (2019)**, the Court held that the one-year statute of limitations in the Fair Debt Collection Practices Act begins to run when the violation occurs, not when the debtor discovers the violation and first knows he has a claim against the debt collector, thus enabling a debt collector to escape liability.

11. **RESTRICTING THE DISGORGEMENT REMEDY.** In ***Liu v. SEC*, 140 S. Ct. 1936 (2020)**, the Court upheld the SEC's authority to seek disgorgement or ill-gotten gains from con artists but imposed two significant limits on that remedy.

12. **INVALIDATING AGENCY STRUCTURE.** In ***Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020)**, the Court held that the removal limits on the director of the Consumer Financial Protection Bureau were unconstitutional, but it also held that the defective provisions were severable from the rest of the law governing the CFPB, thereby avoiding a major dismantling of the agency and a major blow to consumer protection.

13. **APPLYING HARSH STANDING REQUIREMENTS.** In ***Thole v. U.S. Bank,* 140 S. Ct. 1615 (2020)**, the Court held that retirement savers could not sue to stop pension plan trustees from looting their accounts because, although their funds had been depleted, they were still receiving benefits and therefore lacked standing.

14. **ADOPTING A MORE FAVORABLE READING OF ERISA'S STATUTE OF LIMITATIONS.** In ***Intel Corporation Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020)**, the Court read the "actual knowledge" test in the statute of limitations under EIRSA in favor of class action plaintiffs seeking to recover for mismanagement of their retirement plan, avoiding dismissal of the claims.

15. **REMOVING AGENCY ENFORCEMENT REMEDIES.** In ***AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021)**, the Court interpreted the Federal Trade Commission Act narrowly and held that it does not authorize the FTC to seek, or a federal court to award, equitable monetary relief such as restitution or disgorgement, a mainstay of the agency's enforcement program.

16. **UPHOLDING A FLAWED AGENCY RULE.** In ***Federal Communications Commission v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021)**, the Court deferred to a flawed FCC rulemaking under the APA that rolled back policies designed to promote racial and gender diversity among media outlets.

17. **INVOKING STANDING TO END AN ASSAULT ON THE AFFORDABLE CARE ACT.** In ***California v. Texas*, 141 S. Ct. 2104 (2021)**, the Court held that because Congress had set the "shared responsibility payment" for failure to obtain health insurance at zero, neither the states nor the individual plaintiffs attacking the Affordable Care Act had standing to challenge the law.

18. **INVALIDATING AGENCY STRUCTURE.** In ***Collins v. Yellen*, 141 S. Ct. 1761 (2021)**, the Court held that the for-cause-only removal restrictions protecting the director of the Federal Housing Finance Agency were unconstitutional but also narrowed the remedy to avoid invalidating the terms of the GSE bailouts necessitated by the financial crisis.

19. **KEEPING A CLASS ACTION ALIVE.** In ***Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021)**, the Court ruled in favor of plaintiffs with respect to procedural requirements governing certification of class actions, but it edged closer to the dangerous notion that a fraudulent statement may be so generic that it can't support a class action for misrepresentation.

20. **HOLDING THAT EXPLICIT STATUTORY RIGHTS OF ACTION DO NOT ESTABLISH STANDING.** In ***TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)**, the Court held that even where Congress has expressly created a statutory right to sue to enforce a remedial law, as in the Fair Credit Reporting Act, plaintiffs must nevertheless separately satisfy the Court's multi-pronged standing requirements.

Appendix B

Cases Pending on the Supreme Court's 2021-2022 Docket That Involve Financial Regulation and Administrative Law[10]

- *American Hospital Assoc. v. Becerra, No. 20-1114* – How much deference will the Court afford to an agency's interpretation of the law?

- *Badgerow v. Walters, No. 20-1143* – Which courts (state or federal) have jurisdiction when parties seek to vacate or confirm an arbitration award?

- *Axon Enterprise v. Federal Trade Commission, No. 21-86* – 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.

- *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."

- *Southwest Airlines Co. v. Saxon, No. 21-309* – Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate "transportation workers" exempt from the Federal Arbitration Act.

- *Viking River Cruises v. Moriana, No. 20-1573* – Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under the California Private Attorneys General Act.

- *Pivotal Software v. Superior Court of CA, No. 20-1541* – Whether the Private Securities Litigation Reform Act's discovery-stay provision applies to a private action under the Securities Act of 1933 in state or federal court, or solely to a private action in federal court.

[10] *See* SCOTUSBLOG, Cases, https://www.scotusblog.com/case-files/terms/ot2021/?sort=mname.

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