



Fairness in Financial Services: Racism and Discrimination in Banking

Testimony of Lisa C. Rice

President & CEO

Before the United States Senate

Committee on Banking, Housing, and Urban Affairs

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 Palicpic, “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 Jaclyn 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-malika-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

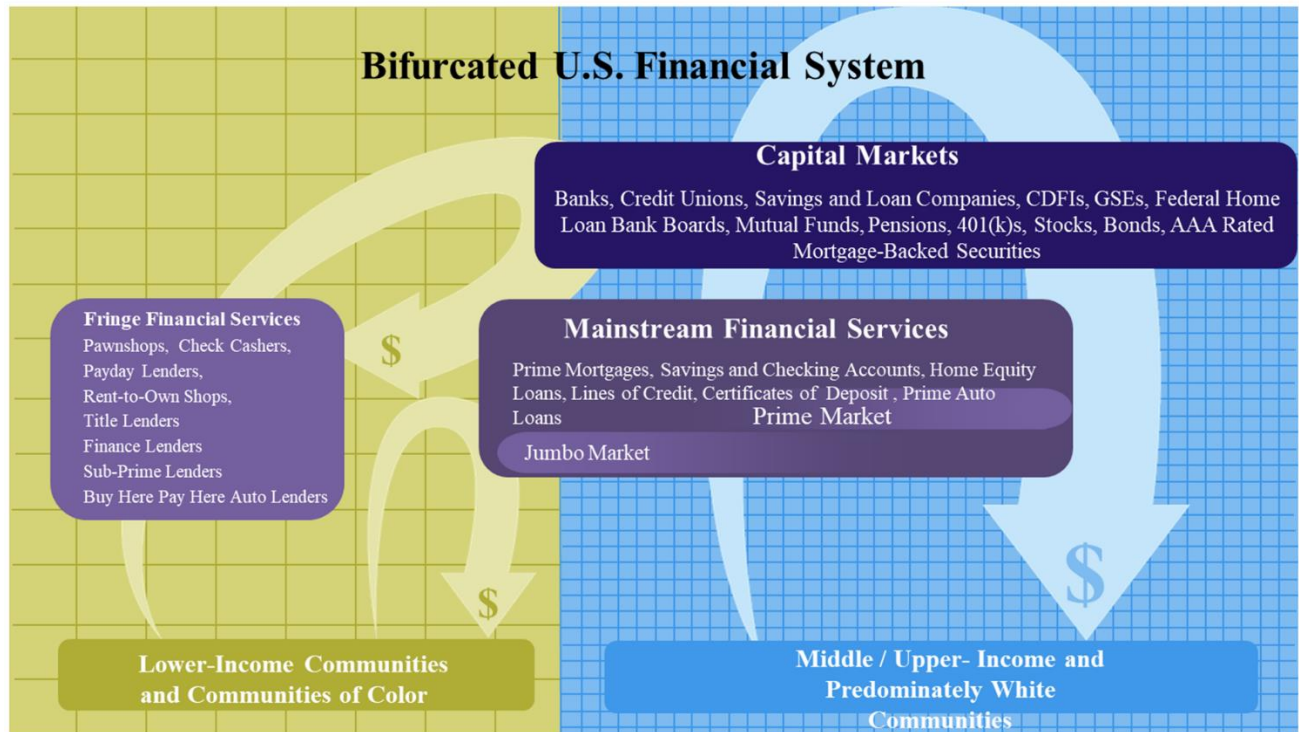
Discriminatory policies, segregation, and disinvestment have led to credit discrimination and the creation of the bifurcated U.S. financial system or dual credit market. It can be challenging for borrowers of color to access mainstream financial institutions for several reasons. First, borrowers of color 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-ownedbanksdwindle.html>.



Source: Jim Carr, Lisa Rice, and Shanti Abedin

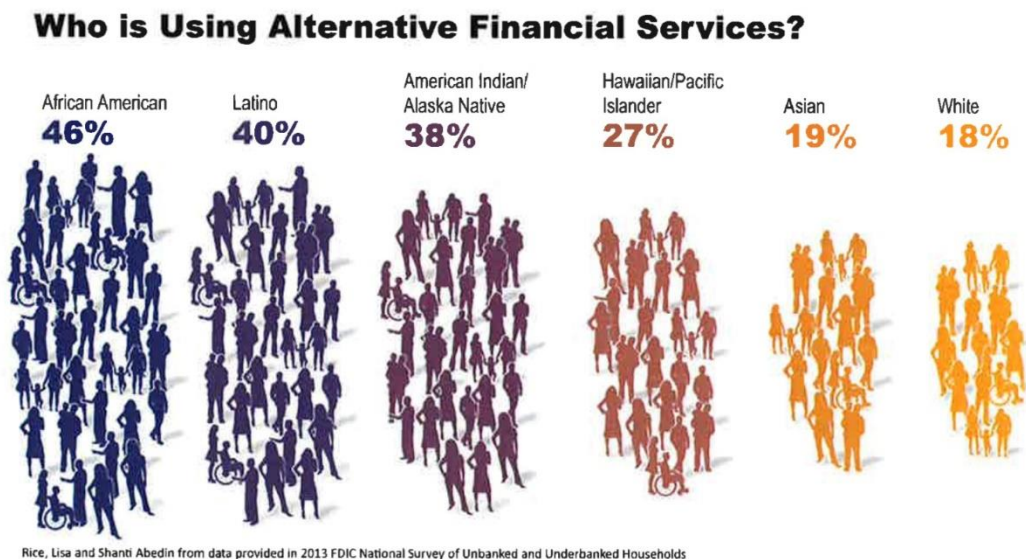
Patterns of Non-Banked and Under-Banked Populations

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.freddiemac.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.



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 Dornauer 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), <https://www.ffiec.gov/pdf/fairlend.pdf>; CFPB, *Lending Discrimination*, CFPB Bulletin 2012-04 (April 18, 2012), https://files.consumerfinance.gov/f/201404_cfpb_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."

³⁸ *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

³⁹ 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/cfpb-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.

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

⁴¹ *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(A)Ps”). 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 UDAAP 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(A)P 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 UDAAP 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/cfpb-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%28E.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.