

**FAIRNESS IN FINANCIAL SERVICES: RACISM AND
DISCRIMINATION IN BANKING**

HEARING
BEFORE THE
COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED SEVENTEENTH CONGRESS
SECOND SESSION
ON
EXAMINING THE LEGACY OF DISCRIMINATION IN AND THE CURRENT
REALITY OF DISCRIMINATION IN FINANCIAL SERVICES

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**FAIRNESS IN FINANCIAL SERVICES: RACISM
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THURSDAY, DECEMBER 1, 2022**

U.S. SENATE
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS
Washington, DC.

The Committee met at 10 a.m., in room 538, Dirksen Senate Office Building, Hon. Sherrod Brown, Chairman of the Committee, presiding.

OPENING STATEMENT OF SENATOR SHERROD BROWN

Chairman BROWN. The Committee on Banking, Housing, and Urban Affairs will come to order. Today's hearing is a hybrid format. Our witnesses are in person. All five of you, thank you. Our Members have the option to appear in person or virtually.

When work has dignity, every American can fully participate in and receive the benefits of our dynamic economy. Financial services and products have played a critical role in helping many families build wealth and plan for the future, whether that means saving for college, retirement, or their first home.

Many Americans have been able to do just that. However, not every community has gotten its share of the prosperity. That is especially true for Black and Brown Americans, who are too often shut out of the financial system because of discrimination.

Let that sink in. In 2022, in the United States of America, you can be turned away at a bank because of the color of your skin.

The wealth and income disparities between White and minority households are a consequence of the unequal access and treatment minorities have faced. From accepting slaves as collateral for loans, to Jim Crow, to redlining, to the subprime mortgage crisis' predatory practices, to the current crypto crisis, Black and Brown Americans have never had equal access to or fair treatment in financial services.

Today's hearing is an opportunity for this Committee to reckon with not only the legacy of discrimination, but the current reality of the pervasive and pernicious discrimination in financial services.

The 2021 FDIC household survey found that 11 percent of Black households and 9 percent of Hispanic households were unbanked, compared to 2 percent of White households. And for Black Americans with checking accounts, it is not always better. We know that some banks close checking accounts at significantly higher rates in communities with more Black residents.

The fact is that many Black and Brown Americans do not have access to, nor do they trust, our financial system.

Think about Dr. Malika Mitchell-Stewart, a doctor, a physician from Texas, who attempted to open an account and deposit her

signing bonus check. The bank tellers raised questions about the check's authenticity and even her employment as a doctor. They ultimately accused her of fraud and they turned her away.

Or consider Clarice Middleton, an African-American woman. As Emily Flitter described in her book "The White Wall", Ms. Middleton, quote, "shook with fear," unquote, as she stood on the sidewalk outside a Wells Fargo branch in Atlanta after she was accused of fraud.

She went to a Wells Fargo branch in a wealthy, mostly White Atlanta neighborhood to cash a security deposit refund check. Three bank employees examined the check and her identification, but refused to look at the additional proof Ms. Middleton offered. They declared the check fraudulent, and one employee called the police.

And then there is Ryan Coogler, the director of the movie "Black Panther", which I recommend or I assume you have seen; if not, I recommend. He was profiled while trying to withdraw money out of his own account. He gave the bank teller his bank card, PIN, and ID. The teller assumed Mr. Coogler was trying to rob the bank. Mr. Coogler's case shows that even wealth and fame cannot overcome or stop discrimination.

Black and Brown customers are viewed with suspicion sometimes for just entering a bank and are questioned over the most basic transactions. And because access to basic financial services is how families build wealth, discrimination in banking only worsens the racial wealth gap.

Many Black and Brown consumers have no place to securely hold their funds. And when consumers are pushed out of financial services, they are forced to rely on check cashers. They have far fewer opportunities to build relationships with financial institutions, relationships that matter when trying to buy a home or start a small business.

The pandemic revealed the detrimental consequences for minority consumers who have been unable to build that relationship with financial institutions. Not only were minority small business owners left out of important programs like the Paycheck Protection Program, but small business owners without banking relationships who were able to obtain Federal aid were sometimes barred from accessing those important funds.

Congress has worked to address this fundamental unfairness with legislation. Civil rights statutes like the Equal Credit Opportunity Act and the Community Reinvestment Act seek to ensure equal access to credit, and to combat discriminatory practices, such as redlining.

The Civil Rights Act of 1964 outlawed discrimination in certain places of public accommodation, such as hotels and restaurants—we know that—but it does not cover banks. Federal courts have held that the law enumerates specific types of businesses. Those that are not on the list, such as financial institutions, simply are not covered.

We must do more to ensure that all Americans have equal access and equal treatment in financial services and products.

The lack of clear protections and the loophole within the Civil Rights Act make it difficult to end discrimination and make it hard for victims of racial discrimination to hold these banks accountable.

Minority consumers also have access to less of their own funds. One report found that Black and Latino consumers are required to maintain a minimum balance of \$821 and \$879, respectively, compared to a minimum balance of \$648 for White consumers. Black and Latino consumers, unlike White consumers, simply do not have access, in too many cases, to their own money.

Banks say they are committed to eradicating the legacy of racism in our financial institutions. Many banks, as you know, have sat at the table that the five of you are sitting at, promising that. Yet a week after the CEOs of our largest banks sat before this Committee and promised to fight against discrimination, the American Bankers Association sued the Consumer Financial Protection Bureau for updating its examination manual to scrutinize unfair discrimination. Think about that.

We know that Wall Street always attacks the CFPB, but their opposition has reached, shall we say, frenzied levels with Rohit Chopra at the helm. Under Director Chopra, the CFPB is using all of its authorities to fight discrimination and they have repeatedly gone after financial institutions for their treatment of Black consumers.

Earlier this year the CFPB announced that it will examine whether discrimination violates the Dodd-Frank prohibition against unfair, deceptive, and abusive acts and practices. In 2021, the CFPB required a bank to pay \$5 million to address redlining that harmed Black consumers. Since its creation, the CFPB has gotten \$637 million from discriminatory institutions, tens of millions of which have gone directly to minority consumers who experienced that discrimination.

And it is no surprise that when an effective agency like the CFPB actually works on behalf of consumers, no surprise Wall Street does everything it can to stop it. We do not see banks holding true to their commitments to fight discrimination, simply put.

To ensure that all Americans have dignity in work, we must work to end discrimination in banking.

Senator Toomey.

STATEMENT OF SENATOR PATRICK J. TOOMEY

Senator TOOMEY. Thank you, Mr. Chairman, and thank you to our witnesses.

Equal treatment under the law is a fundamental American value. Discrimination and racism are wrong and have no place in our society. Unfortunately, they are a sad part of our Nation's history. And even though we have made great strides in dramatically reducing discrimination in our society, that does not mean instances of racial discrimination never take place today. Sometimes they do. And when they do occur, the Government should enforce the antidiscrimination laws, including in financial services.

However, in recent years some Democrats have sought to advance a liberal legal theory called "disparate impact." Disparate impact is not the same as discrimination—far from it. Disparate impact theory punishes people if they make business decisions that produce statistical differences in outcomes between demographic groups, even if there is no discriminatory motive. There can easily

be differences in outcomes when there has been absolutely no discrimination.

Now, in theory, defendants can prevail in disparate impact cases if they can prove at trial that there was a business justification for the policy that created the disparate outcomes. But in practice, these cases entail significant costs and reputational risks that can force even innocent defendants to settle. In this way, disparate impact is a gift from liberal Democrats to trial lawyers. It is also a boon to regulators inclined to abuse their authority, including the CFPB.

For example, the Obama CFPB claimed to have discovered discrimination, based on disparate impact, by auto lenders who did not even know the race of the borrowers they were accused of discriminating against. To underscore the absurdity of this, not only did the lenders not know the race of the borrowers, the CFPB did not even know the race of the borrowers that it claimed were being discriminated against based on race. But that did not stop the CFPB from discovering racial discrimination.

The CFPB's actions were not authorized by statute. But to make matters worse, they were based on flawed methodology, badly flawed. The CFPB guessed race based on last names and ZIP codes, even though they knew this method was flawed. For instance, this methodology predicts there is an 89 percent chance that Chairman Brown is Black, and a 64 percent chance that Senator Tim Scott is White.

Moreover, CFPB documents showed the agency knew that credit scores and other business factors accounted for much of the statistical disparities, and there was a significant risk the CFPB would lose in litigation.

Nonetheless, the CFPB brought enforcement actions they knew might very well fail in court because they determined defendants have, and I quote, a "powerful incentive to settle," end quote, as we discovered in CFPB's internal documents, and so they could drive these defendants to settle cases where they might have been able to win. This is an outrageous abuse of Government power, to pursue litigation because you know the costs, economic and otherwise, would drive an innocent person to settle.

In 2018, Congress overturned the CFPB's disparate impact guidance for auto lending. Nevertheless, the Biden CFPB has expanded its use of disparate impact theory, effectively extending the very policy Congress overturned.

The CFPB has claimed the authority to supervise for disparate impact in all consumer financial services and products, based on an unprecedented reading of the Dodd-Frank's grant of authority to prevent unfair, deceptive, or abusive acts or practices, known as UDAAP. But Congress did not authorize disparate impact under UDAAP. In the 12 years since Dodd-Frank was enacted, the CFPB never previously claimed that it had that authority.

Congress took the UDAAP language from the FTC Act. For nearly a century the FTC never interpreted that language to include discrimination or disparate impact, until after the CFPB's novel reinterpretation.

This is exactly the kind of abuse of power the Supreme Court recently ruled against in *West Virginia v. EPA*, when the EPA, in the

words of the Supreme Court, and I quote, “claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority,” end quote.

They could have been describing the CFPB.

To make matters worse, the CFPB implemented this controversial change in law by fiat, without even going through a rule-making. This overreach was possible because the CFPB is structured to be unaccountable to Congress. It can simply take funds from the Fed, which also is not subject to appropriations, thereby doubly insulating the CFPB from congressional appropriation and control. That is why the Fifth Circuit recently found the CFPB unconstitutional, holding that its funding violates the Appropriations Clause of the Constitution.

The court noted, and I quote, “The Bureau’s perpetual insulation from Congress’s appropriations power . . . renders the Bureau ‘no longer dependent and, as a result, no longer accountable’ to Congress and, ultimately, to the people,” end quote. It is no surprise that this unaccountable agency disregards the law. And it is no surprise the CFPB is already being sued for its disparate impact overreach.

A harmful effect of the CFPB’s unauthorized expansion of disparate impact is that it creates tremendous uncertainty. Any action taken by financial institutions may subject them to disparate impact liability, even if they have no way of knowing whether a disparate impact will occur. They will likely have to pass on the costs of liability to consumers, or just avoid potential frivolous litigation by not offering services and products in the first place. So the expected outcomes of disparate impact liability are higher costs and less access to financial services for low-income families, which disproportionately harms minorities.

The Biden administration should stop abusing its authority to advance this misguided, liberal legal theory.

Thank you, Mr. Chairman.

Chairman BROWN. Thank you, Ranking Member Toomey.

I will introduce today’s witnesses. Ms. Lisa Rice, from Toledo, Ohio, is the President and CEO of the National Fair Housing Alliance, one the Nation’s leading experts on fair housing in lending policies. Welcome, Ms. Rice.

Marc Morial is the President and CEO of the National Urban League. He previously served as mayor of his hometown of New Orleans, and was the President of the U.S. Conference of Mayors. President Morial, welcome.

Mr. MORIAL. Thank you.

Chairman BROWN. Byron Donalds represents Florida’s 19th Congressional District. Before holding office, Representative Donalds worked in the banking, finance, and insurance industry. Congressman Donalds, welcome.

Mr. Devon Westhill is the President and General Counsel at the Center for Equal Opportunity. He served as the top civil rights official at the United States Department of Agriculture. Mr. Westhill, welcome.

Janai Nelson is the President and Director-Counsel at the NAACP Legal Defense and Educational Fund. Prior to joining LDF she was Associate Dean for Faculty Scholarship and Associate Di-

rector of the Ronald Brown Center for Civil Rights and Economic Development at St. John's University School of Law. Ms. Nelson, welcome.

Ms. Rice, please begin your testimony.

STATEMENT OF LISA RICE, PRESIDENT AND CEO, NATIONAL FAIR HOUSING ALLIANCE

Ms. RICE. Thank you. Chairman Brown, Ranking Member Toomey, and other distinguished Members of the Senate Banking Committee, I am so appreciative of you for inviting me to testify today.

The National Fair Housing Alliance is the Nation's only national civil rights organization solely dedicated to eliminating all forms of housing and lending discrimination and creating well-resourced, healthy, vibrant, resilient communities. I can empathize with people like Ryan Coogler, who although being one of the world's most noted and award-winning film directors, was falsely accused of being a bank robber and detained by police when trying to withdraw money from his own bank account. I, too, personally have experienced differential and humiliating discriminatory treatment when trying to access services from financial institutions. No one should have to experience these types of indignities.

Discrimination in financial services is built on our Nation's enduring legacy of discriminatory policies and practices. Thousands, literally thousands of race-based laws, like the Indian Removal Act, Jim Crow laws, Black Codes, the Home Owners' Loan Corporation Act, the National Housing Act, and many other statutes and policies put in place over the last 400 years created inequitable systems like residential segregation. In fact, we are more segregated today than we were 100 years ago because of these discriminatory policies. We have a biased appraisal system, unfair zoning policies, the dual credit market, and biased algorithms that are still in place today, impacting millions of people.

In addition, too many people experience unfair treatment and denial of critical financial services and products. The ongoing failure of financial services providers to fair serve all consumers and communities harms individuals and neighborhoods, stifles innovation, restricts economic progress, generates wealth loss, and makes the U.S. less globally competitive.

The cost of discrimination is incalculable. According to research from the Brookings Institution, homeowners in predominantly Black neighborhoods have lost, cumulatively, \$162 billion in wealth due to appraisal bias. Another study found that eliminating bias against communities of color would have resulted in an additional 770,000 Black homeowners and an additional \$218 billion in sales and expenditures. But due to biased policies and practices, consumers, our society, and the economy lost out on these benefits. Citigroup estimates that eliminating racial inequities for Black consumers alone would add \$5 trillion to the U.S. GDP over a 5-year period.

The Fair Access to Financial Services Act fills a critical gap in the fabric of our Nation's civil rights and consumer protections, and is vital to ensuring people can fully participate in our modern-day economy and that our society can thrive. It covers discriminatory

practices not precluded by the Civil Rights Act of 1866, the Fair Housing Act, the Community Reinvestment Act, and the Equal Credit Opportunity Act. A fair, open, and equitable marketplace promotes economic health and wealth for people, communities, and the greater society, solidifying our position as a global leader, and making our Nation stronger.

The Nation's history of discrimination, segregation, and financial exclusion reverberate to this day, having massive consequences in the lives of everyday Americans who simply want to use the services that are necessary to fully participate in our economy. Congress has done well to pass hard-earned legislation aimed at preventing this history from being repeated, but more can be done to close loopholes in our civil rights enforcement infrastructure to better protect people of color and other marginalized consumers from discrimination in financial services.

The Fair Access to Financial Services Act is an important step in the right direction, and we look forward to working with the Committee and Members of Congress on this legislation.

Chairman BROWN. Thank you, Ms. Rice.

Mr. Morial, welcome.

**STATEMENT OF MARC H. MORIAL, PRESIDENT AND CEO,
NATIONAL URBAN LEAGUE**

Mr. MORIAL. Thank you very much. Chairman Brown, Ranking Member Toomey, and Members of the Committee, I want to thank you for the opportunity to testify before you this morning.

I lead the National Urban League. We serve over 300 communities through a network of 92 affiliates across the Nation. Since 1910, we have been in the forefront of the effort to build generational wealth within the Black community and other underserved populations. Throughout our work we have seen the dire consequences of an American financial system that has systematically cutoff and shut out individuals, families, businesses, and communities of color from access to capital.

Nearly 150 years after the closing of the Freedman's Bank, in the wake of a global pandemic that revealed the true extent of the economic insecurity of communities of color, given all that we know about the historical systemic bigotry of banks and Governments against communities of color, even after the end of slavery and Jim Crow, and in the shadow of an outrageous coordinated attack by some against the newly systemic efforts to address the harms of bigotry, I can think of no more important hearing than this one today.

When people of color suffer racist engagement in the financial marketplace it causes substantial monetary and nonmonetary harm to both them and to this Nation. Depending on how racist behavior occurs, be it systemic, digital, in person, community members are often unaware or unable to prove that they received disparate treatment or discriminatory outcome.

In 2021, 4.5 percent of U.S. households—that is 5.9 million people—were unbanked or underbanked or in banking deserts, meaning that no one in the household had a checking or savings account at a bank or credit union. The likelihood of being unbanked is even higher for Black and Hispanic families. Eight percent of Black

households, 8.4 percent of Hispanic households are unbanked. Only 1.7 percent of White households are unbanked.

Less than a decade ago, during the Great Recession, comparably sized banks closed at higher rates in markets serving communities of color between 2009 and 2014, with some Black and Hispanic communities losing half of their bank branches. This uneven distribution of bank branch locations exacts a cost on residents of communities of color in the form of greater traveling distance and time to the nearest banking facility. These practices create banking deserts in which predatory payday lenders, check cashers, and other nonbank services thrive, thereby implicating banks and facilitating a market dynamic where the financial services environments in communities of color are dramatically different in terms of quality, experience, and expense from those in White, nonminority neighborhoods.

In addition to the reluctance to operate in communities of color, another source of racial discrimination may be bank employees' discretionary power and practices in charging costs and fees. Bank employees wield discretionary power in racially executing bank policies. They determine how much a customer pays in costs, and customers may face varying fees depending on whom they talk to at a bank. These concerns regarding discrimination and bias have led to lawsuits rightfully brought by the U.S. Department of Justice Civil Rights Division, which illuminated the widespread discriminatory practice including loan officers who refer to some subprime loans in minority communities as "ghetto loans," as minority people as "mud people."

The consequences of these acts were reflected in the data in the National Urban League State of Black America 2022 Equality Index. Black are less likely to be approved for mortgages than White Americans. The disparity rate is 41 percent. The home ownership rate for Black Americans, after plunging down to 40 percent in the aftermath of the Great Recession, has climbed back to 43, but compared to Whites at 74.4. This is a wide disparity.

I want to just outline that the National Urban League is in the forefront of "Greenlining" initiatives by investing directly in the communities we serve. And our new Empowerment Center, a \$250 million-dollar, mixed-use real estate project in Harlem, which combines financing from every single tool, new markets tax credits, low-income tax credits, equity, and debt, will provide thousands of jobs for Harlem, and provide a new headquarters for the National Urban League, high-quality retail stores, and a new Civil Rights Museum. We can greenline versus redline.

Today I am proud to say that the bill that you all have proposed would fill important gaps, Senator Brown, in this ecosystem of protections necessary to protect people from systemic discrimination in the marketplace.

And I want to close with this point, which is an important point. Every study, whether by Brookings or McKinsey shows that if we close the racial wealth gap in this Nation by eliminating discrimination in access to capital, in wages, and in home ownership, the impact on the American economy will be \$2 to \$3 in GDP. Let us understand that systemic discrimination affects not only Black and

Brown communities but affects the Nation at large. This is about the America of the 21st century.

So I thank you, and I look forward to the question-and-answer period.

Chairman BROWN. Thank you, Mr. Morial
Mr. Donalds, welcome.

**STATEMENT OF REPRESENTATIVE BYRON DONALDS OF
FLORIDA**

Mr. DONALDS. Chairman Brown, Ranking Member Toomey, thank you for inviting me to testify on this important topic of racial discrimination in financial services. Having had a career in financial services myself I can speak firsthand to the issues and the complexities of our capital markets here in the United States. As a Black man, I understand the burden of discrimination and racism, and I am thankful that discrimination is illegal in our country.

Is our financial system perfect? No. Is it far superior and far more inclusive in comparison to the rest of the world? Absolutely.

While I could point to the loss of banks in minority communities post Dodd-Frank or highlight the frivolous regulatory red tape that negatively impacts economic growth in these communities, I would like to start off with the most glaring, obvious fact. Our markets cannot flourish and best serve consumers when they are saddled with regulatory uncertainty. Government agencies should not expand their own authorities in ways that subvert the stated purpose, avoid congressional review, and break the law. It is harmful, it is illegal, and it is unconstitutional.

Case in point. The CFPB's lawless steps to address "gaps" and "unfairness," quote/unquote, in the financial services industry. The CFPB's use of the Unfair or Deceptive Acts or Practices authority contradicts the Dodd-Frank Act's treatment of unfairness and discrimination, which under the law are two separate and distinct concepts.

The heavy hand of Government is weighing down American consumers through infinite rulemaking and guidance. This way of governing is not in good faith, and it is not a sustainable way of conducting business for the people. Discrimination and racism should absolutely be taken seriously, and that is why there are laws in place, such as the Equal Credit Opportunity Act and the Civil Rights Act.

Disparate impact cannot be used as a justification for Government overreach. I think everyone in this room today would agree that there is progress to be made in growing economic opportunity for all Americans. But that is impossible with a financial activist mindset infused with bad policy prescriptions that do not solve the problem.

I have worked in financial institutions, and there are two colors financial institutions are concerned with: green and red. There are two categories considered: creditworthy or risk prone, and I would add my start in financial services was as a credit officer. I underwrote loans, so I know this firsthand.

There is no subliminal mission to deny access to products based off of race, sexuality, religion, or any other identification of the sort. Banks prioritize handling business, and if any individual

meets necessary standards to conduct business with them that is what banks will do. Taking credit risk into account is responsible banking. It is not racism or discrimination.

We should prioritize ways to help struggling individuals prosper. How can we help create better outcomes for consumers? Well, there are about four basic ways. One, collaboration between Government and private sector is key to address nuanced issues. Agencies should adhere to the rulemaking process. Engaging equally with all stakeholders creates a full picture that prevents undue harm on consumers or unintentional consequences. And I would add, our economic history is replete with unintentional consequences that come from Capitol Hill.

Number two, relax de novo banking requirements. Since Dodd-Frank, almost half of the community banks in the United States have failed, and that has had a critical impact on minorities. We see the impact this has had on minorities at the beginning of the pandemic, with the PPP program. It was not the case of banks not wanting to engage with minorities. It was simply that there was not a preexisting relationship which inhibited small, minority-owned businesses from getting to the first round of PPP. Long story short, if there are not banks in the area, how are those businesses in that area going to be able to get to the consumers? If there is no existing relationship, how are you going to be able to make that thing work, especially when PPP was dropped on everybody in the United States at a moment's notice?

Number three, actions taken by agencies should be based on unbiased data, not anecdotal evidence or assumptions. Agencies should also assess actions taken by industry leaders to ensure there is not duplication between regulators' actions, what banks are already doing to address the needs of underserved communities.

Number four, financial literacy should be prioritized. Discrimination and disparate impacts are not the same, and we have got to understand that equal opportunity does not necessarily mean equal outcomes. If individuals lack credit worthiness that impacts other outcomes relating to financial services, we should be looking at ways to address that, like alternative data, in order to shore up their credit worthiness. The reality is not every American will reach a place of financial wealth, but most Americans can reach a place of financial health.

In closing, racial discrimination in financial services is illegal. It was before this hearing. It will be after this hearing. Expanding of Government is not needed or justified.

Chairman BROWN. Thank you, Mr. Donalds.

Mr. Westhill, welcome.

STATEMENT OF DEVON WESTHILL, PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY

Mr. WESTHILL. Thank you, Chair Brown, thank you, Ranking Member Toomey, and to the Committee Members as well. I am very happy to be here. I think this is an important topic.

I am Devon Westhill. I run an organization called the Center for Equal Opportunity. Our mission is right there in the name. We ad-

vance color-blind equal opportunity and nondiscrimination in America.

That mission is of both professional and personal importance to me. I have written and spoken widely on the topic, including before the U.S. Congress earlier this year at a hearing on discrimination and the civil rights of Asian Americans. More fundamentally, I am a Black man from the South with a Vietnamese wife, with whom I share, like so many other people in this country, two beautifully multiracial babies.

My primary concern here today is how the mission to promote nondiscrimination is carried out. In particular, I am worried about the decision of the Consumer Financial Protection Bureau, the CFPB, to utilize a disparate impact analysis to identify unlawful discrimination in financial services.

So let me expand a little bit on what Ranking Member Toomey mentioned about disparate impact. Disparate impact claims are distinct from disparate treatment claims because plaintiffs are not required to show any intent to discriminate under disparate impact theory. To establish a disparate impact claim, a Government agency or private plaintiff must show that a practice or policy that is nondiscriminatory by its terms, in its intent, and in its application disparately affects members of a protected class. I go into further detail in my written testimony.

But it is hardly ever the case that disparate impact will result from decision or policy but instead by how much and whether you can identify the direct cause of it.

If you do not take anything else away from what I say here today, take this: disparity is not discrimination. Disparity is not bias. Disparity is not racism. These things are distinct. And there is a problem in underestimating discrimination and bias and racism. I admit that. That is clear. But I think we also have to admit that there is a problem in overestimating it as well.

And calling something discrimination or racism or bias when it is not is also problematic. It makes little sense to equate imbalances in one way or another, such as in the racial composition of loan recipients, with discrimination. Imbalances often have a multitude of contributing factors and do not always disfavor minorities.

The sentiment is well summed up, as so often is the case, by economist Thomas Sowell in his book, *Discrimination and Disparities*: “If there is not equality of outcomes among people born to the same parents and raised under the same roof, why should equality of outcomes be expected, or assumed, when conditions are not nearly so comparable?”

The CFPB’s use of disparate impact may harm minorities most, in fact, and I think that is what Congressman Donalds was getting at, in terms of the unintended consequences of rejiggering certain things in CFPB examination manual. It can encourage race-based decisionmaking in financial services. The outcome-focused approach to disparate impact analysis disincentivizes for potential defendants or covered entities, regulated entities, the use of legitimate race-neutral policies and instead encourages race-based decision-making, just the opposite of what civil rights laws like the Equal Credit Opportunity Act are meant to do, for fear of liability.

But more directly, creditors will be perversely incentivized to judge consumers in part by the color of their skin rather than, as should be the case, their financial risk based on generally accepted credit assessments, in order to achieve a predetermined racial balance. That is not something we should be encouraging. Taking race into consideration in making any decision has never been a boon for minorities in America. This creates profound business uncertainty and whiplash as well, that flows to consumers, which will disproportionately harm minorities.

I think there is also a disregard for the plain language of the ECOA in case law. The Supreme Court has consistently held that statutes that provide a disparate impact cause of action must contain “effects” or “results” like the Court has found in the Fair Housing Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964. The Court has refused to hold disparate impact claims cognizable under statutes that lack such language like Title VI. The ECOA, like Title VI, contains no effects-based or consequences-oriented language.

I could go on for quite some time about the increased costs in litigation of threat of litigation that businesses will face under disparate impact regimes and how that flows to consumers and hurts most minority consumers and low-income consumers.

We ought to carefully and thoughtfully work to reduce racial discrimination as much as possible in this country, a country that in so many ways has sanctioned it, not just for preferred classes or races but for everyone, every single individual. I am committed to that. But I think disparate impact is a very dangerous theory that can turn on its head that mission. Thank you.

Chairman BROWN. Thank you, Mr. Westhill.

Ms. Nelson, welcome. Thank you for joining us.

STATEMENT OF JANAI NELSON, PRESIDENT AND DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Ms. NELSON. Thank you. Thank you, Chair Brown and Ranking Member Toomey and Members of the Senate Banking Committee. It is an honor to be here. My name is Janai Nelson, and I am the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, and I am grateful for this opportunity to testify about racial discrimination by financial institutions.

There have already been many examples cited, and I will cite one more, that speaks to the disparate treatment and discrimination that so many Black people face in this country, and that goes underreported in our society. Less than a year ago, in 2021, December, a Black man by the name of Peter Wogbah went into a U.S. Bank in Bloomington, Minnesota, and requested a cashier’s check from his business account. The tellers refused to issue the check and told him the money was unavailable, even after he called U.S. Bank’s 1-800 number to confirm the wire funds were there. The tellers told Mr. Wogbah to go to a different branch and to get the check there. They then called the police.

This discrimination has severe consequences. Unfortunately his story is not unique. This is an underreported phenomenon, and Black people and other people of color are disproportionately de-

nied equal access to financial services that are essential to creating economic opportunity, the opportunity that some have referenced here today. By depriving communities of color equal access, these financial institutions, which are intended to serve the public, the entire public, deprive certain communities of an equal opportunity to save for the future, to invest in a business, to buy a home, and importantly, to build intergenerational wealth.

According to the Brookings Institute, communities of color have fewer options when it comes to financial services than majority White neighborhoods. Banks in these neighborhoods often require higher initial deposits, minimum account balances, and as a result, the Federal Reserve found that an estimated 40 percent of Black Americans are either unbanked or underbanked.

People of color are also denied loans at higher rates and are offered worse terms than other borrowers. In 2022, the FDIC found that Black borrowers are more likely to be denied mortgages and pay higher interest rates than White borrowers, even when controlling for other factors. And that point must be underscored because this debunks the myth that it only requires motive. When you control for other factors and racial disparities still result, that is evidence of discrimination.

The Federal Reserve also found that approximately 14 percent of small Black business owners received all the financing they sought from banks compared to 34 percent of White small business owners.

Discrimination by financial institutions imposes significant costs on communities of color, and we have written about this. Our Thurgood Marshall Institute produced a publication, “The Black-White Racial Wealth Gap”, which I commend to this Committee.

And I want to underscore what some of my colleagues have already said, and that is that the cost is not borne by communities of color alone. It is borne by our economy, that could be thriving, that could be far more expansive if this discrimination did not occur. And when we think about the calculus between the cost of any outcome to preventing discrimination, we must also think of the lost economic gain that results from racial discrimination in financial services.

As has been mentioned, this U.S. economy suffers from a loss of \$1 trillion to \$1.5 trillion between 2019 and 2028, as a result of racial discrimination in financial services. And the Federal courts have made it very difficult for individuals who are harmed by financial institutions to use existing civil rights statutes to address racial discrimination.

And I will give three brief examples. The Civil Rights Act of 1964, prohibits discrimination in public accommodations for people who have a disability but not based on race. That disparity must be fixed. ECOA prohibits racial discrimination by lending, and the Fair Housing Act does, but it does not address non-credit transactions. That is an omission that must be addressed.

And while Sections 1983 and 1982 of the Civil Rights Act of 1866 prohibit racial discrimination in contracts, the Supreme Court and other courts have narrowed the ability to use those statutes effectively, most recently in *Comcast v. National Association of African-American-Owned Media*, where the Supreme Court imposed a read-

ing of Section 1981 that imposes a high burden on harmed individuals and makes it harder for them to hold financial institutions accountable, imposing a “but for causation” requirement.

So we must do more to address racial discrimination by financial institutions. We applaud you, Chairman Brown, for introducing this legislation. This bill makes clear that financial institutions have the same obligation not to discriminate on the basis of race as any other public accommodations. We are encouraged to see legislation being proposed that would eliminate barriers to the Supreme Court created by the Comcast case, and we look forward to working with this Committee to ensure full financial inclusion for communities of color.

And I look forward to your questions, especially exploration of the definition of discrimination and what it entails.

Chairman BROWN. Thank you, Ms. Nelson.

My first question is addressed to Ms. Rice, Mr. Morial, and Ms. Nelson together. Just to be clear, in the year 2022, do financial institutions discriminate against Black and Brown consumers? Ms. Rice?

Ms. RICE. Yes. In fact, we just released yesterday the Fair Housing Trends Report, which showed, Senator Brown, an 8.7 percent increase in the number of housing discrimination complaints filed. This is the largest number of complaints filed by consumers that we have ever seen. We have never seen this level of discriminatory complained filed by consumers. And we saw an increase in not only the number but the percentage of mortgage lending discrimination complaints. In fact, lending complaints increased by 66 percent from over the previous year.

So yes, it is alive and well, and we must address it.

Chairman BROWN. Mr. Morial.

Mr. MORIAL. I would add that, in 2022, the effect of long-term systemic discrimination remains real in this country. It is seen in the consistent disparities in mortgage denial rates. It is seen in the disparity in home ownership. It is seen in the disparity of the lack of access to both loan and equity capital by Black businesses. It is seen in the relative size of Black businesses versus White businesses in this country.

So the responsibility is to deal with discrimination as it exists today, but also an important responsibility to understand the historic systemic discrimination which causes the American economy to underperform, because human capital, a great talent, is being limited and restricted because of discrimination in the financial services industry.

Chairman BROWN. Thank you. Ms. Nelson, same question. Does discrimination exist in financial services?

Ms. NELSON. Absolutely, and it exists in a number of different forms. Many like to focus on discriminatory motive, which is very clear and explicit, and we have given a number of examples of that. But it can also exist when there are race-neutral policies that result in racial disparities that are evident and avoidable.

Discrimination occurs when disadvantage is imposed as a result of your race. That can happen because there is an explicit intention to do so or it can happen as a result of policies that either mask

a nefarious intention or that perpetuate and exacerbate existing racism in our society.

So it exists in all of those forms, and it exists, unfortunately, in profound ways in our financial system. We have spoken about disparities in home ownership, wealth. We have spoken about discrimination in the ways in which Black homes and homes of color are appraised, and my colleague at the end of the table has done amazing research on that front.

But there are many other dimensions to this, including the PPP loans that Black businesses received in comparison to White businesses. There was a significant gap in what the Government doled out to businesses owned by different groups of people in this country.

Chairman BROWN. Thank you, Ms. Nelson. The CFPB recently made updates to its Unfair, Deceptive, or Abusive Acts or Practices exam manual to better protect people and communities from illegal discrimination. Again, starting with you, Ms. Rice, and Mr. Morial, and Ms. Nelson, do you think the CFPB update making clear that discrimination is covered by UDAAP was an important move for the CFPB to make?

Ms. RICE. Yes, I do. Actions can be both unfair and they can be discriminatory. And I will lift up an example of a case that the CFPB brought under UDAAP in conjunction the Navajo Nation to stop an illegal tax refund scheme that steered consumers of color, including many members of the Navajo Nation, to a very high-cost, exploitative tax refund anticipation loan product. The CFPB used its authority under UDAAP to bring this action, which again was both discriminatory and unfair.

So the clarifications that the CFPB recently made, they are not a new approach. They are not an overreach. They are a clarification of the policies and standards that the CFPB has used all along. And I think it is critically important for regulatory agencies to provide additional clarity so that all stakeholders can understand how those regulatory agencies are interpreting the law. That case was brought in 2015.

Chairman BROWN. Mr. Morial.

Mr. MORIAL. Number one, all the talk about regulatory certainty, the CFPB's guidance is designed to create for those who are regulated more certainty as to how this statute will be interpreted. But it is troubling, and it is an act of betrayal for some who, in the wake of the murder of George Floyd, trumpeted their commitment to a new day for racial equity, to then turn around and go through the back door and challenge this guidance in court. And we are going to continue to call out the notion that once you play uptown and you pray downtown, Senator Brown, where, on one hand you say, "We are going to do things differently," but then you turn around and file a lawsuit against something which is designed to create more regulatory uncertainty.

So I agree with Ms. Rice, but I want to add that perspective because I think it is very important that you cannot, on one hand, say, "We want regulatory certainty," and then on the other hand, when regulatory certainty is ordained in a guidance, you walk to the courthouse and you challenge it, after you have made so many

public statements about your commitment to racial justice. So it is important for this Committee to understand that perspective.

Chairman BROWN. Thank you, Mr. Morial. Ms. Nelson.

Ms. NELSON. Yes. So to be clear, the CFPB has the authority to regulate discriminatory conduct as an unfair practice under Dodd-Frank. And I know this Committee know knows that in order to constitute an unfair practice under Dodd-Frank, a practice has to satisfy three prongs. One is that it is likely to cause substantial injury to customers, two, that that injury is not reasonably avoidable, and three, that that injury is not outweighed by countervailing benefits to consumers or competition. And in the words of then FTC Commissioner Rohit Chopra, discriminatory practices from many financial institutions are three for three, when you consider each of those considerations.

That discrimination must be addressed by regulatory agencies. That is their charge. It is not beyond the scope of their authority to do so. And we hope that there will be additional reinforcement to allow this agency to do its work and to fill the gaps that I identified in my testimony, in our current Federal statutes, that are important but do not take us all the way in protecting against racial discrimination in financial services.

Chairman BROWN. Thank you. Senator Toomey.

Senator TOOMEY. Thank you, Mr. Chairman.

Mr. Westhill, you made what I thought was an important point, the gist of which was we should not underestimate discrimination where it exists, and we should call it out and fight it. But it also important not to find discrimination where it does not exist.

I am wondering, so you and Congressman Donalds, both Black men who grew up in the South, I wonder if either or both of you would care to briefly address—I mean, I am sure you have seen and experienced discrimination in your lifetimes. Could you just reflect on how important it is that we get this right, in other words, see discrimination where it exists and fight it and not choose to find it where it does not exist?

Mr. WESTHILL. Yeah, I am happy to respond to that. Thank you very much for the question, Senator. I think it is terribly disempowering if we tell young minority kids in this country that there is discrimination everywhere, there is racism everywhere, there is bias everywhere, that it is institutionalized, that you are going to see it at every turn. That is terribly disempowering. Why would you want to really try your best and succeed and achieve when you know you cannot do it anyway, when you are being told that over and over again?

I think that overestimating bias or racism or discrimination is terribly disempowering and is not helpful. What we really should be doing is putting our finger on exactly what that is and being careful about the way we speak.

I think the dictionary definition of discrimination is something very akin to intentional prejudicial treatment. Disparate impact is not that. That is a gap in outcomes.

Senator TOOMEY. Congressman.

Mr. DONALDS. I agree with what the gentleman said. The only thing I would really add to it, Senator, is if you are going to get into issues associated with what the outcomes are—let us take

home ownership, for example—well, there is a lot of criteria that goes along with it. Number one, what is your credit score? Because if you have 700 credit score it is much easier to qualify for a home loan versus if you have a 600 credit score. Number two, what is the value of the home you are trying to buy? Number three, do you have a downpayment for the home you are trying to buy? If you take a look at home prices throughout the United States, what is happening is they are actually rising, in part because the material to build a home is rising.

So if your income level is X but the cost of the home continues to rise, that is going to have a negative impact overall in your ability to acquire the home. If you want to get into the situation of looking at money you want to borrow for a small business, and one of the things we are talking about is are there impacts on disadvantaged communities, minority communities because of the way banking is structured in the United States right now, I would say yeah. But that fault lies here on Capitol Hill. Because like I said in my testimony, since the passage of Dodd-Frank, community banking in the United States has been eviscerated.

So if you are trying to get a business loan, typically how that works is you have a relationship with the lender in the local community bank. If community banks are gone, what is your relationship? And a Wells-Fargo checking account is a banking relationship. That is a place where you deposit your money. As a former Wells employee I can say that.

Senator TOOMEY. Yeah, and you are absolutely right. Empirically, there is no disputing that after Dodd-Frank the launching of new community banks in America simply stopped. It just ended.

Mr. Westhill, in your testimony you pointed out that disparate impact theory is actually intention with the constitutional guarantee of equal protection because it promotes race-conscious decisionmaking. Could you elaborate on that at all?

Mr. WESTHILL. Sure. So basically what you are doing, if you are telling regulated entities that they have to get the outcome right, there is going to be a look, right, at the skin color, at the ethnicity, at the gender or what have you of the individuals that are asking for a loan or whatever the situation is, because they are trying to avoid liability. That actually encourages racial discrimination. It does not do away with racial discrimination.

Think about that hiring manager, for example, who, at a large bank needs to get his numbers right in terms of the diversity initiatives that the bank has launched. We have heard about something like this fairly recently. And so they are looking at the individuals that they are interviewing more closely for their skin color. And it does not always mean that those individuals are getting the job or getting the loan either.

Senator TOOMEY. Right, and I wonder if the Congressman or Mr. Westhill would comment on this. So we know that the CFPB used fraud data and methodology in the past. Now they are claiming to have more authority to expand the use of disparate impact. What is the net effect that—if they get their way, if the CFPB gets its way, what is the net effect on the cost and the availability of credit and financial services in minority communities, in your view?

Mr. DONALDS. Oh, I am going to tell you right now the cost is going to skyrocket, because what you are going to do is you are going to have to bring in, frankly, more middle managers into every banking institution to deal with the new loopholes that CFPB is going to create. Everybody is going to have to double-check and triple-check boxes. All that does is add more costs to delivering credit into these communities, or any community for that matter, in the United States. And at the end of the day, as somebody who underwrote credit—so I did this as a living—everything that you lend has a cost to the bank. And if the costs are prohibitively more expensive because of the unintended consequences of a regulatory burden from the CFPB—which, by the way, is still unconstitutional in my opinion—then what will happen is the costs will be borne by the consumer in higher credit costs. And if you are talking about people in the United States who are the lower end of the socioeconomic spectrum, the burden will fall on them more than anybody else, and you might actually dry up lending opportunities in the process as well.

Mr. WESTHILL. Yeah, I was just going to make that point. I think not only are costs going to skyrocket, as Congressman Donalds suggested. It may be the case that services are just not provided at all. You know, it is too cost prohibitive or the liability is too great to even provide the services, and it is going to fall disproportionately on minorities, senior citizens, immigrants, individuals who cannot afford to have that sort of scenario play out.

Senator TOOMEY. Thank you very much.

Senator MENENDEZ [presiding]. Thank you. The Chair has had to go to another hearing so I am going to ask my questions, and then Senator Reed will follow up.

First of all, welcome to all of you, particularly my constituent, Mr. Morial, who we are proud to claim as a New Jerseyan, so it is good to see you.

I just wanted to make one comment and that is that the system as it is, is not working for us. So if we think the system as it is, is working just fine then something is wrong.

I am proud to be a cosponsor of Chairman Brown's Fair Access to Financial Services Act, but in my view in order to root out discrimination and promote equitable access in the financial system we need to start at the top with our regulators. Right now there is a staggering lack of diversity in leadership positions at the institutions that set and enforce the rules of the financial system. As a result, Black and Latino communities lack representation at the table when these critical decisions are being made.

So I would like to ask Ms. Rice and Ms. Nelson, what are the consequences of underrepresentation of minority voices among financial regulators?

Ms. RICE. Sure, I am happy to start off there, Senator Menendez, and thank you for the question. So I think it is critical because bringing diverse representation to the table when rules are being set increases the likelihood of creating a more accurate rule. It also increases the likelihood of ensuring that we have the right data brought to bear. I mean, that is one of the reasons that we had the foreclosure and financial crisis in 2008, because we had the wrong

data, right? We were being informed by the wrong information in the lead-up to the crisis.

But it also makes sure that the rules that we craft are accurate and we are considering how those rules are going to impact all market segments. So it is extremely important.

Ms. NELSON. Yes, I would agree, and I think this panel demonstrates that when we are looking for diversity it is important that we have a diversity of thought, a diversity of experiences, people who understand the plight of communities that suffer racial disparities that we have outlined today, and people who have not traditionally had access to credit, access to equal financial services, those who have experienced direct discrimination, based on motive or based on impact. Because those voices, as Ms. Rice has said, will impact how we think about policy and how we create policy that can remedy those harms and not perpetuate them.

Senator MENEZES. Well I can tell you from my own experience of 30 years in Congress between the House and the Senate, if I and others like me were not here, issues that are critically important to our communities would just not be either brought up or pressed. And that does not mean that others are not well intentioned but they are not doing it. They are not putting political capital on the table to make it happen.

One of my concerns has been the Federal Reserve has a well-documented diversity problem. In its 108-year history, the Federal Reserve has never had, for example, a Hispanic regional bank president. And this is an institution that is making some of the most important decisions in our economy.

Let me ask you, the FDIC found that nearly 6 million households in the country are unbanked. These families have no access to checking accounts, debit cards, credit cards. Instead they use cash for day-to-day purchases. And another 14 percent of Americans are underbanked, which means they rely on money orders and other alternative financial services to complete transactions.

Mr. MORIAL, in your work have you found that the unbanked and underbanked populations are disproportionately people of color?

Mr. MORIAL. They are disproportionately people of color, and the reality is that in communities that are banking deserts, payday lenders, check cashers, informal lenders proliferate, and they rent money at exorbitant interest rates, they rent money on abusive terms, and they proliferate. And if you go into any community across America—you can go into Newark or you can go into Jersey City or you can go into Patterson in New Jersey, you can go into Providence, you can go into Philadelphia, Pittsburgh, Scranton, or Harrisburg—and you go in the Black and Brown communities, you are going to see an active effort to use television advertising, radio advertising, street teams to market these types of services in these communities.

So it is a double-edged sword. The banks are not there, but the predators are there, and it has a negative impact on Black and Brown and underserved, and I might even add, such is the case in many rural communities, such is the case in many communities that happen to also be White or Asian. Underserved, underbanked communities are a haven, a breeding ground for predatory financial practices.

Senator MENENDEZ. One final question and then Senator Warren is next. According to the *New York Times*, Wells Fargo conducted fake interviews with women and minority candidates for positions that had already been filled. The bank reportedly undertook these fake interviews to artificially boost diversity statistics in an attempt to satisfy an internal goal to interview at least one woman and one person of color for each position. That information, uncovered by the *New York Times*, is not only highly offensive, it suggests to me a systemic bias and discrimination at the bank, but raises questions of a broader pattern.

Ms. Nelson, if a bank is bringing in candidates of color for positions they already filled, just to create an illusion of diverse hiring practices, can we say that bank is making a good faith effort to promote diversity, equity, and inclusion?

Ms. NELSON. No, we cannot. We cannot. I think it is quite clear that that is—

Senator MENENDEZ. That speaks to the culture, right?

Ms. NELSON. Absolutely, and it speaks to the notion that there is already an idea as to which is worthy of working at a bank and who is preselected as a preferential candidate in that workplace, and that candidates of color have already been ruled out of the equation.

Senator MENENDEZ. Thank you very much. Senator Warren.

Senator WARREN. Thank you, Mr. Chairman.

So the 2008 financial crisis was triggered by big banks and other financial institutions targeting communities of color with predatory mortgage loans. So to ensure that that never happens again, Congress made it illegal, under the Dodd-Frank Act, for any company offering consumer financial products to engage in, and I am going to read the language, “unfair, deceptive, or abusive acts or practices,” or UDAAPs, as they are known, with the acronym. Congress also created the Consumer Financial Protection Bureau and put it in charge of enforcing these laws.

Under Dodd-Frank, a bank commits an unfair practice if three conditions have been met. First, that the practice in question would likely cause substantial injury to the consumer; second, consumers could not reasonably avoid that injury; and third, the injury is not outweighed by other benefits to consumers or competition. So I want to talk through what that unfairness standard means in practice.

Ms. Nelson, you are an expert on civil rights law so let me run through an example with you. Say somebody walks into a bank wearing a cross around their neck, and the bank teller takes one look at them, refuses to help, and tells them to leave, maybe even calls the police to kick them out. Ms. Nelson, do you think that situation would cause the consumer substantial injury?

Ms. NELSON. Absolutely.

Senator WARREN. First element. OK. Do you think the consumer could reasonably have avoided the injury?

Ms. NELSON. I do not see any way they could.

Senator WARREN. OK. And do you think there might be some public or economic benefit to the bank teller for doing what they did, that would outweigh—

Ms. NELSON. No.

Senator WARREN. OK. Good. All right. So we have gone through the test that Congress wrote into Dodd-Frank to define unfair practices. Ms. Nelson, would you conclude that this bank, if it met these three tests, may have violated Dodd-Frank by unfairly discriminating against a customer on the basis of their religion and that regulators should probably take a closer look at this bank?

Ms. NELSON. Yes, they should.

Senator WARREN. OK, good. And if the bank cannot do this because of someone's religion, do you think the bank should be able to do this because of someone's race?

Ms. NELSON. Absolutely not.

Senator WARREN. All right. I agree, and that is why I am very glad that the CFPB is cracking down on discriminatory and other potentially unfair practices under the law when it updated its examination procedures earlier this year. This ensures that the CFPB examiners are doing what Congress told them to do—root out unfair practices against consumers, whether the unfairness is because of their religion, their race, or their sex.

And yet the United States Chamber of Commerce and other lobbyists for big banks have come out in full force to claim that CFPB examiners investigating potentially unfair discriminatory practice amounts to, in their words, "abuse."

Now listen to that again. The bankers claim that the CFPB is engaging in abuse of the big banks if it stops those banks from discriminating against customers based solely on race. Wow.

So over and over, the banks have been caught red-handed discriminating against customers. My colleagues were just talking about it. In 2011, Bank of America agreed to pay \$335 million for charging Black and Latino customers higher rates on mortgages. In 2012, JPMorgan Chase got caught doing the same thing and paid \$55 million in penalties. In 2017, Wells Fargo got caught doing the same thing and agreed to pay \$175 million.

Mr. Morial, your organization has been on the front lines protecting consumers against unfair practices. Can you tell us a little about the impact these practices have on consumers?

Mr. MORIAL. Well, thank you very much, Senator Warren, and thank you for your leadership.

Settlements are never effective to help people recover the wealth that they have been stripped of. And settlements alone do not form, I think, an effective deterrent to future discrimination and a continuation of the practices which led to the lawsuits. You and I both know, and this Committee knows, that when the financial crisis took place the taxpayers of this Nation rode in on their stallion and rescued these banks because of the thought that if they did become destabilized and went under, the broader economic impact would be severe.

So at that time the idea of the CFPB is that there needed to be a stronger methodology and enforcement to prevent the reoccurrences of the kinds of practices that brought us to fall of 2008, which was a tragic moment for this Nation. I testified before this very Banking Committee in 2010, on that crisis and on the need for CFPB, and on the fact that a false narrative had been created by the financial services industry that it was lending to Black and Brown people that caused the crisis. And in this Committee, with

statistics and charts and graphs, that theory, that narrative was debunked.

And so once again we have to push back against any notion that CFPB somehow is going to negatively impact the availability and access to capital for Black and Brown communities. Such an argument is preposterous and disrespectful to the long history of this Nation in trying to overcome systemic discrimination.

So CFPB is an essential, very important agency, and for those that do not support it, give me something better. But having nothing is not an option.

Senator WARREN. All right. Thank you very much. I appreciate your longtime work in this, and I appreciate your strong voice in this. You know, the idea that the banks will continue to argue quite openly that they want to protect their ability to discriminate against people based on race is truly outrageous, and I applaud the CFPB for saying not on their watch. Not going to happen.

Mr. MORIAL. Thank you.

Senator WARREN. Thank you. And I now recognize Senator Warner. Sorry about that.

Senator WARNER. Sorry, Mr. Chairman. Great to see the panel.

Mr. Chairman, are you open at all to a brief second round of questions?

Chairman BROWN [presiding]. Perhaps, but you have not done your first round.

Senator WARNER. No, I understand.

Chairman BROWN. Let me say it this way. If your first round is so outstanding that you deserve a second round—

[Laughter.]

Senator WARREN. Wait. Is that the test?

Senator WARNER. There is a—

Chairman BROWN. Senator Warner—

Senator WARNER. I am just saying—

Chairman BROWN. —I do not know how the hearing is going to go.

Senator WARNER. No, I know. The reason is this. There is a decade-long, ferocious competition that has been going on between Virginia and Maryland, shocking as that may be, over the location of the FBI headquarters. And certainly very distinguished Members of this panel have weighed in on that issue. And many Members of this panel I am very familiar with, and my sense is that issue may be raised by good friend, the Senator from Maryland.

The only reason I would like to come back, if he chooses to raise that, is that, you know, I think the Biden administration has been very good at charging the GSA and the FBI to come up with a set of criteria on what is in the best interest of the FBI, its workforce, and for the first time ever, on a major selection of a Federal building, has put in as one of the criteria equity, which is all about fairness and all about something I know you care about, and I know Senator Warren cares about, and I care about, and Members on both sides of the panel care about.

I have tried not to kind of elevate this into the press because Maryland and Virginia's enormous frustration with the last Administration was that after years of work, starting under the Obama administration, on having a fair process—and we were down to the

final straws, and we are going to duke it out between the two jurisdictions—Maryland delegation is suddenly starting to say, “Well, you know what? We do not like the criteria because it actually includes what the FBI might need themselves, and if we do not get what we want, we are going to go to the White House and change the criteria,” the exact critique we made to the Trump administration, at the 11th hour, coming in and changing the criteria, and taking that process totally aside because a suspicion many of us had that they did not want the FBI headquarters moved out of D.C., because lord knows, you might have a hotel that would then compete with the Trump hotel.

And I am all for equity being part of the consideration in this decision, and I just was going, if my friend, the Senator from Maryland, was going to raise this issue, I was going to make the point that, one, I think the Biden administration has laid out fair criteria and I was going to make the point that the Springfield location is one that is 60 percent people of color, 40 percent foreign born, hits a whole host of criteria on the equity basis that are important.

I mean, listen. PG County, there are two sites, and they are both great sites. They had strong equity issues to make as well. And if that issue was raised I was going to make an appeal, particularly with somebody I had known as well as the National President of the Urban League, that I would urge you—because, you know, I thought we were going to try to play by the rules that the Administration has laid out. I was going to try to make the plaintiff appeal to he and others on this panel that let us make the presentation on equity issues about the site that Virginia puts forward. He may not raise that, and I would be—

Mr. MORIAL. I will just say, and I know the hearing is not on this, you know, and my first choice was for the headquarters to remain in Washington, DC. Honestly, my second choice, move it to New Orleans.

[Laughter.]

Senator WARNER. Touche.

Mr. MORIAL. My third choice was to move it to Newark, which is near where I live now.

Senator WARNER. Yes, sir.

Mr. MORIAL. And then my fourth choice was Maryland, and my fifth choice was Virginia.

Senator WARNER. And all I am asking, President Morial, is that—and again, this is an all is fair in this process. Let me be clear. When my friend, the Senator from Maryland, comes back in this is a critically important decision for the people who work at the FBI, for fairness for the whole region, and the equity debate is an important one.

Mr. MORIAL. My team and I are open to listen.

Senator WARNER. And all I am trying to say is we would love to have the opportunity to make the same kind of presentation to you about the equity issues. I had been concerned when the Maryland delegation have said, “If we do not get the outcome we will go to the White House and try to change things,” which seems exactly a critique of the last Administration’s techniques. But all I would ask is that we have that opportunity.

I do actually have questions on this subject, but if somebody is waiting from the outside to come back in—

Chairman BROWN. Senator Smith is next, so she is waiting.

Senator WARNER. She is waiting?

Chairman BROWN. She is waiting, yes.

Senator WARNER. OK. Well, I will stop my questions. I appreciate the Chairman's discretion.

Chairman BROWN. Of course.

Senator WARNER. But I would like to be able to come back.

Chairman BROWN. I will try to include you.

Senator WARNER. Thank you.

Chairman BROWN. Thank you, Senator Warner.

Senator Smith is recognized from her office, from Minnesota.

Senator SMITH. Thank you, Chair Brown, and thank you, Senator Warner, for that excellent demonstration about how to seize the opportunity wherever you find it. I appreciated that.

I want to talk about the issue of discrimination in mortgage lending. The Minneapolis Fed published a paper earlier this year on this topic, and it laid out—we know that in the Twin Cities area people of color are up to three times more likely to be denied a conventional 30-year mortgage than White applicants. The Minneapolis Fed's findings are not surprising. The pervasiveness of this issue, though, is really jarring.

And, of course, we know that lenders consider multiple factors when reviewing mortgage applications, many of which are race neutral, at least on their face. However, this study specifically focused on low-risk borrowers, and even when controlling for differences in income or credit scores, and even where a home is located, Black and Latino and Asian borrowers continue to be denied at higher rates, based on the findings of this Minneapolis Fed report.

Ms. Rice, can you talk to us about what the consequences are of an economic system that so blatantly excludes families of color from accessing home ownership, and what should we be doing here in Congress to address this specifically?

Ms. RICE. Yes, thank you so much for the question, and you are absolutely right. Study after study has found disparities in access to credit for borrowers of color. For example, Berkeley researchers have found that Black and Latino consumers who had the same financial profile and the same credit scores as their White comparative borrowers are being charged higher rates when they do access mortgage credit by risk-based pricing systems, and these are algorithmic models that are supposed to take in a number of considerations and factor when pricing risk. But they are pricing borrowers of color at a level that is higher than their commensurate level of risk because of multiple factors that are included in those black-box models. Black and Latino consumers are paying \$450 million every single year—every single year—because they are being charged higher rates than they are supposed to be charged.

There are many, many costs of discrimination in our marketplace. And I am so glad you asked this question because I often times like to quote and cite former Federal Reserve Board of Governors Chairman Alan Greenspan, who talked precisely about the costs of discrimination. And he said, and I am paraphrasing, that

discrimination—this is intentional discrimination and unintentional discrimination—erects barriers to the free flow of capital and labor to their most profitable use. He also explained that bias in our markets distorts outputs, creating higher cost of goods.

And I must say this. Discrimination increases the cost of goods. Eliminating discrimination decreases the cost of goods. It also decreases our national wealth. He talks about how removing non-economic distortions like discrimination increases yields and output, expands our economy, and generates higher returns to both people and physical capital.

Discrimination, we know, is one of the major drivers of the racial wealth gap, so let me just cite this. When you look at families, when you just look at families, households with children, Black households with children have one penny of wealth for every dollar of wealth held by White families. That is a penny on the dollar. Latino families have eight cents of wealth for every dollar. That is a huge racial wealth gap, and it is causing all kinds of downstream challenges and inequities that we have to face. And we have said over and over again that if we eliminate discrimination it benefits everyone. It is a win-win. And this is something that we really seriously must address. There are loopholes in the laws and we have to close those loopholes.

Senator SMITH. Thank you very much for that answer. And this is near and dear to my work because the Minneapolis metro area has the largest Black-White home ownership gap in the entire country, and it is getting worse. It is not getting better. According to the Minneapolis Fed, the Black home ownership rate peaked in 1950 in Minneapolis.

So this is not a historic problem, meaning it is not a problem that exists in history. It exists in the current world, and the impacts of that discrimination are broad reaching.

So thank you, Mr. Chair.

Chairman BROWN. Thank you, Senator Smith.

Senator Van Hollen has been introduced marvelously by his colleague in the next State, so Senator Van Hollen, of Maryland.

Senator VAN HOLLEN. Thank you, Mr. Chairman. I said to Senator Warner seniority has its privileges. So since he raised the issue of the siting of the FBI building I feel compelled, Mr. Chairman, to focus on that issue. And I will say, if my colleague wants additional time afterwards, so will I.

So I am going to start with you, Mr. Morial, because we are talking about a different kind of discrimination. We are talking about discrimination that has an impact on economic opportunity and on the racial income wealth gap in the Washington, DC, area. And that has to do with the siting of Federal agencies. And if you look at the history of siting of Federal agencies in the Washington, DC, area, there is no doubt that the majority Black Prince Georges County has gotten the short end of the stick. While Prince Georges County has about 20 percent of the region's workforce, it hosts less than 5 percent of the region's office space.

You have written a letter. You and other civil rights leaders have written a letter to the President and to the head of GSA on exactly this issue. Can you talk about your concerns and how this does play into the discussion about income and wealth equality?

Mr. MORIAL. When President Biden signed his Executive order on racial equity one element of its implementation was its impact on decisionmaking in the siting of Federal facilities, not only in the DMV but all across the Nation, where courthouses, where Federal buildings are located, to ensure that communities of color, urban communities, communities where Black and Brown people live, would get their fair share of those investments.

So in this instance, the leadership of Prince Georges County and many leaders in Maryland, including yourself, reach out to many of us to suggest that Prince Georges County had not been treated fairly in this decisionmaking historically, and that while I said earlier, before you came into the room, that my first choice was Washington, DC, my second choice was New Orleans, my third choice was Newark, that it was OK if my fourth choice was Maryland, and Prince Georges County, because Prince George County, for the DMV, represents something interesting.

When I attended law school here at Georgetown in the 1980s, Prince Georges County was a predominantly White, suburban, and rural community. It has since become the largest predominantly Black county anywhere in the United States. And notwithstanding the fact that there are many rising middle-class families in Prince Georges County, there is still a high level of poverty, a higher level of many, many challenges and issues that affect communities of color.

So it seemed to make sense that in this instance, it is the FBI insisted that it could no longer operate effectively solely in downtown Washington, DC, that Prince Georges County made a good-sense place to ensure that a Black community, a Black jurisdiction would have the opportunity to host and be the home of a facility that will employ literally thousands of people. But then the second and third impact of it, in terms of services and retail and hotels is almost immeasurable over a period or an arc of probably 10, 15, 20, 25, 30 years.

So it was, Senator Warner, no slight to Virginia at all. It was this sort of analysis.

But I also think that—I want to give some due credit, because we are in a public hearing, to the fact that the community leadership and the local elected officials in Maryland got very active in reaching out and encouraging us to think about this and to support this instance. This is not something we would normally involve ourselves in, but because of the President's commitment to racial equity, supported by all of you, I think, here in this room, we think it is important that the Administration be held accountable, to live up to that, when these decisions take place.

So that the background here, and again, no slight to the great State of Virginia. But sometimes when you face these sorts of things, in order to correct the imbalance you have got to do things differently, and I think here that is why Maryland seemed to make a good choice. But again, Senator Warner asked us to listen to what the people of Virginia, or the community leaders of Virginia have to say, and while I have already written a letter I am certainly willing to do that, along with my staff, and I think the other civil rights leaders, because it is a fair thing to do, and maybe

there are some perspectives on Northern Virginia that we are not aware of.

But we are sticking with Maryland for now, and New Orleans and Washington and Newark—

Senator VAN HOLLEN. Well, if I could, Mr. Morial, thank you. Well, no, I would just say to my colleague from Virginia, if he thinks that Virginia has some equities in this issue when it comes to the diversity of the community and the fact that Fairfax County has been overlooked, which it clearly has not, then he will agree with me that when the FBI and GSA grade the issue of equity that they will raise it from the low 15 percent that it is to a higher amount that would reflect the President and the Biden administration's commitment to equity. And the President said, and I quote, when he issued that Executive order, "We need to make the issue of racial equity not just an issue for any one department of Government. It has to be the business of the whole Government." And I would submit that the GSA and the FBI clearly have not gotten the message, given the low weight they have given to this factor. And again, if my friend, Senator Warner, wants to join me in urging the Administration to raise the weight of that factor, we welcome that.

Chairman BROWN. Thank you, Senator Van Hollen.

We really were not planning a second round, and this has been a rather unusual twist in our Committee process, but Senator Warner, I appreciate it if you would actually spend less time debating him on this and go into your round of questioning. Then Senator Toomey wants to ask a couple of questions and I will close. But go ahead.

Senator WARNER. Thank you, Mr. Chairman. I appreciate the courtesy, and I appreciate President Morial, we have worked together on a lot of years, and I look forward to presenting the facts, like 60 percent of the population of Springfield is people of color, and 50 percent speak a language other than English at home. And we actually, in our State presentation to the GSA and FBI, included these equity issues, and I just do not think we ought to be second-guessing the process.

But I think I will start with you, and make sure the whole panel gets a chance to weigh in. One of the things that the Chair and Senator Van Hollen and I completely agree is a huge part of discrimination in the banking system comes from lack of access to capital. And our historic institutions have not done a very good job. We have talked many times of the complete destruction of the vast majority of MDIs in this country after the Great Recession of 2008 and 2009.

One of the areas that I firmly believe is a growth possibility to really invigorate MDIs, also to take the fairly small niche of the financial sector, banking sector, CDFIs, community development and financial institutions, which by definition have to lend 60 percent to low- and moderate-income communities, and do more. This is one of the areas, and kind of strange bedfellow, we found common cause with the former Secretary of the Treasury, Mr. Mnuchin. But we were able to secure a record \$12 billion, \$3 billion in grants, \$9 billion in Tier 1 equity, into these institutions. And I think that

and the next round on CRA is going to help push more capital into these institutions so we can start.

Ms. Rice and I, we have had some debates over how we get more Black and Brown home ownership and downpayment assistance. I believe still there is a great opportunity to first generation, first-time home buyers, disproportionately people of color, give them a chance to acquire equity. Give them a 30-year mortgage. Give them a 20-year rate. You know, double their acquisition equity over a 10-year period.

But my question for everybody on the panel is—and again, this is an area where I think the Chair has weighed in a number of times as well—we know the Fed has to try to get inflation under control. My concern is, and in their zealotry to get inflation under control you could end up driving us into a recession. And the very institutions that we have just come to help may be the first in line, because while we have seen, under COVID, 400,000 Black businesses lost, the good news post-COVID is the fastest-growing rate of new businesses are Black women.

Mr. MORIAL. Yes.

Senator WARNER. But those businesses are going to get squeezed the most in this next space.

So I have been talking about should there be, maybe not looking at mark-to-market on CDFIs, maybe a little of a regulatory forbearance. We need to put guardrails in place to make sure that some of the progress coming out of COVID, for entrepreneurs as well as CDFIs and MDIs, do not get washed away, God forbid, if we fall into a recession.

Mr. MORIAL. Let me say a few things.

Senator WARNER. And I would love to also hear from the whole panel. Thank you, Mr. Chairman.

Mr. MORIAL. You are absolutely on point when you say that strengthening MDI, minority depository institutions, basically Black-, Asian- and Latino-owned banks, could make a difference because their propensity to lend to Black potential homeowners, to Black businesses and Black consumers is certainly greater than mainstream banks. Combined, these banks probably have less than \$3 billion in assets. They are relatively small, even on a combined basis.

So the growth opportunity is significant. What they need is equity capital, because they can plus that up and lend it at a greater rate. And so to the extent that you and this Committee can find ways—and I would say, you know, to Senator Toomey that this issue of strengthening Black businesses in the '70s, the '80s, and the '90s, and even into the early 2000s, in the Bush years, was an area of bipartisan consensus. There was a tremendous effort, and this was one of these things that never brought the same amount of partisan friction. So I would agree with that, and I think we need to think about that.

As far as CDFIs are concerned, one way to assist CDFIs would be to figure out a better way to fund the loan loss reserve component of their capital structure. That tends to be very difficult to raise the money, to sustain it, because that is not money you are going to lend. That is money you raise and you hold to offset non-performing loans.

So CDFIs, but I would also offer this. Many CDFIs are far more focused on real estate transactions, which are less risky because they take a small position in a large project, versus those like ours, the National Urban League's new Urban Empowerment Fund, which we just launched, or relaunched, I should say, which is our CDFI, which is primarily focused on lending to Black-owned businesses.

So these are two areas I think we should double down, and I think you are right that the impact of an overcorrection by the Fed in raising interest rates too fast and too soon could be devastating on some of the progress that is now being made in the comeback of Black-owned businesses.

Chairman BROWN. Thank you, Mayor. I am going to go to Senator Van Hollen for his second round, and then to Senator Toomey, and then I will close.

Senator VAN HOLLEN. Thank you, Mr. Chairman. I just would like to put into the record a couple of documents related the earlier discussion Senator Warner and I had on the FBI. It is the letter that Mr. Morial and his colleagues sent, it is an op-ed piece in The Washington Post by Cortland Milloy yesterday, and an op-ed piece by the County Executive of Prince Georges County, that lay out very clearly the income and wealth gaps that have been created, in part, by the unfair siting of Federal agencies in places outside of Prince Georges County, Maryland.

But on an area that Senator Warner and I agree on, CDFIs. I chair the Appropriations Subcommittee that funds the Treasury Department CDFI accounts, and we have worked to increase those accounts every year, including, we hope, this year, as part of the process. And it was great to work with Senator Warner and others who really pushed hard about a year-and-a-half ago, to get that new capital fund and the emergency funds. And I really do think they are a critical part of our infrastructure for getting more capital to lower-income communities across the country.

And I want to talk also about the issue of banking deserts. Baltimore city has now, in many places, become one of the worst banking deserts in the country, in terms of lack of physical banking locations. And that, of course, both in the city but also other places around the country, means that more people have to go rely on other sources of borrowing, including more and more online financing, some of which provide important protections but many do not. Many are sort of predatory engines where if you do not read the fine print you get totally overwhelmed with fees and unfair interest rates.

This came up yesterday in a discussion, or the day before, in a discussion here in the Banking and Housing Committee with the FDIC confirmation hearing for Marty Gruenberg, for example, FDIC. We are pushing hard for the CRA. I think the CRA will help address some of the changes that have taken place over time that undermined the purposes and intent of the CRA. But the reality is if you look today, fintech loans account for 57 percent of the unsecured personal loans. They are not covered by the FDIC. They are not covered by CRA.

And so one overall question is how do we address that issue? But if you could, Ms. Nelson, speak a little bit to the impact of the

trend that we are seeing where you have bank branch closures, so there is no physical presence of the bank. That means more people go online to get their loans, and a lot of these online systems do take advantage of people. Could you just talk about that trend and what we can do about it?

Ms. NELSON. Absolutely. So fintech does provide another option for some persons who are seeking lending but it is not a remedy to what we have described here today. Fintech also can perpetuate discrimination, and there are a number of criteria that have been harmful. For example, we have worked with Upstart, which was using the SAT scores of universities as a barometer for whether a particular borrower was creditworthy or not, and as a result there were Black and Latino borrowers who went to schools, including HBCUs, that did not have the highest-ranked SAT scores and wound up paying almost \$3,500 a year more over the course of a year loan.

So it is those types of online services that are unregulated, that are unsupervised in the way that they should be that can perpetuate discrimination and create further disparities.

I would also say that the Brookings Institution analyzed the rates of bank closures in six metropolitan areas, including Baltimore, as you mentioned, and found that census tracts with higher rates of Black residents were more likely to experience bank closures between 2010 and 2021. So this is a real phenomenon and a trend that has not abated. And I will say that if we think about the State of Pennsylvania, and we think about the racial wealth gap there, where, in places like the Philadelphia metro area, where the Black-White home ownership gap is over 26 percent, and the Pittsburgh metro area that has a gap of over 41 percent, bank closures and lack of access to financial institutions can have a real impact that exacerbates these already disturbing numbers.

Ms. RICE. Senator Van Hollen, I know we are over time, but if I can just interject here because this is an extremely important point. Banks have always, throughout the entire history of the United States of America, disproportionately closed their branches in communities of color as compared to other communities. That has always been the case. It is still the case today. Banks are closing their branches in predominantly high-income, affluent Black census tracts at a higher rate than they are closing their branches in low-income, non-Black census tracts. So it is definitely a problem that we have to fix.

When people are forced to go to payday lenders, fringe lenders, it is important to note those entities primarily do not report positive consumer behavior to the credit repositories, increasing the likelihood that their consumers will remain credit invisible and credit unscorable.

Senator VAN HOLLEN. Thank you. Thank you all. Thank you, Mr. Chairman. And my challenge to my colleague, Senator Warner, still stands in terms of increasing the weight given to diversity and equity in the FBI siting. Thank you all.

Chairman BROWN. Thank you, Senator Van Hollen.

Senator Toomey will have a couple more questions and then I will close.

Senator TOOMEY. Thank you, Mr. Chairman. Let me begin by observing. You know, I served in the House so I understand the view of most House members with regard to this chamber, and despite that, Congressman Donalds was kind enough to come over here and testify. And to all the witnesses who have been very patient during a discussion that may not have been central to what you thought we were going to be here to talk about, I want to thank you for your patience.

I would like to bring it back to a discussion about an aspect of the CFPB's policy, and what I am specifically referring to is, it strikes me as kind of shocking that the CFPB applies this disparate impact theory to auto lending. Congress demonstrates exactly what it thinks of this by repealing that rule. And then they turn around and say, "Oh, OK. Well, in that case we will expand it and we will apply it in a whole new way." It strikes me as a brazen overreach. And I wonder, to what extent do either of you, if you care to comment on this, think that that kind of action is, I guess, the inevitable result of a construct where Congress has no control over this entity? Congress has no say. They have no reason to care whether what they are doing is completely contrary to the wishes of Congress, because they know there is nothing Congress can do about it. We do not control their budget. We do not even indirectly control their budget. We have no say over this. And I am wondering if either of you think that the unconstitutional design contributes to this kind of overreach. Congressman?

Mr. DONALDS. It absolutely does. There is no doubt about it, because they do not have to come and sit before you gentlemen here in the Senate or us in the House, because they do not have to go through the appropriations process. They largely do what they want. There are some conversations with whoever the President might be at the time, but other than that they are completely unaccountable.

From what I hear over at the CFPB office building, they have got the best in town and the greatest pizza oven. Why? Because all they do is just go from company to company to company, they do their investigations, they levy fines, and they keep on moving.

To a broader point, if you want to address the core issue, and this is actually to, I think, Senator Warner or Senator Van Hollen's point about access to capital, you do not do it by then leveraging an unaccountable agency to have more of a regulatory burden on the financial institution. Because MDIs and CDFIs are not going to solve that problem. The reason why we have banks closing in communities all across the country is because of the regulatory burden that has happened since Dodd-Frank became law in 2010. That is the reason. So if we are going to be serious about this and try to find access to capital issues, it is by lobbying the CFPB to do more. It is actually about reining them in once and for all and then reexamining the banking regulatory structure here, on Capitol Hill, that will allow the industry to flourish.

Senator TOOMEY. Thanks very much. Mr. Westhill?

Mr. WESTHILL. I would just say generally I am concerned about the insulation that the CFPB has from congressional oversight and authority. It is problematic in a number of different respects, including the insulation that the director has. It is outside a little bit

the scope of what we are discussing here in this hearing, but I will say that, you know, I think there is a lot of legitimate criticism, reasonable criticism of the rise of these sorts of Federal agencies, that there could potentially be a legitimate fourth branch of Government growing out of these agencies. And that is really problematic to our constitutional separate of powers and structure.

Mr. DONALDS. Senator, real quick, if I may. The one thing we have to acknowledge is—and I agree with what Senator Menendez said—the system is not working. It is not working. And the reason why it is not working is because of the regulatory burden of we have to stop something from never happening again. What has really happened is the big banks got bigger. They got massively bigger. That is not working for small communities.

So Congress has to address that from a meaningful way on a regulatory basis, and a statutory basis, not by adding more layers to try to fix a problem Congress created in the first place.

Senator TOOMEY. Thank you very much, Mr. Chairman.

Mr. MORIAL. Senator Brown?

Chairman BROWN. I have—

Mr. MORIAL. I am just compelled to offer this perspective. CFPB's director is confirmed by the Senate. It is not an unaccountable agency. The entire apparatus of Federal regulatory agencies are designed to be insulated from political interference so that political wins and decisions are not going to impact them.

So if you challenge the structure of CFPB then you have got to run the tables on all of the regulatory—

Chairman BROWN. You are exactly right, and I am going to cut you off. You are exactly right.

Mr. DONALDS. Senator, if I may.

Chairman BROWN. We are not going to have a debate here. You have each spoken well about it. The CFPB director will be here in 2 weeks, I believe.

Mr. DONALDS. I would only add that the President of the United States makes that appointment. So if the President is making the appointment, to say that it is insulated from politics is ridiculous. That is my only point.

Chairman BROWN. OK. Thank you for that. Thanks to our witnesses today.

Today's hearing has made it clear there are not civil rights protections to prevent discrimination in financial services. I urge my colleagues to work with me on the Fair Access to Financial Services Act to help protect against discrimination in banking.

We heard testimony and highlighted stories that show when wrongdoing occurs in financial services and the bills come due, too often Black and Brown communities suffer the most. Black and Brown communities do not trust our financial institutions in large part. They feel they need an alternative. We should not accept risky alternatives such as crypto as a solution to be excluded from traditional financial services because of discrimination. Crypto is not the answer. It is not a civil rights solution. That is why we should work to pass the Fair Access to Financial Services Act to empower effective agencies like the CFPB.

For Senators who wish to submit questions for the record, due 1 week from today, Thursday, the 8th. To the witnesses, please

submit your responses to questions for the record within 45 days from the time you receive them.

Thank you again. The hearing is adjourned.

[Whereupon, at 11:54 a.m., the hearing was adjourned.]

[Prepared statements, responses to written questions, and additional material supplied for the record follow:]

PREPARED STATEMENT OF CHAIRMAN SHERROD BROWN

When work has dignity, every American can fully participate in and receive the benefits of our dynamic economy.

Financial services and products have played a critical role in helping many families build wealth and plan for the future—whether that means saving for college, retirement, or their first home.

Many Americans have been able to do just that.

However, not every community has gotten its share of the prosperity.

That is especially true for Black and Brown Americans—who are too often shut out of the financial system because of discrimination.

Let that sink in, in 2022, in the United States of America, you can be turned away at a bank because of the color of your skin.

The wealth and income disparities between White and minority households are a consequence of the unequal access and treatment minorities have faced.

From accepting slaves as collateral for loans, to Jim Crow, to redlining, to the subprime mortgage crisis' predatory practices, to the current crypto crisis, Black and Brown Americans have never had equal access to or fair treatment in financial services.

Today's hearing is an opportunity for this Committee to reckon with not only the legacy of discrimination, but the current reality of the pervasive and pernicious discrimination in financial services.

The 2021 FDIC household survey found that roughly eleven percent of Black households and 9 percent of Hispanic households were unbanked—compared to 2 percent of White households.

And for Black Americans with checking accounts, it's not always better. We know that some banks close checking accounts at significantly higher rates in communities with more Black residents.

The fact is that many Black and Brown Americans do not have access to, nor do they trust, our financial system.

Think about Dr. Malika Mitchell-Stewart, a doctor from Texas who attempted to open an account and deposit her signing bonus check. The bank tellers raised questions about the check's authenticity and her employment as a doctor. They ultimately accused her of fraud and turned her away.

Consider Clarice Middleton, an African-American woman. As Emily Flitter described in her book "The White Wall", Ms. Middleton "shook with fear" as she stood on the sidewalk outside a Wells Fargo branch in Atlanta after she was accused of fraud.

Ms. Middleton went to a Wells Fargo branch in a wealthy, mostly White Atlanta neighborhood to cash a security deposit refund check. Three bank employees examined the check and her identification, but refused to look at the additional proof Ms. Middleton offered. They declared the check fraudulent, and one employee called the police.

And then there's Ryan Coogler, the director of the movie "Black Panther", who was profiled while trying to withdraw money out of his own account. He gave the bank teller his bank card, PIN, and ID. The teller assumed Mr. Coogler was trying to rob the bank.

Mr. Coogler's case shows that even wealth and fame can't stop discrimination.

Black and Brown customers are viewed with suspicion for just entering a bank and are questioned over the most basic transactions.

And because access to basic financial services is how families build wealth, discrimination in banking only worsens the racial wealth gap.

Many Black and Brown consumers have no place to securely hold their funds. And when consumers are pushed out of financial services, they are forced to rely on check cashers. They have far fewer opportunities to build relationships with financial institutions—relationships that matter when trying to buy a home or start a small business.

The COVID-19 pandemic revealed the detrimental consequences for minority consumers who have been unable to build a relationship with financial institutions.

Not only were minority small business owners left out of important programs like the Paycheck Protection Program, but small business owners without banking relationships who were able to obtain Federal aid were sometimes barred from accessing those important funds.

Congress has worked to address this fundamental unfairness with legislation.

Civil rights statutes like the Equal Credit Opportunity Act and the Community Reinvestment Act seek to ensure equal access to credit, and to combat discriminatory practices, such as redlining.

The Civil Rights Act of 1964 outlawed discrimination in certain places of public accommodation, such as hotels and restaurants. but it does not cover banks.

Federal courts have held that the law enumerates specific types of businesses. Those that are not on the list, such as financial institutions, are not covered.

We must do more to ensure that all Americans have equal access and equal treatment in financial services and products.

The lack of clear protections and the loophole within the Civil Rights Act make it difficult to end discrimination and make it hard for victims of racial discrimination to hold these banks accountable.

Minority consumers also have access to less of their own funds.

One report found that Black and Latino consumers are required to maintain a minimum balance of \$821 and \$879, respectively, compared to a minimum balance of \$648 for White consumers.

Black and Latino consumers, unlike White consumers, simply don't have access to their own money.

Banks say they are committed to eradicating the legacy of racism in our financial institutions.

Yet a week after the CEOs of our largest banks sat before this Committee and promised to fight against discrimination, the American Bankers Association sued the Consumer Financial Protection Bureau for updating its examination manual to scrutinize unfair discrimination.

We know that Wall Street always attacks the CFPB, but their opposition has reached frenzied levels with Rohit Chopra at the helm.

Under Director Rohit Chopra, the CFPB is using all of its authorities to fight discrimination and has repeatedly gone after financial institutions for their treatment of Black consumers.

Earlier this year the CFPB announced that it will examine whether discrimination violates the Dodd-Frank prohibition against unfair, deceptive, and abusive acts and practices.

In 2021, the CFPB required a bank to pay \$5 million to address redlining that harmed Black consumers.

Since its creation, the CFPB has gotten \$637 million from discriminatory banks, tens of millions of which have gone directly to minority consumers who experienced discrimination.

And it's no surprise that when an effective agency like the CFPB actually works on behalf of consumers, Wall Street does everything in its power to stop it. We don't see banks holding true to their commitments to fight discrimination.

To ensure that all Americans have dignity in work, we must work to end discrimination in banking.

PREPARED STATEMENT OF SENATOR PATRICK J. TOOMEY

Mr. Chairman, thank you. Equal treatment under the law is a fundamental American value. Discrimination and racism are wrong and have no place in our society. Unfortunately, they are a sad part of our Nation's history. Even though we've made great strides in dramatically reducing discrimination in our society, that doesn't mean instances of racial discrimination never take place today. When it occurs, the Government should enforce the antidiscrimination laws, including in financial services.

However, in recent years some Democrats have sought to advance a liberal legal theory called "disparate impact." Disparate impact is not the same as discrimination—far from it. Disparate impact theory punishes people if they make business decisions that produce statistical differences in outcomes between demographic groups, even if there's no discriminatory motive. There can easily be differences in outcomes when there's been absolutely no discrimination.

Now, in theory, defendants can prevail in disparate impact cases if they can prove at trial that there was a business justification for the policy that created the disparate outcomes. But, in practice, these cases entail significant costs and reputational risks that can force even innocent defendants to settle. In this way, disparate impact is a gift from liberal Democrats to trial lawyers. It's also a boon to regulators inclined to abuse their authority, like the CFPB.

For example, the Obama CFPB claimed to have discovered discrimination, based on disparate impact, by auto lenders who didn't even know the race of the borrowers they were accused of discriminating against. To underscore the absurdity of this, not only did the lenders not know the race of the borrowers, the CFPB did not even know the race of the borrowers that it claimed were being discriminated against based on race. But that didn't stop the CFPB from discovering racial discrimination.

The CFPB's actions weren't authorized by statute. To make matters worse, they were based on flawed methodology. The CFPB guessed race based on last names and zip codes, even though this method was flawed. For instance, this methodology predicts there's: an 89 percent chance that Chairman Brown is Black, and a 64 percent chance that Senator Tim Scott is White.

Moreover, CFPB documents showed the agency knew that: Credit scores and other business factors accounted for much of the statistical disparities, and there was a significant risk the CFPB would lose in litigation.

Nonetheless, the CFPB brought enforcement actions they knew might very well fail in court because they determined defendants have a "powerful incentive to settle", as we discovered in CFPB's internal documents, and so could be driven to settle cases that the defendants might be able to win. This is an outrageous abuse of power—to pursue litigation because the costs, economic and otherwise, would drive an innocent person to settle.

In 2018, Congress overturned the CFPB's disparate impact guidance for auto lending. Nonetheless, the Biden CFPB has expanded its use of disparate impact theory—effectively extending the very policy Congress overturned.

The CFPB has claimed the authority to supervise for disparate impact in all consumer financial services and products, based on an unprecedented reading of the Dodd-Frank's grant of authority to prevent unfair, deceptive, or abusive acts or practices, known as UDAAP. But Congress did not authorize disparate impact under UDAAP. In the 12 years since Dodd-Frank was enacted, the CFPB never previously claimed it did.

Congress took the UDAAP language from the FTC Act. For nearly a century the FTC never interpreted that language to include discrimination or disparate impact, until after the CFPB's novel reinterpretation.

That's exactly the kind of abuse of power the Supreme Court recently ruled against in *West Virginia v. EPA*, when the EPA—in the Court's words—"claimed to discover in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority."

It could've been describing the CFPB.

To make matters worse, the CFPB implemented this controversial change in law by fiat—without even rulemaking. This overreach was possible because the CFPB is structured to be unaccountable to Congress. It can simply take funds from the Fed, which also is not subject to appropriations, thereby doubly insulating the CFPB from congressional appropriations and control. That's why the Fifth Circuit recently found the CFPB unconstitutional, holding its funding violates the Appropriations Clause.

The court noted: "The Bureau's perpetual insulation from Congress's appropriations power . . . renders the Bureau 'no longer dependent and, as a result, no longer accountable' to Congress and, ultimately, to the people."

It's no surprise that this unaccountable agency disregards the law. And it's no surprise the CFPB is already being sued for its disparate impact overreach.

A harmful effect of the CFPB's unauthorized expansion of disparate impact is that it creates tremendous uncertainty.

Any action taken by financial institutions may subject them to disparate impact liability, even if they have no way of knowing whether a disparate impact will occur. They'll likely have to pass on the costs of liability to consumers, or avoid potential frivolous litigation by not offering services and products. So, the expected outcomes of disparate impact liability are higher costs and less access to financial services for low-income families, which disproportionately harms minorities.

The Biden administration should stop abusing its authority to advance this misguided, liberal legal theory.

PREPARED STATEMENT OF LISA RICE
PRESIDENT AND CEO, NATIONAL FAIR HOUSING ALLIANCE
DECEMBER 1, 2022

Introduction¹

Chairman Brown, Ranking Member Toomey, and other distinguished members of the Senate Banking Committee. Thank you for the opportunity to testify during the Committee's hearing entitled *Fairness in Financial Services: Racism and Discrimination in Banking*. Discrimination in financial services is built upon our nation's enduring legacy of discriminatory policies that embedded residential segregation and financial exclusion. Its effects are debilitating, and continue to preclude Latino, Black, and other underserved groups from accessing the most basic of services necessary to fully and effectively participate in today's economy. I welcome the Committee's commitment to understanding discrimination in financial services and expanding upon existing protections.

My testimony makes the following key points:

- The United States has a long, disturbing history of discrimination and financial exclusion that created systems and structures, such as residential segregation, that still negatively impact consumers and our markets.
- The ongoing failure of financial services providers to fairly serve all consumers and communities harms individuals and neighborhoods, stifles innovation, restricts economic progress, generates wealth loss, and makes the U.S. less globally competitive.
- A fair, open, and equitable marketplace that promotes economic health and wealth for people, communities, and the greater society, solidifying our position as a global leader and making our nation stronger.
- The Fair Access to Financial Services Act fills a critical gap in the fabric of our nation's civil rights and consumer protections and is vital to ensuring people can fully participate in our modern-day economy and society can thrive.

History of Financial Exclusion in the United States²

The roots of discrimination in the financial services industry are deep, pernicious, and persistent. Thousands of race-conscious housing, banking, and other policies created systems and structures in our society that are highly inequitable and still plague us today. Moreover, discrimination against people based on their race, national origin, gender, religion, disability status or other immutable characteristics causes great harm to people, our communities, and the greater society. We must use every weapon and technique at our disposal to root it out. No one should be denied financial services or treated in a disfavorable or humiliating manner simply because of the color of their skin, faith, gender, or ability status. It is simply un-American. Creating a marketplace free from discrimination is critical to ensure everyone in this nation benefits from our Constitutional protections while ensuring we remain the world's leading nation. Discrimination is crippling; it stifles innovation and progress. A free, open, and equitable society guarantees the United States can be economically viable and globally competitive.

¹ Lisa Rice C. Rice is President and CEO of the National Fair Housing Alliance (NFHA). The *National Fair Housing Alliance* leads the fair housing movement. NFHA works to eliminate housing discrimination and ensure equitable housing opportunities for all people and communities through its education and outreach, member services, public policy, advocacy, housing and community development, tech equity, enforcement, and consulting and compliance programs.

² A fuller discussion about the history of residential discrimination and segregation in the United States can be found at <https://www.banking.senate.gov/download/rice-testimony-4-13-21>.

Centuries of unfair laws and policies created residential segregation, redlining, restrictive zoning policies, a biased appraisal market, and biased algorithmic models. They also produced a dual credit market—a separate and unequal financial system that rewards White households while simultaneously cripples and debilitates Black, Latino, Asian American/Pacific Islander (“AAPI”), and Native American households. Race-based policies like Jim Crow laws, the Indian Removal Act, the Chinese Exclusion Act, and Black Codes are among the bevy of unfair laws passed over the decades. Until the passage of the Fourteenth Amendment in 1868, Black Americans were not legally allowed “to patronize the same banks as whites.”³ However, even today, people of color remain suspect when they visit financial institutions.

Even laws that appeared to be racially neutral were implemented with racialized policies. For example, in the 1930s, the New Deal’s federal Home Owners’ Loan Corporation (“HOLC”) developed one of the most harmful policy decisions in the housing and financial services sectors by creating a system that included race as a fundamental factor in determining the desirability and value of neighborhoods.⁴ The HOLC also created color-coded maps to indicate the risk level of neighborhoods. Communities of color coded as “hazardous,” signified by red shading on the map, were assigned a lower value. Areas that contained even small numbers of Black residents were coded as “hazardous” and shaded red. This approach systemized the association between race and risk and created an institutionalized structure for promoting “redlining” practices throughout the nation. Redlining refers to a policy or practice of restricting access to credit in communities of color.

The federal government developed other explicitly discriminatory policies that perpetuated the unfounded association between race and risk in the nation’s housing and financial markets. For example, the Federal Housing Administration (“FHA”) encouraged the use of racially restrictive covenants and required them in exchange for supporting new housing developments built throughout the nation’s suburban communities. Even after the Supreme Court declared in 1948 that racially restrictive covenants were not enforceable,⁵ the FHA gave preferential treatment to developers that adopted them. From 1934 to 1962, the federal government backed over \$120 billion in mortgages, but FHA’s race-based policies meant that less than 2 percent of loans went to Black, Latino, AAPI, and Native individuals. Similarly, the U.S. Department of Veterans Affairs (“VA”) also instituted the use of discrimination in the administration of the GI Bill loan programs enacted by Congress in 1944. In Mississippi state alone, just two out of 3,229 VA-insured mortgages went to Black servicemembers seeking to finance a home, business, or farm in the programs first three years.⁶

³ Tim Todd, Fed. Res. Bank of Kansas City, *Let Us Put Our Money Together: The Founding of America’s First Black Banks* 12 (May 2019), <https://www.kansascityfed.org/AboutUs/documents/5640/Let-Us-Put-Our-Money-Together-book-FINAL-2019.pdf>.

⁴ The Home Owners’ Loan Act of 1933 established the HOLC as an emergency agency under the Federal Home Loan Bank Board. 12 U.S.C. § 1461 et seq. See also University of Richmond, Virginia Tech, University of Maryland, and Johns Hopkins University, *Mapping Inequality* (documenting the maps and area descriptions created by the HOLC between 1935 and 1940), <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58>; Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

⁵ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁶ Dedrick Asante-Muhammad, et al., *The Road to Zero Wealth: How the Racial Wealth Divide Is Hollowing Out America’s Middle Class*, p. 15 (September 2017), https://prosperitynow.org/files/PDFs/road_to_zero_wealth.pdf.

Ongoing Failure of Banks to Serve All Neighborhoods and Consumers Regardless of Race or Gender

Lack of Banking Centers in Communities of Color

Consumers in the U.S. do not have equal or equitable access to our financial markets. Centuries of discriminatory policies, segregation, and disinvestment have led to the creation of the dual credit market in which banks and credit unions are concentrated in predominantly White communities, while payday lenders, check cashers, title money lenders, and other non-traditional financial services providers are concentrated in predominantly Black and Latino communities. An analysis by Trulia revealed stark disparities in where financial services are located.⁷ The research shows that communities of color had 35 percent fewer mainstream lenders than predominantly White communities. Moreover, there were twice as many alternative financial institutions — like payday lenders and check cashers — in communities of color. This, of course, is a legacy of our nation's long history of lending redlining and discrimination.

This phenomenon is not based on economic logic. Current practices are contributing to the growing disparity in credit access. For example, according to one recent analysis by Standard and Poor's, banks are closing their branches in high-income, affluent Black neighborhoods at a higher rate than they are closing branches in low-income non-Black areas.⁸ Median household income did not help explain the pattern since majority-Black areas with median household incomes above \$100,000 were as likely to not have a branch as low-income non-Black areas.⁹ This means borrowers of color disproportionately access credit outside the financial mainstream with payday lenders, title money lenders and other creditors who typically do not report timely payments to the credit repositories.

Additionally, it means consumers of color face widespread indignities when attempting to access traditional financial services. We have all read the alarming number of news reports of the challenges of "Banking While Black." Black consumers consistently report being racially profiled while they are conducting rudimentary activities such as attempting to deposit a check at a bank,¹⁰ cash a settlement

⁷ Michael Weinreb, *50 Years After the Fair Housing Act – Inequality Lingers*, Trulia (April 19, 2018), <https://www.trulia.com/research/50-years-fair-housing/>

⁸ Zach Fox, Zain Tariq, Liz Thomas, and Ciaralou Pallicpic, "Bank Branch Closures Take Greatest Toll on Majority Black Areas," S&P Global, July 25, 2019, <https://www.spglobal.com/marketintelligence/en/newsinsights/latestnews-headlines/bank-branch-closures-take-greatest-toll-on-majority-black-areas-52872925>.

⁹ Fox, "Bank Branch Closures Take Greatest Toll on Majority-Black Areas."

¹⁰ Jadyn Peiser, A Black doctor says she was refused service at a bank because of her race: 'I felt like a criminal', The Washington Post (Feb. 3, 2022), <https://www.washingtonpost.com/nation/2022/02/03/doctor-maika-mitchell-stewart-lawsuit-racist-bank/>; Erin B. Logan, A black woman says Wells Fargo didn't want to cash her check. She's suing for discrimination., The Washington Post (June 27, 2018), <https://www.washingtonpost.com/news/business/wp/2018/07/27/a-black-woman-says-wells-fargo-didnt-want-to-cash-her-check-shes-suing-for-discrimination/>.

check,¹¹ opening a small business account,¹² opening a joint checking account with a child, or removing money from a personal bank account.¹³ While many high-profile incidents garner mainstream media attention, Black consumers across income levels experience these humiliating situations reflecting systemic bias that is underreported. Moreover, these incidents place the consumers' lives at risk as they are often criminally profiled and accused by bank employees of having unlawful motives, and in many instances, the police are notified, and the consumers are detained.

Lack of access to credit can be harmful in the normal course of business, but in the midst of a pandemic, lack of access can have disastrous consequences for microbusinesses, their owners, and the employees who depend on them for their livelihoods. Further, despite the more than \$800 billion funneled to "small businesses" through the Paycheck Protection Program (PPP), small businesses owned by people of color failed disproportionately during the pandemic-induced recession.

While the PPP will likely go down as one of the nation's greatest taxpayer-funded transfers of wealth, the program's administration raises significant fair lending concerns. Many Black, Latino, AAPI, and Native-owned small businesses could not fairly access the program during the first round where banks lent more than \$350 billion to businesses across the nation. Between the start of the pandemic in March 2020 and April 2020, 41 percent of Black-owned businesses and 32 percent of Latino-owned businesses became inactive, while only 17 percent of White-owned businesses ceased to operate.¹⁴ The design of the program, which relied on banks to originate the loans, unfairly placed Black, Latino, AAPI, and Native American business owners at a distinct disadvantage in attempting to access PPP funds when so many were already on precarious financial footing. Banks prioritized customers with whom they had an existing banking relationship. Banks also tended to prioritize larger PPP loans to maximize fees, leaving out the smallest of small businesses from accessing the lifeline relief.

Proliferation of High-Cost and Abusive Lenders in Communities of Color

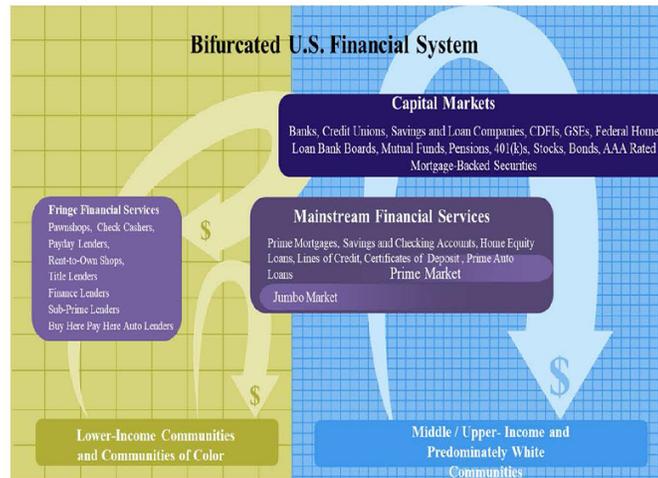
Discriminatory policies, segregation, and disinvestment have led to credit discrimination and the creation of the bifurcated U.S. financial system or dual credit market. It can be challenging for borrowers of color to access mainstream financial institutions for several reasons. First, borrowers of color are limited by the geographic location of mainstream financial services. Banks and credit unions are concentrated in predominantly White communities, while fringe financial services, such as payday lenders, check cashers, and title money lenders, are concentrated in predominantly Black and Latino communities. The graphic below illustrates this concept with non-traditional, poorly regulated, higher-cost, and often less safe "fringe" financial institutions reflected on the tan side of the graphic and safer, more regulated, lower-cost, "mainstream" financial institutions reflected on the blue side.

¹¹ Amita Sharma, San Diego Man Says He Experienced 'Banking While Black' In Local Bank of America Branch, KPBS Midday Edition (July 26, 2021), <https://www.kpbs.org/news/race-social-justice/2021/07/26/san-diego-man-says-he-experienced-banking-while-bl>.

¹² Emily Flitter, 'Banking While Black': How Cashing a Check Can Be a Minefield, The New York Times (June 18, 2020), <https://www.nytimes.com/2020/06/18/business/banks-black-customers-racism.html>.

¹³ Amiyah Taylor, 'Black Panther' director was falsely accused of robbery at Bank of America. It's eerily similar to a Black lawyer's experience., Forbes (March 10, 2022), <https://fortune.com/2022/03/10/black-panther-director-falsely-detained-at-bank-of-america/>.

¹⁴ Cameron Costa, Minority entrepreneurs at a tipping point as Black-owned banks dwindle in the U.S., CNBC (Aug. 25, 2020), <https://www.cnbc.com/2020/08/25/minority-entrepreneurs-at-tipping-point-as-black-owned-bankswindle.html>.



Source: Jim Carr, Lisa Rice, and Shanti Abedin

Patterns of Non-Banked and Under-Banked Populations

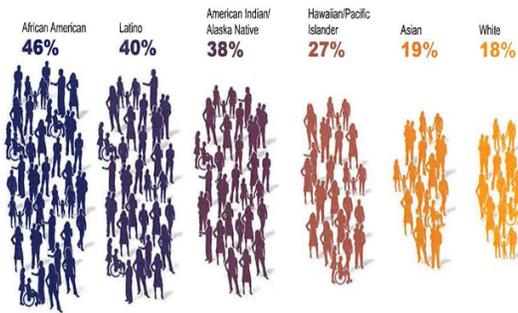
Our current financial system relies on assessments that can unfairly lock underserved groups out of the opportunity to access credit. For example, credit scores are a requirement for automated underwriting and risk-based pricing systems and matrices.¹⁵ Yet roughly one-third of Black and Latino borrowers don't have credit scores¹⁶ because they disproportionately access credit outside of the financial

¹⁵ "Loan-Level Price Adjustment Matrix," Fannie Mae, October 21, 2020, <https://singlefamily.fanniemae.com/media/9391/display>; "Credit Fee in Price Matrix," Freddie Mac, September 24, 2020, https://guide.freddie.com/euf/assets/pdfs/Exhibit_19.pdf.

¹⁶ Jung Hyun Choi, Alanna McCargo, Michael Neal, Laurie Goodman, and Caitlin Young, "Explaining the Black-White Homeownership Gap: A Closer Look at Disparities Across Local Markets," Urban Institute, October 2019, https://www.urban.org/sites/default/files/publication/101160/explaining_the_blackwhite_homeownership_gap_a_closer_look_at_disparities_across_local_markets_0.pdf; "Who Are the Credit Invisibles? How to Help People with Limited Credit Histories," Consumer Financial Protection Bureau, December 2016, https://files.consumerfinance.gov/f/documents/201612_cfpb_credit_invisible_policy_report.pdf.

Mainstream as the graphic below depicts. One of the reasons consumers of color disproportionately access credit through nontraditional credit providers (who typically do not report timely payments to the credit repositories) is because banks are sparsely located in Black and Brown communities.

Who is Using Alternative Financial Services?



Today, while many policies and guidelines may not be explicitly discriminatory on their face, many generate wide-scale disparate outcomes based on race. For example, credit overlay policies, an overreliance on outdated credit scoring systems, and lending pricing policies linked to loan-to-value ratios are all highly correlated to race and national origin and disproportionately disadvantage Latinos, Native Americans, Blacks, and certain segments of the Asian-American and Pacific Islander populations. Algorithm-based systems, like automated underwriting systems and risk-based pricing systems, manifest and perpetuate biases as well.

However, many underserved consumers have nontraditional credit, like timely rental housing payments, or other compensating factors, like residual income, that soundly demonstrate their ability to pay a mortgage obligation. Moreover, the current system relies heavily on debt-to-income ratio requirements that disproportionately affect consumers of color. However, debt-to-income ratio requirements have shown to be poor predictors of risk,¹⁷ — particularly for borrowers who are used to paying higher percentages of their income on rental housing payments. As a result, not only do these standards disadvantage borrowers of color, but they are also suboptimal for achieving their intended purpose of managing risk.

Disparities Regarding the Credit Invisible and Unscoreable Populations

Borrowers who access credit through fringe lenders do not receive the benefits of paying their debt obligations on time, which can trap borrowers in these fringe systems. For one, when credit scoring systems are able to detect that a borrower has accessed credit from a fringe lender, these systems often

¹⁷ "NFHA Comments on the CFPB's Advance Notice of Proposed Rulemaking for the Qualified Mortgage Definition under the Truth in Lending Act (Regulation Z)" National Fair Housing Alliance, September 16, 2019, <https://nationalfairhousing.org/wp-content/uploads/2020/11/NFHA-QM-Comments-Final.pdf>

penalize borrowers even if the borrower always pays their bill on time. For example, the Classic FICO score can penalize borrowers who access credit from finance companies, as opposed to banks, by up to 19 points. This means that borrowers with credit accounts from finance companies can have their credit scores lowered by 19 points even when they pay their obligation on time and never miss a payment.

Additionally, fringe financial services providers do not usually report positive credit payments to credit reporting agencies.¹⁸ This means other creditors cannot see a consumer's positive payment history and the consumer's score will be deflated and unable to improve. Oftentimes, these consumers remain "credit invisible" or "credit unscorable" because it appears they lack the sufficient credit history to generate a score. People of color are disproportionately represented among credit-invisible and unscorable populations.

America's long history of discriminatory housing policies has created distinct advantages for White families, leading to massive racial homeownership, credit, and wealth gaps that persist today. The Black-White homeownership gap today, at a 29-point difference (44% compared to 73.3%) is higher than it was when the Fair Housing Act was passed in 1968 when the gap stood at a 27-point difference. The Latino-White homeownership gap today, at a 23-point difference (50.6% compared to 73.3%) is almost the same as it was when the Fair Housing Act was passed when the gap stood at a 24-point difference. The White homeownership rate is 67% higher than the Black homeownership rate, 45% higher than the rate for Latinos, and 20% higher than the rate for the Asian community.¹⁹

Need for a Fair Marketplace

A Fair Marketplace Benefits All

We have lost trillions of dollars in economic growth due to systemic racial inequality. One study estimates that improving access to housing credit would have resulted in an additional 770,000 Black homeowners and \$218 billion in sales and expenditures.²⁰ Another analysis estimates that addressing racial disparities in homeownership could create nearly 800,000 thousand jobs and generate \$400 billion in tax revenue.²¹ This analysis also found that by not addressing housing inequality nearly 5 million people have been prevented from homeownership opportunities. Eliminating racial inequities in the U.S. could add \$5 trillion of growth in our GDP over the next five years.²² By not resolving centuries-long injustices, we are not only harming individual members of our society, we also are inhibiting the

¹⁸ Gregory Squires, *The Fight for Fair Housing: Causes, Consequences and Future Implications of the 1968 Federal Fair Housing Act*, Rutledge (2nd Ed. 2018), pages 98 – 99.

¹⁹ Analysis based on latest updates to the U.S. Census American Community Survey data.

<https://www.census.gov/programs-surveys/acs/news/data-releases/2021/release.html#oneyear>

²⁰ See, *In Pursuit of Equity: Why America's Future Depends on Closing the Racial Wealth Gap*, Citi, <https://www.nytimes.com/paidpost/citi/in-pursuit-of-equity.html>

²¹ Jeff Cox, *Morgan Stanley says Housing Discrimination Has Taken a Huge Toll on the Economy*, CNBC (November 13, 2020), <https://www.cnbc.com/2020/11/13/morgan-stanley-says-housing-discrimination-has-taken-a-huge-toll-on-the-economy.html>.

²² Dana M Peterson and Catherine L Mann, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, Citi Global Perspectives and Solutions (September 2020), <https://www.citivelocity.com/citigaps/closing-the-racial-inequality-gaps/>.

nation's ability to advance and be economically viable. Ensuring equitable treatment for all will result in our collective prosperity.

Addressing fairness challenges should be a key priority for our federal government, particularly in the face of rising discrimination. NFHA's 2022 Fair Housing Trends Report²³ documents an unprecedented level of discrimination. In 2021, consumers filed a record number of housing discrimination complaints – the highest number since NFHA began tracking this data 25 years ago. The number of complaints filed were up 8.7% over the previous year and tracks with an increase in reports of hate violence against Black, Latino, Asian, Native, and other communities of color. The record number of complaint filings comes on the heels of prolonged attacks on fair housing and lending protections, erosion of civil rights, and weakening of enforcement agencies during the Trump administration. Unfortunately, in too many sectors, discrimination, bigotry, and bias are normalized which is why the federal government must use every available tool to create a completely fair marketplace.

Unfair markets and practices cause economic loss, homelessness, eviction, trauma, stress, negative health outcomes, neighborhood instability and decline, wealth loss, lower educational outcomes, unemployment, and other harms. They also contribute to the racial wealth and homeownership gaps which are staggering. There is a huge wealth gap between Black and White as well as Latino and White households. Black families have just one penny of wealth for every dollar of wealth held by a White family – that's a penny on the dollar. Latino families have just eight cents of wealth for every dollar of wealth held by White families.²⁴ As another example, if we hold White wealth constant, it will take Latinos 84 years and Blacks 228 years to reach parity with White households.²⁵ Moreover, bias in our appraisal markets is resulting in a \$156 billion cumulative loss of wealth for those owning homes in predominately Black communities.²⁶ That kind of wealth loss not only devastates individual families but has spillover effects for the broader society. The inequities in our markets and systems also stifle innovation, productivity, profitability, and economic progress. Former Federal Reserve Board of Governors, Alan Greenspan, remarked²⁷ on the negative impacts of discrimination:

"Discrimination is against the interests of business—yet business people too often practice it. To the extent that market participants discriminate, they erect barriers to the free flow of capital and labor to their most profitable employment, and the distribution of output is distorted. In the end, costs are higher, less real output is produced, and national wealth accumulation is slowed. By removing the non-economic distortions that arise as a result of discrimination, we can generate higher returns to both human and physical capital."

²³ 2022 Fair Housing Trends Report, National Fair Housing Alliance (November 30, 2022),

<https://nationalfairhousing.org/wp-content/uploads/2022/11/2022-Fair-Housing-Trends-Report.pdf>

²⁴ Christine Percheski and Christina Gibson-Davis, *A Penny on the Dollar: Racial Inequalities in Wealth among Households with Children*, SAGE Journals (June 1, 2020),

<https://journals.sagepub.com/doi/full/10.1177/2378023120916616>

²⁵ Chuck Collins, Dedrick Asante-Muhammad, Josh Hoxie, and Emmanuel Nieves, *The Ever-Growing Gap: Failing to Address the Status Quo Will Drive the Racial Wealth Divide for Centuries to Come*, Institute for Policy Studies (August 8, 2016) <https://ips-dc.org/report-ever-growing-gap/>

²⁶ Andre Perry, Jonathan Rothwell, and David Harshbarger, *The Devaluation of Assets in Black Neighborhoods*, Brookings Institution (November 27, 2018), <https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/>

²⁷ See, Remarks by Chairman Alan Greenspan, *Economic Challenges in the New Century before the National Community Reinvestment Coalition Annual Conference* (March 22, 2000), <https://www.federalreserve.gov/boarddocs/speeches/2000/20000322.htm>

By creating a fairer market and removing systemic barriers, we can improve outcomes in a number of ways for individuals and society; companies will be stronger, markets more effective, neighborhoods and cities will be more prosperous, and the USA will be more globally competitive.

Fintech Services Must Be Fair and Accessible

Care must be taken to ensure that technologies used in the financial services sector are both fair and accessible. Financial services providers are increasing their use of technology but may be insufficiently considering whether the technologies are fair, accessible to all market segments, and developed, assessed, and monitored using appropriate compliance management and auditing systems that control for bias and other societal harms.

Investments in fintech firms grew exponentially from 2019 to 2021²⁸ and the use of technologies in the financial services space has grown as well. Just 30 years ago, it was common for mortgage originators to manually underwrite and price consumers. Today manual operations have given way to automated underwriting, risk-based pricing, and data-driven credit scoring systems that severely limit credit access for consumers who live in credit deserts or operate outside of the financial mainstream. Without a credit score, consumers are not likely to obtain a mortgage loan even if they have a long history of paying their rent on time and have savings. Technology can increase opportunities for some while closing the doors of access to others.

It is disproportionately underserved people, like Black, Latino, Native²⁹, urban, and rural³⁰ consumers, who are illy affected by certain technological developments. In fact, these borrowers are more likely to live in areas with limited access to broadband services³¹, thus restricting their ability to access web-based products and utilities.

While technological advances can hold promise for increasing fairness and expanding opportunity, the deployment of biased algorithmic systems can wield great harm. For example, data-driven mortgage pricing models have been found to charge Latino and Black borrowers 7.9 and 3.6 basis points in higher rates than their equivalent White counterparts. This results in borrowers of color paying \$765 million annually in higher costs than they should be required to pay based on their risk profiles.³²

²⁸ See, *Pulse of Fintech H2'21*, KPMG (January 2022), <https://assets.kpmg/content/dam/kpmg/au/pdf/2022/the-pulse-of-fintech-h2-2021.pdf>

²⁹ See, *Limiting Broadband Investment to "Rural Only" Discriminates Against Black Americans and other Communities of Color*, National Digital Inclusion Alliance (June 2020), <https://www.digitalinclusion.org/digital-divide-and-systemic-racism/>

³⁰ Mark Domauer and Robert Bryce, *Too Many Rural Americans Are Living in the Digital Dark: The Problem Demands a New Deal Solution*, Health Affairs (October 28, 2020), <https://www.healthaffairs.org/doi/10.1377/forefront.20201026.515764/full/>

³¹ Leon Yin and Aaron Sankin, *Investigation Finds Lower Internet Speeds for Higher Price in Poor, Less White U.S. Neighborhoods*, PBS (October 19, 2022), <https://www.pbs.org/newshour/economy/investigation-finds-lower-internet-speeds-for-higher-prices-in-poor-less-white-u-s-neighborhoods>

³² Robert Bartlett, Adair Morse, Richard Stanton, and Nancy Wallace, *Consumer-Lending Discrimination in the FinTech Era*, UC Berkeley (November 2019), <https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf>

We must ensure that all consumers, regardless of where they live, have the ability to access quality financial services that are free from bias. Discrimination in fintech presents a drag on our economy while expanding access to opportunity results in an expansion of our economic power.

The Fair Access to Financial Services Act is Critical to Ensuring Equitable Access to Mainstream Banking Services

The Fair Access to Financial Services Act will extend the landscape of civil rights protections to more comprehensively prohibit discrimination in financial services.

The Existing Legal Framework

No existing law ensures nondiscriminatory access to products and services offered by financial institutions generally. Moreover, the protections that do exist in these areas vary and suffer from key limitations that inhibit the ability of victims of discrimination to vindicate their rights.

Title II of the Civil Rights Act of 1964 was passed during the heyday of the Civil Rights Movement to address some of the most visible sites of discrimination: hotels, restaurants, and movie theaters, among others. However, courts have interpreted Title II's enumeration of places of "public accommodation" to be exhaustive rather than illustrative, leaving banks and other financial institutions uncovered.³³ The general principle underlying Title II—that it is illegal for places offering public services to discriminate on the basis of race, religion, or national origin—is engrained as a core American value, and many would be shocked to learn that it does not already include banks and other core financial institutions. The Fair Access to Financial Services Act of 2022 would, in the main, extend those basic protections to financial institutions, with some modest variations such as the inclusion of sex as a protected characteristic.

Later, Congress passed laws to prohibit discrimination in housing and credit, but did not cover public accommodations by financial institutions, deposit products, or certain other financial products and services. In 1968, Congress passed the Fair Housing Act to prohibit discrimination in housing and housing-related transactions.³⁴ In 1974, Congress passed the Equal Credit Opportunity Act ("ECOA") to prohibit discrimination in all credit transactions.³⁵

Courts have recognized two methods of proof under these statutes: disparate treatment (through direct or circumstantial evidence) and disparate impact. Although disparate treatment discrimination is often referred to as "intentional discrimination," the law does not require proof that the defendant intentionally acted with malice. That is, absent direct discriminatory statements or policies, disparate

³³ See, e.g., *Pullins v. Bank*, No. CV 19-00006, 2020 WL 1450560, at *4 (M.D. La. Mar. 25, 2020) ("There is no published authority in any circuit considering whether a bank is a 'public accommodation' within the meaning of Title II...[District] [c]ourts have uniformly rejected the invitation to expand Title II[s] 'public accommodation' definition to include establishments beyond those specifically listed"); see also Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 Cal. L. Rev. 141, 207 (2021) (compiling cases that reject classification of a bank as a place of public accommodation).

³⁴ 42 U.S.C. § 3601, *et seq.*

³⁵ 15 U.S.C. § 1691 *et seq.*

treatment discrimination may be established through an analysis of relevant circumstantial evidence.³⁶ If the plaintiff establishes circumstantial evidence of disparate treatment discrimination, the burden shifts to the defendant to show a legitimate, non-discriminatory reason for the challenged action. However, the plaintiff can still prevail if they can show that the defendant's reason is merely a pretext for discrimination. That is, the plaintiff can show that the reason offered by the defendant is not credible.

Disparate impact discrimination has long been recognized by federal courts and federal agencies,³⁷ and was upheld by the Supreme Court in 2015.³⁸ Disparate impact, as it specifically relates to ECOA, has long been upheld by district and appellate courts and has been incorporated in the Code of Regulations (Reg B) for over forty years. To establish a case of disparate impact liability, a plaintiff first must identify a specific neutral policy or practice that has a discriminatory impact on the basis of race or some other prohibited basis. Often, statistical evidence is used to show the discriminatory effect. Second, the defendant must then defend the challenged policy by showing that it is necessary to achieve some legitimate, nondiscriminatory purpose (also known as "business justification"). Finally, if a legitimate business justification is identified, the plaintiff may still establish a policy is unlawful if the borrower identifies a "less discriminatory alternative" that can achieve the stated purpose.

These fair lending and civil rights laws overlap with discrimination in financial services, but none are comprehensive enough to cover all products and services offered by financial institutions.³⁹ Critically, ECOA does not apply to non-credit-related activities, such as opening deposit accounts, cashing checks, transferring funds, investing, or other central activities of financial institutions. Second, the Fair Housing Act prohibits discrimination in housing (including in residential real estate transactions like mortgages).⁴⁰ But the Fair Housing Act does not apply outside of housing transactions. Third, the Civil Rights Act of 1866 prohibits discrimination in some aspects of dealings with financial institutions—namely, in contracting and in purchasing real and personal property. However, Section 1981's guarantee of the right to "make and enforce contracts" has been interpreted narrowly by some courts, meaning that victims of discrimination might be left without a remedy even in circumstances where discrimination undoubtedly occurred.⁴¹

³⁶ See e.g., *Cartwright v. American Savings & Loan Ass'n*, 880 F.2d 912, 925-27 (7th Cir. 1989).

³⁷ See, e.g., FFIEC, *Interagency Fair Lending Examination Procedures* (2009).

³⁸ <https://www.ffiec.gov/pdf/fairlend.pdf>; CFPB, *Lending Discrimination*, CFPB Bulletin 2012-04 (April 18, 2012), https://files.consumerfinance.gov/f/201404_cfb_bulletin_lending_discrimination.pdf. See also *United States v. Countrywide Financial Corp. et al.*, CV11-10540-PSG (C.D. Cal. Complaint filed Dec. 21, 2011) at Paragraph 48, <https://www.justice.gov/sites/default/files/crt/legacy/2011/12/21/countrywidecomp.pdf>. The settlement resolved allegations that, among other things, the lender "had knowledge that the subjective and unguided discretion that it granted to loan officers and other [lender] employees in its retail loan policies and practices was being exercised in a manner that discriminated against Hispanic and African-American borrowers, but continued to implement its policies and practices with that knowledge."

³⁹ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

⁴⁰ Recently, the CFPB published an updated exam manual for evaluating unfair, deceptive, or abusive acts or practices ("UDAAP"), which may include discrimination in denying access to a bank account. See CFPB, *CFPB Targets Unfair Discrimination in Consumer Finance* (March 16, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfb-targets-unfair-discrimination-in-consumer-finance/>. This is an explanation of the procedures to examine whether a financial institution has engaged in a violation of UDAAP law and not an interpretation of disparate treatment or disparate impact theories of discrimination.

⁴¹ 42 U.S.C. § 3604; 42 U.S.C. § 3605(a).

⁴² *Lopez v. Target Corp.*, 676 F.3d 1230, 1234 (11th Cir. 2012); *Arguello v. Conoco, Inc.*, 330 F.3d 355, 359 (5th Cir. 2003). But see *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir.), *opinion supplemented on denial of reh'g*,

The Supreme Court recently introduced additional ambiguity in dueling dicta, with a majority opinion leaving open the possibility that Section 1981 could be inapplicable in instances such as a lender “requiring prospective borrowers to provide one reference letter if they are white and five if they are black,” or by “reimbursing expenses” for White but not Black applicants, or “refus[ing] to consider applications from black applicants at all.”⁴² As one legal scholar summarized, “courts frequently dismiss plaintiffs’ claims on the basis that the plaintiff has no contractual claim: there was no contract at all, a contract was completed, or a contract could have been completed.”⁴³ Moreover, neither Section 1981 nor Section 1982 is enforced or administered by federal regulatory agencies. And because of prudential limitations, civil rights nonprofits and advocacy groups will sometimes lack standing to pursue claims under these statutes, which is a serious obstacle to effectively investigating alleged incidents of discrimination.

Finally, existing federal and state consumer laws broadly prohibit unfair, deceptive, or abusive acts and practices (“UDA(AP)s”). At the federal level, both the Federal Trade Commission Act, enforced by the Federal Trade Commission (FTC), and the Title X of the Dodd-Frank Act, enforced by the CFPB, prohibit “unfair” and “deceptive” practices; the Dodd-Frank Act also prohibits “abusive” practices.⁴⁴ In March 2022, the CFPB updated its UDAP exam manual to note that “discrimination may meet the criteria for ‘unfairness’ by causing substantial harm to consumers that they cannot reasonably avoid, where that harm is not outweighed by countervailing benefits to consumers or competition.”⁴⁵ Consequently, the CFPB’s current exam practice is to look for discrimination “in all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits.”⁴⁶ These UDA(AP) statutes, however, do not provide for private rights of action, which can leave individual victims without remedy. Trade groups have also filed suit challenging the CFPB’s exercise of its UDAP authority to combat discriminatory practices.⁴⁷

266 F.3d 407 (6th Cir. 2001) (adopting test set forth in *Callwood v. Dave & Buster’s, Inc.*, 98 F.Supp.2d 694, 705 (D.Md. 2000)) (holding that a plaintiff can state a claim under § 1981 by showing either that she “was deprived of services while similarly situated persons outside the protected class were not,” or that she “received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory).

⁴² *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1020 (2020) (Ginsburg, J., concurring in part and concurring in the judgment).

⁴³ Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 Cal. L. Rev. 141, 166 (2021).

⁴⁴ *Id.* at 7.

⁴⁵ Press Release, CFPB, CFPB Targets Unfair Discrimination in Consumer Finance (Mar. 16, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfbp-targets-unfair-discrimination-in-consumer-finance/>.

⁴⁶ *Id.* The FTC has also exercised its UDAP authority to combat discriminatory practices in lending. See Compl., *FTC v. Passport Automotive Group, Inc.*, No. 8:22-cv-02670-GLS at 59-61 (Oct. 18, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Complaint%20Passport%20Auto%20Group%2C%20Inc.%2C%20et%20al..pdf.

⁴⁷ See Compl., Chamber of Commerce of the United States, et al. v. CFPB, No. 6:22-cv-00381 (Sept. 28, 2022), <https://www.chamberlitigation.com/sites/default/files/cases/files/22222222/Complaint%20-%20Chamber%20of%20Commerce%20v.%20CFPB%20-%20E.D.%20Tex.%29.pdf>.

In short, existing laws do not comprehensively prohibit discrimination in financial services, leaving a significant need for robust and effective legislation.

Recommendations to Improve the Fair Access to Financial Services Act of 2022

The Fair Access to Financial Services Act of 2022 advances efforts to expand civil rights protections in financial services, and there are means to develop the legislation to further expand protections in this space. Experience with existing antidiscrimination laws teaches that the following components should be included to ensure the law further advances access to financial services:

1. The law should cover not just the enumerated list of “financial institution(s), as defined in section 803 of the Payment, Clearing, and Settlement Supervision Act of 2010,” but also any “covered person” or “service provider” under Title X of the Dodd-Frank Act, 12 U.S.C. § 5481. This change would ensure that it is illegal for any entity that engages in offering or providing a consumer financial product or service (or service provider to such entity) to discriminate, which is particularly important to ensure the law covers the ever-increasing variety of Fintechs and other entities that provide financial services.
2. The law should allow for the recovery of damages and robust statutory penalties for victims of discrimination. As it stands, it would only provide for preventive relief, like an injunction. Victims would be left without the ability to recover monetary damages and courts would not have the authority to impose statutory damages to ensure appropriate deterrence.
3. The law should explicitly prohibit disparate impact discrimination—a doctrine the Supreme Court has described in the housing context as playing a significant role in furthering the goals of “eradicat[ing] discriminatory practices within a sector of the Nation’s economy.”⁴⁸
4. Finally, the law should explicitly permit efforts by financial institutions to advance access and inclusion for traditionally underserved communities through specially tailored activities like Special Purpose Credit Programs (“SPCPs”). The federal agencies tasked with regulating financial services have encouraged creditors to explore these programs as a way to expand access to credit to better address special social needs.⁴⁹ The Department of Housing and Urban Development has confirmed that such programs instituted in conformity with ECOA and Regulation B generally do not violate the FHA, and therefore creditors may consider the use of SPCPs across all types of credit covered by ECOA and Regulation B.⁵⁰ Congress should ensure that such programs are explicitly permitted by the Fair Access to Financial Services Act as well, to ensure the law is not misinterpreted as limiting these important efforts.

⁴⁸ *Texas Dep’t of Hous. & Comm. Affairs v. Inclusive Comms. Project, Inc.*, 576 U.S. 519, 521 (2015).

⁴⁹ Bd. of Governors of the Federal Reserve Sys., FDIC, NCUA, OCC, CFPB, HUD, DOJ, FHFA, “Interagency Statement on Special Purpose Credit Programs under the Equal Credit Opportunity Act and Regulation B,” (Feb. 22, 2022).

⁵⁰ HUD, “Office of General Counsel Guidance on the Fair Housing Act’s Treatment of Certain Special Purpose Credit Programs That Are Designed and Implemented in Compliance With the Equal Credit Opportunity Act and Regulation B,” at 1 (Dec. 7, 2021), https://www.hud.gov/sites/dfiles/GC/documents/Special_Purpose_Credit_Program_OGC_guidance_12-6-2021.pdf.

Conclusion

The nation's history of discrimination, segregation, and financial exclusion reverberate to this day, having massive consequences in the lives of everyday Americans who simply want to use the services that are necessary to fully participate in today's economy. Congress has done well to pass hard-earned legislation aimed at preventing this history from being repeated, but more can be done to close loopholes in our civil rights enforcement infrastructure to better protect people of color and other marginalized consumers from discrimination in financial services. The Fair Access to Financial Services Act of 2022 is an important step in the right direction and we look forward to working with the Committee on the legislation.

PREPARED STATEMENT OF MARC H. MORIAL
PRESIDENT AND CEO, NATIONAL URBAN LEAGUE
DECEMBER 1, 2022

Testimony of Marc H. Morial
President and CEO, National Urban League
Senate Committee on Banking, Housing, and Urban Affairs

“Fairness in Financial Services: Racism and Discrimination in Banking”

December 1, 2022

Chairman Brown, Ranking Member Toomey, and members of the Committee, thank you for the opportunity to testify before you this morning. My name is Marc Morial, and I proudly serve as President and CEO of the National Urban League. I join you today on behalf of 92 affiliates who serve over 300 communities and over 2 million people across 36 states and the District of Columbia.

The National Urban League is the lineal descendent of a succession of community-aid entities dating back to Emancipation that has specialized in racial parity and the economic and workforce inclusion of the Black community. Since our founding in 1910, the National Urban League has been at the forefront of the effort to build generational wealth within the Black community and other underserved populations. Along with the 20th-century creation and need for fraternal and social organizations, sickness and burial societies, and migration patterns of the Black labor workforce to achieve financial and economic inclusion, the Urban League movement has been a formidable advocate for voting rights, civil rights, and economic justice by way of job training and placement, health and wellness promotion, educational equity, entrepreneurship development, and home ownership. Throughout our work, we have seen the dire consequences of an American financial system that has systematically cut off and shut out individuals, families, businesses, and communities of color from access to capital.

Nearly 150 years after the closing of the Freedman’s Bank, in the wake of a global pandemic that revealed the true extent of the economic insecurity of communities of color, given all that we know about the historical, systemic bigotry of banks and governments against communities of color even after the end of slavery and Jim Crow; and in the shadow of an outrageous, coordinated attack by some against newly systemic efforts to address the harms of that bigotry, I can think of no more important hearing than one on how to achieve greater fairness in financial services. I commend the Chairman, Ranking Member, and the committee members for convening us today.

Discriminatory Practices in Banking

The United States government has long recognized the value of banking, lending, and depository services for its citizens. Moreover, it has recognized the power that such banking services could provide to the Black community and other underserved communities. One of the first post-Civil War acts of Congress to benefit the newly emancipated Freedman was the establishment in 1865 of the Freedman’s Savings and Trust Company. As Vice President Kamala Harris noted in her speech at the 2022 Freedman’s Bank Forum, “[Freedman’s Bank was guided by a vision — the vision of an economy that works for all Americans and includes all Americans; the vision of a nation in which all people have access to the financial resources they need to succeed, to thrive,

and to determine their own future.”¹ However, the bank shuttered, leaving over 60,000 Black depositors with a loss of over \$3 million in capital (in today's dollars, that's \$68.2 million).² The failure of the bank left many Black depositors and borrowers distrustful of the white banking community, especially since the Freedman's Bank was established and managed by white men. The government was not alone in its understanding of the power of banking and lending. Former slave owners also recognized the power of financial instruments and wielded that power over newly emancipated Freedmen. In a precursor to modern day payday lending, former slave owners used contracts of adhesion to extend credit to sharecroppers in a successful scheme to extend de-facto slavery for another hundred years.

The similar use of credit and lending negatively impacted the Black community's access to banking was magnified by a series of discriminatory underwriting and lending regulations beginning in the 1930s. These regulations included in part the Federal Housing Administration restricting insurance of home mortgages to whites-only neighborhoods. These regulations resulted in only two percent of \$120 billion in dollars in new housing subsidized by the federal government between 1934 and 1962 going to non-whites. Indeed, the widely documented and government-sanctioned practice of demarking predominantly Black communities as unsuitable for lending based primarily on racial considerations, known as redlining, had only been officially deemed illegal by the federal government a mere decade before enactment of the Community Reinvestment Act in 1977.

We are only a few years removed from the legal barriers and lack of civil rights protections that prevented most Black Americans from having equal access to commerce and the right to participate in an equal society, particularly when it comes to banking. Further, the enforcement of these laws has become dependent on the willingness of the administration in power to recognize these protections.

When people of color suffer racist engagement in the financial marketplace, it causes substantial monetary and non-monetary harm. Depending on how the racist behavior occurs, be it systematic, digital, in-person, community members often are unaware they received disparate treatment or a discriminatory outcome. This stems from a centuries-long strain of the Black and minority community with banking institutions.

The exclusionary and biased practices have been widely documented, including the banking industry's tendency to disproportionately open and operate branches in white/non-minority communities. In 2021, 4.5 percent of U.S. households (approximately 5.9 million) were unbanked, underbanked, or in banking deserts, meaning that no one in the household had a checking or savings account at a bank or credit union.³ The likelihood of being unbanked is even higher for

¹ House, T. W. (2022, October 4). *Remarks by Vice President Harris at the Freedman's Bank Forum*. The White House. <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/04/remarks-by-vice-president-harris-at-the-freedmans-bank-forum/>.

² *Freedman's Bank Building*. (2022, November 4). U.S. Department of The Treasury. <https://home.treasury.gov/about/history/freedmans-bank-building>.

³ 2021 FDIC National Survey of Unbanked and Underbanked Households. (n.d.). <https://www.fdic.gov/analysis/household-survey/index.html>.

some population segments, such as low-income and racial and ethnic minority households. Black and Hispanic families are disproportionately likely to be unbanked: 8.0 percent of Black households and 8.4 percent of Hispanic households were unbanked, compared to 1.7 percent of White households.⁴ Less than a decade ago, during the Great Recession, comparably sized banks closed at higher rates in markets serving communities of color between 2009 and 2014, with some Black and Hispanic communities losing half their branches. The uneven distribution of bank branch locations exacts a cost on residents of communities of color in the form of greater travel distance and time to the nearest banking facility.^{5,6} These practices also create banking deserts in which predatory payday lenders, check cashers, and other non-bank services thrive, thereby implicating banks in facilitating a market dynamic whereby the financial services environments in communities of color are dramatically different in terms of quality, experience, and expense from those in white/non-minority neighborhoods. These racialized examples raise the concern of discrimination, especially when considering recent examples of disparate impact and differential treatment.⁷

In addition to the reluctance to operate in communities of color, another source of racial discrimination may be bank employees' discretionary practices in charging costs and fees.⁸ Bank employees wield discretionary power in racially executing bank policies – they determine how much a customer pays in costs, and customers may face varying fees depending on who they talk to at the bank.

The concerns about racial discrimination and bias in the banking workforce are also not new and are illustrated in analyses of data from mortgage lending lawsuits brought to the U.S. Department of Justice Civil Rights Division,⁹ which illuminated widespread discriminatory practices, including loan officers who "referred to subprime loans in minority communities as 'ghetto loans' and minority customers as... 'mud people.'^{10 11} The consequences of these acts are reflected in the data: in the National Urban League's *State of Black America 2022 Equality Index*, Black Americans are less likely to be approved for mortgages than white Americans, at a disparity rate

⁴ 2021 FDIC National Survey of Unbanked and Underbanked Households. (n.d.-a). <https://www.fdic.gov/analysis/household-survey/index.html>; <https://www.fdic.gov/analysis/household-survey/2019report.pdf>.

⁵ Baradaran, M. (2019). *The Color of Money: Black Banks and the Racial Wealth Gap* (Reprint). Belknap Press: An Imprint of Harvard University Press.

⁶ Rothstein, R. (2018). *The Color of Law: A Forgotten History of How Our Government Segregated America* (Reprint). Liveright.

⁷ Flitter, E. (2022). *The White Wall: How Big Finance Bankrupts Black America*. Atria/One Signal Publishers.

⁸ Fox, M. (2021, January 13). *Black and Hispanic Americans pay twice as much in bank fees as Whites, survey finds*. CNBC.

⁹ Assistant Attorney General Kristen Clarke Delivers Remarks Announcing. (2022, July 27). <https://www.justice.gov/opa/speech/assistant-attorney-general-kristen-clarke-delivers-remarks-announcing-justice-department>

¹⁰ Powell, M. (2009, June 7). *Bank Accused of Pushing Mortgage Deals on Blacks*. The New York Times <https://www.nytimes.com/2009/06/07/us/07baltimore.html>

¹¹ Egan, M. (2018, February 27). *Wells Fargo accused of preying on black and Latino homebuyers in California*. CNNMoney <https://money.cnn.com/2018/02/27/investing/wells-fargo-sacramento-lawsuit-discriminatory-lending/index.html>

of 41%.¹² Further, the homeownership rates for Black Americans stand at 43.1% compared to 74.4% of white Americans.¹³ The individuals who make decisions exercise enormous power: their responses to the needs of the communities they serve help determine the character of the American economy. Traditionally, decision-making authority at banks has been the bastion of middle- and upper-class white males. However, in recent years, this monopoly of power has been challenged with the work of diversity and inclusion initiatives in the belief that all members of society should be represented in the upper echelons of bank management.

A clear solution to this issue is to invest and strengthen Black-owned banks, of which there is an incredible need. In our *2022 State of Black America Report*¹⁴, we found that the number of Black-owned banks has dwindled immensely over the years. Between 1888 and 1934, there were 134 Black-owned banks to help the Black community. Today, there are only 19 Black-owned banks that qualify as Minority Depository Institutions (MDIs). Due to historic undercapitalization, Black banks are small, with average assets of \$363 million compared to \$4 billion for all U.S. banks. The small number of Black banks and their small asset size limits their overall impact. A century of data proves that Black banks matter. When there is a Black bank in a community, Black people are more likely to be able to buy a home or secure a small business loan. These institutions help minorities build wealth by providing mortgages, small business loans, and financial services when others will not. That is why the work of uplifting Black banks is so vital. But if we are not careful, Black banks will disappear.

A clear example of this need is through the distribution of Paycheck Protection Program (PPP) funds. Billions of dollars were supposed to help small businesses through PPP. But the money was marred by racial inequity. PPP lending revealed stark disparities across the country. When seeking PPP funding as a form of emergency assistance, employer firms owned by people of color, and particularly Black-owned firms, were less likely to receive all the PPP funding that they requested. Only 61% of Black-owned firms applied for a PPP loan compared to 85% of Asian-owned firms, the largest share of any group. When Black-owned firms applied for PPP funds at large banks, 41% received all the funding sought (compared to 71% for white-owned firms). When applying to small banks, 48% of Black-owned firms received the full share (versus 80% for white-owned firms), and 24% were fully approved at online lenders (versus 49% for white-owned firms).¹⁵

Efforts to Address Discriminatory Practices and Increase Equitable Access to Banking

There is work being done at the federal level and additional bipartisan solutions that Congress and the Executive Branch can take to address these ills and barriers. The National Urban League has partnered with both to be part of the solution, because just as redlining and disinvestment in communities of color is contagious, so is “Greenlining” and reinvestment in those communities.

¹² National Urban League, *State of Black America 2022 Equality Index*, <https://soba.iamempowered.com/sites/soba.iamempowered.com/files/State-of-Black-America-2022-Black-White%20Index.pdf>

¹³ *Id.*

¹⁴ Elam, N., & James, R. (2022). The National Urban League- The State of Black America® Report. <https://Soba.Iamempowered.Com/Strengthening-Black-Banks-Will-Strengthen-Black-America>

¹⁵ 2022 Report on Firms Owned by People of Color Based on the Small Business Credit Survey. (n.d.). <https://www.fedsmba.org/survey/2022/2022-report-on-firms-owned-by-people-of-color>

The Biden Harris Administration made clear its intention to focus on racial equity by making one of its first actions an executive order on racial equity, which directs all agencies to implement policies to reduce barriers to entry for communities of color and other underserved populations.¹⁶ As an example, the Biden-Harris Administration's released the PAVE (Property Appraisal and Valuation Equity) Action Plan, which represents the most wide-ranging set of reforms ever put forward to advance equity in the home appraisal process. Most significantly, these equity efforts have been reflected by signing into law the historic American Rescue Plan (ARP) and Bipartisan Infrastructure Law.¹⁷ The Bipartisan Infrastructure Law permanently authorized the Minority Business Development Agency (MBDA) for the first time since its inception and elevated the agency head to the position of Under Secretary, held by Don Cravins, former Executive Vice President, and Chief Operating Officer of the National Urban League, which granted the agency expanded power to support Black- and other minority-owned businesses.. We appreciate the efforts the Administration is taking to combat inequity.

Further, in partnership with the National Urban League, the Treasury Department Office of the Comptroller of the Currency (OCC) announced Project REACH¹⁸ to promote greater access to capital and credit for underserved populations through policy and structural issues at the national and local level. REACH, which stands for Roundtable for Economic Access and Change, brings together leaders from the banking industry, national consumer advocacy and civil rights organizations, business, and technology companies to identify and reduce barriers that prevent full, equal, and fair participation in the nation's economy. The aim is to promote full and fair economic participation by reducing the number of "credit invisibles" in the U.S. (*i.e.*: consumers without a credit score); and increase the inventory of affordable and sustainable housing, as well as enhance the future of minority-owned depository institutions.

For our part, the National Urban League is continuing to advance "greenlining" initiatives by investing directly in the communities we serve. In March of this year, the Treasury Department also certified the National Urban League's small business lending subsidiary, The Urban Empowerment Fund, as a Community Development Financial Institution (CDFI), bolstering its ability to deliver vital capital to urban communities. The Fund provides direct loans to Black and other minority-owned businesses in tandem with select Urban League Entrepreneurship Centers, which are currently operating in thirteen Urban League affiliate cities.

Perhaps one of our greatest achievements to date, however, will be the opening of the National Urban League's new headquarters, the Urban League Empowerment Center. Our new home is not

¹⁶ House, T. W. (2021, January 21). *Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*. The White House. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

¹⁷ House, T. W. (2022, June 19). *FACT SHEET: The Biden-Harris Administration Advances Equity and Opportunity for Black Americans and Communities Across the Country*. The White House. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/19/fact-sheet-the-biden-harris-administration-advances-equity-and-opportunity-for-black-americans-and-communities-across-the-country/>

¹⁸ *OCC Announces Project REACH to Promote Greater Access to Capital and Credit for Underserved Populations* | OCC. (n.d.). <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-89.html>

just a home for us, it is a \$242 million, 414,000-square-foot investment in the community – including both businesses and families – of Harlem, New York. Located on Harlem’s “Main Street,” 125th Street, near legendary cultural institutions like the Apollo Theater and the Studio Museum in Harlem, the Empowerment Center will include the National Urban League’s headquarters; the Urban Civil Rights Museum; the National Urban League Institute for Race, Equity and Justice; 170 units of affordable housing; and below-market office space for non-profits and community groups including One Hundred Black Men of New York and the Harlem-based Jazzmobile. It will also include retail space featuring Target and Trader Joe’s, which will bring much needed jobs to the area.

Our Empowerment Center is one of the most significant economic development projects in Harlem’s recent history. And in constructing it, we are leading with our values. In addition to affordable housing, we are using minority and women-owned contractors and businesses throughout the building’s conceptualization to construction – from our owners’ representative to our construction firms to our professional services firms. We are also ensured that our retail partners share our commitment to diversity and hiring from the community when they hire from contractors to management to front-line workers. With this project, the National Urban League is leading by example and showing what can happen when you put equity first. Our project – built in one of the toughest real estate markets in the world – is on time, on budget, embraced by the community, and slated to open fully by early 2025.

This Committee, Congress, and the Administration can take additional steps to protect traditionally marginalized communities by advancing and passing the *Fair Access to Financial Services Act*. As noted by the Committee, the *Civil Rights Act of 1964* addressed discrimination in places of public accommodation. This milestone, which resulted in overturning centuries of legalized discrimination, was the culmination of bipartisan Congressional leadership, brave men, women, and children whose peaceful protests often received brutal responses, and determined activism from grassroots and national leaders like Dr. Martin Luther King, Jr., Roy Wilkins, Dorothy Height, and the National Urban League’s own Whitney M. Young. By declaring racial discrimination illegal, the Civil Rights Act opened the doors of opportunity for Americans, who were provided access to better schools, jobs, and housing.

In 2010, Congress passed, and the President signed into law the *Dodd-Frank Wall Street Reform and Consumer Protection Act*. Not only did this bill prohibit some of the most outrageous practices witnessed by predatory banking lenders, but it also created the Consumer Financial Protection Bureau (CFPB). We have championed the primary focus of CFPB in developing and implementing fair rules for consumers, targeted for too long by unscrupulous financial services.

However, in the half century since the Civil Rights Act became the law of the land, and in the 12 years since the passage of the Dodd-Frank Act, it is clear that more is needed to ensure that banks and other financial institutions are held accountable for discriminatory banking practices. We are disappointed by recent actions and court rulings¹⁹ aimed at preventing the CFPB from using its existing authority to protect consumers from racial discrimination when seeking mortgages, auto loans, credit cards, bank accounts or other financial services. Just two years after banking

¹⁹ *Appeals court finds CFPB funding unconstitutional*. (2022, October 19). POLITICO. <https://www.politico.com/news/2022/10/19/appeals-court-cfpb-unconstitutional-00062626>

executives named themselves allies in the fight against systemic racism, these lawsuits feel like a betrayal to communities who have been too long discriminated against by these institutions.²⁰ These threats against CFPB may result in a return to the system of inadequate financial supervision that failed taxpayers, depositors, investors, homeowners, and other consumers. Allowing continued predatory and discriminatory practices against consumers will inject greater risk into the financial system. That will raise the threat of a repeat of a Wall Street-caused financial crisis that costs Americans millions of lost jobs, billions of dollars in taxpayer-funded bailouts, and trillions of dollars in lost home values and retirement savings. It will also perpetuate the targeting of racial and ethnic minority communities by wealth-stripping lenders. Our nation's federal financial regulatory agencies such as CFPB must utilize their statutory mandate to supervise U.S. lending institutions for enforcement of the *Equal Credit Opportunity Act (ECOA)* compliance.

Congress and the Biden-Harris Administration must vigorously work to ensure that banks chartered to provide lending services in the U.S. are not discriminating against U.S. taxpayers. Banks with egregious track records must face the appropriate recourse for failing to hold their end of the bargain, including losing their privilege to have funds held at their banks insured by U.S. taxpayers, if necessary. The *Fair Access to Financial Services Act* has an opportunity to build upon the *Dodd-Frank Act of 2010* and regulatory protections by ensuring that all Americans have equal access to goods and services offered by financial institutions and that they are held liable if they do not comply with these standards. The legislation would prohibit banking and other financial institutions from conducting discriminatory practices and services on the basis race, color, religion, national origin, or sex – closing the gap and fulfilling the spirit of the Civil Rights Act to ensure that all people in this country have access to economic equity and empowerment. Congress must take action to advance and pass this critical piece of legislation.

Thank you for your focus on this issue and I look forward to answering your questions.

Attachment:

- 2022 State of Black America Report:
<https://soba.iamempowered.com/sites/soba.iamempowered.com/files/State-of-Black-America-2022-Black-White%20Index.pdf>.

²⁰ Son, H. (2020, June 1). 'Appalled'—Here's what Wall Street CEOs are saying about the killing of George Floyd and protests rocking US cities. CNBC. <https://www.cnbc.com/2020/06/01/wall-street-ceos-speak-out-about-george-floyd-and-protests-rocking-us-cities.html>.


**STATE
OF BLACK
AMERICA®**

A NATIONAL URBAN LEAGUE PUBLICATION

www.stateofblackamerica.org



UNDER SIEGE

THE PLOT TO DESTROY DEMOCRACY

2022

UNDERSTANDING

THE 2022 EQUALITY INDEX™

WHY DOES THE NATIONAL URBAN LEAGUE PUBLISH AN EQUALITY INDEX?

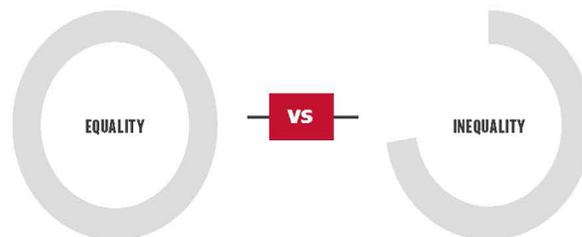
Economic empowerment is the central theme of the National Urban League's mission. The Equality Index gives us a way to document progress toward this mission for Black and Hispanic Americans relative to whites.

WHAT IS THE EQUALITY INDEX TRYING TO DO?

The Equality Index uses pie charts to show how well Black Americans are doing in comparison to whites when it comes to their economic status, their health, their education, social justice, and civic engagement.

The Equality Index measures the share of that pie which African Americans get.

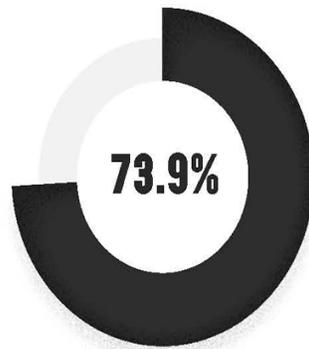
Whites are used as the benchmark because the history of race in America has created advantages for whites that continue to persist in many of the outcomes being measured.



**THE 2022 EQUALITY INDEX OF BLACK AMERICA IS 73.9%.
WHAT DOES THAT MEAN?**

That means that rather than having a whole pie (100%), which would mean full equality with whites in 2022, African Americans are missing about 26% of the pie.

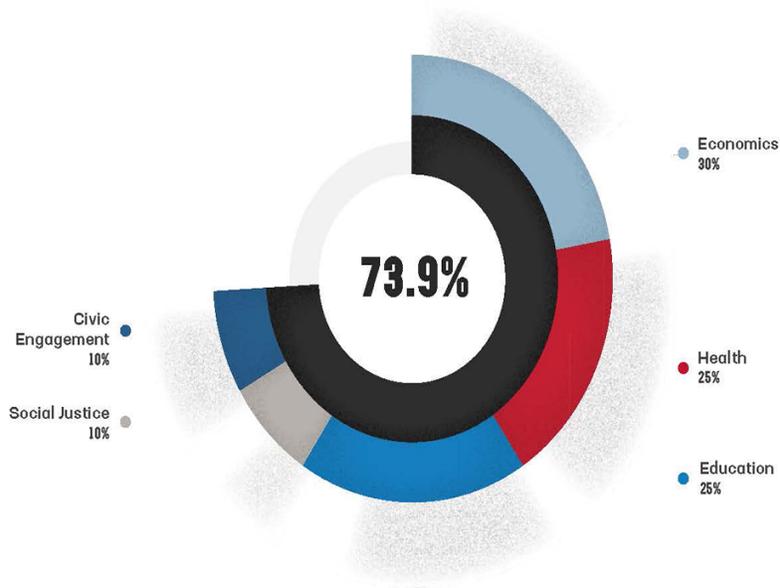
BLACK-WHITE EQUALITY INDEX



HOW IS THE EQUALITY INDEX CALCULATED?

The categories that make up the Equality Index are: economics, health, education, social justice, and civic engagement. In each category, we use nationally representative statistics to calculate a sub-index that captures how well African Americans are doing relative to whites. Each category is weighted based on the importance that we give to each. The weighted average of all five categories is then calculated to get the total Equality Index.

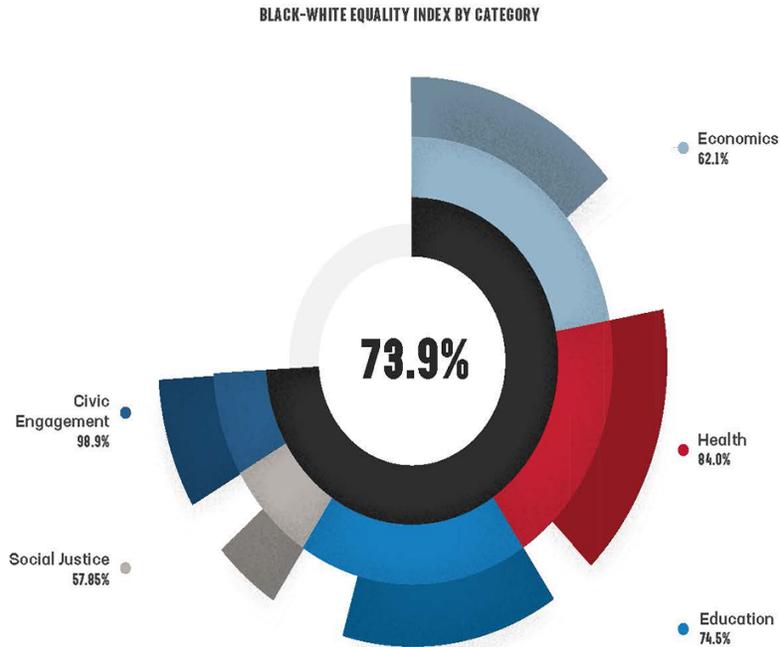
EQUALITY INDEX CATEGORY BREAKDOWN



IS IT POSSIBLE TO SEE HOW WELL AFRICAN AMERICANS ARE DOING IN EACH OF THE CATEGORIES?

Yes. We show this in the tables included with the Equality Index.

We estimate an index for each category that can be interpreted in the same way as the total Equality Index. So, an index of 62.1% for the economics category for African Americans in 2022 means that African Americans are missing almost of a third of the economics mini-pie. The figure below summarizes the total 2022 Equality Index and the index in each category for African Americans.

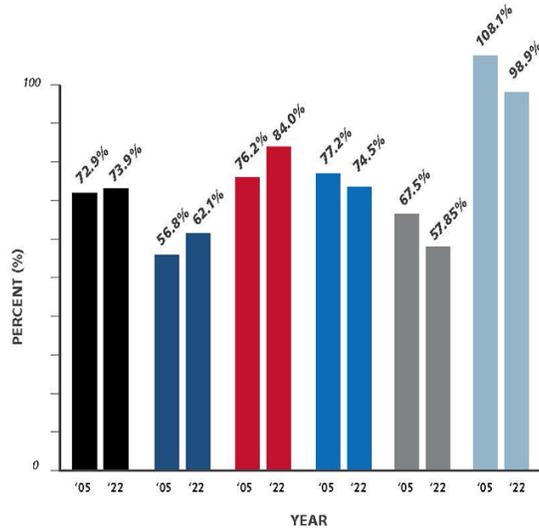


IS IT POSSIBLE TO SEE HOW WELL AFRICAN AMERICANS ARE DOING OVER TIME?

Yes. The National Urban League has published the Equality Index of Black America and all the variables used to calculate it since 2005.

BLACK-WHITE EQUALITY INDEX COMPARISON - 2005 VS 2022

● Equality Index ● Economics ● Health ● Education ● Social Justice ● Civic Engagement



IT DOESN'T LOOK LIKE THERE'S BEEN MUCH IMPROVEMENT IN THE EQUALITY INDEX. WHAT'S THE POINT?

The Equality Index is made up of a lot of different parts. Improvements in one area are sometimes offset by losses in another area, leaving the overall index unchanged.

Change often happens slowly. The Equality Index offers solid evidence of just how slowly it happens, making the index an indispensable tool for shaping the policies needed in the ongoing fight against inequality.

NOT ALL AFRICAN AMERICANS ARE DOING POORLY AND NOT ALL WHITES ARE DOING WELL. WHY DOESN'T THE EQUALITY INDEX CAPTURE CLASS DIFFERENCES?

The Equality Index was created to capture racial inequality. Most of the data points are reported as averages for African Americans and whites. An average is the easiest way to summarize a large amount of information but can mask class differences within each group. While the Equality Index does not detail class differences, it does highlight regional differences in racial inequality through our rankings of metro area unemployment and income inequality (not included this year but available for prior years).

NATIONAL URBAN LEAGUE

THE 2022 EQUALITY INDEX™

DATA PROVIDED BY IHS MARKIT

ECONOMICS

CATEGORY WEIGHT

30%

TOTAL WEIGHTED INDEX

62.1%

DIFFERENCE FROM 2020

+3.0%

2022 EQUALITY INDEX OF BLACK AMERICA

	Source	Year	Black	White	Index	Diff. ('22-'20)
MEDIAN INCOME (0.25)						
Median Household Income (Real), Dollars	ACS	2019	43,862	69,823	63%	0.043
Median Male Earnings, Dollars, Weekly	ACS	2019	793	1096	72%	-0.010
Median Female Earnings, Dollars, Weekly	ACS	2019	719	877	82%	-0.020
POVERTY (0.15)						
Population Living Below Poverty Line, %	ACS	2019	21.2	10.3	49%	0.096
Population Living Below 50% of Poverty Line, %	ACS	2019	9.6	4.5	47%	0.054
Population Living Below 125% of Poverty Line, %	ACS	2019	27.1	13.8	51%	0.107
Population Living Below Poverty Line (Under 18), %	CPS ASEC	2020	27.7	14	51%	0.165
Population Living Below Poverty Line (18-64), %	CPS ASEC	2020	16.7	9.5	57%	
Population Living Below Poverty Line (65 and Older), %	CPS ASEC	2020	17.2	7.8	45%	0.062
EMPLOYMENT ISSUES (0.20)						
Unemployment Rate, %	BLS	Q4 2021	6.7	3.4	51%	-0.034
Unemployment Rate: Male, %	BLS	Q4 2021	7.1	3.1	44%	-0.063
Unemployment Rate: Female, %	BLS	Q4 2021	5.6	3.2	57%	0.000
Unemployment Rate Persons Ages 16-19, %	BLS	Q4 2021	17.8	8.7	49%	-0.067
Percent Not in Workforce: Ages 16-19, %	BLS	Q4 2021	71.6	63.3	88%	-0.010
Percent Not in Workforce: Ages 16 and Older, %	BLS	Q4 2021	39.2	38.4	98%	-0.007
Labor Force Participation Rate, %	BLS	Q4 2021	60.8	61.6	99%	-0.005
LFPR 16-19, %	BLS	Q4 2021	28.4	36.7	77%	-0.029
LFPR 20-24, %	BLS	Q4 2021	67.8	73.1	93%	-0.025
LFPR Over 25: Less Than High School Grad., %	BLS	Q4 2021	32.6	48.3	67%	-0.101
LFPR Over 25: High School Grad., No College, %	BLS	Q4 2021	56.8	55.1	103%	0.005

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
LFPFR Over 25: Some College, No Degree, %	BLS	Q4 2021	64.6	59.5	109%	-0.006
LFPFR Over 25: Associate Degree, %	BLS	Q4 2021	70.6	65.3	108%	0.011
LFPFR Over 25: Some College or Associate Degree, %	BLS	Q4 2021	66.8	61.9	108%	0.001
LFPFR Over 25: College Grad., %	BLS	Q4 2021	76.8	71.1	108%	0.017
Employment to Pop. Ratio, %	BLS	Q4 2021	56.7	59.5	95%	-0.009
HOUSING & WEALTH (0.34)						
Home Ownership Rate, %	Census	Q4 2021	43.1	74.4	58%	-0.027
Mortgage Application Denial Rate (Total), %	HDMA	2017	25.3	10.3	41%	0.000
Mortgage Application Denial Rate (Male), %	HDMA	2017	22.8	11.4	50%	0.000
Mortgage Application Denial Rate (Female), %	HDMA	2017	26.8	12.2	46%	0.000
Mortgage Application Denial Rate (Joint), %	HDMA	2017	25.3	8.6	34%	0.000
Home Improvement Loans Denials (Total), %	HDMA	2017	53.6	28.9	54%	0.000
Home Improvement Loans Denials (Male), %	HDMA	2017	53.5	32.7	61%	0.000
Home Improvement Loans Denials (Female), %	HDMA	2017	57.4	36.4	63%	0.000
Home Improvement Loans Denials (Joint), %	HDMA	2017	42.1	20.8	49%	-0.455
Percent of High-Priced Loans (More Than 3% Above Treasury)	HDMA	2017	9.1	11.0	121%	0.834
Median Home Value, 2000 Dollars (2022 Index is 2019 Dollars)	ACS	2019	172,500	239,700	72%	0.019
Median Wealth, 2010 Dollars (2022 Index is 2019 Dollars)	SCF	2019	24,100	188,200	13%	0.028
Median Equity in Home, Dollars	Census SIPP	2019	82,000	138,700	59%	0.014
Percent Investing in Retirement Account, %	SCF	2019	35.1	57.3	61%	0.056
Percent Investing in IRA, %	SCF					-0.284
U.S. Firms By Race (% Compared to Employment Share)	Census SBO	2017	14.4	107.2	13%	0.000
DIGITAL DIVIDE (0.05)						
Households With Computer at Home, %	ACS	2019	89.6	93.1	96%	0.010
Households With the Internet, %	ACS					-0.944
Adult Users With Broadband Access, %	ACS	2019	79.9	87.2	92%	0.018
TRANSPORTATION (0.01)						
Car Ownership, %	SCF	2019	71.5	89.3	80%	-0.007
Means of Transportation to Work: Drive Alone, %	ACS	2019	11.5	75.4	15%	-0.772
Means of Transportation to Work: Public Transportation, %	ACS	2019	23.1	49.6	215%	1.823
Economic Weighted Index					62.1%	0.03

HEALTH

CATEGORY WEIGHT **TOTAL WEIGHTED INDEX** **DIFFERENCE FROM 2020**

25% **84.0%** **+0.2%**

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
DEATH RATES & LIFE EXPECTANCY (0.45)						
Life Expectancy at Birth	CDC	2019	74.7	78.8	95%	-0.011
Male	CDC	2019	71.3	76.3	93%	-0.010
Female	CDC	2019	78.1	81.3	96%	-0.005
Life Expectancy at 65 (Additional Expected Years)	CDC	2019	18.2	19.5	93%	-0.010
Male at 65	CDC	2019	16.3	18.1	90%	-0.011
Female at 65	CDC	2019	19.7	20.7	95%	-0.009
Age-Adjusted Death Rates (Per 100,000): All Causes	CDC	2019	870.7	736.8	85%	-0.011
Age-Adjusted Death Rates (Per 100,000): Male	CDC	2020	1399.0	985.0	70%	-0.113
Age-Adjusted Death Rates (Per 100,000): Female	CDC	2020	905.2	703.1	78%	-0.106
Age-Adjusted Death Rates (Per 100,000): Heart Disease	CDC	2019	286.9	216.3	75%	-0.058
Ischemic Heart Disease	CDC	2019	72.3	88.1	122%	0.448
Age-Adjusted Death Rates (Per 100,000): Stroke (Cerebrovascular)	CDC	2019	48.6	56.2	116%	0.466
Death Rates (per 100,000): Cancer	CDC	2019	171.4	233.6	136%	
Age-Adjusted Death Rates (Per 100,000): Cancer		2019	173.1	152.0	88%	-0.249
Trachea, Bronchus, and Lung	CDC	2019	36.1	36.6	101%	-0.015
Colon, Rectum, and Anus	CDC	2019	17.4	13.2	76%	0.014
Prostate (Male)	CDC	2019	36.7	17.5	48%	-0.063
Breast (Female)	CDC	2019	28.1	19.5	69%	0.021
Age-Adjusted Death Rates (Per 100,000): Chronic Lower Respiratory	CDC	2019	27.8	69.0	248%	0.946
Age-Adjusted Death Rates (Per 100,000): Influenza and Pneumonia	CDC	2019	13.9	12.5	90%	-0.048
Age-Adjusted Death Rates (Per 100,000): Chronic Liver Disease and Cirrhosis	CDC	2019	7.7	11.9	155%	0.039

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Age-Adjusted Death Rates (Per 100,000): Kidney Disease	CDC	2019	23.7	17.8	75%	
Age-Adjusted Death Rates (Per 100,000): Diabetes	CDC	2019	37.5	29.0	77%	0.288
Age-Adjusted Death Rates (Per 100,000): Septicemia	CDC	2019	16.1	9.4	58%	
Age-Adjusted Death Rates (Per 100,000): HIV	CDC	2019	1.4	0.7	50%	0.390
Age-Adjusted Death Rates (Per 100,000): Alzheimer's	CDC	2019	27.7	31.5	114%	
Age-Adjusted Death Rates (Per 100,000): Dementia-related, Males	CDC NVSR	2019	59.6	59.9	101%	
Age-Adjusted Death Rates (Per 100,000): Dementia-related, Females	CDC NVSR	2019	66.3	78.1	118%	
Age-Adjusted Death Rates (Per 100,000): Dementia-related	CDC NVSR	2019	64.5	71.2	110%	
Age-Adjusted Death Rates (Per 100,000): Drug Induced Causes	CDC NVSR	2019	26.1	27.4	105%	
Age-Adjusted Death Rates (Per 100,000): Drug Induced Causes, Males	CDC NVSR	2019	39.9	36.1	90%	
Age-Adjusted Death Rates (Per 100,000): Drug Induced Causes, Females	CDC NVSR	2019	12.3	14.2	115%	
Age-Adjusted Death Rates (Per 100,000): Alcohol Induced Causes	CDC NVSR	2019	7.6	11.2	147%	
Age-Adjusted Death Rates (Per 100,000): Alcohol Induced Causes, Males	CDC NVSR	2019	11.9	15.8	133%	
Age-Adjusted Death Rates (Per 100,000): Alcohol Induced Causes, Females	CDC NVSR	2019	4.2	6.8	162%	
Age-Adjusted Death Rates (Per 100,000): Firearm Injuries	CDC NVSR	2019	24.5	11.1	45%	
Age-Adjusted Death Rates (Per 100,000): Firearm Injuries, Males	CDC NVSR	2019	44.8	19.0	42%	
Age-Adjusted Death Rates (Per 100,000): Firearm Injuries Females	CDC NVSR	2019	5.1	3.6	71%	
Age-Adjusted Death Rates (Per 100,000): Injury at Work	CDC NVSR	2019	1.7	1.8	106%	
Unintentional Injuries	CDC	2019	52.2	55.0	105%	-0.127
Falls	CDC	2019	4.7	11.0	234%	2.340
Suicide	CDC	2019	7.5	17.7	236%	-0.220
Motor Vehicle-related Injuries	CDC	2019	30.8	24.6	80%	-0.226
High School Youth Risk Behavior: (over past year)	CDC YRBS	2019				
Rarely Wore a Seat Belt		2019	11.6	4.8	41%	
Rode w/ Car Driver Under Influence of Alcohol (%)		2019	20.0	20.2	101%	
Texted While Driving		2019	29.5	43.9	149%	
Threatened With Weapon at School		2019	8.8	7.1	81%	
Had a Concussion		2019	16.7	15.2	91%	
In a Physical Fight		2019	30.2	19.8	66%	
Obesity		2019	21.1	13.1	62%	
Overweight		2019	16.4	14.6	89%	
Asthma		2019	29.2	19.8	68%	
Never Saw a Dentist		2019	4.0	1.1	28%	
Used Tobacco Products in Past Month		2019	24.7	4.2	170%	
Death Rate - Assault		2019	23.7	2.7	11%	

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Age-Adjusted Death Rates (per 100,000): Drug Overdose	CDC NVSS	2019	24.8	26.2	106%	
Age-Adjusted Death Rates (Per 100,000): Suicide						
Age-Adjusted Death Rates (Per 100,000): Suicide Males	CDC	2019	5.5	12.2	222%	-0.256
Death Rates (Per 100,000): Suicide Males Ages 15-24	CDC	2019				-1.591
Age-Adjusted Death Rates (Per 100,000): Suicide Females	CDC	2019	2.1	5.1	243%	-0.393
Death Rates (Per 100,000): Suicide Females Ages 15-24	CDC	2019				-1.525
Age-Adjusted Death Rates (Per 100,000): Homicide	CDC	2019	23.7	2.7	11%	-0.014
Age-Adjusted Death Rates (Per 100,000): Homicide Male	CDC	2019	41.8	3.7	9%	-0.008
Death Rates (Per 100,000): Homicide Males Ages 15-24	CDC	2016				-0.051
Age-Adjusted Death Rates (Per 100,000): Homicide Female	CDC	2019	6.3	1.7	27%	-0.063
Death Rates (Per 100,000): Homicide Females Ages 15-24	CDC	2016				-0.182
Death Rates (Per 100,000) By Age Cohort: >1 Male	NCHS	2019				-0.416
Death Rates (Per 100,000) By Age Cohort: 1-4 Male	NCHS	2019	41.3	23.2	56%	-0.047
Death Rates (Per 100,000) By Age Cohort: 5-9 Male	NCHS	2019	22.0	11.1	50%	-0.143
Death Rates (Per 100,000) By Age Cohort: 10-14 Male	NCHS	2019	26.0	17.3	67%	0.069
Death Rates (Per 100,000) By Age Cohort: 15-19 Male	NCHS	2019	126.9	57.0	45%	-0.078
Death Rates (Per 100,000) By Age Cohort: 20-24 Male	NCHS	2019	215.4	118.0	55%	-0.079
Death Rates (Per 100,000) By Age Cohort: 25-29 Male	NCHS	2019				-0.706
Death Rates (Per 100,000) By Age Cohort: 30-34 Male	NCHS	2019				-0.742
Death Rates (Per 100,000) By Age Cohort: 35-39 Male	NCHS	2019				-0.691
Death Rates (Per 100,000) By Age Cohort: 40-44 Male	NCHS	2019				-0.685
Death Rates (Per 100,000) By Age Cohort: 45-49 Male	NCHS	2019				-0.690
Death Rates (Per 100,000) By Age Cohort: 50-54 Male	NCHS	2019				-0.705
Death Rates (Per 100,000) By Age Cohort: 55-59 Male	NCHS	2019				-0.673
Death Rates (Per 100,000) By Age Cohort: 60-64 Male	NCHS	2019				-0.636
Death Rates (Per 100,000) By Age Cohort: 65-74 Male	NCHS	2019	3,180.2	2,169.9	68%	0.047
Death Rates (Per 100,000) By Age Cohort: 70-74 Male	NCHS	2019				-0.720
Death Rates (Per 100,000) By Age Cohort: 75-84 Male	NCHS	2019	6,052.6	5,206.1	96%	0.056
Death Rates (Per 100,000) By Age Cohort: 80-84 Male	NCHS	2019				-0.908
Death Rates (Per 100,000) By Age Cohort: 85+ Male	NCHS	2019	12,918.7	15,068.1	117%	-0.013
Death Rates (Per 100,000) By Age Cohort: 15-24 Male	CDC	2016				-0.586
Death Rates (Per 100,000) By Age Cohort: 25-34 Male	CDC	2019	266.2	179.2	67%	-0.039
Death Rates (Per 100,000) By Age Cohort: 35-44 Male	CDC	2019	405.2	267.7	66%	-0.032
Death Rates (Per 100,000) By Age Cohort: 45-54 Male	CDC	2019	738.2	501.9	68%	-0.037
Death Rates (Per 100,000) By Age Cohort: 55-64 Male	CDC	2019	1,668.7	1,108.6	66%	0.004
Death Rates (Per 100,000) By Age Cohort: 65+ Male	CDC	2019	4,688.8	4,384.2	94%	0.246
Death Rates (Per 100,000) By Age Cohort: 75-84 Male	CDC	2019				-0.857
Death Rates (Per 100,000) By Age Cohort: >1 Female	CDC	2019				-0.409
Death Rates (Per 100,000) By Age Cohort: 1-4 Female	CDC	2019	37.1	18.2	49%	-0.008
Death Rates (Per 100,000) By Age Cohort: 5-9 Female	CDC	2019	18.5	9.1	49%	-0.165

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Death Rates (Per 100,000) By Age Cohort: 10-14 Female	NCHS	2019	16.9	12.6	75%	0.028
Death Rates (Per 100,000) By Age Cohort: 15-19 Female	NCHS	2019	36.8	28.3	77%	-0.106
Death Rates (Per 100,000) By Age Cohort: 20-24 Female	NCHS	2019	71.7	48.1	67%	-0.148
Death Rates (Per 100,000) By Age Cohort: 25-29 Female	NCHS	2019				-0.842
Death Rates (Per 100,000) By Age Cohort: 30-34 Female	NCHS	2019				-0.831
Death Rates (Per 100,000) By Age Cohort: 35-39 Female	NCHS	2019				-0.759
Death Rates (Per 100,000) By Age Cohort: 40-44 Female	NCHS	2019				-0.705
Death Rates (Per 100,000) By Age Cohort: 45-49 Female	NCHS	2019				-0.710
Death Rates (Per 100,000) By Age Cohort: 50-54 Female	NCHS	2019				-0.695
Death Rates (Per 100,000) By Age Cohort: 55-59 Female	NCHS	2019				-0.671
Death Rates (Per 100,000) By Age Cohort: 60-64 Female	NCHS	2019				-0.659
Death Rates (Per 100,000) By Age Cohort: 65+ Female	NCHS	2019	3,689.3	3,922.9	106%	0.367
Death Rates (Per 100,000) By Age Cohort: 70-74 Female	NCHS	2019				-0.804
Death Rates (Per 100,000) By Age Cohort: 75-79 Female	NCHS	2019				-0.857
Death Rates (Per 100,000) By Age Cohort: 80-84 Female	NCHS	2019				-0.962
Death Rates (Per 100,000) By Age Cohort: 85+ Female	NCHS	2019	11,407.9	13,421.7	118%	0.002
Death Rates (Per 100,000) By Age Cohort: 15-24 Female	CDC	2019				-0.760
Death Rates (Per 100,000) By Age Cohort: 25-34 Female	CDC	2019	109.3	85.7	78%	-0.030
Death Rates (Per 100,000) By Age Cohort: 35-44 Female	CDC	2019	220.3	150.7	68%	-0.044
Death Rates (Per 100,000) By Age Cohort: 45-54 Female	CDC	2019	452.0	310.9	69%	0.001
Death Rates (Per 100,000) By Age Cohort: 55-64 Female	CDC	2019	994.0	677.7	68%	0.019
Death Rates (Per 100,000) By Age Cohort: 65-74 Female	CDC	2019	1,895.7	1,421.6	75%	-0.005
Death Rates (Per 100,000) By Age Cohort: 75-84 Female	CDC	2019	4,208.9	3,845.9	91%	0.007
Infant Mortality Rate	CDC NVSS	2019	10.62	4.49	42%	
Fetal Mortality Rate	CDC-NCHS	2020	10.34	4.73	46%	
Perinatal Mortality Rate	CDC-NCHS	2019	9.90	4.68	47%	
Preterm Birth Rates	CDC-NCHS	2020	12.18	7.36	60%	
Maternal Mortality Rate	CDC NVSS	2019	44.0	17.9	41%	
Maternal Mortality Rate under 25	CDC NVSS	2019	15.3	10.5	69%	
Maternal Mortality Rate 25-39	CDC NVSS	2019	38.2	13.8	36%	
Maternal Mortality Rate 40+	CDC NVSS	2019	239.9	72.0	30%	
Sepsis Related Deaths (per 100,000 age 65+)	CDC NVSS	2019	377.4	275.7	73%	
PHYSICAL CONDITION (0.10)						
Obesity: Children 2-19 Years	CDC BRFSS	2018	24.2	16.1	67%	
Boys	CDC BRFSS	2018	19.4	17.4	90%	
Girls	CDC BRFSS	2018	29.1	14.8	51%	
Overweight: 18+ Years, % of Population	CDC BRFSS	2016				-1.053
Overweight: Men 20+ Years, % of Population	CDC	2018	41.1	44.7	109%	-0.165
Overweight: Women 20+ Years, % of Population	CDC	2018	56.9	39.8	70%	-0.406
Overweight: 20+ Years, % of Population		2018	49.6	42.2	85%	-0.375

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Obese, % of Population	CDC BRFSS	2018	49.6	42.2	85%	0.000
Obese: Men 20+ Years, % of Population	CDC	2018	41.1	44.7	109%	0.000
Obese: Women 20+ Years, % of Population	CDC	2018	39.8	56.9	143%	0.730
Severe Obesity	CDC	2018	13.8	9.3	67%	
Diabetes: Physician Diagnosed in Ages 20+, % of Population	CDC	2020	12.7	11.0	87%	0.253
Diabetes: Undiagnosed in Ages 20+, % of Population	CDC	2020	4.7	2.7	57%	
Pre Diabetes	CDC	2020	39.2	38.7	99%	
AIDS Cases per 100,000 Males Ages 13+						
AIDS Cases per 100,000 Females Ages 13+						
Aids Cases per 100,000	CDC	2019	4.23	0.35	8%	
HIV Infection per 100,000 Males	CDC	2018	11,649	8,022	69%	0.563
HIV Infection per 100,000 Females	CDC	2018	4,104	1,482	36%	0.311
SUBSTANCE ABUSE (0.10)						
Binge Alcohol (5 Drinks in 1 Day, 1x a Year) Ages 18+, % of Population	CDC	2019	6.2	17.3	279%	-0.035
Use of Illicit Drugs in the Past Month Ages 12+, % of Population						-0.859
Ever Used Illicit Drugs, High School Youth, % of Population	CDC	2019	14.6	14.3	98%	-0.377
Tobacco: Both Cigarette & Cigar Ages 12+, % of Population	CDC	2017				
Cigarette Smoking (%)	CDC	2019	14.9	15.5	104%	
MENTAL HEALTH (0.02)						
Students Who Consider Suicide: %	CDC	2019	16.9	19.1	113%	
Students Who Consider Suicide: Male, %	CDC					
Students Who Carry Out Intent and Require Medical Attention: %	CDC	2019	3.3	2.1	64%	
Students Who Carry Out Intent and Require Medical Attention: Male, %	CDC	2017				
Students That Act on Suicidal Feeling: Male, %	CDC	2017				
Students Who Consider Suicide: Female, %	CDC	2017				
Students Who Carry Out Intent and Require Medical Attention: Female, %	CDC	2017				
Students That Act on Suicidal Feeling: Female, %	CDC	2017				
Age Adjusted Suicide Rate for Females	NCHS	2017				
Age Adjusted Suicide Rate for Males	NCHS	2017				
Anxiety Disorder Symptoms (%)	NCHS	2020	29.5	27.2	92%	
ACCESS TO CARE (0.075)						
Private Insurance Payment for Health Care: Under 65 Years Old, % of Distribution	Census CPS	2019	49.8	73.8	67%	-0.066
People Without Health Insurance, % of Population	CDC NCHS	2021	14.7	9.0	61%	0.056
People 18 to 64 Without a Usual Source of Health Insurance, % of Adults	Census CPS	2019	3.3	4.4	133%	0.651
People 18 to 64 and in Poverty Without a Usual Source of Health Insurance, % of Adults	Census CPS	2019	11.3	8.8	78%	-0.286
Population Under 65 Covered By Medicaid, % of Population	Census CPS	2016	34.8	13.7	39%	-0.114

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Persons Under 65 (%) with Exchange-based Coverage	CDC-NCHS	2019	3.5	3.7	106%	
ELDERLY HEALTH CARE (0.03)						
Population Over 65 Covered By Medicaid, % of Population	Census CPS	2019	15.2	3.9	26%	-0.059
Medicare Expenditures Per Beneficiary, Dollars	CDC	2013				
Death Rate - Alzheimer Disease	CDC NVSR	2019	27.7	31.5	114%	1.137
PREGNANCY ISSUES (0.04)						
Prenatal Care Begins in 1st Trimester	CDC	2020	68.4	82.8	83%	0.017
Prenatal Care Begins in 3rd Trimester	CDC	2020	5.8	3.2	55%	0.122
Percent of Births to Mothers 18 and Under	CDC	2015				0.078
Percent of Births to Mothers Under 20	CDC	2020	6.5	3.0	46%	
Percent of Live Births to Unmarried Mothers	CDC	2020	70.4	28.4	40%	-0.011
Infant Mortality Rates Among Mothers With Education 9-12th Grade, No Diploma	CDC	2015	13.4	8.9	67%	0.000
Infant Mortality Rates Among Mothers With HS Diploma or GED	CDC	2015	12.0	6.8	57%	0.000
Infant Mortality Rates Among Mothers with 12 or More Years of Education	CDC	2015	10.6	4.5	43%	0.000
Mothers Who Smoked Cigarettes During Last 3 Months of Pregnancy, %	CDC	2016	6.0	10.5	175%	0.000
Low Birth Weight, % of Live Births	CDC	2020	14.2	6.8	48%	-0.013
Very Low Birth Weight, % of Live Births	CDC	2020	2.9	1.0	35%	0.000
Preterm Birth Rates	CDC NCHS	2020	12.12	7.36	61%	
REPRODUCTION ISSUES (0.01)						
Abortions, Per 1,000 Live Births	CDC	2019	23.8	6.6	28%	-0.047
Women Using Contraception, % of Population	CDC	2019	61.4	69.2	89%	0.025
DELIVERY ISSUES (0.075)						
All Infant Deaths: Neonatal and Post, Per 1,000 Live Births	CDC	2019	10.62	4.49	42%	0.021
Neonatal Deaths, Per 1,000 Live Births	CDC	2019	6.85	2.92	43%	0.007
Postneonatal Deaths, Per 1,000 Live Births	CDC	2019	3.77	1.57	42%	0.042
Maternal Mortality, Per 100,000 Live Births	CDC	2019	44.0	17.9	41%	0.121
Infant, Neonatal, and Postneonatal Mortality Rate (Per 1000)	CDC NVSS	2019	4.17	2.13	51%	
Perinatal Mortality	CDC NVSS	2019	9.90	4.68	47%	
Fetal Mortality Rate	CDC NVSS	2020	10.34	4.73	46%	
CHILDREN'S HEALTH (0.10)						
Babies Breastfed, % at 6 Months	CDC	2018	49.3	60.0	82%	0.031
Children Without a Health Care Visit in Past 12 Months (up to 6 Years Old), %	CDC	2020	7.0	8.8	126%	0.515
Children Without a Usual Place of Health Care, %	NHIS	2020	3.5	2.1	60%	0.031
Vaccinations of Children Below Poverty: Combined Vacc. Combined 7-Vaccine Series % of Children 19-35 Months	CDC	2015				
Uninsured Children, %	Kaiser FF	2020	6.0	3.8	63%	
Overweight Boys 2-19 Years Old, % of Population	CDC	2018	19.4	17.4	90%	0.284
Overweight Girls 2-19 Years Old, % of Population	CDC	2018	29.1	14.8	51%	-0.158

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Overweight Boys 6-11 Years Old, % of Population	CDC	2011-2014				
Overweight Girls 6-11 Years Old, % of Population	CDC	2011-2014				
Overweight % of High School Students	CDC YRBS	2019	16.4	14.6	89%	
Overweight Boys 2-19 Years old, % of Population	NCHS	2019				
Overweight Girls 2-19 Years old, % of Population	NCHS	2019				
AIDS Cases per 100,000 All Children Over 13	CDC	2019				
AIDS Cases per 100,000 All Children Under 13	CDC	2016				
COVID (RATIO VS WHITE)						
Cases		2022	1.0	1.0	100%	
Hospitalization		2022	2.5	1.0	40%	
Death		2022	1.7	1.0	59%	
Health Weighted Index					84.0%	0.002

EDUCATION

CATEGORY WEIGHT **TOTAL WEIGHTED INDEX** **DIFFERENCE FROM 2020**

25% **74.5%** **-2.6%**

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
QUALITY (0.45)						
TEACHER QUALITY (0.10)						
Middle Grades: Teacher lacking at least a college minor in subject taught (High vs. Low Minority Schools), %	ET	2002	49	40	82%	0.000
HS: Teacher Lacking an Undergraduate Major in Subject taught (High vs. Low Poverty Secondary Schools), %	ET	2007-2008	21.9	10.9	50%	0.000
Per Student Funding (High (0%) vs. Low (0%) Poverty Districts), Dollars	SFF	2012	10,702.6	10,761.7	99%	0.000
Teachers with <3 Years Experience, %	NCES	2015-2016	14.2	9.2	65%	0.000
Distribution of Underprepared Teachers (High vs. Low Minority Schools), % (California only)	SRI	2008-2009	5	1	20%	0.000
Uncertified Teachers in Schools with Low and High Student of Color Enrollment, %	LPI	2016	4.8	1.2	25%	
Inexperienced (First- or Second-Year) Teachers in Schools With Low and High Student of Color Enrollment, %	LPI	2016	17.2	9.1	53%	
COURSE QUALITY (0.15)						
College Completion, % of All Entrants	NCES	2018	41.0	67.1	61%	0.000
College Completion, % of Entrants with Strong HS Curriculum (Algebra II Plus Other Courses)	ET	1999	75	86	87%	0.000
HS Students: Enrolled in Chemistry, %	NCES	2009	65	72	91%	0.000
HS Students: Enrolled in Algebra II, %	NCES	2013	52	80	65%	0.000
HS Students: Enrolled in: Precalculus, %	NCES	2013	22	40	55%	0.000
HS Students: Enrolled in: Calculus, %	NCES	2013	6	18	33%	0.000
HS Students: Enrolled in: Physics, %	NCES	2009	27	38	72%	0.000
Students Taking: English Composition, %	CB	2009	31	43	72%	0.000
4th Graders Whose School Offers Programming Classes, %	NCES	2019	30	38	80%	
8th Graders Whose School Offers Programming Classes, %	NCES	2019	51	60	86%	

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
<i>Offers Algebra Classes Equivalent to High School Algebra, %</i>	NCES	2019	84	86	98%	
<i>Has Students Who Take High School Match Classes, %</i>	NCES	2019	80	93	86%	
<i>12th Graders Whose School Offers Courses in Computer Science:</i>						
<i>Advanced Placement (AP) Computer Science, %</i>	NCES	2015	19	23	81%	
<i>Courses in Computer Science Other Than AP, %</i>	NCES	2015	28	39	73%	
ATTAINMENT (0-30)						
<i>Graduation Rates, 2-Year Institutions Where Students Started as Full Time, First Time Students, %</i>	NCES	2020	28.5	36.0	79%	-0.026
<i>Graduation Rates, 4-Year Institutions Where Students Started as Full Time, First Time Students, %</i>	NCES	2020	44.3	66.6	67%	0.046
<i>Overall Division I Graduation Success Rate Trends for Student-Athletes</i>	NCAA	2021	80	94	85%	-0.005
<i>Degrees Earned: At Least Associate, % of Population 18+</i>	NCES	2019	2.9	3.4	85%	-0.027
<i>Degrees Earned: At Least Bachelor's, % of Population 18+</i>	NCES	2019	2.5	4.2	60%	-0.015
<i>Degrees Earned: Master's, % of Population Aged 18+</i>	NCES	2019	0.9	1.1	77%	-0.031
<i>Educational Attainment: at Least High School (25 Yrs and Over), % of Population</i>	Census	2019	87.1	90.4	96%	0.000
<i>Educational Attainment: at Least Bachelor's (25 Yrs and Over), % of Population</i>	Census	2019	22.5	34.4	65%	-0.065
Degrees Conferred, % Distribution, By Field						
<i>Agriculture/Forestry</i>	NCES	2019	0.6	2.6	23%	-0.010
<i>Art/Architecture</i>	NCES	2019	0.3	0.4	75%	0.158
<i>Business/Management</i>	NCES	2019	19.0	19.3	98%	-0.011
<i>Communications</i>	NCES	2019	5.6	4.8	117%	0.013
<i>Computer and Information Sciences</i>	NCES	2019	3.9	3.8	103%	0.032
<i>Education</i>	NCES	2019	3.1	5.2	60%	-0.009
<i>Engineering</i>	NCES	2019	2.6	6.2	42%	-0.041
<i>English/Literature</i>	NCES	2019	1.6	2.2	73%	0.005
<i>Foreign Languages</i>	NCES	2019	0.4	0.8	50%	-0.007
<i>Health Sciences</i>	NCES	2019	14.6	13.5	108%	0.007
<i>Liberal Arts/Humanities</i>	NCES	2019	3.3	2.2	150%	-0.133
<i>Mathematics/Statistics</i>	NCES	2019	0.5	1.1	45%	-0.031
<i>Natural Sciences</i>	NCES	2019	0.8	1.6	50%	-0.015
<i>Philosophy/Religion/Theology</i>	NCES	2019	0.4	0.5	80%	0.162
<i>Psychology</i>	NCES	2019	7.4	5.2	142%	0.036
<i>Social Sciences/History</i>	NCES	2019	7.5	7.4	101%	0.001
<i>Other Fields</i>	NCES	2019	28.4	23.2	122%	-0.037
<i>STEM* degree, % of bachelor's degrees conferred</i> <i>*includes biological and biomedical sciences, computer and information sciences, engineering and engineering technologies, mathematics and statistics, and physical sciences and science technologies.</i>	NCES	2018-2019	13.7	19.4	71%	

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
SCORES (0.25)						
PRESCHOOL 10% OF TOTAL SCORES (0.025)						
Children's School Readiness Skills (Ages 3-5), % With 3 or 4 Skills* <small>*Recognizes all letters, counts to 20 or higher, writes name, reads or pretends to read</small>	NCES	2005	44.1	46.8	94%	0.000
Recognizes Most Letters of the Alphabet (Ages 3-5)	MCHB	2019	12.9	22.4	58%	
Counts Up to 20 (Ages 3-5)	MCHB	2019	31.4	41.9	75%	
Can Always Write First Name (Ages 3-5)	MCHB	2019	39.5	45.8	86%	
ELEMENTARY 40% OF TOTAL SCORES (0.10)						
Average Scale Score in U.S. History, 8th Graders	NCES	2018	245.9	272.0	90%	0.000
Average Scale Score in U.S. History, 4th Graders	NCES	2010	198.0	224.0	88%	0.000
Average Scale Score in Math, 8th Graders	NCES	2019	260	292	89%	0.000
Average Scale Score in Math, 4th Graders	NCES	2019	224	249	90%	0.000
Average Scale Score in Reading, 8th Graders	NCES	2019	244	272	90%	0.000
Average Scale Score in Reading, 4th Graders	NCES	2019	204	230	89%	0.000
Average Scale Score in Science, 8th Graders	NCES	2019	133	165	81%	0.005
Average Scale Score in Science, 4th Graders	NCES	2019	130	163	80%	0.003
Writing Proficiency at or Above Basic, 8th Graders, % of Students	NCES	2011	65.0	87.0	75%	0.000
Writing Proficiency at or Above Basic, 4th Graders, % of Students	NCES	2002	77.0	90.0	86%	0.000
Science Proficiency at or Above Proficient, 4th Graders, % of Students	NCES	2019	13.8	48.2	29%	-0.001
Reading Proficiency at or Above Proficient, 8th Graders, % of Students	NCES	2019	14.9	42.5	35%	-0.007
Reading Proficiency at or Above Proficient, 4th Graders, % of Students	NCES	2019	18.1	45.3	40%	0.000
Math Proficiency at or Above Proficient, 8th Graders, % of Students	NCES	2019	13.6	43.8	31%	-0.008
Math Proficiency at or Above Proficient, 4th Graders, % of Students	NCES	2019	20.3	52.2	39%	0.004
Writing Proficiency at or Above Proficient, 8th Graders, % of Students	NCES	2011	11.0	34.0	32%	0.000
Writing Proficiency at or Above Proficient, 4th Graders, % of Students	NCES	2013	17.0	45.0	38%	0.000
HIGH SCHOOL 50% OF TOTAL SCORES (0.125)						
Writing Proficiency at or Above Basic, 12th Graders, % of Students	NCES	2011	61.0	87.0	70%	0.000
Average Scale Score in Science, 12th Graders	NCES	2019	125.0	161.0	78%	-0.005
Average Scale Score in U.S. History, 12th Graders	NCES	2010	268	296	91%	0.000
Average Scale Score in Reading, 12th Graders	NCES	2019	263	295	89%	-0.010
SAT, Average Total Score	CB	2021	931	1124	83%	
Took SAT, % of Students	CB	2021	11.0	42.0	26%	
High School GPAs for Those Taking the SAT	CB	2009	3.0	3.4	88%	0.000
SAT Evidence-Based Reasoning & Writing (ERW): Mean Scores	CB	2021	477	562	85%	0.002

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
<i>ERW, % Met Benchmarks</i>	CB	2021	46.0	80.0	58%	
Mathematics, Joint	CB	2021	457	550	83%	0.005
<i>Mathematics, % Met Benchmarks</i>	CB	2021	23.0	59.0	39%	
Mathematics, Male	CB	2016	430	550	78%	0.000
Mathematics, Female	CB	2016	422	518	81%	0.000
Critical Reading, Joint	CB	2017	425	530	80%	0.000
Critical Reading, Male	CB	2016	434	526	83%	0.000
Critical Reading, Female	CB	2016	415	511	81%	0.000
Reading, Joint	CB	2021	24	28	86%	
Writing, Joint	CB	2021	23	28	82%	-0.036
Writing, Male	CB	2016	424	517	82%	0.000
Writing, Female	CB	2016	17	22.2	77%	0.000
ACT, Average Composite Score	NCES	2020	16.7	22.0	76%	-0.001
ENROLLMENT (0.10)						
School Enrollment: Ages 3-34, % of Population	Census	2020	52.2	51.8	101%	-0.013
<i>Primary School Enrollment (3 to 5 Years Old)</i>	Census	2020	53.6	58.0	92%	-0.006
<i>3 and 4 Years Old</i>	Census	2020	40.1	40.0	100%	0.066
<i>5 and 6 Years Old</i>	Census	2020	90.0	89.2	101%	0.014
<i>7 to 13 Years Old</i>	Census	2020	95.9	96.4	99%	-0.006
<i>14 and 15 Years Old</i>	Census	2020	98.8	97.5	101%	0.018
<i>16 and 17 Years Old</i>	Census	2020	93.2	92.7	101%	0.019
<i>18 and 19 Years Old</i>	Census	2020	71.6	65.1	110%	-0.177
<i>20 and 21 Years Old</i>	Census	2020	41.5	53.2	78%	-0.136
<i>22 to 24 Years Old</i>	Census	2020	26.9	25.3	106%	0.041
<i>25 to 29 Years Old</i>	Census	2020	9.8	10.0	98%	-0.129
<i>30 to 34 Years Old</i>	Census	2020	7.5	5.3	142%	0.306
<i>35+ Years Old</i>	Census	2020	2.1	1.1	191%	-0.242
College Enrollment (Graduate or undergraduate), Ages 14 and Over, % of Population	Census	2020	7.5	6.0	125%	-0.185
<i>14 to 17 Years Old</i>	Census	2020	2.3	0.8	288%	2.407
<i>18 to 19 Years Old</i>	Census	2020	47.4	48.4	98%	0.209
<i>20 to 21 Years Old</i>	Census	2020	39.3	51.6	76%	-0.122
<i>22 to 24 Years Old</i>	Census	2020	25.9	24.8	104%	-0.008
<i>25 to 29 Years Old</i>	Census	2020	9.7	10.0	97%	-0.441
<i>30 to 34 Years Old</i>	Census	2020	7.3	5.1	143%	-0.033
<i>35+ Years Old</i>	Census	2020	2.0	1.1	182%	-0.372
College Enrollment Rate as a Percent of All 18- to 24-Year-Old High School Completers, %	NCES	2019	49.8	68.0	73%	-0.155
Adult Education Participation, % of Adult Population	NCES	2004-2005	46.0	46.0	100%	0.000
STUDENT STATUS & RISK FACTORS (0.10)						
High School Dropouts: Status Dropouts, % (Not Completed HS and Not Enrolled, Regardless of When Dropped Out)	NCES	2019	5.6	4.5	81%	0.000
Children in Poverty, %	Census	2020	27.7	9.9	36%	0.056

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Children in All Families Below Poverty Level, %	Census	2020	27.4	9.6	35%	0.057
Children in Families Below Poverty Level (Female Householder, No Spouse Present), %	Census	2020	45.5	30.7	67%	-0.099
Children With No Parent in the Labor Force, %	AECF	2018	12.8	5.1	40%	0.000
Children Whose Parents Lack Secure Employment, % of Children of That Race	AECF	2019	40.0	20.0	50%	
Children (Under 18) With a Disability, %	Census	2019	5.1	4.3	84%	0.020
Public School Students (K-12): Repeated Grade, %	NCES	2016	2.7	1.7	63%	0.000
Public School Students (K-12): Ever Suspended %	NCES	2019	29.6	12.3	42%	
Suspended, Male, %	NCES	2019	36.6	18.3	50%	
Suspended, Female, %	NCES	2019	22.6	6.0	27%	
Public School Students (K-12): Expelled, %	NCES	2019	1.4	1.0	71%	
Expelled, Male, %	NCES	2019	1.73	1.71	99%	
Expelled, Female, %	NCES	2019	1.2	0.3	25%	
Public School Students *9th Graders: Suspended or Expelled %	NCES	2013-14	13.7	3.40	25%	0.000
Public School Students (K-12): Expelled, %	NCES	2013-14	0.44	0.20	45%	0.000
Center-Based Child Care of Preschool Children, %	NCES	2019	60.9	67.5	90%	-0.177
Parental Care Only of Preschool Children, %	NCES	2019	21.6	21.0	103%	0.440
Teacher Stability: Remained in Public School, High vs. Low Minority Schools, %	NCES	2011-2012				
Teacher Stability: Remained in Private School, High vs. Low Minority Schools, %	NCES	2009				
Zero Days Absent in the Last *Month, % of *8th Graders	NCES	2019	39.0	41.0	95%	-0.049
3+ Days Late to School, % of 10th Graders	NCES	2002	36.4	44.4	122%	0.000
Never Cut Classes, % of 10th Graders	NCES	2002				
Home Literacy Activities (Age 3 to 5)						
Read to Three or More Times a Week	NCES	2019	75.0	91.0	82%	-0.074
Told a Story at Least Once a Month	NCES	2019	77.0	89.0	87%	-0.123
Taught Words or Numbers Three or More Times a Week	NCES	2019	98.0	96.0	102%	0.000
Visited a Library at Least Once in Last Month	NCES	2019	33.0	40.0	83%	-0.130
Either No Internet Access or Only Dial-up, % of 5- to 17-Year-Old Students	NCES	2019	7.5	3.2	42.7%	
Teachers in Schools Where 0 to 25% of Students are Eligible for Free or Reduced-price Lunch, % Distribution	NCES	2017-2018	1.9	89.8	2.1%	
Teachers in Schools Where 76 to 100% of Students are Eligible for Free or Reduced-price Lunch, % Distribution	NCES	2017-2018	13.7	63.1	461%	
Education Weighted Index					74.5%	-0.026

SOCIAL JUSTICE

CATEGORY WEIGHT **TOTAL WEIGHTED INDEX** **DIFFERENCE FROM 2020**

10% **57.85%** **+0.39%**

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
EQUALITY BEFORE THE LAW (0.70)						
Stopped While Driving	BJS	2011	125.4	95.9	76%	0.000
Speeding	BJS	2011	37.7	50.1	133%	0.000
Vehicle Defect	BJS	2011	19	12.7	67%	0.000
Roadside Check for Drinking Drivers	BJS	2011	14	9	64%	0.000
Record Check	BJS	2011	0.4	1.6	400%	0.000
Seatbelt Violation	BJS	2011	6.5	6.6	102%	0.000
Illegal Turn/Lane Change	BJS	2011	7	6.6	94%	0.000
Stop Sign/Light Violation	BJS	2011	5.5	6.1	111%	0.000
Other	BJS	2011	5.3	4.7	89%	0.000
Percent of U.S. Residents Age 16 or Older With Any Police Contact	BJS	2018	21.1	26	123%	
Police Initiated Contact	BJS	2018	11	11.7	106%	
Resident Initiated Contact	BJS	2018	10.6	15.5	146%	
Traffic Accident	BJS	2018	3.5	3.6	103%	
Residents Who Experienced Nonfatal Threats or Use of Force During Contacts With Police	BJS	2018	3.8	1.5	39%	
Experienced Use of Force During Most Recent Police-initiated Contact	BJS	2018	5.3	2	38%	
Percent That Perceived Force As Excessive	BJS	2018	62.9	44.3	70%	
Mean Incarceration Sentence (In Average Months)	BJS					
Average Sentence for Incarceration (All Offenses): Male, Months	BJS	2016	74	65	88%	-0.011
Average Sentence for Murder	BJS	2006				
Average Sentence for Sexual Assault	BJS	2006				
Average Sentence for Robbery	BJS	2006				

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Average Sentence for Aggravated Assault	BJS	2006				
Average Sentence for Other Violent	BJS	2006				
Average Sentence for Burglary	BJS	2006				
Average Sentence for Larceny	BJS	2006				
Average Sentence for Fraud	BJS	2006				
Average Sentence for Drug Possession	BJS	2006				
Average Sentence for Drug Trafficking	BJS	2006				
Average Sentence for Weapon Offenses	BJS	2006				
Average Sentence for Other Offenses	BJS	2006				
Average Sentence for Incarceration (All Offenses): Female, Months	BJS	2006				
Average Sentence for Murder	BJS	2006				
Average Sentence for Sexual Assault	BJS	2006				
Average Sentence for Robbery	BJS	2006				
Average Sentence for Aggravated Assault	BJS	2006				
Average Sentence for Other Violent	BJS	2006				
Average Sentence for Burglary	BJS	2006				
Average Sentence for Larceny	BJS	2006				
Average Sentence for Fraud	BJS	2006				
Average Sentence for Drug Possession	BJS	2006				
Average Sentence for Drug Trafficking	BJS	2006				
Average Sentence for Weapon Offenses	BJS	2006				
Average Sentence for Other Offenses	BJS	2006				
Convicted Felons Sentenced to Probation, All Offenses, %	BJS	2006				
Probation Sentence for Murder, %	BJS	2006				
Probation Sentence for Sexual Assault, %	BJS	2006				
Probation Sentence for Robbery, %	BJS	2006				
Probation Sentence for Burglary, %	BJS	2006				
Probation Sentence for Fraud, %	BJS	2006				
Probation Sentence for Drug Offenses, %	BJS	2006				
Probation Sentence for Weapon Offenses, %	BJS	2006				
Incarceration Rate, Prisoners Per 100,000	BJS	2020	1,234	223	18%	-0.011
Prisoners Per 100,000 People: Male	BJS	2018				
Prisoners Per 100,000 People: Female	BJS	2018				
Prisoners As a % of Arrests	FBI UCR	2020	34.9	11.3	32%	-0.025
Criminal Justice Status at Time of Arrest for Controlling Offense, Federal Prisoners						
None, %	BJS	2016	68.4	77.4	88%	
Status, %	BJS	2016	35.2	22.6	64%	
On Probation, %	BJS	2016	19.6	12.9	66%	
On Parole, %	BJS	2016	15.3	9.6	63%	

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
Number of Times Ever Arrested, Federal Prisoners						
One, %	BJS	2016	7.6	26.5	29%	
Two-Four, %	BJS	2016	36	34	94%	
Five-Nine, %	BJS	2016	26.8	16.8	63%	
Ten or More, %	BJS	2016	29.6	22.7	77%	
Mean, # of Arrests	BJS	2016	9	7.7	86%	
Number of Prior Incarcerations, Federal Prisoners						
Zero, %	BJS	2016	19	38.7	49%	
One, %	BJS	2016	19.1	17.5	92%	
Two-Four, %	BJS	2016	37.9	24.7	65%	
Five-Nine, %	BJS	2016	17.9	11.9	66%	
Ten or More, %	BJS	2016	6.1	7.3	120%	
Mean, # of Incarcerations	BJS	2016	3.3	3.1	94%	
VICTIMIZATION & MENTAL ANGUISH (0.30)						
Homicide, Rate Per 100,000	CDC	2019	22.6	2.7	12%	-0.008
Homicide, Rate Per 100,000, Firearm	FBI	2020	25.8	2.9	11%	0.018
Homicide, Rate Per 100,000, Stabbings	FBI	2020	1.9	0.6	32%	0.011
Homicide, Rate Per 100,000, Personal Weapons	FBI	2020	0.7	2.1%	30%	-0.084
Homicide, Rate Per 100,000, Male	CDC	2019	41.9	3.6	9%	-0.010
Homicide, Rate Per 100,000, Female	CDC	2019	6.08	1.7	28%	-0.051
Murder Victims, Rate Per 100,000	FBI UCR	2020	24.8	3.7	15%	-0.021
Hate Crimes Victims, Rate Per 100,000	FBI UCR	2020	7.2	0.5	7%	0.000
Violent Crimes Victims, Rate Per 1,000 Persons Age 12 or Older	BJS	2020	17.5	16.2	93%	-0.285
Delinquency Cases, Year of Disposition, Rate Per 100,000	NCJJ	2019	53.9	18.3	34%	0.074
Prisoners Under Sentence of Death, Rate Per 100,000	BJS	2020	2.5	0.7	28%	0.039
High School Students Carrying Weapons on School Property	CDC	2019	8.8	7.1	81%	-0.249
High School Students Carrying Weapons Anywhere	CDC	2019	9.4	15	160%	-0.080
Firearm-Related Death Rates Per 100,000, Males, All Ages	CDC	2019	44.8	20.5	46%	-0.028
Ages 1-14	CDC	2019	2.8	2.5	89%	0.337
Ages 15-24	CDC	2019	92.7	18.9	20%	-0.054
Ages 25-44	CDC	2019	76.3	22.3	29%	-0.010
Ages 25-34	CDC	2019				-0.260
Ages 35-44	CDC	2019				-0.386
Ages 45-64	CDC	2019	24	24.1	100%	0.193
Age 65 and Older	CDC	2019	12.1	34.7	287%	-0.799
Firearm-Related Death Rates Per 100,000, Females, All Ages	CDC	2019	5	3.7	74%	0.046
Ages 1-14	CDC	2019	1.2	0.7	58%	-0.017
Ages 15-24	CDC	2019	10.5	3	29%	-0.062
Ages 25-44	CDC	2019	8.3	4.8	58%	0.043
Ages 25-34	CDC	2018				-0.430

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
<i>Ages 35-44</i>	CDC	2018				-0.734
<i>Ages 45-64</i>	CDC	2019	3.1	5.5	177%	0.441
<i>Age 65 and Older</i>	CDC	2019	0.7	2.9	419%	0.046
Social Justice Weighted Index					57.85%	0.0039

CIVIC ENGAGEMENT

CATEGORY WEIGHT **TOTAL WEIGHTED INDEX** **DIFFERENCE FROM 2020**

10% **98.9%** **-1.1%**

2022 EQUALITY INDEX OF BLACK AMERICA	Source	Year	Black	White	Index	Diff. ('22-'20)
DEMOCRATIC PROCESS (0.4)						
Registered Voters, % of Citizen Population	Census	2020	69	74.2	93%	0.030
Actually Voted, % of Citizen Population	Census	2020	62.6	68.3	92%	0.028
COMMUNITY PARTICIPATION (0.3)						
Percent of Population Volunteering for Military Reserves, %	USDD	2020	0.41	0.35	117%	0.171
Volunteerism, %	CPS	2019	7.9	14.7	54%	-0.194
<i>Civic and Political</i>	CPS	2019	4.1	5.7	72%	0.039
<i>Educational or Youth Service</i>	CPS	2019	25.2	13.4	188%	0.848
<i>Environmental or Animal Care</i>	BLS					
<i>Hospital or Other Health</i>	BLS					
<i>Public Safety</i>	BLS					
<i>Religious</i>	BLS					
<i>Social or Community Service</i>	BLS					
Unpaid Volunteering of Young Adults	NCES	2017	38.1	39.4	97%	-0.302
COLLECTIVE BARGAINING (0.2)						
Members of Unions, % of Employed	BLS	2021	11.5	10.3	112%	0.029
Represented By Unions, % of Employed	BLS	2021	12.9	11.6	111%	0.008
GOVERNMENTAL EMPLOYMENT (0.1)						
Federal Executive Branch (Nonpostal) Employment, % of Adult Population	OPM	2021	1.3	0.8	163%	0.125
State and Local Government Employment, % of Adult Population	EEOC	2019	3.2	2.1	152%	-0.143
Civic Engagement Weighted Index					98.9%	-0.011

Source	Acronym
American Community Survey	ACS
American College Testing	ACT
The Annie E. Casey Foundation	AECF
U.S. Bureau of Justice Statistics	BJS
U.S. Bureau of Labor Statistics	BLS
College Board	CB
Centers for Disease Control and Prevention	CDC
U.S. Census Bureau	Census
Survey of Business Owners and Self-Employed Persons	Census SBO
Survey of Income and Program Participation—U.S. Census Bureau	Census SIPP
Current Population Survey—Annual Social and Economic Supplement	CPS ASEC
U.S. Equal Employment Opportunity Commission	EEOC
The Education Trust	ET
Uniform Crime Reporting Program	FBI UCR
Learning Policy Institute	LPI
Maternal and Child Health Bureau	MCHB
National Archive of Criminal Justice Data	NACJD
National Center for Education Statistics	NCES
National Center for Juvenile Justice	NCJJ
Office of Juvenile Justice and Delinquency Prevention	OJJDP
U.S. Office of Personnel Management	OPM
Survey of Consumer Finances	SCF
School Funding Fairness	SFF

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**PREPARED STATEMENT OF REPRESENTATIVE BYRON DONALDS OF
FLORIDA**

Chairman Brown, Ranking Member Toomey, thank you for inviting me to testify in front of the Committee on the important discussion surrounding racism and discrimination in financial services.

As someone whose spent most of my career in the professional financial services industry, I can speak firsthand on the issues in this space and the complexities that make our capital markets the envy of the world. As a Black man, I understand the burden of discrimination and racism, and because of that, I am thankful that discrimination is not legal in our country, and for laws that validate this fact. Is our financial system perfect? No. Is it far superior, and more inclusive, in comparison to the rest of the world, and is it constantly evolving? Absolutely.

For a long time, our country has had a significant number of unbanked people. Thanks to developments in fintech and banks leveraging fintech partnerships, traditionally unbanked or underserved Americans now have access to the products, tools, and resources that they need to succeed and participate in the global economy.

There are several different ways that we could address gaps in our banking system, and I'm sure that we will get into some of those this afternoon. While I can certainly point to the breakdown of banking relations in minority communities post Dodd-Frank or speak to some of the frivolous red tape that ultimately negatively impacts minority communities, I would like to start off with the most glaringly obvious fact. Our markets cannot flourish and best benefit consumers when contending with ambiguity and regulatory uncertainty. Secondly, agencies cannot expand their own authorities in ways that contradict statute, avoid congressional review, and dismiss the Administrative Procedure Act (APA) and Congressional Review Act (CRA). It is harmful and frankly, it is illegal.

Case in point—the Consumer Financial Protection Bureau's anarchic steps to address “gaps” and “unfairness” in the financial services industry. The CFPB's use of the Unfair or Deceptive Acts or Practices (UDAAP) authority flagrantly contradicts the Dodd-Frank Act's treatment of unfairness and discrimination, which under the law are two separate and distinct concepts. Far too often, the heavy hand of Government ushers in sweeping changes that radically transform our markets and implicate American taxpayers and consumers—rejecting transparency and denying debate by critical voices—through rulemakings and guidance, and by expanding the scope of Government authority. This way of governing isn't in good faith and, quite simply, is not a sustainable way of conducting business for the people.

Discrimination and racism should absolutely be taken seriously, and that is why there are laws in place such as the Equal Credit Opportunity Act (ECOA) and the Civil Rights Act. Disparate impact cannot be used as a justification for Government overreach. I think everyone in the room today could find common ground in acknowledging that there is progress to be made in closing the gap, but that isn't possible with a financial activist mindset infused with disadvantageous policy prescriptions that do nothing to solve the problem. I've worked in several financial institutions and what I can tell you is that there are two colors financial institutions are concerned with: green and red. There are two categories considered: credit worthy or risk prone. There is no subliminal mission to deny access to products based off race, sexuality, religion, or any other identification of the sort. Banks prioritize handling business, and if an individual meets the standards necessary to conduct business with them, that is what the bank will do every time. Taking credit risks into account is responsible banking, it isn't racism or discrimination, and we've got to stop governing in a way that assumes minority communities cannot do better and figure out ways that can help individuals who are struggling to prosper. How can we help create better outcomes for consumers?

1. *Agencies should adhere to the rulemaking process.* They should be engaging equally with all stakeholders to have a full picture and prevent undue harm on consumers or unintentional consequences. Collaboration is key to address nuanced issues. There should be many voices represented and given enough time to provide substantial feedback.

2. *We should relax de novo banking requirements.* Since Dodd-Frank the number of banks has declined, and that has a critical impact on minority institutions. Two-hundred-and-fourteen banks have failed since Dodd Frank was passed.¹ We saw the impact this had on minorities at the beginning of the pandemic, with the Paycheck Protection Program (PPP). It wasn't a case of banks not wanting to engage with mi-

¹ <https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/>

minorities. There simply wasn't a preexisting relationship, which inhibited small minority owned businesses from getting the first round of PPP.

3. *So much of our Government isn't working for the people.* The runaway, unaccountable, and financial activism-focused Consumer Financial Protection Bureau (CFPB) is at the spear tip of this worsening problem. As elected officials, it is imperative that we empower consumers and businesses, not engulf them with bureaucratic shackles that stifle economic freedom and access to capital. It is high time for Congress to eliminate the CFPB and allow our free markets to flourish. Earlier this year, I introduced legislation (H.R. 6409—Repeal CFPB Act) with now Senator-Elect Budd of North Carolina to abolish this consumer-last agency once and for all.

4. *Actions taken by agencies should be proven by unbiased data, not anecdotal evidence, or assumptions.* Agencies should also assess the actions taken by industry leaders to ensure there isn't duplication between the regulators' actions and what banks are already doing to address the needs of underserved communities. For example, BPI put out 30 best practices to address the needs of minority communities. Citi Bridge has worked to connect small and midsize business with local lenders for loans up to \$10 million. Bank of America has 700 community financial centers in low and moderate-income neighborhoods that help connect the unbanked and underbanked to the products and financial education they need. These actions do not align with the narrative that the CFPB has created.

5. *Financial literacy should be prioritized.* Discrimination and disparate impact are not the same, and we've got to understand that equal opportunity doesn't necessarily mean equal outcomes. If individuals lack credit worthiness and that impacts other outcomes relating to financial services, we should be looking at ways to address this, like alternative data. People should understand the fundamentals of budgeting, saving, and borrowing. The reality is that not every American will reach a place of financial wealth, but I believe most Americans can reach a place of financial health.

6. *Congress and this Administration should work together to address inflation.* This is why I am a proud colead of my colleague French Hill's Price Stability Act, which would end the Fed's dual mandate and ensure the central bank concentrates exclusively on containing inflation. Inflation is one of the most harmful things to affect minority communities. It has a negative impact that Americans feel every day when they open their bills, fill up their gas tank, and stock their fridge. This prevents individuals from being able to save and move the needle economically. If people don't have money, they don't have a reason to bank.

7. *This Administration should explore the role that responsible innovation and technology through Fintech can play in providing access to capital and financial services to all.* Fintech when done responsibly has been shown to bridge the gap and break down traditional barriers to financial services in underserved communities. This was seen very clearly during the PPP process where fintech lenders were critical in delivering PPP loans to underrepresented populations, particularly Black-owned businesses during the pandemic. Studies have shown that about 1 in 4 Black-owned companies applied with fintech lenders. By leveraging the latest technology, fintech creates economic justice and opportunity to deliver nimble and scalable financial, lending, and payment solutions for every family and small business. Since the start of this Administration, Federal financial regulators, especially at the CFPB and FDIC, have shown an aversion to new financial innovations in lending, payments, and other traditional banking functions under the guise of their "increased profiles", without sufficient evidence to substantiate these claims. The leaders at these financial regulatory agencies would do well to remember the very real benefits provided by fintech and technology-focused banks to underserved communities during and after the Pandemic, and not regulate these innovations out of the market, ultimately harming the consumers these agencies claim to help.

To close I would like to say this: Agencies must return to their missions. My best advice to all agencies is to focus on your mission. We in Congress have an obligation to balance and check agencies that overreach. We are not doing that. This Congress and this Administration owe the American people focus on the issues that actually matter to Americans, and policy that moves the needle where it counts. The FTX disaster is perfect model to illustrate how our current regulators and the current legal framework are being used to pursue social campaigns like climate change, abortion, and other wish list items of tomorrow, rather than prioritizing the issues plaguing every American right now.

PREPARED STATEMENT OF DEVON WESTHILL
 PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY
 DECEMBER 1, 2022

Chair Brown, Ranking Member Toomey, and distinguished Members of the Committee, thank you for the opportunity to provide my testimony on “Fairness in Financial Services: Racism and Discrimination in Banking”.

My name is Devon Westhill and I am the president and general counsel of the Center for Equal Opportunity. CEO is a nonpartisan, nonprofit research and educational organization that for nearly 30 years has conducted studies and produced reports, monitored and advised on Government action, and educated the public with the goal of promoting colorblind equal opportunity and nondiscrimination in America.

That mission is of both professional and personal importance to me. I have written and spoken widely on this topic including before the U.S. Congress earlier this year on discrimination and the civil rights of Asian Americans.¹ More fundamentally, I am a black man from the American South with a Vietnamese wife with whom I share, like many others in this country, two beautifully multiracial babies.

My primary concern today is how the mission to promote nondiscrimination is carried out. In particular, I am worried about the decision of the Consumer Financial Protection Bureau (CFPB) to utilize a disparate impact analysis to identify unlawful discrimination in financial services.

I will comment on why I think the concept is generally problematic. I will then cover potential issues I see with the CFPB implementation of disparate impact. I close by suggesting a better way forward and a warning of potential legal risks.

Disparate Impact Generally

Disparate impact claims are distinct from disparate treatment claims because plaintiffs are not required to show any intent to discriminate under disparate impact theory. To establish a disparate impact claim, a Government agency or private plaintiff must show that a practice or policy that is nondiscriminatory by its terms, in its intent, and in its application disparately affects members of a protected class. If a claimant shows a disparate effect on a protected class, typically the defendant must offer a “legitimate business justification” for the practice or policy. If the defendant satisfies this burden, then the claimant must demonstrate either that the justification is phony or that another practice known to the defendant both serves the same business purpose and has a smaller disparate effect on the protected class. It need not be alleged nor proved, and it does not even matter if the defendant proves that there was no discriminatory motive.

It is hardly ever a question of whether disparate impact will result from a decision or policy but instead, by how much and whether it is a direct cause.

Disparity is not discrimination.

It makes little sense to equate imbalances in one way or another, such as in the racial composition of loan recipients, with discrimination. Imbalances often have a multitude of contributing factors and do not always disfavor minorities. The sentiment is well summed up, as so often is the case, by economist Thomas Sowell in his book *Discrimination and Disparities*:

“If there is not equality of outcomes among people born to the same parents and raised under the same roof, why should equality of outcomes be expected—or assumed—when conditions are not nearly so comparable?”²

Indeed, to disregard this obvious truth leads to topsy-turvy unintended consequences as Justice Samuel Alito cogently illustrated in his dissent in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*³ where he wrote: “No one wants to live in a rat’s nest.”⁴ He was referencing the earlier *Gallagher v. Magner* case involving a claim by slumlords in St. Paul, Minnesota, that the city’s efforts to combat rodent infestation would have a disparate impact on racial minorities because of the resulting rent increases for them.⁵

¹“Discrimination and the Civil Rights of the Muslim, Arab, and South Asian American Communities”: Hearing Before House Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, 117 Cong. 1 (2022) (Statement of Devon Westhill) <https://www.congress.gov/117/meeting/house/114438/witnesses/HMTG-117-JU10-Wstate-WesthillD-20220301.pdf>.

²Thomas Sowell, “Discrimination and Disparities” (2018).

³*Texas Dep’t of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

⁴*Id.* at 557 (Alito, J., dissenting).

⁵*Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010).

Justice Alito concluded: “Something has gone badly awry when a city can’t even make slumlords kill rats without fear of a lawsuit.”⁶

CFPB Use of Disparate Impact May Harm Minorities Most

Encourage race-based decision-making in financial services.

The outcome-focused approach to disparate impact analysis disincentivizes for potential defendants the use of legitimate and race-neutral policies and instead, encourages race-based decision making—just the opposite of what civil rights laws like the Equal Credit Opportunity Act (ECOA) are meant to do—for fear of liability. Put more directly, creditors will be perversely incentivized to judge consumers in part by the color of their skin rather than, as should be the case, their financial risk based on generally accepted credit assessment in order to achieve a predetermined racial balance. Taking race into consideration in making any decision has never been a boon to minorities in America.

Creating profound business uncertainty and whiplash that flows to consumers.

With the change of political Administrations, the racial or ethnic balance required to satisfy disparate impact analysis is subject to change. There is no limiting principle that restrains any given Administration from requiring businesses ensure the numbers come out in any particular way. For example, one Administration, under a disparate impact regime, may see fit to require creditors ensure Asian American consumers receive loans at a rate commensurate with their representation in the general population while another may demand the rate be commensurate with the regional population. Still others may require parity with State or local populations. Moreover, if the precedent is established such that this change can be effectuated outside of formal notice-and-comment rulemaking, as the CFPB has done by merely publishing an updated supervision and examination manual,⁷ it can and will be done on a whim causing substantial uncertainty among regulated entities and whiplash effect that benefits no one and perhaps, places burdens on minorities most.

Disregard for plain language of the ECOA and caselaw.

The Supreme Court has consistently held that statutes that provide a disparate impact cause of action contain “effects” or “results” language like the Court has found in the Fair Housing Act, Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964.⁸ Conversely, the Court has refused to hold disparate impact claims cognizable under statutes that lack such language such as Title VI. The ECOA, like Title VI, contains no effects-based or consequences-oriented language.⁹

Disparate impact masks reasons and will stifle efforts to address why there are a disproportionate number of a certain group not meeting standards.

Factors such as a consumer’s income, continuity of income, and adequacy of collateral, among other factors that are differentially distributed among applicants, are all relevant to credit decisions. An undue focus on a numbers-driven theory can paper over fundamental issues within certain demographic populations contribute to a failure to meet lending standards. Such obfuscation can in turn lead to these issues being neglected with, again, minorities perhaps the most acutely affected.

Studies on financial inclusion suggest important ways to raise lending standard success for the greatest number especially, low-income and young consumers, minorities, and immigrants are innovation, competition by lowering barriers to entry, and consumer empowerment through financial education. Undue emphasis on achieving racial balance can stifle business decisions which might otherwise spur innovation in financial services to improve financial inclusion for traditionally under-represented populations.

Increased cost of doing business.

Disparate impact liability can raise costs for businesses through, especially, litigation or the threat of litigation which may then flow disproportionately to lower income Americans who on average are disproportionately minorities.

⁶Inclusive Communities, 576 U.S. 519 at 558 (Alito, J., dissenting).

⁷See generally Consumer Finance Protection Bureau, “Supervision and Examination Manual”, <https://files.consumerfinance.gov/f/documents/cfpb-supervision-and-examination-manual.pdf>.

⁸E.g., O’Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); Bank of Am. Corp. v. City of Miami, 581 U.S. 189 (2017).

⁹Equal Credit Opportunity, 15 U.S.C. §1691(a)(1), in pertinent part prohibits discrimination “on the basis of race, color, religion, national origin, sex or marital status, or age.”

Conclusion

We ought to carefully and thoughtfully work to reduce racial discrimination as much as possible in a country that in so many ways over its history has sanctioned it. Not just for preferred races, but for every single individual. This is good and serious work and, as I have indicated, I am both professionally and personally committed to it. However, it is my position that the CFPB, or any agency, should refrain from adopting disparate impact theory as a tool to presume discrimination—much less to prove discrimination—for the consequences we can anticipate, the failure in logic that entails, and the likelihood of many other costs we cannot yet envision. There is a better way.

Employ discriminatory intent fact-intensive balancing test.

Justice Kennedy’s opinion in *Inclusive Communities* recognizes that the disparate-impact approach can lead to very bad results and suggests a fact-intensive inquiry instead is vitally important—similar to the approach outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁰ For example, Justice Kennedy warns the lower courts against “second-guess[ing]” the nondiscriminatory reasons for challenged policies, requires a “robust causality requirement” rather than relying simply on racial disproportions, and recognizes that “racial quotas” and “racial considerations” and “abusive . . . claims” can result from threatened and actual lawsuits.

Shrinking liberty, expanding Government, and inviting legal challenge.

The disparate impact approach to civil rights enforcement which presumes discrimination rather than a data point among many to root it out, is on shaky ground from a legal and policy perspective. It disregards nondiscriminatory decisions and policies and encourages race-conscious decision-making without congressional or judicial permission. That is a disturbing abuse of power at the expense of liberty and, if done by Federal agencies, the constitutionally limited Federal Government. The Federal Government has an interest in circumstances evincing racial discrimination, but the disparate impact approach is typically used precisely because disparate treatment of the basis of race has not been shown. The issue deepens here since it is the Federal Government encouraging race conscious decision-making—which invites a potential equal protection challenge.

And, as stated above, one should anticipate an additional legal challenge given the Supreme Court’s consistent position that disparate impact claims are not cognizable under statutes lacking effects-based language. That challenge could reach a Supreme Court potentially sympathetic to the view Justice Clarence Thomas put forward in his dissent in *Inclusive Communities*, just seven years ago:

“Statutes prohibiting on their face intentional discrimination should not be extended by judicial or administrative fiat to encompass disparate impact theories.”¹¹

Upset efforts to address racial equity.

Finally, every Fortune 100 company—and many others—has now adopted DEI programs.¹² For example, the Fortune 1 company, Wal-Mart, has devoted \$100 million to its “Center for Racial Equity.” Governmental zeal to aggressively implement disparate impact analysis in its oversight of the private sector may inadvertently frustrate these efforts and potentially, discourage additional large, medium, and small-sized enterprises from launching and allocating resources for such efforts. If one supports these efforts, it is prudent to provide space for them to play out and to study their progress in addressing potential issues of diversity, equity, and inclusion.

Again, I thank you for the opportunity to provide my testimony and look forward to your questions.

¹⁰ See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

¹¹ *Inclusive Communities*, 576 U.S. 519 at 581 (Thomas, J., dissenting).

¹² Christopher Rufo, “The DEI Regime”, *City Journal*, July 13, 2022, <https://www.city-journal.org/the-diversity-equity-and-inclusion-regime>.

PREPARED STATEMENT OF JANAI NELSON
 PRESIDENT AND DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL
 FUND, INC.

DECEMBER 1, 2022

I. Introduction

Good morning. My name is Janai Nelson, and I am the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF). Thank you for the opportunity to testify about racial discrimination in the financial services industry.

Access to financial services is essential to creating economic mobility and opportunity. Yet Black communities and other communities of color have long been deprived of the full and equal opportunity to save for the future, invest in a business, buy a home, and build inter-generational wealth to sustain the futures of their children and grandchildren.¹ Today, financial institutions still fail to adequately serve communities of color, and continue to offer people of color worse service on worse terms, or deny them service altogether.² As a result of these unfair discriminatory practices, the Black-white homeownership rate gap is wider now than it was in 1968, when Congress passed the Fair Housing Act (FHA),³ and the racial wealth gap continues to grow.⁴ Currently, Black households have approximately seven cents on the dollar in net worth relative to white households.⁵

Financial institutions are governed by a patchwork of existing civil rights laws, such as the FHA and the Equal Credit Opportunity Act (ECOA), that unfortunately leave significant gaps in protecting communities of color from discrimination. These laws do not treat financial institutions as public accommodations for the purposes of racial discrimination; limit recovery for discrimination in non-credit transactions; and fail to adequately incentivize financial institutions to serve communities of color.⁶ Federal courts have further narrowed the protections of these laws, allowing racial profiling and other forms of racial discrimination to evade sanction and imposing the costs of discrimination on society as a whole.⁷

¹ See, e.g., TOM SHAPIRO ET AL., LDF THURGOOD MARSHALL INST. & INST. ON ASSETS AND SOC. POL'Y AT BRANDEIS UNIV. THE BLACK-WHITE RACIAL WEALTH GAP 5 (2019), <https://tminstituteldf.org/wp-content/uploads/2019/11/FINAL-RWG-Brief-v1.pdf>, Aria Florant, et al., *The case for accelerating financial inclusion in black communities*, MCKINSEY INST. FOR BLACK ECON. MOBILITY Ex. 3 (Feb. 25, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-case-for-accelerating-financial-inclusion-in-black-communities>.

² See *infra* Part III.

³ BRAD BLOWER ET AL., NAT'L CMTY. REINVESTMENT COAL., ADDING ROBUST CONSIDERATION OF RACE TO COMMUNITY REINVESTMENT ACT REGULATIONS: AN ESSENTIAL AND CONSTITUTIONAL PROPOSAL (2021), <https://nrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/#ftnref7>.

⁴ See SHAPIRO ET AL., *supra* note 1, at 5.

⁵ *Id.*

⁶ See *infra* Part IV; see also Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 CAL. L. REV. 141 (2021), available at <https://www.californialawreview.org/print/the-customer-caste-lawful-discrimination-by-public-businesses/#:~:text=Jim%20Crow%20laws%20ceased%20to,hotels%2C%20banks%2C%20and%20airplanes>.

⁷ *Id.*

We must do more to ensure that people of color have full and equal access to financial services, and that financial institutions serve the needs of people of color. The Fair Access to Financial Services Act of 2022 would take the important step of closing the loophole that prevents people from holding financial institutions accountable for racial discrimination in the same way as restaurants, hotels, stadiums, and other public accommodations.⁸ Congress and federal regulators should also take additional steps to ensure that financial institutions are serving communities of color, and should address the risks posed by the increased use of algorithms and resulting algorithmic bias.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.⁹ LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. For more than 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for Black Americans and other people of color. LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society.

Since its inception, LDF has worked to increase fairness and equal opportunity for Black Americans in all aspects of the economy. Some of LDF's early victories in the Supreme Court were in seminal cases, such as *Shelley v. Kramer*, 334 U.S. 1 (1948), and *McGhee v. Sipes*, 334 U.S. 1 (1948), which held that state enforcement of racially restrictive covenants violated the Equal Protection Clause. LDF was also counsel of record in *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968), a landmark case solidifying the power of public accommodations laws to eradicate discrimination. In the decades since those victories, LDF has continued to challenge public and private policies and practices that deny Black Americans economic mobility and opportunity.

II. Financial Institutions Have Discriminated Against Black People and Other People of Color for Decades.

Black Americans have long struggled for financial inclusion. While Black banks and businesses briefly bloomed in the years following Reconstruction,¹⁰ these gains were quickly lost as the Supreme Court rolled back civil rights protections and institutionalized discrimination metastasized.¹¹ Institutionalized discrimination such as redlining continued through the 1970s,¹² ultimately leading to the passage of a suite of civil rights bills banning discrimination in housing

⁸ 42 U.S.C. § 2000a.

⁹ LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

¹⁰ KRISTEN BROADY, ET AL., BROOKING INST., AN ANALYSIS OF FINANCIAL INSTITUTIONS IN BLACK-MAJORITY COMMUNITIES: BLACK BORROWERS AND DEPOSITORS FACE CONSIDERABLE CHALLENGES IN ACCESSING BANK SERVICES (2021), <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/>.

¹¹ Florant, et al., *supra* note 1, at Ex. 3.

¹² See Emily Badger, *How Redlining's Racist Effects Lasted for Decades*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/upshot/how-redlinings-racist-effects-lasting-for-decades.html>.

and lending, and incentivizing banks to serve the entire community, including communities of color.

Congress' early attempts to address discrimination in financial services and other industries were met with significant resistance. The Civil Rights Act of 1866, as codified in Sections 1981 and 1982,¹³ intended to place Black Americans on equal footing with white Americans and to remove the vestiges of slavery by outlawing racial discrimination in banking and other sectors. Unfortunately, due to lack of support for enforcement, the 1866 Act had limited impact at the time.¹⁴ Moreover, although Congress passed legislation prohibiting discrimination in public accommodations and transportation, the Supreme Court struck it down as unconstitutional.¹⁵ The decision emboldened many southern states to pass laws mandating racial segregation, and private business followed suit with similar policies.¹⁶

During this period, financial institutions enabled residential segregation and economic exclusion by refusing to lend to Black borrowers and in Black communities.¹⁷ For example, in its report following the 1919 race riot, the Chicago Commission on Race Relations reported that Black borrowers faced significant barriers in securing mortgages, with some lenders completely avoiding Black communities.¹⁸ Similarly, as early as 1932, the Mortgage Conference of New York shared block-level maps of neighborhoods and encouraged member banks to avoid Black communities.¹⁹

Through its policies and practices the federal government for many years encouraged financial institutions to discriminate against communities of color. While the New Deal dramatically expanded access to financial services, particularly through the rapid dissemination of low-cost credit to homeowners,²⁰ these same policies deliberately excluded people of color and exacerbated racial segregation.²¹ In order to help evaluate mortgage risk, the Federal Home Owners' Loan Corporation (HOLC) deployed examiners around the country to consult with local bank loan officers, appraisers, realtors, and city officials in order to create "Residential Security" maps of cities.²² These color-coded maps represented the perceived risk of lending in particular neighborhoods, with "hazardous" (the highest risk) areas coded in red.²³ The presence of Black

¹³ Civil Rights Act of 1866, 14 Stat. 27-30 (codified at 42 U.S.C. § 1981 *et seq.*).

¹⁴ Thomas, *supra* note 6, at 149.

¹⁵ *Civil Rights Cases*, 109 U.S. 3, 26 (1883).

¹⁶ Thomas, *supra* note 6, at 150.

¹⁷ Amy E. Hillier, *Redlining and the Homeowners' Loan Corporation*, J. URBAN HISTORY, vol. 29 (May 2003), at 394, 398, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1002&context=cplan_papers.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Mehrsa Baradaran, *Jim Crow Credit*, 9 UC IRVINE L. REV. 887, 888-89 (2019), available at <https://scholarship.law.uci.edu/ucilr/vol9/iss4/4>.

²¹ *Id.*; see also RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

²² BRUCE MITCHEL & JUAN FRANCO, NAT'L CMTY. REINVESTMENT COAL., HOLC "REDLINING" MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY (2018), <https://nrc.org/holc/>.

²³ *Id.*; see also *see also* Testimony of Richard Rothstein, Distinguished Fellow of the Economic Policy Institute and Senior Fellow, Emeritus, NAACP Legal Defense and Educational Fund, Inc. on behalf of himself and Sherrilyn Ifill President and Director-Counsel NAACP Legal Defense and Educational Fund, Inc. Before the U.S. Senate

people routinely led to a “hazardous” rating, discouraging lending in those areas, a practice which became known as “redlining.”²⁴ In effect, these maps documented, codified, and endorsed existing patterns of discrimination in lending.²⁵ The Federal Housing Administration, which covered the insurance of over one-third of the U.S. mortgage market by the middle of the century,²⁶ later developed similar maps.²⁷

In tandem, the Federal Housing Administration and HOLC helped lock in existing patterns of racial discrimination in the U.S. housing²⁸ and financial services²⁹ markets. Financial institutions relied on these risk calculations to decide where and to whom to make loans and where to locate their branches.³⁰

The Federal Housing Administration also took additional steps to discourage lending to borrowers and communities of color. For example, the agency’s 1939 Underwriting Manual explicitly prohibited lending in neighborhoods that were changing in racial composition.³¹ Its 1941 manual similarly warned that “the rapidly rising Negro population ha[d] produced a problem in the maintenance of real estate values.”³² Finally, the Federal Housing Administration refused to guarantee mortgages for developers who were building subdivisions unless the deeds included racially-restrictive covenants, effectively stopping development of integrated suburban communities.³³

Because these discriminatory practices by financial institutions and the fact that the federal government often barred access to traditional loans or bank branches, many borrowers of color could only access credit in the form of a high-cost loan or contract sale.³⁴ For example, as Ralph Nader testified during the Senate hearings on the Community Reinvestment Act (CRA), borrowers in Washington, D.C., which at that time had a predominantly Black population, seeking home purchase loans from banks often had to put down twenty-five percent down payments, which was

Committee on Banking, Housing & Urb. Affairs, *Separate and Unequal: The Legacy of Racial Discrimination in Housing* 6 (Apr. 13, 2021), https://www.naacpldf.org/wp-content/uploads/LDF-Testimony-Senate-Banking-Racial-Discrimination-in-Housing_FINAL.pdf.

²⁴ ROTHSTEIN, *supra* note 21; *see also* Testimony of Richard Rothstein, *supra* note 23, at 6-10; Desmond Brown, Assistant Dir., Consumer Fin. Prot. Bureau, Dr. Charles Nier, Senior Couns., Consumer Fin. Protection Bureau & Varda Hussain, Special Litig. Couns. for Fair Lending, U.S. Dep’t of Just., Presentation at the Consumer Fin. Prot. Bureau Fin. Educ. Exch. Webinar: Unpacking the Black Wealth Gap (Feb. 22, 2022), https://files.consumerfinance.gov/f/documents/cfpb_unpacking-black-wealth-gap-part-2_webinar-slides_2022-02.pdf.

²⁵ Mitchell & Franco, *supra* note 22.

²⁶ BROADY, ET AL., *supra* note 10.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See* Baradaran, *supra* note 20, at 891.

³⁰ *Id.*

³¹ *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 37 (2010); *see also* DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 54 (1993).

³² Conley, *supra* note 31, at 37.

³³ HEATHER MCGEE, THE SUM OF US 80 (2022).

³⁴ Baradaran, *supra* note 20, at 893.

prohibitive for most Black borrowers.³⁵ While contract sales were more accessible, these alternative products were worse for borrowers. In a contract sale, speculators purchased properties for a few thousand dollars and then “sold” the home to a black buyer through “rent-to-own” contracts for three to four times the price of the home.³⁶ By the 1950s, 85 percent of the homes sold to Black people in Chicago were sold through contract sales with exploitative terms.³⁷

This institutionalized discrimination persisted in the financial services industry for decades. In its 1961 report, the U.S. Commission on Civil Rights documented numerous discriminatory housing and lending practices, from requiring Black borrowers to make higher down payments and adopt faster repayment schedules, to refusing to loan money on the basis of race.³⁸

Ultimately, the civil rights movement that propelled legislation and litigation to dismantle segregation in education³⁹ and public accommodations⁴⁰ also sought to address discrimination in financial services. In the 1960s, Congress passed the FHA and ECOA.⁴¹ These landmark civil rights laws prohibit creditors from discriminating against an applicant in any aspect of a housing or credit transaction on the basis of race and other protected characteristics. The 1975 Home Mortgage Disclosure Act provides needed transparency by requiring financial institutions to publish the number and size of mortgages in each zip code or census tract. And to address the ongoing problem of redlining, in 1977, Congress passed the CRA, which requires regulators to assess a financial institution’s record of “meeting the credit needs of the entire community, including low- and moderate-income [LMI] neighborhoods.”⁴² Taken together, these laws provide much needed protections for vulnerable communities of color, but they do not go far enough.

III. Discrimination by Financial institutions Remains a Persistent Problem Today.

Despite the passage of these vital civil rights laws, financial institutions continue to discriminate against people and communities of color. Communities of color are less likely to have access to traditional financial services; pay more to open and maintain their accounts; and are more likely to be denied mortgages and small business loans and to be offered loans on worse terms, whether through face-to-face lending or via financial technology (fintech) platforms. People of

³⁵ Josh Silver, *The Purpose and Design of the Community Reinvestment Act (CRA): An Examination of the 1977 Hearings and Passage of the CRA*, NAT’L CMTY. REINVESTMENT COAL. (Jun. 14, 2019), <https://nrc.org/the-purpose-and-design-of-the-community-reinvestment-act-cra-an-examination-of-the-1977-hearings-and-passage-of-the-cra/>.

³⁶ See BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE AND THE EXPLOITATION OF BLACK URBAN AMERICA* 38 (2009).

³⁷ *Id.* at 4.

³⁸ U.S. COMM’N ON CIVIL RTS., *BOOK 4: HOUSING* (1961), <https://www2.law.umaryland.edu/marshall/usccr/documents/cr11961bk4.pdf>.

³⁹ *E.g.* *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁴⁰ 42 U.S.C. § 2000a.

⁴¹ Fair Housing Act, Pub. L. No. 90-285, 82 Stat. 81 (1968) (codified at 42 U.S.C. 3601 *et seq.*); Equal Credit Opportunity Act, Pub. L. No. 90-321, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §1691 *et seq.*).

⁴² 12 U.S.C. § 2903(a)(1).

color have also been racially-profiled and barred from cashing checks, making withdrawals, and opening accounts—even at their own financial institutions. This ongoing discrimination imposes significant costs on people and communities of color, and on society as a whole.

A. *Lack of access to traditional financial services.*

Financial institutions still fail to adequately serve communities of color. According to the Brookings Institution, “majority Black and Latino or Hispanic neighborhoods have fewer options when it comes to financial services than majority white neighborhoods.”⁴³ Similarly, in 2021, majority Black census tracts were much less likely to have a bank branch than other census tracts.⁴⁴ In many Black and Latino communities, check cashing entities and payday lenders, which often charge exorbitant fees, are more common than bank branches and offer more accessible hours.⁴⁵

As a result, people of color are more likely to experience gaps in accessing financial services.⁴⁶ According to a report by the Federal Reserve, in 2021 an estimated 40 percent of Black Americans and 29 percent of Latino Americans were either unbanked or underbanked.⁴⁷ Because communities of color have limited or no access to traditional financial services, they rely on more common—but more costly—alternative financial services for everyday transactions.⁴⁸ As a result, Ex-JP Morgan Managing Director and founder of Mobility Capital Finance, Wole Coaxum estimates that “Black and Hispanic people spend 50 to 100 percent more per month for basic banking services, which, over a lifetime, can cost as much as \$40,000 in fees.”⁴⁹

B. *Higher opening deposits, fees, and service costs.*

Financial institutions often offer services to customers of color on worse terms than they offer those same services to other customers. According to a 2020 report by Citi, “traditional banks in predominately Black neighborhoods tend to require higher initial opening deposits [and] higher minimum balances. This translates into Black accountholders needing to deposit a higher percentage of their paychecks into accounts to avoid fees or closure.”⁵⁰

⁴³ BROADY, ET AL., *supra* note 10.

⁴⁴ *Id.*

⁴⁵ KENDRA NEWSOME REEVES, ET AL., RACIAL EQUITY IN BANKING STARTS WITH BUSTING THE MYTHS (2021), <https://www.bcg.com/publications/2021/unbanked-and-underbanked-households-breaking-down-the-myths-towards-racial-equity-in-banking>.

⁴⁶ Florant, et al., *supra* note 1.

⁴⁷ FED. RESERVE BD. OF GOV., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2021 TBL. 11 (2022), <https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf>.

⁴⁸ Florant, et al., *supra* note 1.

⁴⁹ Ellen Rosen, *Trying to Correct Banking’s Racial Imbalance*, N.Y. TIMES (Jun. 30, 2020), <https://www.nytimes.com/2020/06/30/business/banking-race-black-inequality.html>; see also MATT FELLOWES & MIA MABANTA, BROOKINGS INST., BANKING ON WEALTH: AMERICA’S NEW RETAIL BANKING INFRASTRUCTURE AND ITS WEALTH-BUILDING POTENTIAL (2008), https://www.brookings.edu/wp-content/uploads/2016/06/01_banking_fellowes.pdf.

⁵⁰ DANA M. PETERSON & CATHERINE L. MANN, CITI GPS, CLOSING THE RACIAL INEQUALITY GAPS: THE ECONOMIC COST OF BLACK INEQUALITY IN THE U.S. 54 (2020).

A study by researchers at New America similarly found that commercial banks offered worse terms to Black customers.⁵¹ Customers in majority Black communities had to pay substantially more in order to open a basic, entry-level checking account: the minimum opening deposit in communities with majority Black populations was \$80.60, compared to \$68.50 for majority white communities.⁵² Customers in communities where the majority of the population was people of color also had to maintain a higher minimum balance (\$625.50 in a majority white tract, compared to \$748.80 in majority Latino tracts and \$870.50 in majority Black tracts),⁵³ and spent more in maintenance fees.⁵⁴ As a result, people of color spent hundreds of dollars more in checking account costs and fees.⁵⁵

C. Higher denial rates for mortgage and small business loans, and higher interest rates.

People of color are also denied mortgages at higher rates and when they do receive loans are offered worse terms than other borrowers, causing them to pay more for the same services.

- In 2017, J.P. Morgan settled a case brought by the U.S. Attorney for the Southern District of New York alleging that the bank charged higher interest rates to Black and Latino borrowers from 2006-2009.⁵⁶ These higher interest rates resulted in, on average, an additional \$968 in charges for Latino borrowers and an additional \$1,126 in charges for Black borrowers during the first five years of the loan.
- A 2019 investigation of 61 metro areas across the country found that people of color were more likely to be denied a conventional mortgage than their white counterparts, even when they made the same amount of money, tried to borrow the same amount of money, and wanted to buy in the same neighborhood.⁵⁷
- An analysis of mortgage refinance loans during the 2020 boom found that there was a stark racial disparity in the approval rate for those loans. Only 70 percent of Black and 78 percent

<https://ir.citi.com/%2FPRxPvgNWu319AU1ajGf%2BsKbjjBJSaTOSdw2DF4synPwFB8a2jV1FaA3Idy7vY59bOtN2kVQM%3D>.

⁵¹ JACOB FABER & TERRI FRIEDLINE, *NEW AMERICA, THE RACIALIZED COSTS OF BANKING* (2018), https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Racialized_Costs_of_Banking_2018-06-20_205129.pdf.

⁵² *Id.* at 11.

⁵³ *Id.* at 12.

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* at 15.

⁵⁶ Gillian B. White, *J.P. Morgan Chase's \$55 Million Discrimination Settlement*, ATLANTIC (Jan. 18, 2017), <https://www.theatlantic.com/business/archive/2017/01/jpmorgan-lawsuit-discrimination/513494/>.

⁵⁷ *The Community Reinvestment Act: Assessing the Law's Impact on Discrimination and Redlining: Hearing Before the Subcomm. on Consumer Prot. and Fin. Insts. of the H. Comm. on Fin. Servs.*, 116th Cong. 14-15 (2019) (statement of Aaron Glantz, Senior Reporter, Reveal From the Center for Investigative Reporting), available at <https://www.congress.gov/116/meeting/house/109303/witnesses/HHRG-116-BA15-Wstate-GlantzA-20190409.pdf>.

of Latino applicants were approved for mortgage refinances in 2020, compared to about 87 percent of non-Latino white applicants.⁵⁸

- A 2022 FDIC study likewise found that Black borrowers are more likely to be denied home loans and pay higher interest rates than white borrowers, even when controlling for other factors.⁵⁹
- A report released yesterday by the National Association of Real Estate Brokers found that Black borrowers are more than twice as likely to be denied a mortgage, and were nearly three times more likely to rely on high-cost loans, compared to white borrowers.⁶⁰

Black small business owners encounter similar obstacles.⁶¹ According to the Federal Reserve, creditworthy Black-owned firms were 7 percent less likely to get approved for business loans overall, and 20 percent and 17 percent less likely to obtain credit at large and small banks, respectively, than other firms, even when controlling for firm characteristics and performance.⁶² Furthermore, when Black-owned businesses are approved for financing it is often at substantially lower levels than white businesses. For example, Black-owned businesses received loans through the Paycheck Protection Program that were approximately 50 percent lower than White-owned businesses with similar characteristics.⁶³ Similarly, the Federal Reserve found that only approximately 14 percent of Black small business owners and 19 percent of Latino small business owners received all the financing they sought from banks in 2021, compared to 34 percent of white small business owners.⁶⁴ As a result, Black entrepreneurs were less likely to rely on bank loans to launch their business than white entrepreneurs, and were more dependent on capital from friends, family, and their own resources.⁶⁵ These sources tend to yield less capital and, Black entrepreneurs also rely on personal and business credit cards, which can result in higher rates and fees.⁶⁶

⁵⁸ Shawn Dornan, et al., *Wells Fargo Rejected Half Its Black Applicants in Mortgage Refinancing Boom*, BLOOMBERG BUSINESSWEEK + EQUALITY (Mar. 11, 2022), <https://www.bloomberg.com/graphics/2022-wells-fargo-black-home-loan-refinancing/>.

⁵⁹ Stephen Popick, *Did Minority Applicants Experience Worse Lending Outcomes in the Mortgage Market? A Study Using 2020 Expanded HMDA Data*, FED. DEPOSIT INS. CO. (June 2022), https://www.fdic.gov/analysis/cfr/working-papers/2022/cfr-wp2022-05.pdf?source=govdelivery&utm_medium=email&utm_source=govdelivery.

⁶⁰ Debra Kamin, *Discrimination Seeps Into Every Aspect of Home Buying for Black Americans*, N.Y. TIMES (Nov. 29, 2022), <https://www.nytimes.com/2022/11/29/realestate/black-homeowner-mortgage-racism.html?smid=tw-nytimes&smtyp=cur>.

⁶¹ BROADY, ET AL., *supra* note 10; Mels de Zeeuw & Brett Barkley, *Mind the Gap: Minority-Owned Small Businesses' Financing Experiences in 2018*, CONSUMER & CMTY. CONTEXT, A FED. RESERVE SYST. PUB., Vol. 1, No. 2, p. 16 (Nov. 2019), <https://www.federalreserve.gov/publications/2019-november-consumer-community-context.htm>.

⁶² PETERSON & MANN, *supra* note 50, at 61.

⁶³ Rachel Atkins, et al., *Discrimination in lending? Evidence from the Paycheck Protection Program*, 58 SMALL BUS. ECON. 843 (2022).

⁶⁴ ANN MARIE WIERSCH, ET AL., U.S. FED. RESERVE SYS., THE SMALL BUSINESS CREDIT SURVEY 2022 REPORT ON EMPLOYER FIRMS 18 (2022).

⁶⁵ PETERSON & MANN, *supra* note 50, at 59-60.

⁶⁶ *Id.* at 59.

Lenders have also targeted Black communities and other communities of color with predatory loans and steered Black borrowers to subprime mortgage loans that carried high interest rates and fees, even when the borrowers qualified for lower-cost and more favorable prime loans based on their objective credit characteristics.⁶⁷ Many of these borrowers lost their homes during the Great Recession.⁶⁸

D. Algorithmic bias in fintech.

While financial technology, or fintech, has the potential to lead to more fair decision-making⁶⁹ by eliminating human bias and expanding access to credit through the use of alternative data such as rental and utility payments,⁷⁰ it can also result in the exacerbation and further entrenchment of racial bias or discrimination. A recent study by researchers at the University of California—Berkeley examined the practices of six fintech lenders, which they defined as lenders with a strong online presence where nearly all of their mortgage application process took place online and applications were evaluated using an algorithm with no human involvement from the lenders.⁷¹ The study found that, while the algorithmic lending platforms it tested discriminated 40 percent less than face-to-face lenders, “Latin[o] and African-American [borrowers] pay 5.3 basis points more in interest for purchase mortgages and 2.0 basis points for refinance mortgages originated on FinTech platforms.”⁷²

Another example of how fintech algorithms can discriminate against people of color was revealed in 2020, when the Student Borrower Protection Center (SBPC) tested a lending algorithm developed by a company called Upstart. Upstart’s algorithm incorporated educational data, including where the borrower attended college and the average SAT and ACT scores for different colleges and universities.⁷³ The algorithm divided schools into tiers based on standardized test

⁶⁷ See Compl., *United States v. Wells Fargo Bank*, No. 1:12-cv-01150 (D.D.C. July 12, 2012) [hereinafter *Wells Fargo Compl.*]; Compl., *United States v. Countrywide Financial Corp.*, No. 11-cv-10540-PSGAJW (C.D. Cal. Dec. 21, 2011).

⁶⁸ See, e.g., *Wells Fargo Compl.*, *supra* note 67, at 1-2, 4-5.

⁶⁹ Katie Jensen, *Fintech Mortgage Proven To Reduce Racial Bias In Lending*, NAT’L MORTG. PROF. (Nov. 19, 2021), <https://nationalmortgageprofessional.com/news/fintech-mortgage-proven-reduce-racial-bias-lending>

⁷⁰ For example, both Freddie Mac and Fannie Mae now give borrowers and lenders the option of submitting rental payment history for consideration as part of the entities’ automated mortgage underwriting system. *Freddie Mac Takes Further Action to Help Renters Achieve Homeownership*, FREDDIE MAC (June 29, 2022 10:00 ET), <https://www.globenewswire.com/news-release/2022/06/29/2471417/0/en/Freddie-Mac-Takes-Further-Action-to-Help-Renters-Achieve-Homeownership.html>;

FHFA Announces Inclusion of Rental Payment History in Fannie Mae’s Underwriting Process, FED. HOUSING FINANCE AGENCY (Aug. 11, 2021), <https://www.fhfa.gov/mobile/Pages/public-affairs-detail.aspx?PageName=FHFA-Announces-Inclusion-of-Rental-Payment-History-in-Fannie-Maes-Underwriting-Process.aspx>.

⁷¹ Robert Bartlett, et al., *Consumer-Lending Discrimination in the FinTech Era*, UC BERKELEY PUB. LAW RES. PAPER 5 (Nov. 2019), <https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf>.

⁷² *Id.* at 6.

⁷³ STUDENT BORROWER PROTECTION CTR., EDUCATIONAL REDLINING 16 (2019), <https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf>; Letter from LDF & Student Borrower Protection Center to Dave Girouard, CEO of Upstart Network, Inc. (Jul. 30, 2020), <https://www.naacpldf.org/wp-content/uploads/2020-07-30-FINAL-Demand-Letter.pdf> (hereinafter “Upstart Demand Letter”).

scores.⁷⁴ The higher the incoming class's average standardized test scores, the higher the school's tier, and the more favorable the terms offered.⁷⁵ Because students of color tend to perform worse on these standardized tests (which in fact have been found to be racially biased),⁷⁶ schools with higher percentages of students of color were assigned to lower tranches.⁷⁷ For example, "only nine percent of Black students, eight percent of Indigenous American students, and twelve percent of Latino students attend America's most elite public universities."⁷⁸ Ninety-five percent of Historically Black Colleges and Universities (HBCU) were in the bottom rankings; just two were in the top tier.⁷⁹ In practice, this translated into substantially different loan terms for borrowers: A hypothetical graduate of the well-known HBCU Howard University who applied for a loan through Upstart's lending platform was charged nearly \$3,499 more over the life of a five-year loan than a similarly-situated graduate of New York University, a predominantly white institution.⁸⁰ LDF and SBPC sent a demand letter to Upstart outlining how its algorithm likely violated ECOA and the FHA.⁸¹ In response, Upstart agreed to a fair lending monitorship.⁸² LDF's work to ensure compliance with the monitorship is ongoing.

E. Racial profiling in bank transactions.

Finally, financial institutions have also racially-profiled their own current and potential Black customers, denying them service, accusing them of fraud, and threatening them with arrest:

- In 2018, Clarice Middleton walked into a Wells Fargo branch in Atlanta, Georgia and attempted to cash a \$200 refund check for a security deposit from a real estate company that had an account with the bank. Although she showed three bank employees the check and her identification, the employees accused her of fraud and called 911.⁸³
- In 2019, Jabari Bennett sold his house in Atlanta, Georgia and moved to Wilmington, Delaware to live with his mother. That March, Mr. Bennett, a Wells Fargo account holder for four years, went into a local branch in Wilmington to withdraw money from his account to buy a used car. The bank teller refused to accept that he was the account holder. The

⁷⁴ Upstart Demand Letter, *supra* note 73.

⁷⁵ *Id.*

⁷⁶ See, e.g., Ember Smith & Richard Reeves, *SAT math scores mirror and maintain inequity*, Brookings Inst. (Dec. 1, 2020), <https://www.brookings.edu/blog/up-front/2020/12/01/sat-math-scores-mirror-and-maintain-racial-inequity/>; Gregory M. Walton & Steven J. Spencer, *Latent Ability*, 20 PSYCH. SCI. 1132, 1137 (2009). See also John Rosales & Tim Walker, *The Racist Beginnings of Standardized Testing*, NAT'L EDUC. ASSOC. TODAY (Mar. 20, 2021), <https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing>.

⁷⁷ Upstart Demand Letter, *supra* note 73.

⁷⁸ See EDUCATIONAL REDLINING, *supra* note 73, at 9.

⁷⁹ Upstart Demand Letter, *supra* note 73.

⁸⁰ See EDUCATIONAL REDLINING, *supra* note 73, at 18.

⁸¹ Upstart Demand Letter, *supra* note 73.

⁸² Press Release, LDF & Student Borrower Protection Center, NAACP Legal Defense and Educational Fund and Student Borrower Protection Center Announce Fair Lending Testing Agreement with Upstart Network (Dec. 1, 2020), <https://protectborrowers.org/naacpldf-sbpc-upstart-agreement/>.

⁸³ Emily Flitter, *'Banking While Black': How Cashing a Check Can Be a Minefield*, N.Y. TIMES (Jun. 18, 2020), <https://www.nytimes.com/2020/06/18/business/banks-black-customers-racism.html>.

branch manager told Mr. Bennett to leave, then threatened to call the police after he left and returned to try to complete the transaction.⁸⁴

- In June 2019, Robyn Murphy took her 18-year-old son, Jason, to a Bank of America branch in Owings Mills, Maryland to open a joint savings account. Although Ms. Murphy had been a customer of the bank for 20 years, an employee refused to open the account after a computer program flagged her son's Social Security number as fraudulent—even though Jason already had his own checking account at the bank.⁸⁵
- In December 2021, Peter Wogbah went into a U.S. Bank in Bloomington, Minnesota and requested a cashier's check from his business account. The tellers refused to issue the check and told him the money was unavailable, even after he called U.S. Bank's 1-800 number to confirm the funds were wired to his account. The tellers told Mr. Wogbah to go to a different branch to get the check and called the police.⁸⁶
- Earlier this year, Ryan Coogler, director of the top box office earning movie, *Black Panther*, attempted to withdraw money from his account at Bank of America. After the transaction was flagged, the teller assumed that Mr. Coogler was trying to rob the bank. She called the police, who handcuffed and detained him.⁸⁷

Although many people who are profiled in this way are eventually able to complete their transaction, Ms. Middleton, Mr. Bennett, and others like them are harmed from the moment bank employees assume that, because of the color of their skin, they could not be legitimate customers and deny them service. When merchants exclude individuals from commercial transactions based on their identity, the excluded individuals suffer stigma and psychological harm that endures even if they can eventually complete those transactions. This psychological harm can, in turn, negatively impact victims' health: as described by researchers in the *American Behavioral Scientist*, "experiences of racial discrimination are an important type of psychosocial stressor that can lead to adverse changes in health status and altered behavioral patterns that increase health risks."⁸⁸ This harmful phenomenon is also vastly under-reported.

F. *Costs of discrimination.*

Discrimination by financial institutions imposes real costs on communities of color. As LDF's Thurgood Marshall Institute (TMI) outlined in its report, *The Black-White Racial Wealth*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Eric Rasmussen, *Banking While Black: More complaints of discrimination as U.S. Bank CEO promises change*, KTSP (Mar. 24, 2022 11:26 PM), <https://kstp.com/5-investigates/banking-while-black-more-complaints-of-discrimination-as-u-s-bank-ceo-promises-change/>.

⁸⁷ Johnny Diaz & Michael Levenson, *'Black Panther' Director Ryan Coogler Mistaken for Bank Robber in Atlanta*, N.Y. TIMES (Mar. 9, 2022), <https://www.nytimes.com/2022/03/09/arts/ryan-coogler-bank-america.html>.

⁸⁸ David R. Williams & Selina Mohammed, *Racism and Health I: Pathways and Scientific Evidence*, AM. BEHAVIORAL SCI., vol. 57 (May 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3863357/>.

Gap, discrimination by financial institutions and exclusion from financial services have contributed to a significant and growing racial wealth gap.⁸⁹ The additional costs Black people incur because they rely on alternative financial services and pay higher bank fees prevent them from turning their income into savings and building wealth.⁹⁰ Moreover, as noted above, without adequate access to capital and credit, the Black-white homeownership rate gap has grown,⁹¹ and Black business owners are more likely to cease operations than other business owners.⁹² As a result of these and other policies, Black households have about seven cents on the dollar in net worth relative to white households.⁹³

While racial discrimination hurts communities of color most, it also hurts financial institutions and society as a whole. For example, a 2020 study by Citi estimates that the United States' aggregate economic output would have been \$16 trillion higher since 2000 if we had closed racial gaps in wages, access to higher education, lending, and mortgage access.⁹⁴ Researchers at McKinsey estimated that the racial wealth gap alone will cost the U.S. economy between \$1 trillion and \$1.5 trillion between 2019 and 2028—4 to 6 percent of the projected GDP in 2028.⁹⁵ By contrast, financial institutions could earn approximately \$2 billion annually in additional revenue if Black Americans had the same access to financial products as white Americans, and up to \$60 billion annually in additional revenue if Black Americans reached full wealth parity.⁹⁶

IV. The Patchwork of Existing Federal Civil Rights Laws Prevents Some Racially Discriminatory Conduct by Financial Institutions, But Also Leaves Gaps.

As noted above, a patchwork of civil rights laws prohibits financial institutions from taking certain discriminatory actions on the basis of race. Unfortunately, federal courts have made it harder for harmed individuals to use these statutes to address racial discrimination by financial institutions, particularly in non-credit transactions.⁹⁷

First, courts have barred harmed individuals from bringing racial discrimination claims against financial institutions as public accommodations. Title II of the federal Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, or national origin in restaurants, hotels, gas stations, and places of entertainment.⁹⁸ The law was designed to “vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public

⁸⁹ SHAPIRO ET AL., *supra* note 1.

⁹⁰ Florant, et al., *supra* note 1.

⁹¹ BLOWER ET AL., *supra* note 2.

⁹² PETERSON & MANN, *supra* note 50, at 59.

⁹³ SHAPIRO ET AL., *supra* note 1, at 5.

⁹⁴ PETERSON & MANN, *supra* note 50, at 7.

⁹⁵ Nick Noel, et al., *The economic impact of closing the racial wealth gap*, MCKINSEY INST. FOR BLACK ECON. MOBILITY (Aug. 13, 2019), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-impact-of-closing-the-racial-wealth-gap>.

⁹⁶ Florant, et al., *supra* note 1.

⁹⁷ Thomas, *supra* note 6, at 143-44.

⁹⁸ See 42 U.S.C. § 2000a.

establishments.⁹⁹ Banks are enumerated as “public accommodations” for the purposes of discrimination on the basis of disability under similar provisions in the Americans with Disabilities Act.¹⁰⁰ However, courts have held that banks are not “public accommodations” under Title II.¹⁰¹ In practice, if a bank teller refuses to cash a check because someone is disabled, that victim could bring a claim under the Americans with Disabilities Act,¹⁰² if a bank teller refuses to cash a check because someone is Black, that victim has no recourse under Title II.

Second, ECOA and the FHA only apply to financial institutions in credit transactions. As noted above, ECOA prohibits lenders from discriminating on the basis of race and other protected characteristics,¹⁰³ and both ECOA and the FHA prohibit discrimination in any residential real estate-related transaction.¹⁰⁴ Yet neither ECOA nor FHA cover financial institution’s practices with respect to deposit accounts and other non-credit products.

Third, while Sections 1981 and 1982 of the Civil Rights Act of 1866 allow some racial discrimination claims in non-credit transactions, courts have significantly narrowed their scope, preventing recovery in many cases. Section 1981 confers on “[a]ll persons within the jurisdiction of the United States . . . the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings.”¹⁰⁵ Under this statute, financial institutions may not prevent customers of color from completing a transaction or force them to complete the transaction on different terms from other customers. Section 1982 has a similar scope, and prohibits racial discrimination in real and personal property transactions.¹⁰⁶ The Supreme Court has “construed §§ 1981 and 1982 similarly.”¹⁰⁷ Yet courts have narrowly interpreted these statutes to exclude many kinds of discriminatory conduct. Courts have found, for example, that Section 1981 does not prohibit financial institutions or other entities from delaying a transaction because of someone’s race, so long as the customer eventually completes the transaction.¹⁰⁸ In *York v. JPMorgan Chase*

⁹⁹ *Hearth of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964) (internal quotation marks omitted).

¹⁰⁰ 42 U.S.C. §§ 12181(7)(F), 12182.

¹⁰¹ See, e.g., *Lowe v. ViewPoint Bank*, 972 F. Supp. 2d 947, 959 (N.D. Tex. 2013) (granting summary judgment on plaintiff’s Title II claim against defendant bank on the basis that “a bank is not a place of public accommodation” under 42 U.S.C. § 2000a(b)); *Akyar v. TD Bank US Holding Co.*, 18-CV-379, 2018 WL 4356734, at *5 (S.D.N.Y. Sept. 12, 2018); *Ajuluchuku v. Wachovia Corp.*, No. 3:05CV532-C, 2006 WL 406602 (W.D.N.C. Feb. 17, 2006) (granting motion to dismiss plaintiff’s Title II claim because defendant bank is not a “public accommodation”); *Wilson v. Harding*, No. CIV. A. 98-2092-KHV, 1999 WL 203458, at *2 (D. Kan. Apr. 5, 1999) (“Defendants, a bank and two of its employees, clearly are not covered by this statutory provision.”) (citing 42 U.S.C. § 2000a(b)). See also e.g., *Cuevas v. Sdrales*, 344 F.2d 1019, 1021 (10th Cir. 1965) (noting “[m]any business establishments were not included within the scope of [42 U.S.C. § 2000a]”, cert. denied, 382 U.S. 1014 (1966)).

¹⁰² 42 U.S.C. § 12181(7)(F); 42 U.S.C. § 12182(a).

¹⁰³ These characteristics include race, color, religion, national origin, sex (including sexual orientation and gender identity), marital status, age, receipt of public assistance, or the good faith exercise of any right under the Consumer Credit Protection Act.

¹⁰⁴ Fair Housing Act, Pub. L. No. 90-285, 82 Stat. 81 (1968) (codified at 42 U.S.C. 3601 *et seq.*); Equal Credit Opportunity Act, Pub. L. No. 90-321, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §1691 *et seq.*).

¹⁰⁵ 42 U.S.C. § 1981(a).

¹⁰⁶ 42 U.S.C. § 1982.

¹⁰⁷ E.g., *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 447 (2008).

¹⁰⁸ See, e.g., *Nevin v. Citibank N.A.*, 107 F. Supp. 2d 333, 349 (S.D.N.Y. 2000) (granting summary judgment on Section 1981 claim when “[p]laintiff purchased everything she desired”); *Harrison v. Wells Fargo Bank*, 2020 WL

Bank, National Association, for instance, a bank teller refused to allow Alison York, a Black woman, to withdraw money from her account even after the acting bank manager verified that the signature the bank had on file matched Ms. York's driver's license.¹⁰⁹ The bank teller claimed that "she did not feel comfortable" giving Ms. York money and that she "had the right to refuse service."¹¹⁰ However, because Ms. York was eventually able to complete the transaction, the district court dismissed Ms. York's Section 1981 claim.¹¹¹ Similarly, several courts have found that neither Section 1981 nor Section 1982 prohibits discriminatory surveillance or detention.¹¹²

Moreover, following the Supreme Court's 2020 decision in *Comcast v. National Association of African American-Owned Media*, harmed individuals must show evidence that discrimination was the "but for" cause of the harm in order to make out a preliminary cause of action.¹¹³ This ruling is inconsistent with the letter and spirit of Section 1981 and places an extremely high burden on the harmed individual, making it more difficult to hold entities engaged in discrimination accountable for their actions.

Fourth, the CRA requires regulators to assess a financial institution's record of "meeting the credit needs of the entire community, including low- and moderate-income [LMI] neighborhoods."¹¹⁴ Yet currently the CRA does not require regulators to examine whether financial institutions adequately serve Black and other communities of color, and current CRA exams have failed to ensure that those communities have equal access to financial services. According to a 2022 study by the Urban Institute, neighborhoods which are predominantly people of color receive less than their proportionate share of overall lending and bank loans. While LMI neighborhoods predominantly inhabited by people of color constitute 36.7% of the households in all LMI neighborhoods, they receive only 25.2% of owner-occupied purchase loans made in LMI neighborhoods.¹¹⁵ Black borrowers in particular are underserved: 17.9% of existing homeowners in LMI neighborhoods are Black, but Black borrowers receive only 13.1% of owner-occupied purchase loans in these neighborhoods.¹¹⁶ By contrast, Latino homeowners compose 19% of existing homeowners in LMI neighborhoods, but receive 23.1% of owner-occupied purchase

1322921, at *3 (N.D. Cal. Mar. 20, 2020) (granting summary judgment on plaintiff's Section 1981 claim where plaintiff was able to complete her transaction despite being subjected to discriminatory language); *Jackson v. Cititrends Utica, New York*, No. 20-CV-14, 2020 WL 3035577, at *1 (N.D.N.Y. Jun. 5, 2020) (dismissing Section 1981 claim when plaintiffs were able to complete their transaction with another cashier and thus not prevented from purchasing anything at the store).

¹⁰⁹ See *York v. JPMorgan Chase Bank, Nat'l Ass'n*, No. CV-18-04039-PHX-SPL, 2019 WL 3802535, at *1 (D. Ariz. Aug. 13, 2019).

¹¹⁰ *Id.*

¹¹¹ *Id.* at *2.

¹¹² See, e.g., *Morris v. Office Max, Inc.*, 89 F.3d 411, 411-12 (7th Cir. 1996); *Garrett v. Tandy Corp.*, 142 F. Supp. 2d 117, 119 (D. Me. 2001), *aff'd*, 295 F.3d 94, 101 (1st Cir. 2002); *Chambers v. Simon Prop. Grp.*, No. 12-1179-EFM, 2013 WL 1947422, at *1 (D. Kan. May 10, 2013).

¹¹³ *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S.Ct. 1009, 1016-17 (2020).

¹¹⁴ 12 U.S.C. § 2903(a)(1).

¹¹⁵ LINNA ZHU, ET AL., SHOULD THE COMMUNITY REINVESTMENT ACT CONSIDER RACE? 10 (2022).

https://www.urban.org/sites/default/files/2022-04/should-the-community-reinvestment-act-consider-race_1.pdf, *Id.* at 10.

¹¹⁶ *Id.* at 12.

loans.¹¹⁷ These statistics show that assessing services to LMI neighborhoods alone is insufficient to ensure that banks are serving the entire community, as intended by the CRA.

Finally, while existing anti-discrimination laws prohibit discrimination caused by algorithms, using these statutes to address algorithmic bias presents unique challenges. For example, there is no requirement that designers or developers of fintech publish their algorithms or share information about what data they used to develop and train the algorithm, how it was validated, whether it has been audited for bias, or the outcome of and response to that audit. In fact, the algorithms are usually considered proprietary.¹¹⁸ Without access to the algorithm or information about the algorithm, it can be difficult for harmed individuals to establish that the algorithm caused a discriminatory and adverse outcome.¹¹⁹ While advocacy organizations and researchers can try to test a model for bias—for example, by creating different borrower profiles, as in the Upstart case¹²⁰—this process can be resource intensive. It also may not be possible to easily identify algorithmic bias through testing if the bias is the result of the interaction of multiple variables,¹²¹ or if the company does not offer a public platform to use for testing, as was true with Upstart. Moreover, there are currently no mandates requiring companies to preserve the algorithm as it existed at the time of an adverse decision, potentially preventing harmed individuals from being able to test the model to show algorithmic bias.

V. Congress and Federal Regulators Must Act to Ensure that Financial Institutions Offer Full and Equal Access to People and Communities of Color.

Congress and federal regulators should take a number of steps to address the persistent and pernicious racial bias in financial services.

First, we applaud Senator Sherrod Brown and his colleagues for introducing the Fair Access to Financial Services Act and encourage the Senate to pass this critical legislation.¹²² This bill would make it illegal for banks and other financial institutions to deny services based on race, color, religion, national origin, sexual orientation, and gender identity. It would make clear that financial institutions are the same as other businesses that offer services to the public, and that they have the same obligation not to discriminate against their customers whether that discrimination is on the basis of disability or race and other protected characteristics. We are also encouraged to

¹¹⁷ *Id.*

¹¹⁸ Lorena Rodriguez, *All Data Is Not Credit Data: Closing The Gap Between The Fair Housing Act And Algorithmic Decisionmaking In The Lending Industry*, 120 COLUM. L. REV. 1843, 1858 (2020).

¹¹⁹ Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 8 YALE J.L. & TECH. 148, 194 (2016), [hurley_18yjolt136_jz_proofedits_final_7aug16_clean_0.pdf](#)

¹²⁰ See EDUCATIONAL REDLINING, *supra* note 73.

¹²¹ Hurley & Adebayo, *supra* note 119, at 194.

¹²² Fair Access to Financial Services Act of 2022, S.4619 (117th Cong.), available at https://www.banking.senate.gov/imo/media/doc/The%20Fair%20Access%20to%20Financial%20Services%20Act_%20Final%20Bill%20Text.pdf.

see legislation proposed that would eliminate the contra-textual barriers the Supreme Court created to Section 1981 claims in *Comcast* and other cases.¹²³

Second, federal regulators should update the CRA to ensure that banks actually serve the entire community—including communities of color. The Office of the Comptroller of the Currency, the Federal Reserve Bank, and the Federal Deposit Insurance Corporation issued a Notice of Proposed Rulemaking proposing updates to the CRA earlier this summer. As they finalize the rule, federal regulators should take several steps to ensure that the CRA benefits communities of color and fulfills its legislative purpose. Regulators should use disaggregated data to calculate a financial institution’s overall grade on all CRA exams. Regulators should also consider activities to serve people and communities of color—and activities in underserved census tracts, which will likely include many communities of color—in the same way they consider financial institution’s activities that benefit low- and moderate-income people and communities when calculating grades. Finally, regulators should conduct fair lending reviews in CRA exams that explicitly examine whether financial institutions lend to people of color and explain in detail the statistical methodology that was employed to test for discrimination in lending.

Third, federal regulators should also use their existing power—supplemented by additional legislation if necessary—to address algorithmic bias in the financial sector. The White House Office of Science and Technology Policy recently took the positive step of issuing a Blueprint for an AI Bill of Rights that adopts as one of its principles that people should “not face discrimination by algorithms and systems should be used and designed in an equitable way.”¹²⁴ This principle should be put into practice by requiring companies that develop, design, and use fintech to: 1) use data that fully and accurately represents the community the algorithm will assess when building and testing their algorithms; 2) proactively identify variables that may lead to biased assessments and outcomes; 3) use independent auditors to evaluate their algorithms throughout their lifecycle (i.e., during the design stage, pre-implementation, and continuously after release) in order to identify and mitigate discriminatory impacts; and 4) increase transparency about the use, risks, and effects of algorithms.

VI. Conclusion

Financial institutions have long failed to provide full and equal access to financial services to people and communities of color, denying them economic mobility and opportunity. Society as a whole benefits when people of color can grow their savings, invest in a home or a business, and pass wealth on to their children. We look forward to working with the Committee to ensure full financial inclusion.

¹²³ Economic Inclusion Civil Rights Act of 2021, S. 2298 (117th Cong.) available at <https://www.congress.gov/117/bills/s/2298/BILLS-117s2298is.pdf>.

¹²⁴ WHITE HOUSE OFFICE OF SCI. & TECH. POL’Y, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> (AI Bill of Rights).

**RESPONSES TO WRITTEN QUESTIONS OF SENATOR SINEMA
FROM LISA RICE**

Q.1. Ms. Rice, we know that low home price appraisals can harm families of color because home ownership is one of the greatest means of intergenerational transmissions of wealth. What efforts is your organization undertaking to ensure that home prices are correctly valued and that appraisers have the tools to make accurate appraisals?

A.1. The National Fair Housing Alliance (NFHA) is working with a variety of allies across advocacy groups, industry, and Government to promote fair and accurate appraisals.

Congressional Solutions

NFHA continues to work closely with the Senate Banking Committee, House Financial Services Committee, and the White House to consider and develop proposed legislation for much-needed reforms.

March 29, 2022: The House Financial Services Committee held a hearing entitled, “Devalued, Denied, and Disrespected: How Home Appraisal Bias and Discrimination Are Hurting Homeowners and Communities of Color”. NFHA’s President and CEO, Lisa Rice, provided testimony and NFHA contributed to the discussion draft legislation from Chairwoman Waters entitled, the “Fair Appraisal and Inequity Reform Act of 2022”.¹

September 9, 2022: NFHA and other leading civil rights and consumer advocates called on the House Financial Services Committee, the Senate Banking Committee, and the Biden administration to support meaningful appraisal reform legislation. The advocates urged Congress to transfer rulemaking authority for the Uniform Standards of Professional Appraisal Practice (USPAP) and the Real Property Appraiser Qualification Criteria from The Appraisal Foundation to the Appraisal Subcommittee.²

Regulatory Solutions

January 2022: NFHA, Dane Law, and the Christensen Law Firm (the “NFHA Consortium”) released a report commissioned by the Appraisal Subcommittee (the “NFHA Consortium Report”) that reviewed the extent to which USPAP and the Real Property Appraiser Qualification Criteria (Appraiser Qualification Criteria) encouraged or systematized bias.³ The NFHA Team briefed the PAVE Task Force on the findings, which influenced the PAVE Task Force Action Plans. NFHA’s President and CEO Lisa Rice was present at the PAVE release event with Vice President Harris, Ambassador Rice, and Secretary Fudge.

¹ Hearing: Devalued, Denied, and Disrespected: How Home Appraisal Bias and Discrimination Are Hurting Homeowners and Communities of Color, before the House Financial Services Committee (March 29, 2022), <https://financialservices.house.gov/calendar/eventsingle.aspx?EventID=408296>.

² NFHA Press Release, Leading Civil Rights and Consumer Advocates Urge Congress to Enact Meaningful Appraisal Reform, <https://nationalfairhousing.org/leading-civil-rights-and-consumer-advocates-urge-congress-to-enact-meaningful-appraisal-reform/>.

³ Appraisal Subcommittee, Review of USPAP and AQB Criteria; Focus on Fairness, Equity, Objectivity and Diversity, (June 4, 2021), <https://www.asc.gov/Pages/ViewWhatsNew.aspx?ID=164>.

2022–2023: Over the past year, NFHA has held briefings, participated in panel discussions, and provided comment letters to The Appraisal Foundation as it seeks to prevent appraisal bias by reforming USPAP and the Appraiser Qualification Criteria.

August 2022 to the present: NFHA and other advocates have held regular meetings with the Federal Housing Finance Agency (FHFA), Fannie Mae, and Freddie Mac to advise the GSEs on methods for reducing appraisal bias in the Redesign of the Uniform Residential Appraisal Report.

Education and Outreach

2022–2023: Over the past year, NFHA has briefed numerous industry, Government, and advocate audiences on the risks of appraisal discrimination and potential solutions. Audiences included the PAVE Task Force, The Appraisal Foundation, the Appraisal Institute, the American Society of Appraisers, the Real Estate Valuation Advocacy Association, the Collateral Risk Network, Fannie Mae, Freddie Mac, the Consumer Lender Roundtable, and the Leadership Conference on Civil Rights Task Force.

December 2022/January 2023: NFHA was prominently featured in the ABC documentary of appraisal bias entitled, “Our America: Lowballed”.⁴ In addition, NFHA and the Brookings Institution hosted a screening and panel event with opening remarks by the Secretary of Housing and Urban Development Marcia Fudge and Housing Financial Services Chair Maxine Waters and closing remarks by Zixta Martinez, CFPB Deputy Director.⁵ The panel included Julian Glover, producer of “Our America: Lowballed” as well as noted economist and researcher, Dr. Andre Perry, NFHA’s CEO, Lisa Rice, and two appraisal industry experts, Jillian White, SRA, and Joan Trice, Founder of Collateral Risk Network.

NFHA regularly participates in industry and advocate collaborations seeking solutions for appraisal reform, including OCC Project Reach and the Appraisal Salon.

RESPONSES TO WRITTEN QUESTIONS OF SENATOR OSSOFF FROM LISA RICE

Q.1. Many studies have found that, in the run up to the Great Recession, many lenders targeted communities of color for their subprime mortgage products, at times without regard to the borrowers’ creditworthiness. A study published by the National Bureau of Economic Research which examined high-cost mortgages in metropolitan areas between 2004 and 2007 found that, even after controlling for credit score and other risk factors, African-American and Hispanic home buyers were 105 percent and 78 percent more likely, respectively, to have high cost mortgages for home purchases. As we experience more turmoil in mortgage markets today, has the National Fair Housing Alliance noticed any similar behav-

⁴NFHA Press Release, NFHA Featured in Newly-Released Documentary “Our America: Lowballed”, (Dec. 6, 2022), <https://nationalfairhousing.org/nfha-featured-in-newly-released-documentary-our-america-lowballed/>.

⁵Brookings Institution Event, Examining Racial Bias in Home Appraisals: Screening of “Our America: Lowballed”, (Jan. 12, 2023), <https://www.brookings.edu/events/examining-racial-bias-in-home-appraisals-screening-of-our-america-lowballed/>.

ior on the part of lenders which has directly targeted communities of color? If not, what changed?

A.1. As described below, lenders continue to discriminate in all aspects of the mortgage transaction, which causes harm to consumers and communities of color and exacerbates the racial housing and wealth gaps. We urge the Senate Banking Committee to exercise strong oversight over the lending industry and the Federal financial regulators. While the Department of Justice (DOJ) has significantly increased its efforts to address these harmful practices, the Federal financial regulators still lag behind. Among other things, the Senate Banking Committee should ask the General Accounting Office (GAO) to review Federal oversight and enforcement of fair lending laws, focusing on: (1) efforts to strengthen law enforcement procedures; (2) challenges the Federal financial regulators face in their efforts to detect discrimination and ensure compliance; and (3) and how Federal regulators and executive agencies coordinate with each other when appropriate. The GAO last conducted this type of review 25 years ago (in 1996),¹ which resulted in significant policy changes and renewed efforts for robust fair lending supervision and enforcement. The time is right to conduct a new review of the scope and effectiveness of Federal financial regulators' fair lending approaches and methodologies.

Redlining

In 2021, the DOJ undertook the ambitious “Combatting Redlining Initiative” to root out redlining across the Nation.² Since that time, the DOJ has settled numerous cases and required lenders to provide equal access to credit.³ While we applaud the DOJ's much-needed effort, it is troubling to see that lenders continue to starve communities of color for safe and fairly priced credit.

Marketing

As lenders embrace new methods of customer outreach, they may neglect to monitor compliance with the fair lending laws. For example, the National Fair Housing Alliance's settlement with Facebook identified ways in which the world's largest digital marketing advertiser designed its advertising platform in a way that not only allowed, but generated discriminatory ad placements for housing, credit, and employment opportunities.⁴ Moreover, the DOJ's settlement with Meta (Facebook) resolved allegations that Facebook engaged in discriminatory advertising for housing, credit, and employment by, among other things, allowing lenders to determine who could see their ads based on race and other protected charac-

¹The U.S. Government Accountability Office, “Fair Lending: Federal Oversight and Enforcement Improved But Some Challenges Remain”, GGD-96-145, August 13, 1996, <https://www.gao.gov/products/ggd-96-145>.

²DOJ, Justice Department Announces New Initiative to Combat Redlining (Oct. 22, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-new-initiative-combat-redlining>.

³See, e.g., United States v. City National Bank (Jan. 12, 2023), <https://www.justice.gov/opa/pr/justice-department-secures-over-31-million-city-national-bank-address-lending-discrimination>; United States v. Trident Mortgage Company (July 27, 2022), <https://www.justice.gov/opa/pr/justice-department-and-consumer-financial-protection-bureau-secure-agreement-trident-mortgage>; United States v. Trustmark National Bank (Oct. 27, 2021), <https://www.justice.gov/crt/case/consent-order-united-states-v-trustmark-national-bank-wd-tenn>.

⁴National Fair Housing Alliance, “Facebook Settlement-Civil Rights Advocates Settle Lawsuit With Facebook, Transforms Facebook's Platform Impacting Millions of Users” (March 14, 2019), <https://nationalfairhousing.org/facebook-settlement/>.

teristics.⁵ As Facebook continued to offer this option, it seems that lenders failed to monitor this third-party vendor for compliance with the Fair Housing Act.

Appraisals

Numerous news stories⁶ as well as research by the Federal Housing Finance Agency, Fannie Mae, Freddie Mac, Drs. Junia Howell and Elizabeth Korver-Glenn, the Brookings Institution, and the National Fair Housing Alliance⁷ have documented the problem of appraisal undervaluations for consumers and communities of color. Notably, lenders have failed to monitor their third-party appraisal vendors, update their Request for Reconsideration of Value policies and procedures, and to control the risk of appraisal discrimination.

Underwriting and Pricing

Studies have shown the bias hidden in underwriting algorithms. For example, an investigation by The Markup has found that lenders in 2019 were more likely to deny home loans to people of color than to White people with similar financial characteristics—even when they controlled for newly available financial factors that the mortgage industry for years has said would explain racial disparities in lending.⁸

Similarly, studies show that pricing discrimination continues to harm consumers of color. For example,⁹ a study from the University of California-Berkeley found that both online and face-to-face lenders charge higher interest rates to African-American and Latino borrowers, earning 11 to 17 percent higher profits on such loans.

⁵ DOJ, “Justice Department Secures Groundbreaking Settlement With Meta Platforms, Formerly Known as Facebook, To Resolve Allegations of Discriminatory Advertising” (June 21, 2022), <https://www.justice.gov/opa/pr/justice-department-secures-groundbreaking-settlement-agreement-meta-platforms-formerly-known>.

⁶ See, e.g., Julian Glover and Mark Nichols, “Our America: Lowballed”, ABC (Dec. 2022), <https://abc7.com/feature/our-america-lowball-home-appraisal-racial-bias-discrimination/12325606/>.

⁷ See FHFA, “Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary”, FHFA Insights Blog (Dec. 14, 2021), <https://www.fhfa.gov/Media/Blog/Pages/Reducing-Valuation-Bias-by-Addressing-Appraiser-and-Property-Valuation-Commentary.aspx>; Jake Williamson and Mark Palim, “Appraising the Appraisal”, Fannie Mae (Feb. 2022), <https://www.fanniemae.com/media/42541/display>; Melissa Narragon, et al., “Racial and Ethnic Valuation Gaps in Home Purchase Appraisals”, Freddie Mac Economic and Housing Research Note (Sept. 2021), <http://www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf>; Dr. Junia Howell and Dr. Elizabeth Korver-Glenn, “Appraised: The Persistent Evaluation of White Neighborhoods as More Valuable Than Communities of Color”, Eruka (Nov. 2, 2022), <https://www.eruka.org/appraised>; Andre M. Perry, Jonathan Rothwell, and David Harshbarger, “The Devaluation of Assets in Black Neighborhoods”, The Brookings Institution Metropolitan Policy Program (Nov. 2018), <https://www.brookings.edu/wp-content/uploads/2018/11/2018.11-Brookings-Metro-Devaluation-Assets-Black-Neighborhoods-final.pdf>; National Fair Housing Alliance, Dane Law, Christensen Law Firm, “Review of USPAP and AQB Criteria; Focus on Fairness, Equity, Objectivity and Diversity”, (June 4, 2021), <https://www.asc.gov/Pages/ViewWhatsNew.aspx?ID=164>.

⁸ Emmanuel Martinez and Lauren Kirchner, “The Secret Bias Hidden in Mortgage Approval Algorithms”, The Markup (Aug. 25, 2021), <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms>.

⁹ Robert Bartlett, Adair Morse, Richard Stanton, and Nancy Wallace, “Consumer Lending Discrimination in the Fintech Era”, University of California-Berkeley (Nov. 2019), <http://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf?ga=2.234059549.2013228870.1674166818-1765184121.1674077388>. See also Laura Counts, “Minority Homebuyers Face Widespread Statistical Lending Discrimination, Study Finds”, Newsroom Berkeley Haas (Nov. 13, 2018), <https://newsroom.haas.berkeley.edu/minority-homebuyers-face-widespread-statistical-lending-discrimination-study-finds/>.

Regulators need to do more to understand the data and algorithms that lenders use to grant access to credit. As stated by Lisa Rice, President and CEO of the National Fair Housing Alliance, “Any type of data that you look at from the financial services space has a high tendency to be highly correlated to race.”

Refinancing

Finally, it seems that lenders have fallen short in including consumers of color in the refinancing boom that allowed borrowers to take advantage of historically low interest rates. Researchers at the Federal Reserve Bank of Boston found that Black, Latino, and Asian borrowers were significantly less likely than White borrowers to take advantage of low mortgage interest rates during the pandemic.¹⁰ For example, according to a Bloomberg News analysis of Federal mortgage data, only 47 percent of Black homeowners who completed a refinance application with Wells Fargo in 2020 were approved, compared with 72 percent of White homeowners.¹¹

RESPONSES TO WRITTEN QUESTIONS OF SENATOR OSSOFF FROM MARC H. MORIAL

Q.1. One of the most important metrics in determining eligibility for a mortgage, a key wealth-building tool, is a credit score. One of the top service providers for credit score reporting, FICO, no longer offers online services in Spanish through their customer portal known as myFICO. Additionally, only one of the three major credit bureaus offers online services in Spanish on their websites.

What does a lack of Spanish-language services mean for Spanish-speaking families in places like Dalton or Atlanta, Georgia, when it comes to building generational wealth?

A.1. The National Urban League supports all public and private sector policies, services and programs that provide timely, meaningful access for persons with Limited English Proficiency (LEP). Many entities nationally and within the State of Georgia administer numerous programs that provide funds and services directly to State and local governments, Public Housing Agencies (PHAs), and for-profit and nonprofit organizations, such as Urban League affiliates, to implement critical LEP housing and community development programs and activities.

According to the American Community Survey,¹ approximately 25.9 million individuals, roughly 9 percent of the U.S. population, are considered LEP. Approximately 83 percent of all LEP residents speak one of eight languages: Spanish, Chinese, Vietnamese, Korean, Tagalog, Russian, Arabic, and Haitian Creole. About 64 percent of the LEP population speaks Spanish. Home ownership rep-

¹⁰Kristopher Gerardi, Lauren Lambie Hanson, and Paul S. Willen, “Wealth Accumulation During COVID-19”, Federal Reserve Bank of Boston (June 22, 2021), <https://www.bostonfed.org/publications/current-policy-perspectives/2021/racial-differences-in-mortgage-refinancing-distress-and-housing-wealth-accumulation-during-covid-19.aspx>.

¹¹Shawn Donnan, Ann Choi, Hannah Levitt, and Christopher Cannon, “Wells Fargo Rejected Half Its Black Applicants in Mortgage Refinancing Boom”, *Bloomberg News* (March 11, 2022), <https://www.bloomberg.com/graphics/2022-wells-fargo-black-home-loan-refinancing/?leadSource=verify%20wall>.

¹“Spotlight on Serving Limited English Proficient Consumers”. Consumer Financial Protection Bureau, www.consumerfinance.gov/data-research/research-reports/spotlight-serving-limited-english-proficient-consumers/ (Nov. 2017).

resents a substantial source of generational wealth—especially for Latino and LEP households. Home equity represents 67 percent of the net worth of Latino households compared to 41 percent for White households—higher than any other community of color in the country.

LEP consumers have experienced substantial barriers in the consumer financial marketplace. Whether these barriers include financial disclosures, written documents solely available in English, the lack of bilingual employees, or limited interpretation services at financial institutions, these consumers remain underserved. Families of color continue to face barriers to access the mortgage and credit markets, as well as a lack of adequate oversight and enforcement to protect their rights in financial services.

Disadvantaged credit scores and reporting have led to decades of discrimination in employment, lending policies, debt collection, and criminal prosecution that have left minority families vulnerable to financial insecurity. Unequal access to financial services and credit reporting is not the only thing that hampers efforts by minority and LEP households to establish financial security and accrue lasting wealth. The legacies of redlining, underinvestment, and a prevalence of alternative banking within these communities have also made minorities more likely to encounter discriminatory lending practices and adverse credit score impact.

Practices such as formal and informal redlining prevented many Black and Latino households from purchasing a home. Minority households are also denied mortgages at a rate much higher than White Americans. And through limited fair access to credit and credit reporting systems, many minority households and other LEP applicants have been unable to access home ownership and the wealth-building opportunity it provides. Even when credit is available, many homeowners in these same communities end up paying more for their mortgage loans.

In 2021, the Consumer Finance and Protection Bureau (CFPB) issued a statement encouraging “. . . Financial institutions and services to seek and better serve LEP consumers while complying with State, Federal, and other legal requirements. As well as efforts to assist compliance with the Dodd-Frank Act, the Equal Credit Opportunity Act (ECOA), and other applicable laws.” Increased oversight and regulation, as well as resource education and advocacy, will improve outcomes for the LEP population.

Q.2. What role can greater language accessibility for critical services like credit reporting play in narrowing the racial wealth gap in communities across Georgia?

A.2. According to a 2021 report from the Federal Reserve,² Black and Latino households typically earn half of what the average White household earns, and only have 15 to 20 percent of the net wealth of White households. Improved access for LEP households to retrieve financial and credit reporting services can provide opportunities to build wealth and provide paths out of historical inequality in wealth accumulation. Greater access to credit reporting

²Aladangady, Aditya, and Akila Forde. “Wealth Inequality and the Racial Wealth Gap”. www.federalreserve.gov, 22 Oct. 2021, www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.htm.

services and improved enforcement of the 1974 Equal Credit Opportunity Act will reduce barriers to overcoming discrimination that is often hidden in financial policies and products that aim to be bias-free.

One of the Urban League's goals is to give consumers practical, actionable information that they can use in pursuing their own financial goals and in making financial decisions. We strongly believe that our frontline, consumer-facing wealth-building programs and services must offer information and tools to help consumers build the financial knowledge and skills that they need to make well-informed financial decisions for themselves and their families to serve their own financial goals. For the LEP community across Georgia and other geographies, this includes access in consumers' native languages to consumer financial education materials. Urban League Affiliates typically offer this information directly through their websites and/or Spanish-translated websites and make it available to LEP consumers through community service channels and at community roundtables throughout the State.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

Statement submitted by the U.S. Chamber of Commerce**Introduction**

The mission of the Center for Capital Markets Competitiveness (CCMC) is to advance America's global leadership in capital formation by supporting diverse capital markets that are the most fair, transparent, efficient, and innovative in the world. CCMC advocates on behalf of American businesses to ensure that legislation and regulation strengthen our capital markets so that businesses—from the local flower shop to a multinational manufacturer—are able to mitigate risks, manage liquidity, access credit, and raise capital.

The U.S. Chamber of Commerce commends the Committee for convening this hearing and its attention to concerns that have been raised about discrimination based on race or other impermissible factors. There should be no room for discrimination and racism in banking, in other parts of the financial services sector, in other industries, or anywhere in our society. The business community strongly supports effective anti-discrimination policies and adherence to the laws prescribed by Congress. We agree with the concept of fairness in our marketplace based on equal opportunity.

The U.S. Chamber of Commerce launched the Equality of Opportunity Initiative (EOI) to develop real, sustainable solutions to help close race-based opportunity gaps in six key areas: education, employment, entrepreneurship, criminal justice, health, and wealth. Driven by data and informed by conversations, the EOI agenda advances these solutions through private sector initiatives, and policy advocacy at the federal, state, and local levels. Through this work, we continue to develop research and data insights, convene key stakeholders to address EOI issues, advocate and drive action to advance policies and private sector solutions, and design programs, initiatives and partnerships that address systemic inequalities and promote the promise of equal opportunity for all Americans.¹

The U.S. Chamber of Commerce is concerned that the Consumer Financial Protection Bureau (CFPB) is taking actions that will reduce opportunities for consumers to participate in the regulated market for financial products and services—which will force some consumers into unsafe, unregulated markets. The agency's structure, combined with the actions of its current leadership, have created significant concerns in a business community that is striving to serve underserved communities while continuing to meet its regulatory and legal obligations. The CFPB can play a critical role in protecting consumers and shaping the market for consumer financial products and services; however, the agency's credibility and its interest and ability to fulfill that mission is in doubt. The Bureau's structure and approach have been controversial since its inception, and we are at an inflection point in terms of the ability to preserve the agency's future.

The U.S. Chamber of Commerce has long advocated for reforms to promote increased transparency and accountability of the CFPB with the objective of putting the agency on a firm footing for the future, and promoting the policy certainty that industry and consumers expect. We have advocated for changes to bring the agency into compliance with the checks and balances required under the U.S. Constitution including a requirement that the funding mechanism be subject to the appropriations process. In 2018 CCMC released a report, "*Consumer Financial Protection Bureau: Working Towards Fundamental Reform*" with recommendations for the Bureau and Congress that remain more relevant than ever. We also have testified before this Committee and other congressional committees on the need for reform of the CFPB's structure and of the Bureau's regulatory approach. A more transparent and accountable structure will not only help protect the agency from justified legal challenges; it will drive the Bureau to produce better policy.

¹ <https://www.uschamber.com/major-initiative/equality-of-opportunity-initiative>

The CFPB is not a Competition Regulator

The CFPB is failing in its responsibility to protect consumers because it is instead pursuing a wholesale restructuring of the financial services market. In late May, the CFPB announced the creation of the “Office of Competition and Innovation” tasked with identifying “market-structure problems that create obstacles to innovation.” This initiative seems more focused on market regulation than innovation. In July, the Director doubled down in a blog post explaining that a myriad of regulatory priorities were necessary to “promote competition.”²

The broad authority granted to the CFPB by Congress has been a topic of debate since the agency’s inception in 2011, but there cannot be serious debate that the agency’s primary purpose was, and is, to enforce federal consumer financial protection laws. Certainly, Congress explicitly did *not* vest in the CFPB authority to act as an antitrust regulator or to manage competition across the financial services sector. The Dodd-Frank Act mentions the CFPB should ensure markets are competitive, but that general statement should not be conflated with the FTC and DOJ’s clear authority to enforce the Federal Trade Commission Act, the Clayton Act, and the Sherman Act.

In recent months the CFPB has claimed, without supporting data, that a lack of market competition justifies a host of new regulatory actions interfering in the financial services market. But, recent research published by the U.S. Chamber in partnership with NERA Economic Consulting shows there has been a reduction in market concentration in commercial banking, consumer lending, and credit card issuing firms in recent years.³

A focus on competition nonetheless appears to be driving the CFPB’s policy decisions. For example, the CFPB recently began a rulemaking process under Sec. 1033 of the Dodd-Frank Act. That provision states that covered persons are obligated, upon request by a consumer, to make information they control or possess concerning a consumer available in an electronic form – it makes no mention of “competition.”⁴

The Chamber believes the Bureau has authority to promulgate a rule, and believes a well-reasoned rule could have the benefit of protecting consumers and clarifying obligations of financial institutions and their service providers, but is concerned that the Bureau will overreach under the auspices of its self-divined “competition” mandate. Indeed, the agency’s announcement is replete with mentions of “competition,” instead of squarely focusing on its authority to implement the Dodd-Frank Act.⁵ Maybe this should not come as a surprise given the rulemaking is mentioned in President Biden’s Executive Order on Promoting Competition in the American Economy.⁶ But that Presidential directive cannot, and does not, change the purpose of Sec. 1033 or expand the CFPB’s mandate.

² <https://www.consumerfinance.gov/about-us/blog/promoting-competition-in-our-financial-markets/>

³ <https://www.uschamber.com/finance/antitrust/u-s-chamber-study-industrial-concentration-in-the-u-s-economy-is-declining-not-increasing>

⁴ SEC. 1033 CONSUMER RIGHTS TO ACCESS INFORMATION. IN GENERAL.—Subject to rules prescribed by the Bureau, a covered person shall make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data. The information shall be made available in an electronic form usable by consumers.

⁵ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-personal-financial-data-rights-rulemaking/>

⁶ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

Mismanagement of the CFPB

The current CFPB Director is acting recklessly, and in some cases unlawfully, as he attempts to institute his preferred policies. The Director has concentrated his circle of advisors and decision-makers in a manner unprecedented at the CFPB, and as a result sidelined the knowledge and expert judgement of career staff.

Reckless Rhetoric

The current CFPB Director favors the use of inflammatory rhetoric, rather than deliberate notice-and-comment rulemaking, as the preferred method to change market practices. Earlier this year, he gave a speech in which he claimed he would seek historically unprecedented punishments for financial institutions as part of the agency's enforcement program for what he described as "corporate recidivism" and "repeat offenders." The Director described punishments ranging from caps on asset size, to banning certain types of business practices, banning certain product lines, and even revoking the federal insurance that protects the deposits of consumers and small businesses.⁷ The agency also is depending on new forms of guidance and blog posts as a cudgel to enact change.

Fees

The CFPB has taken to labeling fees it does not like, including those that are legally permissible, as "junk." In January, Director Chopra stated in prepared remarks, "Service charges inflate ticket prices, resort fees hike our costs to stay in hotels, and our phone bills are often laden with mystery charges. These junk fees make it harder for us to choose the best product or service, since the true cost is hidden. . . . Banking is no different."⁸ The CFPB has since cited this theory in multiple policy initiatives, oftentimes without legal justification, in an attempt to ban or eliminate fees that it simply does not like. The CFPB fails to recognize that fees are a necessary part of enabling the myriad opportunities our robust and competitive financial system makes available to consumers.

Financial services companies use fees to ensure that the products they offer are competitive and commercially viable. Fees allow financial services companies to employ tailored pricing that reflects both the services used and financial needs of individual consumers. Along with other pricing components, product features, rewards and other product elements, fees play a role in each consumer's often complex and distinctive decision of what product is best for them. Indeed, a consumer is better empowered to choose the most suitable financial products and services when financial services companies can offer products and services with choices for various benefits and features with varying pricing structures. This consumer choice powers the robust competition and innovation seen in the consumer financial services market.

Congress has not imposed significant limitations or prohibitions upon fees charged for consumer financial products and services. For example, Congress clearly stated that no provision of the Consumer Financial Protection Act "shall be construed as conferring authority on the Bureau to establish a usury limit applicable to an extension of credit offered or made by a covered person to a consumer, unless explicitly authorized by law."⁹ Congress has focused on fee *disclosures* across the broad range of consumer finance products. As a result, fees charged by consumer financial services companies are

⁷ <https://www.consumerfinance.gov/about-us/newsroom/reining-in-repeat-offenders-2022-distinguished-lecture-on-regulation-university-of-pennsylvania-law-school/>

⁸ <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call/>

⁹ See 12 U.S.C. § 5517(o).

subject to strict disclosure requirements, including requirements related to when a financial institution must disclose the fees. These disclosure requirements, which are implemented through numerous regulatory frameworks, empower consumers to decide for themselves what is in their best interest based on the material product and financial elements of a particular consumer finance product or service and the consumer's own financial goals and needs.

The CFPB's efforts in this area are stretching beyond the breaking point for the agency's authority to prohibit "unfair" acts and practices, given the absence of any express authority from Congress to limit fees. The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when: 1) It causes or is likely to cause substantial injury to consumers; 2) The injury is not reasonably avoidable by consumers; and 3) The injury is not outweighed by the countervailing benefits to consumers or to competition.

The CFPB has recently introduced a temporal component that effectively stipulates disclosure of fees (and other terms) at the time of opening the account is an insufficient defense that the alleged injury cannot be "reasonable avoidable" by consumers.¹⁹ This novel interpretation of "unfair" appears in two recent policy statements announced on October 26, 2022. First, the CFPB announced a new Circular on "surprise" overdraft fees that are "unanticipated" for consumers even if they "closely monitor their account balances and carefully calibrate their spending"—asserting that "despite [financial institutions'] disclosures," "consumers face significant uncertainty."²⁰ The Bureau did not explain how or why consumers could face uncertainty given the financial institutions' disclosures about possible fees at the time of account opening. Second, the CFPB announced a new Compliance Bulletin on "surprise" deposit fees. The CFPB stated a person should not be subject to a fee if a check bounces because the consumer cannot know at the time of deposit if it will clear. But the financial institution accepting the check cannot know whether the check will bounce until it attempts to clear it—so there is no basis for categorizing the fee as 'unfair' given the costs imposed on institutions.

The agency's invocation of its "unfair" authority in this way may make for a good soundbite. But the statutory bounds of the Dodd-Frank Act and decades of precedent make clear that these policies are unlawful, especially because they were imposed via guidance rather than notice-and-comment rulemaking.

Disparate Treatment vs. Disparate Impact

The CFPB consistently conflates "disparate treatment" with "disparate impact" when suggesting activity is unlawfully discriminatory. Disparate treatment is intentional discrimination based on impermissible characteristics or criteria (e.g. race, religion, sex, age). Disparate impact occurs when treatment of a characteristic or criteria (e.g. employment status, income, assets, credit score) leads to different outcomes for different categories of individuals (e.g., when individuals are divided up by race, religion, sex, age). The two concepts should not be conflated.

The CFPB, nevertheless, is using inflammatory rhetoric to suggest racist decision-making and other unlawful discriminatory activity by financial institutions. For example, in the blog post published when the CFPB amended its examination procedures, CFPB staff stated: "When people of color suffer racist conduct in the financial marketplace, it can cause substantial monetary and non-monetary harms.

¹⁹ https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf

Depending on how the conduct occurs (face-to-face, digital, systematic, etc.), many individuals may be unaware they received disparate treatment or a discriminatory outcome.¹¹

Guidance vs. Regulation

The CFPB Director made a speech in June in which he stated that “The CFPB is seeking to move away from highly complicated rules . . . and towards simpler and clearer rules . . . in addition, the CFPB is dramatically increasing the amount of guidance. . . .” But in fact the CFPB now uses numerous different types of guidance documents in addition to regulations it is required to issue via notice and comment rulemaking. For example, the CFPB issues “compliance bulletins” as supervisory guidance to inform and advise regulated entities.¹² The CFPB issues “advisory opinions” to provide written guidance to assist regulated entities to better understand their legal and regulatory obligations. The CFPB also began a new program in May 2022 of issuing “circulars” advising parties with authority to enforce federal consumer financial law including state attorneys general, state regulators, and federal regulators. And finally, the CFPB issues interpretive and procedural rules as another means of changing the rules of the road without adhering to notice and comment rulemaking. Guidance should be used to clarify aspects of the law, not create new policy.

This new web of guidance documents being spun by the CFPB is issued without notice and subject to change on the Director’s whim, especially when new Directors are appointed. Guidance has the potential to be helpful, but not under this approach. These guidance documents are not being used to provide legal clarifications sought by regulated entities; they are being used to put forth new legal interpretations that regulated entities are expected to follow. Even more concerning, these guidance documents suggest that past actions will be scrutinized via the agency’s new interpretation, not just future actions. This type of ex post facto change in the rules turns regulatory compliance into a guessing game.

The CFPB claims these documents are “just guidance” but it is, at best, sending mixed signals about the efforts that regulated companies must undertake to comply. Examples abound, but two are highlighted below. First, the CFPB issued guidance on October 26, 2022 as a “compliance bulletin” saying that certain overdraft practices are *likely* “unfair and unlawful” under existing law. However, President Biden undermined the value of this guidance the same day through conflicting remarks “making clear” that such practices are “unfair” and “illegal.”¹³ Second, the CFPB issued an “interpretive rule” on June 28, 2022, that attempts to call into question the federal preemption of the Fair Credit Reporting Act by finding “it preempts only narrow categories of state laws.”¹⁴ The CFPB issued this interpretive rule in an attempt to influence the outcome of ongoing litigation, seeking to tip the scales in favor of undermining the express preemption provisions of the FCRA. This type of effort to influence litigation against participants in the credit reporting system exceeds any sort of reasonable “guidance.” Much of the agency’s use of guidance is unhelp and reckless, some of it is unlawful.

Unlawful

On June 28, 2022, the U.S. Chamber of Commerce sent two letters to the CFPB requesting explanations for unlawful and legally dubious activity. The first letter takes issue with the March 16, 2022

¹¹ <https://www.consumerfinance.gov/about-us/blog/cracking-down-on-discrimination-in-the-financial-sector/#:~:text=When%20people%20of%20color%20suffer,treatment%20or%20a%20discriminatory%20outcome.>

¹² <https://www.consumerfinance.gov/compliance/supervisory-guidance/>

¹³ <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/26/remarks-by-president-biden-on-protecting-american-consumers-from-junk-fees/>

¹⁴ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-affirms-ability-for-states-to-police-credit-reporting-markets/>

amendment to the CFPB's Supervision and Examination Manual adopting the novel position that the agency can examine financial institutions for alleged discriminatory conduct under its "unfair, deceptive, and abusive acts or practices" (UDAAP) authority.¹⁵ The second letter expresses concerns with 1) The CFPB's Policy Fellowship program; 2) The revisions to Rules of Practice for Adjudication Proceedings; 3) Effective repeal of the 2013 decision not to publish a final decision or establishing supervisory authority; and, 4) The interpretive rule claiming that state attorneys general have the authority to enforce the Consumer Financial Protection Act.

The first letter explains that the Bureau exceeded its authority by extending fair-lending laws beyond the bounds carefully set by Congress. Specifically, the Bureau's mistaken notion that "[d]iscrimination ... can trigger liability under [the] ban on unfair acts or practices" ignores the text, structure, and history of the Dodd-Frank Act, as well as similar legislation addressing agency authority to regulate unfairness. What's more, the Bureau's contemplation of disparate-impact liability—a specific form of liability that not even most antidiscrimination laws create—flouts congressional intent and Supreme Court precedent. This March 16, 2022 amendment to the CFPB's Supervision and Examination Manual is the subject of a lawsuit by the U.S. Chamber of Commerce and other industry associations.

The second letter details various other concerns regarding the agency's direction under its current leadership. The CFPB's Policy Fellow program circumvents the competitive service requirements.¹⁶ Hiring for competitive-service positions must follow a strict process governed by statutes and regulations.¹⁷ Yet, the Bureau hired over 20 "policy fellows" outside of this process to serve as project directors for the Director, with salaries, in some cases in excess of \$200,000, that indicate significant responsibility. This sort of backdoor favoritism is precisely what the civil-service laws are designed to prevent. Regardless of the legalities, Members of the House Committee on Financial Services detailed why this program is misguided—opening the door to all manner of favoritism and ideologically driven personnel selection and mismanagement, as well as conflicts of interest. Indeed, the program could hardly have been designed better to achieve those ends. The terms of the program reportedly permit fellows to engage in outside employment with written approval from Bureau management.¹⁸ The Bureau does not publicly disclose the roster of fellows. Fellows also appear to be exempt from filing financial disclosures required of other federal employees with similar responsibilities.¹⁹ These and other features create self-evident risks for conflicts of interest and make the program ripe for unchecked favoritism in selection.

The Bureau's revised Rules of Practice for Adjudication Proceedings represent a dramatic departure from agency practice, with little regard for due-process and separation-of-powers concerns. Traditionally, the Bureau has favored adjudication in federal court of alleged violations of federal consumer-finance laws, but the revised rules shift to greater reliance on administrative adjudication while eliminating procedural safeguards that apply to such adjudications. The revised rules made critical changes to the administrative adjudication process by expanding the Director's power and reducing protection for defendant companies that lack due process. The Director is a political appointee who serves at the will of the current President. The Director is not an impartial judge.

Specifically, on February 22, 2022, the Bureau issued revised rules that provide new powers to the Director to review cases, to decide dispositive motions, and to refer such motions to an administrative law judge. It is telling that the Bureau rushed this policy change without any advance opportunity for

¹⁵ https://www.uschamber.com/assets/documents/20220628-Letter-Manual_2022-06-28-160834_onw1.pdf

¹⁶ 5 U.S.C. §2102.

¹⁷ *Id.*; see also 5 C.F.R. §§332, 337.

¹⁸ House Cmte. Ltr. at 1, https://republicans-financialservices.house.gov/uploadedfiles/2022-05-12_letter_to_chopra_on_fellows_program_final.pdf

¹⁹ *Id.*

public comment and without any effort to amplify its perfunctory request for post-hoc public participation. In fact, the Bureau only briefly noted in an announcement in the Federal Register that it welcomed comments on the rules, which went into effect immediately. This quiet revision and shift to a great reliance on in-house administrative adjudication takes the Bureau in the wrong direction at a time when courts are expressing deep skepticism about the fairness and even the constitutionality of administrative adjudication.

The Bureau violated the Administrative Procedure Act when it repealed its 2013 rule providing that the Bureau would not make public a **final decision or order establishing supervisory authority** over a covered person. Under that 2013 standard, “all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information.”²⁰ The standard went through the notice-and-comment process to guarantee confidentiality for businesses in certain proceedings, and “[a]fter consideration of the comments regarding confidentiality,” the Bureau expressly “agree[d] that all aspects of a proceeding under the final rule relate to the Bureau’s supervisory process and should be deemed confidential supervisory information.” Recently, the Bureau has effectively rescinded that rule, and given the Director discretion to remove confidentiality protections from final decisions and orders. The Bureau wrongly decided that “this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act” as a rule of agency organization, procedure, or practice.

Finally, the Bureau’s **interpretative rule stating that state attorneys general have the authority to enforce the Consumer Financial Protection Act** (part of the Dodd-Frank Act) is incorrect in several respects. The interpretative rule claims that States can bring claims under Section 1042 of Dodd-Frank for violations of other enumerated consumer [financial protection] laws.²¹ That claim is unambiguously wrong. The Consumer Financial Protection Act does not authorize States broadly to enforce all provisions of the Act under Section 1042.²²

U.S. Chamber of Commerce v. CFPB

On September 28, 2022, the U.S. Chamber of Commerce and co-plaintiffs sued the CFPB to hold it accountable to the rule of law as it pursues its important mission.²³ The U.S. Chamber and co-plaintiffs challenge the CFPB’s recent update to the Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) section of its examination manual to include discrimination and in particular disparate impact. The violations of law by the CFPB targeted in the lawsuit are emblematic of the structural issues with the agency and its current management. Plaintiffs explain that the agency acted in excess of its statutory authority under the Dodd-Frank Act; violated procedural requirements under the Administrative Procedure Act; and that the agency’s funding is not properly appropriated in accordance with the law given the Appropriations Clause requires legislative applications prior to executive expenditures.

Importing disparate impact into UDAAP will likely result in the disappearance of products consumers currently enjoy and benefit from. For example, no-fee checking accounts are more often offered to customers with higher balances, which often are individuals further into their careers as opposed to those who are just beginning to work. A disparate impact analysis could find that no-fee

²⁰ 12 C.F.R. §1091.115 (emphasis added).

²¹ Authority of States To Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940, 31941 (May 26, 2022).

²² See 12 U.S.C. §5552.

²³ <https://www.uschamber.com/finance/u-s-chamber-sues-to-hold-consumer-financial-protection-bureau-accountable-to-the-rule-of-law-and-consumers>

policies for customers with larger balances constitute age discrimination against younger customers, and therefore banks may no longer be willing to offer such products to consumers for fear that they will be declared unlawful.

Unfairness and Discrimination – Distinct Statutory Concepts

Congress has enacted a series of civil rights laws to protect consumers from invidious discrimination on the basis of specific characteristics and in specific contexts, including Title VII of the Civil Rights Act of 1964 (employment), the Fair Housing Act of 1968 (housing), the Equal Credit Opportunity Act of 1974 (credit), and the Americans with Disabilities Act of 1990 (disability).

Separately, when it created the CFPB in 2010, Congress gave the Bureau authority nearly identical to that of the FTC to prohibit “unfair” acts or practices by covered persons or service providers offering or providing consumer financial products and services. Congress also separately authorized the CFPB to implement two specific antidiscrimination laws, the Equal Credit Opportunity Act (ECOA) and the Home Mortgage Disclosure Act (HMDA).²⁴

On March 16, 2022, the CFPB erroneously conflated the concepts of “unfairness” and “discrimination” by announcing that it would begin examining financial institutions for alleged discriminatory conduct that it deemed to be “unfair” under its “unfair, deceptive, and abusive acts or practices” (UDAAP) authority. The CFPB also revised its examination manual to reflect its new view that its “unfairness” authority can be used to investigate and sanction allegedly discriminatory practices.

Congress has never indicated that these two statutory concepts, “unfairness” on the one hand, and “discrimination” on the other, are interchangeable or overlapping. Rather, they are distinct, and each has a well-established meaning and scope of application. Thus, the Dodd-Frank Act discusses “unfairness” and “discrimination” as two separate concepts, and defines “unfairness” without mentioning discrimination. The Act’s legislative history refers to the Bureau’s antidiscrimination authority in the context of ECOA and HMDA, while referring to the Bureau’s UDAAP authority separately.²⁵

Violation of the Administrative Procedure Act

By failing to go through proper notice-and-comment procedures when amending its manual, the CFPB violated the Administrative Procedure Act’s procedural requirements. Under the Administrative Procedure Act, the agency cannot take arbitrary or capricious actions and must submit legislative rules to the notice and comment process. Through its recent examination manual update, the CFPB has, with the stroke of a pen, arrogated an open-ended and novel power to police regulated entities for discrimination—including for mere disparate impacts. And while its “update” imposes substantial new obligations on regulated entities, the CFPB entirely bypassed the notice-and-comment process required by the APA. This is not just unlawful; it is bad policymaking.

Regulated entities are all but left to guess how to comply with the Bureau’s “update” to its examination manual. Significantly, the CFPB has not identified protected classes or characteristics, or delineated what legal test it will use to determine whether discrimination actually took place. Are race and ethnicity the only protected classes, or does the Bureau intend to enforce the update to prohibit discrimination, including disparate impact, based on other classes or characteristics? What legal test will the Bureau follow? What steps can financial institutions take to demonstrate compliance? These

²⁴ <https://www.aba.com/advocacy/policy-analysis/unfairness-and-discrimination>

²⁵ <https://www.aba.com/advocacy/policy-analysis/unfairness-and-discrimination>

questions, and others (i.e. the agency’s statutory authority), would typically be addressed via notice and comment rulemaking.

The CFPB’s Structure is Unconstitutional

The CFPB has been structurally flawed since the beginning. The Dodd-Frank Act, the legislation authorizing the creation of the CFPB, created an agency with extremely broad authority and less accountability and transparency than other financial regulators. While the Supreme Court has invalidated one element of the Bureau’s structure—the limits on the President’s authority to remove the Director—the Bureau’s continued unconstitutional structure allows the Director to make significant decisions that affect the financial wellbeing of millions of Americans without being subject to appropriate checks and balances.

Seila Law v. CFPB

The U.S. Supreme Court addressed the agency’s structure in 2020, holding invalid the provision of Dodd-Frank providing that the President could remove the Director only “for cause.” In our amicus curiae brief in *Seila Law v. CFPB*, the Chamber argued all of this governmental power is concentrated in a single individual—the Bureau’s Director—who serves a five-year term and (at that time) could be removed from office only for cause. Which is to say that Congress entrenched these significant powers in an officer unaccountable to the President, the elected official who is solely vested with “the executive Power,” U.S. Const. Art. II, § 1, Cl. 1, and the duty to “take Care that the Laws be faithfully executed,” id. Art. II, § 2, Cl. 2.²⁶ The Supreme Court held that the CFPB’s leadership by a single Director removable only for inefficiency, neglect, or malfeasance violated the separation of powers, but concluded that the removal restriction could be severed from the rest of the Dodd-Frank Act.

The Bureau’s Funding Mechanism

The CFPB’s funding is not subject to Congressional oversight via the appropriations process—instead the Bureau obtains its funds from the Federal Reserve. The Dodd-Frank Act requires the Federal Reserve Board to transfer to the CFPB the “amount determined by the Director to be reasonably necessary,” subject to a cap equal to 12 percent of the Federal Reserve System’s total 2009 operating expenses, adjusted annually based on the percentage increase in the employment cost index by the Federal Government for total compensation for state and local government. According to the CFPB, the FY 2021 transfer cap is \$717.5 million.

The U.S. Court of Appeals for the Fifth Circuit recently held, in *Community Financial Services Association of America, Limited v. CFPB*, that the Bureau’s funding structure is unconstitutional, because it circumvents Article I, Section 9, Clause 7 of the U.S. Constitution, which provides: “No Money shall be drawn from the Treasury in Consequence of Appropriations made by Law...” The court stated that “Congress’s decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution’s structural separation of powers.” It found “Congress did not merely cede *direct* control over the Bureau’s budget by insulating it from annual or other time limited appropriations. It also ceded *indirect control* by providing that the Bureau’s self-determined funding be drawn from a source [the Federal Reserve] that is itself outside the appropriations process—a

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<https://www.chamberlitigation.com/sites/default/files/cases/files/19191919/U.S.%20Chamber%20Amicus%20Brief%20-%28merits%29-%20-%20Seila%20Law%20LLC%20v.%20CFPB%20-%28U.S.%20Suprem%20Court%29.pdf>

double insulation from Congress's purse strings that is 'unprecedented' across the government." And the court stated, "The Bureau's perpetual insulation from Congress's appropriations power, including the express exemption from congressional review of its funding, renders the Bureau no longer dependent and, as a result, no longer accountable' to Congress and, ultimately, to the people."²⁷

The CFPB and Department of Justice recently petitioned the Supreme Court for a writ of certiorari to review the Fifth Circuit's ruling.²⁸ They argued that review by the Supreme Court "is warranted because the court of appeals' decision declared an Act of Congress unconstitutional, because it squarely conflicts with a decision of the D.C. Circuit, and because it threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector." It seems likely the Supreme Court will grant review and hear arguments on the CFPB's funding structure in Spring 2023. We believe the Court should conclude that the CFPB must be funded through an appropriation enacted by Congress.

If the Court reaches that conclusion, Congress should appropriate funds to keep the CFPB operating. The agency should not be left without funding. Despite our frustrations with the agency's current leadership, the CFPB has an important role in protecting consumers from predatory actors that seek to operate outside the reach of the law. The need for congressional action should not be used to undermine the agency's important mission of consumer protection – it should be used as an opportunity to institute guardrails for how this mission is fulfilled. We anticipate Congress will use this opportunity to debate other reforms to the CFPB, which we believe would be wise, but we would be unsympathetic to efforts intended to undermine the agency's mission. Any structural reforms or funding riders considered as part of an appropriation bill to fund the agency should be targeted in nature. We will actively build a bipartisan coalition in Congress to provide funding and targeted reforms to the CFPB if the Supreme Court finds its funding structure unconstitutional.

Legislative Reforms

We believe it is now more important than ever for Congress to enact legislation preventing the Bureau's regulatory abuses and to conduct oversight of the CFPB's actions. We support the measures described below and believe they should be prioritized in any discussions by Congress.

Require Funding to Come from Congressional Appropriations.

Fiscal reform requiring the Bureau to be funded through an appropriation enacted by Congress would strengthen congressional oversight. The CFPB would be required to justify its spending and policies to Congress, not just make empty promises. This is a reform that both Democrats and Republicans should be able to get behind – both parties have expressed frustration about how the Director of the opposing political party has managed the agency. That is the precise reason why the framers of the U.S. Constitution adopted a system of checks and balances on political power in our government.

Subjecting the Bureau to funding oversight would align it with similar agencies. The Federal Trade Commission (FTC) has a similar consumer protection mandate via its authority to prohibit Unfair and Deceptive Acts and Practices. In fact, it is narrower given it does not have authority to prohibit "abusive" acts and practices and its rulemaking authority is subject to additional rigor under the Magnuson-Moss Process. Yet, it is subject to funding oversight from Congress. The Consumer Product

²⁷ <https://www.ca5.uscourts.gov/opinions/pub/21/21-50826-CV0.pdf>

²⁸ https://www.supremecourt.gov/DocketPDF/22/22-448/246429/20221114155607407_No.%20CFPB%20et%20al.%20v.%20CFSA%20et%20al.pdf

Safety Commission (CPSC), which Senator Warren has described as the model for the CFPB, is also subject to funding oversight from Congress.²⁹

Replace the Director with a Multi-Member Bipartisan Commission

In 2008 in the *Journal of Consumer Affairs*, now Senator Elizabeth Warren (D-MA) authored an article titled “*Product Safety Regulation as a Model for Financial Services Regulation*” that states that “A Financial Product Safety *Commission* [emphasis added] would provide coherent regulation of financial products, eliminating their most dangerous features.”³⁰ We agree that replacing the single Director with a multi-member commission would make the Bureau’s regulatory actions more coherent more fair. The article concludes by finding, “Personal responsibility will always play a critical role in dealing with financial services products, just as personal responsibility remains a central feature in the safe use of any other product, but a Financial Product Safety *Commission* would be the consumers’ ally.” Again, we agree, and we believe a five-member commission representing multiple perspectives and positions will serve as a stronger ally to consumers than a single Director.

Congress originally expressed support with the concept of a Commission. The original draft of the Dodd-Frank Act that passed the U.S. House of Representatives on December 11, 2009 “creates a Commission to succeed to all the authorities of the Agency ...” The legislation was sponsored by former Representative Barney Frank (D-MA) and received the votes of 223 Democrats.³¹ The Senate instead adopted a provision providing for a single Director, without explanation in the Congressional Record.

Due to the single-director structure, Presidential transitions can usher uncertainty in the financial services industry by constant turnover. Finally, each Presidential administration brings different philosophies and approaches to lending services that can negatively affect consumers and small businesses. A commission structure, by contrast, would provide more stability in the rulemaking process and the interpretation and enforcement of consumer protection laws across administrations.

Provide for Right of Removal to Federal Court from CFPB’s Administrative Adjudication Forum

Administrative adjudication can play an essential and valuable role in an effective regulatory system by providing an efficient—and equally fair—alternative to civil litigation. Properly structured administrative adjudication can be a preferred forum for all participants—particularly for routine matters involving limited legal or factual disputes. The Bureau’s new Revised Rules, discussed above, unfairly favor the CFPB. Congress could address the constitutional and policy issues created by the Revised Rules by adopting legislation that provides defendants a right of removal to federal court.

By granting unprecedented authority to the Director (who authorized the enforcement action) at all stages of the adjudication process, the Revised Rules undermine, not advance the goal of legal uncertainty espoused by the CFPB. The decisions of the Director in any administrative adjudication will not be viewed as permanent statements of the law, or as impartial applications of settled legal principles to the facts, but as the individual views of a single official that only reflect the policy judgments of the

²⁹ “Just as the Consumer Product Safety Commission (CPSC) protects buyers of goods and supports a competitive market, a new regulatory agency—a Financial Product Safety Commission (FPSC)—would protect consumers who use financial products.” <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1745-6606.2008.00122.x>

³⁰ <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1745-6606.2008.00122.x>

³¹ <https://clerk.house.gov/Votes/2009968>

present administration. Rather than creating legal stability and certainty, the Revised Rules' concentration of adjudicative authority in the CFPB Director will lead to the imposition of legal interpretations that swing, often substantially, under the appointees of one administration to the next. This concentration of authority also will further confuse and mix the distinct functions of investigator, prosecutor, and adjudicator, exacerbating due process risks and undermining the legitimacy and defensibility of the Bureau's adjudications.

Conclusion

The CFPB's current leadership is acting without transparency or accountability. The Director seeks to reshape financial markets under the guise of promoting "competition," is avoiding rulemaking under the APA in favor of guidance and is acting unlawfully to implement a political agenda that will reduce access to the regulated financial system for consumers.

The CFPB's credibility must be restored if it is to fulfill the important mission of consumer protection prescribed by Congress. The agency runs the risk of being plagued by political agendas and mismanagement unless Congress institutes the checks and balances that have been considered, oftentimes with bipartisan support, since the agency's inception. One person should not have such significant influence over the competitive market that makes financial products and services available to consumers.

**Letter submitted by National Urban League, National Action Network, the
Greater Washington Urban League, and the National Action Network's
Greater Washington, DC, Chapter**



November 18, 2022

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue Northwest
Washington, DC 20500

The Honorable Robin Camahan
Administrator of General Services
United States General Services Administration
1800 F Street NW
Washington, DC 20405

Dear Mr. President and Administrator Camahan:

On behalf of the National Urban League, National Action Network, the Greater Washington Urban League, and the National Action Network's Greater Washington, DC Chapter, organizations with a demonstrated history of advocating for policies that promote equitable access to adequate economic opportunity for African Americans and other historically underserved communities, we write to strongly encourage the Biden-Harris Administration (Administration) to select a Prince George's County site – Greenbelt, MD or Landover, MD – to house the new consolidated Federal Bureau of Investigation (FBI) headquarters. The selection of a Prince George's County site is consistent with the Fiscal Year 2022 Consolidated Appropriations Act and the Administration's commitment to equity and empowerment initiatives.

Prince George's County is home to the largest suburban majority Black population in the region and one of the largest in the nation. Though there is a talented and educated workforce in the county, this community has historically been left out of federal office space allocations and other investments from the Federal Government. Such disparities in the county contribute to a median income that is 18% lower than the median income of the region as a whole and 48% lower than the median income of Fairfax County.

In January 2021, the Biden Administration solidified its commitment to racial equity when it announced the "Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" (Executive Order).¹ The language in the Executive Order acknowledges the "unbearable human costs" of the entrenched racial disparities in our laws and policies and affirmatively commits the Federal Government to a comprehensive approach in advancing equity for all. Selecting a Prince George's County site to house the consolidated FBI headquarters would help effectuate the Administration's written commitment to racial equity.

Section 6 of the Executive Order – titled, "Allocating Federal Resources to Advance Fairness and Opportunity" – is especially relevant here. Section 6 reads in part, "The Federal Government should ... allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved

¹ Exec. Order No. 13985, 86 Fed. Reg. 7009 (2021).

communities.”² Prince George’s County has 48% of federal warehouse space and 20% of the region’s federal workforce, yet only 4% of the region’s federal office spaces are housed in the county. A federal investment in this county the size and significance of the new FBI headquarters would begin to address the low rate of federal office space and bring economic growth and development to this community that has been historically underserved. This selection therefore squarely aligns with the Federal Government’s stated commitment in Section 6 of the Executive Order.

The Federal Government’s commitment to racial equity is also highlighted in one of the five criteria for selecting the location of the new consolidated FBI headquarters. Part of Criteria #4, as outlined by the General Services Administration (GSA), is to advance “racial equity and support for underserved communities through the Federal Government.”³ The Administration has therefore given two clear indications that holistic pursuit of an equity agenda is a priority for the Federal Government.

We implore the Administration to select Greenbelt, MD or Landover, MD as the home of the new consolidated FBI headquarters. Doing so would represent an important step toward addressing the historic failure to invest equitably in Prince George’s County. It is similarly an important step toward making real the Administration’s commitment to racial equity.

The National Urban League, Greater Washington Urban League, National Action Network, and National Action Network’s Washington DC Chapter appreciate the opportunity to comment on this important issue. Should you have any further questions, please contact Joi Chaney (jchaney@nul.org), Senior Vice President of Policy and Advocacy at the National Urban League, and Ebonie Riley (eriley@nationalactionnetwork.net), Senior Vice President of Policy and Strategic Partnerships at National Action Network.

Sincerely,

Marc H. Morial
President & CEO
National Urban League

Reverend Al Sharpton
Founder & President
National Action Network

George H. Lambert, Jr.
President & CEO
Greater Washington Urban League

Nia 2X
President
Greater Washington, DC Chapter
National Action Network

cc: Shalanda D. Young, Director, Office of Management and Budget

² *Id.* at 7010-11.

³ Site Selection Plan: Federal Bureau of Investigation Suburban Headquarters, General Services Administration (September 22, 2022), https://www.gsa.gov/cdnstatic/2022-09-22-FINAL-FBI%20HQ%20Site%20Selection%20Plan%20Signed%20and%20Redacted_0.pdf.

**“The New FBI Site Is a Matter of Equity”, Angela D. Alsobrooks,
Washington Post, November 4, 2022**



LOCAL OPINIONS

Opinion The new FBI site is a matter of equity

By Angela D. Alsobrooks

November 4, 2022 at 10:00 a.m. EDT

Angela D. Alsobrooks, a Democrat, is the Prince George's County executive.

Thanks to President Biden's leadership, the selection of a location for the new FBI headquarters is again moving forward after plans were stalled in 2017 under President Donald Trump. However, I am deeply concerned with recent developments in the site-selection process that undermine the Biden administration's commitment to advancing equity.

The process for selecting a new FBI headquarters dates back to 2012, with 35 sites under initial consideration now down to three finalists. Prince George's County has two of the three sites under consideration, in Greenbelt and Landover; the third site is in Virginia, in Springfield. Throughout the past decade, the General Services Administration (GSA) has said it would focus on access to transit, cost and environmental impact when selecting a new site.

Both Prince George's sites are superior based on the criteria the GSA set in 2012. They include great transit and highway networks, access to quality amenities, proximity to an outstanding workforce and an unmatched STEM research ecosystem where the FBI could engage with public and private institutional partners to meet the new cyberthreats of the 21st century. And the sites are ready now.

Further, the Greenbelt site offers direct access to Metro, making it the only site that would not increase negative environmental impacts by putting more cars on the road. Landover, with a lot of available space, has unmatched security buffer options. My administration, Maryland Gov. Larry Hogan (R), Maryland state leaders and our Maryland congressional delegation all agree that the two sites in Prince George's remain the best options for the new FBI headquarters.

The GSA recently announced new selection criteria for the FBI headquarters, in which proximity to Quantico, Va., was added. It is heavily weighted and seemingly the deciding criterion. It also undermines a key priority of the Biden administration — advancing equity — that ranked only fourth out of GSA's five criteria and has so little weight it barely registers. This is an abrupt change that favors the site in Springfield and clearly puts the Prince George's locations at a disadvantage. We strongly believe equity should be prioritized, and we ask that it be given equal consideration along with the other criteria.

Prince George's County is a majority-minority community whose population is more than three-fifths Black and about one-fifth Latino, and we have historically missed out on federal investments when it comes to government office space. Though we house 20 percent of the region's federal workforce, we host less than 5 percent of the region's federal office space.

Decisions such as this have major, and sometimes generational, effects on communities. The federal government's decision in 1941 to situate the Pentagon on the west bank of the Potomac in Virginia created decades of additional and massive investment in the area. Likewise, the federal government's decision to locate the National Institutes of Health in Montgomery County has had a similar effect. Federal centers have driven job and income growth in our region, and decisions about where to situate them have historically advantaged majority communities over minority communities such as Prince George's.

The results of this lack of investment are clear. Median household incomes are 48 percent lower in Prince George's County compared with Fairfax County, where the Springfield site is. Out of the largest 150 counties in the country, Fairfax ranks second in growth of income and wealth over time; Prince George's ranks 142nd. Additionally, even though we have some of the same assets in availability of land and transit access, we have faced obstacles in attracting the same types of private investment that we see in jurisdictions such as Fairfax and Montgomery counties.

The GSA's site-selection criteria represent policy decisions, and, again, it appears that some in the federal government are seeking to favor investing in the same communities that have historically received the majority of these investments for decades. Meanwhile, it appears communities of color, such as Prince George's, again might get left behind.

It's time for a change.

The Prince George's sites clearly remain the best positioned to serve as the new home of the FBI headquarters. Our sites would provide the dedicated men and women of the FBI with modern, safe, world-class accommodations as they work daily to protect this nation from its threats. But just as important, situating the headquarters in Prince George's would create long-overdue generational transformation and investment.

“The Spirit of J. Edgar Hoover Begins To Stir in Prince George’s County Perspective”, Courtland Milloy, Washington Post, November 29, 2022

The Washington Post
Democracy Dies in Darkness

The spirit of J. Edgar Hoover begins to stir in Prince George’s County

Perspective by [Courtland Milloy](#)

Columnist

November 29, 2022 at 5:33 p.m. EST

There’s a huge political fight going on between Prince George’s and Fairfax counties over the prospective location of the next headquarters for the FBI.

I live in Prince George’s and whenever I try to imagine an FBI headquarters here, all I see is a name — J. Edgar Hoover. And I think of Hoover giving bonuses to Black agents who helped set up Fred Hampton, a leader of the Black Panther Party in 1969, who was killed in a police raid in Chicago while he slept.

And I see Hoover using lies and blackmail in a failed attempt to make the Rev. Martin Luther King Jr. give up his civil rights work. Five years from now, in 2027, evidence from Hoover’s bugging of King’s hotel rooms will be unsealed. And Hoover’s pathological attempts to destroy King’s reputation will apparently continue from beyond the grave.

As historian Beverly Gage notes in “G-man: J. Edgar Hoover and the Making of the American Century,” her new biography, “Hoover did as much as any individual in government to contain and cripple movements seeking social justice, and thus to limit the forms of democracy and governance that might have been possible.”

And yet, I understand the excitement surrounding the quest to get the FBI headquarters relocated into a state-of-the-art suburban complex. A competition that began a decade ago with 35 possible sites throughout the Washington region has been whittled down to a final three — with two of them in Prince George’s County. The third is Springfield, in Fairfax County.

David Iannucci, president and chief executive of the Prince George’s County Economic Development Corp., said that getting the FBI headquarters would be a “generation-shaping game changer.” And, for a while, he felt the county’s chances were excellent.

“Our sites are objectively better — the fastest to develop, least expensive land, easier to secure and with convenient access to mass transit,” he told me.

The estimated size of the FBI complex would be 2.1 million square feet. It would hold about 11,000 FBI employees along with support personnel. Iannucci said Prince George’s could see 25,000 new jobs in addition to the federal jobs. New businesses and new housing could create a ripple effect on development throughout the county, he said, and even into those less affluent areas of the District that border Prince George’s.

The predominantly Black county is home to 20 percent of the federal workforce but only 5 percent of the office space. Residents and elected officials alike yearn for a substantial, transformational development. The relocation of a major federal agency, like the FBI, does not happen very often. Never in a place like Prince George’s — which generally gets only the warehouse space.

“We accept that responsibility and the privilege to be the custodian of information and documents for the federal government, but we are more than just a warehouse county,” said Anthony G. Brown, who was recently elected Maryland’s attorney general after serving two terms in Congress representing the county.

The entire region would be made economically stronger by a more equitable distribution of government resources.

When Barbara A. Mikulski (D) represented Maryland in the Senate and served as chair of the Appropriations Committee, she once observed, correctly, “For too long, we think, Prince George’s County has been redlined, sidelined, overlooked and undervalued.”

That appeared to be on the verge of changing. With site selection set for December, Prince George’s should have been the easy pick. Then, a few weeks ago, federal officials revealed that a new criterion had been added — one that would carry more weight than any other: proximity to Quantico, where the FBI training academy is located.

Fairfax County’s Springfield site is closest to it — 33 miles. And now a new front-runner had emerged.

“This is an abrupt change that clearly favors Springfield and puts our county at a disadvantage,” Prince George’s County Executive Angela D. Alsobrooks (D) said at a recent news conference. “Our sites are clear winners when it comes to transit, sustainability and cost. And as an added benefit, our sites also promote equity across the region. We ask, why then is the [General Services Administration] suddenly changing the rules of the game in the 11th hour?”

Alsobrooks said she plans to raise the issue of last-minute surprises with the White House, citing declarations made by President Biden that equity in the allocation of government resources would be a priority.

Rep. Steny H. Hoyer (D-Md.), the House majority leader who represents a part of the county, blamed the FBI on the sudden turnabout, accusing the agency of trying to put its thumb on the scale. “I think the FBI has frankly determined where it wants to go,” he said.

To my mind, Hoover's spirit is still stirring at the agency. Check that weighted scale for the G-man's thumbprint. Clandestine manipulation, that was Hoover's style.

While studying law at George Washington University, Hoover had joined the Kappa Alpha fraternity — founded in 1865 in honor of Robert E. Lee. The fraternity club was a “bastion of the Lost Cause mythology that glorified the defeated plantation culture of the slaveholding South,” as journalist Margaret Talbot wrote in a review of Gage's book for the *New Yorker*.

From the ranks of the Confederate sympathizing Kappa Alphas, Hoover found not only friendships, but also leaders for his new FBI.

Given a choice between Prince George's in Maryland, and Springfield in Virginia for the FBI's relocation, it's not hard to imagine which Hoover would choose. I can certainly imagine his being pleased with how the matter has turned out so far.

But the fight is not over. The Springfield location, despite its proximity to Quantico, does have drawbacks. At the site is a government warehouse and a CIA facility so secure that hardly anyone is known to have been inside. Everything would have to go to make room for the FBI. So far no one has seen any moving vans.

According to Iannucci, as much as 40 percent of the FBI's administrative personnel live in Prince George's. That would mean, if selected, the county would become less of a “bedroom community,” emptied out for work by day, dead asleep at night.

I wouldn't mind having the FBI headquartered in Prince George's — despite Hoover's legacy. But leave his name on the obsolete monstrosity in downtown D.C. even as the demolition crane starts to swing.

Statement submitted by Renee King, Founder and CEO of Fund Black Founders

November 30, 2022

Dear Members of the Senate Committee on Banking, Housing, and Urban Affairs,

My name is Renee King and I am the Founder and CEO of [Fund Black Founders](#), a crowdfunding platform dedicated to narrowing the capital access gap by connecting Black founders with the financial and community resources they need. We strive to fill the “friends and family” funding round so many Black and brown founders lack. Through our work, we see the inequities in capital access for underrepresented founders as painfully obvious. But the gaps exist not just in venture capital or self-financing, but through our banking system as well. Across the board, Black founders face diminished access to the capital they need and without policy change, founders of color will continue to face barriers throughout our startup ecosystem.

The greatest challenge a founder faces is acquiring funding, but the U.S. banking system, simply put, does not provide equitable access for many Black and brown individuals. This became apparent to many amidst the pandemic and the roll out of the Paycheck Protection Program (PPP). Predominantly Black congressional districts received fewer loans, faced delays in approval, and many Black and brown small business owners were shut out of relief due to insufficient banking relationships.¹

But, the PPP isn't the only example of inequity in the banking system. While one in 20 American families lack a banking relationship, this issue is particularly acute for underrepresented founders.² Bank branch closures in Black and rural communities continue, and many Black-owned banks have closed, limiting access for founders in need of loans.³ Even when minority business owners have banking access, they are more frequently denied loans, even when controlling for other factors.⁴ Disparities in credit scores as a result of income and wealth inequality affect Black and brown founders' ability to secure a loan,⁵ as these are used by banks to determine loan worthiness. And when they are approved, they face higher interest rates⁶ and many fail to be granted full

¹ Matt O. Dhaiti and Jamie Dohopolski, *Engine's Response to the Call for Comments on Expanding American Innovation* (Feb. 23, 2021), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60366ecbd288114c62743e45/1614180046522/Engine+USPTO+diversity+comments.pdf>; and, See testimony of Karen Kerrigan, President and CEO, SBE Council, available at:

<https://democrats-financialservices.house.gov/UploadedFiles/HHRG-116-BA13-Wstute-KerriganK-20200709.pdf>.

² Dhaiti and Dohopolski, *supra* note 1.

³ *Id.*

⁴ SBA Office of Advocacy, *Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms* (April 2013), [https://www.sba.gov/sites/default/files/files/rs403tot\(2\).pdf](https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf).

⁵ Dhaiti and Dohopolski, *supra* note 1.

⁶ Jared Weitz, *Why Minorities Have So Much Trouble Accessing Small Business Loans* (January 22, 2018), <https://www.forbes.com/sites/forbesfinanccouncil/2018/01/22/why-minorities-have-so-much-trouble-accessing-small-business-loans/#2668d7af55c4>.

financing.⁷ Moreover, the prioritization of businesses with existing lines of credit means many Black businesses are further excluded from bank loans as a funding source.⁸

The discrimination and poor outcomes underrepresented founders experience when using the banking system means many Black and brown founders struggle to launch and grow their startups. Many founders are pushed to pursue riskier financing, including using personal credit cards, to fund their businesses.⁹ Some will refrain from applying at all due to fear of rejection.¹⁰ And others still may forgo innovation as a career path, abandoning dreams of owning and growing a business.

I am grateful to the committee for taking the time to examine racism and discrimination in banking. Unfortunately, this all too common occurrence, unless remedied, will continue to shut Black and brown founders out of our banking system and out of the innovation ecosystem. Seventeen percent of Black women are in the process of starting a new business compared to 10 percent of white women and 15 percent of white men.¹¹ But for these founders to succeed, they need equitable access to business funding. If we truly want to foster an environment that produces diverse innovation and embraces a representative startup ecosystem, policymakers must work to address the systemic inequities across all funding streams on which founders rely.

⁷ *Id.*, and, Gene Marks, *Black Owned Firms are Twice as Likely to be Rejected for Loans. Is this Discrimination?* (Jan. 16, 2020),

<https://www.theguardian.com/business/2020/jan/16/black-owned-firms-are-twice-as-likely-to-be-rejected-for-loans-is-this-discrimination>.

⁸ Gina Heeb, *Businesses Owned By Blacks, Latinos Less Than Half As Likely To Be Approved For Loans Than Whites, Fed Says* (April 15, 2021),

<https://www.forbes.com/sites/ginaheeb/2021/04/15/businesses-owned-by-blacks-latinos-less-than-half-as-likely-to-be-approved-for-loans-than-whites-fed-says/?sh=3cf81ded53da>.

⁹ Dhaiti and Dohopolski, *supra* note 1.

¹⁰ Weitz, *supra* note 6.

¹¹ Donna Kelley, Mahdi Majboui, and Angela Randolph, *Black Women are More Likely to Start a Business than White Men* (May 11, 2021), <https://hbx.org/2021/05/black-women-are-more-likely-to-start-a-business-than-white-men>.