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As Real Estate Booms, So Does Appraisal Discrimination

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As Real Estate Booms, So Does Appraisal Discrimination

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Gender and Law AWR

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Table of Contents

<i>I. Introduction</i>	3
<i>II. The appraisal process is subjective and lacks consistency</i>	5
A. How are appraisals conducted?	6
B. History of Appraisals.....	7
C. Contemporary problems in the appraisals process	10
Appraiser’s demographics: The industry’s diversity problem.....	11
Appraiser’s Bias When Selecting Comparables.....	12
Appraiser’s Implicit Bias When They Think a Homeowner is Black.....	13
<i>III. Deficiencies of the FHA’s anti-discrimination policy</i>	14
A. The FHA lacks language explicitly banning appraisal discrimination making enforcement weak.....	15
B. Private suits as enforcement mechanisms have made it difficult to prove appraisal discrimination	19
Disparate Treatment	21
Disparate Impact	23
<i>IV. The way forward: current proposed solutions by the PAVE Action Plan and the solutions not tackled therein</i>	25
A. The PAVE Action Plan	26
B. Exploring reparations for previous appraisal discrimination	30
C. Exploring a new appraisal system	32
<i>V. Conclusion</i>	36

I. Introduction

During the pandemic, people, en masse, have been deserting the cities for the suburbs in search of more space and distance from neighbors.¹ In 2022, the housing market exploded, with houses now being purchased at faster rates than pre-pandemic years.² With the explosion of the housing market, there has also been an explosion of appraisal related discrimination.³ Currently, the United States Department of Housing and Urban Development (HUD) has seen a tenfold increase in appraisal related discrimination reports since 2019.⁴

In December 2021, a story broke of a Black couple who used a White friend to stand in as the “homeowner” during their home appraisal.⁵ As a result of using their White friend as a stand in during the appraisal their home was appraised for nearly half a million dollars more than what it was when appraised under them.⁶ This story was one of hundreds to have come out in recent years relating to appraisal discrimination.⁷ These situations have illuminated that the appraisal process is subjective. These subjective appraisals continuously negatively impact people of color, with a particular pervasive bias against Black families.⁸ The Austins, the family at the center of the story, filed a lawsuit alleging race discrimination and arguing that the white

¹ Diana Olick, *Smaller American Cities See Big Interest from Urban Flight*, CNBC (Apr. 14, 2022), www.cnn.com/2020/10/30/smaller-american-cities-see-big-interest-from-urban-flight-.html.

² See *January 2022 Monthly Housing Market Trends Report*, REALTOR.COM (March 24, 2022), <https://www.realtor.com/research/january-2022-data>.

³ Alanna McCargo, *Virtual Home Appraisal Bias Event*, YOUTUBE (Mar. 1, 2022) <https://youtube.com/watch?v=WIfVgwuiYMc> (Alanna McCargo is the HUD’s senior advisor for housing finance, stated this during a June 2021 roundtable on a appraisal bias hosted by the Consumer Financial Protection Bureau).

⁴ *Id.*

⁵ Joe Johns et al, *A Black Couple had a White Friend Show their Home and its Appraisal Rose by Nearly Half a Million dollars*, CNN (Dec. 9, 2021), <https://www.cnn.com/2021/12/09/business/black-homeowners-appraisal-discrimination-lawsuit/index.html>.

⁶ *Id.*

⁷ See Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Apr. 14, 2022), [nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html](https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html); Alexandria Burris, *Black Homeowner had a White Friend Stand in for Third Appraisal. Her Home Value Doubled.*, INDYSTAR (Apr. 14, 2022), [indystar.com/story/money/2021/05/13/Indianapolis-black-homeowner-home-appraisal-discrimination-fair-housing-center-central-indiana/4936571001/](https://www.indystar.com/story/money/2021/05/13/Indianapolis-black-homeowner-home-appraisal-discrimination-fair-housing-center-central-indiana/4936571001/).

⁸ Freddie Mac, *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals* (Sept. 20, 2021), [http://www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf](https://www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf).

appraiser who valued their home violated the Fair Housing Act (“FHA”)⁹ when she utilized race as a factor in her appraisal.¹⁰

Although there is extensive literature on how systemic racism affects the U.S. housing market,¹¹ there has been little exploration of how the appraisal process has fueled this system. This paper argues that current FHA regulations fail to curb racial discrimination in appraisals. The regulations do not address appraiser’s devaluation of homes in Black communities or the resulting limitations on home financing to Black individuals due to appraisal discrimination.¹² Further, it posits that reparations along with an enhanced, objective appraisal process is needed to prevent and remedy race discrimination in appraisals.

This paper proceeds as follows. Part II shows how the current appraisal system works and demonstrates that the process is subjective and penalizes black individuals. Part III discusses the history of the FHA’s anti-discrimination policy. This part also describes how the current FHA regulation lacks adequate enforcement mechanisms and how courts’ application of the FHA has made it difficult for plaintiffs to prove discrimination. Part IV explores why proposed solutions to the appraisal process are not sufficient to remedy appraisal discrimination. Lastly, Part V argues that since the FHA anti-discrimination law does not truly protect people of color from appraisal discrimination, then lawmakers should implement the following measures: (1) explore the use of reparations to amend past appraisal discrimination that has marginalized Black

⁹ 42 U.S.C. § 3601.

¹⁰ See *Tate-Austin v. Miller*, No. 21-CV-09319-MMC, 2022 WL 1105072, at *2 (N.D. Cal. Apr. 13, 2022).

¹¹ See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

¹² This paper discusses appraisal discrimination in two situations: (1) when appraisers are appraising a home and have knowledge that the homeowner is Black; and (2) when appraisers are appraising homes in Black neighborhoods. In both circumstances, if there is appraiser’s bias, the outcome is an undervaluation of a home that predominantly affects a Black individual’s ability to generate wealth through the real estate process.

individuals, and (2) design a new objective appraisal system with safeguards to prevent further discrimination.

II. The appraisal process is subjective and lacks consistency

Since the appraisal process is subjective, it is rife with opportunity for appraisers to infuse their own prejudices into home appraisals. To depict the subjectivity of appraisals, this paper explains how appraisals are conducted and the history of the appraisal process. Given its history, the appraisal industry lacks appraiser diversity and has allowed appraisers too much freedom in the process, thereby creating a system that undervalues black families' homes.¹³

The most common appraisal method is the sales-comparison approach to valuation, where the appraiser will select comparable homes, called “comps” or “comparables”, which are supposed to be similar, nearby homes that have sold.¹⁴ However, the comps selection process is not standardized, and therefore allows appraisers to select comparable homes as they see fit, inviting subjectivity and bias into the process.¹⁵ Particularly, an appraiser's knowledge of the racial composition of a neighborhood or of a homeowner's race fuels bias-based appraisals, perpetuating a long history of systemic racism in the housing sphere.¹⁶ The continued use of this highly discretionary appraisal method is a self-fulfilling prophesy because an under-appraisal “places a lid on the entire market.”¹⁷ Further, because of its lack of objectivity, the comps appraisal method upholds segregation and promulgates a system that penalizes and disincentivizes Black home ownership. As Black individuals have garnered increased purchasing

¹³ Elizabeth Korver-Glenn, *Compounding Inequalities: How Racial Stereotypes and Discrimination Accumulate Across the Stages of Housing Exchange*, 83 AM. SOCIO. REV. 627, 646 (2018).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 647.

¹⁷ See *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1389 (5th Cir. 1986) (recounting expert testimony that underappraisals could “effectively place a ‘lid’ on the entire [neighborhood] market” if an underappraisal led to a lower sales price that was subsequently used as a comparable to appraise another property in the area).

power and become more active in the real estate market, the effects of these subjective appraisals have culminated in a limit of Black families' ability to generate generational wealth through home ownership.

A. How are appraisals conducted?

The appraisal system has been in existence since 1935.¹⁸ When the Federal Housing Administration (Agency) was created in the 1930s, it required all homebuyers who were taking out mortgages to obtain a home appraisal.¹⁹ The appraisal was conducted to assess the value of the home.²⁰ This was done to ensure that the mortgage loan amount would be covered by the value of the home in the case of a default on the loan.²¹ Thus, the house must first be appraised for a mortgage loan to be approved and for the transaction to be completed.²² Given the use of the appraisal, it was important that appraisers capture the proper value of a home.

In the 1980s the Uniform Standards for Professional Appraisal Practices was passed to standardize the appraisal process.²³ The sales-comparison approach to valuation, where the appraiser selects the comps, became the standard practice for conducting appraisals.²⁴ After an appraiser selects their comps, they determine the home's by analyzing data about the building itself, lot square footage, the number and condition of the bedrooms and bathrooms, and the quality of the interior and exterior of the home.²⁵ Additionally, appraisers sometimes begin with an in-person visual where they look at the homes internally and externally, and evaluate its

¹⁸ Junia Howell & Elizabeth Korver-Glenn, *Neighborhoods, Race, and the Twenty-First-Century Housing Appraisal Industry*, 4 Soc. RACE & ETHNICITY 474 (2018).

¹⁹ *Id.*

²⁰ GUY STUART, *DISCRIMINATING RISK: THE U.S. MORTGAGE LENDING INDUSTRY IN THE TWENTIETH CENTURY* 33-34 (2003).

²¹ *Id.*

²² Korver-Glenn, *supra* note 13.

²³ Howell & Korver-Glenn, *supra* note 18, at 482.

²⁴ Korver-Glenn, *supra* note 13.

²⁵ *Id.*

upkeep, size and style to help them select the comps.²⁶ While appraisers analyze similar factors when evaluating homes, there is no set standard or guideline for selecting comps, which promotes a lack of uniformity in the process.²⁷ An appraiser is supposed to select nearby, similar homes, but an appraiser's implicit biases and their personal stigmas of the neighborhood are likely to impact the comparable selection.²⁸ Further, an appraiser may also receive information about the homeowner, whether through personal contact from the mortgage company or other realtors, that can influence and even taint their decisions during the appraisal process.²⁹ Part II subsection C discusses how an appraiser's implicit bias affects appraisals and fuels appraisal discrimination.

B. History of Appraisals

The contemporary approach to appraisals upholds the outdated belief that white, single-family homes are inherently more valuable. Since its inception, the appraisal process has sought to keep the races separated, on the assumption that otherwise, property values would decline if Black individuals were to be allowed to move into White neighborhoods.³⁰ In accordance with this perception, Black individual's homes were purposely given lower values and were subject to redlining.³¹ Redlining was the practice by the Agency to designate areas in a map depending on their "perceived stability."³² White homes and neighborhoods were traditionally considered more valuable with a lower risk of mortgage default.³³ Areas that were white and lacked a "single

²⁶ Howell & Korver-Glenn, *supra* note 18, at 482.

²⁷ See Howell & Korver-Glenn, *supra* note 18, at 485.

²⁸ *Id.* at 644.

²⁹ See Korver-Glenn, *supra* note 13, at 629.

³⁰ See STUART, *supra* note 20, at 33; Howell & Korver-Glenn, *supra* note 18, at 675.

³¹ See ROTHSTEIN, *supra* note 11, at 63-67.

³² Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

³³ *Id.*

foreigner or Negro” were green.³⁴ Black neighborhoods were colored in red to designate lower ratings and considered ineligible for federal housing loans.³⁵ Thus, Black individuals were de facto excluded from receiving mortgage loans and in turn from owning their own homes.³⁶ Although there has been progress, there are still barriers Black individuals must face due to both the lingering effects of redlining and the overly subjective appraisal process still in place today.

One of the home valuation methods used in the 1920s was the market value approach, which has evolved into the sales comparison approach to valuation that is used in present day.³⁷ In the 1920s, the Agency believed that to revitalize the housing market, the different races had to be kept separate.³⁸ To achieve this goal, appraisers assigned lower values to homes in Black neighborhoods. Any deviation from the generally desired one-family structure of White neighborhoods would decrease home values.³⁹ Therefore, when appraisers conducted appraisals, they provided homes with designations such as tenements, apartments, or houses.⁴⁰ These designations were to signal the difference of race or social class in a neighborhood.⁴¹ Thus, in a White neighborhood they could term a home as a “house” and a structurally similar home in a Black neighborhood as a “tenement.”⁴² This terminology would allow the appraiser to assign different values depending on these designations, even if the houses were structurally identical.⁴³

Throughout history appraisers have had a great deal of freedom when selecting comps.⁴⁴ Thus, if an appraiser knows they are in a Black neighborhood that is across the street from a

³⁴ *Id.*

³⁵ *Id.*

³⁶ Howell & Korver-Glenn, *supra* note 18, at 475.

³⁷ STUART, *supra* note 20, at 31.

³⁸ *Id.* at 32.

³⁹ *Id.* at 34.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Howell & Korver-Glenn, *supra* note 18.

White neighborhood, then they are likely to have a bias against selecting comparables in the White neighborhood.⁴⁵ By doing so, appraisers have imposed their implicit biases into their appraisals. By selecting homes appraisers deem to be racially similar as opposed to actually physically similar, like in number of bedrooms or square footage, they are actively driving down the prices of a home.⁴⁶

In the 1960s and 1970s, the Federal Housing Administration set forth laws to curb discrimination in the appraisal industry.⁴⁷ The Fair Housing Act legislation passed in 1964 was meant to outlaw the use of color-coded maps used in redlining Black neighborhoods.⁴⁸ Thereafter, in the 1980s, the Housing and Urban Development, Fannie Mae, and various appraisal societies created the 1986 Uniform Residential Appraisal Report and the 1989 Uniform Standards of Appraisal (“Act”).⁴⁹ The Uniform Act provides uniform standards in the appraisal industry and creates an objective system to provide the most accurate market value of the home.⁵⁰ However, The Uniform Act has had limited success. The Act claims to outline objective standards, but there is a lot of room for appraisers to be subjective, given that each appraiser is still able to select their own comps.⁵¹ Since then, there has not been any drastic legislative changes addressing appraisal discrimination.⁵² In addition to the lack of change to legislation, the problems faced in the early stages of the appraisal system have been compounded due to appraiser’s implicit biases plaguing the process.

⁴⁵ See Howell & Korver-Glenn, *supra* note 18, at 483 (provides an example of an appraiser selecting homes that were further away and not as similar as to not pick similar homes in a White neighborhood across the street).

⁴⁶ See Korver-Glenn, *supra* note 13, at 646.

⁴⁷ Howell & Korver-Glenn, *supra* note 18, at 475.

⁴⁸ See *infra* Part III (discussing The Fair Housing Act).

⁴⁹ Howell & Korver-Glenn, *supra* note 18, at 474.

⁵⁰ STUART, *supra* note 20, at 65.

⁵¹ Howell & Korver-Glenn, *supra* note 18, at 474.

⁵² See US Government Accountability Office, *Real Estate Appraisals: Appraisal Subcommittee Needs to Improve Monitoring Procedures*, 1-2 (2012) (identifying that between the 80s creation of the Uniform Standards and 2010s Dodd Frank, no legislation specifically addressed appraisal discrimination).

C. Contemporary problems in the appraisals process

“Homes located in a majority Black neighborhoods and majority Latino or Hispanic neighborhoods are significantly more likely to have appraisals submitted to Freddie Mac that are below the contract price when compared to homes in majority White (not Latino or Hispanic) neighborhoods.”⁵³ A 2018 Brookings Institution study found that similar homes were worth 23 percent less in majority-Black neighborhoods compared with neighborhoods with few or no Black residents.⁵⁴ Another recent Brookings study found that homes in Black neighborhoods tend to be undervalued by around \$48,000.⁵⁵ Generally the quality of a neighborhood can be determined by the general amenities in the neighborhood and crime statistics amongst some other factors.⁵⁶ The differences in the quality of a neighborhood usually show up in the price differences between homes in different neighborhoods.⁵⁷ However, the 23 percent difference in home prices is accounting for those variables, such as difference in the quality of a neighborhood, that could drive the price differences.⁵⁸ In other words, even when accounting for other variables, that 23 percent represents value being lost when all things are considered equal.⁵⁹ As such, anti-Black bias is a large factor that continues to drive down housing values. For

⁵³ Jonathan Rothwell & Andre M. Perry, *Biased Appraisals and the Devaluation of Housing in Black Neighborhoods* (Nov. 17, 2021), <https://www.brookings.edu/research/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/>.

⁵⁴ *Id.*

⁵⁵ ANDRE M. PERRY ET AL., THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS: THE CASE OF RESIDENTIAL PROPERTY 11 (Nov. 27, 2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf.

⁵⁶ See Rothwell & Perry, *supra* note 53 (other characteristics to determine the quality of a neighborhood are the school districts, access to public transportation, proximity to local stores, walkability).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

example, a belief that a neighborhood becoming 10% or more Black, leads to decreased home values,⁶⁰ and appraisal discrimination helps enforce this bias.⁶¹

What this loss of value has demonstrated is that this home financing discrimination, which begins with appraisal discrimination, is affecting Black family's wealth.⁶² As people buy homes, they obtain equity both when they pay off their mortgage and when the house price rises. Improvements made to the house can also aid in increasing its valuation.⁶³ If Black individuals' property is continually undervalued, then their ability to attain wealth by selling their homes is diminished in comparison to their White counterparts.⁶⁴ Appraisers are responsible for creating these limitations on Black homeownership by fostering an industry that is racially homogenous and creates barriers to entry for diverse individuals. Additionally, appraisers' implicit biases and discretion when selecting comps has created a racialized process that continues to enforce housing racial segregation.

Appraiser's demographics: The industry's diversity problem

The appraisal industry is one of the least diverse workforces in the country.⁶⁵ Seventy-eight percent of appraisers are men, 71% are age 51 or older, and 85% are white.⁶⁶ Additionally, fewer than 2% of appraisers nationwide are black according to the Appraisal Institute.⁶⁷ The lack

⁶⁰ Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 355 (2010).

⁶¹ See Rothwell & Perry, *supra* note 53.

⁶² Rothwell & Perry, *supra* note 53.

⁶³ PERRY, *supra* note 55, at 4.

⁶⁴ See Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. F., at 573 (2015).

⁶⁵ See U.S. BUREAU LAB. STAT, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (Jan 22, 2021), [Bls.gov/cps/cpsaat11.htm](https://www.bls.gov/cps/cpsaat11.htm).

⁶⁶ See APPRAISAL INSTITUTE, U.S. VALUATION PROFESSION FACT SHEET Q1 2019, 2 (Apr. 2020), <https://www.appraisal institute.org/file.aspx?DocumentId=2342#:~:text=In%20Q1%202019%2C%20the%20Appraisal,the%2095%20percent%20confidence%20level>.

⁶⁷ *Id.*

of diversity in the appraiser profession is another driving force of appraisal discrimination, making the reinforcement of racial stereotyping more likely.⁶⁸

The Financial Institution Reform, Recovery and Enforcement Act of 1989 (FIRREA) sets forth appraiser's standards.⁶⁹ This Act lists the licensing requirements for appraisers. FIRREA sets the procedures for the examination for appraisers and requires they pass either the Uniform State Certification Examination, an examination similar, or an exam endorsed by the Appraiser Qualification Board of the Appraisal Foundation.⁷⁰ However, the Act does not ban appraisal discrimination.⁷¹ The only safeguard it puts in place to prevent discrimination is requiring appraisers to abide by the Uniform Standards of Professional Appraisal Practice ("USPAP"), adopted by many appraisal organizations.⁷² USPAP simply encourages appraisers to avoid biased assumptions relating to race, amongst other protected statuses, when looking at neighborhood trends.⁷³ Therefore, the legislation creates a high barrier to entry to the appraiser industry, maintaining the industry primarily white, without providing a shield to protect against appraisers' bias.⁷⁴ In addition to a diversity problem, there are multiple ways appraisers' bias flow into the appraisals process.

Appraisers' Bias When Selecting Comparables

⁶⁸ INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, ACTION PLAN TO ADVANCE PROPERTY APPRAISAL AND VALUATION EQUITY 31 (March 2022), <https://pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf>.

⁶⁹ See 12 U.S.C. § 3345(a) (covering certification and licensing requirements for individuals who have satisfied requirements of certification for real estate appraisers).

⁷⁰ 12 U.S.C. § 3345(b).

⁷¹ Robert G. Schwemm, *Housing Discrimination and the Appraisal Industry*, in MORTGAGE, LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY, 367-69 (John Goering and Ron Wienk eds., 1996) (FIRREA, for example, requires appraisers to be certified or licensed and conduct their appraisals according to their state's procedure, but there is no ban on discriminatory appraisals unless the state's procedure bans it).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note 68, at 5.

Even with guidelines to avoid appraisers' biases, it is likely that appraisers still impress their own biases in the appraisals. In a study exploring how racial stereotypes affect appraisals, the author discussed how an appraiser's racial beliefs influence comp selections and home values.⁷⁵ In the study, the author conducted interviews with appraisers and found instances of appraisal discrimination.⁷⁶ One appraiser, for example, looked at a house in a Houston neighborhood that is largely Hispanic and middle class.⁷⁷ When picking out comps, instead of looking at homes in the neighborhood directly across the highway, which contained houses identical to the first town's house, he chose to look at houses in a subdivision 30 miles away.⁷⁸ The appraiser explained that the neighborhood directly across the highway was a White, upper-middle class neighborhood and though its lots were smaller, he stated that "the Heights has always been great, because it's the Heights . . . and Lindale Park, it's like, 'I'm over there in the ghetto.'"⁷⁹ Yet, given the geographic, socioeconomic and housing similarities it would have made more sense for the appraiser to pull comps that were available from this White neighborhood instead of one 30 miles away.⁸⁰

Appraisers' Implicit Bias When They Think a Homeowner is Black

The home inspection process also involves a visual inspection of the subject property and often involves an internal and external scan of the home.⁸¹ By looking at the inside of a home, appraisers also get to collect information about the family that lives there which can include information about that family's race or ethnicity.⁸² Appraisers knowing the racial makeup of a

⁷⁵ See generally Korver-Glenn, *supra* note 13.

⁷⁶ Howell & Korver-Glenn, *supra* note 18, at 476.

⁷⁷ *Id.* at 476.

⁷⁸ *Id.* at 483.

⁷⁹ *Id.* at 483.

⁸⁰ *Id.* at 483.

⁸¹ *Id.* at 482.

⁸² *Id.*

family can create further issues with implicit bias.⁸³ In the same racial stereotypes and appraisals study, appraisers discussed how realtors or lenders would try to exert influence by disclosing information about the families to the appraiser, which may taint an appraiser's home valuation.⁸⁴

Although appraisal discrimination has been an issue for decades, the 2021 real estate explosion has led to a myriad of stories of Black families, like the Austins mentioned in the introduction, alleging that their houses have been undervalued due to appraisal discrimination.⁸⁵ As long as the appraisal industry continues to suffer a diversity problem and fails to implement a standardized comps selection process, appraisers will continue to undervalue Black individuals' homes and neighborhoods. In undervaluing these homes and neighborhoods, appraisers will fuel the wealth disparity between Black and White families. Besides the appraisal industry's racial bias, the issue of appraisal discrimination is exacerbated by the FHA's weak regulation, which has also failed to provide Black families remedies for appraisal discrimination.

III. Deficiencies of the FHA's anti-discrimination policy

The history of housing laws is important to understand the FHA and its deficiencies. One housing legislation that predated the FHA is The Housing Act of 1934. The Housing Act was enacted as part of the New Deal legislation after the Depression.⁸⁶ Under the Housing Act, Congress created the Federal Housing Administration (Agency).⁸⁷ The goal of the agency was to increase suburbanization by making homeownership more affordable and providing home

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See *Black Homeowner's Appraisal Doubled After White Friend Stood In For Her*, CNN (May 2021), <https://www.cnn.com/videos/business/2021/05/19/black-woman-says-home-appraisal-increased-after-white-friend-stood-in-for-her-carlette-duffy-newday-vpx.cnn>; Troy McMullen, *For Black Homeowners, a Common Conundrum with Appraisals*, WASH. POST (Jan. 21, 2021), https://www.washingtonpost.com/realestate/for-black-homeowners-a-common-conundrum-with-appraisals/2021/01/20/80fbfb50-543c-11eb-a817-e5e7f8a406d6_story.html.

⁸⁶ Kevin Fox Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Fed. Housing Admin.*, 43 SOCIO. PERSP. 291, 292 (2000).

⁸⁷ *Id.*

financing.⁸⁸ However, the Agency created social and racial division by institutionalizing “redlining”⁸⁹ and relegating black individuals to “risky” neighborhoods.⁹⁰

As a response to the pervasive racial injustices during the 1960s, President Lyndon Johnson signed into law the Fair Housing Act as part of the Civil Rights Act of 1968.⁹¹ The FHA’s goal was to provide “fair housing throughout the United States . . . [to achieve] truly integrated and balanced living parties.”⁹² The FHA aimed to undo the Federal Housing Association’s policies that made home financing more difficult for black individuals.⁹³ Thus, the FHA implemented a new set of protections to prevent discrimination.⁹⁴ Yet, as the FHA was updated no language was implemented to clearly protect against appraisal discrimination.⁹⁵ In addition to the lack of explicit language banning appraisal discrimination, the legislation relies on private suits as the enforcement mechanism, which has created gaps due to weak regulation.⁹⁶

A. The FHA lacks language explicitly banning appraisal discrimination making enforcement weak

The FHA did not include language outright banning appraisal discrimination.⁹⁷ As such, private litigants have resorted to other provisions and regulations to sue for appraisal

⁸⁸ *Id.*

⁸⁹ Coates, *supra* note 32.

⁹⁰ Massey, *supra* note 64, at 574 (explaining the creation of redlining and its legacy).

⁹¹ 42 U.S.C. § 3601.

⁹² 114 Cong. Rec. 3422 (1968) (remarks by Sen. Mondale).

⁹³ Gotham, *supra* note 86, at 309.

⁹⁴ *Id.*

⁹⁵ Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (1968) (which amended the FHA to include disabilities and family status as protected characteristics).

⁹⁶ *See Hanson.*, 800 F.2d at 1389 (finding that, though the plaintiff showed the Veterans Admin. appraisers had adhered to the “principle of conformity” thereby devaluing the property by assigning negative values for when neighborhoods were not homogenous, there was no clear error in the district court finding the nondiscriminatory reason provided by the VA plausible); *See also Jorman v. Veterans Admin.*, 830 F.2d 1420, 1424 (7th Cir. 1987) (finding that plaintiffs did not meet the causation element of standing because the injury was not shown to be traceable to the practices by the Veterans Administration, though there was sufficient injury to challenge the appraisal as discriminatory).

⁹⁷ 42 U.S.C. § 3604.

discrimination.⁹⁸ However, those provisions and regulations do not provide sufficient protection when they are weakly enforced and when racism has been historically imbedded in the appraisal process.⁹⁹

Historically, the current appraisals method has been marred by explicit discrimination that has now become subtle. In the 1930s, the Agency refused to provide insurance for mortgages in minority areas.¹⁰⁰ The Agency also added racially restrictive covenants to deeds of government-insured housing to maintain communities segregated.¹⁰¹ During this time, the underwriting manual instructed appraisers to investigate areas to “determine whether incompatible racial and social groups [were] present.”¹⁰² Appraisers believed that any change to the socioeconomic and racial make-up of a neighborhood created instability, leading to a decline in home values.¹⁰³ The Agency thus refused to provide mortgages to homebuyers in poor or racially mixed neighborhoods.¹⁰⁴

While the FHA did not explicitly address appraisal discrimination, some provisions indirectly deal with the same.¹⁰⁵ Specifically, section 3605 provides that “it shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate . . . because of race, color, religion, sex, handicap, familial status or

⁹⁸ Schwemm, *supra* note 71, at 371.

⁹⁹ See generally FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNSEL, IDENTIFYING BIAS AND BARRIERS: PROMOTING EQUITY: AN ANALYSIS OF THE USPAP STANDARDS AND APPRAISER QUALIFICATIONS CRITERIA 11 (Jan. 2022), https://nationalfairhousing.org/wp-content/uploads/2022/01/2022-01-18-NFHA-et-a1_Analysis-of-Appraisal-Standards-and-Appraiser-Criteria_FINAL.pdf (discussing the history of the current problems of bias in the appraisal industry and analysis and recommendations for rectification).

¹⁰⁰ See FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNTIL TITLE II OF THE NATIONAL HOUSING ACT 901 (1936), <https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Gotham, *supra* note 86, at 310.

¹⁰⁵ Schwemm, *supra* note 71, at 368-69.

national origin.”¹⁰⁶ Within the code, “real estate related transactions” include the making or purchasing of loans which also means appraisals.¹⁰⁷ Yet, section 3605(c) contains the appraisal exception, which states that “nothing in this subchapter prohibits a person engaged in the business of furnishing appraisals . . . to take into consideration factors other than race, color, religion, national origin, sex, handicap or familial status.”¹⁰⁸ This exception allows appraisers to consider these characteristics in their appraisal’s process.

A second provision used to challenge appraisal discrimination is section 3604, which makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin.”¹⁰⁹ For instance, if an appraiser’s discrimination causes a family to lose out on home financing, then the appraiser’s action would have effectively made housing unavailable. As such, the family could sue on the violation of section 3604. Therefore, though the section does not specifically state that appraisal discrimination is prohibited, it could still be used to prove that an appraiser made housing unavailable. This was one way that the FHA was used to combat appraisal discrimination based on race.¹¹⁰ Yet, nowhere in the FHA is there explicit language banning appraisal discrimination or redlining.¹¹¹ This lack of explicit prohibition creates ambiguity in how to assess claims of appraisal discrimination under the FHA.

Congress has enacted other regulation to mitigate discrimination in the housing process. The Equal Credit Opportunity Act of 1974 (ECOA) prohibits creditors from discriminating on

¹⁰⁶ 42 U.S.C. § 3605.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 42 U.S.C. § 3604.

¹¹⁰ *Id.*; See Schwemm, *supra* note 71.

¹¹¹ Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 113 (2006).

the basis of race, amongst other protected statuses.¹¹² Thus, if a family is discriminated against and denied home financing, it would be a violation of the ECOA. But, implemented federal regulation does not explicitly address appraisal discrimination, as it mostly focuses on other type of housing-market discrimination.¹¹³ In 2013, the federal government did explicitly tackle appraisal discrimination by implementing a requirement that creditors provide free copies of all appraisals made in connection with loan applications to applicants.¹¹⁴ However, this offers limited protection since it only applies to creditors and in connection with providing credit.¹¹⁵ Therefore, the regulation dealing with appraisal discrimination has been limited, and that scarcity has reflected in its enforcement.

Families have used sections 3604 and 3605 of Title VIII to challenge discriminatory appraisals as there is no direct protection for appraisal discrimination.¹¹⁶ *United States v. American Institute of Real Estate Appraisers* is a pivotal case in appraisal discrimination.¹¹⁷ In this case, the Department of Justice (DOJ) sued the American Institute of Real Estate Appraisers, along with three other defendants, for allegedly violating the FHA.¹¹⁸ The DOJ alleged that the defendants assigned race and national origin as a negative factor when looking at home values.¹¹⁹ As a result, the DOJ reached a settlement with Real Estate Appraisers in which they agreed to

¹¹² 15 U.S.C. § 1619(a); *See e.g.*, *Cartwright v. American Savings & Loan Ass'n*, 880 F.2d 912, 925-27 (7th Cir. 1989) (alleging that her home application was refused because of her race and sex in violation of the ECOA by requesting she provide comparable housing information for the appraisal).

¹¹³ FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNSEL, *supra* note **Error! Bookmark not defined.**, at 16-17.

¹¹⁴ *See* 12 C.F.R. § 1002 (2013).

¹¹⁵ FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNSEL, *supra* note **Error! Bookmark not defined.**, at 33.

¹¹⁶ *See* *Thomas v. First Federal Savings bank of Indiana*, 653 F. Supp. 1330, 1334 (N.D. Ind. 1987); *Hanson*, 800 F.2d at 1383 (cases which use 3604 and 3605 to challenge appraisal discrimination).

¹¹⁷ *See* *United States v. American Institute of Real Estate Appraisers of Nat. Ass'n of Realtors*, 442 F. Supp. 1072, 1076 (N.D. Ill 1977).

¹¹⁸ *Id.* at 1082.

¹¹⁹ *Id.* at 1076.

adopt policy statements where they admit that it is improper to use race or ethnicity as a basis of home values and neighborhood trends.¹²⁰

This case highlighted how the FHA initially did not do enough to prevent appraisal discrimination, but further how intrinsically intertwined utilizing race was in home values.¹²¹

Though the case did solidify how appraisal discrimination was indeed covered by the FHA, the FHA's ban on discriminatory appraisal had only, until recently, produced few cases on discriminatory appraisals.¹²²

B. Private suits as enforcement mechanisms have made it difficult to prove appraisal discrimination

Although the suit against the Society of Real Estate Appraisers was successful in setting forth a new policy to prevent appraisal discrimination, the case law that followed was scarce and showed that proving discrimination is difficult.¹²³ This has led to less than desirable outcomes for plaintiffs. Returning to *American Institute of Real Estate Appraisers*, the DOJ challenged American Institute of Real Estate Appraiser's use of their appraisal textbook which encouraged the use of the "principle of conformity."¹²⁴ This principle emphasized the belief that to keep communities "homogenous", the races were to be kept separate.¹²⁵ After *American Institute of Real Estate Appraisers*, the Justice Department did not file any mortgage discrimination suits for

¹²⁰ See *American Institute of Real Estate Appraisers*, 442 F. Supp. at 1077 (The full policy statement of *American Institute of Real Estate Appraiser* is: "1) It is improper to base a conclusion or opinion of value upon the premise that the racial, ethnic, or religious homogeneity of the inhabitants of an area or of a property is necessary for maximum value. 2) Racial, religious, or ethnic factors are deemed unreliable predictors of value trends or price variance. 3) It is improper to base a conclusion or opinion of value, or a conclusion with respect to neighborhood trends, upon stereotyped or biased presumptions relating to race, color, religion, sex, or national origin or upon unsupported presumptions relating to the effective age or remaining life of the property being appraised or the life expectancy of the neighborhood in which it is located.")

¹²¹ Schwemm, *supra* note 71, at 371.

¹²² *Id.* at 372.

¹²³ *Id.*

¹²⁴ See *American Institute of Real Estate Appraisers*, 442 F. Supp. at 1080.

¹²⁵ *Id.*

two decades and very few private lawsuits materialized.¹²⁶ Private suits for appraisal discrimination require proof of discriminatory intent or significant discriminatory effect.¹²⁷ By requiring either one of these methods to prove appraisal discrimination, the law has made it difficult to show discrimination.¹²⁸ Utilizing these methods of proof require intent or data to prove discrimination. Thus, a private litigant has a high threshold to show an appraiser distorted a nondiscriminatory process into a discriminatory one. However, the courts fail to look at the historically discriminatory housing laws and its continuing impact on black homeownership.¹²⁹

After *American Institute of Real Estate Appraiser's*, the case of *Hanson v. Veterans Administration* demonstrated how difficult it is for individuals to prove appraisal discrimination.¹³⁰ In *Hanson*, the plaintiffs asserted that they received a low appraisal due to the home being in a black neighborhood.¹³¹ Using the sales comparison approach, the appraiser valued the home below the agreed upon purchasing price.¹³² The district court dismissed the suit on multiple grounds, one of which was failure to establish discriminatory intent or effect.¹³³

The appellate court reviewed the district court's decision in *Hanson* and found that there was no clear error and the evidence justified the district court's ruling.¹³⁴ The court stated that under section 3604, the plaintiff needed to show proof of discriminatory intent or significant discriminatory effect to succeed in their appraisal discrimination claim.¹³⁵ The plaintiffs argued that the appraisers were relying on the "principle of conformity" by using certain racially coded

¹²⁶ Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 386 (2010).

¹²⁷ *Id.* at 404-06.

¹²⁸ *Id.* at 423.

¹²⁹ See Schwemm, *supra* note 126, at 387.

¹³⁰ See *Hanson*, 800 F.2d at 1383.

¹³¹ *Id.* at 1385.

¹³² *Id.* at 1383.

¹³³ *Id.* at 1384.

¹³⁴ *Id.* at 1388.

¹³⁵ *Id.* at 1386-88.

words to describe their predominantly Black neighborhood.¹³⁶ The defendants provided witnesses to testify that the language was not racially coded.¹³⁷ Additionally, the defendants argued that the market approach was race neutral because it looked at the sales price of comparable homes in the neighborhood.¹³⁸ The courts agreed.¹³⁹ However, in this approach, courts are not considering the historical contexts of the words used in the real estate profession, which stem from the historical discrimination put in place by the Housing Act.

Disparate Treatment

There are two main theories of proof used when looking at appraisal discrimination under the FHA: 1) disparate treatment and 2) disparate impact.¹⁴⁰ The disparate treatment theory to discrimination was extracted from the employment discrimination realm.¹⁴¹ Through this theory two things needed to be shown. One, the plaintiff needs to show that they were qualified for a loan.¹⁴² Two, they need to show that instead someone else that is not in a protected class was given the loan.¹⁴³ Then, the burden shifts to the defendant to show a nondiscriminatory reason for the low appraisal.¹⁴⁴ It is difficult to prove non-direct discrimination under disparate

¹³⁶ *Id.* at 1387.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1385.

¹³⁹ *Id.* at 1390

¹⁴⁰ FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNSEL, *supra* note **Error! Bookmark not defined.**, at 30; *See also* Erin Elisabeth Dancy, *Latimore v. Citibank Fed. Savings Bank: A Journey through the Labyrinth of Lending Discrimination*, 3 N.C. BANKING INST. 233, 250 (1999)(stating how courts of appeal will utilize different standards regardless of whether applying the disparate treatment or disparate impact)

¹⁴¹ *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801-02 (1973) (creating the McDonnell Douglas discrimination framework in employment discrimination).

¹⁴² Erin Elisabeth Dancy, *supra* note 140, at 244-45.

¹⁴³ *Id.*

¹⁴⁴ *See McDonnell Douglas Corp.*, 411 U.S. at 802; *See also* Old West End Ass'n v. Buckeye Fed. Sav. and Loan, 675 F. Supp. 1100, 1103 (N.D. Ohio 1987) (applying the McDonnell Douglas framework under the FHA by seeking that a plaintiff establish that 1) the housing sought to be secured was in a minority neighborhood; 2) that the application for a loan to purchase the housing located in a minority neighborhood was made; 3) that an independent appraisal concluded that the value of the housing equaled the sale price; 4) that the buyers were credit worthy and 5) that the loan was rejected).

treatment because evidence of solely an undervaluation is not sufficient.¹⁴⁵ Instead, direct or circumstantial evidence of discrimination is required.¹⁴⁶ Disparate treatment can be proven by: (1) proof of express discrimination via an appraiser's direct discriminatory comments, or (2) showing that the appraiser acted outside of policy, and used a characteristic like race to determine value.¹⁴⁷ However, it becomes difficult to prove express discrimination or that an appraiser is acting outside of policy when appraisers hide their discrimination by utilizing racially coded language, such as using "risky" to identify black neighborhoods.

Steptoe v. Savings of America demonstrates additional challenges in proving discrimination. In *Steptoe*, the district court found that the plaintiff provided sufficient evidence to establish appraisal discrimination.¹⁴⁸ *Steptoe* is a pivotal case because it demonstrated how an appraisal discrimination case should use circumstantial evidence to prove discrimination.¹⁴⁹ The plaintiffs here provided: (1) statistical data of the appraisers lending patterns in White and Black areas; (2) data showing that the appraiser did not follow its usual procedures; and (3) expert testimony that the appraisal was defective.¹⁵⁰ The court thus found that this was enough but it did not describe what the comparisons showed, only that it supported the plaintiff's position that they were discriminated against.¹⁵¹ Additionally, though the plaintiffs were successful, the courts have made clear that appraisal discrimination will be looked at on a case-by-case basis.¹⁵² Thus,

¹⁴⁵ See *Thomas v. First Fed. Sav. Bank of Ind.*, 653 F. Supp. 1330, 1339 (N.D. Ind. 1987) (finding that the discriminatory effect theory was appropriate under Title VIII, but holding that evidence which included testimony by an expert witness stating an appraisal was unjustifiably low was not sufficient to show discrimination in the appraisal process, as more must be shown)

¹⁴⁶ *Dancy*, *supra* note 140, at 252-53.

¹⁴⁷ *Schwemm*, *supra* note 71, at 386.

¹⁴⁸ See *Steptoe v. Savings of America*, 800 F. Supp. 1542, 1548 (N.D. Ohio 1992).

¹⁴⁹ *Schwemm*, *supra* note 71, at 386.

¹⁵⁰ See *Steptoe*, 800 F. Supp. at 1547-48.

¹⁵¹ *Schwemm*, *supra* note 71, at 386-7.

¹⁵² See *Steptoe*, 800 F. Supp. at 1547-48.

the courts have not established clear guidelines of what is required to show appraisal discrimination.¹⁵³

Disparate Impact

Then, there's disparate impact which is usually applied when there are neutral policies that have a discriminatory effect, without discriminatory intent being required.¹⁵⁴ In 2015, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court held that this theory was a viable way to prove discrimination under the FHA.¹⁵⁵ A disparate impact claim is supposed to be more practical for plaintiffs trying to prove discrimination, since defendants can always hide discriminatory intent.¹⁵⁶ To prove disparate impact, a court looks at whether: (1) there is a discriminatory effect stemming from the neutral policy, (2) the defendant's nondiscriminatory reasons are legitimate, and (3) if any alternatives can serve those means.¹⁵⁷

However, there is a high threshold when using disparate impact to prove appraisal discrimination. Courts consider four factors in a disparate impact case: "1) the strength of the plaintiff's statistical showing; 2) the legitimacy of the defendant's interest in taking the action . . .; 3) some indication . . . of discriminatory intent; and 4) the extent to which relief could be obtained by limiting interference by, rather than requiring positive remedial measures of the defendant."¹⁵⁸ Providing statistical data is the biggest hurdle for litigants. To prove

¹⁵³ See *Thomas*, 653 F. Supp. at 1339 (an expert witness has stated the appraisal was unjustifiably low, and even statistics provided showing where the defendants show where it has made loans it may be sufficient in some instances yet not in others, but there is a lack of clarity as per Steptoe of what about the additional evidence is sufficient).

¹⁵⁴ See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN.L. REV. 739, 784-87 (1993) (discussing how every circuit has approved some version of the FHA's discriminatory effects standard)

¹⁵⁵ *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities. Project, Inc.*, 576 U.S. 519, 545 (2015).

¹⁵⁶ Dubin, *supra* note 154, at 786.

¹⁵⁷ See *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977).

¹⁵⁸ See *Thomas*, 653 F. Supp. at 1340.

discriminatory impact there needs to be significant statistical data showing that the protected person's representation in the applicant pool is adversely affected compared to those generally accepted.¹⁵⁹ However, the policy may still be lawful if it is sufficiently justified.¹⁶⁰

For example, in *Saldana*, the plaintiff sued Citibank claiming that the minimum amount for the applicants' loans was discriminatory.¹⁶¹ They claimed the minimum would exclude Black communities because the minimums exceeded those neighborhood's home prices.¹⁶² The court found for Citibank stating that Saldana did not provide enough statistical evidence demonstrating a discriminatory impact on the protected class.¹⁶³ Yet, the type of evidence the court required in *Saldana* is difficult to obtain.¹⁶⁴ In addition, without such extensive and accurate data many of these cases fail in the summary judgment stage.¹⁶⁵ Due to the difficulty in obtaining specific data to substantiate disparate impact claims, courts continue to find against there being statistically significant differences between White and Black borrowers and homebuyers. Instead, the courts continue to find that there may be a failure to account for different variables.¹⁶⁶ However, acquiring data that accounts for all these variables would be expensive, require expert analysis and produce large data sets.¹⁶⁷ This data requirement is financially burdensome for plaintiffs but is needed to survive summary judgment.¹⁶⁸

Plaintiffs are often unsuccessful in appraisal discrimination cases because of the courts lack of guidelines for establishing disparate treatment and the difficulties plaintiffs face in

¹⁵⁹ *Id.*

¹⁶⁰ *See* 24 C.F.R. § 100.500(c)(3).

¹⁶¹ *Saldana v. Citibank, Fed. Sav. Bank*, No. 93 C 4164, 1996 WL 332451, at * 4 (N.D. Ill. 1996).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See* Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 819 (1995).

¹⁶⁵ *Id.* at 830.

¹⁶⁶ *Id.* at 807.

¹⁶⁷ *Id.* at 831.

¹⁶⁸ *Id.*

proving disparate impact.¹⁶⁹ Thus, the FHA’s reliance on suits to regulate lending discrimination is ineffective given the high threshold plaintiffs have to meet to survive summary judgment and how few plaintiffs successfully establish appraisal discrimination. Therefore, not only is the appraisal process rife with opportunity for racism but then the enforcement mechanism available sets a difficult threshold to meet leaving individuals with few remedies.

IV. The way forward: current proposed solutions by the PAVE Action Plan and the solutions not tackled therein

Until recently, the government and the appraisal industry have neglected to examine the impact that appraisal discrimination has on Black and Brown individuals and neighborhoods. However, growing research on the subject has magnified the government’s and industry’s focus on this issue.¹⁷⁰ On June 1, 2021, the White House directed HUD to lead an interagency initiative to address inequity in appraisals.¹⁷¹ On March 2022, the taskforce called Property Appraisal and Valuation Equity (PAVE), chaired by HUD secretary Marcia Fudge and Domestic Policy Counsel director Susan Rice, released an Action Plan outlining some causes and consequences of appraisal discrimination along with solutions.¹⁷² As part of the Action Plan, PAVE worked with federal, state, and local agencies to promptly implement changes.¹⁷³ However, the Action Plan is limited to actions that “can be undertaken by federal agencies using existing authorities.”¹⁷⁴ The limitation of the plan means that although recommendations were made to the appraisal industry, there is no enforcement mechanism to push the industry to undertake these changes.

¹⁶⁹ See *Thomas*, 653 F. Supp. at 1340 (the court found the statistical evidence was not enough but did not provide exactly what they wanted to see out of the statistical evidence, only that it was nonexistent).

¹⁷⁰ See PAVE: INTERAGENCY TASK FORCE ON PROPERTY APPRAISAL AND VALUATION EQUITY, <https://pave.hud.gov/> (government website specifically focused towards addressing appraisal discrimination as part of a White House initiative).

¹⁷¹ INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 1.

¹⁷² *Id.*

¹⁷³ *Id.* at 9.

¹⁷⁴ *Id.* at 1.

Prior to the taskforce, the Appraisal Institute posed solutions that were primarily focused on commitment to diversity initiatives.¹⁷⁵ The Taskforce's Action Plan addresses an extensive number of issues that exist within the appraisal industry. The Action Plan is a positive step in rectifying the discrimination in the industry. Nonetheless, the Action Plan does not go far enough to remedy discrimination. In addition to the solutions in the Action Plan, the government needs to consider reparations as a method to redress past discrimination. Further, guidelines should be implemented to standardize the choosing of comps for appraisals. Although standardizing comparable selection is one way to attempt to curb appraiser's bias, the industry would also benefit from a new appraisal system where there is a blind, double appraisal component to provide oversight of appraisers. A new appraisal process would help cleanse the industry of an approach that has inherently racist roots.

A. The PAVE Action Plan

The PAVE Action Plan contains a list of the progress the Task Force made since August 2021, and includes future commitments, as well as additional policy efforts that will be undertaken or are required.¹⁷⁶ The Task Force began to make changes prior to the release of the Action Plan.¹⁷⁷ In addition, HUD, along with the Federal Housing Finance Agency (FHFA), entered into an agreement to strengthen enforcement of the FHA.¹⁷⁸ Furthermore, the Action Plan outlines Task Force commitments in multiple areas. The two commitments relevant to this paper are: (1) giving enforcement agencies better data to study and monitor valuation bias, and (2) building a diverse appraiser workforce.¹⁷⁹ Lastly, the Task Force also vowed to devote more

¹⁷⁵ See APPRAISAL INSTITUTE, COMMITMENT TO DIVERSITY (May 1, 2021), <https://www.appraisalinstitute.org/appraisal-profession/commitment-to-diversity/>.

¹⁷⁶ INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 19.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 20.

¹⁷⁹ *Id.* at 7.

research efforts to enhance the sales comparison approach and look for alternatives to traditional appraising methods.¹⁸⁰

One of the issues discussed in Part II is how the FHA does not have specific language barring appraisal discrimination. Instead, there are provisions used to imply that it is unlawful.¹⁸¹ In February 2022, the DOJ filed a statement of interest to update the FHA to include language explicitly prohibiting appraisal discrimination.¹⁸² This statement would create a liability under the FHA for those appraisers who are engaging in discriminatory behavior. The Action plan, in conjunction with clarifying the FHA, is also looking to enhance enforcement.¹⁸³

However, the Action Plan does not describe how the additional enforcement would work. If the new enforcement still requires private suits, then the enforcement would continue to fail as all the issues with private suits outlined in this paper would still exist. Nonetheless, the increased focus in enhancing enforcement is important to those private litigants seeking to prove appraisal discrimination. If the current process is so onerous on private litigants, enhanced enforcement could ease the process for litigants or altogether provide an alternative to private suits.¹⁸⁴ If the Action Plan's enforcement mechanism can empower consumers who have experienced appraisal discrimination, then the appraisal industry is likely to see a decrease in future discrimination.

The PAVE Action Plan also highlights how the lack of appraisal discrimination data harms investigators and prevents federal agencies from “establishing metrics that could be used to identify appraisal bias where it occurs.”¹⁸⁵ There is increased importance on datasets that may

¹⁸⁰ *Id.*; See *infra* Part IV.C (discussing alternative appraisal methods).

¹⁸¹ See *supra* notes 106-109 and accompanying text (discussing sections 3605 and 3604).

¹⁸² INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 21.

¹⁸³ *Id.* at 20.

¹⁸⁴ See *supra* Section III.B.

¹⁸⁵ *Id.* at 39.

help prove when and where appraisal discrimination occurs specially for enforcement or private litigation purposes.¹⁸⁶

The Action Plan seeks to make appraisal-related data more widely available. Doing so would make deficiencies in the enforcement easier to detect. If enforcement agencies carry this data and share it with one another as the plan proposes,¹⁸⁷ it will be easier to identify where current guidelines are failing. Further, this dataset could help determine where guidelines need to be amended to rectify for biases. Private litigants could utilize this data to strengthen their case and make it easier to show disparate impact. Since litigants need statistical data in a disparate impact claim to show they are affected, this dataset would provide the statistical data they need without the incurred cost of doing it themselves. Litigants' lack of access to, and difficulty in, obtaining this data has hindered their ability to obtain success in appraisal discrimination suits. This data would allow litigants to show during litigation how the underappraisal is primarily driven by discrimination.

Another solution that the Appraisal Institute is currently working on is expanding diversity initiatives.¹⁸⁸ The Action Plan highlights the importance of expanding the appraising industry's diversity to mitigate appraisal discrimination. The Appraisal Institute and HUD are working on equity, diversity, and inclusion solutions with other groups and agencies.¹⁸⁹ For example, they are recruiting more appraisers of color in addition to conducting unconscious bias courses.¹⁹⁰ However, the impact of Diversity, Equity, and Inclusion (DEI) initiatives depends on

¹⁸⁶ *Id.* at 39.

¹⁸⁷ See INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 38.

¹⁸⁸ See APPRAISAL INSTITUTE, COMMITMENT TO DIVERSITY (May 1, 2021), <https://www.appraisal institute.org/appraisal-profession/commitment-to-diversity/>.

¹⁸⁹ See INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 21.

¹⁹⁰ See APPRAISAL INSTITUTE, *supra* note 188.

how the initiatives are managed.¹⁹¹ Studies show that results happen when groups actively implement programs that serve as a stopgap to bias hiring.¹⁹² Therefore, DEI training is necessary, but by itself is not sufficient without a change in actual policies and procedures that force people to act in inclusive ways.¹⁹³

As part of the PAVE Action Plan, the Task Force aims to lower barriers to the appraiser industry.¹⁹⁴ The current requirements to receive the credential's to be an appraiser are extensive sometimes necessitating up to 3,000 hours of unpaid experience.¹⁹⁵ This requirement is difficult for people of color that due to socioeconomic reasons are often unable to dedicate this type of time to unpaid experiences.¹⁹⁶ The Task Force is asking the appraisal organizations, such as the Appraisal Institute which sets appraiser's standards, to consider lowering these extensive time requirements.¹⁹⁷ In addition, the Task Force is asking the appraisal organizations to develop a comprehensive exam in lieu of college degrees and other higher education requirements.¹⁹⁸ By creating alternative requirements it would allow for more applicants to become involved in the industry.¹⁹⁹ Building a more diverse workforce would allow for new ideas to flow into the industry, thus creating a lower likelihood of negative bias permeating when appraising homes in communities of color. Thus, as part of rectifying appraisal discrimination, the appraiser industry needs to move towards being a more inclusive industry. Creating an inclusive industry allows for more appraiser bias to be checked, lessening the undervaluation of homes in Black

¹⁹¹ Maureen Giovannini, *What Gets Measured Gets Done: Achieving Results Through Diversity and Inclusion*, 27 J. FOR QUALITY & PARTICIPATION 21, 22 (2004).

¹⁹² *Id.* at 22-5.

¹⁹³ *Id.* at 25.

¹⁹⁴ See INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 31.

¹⁹⁵ *Id.* at 31.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 32.

neighborhoods and Black-owned homes. Diversity in the industry is one way to move the industry forward, but it is also important to explore rectifying past appraisal discrimination to account for the loss of wealth the discrimination has caused Black families.

B. Exploring reparations for previous appraisal discrimination

Historically, appraisals placed a “lid” on black success, home ownership, and intergenerational wealth building. African Americans have been “locked out” of homebuying which is one of the few ways to create intergenerational wealth.²⁰⁰ Home financing in the Black community was capped by the Federal Housing Administration’s appraisers who cut off Black Americans sources to new investments.²⁰¹ The Black community’s inability to obtain financing thus caused homes to deteriorate and lose value compared to homes that were not in redlined areas.²⁰² As a result, Black people have lost out on hundreds of years of wealth accumulation.²⁰³ As such, a redress of past wrongs needs to occur as “[t]he discount rate on black humanity has been enormous.”²⁰⁴ To mitigate the disparity, reparations for appraisal discrimination is a necessary part of rectifying the appraisal process.²⁰⁵

In a 2007 journal article, Jonathan Kaplan and Andrew Valls argued that recent housing and lending discrimination should constitute as the basis for Black reparations.²⁰⁶ They argue the focus should be in current disadvantages that can also be quantified.²⁰⁷ The wealth gap is heavily

²⁰⁰ See INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 1.

²⁰¹ See WILLIAM A. DARITY & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 258 (2020).

²⁰² *Id.* at 259.

²⁰³ *Id.* at 268.

²⁰⁴ *Id.* at 219.

²⁰⁵ This paper is not implying that this is the only form of reparations that should be explored. Instead, that this can be one way that a particular group of people, in this case black homeowners, could receive reparations if they have been discriminated against. In this paradigm, there would need to be other forms of reparations for those black individuals who are not and have not been homeowners; See Coates, *supra* note 32 (for further discussion on the case for reparations).

²⁰⁶ See DARITY & MULLEN, *supra* note 201, at 258.

²⁰⁷ *Id.*

correlated with home ownership.²⁰⁸ Kaplan argues, however, that perhaps the reparation can be paid through policies that help close the wealth gap as opposed to payments to individuals. Their focus is to provide some possibilities that help generate wealth.

However, policy alone is insufficient. For those who have suffered housing or appraisal discrimination, there is in fact a number that can be associated with their loss. For example, those who have suffered appraisal discrimination would have an appropriate number based on what their house should have been valued at and what it was. However, a higher appraisal does not mean the house will sell for that amount which presents some difficulties in evaluating the amount lost. On the other hand, if the data were to show a devaluation because of appraisal discrimination, it would at least become a starting place to assess the reparation amount. The starting point would be determining the range a house could have sold for. After obtaining the starting number, those calculating for reparations could adjust the number by considering market conditions at the time of sale or purchase along with other factors. From this point, the number could be adjusted by the percentage that Black homes are often undervalued compared to similar White homes in the vicinity, resulting in a set number for reparations.²⁰⁹

Moreover, in doing this exercise, one cannot be concerned with the exact dollar amount, but instead as close to fair as numerically possible. Providing reparations would also be a welcomed alternative instead of going through litigation to obtain damages. Further, reparations would allow those who could show that they received a discriminatory appraisal that they are owed the difference. Though this does not solve appraisal discrimination, it begins the

²⁰⁸ See INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 17.

²⁰⁹ See Char Adams, *Evanston is the First U.S. City to Issue Slavery Reparations. Experts Say It's a Noble Start*, NBCNEWS (Mar. 26, 2021), <https://nbcnews.com/news/nbcblk/evanston-s-reparations-plan-noble-start-complicated-process-experts-say-n1262096> (Evanston, Illinois became the first U.S. state city to issue reparations by issuing housing grants. The grants are to go towards home repairs or property costs. Though critics say it would be better to give money directly to individuals, the grants are to address discriminatory housing policies in particular, with a historical report of the city's policies "identified housing as the strongest case for reparations").

rectification period of adjusting the past instances of discrimination. In addition to reparations, to make meaningful change in the appraisal industry, there need to be alternative methods that replace the existing appraisal approach which carries such heavy history of discrimination.

C. Exploring a new appraisal system

In the Taskforce Action Plan, HUD posits a number of solutions ranging from strengthening appraisal datasets to reduce the ability for appraisers to apply subjective criteria.²¹⁰ Many of these solutions would provide checks in the appraisal industry to limit appraiser bias, especially because the current appraisal method is vulnerable to appraiser's biases. However, the existing appraisal method may never fully disentangle itself from its inherently racist roots. Thus, appraiser groups have looked to find new, innovative ways to conduct appraisals. For example, the Brookings Institute and Ashoka²¹¹ have an initiative that will award up to \$1 million to the person or organization that can come up with an innovative new alternative for home appraisals focused on reducing racial inequality.²¹²

Since there are no guidelines for choosing comps, appraisers' biases easily seep into their comp selections and appraisals. Thus, a new appraisal method would need to limit the ability of an appraiser's bias to interfere with their appraisals. There are two potential ways to tackle this issue. First, appraisal manuals should be standardized, like other parts of the industry were standardized in the 1980s, to include a standard comp selection system. Second, a blind, double-appraisal system should be instituted to create oversight over single appraisers.

²¹⁰ INTERAGENCY TASK FORCE ON PROP. APPRAISAL AND VALUATION EQUITY, *supra* note at 68, at 7.

²¹¹ Andre M. Perry & Stuart Yargur, *Introducing the Brookings and Ashoka Collaborative Innovation Challenge: Valuing Homes in Black Communities* (Oct. 28, 2021), <https://www.brookings.edu/blog/the-avenue/2021/10/28/introducing-the-brookings-and-ashoka-collaborative-innovation-challenge-valuing-homes-in-black-communities/>.

²¹² Brentin Mock, *What It Will Take to Close the Race Gap in Home Appraisals*, BLOOMBERG.COM (Mar. 3, 2021), <https://www.bloomberg.com/news/articles/2021-03-03/appraisers-acknowledge-bias-in-home-valuations>.

Currently, there are many ways appraisers select their comps, as per the study discussed in Part II. Some examples noted in the study include one appraiser who would pick comps that were within one-mile radius.²¹³ Other appraisers would use their own made-up criteria like staying in the same subdivision but going back in time to find similar homes. Another variation was where the appraiser focused on the racial and socioeconomic background of a neighborhood instead of the structural similarities of the home and community.²¹⁴

When appraisers are allowed to pick their own comps there is a risk that they are not looking only at objective factors to pick those homes. Even though markets, subdivisions and communities look different throughout the country, there is a viable way to create set standards for selecting comparables. One potential way to create such set guidelines would be to first have the appraiser mandatorily select a home within a mile radius that has a similar composition. In this case, similar composition would entail similar square footage within a range, similar number of rooms, bathrooms, surrounding amenities and features of the home. When comparing against this nearby comp, the point would be assigned based on their similarities in features and factors. For instance, if both houses have built in additions, then they would each get a point under the ‘additions’ factor. If one house has more additions, then they would get additional points for those additional factors within that section. Then, if the total points fall under a range, then the houses are similar enough to be appropriate comparables in terms of price.

This is only one of the many ways that the appraisal industry could work towards building a more objective appraisal process. Though it may be initially burdensome to figure out the potential parameters, standardizing comp selections is necessary to minimize the discrimination risk. Another method could include selecting a home that is within a 1-mile

²¹³ Korver-Glenn, *supra* note 13, at 646.

²¹⁴ Korver-Glenn, *supra* note 13, at 647.

radius, then selecting a second comparable within a 5-mile radius that may be more structurally similar than the 1-mile radius home. Then, selecting a third comparable where the house is similar in structure and neighborhood. Then, after comparing how close the original home is to each of the three comparables a range band could be created for the value of the home. The risk of continuing to assess neighborhoods is that then it will perpetuate selections based on racialized opinions of neighborhoods. However, this should be tapered by not selecting homes based on neighborhoods in at least two of the selected comparables, as to weigh out the potential for devaluation. The point of putting forth these examples is not just to outline potential solutions but to highlight that there are creative ways the appraisal organizations can explore standardizing this the comparables selection.

The value of a home can be largely attributed to other neighborhood resources like schooling, crime statistics and location.²¹⁵ However, statistical analysis show that even when accounting for property and neighboring characteristics, it does not fully explain the disparity in home prices between the majority-White neighborhoods and majority-Black neighborhoods.²¹⁶ A way to solve for this disparity occurring between White and Black neighborhoods is to add a blind appraisal component to the process.

A blind appraisal where one appraiser gives an estimated number utilizing just schematics of the house, without neighborhood or personal data, can be one way to set a baseline for the home valuation. Currently, appraisers will choose comparatives but also look inside the house to assess the internal features of the home.²¹⁷ An innovative way to conduct an appraisal to avoid the risk of appraiser bias due to knowledge of the home owner's race, is to begin with a

²¹⁵ PERRY, *supra* note 55, at 5.

²¹⁶ *Id.*

²¹⁷ Korver-Glenn, *supra* note 13, at 644.

blind baseline. First, an appraiser would only get the basic information of the home. For example, the appraiser would obtain the median income for the neighborhood, neighborhood amenities and schematics of the house, meaning the number of rooms, bathrooms, built-ins, and additions. In addition, the appraiser would get a statement from, both purchasing and selling parties', realtor on the overall condition of the house. Based on that information, the appraiser would provide a range for the house. This first appraisal would be the baseline to avoid being tainted from certain neighborhood information.

Then, an in-person, regular appraisal could occur utilizing the existing method. If the price ranges are very different from one another, within a certain standard of error, then this would need to go to a committee where they would need to derive reason for the difference in appraisal prices. The committee would be tasked with providing final range to the individuals and the bank. This documentation would then need to be provided to the homeowners or those seeking the loans. This process, though lengthy, would allow for multiple checks and balances on the process, as it would require more people to question the validity of these appraisals.

Though there is a risk that appraisers would likely support and agree with each other, the ability of the homeowner to have this report would allow them to have data to use in case of filing an appraisal complaint. This enhanced oversight could make the appraisal process lengthier and increase its cost, potentially making it a less desirable option. Nevertheless, the lengthier process and increased cost should mean the home will be given a fair valuation. The fair valuation would protect the equity gained by Black homeowners or those homes in Black neighborhoods. Thus, paying more for new appraisal process is appropriate when the tradeoff is

gaining thousands more in home equity.²¹⁸ Therefore, the need for protecting home equity for Black individuals and Black neighborhoods necessitates a new appraisal process even if it means a longer or slightly more expensive process. There is not one set way the new appraisal process should look like, but the goal should be to remove discrimination and create a fairer home financing system.

V. Conclusion

People of color seeking to establish roots is part of the American Dream. Part of that dream is the ability to purchase homes and build equity without fear of barriers due to the color of one's skin. Appraisal discrimination has continuously robbed Black individuals and other people of color from leveraging homeownership to build wealth by growing home equity.²¹⁹ Furthermore, the current remedies Black individuals have in order to combat appraisal discrimination have been unsuccessful in curbing appraisal discrimination. By focusing on private litigation, the courts have placed a high threshold for plaintiffs leading to little actual enforcement or repercussions for discriminatory appraisals. Lastly, the appraisal process has not been revamped which has allowed for appraisers to continue to infuse their appraisals with discriminatory behavior, whether subconsciously or consciously.

The new focus on appraisal discrimination highlights the government's acknowledgment that Black homeowners have financially suffered due to discrimination in this process. This new focus on appraisal discrimination provides an opportunity to look to the past and right previous wrongs. The government's commitment to addressing appraisal discrimination has also resulted

²¹⁸ This paper does not explore the additional impact on gentrification that pricing out individuals or making home less affordable for people of color in what would previously be considered accessible neighborhoods. This would be a topic that would need to be discussed by scholars as these homes and neighborhoods increase in price.

²¹⁹ STUART, *supra* note 20, at 182.

in the PAVE Action Plan which outlines an extensive number of recommendations and actions already taken by multiple agencies. Though many of these recommendations and actions will provide some relief and consequently lessen appraisal discrimination, there is still a long way to go in rectifying a system that has such extensive discriminatory roots. Solutions ranging from standardizing comps to overhauling the appraisals process are imperative in reducing discrimination in the appraisal industry. All these solutions need to be taken together to meaningfully rectify a process and industry that has decades long history of stifling Black homeownership and wealth building. If appraisers continue to allow their biases to influence home valuations and the FHA does not provide proper protections, then appraisal discrimination will persist. Yet, the ability to make meaningful change exists and can be implemented in conjunction with the current changes being made.