
NOTE

MY UNFAIR LADY: AN ANALYSIS OF THE CFPB'S AUTHORITY TO PROSECUTE DISCRIMINATORY CONDUCT UNDER DODD-FRANK'S UDAAP STANDARD IN THE AGE OF THE MAJOR QUESTIONS DOCTRINE

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According to President Lyndon B. Johnson, the Civil Rights Act of 1964 “affirmed that men equal under God are also equal when they seek a job, when they go to get a meal in a restaurant, or when they seek lodging for the night in any State in the Union.” Neither Congress nor President Johnson, however, mentioned bank accounts, overdraft fees, or access to bank branches. On March 16, 2022—nearly six decades later—the Consumer Financial Protection Bureau attempted to fill this gap. It revised its examination manual to identify discrimination in consumer financial products as an “unfair, deceptive, or abusive act or practice.” When Congress established the CFPB in 2010, it expressly empowered it to eliminate such practices, adopting a standard which it has featured in federal law since 1938. Various agencies have previously considered using the standard to address discrimination, but until March 2022 none ever had.

So why now? The CFPB's newly appointed director, Rohit Chopra, announced the change to the examination manual and said, “When a person is denied access to a bank account because of their religion or race, this is unambiguously unfair.”

Less than five months after the announcement, however, the Supreme Court threw the agency's decision into doubt by

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offering a new framework for evaluating agency statutory interpretation in *West Virginia v. EPA*. The *West Virginia* case announces a new “major questions doctrine” in which agency action requires clear congressional authorization depending on the “history and breadth of the authority that [the agency] has asserted” and its “economic and political significance.” On September 28, 2022, industry groups led by the Chamber of Commerce filed suit against the CFPB, citing *West Virginia v. EPA* in claiming the CFPB overstepped its statutory authority. On September 8, 2023, a federal judge sitting in the Eastern District of Texas decided against the CFPB, enjoining the agency from implementing its anti-discrimination policy. The judge cited the major questions doctrine and *West Virginia v. EPA* in striking down the agency’s revision as beyond its statutory authority.

This Note considers the effects of *West Virginia v. EPA* and the ‘major questions doctrine’ on anti-discrimination efforts by the CFPB and other federal agencies, specifically analyzing discrimination as a “major question,” and determining the lengths to which the UDAAP standard “clearly authorizes” anti-discrimination action. Given the political significance of anti-discrimination laws, the potential ramifications of allowing the CFPB freedom to interpret the UDAAP standard, and the long history of a narrower interpretation of the law, this Note argues that whether the CFPB can prohibit banks from denying access to accounts on the basis of religion or race could be a major question. However, the UDAAP standard, which is an express delegation by Congress to the CFPB to liquidate the content and nature of fair practices over time, is best read as a clear statement authorizing the CFPB to eliminate discrimination in consumer financial products.

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I. LEGAL AND REGULATORY BACKGROUND

In 2010, during the most severe economic recession in recent memory, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).¹ Considered a transformative reform of the financial system, the purpose of the legislation as outlined in the statute was to “promote the financial stability of the United States by improving accountability and transparency in the financial system,” to end “too big to fail,” and “to protect consumers from abusive financial services practices.”²

The third goal—consumer protection—was to be championed by a new agency, the Consumer Financial Protection Bureau (CFPB).³ The CFPB would be like “a cop on the beat,” or as the CFPB puts it, a “21st century agency that implements and enforces Federal consumer financial law and ensures that

¹ *Wall Street Reform: The Dodd-Frank Act*, OBAMA WHITE HOUSE, <https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform> [<https://perma.cc/3N6Q-GMA5>] (last visited Oct. 31, 2023); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 42 U.S.C. §§ 7, 12, 15, 22, 31 (2012)).

² *See id.* tit. I, 124 Stat. at 1376.

³ *See id.* tit. X, 124 Stat. at 1955-2113.

markets for consumer financial products are fair, transparent, and competitive.”⁴ The CFPB filled a legal gap in consumer protection where state governments were preempted by federal law from acting and federal agencies were ineffective.⁵

Among its many powers and responsibilities, Congress authorized the CFPB to write legislative rules identifying “unfair, deceptive, or abusive acts or practices (UDAAP) in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”⁶ The CFPB’s authority extends to any “covered person” meaning “any person that engages in offering or providing a consumer financial product or service.”⁷ Congress listed objectives for the CFPB, stating the agency “is authorized to exercise its authorities for the purposes of ensuring that...consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination.”⁸

Congress, however, did not craft this standard anew in 2010. UDAP (the second A, for abusive was added in Dodd-Frank) has been a part of the U.S. Code since 1938, when Congress expanded the FTC’s authority, supplementing its power to prohibit unfair methods of competition with the authority to ban unfair or deceptive acts and practices.⁹ The FTC used UDAP to tackle a variety of problems, including false advertising, tobacco product marketing, online scams, and issues involving toy manufacturers and auto dealerships.¹⁰

⁴ *About us*, CFPB, <https://www.consumerfinance.gov/about-us/> [<https://perma.cc/6PCW-Z9H>] (last visited Oct. 31, 2023); *The CFPB’s Budget*, CFPB, (Feb. 14, 2011), <https://www.consumerfinance.gov/about-us/blog/the-cfpbs-budget/> [<https://perma.cc/C45M-RCP5>].

⁵ Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 322, 329-32 (2013) (discussing the issues in consumer protection before the creation of the CFPB).

⁶ 12 U.S.C. § 5531.

⁷ 12 U.S.C. §§ 5536, 5481.

⁸ 12 U.S.C. § 5511.

⁹ Wheeler-Lea Act, 15 U.S.C. § 45 (1938) (banning “unfair or deceptive acts or practices” in addition to previously prohibited “unfair methods of competition”); 12 U.S.C. § 5536 (addition of “abusive”).

¹⁰ Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 482-84 (2021) (recounting history of FTC UDAP action in the 1970s);

Generally, courts have treated UDAP as a “flexible concept with evolving content.”¹¹

The CFPB UDAAP statutory language was copied almost word for word from the FTC Act as amended in 1994.¹² Dodd-Frank identifies a practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers, (2) the injury is not reasonably avoidable by consumers, and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.¹³ The examination manual includes some examples, based on real-life cases, of unfair conduct such as: refusing to release a consumer from a lien after final payment, processing payments for companies engaged in fraud, and dishonoring credit card convenience checks without notice.¹⁴

Although the FTC and CFPB have used UDAAP to address a wide range of financial products and services, they have never before used it to directly target discriminatory conduct.¹⁵ However, the CFPB took the first step in advancing this potential new form of anti-discrimination law.

Margaret Kraweic, Ivan Schlager, Neepa Mehta, Keyawna Griffith & Lotus Ryan, *FTC Trends in Consumer Protection*, 31 LOY. CONSUMER L. REV. 225, 234 (2019).

¹¹ See *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 243 (3d Cir. 2015) (quoting *F.T.C. v. Bunte Bros.*, 312 U.S. 349, 353 (1941)); William C. Erxleben, *The FTC's Kaleidoscopic Unfairness Statute: Section 5*, 10 GONZ. L. REV. 333, 333 (1975). See also *Atl. Refin. Co. v. F.T.C.*, 381 U.S. 357, 367 (1965) (“In a broad delegation of power it employs the Commission . . . to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term ‘unfair’ to the Commission rather than attempting to define ‘the many and variable unfair practices which prevail in commerce.’” (quoting S. REP. No. 592, 63d Cong., 2d Sess., 13. (1913))).

¹² Compare 12 U.S.C. §§ 5531, 5536, with Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, §§ 5, 9, 108 Stat. 1691, 1692, 1695.

¹³ 12 U.S.C. §5531.

¹⁴ CFPB, SUPERVISION AND EXAMINATION MANUAL (2022), at UDAAP 3–5 [hereinafter CFPB MANUAL].

¹⁵ Herrine, *supra* note 10, at 477 (noting the effect of the civil rights struggle of the 1960s on the FTC and recounting enforcement actions FTC took to protect black consumers through indirect methods like the Credit Practices Rule).

On March 16, 2022, the CFPB added the term discrimination to a list of conduct prohibited by the UDAAP standard in its supervision and examination manual (the “CFPB manual revision”).¹⁶ The CFPB’s revised manual indicates it will be examining covered entities for evidence of discriminatory conduct and compliance with the updated manual.¹⁷ Director Rohit Chopra specified that the authority to prosecute this conduct is derived from the unfairness prong of the CFPB’s UDAAP authority, saying that discrimination in consumer financial products is “unambiguously unfair.”¹⁸

Much remains up in the air. Neither the announcement nor the language added to the manual address the classes of persons that are protected from discriminatory practices.¹⁹ However, given the CFPB’s public statements, it seems likely that the agency will bring an enforcement action against discriminatory conduct in the near future.

Already, there have been consequences for financial service providers. As it stands, many covered persons do not have compliance standards or anti-discrimination capabilities set in place.²⁰ Although the Equal Credit Opportunity Act (“ECOA”) and the Federal Housing Act (“FHA”)’s anti-discrimination language already applies to creditors and lenders, the new policy covers “any person” who offers a consumer

¹⁶ CFPB, *CFPB Targets Unfair Discrimination in Consumer Finance* (Mar. 16, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/> [<https://perma.cc/GH6R-R4FN>].

¹⁷ See CFPB MANUAL, *supra* note 14, at UDAAP 10-17 (addition of discrimination).

¹⁸ CFPB, *supra* note 16.

¹⁹ *Id.*; CFPB MANUAL, *supra* note 14.

²⁰ SULLIVAN & CROMWELL LLP, CFPB UPDATES UDAAP EXAMINATION PROCEDURES: CHANGES BROADEN ANALYSIS OF UNFAIR ACTS OR PRACTICE TO EMBRACE DISCRIMINATORY CONDUCT AND SIGNAL AGENCY’S CONTINUED FOCUS ON FAIR LENDING ISSUES, INCLUDING IN ALGORITHMS 4 (Mar. 25, 2022), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/sc-publication-CFPB-updates-UDAAP-examination-procedures.pdf [<https://perma.cc/7E3C-AL5M>] (“As a result, some financial services providers may not presently have in place an adequate framework to demonstrate the absence of discrimination in products and services unrelated to lending.”).

financial product, broadening coverage to include savings accounts, checking accounts, debit cards, and other non-credit products.²¹ Additionally, ambiguity regarding the full scope of protected classes and potential for disparate impact liability means consumer financial service providers may have substantial work to do to ensure compliance.²²

Although there are concerns, the CFPB has a solid factual foundation for believing racial discrimination in financial products is a problem that needs to be addressed.²³ For example, in 2020, a *New York Times* report detailed many instances of Black Americans targeted by racial profiling and discrimination while visiting bank branches to withdraw cash, make deposits, and generally interact with bank staff.²⁴ Research has found it is more expensive for members of minority groups to open a checking account, and members of minority groups pay more in fees.²⁵ Banks are more likely to open branches in whiter neighborhoods and close checking accounts at higher rates in counties with higher percentages of Black residents.²⁶

²¹ See *id.* See also Equal Credit Opportunity Act, 15 U.S.C. §1691 (2014) (prohibiting discrimination in lending based on race, color, religion, national origin, sex, marital status, or age); Fair Housing Act, 42 U.S.C. §§ 3601–19 (2008) (prohibiting discrimination in housing with same protected classes except without protection for age, and with familial status substituted for marital status).

²² SULLIVAN & CROMWELL LLP, *supra* note 20, at 4; Complaint at 2, Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022).

²³ STEPHEN HAYES & KALI SCHELLENBERG, DISCRIMINATION IS “UNFAIR”: INTERPRETING UDA(A)P TO PROHIBIT DISCRIMINATION, STUDENT BORROWER PROT. CTR. (April 2021), https://protectborrowers.org/wp-content/uploads/2021/04/Discrimination_is_Unfair.pdf [https://perma.cc/S5WX-JVQC].

²⁴ Emily Flitter, *‘Banking While Black’: How Cashing a Check Can Be a Minefield*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/business/banks-black-customers-racism.html> [https://perma.cc/Y38L-W93P].

²⁵ JACOB FABER & TERRI FRIEDLINE, THE RACIALIZED COST OF BANKING, NEW AMERICA 10 (June 21, 2018), <https://www.newamerica.org/family-centered-social-policy/reports/racialized-costs-banking> [https://perma.cc/W7K3-FKQY].

²⁶ *Id.*

Lawsuits have been filed alleging discrimination in financial products against large financial institutions like Wells Fargo and J.P. Morgan.²⁷

Unfortunately, regulators do not have explicit statutory authority to take enforcement actions against discrimination in non-credit financial products as the ECOA and FHA's language only applies to credit transactions.²⁸ As it stands, there is no federal law stopping banks from discrimination in this area.²⁹ This statutory gap did not go unrecognized by Congress: lawmakers recognized this "loophole" and discussed legislation that would have covered these financial products, but the bill failed to pass.³⁰

A few months after the CFPB announcement, the Supreme Court handed down its decision in *West Virginia v. EPA*.³¹ The case involved the EPA's regulation of carbon dioxide emissions from existing fossil fuel sources, but the Court's opinion was crafted to apply more broadly.³² It held that administrative agencies cannot address matters of great economic or political significance unless courts determine, as a matter of de novo statutory interpretation, that Congress clearly authorized the

²⁷ *Id.* at 6.

²⁸ 15 U.S.C. §1691; 42 U.S.C. §§3601-3619; Emily Flitter, *Senate Bill Would Outlaw Bank Discrimination for the First Time*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/business/democrats-bill-banking-discrimination.html> [<https://perma.cc/9S7C-EWVK>]; HAYES & SCHELLENBERG, *supra* note 23, at 10–11 (discussing the statutory gap in banning discrimination in non-credit financial products).

²⁹ Press Release, Sherrod Brown, Senator, U.S. Senate, We Must End Discrimination in Banking (Dec. 1, 2022), <https://www.banking.senate.gov/newsroom/majority/brown-end-discrimination-banking> [<https://perma.cc/5W83-AJAC>]; Flitter, *supra* note 28.

³⁰ Press Release, Sherrod Brown, Senator, U.S. Senate, We Must End Discrimination in Banking (Dec. 1, 2022), <https://www.banking.senate.gov/newsroom/majority/brown-end-discrimination-banking> [<https://perma.cc/5W83-AJAC>]

³¹ *West Virginia v. EPA*, 597 U.S. 697 (2022).

³² *See id.* at 766 (Kagan, J., dissenting) (“[The majority] announces the arrival of the “major questions doctrine,” which replaces normal text-in-context statutory interpretation . . .”).

agency to do so.³³ Accordingly, on covered issues, federal courts will strike down agency action as unlawful even when the relevant statute is ambiguous and the agency's interpretation of the statute is reasonable.³⁴ Depending on the scope of the doctrine, even more than a "best reading" of a statute may be required to "clearly authorize" a significant agency action.³⁵ This represents a major break from the normal judicial deference to administrative agency rulemaking.³⁶ Federal courts have begun striking down various agency actions using this newly articulated major questions doctrine.³⁷

In *West Virginia v. EPA*, the Court relied on several factors to determine when an agency's action addresses a major question, including: (1) the economic significance of the decision, (2) the political significance of the decision, (3) whether the source of the agency's authority appears in an "ancillary" statutory provision, (4) whether Congress has "conspicuous[ly]" refused to act on the relevant issue through legislation, (5) the agency's prior practice, (6) and the agency's expertise or lack thereof in tackling the problem.³⁸ Several of these factors implicate the CFPB's ability to pursue discriminatory practices,

³³ See *id.* at 724 ("[A] requirement of 'clear congressional authorization' . . . confirms that the approach under the major questions doctrine is distinct.") (citation omitted).

³⁴ *Id.*

³⁵ Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Daniel T. Deacon & Leah M. Litman, *The New §Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023).

³⁶ *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014) ("We routinely accord dispositive effect to an agency's reasonable interpretation of ambiguous statutory language.") (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); THOMAS W. MERRILL, *THE CHEVRON DOCTRINE* 99 (2022).

³⁷ *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022) (holding the President lacked the ability to impose a vaccine mandate on federal contractors citing *West Virginia*); *Brown v. U.S. Dep't of Educ.*, 640 F. Supp. 3d 644 (N.D. Tex. 2022) (holding unlawful Biden's student loan forgiveness program a major question without clear statutory authorization), *vacated and remanded*, 600 U.S. 551 (2023).

³⁸ *West Virginia v. EPA*, 597 U.S. at 724–28.

and the complaint against the CFPB cites the *West Virginia* case.³⁹

The Court's guidance on what constitutes sufficiently clear statutory authorization that would overcome the Court's "skepticism" of an expansion of power under the major questions doctrine is more limited.⁴⁰ The majority's analysis focused on the text of the Clean Air Act, concluding that it did not clearly authorize the agency to consider a practice known as generation shifting when determining the best system of emissions reduction for power plants.⁴¹ The Court's majority opinion provided little explanation for what such clear authorization would look like, nor did it explain how the inquiry would work more generally.⁴²

On September 28, 2022, several industry groups filed suit to enjoin the CFPB from changing its examination process before any tangible enforcement takes place, arguing it was contrary to the APA and in excess of statutory authority.⁴³ A federal judge agreed, and on September 9, 2023, the CFPB was enjoined from implementing its anti-discriminatory revisions to its examination manual.⁴⁴ In reaching the decision, the judge stated that "The major-questions canon applies here. The choice whether the CFPB has authority to police the financial-services industry for discrimination against any group that the agency deems protected...is a question of major economic and political significance."⁴⁵ The Court concluded that the Dodd-Frank Act did not clearly authorize the agency action given "the statutory text, structure, and history."⁴⁶ At

³⁹ Complaint at 17, Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022).

⁴⁰ *West Virginia v. EPA*, 597 U.S. at 731–34 (holding the statutory language too "vague" to provide clear authorization).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Complaint, Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sep. 28, 2022).

⁴⁴ Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 8, 2023).

⁴⁵ *Id.* at *13.

⁴⁶ *Id.* at *10.

this point, the CFPB has decided not to appeal the district court's decision, but the future of unfairness as an anti-discrimination tool will likely come up again.⁴⁷

Part II of this Note recounts the Court's development of the major questions doctrine. Section III.A considers whether the CFPB's decision to address discriminatory practices using its powers to prosecute UDAAPs is a major question under *West Virginia v. EPA* and other Supreme Court precedent and concludes that it is probably not a major question, at least in addressing intentional racial discrimination. Section III.B then analyzes the extent to which the UDAAP standard and Dodd-Frank clearly authorizes the CFPB's new anti-discrimination policy, and finds that it unambiguously does.

II. ORIGIN AND DEVELOPMENT OF THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine as currently applied is a clear statement rule designed to limit an agency's power to address matters of "vast" significance.⁴⁸ However, it is a recent innovation, with a short list of past applications to date (although there is some disagreement on this point).⁴⁹

Following the Supreme Court's landmark decision in *Chevron*, federal courts have generally accepted agencies'

⁴⁷ FTC, *Federal Trade Commission Takes Action Against Passport Automotive Group for Illegally Charging Junk Fees and Discriminating Against Black and Latino Customers* (Oct. 18, 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-takes-action-against-passport-automotive-group-illegally-charging-junk-fees> [<https://perma.cc/G65Q-M9DJ>] (using UDAP authority to pursue a discrimination claim)

⁴⁸ *West Virginia v. EPA*, 597 U.S. 697, 735 (Gorsuch, J., concurring) ("Like many parallel clear-statement rules in our law, [the major questions doctrine] operates to protect foundational constitutional guarantees.").

⁴⁹ See Kevin O. Leske, *Major Questions About the Major Questions Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 485–97 (2016) (recounting the early history of the major questions doctrine until 2016); Deacon & Litman, *supra* note 35 (also recounting the history of the doctrine with a focus on the recent effect of *West Virginia* and the COVID cases).

reasonable interpretations of ambiguous statutes.⁵⁰ As a result, agencies tend to have flexibility to interpret existing statutes to address problems in new ways. One of the reasons why courts adopted this deference standard was to prevent legal ossification and allow agencies to draw on their subject matter expertise to flexibly respond to new developments without worrying about judicial second-guessing.⁵¹ The *West Virginia* version of the major questions doctrine reverses this arrangement in “extraordinary cases.”⁵²

The Court today looks to *FDA v. Brown & Williamson Tobacco Corp* as an early example of the doctrine in action.⁵³ In *Brown & Williamson*, the Court explained that in “extraordinary cases. . .there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”⁵⁴ The Court ruled against the FDA even though the statute, at least from a strict textualist interpretation, was ambiguous as to whether the Food, Drug, and Cosmetic Act’s definition of “drugs” and “devices” encompassed tobacco products.⁵⁵ The majority, however, applied the *Chevron* framework, holding

⁵⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); MERRILL, *supra* note 36, at 95.

⁵¹ See Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 452, 466 (2021) (“*Chevron* could free agencies from unreasonable judicial interference, allowing them to use their superior subject-matter knowledge to better fulfill congressional intent and address important problems.”).

⁵² Deacon & Litman, *supra* note 35, at 1070–72 (explaining how the major questions doctrine is skeptical of, rather than deferential to agency determinations); *West Virginia v. EPA*, 597 U.S. 697 at 721.

⁵³ Deacon & Litman, *supra* note 35, at 1021 (“Though it has roots in earlier cases such as *MCI Telecommunications v. AT&T*, and *Benzene*, the major questions inquiry was most clearly incorporated into the *Chevron* framework in *FDA v. Brown & Williamson Tobacco Corp.*”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

⁵⁴ *Brown & Williamson*, 529 U.S. at 159.

⁵⁵ *Id.* at 167–68 (Breyer, J., dissenting) (“The statute defines ‘device,’ for example, as ‘an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article...intended to affect the structure or any function of the body...’ Taken literally, this definition might include everything from room air conditioners to thermal pajamas.” (citing 21 U.S.C. § 321(h))).

that the statutory text unambiguously precluded regulation of tobacco products, with the significance of the matter at hand as logical support to that reasoning.⁵⁶ The court applied a similar method of reasoning in *Utility Air Regulatory Group v. EPA*, concluding that the EPA's interpretation was unambiguously foreclosed by the statute in part because Congress would have spoken more clearly if it had intended to delegate such significant authority.⁵⁷

Then, in *King v. Burwell*, the Court simply declined to apply the *Chevron* framework.⁵⁸ It instead concluded that the IRS's interpretation of the relevant text was entitled to no weight at all given the IRS's lack of expertise and the significance of the question at hand.⁵⁹ During the COVID pandemic, the Court further expanded the doctrine's reach, releasing several decisions that limited agencies' ability to move forward with regulations intended to reduce the spread of COVID by seemingly requiring more than simply a reasonable interpretation to authorize significant agency action.⁶⁰ These cases are similar in analysis to *West Virginia*, and together with *West Virginia* formulate what academics are referring to

⁵⁶ *Id.* at 159–61.

⁵⁷ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325–26 (2014).

⁵⁸ *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (“Whether those credits are available on Federal Exchanges is thus a question of deep ‘economic and political significance’ that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.”) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

⁵⁹ *Id.*

⁶⁰ *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety and Health Admin.*, 595 U.S. 109, 119–120 (2022) (“This ‘lack of historical precedent,’ coupled with the breadth of authority that the Secretary now claims, is a ‘telling indication’ that the mandate extends beyond the agency’s legitimate reach.” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))); *Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (“Even if the text were ambiguous, the sheer scope of the CDC’s claimed authority under § 361(a) would counsel against the Government’s interpretation. We expect Congress to speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’” (internal quotation marks omitted) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324)).

as the “new” major questions doctrine.⁶¹ This new doctrine is used as a clear statement rule, preventing agencies from relying on statutory provisions to address “major” issues absent “clear” authorization by Congress.⁶²

As it stands now, courts must follow a two-step inquiry to determine what level of review is appropriate. First, they must consider the factors outlined above to determine whether an agency action tackles a “major” issue.⁶³ Second, if the issue is decided to be major, the courts must hold the action unlawful unless it is clearly authorized by the governing statute.⁶⁴ Part III of this Note applies this new doctrine to the CFPB’s decision to prohibit discriminatory conduct under its UDAAP authorization in Dodd-Frank.

III. APPLYING THE MAJOR QUESTIONS DOCTRINE TO THE CFPB’S NEW ANTI-DISCRIMINATION POLICY

A. Is the Legality of Discriminatory Practices in Banking a Major Question?

Applying the major questions doctrine to the CFPB action at hand is somewhat complicated, as *West Virginia* is the first case in which the doctrine was formally articulated by the Supreme Court. The Court has put forward six (albeit partly overlapping) factors used to judge an agency action’s “major-ness.” This Section of the Note evaluates the CFPB’s anti-discrimination action considering those factors.⁶⁵

⁶¹ See, e.g., Deacon & Litman, *supra* note 35.

⁶² *Id.* at 1012.

⁶³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2634 (2022) (Kagan, J., dissenting) (“First, a court must decide, by looking at some panoply of factors, whether agency action presents an ‘extraordinary case.’ If it does, the agency ‘must point to clear congressional authorization for the power it claims,’ someplace over and above the normal statutory basis we require.”); see *supra* Part I; Sohoni, *supra* note 35.

⁶⁴ *West Virginia v. EPA*, 597 U.S. at 766.

⁶⁵ This Note focuses on the CFPB’s ability to regulate intentional discrimination in non-credit financial products. To the extent the CFPB pursues a disparate impact theory of liability in regulating these products, it is

1. Economic Significance

The economic effect of the CFPB's revision of its examination manual in banking does not appear to be significant enough to meet the standard set by the Court's precedents.

In *FDA v. Brown & Williamson*, the FDA was attempting to regulate the tobacco industry for the first time by restricting sales, distribution, and advertisement of tobacco products.⁶⁶ The majority noted that the tobacco industry constituted "a significant portion of the American economy[.]" and alluded to the fact that the industry was generating tens of billions of dollars in revenue.⁶⁷ The FDA's regulations were certain to reduce the industry's revenues, and the FDA opened the door for future regulation that could have imposed further costs and restrictions on the multi-billion-dollar industry.⁶⁸

West Virginia further illuminates this standard, as the Court, in finding economic significance, cited government projections that "the rule would entail billions of dollars in compliance costs. . . , require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."⁶⁹ The concurrence, in aiming to provide additional guidance on this issue, noted that a regulation requiring

more likely to be a major question, as disparate impact liability is more controversial at the Supreme Court. *See* *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 588 (2015) (Alito, J., dissenting) ("But the Court concedes that disparate impact can be dangerous"). It has greater economic significance (it is easier for organizations to eliminate unintentional discrimination than disparate outcomes), and is more politically controversial, particularly in the eyes of certain of the Court's members. Additionally, disparate impact liability is often treated differently under existing law. *See, e.g., id.* at 533 ("[A]ntidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.").

⁶⁶ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

⁶⁷ *Id.* at 159.

⁶⁸ *Id.* at 120 ("The regulations therefore aim to reduce tobacco use by minors so as to substantially reduce the prevalence of addiction in future generations[.]").

⁶⁹ *West Virginia v. EPA*, 597 U.S. at 714.

“billions of dollars” in spending would likely be economically significant.⁷⁰

Furthermore, In *King v. Burwell* the IRS attempted to determine the distribution of billions of dollars’ worth of tax credits, and in *Utility Air Regulatory Group*, the Court found “administrative costs would swell from \$12 million to over \$1.5 billion; and decade-long delays in issuing permits would become common[.]”⁷¹ In each of these instances, the Court found economic significance.

In this case, compliance costs are the main contributor to the economic impact of the CFPB manual revision.⁷² Compliance costs in the aggregate are a heavy burden on financial institutions, and this revision would simply add to this burden by adding another regulatory obligation.⁷³ However, this action may not require a complete overhaul of compliance processes given that financial institutions are already both heavily regulated and are required to avoid discrimination in their credit products in order to comply with the ECOA and the FHA.⁷⁴

Of course, industry groups will claim significant compliance costs to address the new CFPB policy.⁷⁵ Companies will

⁷⁰ *Id.* at 743 (Gorsuch, J., concurring).

⁷¹ *King v. Burwell*, 576 U.S. 473, 485 (2015); *Util. Air Regul. Grp. v. EPA.*, 573 U.S. 302, 324 (2014).

⁷² Complaint at 9, Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022).

⁷³ Shakeel Lone, *The Creeping Cost of Compliance*, FORBES (Oct. 21, 2021), <https://www.forbes.com/sites/servicenow/2021/10/21/the-creeping-cost-of-compliance/?sh=8cbd86756cca>. [<https://perma.cc/5TT4-78ZT>].

⁷⁴ Ben Horowitz, *Fair Lending Laws and the CRA: Complementary Tools for Increasing Equitable Access to Credit*, FEDERAL RESERVE BANK OF MINNEAPOLIS (Mar. 8, 2018), <https://www.minneapolisfed.org/article/2018/fair-lending-laws-and-the-cra-complementary-tools-for-increasing-equitable-access-to-credit> [<https://perma.cc/ZR9F-92VT>]; Michael Berman, *The Cost of Compliance in 2021*, VIZO FINANCIAL BLOG (May 11, 2021), blog.vfccu.org/the-cost-of-compliance-in-2021/ [<https://perma.cc/L82C-9HVG>] (describing enforcement actions against financial institutions for violations of the ECOA and FHA in listing the costs of noncompliance).

⁷⁵ Complaint at 9, Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022) (“For UDAAP in particular, compliance requires substantial resources.”).

need to update compliance manuals, retrain existing employees, hire new compliance staff, and perhaps hire experts or consultants who specialize in minimizing the risk of racial discrimination.⁷⁶ The existing complaint lists several ways in which the agency change will complicate these efforts, including a lack of instruction by the agency on what constitutes unfair discrimination, an absence of a list of protected classes, and an overarching lack of clarity on what conduct the UDAAP standard could be expanded to cover.⁷⁷ However, these are the sorts of costs that any regulatory action is likely to entail. The complaint fails to quantify any of these issues, and commentary from industry experts and law firms tends to be qualitative rather than quantitative.⁷⁸

In any case, the compliance costs and changes related to the CFPB revision are unlikely to rise to the level of economic significance recognized in prior major questions cases. It is unlikely that the agency's rule will necessitate billions of dollars of spending given many of the financial institutions are likely to already have some form of anti-discrimination compliance programming.⁷⁹ Additionally, basic extrapolation from existing compliance costs indicates that adding on a relatively minor regulatory burden will not add billions more in costs.⁸⁰

In the *Chamber of Commerce v. CFPB* case however, the judge decided that the revision was economically significant claiming that the action “would have large implications for the financial services industry” and is causing companies to spend

⁷⁶ Berman, *supra* note 74 (describing different costs related to compliance strategy for banks).

⁷⁷ Complaint at 9–11, *Chamber of Com. of the U.S. v. CFPB*, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022).

⁷⁸ *Id.*; SULLIVAN & CROMWELL LLP, *supra* note 20, at 5.

⁷⁹ Complaint at 9, *Chamber of Com. of the U.S. v. CFPB*, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022).; Berman, *supra* note 74.

⁸⁰ Lone, *supra* note 73.

“millions of dollars per year.”⁸¹ Given Supreme Court precedent this should not be enough.

Common sense dictates that due to its narrow scope, the CFPB’s manual revision is unlikely to result in the elimination of tens of thousands of jobs or to significantly raise prices for consumers, in contrast to the economic stakes of the agency actions in *Utility Air, West Virginia*, and *Brown & Williamson*.⁸² Instead, the CFPB is regulating the industry it was created to regulate, the products it was intended to regulate, and the knock-on effects in regard to employment and economic disruption are likely to be modest.⁸³

2. Political Significance

Political significance is perhaps the most difficult factor to analyze under the Supreme Court’s new major questions test. The majority in *West Virginia* contends that an issue satisfies this factor if it is the subject of “earnest and profound debate across the country” or if it is a major policy decision that Congress would intend to keep for itself.⁸⁴ The concurrence describes the standard as being satisfied where “certain States were considering whether to permit the practice” and “state legislatures were engaged in robust debates over [the issue].”⁸⁵ The *Alabama Association of Realtors v. HHS* case points to agency actions that “significantly alter the balance

⁸¹ Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 at *7 (E.D. Tex. Sept. 8, 2023).

⁸² Lone, *supra* note 73 (stating the total cost of Dodd-Frank compliance to be \$50 billion dollars). The impact of banning non-credit intentional discrimination is likely to be a tiny fraction of the massive regulatory compliance expenses the passing of Dodd-Frank added to financial institutions given its dramatic overhaul of the financial regulatory system.

⁸³ If the CFPB were to decide to pursue anti-discrimination action in novel ways, such as expanding the list of protected classes to those not currently covered by compliance programs, costs will be higher, and the analysis could change.

⁸⁴ *West Virginia v. EPA*, 597 U.S. 697, 722, 732 (2021).

⁸⁵ *Id.* at 742 (Gorsuch, J., concurring).

between federal and state power.”⁸⁶ In the *Biden v. Nebraska* case, the majority pointed to debate in Congress and stated that student loan cancellation “raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy.”⁸⁷

With respect to the legality of discrimination in banking there does not seem to be a “profound debate” on the issue. It can be assumed that most Americans are supportive of, and favor enforcement of, laws like the Civil Rights Act, FHA, and ECOA given that polling shows strong support for further measures addressing discrimination, and Americans as a whole are strongly against the legalization of intentional discrimination.⁸⁸ Even the complaint opposing the CFPB decision specifically states that the plaintiffs “fully support the fair enforcement of nondiscrimination laws.”⁸⁹ Neither Congress nor state legislatures are arguing over bills that would allow discrimination based on national origin, race, color, or sex in financial products.⁹⁰ Federal state balance will not be radically altered in the area of financial discrimination or

⁸⁶ Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

⁸⁷ *Biden v. Nebraska*, 143 S. Ct. 2355, 2373–74 (2023) (internal quotation marks omitted).

⁸⁸ Tim Malloy, *68% Say Discrimination Against Black Americans a “Serious Problem,” Quinnipiac University National Poll Finds; Slight Majority Support Removing Confederate Statues*, QUINNIPIAC UNIV. POLL (June 17, 2020), <https://poll.qu.edu/Poll-Release?releaseid=3786> [<https://perma.cc/H9H5-L6S4>] (showing majority support for removal of Confederate statutes and for the proposition that racial discrimination is a serious problem that should be addressed); Frank Newport, *American Public Opinion and the Equality Act*, GALLUP POLLING (Mar. 19, 2021), <https://news.gallup.com/opinion/polling-matters/340349/american-public-opinion-equality-act.aspx#:~:text=Overall%2C%20the%20Equality%20Act%20seems,righ%20protections%20for%20LGBT%20persons> [<https://perma.cc/AMV8-5ZQ5>] (reporting that large majority of Americans support banning discrimination against LGBTQ Americans).

⁸⁹ Complaint at 2, Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022).

⁹⁰ Congress has been debating legislation aiming to prevent this type of behavior rather than allow it. See Flitter, *supra* note 28.

discrimination in general, given the existence of laws like the Civil Rights Act, FHA, and ECOA.⁹¹

However, the expressed standard allows the Court (or any federal court) flexibility in determining whether an issue is politically significant.⁹² A federal court could simply frame the issue as generally as possible to manufacture a finding of political controversy. Racial discrimination has a long history of political significance in the United States, with some of the most contentious moments in U.S. history involving issues of intentional discrimination.⁹³ Debates continue in the Supreme Court and elsewhere regarding issues in the general category of discrimination like affirmative action, public accommodation laws and their interaction with first amendment, and racial gerrymandering.⁹⁴ Protests regarding racially motivated police violence spread throughout the country in 2020.⁹⁵ These issues are certainly not insignificant.

The Court shied away from using such a high-level framing in *Biden v. Missouri*.⁹⁶ Unlike the *OSHA* case, where a large-employer vaccine mandate was shut down in part due to the political significance of vaccine mandates, the Court upheld a more specific federal government funded healthcare worker

⁹¹ 12 U.S.C. §§ 5390, 5511, 5567.

⁹² Deacon & Litman, *supra* note 35, at 1051-56 (explaining the leeway a federal court could have in determining if an issue is politically significant under the Court's current political significance test); Sohoni, *supra* note 35, at 283-88 (stating the breadth and quantity of the factors going into the major questions test could allow courts to pick and choose).

⁹³ See, e.g., Foster Hailey, *Dr. King Arrested at Birmingham*, N.Y. TIMES, Apr. 13, 1963, at A1; E. W. Kenworthy, *200,000 March for Civil Rights*, N.Y. TIMES, Aug. 29, 1963, at A1; Ben Kesling, Felicia Schwartz & Byron Tau, *Hundreds of Thousands of Demonstrators Attend Women's March on Washington*, WALL ST. J. (Jan. 21, 2017) <https://www.wsj.com/articles/demonstrators-gather-for-womens-march-a-day-after-trump-inauguration-1485006572> [<https://perma.cc/4UCE-E9UZ>].

⁹⁴ *Granted & Noted List, October Term 2022 Cases for Argument*, SUP. CT. U.S. (Feb. 28, 2023) <https://www.supremecourt.gov/grantednotedlist/22grantednotedlist> [<https://perma.cc/WV6M-G7ZR>].

⁹⁵ Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021) <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [on file with the Columbia Business Law Review].

⁹⁶ *Biden v. Missouri*, 595 U.S. 87 (2022).

mandate.⁹⁷ In upholding this narrower mandate, the Court did not even address the political significance of the vaccine, and further did not use any major questions-type analysis in finding the statute authorized the HHS to issue such a rule.⁹⁸ The Court instead focused on the congruence between the statutory text allowing the Secretary to impose conditions “in the interest of the health and safety of individuals who are furnished services” and the HHS vaccination rule.⁹⁹

If the CFPB decides to prohibit discrimination in financial products against classes not normally protected under nondiscrimination laws, such as transgender status, courts may identify more evidence of political controversy. Multiple state legislatures have considered whether and to what extent the law should protect transgender rights.¹⁰⁰ Additionally, many state legislatures have passed statutes banning addressing discrimination in banking in their state.¹⁰¹ If state legislative debate or state legislation in the area is all that is required for political significance under *West Virginia*, this dimension is much more likely to support the conclusion that the modification to the CFPB’s manual was “major.”¹⁰²

⁹⁷ *Id.*; Nat’l Fed’n of Indep. Bus. v. OSHA, 595 U.S. 109 661 (2022).

⁹⁸ *Biden v. Missouri*, 595 U.S. 87 (2022).

⁹⁹ *Id.* at 93.

¹⁰⁰ *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, AM. CIV. LIBERTIES UNION (Feb. 21, 2024) <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> [<https://perma.cc/LH9V-J7SY>].

¹⁰¹ ARIZ. REV. STAT. ANN. § 41-1491.20 (2023); ARK. CODE ANN. §§ 4-87-104 (2023), 16-123-107(a)(4) (2023); OHIO REV. CODE ANN. § 4112.021 (West 2023); S.C. CODE ANN. § 31-21-60(B)(1) (2023); TENN. CODE ANN. § 47-18-802 (2023); TEX. PROP. CODE ANN. § 301.026 (2023); UTAH CODE ANN. § 57-21-6(1)(b)(i) (2023).

¹⁰² *West Virginia v. EPA*, 597 U.S. 697, 743 (Gorsuch, J., concurring) (stating, “so, for example, in *Gonzales*, the Court found that the doctrine applied when the Attorney General issued a regulation that would have effectively banned most forms of physician-assisted suicide even as certain States were considering whether to permit the practice” in providing an example of a politically significant issue). If “certain States” debating legislation on the issue at hand is the test for political significance, the doctrine would dramatically expand, but the majority opted for the “profound debate across the country” test for determining political significance, which appears to be less stringent.

Political significance can also be framed by analyzing what the agency could do in the future if the statutory authority was granted. The Court has used this framing in previous cases, most notably in *Alabama Association of Realtors v. HHS*, where the Court argued that if they accepted the government's interpretation there would be "no limit in [the statutory provision] beyond the requirement that the CDC deem a measure 'necessary.'"¹⁰³ The Court hypothesized that without such a limit, the CDC could expand its authority to mandate free grocery delivery and high-speed internet.¹⁰⁴

Here, it could be argued that if the CFPB was allowed to include discrimination within the definition of unfair, any conduct that is definitionally unfair, i.e., "marked by injustice, partiality, or deception" or "not based on or behaving according to the principles of equality and justice" or "unkind, inconsiderate, or unreasonable" could be prohibited by the CFPB as long as such a practice caused a substantial injury, could not be reasonably avoided, and the economic benefits of the act did not outweigh the harm.¹⁰⁵

Applying the Court's reasoning in the *Alabama Association of Realtors v. HHS* case, the Court could determine the CFPB may sometime in the future decide that it is "unfair" for banks to offer additional incentives to those with a higher credit score or higher income. Such a practice causes harm, is hard to "reasonably" avoid if one is indigent, and the benefits to consumers may not outweigh the harms. Although the statutory requirements to be filled somewhat limit the universe of what could fall under the UDAAP standard, the Court's aversion to what it seemingly considers a type of slippery-slope problem could weigh against the CFPB, especially given the

¹⁰³ Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

¹⁰⁴ *Id.*

¹⁰⁵ *Unfair*, MERRIAM-WEBSTER.COM DICTIONARY (Aug. 30, 2023) <https://www.merriam-webster.com/dictionary/unfair> [<https://perma.cc/7QMX-7AVD>]; *Unfair*, ENCYCLOPEDIA.COM <https://www.encyclopedia.com/humanities/dictionaries-thesauruses-pictures-and-press-releases/unfair> [<https://perma.cc/D89Q-AABF>] (last visited Sept. 9, 2023).

long leash the FTC and CFPB have already been given in interpretation.¹⁰⁶

Given the vague standard the Court has articulated for political significance, clarification may be required in the future. Academics have criticized the current political significance standard as both (1) allowing federal judges free rein to make decisions based on policy preferences and (2) providing bad incentives for political actors to create controversy in order to prevent agency interpretations, potentially adding a new source of uncertainty into federal administrative law.¹⁰⁷ Litigation around the UDAAP standard may provide a good opportunity to provide clarification. As shown above, the political significance of discrimination, especially involving statutes that are more indirect than the Civil Rights or ECOA, can be manipulated to reach a particular result depending on the forecasted protected classes involved, the framing of the issue, and the Court's comfort with the reach of the statute at hand. A decision in this case could provide more guidance to lower courts, discouraging lower court judges from using policy preferences as a stand in for true political significance.

3. Source of Statutory Authority: Ancillary or Primary Provision

The Court described this factor as coming into play when an agency finds a “newfound power in the vague language of

¹⁰⁶ 12 U.S.C.A. §5531; *see supra* note 11. Although it may be argued that credit scores provide offsetting benefits, the credit score industry has come under increasing criticism with allegations that taking into account credit score enhances inequality and prevents low income and people of color from accessing credit. *See* Lisa Rice & Deidre Swesnik, *Discriminatory Effects of Credit Scoring on Communities of Color*, 46 SUFFOLK U.L. REV. 935 (2013). It is less outlandish than it may seem at first glance for credit score and income discrimination to be deemed unfair. However, the two theories of UDAAP discussed in Section III.B, the consumer choice model and the democratic deliberation model, each provide an avenue for the court to limit the scope of the UDAAP standard while still allowing for anti-discrimination efforts.

¹⁰⁷ Deacon, *supra* note 35 at 33–40.

an ancillary provision[.]”¹⁰⁸ In *West Virginia*, the Court found the provision used was ancillary because it “was designed to function as a gap filler and had rarely been used in the preceding decades.”¹⁰⁹ Essentially, the Court’s more skeptical scrutiny is likely to be triggered if a newfound power is found in a piece of the statute that historically has been sidelined in rulemaking and adjudication.

This factor will be further analyzed under Section II.B on clear authorization, but it is worth mentioning here the authorization for the CFPB to prohibit “unfair...acts or practices” is widely considered to be a substantial delegation of authority to the CFPB.¹¹⁰ The CFPB and FTC have used UDAP/UDAAP authority in hundreds of enforcement actions, rulemakings and other agency actions since the concept’s inception in 1938.¹¹¹ The Supreme Court has confirmed this large delegation of power in *Seila Law v. CFPB*, describing the CFPB’s power to regulate under this grant as “broad.”¹¹² This is a primary provision.¹¹³

4. Congressional Rejection of Legislation Regarding the Issue

If Congress had debated legislation regarding the specific issue the agency portends to address and failed to act, the Court has found this to be a strong indication the issue is a

¹⁰⁸ *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (internal quotation marks omitted).

¹⁰⁹ *Id.*

¹¹⁰ *See supra* notes 7-12 and accompanying text.

¹¹¹ Stephen J. Canzona, “*I’ll Know It When I See It*”: *Defending the Consumer Financial Protection Bureau’s Approach of Interpreting the Scope of Unfair, Deceptive, or Abusive Acts or Practices*, 45 J. Leg. 60, 61 and 74 (2018); Margaret Krawiec et. al., *supra* note 10 (describing the strategy behind the UDAAP enforcement actions the CFPB has pursued in 2017 and 2018).

¹¹² *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2193 (2020) (“Congress enacted a new prohibition on ‘any unfair, deceptive, or abusive act or practice’ by certain participants in the consumer-finance sector . . . Congress authorized the CFPB to implement that broad standard[.]” (quoting 12 U.S.C. § 5536(a)(1)(B))).

¹¹³ *See infra* Section III.B.

“major question.”¹¹⁴ The logic seems to be that if Congress has debated the issue and rejected the agency’s proposed solution it is (1) unlikely the statute gives the agency authority, otherwise Congress would not have debated legislation and (2) the agency is subverting the democratic process by taking action that is too unpopular to be passed through legislation.¹¹⁵ In *West Virginia* and *Biden v. Nebraska*, the Court found that legislation similar to the agency action at issue was telling in determining it was unlikely Congress intended to grant this power.¹¹⁶

In this instance, Congress has looked at the specific issue and failed to act. In October of 2020, Democrats introduced legislation titled the Fair Access to Financial Services Act to close the ECOA/FHA loophole and prohibit financial institutions from discriminating on race, religion, sexual orientation, or other characteristics.¹¹⁷ However, the bill failed in the Senate in 2020.¹¹⁸ The Court is likely to look at the failure of this legislation to pass as evidence that the issue is a major question, especially given the legislation was directed almost exactly at the issue the CFPB is attempting to rectify and would have the same effect in the area of consumer financial products.¹¹⁹ The purported legislation was broader in scope than

¹¹⁴ *West Virginia v. EPA*, 597 U.S. at 731.

¹¹⁵ *Id.* (“Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions ‘had become well known, Congress considered and rejected’ multiple times” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000))); *Id.* at 2620-21 (Gorsuch, J., concurring) (“Relatedly, this Court has found it telling when Congress has considered and rejected bills authorizing something akin to the agency’s proposed course of action. That too may be a sign that an agency is attempting to ‘work [a]round’ the legislative process to resolve for itself a question of great political significance.” (citation omitted) (internal quotation marks omitted) (quoting *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 122 (2022) (Gorsuch, J., concurring))).

¹¹⁶ *Id.* at 731; *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023).

¹¹⁷ *See* Flitter, *supra* note 28.

¹¹⁸ *Id.*

¹¹⁹ S.563, 117th Cong. § 8(b)(1) (2021) (“To provide fair access to financial services, a covered bank . . . shall . . . not deny any person a financial

the CFPB's action, and never came to a vote.¹²⁰ Without more specificity on what Congressional consideration and rejection looks like specifically, the fact this bill was not voted down may reduce the importance of this factor.

5. Consistency of Prior Use of the Statutory Provision at Issue

Although the CFPB is relatively new, having been created in 2010, the UDAAP standard is not.¹²¹ The UDAAP standard has existed in federal law since 1938 and has never before been used as an anti-discrimination device.¹²² Converting the long-standing UDAAP standard into an anti-discrimination tool could be seen as the type of agency action the Supreme Court viewed with skepticism in *West Virginia*: “an unheralded power representing a transformative expansion in its regulatory authority.”¹²³ However, the standard was intended to be used in a flexible manner to address a wide variety of market issues.¹²⁴ The Court has recognized this fact, noting that the concept of unfairness was intentionally unmoored

service the covered bank offers unless the denial is justified by such quantified and documented failure of the person to meet quantitative, impartial risk-based standards established in advance by the covered bank[.]”.

¹²⁰ *Id.*; Press Release, S. Comm. on Banking, Housing, and Urb. Affs. Brown, Colleagues Reintroduce Legislation to Fight Discrimination from Financial Institutions (July 26, 2022), <https://www.banking.senate.gov/newsroom/majority/brown-colleagues-legislation-discrimination-financial-institutions> [<https://perma.cc/4LET-6KQW>].

¹²¹ *See* Herrine, *supra* note 10.

¹²² *Id.* at 1 (“But even in a world of widespread corporate surveillance, ongoing racial discrimination, impenetrably complex financial products, pyramid schemes, and more, the unfairness authority is used rarely, mostly in egregious cases of wrongdoing. Why?”).

¹²³ *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

¹²⁴ *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-241 (1972) (recounting legislative history from Congress discussing the flexibility Congress intended the FTC to have in defining and enforcing the bounds of the UDAAP standard in §5 and stating “...the sweep and flexibility of this approach were thus made crystal clear.”); *See also* Erxleben, *supra* note 11, at 333.

from any specific practices and instead the “Commission has broad powers to declare trade practices unfair.”¹²⁵ The FTC has developed its use of the UDAAP standard over time to cover both new methods of unfair practices and new types of unfairness.¹²⁶ The CFPB’s UDAAP authority is textually near-identical, showing congressional intent to give the CFPB similar flexibility in enforcing UDAAP to protect consumers from financial fraud.¹²⁷

The Court will thus have to make a decision between two quite different paths. On the one hand, the Court could hold that any statutory provision that is reinterpreted by an agency to address a new problem is suspect and triggers this factor if it expands the agency’s power or changes its previous scope of regulatory authority. The Court could also hold there are certain provisions, oftentimes called standards, in legislation that are specifically meant to be interpreted in an evolving fashion, and that new interpretations of this type of provision does not trigger this major question factor. In fact, interpreting these provisions in a new way may be the “consistent” use after all. This standard versus “ordinary” provision split better reflects congressional intent in agency action, which is one of the stated goals of the major questions doctrine.¹²⁸

To the extent that major questions doctrine acts as a clear statement rule, standards like the UDAAP provision should not trigger the same type of scrutiny¹²⁹ under this factor as

¹²⁵ *F.T.C. v. Sperry & Hutchinson*, 405 U.S. at 242.

¹²⁶ See Erxleben, *supra* note 11, at 333–335.

¹²⁷ *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 904 (S.D. Ind. 2015) (“The CFPA, like the FTCA before it, has empowered the agency itself to fill in the broad outlines of its authority with specific regulations and interpretations. The agency and the courts have done so in fleshing out the term ‘unfair . . . act or practice,’ and Congress has tapped into that existing body of law in framing the CFPA with identical terminology.”).

¹²⁸ *West Virginia v. EPA*, 597 U.S. at 723 (“[A] practical understanding of legislative intent make[s] us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.” (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014))).

¹²⁹ See *infra* Section III.B.

the ancillary, somewhat oblique “backup” provisions like the one analyzed in *West Virginia*.¹³⁰ If the Court settles on a version of the major question doctrine that works as a non-delegation doctrine, then this factor is likely to weigh against the agency regardless of how Congress intended the provision to act, as the Court would also be skeptical that Congress *could* make this type of evolving standard rather than being skeptical that Congress *had*.¹³¹ If the Court wishes to rein in the administrative state generally, it is likely this factor will be used regardless of any prior progression of the use of the provision in the past.

6. CFPB Expertise on the Issue

The CFPB likely does have comparative expertise in the area of anti-discrimination law according to the “comparative expertise” analysis in *West Virginia* and *King v. Burwell*. The Court in *West Virginia* reasoned that “when an agency has no comparative expertise in making certain policy judgements, we have said, Congress presumably would not task it with doing so.”¹³² In discussing why the EPA did not have expertise in instituting the Clean Power Plan, the Court remarked that system wide changes in electricity generation are outside the EPA’s area of expertise, even though, as the dissent points out, the Court previously recognized the EPA’s authority to regulate carbon dioxide emissions and associated pollution.¹³³ In *King v. Burwell*, where the issue was the distribution of health-insurance related tax credits, the Court stated “[the

¹³⁰ *West Virginia v. EPA*, 597 U.S. at 723, 730 (2022).

¹³¹ *Id.* at 2616 (Gorsuch, J., concurring) (stating that “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives” in describing the doctrine as a non-delegation rule to prevent the Executive from determining the laws and policy of the Nation).

¹³² *Id.* at 729 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019)).

¹³³ *Id.* at 771 (Kagan, J., dissenting) (“Consider the Clean Power Plan’s component parts—let’s call them the what, who, and how—to see the rule’s normalcy. The ‘what’ is the subject matter of the Plan: carbon dioxide emissions. This Court has already found that those emissions fall within EPA’s domain.”).

IRS] has no expertise in crafting health insurance policy of this sort.”¹³⁴

The Court’s standard as applied arguably requires that the agency needs to be the *best* equipped of any agency to handle the substantive matter of the specific rule/agency action. Since the HHS had more expertise in health-care policy than the IRS in *King v. Burwell*, and FERC has more expertise in electricity generation than the EPA, neither the IRS nor the EPA respectively had the “comparative expertise” necessary to pass this factor. Although this “best agency” rule is unstated, it is a far better explanation for the Court’s decision-making than the idea that the EPA lacks comparative expertise in energy generation or that the IRS does not have any expert knowledge in the distribution of tax credits. Relatedly, in decisions where the expertise issue was more obvious, the Court made quick work of the idea that the CDC had any expertise in protecting public health through an eviction moratorium, or that OSHA had expertise in promoting workplace safety through a vaccine mandate.¹³⁵

Under this type of analysis, the CFPB is likely to have court-recognized expertise, although the question is a close one. Unlike the EPA, IRS, OSHA, or CDC in the cases listed above, the CFPB is the agency most apt to handle anti-discrimination in banking products. Although other agencies like the EEOC and DOJ Civil Rights Division enforce more direct discrimination statutes, neither agency has the financial products/services expertise to set a rule protecting consumers from discrimination.¹³⁶ The DOJ lacks rulemaking authority in this area and is better suited for enforcement rather than the rulemaking required in this instance. Other financial regulators such as the FDIC and OCC are focused on stabilizing the financial system, rather than on identifying specific behavior by institutions that is harmful to

¹³⁴ *King v. Burwell*, 576 U.S. 473, 474 (2015).

¹³⁵ *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety and Health Admin.*, 142 S. Ct. 661, 665 (2022); *Ala. Ass’n of Realtors v. Dep’t of Health and Human Serv.*, 141 S. Ct. 2485, 2488 (2021).

¹³⁶ *See Levitin, supra* note 5, at 329-32.

consumers/individuals.¹³⁷ These financial agencies were also ineffective in protecting individuals/consumers from harm prior to the CFPB's creation.¹³⁸

The CFPB was created to essentially cover a gap in federal financial regulation. Before the creation of the CFPB federal regulators were often ineffective in protecting consumers from intentional misbehavior or incompetence from financial institutions. The FTC lacked jurisdiction in the area, and state consumer protection law and regulation was pre-empted by the Federal Government.¹³⁹ The CFPB came into this opening as an agency designed to focus on harm to individual consumers, rather than as an agency focused on stability and growth.¹⁴⁰

Discrimination is harmful to individual consumers, but often lacks the systemic danger to the financial system to garner the attention and focus of other regulators. Furthermore, the creation of the CFPB effectively displaced the other financial agencies in the area as the CFPB took over rulemaking, enforcement, and supervision of financial products as they relate to consumers. The CFPB does have the authority to enforce the ECOA, which directly addresses discrimination, giving the CFPB some experience in the area of discrimination in financial services.¹⁴¹ The combination of the technical subject matter expertise regarding consumer financial products along with the individualized and consumer-focused nature of the

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (discussing problems with the regulatory system before the creation of the CFPB including a dearth of regulatory expertise in other financial regulators, a lack of an agency with consumer focus, subordination of consumer protection goals to profitability and stability concerns, and issues with regulatory arbitrage).

¹⁴⁰ *Id.*

¹⁴¹ Brian Kreiswirth & Anna-Marie Tabor, *What You Need to Know about the Equal Credit Opportunity Act and How It Can Help You: Why It Was Passed and What It Is*, CFPB (Oct. 31, 2016), <https://www.consumerfinance.gov/about-us/blog/what-you-need-know-about-equal-credit-opportunity-act-and-how-it-can-help-you-why-it-was-passed-and-what-it/> [<https://perma.cc/Y9HK-D453>] (explaining the CFPB's jurisdiction and enforcement in regard to the ECOA).

harm resulting from discrimination in these products leaves the CFPB as the best agency to address the concern.

However, the CFPB expertise on discrimination issues looks very similar to the EPA's expertise in *West Virginia*. The EPA in that case had expertise in the effect of the rule, reducing pollution, and the CFPB has expertise in the effect of this guidance, reducing harmful effects on consumers.¹⁴² It may be however, that a court sees the issue as neither the EPA nor the CFPB having the best expertise in the substance of the action, in the case of the EPA changing to the industry-wide mixture of electricity generation, and in the case of the CFPB identifying and prohibiting discriminatory behavior. Nevertheless, here there is no other agency, unlike FERC in *West Virginia*, that has the congressional directive and the expertise to step in on the substance of the rule. Combining the Court's precedent with realities of the regulatory environment leads to the conclusion the CFPB should be found to have comparative expertise.

7. Summary

Under a balancing analysis, factors 1-3 and 6 weigh against the CFPB revision being classified as a "major questions," while factors 4 and 5 weigh towards it being classified as a "major question." If political significance and economic significance are the dominant factors in major questions analysis, which seems possible if not probable, the CFPB revision of its examination manual will likely be spared this enhanced scrutiny.¹⁴³ If, however, a federal court weighs agency expertise, consistency of use, and Congressional rejection of on-point legislation more heavily or finds discrimination to be categorially significant, this action could fall under the major questions doctrine.

¹⁴² *West Virginia v. EPA*, 597 U.S. 697, 772 (2022) (Kagan, J., dissenting.)

¹⁴³ *West Virginia v. EPA*, 597 U.S. at 721 (introducing the major questions doctrine as applicable where the "economic and political significance of the assertion" of agency power should make courts skeptical that Congress intended delegation of the asserted power).

B. Does UDAAP Under Dodd-Frank Provide Clear Authorization?

Assuming a court finds the CFPB revision is a major question, it will have to proceed to part two of the analysis and decide if the agency action was clearly authorized by statute. As discussed, the Court's majority opinion in *West Virginia* and the COVID cases were somewhat unclear in what clear authorization would have allowed the agencies to take the planned actions.¹⁴⁴ The majority opinion in *West Virginia* applies a context specific test, looking at the text of the statute in question and the statutory scheme in coming to a conclusion the Clean Power Plan was not "clearly authorized."¹⁴⁵ In *NFIB v. OSHA*, the Court compared the statutory text allowing for workplace standards with the breadth of the agency's vaccine mandate, and finding a mismatch between the two, found the mandate was not clearly authorized.¹⁴⁶

Academics are operating on the assumption that the *West Virginia* form of the major questions doctrine acts almost as an opposite of *Chevron* by shifting the burden of textual proof against an agency.¹⁴⁷ It has been described as anti-textualist, because even an unambiguous grant of authority may not be enough to uphold an agency action under this formulation.¹⁴⁸ Instead, courts may now move to a clear statement type analysis where only a certain elevated level of match between the statute and the action at hand can lead a court to uphold whatever the agency is trying to do.¹⁴⁹

¹⁴⁴ See *supra* notes 40 and 42.

¹⁴⁵ *West Virginia v. EPA*, 597 U.S. at 731–33.

¹⁴⁶ *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety and Health Admin.* 597 U.S. 661, 665, 666 (2022).

¹⁴⁷ See, e.g., Sohoni, *supra* note 35, at 310; Deacon & Litman, *supra* note 35, at 6.

¹⁴⁸ See sources cited *supra* note 147.

¹⁴⁹ Clear statement rules and their analysis are better suited elsewhere as it is unclear exactly how the major questions clear authorization rule will be used or how previous analysis of clear statement rule application would be helpful in predicting outcomes under the major questions doctrine. See, e.g., John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010); William N. Eskridge Jr. & Philip P. Frickey,

Thus, in determining whether there is clear authorization for the CFPB's revision of its examination manual, the statutory scheme, statutory text, and the congruence between scheme, text, and the action taken must be analyzed in the context of a clear-statement requirement. The analysis of statutory text is relatively simple. As discussed below, discrimination in financial products fits squarely within the plain meaning of "unfair," and it satisfies Dodd-Frank's three requirements for the prohibition of an unfair act or practice.

Based on the plain text of the statute, the CFPB's action appears to be authorized. The CFPB was created to protect consumers from abusive financial practices which developed from the crisis of 2006. The statute only briefly address discrimination, using the word a total of five times throughout.¹⁵⁰ It only lists protected classes in a small provision dealing with the disposition of assets.¹⁵¹ Dodd-Frank does list as one of the objectives of the Bureau to protect consumers from "unfair, deceptive, or abusive acts and practices and from *discrimination*."¹⁵²

More importantly however, discrimination is "marked by injustice, partiality, or deception" and thus easily fits into the

Quasi-Constitutional Law: Clear Statement Rules as Constitutional Law-making, 45 VAND. L. REV. 593 (1992). Justice Gorsuch and the other justices in favor of a non-delegation form of the major questions doctrine are in favor of a clear authorization standard that works more similarly to other clear-statement constitutional rules. *West Virginia v. EPA*, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring). Additionally, Justice Barrett put forward a third conception of the doctrine this term as a form of textualism doctrine, stating that the major questions doctrine situates text in context of the statute. *Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023).

¹⁵⁰ 12 U.S.C. §§ 5390, 5511, 5567.

¹⁵¹ 12 U.S.C. §5390 ("In exercising any right, power, privilege, or authority as receiver in connection with any covered financial company for which the Corporation is acting as receiver under this section, the Corporation shall, to the greatest extent practicable, conduct its operations in a manner that... prohibits discrimination on the basis of race, sex, or ethnic group in the solicitation and consideration of offers.") This is outside the purview of the portion of the statute that pertains to the CFPB.

¹⁵² 12 U.S.C. §5511(b) (emphasis added).

dictionary definition of unfair.¹⁵³ The statutory requirements for an unfairness finding are also easily met. Dodd-Frank identifies a practice is unfair when: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or to competition.¹⁵⁴ Discrimination substantially injures consumers economically and limits their ability to participate in the free market; a marker that has normally been considered important in traditional FTC UDAP enforcement.¹⁵⁵ Discrimination is unavoidable; consumers may not even know discrimination is occurring, particularly when dealing with complex financial products.¹⁵⁶ Finally, discrimination does not provide benefits, if any can even be conceived of, that outweigh the high costs discrimination places on consumers.¹⁵⁷

However, it should be noted that in granting the agency actual rulemaking power, the statute removes the term “discrimination,” instead opting to grant the CFPB the ability to act in regards to “unfair, deceptive, or abusive acts or practice in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”¹⁵⁸ Although this removal could be deemed as removing actual authority for the CFPB to address discrimination, this does not seem like enough to ignore the fact that discrimination fits both plain meaning of unfair and the statutory requirements for prohibition of an unfair act.

Justice Gorsuch’s arguments in *Bostock* are conclusive here.¹⁵⁹ As noted in *Bostock*, “This Court has explained many

¹⁵³ *Unfair*, MERRIAM-WEBSTER.COM DICTIONARY, <https://www.merriam-webster.com/dictionary/unfair> (last updated Sept. 11, 2023).

¹⁵⁴ 12 U.S.C. §5531.

¹⁵⁵ Hayes & Schellenberg, *supra* note 28.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 12 U.S.C. §5531; 12 U.S.C. §5511(b).

¹⁵⁹ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020). It is also worth noting the Court’s decision in *Bostock* bolstered anti-discrimination

times over many years that, when the meaning of the statute's terms is plain, our job is at an end."¹⁶⁰ The majority opinion also added, "But the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command."¹⁶¹ The textual command in Dodd-Frank's UDAAP provision seems at least as clear as the provision of Title VII analyzed in *Bostock*, regardless of the placement of any statutory language.

Interpreting this text within the statutory scheme raises more interesting and complex questions. As discussed throughout this paper, UDAAP authority is a broad grant of power to the CFPB, and this conception of the statute has been confirmed by federal courts.¹⁶² The CFPB's UDAAP authority falls under a type of law most commonly referred to as a standard. It is meant to be flexible in its interpretation, but there are limits.¹⁶³

The CFPB and FTC do not have limitless discretion under the scheme to ban any practice that falls under the broad definitions of unfair, deceptive, or abusive. Line drawing was difficult for both courts and the agency in determining the outer limits of permissible interpretation of the FTC Act.¹⁶⁴ So far, both the FTC and the CFPB have taken advantage of this

efforts on the basis of sexual orientation and gender identity, and those same efforts are, albeit indirectly, at issue in this case.

¹⁶⁰ *Id.* at 1749.

¹⁶¹ *Id.* (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

¹⁶² *Supra* notes 11, 112, 127.

¹⁶³ The district court's opinion in *Chamber v. CFPB* essentially points to the structure of the statute, the removal of the word discrimination in the CFPB's powers under UDAAP, and the existence of other anti-discrimination statutes in finding a lack of clear authorization. See *Chamber of Com. of the U.S. v. CFPB*, No. 6:22-CV-00381, WL 5835951 at 12-24 (E.D. Tex. Sept. 8, 2023).

¹⁶⁴ Neil W. Averitt, *The Meaning of Unfair Acts or Practices in Section 5 of the Federal Trade Commission Act*, 70 GEO. L. J. 225, 225-26 (1981) ("This statutory language gives the Commission substantial latitude in defining unfair consumer practice but the very breadth of the mandate has led to some uncertainty about its limits and its underlying principles."); Erxleben, *supra* note 11, at 335; Herrine, *supra* note 7, at 433-40.

flexibility, and courts have been permissive.¹⁶⁵ So where is the line for UDAAP, and do anti-discrimination efforts sit outside or inside the line?¹⁶⁶

In exploring the outer limits of UDAAP, it is helpful to understand how the standard has evolved over time. At first, the original FTC Act granted the Commission the authority to prohibit “unfair methods of competition” in order to stop unethical behavior affecting the nation’s commerce.¹⁶⁷ Congress chose the term unfairness for its capaciousness, as the intent was to avoid creating loopholes through either an exhaustive list or an overly narrow standard that would limit the FTC’s ability to act towards new practices or new standards of unfairness.¹⁶⁸ In 1938, Congress added authority for the FTC to also ban unfair or deceptive acts or practices to allow for the

¹⁶⁵ See *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972) (recounting legislative history from Congress discussing the flexibility Congress intended the FTC to have in defining and enforcing the bounds of the UDAP standard in §5 and stating “...the sweep and flexibility of this approach were thus made crystal clear”); *id.* at 242; Erxleben, *supra* note 11, at 333; *id.* at 333-4; *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 904 (S.D. Ind. 2015) (“The CFPB, like the FTCA before it, has empowered the agency itself to fill in the broad outlines of its authority with specific regulations and interpretations. The agency and the courts have done so in fleshing out the term ‘unfair . . . act or practice,’ and Congress has tapped into that existing body of law in framing the CFPB with identical terminology.”).

¹⁶⁶ This is essentially the argument the industry groups have made. See Combined Reply Supp. of Mot. Summ. J. at 22, Chamber of Com. of the U.S. v. CFPB, No. 6:22cv381 at 22 (E.D. Tex. Jan. 10, 2023) (“The question is whether the CFPB can treat discrimination as an ‘unfair, deceptive, or abusive act or practice’— whether it can use its UDAAP authority to grant itself new regulatory authority over the field of antidiscrimination outside of the lending context that Congress authorized. That is what the CFPB purports to do in the manual update. And that is what exceeds the agency’s authority.”).

¹⁶⁷ *Id.*; 51 CONG. REC. 13310 (1914) (remarks of Sen. Reed) (stating the goal of the FTC is to forbid unfair competition that unreasonably interferes with the business of another or prevents his engaging in business, a summary of the FTC power that would permit the agency to prohibit discrimination in commerce as it prevents persons from engaging in business).

¹⁶⁸ Averitt, *supra* note 164, at 225-226.

prohibition of practices beyond just those that affected competition and to focus the agency more on harm to consumers.¹⁶⁹

Until 1964, FTC action was mostly cabined to deceptive practices.¹⁷⁰ That year, the FTC used a relatively broad definition of unfairness in regulating cigarette advertising, followed by an unfairness action against Pfizer where the FTC described its duty to “create a new body of law...adapted to the diverse and changing needs of a complex and evolving competitive system.”¹⁷¹ The Commission’s new approach was blessed by the Supreme Court in the previously discussed *Sperry & Hutchinson* case.¹⁷²

However, after an ill-fated regulation on advertising to children led to a funding showdown, the political environment shifted, and the FTC pulled back from this expansive public policy use of unfairness towards an approach centered around consumer sovereignty.¹⁷³ Congress codified this more limited view of the unfairness standard, stripping the FTC of authority unless the act causes “substantial injury,” the harm outweighs the benefits, and the consumer cannot reasonably avoid the harm.¹⁷⁴

¹⁶⁹ *Id.* at 233-239.

¹⁷⁰ Herrine, *supra* note 10, at 439.

¹⁷¹ *In re Pfizer Inc.* 81 F.T.C. 23, 28 (1972); Herrine, *supra* note 10, at 440 (“The definition of ‘unfair’ in the Cigarette Rule included anything that ‘offends public policy,’ is otherwise ‘immoral, unethical, oppressive, or unscrupulous,’ and which ‘causes substantial injury to consumers’ or competitors.” (quoting Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964) (codified at 16 C.F.R. § 408.1))); Averitt, *supra* note 164, at 242.

¹⁷² *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 242 (1972).

¹⁷³ Herrine, *supra* note 10, at 440-41.

¹⁷⁴ FTC Act Amendments of 1994, sec. 5, § 9, Pub. L. No. 103-312, 108 Stat. 1691, 1695 (“The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”); Howard Beales, *The FTC’s Use of*

Dodd-Frank's statutory UDAAP authority is nearly identical in statutory language to the amended 1994 FTC UDAP. This was no accident, Congress intended to bestow a very similar latitude for the CFPB to act in the realm of financial products for consumers.¹⁷⁵ The unfairness standard was meant to essentially match the 1994 version of the FTC Act, as the CFPB must also prove substantial injury that is not reasonably avoidable and that the benefits of the practice do not outweigh the harms in order to prohibit a practice under the unfairness standard.¹⁷⁶ It is thus reasonable to assume the boundaries of the unfairness standard in both cases are the same.

In his article, *The Meaning of Unfair Acts or Practices*, Neil Averitt argues that based on an analysis of the text and the legislative history, the limits of the FTC Act and the 1938 amendment are centered around prohibiting practices that limit consumer choice and market processes, with a secondary and restricted focus on in upholding morality in business practices.¹⁷⁷ This can be considered the more restrictive view. Luke Herrine criticizes this conception of unfairness power as one formulated by a well-funded effort by regulated businesses, and he argues the unfairness standard is best understood to "facilitate democratic deliberation over moral standards for business conduct and enforce those standards."¹⁷⁸ This can be considered the more expansive view.

Either conception of unfairness provides clear authorization for the anti-discrimination rule. Under the more restrictive view, discrimination prevents consumer choice by allowing certain producers/suppliers to exclude consumers based on

Unfairness Authority: Its Rise, Fall, and Resurrection, FED. TRADE COMM'N (May 30, 2003), <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection> [https://perma.cc/F2L6-XZ5B].

¹⁷⁵ See *supra* note 127.

¹⁷⁶ Compare 12 U.S.C. § 5531, 5536., with Federal Trade Commission Act Amendments of 1994, sec. 5, § 9, Pub. L. No. 103-312, § 108 Stat. 1691, 1695.

¹⁷⁷ See Averitt, *supra* note 164.

¹⁷⁸ See Herrine, *supra* note 10, at 525.

economically irrelevant characteristics. Under the more expansive view, society has come to a “democratic deliberation” on the issue of intentional racial or sex discrimination in commerce and the time is ripe for the CFPB to enforce this moral standard where existing legislation has left gaps.¹⁷⁹

Thus, under the clear authorization standard the text and the scheme suffice to find clear authorization according to the precedent *West Virginia* sets. The use of a primary and broad provision to further goals both the statutory scheme and text clearly permit should be enough to pass through the more searching standard major questions review contemplates.

There are potential pitfalls, however. A comparison to other anti-discrimination statutes and the general anti-discrimination statutory scheme could prove problematic to the above analysis. Unlike statutes such as the FHA, ECOA, or the Civil Rights Act, Dodd-Frank does not explicitly appoint an agency to carry out any anti-discrimination goals, and outside the relatively minor references to discrimination in the act, it is silent on the matter altogether.¹⁸⁰ Furthermore, the lack of protected classes is a marked departure from other legislation used for anti-discrimination purposes.¹⁸¹ Based on committee reports, and other legislative materials, it does not appear that Congress was thinking about the prospect of the bill addressing protected class discrimination in the financial services industry.¹⁸² However, in addition to the arguments made above, Justice Gorsuch’s statement in *Bostock* should ring true again: “when the meaning of the statute’s terms is

¹⁷⁹ See *supra* Section III.A.2.

¹⁸⁰ 12 U.S.C. §§ 5390, 5511, 5567.

¹⁸¹ Complaint at 14, Chamber of Com. of the U.S. v. CFPB, No. 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 28, 2022). (“The CFPB did not identify any protected classes or characteristics, as essentially all nondiscrimination statutes must do. For example, ECOA prohibits discrimination on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public assistance, or good faith exercise of any rights under the Consumer Credit Protection Act. But other federal antidiscrimination laws protect classes with different characteristics.”).

¹⁸² See, e.g., *The Impact of Exotic Mortgage Products on Homebuyers and Homeowners*, Hearing Before the S. Comm. on Banking, Hous., and Urb. Aff., 110th Cong. (2007).

plain, our job is at an end.”¹⁸³ Discrimination is unambiguously unfair, and the CFPB should be clearly authorized to protect Americans from its negative economic, emotional, and societal effects.

IV. CONCLUSION

The future of anti-discrimination actions by agencies under the unfairness standard is likely to hinge on the case against the CFPB. If anti-discrimination action in non-credit financial products is a major question, and the statutory text of the UDAAP is deemed to not give “clear authorization” to agencies, the CFPB and subsequently the FTC are hamstrung in using their authority to provide a more equitable economy in the future. One could imagine the CFPB being unable to prevent discrimination in new financial products that arise, such as cryptocurrencies or cryptocurrency-related consumer products.

The implications could be broader. If discrimination is categorically deemed to be an area of such political significance that agency action in the space is always considered a major question, the administrative state as a whole will likely be hampered in addressing new forms of discrimination or protecting new classes of people suffering from discrimination.

Under a *Chevron* or *Skidmore* style reading a Court would almost certainly rule in favor of the CFPB. Discrimination is unfair, through both plain meaning and by fulfilling the statutory requirements for unfairness outlined in Dodd-Frank. Now, the answer is not as clear. The new major questions doctrine adds uncertainty to any agency action where a statute is interpreted in a new way. If the CFPB’s decision to address discrimination were to reach the Supreme Court, the Court would likely have to grapple with and clarify how: (1) the political significance factor should be applied, perhaps with more objective criteria and (2) how very broad standards should be analyzed with regards to the clear authorization element of the test. In the meantime, agencies have to toe an unclear line, or face the legal consequences.

¹⁸³ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020).