Office of Commissioner
Melissa Holyoak

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

Dissenting and Concurring Statement of Commissioner Melissa Holyoak

Coulter Motor Company, LLC; FTC No. 2223033

August 15, 2024

I vote to bring this case because I have reason to believe defendants engaged in the violations of law alleged in Counts I-III, and VI.[1] And I commend staff for their diligence and hard work in this matter. But I also write to dissent from the Commission's Section 5 claim of "unfair discrimination" under Count IV. Absent Congressional authorization, the Commission should not attempt to broaden the FTC's unfairness *consumer protection* authority into a comprehensive *civil rights* authority—a new standard of liability that may have unintended and pernicious consequences. These consequences may be especially pernicious when the Commission assigns individual liability due to statistical disparities. Individuals may, for example, have strong incentive to shield themselves from liability by "inject[ing] racial considerations," practices, or audits into everyday business activities to fend off future unfair discrimination claims.[2]

In addition, the Commission's ongoing effort to unilaterally expand its own authority looks even more problematic given the Court's recent decision in *Loper Bright Enterprises v. Raimondo*,[3] and what that case generally portends about the importance of adhering carefully to what Congress has said—not what some at the Commission may wish it had said. Indeed, in a recent opinion striking down an analogous broadening of the Commission's authority, a federal district court explained that agencies "do not have unlimited power to accomplish their policy preferences," but "have only the powers that Congress grants through a textual commitment of authority."[4] When the facts and evidence warrant it, I will vigorously support enforcement against unlawful discriminatory conduct—as I have here—where Congress has authorized that we act.[5] But since no such authority exists in this case under Section 5, I respectfully dissent from Count IV. I also write briefly concerning the proposed order.

In this case, the Commission and Arizona's Attorney General are filing a complaint against Coulter Motor Company and an individual in federal district court, as well as filing a proposed consent order resolving the allegations in the complaint. The defendants allegedly advertised

[1] Count V is for alleged violations of state law, the Arizona Consumer Fraud Act, brought by our co-plaintiff, the Arizona Attorney General's Office.
[2] *Cf. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 543 (2015).
[3] 144 S. Ct. 2244 (2024).
[4] *See Ryan LLC v. FTC*, 3:24-cv-00986-E, 2024 WL 3297524, at *10 (N.D. Tex. July 3, 2024) (quoting *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1272 (5th Cir. 1983)); *see id.* (rejecting the FTC's "reasoning as a piecemeal attempt to confer rulemaking authority that Congress has not affirmatively granted," and explaining: "The role of an administrative agency is to do as told by Congress, not to do what the agency think[s] it should do.").
[5] *See* the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 et seq.

misleading prices for vehicles to attract consumers to the dealerships—actual prices were thousands of dollars more than advertised.[6] Additionally, defendants allegedly charged consumers for add-on items they never authorized; told consumers such add-ons were required when they were not; and charged consumers twice for the same add-ons.[7] I concur with Counts I-III.[8]

That brings us to Counts IV and VI—claims relating to discriminatory financing practices. Relying on statistical analysis,[9] the Complaint alleges that "Defendants arrange financing with higher interest rate markups and costlier add-ons for Latino consumers than for non-Latino White consumers."[10] Based on these allegations, Count VI asserts violations of the Equal Credit Opportunity Act ("ECOA"). The Commission is charged with enforcing violations of ECOA, which prohibits creditors from discriminating against a credit applicant on the basis of race, color, religion, national origin, sex, marital status, age, or because of receipt of public assistance.[11] Racism is abhorrent. Where the facts and law warrant, I support robust enforcement of ECOA. Accordingly, I support Count VI in this case.[12]

But the Complaint also contains Count IV, which alleges "unfair discrimination" under Section 5 of the FTC Act.[13] This count addresses the same alleged conduct on which the ECOA claim is based yet provides no additional relief. If the goal of today's action is to remedy the alleged unlawful discrimination, there is simply no reason to include this superfluous count. For those tracking the agency over the last few years, however, it comes as no surprise. Bringing an "unfair discrimination" claim here based on statistical analysis and disparate impact is consistent with a broader vision to achieve economy-wide, equity-oriented regulation of conduct that historically was never proscribed by Section 5 of the FTC Act. Disparate impact theory has historically been used in the context of civil rights laws to examine whether a neutral policy has disproportionately impacted members of a class Congress designated for protection. Importing disparate impact theory into Section 5, former Commissioner Chopra advocated in 2020 for disparate impact analysis and use of the FTC's unfairness authority as a "gap-filler to combat discrimination across the economy."[14] Understanding the broader motivation for the approach in this case—that is, as

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[6] Compl. ¶ 3.
[7] *Id.*
[8] Again, Count V is for alleged violations of state law.
[9] *See, e.g.*, Compl. ¶¶ 46-48, 56-57.
[10] *Id*. ¶ 27; *see id.* ¶ 29.
[11] 15 U.S.C. § 1691(a).
[12] I share Commissioner Ferguson's concerns about whether the text of ECOA permits disparate impact claims. Others have expressed this concern, as well. *See, e.g.*, UNSAFE AT ANY BUREAUCRACY: CFPB JUNK SCIENCE AND INDIRECT AUTO LENDING, COMMITTEE ON FINANCIAL SERVICES, U.S. HOUSE OF REPRESENTATIVES, 13 (Nov. 24, 2015), https://financialservices.house.gov/uploadedfiles/11-24-15_cfpb_indirect_auto_staff_report.pdf.
[13] *See* Count IV & Compl. ¶¶ 32, 48.
[14] *See* Introductory Remarks of Commissioner Rohit Chopra, National Fair Housing Alliance 2020 National Conference, at 2 (Oct. 6, 2020) ("The second tool we can use today is the FTC Act's prohibition on unfair acts and practices. As we all know, it is rare to uncover direct evidence of racist intent, which is why 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. But many areas of the economy are not covered by these laws. In a recent auto lending discrimination case brought by the FTC, I argued that many discriminatory practices are also unfair under the FTC Act, which covers almost the entire economy. . . . [T]he FTC Act can serve as an important gap-filler to combat discrimination across the economy . . . ."), https://www.ftc.gov/system/files/documents/public_statements/

an effort to expand unfairness well beyond its traditional metes and bounds to "combat discrimination across the economy"—makes clear the Majority's purpose for including the otherwise superfluous unfair discrimination count.

Following Commissioner Chopra's instructions, the Commission thereafter began pursuing unfair discrimination actions in earnest. In March 2022, the Commission settled with another car automotive dealer where two of my colleagues, now in the majority, argued that the Commission should have included an unfair discrimination claim against the defendant.[15] Then, in October 2022, the majority included an unfair discrimination claim in *Passport Automotive*.[16] That case settled without litigation.[17] But two then-Commissioners disputed the Commission's authority to bring an unfair discrimination claim, based on the argument that Section 5 is not a general tool for policing discrimination.[18]

Former Commissioner Phillips's dissent in *Passport* sets forth multiple reasons why the Commission's attempt to transform Section 5 into an antidiscrimination statute is legally unsound. First, unlike the civil rights statutes that expressly make it unlawful to "discriminate," nothing in the 1938 Wheeler-Lea Act amendments to the FTC Act that created Section 5's prohibition on "unfair or deceptive acts or practices" or the 1994 amendments defining Section 5's "unfairness" authority suggest that Congress was addressing discrimination.[19] Indeed, while antidiscrimination

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1581594/final_remarks_of_rchopra_to_nfha_v3.pdf; *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."), https://www.ftc.gov/system/files/documents/public_statements/1576002/bronx_honda_final_rchopra_bronx_honda_statement.pdf.

[15] Press Release, *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-bills; 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), https://www.ftc.gov/system/files/ftc_gov/pdf/Statement%20of%20Chair%20Lina%20M.%20Khan%20Joined%20by%20RKS%20in%20re%20Napleton_Finalized.pdf.

[16] Press Release, *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.

[17] *See id.* It is no coincidence that the Commission has asserted its novel "unfair discrimination" authority only outside the scrutiny of courts and in the context of consent orders.

[18] Dissenting Statement of Commissioner Noah Joshua Phillips, *Regarding Federal Trade Commission vs. Passport Automotive Group, Inc. et al.*, File No. 2023199 (Oct. 14, 2022) ("Phillips Dissent"), https://www.ftc.gov/system/files/ftc_gov/pdf/Dissenting-Statement-of-Commissioner-Noah-Joshua-Phillips.pdf; *see* Concurring and Dissenting Statement of Commissioner Christine S. Wilson, *FTC v. Passport Automotive Group, Inc., et al.*, at 4 (Oct. 18, 2022) (dissenting from unfair discrimination claim), https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-wilson-passport-statement.pdf.

[19] Phillips Dissent at 3 (comparing Title VII of the Civil Rights Act of 1964, Pub. L. 88-325; The Equal Pay Act of 1963, Pub. L. 88-38; and The Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., with the Wheeler-Lea Act, Pub. L. 75-447 (1938) and 15 U.S.C. § 45).

statutes describe certain classes the law is seeking to protect, Section 5 includes no such guidance and thus "could make disparity on the basis of qualification or customer loyalty illegal."[20]

Second, antidiscrimination statutes identify the context where Congress has identified discrimination that must be rooted out, *e.g.*, housing, employment, and credit. But Congress did not identify a particular context in Section 5.[21] And third, Section 5 includes no indication as to whether any purported discrimination claim could be proven on a disparate treatment theory (individuals treated differently based on a protected characteristic) or disparate impact theory (neutral policy that disproportionately impacts members of a protected class), putting the Commission's new approach at odds with Supreme Court precedent.[22]

Phillips's cogent dissent remains apposite, but we also now have the benefit of a federal district court decision: *Chamber of Commerce v. CFPB*.[23] There, the district court struck down the CFPB's attempt to use its unfairness authority to widely police discrimination in the financial services market.[24] In Dodd-Frank,[25] Congress gave the CFPB a wide range of enforcement and supervisory authorities, including the authority to declare unlawful unfair acts or practices.[26] Because Dodd-Frank provided the CFPB with many authorities that previously resided with the Commission, Congress defined "unfairness" using language from Section 5.[27] Using the same language found in Section 5 of the FTC Act, the CFPB in 2022 "announced that it consider[ed] discrimination" to be unfair, and that it would "begin examining for discrimination itself and for whether companies are adequately testing for discrimination in their advertising, pricing, and other activities."[28]

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[20] *Id.* ("Section 5 looks nothing like the antidiscrimination laws Congress passed; and as applied to address discrimination, it would sweep more broadly than any. For one critical thing, Section 5 does not tell us on what basis discrimination is impermissible, which classes the law protects.").
[21] *Id.* at 3-4.
[22] *Id.* at 4 (citing *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 534).
[23] 691 F. Supp. 3d 730 (E.D. Tex. 2023), *appeal docketed*, No. 23-40650 (5th Cir. Nov. 8, 2023).
[24] *Id.* at 739-40, 743.
[25] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
[26] *See* 12 U.S.C. § 5531.
[27] *See generally CFPB*, 691 F. Supp. 3d at 742 ("the Dodd–Frank Act's [unfairness] definition can be understood with reference to the FTC Act's definition"); *compare* 12 U.S.C. § 5531(c) ("Unfairness") ("The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that--(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition. . . . In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination."), *with* 15 U.S.C. § 45(n) ("The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is 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. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.").
[28] *See generally CFPB*, 691 F. Supp. 3d at 733-34 (cleaned up); *see also* Eric Halperin & Lorelei Salas, *Cracking Down on Discrimination in the Financial Sector*, CFPB (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/; Press Release, *CFPB Targets Unfair*

The district court rejected the CFPB's interpretation of its "unfairness" authority and held that it exceeded the agency's statutory remit. The court noted at the outset that "[e]ven if an agency's 'regulatory assertions had a colorable textual basis,' a court must consider 'common sense as to the manner' in which Congress would likely delegate the power claimed in light of the law's history, the breadth of the regulatory assertion, and the economic and political significance of the assertion."[29] Based on the statutory text, structure, and history, the court held that the CFPB did not have the sweeping antidiscrimination authority it claimed.[30]

The district court examined the text and found that the statute treated the concepts of unfairness and discrimination differently in separate sections, and emphasized that Congress also authorized CFPB to enforce ECOA.[31] The court thus concluded: "The statutory text . . . illustrates that Congress knew how to clearly add nondiscrimination to the CFPB's portfolio when it meant to do so."[32] The court further observed that the CFPB's unfairness section did not make "any mention of discrimination, any mention of protected classes, and any mention of disparate-impact standards."[33]

Finally, the court recognized that because the Dodd-Frank unfairness section was drawn from the FTC Act, the "definition could be understood with reference to the FTC Act's definition."[34] It contrasted the Commission's various positions relating to unfairness—a traditional policy focused on "maintenance of consumer choice or consumer sovereignty, an economic concept"[35] versus the recently proposed approach of "allowing the FTC to regulate 'practices that

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Discrimination in Consumer Finance (Mar. 16, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-targets-unfair-discrimination-in-consumer-finance/.

[29] *CFPB*, 691 F. Supp. 3d at 740 (quoting *West Virginia v. EPA*, 597 U.S. 697, 722-23 (2022)). The Majority's approach to Section 5(n) ignores these important considerations. *See* Joint Statement of Chair Lina M. Khan, Commissioner Rebecca Kelly Slaughter, and Commissioner Alvaro Bedoya, *Coulter Motor Company, LLC*, Commission File No. 2223033, at 3-4 (August 15, 2024) ("Joint Statement"). While the Majority does not address the vast chasm between the FTC Act and other antidiscrimination statutes (*e.g.*, to account for text, history, context, protected classes), as recognized by Commissioner Phillips and the *CFPB* court, there also remains a textual inconsistency between a disparate impact claim and Section 5. Section 5 seeks to address unfair *acts or practices*, but the alleged unfair act or practice here is effectively a neutral policy. Referring to the elements in Section 5(n) to suggest that disparate impact satisfies the standard fails to assess the act or practice—here, the neutral policy—as the text requires. *Cf*. Phillips Dissent at 4-5 (describing why using Section 5 as an antidiscrimination statute could lead to results that contradict antidiscrimination statutes and why the disparate impact claim conflated two separate parts of the Section 5 analysis).

[30] The court held that the major-questions canon applied because the CFPB's claimed regulatory authority presented a question of major economic and political significance. *CFPB*, 691 F. Supp. 3d at 740. Under the major-questions canon, the agency "must point to clear congressional authorization for the power it claims." *Id.* (quoting *West Virginia*, 597 U.S. at 723). Whether or not the major-questions canon applies in this case, the underlying question remains the same—does the statute confer the power asserted by the agency? Thus, the *CFPB* court's textual analysis rejecting antidiscrimination authority remains persuasive.

[31] *Id.* at 741-42.

[32] *Id*. at 742.

[33] *Id.*

[34] *Id.*

[35] *Id.* (quoting *In re Int'l Harvester Co*., 104 F.T.C. 949, 1061 n.47 (Dec. 21, 1984)).

existing discrimination laws are unlikely to reach.'"[36] But because "'we typically think of discrimination as a separate problem from consumer protection,'" the court held that the "history of the legal provision at issue [] does not refute its ambiguity."[37]

The district court's analysis is instructive here. Since the FTC's unfairness text is functionally identical to the CFPB's unfairness language, Section 5's authority also does not extend to broadly policing alleged discrimination. Indeed, like the CFPB, the FTC is charged with enforcing ECOA—when Congress wants to authorize discrimination-related authority, it knows how to do so. Section 5 also makes no mention of discrimination, protected classes, or disparate-impact standards. And finally, "[n]owhere in [Section 5's] long, rich history does the concept of antidiscrimination arise."[38]

In addition, regardless of what may have happened before *Loper Bright*, now the Commission's view of Section 5 receives no *Chevron* deference.[39] Instead, the Commission must convince a court that when Congress granted it "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. I suspect that would be news to Congress.

Moreover, the unfair discrimination claim addresses the *same* alleged conduct on which the ECOA claim is based yet provides no additional relief. There is simply no reason to include this superfluous count—unless the motivation for the claim is to further broaden the Commission's authority to proscribe conduct ECOA cannot reach. For those tracking the agency over the last few years, this installment in the Commission's expansive regulatory vision comes as no surprise.[40] But that makes it no less problematic. By seeking to repurpose Section 5 and transform the agency into a general civil rights regulator, the Commission risks further politicizing the agency's mission.[41] And no matter how well-intended, broad standards of liability under disparate impact theories can backfire—particularly ones that seek to regulate the entire American economy—

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[36] *Id.* at 743 (quoting Andrew D. Selbst & Solon Barocas, *Unfair Artificial Intelligence: How FTC Intervention Can Overcome the Limitations of Discrimination*, 171 U. Pa. L. Rev. 1023, 1027 (2023)).
[37] *Id*.
[38] Phillips Dissent at 6; *cf. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") (cleaned up); *see also West Virginia*, 597 U.S. at 747 (Gorsuch, J., concurring) ("A 'contemporaneous' and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency.") (quoting *United States v. Philbrick*, 120 U.S. 52, 59 (1887)).
[39] 144 S. Ct. 2244 (2024). Even deference based on *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994), would depend in part on the Commission's "thoroughness evident in its consideration, the validity of its reasoning," and "its consistency with earlier and later pronouncements." *See id.* at 2259 (quoting *Skidmore*, 323 U.S. at 140). The Commission's novel interpretation of Section 5 as a sweeping antidiscrimination statute falls short of these requirements.
[40] *See* Introductory Remarks of Commissioner Rohit Chopra, *supra* note 14; Statement of Chair Lina M. Khan, *supra* note 15.
[41] Such politicization will grow more apparent as time passes and the Majority seeks to continue wielding its self-granted authority in new contexts—likely circumstances well beyond where ECOA applies. Only time will tell whether a neutral HR practice that leads to disparate impact on certain classes—classes that the Commission will need to identify in the future (since Congress has not)—is classified as "unfair"; or whether a neutral sales practice that results in sales inadequately distributed across various customers is an unfair practice.

creating risks of unlawful race-based practices.[42] "The solution to our Nation's racial problems [] cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism."[43]

To be sure, the Commission is no stranger to asserting authority it does not have. For example, the Commission recently asserted in its Non-Compete Rule ("Rule") that the FTC's Section 6(g) authority to "make rules and regulations for the purpose of carrying out the provisions" of the FTC Act authorizes the Commission to write competition legislative rules.[44] After a searching review of the FTC Act's text, history, and structure, a court enjoined the Rule, generally concluding that the Commission's reliance on the word "rules" was erroneous.[45] The Commission's flawed interpretive approach in the Rule is present in its unfair discrimination analysis. Simply reciting the language of Section 5—as the Commission did with Section 6(g)[46] and the Majority effectively endorses in this case—without evaluating the text, structure, and history of the statute falls short of the bar set by the Supreme Court.[47] Confusingly, the Majority's statement suggests my interpretation would give "lawbreakers . . . effective immunity" under Section 5.[48] But immunity is an *exemption* from liability.[49] The Majority presupposes liability and avoids the threshold question—whether Congress gave the Commission the authority it asserts here.

Setting aside the Commission's dubious legal assertion, there are prudential considerations that militate against today's unwise assertion of authority. Compounding recent erroneous assertions of authority by doubling down lessens the chance that Congress will trust the Commission with more authority or more resources,[50] even regarding areas of enforcement where there is bipartisan agreement. There is little doubt in my mind that today's misguided inclusion of

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[42] *Cf. Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 542 ("Without adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and would almost inexorably lead governmental or private entities to use numerical quotas, and serious constitutional questions then could arise.") (cleaned up); *id.* at 543 ("Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.").

[43] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 277 (2023) (Thomas, J., concurring).

[44] Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38349 (May 7, 2024).

[45] *See Ryan*, 2024 WL 3297524, at *8, *10.

[46] *See id*. at *8 (". . . after reviewing the text, structure, and history of the Act, the Court concludes the FTC lacks the authority to create substantive rules through this method. Section 6(g) is indeed a housekeeping statute, authorizing what the APA terms 'rules of agency organization procedure or practice' as opposed to 'substantive rules.'") (cleaned up).

[47] *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000) ("no matter how important, conspicuous, and controversial the issue, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress").

[48] Joint Statement at 4.

[49] *See, e.g.*, Black's Law Dictionary (12th ed. 2024) (defining "immunity" as an "exemption from . . . liability").

[50] *See generally* Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew Ferguson, *Health Breach Notification Rule*, File No. P205405, at 8 (Apr. 26, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p205405_hbnr_mhstmt_0.pdf; *cf.* Oral Statement of Commissioner Melissa Holyoak, *In the Matter of the Non-Compete Clause Rule*, Matter No. P201200, at 3 (Apr. 23, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/non-compete-oral-statement-holyoak.pdf; Dissenting Statement of Commissioner Melissa Holyoak, Joined by Commissioner Andrew N. Ferguson, *In the Matter of the Non-Compete Clause Rule*, Matter No. P201200, at 2 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/2024-6-28-commissioner-holyoak-nc.pdf.

an unfair discrimination claim further reduces the likelihood Congress increases our funding or restores our authority to seek economic redress for consumers.[51] Indeed, last month's Congressional hearing concerning the Commission's funding and authorities confirms my view. Describing the erosion of the public's trust in the Commission, the Subcommittee Chairman implored the Chair to "regain [Congress's] trust."[52] Instead of rebuilding that trust, today the Commission asserts it has broad enforcement authority to identify and police discrimination across the economy—further jeopardizing the agency's efforts.

The FTC has strayed before in its use of its unfairness authority.[53] That exercise in legislation ended poorly. And I am afraid the recent course the Commission has set us on may end poorly as well. I respectfully dissent.

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Last, I write briefly concerning the proposed order. Some of what it requires resembles provisions in the Combating Auto Retail Scams (CARS) Rule, finalized in January of this year but not yet in effect.[54] My vote for this proposed order—based on the facts and evidence staff developed in this particular case—should not be understood as endorsing that Rule.

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[51] Surely those chances will diminish further as Congress, and individual constituents, increasingly recognize the Commission is exercising a new-found authority to bring unfair discrimination claims based on statistical analysis, *against individual defendants*. Depending on how the Commission chooses to exercise this new-forged authority, women and men may have no notice of—nor any practical way to find out—the alleged disparate impact their practices allegedly cause to classes that Congress may never have defined. That potential for liability may, in turn, drive individuals to import race-based considerations to new contexts, with troubling results. *Cf. Students for Fair Admissions*, 600 U.S. at 277; *Texas Dep't of Hous. & Cmty. Affs.*, 576 U.S. at 543.

[52] *See* Hearing, "The Fiscal Year 2025 Federal Trade Commission Budget," before the Subcommittee on Innovation, Data, and Commerce of the Committee on Energy and Commerce, House of Representatives (July 9, 2024), https://energycommerce.house.gov/events/innovation-data-and-commerce-subcommittee-hearing-the-fiscal-year-2025-federal-trade-commission-budget.

[53] *See generally* J. HOWARD BEALES, THE FTC'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.

[54] *See, e.g.*, Stip. Order at 5-6, *FTC v. Coulter Motor Company, LLC* (Aug. 15, 2024); Combating Auto Retail Scams Trade Regulation Rule, 89 Fed. Reg. 590, 694 (Jan. 4, 2024). The Rule's effective date has been stayed, pending litigation. *See* Order Postponing Effective Date of Final Rule Pending Judicial Review, In the Matter of: Combating Auto Retail Scams Trade Regulation Rule, Matter No. P204800 (Jan. 18, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/P204800CARSExtensionOrder.pdf.