Office of Commissioner
Noah Joshua Phillips

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

From August 2017 to August 2020, Black consumers were charged, on average, $291 more in interest and Latino consumers were charged, on average, $235 more in interest than similarly situated non-Latino White consumers.

The complaint also alleges that Passport's practice of adding extra inspection, reconditioning, vehicle preparation, and certification fees resulted in Black and Latino consumers being charged these fees more frequently, and in higher amounts, than non-Latino White consumers.

The Equal Credit Opportunity Act (ECOA) prohibits creditors from discriminating against an applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, or because of receipt of public assistance.[3] Per the complaint, Passport's discretionary markup policy imposed higher costs on Black and Latino consumers in violation of ECOA.[4]

The complaint also alleges that the higher costs Passport imposed on Black and Latino consumers caused substantial injury to those consumers, were not reasonably avoidable by them, and were not outweighed by any benefits to consumers and competition, and therefore Passport's conduct was unfair. This is the first case in which the Commission has alleged that the disparate impact of business conduct is unfair in violation of Section 5.

I have no quarrel with Counts I and II, nor Count IV's allegation that Passport's discretionary markup policy violated ECOA.[5] I would have voted in favor of a complaint limited to those complaint counts.[6]

I cannot support Count III and its novel interpretation of unfairness.

As a threshold matter, Count III is entirely gratuitous. First, it condemns conduct that is already covered by Count IV. Second, Count III is not necessary for the injunctive relief being sought, and does not allow the Commission to obtain monetary redress for harmed consumers or a civil penalty. Count III accomplishes nothing in this case. The sole reason for its inclusion is to announce to the world that the FTC has expa

such discrimination exists, that is pernicious, and that it must stop. As a nation, we are better off because of the exercise of that judgment. But Section 5 has no such definition; and, under the theory of Count III, it will be up for the Commission to decide.

A third matter. Antidiscrimination law has developed two theories of proving discrimination: disparate treatment and disparate impact. Disparate treatment occurs when some individuals are treated differently than similarly situated individuals based on a protected characteristic (e.g., women are not eligible for a job). Disparate impact occurs when a neutral policy has the effect of disproportionately excluding members of a protected class (e.g., a height requirement for getting a job has the effect of fewer women being hired). Disparate impact is not cognizable under every antidiscrimination statute. The Supreme Court has held that "antidiscrimination laws must be construed to encompass disparate impact claims when their text refers to the consequences of actions and not just the mindset of actors, and where that interpretation is consistent with the statutory purpose."[17]

In this case, the Commission is considering not only that Section 5 is an antidiscrimination statute, but also that liability can be predicated upon the disparate impact of conduct. This interpretation of Section 5 fails the Court's test and would give the Commission the authority to go far beyond the antidiscrimination laws on the books.

Section 5 does not mention discrimination. It does not identify protected classes, the bases on which discrimination is impermissible. Section 5 does not identify any context where Congress has determined discrimination exists and must be rooted out. And it gives enforcers and courts no guidance whether liability may be predicated on the disparate impact (on, again, any basis) of a business practice alone. One obvious takeaway from all of this is that Section 5 is not an antidiscrimination statute. No beak, no feathers, no walk, no quack – Section 5 is a terrific consumer protection tool, but it is no duck.

But if it were, Section 5 would be an odd duck indeed. To establish liability under the Fair Housing Act using a disparate impact theory, for example, a plaintiff must show that a facially neutral policy has resulted in a disparate impact, at which point the burden shifts to the defendant to provide a legitimate need for the policy. The burden then shifts back to the plaintiff to show that a less discriminatory alternative was available and serves the defendant's legitimate need.[18] A defendant will not be liable for a disparate impact if there was a valid justification and no less discriminatory alternative. That is not how Section 5 works. Unfairness requires that the costs of a business practice outweigh its benefits. That leaves open the possibility that the Commission could determine that a business practice that was legitimate and for which there was no less restrictive alternative was nonetheless illegal discrimination under Section 5 because, in our view, the benefits of the conduct didn't justify the discrimination. Put differently, the theory of

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credit and bars discrimination "with respect to any aspect of a credit transaction" on the basis of race, color, religion, national origin, sex, marital status, age, or because of receipt of public assistance.

[17] Texas Dep't of Hous. & Comty. Affs. v. Inclusive Communities Project, Inc., 576 US 519, 534 (2015).

[18] Id. (adopting this three-step burden-shifting test for disparate-impact under the Fair Housing Act).

Count III would allow the Commission to condemn conduct covered by antidiscrimination laws but permitted by them.

If the FTC Act is an antidiscrimination statute encompassing disparate impact liability untethered to protected classes or context, then the Commission has the power to declare a great many legal things illegal. For example, a dating service that allows users to specify a preference for potential partners with a particular gender, religion, race, or national origin, resulting in fewer matches for some classes of users.[19] Or a music streaming service that uses an algorithm that recommends more male artists than female artists to its users.[20] It sounds silly to suggest that the FTC would make a federal case over Spotify recommending Ed Sheeran more often than Taylor Swift, but such a suit would be possible under the majority's view of unfairness. Businesses trying to follow the law will have to wait and see what the Commission chooses to condemn.

On a more practical note, this pleading also fails as a matter of Section 5. Disparate impact liability examines the impact of business conduct. A defendant does something, and that thing has a disparate impact. In this case, we apply the Section 5 unfairness test as if the disparate impact were the conduct itself. So, we look only to the disparate impact for the substantial injury and then again, and only, to the impact in weighing the costs and benefits of the conduct. That analysis mistakes the impact for the conduct, effectively conflating two separate parts of the Section 5 analysis.

Some have argued that Section 5 unfairness can be a "gap filler" for where antidiscrimination law does not apply.[21] They maintain that discrimination falls cleanly within the scope of unfairness, and point to the fact that the Commission can consider public policy in evaluating whether conduct is unfair to bolster their argument. This misinterprets the history of Section 5. In 1938, Congress amended the FTC Act to give the Commission the ability to protect consumers from "unfair or deceptive acts or practices."[22] "Unfair" is an elastic term, and it went undefined for decades. During the 1960s and 70s, the Commission used the flexibility in the language with increasing breadth until its ambitions met with resistance from Congress and the public.[23] Congress shut down the agency.[24] In 1980, the Commission issued its Unfairness Policy

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[19] Christian Gollayan, Dating apps promote racial discrimination: study, N.Y. POST (Oct. 3, 2018), https://nypost.com/2018/10/03/dating-apps-promote-racial-discrimination-study/

[20] Andres Ferraro, Xavier Serra, & Christine Bauer, Break the Loop: Gender Imbalance in Music Recommenders, CHIIR '21: Proceedings of the 2021 Conference on Human Information Interaction and Retrieval, 249-254 (Mar. 14, 2021), https://dl.acm.org/doi/10.1145/3406522.3446033

[21] Stephen Hayes and Kali Schellenberg, Discrimination is "Unfair" Interpreting UDA(A)P to Prohibit Discrimination, Student Borrower Protection Center (Apr. 2021), https://protectborrowers.org/discrimination-is-unfair-interpreting-udaap-to-prohibit-discrimination/.

[22] Wheeler-Lea Amendment, Pub. L. No. 75-447, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. 45(a)(1)).

[23] See, e.g., J. Howard Beales III, The Federal Trade Commission's Use of Unfairness Authority: Its Rise, Fall, and Resurrection, 22 J. PUB. POL'Y & MKTG. 192 (2003); Ernest Gellhorn, The Wages of Zealotry: The FTC Under Siege, 4 REGULATION 33 (1980).

[24] See, Merrill Brown, FTC Temporarily Closed in Budget Dispute, WASH. POST (May 1, 1980), https://www.washingtonpost.com/archive/business/1980/05/01/ftc-temporarily-closed-in-budget-dispute/5c63ef5d-4e28-471d-8f9c-014d4d28d360/.