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 general managers. The Commission accuses them of making various misrepresentations—including about fees, add-ons, and payment authorizations—in the course of selling cars to consumers. I concur in charging these counts without qualification. The Commission also accuses the defendants of discriminatory practices in violation of the Equal Credit Opportunity Act (ECOA)[1] and Section 5 of the FTC Act.[2] I concur with some reservation in the ECOA claim, but dissent from the Section 5 claim.

I

The Complaint pleads both disparate-treatment and disparate-impact theories of liability under Section 701(a)(1) of ECOA.[3] There is no doubt that ECOA prohibits intentional discrimination. But the complaint also alleges that the Defendants implemented an unlawful practice or policy that disparately impacted Latino customers in violation of ECOA. I concur in charging this count because the Commission and the courts have previously applied disparate-impact theories in ECOA cases. My support of this count should not, however, be interpreted as agreement that disparate-impact claims are in fact cognizable under ECOA. Indeed, I have reservations about whether ECOA, properly interpreted in light of recent Supreme Court decisions, imposes disparate-impact liability.

As a general matter, our civil rights laws prohibit practices that intentionally discriminate on the basis of a person's protected characteristics. This sort of intentional discrimination is known as "disparate treatment." "Disparate-treatment cases present 'the most easily understood type of discrimination,' and occur where a [defendant] has 'treated [a] particular person less favorably than others because of' a protected trait."[4] To prevail on a disparate-treatment claim, a "plaintiff must establish 'that the defendant had a discriminatory intent or motive.'"[5]

---

[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 *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977), and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985–86 (1988)).
[5] *Id.* (quoting *Watson*, 487 U.S. at 986).

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]

---

[6] *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 524 (2015) (quoting *Ricci*, 557 U.S. at 577).

[7] See, e.g., 42 U.S.C. § 2000e–2(k)(1)(A)(i), (ii) (establishing liability under Title VII of the Civil Rights Act of 1964 for "a particular employment practices that causes a disparate impact on the basis of" a protected status, where such practice is not "job related for the position in question and consistent with business necessity"). Title VII did not originally address disparate-impact liability directly. Instead, the Supreme Court interpreted Title VII to prohibit race-neutral practices with adverse racial effects on the ground that doing so was necessary to vindicate the general antidiscrimination purpose underlying the Civil Rights Act of 1964. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30, 431 (1971). The Supreme Court's reading of Title VII came under withering criticism. See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 507 & n.53 (2003) (discussing wide-ranging criticism of *Griggs*). Congress responded to the criticism in 1991 by making express the prohibition on neutral policies with disparate effects. See Civil Rights Act of 1991, § 105, Pub. L. No. 102–166, 105 Stat. 1071, 1074.

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

[9] See *Watson*, 487 U.S. at 991 (quoting 42 U.S.C. § 2000e–2(a)(2) (1982)) (emphasis added); see also *Smith v. City of Jackson*, 544 U.S. 228, 235 (2005) ("While our opinion in *Griggs* 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)).

[10] 29 U.S.C. § 623(a)(1).

[11] *Smith*, 544 U.S. at 235–36 (Stevens, J.) (plurality opinion); see also *id.* at 243–47 (Scalia, J., concurring in the judgment) (concluding that the "adversely affect" language is ambiguous but deferring to the EEOC's interpretation of the ambiguous language to create disparate-impact liability).

[12] 42 U.S.C. § 3604(a).

[13] *Inclusive Cmtys. Project*, 576 U.S. at 534.

ECOA, by contrast, lacks any similar textual indication of Congress's intention to reach the consequences of actions irrespective of the mindset of the actors. Section 1 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 race, color, religion, national origin, sex or marital status, or age …."[14] As the D.C. Circuit pointed out nearly two decades ago, the ECOA statute contains no language focusing on the effects of conduct like Title VII's and the ADEA's prohibitions against conduct that "otherwise adversely affect" jobseekers, or the FHA's prohibition against conduct that would "otherwise make unavailable" housing.[15]

There are reasonable arguments that disparate-impact liability would be consistent with ECOA's broad purpose of promoting access to credit without regard to protected status.[16] And a Senate Report on the 1976 amendments to ECOA suggested the availability of disparate-impact liability.[17] But the Supreme Court has jettisoned the freewheeling purpose-first, text-second approach that once characterized statutory interpretation.[18] The primary inquiry under *Inclusive Communities Project* is whether the *text* reveals Congress's intention to proscribe conduct without regard to the actor's motivation. I see little evidence in the text of ECOA that Congress intended to do so.[19]

My reservations notwithstanding, I concur in the ECOA claim because I have reason to believe that the defendants violated ECOA in light of pre-*Inclusive Communities Project*

---

[14] 15 U.S.C. § 1691(a).

[15] See *Garcia v. Johanns*, 444 F.3d 625, 633 n.9 (D.C. Cir. 2006) (Henderson, J.) (noting that ECOA lacks the disparate-impact language of Title VII and the ADEA, but declining to address the question directly in the context of class certification).

[16] See ECOA, Pub. L. No. 93-495, § 502, 88 Stat. 1521, 1521 (1974) ("It is the purpose of this Act to require that financial institutions and other firms engaged in the extension of credit make that credit equally available to all credit-worthy customers without regard to sex or marital status.").

[17] S. Rep. No. 94-589, at 4–5 (1976) ("In determining the existence of discrimination on these grounds, as well as on the other grounds discussed below, courts or agencies are free to look at the effects of a creditor's practices as well as the creditor's motives or conduct in individual transactions. Thus judicial constructions of anti-discrimination legislation in the employment field, in cases such as *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), and *Albemarle Paper Company v. Moody* (U.S. Supreme Court, June 25, 1975), are intended to serve as guides in the application of this Act, especially with respect to the allocations of burdens of proof.").

[18] *See 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); *Conroy v. Ansikoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.").

[19] See Winnie F. Taylor, *The ECOA and Disparate Impact Theory: A Historical Perspective*, 26 J. L. & Pol'y 575, 627 (2018) (conceding that "*Inclusive Communities*' textual analysis does not support ECOA disparate impact claims," but arguing that legislative history and policy concerns favor permitting disparate-impact claims).

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

[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. Am. Holdings Inc.*, No. 07 C 4315, 2008 WL 517138, at *2 (N.D. Ill. Feb. 20, 2008) (applying a narrow reading of *Smith* and relying on previous judicial application of disparate impact theories to reject defendant's assertion that such theories are not available under ECOA); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062, 1066–68 (S.D. Cal. 2008) (same); *Williams v. First Fed. Sav. & Loan Ass'n of Rochester*, 554 F. Supp. 447, 448–49 (N.D.N.Y. 1981), aff'd, 697 F.2d 302 (2d Cir. 1982) (relying on the Senate report accompanying the 1976 ECOA amendments to allow a disparate impact theory under ECOA); *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1029–30 (N.D. Ga. 1980) (reasoning that disparate impact liability would better accomplish ECOA's goals since intentional discrimination was likely less common than unintentional discrimination in the first place and that it would be rare for companies to expressly state that they were denying credit for a prohibited reason).

[21] The majority argues in their statement that numerous federal appellate courts have so held. Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro M. Bedoya in the Matter of Coulter Motor Company (August 15, 2024) at 1 & n.2 (hereinafter "Joint Statement"). But the availability of disparate impact under ECOA was not in dispute in any of the cases they cite. *Miller v. American Express Co.*, 688 F.2d 1235 (9th Cir. 1982), is the closest they come to citing an appellate holding on the matter. But *Miller* ultimately was about the meaning of whether a federal regulation implementing ECOA could impose liability even when neither disparate treatment nor disparate impact is proven, not whether ECOA imposed disparate-impact liability. *Id.* at 1237-40. Nonetheless, some district courts have cited *Miller* as standing for the proposition that disparate impact is available under ECOA. See, e.g., *Taylor*, 580 F. Supp. 2d at 1066; *Ramirez*, 633 F. Supp. 2d at 926; *Barrett v. H & R Block, Inc.*, 652 F. Supp. 2d 104, 108 (D. Mass. 2009).

[22] See, e.g., *Golden v. City of Columbus*, 404 F.3d 950, 963 & n.11 (6th Cir. 2005) (assuming the availability of disparate impact under ECOA to affirm partial summary judgment against plaintiff, but noting that other cases, legislative history, and a law review article support its assumption); *Bhandari v. First Nat. Bank of Com.*, 808 F.2d 1082, 1101 (5th Cir.), *on reh'g,* 829 F.2d 1343 (5th Cir. 1987), *cert. granted, judgment vacated,* 492 U.S. 901 (1989), and *opinion reinstated,* 887 F.2d 609 (5th Cir. 1989) (suggesting that an ECOA disparate-impact theory was available to the plaintiff but that he failed to plead it adequately); *Brown v. City Nat'l Bank*, No. 23-cv-03195, 2024 WL 201360, at *5 (N.D. Cal. Jan. 18, 2024) (citing *Inclusive Communities Project* for the elements of a disparate impact claim); *Bankhead v. Wintrust Fin. Corp.*, No. 22-cv-02759, 2023 WL 6290548, at *4 (N.D. Ill. Sept. 27, 2023) (assuming disparate impact is available under ECOA and reciting its elements); *Glenn v. Vilsack*, No. 4:21-cv-137, 2022 WL 3012744, at *2 & n.4 (N.D. Fla. June 29, 2022) (dismissing the claim and stating that the court "need not decide" whether disparate impact was available under ECOA because plaintiff had "not made a prima facie showing"); *Pettye v. Santander Consumer, USA, Inc.*, No. 15 C 7669, 2016 WL 704840, at *4 (N.D. Ill. Feb. 23, 2016) (reciting the elements of an ECOA disparate-impact claim); *Coleman v. Gen. Motors Acceptance Corp.*, 196 F.R.D. 315, 325-26 (M.D. Tenn. 2000), *vacated on other grounds,* 296 F.3d 443 (6th Cir. 2002) (relying on legislative history to recite that disparate impact is available under ECOA, a matter not disputed by the parties); *A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chicago*, 962 F. Supp. 1056, 1060 n.7 (N.D. Ill. 1997) (noting that regulators had treated ECOA as allowing disparate impact claims and had cited legislative history in support of that conclusion); *Cragin v. First Fed. Sav. & Loan Ass'n*, 498 F. Supp. 379, 384 (D. Nev. 1980) (determining the standard for proving an ECOA disparate-impact claim that Senate Report No. 94-589 suggested was required and dismissing plaintiff's claims for failing to meet it); *Vander Missen v. Kellogg-Citizens Nat. Bank of Green Bay*, 481 F. Supp. 742, 745 (E.D. Wis. 1979) (reasoning that while *Griggs'* effects test would suffice to establish liability under ECOA, it did not speak to the availability or amount of punitive damages); *Carroll v. Exxon Co., U.S.A.*, 434 F. Supp. 557, 563 & n.14 (E.D. La. 1977) (relying on *Moody* and *Griggs*, as Congress had suggested in Senate Report No. 94-589, to dismiss plaintiff's claim for failing to make out a prima facie disparate-impact case).

[23] See, e.g., Complaint for Permanent Injunction, Monetary Relief, and Other Relief, *FTC v. N. Am. Auto. Servs.*, No. 1:22-cv-01690 (N.D. Ill. Mar. 31, 2022).

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.

The accusation of activism in particular is bitterly ironic. The Chair's antitrust-enforcement program has been animated by her view that the modern antitrust doctrine articulated by the Supreme Court is "unduly narrow and betrays congressional intent" and "should be abandoned,"[30]

---

[24] *Inclusive Cmtys. Project*, 576 U.S. at 524 (quoting *Ricci*, 557 U.S. at 577)).
[25] Joint's Statement at 2.
[26] *Id.* at 2 n.7.
[27] See, e.g., *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3297524 (N.D. Tex. July 3, 2024) (finding that the FTC likely exceeded its statutory authority and violated the Administrative Procedure Act when it promulgated its rule banning noncompete agreements, and enjoining its enforcement as to the plaintiffs in the case); *FTC v. Microsoft Corp.*, 681 F. Supp. 3d 1069 (N.D. Cal. 2023) (denying the FTC's request for a preliminary injunction to prevent the merger of Microsoft and video-game maker Activision); *FTC v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023) (rejecting the FTC's attempt to block the merger of Meta Platforms and Within, a virtual reality fitness company)*; FTC v. U.S. Anesthesia Partners, Inc.*, No. 4:23-CV-03560, 2024 WL 2137649 (S.D. Tex. May 13, 2024) (rejecting the Commission's "novel interpretation" that would have "expand[ed] the FTC's reach further than any court has seen fit" by holding minority, noncontrolling investors in companies liable for anti-competitive acquisitions by those companies).
[28] Joint Statement at 1-2.
[29] Antonin Scalia, *Common–Law Courts in a Civil–Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 3, 22 (1997) ("The text is the law, and it is the text that must be observed.").
[30] See Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 737, 738 (2017).

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 prohibited basis can violate ECOA."[34] It is true that the Consumer Financial Protection Bureau's and Federal Reserve's regulations have interpreted ECOA's legislative history to permit disparate-impact claims.[35] But after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[36] the agencies' opinion on the matter is worth very little. When we fulfill our congressional mandate to enforce ECOA, our duty is to interpret ECOA's text, not to "fall back on" technocratic musings about legislative history.[37]

The majority gets around to engaging with ECOA's text in a footnote. They argue that some of ECOA's exceptions to liability "make[] sense only if facially neutral policies may otherwise violate the statute."[38] The majority cites one of the activities protected by 15 U.S.C. § 1691(c) as an example: "[R]efus[ing] to extend credit offered pursuant to … a credit assistance program administered by a nonprofit organizations for its members … if such refusal is required by or made pursuant to such a program."[39] But this exception clearly applies to intentional discrimination. It allows, for example, a nonprofit organization specifically to arrange for its female or racial-minority members to be offered credit, without fear that the program violates ECOA by intentionally treating those members differently than men or other racial groups. Indeed, the function of subsection (c) as a whole is not to protect certain kinds of *accidental* discrimination, but to permit *intentional* discrimination on behalf of "disadvantaged class[es] of persons" and

---

[31] See *Camreta v. Greene*, 563 U.S. 692, 703 n. 7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (cleaned up)).
[32] U.S. Const. art. II, § 3 (Take Care Clause).
[33] Fed. R. Civ. P. 11(b)(2) (legal positions taken in federal court must be "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").
[34] Joint Statement at 1.
[35] 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).
[36] 144 S. Ct. 2244 (2024).
[37] *Id.* at 2268 (cleaned up).
[38] Joint Statement at 2 n.6.
[39] 15 U.S.C. § 1691(c).

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.