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 ra prngh

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an effort to expand unfairness well beyond its traditional metes and bounds to “combat discrimination across the economy”—

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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

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The district court rejected the CFPB’s interpretation of its “unfairness” authority and held that it exceeded the

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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 Execu1la4.2 (ne)we

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 Commissi (c)4.002 343nawf0 Td[((a)4 (45]c6)1 (i (cm.088 Tw 0.

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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

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