



## Industry eager for Barrett's views on financial regulations

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President Trump's nominee to replace the late Justice Ruth Bader Ginsburg could play a crucial role in two finance-related cases on the Supreme Court's docket this term.

Judge Amy Coney Barrett, who is expected to be confirmed by the GOP-controlled Senate, is poised to be on the bench by the time justices hear oral arguments in cases on how the federal government supports the housing finance system and enforces tax law.

Barrett, a conservative in the mold of the late Justice Antonin Scalia, has issued just a handful of opinions since joining the 7th Circuit Court of Appeals in 2017. Without a lengthy judicial record on financial regulation, observers will be watching her upcoming confirmation hearing closely for any clues about how she might rule.

"We don't have much in this area," said Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the libertarian Cato Institute, of Barrett's record. "Administrative law, separation-of-powers-type questions don't come before the 7th Circuit that much."

Even so, Shapiro said the staunchly conservative viewpoint laid out by Barrett over her academic career could sway the court away from the restrained approach seen in several high-profile cases decided under Chief Justice John Roberts.

"Roberts in general cares more about judicial restraint and minimalism than he does about overarching theories of interpretation and originalism or anything else," Shapiro said. "With Barrett on the court, it becomes a more principled court, whether you agree with it or not."

Trump on Tuesday submitted Barrett's nomination to the Senate to fill the seat left vacant by Ginsburg's death on Sept. 18. Senate confirmation hearings are slated to begin the week of Oct. 12.

Barrett, a former law professor at the University of Notre Dame, has been a favorite of conservatives and feared by liberals as a front-runner to join the high court ever since Trump nominated her to the 7th Circuit in 2017. The discussions around her Supreme Court nomination has primarily focused on how she may rule in cases challenging the result of the upcoming presidential election, the constitutionality of the Affordable Care Act and *Roe v. Wade*.

But progressives and the financial industry are also bracing for Barrett's potential impact on a range of financial cases that the court is slated to hear this term.

Chief among those cases is *Mnuchin v. Collins*, a challenge to the constitutionality of the Federal Housing Finance Agency (FHFA). The court will hear oral arguments on Dec. 9.

The FHFA was created in 2008 to oversee and regulate Fannie Mae and Freddie Mac, two government-sponsored enterprises that purchase mortgages from banks, package them into bonds and sell those bonds to help fund other affordable home loans. Both play integral roles in the U.S. housing finance system and have been the focus of more than a decade of political debate and litigation.

In *Mnuchin v. Collins*, a group of Fannie and Freddie shareholders have asked the court to decide if the FHFA's governing structure — a single director not fireable by the president unless for neglect or misconduct — violates the president's authority over the executive branch and makes the agency's actions unenforceable.

The court took up a similar challenge to the nearly identical structure of the Consumer Financial Protection Bureau (CFPB) brought by the law firm Seila Law earlier this year. It ruled in a 5-4 opinion, with Ginsburg dissenting, that while the CFPB's structure was unconstitutional, it could be remedied by striking a provision that protected the director from being fired at-will.

"In *Seila Law*, the Supreme Court also relied on the executive power exercised by the CFPB Director as a basis for its holding that the CFPB's single director structure was unconstitutional," wrote Alan Kaplinsky, partner at law firm Ballard Spahr, in a July analysis.

While precedent would likely lead the court to a similar ruling for the FHFA, there is no guarantee that an ideologically more conservative bench would follow suit. And Shapiro noted that Barrett has expressed some skepticism of *stare decisis*, the legal concept of abiding by previous rulings despite disagreements with how the case was decided.

"Scalia agreed with *stare decisis* in some contexts and [Justice Clarence] Thomas pretty much has never met an erroneous precedent he wouldn't overturn. She's probably somewhere in between the two," Shapiro said.

Barrett's commitment to textualism — the idea that legal judgments should be based solely on the text of the relevant law and U.S. Constitution without consideration of legislative intent — may also influence the outcome of *CIC Services vs. Internal Revenue Service*. That case, which will appear before the court on Dec. 1, focuses on whether a law barring lawsuits that could impede the collection of taxes also applies to suits over regulatory actions.

A group of former government officials from both Democratic and Republican administrations fears that a ruling against the IRS could interfere with efforts to crack down on tax shelters.

"At stake is whether the tax-shelter industry will be permitted to use waves of strategic pre-enforcement lawsuits to hobble the IRS's efforts to combat abusive tax shelters," wrote six former administration and congressional tax experts in a Sept. 15 brief submitted to the court.

“The narrow legal question can and should be decided based on the plain statutory text,” they continued.