UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C.20580

Office of Commissioner
Andrew N. Ferguson

Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson
Coulter Motor Company, LLC
Matter No.2223033

August 15, 2024

Today, we vote to approve filing a Complaint and stipulated Order in the U.S. District Court for the District of Arizona against a car dealer Coulter Motor Company and one of its [illegible] 1 (at)e-

[1] 15 U.S.C. § 1691 et seq. See also id. § 1691c(c) ("For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of any requirement imposed by [ECOA] shall be deemed a violation of a requirement imposed under the [FTC] Act.").
[2] Id. § 45.
[3] Id. § 1691(a)(1).
[4] Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (quoting

Some statutes go further and prohibit "practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale" irrespective of the defendant's intention or motivation.[6] These claims of unintentional discrimination are known as "disparate-impact" claims. Although Congress sometimes expressly states its intention to prohibit both intentional discrimination and neutral policies that disparately affect minorities,[7] it ordinarily does not address the latter expressly. Whether a general statutory prohibition on discrimination covers both intentional discrimination (disparate treatment) and neutral policies with disparate effects (disparate impact) is thus a question of statutory interpretation.

The Supreme Court has instructed lower courts and administrative agencies to interpret "antidiscrimination laws … 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."[8] For example, the Supreme Court relied on Title VII's prohibition of practices that "'*adversely affect* [an individual's] status as an employee because of'" the employee's protected status as evidence that Title VII reached the effects of a policy on the employee irrespective of the motivation or intention of the employer.[9] A plurality of the Court relied on the same "adversely affect" language in section 4(a)(1) of the Age Discrimination in Employment Act (ADEA)[10] to conclude that the ADEA "focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer."[11] And in *Inclusive Communities Project*, the Supreme Court held that the Fair Housing Act's (FHA)[12] prohibition of policies that would "otherwise make unavailable" a dwelling on the basis of a protected status demonstrated Congress's intention to address "the consequences of [the policy] rather than the actor's intent."[13]

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[6] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. n(m)-2 (519,)19.5 A2 1RrCH76 -1 (57.002 Tc 0.6005

precedents in the district courts[20] and, arguably, one court of appeals[21] holding that ECOA imposes disparate-impact liability. Others courts both before and after *Inclusive Communities Project* assumed without deciding that ECOA imposes such liability—albeit without addressing *Inclusive Communities Project*.[22] And the Commission has unanimously adopted this theory in previous complaints.[23] Because this is a vote to file the Complaint and stipulated Order agreed to by the

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[20] *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922, 926–28 (N.D. Cal. 2008) (holding that *Smith v. City of Jackson* did not overrule *Miller v. American Express Co.*, which the district court treated as binding circuit precedent); *Zamudio v. HSBC N.* [illegible]

Defendants, the allegations in the Complaint and the weight of authority are sufficient to vote in favor.

If this question ever comes before me on the merits, I will keep an open mind about whether ECOA satisfies the *Inclusive Communities Project* test—that is, whether its text demonstrates Congress's intention to prohibit neutral "practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale" irrespective of the creditor's motivation.[24] My vote in favor of the Complaint and stipulated Order today should not be understood to have foreclosed consideration of arguments against the application of disparate-impact liability under ECOA.

The majority takes great offense to my position and responds with a barrage of breathless arguments. First, they argue that "[e]very district and appellate court to face the issue . . . has accepted that disparate impact is a cognizable basis for ECOA liability," and that "no court agrees with" me.[25] To the contrary, no court has considered the question I raised, and no court disagrees with me. In none of the cases the majority cites[26] did any court decide whether ECOA satisfies the disparate-impact test announced in *Inclusive Communities Project*. The majority's litany of mostly unpublished district court decisions that do not address the question are a non sequitur. Then again, carefully reading cases has not been the majority's strong suit these last three years.[27]

Second, the majority argues that "[a]s law enforcers, we must be faithful to the law" and that I am "stray[ing] into activism."[28] I agree we must be faithful to the law. The text of ECOA is the law,[29] and we must follow it. It is the exact opposite of "activism" to make clear that I am reserving judgment on a question that no court has considered. I am merely arguing that we must obey binding judicial precedent, including *Inclusive Communities Project*'s rule for reading disparate-impact liability into antidiscrimination statutes.

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precedent be damned. That certainly sounds like activism. Reserving judgment on a question no court has decided is not.

Even if they addressed the question, none of the district court decisions on which the majority relies would be binding. District court opinions do not bind anyone, including the district judges who wrote them.[31] Furthermore, the Executive Branch has a constitutional duty to interpret laws Congress has entrusted it with enforcing to determine when and how they should be enforced—subject always, of course, to truly binding judicial decisions.[32] And even in the face of binding decisions, the Executive Branch, like any other litigant, has the right to ask the courts to reconsider their precedents.[33] Nonetheless, it bears repeating that no case cited by the majority addresses the question I am raising today.

Third, the majority argues that "it is the Federal Reserve, not the [Commission], which Congress has charged with prescribing regulations implementing ECOA. The Federal Reserve has long said that a facially neutral policy that disproportionately excludes or burdens persons on a

through programs with the "special purpose" of "meet[ing] special social needs," or by way of "nonprofit organization[s]" facilitating credit for their members.[40] Provisions permitting intentional discrimination are probably not a textual basis for disparate-impact liability.

II

The Complaint further alleges that Defendants' discriminatory practices violated Section 5 of the FTC Act. I dissent from this count for the reasons given by Commissioner Phillips in his dissent in *Passport Automotive Group*.[41] This theory rests on the premise that Congress adopted the broadest antidiscrimination law in American history in 1938, but that we failed to notice it had done so until 2022. The Supreme Court has more than once chastised agencies for claiming to discover new and extraordinarily broad powers in old statutes,[42] and that is precisely what the Commission has done. It is also hard to square with the rest of our federal civil rights laws. For one thing, unlike every other antidiscrimination statute, Section 5 does not explicitly identify the practices prohibited, the class of persons protected, or the circumstances under which Congress has concluded disparate treatment may be justified.[43] (And, on the majority's interpretation, the majority alone knows which types of discrimination are prohibited by Section 5, and they will tell us on a case-by-case basis.) For another thing, it is hard to explain why Congress would have worked so hard to adopt our suite of federal civil rights laws—and why so many Americans

[40] *Id*. The same is true of the exceptions in 15 U.S.C. § 1691(b)(1)—which permits a potential creditor to inquire into an applicant's marital status for the purpose of ascertaining the "creditor's rights and remedies" regarding a potential loan—and in 15 U.S.C. § 1691(b)(2), which permits a potential creditor to inquire whether an applicant derives income from public assistance programs for the "purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations." These sections are applicable to intentional-discrimination claims. *Bowman v. Bank of Am. N.A.*, No. 3:13-CV-3436-TLW, 2016 WL 8943266, at *5 (D.S.C. June 16, 2016), *aff'd sub nom.* 676 F. App'x 216 (4th Cir. 2017) (relying on (b)(2) to reject a direct-evidence, intentional discrimination theory of liability); *Massey v. First Greensboro Home Equity, Inc.*, No. 97-1292-CIV-T-17, 1998 WL 231141, at *11 (M.D. Fla. Apr. 27, 1998) (allowing a jury to consider a (b)(2) defense in an intentional discrimination case). See also *Segaline v. Bank of Am., N.A.*, No. EP-02-CA-185-DB, 2003 WL 21135553 (W.D. Tex. Apr. 18, 2003) (applying subsection (b)(1) to dismiss a claim that a bank discriminated against a woman by denying her previously-approved loan upon learning of her divorce due to concern that her collateral was no longer her homestead). These exceptions to ECOA also apply as exceptions to regulatory prohibitions, promulgated under ECOA, on mere inquiry as to certain protected characteristics. See Regulation B, 12 C.F.R. § 1002.5(c)–(d) (prohibiting inquiry of marital status and regarding spouses and former spouses, but with exceptions implementing 15 U.S.C. § 1691(b)(1)).

[41] Dissenting Statement of Noah J. Phillips, Comm'r, Regarding *FTC v. Passport Automotive Group, Inc.*, No. 2023199 (Oct. 14, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Dissenting-Statement-of-Commissioner-Noah-Joshua-Phillips.pdf

[42] Dissenting Statement of Commissioner Andrew N. Ferguson, joined by Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule at 5 (June 28, 2024), https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/dissenting-statement-commissioner-andrew-n-ferguson-joined-commissioner-melissa-holyoak-matter-non; *West Virginia v. EPA*, 597 U.S. 697, 738 (2022) (rejecting EPA's "claim[] to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority") (cleaned up).

[43] See, e.g., 42 U.S.C. § 2000e(b) (defining "employer" within Title VII such that it does not include employers with fewer than 15 employees or private membership clubs); 42 U.S.C. § 2000e-1(a) (exempting religious corporations, associations, educational institutions, and societies from Title VII); 42 U.S.C. § 2000e-2(e) (allowing discrimination on the basis of religion, sex, or national origin when such characteristic is a "bona fide occupational qualification"); 15 U.S.C. § 1691(b), (c) (adopting a litany of exceptions to ECOA, including allowing discrimination in favor of "economically disadvantaged class[es] of persons" and, in some cases, empirically-justified age discrimination).

struggled tirelessly for their passage—when it had already given the Commission the power to proscribe any sort of discrimination it wanted to proscribe.

Racial discrimination in the extension of credit is indefensible. It is an attack on colorblind equality—a prerequisite for the survival of a multiracial society—and an affront to the equal dignity of every human being. That is why Congress banned it in ECOA. There is simply no need for us to twist Section 5 in knots in this case. I therefore respectfully dissent from the Section 5 discrimination claim.