

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

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LILA HARPER HELMS, MAJORITY STAFF DIRECTOR
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August 22, 2024

The Honorable Lina Khan
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Chairwoman Khan:

I am writing to request information about the data and methods used by the Federal Trade Commission (FTC) when suing American companies over multi-million dollar claims of racial discrimination. I am concerned that instead of relying on sound evidence and acting within the law, the FTC is suing—and threatening to sue—companies for racial discrimination under the fringe, left-wing disparate impact legal theory. Perhaps even more troubling, the FTC is basing such discrimination claims on a discredited and congressionally rejected model that *guesses* a person's race based on their name. Stereotyping a person's race by their name is not just unseemly, but prone to significant inaccuracy. Moreover, the FTC's use of race-guessing to bring lawsuits may be unconstitutional.

The highly controversial legal theory of disparate impact imposes liability for a facially-neutral practice—one that has no discriminatory intent or motive—if that practice results in different statistical outcomes for protected classes. In effect, under this theory, any statistical racial disparity is the result of racial discrimination. The FTC is thus searching for statistical disparities to justify enforcement actions. But only Congress has the authority to direct such a sweeping policy change as allowing liability based on disparate impact analysis—assuming that would be constitutionally permissible in the first place—and Congress has not done so.

In fact, Congress has expressly rejected executive branch efforts to rely on disparate impact theory. In 2018, Congress enacted into law a resolution under the Congressional Review Act blocking the Consumer Financial Protection Bureau (CFPB) from pursuing enforcement actions against auto lenders for pricing policies that may disparately impact people of certain races.¹ The CFPB had been guessing borrowers' races much like the FTC is doing today. Acting CFPB

¹ S. J. Res. 57, Pub. L. 115-172.

Bureau Director Mick Mulvany said then, executive agencies “are bound to enforce the law as written, not as [they] may wish it to be.”² That fact remains true today.

Commissioner Melissa Holyoak recently cautioned against using the methods and methodology deployed by the FTC, citing the congressional report that condemned the very CFPB activity Congress expressly blocked.³ It thus appears that when deciding to pursue enforcement actions and calculate remedies, the FTC is adopting the same discredited race-based approach as the CFPB, using a data proxy methodology called Bayesian Improved Surname Geocoding (BISG). The BISG method estimates the probability that a person belongs to a particular race or ethnicity by combining a person’s first and last name with geographical data. Armed with “data” showing that a company’s actions disproportionately affected members of a particular race, the FTC then sues that company for millions of dollars. Based on Commissioner Holyoak’s recent statement, it also appears the FTC does not inform parties subject to enforcement actions of its “enforcement methodology” (presumably BISG) to calculate this data.⁴

It is understandable why the FTC has not disclosed this practice to companies subjected to enforcement actions: BISG has been rightly criticized for its high error rates for racial minorities.⁵ For example, a 2023 study found that BISG “produces misclassification errors that are strongly correlated with demographic and socioeconomic factors.”⁶ “In addition to the high error rates for some racial subgroups,” the study found that “the misclassification rates are correlated with the political and economic characteristics of a voter’s neighborhood.”⁷ It is therefore unsurprising that BISG leads to flawed outcomes. In 2014, a report prepared for the American Financial Services Association revealed that by relying on BISG to measure disparities in auto dealer lending, the CFPB overestimated black Americans by 21 percent.⁸ And a 2023 report warned “analyses that use predicted race,” including BISG, “must be interpreted with

² Press Release, Statement of the Bureau of Consumer Financial Protection on Enactment of S.J. Res. 57, CBFBB (May 21, 2018), <https://www.consumerfinance.gov/about-us/newsroom/statement-bureau-consumer-financial-protection-enactment-sj-res-57/>.

³ Melissa Holyoak, Statement of Commissioner Melissa Holyoak: Asbury Automotive Group – McDavid Group; Matter No. 2223135 (Aug. 16, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-asbury8-16-24.pdf.

⁴ *Id.*

⁵ *See, e.g.*, REPUBLICAN STAFF OF H. COMM. ON FIN. SERVS., UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING, H. COMM. ON FIN. SERVS., 114th Cong. (Nov. 24, 2015), https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf.

⁶ Lisa P. Argyle & Michael Barber, *Misclassification and Bias in Predictions of Individual Ethnicity from Administrative Records*, 118 AM. POL. SCI. REV. 1058 (2024), <https://www.cambridge.org/core/journals/american-political-science-review/article/misclassification-and-bias-in-predictions-of-individual-ethnicity-from-administrative-records/18E20B8D196D734401DCB96C83E492F7>.

⁷ *Id.*

⁸ Arthur P. Baines & Marsha J. Courchane, FAIR LENDING: IMPLICATIONS FOR THE INDIRECT AUTO FINANCE MARKET, CHARLES RIVER ASSOCIATES FOR AMERICAN FINANCIAL SERVICES ASSOCIATION, AM. FIN. SERVS. ASS’N., 4 (Nov. 19, 2014), <https://afsaonline.org/portals/0/Federal/Issue%20Briefs/Fair%20Lending%20in%20the%20Indirect%20Auto%20Lending%20Markey%20Summary.pdf>.

great caution.”⁹ It specifically noted the “findings on the limits of BISG and related measures of race raise significant concerns about the use of such measures in assessing disparate impact.”¹⁰

Yet the FTC is disregarding BISG’s known faults and using the flawed statistics BISG generates to bring disparate impact theory discrimination lawsuits against American companies. The FTC’s pursuit of disparate impact claims is itself, to put it mildly, legally dubious because Congress has never expressly granted the FTC such authority.¹¹ Even if Congress had done so, accusing a company of racial discrimination and destroying its reputation based on a hunch or guess falls far below the “robust causality requirement” necessary to establish a prima facie disparate impact claim.¹² As the Supreme Court explained, this requirement is critical to “protect defendants from being held liable for racial disparities they did not create.”¹³ The FTC’s apparent avoidance of this requirement therefore may violate parties’ constitutional due process rights.

Understanding the FTC’s use of BISG and other proxy modeling methods is also important as Congress considers the implications of legislative proposals to grant the FTC disparate impact enforcement authority. For example, a prior version of the American Privacy Rights Act would have given the FTC (as well as State attorneys general and private litigants) broad authority to pursue a new data discrimination cause of action based on a disparate impact theory of liability.¹⁴

So that I may better evaluate the FTC’s data quality standards for discrimination enforcement actions and remedy calculations, as well as to inform consideration of congressional legislation, please provide written answers and documents responsive to the following questions no later than September 5, 2024, in accordance with the attached instructions.

1. Please identify and describe each statistical proxy model the FTC has used in the past five years to calculate any data or statistics that the agency uses in enforcement actions, including the decision to bring an enforcement action.

⁹ Sergey Chrenko & David Scharfstein, *The Limits of Algorithmic Measures of Race in Studies of Outcome Disparities* 15 (Apr. 2023),

https://www.hbs.edu/ris/Publication%20Files/The%20Limits%20of%20Algorithmic%20Measures%20of%20Race%20in%20Studies%20of%20Outcome%20Disparities_b1317bb9-ebc5-442c-9cae-a2a7cbdca5c1.pdf.

¹⁰ *Id.*

¹¹ Under your tenure, the FTC has not only brought actions alleging discrimination under disparate impact theory, but has also sought to expand FTC’s regulatory power by broadly construing the term “unfair” under Section 5 of the Federal Trade Commission Act to cover “any discrimination found to be based on disparate treatment or disparate impact.” Lina Khan, *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter in the Matter of Napleton Automotive Group, Commission File No. 2023195*, FTC (Mar. 31, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf. However, Congress neither wrote Section 5 as a general antidiscrimination statute nor authorized the FTC to impose disparate impact liability.

¹² *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 521 (2015).

¹³ *Id.* at 522.

Section 13, American Privacy Rights Act (Discussion Draft);

https://d1dth6e84htgma.cloudfront.net/American_Privacy_Rights_Act_of_2024_Discussion_Draft_0ec8168a66.pdf

2. In the past five years, has the FTC used the BISG method, or any other similar method, to calculate any data or statistics publicly reported by the agency? Please answer “yes” or “no” before providing further explanation. If the answer is “yes,” please provide a list of all public reports and other public documents in which the FTC used BISG or a similar method, identifying the exact method(s) it used.

3. In the past five years, has the FTC used the BISG method or any similar method to calculate any data or statistics used in enforcement actions, including the decision to bring an enforcement action or to calculate damages and proposed remedies? Please answer “yes” or “no” before providing further explanation. If the answer is “yes,” please identify every enforcement action in which the FTC used BISG or a similar method. For each enforcement action listed, please indicate:
 - a. The exact method(s) the FTC used;
 - b. The statute(s) under which the enforcement action was brought;
 - c. How the FTC used data generated by BISG or a similar method in the enforcement action;
 - d. Whether the FTC used data generated by BISG or a similar method in the enforcement action to calculate damages or a proposed remedy for an individual consumer; and
 - e. If the answer to (d) is yes, whether an individual consumer has received such damages or remedy generated by such method.

4. In the past five years, has the FTC required parties to use or otherwise rely upon data generated by the BISG method or any statistical proxy method for the calculations or processing of any data or statistics as a provision in any consent decree? Please answer “yes” or “no” before providing further explanation. If the answer is “yes,” please identify every consent decree in which the FTC required the use of BISG or a similar method. For each consent decree listed, please indicate:
 - a. The exact method(s) the FTC required the parties to use; and
 - b. How the data generated by BISG or a similar method was used in the consent decree.

5. In the FTC’s recently updated Data Quality Appendix, the FTC notes that it uses BISG for calculating data in its performance reports, but acknowledges the method’s limitations, stating, the Bureau of Economics “will apply the best available analysis to redress data to predict which recipients [of redress payments] are likely to be members of a historically underserved racial or ethnic community. There are some limitations with the methods available.”¹⁵
 - a. Please describe in detail every limitation in using the BISG method the FTC identified.

¹⁵ FTC, *Federal Trade Commission Data Quality Appendix* (Apr. 4, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/data-quality-appendix-040424.pdf.

- b. Has the FTC ever corrected any data or statistic generated using the BISG method? If so, please describe each instance.
6. The Equal Credit Opportunity Act (ECOA) and Regulation B both generally prohibit a creditor from inquiring about the “race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction.”¹⁶ For this reason, dealers do not request this information nor is it transmitted to auto creditors. The FTC recently settled two cases with Napleton¹⁷ and Passport Auto,¹⁸ and has filed complaints against Asbury Automotive¹⁹ and Coulter Motor Company,²⁰ in which the FTC cited racial disparity data in its legal complaints.
 - a. How did the FTC obtain data based on race if collection of such data is prohibited under ECOA and Regulation B?
 - b. Did the FTC use BISG or another proxy model to “guess” the race-based data cited in the complaint?
 - c. Was use of BISG or another proxy model disclosed to the defendants? If so, please describe what disclosures were given.
 - d. Did the FTC use BISG or another proxy model to calculate the remedies associated in each settlement agreement?
7. In the complaints filed against Passport Automotive Group and Coulter Motor Company, the FTC notably charged both Passport Automotive and Coulter Motor Company with “unfair discrimination” citing its practices as an “unfair act or practice” in violation of Section 5 of the FTC Act.²¹ In charging this count, it appears that the FTC understands Section 5 to be a general “antidiscrimination statute” encompassing “disparate impact,” which former Commissioner Noah Phillips noted in his dissent to Passport Automotive Group is a novel

¹⁶ 12 C.F.R. § 1002.5(b) (2024).

¹⁷ Press Release, FTC, FTC Returns More than \$9.8 million to Consumers Harmed by Napleton Auto’s Junk Fees and Discriminatory Practices (Nov. 14, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-returns-more-98-million-consumers-harmed-napleton-autos-junk-fees-discriminatory-practices>.

¹⁸ Press Release, FTC, FTC Sends More than \$3.3 Million to Consumers Harmed by Passport Auto’s Illegal Junk Fees and Discriminatory Practices (May 16, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sends-more-33-million-consumers-harmed-passport-autos-illegal-junk-fees-discriminatory-practices>.

¹⁹ 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>.

²⁰ 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>

²¹ *Passport Automotive Group, Inc. v. FTC*, FTC, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023199-passport-automotive-group-inc-ftc-v> (last visited Jun. 5, 2024).

interpretation of “unfairness.”²² Former Commissioner Phillips’ concerns were echoed by both Commissioners Holyoak²³ and Andrew Ferguson²⁴ with respect to Coulter Motor Company.

- a. Does the FTC understand the FTC Act to be an antidiscrimination statute? Please be specific and detail the FTC’s legal approach.
- b. Does the FTC understand the FTC Act to encompass disparate impact theory liability? Please be specific and detail the FTC’s legal approach.
- c. Please provide a list of every enforcement action in which the FTC has treated discrimination as a violation of the FTC Act.

Thank you for your attention to this matter.

Sincerely,



Ted Cruz
Ranking Member

²² Noah Joshua Phillips, *Dissenting Statement of Commissioner Noah Joshua Phillips: Regarding Federal Trade Commission vs. Passport Automotive Group, Inc. et al.*, FTC (Oct. 14, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Dissenting-Statement-of-Commissioner-Noah-Joshua-Phillips.pdf.

²³ Melissa Holyoak, *Dissenting and Concurring Statement of Commissioner Melissa Holyoak: Coulter Motor Company, LLC; FTC No. 2223033* (AUG. 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-holyoak-statement-re-coulter-8-15-24.pdf

²⁴ Andrew N. Ferguson, *Concurring and Dissenting Statement of Commissioner Andrew N. Ferguson: Coulter Motor Company, LLC, Matter No. 2223033* (AUG. 15, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-ferguson-concurring-statement-coulter.pdf.