Federal Trade Commission Policy Statement Regarding Disparate-Impact Claims and "Unfair Discrimination" Claims[1]

I. Introduction

President Trump has issued a historic executive order entitled "Restoring Equality of Opportunity and Meritocracy."[2] The executive order concerns disparate-impact liability, a legal theory "which holds that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups," even in the absence of any discriminatory intent or facially discriminatory policy.[3] As the order explains, disparate-impact liability—and the movement that champions it—are "pernicious" and must be rejected.[4]

The fundamental problem is that disparate-impact liability "all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability."[5] It therefore "imperils the effectiveness of civil rights laws by mandating, rather than proscribing, discrimination."[6] Government-dictated racial discrimination violates the bedrock American principle of equality under the law; it is "wholly inconsistent with the Constitution"; and it harms the public by preventing businesses from making merit-based decisions (and forcing them to focus instead on the "irrelevant immutable characteristics" of the individual involved).[7] Ultimately, disparate-impact liability shares the legal, practical, and moral flaws of diversity, equity, and inclusion ("DEI"): "It divides people into castes … and treats them as caste members rather than as individuals."[8]

The executive order adopts a policy of "eliminat[ing] the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil

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[1] This Policy Statement does not confer any rights on any person and does not operate to bind the FTC or the public. In any enforcement action, the Commission must prove the challenged act or practice violates one or more existing statutory or regulatory requirements. In addition, this Policy Statement does not preempt federal, state, or local laws. Compliance with those laws, however, will not necessarily preclude Commission law enforcement action under the FTC Act or other statutes. Pursuant to the Congressional Review Act (5 U.S.C. § 801 *et seq.*), the Office of Information and Regulatory Affairs designated this Policy Statement as not a "major rule," as defined by 5 U.S.C. § 804(2).

[2] Exec. Order No. 14281, *Restoring Equality of Opportunity and Meritocracy*, § 1, 90 Fed. Reg. 17537 (Apr. 23, 2025) ("Disparate Impact Order").

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Press Release, FTC, *FTC Chairman Ferguson Announces that DEI is Over at the FTC* (Jan. 22, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-chairman-ferguson-announces-dei-over-ftc.

rights laws, and basic American ideals."[9] And it directs agencies, including the Federal Trade Commission ("FTC" or "Commission") to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability."[10]

The FTC has previously pursued disparate-impact claims in two contexts: under Section 5 of the FTC Act (where they have been styled as "unfair discrimination" claims), and under the Equal Credit Opportunity Act ("ECOA"). In both instances, the FTC acted ultra vires. Section 5 contains no antidiscrimination cause of action, let alone a disparate-impact one. And while ECOA does prohibit *intentional* discrimination, it does not authorize disparate-impact claims.

Accordingly, in light of (1) the FTC's lack of statutory authority to bring disparate-impact claims and (2) the fundamental legal and policy defects of disparate-impact liability laid out in President Trump's executive order, the FTC will no longer pursue disparate-impact claims in any context. In addition, because Section 5 does not create an antidiscrimination cause of action, the Commission will not bring *any* such claims under Section 5.

II. Background

A. Disparate-impact liability

We begin with a brief overview of disparate-impact liability. While traditional disparate-treatment claims require plaintiffs to "establish that the defendant had a discriminatory intent or motive," disparate-impact claims "challenge[] practices that have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale."[11] In other words, disparate-impact liability can be imposed—and defendants can be found to have discriminated on the basis of race or other protected characteristics—without *any* showing of discriminatory intent. As noted above, President Trump's executive order strongly condemns disparate-impact liability and calls for it to be eliminated to the maximum possible extent. The order is grounded in a long history of criticisms of disparate-impact liability and correctly identifies its profound legal, conceptual, and practical flaws.

To begin, disparate-impact liability does not serve any beneficial societal purpose. Intentional discrimination can be combatted through traditional disparate-treatment claims, and the Commission remains firmly committed to bringing such claims where the law allows.[12]

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[9] Disparate Impact Order § 2.

[10] *Id.* § 4.

[11] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 524 (2015) (cleaned up).

[12] Both current Commissioners recently confirmed this commitment to bring appropriate disparate-treatment claims. Concurring Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak and Commissioner Mark R. Meador In the Matter of Asbury Automotive Group, Inc. et al., Matter No. 2223135 at 4 (July 17, 2025) ("Asbury Statement") ("The Commission is steadfastly committed to enforcing ECOA to prevent and punish lenders who would treat consumers differently on the basis of their race, color, religion, national origin, sex or marital

Importantly, disparate treatment does not mean the Commission cannot look behind the curtain to determine if discriminatory intent is being masked by a supposedly neutral policy. As Justice Alito has noted, disparate-treatment claims cannot be defeated simply "by conjuring up neutral excuses" because "federal judges have decades of experience sniffing out pretext"[13] and have developed appropriate evidentiary rules for doing so.[14] That is to say, disparate-impact liability comes into play only when there is no evidence of intentional discrimination. As Justice Thomas observed, "disparate-impact proponents doggedly assume that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it."[15] But the assumption is false. In reality, "racial imbalance can also result from any number of innocent private decisions" and "[w]e should not automatically presume that any institution with a neutral practice that happens to produce a racial disparity is guilty of discrimination until proved innocent."[16]

By contrast, the social harms of disparate-impact liability are legion.[17] Most fundamentally, the theory requires government-mandated racial decisionmaking. The fear of disparate-impact liability prevents regulated entities from making decisions based on the merits, and sometimes paralyzes them from acting altogether.[18] Indeed, there is only one reliable way to protect oneself from disparate-impact claims: namely, to engage in affirmative racial balancing (and other forms of balancing) to ensure proportionate outcomes along all protected dimensions.[19] But such government-mandated racial decisionmaking runs headlong into the Equal Protection Clause, as Justice Scalia famously recognized in his separate opinion in *Ricci v. DeStefano.*[20]

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status, or age …. [T]he Commission will not hesitate to bring disparate-treatment claims under ECOA where the facts support such claims.").

[13] *Inclusive Cmtys. Project*, 576 U.S. at 588 (Alito, J., dissenting).

[14] *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (announcing test for determining whether facially neutral policy is motivated by unlawful discriminatory purpose); *cf. Pers. Admin'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (similar).

[15] *Inclusive Cmtys. Project*, 576 U.S. at 553 (Thomas, J., dissenting).

[16] *Id.* at 553–54 (Thomas, J. dissenting) (cleaned up).

[17] *See* Asbury Statement at 2–4 (describing some of these harms).

[18] *Inclusive Cmtys. Project*, 576 U.S. at 544 (noting concern that "the specter of disparate-impact litigation" could "cause[] private developers to no longer construct or renovate housing units for low-income individuals"); *id.* at 558 (Alito, J., dissenting) (noting that St. Paul had been sued for a "good-faith attempt to ensure minimally acceptable housing for its poorest residents"); *id.* at 585 (noting that a state agency would be subject to suit regardless of how it allocated housing credits between high and low income areas); *id.* at 557 (Thomas, J., dissenting) (explaining that "the threat of disparate-impact suits … has hindered [the Houston Housing Authority's (HHA)] efforts to provide affordable housing" and that "[s]tate and federal housing agencies have refused to approve all but two of HHA's eight proposed development projects over the past two years out of fears of disparate-impact liability").

[19] *Id.* at 587 (Alito, J., dissenting) (noting that "parties fearful of disparate-impact claims may let race drive their decisionmaking in hopes of avoiding litigation altogether").

[20] 557 U.S. 557, 594 (2009) (Scalia, J. concurring).

Justice Scalia explained that "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[21] But "that type of racial decisionmaking is … discriminatory."[22] And "if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties … discriminate on the basis of race."[23] Accordingly, the imposition of race-based decisionmaking by disparate-impact laws "would … seemingly violate equal protection principles," and "the war between disparate impact and equal protection will be waged sooner or later."[24]

Compounding its perniciousness, the theory of disparate-impact liability is effectively unbounded because almost any conceivable policy or practice affects different groups differently. As one commentator succinctly put it, "[d]isparate impact is one of the most controversial concepts in civil rights law and policy partly because just about everything has a disparate impact."[25] And while some form of a business-necessity defense is generally available, in practice that defense often provides little protection.[26] As a result, enforcement agencies are left with enormous

[21] *Id.* (Scalia, J., concurring).

[22] *Id.*

[23] *Id.*; *see Constitutionality of Disparate-Impact Liability Under Title VII*, 50 O.L.C. __, slip op. at *9 (June 9, 2026) (reasoning that "it is unconstitutional for the federal government to coerce employers to adopt employment policies or make employment decisions motivated by race").

[24] 557 U.S. at 595 (Scalia, J., concurring). Disparate impact also conflicts with the Equal Protection Clause in another way. While the matter is not entirely resolved, it has at least been frequently suggested that disparate-impact claims are not equally available to all groups (and in particular, that disparate-impact claims cannot be raised by whites with respect to racial discrimination or by men with respect to sex discrimination). Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal*, 14 N.Y.U. J.L. & Liberty 1, 138–42 (2020) (collecting sources and noting that this would mean that disparate-impact laws would have to survive strict scrutiny). As Justice Thomas explained, if "disparate-impact claims [are] limited to only some groups—if, for instance, white basketball players cannot bring disparate-impact suits—then we as a court have constructed a scheme that parcels out legal privileges to individuals on the basis of skin color." *Inclusive Cmtys. Project*, 576 U.S. at 555 (Thomas, J., dissenting); *see also, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (explaining that the Equal Protection Clause "applies without any regard to any differences of race, of color, or of nationality" because "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color" (cleaned up)).

[25] Alison Somin, *Disparate Impact as a Non-Delegation Violation and Major Question*, Harv. J.L. & Pub. Pol'y Per Curiam, Summer 2024, at 1; *see also, e.g.*, Heriot, *supra* note 24, at 6 ("[T]he supply of potential bases for disparate impact liability is virtually limitless, since … everything or nearly everything has a disparate impact on *some* race, color, religion, sex, or national origin group."); *id.* at 37 ("I have in the past promised to pay $10,000 to the favorite charity of anyone who can bring to my attention a job qualification that has made a difference in a real case and has no disparate impact on any race, color, religion, sex, or national origin group. So far I have not had to pay.").

[26] *Inclusive Cmtys. Project*, 576 U.S. at 586 (Alito, J. dissenting) (noting that the impact of HUD regulations setting out such a defense was, "not surprisingly … to confer enormous discretion on HUD—without actually solving the problem"); Somin, *supra* note 25, at 7 ("As for the necessity defenses, disagreement remains on how strong they are …. But whatever the best of those competing interpretations, the practical result has been that many employers take the most risk-averse course and act as though business necessity gives them no real protection."); *id.* at 8

discretion[27]—discretion to decide the impact on what race, color, religion, sex or national origin to prioritize—which sometimes, unsurprisingly, is abused for partisan or ideological ends.[28]

Disparate-impact liability creates two more problems. First, because disparate-impact claims are rooted in statistical disparities, they encourage the use of dodgy statistical methodologies, such as Bayesian Improved Surname Geocoding (BISG)—which has been criticized for "high error rates for racial minorities."[29] BISG is a common form of evidence in disparate-impact claims where racial data on the allegedly injured population is unavailable.[30] In the absence of racial data, disparate-impact plaintiffs (including the Commission) infer a person's race from their last name and their address—for example, inferring that a person is black because they have a last name common among black Americans and live in a black neighborhood.[31] This "sordid" methodology introduces yet another inferential step into the process,[32] requiring enforcement agencies not only to infer racial discrimination from racial disparities, but also to infer the very existence of the racial disparities in the first place from names and addresses.[33]

("Agencies that enforce disparate-impact rules also have generally not seen necessity as much of a constraint."); Heriot, *supra* note 24, at 114 ("Despite its name, the 2012 [EEOC] Guidance provides little *guidance* to employers on what constitutes 'business necessity,' apart from making it clear that the need to hire only employees who were likely to be law abiding was not a clear case of business necessity.").

[27] Heriot, *supra* note 24, at 37 ("Since all job qualifications have a disparate impact on some group, all employer decisions are subject to second-guessing by the EEOC (or by the courts in the case of a private lawsuit)."); Somin, *supra* note 25, at 2 ("Because disparate-impact violations can result from so many innocuous decisions, agencies that enforce disparate impact have virtually unfettered discretion to decide what disparate-impact violations to pursue.").

[28] Somin, *supra* note 25, at 6–7 (describing pattern of ideological disparate-impact enforcement by the EEOC).

[29] Letter from Senator Ted Cruz to Chairwoman Lina Khan (Aug. 22, 2024), https://www.commerce.senate.gov/press/rep/release/cruz-seeks-info-on-ftc-s-use-of-racial-stereotypes-to-target-u-s-companies-2024-8/ (noting criticisms of BISG, criticizing its use by the CFPB, and raising questions about its use by the FTC); Statement of Commissioner Melissa Holyoak, *Asbury Automotive Group – McDavid Group*, Matter No. 2223135 (Aug. 16, 2024) (calling for careful use of statistical methods that have not been tested in court, and encouraging "the Commission and Commission staff [to] be clear about the methodology the Commission uses to assess liability").

[30] *See, e.g.*, Marc Elliott et al., *Using the Census Bureau's Surname List to Improve Estimates of Race/Ethnicity and Associated Disparities*, 9 Health Serv. & Outcomes Research Methodology 69 (2009); *Little v. Washington Metro. Area Transit Auth.*, 249 F. Supp. 3d 394, 416 (D.D.C. 2017) (discussing an expert report using BISG to show that an employment policy had "a statistically significant disparate impact on African-American candidates").

[31] *See, e.g.*, Consumer Fin. Prot. Bureau, *Using Publicly Available Information to Proxy for Unidentified Race and Ethnicity*, at 3 (2014), https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf (explaining that BISG "combines geography- and surname-based information into a single proxy probability for race and ethnicity").

[32] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) ("It is a sordid business, this divvying us up by race.").

[33] BISG is far from the only problematic method used to assess statistical disparities. Other suspect methodologies include the "the 4/5 Rule," *Bazile v. City of Houston*, 858 F. Supp. 2d 718, 763–74 (S.D. Tex. 2012), the "risk ratio" method, *Blunt v. Lower Merion Sch. Dist.*, 826 F. Supp. 2d 749, 756 (E.D. Pa. 2011), *aff'd*, 767 F.3d 247 (3d Cir. 2014), and "Fischer's Exact" test, *Jones v. Pepsi-Cola Metro. Bottling Co.*, 871 F. Supp. 305, 311 (E.D. Mich. 1994).

Finally, the accusation that someone discriminates based on race—specifically, that that person is a "racist"—has long been an effective cudgel to police people's behavior. It is so effective because we, as a people, do not abide harmful conduct inflicted on our fellow Americans *because of* their race. This accusation, even (or especially) when the claim is unsubstantiated or false, carries a threat to upend the accused's life.[34] Accordingly, the scarlet letter of "racist" ought not to be applied in the absence of clear evidence of the discriminatory motive that society has chosen to anathematize. And yet disparate-impact claims carry the weight of an accusation of racism without requiring any such evidence. These claims have thus allowed the government to wield the threat of being publicly perceived as racist against countless Americans who had no intent or desire to discriminate.

In short, the Commission strongly agrees with President Trump's executive order and its rejection of disparate-impact liability.

B. "Unfair discrimination" claims under Section 5 of the FTC Act

For almost 90 years, Section 5 of the FTC Act has empowered the FTC to protect consumers from "unfair or deceptive acts or practices."[35] This is a flexible provision that has allowed the FTC to address a range of harmful practices and adapt to new threats that arise with the development of new technologies and industries. But it is not all-encompassing. Indeed, the FTC has previously overstepped its authority by adopting increasingly broad and untethered interpretations of the Section 5 unfairness language.[36] The Commission's overextension invited pushback from Congress and the public, and Congress ultimately amended the statute in 1994 to clarify that unfair acts and practices are limited to those that "cause or [are] 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."[37] Notably, "nowhere in this long, rich history [did] the concept of antidiscrimination arise."[38]

That is, until the last few years, when certain former Commissioners began to argue that the Commission should use its Section 5 authority to become a universal civil-rights regulator. One Commissioner offered a particularly clear statement of this position. He explained that because it is difficult to "uncover direct evidence of racist intent"—as is required by traditional

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[34] *See, e.g.*, Emma Camp, *How an Ill-Informed Internet Mob Ruined a UVA Student's Life*, Reason (June 2023), https://reason.com/2023/04/24/the-most-hated-person-on-campus/.

[35] Wheeler-Lea Act, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111–117 (1938) (codified as amended at 15 U.S.C. § 45(a)(1)).

[36] *See* J. Howard Beales, *The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection* (May 30, 2003), https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection.

[37] 15 U.S.C. § 45(n).

[38] Dissenting Statement of Commissioner Noah Joshua Phillips Regarding Federal Trade Commission vs. Passport Automotive Group, Inc. et al., FTC File No. 2023199, at 2 (Oct. 14, 2022) ("Phillips Dissent").

disparate-treatment claims[39]—"disparate impact analysis is a critical tool to uncover hidden forms of discrimination under sector-specific laws like the Fair Housing Act and the Equal Credit Opportunity Act."[40] But sector-specific antidiscrimination laws are just that: sector-specific. They do not give the government free rein to root out disparate impact wherever such effects might be found. This same Commissioner then revealed the broader ambition behind this position, calling for the FTC to treat "many discriminatory practices [as] unfair" across "almost the entire economy."[41] This, he argued, would allow Section 5 to "serve as an important gap-filler to combat discrimination across the economy."[42] In other words, he proposed transforming a narrow tool grounded in discrete statutes into a sweeping, economy-wide mandate.

Other Commissioners soon put that theory into practice. In March 2022, the Commission settled a case with an auto dealer, with two Commissioners arguing that the Commission should have asserted a Section 5 "unfair discrimination" claim[43]—a count the four-member Commission deadlocked on. By October 2022, the Commission had five members and, in another auto-dealer settlement, a majority coalesced behind an unfair-discrimination theory for the first time.[44] Two Commissioners dissented from that count of the complaint because Section 5 does not permit such claims.[45] Former Commissioner Phillips, in particular, persuasively explained why this "novel interpretation of unfairness" could not be sustained.[46] He also observed that the inclusion of the unfair-discrimination count was entirely gratuitous because it did not address any conduct—nor permit any relief—beyond what the more conventional counts in the complaint already covered.[47]

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[39] *See, e.g.*, *Inclusive Cmtys. Project*, 576 U.S. at 524–25.

[40] Introductory Remarks of Commissioner Rohit Chopra, National Fair Housing Alliance 2020 National Conference, at 2 (Oct. 6, 2020) ("Chopra Speech").

[41] *Id.*

[42] *Id.*; *see also* Statement of Commissioner Rohit Chopra, In the Matter of Liberty Chevrolet, Inc. d/b/a Bronx Honda, File No. 1623238, at 1 (May 27, 2020) ("Given the difficulty of uncovering direct evidence of discriminatory intent, disparate impact analysis is critical for detecting potentially unlawful discrimination. With the proliferation of machine learning and predictive analytics, the FTC should make use of its unfairness authority to tackle discriminatory algorithms and practices in the economy.").

[43] Press Release, FTC, *FTC Takes Action Against Multistate Auto Dealer Napleton for Sneaking Illegal Junk Fees onto Bills and Discriminating Against Black Consumers* (Apr. 1, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-takes-action-against-multistate-auto-dealer-napleton-sneaking-illegal-junk-fees-bill; Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter In the Matter of Napleton Automotive Group, File No. 2023195, at 3–4 (Mar. 31, 2022).

[44] Press Release, 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.

[45] Phillips Dissent; Concurring and Dissenting Statement of Commissioner Christine S. Wilson, FTC v. Passport Automotive Group, Inc., et al., File No. 2023199, at 4 (Oct. 18, 2022).

[46] Phillips Dissent at 2–6.

[47] *Id.* at 2.

In other words, the inclusion of the unfair-discrimination count "accomplishe[d] nothing" and served no purpose—except to "announce to the world that the FTC had expanded its unfairness jurisdiction to include antidiscrimination."[48]

In August 2024, the Commission asserted a similar unfair-discrimination claim in *Coulter Motor Company*, another settled auto-dealer complaint.[49] This time, then-Commissioner Ferguson and former Commissioner Holyoak dissented from the inclusion of that count, endorsing the arguments previously made by former Commissioner Phillips as to why disparate-impact claims were not cognizable under Section 5 and adding further arguments to the same effect.[50] Former Commissioner Holyoak also noted that the inclusion of the count was once again "superfluous" because the count addressed "the same alleged conduct" as an ECOA count, and "provide[d] no additional relief."[51] Thus, the unfair-discrimination count did nothing to remedy unlawful discrimination, and served only to further "a broader vision to achieve economy-wide, equity-oriented regulation of conduct that historically was never proscribed by Section 5 of the FTC Act."[52]

Because parties to the *Coulter* matter also settled, no court has yet considered this novel theory of Section 5 unfairness. And that Commission majority's avoidance of judicial review appears to have been deliberate. The very next day, the Commission filed a similar complaint against another auto dealer, Asbury Automotive, which refused to settle and instead decided to litigate the case.[53] Although the factual allegations in the two cases were "substantively identical," the Commission did *not* include an unfair-discrimination claim in the *Asbury* complaint.[54] As then-Commissioner Ferguson explained: "The reader can do the math. The majority has advanced

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[48] *Id.* at 2–3.

[49] Press Release, FTC, *FTC, State of Arizona Take Action Against Coulter Motor Company for Deceptive Pricing and Discriminatory Practices* (Aug. 15, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/ftc-state-arizona-take-action-against-coulter-motor-company-deceptive-pricing-discriminatory. In the interim, the Commission had filed two more unadjudicated complaints asserting unfair-discrimination counts. Complaint, *FTC v. Rhinelander Auto Ctr., Inc., et al.*, No. 3:23-cv-737 (W.D. Wis. Oct. 24, 2023); Complaint, *FTC v. Floatme Corp., et al.*, No. 5:24-cv-00001 (W.D. Tex. Jan. 2, 2024). When those complaints were filed, the three Commissioners in the *Coulter* majority were the sole members of the Commission. In other words, unfair-discrimination claims have only been advanced on party-line votes. *See* Concurring Statement of Commissioner Andrew N. Ferguson, In re Asbury Automotive Group, Inc., et al., Matter No. 2223135, at 2 (Aug. 16, 2024) ("Ferguson Concurrence").

[50] Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson, Coulter Motor Company, LLC, Matter No. 2223033, at 7–8 (Aug. 15, 2024) ("Ferguson Dissent"); Dissenting and Concurring Statement of Commissioner Melissa Holyoak, Coulter Motor Company, LLC, Matter No. 2223033 (Aug. 15, 2024) ("Holyoak Dissent").

[51] Holyoak Dissent at 2.

[52] *Id.*

[53] Press Release, FTC, *FTC Takes Action Against Auto Dealer Group Asbury Automotive for Discriminating Against Black and Latino Consumers and Charging for Unwanted Add-Ons* (Aug. 16, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/08/ftc-takes-action-against-auto-dealer-group-asbury-automotive-discriminating-against-black-latino.

[54] Ferguson Concurrence at 1.

its novel theory in a case no court will decide but omitted it from a proceeding that could very well go to court. The only inference to draw is that the majority does not want a court to look under the hood of its new Section 5 theory."[55] This is no surprise: as discussed in more detail below, the theory has no basis in the text or history of Section 5, and the only court to consider a similar theory strongly rejected it.[56]

The provenance of the unfair-discrimination theory is recent, its implications are sweeping, its precedential support is nonexistent, and its substance—as discussed in detail below—is indefensible.

C. Disparate-impact claims under ECOA

ECOA prohibits creditors from discriminating against credit applicants on a variety of grounds (such as race, religion, age, and marital status).[57] There is no question that ECOA proscribes practices that intentionally discriminate on the basis of these protected characteristics (i.e., disparate treatment). There has been disagreement, however, as to whether ECOA also proscribes "disparate impact"—that is, policies that have disparate effects on different groups (even in the absence of any intentional discrimination).

The Commission has brought disparate-impact claims under ECOA in the past,[58] and some courts have endorsed such claims.[59] But as then-Commissioner Ferguson explained—and former Commissioner Holyoak agreed—there are grave reasons to doubt that ECOA permits disparate-impact claims.[60] Most importantly, in *Inclusive Communities Project*, the Supreme Court has set out a textual analysis that must be performed to assess whether an antidiscrimination statute creates disparate-impact liability. ECOA's text simply does not meet the test. And none of the judicial authorities endorsing disparate impact under ECOA have grappled with the issue. These points are discussed in greater detail below.

Recently, complaint counsel in a pending matter moved to amend the complaint to remove an ECOA discrimination count. The Commission unanimously granted the motion, and each of the Commissioners joined a statement explaining that (1) the Commission had "lack[ed] evidence to support a disparate-treatment claim under ECOA" and thus (2) "could proceed only on a disparate-impact theory in violation of Executive Order 14821."[61]

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[55] *Id.* at 2.

[56] *See Chamber of Com. of U.S. v. CFPB*, 691 F. Supp. 3d 730 (E.D. Tex. 2023).

[57] 15 U.S.C. § 1691 *et seq*.

[58] *See, e.g.*, Complaint, *FTC v. N. Am. Auto. Servs*., No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022).

[59] *See* Ferguson Dissent at 3–4 (collecting cases).

[60] *Id.* at 1–7; Holyoak Dissent at 2 n.12.

[61] Asbury Statement at 4.

Still more recently, the Department of Justice's Office of Legal Counsel ("OLC") issued an opinion concluding that "the best reading of ECOA is that it prohibits only intentional discrimination and does not provide for disparate-impact liability."[62] Similarly, the Consumer Financial Protection Bureau (which also has enforcement jurisdiction under ECOA) issued a new rule explaining its view that ECOA creates liability only for intentional discrimination.[63]

III. Analysis

A. The Commission Will No Longer Pursue Disparate-Impact Claims of Any Kind.

The Commission now adopts a policy against pursuing disparate-impact claims in any context. We rest this policy on two independently sufficient reasons. First, the FTC lacks the statutory authority to pursue disparate-impact claims. Second, such claims are inconsistent with the Constitution and with equality of opportunity, they impose unnecessary burdens on businesses and the public, and they are contrary to President Trump's executive order.

1. The Commission Lacks Statutory Authority to Pursue Disparate-Impact Claims.

The Commission will no longer bring disparate-impact claims, first, for the simple reason that Congress has not authorized the FTC to bring such claims. The only two potential candidates for such statutory authorization are Section 5 and ECOA. Neither one does the trick.[64]

<u>Section 5 of the FTC Act</u>

As recognized in recent statements by former Commissioners Phillips and Holyoak, and then-Commissioner Ferguson, it is pellucidly clear that Section 5 is not an antidiscrimination statute (let alone a disparate-impact statute).[65]

Start with the language of the statute, which is dispositive. Section 5 prohibits "unfair … acts or practices."[66] This is the language of consumer protection, *not* antidiscrimination.[67] When Congress wishes to ban discrimination, it says so explicitly, as it has done, for example, in the Civil Rights Act of 1964, Equal Pay Act of 1963, the Americans with Disabilities Act, and the

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[62] *Whether the Equal Credit Opportunity Act Creates Disparate-Impact Liability*, 50 Op. O.L.C. __, slip op. at *20 (June 12, 2026) ("O.L.C. Opinion").

[63] *See* Final Rule, Equal Credit Opportunity Act (Regulation B), 91 Fed. Reg. 21620, 21637 (Apr. 22, 2026) (explaining that "disparate-impact claims are not available ... under the best reading of ECOA").

[64] Even assuming arguendo that this question is debatable, it is at the very least *doubtful* whether the Commission has such statutory authority, and any further efforts to exercise it could well be rebuffed by courts. Accordingly, the Commission has concluded that its resources are better spent on pursuing claims that have stronger legal footing.

[65] *See* Phillips Dissent; Holyoak Dissent; Ferguson Dissent.

[66] 15 U.S.C. § 45(a)(1).

[67] *See Chamber of Com.*, 691 F. Supp. 3d at 743 (noting that "we typically think of discrimination as a separate problem from consumer protection" (cleaned up)).

Equal Credit Opportunity Act (which applies to the FTC and is as discussed below), all of which use the terms "discriminate" or "discrimination."[68]

But there's more. As then-Commissioner Ferguson observed, Section 5 is distinct from *every* antidiscrimination statute in that it "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."[69] Namely, Section 5 lacks any semblance of the most fundamental guardrails that one would expect to find—and does find—in every antidiscrimination statute.

Take these points one at a time. First, other antidiscrimination statutes identify a particular context in which discrimination is illegal—such as housing, employment, or credit.[70] Section 5, by contrast, is not limited to any particular sector (making one wonder why any of the later civil rights statutes were even necessary).[71] To be sure, some might view the protean nature of "unfair discrimination" as a feature rather than a bug. Recall that one former Commissioner argued that Section 5 could serve "an important gap-filler to combat discrimination across the economy."[72] But this argument makes little sense. A legislature would not enact a gap-filling statute many decades before creating the legal framework—the antidiscrimination laws—in which any "gaps" could appear. This argument is thus a policy aspiration unrelated to the text, structure, or history of Section 5.

Second, Section 5 says nothing about *which classes* are protected. For example, Title VII prohibits employment discrimination based on race, color, religion, sex or national origin; Title IX prohibits discrimination on the basis of sex; the Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against individuals aged 40 and over.[73] And this is no small matter for an antidiscrimination statute; it is in fact one of the most important political choices Congress makes when it writes these laws. For example, Title VII of the Civil Rights Act of 1964 prohibits discrimination by public and private employers on the basis of religion.[74] When those same employers use federal funds to operate their programs, however, Title VI of the same law does not forbid religious discrimination in the operation of those programs.[75] And when Congress

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[68] Phillips Dissent at 3 (citing Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-325, the Equal Pay Act of 1963, Pub. L. No. 88-38, and the Americans with Disabilities Act, 42 U.S.C. § 12101).

[69] Ferguson Dissent at 7.

[70] Phillips Dissent at 3 (citing the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101, and ECOA, 15 U.S.C. § 1691 *et seq.*).

[71] *See* Ferguson Dissent at 7–8 (raising this question).

[72] Chopra Speech at 2.

[73] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-325; Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

[74] 42 U.S.C. § 2000e-2(a).

[75] *Id.* § 2000d; *Bhombal v. Irving Indep. Sch. Dist.*, 809 F. App'x 233, 237 (5th Cir. 2020) ("Title VI does not authorize claims for religious discrimination.").

has determined that an antidiscrimination law is too narrow, it has amended the law to expand its scope, including by listing additional protected classes.[76] Congress thus carefully and precisely chooses which classes are covered for any particular type of antidiscrimination law. But Section 5—if the "unfair discrimination" theorists are to be believed—prohibits all "discrimination" writ large, and the particulars of the classes of persons protected and the types of discrimination prohibited can be worked out later. That will not do.

Third, Section 5 says nothing about what *type* of discriminatory acts or practices are prohibited or when such acts or practices might be justified. On the former point, Section 5 of course has nothing at all to say about whether "unfair discrimination" is limited to disparate treatment or—as the Commission has previously insisted—it extends to disparate impact as well.[77] And assuming it does encompass disparate impact, Section 5's text does not contain a clear framework for justifying the purportedly discriminatory practice. It does not, for example, establish a burden-shifting framework that would require the FTC to show that a less discriminatory alternative was available that could serve the defendant's legitimate need.[78] Instead, it could potentially be read to prohibit practices that cause a disparate impact simply because their benefits purportedly do not outweigh their costs—even if the practice serves a legitimate end and there is no less restrictive alternative.[79]

In short, it is apparent from Section 5's language that the provision creates no "unfair discrimination" cause of action. Indeed, Section 5 lacks *every* basic feature of an antidiscrimination statute.

Moreover, contorting the statutory language to allow for antidiscrimination claims would create a statute of astonishing and unprecedented breadth. Because it is not limited by sector, it could sweep across virtually the entire economy; because it does not identify a set list of protected classes, it could ultimately prohibit discrimination across any number of dimensions; and because it does not describe what types of discrimination are prohibited, or specify how they must be justified, it could be interpreted to impose breathtakingly broad disparate-impact protections.

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[76] *See, e.g.*, Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239, § 2, 90 Stat. 251, 251–52 (1976) (adding "race, color, religion, national origin, ... [and] age" as protected characteristics under ECOA); David H. Carpenter, Cong. Rsch. Serv., R48113, *The Fair Housing Act (FHA): A Legal Overview*, at 1 (June 27, 2024), https://www.congress.gov/crs_external_products/R/PDF/R48113/R48113.1.pdf (explaining that Congress amended the Fair Housing Act in 1974 "to add sex discrimination to the list of prohibited activities" and amended the Act again in 1988 "to prohibit discrimination on the additional grounds of physical and mental disability, as well as familial status").

[77] Note that, as Commissioner Phillips has explained, that conclusion was clearly misguided in light of the textual test set out in *Inclusive Communities Project*. Phillips Dissent at 4.

[78] *Id.* at 4–5 (discussing this framework in the context of the Fair Housing Act).

[79] *Id.*; *see also Inclusive Cmtys. Project*, 576 U.S. at 533 ("[B]efore rejecting a business justification … a court must determine that a plaintiff has shown that there is an available alternative practice that has less disparate impact and serves the entity's legitimate needs." (cleaned up)).

The Commission majorities' own understanding of unfair discrimination in *Coulter* and *Passport Automotive* is a case in point. The majorities in those cases adopted an understanding of disparate impact that was remarkably broad in at least two respects.

First, as former Commissioners Holyoak and Phillips recognized, the majorities had to contend with a basic textual mismatch between Section 5 and disparate-impact liability.[80] Section 5 requires an unfair act or practice. But a disparate-impact claim involves a policy which may itself be entirely neutral, and therefore could not be easily characterized as unfair. The majorities in *Coulter* and *Passport Automotive* evaded this problem by simply collapsing two distinct parts of the analysis and treating the disparate impact—the different costs allegedly paid, on average, by different groups—as also the unfair practice itself. In so doing, the majorities effectively dodged their obligation—under both Section 5 and conventional disparate-impact analysis—to identify an objectionable underlying practice. As the Supreme Court has explained, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[81] But the *Coulter* and *Passport Automotive* majorities were undeterred.

Second, and relatedly, those majorities sought to make it extremely difficult—perhaps virtually impossible—to justify any practice that causes a disparate impact. Now cleaving closely to a portion of the statutory text, they insisted that there were only three ways that the disparate pricing could be justified.[82] First, a defendant could argue that the group that paid the higher prices on average did not suffer a substantial economic injury. This showing would presumably be difficult to make any time a meaningful disparate impact was identified. Second, a defendant could argue that the consumer could reasonably have avoided this injury. Presumably, this would rarely if ever be the case because the consumer is unlikely even to be aware of the disparate impact (let alone be in a position to change the seller's behavior). Finally, a defendant could argue that the benefits of the practice at issue outweighed the costs. But recall that the "practice" identified by the *Coulter* and *Passport Automotive* majorities was simply the disparate impact itself. And it is hard to imagine how disparate impact in and of itself—rather than the underlying policy that causes it—could have an offsetting benefit.

To sum up, the theory of disparate-impact liability under Section 5 that the Commission adopted in *Passport Automotive* and *Coulter* would allow the Commission to seek out and punish

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[80] Holyoak Dissent at 5 n.29; Phillips Dissent at 5.

[81] *Inclusive Cmtys. Project*, 576 U.S. at 542.

[82] Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya, In the Matter of Passport Auto Group, Matter No. 2023199, at 1–2 (Oct. 18, 2002); Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya, Coulter Motor Company, LLC, Matter No. 2223033, at 3–4 (Aug. 15, 2024) ("Joint Statement").

virtually any statistical disparity that it disliked.[83] And because the defendant may not have access to the sophisticated statistical tools the Commission used to identify the purported disparities in *Passport Automotive* and *Coulter*, the defendant may not even be in a position to know whether it is guilty of unlawful discrimination.[84] This is an unsettling prospect as a practical matter, but it also further undercuts the "unfair discrimination" interpretation of Section 5 as a textual matter.

For one thing, courts are deeply skeptical when an agency "claim[s] to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority."[85] This situation fits that description to a T. As then-Commissioner Ferguson put it, the unfair-discrimination theory of Section 5 "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."[86]

More broadly, "[e]xtraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms or subtle devices."[87] Courts "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies."[88] Accordingly, a "merely plausible textual basis" is not enough to sustain such an assertion of agency power; only "clear congressional authorization" will suffice.[89] And this is especially true when an agency asserts an authority that would "significantly alter the balance between federal and state power" or "the power of the Government over private property."[90] Such an authority can only be granted by Congress with "exceedingly clear language."[91]

These principles are fully applicable here. In its decisions treating Section 5 as an anti-discrimination statute, the Commission has asserted a truly extraordinary power: to fill in the gaps

[83] *But see Inclusive Cmtys. Project*, 576 U.S. at 540 (noting that "serious constitutional questions … might arise … if [disparate-impact] liability were imposed based solely on a showing of a statistical disparity"); *id.* at 451 ("An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies …. As the Court explained in *Ricci*, an entity could be liable for disparate-impact discrimination only if the challenged practices were not job related and consistent with business necessity." (cleaned up)).

[84] Holyoak Dissent at 8; *see Inclusive Cmtys. Project*, 576 U.S. at 533 ("These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.").

[85] *West Virginia v. EPA*, 597 U.S. 697, 738 (2022) (cleaned up).

[86] Ferguson Dissent at 7; *see also* Holyoak Dissent at 6 (noting that proponents of the theory would have to "convince a court that when Congress granted [the FTC] 'unfair or deceptive acts or practices' enforcement authority in 1938, Congress authorized the Commission to act as a civil rights enforcer across the entire economy.").

[87] *West Virginia*, 597 U.S. at 723 (cleaned up).

[88] *Id.* (cleaned up).

[89] *Id.* (cleaned up).

[90] *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 622 (2020)).

[91] *Id.*

among—that is, obliterate the congressionally imposed limitations on—*all* existing antidiscrimination statutes. And this extraordinary power would profoundly shift the federal-state balance by displacing a great many decisions made by States "about what classes are protected or not, what conduct is prohibited or allowed, and what defenses and remedies are available or not."[92]

If Congress wished to give the FTC the power to pursue unfair-discrimination claims, it would have said so explicitly as it has every other time it prohibited discrimination. But as explained above, Section 5 does not grant the FTC such a power at all, let alone clearly. The "unfair discrimination" reading of Section 5 must therefore be rejected.

Finally, this conclusion is reinforced by a district court decision that considered a virtually identical theory advanced by the CFPB, which sought to bring disparate-impact claims based on statutory unfairness language that was modeled after, and functionally identical to, the language in Section 5 of the FTC Act.[93] The district court firmly rejected CFPB's position, for reasons that apply straightforwardly to Section 5, and largely echo the points made above. In particular, the Court observed that: (1) in light of the extraordinary assertion of agency power at issue, the statutory language would have to be quite clear;[94] (2) Congress "knew how to clearly add nondiscrimination to the CFPB's portfolio when it meant to do so," for example by granting the CFPB the power to enforce ECOA[95] (which Congress has granted to the FTC as well)[96]; and (3) the statutory language made no mention of discrimination, protected classes, or disparate-impact standards (just as Section 5 does not).[97] Ultimately, just like the CFPB, the FTC would "face[] a high burden in arguing that Congress conferred a sweeping antidiscrimination authority without defining protected classes or defenses, without using the words 'discrimination' or 'disparate impact,' and while separately giving the agency authority to police 'discrimination' only in specific areas."[98] Just like the CFPB, the FTC also could not meet that high burden. And for the reasons put forth here, there is good reason to believe that other federal courts reviewing such a theory would come out the same way.

One thing is clear, the "unfair discrimination" theory is foreclosed as a legal matter. And the theory's proponents know it. As noted above, the former Commissioners who advanced this theory always made sure to avoid judicial review. But eventually courts will have their say. The *CFPB* decision illustrates that they are not likely to look upon the theory favorably. And more broadly, aggressive and unfounded assertions of agency power risk a political backlash that might

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[92] *Chamber of Com.*, 691 F. Supp. 3d at 740–41.

[93] *Id.* at 742; *see* 12 U.S.C. §§ 5531(c), 5536(a)(1)(B); Holyoak Dissent 4–6.

[94] *Chamber of Com.*, 691 F. Supp. 3d at 740–41.

[95] *Id.* at 741–42; *see* 15 U.S.C. 1691; *see also* 12 U.S.C. § 5493(c)(2)(A).

[96] 15 U.S.C. § 1691c(c).

[97] *Chamber of Com.*, 691 F. Supp. 3d at 742.

[98] *Id.* at 741.

compromise the Commission's other important work on behalf of Americans.[99] As former Commissioner Holyoak observed, "[t]he FTC has strayed before in its use of its unfairness authority," and "[t]hat exercise in legislation ended poorly."[100]

To sum up, Section 5 does not authorize "unfair discrimination" claims of any stripe. It therefore cannot support the assertion of any disparate-impact claims by the FTC.

Equal Credit Opportunity Act

We reach the same conclusion about disparate-impact claims under ECOA. To be sure, unlike Section 5, ECOA actually is an antidiscrimination statute. But, as OLC recently concluded, ECOA "create[s] liability only for intentional discrimination."[101]

In *Inclusive Communities Project*, the Supreme Court articulated a textual test for determining whether an antidiscrimination statute allows for disparate-impact liability. The Court explained that "antidiscrimination laws … 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."[102] Accordingly, the Supreme Court held that the Fair Housing Act imposed disparate-impact liability because it prohibited policies that would "otherwise make unavailable" a dwelling on the basis of a protected status, which demonstrated Congress's intention to address "the consequence of [the policy] rather than the actor's intent."[103] Similarly, the Court had previously relied on Title VII's language proscribing practices that "*otherwise adversely affect* [an individual's] status as an employee, because of [the individual's protected status]" to conclude that Title VII supported disparate-impact claims.[104]

As OLC has explained, ECOA does not satisfy the *Inclusive Communities Project* test and therefore does not give rise to disparate-impact liability. To begin, ECOA contains no language indicating a focus on *consequences* of actions rather than a discriminatory mindset. "The conclusion that ECOA does not create liability for disparate impacts is confirmed by the statute's complete lack of 'results-oriented' language."[105] Moreover, ECOA's focus "on intent" also "rul[es]

[99] Holyoak Dissent at 6–8.

[100] *Id.* at 8 (citing Beales, *supra* note 36).

[101] O.L.C. Opinion at *1 ("Under the plain meaning of ECOA's text and the analysis required by current Supreme Court precedent, ECOA creates liability only for intentional discrimination. Of course, disparate impacts may sometimes suggest intentional discrimination. But even then, it is always the intentional discrimination—not the disparate impact itself—that gives rise to ECOA liability." (internal citations omitted)).

[102] *Inclusive Cmtys. Project*, 576 U.S. at 533.

[103] *Id.* at 533–34; *see* Ferguson Dissent at 2–3 (discussing *Inclusive Cmtys. Project*).

[104] *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985 (1988) (emphasis added) (quoting 42 U.S.C. § 2000e-2(a)(2) (1982)); *see Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) (plurality op.) ("While our opinion in *Griggs* [*v. Duke Power Co.*, 401 U.S. 424 (1971)] relied primarily on the purposes of [Title VII], … we have subsequently noted that our holding represented the better reading of the statutory text as well." (citing *Watson*, 487 U.S. at 991)).

[105] O.L.C. Opinion at *9 (quoting *Inclusive Cmtys. Project*, 576 U.S. at 534).

out the possibility of disparate impact liability."[106] ECOA provides that "[i]t shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction … on the basis of [membership in a protected class]."[107] By using "causal language ... to link the term 'discriminate' with various protected characteristics" specified by statute, Congress confirmed that ECOA "requires the intent generally implicit in the concept of discrimination."[108] Reading "disparate-impact liability" into ECOA would erase the statute's causation and intent requirements.[109] As even a commentator who supports disparate-impact liability under ECOA has acknowledged, "*Inclusive Communities*' textual analysis does not support ECOA disparate impact claims."[110]

Ultimately, ECOA fails the *Inclusive Communities Project* test because it lacks results-oriented language. And while *Inclusive Communities Project* also "looked to three indicators of statutory purpose—statutory structure, statutory history, and legislative history"[111]—none of those factors move the needle here.

First, statutory structure—namely, ECOA's enumerated exceptions to liability—"provide[s] no support for the idea that ECOA creates disparate-impact liability."[112] Importantly, ECOA lacks the safe harbors against disparate-impact liability that exist in other statutes where the Supreme Court has found disparate-impact liability, indicating that Congress "did not contemplate such liability" under ECOA.[113] And each of the exemptions ECOA does provide "is compatible with the understanding that the statute creates liability only for intentional discrimination."[114]

Second, statutory history "also gives no indication that ECOA is intended to hold creditors liable for discrimination when they act without discriminatory intent."[115] In *Inclusive Communities Project*, the Court found that disparate-impact liability was supported by legislative amendments that effectively ratified longstanding, settled interpretations of the statute at issue.[116] "But when Congress amended ECOA in 2010, there was no settled interpretation of the statute for

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[106] *Id.* at *6.

[107] 15 U.S.C. § 1691(a).

[108] O.L.C. Opinion at *7.

[109] *Id.* at *7–8.

[110] Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J.L. & Pol'y, 575, 627 (2018).

[111] O.L.C. Opinion at *12.

[112] *Id.*

[113] *Id.*

[114] *Id.* at *15.

[115] *Id.*

[116] 576 U.S. at 535–36.

Congress to ratify," and thus the amendment provides no support for imposing disparate-impact liability.[117]

Finally, ECOA's legislative history does not change the analysis. The Supreme Court has repeatedly made clear that the lodestar of statutory interpretation is the statutory text.[118] The primary inquiry under *Inclusive Communities Project* is therefore a textual one. At any rate, even if one were inclined to consider legislative history at all, it is uninformative here. In particular, while some legislative history from the 1976 amendments to ECOA could be read to suggest the availability of disparate-impact liability,[119] it is of dubious value. After all, the basic ECOA prohibition of "discriminat[ion] against any applicant on the basis of [a set of protected characteristics]" was adopted when Congress passed ECOA in 1974, and was reenacted without change in the 1976 amendments.[120] Those amendments added several categories of prohibited discrimination but did not change that key language.[121] Legislative history from 1976 is of limited value (at best) in assessing what a different Congress had done when it originally adopted the relevant text in 1974, and such legislative gloss certainly cannot change the meaning of ECOA's preexisting mandate.[122] This is why OLC concluded "the legislative record contains no evidence of a congressional intent to impose disparate-impact liability."[123]

Despite the lack of support in ECOA (or even in its legislative history), some district courts have held that disparate-impact claims are cognizable under ECOA.[124] But district court holdings do not bind anyone outside of the specific parties, in the specific context of that case or controversy.[125] And no appellate court has gone so far.[126] Moreover, it appears that "no court has

[117] O.L.C. Opinion at *16.

[118] *E.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (cleaned up)).

[119] *See* S. Rep. No. 94-589, at 4–5 (1976).

[120] Pub. L. No. 93-495, § 503, 88 Stat. 1521, 1521 (1974).

[121] Pub. L. No. 94-239, § 2, 90 Stat. 251, 251–52 (1976); *see* Report Prepared by the Republican Staff of the Committee on Financial Services, U.S. House of Representatives, *Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending* at 9–10 (Nov. 24, 2015), https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf (discussing the legislative history).

[122] *See, e.g.*, *Jones v. United States*, 526 U.S. 227, 238 (1999) (explaining "that subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" (cleaned up)); *see also* O.L.C. Opinion at *18.

[123] O.L.C. Opinion at *17.

[124] Ferguson Dissent at 5.

[125] *Id.* at 5–6; *see id.* at 6 (explaining that "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" but that "[d]istrict court opinions do not bind anyone, including the district judges who wrote them").

[126] O.L.C. Opinion at *16 n.9.

considered whether ECOA permits disparate-impact claims under the framework prescribed by *Inclusive Communities*."[127] Nonbinding lower court decisions that either pre-date or fail to apply *Inclusive Communities Project* provide no basis to misread ECOA.

That the CFPB and Federal Reserve had previously promulgated regulations interpreting ECOA's legislative history to permit disparate-impact claims[128] has no effect on the analysis either. The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*[129] renders agencies' opinion on the matter of little value. In any event, the CFPB has now abandoned prior regulations interpreting ECOA to authorize disparate-impact claims,[130] and the Federal Reserve's views are of limited relevance, as its regulatory authority under ECOA was transferred in large part to the CFPB.[131]

All told, "the best reading of ECOA is that it prohibits intentional discrimination and does not provide for disparate-impact liability."[132]

2. Disparate-Impact Liability Suffers from Fundamental Legal and Policy Defects, as President Trump's Executive Order Explains.

As noted above, President Trump's executive order directs the FTC to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability."[133] Chairman Ferguson and Commissioner Meador have already made clear that they "embrace the President's Executive Order wholeheartedly and will take the necessary steps to implement this policy."[134] The FTC is actually required by applicable law to forgo disparate-impact claims, as already discussed, because the FTC lacks any statutory authority to pursue such claims. But, even were that not the case, certainly no source of law requires the FTC to assert claims on the outer bounds of its authority. Accordingly, as directed by the order, the FTC will no longer bring

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[127] *Id.*; *see* Ferguson Dissent at 5.

[128] *See* 12 C.F.R. § 1002.6(a) ("The legislative history of [ECOA] indicates that the Congress intended an 'effects test' concept, as outlined in the employment field by the Supreme Court … to be applicable to a creditor's determination of creditworthiness."); *id.* § 202.6(a) n.1 (same).

[129] 603 U.S. 369 (2024).

[130] Final Rule, Equal Credit Opportunity Act (Regulation B), 91 Fed. Reg. 21620, 21629 (Apr. 22, 2026) ("As a result, the Bureau is deleting language in § 1002.6(a) and its accompanying commentary indicating that disparate-impact liability, which is referred to in the rule as the 'effects test,' may be applicable under ECOA, and adding language stating that the Act does not recognize the 'effects test.' The Bureau is also deleting the language in comment 2(p)–4 referring to the 'effects test.'").

[131] *See* 12 U.S.C. § 5581(b)(1) (transferring authority from the Federal Reserve Board to CFPB).

[132] O.L.C. Opinion at *20.

[133] Disparate Impact Order §§ 4, 9.

[134] Asbury Statement at 4.

disparate-impact claims,[135] and will instead focus on other enforcement priorities that do not conflict with the policy of the United States.

Even aside from the dubious legality of disparate-impact liability and the executive order's direction, there are sound reasons to abandon that theory of liability. As explained in President Trump's executive order, disparate-impact liability is corrosive, unlawful, and un-American.

The Commission wholly agrees with President Trump that equality of opportunity, colorblindness, and meritocracy are fundamental American ideals which are indispensable to securing equal treatment under the law.[136] Disparate-impact liability, by contrast, virtually compels regulated entities to engage in racial balancing (and other forms of balancing based on protected characteristics). In doing so, it violates the equal protection guarantee of the Constitution, runs contrary to the civil rights legislation, and harms businesses and the public by preventing businesses from making merit-based decisions. For example, OLC recently explained that Title VII disparate-impact liability as embodied in certain guidelines from the Equal Employment Opportunity Commission is unconstitutional, and it identified three principles that could "prevent a constitutional collision under current Supreme Court precedent": (1) "the business-necessity defense to liability must provide defendants significant 'leeway to state and explain the valid interests served by their policies,'" (2) "any disparate-impact claim must satisfy a robust causality requirement," and (3) "the plaintiff must offer a viable alternative to the challenged practice that accomplishes the employer's legitimate goals 'just as well.'"[137]

The form of disparate-impact liability that has recently been pursued by the Commission under the label of "unfair discrimination" utilizes none of those limiting principles. Indeed, the applications of disparate-impact liability that the Commission previously contemplated were particularly indefensible. As described above, reading disparate impact into Section 5 potentially turns that provision into the broadest antidiscrimination law in history, with no limit on the number of protected classes, no delineation of prohibited practices, and no meaningful parallel to the business necessity defense (which, as noted, is itself inadequate).

The FTC declines to take part in this pernicious racial shell game any longer.

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To sum up: The Commission lacks statutory authority to pursue disparate-impact claims under any statute it enforces; such claims are pernicious and contrary to fundamental constitutional values; and they are inconsistent with President Trump's order to the federal government to

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[135] *See* Disparate Impact Order § 2; Asbury Statement at 4 (recognizing that pursuing a disparate-impact claim under ECOA would violate the Executive Order).

[136] Disparate Impact Order § 1; Asbury Statement at 2–4.

[137] *Constitutionality of Disparate-Impact Liability Under Title VII*, 50 O.L.C. __, slip op. at *2, *14–18 (June 9, 2026) (first quoting *Inclusive Cmtys. Project*, 576 U.S. at 541; then quoting *Louisiana v. Callais*, 146 S. Ct. 1131, 1159 (2026)).

deprioritize such claims. In light of these mutually reinforcing considerations, the Commission will no longer assert disparate-impact claims in any context.

B. The Commission Will No Longer Pursue Any Antidiscrimination Claims Under Its Section 5 Unfairness Authority.

The Commission also adopts a policy against pursuing any antidiscrimination claims under Section 5. As explained in detail above, Section 5 is not an antidiscrimination statute and does not authorize the Commission to bring any antidiscrimination claims. A party challenging such a claim in court would, and should, prevail. Going forward, the Commission will abide by this limitation in its statutory authority. It will pursue discrimination claims in appropriate contexts—for example, it will continue to assert disparate-treatment claims under ECOA—but it will treat Section 5 as the consumer-protection statute it has always been.