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Matthew W. Singleton

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# Looking Forward: Potential Major Questions Limits on the CFPB's Power to Regulate Open Banking

## I. Introduction

A friend of mine recently needed to switch their bank. They, it should be noted, do almost all of their banking electronically; I'm sure if I asked, they couldn't remember the last time they'd actually visited their bank. They pay bills using online banking, shop online with a credit card through their bank, and generally interact with their finances through a digital lens. Yet when it came time to switch banks, their banker handed them a cashier's check—good for all the money they owned—and advised my friend, very carefully, not to lose the check before they had a chance to deposit it in their new bank account. This incongruity between the possibilities of digital banking and the complication of real-life banking is by no means unique. Frustrations with the narrow and hidden nature of the financial ecosystem are mounting, and many people imagine that Open Banking, a system in which financial data flows freely between providers, could be the answer.

The actual implementation of an Open Banking system would require a fundamental restructuring of the financial ecosystem.[1] As indicated by the European Union's efforts to craft such a system,[2] Open Banking must be backed by an extensive and far-reaching regulatory regime at the intersection of financial and digital regulation. The Consumer Financial Protection Bureau's ("CFPB") proposed Open Banking rules rely on the agency's powers under Section 1033 of the

1. *See* Phil Laplante & Nir Kshetri, *Open Banking: Definition and Description*, 54 COMPUT. 122, 127 (2021) ("[I]n the United States, more work needs to be done on implementation, security, privacy and trust concerns, and more experiences from other countries needs to be gained.").

2. *See, e.g.*, *What is GDPR, the EU's new data protection law?*, GDPR.EU, https://gdpr.eu/what-is-gdpr/ [https://perma.cc/C7FJ-JDS6] (last visited Jan. 14, 2024) (explaining the EU's General Data Protection Regulation, the "toughest privacy and security law in the world"); *Everything you need to know about PSD2*, BBVA (Feb. 21, 2023), https://www.bbva.com/en/everything-need-know-psd2/ [https://perma.cc/38RG-YKUF] (offering an overview of the EU's Payment Services Directive 2, a regulation of electronic payment services).

Dodd-Frank Act.[3] However, the CFPB's use of its Section 1033 powers to enact Open Banking would probably fail in the face of the Supreme Court's recent jurisprudence involving the Major Questions doctrine.

Section 1033 empowers the CFPB to craft rules in furtherance of ensuring that financial institutions provide consumers access to any data gathered by the institutions about the consumers.[4] However, Open Banking requires that data flow freely between providers, consumers, and third parties in order to enable new service providers to craft innovative products tailored to meet consumers' needs.[5] Section 1033 rulemaking seeking to implement such a system would present a "major question" because, under the approach the Supreme Court announced in *West Virginia v. EPA,* it would be (1) an effort to substantially restructure the banking market, (2) fundamentally different than previous actions, (3) a statutory power that has never before been used, and (4) a regulatory regime that Congress has itself not implemented.[6] Accordingly, there must be clear congressional authorization for the proposed rulemaking; since Congress only authorized the CFPB to ensure individual consumers may access their data, and not third parties, such rulemaking would fail under the Major Questions doctrine.[7]

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3. Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36998 (Jul. 14, 2021).

4. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1033(a), 12 U.S.C. § 5533(a).

5. *See infra* Part II.

6. *See* West Virginia v. EPA, 597 U.S. 697, 724 (2022) ("Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority. It located that newfound power in the vague language of an ancillary provision of the Act, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." (cleaned up) (citations and internal quotations omitted)). *See also infra* Part V.

7. *See West Virginia,* 597 U.S. at 732 ("Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to clear congressional authorization to regulate in that manner." (cleaned up) (citations and internal quotations omitted)). *See also infra* Part V.

## II. OPEN BANKING

### *A. Open Banking Defined*

The term Open Banking generally refers to financial ecosystems premised on the portability of financial data that increase consumer access to financial services products.[8] The Bank for International Settlement's Basel Committee on Banking Supervision defines Open Banking as "the sharing and leveraging of customer-permissioned data by banks with third party developers and firms to build applications and services, including[,] for example[,] those that provide real-time payments, greater financial transparency options for account holders, [and] marketing and cross-selling opportunities."[9]

Open Banking seeks to change the relationship between a consumer, financial services providers, and financial data. Currently, financial services providers own the data generated by their customers.[10] This data ownership helps to explain why many aspects of modern banking, such as the process of switching banks, can feel so inefficient and slow.[11] Under an Open Banking system, scholars imagine that consumers will interact with a financial "cloud" filled with various products and services from which they can select on an "*a la carte* basis".[12] In doing so, consumers will have an easier time accessing those areas of the financial market in which they traditionally engage

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8. *See* Laplante & Kshetri, *supra* note 1, at 122 ("The OB ecosystem provides more choices and information to consumers and allow[s] easier interaction with and movement of money between financial institutions and any other entity choosing to participate in the financial ecosystem.").

9. BASEL COMM. ON BANKING SUPERVISION, REPORT ON OPEN BANKING AND APPLICATION PROGRAMMING INTERFACES, BANK FOR INT'L SETTLEMENTS 4 n.1 (Nov. 2019), https://www.bis.org/bcbs/publ/d486.pdf [https://perma.cc/5NNY-EDGV].

10. *See* Laplante & Kshetri, *supra* note 1, at 124 (describing financial data as the "proprietary data" of banks).

11. *See, e.g.*, Iris Murillo, Comment on Proposed Required Rulemaking on Personal Financial Data Rights (Nov. 7, 2023) https://www.regulations.gov/comment/CFPB-2023-0052-0025 [https://perma.cc/PT4C-SXUA] ("Right now, the process of changing banks is slow, expensive[,] and onerous. We recently changed from Wells Fargo to a credit union but it took months as the bank would only allow us to move limited amounts and were charging fees in the process. It was frustrating and exhausting. Allowing customers to take control of their banking data, more easily switch banks and secure better service, would save consumers money, time[,] and energy and free us from strong arm tactics employed by major banks today.").

12. Laplante & Kshetri, *supra* note 1, at 124.

only through their bank.[13] Open Banking would also enable a larger market for personalized financial service products.[14]

### *B. Data Portability and Access*

Open Banking necessarily relies on consumer data portability.[15] Third parties must have the ability to access and import consumer financial data in order to craft new and innovative products.[16] Consumer financial data is uniquely important to the goals of Open Banking because it contains a significant amount of information about consumers.[17] Skilled interpreters of transactional data can create a relatively accurate picture of consumers' desires and tendencies because the data indicates when, on what, and where consumers spend their money.[18] Access to this data is necessary to a goal of Open Banking: increasing the marketplace of personalized financial products.[19]

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13. *See* BASEL, *supra* note 9, at 9 ("[T]o access these new [Open Banking] services, many bank customers give permission to third party firms to access their banking information, including, for example, tax preparers, accountants, financial advisors and payment fund transmitters.").

14. *See* Daniel Gozman et al., *Open Banking: Emergent Roles, Risks & Opportunities*, EUR. CONF. INFO. SYS. 2018 PROC. 1, https://research-api.cbs.dk/ws/portalfiles/portal/58899604/Gozman_Hedman_Sylvest.pdf [https://perma.cc/EXU4-TEEN] (noting that Open Banking initiatives aim to improve the ability of banks to personalize customer experiences); Markos Zachariadis & Pinar Ozcan, *The API Economy and Digital Transformation in Financial Services: The Case of Open Banking* 13 (SWIFT Inst., Working Paper No. 2016-001, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2975199 [https://perma.cc/4FEL-LCTH] (noting that "platform banks" applying Open Banking principles can use their customers' data to engage them with products they are likely to use).

15. Scott Farrell, *Embedding Open Banking in Banking Law: Responsibilities, Performance, Risk and Trust*, 17 J. OF BUS. AND TECH. L. 265, 270-71 (2022) (recognizing "data portability," "consumer autonomy," and "recipient accountability" as the three key functions of Open Banking).

16. *See, e.g.*, BASEL, *supra* note 9, at 8–9 (noting that the choice of consumers to grant third parties access to their banking information is a key aspect of Open Banking).

17. *See* Faith Reynolds, *Open Banking: A Consumer Perspective*, BARCLAYS 6 (Jan. 2017), https://home.barclays/content/dam/home-barclays/documents/citizenship/access-to-financial-and-digital-empowerment/Open-Banking-A-Consumer-Perspective-Faith-Reynolds.pdf [https://perma.cc/83MJ-BMUL] ("Transactional [financial] data is particularly powerful because it is a high-quality data-set that informs others about how we spend, and from this to infer our priorities, interests and needs.").

18. *See id.* (noting how adept use of transactional financial data can give businesses a picture of each consumer's potential monetary value).

19. *See* CHERYL R. COOPER, CONG. RSCH. SERV., IN11745, OPEN BANKING, DATA SHARING, AND THE CFPB'S 1033 RULEMAKING 1 (2021) ("Open banking refers to the practice of giving financial services firms access to customer banking and other financial data to facilitate the development of new types of products and services for consumers.").

### *C. Application Programming Interfaces ("APIs")*

The realization of Open Banking will also require the use of Application Programming Interfaces ("APIs") to enable the movement of data between service providers. Generally, when someone writes software or generates data, that software or data can only work within the specific context or programming in which the software or data was generated.[20] APIs solve this problem by enabling software applications to interact and share data.[21] For example, Uber uses APIs to power its ride-hailing mobile application.[22] Data from Google Maps, payment companies, and the user's cellular provider connect through Uber's APIs to make the app functional.[23]

Without APIs, different banking software will be unable to pull from and interpret a variety of data sources, and the goals of Open Banking will be unrealized. In an Open Banking system, third parties, such as investment funds, tax accountants, or other financial advisors, could access and interpret the data that a credit card company gathers about its customers' spending habits in order to build customized recommendations or products.[24] However, if the tax accountant could not access the data or the investment fund could not read it, such tailoring would be impossible and consumers could only choose from the same one-size-fits-all offerings already on the market.[25] Richard Thaler and Cass Sunstein use the example of higher risk mortgage products—noting that these have traditionally been reserved only for sophisticated investors—but arguing that access to financial data could allow more every day investors to purchase riskier or more innovative

20. *See, e.g.*, *What is an API (Application Programming Interface)?*, AMAZON WEB SERVICES, https://aws.amazon.com/what-is/api/ [https://perma.cc/RTQ3-UMUK] (last visited Dec. 29, 2023) (explaining APIs and their purpose within the Amazon digital ecosystem).

21. *See* Reynolds, *supra* note 17, at 5 ("APIs . . . allow banks and other companies to conveniently and securely share data between their organizations.").

22. *Id.*

23. *Id.*

24. BASEL, *supra* note 9, at 9.

25. *See*, Laplante & Kshetri, *supra* note 1, at 124 (arguing that Open Banking will provide consumers access to an "*a la carte*" selection from a "cloud" of customizable financial products).

mortgage investment products that they previously would not have known to look for.[26]

### *D. Open Banking and Competition*

Open Banking could help increase competition in the banking and financial sectors. Because more providers will create more products, there will be more banking and financial competitors.[27] Like many American industries, banking has consolidated at the top: a handful of companies dominate the sector,[28] while smaller, local banks are in decline.[29]

The American banking market was once made up of a number of smaller, more local banks anchored in specific communities or geographic areas.[30] Gradual deregulation and the repeal of geographic limitations, however, have caused intense consolidation of geographically limited banks in favor of replacement by multi-state banks operating across the country.[31] In addition to the general belief

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26. *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 134-46 (2008) (exploring how increasing access to consumer data could allow those consumers to access products they would not have been able to before).

27. *See, e.g.*, Statement, FACT SHEET: Executive Order on Promoting Competition in the American Economy (Jul. 9, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/97NS-NAXX] (discussing Executive Order that encourages the CFPB to issue rules in keeping with Open Banking principles, like allowing customers to download their banking data and take it with them, in furtherance of increasing competition).

28. *See* Martin Schmalz, *One Big Reason There's So Little Competition Amongst Banks*, HARV. BUS. REV. (Jun. 13, 2016), https://hbr.org/2016/06/one-big-reason-theres-so-little-competition-among-u-s-banks [https://perma.cc/S7VV-WRSC] (last visited Jan. 2, 2023) (noting that asset management companies have become powerful bank shareholders, thus increasing the rate of bank consolidation and driving down competition).

29. *See* Michelle W. Bowman, Gov. Bd. of Govs. of the Fed. Rsrv. Sys., The New Landscape for Banking Competition (Sep. 28, 2022), https://www.federalreserve.gov/newsevents/speech/bowman20220928a.htm [https://perma.cc/9U3L-QAAV] (noting a twenty percent decline in charters centered around banks with less than $250 million in total assets and a massive decline in branches since 2009).

30. *See* BROOME ET AL., REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES 77 (6th ed. 2021) ("[B]anks and bank holding companies have historically been limited in the geographic areas in which they may operate . . . .").

31. *See id.* at 98 ("The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 . . . struck down the federal restrictions on interstate banking and interstate branching."); *see also id.* at 102 n. 7 ("According to FDIC statistics, between 1934 and 1988 there were each year between 13,000 and 14,500 commercial banks operating in the

that competition will bring lower prices,[32] many hope that increased competition in the banking world will bring back some of the advantages of the small community bank.[33] For example, community banks have been able to fill specialty niches in the lending ecosystem that big banks are unable to meet, such as agriculture.[34] Community banks can also improve the stability of investments.[35]

Open Banking will probably not bring a return to the locally oriented community banking of yesteryear, but one can certainly see a similar outline. Open Banking could open the doors for smaller banks aiming to cater products tailormade to *virtual* communities of consumers, much in the way that community banks have always strived to meet the specific needs of their local communities. Replace local community with consumers across the market who seem financially similar, and you've got Open Banking.

### *E. Risks*

Open Banking is not without risks. Any Open Banking system raises serious data protection and privacy concerns. Open Banking will require the unprecedented union of the banking and technology industries. Further, some scholars have argued that competition may be a uniquely poor feature to chase in the banking industry.[36]

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United States . . . . Since 1988, the number of commercial banks declined each year to . . . 4,518 in 2019.").

32. *See FACT SHEET: Executive Order on Promoting Competition in the American Economy*, *supra* note 27 (noting that lack of competition drives up prices for consumers in many industries, including financial services).

33. *See* Marshall Lux & Robert Greene, *The State and Fate of Community Banking*, 2 (M-RCBG Assoc. Working Paper Series, No. 37) (Feb. 2015) (claiming that, although community banks have declined in number, they still serve vital roles in their communities).

34. *See id*. at 2 ("Agricultural lending, in particular, is a specialty that requires a knowledge of farming, often very specific to the region, to the farm or to the farmer, and a longer-term perspective.").

35. *See id.* ("In 2013, the default rates for loans secured by one to four-family residential properties ran at 3.47 percent for small community banks (banks with $1 billion or less in assets) versus 10.42 percent for banks with more than $1 billion in assets." (footnote and citation omitted)).

36. *See* Mitchell A. Petersen & Raghuram G. Rajan, *The Effect of Credit Market Competition on Lending Relationships*, 110 Q. J. OF ECON. 407, 407 (1995) (arguing that banking monopolies are better for consumers seeking loans); *see also* Sherill Shaffer, *The Winner's Curse in Banking*, 7 J. OF FIN. INTERMEDIATION 359, 359-60 (1998) (describing the "Winners Curse" in banking, where a competitive market increases the likelihood that rejected risky loan applicants can acquire a loan).

Open Banking poses a potentially massive risk to consumers' data privacy and security. By increasing the number of actors who may access financial data, Open Banking also increases the opportunities for consumer data to be leaked or compromised.[37] In expanding access to financial data, Open Banking asks consumers to put their faith in new actors.[38] Traditionally, consumers may have had faith in the security of established banks, whereas under Open Banking, consumers must trust third party mobile application developers to protect their financial data.[39] Likewise, the increase in actors who may access consumers' financial data will probably require an expansion in the capabilities of existing financial security measures.[40] Beyond the concern of individual consumers over their financial data, the Pentagon has recently identified financial data security as a core component of national security.[41] Because digital security issues may undermine public confidence in banks, they have a potential to trigger bank runs, which the Department of Defense[42] and Senator Mark Warner[43] have identified as national security threats.

37. *Putting security and privacy at the heart of Open Banking*, PWC, https://www.pwc.com/ca/en/industries/banking-capital-markets/canadian-banks-2019/putting-security-and-privacy-at-the-heart-of-open-banking.html [https://perma.cc/CBT8-8MHQ] (last visited Jan. 2, 2023).

38. *See The Risks of Open Banking,* TREND MICRO (Sept. 17, 2019), https://www.trendmicro.com/vinfo/it/security/news/cybercrime-and-digital-threats/the-risks-of-open-banking-are-banks-and-their-customers-ready-for-psd2 [https://perma.cc/7W4P-JGSZ] ("Whereas customers placed their faith in decades-old institutions with a long history of security, they will now be transferring that same trust to lesser-known third-party providers that don't have a long track record of combating fraud.").

39. *Id.*

40. *See* Gozman et al., *supra* note 14, at 10 ("The improved information sharing between banks is also expected to improve decision-making and mitigation measures regarding fraud prevention").

41. *See* Erica Borghard, *Protecting Financial Institutions Against Cyber Threats: A National Security Issue*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 24, 2018), https://carnegieendowment.org/2018/09/24/protecting-financial-institutions-against-cyber-threats-national-security-issue-pub-77324 [https://perma.cc/2ZDP-Z6AJ] (noting/ something that ends with a gerund the evolution of the threat landscape, foreign threats to the U.S. financial sector in cyberspace should be conceptualized as a national security challenge.).

42. Ken Klippenstein & Daniel Boguslaw, *Pentagon Tries to Cast Bank Runs as National Security Threat*, THE INTERCEPT (Apr. 3, 2023), https://theintercept.com/2023/04/03/silicon-valley-bank-bailout-pentagon/ [https://perma.cc/3P97-4RPZ].

43. Press Release, Mark Warner, *Statement of U.S. Sen. Mark R. Warner on the Banking System*, (Mar. 12, 2023) https://www.warner.senate.gov/public/index.cfm/pressreleases?ID=2BDEE30E-B05F-497F-ADB2-080C5464C9DD [https://perma.cc/D9CX-E27Q].

The potential union of the technology and banking industries has been enough to give some reservations about a hasty pivot to Open Banking.[44] Currently, many banks contract out digital work to firms specializing in Financial Technology or "Fintechs;"[45] Open Banking, however, threatens the arrival of so-called BigTech into the financial services sector.[46] Scholars have worried over the motivation of BigTech companies should they enter into the financial space.[47] Though the American bank regulatory scheme is complex, it is premised on the idea that banks perform two main functions: accepting "demand deposits" and making "commercial loans."[48] It is not immediately clear where technology companies seeking to offer financial services will fit into the American bank regulatory scheme, nor whether they will prioritize consumers' financial interests.

The increase in competition aimed at via Open Banking may not be the boon its proponents imagine it will be. A number of scholars have grappled with whether competition is actually healthy in the banking industry. A 1995 paper argues that given the unique nature of loans, a monopoly is actually better because it encourages a bank to offer low-rate subsidized loans in order to lock in later participation.[49]

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44. *See* BASEL, *supra* note 9, at 6 ("[B]anks and bank supervisors will have to pay greater attention to risks that come with the increased sharing of customer-permissioned data and growing connectivity between banks and various parties.").

45. *See* Hornuf et al., *How do banks interact with fintech startups?*, 57 SMALL BUS. ECON. 1505, 1505 (2021) ("Many banks tackle the challenges of digitalization by cooperating with startup firms that offer technology-driven financial services and novel service packages (fintechs).").

46. *See* Nydia Remolina, *Open Banking: Regulatory Challenges for a New Form of Financial Intermediation in a Data-driven World* 26 (SMU Cent. for AI & Data Governance, Working Paper No. 2019/05, 2019) ("[O]pen Banking can become a Trojan Horse for BigTech dominance of financial services."); *see also* Allesandro Palmieri & Blerina Nazeraj, OPEN BANKING AND COMPETITION: AN INTRICATE RELATIONSHIP, 5 ECLIC 217, 222 (2021) ("Nevertheless, as we mentioned above, financial institutions will suffer . . . an attack from BigTech companies.").

47. *See Big Banks, Bigger Techs?*, OLIVER WYMAN & INT'L BANKING FED'N 16 (2020), https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2020/jul/Big%20Banks%20Bigger%20Techs%20Final%20Version.pdf [https://perma.cc/RXK2-Z7EL] ("Big techs' entry in finance is primarily driven by a strong focus on customers' needs and experiences. This makes the motivation more about monetizing existing core businesses and serving customers holistically than the financial service itself.").

48. *See, e.g.*, Bank Holding Company Act of 1956 § 2(c)(1)(B)(i–ii), 12 U.S.C. §1841(c)(1)(B)(i–ii) ("The term 'bank' means . . . an institution . . . which both (i) accepts demand deposits . . . ; and (ii) is engaged in the business of making commercial loans.").

49. *See* Mitchell A. Petersen & Raghuram G. Rajan, *The Effect of Credit Market Competition on Lending Relationships*, 110 Q. J. OF ECON. 407, 407 (1995) ("Creditors are

By contrast, a bank facing competition that must only lend in accordance with the market conditions will mostly offer high-rate loans in order to protect its own interests.[50] Another scholar described the problem of the "winner's curse"—in a highly competitive banking sector, rejected loan applicants can continue to apply, thus increasing the likelihood that they will receive a loan to the detriment of the bank's other customers.[51] Though these are by no means tremendous roadblocks in the implementation of Open Banking, they may at least give pause to the project.

## III. THE CFPB AND OPEN BANKING

### *A. Section 1033*

On July 9, 2021, President Biden issued an executive order that tasked the Director of the CFPB with "commencing or continuing a rulemaking under Section 1033 of the Dodd-Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new and innovative financial products."[52] Accordingly, the CFPB began considering proposals for rules under Section 1033 in order to implement the necessary groundwork and accelerate the arrival of Open Banking in the United States.[53] In October, 2023, the CFPB released its proposed rules to implement section 1033 of the Dodd-Frank Act.[54]

Under 1033, there are two key subsections that govern the CFPB's rulemaking undertaking.[55] The first, Section A, is the initial foothold of the CFPB's proposed Open Banking rules; it gives consumers the necessary ownership over their financial data for Open

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more likely to finance credit-constrained firms when credit markets are concentrated because it is easier for these creditors to internalize the benefits of assisting the firm.").

50. *Id.* at 407–08.

51. Sherill Shaffer, *The Winner's Curse in Banking*, 7 J. OF FIN. INTERMEDIATION 359, 359–60 (1998).

52. Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36998 (July 14, 2021).

53. Rohit Chopra, *Laying the foundation for open banking in the United States*, CFPB (June 12, 2023), https://www.consumerfinance.gov/about-us/blog/laying-the-foundation-for-open-banking-in-the-united-states/ [https://perma.cc/ZN52-8RWH].

54. *Required Rulemaking on Personal Financial Data Rights,* CFPB, https://www.consumerfinance.gov/personal-financial-data-rights/ [https://perma.cc/Z2N2-BXCX] (last visited Jan. 2, 2023).

55. Dodd-Frank § 1033, 12 U.S.C. § 5533.

Banking.[56] The statutory language, in relevant part, declares that "[s]ubject to rules prescribed by the [CFPB], a covered person shall make available to a consumer, upon request, [financial information] including information relating to any transaction, series of transactions, or to the accounts including costs, charges, and usage data."[57] Importantly, Section A is generally understood to give consumers the rights to, at a minimum, access their financial data, though it is still held by their bank; the CFPB describes this section as concerning "Personal Financial Data Rights."[58]

Subsection B places limits on the rulemaking power of the CFPB.[59] In particular, it requires the CFPB to "consult with the Federal banking agencies and the Federal Trade Commission," when writing rules, and imposes three key requirements on any potential rules: (1) they must "impose substantively similar requirements on covered persons," (2) they must "take into account conditions under which covered persons do business both in the United States and in other countries," and (3) they must "not require or promote the use of any particular technology in order to develop systems of compliance."[60] This language theoretically presents limits on any rules the CFPB seeks to implement—first by recognizing that collaboration across agencies is necessary, and second by ensuring that rules are not applied differently across financial institutions, apply both in the US and abroad, and do not require the adoption of any particular technology.[61]

### *B. The CFPB's Proposals*

In October of 2023, the CFPB released its proposed rules to implement Section 1033 of the Dodd-Frank Act. The proposed regulations require that a "data provider . . . make available to a

56. *See supra* text accompanying note 27.
57. Dodd-Frank Act, § 1033(a), 12 U.S.C. § 5533(a).
58. *Required Rulemaking on Personal Financial Data Rights,* CFPB, https://www.consumerfinance.gov/personal-financial-data-rights/ [https://perma.cc/Z2N2-BXCX] (last visited Jan. 2, 2023).
59. Dodd-Frank § 1033(e), 12 U.S.C. § 5533(e).
60. *Id.*
61. *See id.* ("The Bureau shall . . . consult with the Federal banking agencies and the Federal Trade Commission to ensure . . . that the rules . . . impose substantively similar requirements . . . ; take into account conditions under which covered persons do business both in the United States and in other countries; and do not require or promote the use of any particular technology in order to develop systems for compliance.")

consumer and an authorized third party, upon request, covered data in the data provider's control."[62] Importantly, "authorized third parties" must "obtain the consumer's express informed consent to access covered data by obtaining an authorization disclosure that is signed by the consumer electronically or in writing."[63] The considered proposals would leverage certain additional requirements on "covered persons" under the Dodd-Frank Act; "covered persons" include "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person."[64] The proposals would require covered persons "to make consumer financial information available to a consumer or an authorized third party."[65]

### *C. Industry Response*

Several prominent banks and players in the industry responded to the CFPB's advanced notice of proposed rulemaking expressing concern over the CFPB's potential foray into Open Banking, and, of those to submit comments, Capital One was both the only large bank to offer its perspective and the most critical.[66] Capital One raised several concerns, but specifically challenged whether 1033 even authorizes Open Banking, alleging that "[t]he statute's plain language . . . and the context in which it was drafted raise serious concerns as to whether it was meant to or should apply to consumer data sharing."[67] They argue that, instead, 1033 simply requires that "Data Holders periodically provide consumers a downloadable spreadsheet-like file of their transactions," therefore saying "nothing about repeated or ongoing

62. Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (Oct. 19, 2023) (to be codified at 12 C.F.R. pt.1033.201(a)).

63. Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (Oct. 19, 2023) (to be codified at 12 C.F.R. pt. 1033.401(c)).

64. Dodd-Frank § 1002(6)(a), 12 U.S.C. § 5481(6)

65. CFPB, HIGH-LEVEL SUMMARY AND DISCUSSION GUIDE OF OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION FOR SBREFA: REQUIRED RULEMAKING ON PERSONAL FINANCIAL DATA RIGHTS 3 (Oct. 27, 2022) https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA-high-level-summary-discussion-guide_2022-10.pdf [https://perma.cc/5ZHN-9SBA].

66. Comment Letter from Meredith Fuchs & Andres L. Navarrete, Capital One, to Rohit Chapra, Consumer Fin. Prot. Bureau (Feb 2, 2021) https://www.regulations.gov/comment/CFPB-2020-0034-0077 [https://perma.cc/52EW-8PXE].

67. *Id.* at 4.

access to such data by third parties."[68] Capital One's largest reported concern is over "data aggregators," and the way the proposed rule's authorization of the use of data aggregators could potentially be a path around the rules' data privacy-oriented restrictions on third party access.[69] This concern, though highly relevant to the ongoing debate at large, is beyond the scope of this note. However, Capital One's concerns about the history and purpose of 1033 echo the potential problems raised here.[70]

## IV. THE MAJOR QUESTIONS DOCTRINE

### *A. Background*

The Major Questions doctrine is a doctrine of statutory construction that emerged from a "series of cases over the last thirty years."[71] The doctrine provides an exception to *Chevron* deference, the dominant methodology courts have used for the past forty years in reviewing a federal agency's interpretation of its own enabling statute.[72] Under *Chevron,* when faced with questions of an agency's congressional authorization, courts first look to the statute in question to ask whether the "intent of Congress is clear" in its language.[73] If the language is clear, the court and agency must follow Congress's direction.[74] However, if the language is ambiguous, courts must consider whether the agency's claimed interpretation is "based on a permissible construction of the statute."[75] Under this second step of *Chevron*, the agency's interpretation of congressional intent is given

68. *Id.*
69. *Id.* at 3.
70. *See infra* Part V(A)(4) (explaining that the context around Dodd-Frank's 1033, given the actors involved and scholarly debates at the time, raise questions about the argument that 1033 was meant to enable expansive Open Banking-oriented rulemaking).
71. Eric J. Spitler, *The Supreme Court's Major Questions doctrine: Implications for Responding to Financial Crises*, 27 N.C. BANKING INST. 1, 7 (2023).
72. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").
73. *Id.* at 842–43.
74. *See id.* at 842–43 ("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.").
75. *Id.* at 843.

deference.[76] *Chevron* presents, therefore, an interpretive doctrine enormously favorable to regulatory agencies. However, the Supreme Court began to roll back the broad reach of *Chevron* as it became cautious of offering too much deference to an agency's interpretation of statutes, especially when an agency action arguably relates to matters of great economic and political significance.[77]

The Major Questions doctrine has been described as a "clear statement rule" that imposes a "clarity tax" on Congress.[78] The doctrine thus creates "a presumption against certain kinds of agency interpretations and an instruction to Congress: if Congress wants to assign economically and politically important regulatory questions to an agency, it must speak clearly."[79] Scholars have criticized the modern evolution of the Major Questions doctrine, in this regard, as fundamentally differing from previous jurisprudence because it *requires* skepticism of agency interpretations, rather than just asking whether deference is appropriate.[80]

### *B. West Virginia v. EPA and the Crystallization of the Major Questions doctrine*

In 2022, the Supreme Court had the chance to clarify its growing body of split jurisprudence given the conflict between its traditional deference and the newly emerging heightened investigation of the Major Questions doctrine in the case of *West Virginia v. EPA*.[81]

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76. *Id.* at 844.

77. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

78. Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring).

79. *See* Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1947 (2017) (discussing the precedential doctrine that was ultimately crystalized in *West Virginia*).

80. *See, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" doctrines*, 73 ADMIN. L. REV. 475, 483 (2021) ("The Court said, instead, that if an agency seeks to expand its authority, and to regulate a significant amount of the economy . . . its interpretation will be treated with skepticism. Congress must confer that authority in plain terms.").

81. For examples of cases where the Court declined to apply the deferential *Chevron* standard, used to support the Major Questions doctrine in *Chevron*, see MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225-29 (1994) (declining to offer deference because "[v]irtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion," thus meaning that the agency's interpretation went "beyond the meaning the statute can bear"); FDA v. Brown & Williamson Tobacco Corp.,

While legal scholars and practitioners are still trying to figure out exactly what *West Virginia* means for administrative law going forward, the case has been generally interpreted as cementing a two-part test under the Major Questions doctrine.[82]

Under that test, the reviewing court must first ask whether the case poses a major question.[83] Major questions are "extraordinary cases in which the history and breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."[84] In this way, the Supreme Court cemented a doctrine of hesitancy, where a reviewing court's first instinct is to assume that if Congress wanted an agency to do something specific, it would have so written.[85]

Although legal scholars have identified this first prong as the crucial question to the Major Questions doctrine's analysis, scholars also have criticized it for not offering discrete guidance to lower courts or advocates.[86] To that end, Justice Gorsuch's concurrence similarly

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529 U.S. 120, 121 (2000) ("The court must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) ("[R]espondents must show a textual commitment of authority to the EPA .... Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions . . . ."); Gonzales v. Oregon, 546 U.S. 243, 258, 267 (2006) ("Chevron deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved.") ("The importance of the issue of physician-assisted suicide, which has been the subject of an earnest and profound debate across the country, makes the oblique form of the claimed delegation all the more suspect.") (cleaned up); Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'") (citations omitted).

82. *See* Spitler, *supra* note 71, at 8 ("In *West Virginia*, the Court established a two-part test under the Major Questions doctrine.").

83. West Virginia v. EPA, 597 U.S. 697, 721 (2022).

84. *Id.* (quoting *Brown and Williamson*, 529 U.S. at 159–60).

85. *See, e.g.*, *MCI,* 512 U.S. at 228 ("[T]he § 203(b)(2) authority to "modify" does not contemplate fundamental changes."). *See also Gonzales*, 546 U.S. at 258 ("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official."); *Util. Air Regul. Grp*., 573 U.S. at 306 ("EPA's interpretation would also bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization.").

86. Spitler, *supra* note 66, at 9 ("[T]he Court provid[ed] only the broad elements of the major questions doctrine in its opinion . . . .").

seems to find the majority's opinion lacking in clear direction and seeks to offer guidance otherwise missing from the opinion.[87]

Justice Gorsuch, in his concurrence, identifies three key "triggers" that would prompt a reviewing court to apply the Major Questions doctrine.[88] First, Justice Gorsuch notes that "the doctrine applies when an agency claims the power to resolve a matter of great political significance."[89] Since that analysis defines the Major Questions doctrine by its traditional, unclear, standard, Justice Gorsuch points to past examples, such as *Gonzales v. Oregon*[90] and *NFIB v. OSHA*,[91] to guide future analyses.[92] The second trigger is when an agency "seeks to regulate a significant portion of the American economy."[93] Third, the Major Questions doctrine is triggered when an agency "intrudes into an area that is the particular domain of state law."[94]

If a reviewing court determines an administrative agency has regulated around a major question, then the court applies the second *West Virginia* prong, asking whether the agency can "point to clear congressional authorization for the authority it claims."[95] That authorization must be "something more than a merely plausible textual basis for agency action."[96]

Under this framework, the Supreme Court ruled that the EPA's 2015 rulemaking under the Clean Air Act addressed a major question, and that the EPA did not have appropriate congressional authority to implement the challenged regulations.[97] The Supreme Court identified four major factors in this case that resulted in a ruling against the EPA's

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87. *Id. See also West Virginia*, 597 U.S. at 735 (Gorsuch, J., concurring) ("I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests.").

88. *West Virginia*, 597 U.S. at 743-44 (Gorsuch, J., concurring).

89. *Id.* at 743.

90. *See Gonzales* v. Oregon, 546 U.S. 243, 270-72 (2006) (holding that the Controlled Substances Act did not empower the Attorney General to prohibit physicians from prescribing drugs for the purpose of physician-assisted suicide.).

91. *See* Nat'l Fed'n Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022) (ruling that the Secretary of Labor, through OSHA, had exceeded their statutory mandate in directing employers of more than 100 employees to require COVID-19 vaccination or weekly COVID-19 tests.).

92. *West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring).

93. *Id.*

94. *Id.* at 744.

95. *Id.* (quoting Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014)).

96. *Id.* at 723.

97. *Id.* at 735.

regulatory scheme. First, the EPA sought to "substantially restructure the American energy market."[98] Second, in order to do so, the EPA "claimed to 'discover in a long-extant statute an unheralded power' representing a transformative expansion in its regulatory authority."[99] Third, the EPA argued that its power was located in a statute that had "rarely been used in the preceding decades."[100] Finally, and maybe most significantly for the Court, the EPA sought to "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[101]

As to the second prong—clear congressional authorization—the Court found the EPA's justification lacking.[102] In particular, the Supreme Court was critical of the argument that because the EPA is empowered to establish "the best system of emission reduction," it could engage in "generation shifting regulation."[103] Accordingly, the Court ruled that "[a] decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[104]

### *C. Alabama and Nebraska: The Supreme Court's Other Recent Major Questions Cases*

Alongside West Virginia, the Major Questions doctrine has been implicated in two recent cases: Alabama Association of Realtors v. Department of Health and Human Services[105] and Biden v. Nebraska.[106]

In *Alabama*, a group of realtors sought to challenge the CDC's moratorium on evictions during the COVID-19 pandemic; while the group won in district court, the district court also stayed its order vacating the CDC's moratorium in order to give the government time to

98. *Id.* at 724.
99. *Id.* (quoting *Util. Air Regul. Grp*., 573 U.S. at 324) (cleaned up).
100. *Id.*
101. *Id.*
102. *Id.* at 733–35.
103. *Id.* at 732 (quoting Clean Air Act, 42 U.S.C. § 7411(a)(1)).
104. *Id.* at 735.
105. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (holding, prior to *West Virginia*, that the CDC's eviction moratorium was an unconstitutional overreach).
106. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (applying *West Virginia* and finding the Biden administration's student loan forgiveness plan to be an unconstitutional overreach under the Major Questions doctrine).

appeal.[107] In a *per curiam* opinion, the Supreme Court upheld the district court's initial ruling and vacated the stay, noting that the district court correctly concluded that "the statute on which the CDC relies does not grant it the authority it claims."[108] While *Alabama* was decided before *West Virginia*, the Court's reasoning in *Alabama* parallels its reasoning in *West Virginia*. In *Alabama*, the Court agreed that the CDC did not have sufficient statutory authority to issue that moratorium because: (1) the moratorium had a massive economic impact, evidenced by Congress passing a $50 billion emergency rental assistance plan,[109] (2) the moratorium affected "at least 80% of the country," including "between 6 and 17 million tenants," actually at risk of eviction,[110] (3) allowing the CDC to exercise authority over landlord-tenant relations would give it a "breathtaking amount of authority" over an area not traditionally within its purview,[111] and (4) the CDC's moratorium was an extension of one issued by Congress, that Congress itself had declined to repeatedly extend.[112]

In *Nebraska*, the Court had the opportunity to apply its *West Virginia* precedent and upheld several states' challenge to the Biden administration's student loan forgiveness policy.[113] The Biden administration had rooted its plan in the HEROES Act, a 2003 law giving the Secretary of Education the authority to "modify" student loans during national emergencies, initially aimed at helping to forgive the student loans of soldiers and veterans returning from the Middle East following the September 11th Attacks.[114] In applying its precedent, the Court noted that the Major Questions doctrine was the appropriate tool of analysis for several reasons: (1) the loan forgiveness plan had a

107. *Ala. Ass'n*, 141 S. Ct. at 2489.

108. *Id.* at 2490.

109. *Id.* at 2489.

110. *Id.*

111. *Id.*

112. *Id.* at 2486–87.

113. Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

114. *Id.* at 2362–63; *see* The Higher Education Relief Opportunities for Students (HEROES) Act of 2003 § 1(b)(6), 20 U.S.C. § 1098aa(b)(6) ("There is no more important cause for this Congress than to support the members of the United States military and provide assistance with their transition into and out of active duty and active service."), HEROES Act § 2(a)(1), 20 U.S.C. § 1098bb(a)(1) ("[T]he Secretary of Education (referred to in this part as the "Secretary") may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications . . . ").

tremendous impact—costing taxpayers "between $469 billion and $519 billion" and benefiting "[p]ractically every student borrower . . . regardless of circumstances;"[115] (2) previous modifications to the HEROES act had been "minor" in nature and aimed at procedural concerns, where the Biden administration was seeking to craft a "novel and fundamentally different loan forgiveness program;"[116] (3) this was the first time the Secretary of Education had "claimed powers of this magnitude under the HEROES Act;"[117] and (4) Congress had not passed a student loan forgiveness plan, despite seeming to consider it.[118]

## V. THE MAJOR QUESTIONS DOCTRINE AND OPEN BANKING

The CFPB's efforts to implement an Open Banking system will require a massive regulatory scheme that could prompt a seismic shift in the banking and consumer financial service landscapes.[119] For example, similar undertakings in the United Kingdom and European Union have involved innovative regulatory schemes combining financial and digital regulation built on top of a strong foundation of data privacy.[120] Indeed, American industry professionals have lamented that without regulations resembling the European GDPR or PSD2,[121] the true implementation of Open Banking in the US is five to ten years away.[122] Without clear

115. *Biden, 143 S. Ct.* at 2373.
116. *Id.* at 2369.
117. *Id.* at 2372.
118. *Id.* at 2374.
119. *See supra* Part II.
120. European Union, *Commission Delegated Regulation (EU) 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentical and common and secure open standards of communication*, 61 OFFICIAL J. OF THE EUROPEAN UNION 23, 23–44 (2018).
121. The GDPR (General Data Protection Regulation) is the EU's sweeping data privacy and security regulatory scheme, advertised as the "toughest privacy and security law in the world." Ben Wolford, *What is GDPR, the EU's New Data Protection Law?*, GDPR, https://gdpr.eu/what-is-gdpr/ [https://perma.cc/C7FJ-JDS6] (last visited Jan. 2, 2024). The EU further describes it as "large, far-reaching, and fairly light on specifics" with the goal of making compliance a "daunting prospect." *Id.* PSD2 (an amendment to the Payment Services Directive) is the EU's 'Open Banking' law, which sought to create a "single payment market . . . to promote innovation, competition, and efficiency." *Everything You Need to Know about PSD2*, BBVA, https://www.bbva.com/en/everything-need-know-psd2/ [https://perma.cc/38RG-YKUF] (Feb. 21, 2023).
122. Tomio Geron, *Open Banking in the US Seems Impossible. Here's Why.*, PROTOCOL, (July 1, 2021), https://www.protocol.com/fintech/open-banking-treasury-prime [https://perma.cc/BX85-AU5J].

authorization from Congress that it intended for the CFPB to pursue rulemaking aimed at Open Banking, any such attempt would likely violate the Major Questions doctrine.[123] A reviewing court could easily ask, in accordance with the underlying themes of *West Virginia*, why Congress did not simply charge the CFPB with insuring data portability for the purposes of accelerating the development of an Open Banking system, if that was its intent.

### *A. Would this be a major question under West Virginia?*

Because Open Banking involves a fundamental shift in the way consumers interact with their banks, it would be a matter of "economic and political significance," therefore triggering the Major Questions doctrine.[124] In many ways, Open Banking is a fundamental restructuring of the way banking works, and that alone would provide the necessary reason for a reviewing court to hesitate under the *West Virginia* standard.[125]

Under the Dodd-Frank Act, the CFPB "shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[126] Guided by *West Virginia*, the statutory language to "regulate" does not *de facto* include the authority to fundamentally reshape how consumer financial products and services are provided.[127] In *West Virginia*, the Court identified four key characteristics of the EPA's rulemaking that placed it within the confines of the major questions doctrine; each of those is closely paralleled in the Open Banking rulemaking.[128] Under the majority

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123. *See* West Virginia v. EPA, 597 U.S. 697, 735 (2022) (holding that regulatory agencies need clear congressional authorization for matters of great political significance); *supra* Part IV.

124. *West Virginia,* 597 U.S. at 721 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

125. *See id.* ("[T]here are extraordinary cases in which the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority.") (cleaned up) (citations and internal quotations omitted).

126. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1011(a), 12 U.S.C. § 5491(a).

127. *See West Virginia*, 597 U.S. at 723 (2022) ("Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices.") (cleaned up) (citations and internal quotations removed).

128. *See supra* Part IV (explaining that the EPA failed under the Major Questions doctrine because it: attempted to "substantially restructure the American energy market,"

opinion in *West Virginia*, the CFPB rulemaking aimed at Open Banking would most likely trigger the Major Questions doctrine because: (1) such rulemaking is analogous to other agency rulemaking efforts that have triggered the doctrine, (2) it would probably constitute a "transformative expansion" in the CFPB's rulemaking, (3) the CFPB has never before used its 1033 powers, and (4) Congress has not adopted any sort of Open Banking proposal on its own.[129]

### 1. 1033 rulemaking would likely be an effort analogous to the EPA's attempt to "substantially restructure the American energy market."

First, the Supreme Court noted that the EPA rules were part of an undertaking to "substantially restructure the American energy market."[130] Rulemaking designed to bring about Open Banking would have to be an effort to "substantially restructure" the American consumer financial product market.[131] The proposed rules necessarily include regulations aimed at creating unprecedented data portability—requiring that banks "make available to . . . an authorized third party . . . covered data"[132]—with the express goal of "jumpstart[ing] competition."[133] As the banking market is not generally known for competition,[134] any effort to create or increase competition would raise judicial concerns over efforts to substantially alter a market.[135]

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"claimed to 'discover in a long-extant statute an unheralded power' representing a transformative expansion in its regulatory authority," located its power in a statute that had "rarely been used in the preceding decades," and sought to "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." *West Virginia*, 597 U.S. at 724 (2022)).

129. *See infra* Part V.1, 2, 3, 4 (explaining the four reasons why the CFPB's rules will fail under the Major Questions doctrine).

130. *West Virginia,* 597 U.S. at 724.

131. *Id.*, *supra* Part III.

132. Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (proposed Oct. 31, 2023) (to be codified at 12 CFR pt. 1033.201).

133. Chopra, *supra* note 53.

134. *See, e.g.*, *What's Behind the Decline in US Banks?*, USAFACTS, https://usafacts.org/articles/whats-behind-the-decline-in-us-banks/ (Oct. 4, 2023) [https://perma.cc/G8FV-S7N9] ("Over the last four decades, the number of FDIC-insured commercial banks has fallen by more than 70%" due to "the increasingly commonplace practice of bank mergers.").

135. *See West Virginia,* 597 U.S. at 724 (holding that efforts to fundamentally alter a market may require clear congressional authorization).

The Court has investigated the amount of capital that would potentially fall within a regulatory scheme to determine whether it is analogous to an effort to "substantially restructure" the market.[136] In *Nebraska*, the Court found it relevant that the Biden administration's student loan forgiveness program would potentially "cost taxpayers between $469 billion and $519 billion, depending on the total number of borrowers ultimately covered."[137] Similarly, in *Alabama Association of Realtors v. Department of Health and Human* Services, the Court ruled that the Department of Health and Human Services' eviction moratorium fell within the confines of the Major Questions doctrine, highlighting that "Congress has provided nearly $50 billion in emergency rental assistance—a reasonable proxy of the moratorium's economic impact."[138] Any rulemaking designed to accelerate the arrival of Open Banking will implicate similarly large amounts of capital; in 2019, for example, "the US banking system had $18.6 trillion in assets and a net income of $235.9 billion." [139] Therefore, in 2019, US banks-controlled capital was equal to almost 87% of the US GDP of $21.38 trillion.[140]

The Court has also looked to the number of people potentially impacted by proposed rules in order to determine whether the regulation might be an effort analogous to EPA's attempt to "substantially restructure" a market.[141] In *Nebraska*, for example, the Court emphasized, in determining that the major questions doctrine was the properly applicable body of law, that under the Biden administration's student loan forgiveness plan "[p]ractically every student borrower benefits, regardless of circumstances."[142] In *Alabama*, the Court similarly noted that "[a]t least 80% of the country, including between 6 and 17 million tenants at risk of eviction, falls within the moratorium."[143]

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136. *Id.*; *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

137. *Biden*, 143 S. Ct. at 2373 (internal quotations removed).

138. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

139. *Financial Services Industry,* SELECTUSA (https://www.trade.gov/selectusa-financial-services-industry) [https://perma.cc/47Y6-6PCM] (last visited Jan. 31, 2024).

140. *GDP (Current US$) – United States*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US [https://perma.cc/AVQ5-AFUN] (last visited Jan. 31, 2024).

141. *West Virginia,* 597 U.S. at 724.

142. *Biden*, 143 S. Ct. at 2373.

143. *Ala. Ass'n*, 141 S. Ct. at 2489.

Likewise, the CFPB's proposed rules around open banking have the potential to impact vast swaths of the American people; between 2020 and 2021, the Federal Reserve Board reported that 81% of American adults were "fully banked," meaning that "they had a bank account."[144] While every American with a bank account will not be required to embrace Open Banking under the proposed rules,[145] the introduction of Open Banking into the American banking market has the potential to impact everybody within that space.[146]

2. § 1033 rulemaking would likely constitute a "transformative expression in [the CFPB's] regulatory authority" under West Virginia.

Second, because the CFPB has mostly engaged in enforcement-based actions, 1033 rulemaking of the magnitude required by Open Banking would be a "transformative expansion" in its regulatory process, and therefore authority.[147] In *West Virginia*, the Supreme Court expressed concerns that the EPA had engineered a "transformative expansion in its regulatory authority."[148] In particular, the Court emphasized that the EPA's past regulatory efforts under the questioned statute were both rare in occurrence and fundamentally different from its challenged regulatory scheme.[149] The CFPB's proposed regulation, aimed at accelerating a transition to Open Banking, could similarly be construed as a transformative departure from the CFPB's traditional regulatory *modus operandi*.

144. BD. OF GOVERNORS OF THE FED. RSRV. SYS., *Economic Well-Being of U.S. Households in 2021*, (2022), https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-banking-and-credit.htm [https://perma.cc/BUT2-6Z9S].

145. *See* Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796, 74809 (to be codified at 12 CFR pt. 1033.201) ("[D]ata provider[s] [are required] to make available to consumers and authorized third parties, *upon request*, covered data in the data provider's control or possession concerning a covered consumer financial product or service[.]" (emphasis added)).

146. *See supra* Part II (explaining how Open Banking could fundamentally change the banking space or increase risk to all consumers).

147. *West Virginia,* 597 U.S. at 724.

148. *Id.* (quoting Util. Air Regul. Grp. v. EPA., 573 U.S. 302, 324 (2014)).

149. *See id.* at 725 ("Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. It had never devised a cap by looking to a system that would reduce pollution simply by shifting polluting activity 'from dirtier to cleaner sources.") (citations and internal quotations omitted).

While the CFPB does enjoy theoretically broad regulatory discretion, it has traditionally exercised its powers with a focus on responding to consumer complaints, prosecuting illegal financial activities, and protecting consumer access to economic and financial relief.[150] For example, the CFPB established regulations to protect consumers from irresponsible or risky lending practices following the 2008 financial crisis, regulated against discriminatory lending practices in a variety of different contexts, and established rules in order to ensure that consumers had access to the appropriate financial relief during the COVID-19 pandemic.[151] However, none of those practices come close to the sort of regulation contemplated by efforts to accelerate the shift to Open Banking, meaning that such rules would almost certainly trigger concerns of an "transformative expansion" under *West Virginia*.[152]

This second investigation—that a regulatory agency seems to exercise a statutory power in a fundamentally new manner—has been a major touchstone of the Supreme Court's jurisprudence around whether the Major Questions doctrine is implicated.[153] In *Nebraska*, for example, it was highly relevant that "[p]rior to the COVID–19 pandemic, modifications issued under the Act implemented only minor changes," including rulemaking aimed at "reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations."[154] In contrast, with regards to the Biden administration's loan forgiveness plan, the Court wrote that "they created a novel and fundamentally different loan forgiveness program."[155] With regards to 1033, the CFPB is authorized to engage in rulemaking designed at ensuring that consumer financial data is made "available"[156] to the consumers, but not in the pursuit of data

150. *See* Dave Uejio, *Celebrating 10 Years of Consumer Protection*, CONSUMER FIN. PROT BUREAU (July 21, 2021) https://www.consumerfinance.gov/about-us/blog/celebrating-10-years-consumer-protection/ [https://perma.cc/6MPC-C7YD] (celebrating the CFPB's storied history of enforcement actions).

151. *Id.*

152. *See West Virginia,* 597 U.S. at 724 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

153. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023) (emphasizing that the challenged policy was fundamentally different than past rulemaking efforts under the act).

154. *Id. at* 2369 (internal quotation marks omitted).

155. *Id*.

156. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1033(a), 12 U.S.C. § 5533(a)(2008).

"portability" as requested by President Biden in his executive order.[157] This would seemingly raise similar issues as the Department of Education's novel construction of "modification."[158]

Similarly, in *Alabama*, the CDC argued that its moratorium on evictions was justified under the Public Health Service Act as part of its tasking to "to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of [COVID-19]."[159] However, the Court noted that should the CDC's regulatory power include the authority to regulate landlord-tenant relations, it would "give the CDC a breathtaking amount of authority," and make it "hard to see what measures this interpretation would place outside the CDC's reach."[160] Likewise, in *Whitman*, one of the Court's foundational opinions in the Major Questions cannon, the Court explicitly ruled that "Congress does not alter a regulatory scheme's fundamental details in vague terms or ancillary provisions."[161]

Again, it seems likely that the CFPB rulemaking under 1033 may flag exactly the sort of concern that the Court has considered triggering conditions for the Major Questions doctrine. The CFPB will need to rely on a novel interpretation of a statutory term, one that seemingly differs from a plain-text reading of that same term.[162] However, the novel nature of these rules may not actually be detrimental to the CFPB's case; the CFPB has been frequently criticized for "rulemaking by enforcement," or forcing banks and other entities to determine permissible activities for themselves by conceptually separating them from activities on which the CFPB has leveraged enforcement actions.[163] In many ways then, this new form of regulation

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157. Exec. Order No. 14,036, 86 Fed. Reg. 36987, 36998 (July 14, 2021).

158. *See Biden*, 143 S. Ct. at 2369 ("The Secretary's new modifications of these provisions were not moderate or minor. Instead, they created a novel and fundamentally different loan forgiveness program.") (citations and internal quotations removed).

159. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021) (quoting 42 U.S.C. § 264(a)).

160. *Id.* at 2489.

161. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 458 (2001).

162. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1033(a), 12 U.S.C. § 5533(a) ("[A] covered person shall make available to a *consumer* . . . information . . . ." (emphasis added)).

163. *See* CTR. FOR CAP. MKTS. COMPETITIVENESS, CONSUMER FINANCIAL PROTECTION BUREAU: WORKING TOWARDS FUNDAMENTAL REFORM 5 (2018), https://www.centerforcapitalmarkets.com/wp-content/uploads/2018/03/CCMC_CFPB-Agenda.pdf [https://perma.cc/4FMU-2TG5] (offering criticisms the CFPB's general approach to regulation by enforcement rather than rulemaking); *see also* Andreas Fuster et

could actually be the sort of change that some of the CFPB's critics have long clamored for. Unfortunately, it's not clear how such a consideration would factor into the Court's Major Questions analysis, if it is at all relevant; instead, a reviewing court would likely conclude that the rules are a departure from the CFPB's traditional regulatory activities.

3. The CFPB has never before used its § 1033 powers.

Third, the Supreme Court emphasized that the EPA was exercising a power that had "rarely been used in the preceding decades."[164] With regards to Open Banking, the CFPB has itself described its efforts to engage in rulemaking under 1033 as "formalizing an unused legal authority."[165] Guided by *West Virginia*, the CFPB's proposal of rules under 1033, a historically unused statute, could raise a red flag of administrative overreach.[166]

In *Nebraska*, the Court placed heavier emphasis on the Secretary of Education having "never previously claimed powers of this magnitude under the HEROES Act."[167] However, that presents a core difference between *Nebraska*, *West Virginia*, and the CFPB's potential rulemaking under 1033. In *Nebraska*, and unlike in *West Virginia*, the Department of Education had previously engaged in student debt relief under its HEROES Act powers, just not to the generalized extent it was pursuing at the time.[168] In contrast, in *West Virginia*, the Court specifically took issue with the fact that the EPA had never before engaged in "generation shifting regulation" under the Clean Air Act.[169] Regardless, the two rulings are connected by the common theme of a regulatory agency exploring rulemaking in a fundamentally new way. With Open Banking, all of these concerns are potentially implicated;

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al., *Analyzing the Effects of CFPB Oversight*, LIBERTY ST. ECON., (Oct. 9, 2018), https://libertystreeteconomics.newyorkfed.org/2018/10/analyzing-the-effects-of-cfpb-oversight/ [https://perma.cc/AV3Q-UVNX] (arguing that the CFPB's enforcement-based regulation is ineffectual and confusing).

164. West Virginia v. EPA, 597 U.S. 697, 724 (2022).

165. Chopra, *supra* note 53.

166. *See West Virginia,* 597 U.S. at 732 (finding that an agency using historically unexercised powers counsels skepticism under the Major Questions doctrine).

167. Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023).

168. *Id.*

169. *See West Virginia,* 597 U.S. at 716.

because the CFPB has never engaged in rulemaking under 1033, the scope of this rulemaking is also unprecedented.

However, there are potentially key differences between the Court's concerns in *West Virginia* and with the CFPB's 1033 rulemaking. The Court was specifically concerned in *West Virginia* that the questioned authority had "rarely been used in the preceding decades."[170] With Open Banking, in contrast, the CFPB has never pursued rulemaking under 1033, but that statute itself was only enacted in 2010.[171] Furthermore, the CFPB has only recently been directed to pursue rulemaking under 1033, meaning that the CFPB has not had the same opportunity to exercise these powers as the EPA had to exercise its questioned powers in *West Virginia*.[172] In *West Virginia*, and to a lesser extent in *Nebraska*, the Supreme Court was specifically concerned with the way an administrative agency's use of its powers differed from any previous uses. Here, at least, the Court cannot say that the CFPB's proposed rules under 1033 fundamentally differ from its previous 1033 rulemaking—only that the endeavor may be a fundamental shift away from the CFPB's traditional regulatory activities.

4. Congress has not adopted an Open Banking system.

Fourth, and finally, the Court in *West Virginia* expressed concern that the EPA was seeking to "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself."[173] With regards to Open Banking and 1033 rulemaking, it is not clear how a reviewing court would respond under *West Virginia* and the Supreme Court's other major questions jurisprudence. Congress has technically had the opportunity to enact an Open Banking regime insofar as Congress has the opportunity to enact anything within its powers.[174] However, Congress has not truly declined to enact a scheme because they have not engaged with Open Banking at all.

170. *Id.* at 724.

171. Chopra, *supra* note 53.

172. Exec. Order No. 14036, 86 Fed. Reg. 36987 § 5(t)(i) (July 14, 2021).

173. *West Virginia,* 597 U.S. at 724.

174. *See* U.S. Const. art. I, § 8 (laying out the permissible areas in which Congress may legislate).

In *West Virginia* in particular, the court explicitly noted that "Congress had *conspicuously* and *repeatedly* declined to enact" the questioned regulatory scheme."[175] Therefore, in *West Virginia*, the Court was not concerned with Congress' potential implicit rejection of the regulations, but rather took careful note of Congress' many actual decisions not to enact the regulatory scheme.[176] Congress has not publicly rejected Open Banking; in fact, it does not appear as though it has considered it all. Instead, this regulatory undertaking seems to be the sole product of the CFPB and President Biden.[177]

In *Alabama*, Congress had previously enacted a 120-day eviction moratorium as part of the CARES Act but declined to renew it upon its expiration.[178] The Court emphasized that in enacting its own moratorium, the CDC "decided to do what Congress had not," but downplayed that Congress later extended the CDC's eviction moratorium, which could be construed at Congress' offering at least tacit approval of the CDC regulation.[179] Instead, the Court noted that Congress had not subsequently extended the CDC's moratorium and that the agency had continued to extend the moratorium under its own authority.[180] If guided by the Court's writing in *Alabama*, it seems likely that a reviewing court could find Congress' lack of action surrounding Open Banking to be an implicit rejection, just as the Court reasoned in *Alabama*.[181]

Similarly, in *Nebraska*, the Court did not note any explicit rejection from Congress to engage in student loan forgiveness.[182] However, the Court did highlight that then-Speaker Pelosi had stated that, in her opinion, a potential student loan forgiveness plan "has to be an act of Congress," because the executive does not have "the power for debt forgiveness."[183] Though the Court did not explicitly discuss this,

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175. *West Virginia,* 597 U.S. at 724. (emphasis added).
176. *Id.*
177. *See, e.g.,* Casey Jennings & Jaimie Nawaday, *Open Banking is Coming to America*, JD SUPRA (Nov. 18, 2022), https://www.jdsupra.com/legalnews/open-banking-is-coming-to-america-9783680/ [https://perma.cc/QS9U-P8YY] (noting that the CFPB had undertaken rules aimed at Open Banking).
178. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2487 (2021).
179. *Id.* at 2486–87.
180. *Id.*
181. *See id.* (emphasizing Congress' lack of action as a key factor in the decision).
182. Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023).
183. *Id.*

the Court certainly seemed to take Representative Nancy Pelosi's comments as indicating that Congress had, at least, considered student loan forgiveness and for some reason declined to legislate around it.[184] In contrast, Congress has not considered Open Banking in any public or official capacity, so the Court's guidance here is somewhat unclear.

The argument could be made that 1033 is, itself, Congress' attempt at empowering the CFPB to implement Open Banking; however, that argument is not supported by the historical context around 1033. Far from an expansive authorization to pursue new and innovative banking ecosystems, 1033 was initially advanced as a part of the Obama Administration's "Smart Disclosure" initiative.[185] Cass Sunstein, the then Administrator of the Office of Management and Budget, previously championed an idea similar to "Smart Disclosure" in his book, *Nudge*.[186] In the book, Sunstein and his co-author proposed a similar framework, but applied it to the cell phone industry, advocating for a "usage disclosure requirement" that would result in cell-phone customers being sent a "complete listing of all the ways they had used the phone and all the fees that had been incurred."[187] The customer could then take that data, and use it to shop around for better products on their own and in a limited manner.[188] The Smart Disclosure initiative, and subsequently 1033, are applications of that to the financial services sector. They do have *some* similarities with Open Banking—the consumer uses data in order to achieve better or more curated products—however, it hinges on the consumer taking that data and going shopping with it.[189] There is, therefore, a discrepancy

184. *See id.* (offering then-Speaker Pelosi's words as evidence of Congress being the proper branch of government to institute student loan forgiveness plans).

185. *See, e.g.,* EXEC. OFFICE OF THE PRESIDENT NAT'L SCI. AND TECH. COUNCIL, SMART DISCLOSURE AND CONSUMER DECISION MAKING: REPORT OF THE TASK FORCE ON SMART DISCLOSURE, 18–19 (May 2013), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf [https://perma.cc/G94W-TJMJ]; Memorandum for the Heads of Exec. Dept. and Agencies: Informing Consumers through Smart Disclosure (Sept. 8, 2011) (on file with the Off. of Mgmt. and Budget), https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf [https://perma.cc/QEG7-G7B5].

186. RICHARD H. THALER & CASS R. SUNSTEIN, *Nudge* at 134–46 (Penguin Books 2008).

187. *Id.*

188. *Id.*

189. *Compare* EXEC. OFFICE OF THE PRESIDENT NAT'L SCI. AND TECH. COUNCIL *supra* note 185, at 8 ("Smart disclosure benefits consumers by enabling the creation of Web-based tools and mobile apps that help consumers make smarter choices in the marketplace."), *with*

between the context around the writing of 1033 and the CFPB's current implementation of it; the current proposed rules require *banks* to make data available upon request, rather than simply allowing the consumer to do it on their own.[190]

### *B. Open banking under Justice Gorsuch's concurrence in West Virginia*

In his concurrence in *West Virginia*, Justice Gorsuch identified three major triggers for reviewing courts to look for when determining whether the Major Questions doctrine would govern their analysis.[191] First, "the doctrine applies when an agency claims the power to resolve a matter of great political significance."[192] Second, courts should look to the Major Questions doctrine when an agency "seeks to regulate a significant portion of the American economy."[193] And third, the Major Questions doctrine is triggered when an agency "intrude[s] into an area that is the particular domain of state law."[194] It is important to consider how Justice Gorsuch's factors may weigh for or against applying the Major Questions doctrine in this case, as some lower courts have already begun using Justice Gorsuch's concurrence to guide analyses under the Major Questions doctrine.[195]

Justice Gorsuch's first factor, that "an agency claims the power to resolve a matter of great political significance," seems to weigh heavily in favor of the CFPB's proposed Open Banking rules falling

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Laplante & Kshetri, *supra* note 1, at 122 ("The OB ecosystem provides more choices and information to consumers *and* allow[s] easier interaction with and movement of money between financial institutions and any other entity choosing to participate in the financial ecosystem.") (emphasis added).

190. *See* Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796, 74809 (to be codified at 12 CFR pt. 1033.201) ("[D]ata provider[s] [are required] to make available to consumers and authorized third parties, upon request, covered data in the data provider's control or possession concerning a covered consumer financial product or service[.]").

191. *See supra* Part IV.B.

192. West Virginia v. EPA, 597 U.S. 697, 743 (2022) (Gorsuch, J., concurring) (citations and internal quotations omitted).

193. *Id.* at 744 (Gorsuch, J., concurring) (citations and internal quotations omitted).

194. *Id.* (Gorsuch, J., concurring) (citations and internal quotations omitted).

195. *See, e.g.,* United States v. Freeman, No. 21-cr-41-JL, 2023 WL 5391417 (D.N.H. Aug. 22, 2023) (applying the factors from Justice Gorsuch's *West Virginia* concurrence in order to determine whether the major questions doctrine applied); *Brown v. U.S. Dep't of Ed.*, 640 F. Supp. 3d 644, 664–68 (N.D. Tex. 2022) (citing Justice Gorsuch's concurrence in order to apply to the major questions doctrine).

within the Major Questions doctrine.[196] The CFPB's 1033 rules must inherently resolve tensions in the ownership and portability of financial data.[197] There is a potential argument that this is not a question of great political significance, but given that Open Banking could shift the foundations of the American banking market, it seems likely that reviewing courts will consider it to be a "matter of great political significance."[198]

Justice Gorsuch's second triggering condition also seems to point to this being a major question; the CFPB's Open Banking regulation undoubtedly "seeks to regulate a significant portion of the American economy."[199] In 2019, for example, "the U.S. banking system had $18.6 trillion in assets and a net income of $235.9 billion,"[200] meaning that, in 2019, US banks controlled capital equal to almost 87% of the US GDP of 21.38 trillion dollars.[201] Likewise, between 2021 and 2022, the Federal Reserve Board reported that 81% of American adults were "fully banked," meaning that they "had a bank account."[202] While it is unclear what, exactly, Justice Gorsuch imagined as the standard for a "significant portion of the American economy," it's hard to imagine that such a trigger would not encompass regulation affecting wealth potentially equal to 87% of the country's GDP and potentially affecting 81% of American adults.[203] Accordingly, the CFPB would need to be

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196. *West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (citations and internal quotations omitted).

197. *See* Chopra, *supra* note 53 ("Consumers continue to encounter all too familiar obstacles when trying to switch banks or apply for loans. The CFPB is working to . . . break down these obstacles . . . and protect financial privacy.").

198. *West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (citations and internal quotations omitted). .

199. *Id.* at 744 (Gorsuch, J., concurring) (citations and internal quotations omitted).

200. *Financial Services Industry,* SELECTUSA (https://www.trade.gov/selectusa-financial-services-industry) [https://perma.cc/47Y6-6PCM] (last visited Jan. 7, 2024).

201. *GDP (current US$) – United States*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US [https://perma.cc/AVQ5-AFUN] (last visited Jan. 7, 2024).

202. BD. OF GOVERNORS OF THE FED. RSRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2021 [ 3] (2022), https://www.federalreserve.gov/publications/2022-economic-well-being-of-us-households-in-2021-executive-summary.htm [https://perma.cc/C6WA-B8XV].

203. *See West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (citations and internal quotations omitted) (noting that when a "significant portion of the economy" is to be regulated may signal that the Major Questions doctrine is the appropriate analysis).

able to point to "clear congressional authorization" for Open Banking regulation under the major questions doctrine.[204]

### *C. Can the CFPB point to clear congressional authorization?*

The CFPB's authorization for these rules comes from two places. First, as has been previously explored, the CFPB has explicitly written these rules under its 1033 powers—which task the CFPB with writing rules in order to ensure consumer financial service providers "make available to a consumer, upon request, information in the control or possession of the [provider] concerning the consumer financial product or service that the consumer obtained from [that provider]."[205] Secondly, and more broadly, under its chartering statute, the CFPB is explicitly tasked with "regulat[ing] the offering and provision of consumer financial products."[206]

The CFPB's first hurdle in pointing to clear congressional authorization is the incongruity between data access and data portability. The Dodd-Frank Act charges the CFPB with ensuring that consumer financial data is made "available" to consumers "upon request."[207] However, Open Banking does not simply require that consumers be able to access their financial data; it necessarily requires an element of portability—that data be able to move between financial institutions in order to generate the desired ease of movement and increased competition.[208] The CFPB's proposed rules, therefore, require that a "data provider . . . make available to . . . an authorized third party,

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204. *Id.* (Gorsuch, J., concurring).

205. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1033(a), 12 U.S.C. § 5533(a).

206. Dodd-Frank § 1011(a), 12 U.S.C. § 5491(a).

207. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1033(a), 12 U.S.C. § 5533(a).

208. *See, e.g.,* Jennings & Nawaday, *supra* note 177 ("Conceptually, Open Banking mandates that financial service providers have open access to consumer financial data held by other financial institutions through the use of application programming interfaces ('APIs')."); *see also CFPB Kicks Off Personal Financial Data Rights Rulemaking*, CONSUMER FIN. PROT. BUREAU (Oct. 27, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-personal-financial-data-rights-rulemaking/ [https://perma.cc/PL3X-NXRV] ("[C]onsumers would be able to more easily and safely walk away from companies offering bad products and poor service and move towards companies competing for their business with alternate or innovative products and services.").

upon request, covered data in the data provider's control."[209] Accordingly, the CFPB will certainly face a roadblock in attempting to justify that a statute *explicitly* authorizing it implement rules around ensuring access to data also *implicitly* authorizes the CFPB to implement rules aimed at accelerating the arrival of a financial ecosystem centered around data portability. Conceptually, such a regulatory undertaking seems to be exactly the sort of situation where the Major Questions doctrine counsels for explicit authorization.[210]

There could be, alternatively, some argument that the CFPB's regulation is not expansive at all, that, instead, it simply allows the consumer to do what Dodd-Frank already allowed them to do—take their data and offer it to third parties. The CFPB's regulations, taken in that light, simply eliminate some of the consumer's middle-man responsibilities. Instead of requiring the consumer to actually take their data elsewhere, the CFPB's regulations will have banks transfer it upon request.[211] However, the historical context around the implementation of 1033 paints the picture that Congress likely intended, exactly, the scenario that the CFPB has sought to replace.[212] The debate around data at the time of the Dodd-Frank Act make it seem likely that 1033 was part of an attempt to build a framework in line with *Nudge*, or the Smart Disclosure initiative, where consumers could take their financial data and use it to more effectively shop for consumer products.[213] Given this, the CFPB's rules are still an expansion beyond Congress' original intent, which is likely a death sentence under the Major Questions doctrine.

Similarly, the broad authorization under 5491 seems to lack the sort of clear authorization for which the Major Questions doctrine searches. In *West Virginia*, the Supreme Court rejected the argument that a statute tasking the EPA with establishing "the best system of emission reduction"[214] further empowered it to engage in large scale expansive regulation designed to "force a nationwide transition away

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209. Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796, 74809 (Oct. 31, 2023) (to be codified at 12 CFR pt. 1033.201).

210. *See* West Virginia v. EPA, 597 U.S. 697, 721 (2022) ("[T]he history and breadth of the authority . . . provide a reason to hesitate before concluding that Congress meant to confer such authority.") (citations and internal quotations omitted).

211. Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. at 74809.

212. *Supra* Part V.A.4.

213. *Supra* Part V.A.4.

214. *West Virginia,* 597 U.S. at 734 (quoting 42 U.S.C. § 7411(a)(1)).

from the use of coal."[215] Rather, the Court emphasized that such a regulatory direction "rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[216] Here, the CFPB would most likely run into a similar argument against regulation. Although Section 5491 authorizes the CFPB to "regulate the offering and provision of consumer financial products,"[217] its lack of explicit language concerning the sort of massive regulatory undertaking necessary to accelerate the arrival of Open Banking will present a fatal flaw under the Supreme Court's current Major Questions jurisprudence.[218]

The CFPB may face additional issues rooting its authorization for these rules in 1033, as Section 1033 also tasks the CFPB with ensuring that its rules "do not require or promote the use of any particular technology in order to develop systems of compliance."[219] Consequentially, Open Banking requires the use of a "particular technology," namely the APIs to facilitate the movement of financial data between different financial institutions.[220] APIs are enormously important to the project of Open Banking; assuming that most financial institutions have their own proprietary data systems, APIs are the key tool in order to allow otherwise incompatible electronic data to flow between financial institutions.[221] Accordingly, it seems likely that the CFPB's regulations aimed at Open Banking will necessarily create a system of compliance that relies on the use of a "particular technology,"

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215. *Id*. at 735.

216. *Id.*

217. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1011(a), 12 U.S.C. § 5491(a).

218. *See West Virginia,* 596 U.S. at 735 (holding that massive regulatory efforts fall under the Major Questions doctrine, and therefore must be clearly authorized).

219. Dodd-Frank § 1033(e), 12 U.S.C. § 5533(e)(3).

220. *See* Jennings & Nawaday, *supra* note 177 ("Conceptually, open banking mandates that financial service providers have open access to consumer financial data held by other financial institutions through the use of application programming interfaces ('APIs')."); *see also* CONSUMER FIN. PROT. BUREAU, HIGH-LEVEL SUMMARY AND DISCUSSION GUIDE OF OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION FOR SBREFA: REQUIRED RULEMAKING ON PERSONAL FINANCIAL DATA RIGHTS 9–12 (Oct. 27, 2022), https://files.consumerfinance.gov/f/documents/cfpb_data-rights-rulemaking-1033-SBREFA-high-level-summary-discussion-guide_2022-10.pdf [https://perma.cc/5ZHN-9SBA] (considering proposals mandating third-party "access portals").

221. Faith Reynolds, *Open Banking: A Consumer Perspective*, BARCLAYS (Jan. 2017), https://home.barclays/content/dam/home-barclays/documents/citizenship/access-to-financial-and-digital-empowerment/Open-Banking-A-Consumer-Perspective-Faith-Reynolds.pdf [https://perma.cc/83MJ-BMUL].

at least in the common sense of the word.[222] While it may be a separate, and seemingly novel, issue this may present problems for the CFPB in even rooting its regulatory powers in 1033, as it seems like 1033 explicitly forbids exactly the sort of requirements within the CFPB's Open Banking regulatory scheme.

## VI. CONCLUSION

Under the Major Questions doctrine, courts are inherently skeptical of administrative agency's claims that they have the authority to issue sweeping regulations.[223] Guided by *West Virginia*, the Major Questions doctrine is the appropriate tool of analysis when: (1) agency regulations will have far-reaching effects,[224] (2) agencies expand the nature of their regulatory activities,[225] (3) agencies utilize historically unused statutes to justify their actions,[226] and (4) Congress has declined to adopt the regulatory scheme in question.[227] In an inquiry subject to the Major Questions doctrine, a federal agency must "point to clear congressional authorization for the authority it claims."[228]

Open Banking regulation presents a Major Question under *West Virginia* because: (1) the CFPB regulations will have the potential to affect every consumer in the financial services sector; (2) the CFPB's regulations are a departure from the CFPB's traditional more enforcement-oriented actions; (3) the CFPB has never issued rules under 1033 before; and (4) Congress has not sought to implement any sort of Open Banking system itself. Unfortunately, 1033 does not provide clear congressional authorization. The CFPB simply has the powers to issue rules in pursuit of ensuring that Consumers have access to their own financial data; the statute does not empower the CFPB to

222. Dodd-Frank § 1033(e)(3), 12 U.S.C. § 5533(e)(3).

223. *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decision of vast economic and political significance.") (citations and internal quotations omitted).

224. West Virginia v. EPA*,* 597 U.S. at 724 (2022) (noting that the EPA was endeavoring to "substantially restructure the American energy market . . . .").

225. *See id.* (noting that the EPA "claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority . . . .").

226. *See id.* (noting that the provision identified by the EPA as conferring authority had "rarely been used in the preceding decades . . . .").

227. *See id.* (stating that the EPA was attempting to "adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself . . . .").

228. *Id.* at 744 (Gorsuch, J., concurring).

pursue data portability in furtherance of allowing competitors to access financial data.

MATTHEW W. SINGLETON[*]

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