BETTER MARKETS

SPECIAL REPORT

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The Supreme Court's Decisions That Affect Americans' Financial Lives & The Growing Threat To The Administrative State

A Review of Important Cases in
Financial Regulation and Administrative Law
Decided During the 2021–22 Term

A Closer Look at the Assault on the Administrative State,
A Major Threat to the Regulatory Framework That Has Served
the Public Well for Over a Century

A Preview of Some Key Cases
To Be Decided During the 2022–23 Term

INTRODUCTION

Every term, the Supreme Court decides critically important but often unnoticed cases in the areas of financial regulation and administrative law. Those decisions tend to be overshadowed by the Court's more headline-grabbing pronouncements that address controversial social policy questions, such as those involving abortion rights, gun control, and others. Yet the financial cases have a profound impact on the economic well-being of every American who is working, saving, and investing for a better standard of living and a decent retirement. 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.

Hughes v. Northwestern University illustrates the point and serves as a clear example of the direct connection between the Court's decisions and the wallets of ordinary Americans.[1] In *Hughes*, the plaintiffs were participants in a retirement plan, seeking to recover losses because the plan administrators offered a confusing array of investment options, many of which were overpriced and underperforming. The U.S. Court of Appeals for the Seventh Circuit rejected their claims, based on the notion that the administrators had satisfied their duty by offering at least some investment options that weren't so bad. Fortunately, the Supreme Court reversed the Seventh Circuit and restored the plaintiffs' claims, holding that retirement plan fiduciaries have an ongoing duty to monitor investment options and remove those that are overpriced or otherwise imprudent, regardless of whether the menu of options includes some prudent alternatives from which investors can choose. While the plaintiffs in the case are not out of the woods yet—the Seventh Circuit still has to re-evaluate their claims in light of the Supreme Court's articulation of the applicable legal standard—it is nevertheless a positive outcome. It gives the plaintiffs in the case a fighting chance of recovering their losses, and more broadly it reaffirms the powerful fiduciary duty that retirement plan administrators owe their plan participants. That means retirement savers can protect and preserve more of their hard-earned money.

Another case going further back in time drives home the point. Seventy-five years ago, in a decision known as *Howey*,[2] the Court broadly and flexibly defined a class of securities called "investment contracts." The Court wisely anticipated the need for a definition that could evolve over time and keep pace as the nature of securities offerings—and the imaginative schemes of the con artist—evolved. Today, that legal concept serves as the single most important tool in the SEC's ongoing battle against fraud and manipulation in the cryptocurrency markets. As a direct result, the SEC has the authority—the "jurisdiction"—to regulate most cryptocurrency offerings, punish and deter cryptocurrency frauds,

[1] 142 S. Ct. 737 (2022).

[2] *See generally SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

and even seek disgorgement for the benefit of the countless investors who have sustained—and continue to sustain—heavy losses.

Over the years, the Court has also handed down decisions that make life much *harder* for investors and the regulatory agencies that seek to protect them from financial predators. For example, over 30 years ago, the Court legitimized the now widespread practice among brokers of including fine-print clauses in account agreements that force their clients out of court and into arbitration. That's a biased, secretive, and industry-run dispute resolution process that gives investors little hope of fully, or even significantly, recovering their losses from dishonest practices. The toll on everyday American investors has been enormous. The Court's cases on financial regulation also have the potential either to erode or fortify the regulatory framework that helps stabilize our financial system and prevent crises like the one that overwhelmed our economy in 2008 and inflicted hardship unlike anything seen since the Great Depression.

Even cases that lie outside the immediate realm of financial regulation, such as those addressing questions of administrative law, can have a huge impact on the financial lives of Americans. In *West Virginia v. EPA*,[3] for example, the Court officially recognized a rule of law that in some cases may hinder the regulatory agencies' ability to address the gravest threats Americans face, from climate change to deeply embedded and unscrupulous financial practices. In that decision, the Court gave the so-called "major questions" doctrine its unqualified imprimatur. That rule can serve as the basis for judicial nullification if a court believes an agency's rule is too ambitious or consequential to have been intended by Congress—regardless of how beneficial the rule may be. And the Court based this rule of law on a meager foundation indeed, as Justice Kagan demonstrated in a powerful dissent, discussed below. More troubling still, the decision in *West Virginia v. EPA* appears to be part of a larger agenda among the conservative Justices on the Court to scale back the administrative state, the system of federal regulation that has admirably protected Americans from environmental pollution, unsafe products, and financial predators for a century.

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.[4] In this Report, we continue that tradition. We examine some noteworthy cases from the prior term and review some cases to be decided during the term about to begin on October 3. In addition, we take a closer look at the major questions doctrine canonized in the *West Virginia* decision along with two related legal trends: (1) the threatened erosion of so-called *Chevron* deference to agency interpretations of the law and (2) the possible resuscitation of the "non-delegation doctrine," which can be wielded to invalidate entire swaths of statutory language. Sadly, these three currents in administrative law appear likely to play an increasingly prominent role as the Court's conservative majority takes aim at our national regulatory framework.

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[3] 142 S. Ct. 2587 (2022).

[4] Better Markets, *Special Report: If Confirmed to the Supreme Court, Judge Ketanji Brown Jackson Will Help Improve the Financial Lives of American Consumers and Investors* (Mar. 15, 2022), https://bettermarkets.org/analysis/better-markets-releases-supreme-court-report-if-confirmed-to-the-supreme-court-judge-ketanji-brown-jackson-will-help-improve-the-financial-lives-of-american-consumers-and-investors/; Better Markets, *Special Report: The Supreme Court's 2020–2021 Term* (July 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/.

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. Some of the Court's decisions directly address the scope of financial regulation; others have an equally profound but indirect impact on Americans' financial lives by determining the scope of the authority that all agencies—financial or otherwise—may exercise under their laws:

- Statutory and Regulatory Interpretation – How broad are the laws and regulations that are supposed to protect our financial system from another near collapse and safeguard consumers, investors, and retirement savers from predatory conduct and conflicts of interest in the financial markets? What tools do regulatory agencies have to punish and deter banks and other financial institutions that exploit their clients?

- Administrative Law – Has an agency exceeded its authority? Has it failed to comply with the procedural requirements applicable to rulemaking under the Administrative Procedure Act, including issuing public notice and giving all stakeholders an opportunity to comment? And how much weight should courts afford to the legal interpretations, actions, and rules of the regulatory agencies?

- Standing – Have the plaintiffs who seek judicial 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 even its future viability?

- Transparency – Has an agency adequately responded to public requests seeking access to government documents, or is it improperly invoking exemptions to withhold information? And does it generally operate in a way that maximizes transparency within the bounds of the law?

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 decision are final. In addition, the Court's decisions are national in scope, and they endure for decades, unless Congress intervenes on a matter not determined 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 recently, has long obligated the Court to "stand by things decided" absent the most compelling reasons.

II. WHAT WAS DECIDED: SOME KEY DECISIONS IN THE REALM OF FINANCIAL REGULATION AND ADMINISTRATIVE LAW FROM THE LAST TERM.

During its most recent term, from October 2021 to July 2022, the Court issued a number of important decisions involving financial regulation, the rights of investors to seek relief, and administrative law.[5] The results were mixed to say the least. In the three cases we profile below, the Court affirmed the duty of retirement plan fiduciaries to monitor investment options and remove those that are overpriced or confusing (*Hughes v. Northwestern University*); respected the jurisdiction of the state courts when those subject to flawed arbitration awards seek to vacate (or confirm) them (*Badgerow v. Walters*); and, as observed in our Introduction, created a new legal weapon that courts may invoke to invalidate agency rules by demanding especially clear authorization from Congress for any rules that the courts deem too economically or politically significant (*West Virginia v. EPA*).

Here's a brief overview of each of those three cases. In each instance, we set forth the background, the major elements of the Court's decision, and some observations about why it matters. On that issue, the Supreme Court's decisions almost always prove important on multiple levels: They affect the parties before the Court, whose interests are at stake; they establish new rules that will apply going forward, often reshaping financial regulation and investor remedies; and they sometimes foreshadow broader trends in the Court's approach to the law that have far-reaching and sometimes harmful long-term consequences.

1. REAFFIRIMING RETIREMENT PLAN FIDUCIARY DUTIES – *Hughes v. Northwestern University*, 142 S. Ct. 737 (Jan. 24, 2022) – The Court sides with retirement savers and reaffirms the duty to monitor investment options and cull overpriced offerings.

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, specifically the duty to monitor plan investment options and remove those that do not serve the interests of the participants and beneficiaries.

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 administrator's 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. The plaintiffs alleged that they suffered losses because their retirement plan administrators offered such a confusing collection of hundreds of investment options, failed to monitor those offerings, and failed to remove the imprudent ones with excessive investment management and recordkeeping fees.

[5] A full list of decisions from the October 2021 term can be found in a helpful format at SCOTUSBLOG. *See October Term 2021*, SCOTUSBLOG, Cases, https://www.scotusblog.com/case-files/terms/ot2021/?sort=mname.

The district court dismissed the plaintiffs' lawsuit for failing to state a claim. The U.S. Court of Appeals for the Seventh Circuit affirmed that ruling, largely on the ground that the plan included at least some prudent selections among its hundreds of options. According to the Seventh Circuit, Northwestern did not breach its fiduciary duty by offering its beneficiaries poorly performing and expensive investment options, because it *also* offered its beneficiaries investment options that were better on both counts.[6] 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.

Better Markets joined with AARP and other groups in an *amicus curiae* brief 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.[7]

The Decision. In a unanimous opinion written by Justice Sotomayor, the Supreme Court sided with retirement savers (and Better Markets). The Court disagreed with the district court and the Seventh Circuit decisions that absolved plan fiduciaries because they included at least some prudent investment options along with the imprudent ones.

The Supreme Court held that, under one of its prior decisions, *Tibble v. Edison International*,[8] 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 a diverse menu of options that includes *some* prudent alternatives from which investors could choose did not excuse breach of that duty. As the Court said:

> In *Tibble*, this Court explained that, even in a defined-contribution plan where participants choose their investments, plan fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options. If the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty.[9]

The Court remanded the case to the Seventh Circuit so that it could reevaluate the plaintiffs' allegations in light of the standard articulated in *Tibble*. The Court also observed that, "[b]ecause the content of the duty of prudence turns on the specific circumstances prevailing at the time the fiduciary acts, the appropriate inquiry will necessarily be context specific."[10] And in another observation seemingly aimed at giving fiduciaries some flexibility, the Court added that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."[11] Thus, for

[6] *See Divane v Nw. Univ.*, 953 F.3d 980, 988 (7th Cir. 2020) ("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.").

[7] *See* Brief of AARP, AARP Foundation, Better Markets, Inc., Consumer Federation of America, National Employment Law Project, and Pension Rights Center as Amici Curiae Supporting Petitioners and Urging Reversal, *Hughes v. Nw. Univ.*, 142 S. Ct. 737 (2022) (No. 19-1401), https://bettermarkets.org/sites/default/files/documents/Hughes_v_Northwestern_University_%20Amicus_Brief.pdf; *see also* Press Release, Better Markets, Better Markets Joins Amicus Brief Urging U.S. Supreme Court to Help Protect Americans' Retirement Savings (Sept. 13, 2021), https://bettermarkets.org/newsroom/better-markets-joins-amicus-brief-urging-us-supreme-court-help-protect-americans-retirement/.

[8] 575 U.S. 523 (2015).

[9] *Hughes v. Nw. Univ.*, 142 S. Ct. 737, 742 (2022) (citations omitted).

[10] *Id.* (citations omitted) (internal quotation marks omitted).

[11] *Id.*

now, the Court has helped reaffirm the high standard that retirement plan administrators must follow under ERISA, the law written to protect Americans' retirement savings—albeit with some leeway for the appellate court still to reject the plaintiffs' claims on remand.

Why It Matters. At stake in *Hughes* was the ability of retirement savers to protect their hard-earned money from mismanagement by fiduciaries who include confusing, overpriced, and underperforming investment options in their retirement plans. As we pointed out in the joint amicus brief we filed in this case, 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 Court agreed that the Seventh Circuit's reasoning would have introduced 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 case is important in part because the data show that such costly investments, even with fee rates that are excessive but not exorbitant in absolute amount, 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. In this case, the Court has at least recognized the importance of requiring retirement plan fiduciaries to monitor investment options and to remove the imprudent offerings.

2. **STATE VS. FEDERAL COURT JURISDICTION FOR ARBITRATION – *Badgerow v. Walters*, 142 S. Ct. 1310 (March 31, 2022) – The "look-through" approach to determining federal jurisdiction does not apply to requests to confirm or vacate arbitration awards.**

Background. In *Badgerow v. Walters*, the plaintiff, Denise Badgerow, was a financial advisor who was terminated after raising concerns about workplace harassment and reporting to her employer violations of the federal securities laws, SEC regulations, and Financial Industry Regulatory Authority ("FINRA") rules. Bound by an agreement requiring FINRA arbitration of any claims arising from her employment, she initiated an arbitration asserting violations of state and federal rules and statutes. Her claims were subsequently dismissed with prejudice by the arbitration panel. Badgerow then filed suit in Louisiana state court seeking to vacate the arbitration decision on the grounds 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.

In a previous case, *Vaden v. Discover Bank*,[12] 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 FAA. After *Vaden*, a circuit split arose over whether the same "look-through" approach that applies to motions to compel arbitration under Section 4 of the statute 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 Construction Services, Inc.*,[13] a divided panel of the Fifth Circuit held that the "look-through" approach applies under

[12] 556 U.S. 49 (2009).

[13] 946 F.3d 837 (5th Cir. 2020).

Sections 9 and 10, as it does under Section 4 of the FAA. 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.[14] When Badgerow appealed her own case to the Fifth Circuit, that court considered itself "bound" by its earlier decision in *Quezada*.[15]

Badgerow then sought Supreme Court review, 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.

The Decision. In an 8–1 opinion, Justice Kagan, writing for the Supreme Court, reversed the Fifth Circuit and held that a federal court, in determining whether it has jurisdiction to decide an application to confirm, vacate, or modify an arbitral award, does *not* look through the application to the underlying substantive controversy between the parties but instead looks only to the application actually submitted to the court. Abrogating *Quezada*, the Court held that the "look-through" approach to determining federal jurisdiction does not apply to requests to confirm or vacate arbitration awards under Sections 9 and 10 of the FAA. As the application to affirm the arbitration award did not raise, on its face, a federal question,[16] the federal courts were left without subject matter jurisdiction and the matter was left to the state court.

Why It Matters. In this case, the Court's decision allows Badgerow the opportunity to challenge the dismissal of her arbitration claim in a state court, the forum she preferred and one that might be less inclined than a federal court to reflexively affirm the arbitration panel's decision. The case also exemplifies the wide variety of issue that come before the federal courts, including the Supreme Court, involving arbitration. Cases involving mandatory arbitration are well-represented on the Court's docket every term, and for good reason. As we have pointed out, mandatory arbitration is typically an unfair method of dispute resolution for consumers, employees, and other individuals.[17] Disputes accordingly arise as consumers and investors who have suffered harm at the hands of unscrupulous firms struggle to free themselves 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. Virtually every decision from the Court addressing arbitration—including *Badgerow*—helps build out, for better or worse, the collection of principles that determine whether and when wronged parties will be forced to submit to arbitration, how the process will play out, and what post-award remedies will be available.

[14] *Id.* at 842.

[15] *Badgerow v. Walters*, 975 F.3d 469, 474 (5th Cir. 2020).

[16] Although the underlying dispute between the parties involved federal employment claims, the application to affirm the arbitration award did not raise, on its face, a federal question because the parties were not diverse and the immediate issue before the federal courts "concerns the contractual rights provided in the arbitration agreement, generally governed by state law." *Badgerow v. Walters*, 142 S. Ct. 1310, 1321 (2022).

[17] Better Markets, *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/.

Unfortunately, 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 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.[18]

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 can be forced into arbitration.[19] 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.[20] 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 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."[21]

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 resolving disputes. On the contrary, through the common use of fine-print contracts, it is sprung on unsuspecting investors (who lack the bargaining power to contest such clauses even if they are aware of them). It is unfairly skewed toward large firms, as panels tend to favor industry. And even a "win" for the investor typically means a monetary award that falls well short of her actual losses and attorneys' fees. Some forms of damages available in court may be 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 gets the facts or law wrong, an appeal is available to challenge the ruling. However, under the FAA, 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.[22]

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[18] Imre S. Szalai, *The Supreme Court's Arbitration Docket*, AM. CONST. SOC'Y (last visited Sept. 14, 2022), https://www.acslaw.org/analysis/acs-supreme-court-review/the-supreme-courts-arbitration-docket/.

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

[20] 15 U.S.C. § 78cc(a); 15 U.S.C. § 77n.

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

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

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.[23]

2. **FULLY EMBRACING A NEW WEAPON AGAINST REGULATION, THE "MAJOR QUESTIONS" DOCTRINE – *West Virginia v. EPA*, 142 S. Ct. 1906 (June 30, 2022) – The EPA's Clean Power Plan is struck down for lack of sufficiently clear congressional authority.**

Background. In 2015, the EPA under the Obama administration adopted a rule known as the Clean Power Plan ("CPP"). The CPP was an effort to reduce carbon dioxide emissions from power plants and thus help slow climate change. It relied on Section 111 of the Clean Air Act, under which the EPA, when setting the emissions limits, was authorized to identify the "best *system* of emission reduction" for existing sources of pollution. The EPA determined that the "best" such "system" for coal and natural gas power plants would be a combination of measures: not only source-specific practices that electricity-generating plants could adopt to operate more cleanly, but also "generation shifting" measures at the grid level, such as greater use of natural gas or renewables such as wind and solar. In short, to meet the new standards under the rule, plants could reduce their own output; increase their use of natural gas, wind, or solar energy production; or purchase emission allowances or credits as part of a cap-and-trade regime. To determine the degree of emissions reduction achievable through that system, the EPA settled on a reasonable amount, which it quantified as a reduction in the share of coal-generated power from 38% in 2014 to 27% by 2030.

The CPP was promptly challenged in the U.S. Court of Appeals for the D.C. Circuit and stayed by the Supreme Court pending review.[24] However, in 2019, the Trump administration's EPA repealed the CPP and adopted in its place the more narrow Affordable Clean Energy Rule ("ACE"). The Trump EPA believed the EPA's authority under Section 111 of the CAA was limited to measures that could be implemented on the physical premises of a power plant, i.e., "inside the fenceline," rather than the generation shifting approach adopted under the CPP. According to the Trump EPA, any regulation beyond the fenceline was too major a question for the agency to address without further congressional authorization.

The EPA's decision to repeal the CPP and adopt the ACE was also challenged in the D.C. Circuit. In a decision issued in January 2021, the circuit court vacated the repeal of the CPP, thus reinstating it.[25] The court sided with the EPA's original reading of the Clean Air Act, finding that there is "nothing in the text, structure, history, or purpose of Section 7411" that precludes generation shifting as a "system

[23] Szalai, *The Supreme Court's Arbitration Docket, supra* note 18.

[24] *West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

[25] *See generally Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021).

of emission reduction."[26] The D.C. Circuit also disagreed with the EPA regarding its "major question" theory. Twenty states, joined by the coal industry, sought review of the D.C. Circuit's decision in the Supreme Court.[27]

The Decision. In a 6–3 opinion written by Chief Justice Roberts, the Court reversed the D.C. Circuit Court and judicially nullified the Clean Power Plan, holding that the Clean Air Act did not grant the EPA the authority to adopt the generation shifting approach in the CPP. At the heart of the decision are three flawed rulings.[28]

First, the Court brushed aside the government's standing challenge, adopting a relaxed approach to a normally exacting threshold determination. The government had argued that the challengers lacked standing (and therefore the right to be in federal court) because they did not face injury from reinstatement of the CPP. They pointed to the EPA's decision not to enforce the rule and its intention instead to draft a new rule to regulate carbon emissions. The Court, however, observed that, technically at least, the CPP had been reinstated, raising at least the theoretical specter of injury. And to deflect the EPA's stated intention to adopt and enforce an entirely different regulation, the Court latched onto the mootness doctrine. The Court held, in essence, that the government could not rule out the possibility that the EPA might someday enforce the CPP, preventing a finding of mootness. The Court, in short, was decidedly accommodating to the challengers on the standing question.

Second, with respect to the merits, the Court ceremoniously declared that "this is a major questions case," heralding and legitimizing a new theory that anti-regulatory advocates are likely to deploy against what they regard as overly transformative regulation.[29] The Court took the view that the case was "extraordinary," one in which an agency sought to exercise broad authority in a way that would have vast "economic and political significance."[30] Under those circumstances, the Court asserted, the agency must point to especially "clear congressional authorization" for the authority it has claimed.[31]

Finally, and based on an exceedingly thin statutory analysis, the Court concluded that Congress had not in fact provided such clear authorization in Section 111 for the generation shifting approach the EPA took in the CPP. It therefore reversed the D.C. Circuit and formally nullified the CPP.

In his concurring opinion, Justice Neil Gorsuch offered enthusiastic support for the major questions doctrine, writing that, "[a]t stake [are] . . . basic questions about self-government, equality, fair notice, federalism, and the separation of powers."[32] The major questions doctrine, he wrote, "seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions on these interests" by requiring agencies to have "clear congressional authorization."[33] Conspicuously absent from his analysis, however, was any persuasive, concrete support for the notion that agencies pose a grave threat to the American public by grossly overreaching the limits of their delegated authority.

[26] *Id.* at 957.

[27] It is worth noting that many non-coal-based, large power companies supported the generation shifting focus contained in the CPP.

[28] *See* Better Markets, *Supreme Court's EPA Decision is a Dagger Aimed at the Heart of the Government's Ability to Protect the Health, Safety, and Welfare of the American People* (June 30, 2022), https://bettermarkets.org/newsroom/supreme-courts-epa-decision-is-a-dagger-aimed-at-the-heart-of-the-governments-ability-to-protect-the-health-safety-and-welfare-of-the-american-people/.

[29] *West Virginia*, 142 S. Ct. at 2610.

[30] *Id.* at 2608 (internal quotation marks omitted).

[31] *Id.* at 2609 (internal quotation marks omitted).

[32] *Id.* at 2621 (Gorsuch, J., concurring).

[33] *Id.* at 2594.

Justice Kagan, joined by Justices Breyer and Sotomayor, wrote a powerful dissent persuasively refuting the majority's approach. She opened by removing any doubt about the reality of climate change and the enormous threat it poses. She also chided the Court for its long-standing hostility to the CPP, citing the Court's unprecedented decision to stay the rule while it was initially under review in the D. C. Circuit. That, in turn, allowed time for the Trump administration to take office and repeal the CPP. She further criticized the Court's decision to take the case, given the EPA's plan to develop a new rule.

On the merits, Justice Kagan flatly challenged the majority's reading of the law:

> The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants.[34]

She then proceeded to substantiate this view with the type of thorough statutory analysis that the majority neglected to provide, focusing on the plain language of Section 111; the overall structure of the Clean Air Act; its legislative history; its purpose or design; and the EPA's expertise in the areas addressed by the CPP—all demonstrating that the EPA clearly did have the requisite authority from Congress to adopt the rule.

Along the way, Justice Kagan eloquently explained two essential points, one about the Court's disturbing trend toward ideologically convenient modes of analysis and the other about the obvious need for Congress to delegate complex regulatory problems to agencies. As to the first, she challenged the very legitimacy of the major questions doctrine, insisting—and demonstrating—that the precedents on which the majority relied as the basis for the newly coined doctrine in fact involved "normal statutory interpretation."[35] She explained that the text of any broad delegation must be read in context, with an eye toward whether the agency was operating in an area far outside its expertise, and whether the agency's action would conflict with Congress's broader design.[36] In her view, these attributes of traditional statutory analysis can accommodate agency actions even with large-scale consequences, and there is no need, nor any basis upon which, to contrive a grand new doctrine to restrict agency authority. And she explained why the majority's infatuation with its new canon of administrative law was so troubling:

> Some years ago, I remarked that "[w]e're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards. Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence. See *ante*, at ——, —— – ——; *e.g.*, *ante*, at —— – —— (GORSUCH, J., concurring).[37]

[34] *Id.* at 2826 (Kagan, J., dissenting) (citations omitted).

[35] *Id.* at 2632.

[36] *Id.*

[37] *Id.* at 2641 (alteration in original).

To the second key point in the dissent, Justice Kagan made plain why it is so vital for Congress to delegate to agencies, including—and especially—on important policy issues: Members of Congress often "*don't* know enough" to regulate sensibly on a matter, and moreover, they "*can't* know enough" to ensure that regulatory schemes work across time.[38] And she rightly highlighted the impressive track record that regulation has amassed in protecting the public:

> Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.[39]

She ended her dissent with this observation: "The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening."[40]

Why It Matters. The decision in *West Virginia v. EPA* is important on multiple levels. Most immediately, it may constrict the ability of the EPA to develop new regulatory solutions to the daunting problem of climate change. More broadly, of course, enshrining the "major questions" doctrine in the Supreme Court's jurisprudence will embolden those in industry and others who wish to prevent or scale back rules across the regulatory spectrum—including from the financial regulatory agencies—that are necessary to address major societal challenges.[41]

Yet more broadly, the decision is part of a fresh assault on the administrative state. It is a misguided legal contrivance won by those seeking to weaken or dismantle the post-New Deal framework of federal regulation that was created to promote the broad public interest by protecting the health, safety, and welfare of all Americans. Recognizing that Congress did not have the expertise and was not structured or able to address some of the most important issues facing the country, it created regulatory agencies to hire experts, gather and analyze data, seek and receive public input, and adopt regulations to respond to the many complex issues that arise from a vast and complex economic system and a sprawling, technologically advanced country. *West Virginia v. EPA* will be invoked in an effort to scale back this essential work of the regulatory agencies where a rule promises to have a significant political or economic impact. The case has already been cited by those who oppose the SEC's recently proposed climate risk disclosure rule.[42]

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[38] *Id.* at 2642 (emphasis added).

[39] *Id.* at 2643.

[40] *Id.* at 2644.

[41] *See* Ellie Borst, *Supreme Court Climate Ruling Ignites Deregulatory Challenges*, E&E NEWS (Aug. 16, 2022), https://www.eenews.net/articles/supreme-court-climate-ruling-ignites-deregulatory-challenges/.

[42] *See User Clip: Sen. Toomey Grills Chairman Gensler on Congressional Authorization*, C-SPAN, at 1:59–3:59 (Sept. 15, 2022), https://www.c-span.org/video/?c5031257/user-clip-sen-toomey-grills-chairman-gensler-congressional-authorization. The Court has applied the major questions doctrine twice in the last year on its emergency docket: (i) in lifting a COVID-19 related ban on evictions imposed by the Centers for Disease Control and (ii) in opposing mandatory vaccines. *See Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Health & Safety Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

And if the doctrine gains further traction in the courts, it will mean less regulation, not better regulation, since tying the agencies' hands and relying on Congress—a divided one at that—to protect the American people means more paralysis and inaction in the face of important challenges. The result will be fewer protections for the American people from corporate misconduct, dirty air and water, unsafe toys and other products, dangerous predatory conduct by Wall Street banks, and other threats to the health, safety, and welfare of the American people.

III.
A CLOSER LOOK: THE ASSAULT ON THE ADMINISTRATIVE STATE

The legal assault on the administrative state is gathering momentum, and it threatens the health, safety, and financial prosperity of all Americans. As observed above, Americans rely on a wide variety of agencies that implement the statutes passed by Congress through rules and enforcement actions in many areas. Those laws and rules help safeguard consumers and investors from defective products, environmental pollutants, unfair employment practices, and reckless and predatory behavior by banks and brokers. At the federal level, these regulations are developed by agencies staffed with civil servants who have devoted their careers to a particular technical expertise or policy issue. Collectively, they comprise what has come to be known as the "administrative state." To some, this "administrative state" is to be criticized, curtailed, and even reversed, representing in their eyes an unaccountable bureaucracy that threatens more harm than good—notwithstanding the mountain of evidence showing without question that Americans benefit enormously from regulation.

The legal framework that governs these agencies is known as administrative law; it is the underlying structure around which specific regulatory programs are built. And it is a major point of attack on the regulatory agencies in the effort to diminish their authority and role. Unfortunately, those seeking to limit or rollback the work of these agencies have found an increasingly receptive audience in the federal courts and, most importantly, in the Supreme Court, as evidenced by the Court's decision in *West Virginia v. EPA*, canonizing the so-called "major questions" doctrine.

Below, we examine the development and consequences of that new doctrine, and we then briefly review two other rules of administrative law that the Court may soon revisit in the intensifying attack on the administrative state—the *Chevron* and "non-delegation" doctrines. Unfortunately, the Court's likely course portends serious reversals in the protection of consumers, investors, and the general public. But those battles are still being joined.

A. The "Major Questions" Doctrine — Raising the Bar on Agencies Seeking to Protect the Public Against Major Threats

The Supreme Court released its opinion in *West Virginia* on June 30, 2022, making it the second-to-last case issued before the Court's summer break.[43] *West Virginia* broke new ground as the first time a majority opinion formally adopted the "major questions doctrine."[44] Under this theory, agency rules or orders that represent "extraordinary" or "highly consequential" actions—"major" actions—will not survive judicial scrutiny unless the agency can point to an exceptionally clear and specific grant of

[43] *See generally* 142 S. Ct. 2587 (2022).

[44] *Id.* at 2609. Justice Gorsuch had advanced the doctrine in at least two of his prior opinions joined only by a minority of the Court. *See Nat'l Fed'n of Indep. Bus*., 142 S. Ct. at 667–68 (2022) (Gorsuch, J., concurring); *Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting); *see also Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari) (explaining that "the Court has applied a . . . statutory interpretation doctrine" related to "regulatory authority over a major policy question of great economic and political importance").

authority from Congress.[45] The agency may not rely only on a "plausible" view of its delegated authority,[46] perhaps not even the most plausible view.[47] In legal parlance, this amounts to a "clear statement rule."[48] This type of rule can operate as "a special substantive limit" not only on agencies but on Congress' own legislative actions.[49] The particular clear statement rule from *West Virginia* will facilitate attacks on rules the Court deems "major."

Below, we analyze the problems with this new doctrine. First, we identify its tenuous legal foundations; where earlier cases tried to determine what *Congress* had decided about public policy, the new doctrine quietly shifts more power over policy to the *courts*. Next, we examine the considerable difficulties surrounding application of the doctrine, even accepting it at face value. And finally, we look at the harm to the public that it may inflict and the traction it is already gaining in the federal courts.

1. ***West Virginia*** distorts earlier Supreme Court decisions.

The *West Virginia* Court traced the origins of its doctrine to *FDA v. Brown & Williamson Tobacco Corp.*, an unusual, winding 5–4 opinion, written by Justice O'Connor at the turn of the century.[50] In the eyes of the current Court, *Brown & Williamson* stood for the view that judges could opt for a wholly "different approach" when they sensed large-scale "'economic and political significance'" behind a case.[51] But *Brown & Williamson* was much more modest. It was, as Justice Kagan noted in her *West Virginia* dissent, simply an example of "normal principles of statutory interpretation" applied to an abnormal situation.[52] No special doctrine was needed, nor could any such novel interpretive rule be plausibly based on the *Brown & Williamson* decision.

For over eighty years, the FDA or its predecessor agency had disavowed authority to regulate tobacco products as "drugs" or "devices" under the Food, Drug, and Cosmetic Act.[53] Yet, in 1996, the FDA reversed course, declaring nicotine a regulated "drug" and tobacco products as regulated "drug delivery devices."[54] The agency then issued rules to restrict the sale and marketing of tobacco products to children and adolescents.[55] Predictably, the tobacco industry sued.[56]

The Supreme Court rejected the FDA's new assertion of authority over tobacco as beyond the scope of the Food, Drug, and Cosmetic Act.[57] The Court began by noting that statutory analysis extends beyond the definitions of isolated terms like "drug" or "device;" the Court had to look at such terms in context, including the statutory "scheme."[58] That scheme could itself include other statutes that addressed the same subject matter.[59]

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[45] *West Virginia*, 142 S. Ct. at 2609.

[46] *Id.* ("To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary.").

[47] *See, e.g.*, *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1499 (2022) ("We agree that [the IRS's interpretation] is a plausible interpretation of the statute. Some might even think it better than Boechler's. But in th[e] context [of a clear statement rule], better is not enough.").

[48] See *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

[49] *Id.*

[50] *See id.* at 2608 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

[51] *Id.* (internal quotation marks omitted).

[52] *Id.* at 2633 (Kagan, J., dissenting).

[53] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146–47 (2000).

[54] *Id.* at 127.

[55] *Id.* at 128–29.

[56] *Id.* at 129.

[57] *Id.* at 126.

[58] *Id.* at 132–33 (internal quotation marks omitted).

[59] *See id.* at 133.

In the case of tobacco, the statutory scheme lead to an untenable policy conflict: If the FDA found nicotine and cigarettes to be drugs and devices, it would have to examine their safety and efficacy.[60] But tobacco clearly is not safe, so the FDA would be forced to ban tobacco products entirely, not just try to keep them out of the hands of minors, as FDA had done.[61] And a full ban could not be correct, not because it warped the law's definition of a "drug" or "device" but because Congress had passed other legislation that assumed a viable tobacco industry.[62] So Congress must have implied in the Food, Drug, and Cosmetic Act that tobacco qualified as neither a drug nor a device.[63]

That was just the Court's first rationale under the statutory scheme; it next turned to related statutes. This second rationale was an exhaustive look at 35 years of tobacco-specific federal legislation and what FDA had represented to Congress when each bill was passed.[64] In brief, the agency had specifically and repeatedly informed Congress that it could not and would not regulate tobacco, and Congress had acted in reliance on that information.[65] In one such statute, in fact, Congress had established a specific federal "policy" to protect "'commerce and the national economy'" through continued tobacco sales.[66] Congress, the Court thought, must have expected the FDA to continue with its original views not to regulate tobacco given this background.[67]

Thus, under well-established principles of statutory construction, and taking into account not only the wording of the law but the context, including other indications of congressional intent, the Court had arguably reasonable grounds for overturning the FDA's rule. The Court explained at length how any attempt to regulate tobacco would result in a complete national ban on tobacco contrary to the powerful indications that this would be squarely at odds with Congress's intent. Perhaps most importantly, Congress had expressly tied tobacco to the health of the "'national economy'" through a federal statute.[68] This was, in sum, just another part of the overall statutory scheme; the Court did not need to create a whole new doctrine to decide *Brown & Williamson*.

But the Court choose to go further and offer a closing observation often cited as the seeds of the major questions doctrine, now elevated to a new principle of statutory construction. In a short section concluding its opinion, the Court noted that, "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended" to give an agency authority over an issue.[69] This was off the mark as to the issue then before the Court. Tobacco and its history did not present the Court with congressional silence or ambiguity requiring a new guidepost, given its unique place in American history and society" and "its own unique political history."[70] Indeed, the case was extraordinary not because of the upheaval the FDA's rule might admittedly cause so much as the abundant evidence that Congress clearly had something different in mind.

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[60] *See id.* at 133–34.

[61] *See id.* at 134–37.

[62] *See id.* at 137–43.

[63] *See id.* at 143.

[64] *See id.* at 143–59.

[65] *See, e.g.*, *id.* at 146.

[66] *Id.* at 138–39 (quoting 15 U.S.C. § 1331).

[67] *See id.* at 156–57.

[68] *Id.* at 138–39 (quoting 15 U.S.C. § 1331).

[69] *Id.* at 159.

[70] *Id.*

Yet the *West Virginia* Court seized on that observation and thereby inverted the logic of *Brown & Williamson*. The majority in *West Virginia* started with its own independent determination that the Clean Power Plan presented an extraordinary question.[71] Yet the Court in *Brown & Williamson* had the aid of a determination of that sort from *Congress* and, even then, turned to that determination only as a final consideration. Now, though, the policy judgments of six Justices have essentially commandeered the case, and the statutory analysis has receded to the background. That is not how judicial interpretation ought to work.

2. On its own terms, the major questions doctrine will be difficult to apply rationally and consistently.

The major questions doctrine has been widely and rightly criticized as too subjective.[72] Of course, whether an issue is sufficiently "major," or even whether it touches "'economic and political significance,'"[73] lies to a significant degree in the eye of the beholder, and the answer will often come across as little more than the personal preference of the reviewing judge.[74] Regulators would have a tall order to predict those preferences years before their rules arrive in court, and even the appearance of subjective decisions would lessen the public's view of judicial legitimacy.

Justice Gorsuch attempted to mitigate this subjectivity problem through his concurring opinion in *West Virginia*, offering what he styled as "guidance about when an agency action involves a major question."[75] But it is not clear if his guidance makes things better or worse. First, he pointed to issues of "great political significance" or "earnest and profound debate across the country."[76] Yet what exactly tells us political attention becomes "great" enough or when the debate is "profound" (much less in good faith)? Would the fierce opposition of the regulated industry suffice?[77] Or dissenting votes from SEC or CFTC Commissioners who are ideologically inclined to favor more limited regulation? Would attention from a national news pundit or a floor speech from a House Member satisfy the test? And at what point would this doctrine simply incentivize political gamesmanship in Congress to set up a challenge in court?

Justice Gorsuch also invoked economic significance, suggesting two possible guides: a "significant portion of the American economy" or a monetary threshold in the "billions."[78] Obviously, the former is as problematic as political significance; there is simply no universal definition of what constitutes a sufficiently large part of the economy to be "significant." Any regulated industry likely thinks that it qualifies.

Even a loose monetary threshold raises its own questions. What if the projected costs are hotly contested? And how far into the future should those costs be tabulated? Would a modest increase in present-day costs be major if those costs persist into the next century? At the same time, will the Court maintain a strict $1 billion threshold for major question status, even if the relative import of that

[71] *See West Virginia*, 142 S. Ct. at 2610.

[72] *See, e.g.*, Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 196–97 (2022); *see also* Lisa Heinzerling, *The Power Canons*, 58 Wm. & Mary L. Rev. 1933, 1986–87 (2017).

[73] *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson*, 529 U.S. at 160).

[74] *See, e.g.*, Richardson, *supra* note 72, at 197.

[75] *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

[76] *Id.* (internal quotation marks omitted).

[77] *See, e.g.*, Heinzerling, *supra* note 72, at 1988.

[78] *See West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (internal quotation marks omitted).

amount decreases with the economy's growth? And what if even billions of dollars make no dent in a very large and profitable industry—or even a single investment bank? Does the Court give special attention to any rule that applies to JPMorgan Chase, a bank with over $3.7 trillion in assets and annual revenues on the scale of $100 billion?

As a final trigger for the doctrine, Justice Gorsuch pointed to an intrusion in subjects traditionally regulated by state governments.[79] But would this have helped the FDA predict the Court's opposition to tobacco regulation? Or to help the EPA predict special scrutiny for regulation of greenhouse gases from power plants? More importantly, why is a new doctrine needed to address this concern? As Justice Gorsuch himself noted, the Court has long had a separate clear statement rule to protect States' constitutional prerogatives.[80]

Even with Justice Gorsuch's attempt at clarification, *West Virginia* still leaves other questions unanswered. For instance, once a court deems an issue "major," will that status be permanent? Or could its political or economic significance recede enough for an agency to return to regulation? As another example, would an agency action to remove regulation—or even inaction—ever qualify as major, even if it foregoes enormous social benefits? Or, as many critics fear,[81] is the major questions doctrine almost entirely a new weapon for anti-regulatory interests? That would seem to be the case, given the threadbare basis for the rule offered in *West Virginia*.

3. The doctrine may cause harm by limiting or rolling back regulation necessary to protect the American public from major threats to public health, safety, and financial security—and it is rapidly gaining traction.

The major questions doctrine is now here to stay. The newly invigorated version of this doctrine might prove to have a strong anti-regulatory effect. Some rules may die in court once deemed "major." And the doctrine may have a chilling effect, with some agencies shying away from attempts to regulate in "major" or important ways unless very sure of their legal case.[82] So, too, some may be tempted to adjust their regulatory agendas away from the most pressing, consequential, or beneficial actions and towards more modest efforts; they might also feel forced to opt for more traditional and less novel methods of regulatory intervention.[83] The social costs of these unseen losses—rules never issued—might far exceed the magnitude of even major rules visibly struck down in court.

Financial regulation is not immune from the import of the decision, even though the case centers on environmental rulemaking. For example, some industry groups have already begun laying the groundwork for a "major questions" challenge to the SEC's proposal for climate risk disclosure.[84] In fact, that proposed rule is eminently appropriate and defensible under the firmly established disclosure authority granted to the SEC in the securities laws. Yet foes of the rule may contend that it cannot be tied to a "clear statement" specifically compelling climate-related disclosures in either the Securities Act of 1933 or the Securities Exchange Act of 1934. Similarly, regulatory efforts grounded in

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[79] *See id.* at 2621.

[80] *See id.* (citing *Gregory v. Ashcroft,* 501 U.S. 452, 459–60 (1991)).

[81] *See, e.g.*, Heinzerling, *supra* note 72, at 1986–87.

[82] *See* Richardson, *supra* note 72, at 196–97 (citing Brief of Richard L. Revesz as Amicus Curiae Supporting Respondent at 10–11, 20–21, *West Virginia v. EPA*, Nos. 20-1530, 20-1531, 20-1778, 20-1780 (Jan. 25, 2022)).

[83] *See, e.g.*, Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 479 (2021) (raising the hypothetical of a novel cap-and-trade approach to automobile fuel economy regulations).

[84] *See* Lisa Benjamin, *The SEC and Climate Risk*, 40 UCLA J. ENVTL. L. & POL'Y 1, 46 (2022) (noting invocation of the major questions doctrine in comments from oil-and-gas trade groups submitted to the SEC).

"systemic risk" are in some ways inherently tied to issues of great economic consequence, perhaps making them also targets of industry under *West Virginia*. Such legal challenges would hold little water, yet they may appeal to some courts.

None of this is to say that *West Virginia* is a death knell for all regulatory ambition. Far from it. The doctrine only comes into play in the extraordinary case of "major" rules, and while the ambit of that descriptor is surely vague, it represents a threshold condition that will likely fend off many rule challenges based on the major questions doctrine. In addition, future courts may give agencies some say in what types of questions count as major or minor, especially if agencies tackle a large-scale problem through iterative or sequential policymaking. Moreover, even where a rule is found to be "major," much will hinge on the interpretation of Congress's authorizing language. In some cases, that language will surely pass muster and favor the agency, as there will be unambiguous mandates from Congress.

Its invocation was already gaining steam in the lower courts as the Supreme Court was building momentum towards *West Virginia*,[85] and that pace only seems to have quickened with the doctrine's full ascendancy. Only a few months after the decision's release, *West Virginia* has already been cited in appellate court decisions on federal procurement policy (successfully)[86] and ocean fishery management (unsuccessfully).[87] We are aware of its invocation, too, in ongoing or recent challenges to regulations as disparate as automotive racing modifications[88] and storage of spent nuclear fuel.[89] Even agencies have already begun to wrestle with it in their public decisions or communications.[90] Clearly, the major questions doctrine has come a long way from its obscure roots in *Brown & Williamson*. It is now closer to a favorite weapon against all "major" regulation.

In the end, much will depend on how agencies respond—either by yielding to the chilling effect of the decision, or, proceeding with whatever rules they believe are necessary in the public interest and supported by the broad congressional authority they typically have. We trust—at least hope—that they will prefer the latter course, notwithstanding the *West Virginia* ruling.

B. Eroding *Chevron* Deference to Agency Expertise

While the major questions doctrine may have cast a shadow over the ability of agencies to embark on major rulemakings, it is unfortunately not the only looming threat. More subtle, but no less important, has been a quiet erosion of a central tenet of modern administrative law: the doctrine of *Chevron* deference to agency interpretations of the law, established in a landmark decision from 1984.[91]

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[85] *See, e.g.*, *Health Freedom Def. Fund v. Biden*, --- F. Supp. 3d ---, No. 8:21-cv-1693-KKM-AEP, 2022 WL 1134138, at *10–12 (M.D. Fla. Apr. 18, 2022) (invalidating a transportation-based mask mandate as a major rule unsupported by a clear congressional statement).

[86] *See Georgia v. President of the United States*, --- F.4th ---, No. 21-14269, 2022 WL 3703822, at *6–8 (11th Cir. Aug. 26, 2022) (invalidating vaccination requirements imposed pursuant to the Procurement Act).

[87] *See Loper Bright Enters., Inc. v. Raimondo*, --- F.4th ---, No. 21-5166, 2022 WL 3330362, at *2 (D.C. Cir. Aug. 12, 2022) (sustaining a rule for at-sea monitoring under the Magnuson-Stevens Fishery Conservation and Management Act).

[88] Petitioner's Fed. R. App. P. 28(j) Letter at 1–2, *Racing Enthusiasts & Suppliers Coal. v. EPA*, No. 16-1447 (D.C. Cir. July 12, 2022).

[89] *See* Petitioners' Fed. R. App. P. 28(j) Letter at 1–2, *Texas v. Nuclear Reg. Comm'n*, No. 21-60743 (5th Cir. July 6, 2022).

[90] *See, e.g.*, Statement of Comm'r Rebecca Kelley Slaughter, Fed. Trade Comm'n, at 5 (Aug. 11, 2022) (explaining why *West Virginia* should not apply to future FTC proposals on commercial surveillance and data privacy), https://www.ftc.gov/system/files/ftc_gov/pdf/RKS%20ANPR%20Statement%2008112022.pdf.

[91] *See generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Like *West Virginia*, *Chevron* comes into play when an agency must interpret a statute as it is issuing a rule or taking other regulatory actions.[92] Unlike *West Virginia*, however, *Chevron* identifies conditions under which the court will defer to the agency's views, even if the court would prefer some other outcome.[93] First, the Court uses its "traditional tools" for interpreting statutes to divine "whether Congress has directly spoken to the precise question at issue."[94] "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[95] But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on . . . a reasonable interpretation" of the law.[96] The court may not override a reasonable agency view even if the court thinks a better view exists; the agency's view simply gets more weight on the scale.[97]

Chevron deference rests on several sound policy justifications.[98] First, agency personnel are subject matter experts, especially relative to judges.[99] That expertise allows them to better understand the real-world background assumptions behind a statute and how the technical aspects of a regulatory program can or should fit together.[100] In *Chevron* itself, for instance, that meant determining whether Clean Air Act permits should be issued for an entire industrial facility or instead for individual smokestacks or buildings within that facility.[101]

Second, despite their undeserved public reputation as faceless bureaucrats, agency leaders have more political accountability than judges.[102] We owe that in part to the President's oversight of those leaders; virtually no one receives more political heat from controversial regulatory actions than the President.[103] Agencies also interact much more directly with elected representatives in Congress, both through oversight and in the process of drafting legislation.[104] And when political responses give the agency some reason for regulatory change, it can arguably change course more easily than a precedent-bound court.[105]

Finally, agencies set nationally applicable rules; that helps establish uniformity where otherwise a patchwork of conflicting judicial decisions might exist.[106] That sort of national uniformity is often one reason why even heavily regulated industries prefer federal agency action. In a similar vein, *Chevron* even helps Congress legislate under a stable expectation that issues it assigns to an agency will be consistently, uniformly, and predictably applied.[107]

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92 *See, e.g., id.* at 839–40 (describing EPA's rule to define a "major stationary source" under the Clean Air Act).

93 *See id.* at 842–44.

94 *Id.* at 842–43, 843 n.9.

95 *Id.* at 842–43.

96 *Id.* at 843–44.

97 *Id.* at 843, 843 n.11.

98 *See, e.g.*, Jonathan H. Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 987–89 (2016).

99 *See id.* at 987–88; *see also Chevron, U.S.A., Inc.*, 467 U.S. at 865–66.

100 *See id.*

101 *See, e.g., Chevron, U.S.A., Inc.*, 467 U.S. at 840 (discussing EPA's interpretation of the term "stationary source").

102 *See, e.g.,* Adler, *supra* note 98, at 988; *see also Chevron, U.S.A., Inc.*, 467 U.S. at 865–66.

103 *See id.*

104 *See* Adler, *supra* note 98, at 988.

105 *See id.* at 988-99, 988 n.30 (citing Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretation*s, 40 J. LEGAL STUD. 85, 91 (2011)); *see also United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) (arguing that the loss of *Chevron* would "lead to the ossification of large portions of our statutory law" through "judicial resolution").

106 *See* Adler, *supra* note 98, at 989.

107 *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2012).

To call *Chevron* a cornerstone of administrative law might sell it short. By our count on a public legal database, it has been cited over 17,000 times by federal courts. Yet several of the Court's opinions suggest its decline. *West Virginia* converts ambiguities in a statute from regulatory tools into judicial weapons that can be aimed at "major" rules, as discussed above. But while the implications are not yet entirely clear, three other cases portend a more subtle, perhaps even hidden, move away from judicial deference of the *Chevron* variety.

Unusually, each of these three cases—*American Hospital Association v. Becerra*,[108] *Becerra v. Empire Health Foundation*,[109] and *Biden v. Missouri*[110]—arose from agency rules related to Medicare, yet none of these three opinions evens mentions *Chevron* as the governing legal framework, and none formally applies its two-step analysis. This omission is all the more striking because court observers were watching *American Hospital Association* precisely to see if the Court would maintain the *Chevron* approach: Some entities weighing in on behalf of the challengers had explicitly asked the Court to abandon or revise *Chevron*.[111] Indeed, the parties' briefing in the matter was replete with *Chevron* references.

While it was expected that some Justices, notably Justices Kavanaugh and Gorsuch, might rail against the *Chevron* doctrine, portraying it as an indefensible element of the "administrative state" and an usurpation of legislative authority, no one expected that a case about *Chevron* deference would be decided without ever mentioning *Chevron* once. Perhaps silence does not mean that *Chevron* is already gone; the Court sustained the government's rules in two of the three cases. But its continued viability is at most ambiguous from these cases.

Chevron's omission has already attracted the attention of lower courts, with some speculating that "the Supreme Court may be distancing itself from *Chevron*"[112] or that "the *Chevron* framework may have fallen out of favor."[113] In the wake of this term, where exactly *Chevron* stands with the Court still remains to be seen, but given the current ideological leaning of the justices, it does not appear to have a bright future.

We hope this trend is illusory and that the Court will reaffirm the central role of *Chevron* in its next term. Otherwise, financial regulators—and federal regulators across all domains—are likely to face increased judicial hostility. 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, 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.

[108] *See generally* 142 S. Ct. 1896 (2022).

[109] *See generally* 142 S. Ct. 2354 (2022).

[110] *See generally* 142 S. Ct. 647 (2022) (per curiam).

[111] *See, e.g.*, Brief for Pacific Legal Foundation as Amicus Curiae Supporting Petitioners at 7–8, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (No. 20-1114).

[112] *ITServe All., Inc. v. United States*, --- Fed. Cl. ---, No. 21-1190, 2022 WL 3349336, at *5 n.3 (Aug. 12, 2022).

[113] *Texas v. Becerra*, --- F. Supp. 3d ---, No. 5:22-cv-185-H, 2022 WL 3639525, at *19 n.11 (N.D. Tex. Aug. 23, 2022).

Perhaps ironically, the late Justice Antonin Scalia aptly described some of the adverse consequences that would come from the loss of *Chevron* deference: "Some judges would be . . . tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands."[114] "It was possible to live with the indeterminacy of [pre-*Chevron* regimes] in earlier times. But in an era when federal statutory law administered by federal agencies is pervasive, and when the ambiguities (intended or unintended) that those statutes contain are innumerable," returning to the pre-*Chevron* law "is a recipe for uncertainty, unpredictability, and endless litigation."[115]

C. Non-Delegation — Potentially Reviving a Long-Dormant Principle

Yet another weapon in the attack on the administrative state may soon receive the Court's attention: the non-delegation doctrine. Cases like *West Virginia* and *Chevron* address how a federal agency may interpret and deploy a statute. The non-delegation doctrine does something potentially even more consequential; it can lead the court to strike down the statute itself.[116] Its core tenet is that because the Constitution vests all legislative power solely in Congress, no statute may delegate the power to make laws to a federal agency or other outside entity—unless that statute contains an "intelligible principle" to guide the agency's work.[117]

The doctrine can be a powerful anti-regulatory tool, and there was a very brief time in 1935 during which the Supreme Court used it twice to strike down New Deal statutes.[118] But since that time, the Court has bent over backwards to avoid the doctrine's bite.[119] As one federal court recently summarized, "The [Supreme] Court has found only two delegations to be unconstitutional. Ever. And none in more than eighty years."[120] The Court's reticence is undoubtedly driven by pragmatism. Congress cannot realistically identify and address every technical problem or implementation detail when writing a statute; it must rely on the Executive Branch to do some of that work after the bill becomes law.[121]

Justice Gorsuch's separate concurrence in *West Virginia* praised the major questions doctrine as a lighter form of non-delegation review,[122] and he certainly seems favorable to reviving non-delegation in its original, more robust form. In fact, only three years ago, he came two votes short of voiding the Sex Offender Registration and Notification Act as an unconstitutional delegation.[123] Even then, Justice Alito, one of the two deciding votes, indicated that he might later warm to the doctrine (though not for the sex offender law),[124] and Justice Kavanaugh, who did not participate in that case, praised Justice Gorsuch's dissent in a separate case several months later.[125] Thus, a majority receptive to reviving the doctrine might now exist, just waiting for the right case.

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[114] *City of Arlington*, 569 U.S. at 304.

[115] *Mead Corp.*, 533 U.S. at 250 (Scalia, J., dissenting).

[116] *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989).

[117] *See, e.g.*, *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001).

[118] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429–30 (1935).

[119] *See, e.g.*, *Whitman*, 531 at 474–75 (collecting cases in which the Court found a sufficient intelligible principle).

[120] *Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 446 (5th Cir. 2020).

[121] *See, e.g.*, *Mistretta*, 488 U.S. at 372.

[122] *See West Virginia*, 142 S. Ct. at 2619–20 (Gorsuch, J., concurring).

[123] *See Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., concurring).

[124] *See id.* at 2130–31 (Alito, J., concurring).

[125] *See Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his Gundy dissent may warrant further consideration in future cases.").

Perhaps that bloc will be satisfied with the major questions doctrine as a proxy for non-delegation. But if they are hungry for the full course, they are likely to have the table set soon. Just a few months ago, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit issued its opinion in *Jarkesy v. SEC*, which struck down a Dodd-Frank section authorizing the SEC to impose civil monetary penalties through administrative enforcement.[126] And it did so while quoting Justice Gorsuch's dissenting opinion on the Sex Offender Registration and Notification Act.[127] The SEC has asked the Fifth Circuit to vacate that opinion and rehear the case before the entire roster of its judges,[128] but its request has yet to be ruled upon. Whether or not the three-judge opinion remains in place, one party or the other may be forced to seek higher review. That would give the Court a fresh chance to revive the non-delegation doctrine.[129]

In sum, the Court's last term signaled an invigorated assault on the administrative state. It portends, unfortunately, some serious and negative changes in the offing. If the major question doctrine is a setback for pro-regulatory interests, the loss of *Chevron* would be worse still, and reintroducing the non-delegation doctrine would be the worst of all outcomes. Again, it can put in jeopardy not merely an agency rule but even regulatory efforts by *Congress*. The consequences might be orders of magnitude greater.

IV.
WHAT LIES AHEAD: SOME KEY CASES TO BE HEARD IN THE 2022-23 TERM AND PENDING PETITIONS FOR CERTIORARI

In the term about to begin in October, the Court has agreed to hear a number of important cases in the area of financial regulation, including a challenge to the SEC's administrative enforcement system and a case concerning the appropriate penalty amounts for violations of the Bank Secrecy Act. In addition, the Court will address the always lurking threshold question of standing: Does the party seeking relief face a sufficiently concrete injury in the dispute to enable them to pursue their claims in federal court?

During the forthcoming term, the Court will also consider a long list of petitions for a writ of certiorari ("cert."), the legal device filed by litigants asking the Court to exercise its discretion and accept their case for review. Many of the petitions already filed with the Court involve arbitration, administrative law—including the *Chevron* doctrine—and other issues integral to financial regulation. In the sections below, we first review three cases the Court will consider on the merits and then list the pending petitions for cert. according to their subject matter.

[126] *See Jarkesy v. SEC*, 34 F.4th 446, 459–63 (5th Cir. 2022).

[127] *See id.* at 460 (quoting *Gundy*, 149 S. Ct. at 2134 (Gorsuch, J., dissenting)).

[128] *See* Petition of the SEC for Rehearing En Banc, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007).

[129] We also note that yet another challenger to the SEC has raised a non-delegation claim before the Fifth Circuit; that case tests SEC approval of board diversity disclosure requirements imposed by NASDAQ. *See* Opening Brief for Petitioner National Center for Public Policy Research at 24–28, *All. for Fair Bd. Recruitment v. SEC*, No. 21-60626 (5th Cir. Dec. 20, 2021). That case has not yet been decided.

A. Cases To Be Decided

1. Will the Court facilitate attacks on SEC enforcement proceedings by expanding district court jurisdiction to hear those challenges? *SEC v. Cochran*, No. 21-1239, seeking review of the Fifth Circuit's *en banc* decision in *Cochran v. SEC*, 20 F. 4th 194 (decided Dec. 13, 2021)

The Gist. The Supreme Court agreed to hear a case in the upcoming term involving yet another attack on the administrative law judges ("ALJs") that hear many of the SEC's enforcement actions. The issue now before the Court is a procedural or jurisdictional one, not the merits of the constitutional claims lodged against the administrative enforcement mechanism. The securities laws plainly provide that challenges to the outcome of an administrative enforcement proceeding must be brought only after the proceeding has ended and only in a federal appellate court, not a district court.[130] In this case, however, a respondent who was alleged to have committed serious violations of the securities laws is seeking to block the administrative enforcement action against her by jumping into district court before the case has run its course. If the Court accepts this defensive maneuver, those charged with violating the securities laws will be able to short-circuit the law, delay the process, and ultimately impede effective and efficient enforcement by the SEC.

Background. The respondent before the Court, Michelle Cochran, was fined over $20,000, suspended for five years, and ordered to cease and desist from future violations of federal accounting standards in an SEC administrative enforcement action. After the Supreme Court ruled in *Lucia v. SEC* that the SEC's corps of ALJs had been appointed in violation of the Constitution,[131] the SEC sent Cochran's case back for rehearing before a properly appointed ALJ. However, in a defensive gambit, Cochran challenged the enforcement action on yet additional constitutional grounds, asserting that the restrictions on the removal of ALJs violate Article II of the constitution (a separation of powers argument) and that combining prosecutorial and adjudicative functions in an agency's administrative proceeding violates the due process clause. Rather than contesting the case on the merits and then challenging any adverse outcome in the appellate court, as prescribed by law, Cochran promptly asked a federal district court to block the case.

The district court appropriately held that the Exchange Act requires all challenges to the SEC's adjudications to be brought only after they are final and only in courts of appeals. It further held that the Act's review framework encompasses even the types of constitutional claims that Cochran had raised. However, in an *en banc* opinion, the Fifth Circuit reversed in part, holding that the district court *did* have jurisdiction over Cochran's removal-power claim. The court identified various features of the Exchange Act that, in its view, allowed district courts to review such claims. The court further concluded that Cochran's removal power claim would not receive meaningful judicial review in a court of appeals; that the claim was wholly collateral to the enforcement action review process; and that the claim lay outside the SEC's expertise. The dissenting judges would have held that, by providing for review of SEC orders in courts of appeals, Congress had precluded review in district courts. They also would have held that Congress did not exempt Cochran's constitutional removal power claim from that review process.

In their brief to the Supreme Court on the merits, the Solicitor General and the SEC have argued persuasively that Cochran's bid to short circuit the enforcement case is premature and literally misplaced—in the wrong court. They point out that the Exchange Act includes detailed provisions

[130] The companion case to *Cochran* is *Axon Enterprise, Inc. v. FTC*, No. 21-86, in which similar questions are presented to the Court with respect to enforcement actions brought by the Federal Trade Commission.

[131] 138 S. Ct. 2044 (2018).

for judicial review of orders issued by the Commission during administrative adjudications. They authorize review only at the end of the administrative proceedings, after the Commission issues its final order, and only in courts of appeals, not in district courts. Moreover, her attempt to seek review violates the Administrative Procedure Act, as the APA generally authorizes judicial review only of "final agency action."[132] And neither the Exchange Act nor the APA contains any exceptions for constitutional claims, Article II claims, or removal-power claims. To the contrary, the APA explicitly "encompasses suits alleging that an agency has acted 'contrary to *constitutional* right, power, privilege, or immunity.'[133]

Finally, the government brief highlights the disruptive consequences of a ruling in Cochran's favor. It points out that her theory "would turn constitutional avoidance upside down," accelerating judicial consideration of weighty constitutional claims that federal courts generally avoid if possible while deferring consideration of non-constitutional claims.[134] Their theory also would "produce parallel litigation by bifurcating judicial review, with a district court and a court of appeals (perhaps in another circuit) reviewing different claims arising out of the same agency proceeding."[135] In addition, Cochran's theory would be difficult to administer, as judges in the circuit courts would disagree about which constitutional claims can be heard immediately in the district courts.

Why It Matters. Ultimately, the underlying merits of Cochran's constitutional challenge will be decided, but before then, the Court's disposition of the jurisdictional issue will be significant. First, a ruling that sides with Cochran and allows premature challenges to administrative enforcement proceedings will severely disrupt the enforcement of the securities laws. Such a ruling would encourage other respondents to file district court cases seeking to derail administrative enforcement actions against them, at least where they launch constitutionally-based challenges to the proceedings. That, in turn, would seriously disrupt the agency's administrative enforcement mechanism on which it heavily relies to police fraud and bad actors in the securities markets. Each year, the SEC files hundreds of enforcement actions in district court and roughly the same number of stand-alone actions before ALJs. In addition, the SEC files a substantial number of additional "follow-on" administrative proceedings "seeking bars against individuals based on criminal convictions, civil injunctions, or other orders."[136] The administrative enforcement mechanism has stood the test of time and serves as a pillar of the SEC's enforcement program.

Second, the decision will shed additional light on how this Court reads the law—here, the provisions clearly specifying where and when respondents may challenge the SEC's administrative enforcement proceedings. And it may also shed light on how the Justices align on the larger questions surrounding the so-called "administrative state." The more conservative Justices may well seize the opportunity to complain about what they view as the excessive and unaccountable power of regulatory agencies to both write rules and enforce the law. Of course, this hostility starkly conflicts with the unquestionably successful and longstanding role that the regulatory agencies have played in implementing and enforcing federal statutes and rules to protect the public from a wide range of threats to their health, safety, and financial well-being.

[132] 5 U.S.C. § 704.

[133] Brief for the Federal Parties at 11, *SEC v. Cochran*, Nos. 21-86, 21-1239 (Aug. 8, 2022) (quoting 5 U.S.C. § 706(2)(B)) (emphasis added).

[134] *Id.*

[135] *Id.*

[136] Press Release, SEC, SEC Announces Enforcement Results for FY 2021 (Nov. 18, 2021), https://www.sec.gov/news/press-release/2021-238.

2. **Will the Court allow states to challenge federal immigration guidance by accepting their claims of injury and their insistence that the Department of Homeland Security ("DHS") violated the requirements of administrative law? — *United States v. Texas*, No. 22-58**

The Gist. This case calls upon the Court to decide two important legal questions that often arise in cases involving financial regulation: When do complaining parties—in this case, state governments—have standing to challenge agency action, and when has a federal agency acted arbitrarily and capriciously in issuing guidance or rules? The case focuses on formally non-binding guidelines issued by DHS to federal officers who enforce immigration laws against aliens. Two states, Texas and Louisiana, claim that these guidelines ultimately result in downstream harm to their budgets, public safety, or sovereign interests. They also challenge the guidance as contrary to law, arbitrary and capricious, and procedurally flawed in that it was not subjected to notice-and-comment rulemaking. The Court's decision will reveal a good deal about its views on state standing to challenge federal policy and the contours of the APA, especially the distinction between guidance and binding rules, which are subject to various procedural requirements.

Background. In September 2021, DHS issued guidance on the implementation of statutory provisions governing the apprehension and removal of certain aliens, including those convicted of enumerated crimes. Texas and Louisiana sued to vacate those guidelines for alleged failure to comply with the APA and federal immigration law. In the states' view, the guidelines ignored statutory directives to detain aliens convicted of certain crimes when released from state or local custody and those aliens subject to a removal order; that it was in fact a binding rule that should have gone through notice-and-comment procedures; and that the guidelines arbitrarily failed to consider impacts on the states caused by recidivism. DHS denied these claims and also argued that the states lacked standing to sue because they suffered no concrete injury traceable to the guidelines.

After a bench trial, the district court sided with the states on each of these issues and vacated the guidelines nationally. DHS then sought a stay from the U.S. Court of Appeals for the Fifth Circuit. The appellate court refused to stay the judgement against the DHS, notwithstanding a conflicting decision from U.S. Court of Appeals for the Sixth Circuit in a similar suit brought by other states.

Two of the Fifth Circuit's holdings are especially noteworthy. First, on standing, the Fifth Circuit held that Texas would incur costs from the recidivism or additional use of public services attributable to an increase in the number of aliens who were not detained. This holding stands in stark contrast to the Sixth Circuit, which did not interpret the guidelines as necessarily dictating that DHS would or would not apprehend, detain, or remove a different total number of aliens. And the Fifth Circuit gave Texas and Louisiana special leniency for their interests in immigration enforcement as quasi-sovereigns, whereas the Sixth Circuit had found sovereign interest in immigration to reside exclusively with the federal government.

Second, the Fifth Circuit accepted the states' various claims, including the assertion that the guidelines were a legislative rule, not a statement of policy, which dictated DHS decisions and thus should have been subject to notice and comment rulemaking. The Sixth Circuit, in contrast, had focused on the fact the guidelines formally left each individual enforcement action to the discretion of the officer considering the totality of the circumstances.

DHS has applied to the Supreme Court for a stay of the district court's judgment, raising many of the same arguments it did below but emphasizing the highly indirect nature of any downstream impact on the states. As the Solicitor General put it, "[v]irtually any federal action—from prosecuting crimes, to imposing taxes, to managing property—could be said to have some incidental effect on a State's population or fisc."[137] The Court construed the application for a stay as a petition for cert., which it granted, and it will receive full merits briefing later this fall on the standing and administrative law issues presented.

Why It Matters. Standing is a critically important and pervasive issue whenever litigants seek remedies in federal court, especially when they challenge agency action. In *Lujan v. Defenders of Wildlife*,[138] the Supreme 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: concrete injury, a causal connection between the injury and the challenged conduct, and a likelihood that the injury will be redressed by a favorable court 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. Standing is, in short, an indispensable ticket to the courthouse. The Court's disposition of the standing claim in this case will raise a number of key questions, including this: Has the Court applied its standing principles consistently, or has it reshaped its standing doctrine to allow a challenge that may align better with its ideological bent—here, an assault on the Biden administration's immigration policy—to go forward?

The current context makes that question all the more important. State governments have increasingly taken the lead in challenging regulatory (and deregulatory) actions by the Executive Branch, and state attorneys general have often carried the fight to federal court. The Court is likely to offer new clarification on exactly how small or how indirect the impacts of federal actions must be before a state loses its right to sue. That clarification will be particularly important to future challenges to federal agency rules and enforcement decisions.

Finally, the Court can be expected to provide further direction on a number of related administrative law principles. In particular, we may know more about the dividing line between legislative rules, which require public notice and comment, and non-binding guidance, which does not.

3. **Will the Court read the monetary penalty provisions in the Bank Secrecy Act to maximize their punitive and deterrent impact against those who fail to report foreign bank accounts? – *Bittner v. United States*, No. 21-1195.**

The Gist. The Court will also hear a case on how to count the number of violations under the Bank Secrecy Act, which requires citizens to submit reports about their interests in foreign financial accounts. The size of any monetary fine under that law is tied to the number of violations. The petitioner, a U.S. citizen who failed to report dozens of foreign accounts over several years, seeks a ruling that he can only commit one violation each year because he must file only one annual form. The government contends that violations arise from each foreign account not listed on that form. Who prevails will have a dramatic impact on the incentive to report accurately, with implications not only for U.S. tax collection but perhaps other regulatory regimes that rely, as many do, on the number of violations to determine the prescribed monetary sanction.

[137] Application for a Stay of the Judgment Entered by the United States District Court for the Eastern District of Texas at 18, *United States v. Texas*, No. 22-58 (July 8, 2022).

[138] 504 U.S. 555 (1992).

Background. Congress enacted the Bank Secrecy Act to help reduce tax evasion or other misconduct involving the use of foreign financial accounts. That law requires U.S. citizens, residents, and other entities doing business in the U.S. to report certain foreign financial "transactions" or "relation[s]" involving a variety of financial accounts, as specified by Treasury Department regulations.[139] Those reports are made on a single IRS form, filed annually and enumerating all foreign bank, securities, or other financial accounts. Violating the Act's reporting requirement triggers civil penalties up to $10,000 for a non-willful violation or $100,000 or more for willful violations.

The petitioner, Alexandru Bittner, held substantial numbers of bank accounts in Romania, Switzerland, and Liechtenstein. He did not report his foreign accounts until he hired an American accountant in 2012. Even then, his accountant reported only his single largest account, an error later corrected after he hired a new accountant. He ultimately failed to report roughly 40–60 foreign accounts each year between 2007 and 2011, though this failure does not seem to have been deliberate on his part. The IRS assessed a penalty of $10,000 for each unreported account, ultimately totaling over $2.7 million. Bittner contested this number in federal court under the theory that the Bank Secrecy Act's penalty provisions defined a violation in terms of each annual report not filed (the IRS form), not each account failing to appear in the report.

After Bittner prevailed on that issue in the district court, the U.S. Court of Appeals for the Fifth Circuit reversed. In its view, the Bank Secrecy Act required reporting of individual transactions, including accounts, and this meant that failing to report a given transaction was thus a discrete violation. The reporting form was simply the result of an agency procedural rule created for administrative purposes. The Act itself did not require a single annual reporting form, and the Treasury Department could have chosen to require the filing of multiple forms.

Bittner successfully petitioned for review by the Supreme Court. Briefing concludes later this fall, with oral argument scheduled for early November.

Why it matters. A victory for Bittner threatens to weaken the deterrent effect of the Bank Secrecy Act's penalty provisions. If the fines for non-willful violations are effectively capped at $10,000 per year—without regard for the potential impact on U.S. tax revenues or the harm caused by financial crimes or regulatory violations—wealthy individuals or large businesses would have a far weaker incentive to comply with the reporting requirement by faithfully reporting all of their accounts or investing in adequate compliance measures. It is easy to imagine that Bittner himself might have shrugged off a $10,000 fine given his scores of foreign accounts across three countries.

Compliance with the law is clearly important, as it was intended to shed light on financial activity relevant to "criminal, tax, or regulatory investigations or proceedings."[140] The scale of potential sanctions reinforces this view: The law provides for the imposition of significant civil penalties for non-willful violations, with substantially greater amounts for willful violations, including potentially 50 percent of the amount of the transaction or even the entire balance of an account at the time of the violation. And Bittner's petition notes that "the sheer number of cases potentially affected by this issue is stunning," applying to a wide variety of persons and foreign accounts, including citizens, residents, corporations, partnerships, estates, and trusts, and their interests in checking accounts, savings accounts, brokerage accounts, mutual funds, commodity-futures accounts, and certain life-insurance policies.[141] More generally, however, the issue of how to define the number of statutory

[139] 31 U.S.C. § 5314(a)–(b).

[140] *United States v. Bittne*r, 19 F.4th 734, 738 (2021) (internal quotation marks omitted).

[141] Petition for Writ of Certiorari at 25, *Bittner v. United States*, No. 21-1195 (Feb. 28, 2022).

violations is one that recurs under many other laws in addition to the Bank Secrecy Act, with similar implications for deterring misconduct.

And finally, as always, the Court's statutory analysis will inevitably reveal the interpretive approaches of the Justices, auguring the way the Court will read the law in future cases—restrictively or broadly to achieve Congress's objective.

B. Pending Petitions for Cert.

The Supreme Court receives a steady and voluminous stream of "petitions for a writ of certiorari," estimated at 7,000–8,000 for each nine-month term.[142] These petitions are the vehicle that litigants use to request Supreme Court review of decisions from an appellate court. 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 or conflicting decisions from the lower courts.

Below are the petitions for cert. now pending before the Court in financial regulation, administrative law, and related areas.[143] This list is noteworthy for the high number of cases in two particular areas: arbitration and judicial deference to agency interpretations of the law under the *Chevron* doctrine. 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. Arbitration

- *Coinbase, Inc. v. Bielski*, No. 22-105 – Whether a non-frivolous appeal of the denial of a motion to compel arbitration ousts a district court's jurisdiction to proceed with litigation pending appeal.

- *Northport Health Services of Arkansas, LLC v. Department of Health and Human Services*, No. 21-1455 – (1) Whether the Federal Arbitration Act is indifferent to rules that penalize parties for using arbitration agreements but leave enforceable any theoretical agreements parties enter into despite those penalties; and (2) whether the Department of Health and Human Services may promulgate a rule that concededly singles out arbitration agreements for disfavored treatment even though Congress has nowhere expressly empowered HHS to override the FAA or its federal policy favoring arbitration.

- *ForwardLine Financial, LLC v. Ahlmann*, No. 22-75 – Whether, in light of *Viking River Cruises v. Moriana*, the Supreme Court should grant the writ of certiorari, vacate the judgment below, and remand the case for consideration of whether a mutual pre-dispute agreement to arbitrate all claims arising from an employment relationship is enforceable as to an employee's claims under California's Private Attorneys General Act alleging Labor Code violations.

[142] Pub. Info. Off., Sup. Ct. of the U.S., A Reporter's Guide to Applications Pending Before The Supreme Court of the United States 15 (2022), https://www.supremecourt.gov/publicinfo/reportersguide.pdf.

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

- *Santa Ana Healthcare & Wellness Centre, LP v. Mondragon*, No. 21-1307; *Dolgen California, LLC v. Galarsa*, No. 21-1444 – Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot assert representative claims, including under the California Private Attorneys General Act.

- *Postmates, LLC v. Rimler*, No. 21-119; *Postmates, LLC v. Santana*, No. 21-420; *Postmates, LLC v. Winns*, No. 21-1246 – 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.

- *Domino's Pizza, LLC v. Carmona*, No. 21-1572 – Whether drivers making solely in-state deliveries of goods ordered by in-state customers from an in-state warehouse are nevertheless a "class of workers engaged in foreign or interstate commerce" for purposes of Section 1 of the Federal Arbitration Act simply because some of those goods crossed state lines before coming to rest at the warehouse.

2. Administrative Law and Chevron Deference

- *Buffington v. McDonough*, No. 21-972 – (1) Whether the *Chevron* doctrine permits courts to defer to the Department of Veterans Affairs' construction of a statute designed to benefit veterans, without first considering the pro-veteran canon of construction; and (2) whether *Chevron* should be overruled.

- *Gun Owners of America, Inc. v. Garland*, No. 21-1215 – (1) Whether the definition of "machinegun" found in 26 U.S.C. § 5845(b) is clear and unambiguous, and whether bump stocks meet that definition; (2) whether deference under *Chevron* should be given to agency interpretations of ambiguous criminal statutes, displacing the rule of lenity; and (3) whether courts should give deference to agencies when the government expressly waives *Chevron*.

- *Aposhian v. Garland*, No. 21-159 – (1) Whether courts should defer under *Chevron* to an agency interpretation of federal law when the federal government affirmatively disavows *Chevron* deference; (2) whether the *Chevron* framework applies to statutes with criminal-law applications; and (3) whether, if a court determines that a statute with criminal-law applications is ambiguous, the rule of lenity requires the court to construe the statute in favor of the criminal defendant, notwithstanding a contrary federal agency construction

- *Moses v. United States*, No. 22-163 – (1) Whether the limits on agency deference announced in *Kisor v. Wilkie* constrain the deference that courts may accord to interpretive or explanatory commentary in the U.S. Sentencing Guidelines Manual; and (2) whether deference to the Guidelines commentary is impermissible in any form.

- *NGL Supply Wholesale, LLC v. FERC*, No. 22-90 – Whether the U.S. Court of Appeals for the District of Columbia Circuit erred in deferring to the Federal Energy Regulatory Commission's "interpretation of its own precedent" in the absence of a reasoned explanation for departing from the standards embodied in those precedents.

- *Cleveland County, North Carolina v. Conner*, No. 21-1538 – (1) Whether the Fair Labor Standards Act allows an employee, who has been paid at least the required minimum wage and overtime pay at a rate that is at least one and one-half times her regular rate, to sue her employer for and recover unpaid straight-time wages earned in weeks when she worked overtime; and (2) whether *Skidmore v. Swift & Co.* allows courts to independently evaluate an agency's nonbinding interpretation of a statute.

- *Missouri v. Biden*, No. 21-1463 – (1) Whether the Centers for Medicare & Medicaid Services' Nov. 5, 2021, vaccine mandate for workers in most federally funded healthcare facilities violates the Administrative Procedure Act because it is arbitrary, capricious, and unlawful; (2) whether the mandate is unconstitutional under the Constitution's spending clause, the anti-commandeering doctrine, and the Tenth Amendment; (3) whether the mandate violates the APA because it was issued without notice and comment; and (4) whether the mandate exceeds CMS's statutory authority.

3. False Claims Act

- *United States ex rel. Proctor v. Safeway*, No. 22-111; *United States ex rel. Schutte v. SuperValu Inc.*, No. 21-1326 – Whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it "knowingly" violated the False Claims Act.

- *Johnson v. Bethany Hospice and Palliative Care LLC*, No. 21-462; *United States ex rel. Owsley v. Fazzi Associates, Inc.*, No. 21-936 – Whether Federal Rule of Civil Procedure 9(b) requires plaintiffs in False Claims Act cases who plead a fraudulent scheme with particularity to also plead specific details of false claims.

4. Government-Sponsored Enterprises (Fannie Mae & Freddie Mac)

- *Barrett v. United States*, No. 22-99 – Whether the government's uncompensated appropriation of Fannie Mae's and Freddie Mac's earnings and net worth effects a taking under the Fifth Amendment.

- *Owl Creek Asia I, L.P. v. United States*, No. 22-97 – Whether, if the United States causes a company to transfer private shareholders' rights incident to their ownership of shares in the company to the United States for the public benefit, the private shareholders have a direct, personal interest in a cause of action challenging that taking.

- *Fairholme Funds, Inc. v. United States*, No. 22-100 – (1) Whether, if the United States causes a company to transfer private shareholders' rights incident to their ownership of shares in the company to the United States for the public benefit, the private shareholders have a direct, personal interest in a cause of action challenging that taking; and (2) whether the rights to future dividends and other distributions held by petitioners are cognizable property rights protected by the takings clause of the Fifth Amendment.

- *Cacciapalle v. United States*, No. 22-98 – (1) Whether the U.S. Court of Appeals for the Federal Circuit erred in barring as "substantively derivative" the claims of private shareholders of Fannie Mae and Freddie Mac for the taking of their shareholder rights and the transfer of 100% of their economic interest to the U.S. Treasury, without making a determination as to whether the private shareholders had identified a valid property right that they directly owned and that the government had taken; and (2) whether the rights to future dividends and other distributions held by shareholders are cognizable property rights protected by the takings clause of the Fifth Amendment.

5. Employee Retirement Income Security Act

- *The ERISA Industry Committee v. City of Seattle, Washington*, No. 21-1019 – Whether state and local play-or-pay laws that require employers to make minimum monthly healthcare expenditures for their covered employees relate to ERISA plans and are thus preempted by ERISA.

- *Ragan v. Ragan*, No. 21-1751 – Whether, after an ERISA plan administrator has fully distributed life insurance plan proceeds, ERISA preempts a claimant's state-law right to those proceeds.

6. Standing to Sue

- *Apple Inc. v. Qualcomm Inc.*, No. 21-1327 – Whether a licensee has Article III standing to challenge the validity of a patent covered by a license agreement that covers multiple patents.

7. Class Actions

- *Lowery v. Joffe*, No. 21-1535 – (1) Whether, or in what circumstances, a *cy pres* award that provides no direct relief or benefit to class members comports with the Federal Rule of Civil Procedure 23(e) requirement that a settlement binding class members must be "fair, reasonable, and adequate"; and (2) whether Rule 23(b)(3) permits certification of a class where the district court has found that class members cannot be ascertained or even self-identify without an individualized "difficult and expensive" inquiry.

CONCLUSION

The Supreme Court's last term emphatically confirmed the importance of the decisions the Court renders concerning financial regulation, administrative law, and constitutional principles such as standing. The Court got it right—or close to right—in *Hughes* and *Badgerow*, by reaffirming the fiduciary duty applicable to retirement plan administrators and by allowing the validity of an arbitration award to be decided in the challenger's chosen state court. Yet it fully embraced the major questions doctrine, which heightens the threat of judicial nullification where "major" rules are at stake, rules designed to address important problems confronting American consumers, investors, and the American public at large.

As our report also shows, the upcoming Supreme Court term promises to be eventful, to say the least. We may see how far the Court is willing to go in wielding the major questions doctrine to abolish important rules. We'll also see how the Court addresses the more familiar but always important issues surrounding the interpretation of financial laws (the Bank Secrecy Act in *Bittner v. United States*), the role of state governments in regulatory litigation (*U.S. v. Texas*), and attempts to dismantle the SEC's administrative enforcement system by stretching district court jurisdiction beyond explicit statutory bounds (*SEC v. Cochran*). And the pending petitions for cert. suggest that the court may once again venture repeatedly into the thicket of controversies surrounding mandatory arbitration, an area of law of enormous consequence to investors who so often find themselves without meaningful recourse for financial fraud when they are consigned to arbitration. Those petitions also indicate that the assault on the administrative state will again be front and center, this time as the viability of the *Chevron* doctrine is in the crosshairs. All of which means that we, and every American concerned about their financial well-being, should be paying close attention.

APPENDIX

Important Supreme Court Decisions Involving Financial Regulation and Administrative Law

Here are some of the Supreme Court's landmark cases in the area of financial regulation, spanning decades and further illustrating the profound impact that this third branch of government has had—and continues to have—on Americans' financial well-being. In some cases, the Court has interpreted the law broadly with an eye toward its remedial investor protection purposes, while in others it has cut back on financial regulation to the public's detriment.

1. **BROADLY DEFINING "INVESTMENT CONTRACTS."** In ***SEC v. W.J. Howey Co.***, **328 U.S. 293 (1946**), the Court established a broad and flexible definition of a security under the investment contract test, to include schemes that "involve an investment of money in a common enterprise with profits to come solely from the efforts of others." The decision has stood the test of time and is now central to the SEC's fight against fraud and manipulation in cryptocurrency offerings.

2. **RECOGNIZING A PRIVATE RIGHT OF ACTION.** In ***J.I. Case v. Borak,*** **377 U.S. 426 (1964)**, the Court held that a private right of action is implied under Section 14(a) of the 1933 Act for false or misleading proxy solicitation materials. This case and others that followed were profoundly important in allowing defrauded investors to seek meaningful recovery in court and to supplement the deterrent effect of the SEC's enforcement program.

3. **ALLOWING WALL STREET TO FORCE INVESTORS INTO MANDATORY ARBITRATION.** In ***Shearson/American Express v. McMahon***, **482 U.S. 220 (1987)**, the Court held that claims under Section 10(b) of the Exchange Act, 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. Widely recognized as one of the most important securities laws 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.

4. **LIMITING ACCESS TO THE FEDERAL COURTS.** In ***Lujan v. Defenders of Wildlife,*** **504 U.S. 555 (1992)**, the 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 geographic reach of the Act, because they faced no "actual or imminent" injury from the operation of the rule. The Court articulated the three hurdles that litigants must overcome to establish a constitutionally sufficient case or controversy and to press their claims in court: injury, causation, and redressability. *Lujan* and subsequent decisions from the Court have made it extremely difficult for litigants, especially non-industry advocates seeking to challenge government action and protect the public interest, to survive motions to dismiss and have their claims heard by a federal court.

5. **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.

6. **<u>PREEMPTING STATE LAW.</u>** 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.

7. **<u>RESTRICTING ENFORCEMENT REMEDIES.</u>** 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.

8. **<u>UNDERMINING WHISTLEBLOWERS.</u>** 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.

9. **<u>INVALIDATING ADMINISTRATIVE LAW JUDGE APPOINTMENTS.</u>** 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.

10. **<u>BROADLY READING THE ANTI-FRAUD PROVISIONS.</u>** 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.

11. **<u>REQUIRING ARBITRATION OF ARBITRABILITY.</u>** 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.

12. **<u>LIMITING ACCESS TO INFORMATION UNDER FOIA.</u>** In ***Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019)**, the Court broadened exemption number 4 in the Freedom of Information Act, which allows for the withholding of "trade secrets and commercial or financial information," thus constricting the public's access to information.

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

14. **<u>APPLYING A STRINGENT STATUTE OF LIMITATIONS.</u>** 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.

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

16. **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.

17. **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 or "injury."

18. **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 ERISA in favor of class action plaintiffs seeking to recover for mismanagement of their retirement plan, avoiding dismissal of the claims.

19. **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.

20. **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.

21. **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 state nor the individual plaintiffs attacking the Affordable Care Act had standing to challenge the law.

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

23. **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 moved closer to the dangerous notion that a fraudulent statement may be so generic that it can't support a class action for misrepresentation.

24. **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.

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