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

Office of

[1] by making various misrepresentations about fees, add-ons, and payment authorizations in the course of selling cars to consumers. I concur in those claims because I have reason to believe that the allegations contained in the complaint are true and state a violation

believes it broke the law and wishes to rectify that violation without the expense of litigation.[13] But many firms settle even if they honestly believe they did nothing wrong and that they would prevail in litigation. Those firms reasonably conclude that a swift end to the Commission's investigation or threatened enforcement advances their interests more than a litigation victory. A settlement extracted from an innocent party reveals much about the Commission's power, but nothing about the law.

Second, the overtness with which the majority dodges judicial review frustrates Congress's design of Section 5 and damages the Commission's legitimacy. Congress did not give the Commission the power to decide on its own which practices were unfair. Our role is to issue a complaint if we have reason to believe conduct is unfair, and then either determine in our own administrative proceedings whether the conduct is in fact unfair or else support our complaint in an Article III district court with evidence and argument. Both types of proceedings are subject to review by the U.S. Courts of Appeals.[14] A court thus ultimately decides whether the Commission is correct that conduct is unfair. We are entitled to "some deference"[15] on that question, at least when our "conclusion" is "based … upon clear, specific, and comprehensive findings supported by evidence."[16] But "the definition of 'unfairness' is ultimately one for judicial determination."[17] Judicial review is critical to Congress's design of the FTC Act because it is the only way to "give assurance that the action of the Commission is taken within its statutory authority."[18] Dodging judicial review, as the Commission does today, shortchanges Congress's carefully structured process. The public rightly should doubt the legitimacy of any theory of unfairness that the majority is so desperate to shield from judicial review.

Finally, this practice generates perverse incentives. The majority has pushed its novel discrimination theory only in unadjudicated complaints and omitted it from complaints alleging substantively identical conduct that might make their way into court. But it continues to rely on

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[13] This reveals nothing about the law. The settlement embodies the untested beliefs of a majority of the Commission and the settling firm.

[14] See *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 180–81 (2023); *cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935) ("What are 'unfair methods of competition' are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. To make this possible, Congress set up a special procedure. A commission, a quasi judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority." (internal citations omitted)).

[15] *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

[16] *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934).

[17] Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980), appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1072 n.6 (1984); *Ind. Fed'n of Dentists*, 476 U.S. at 454 ("The legal issues presented—that is, the identification of governing legal standards and their application to8 (tio(d)-7 (a)64h)-7 (e2e 71 (6))]6 o4vt70.00 (4)-12 (54)]TJ0.006 Tw 2.265 0 365 0 9.3 (r)-5..747 0 Td(—r)676

the untested theory as grounds to enforce Section 5—and therefore as grounds to coerce regulated firms into compliance. The majority thus creates for itself an endlessly recursive legal loop. It develops a novel legal theory to accuse a firm of misconduct; the firm does not resist the accusation, content to settle so that the Commission goes away; the majority then treats the accusation as "the law"; and the majority enforces the accusation-cum-law in future cases. Eventually, in one of these future settlement complaints, the majority may add a new aggressive theory on some other issue, which once again will go unchallenged. The cycle begins anew, and no court gets a say. The rule of law demands more than this bureaucratic chicanery.

That a firm may break this cycle by litigating is no answer to my objection. For most small businesses—and many large ones—a Commission investigation is costly. Lawyers are expensive, and investigations sometimes last for years. Litigation may take many years more. The mere risk of a Commission investigation is coercive and can be enough to force some businesses to yield. In