8-25-2023

Appraisal Discrimination: Five Lessons for Litigators

Heather R. Abraham
University at Buffalo School of Law

APPRAISAL DISCRIMINATION: FIVE LESSONS FOR LITIGATORS

*Heather R. Abraham**

ABSTRACT

Appraisal discrimination not only persists, but its influence has actually increased in some housing markets. New studies document how contemporary appraisal methods operate as systemic racism, such as how appraisers select from a narrower set of comparable properties when appraising homes in predominantly Black neighborhoods. Recent events have renewed public attention to appraisal discrimination, from shocking news stories to a new multiagency federal task force. In tandem, a new wave of litigation has emerged.

This Article examines litigation as one element of a multifaceted approach to combatting appraisal discrimination. After examining the weaknesses of the regulatory framework governing appraisals, this Article turns to the role of the litigator, offering a primer on effective appraisal discrimination litigation. Drawing on interviews with fair housing litigators, it explores the landscape of these cases and their empirical outcomes, identifies the greatest impediments to successful litigation, and offers concrete strategies for overcoming those challenges.

TABLE OF CONTENTS

https://doi.org/10.25172/smulr.76.2.3

* Associate Professor of Law and Director of the Civil Rights & Transparency Clinic, State University of New York at Buffalo School of Law. I'm particularly grateful to the advocates who are trailblazing at the frontiers of appraisal discrimination enforcement, among them Liza Cristol-Deman, Julia Howard-Gibbon, Maria Callahan, Caroline Peattie, Amy Nelson, Scott Chang, Justin Monteiro, Maureen Yap, Shivaughn Ferguson, John Relman, Soohyun Choi, and Gabriel Diaz. I'm also deeply grateful to the experts who provided feedback on this Article, including Stephen Dane, Robert Schwemm, Morgan Williams, Florence Wagman Roisman, Steve Tomkowiak, and Peter Christensen. Additionally, thank you to Federal Reserve Bank of Chicago economists Nathan B. Anderson and Jonathan Rose, who invited me to present my research and offered critiques to improve this Article. Finally, I'm indebted to Maura Graham for her diligent research assistance.

I. INTRODUCTION

"It sinks in that what was devaluing my home was me."
–Carlette Duffy, Indianapolis, IN

"I was devaluing the home just by sitting in it, just by living my life, just by paying my mortgage, just by raising my son there."
–Abena Horton, Jacksonville, FL

IN 2016, Black homeowners Paul Austin and Tenisha Tate-Austin purchased a home in Marin City, California, near San Francisco.[1] A destination for Black migrants during the Great Migration, Marin City remains one of the most racially segregated areas in the region.[2] After purchasing their home for $550,000, the Austins made extensive renovations—a new foundation and retaining wall that added significant square footage, a new deck, and substantial appliance upgrades.[3] Three years later, the home was appraised at $1.45 million.[4] They decided to refinance to take advantage of historically low interest rates.[5] The lender requested a new appraisal, which came back at $995,000.[6] Suspicious about the low estimate, the Austins requested a new appraisal.[7] The lender agreed.[8] Before the new appraisal, the Austins decided to "white-wash" their

1. First Amended Complaint at 1–2, Tate-Austin v. Miller, No. 3:21-cv-09319 (N.D. Cal. May 6, 2022) [hereinafter Tate-Austin Complaint], ECF No. 43.

2. *See, e.g.*, Liam Dillon, *Marin County Has Long Resisted Growth in the Name of Environmentalism. But High Housing Costs and Segregation Persist.*, L.A. TIMES (Jan. 7, 2018, 12:05 AM), www.latimes.com/politics/la-pol-ca-marin-county-affordable-housing-20170107-story.html [https://perma.cc/H82H-BCMD] ("Today, Marin City is physically, economically and racially divided from the rest of the county. U.S. Highway 101 separates it from well-heeled Sausalito, a city just a mile away. Marin City's median household income of $40,000 is less than half the countywide median. Black[ ] [residents] make up less than 4% of Marin County's population, but almost 40% of Marin City's."); Tate-Austin Complaint, *supra* note 1, at 4 (citing U.S. Census data); ADVANCEMENT PROJECT, RACE COUNTS: ADVANCING OPPORTUNITIES FOR ALL CALIFORNIANS 42 (2017), www.racecounts.org/wp-content/uploads/2017/11/Race-Counts-Launch-Report-digital-1.pdf [https://perma.cc/5B28-4HS8].

3. Tate-Austin Complaint, *supra* note 1, at 11–12.

4. *Id.* at 12.

5. *Id.*

6. *Id.* at 13.

7. *See id.* at 19.

8. *See id.*

home by removing family photos depicting them as Black, replacing them with photos of white people.[9] They also asked a white friend to pose as the homeowner.[10] The new appraised value was $1,482,500—an increase of nearly 50 percent, or $487,500.[11] Working with a fair housing center, the Austins sued the low-balling appraiser, appraisal company, and appraisal management company for race-based discrimination.[12]

The Austins' experience is all too common.[13] News stories have chronicled this phenomenon in markets across the country.[14] New research has exposed the persistent, systemic nature of the racial appraisal gap, sometimes referred to as the "value gap."[15] Moreover, fair housing advocates

---

9. *Id.*
10. *Id.*
11. *Id.* at 19–20.
12. *See id.* at 22–26.
13. *See, e.g.*, Antonio Planas, *After She Concealed Her Race, Black Indianapolis Owner's Home Value More Than Doubled*, NBC NEWS (May 17, 2021, 7:28 PM), www.nbcnews.com/news/us-news/after-concealing-her-race-black-indianapolis-owner-s-home-value-n1267710 [https://perma.cc/G99B-FHEQ] (explaining that the homeowner's low appraisal is "not unique").
14. *See, e.g.*, Julian Glover, *West Oakland Family Beats Low Appraisal by $70,000 After Help From ABC7 News*, ABC7 NEWS (Apr. 23, 2021), https://abc7news.com/black-homeowner-problems-california-bay-area-housing-discrimination-minority-homeowner ship-anti-black-policy-sf/10542069 [https://perma.cc/S8UQ-TJZ6]; Troy McMullen, *For Black Homeowners, a Common Conundrum With Appraisals*, WASH. POST (Jan. 21, 2021, 8:00 AM), www.washingtonpost.com/realestate/for-black-homeowners-a-common-conundrum-with-appraisals/2021/01/20/80fbfb50-543c-11eb-a817-e5e7f8a406d6_story.html [https://perma.cc/QZ5Y-PFSK]; Lucy May, *This Black Family's Home Appraisal Grew by $92,000 After They Removed All Signs of Their Race*, WCPO (Aug. 26, 2021, 3:39 PM), www.wcpo.com/news/our-community/this-black-familys-home-appraisal-grew-by-92-000-after-they-removed-all-signs-of-their-race [https://perma.cc/7WQ8-4HT3]; Natalie Moore, *Racial Inequality in How Chicago-Area Homes are Valued is Increasing*, WBEZ CHI. (May 17, 2021, 6:00 AM), www.wbez.org/stories/racial-inequality-in-how-chicago-area-homes-are-valued-is-increasing/241643ab-6cba-4646-9660-af4f26acc6d8 [https://perma.cc/P4TT-Y2TR]; Steve Crocker, *The Black Tax: Race and Housing*, WBRC (Feb. 25, 2021, 12:59 PM), www.wbrc.com/2021/02/25/black-tax-race-housing [https://perma.cc/FE7T-KDYT]. Additional news stories are on file with the author, including thirteen recent instances of potential appraisal discrimination across eight states.
15. *See infra* notes 35–43 (citing studies). Critically, not all recent studies use actual appraisal reports as the primary dataset. Some studies rely on appraisal reports, while others rely on other valuation methods like tax assessments, census surveys, and self-reported values. Alternative valuation methods can be useful for appraisal research and may serve as a proxy for appraisals, but they are not exact substitutes and can lead to misleading conclusions about appraisals. One reason researchers use proxy data is the lack of publicly available data on actual appraisals. In recent years, researchers have spoken out about the significant need for the federal government to release appraisal data. *See, e.g.*, Gregory D. Squires, Speaker at the 34th Annual Fair Housing Workshop Series: Fair Housing Momentum, Session B: Discriminatory Appraisals (Apr. 28, 2022) (describing the need for HMDA-like data for appraisals and critiquing the PAVE Task Force's final report that failed to call for public release of this data). Researchers, policymakers, investigative reporters, and others would be better served if the government released data on the census tract of appraised properties, the appraisal estimate, the sale price, and whether there was a reconsideration of value and its outcome. Data would also benefit institutional consumers of appraisals, such as municipalities, universities, hospitals, nonprofit lenders, and others seeking work with appraisal companies with good track records.

The Federal Housing Finance Agency recently released one new dataset. *See FHFA Publishes New Uniform Appraisal Dataset (UAD) Aggregate Statistics Data File*, FED. HOUS. FIN. AGENCY (Oct. 24, 2022), www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Pub-

and the appraisal industry itself have released policy reports and hosted events to draw attention to this long-overlooked problem. In 2021, the federal government established the Interagency Task Force on Property Appraisal Valuation Equity (PAVE), which has issued a government-led "Action Plan" with policy recommendations.[16] Concurrently, a new wave of litigation has also emerged, consisting of a small but growing body of judicial and administrative complaints alleging appraisal discrimination under federal and state law.[17]

Appraisal discrimination has far-reaching implications. A widespread pattern of undervaluation affects both individual households and neigh-

---

lishes-New-UAD-Aggregate-Statistics-Data-File.aspx [https://perma.cc/U22M-VZ5Y]. Researchers have used this newly available dataset as another basis to document the prevalence of the appraisal gap. *See* Junia Howell & Elizabeth Korver-Glenn, *Appraised: The Persistent Evaluation of White Neighborhoods as More Valuable Than Communities of Color*, ERUKA (Nov. 2, 2022), nationalfairhousing.org/wp-content/uploads/2022/11/2022-11-2_Howell-and-Korver-Glenn-Appraised.pdf [https://perma.cc/N77J-G5NH] (relying on the newly released Uniform Appraisal Dataset from the FHFA, which "includes more than 47 million appraisal reports gathered from licensed appraisers between 2013 and the second quarter of 2022").

16. PAVE, ACTION PLAN TO ADVANCE PROPERTY APPRAISAL AND VALUATION EQUITY 1 (2022) [hereinafter PAVE ACTION PLAN], pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf [https://perma.cc/B22S-VMTD]; *see also* Robin Lovelace, *HUD News in Review: December 29, 2021*, AFFORDABLE HOUS. ONLINE NEWS (Dec. 29, 2021), affordablehousingonline.com/blog/hud-news-in-review-12-29-2021 [https://perma.cc/DB2V-3HGA]; U.S. Dep't of Hous. & Urb. Dev., *HUD Looks Back at 2021 Accomplishments*, RISMEDIA (Jan. 3, 2022), www.rismedia.com/2022/01/03/hud-looks-back-2021-accomplishments [https://perma.cc/7U49-FWQA]; Marcia L. Fudge (@SecFudge), TWITTER (July 29, 2021, 2:57 PM), twitter.com/SecFudge/status/1420835886258954241?s=20 (announcing the creation of the PAVE task force). HUD has also created a Learning Pathway for "fair housing practitioners and others [to] learn about appraisals and appraisal bias." UNDERSTAND RACIAL BIAS IN APPRAISALS, U.S. DEP'T OF HOUS. & URB. DEV., www.hudexchange.info/trainings/learning-pathways/understand-racial-bias-in-appraisals/?utm_source=HUD+Exchange+Mailing+List&utm_campaign=0284a21a5f-New-LP-Understand-Racial-Bias-in-Appraisals&utm_medium=email&utm_term=0_-0284a21a5f-%5BLIST_EMAIL_ID%5D [https://perma.cc/4M8Z-PMKF].

17. The three currently pending federal cases are *Bailey v. Santander Bank, N.A.*, No. 3:23-cv-00129 (D. Ct.) (filed 2023); *Connolly v. Lanham*, No. 1:22-cv-02048 (D. Md.) (filed 2022); *Washington v. Wells Fargo Bank*, No. 1:22-cv-00764 (M.D.N.C.) (filed 2022). Another case recently settled. *See* Tate-Austin v. Miller, No. 3:21-cv-09319 (N.D. Cal.) (filed 2021). Additionally, complainants have filed 159 appraisal-related administrative complaints with the U.S. Department of Housing and Urban Development (HUD). For a discussion of the substantial body of pending HUD administrative complaints, see *infra* note 238. This Article discusses various examples of administrative complaints. *See* Duffy v. Citywide Home Loans, FHEO No. 05-21-2271-8 (filed 2021) [hereinafter Duffy Complaint]; Robinson v. Lindsey, FHEO Nos. 09-21-5692-8, 09-21-6174-8, 09-21-5693-8, 09-21-6175-8 (filed 2021) [hereinafter Robinson Complaint], www.fairhousingnorcal.org/uploads/1/7/0/5/17051262/robinson_complaint_home_point_address_redacted_redacted.pdf [https://perma.cc/K4G9-E86P], www.fairhousingnorcal.org/uploads/1/7/0/5/17051262/fhanc_complaint_-_home_point_redacted.pdf [https://perma.cc/3MPU-KQR3], www.fairhousingnorcal.org/uploads/1/7/0/5/17051262/fhanc_complaint_-_broker_solutions.redacted.pdf [https://perma.cc/2CYV-UZWB]; HUD v. JPMorgan Chase, FHEO No. 05-21-0635-8 (filed 2021) (HUD pursued and settled the case on behalf of the original complainant); Rich Lord, *"What Changed in That Time?" Two Home Appraisals, 3 Days and $36,000 Apart, Spur a Housing Bias Complaint*, PUBLICSOURCE (May 23, 2022), www.publicsource.org/unbalanced-pittsburgh-appraisal-bias-fair-housing-partnership-complaint-hud [https://perma.cc/CW3K-ZX3W] (discussing a homeowner's complaint against an appraisal company filed with HUD); *see also infra* Part III.

borhoods. At the household level, homeownership "is the primary tool for building wealth" and "plays a bigger role in creating wealth for Black families than it does for white families."[18] Undervaluation undermines a family's wealth accumulation across generations and can affect entire neighborhoods.[19] "Each instance of a lower purchase price becomes a candidate for the next appraiser to choose as a comparable sale for the next appraisal in the community, carrying the impact of the lower value forward."[20] "Over time, even a slight imbalance of undervaluation can have a significant effect on the property values in a community."[21] "This effect can hinder families in that community from leveraging equity to pay for college, pay for repairs, or use as a buffer during financial hardship. Reduced property values can also diminish the property tax revenue that funds the maintenance and improvement of community schools and amenities."[22]

On a larger scale, appraisal discrimination reinforces housing segregation,[23] which has a compounding, inequitable effect across countless areas of life.[24] Neighborhood segregation engenders other racial inequities and—in a cyclical fashion—breeds more segregation.[25] A steep cost, the consequences of segregation affect virtually all aspects of American life.[26] Among the consequences, segregation drives the homeownership gap and racial-wealth gap, reduces metropolitan GDP, and relentlessly undermines access to many opportunities in life, from education to health care, which results in unequal health outcomes.[27] "Racial segregation poses se-

18. ALANNA MCCARGO & JUNG HYUN CHOI, URB. INST., CLOSING THE GAPS: BUILDING BLACK WEALTH THROUGH HOMEOWNERSHIP 1–2 (2020), www.urban.org/sites/default/files/publication/103267/closing-the-gaps-building-black-wealth-through-homeownership_1.pdf [https://perma.cc/4SRH-T3AJ].

19. PAVE ACTION PLAN, *supra* note 16, at 3.

20. *Id.*

21. *Id.* at 3–4.

22. *Id.* at 4.

23. *See, e.g.*, ELIZABETH KORVER-GLENN, RACE BROKERS: HOUSING MARKETS AND SEGREGATION IN 21ST CENTURY URBAN AMERICA 1–14 (2021) (describing the relationship between appraisal discrimination and segregation); MAUREEN YAP, MORGAN WILLIAMS, LISA RICE, SCOTT CHANG, PETER CHRISTENSEN & STEPHEN M. DANE, NAT'L FAIR HOUS. ALL., IDENTIFYING BIAS AND BARRIERS, PROMOTING EQUITY: AN ANALYSIS OF THE USPAP STANDARDS AND APPRAISER QUALIFICATIONS CRITERIA 16, 55, 59 (2022) [hereinafter NFHA APPRAISAL REPORT], nationalfairhousing.org/wp-content/uploads/2022/02/2022-01-28-NFHA-et-al_Analysis-of-Appraisal-Standards-and-Appraiser-Criteria_FINAL.pdf [https://perma.cc/EH49-SVRG] (same).

24. MARIA KRYSAN & KYLE CROWDER, CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION 3–7, 17–65 (2017).

25. *Id.*

26. *See, e.g.*, Heather R. Abraham, *Segregation Autopilot: How the Government Perpetuates Segregation and How to Stop It*, 107 IOWA L. REV. 1963, 1964–67 (2022) [hereinafter Abraham, *Segregation Autopilot*] (detailing segregation's enduring effects); Heather R. Abraham, *Fair Housing's Third Act: American Tragedy or Triumph?*, 39 YALE L. & POL'Y REV. 1, 3–4 (2020) [hereinafter Abraham, *Fair Housing's Third Act*] (collecting sources on the impact of housing segregation).

27. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 180–83 (2017) (describing how segregation perpetuates other racial inequities); *see also* SAM FULWOOD III, *The Costs of Segregation and the Benefits of the Fair Housing Act*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES,

rious problems for American society more broadly. Among many other problems, it is tied to ongoing wealth, educational, and health inequalities; intensified and more violent policing of Black and Latinx people; social isolation and lack of interracial contact; and sociopolitical conflict."[28] "Indeed, on almost any measure one can pick, outcomes for African-Americans are unambiguously worse—often dramatically worse—in the highly segregated areas."[29] "In other words, racial segregation is one of the key mechanisms at the core of systemic American racial inequality."[30] By contrast, greater integration tends to improve life outcomes, from job access and greater school integration to quality of public services, among others.[31] Moreover, research on neighborhood segregation shows that segregation undermines even the most well-designed social policies targeted at low-income households.[32] Indeed, virtually every appraisal case discussed in this Article arose in the context of segregated neighborhoods—with low-balled properties most commonly in predominantly non-white neighborhoods.[33] If residential segregation were reduced or eliminated, it would go a long way to ameliorate the appraisal discrimination phenomenon.

Responding to skeptics,[34] researchers have documented the persistence

---

CONSEQUENCES AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 40 (Gregory D. Squires ed., 2018) (discussing segregation's economic impact); MARISA NOVARA, ALDEN LOURY & AMY KHARE, METRO. PLAN. COUNCIL, THE COSTS OF SEGREGATION 4–5, 4 n.1 (2017), www.metroplanning.org/uploads/cms/documents/cost-of-segregation.pdf [https://perma.cc/FB3L-Y53R] (discussing segregation's impact on gross domestic product); GREGORY ACS, ROLF PENDALL, MARK TRESKON & AMY KHARE, URB. INST., THE COST OF SEGREGATION: NATIONAL TRENDS AND THE CASE OF CHICAGO, 1990–2010, at 20–27 (2017), www.urban.org/sites/default/files/publication/89201/the_cost_of_segregation_final.pdf [https://perma.cc/H8LJ-GGS8] (discussing segregation's impact on income, education, life expectancy, and homicide rates).

28. KORVER-GLENN, *supra* note 23, at 3.

29. RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 3 (2018); *see also Life Expectancy: Could Where You Live Influence How Long You Live?*, ROBERT WOOD JOHNSON FOUND., www.rwjf.org/en/library/interactives/whereyouliveaffectshowlongyoulive.html [https://perma.cc/W3K4-2SKY] (discussing segregation's effect on life expectancy); M. Gabriela Alcalde, *Zip Codes Don't Kill People—Racism Does*, HEALTH AFFS. FOREFRONT (Nov. 29, 2018), www.healthaffairs.org/do/10.1377/hblog20181127.606916/full [https://perma.cc/V6YS-BUMU] (same); *see generally* KRYSAN & CROWDER, *supra* note 24, at 3–7, 17–65 (discussing segregation's cyclical self-perpetuation).

30. KORVER-GLENN, *supra* note 23, at 3; *see generally* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 115–216 (1993) (describing segregation's role in the creation and perpetuation of an "underclass" based on race); ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 290–362 (4th ed. 2021) (discussing housing segregation based on race and income).

31. *See* KORVER-GLENN, *supra* note 23, at 4.

32. *See, e.g.*, KRYSAN & CROWDER, *supra* note 24, at 3–7.

33. *See infra* Part III.

34. *See, e.g.*, Edward Pinto & Tobias Peter, *A Wasted Opportunity to Improve Housing Outcomes for Minorities*, WALL ST. J. (Mar. 28, 2022, 6:42 PM), www.wsj.com/articles/a-wasted-opportunity-to-improve-housing-outcomes-for-minorities-home-valuation-race-pave-11648498576?mod=opinion_lead_pos8 [https://perma.cc/SND2-PVCD] (questioning the prevalence of appraisal discrimination); *see also* Edward J. Pinto & Tobias Peter, *Comments on PAVE's "Action Plan to Advance Property Appraisal and Valuation Equity: Closing the Racial Wealth Gap by Addressing Mis-valuations for Families and Communities of*

of the racial appraisal gap in recent studies.[35] One study of home values across a thirty-five-year span concluded that the racial appraisal gap has substantially increased since 1980.[36] Contrary to the public perception that racial discrimination has subsided,[37] the study describes how and why the appraisal gap is growing.[38] Its findings suggest that the appraisal gap's staying power is largely attributable to how appraisers apply the

Color", AM. ENTER. INST. (Mar. 24, 2022), www.aei.org/wp-content/uploads/2022/03/AEI-Housing-Center-Comments-on-PAVE-report-FINAL-3.25.22.pdf?x91208 [https://perma.cc/9LTB-EW4W] ("[W]e should address the root cause for lower [socioeconomic status] instead of unsubstantiated claims of systemic bias and racism in the housing finance sector."); EDWARD PINTO & TOBIAS PETER, AEI HOUS. CTR., AEI HOUSING CENTER RESPONSE TO PERRY AND ROTHWELL 1 (2021), www.aei.org/wp-content/uploads/2021/12/AEI-Housing-Center-Response-to-Perry-and-Rothwell-2021-final.pdf?x91208 [https://perma.cc/VXZ5-VBRE] (criticizing the Brookings study, *infra* note 35, for overstating the influence of racial bias on the home valuation gap).

35. The following are three recent studies. As indicated in parentheses, not all studies rely on actual appraisal data. For a discussion of the lack of data, see *supra* note 15. MELISSA NARRAGON, DANNY WILEY, VIVIAN LI, ZHIQIANG BI, KANGLI LI & XUE WU, FREDDIE MAC, RACIAL AND ETHNIC VALUATION GAPS IN HOME PURCHASE APPRAISALS: A MODELING APPROACH 1–14 (2022) [hereinafter 2022 FREDDIE MAC STUDY], www.freddiemac.com/research/pdf/202205-Note-Appraisals-09.pdf [https://perma.cc/KW26-8V6G] (relying on actual appraisal data and sale prices); Junia Howell & Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980–2015*, 68 SOC. PROBS. 1051, 1051–69 (2021) (relying on self-reported home values from the American Community Survey and Decennial Censuses); ANDRE PERRY, JONATHAN ROTHWELL & DAVID HARSHBARGER, BROOKINGS, THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS 2–22 (2018), www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf [https://perma.cc/WA7X-MAMZ] (relying on self-reported home values from the American Community Survey). More recently, a report has been published relying on a newly released Uniform Appraisal Dataset from the Federal Housing Finance Agency. *See* Howell & Korver-Glenn, *supra* note 15.

36. Howell & Korver-Glenn, *supra* note 35, at 1051 (finding that racial composition of a neighborhood is an even "stronger determinant" of a home's appraised value in 2015 than in 1980). According to the study, the appraisal gap has doubled since 1980, with the difference in average home appraisals in predominantly white neighborhoods versus predominantly Black and Latinx neighborhoods was $164,000 in 2015, compared to $86,000 in 1980. *See id.* at 1062–67; *see also* KORVER-GLENN, *supra* note 23, at 117 ("At the very least, my data indicate that appraisers' ongoing use of the sales comparison approach recycles home values that were initially determined under the explicitly racist appraisal criteria used prior to the 1960s and 1970s . . . . My data suggest that appraisers have contributed to this growing inequality through their use of racist, if unofficial, appraisal logic and methods."); Brentin Mock, *A Neighborhood's Race Affects Home Values More Now Than in 1980*, BLOOMBERG (Sept. 21, 2020, 1:29 PM), www.bloomberg.com/news/articles/2020-09-21/race-gap-in-home-appraisals-has-doubled-since-1980 [https://perma.cc/GV58-VEPB] (describing results of the Howell and Korver-Glenn study).

37. Many Americans underestimate the contemporary impact of racism on life outcomes. *See, e.g.*, Frank Newport, *American Attitudes and Race*, GALLUP (June 17, 2020), news.gallup.com/opinion/polling-matters/312590/american-attitudes-race.aspx [https://perma.cc/KN76-ZB8B]; Lydia Saad, *Americans' Confidence in Racial Fairness Waning*, GALLUP (July 30, 2021), news.gallup.com/poll/352832/americans-confidence-racial-fairness-waning.aspx [https://perma.cc/NW2S-4733]; BETSY COOPER, DANIEL COX, RACHEL LIENESCH & ROBERT P. JONES, PUB. RELIGION RSCH. INST., ANXIETY, NOSTALGIA, AND MISTRUST: FINDINGS FROM THE 2015 AMERICAN VALUES SURVEY 5–6 (2015), www.prri.org/wp-content/uploads/2015/11/PRRI-AVS-2015-1.pdf [https://perma.cc/ZF7W-LQXV]; Juliana Menasce Horowitz, Anna Brown & Kiana Cox, *Race in America 2019*, PEW RSCH. CTR. (Apr. 9, 2019), www.pewresearch.org/social-trends/2019/04/09/race-in-america-2019 [https://perma.cc/E99L-DHY4].

38. Howell & Korver-Glenn, *supra* note 35, at 1051–67.

"sales comparison approach," which is the dominant method for estimating home values in the modern era.[39] Several elements of the sales comparison approach contribute to the appraisal gap. For one, the approach recycles historical home values that were initially determined under the explicitly racist appraisal criteria used prior to the mid-1970s.[40] "In other words, if an appraiser is calculating the value of a home in a Black neighborhood by comparing it to houses recently sold around it, then chances are she is comparing it to other Black-owned houses that, because of the legacy of segregation, have handicapped values in the market compared to similar homes in white communities appraised at higher prices."[41] This recycling process maintains unequal home values. However, it is critical to note that the degree of home value inequality across white neighborhoods and neighborhoods of color has not remained constant. Rather, "the level of inequality in home values across racially distinct neighborhoods has *increased* during the past several decades—and, net of historic appraisals, contemporary appraisals have played a key role in this increase."[42]

Another recent study offers additional evidence on how the appraisal gap endures. In 2021, the Federal Home Loan Mortgage Corporation (Freddie Mac) released a report on a five-year study of twelve million appraisals.[43] The report offers two key findings. First, an appraiser's estimated home value is more likely to fall below the sale contract price in Black and Latinx census tracts than in white census tracts, and the extent of the appraisal gap increases as the percentage of Black or Latinx people in the tract increases.[44] Thus, the racial composition of the neighborhood affects appraisal values. Second, the study reviewed empirical trends in how appraisers select comparable properties (commonly referred to as "comps").[45] It concluded that appraisers chose comps located significantly closer to the subject property when that property was located in a Black or Latinx census tract than if the property was in a white census

39. *See, e.g.*, KORVER-GLENN, *supra* note 23, at 116–18 (describing the history and methodology of the sales comparison approach).

40. *See, e.g.*, *id.* at 125 ("[T]he explicitly racist logic characterizing official appraisal standards until 1976 was carried forward in unofficial yet widespread contemporary appraisal practices.").

41. Mock, *supra* note 36.

42. KORVER-GLENN, *supra* note 23, at 117 (emphasis added) (describing Howell and Korver-Glenn's data and findings).

43. MELISSA NARRAGON, DANNY WILEY, DOUG MCMANUS, VIVIAN LI, KANGLI LI, XUE WU & KADIRI KARAMON, FREDDIE MAC, RACIAL AND ETHNIC VALUATION GAPS IN HOME PURCHASE APPRAISALS 2–3 (2021) [hereinafter 2021 FREDDIE MAC STUDY], www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf [https://perma.cc/9ST8-2LKB]; *see also* 2022 FREDDIE MAC STUDY, *supra* note 35, at 1 (refining and expanding the modeling approach in response to feedback) ("[E]ven after controlling for important factors that affect house values and appraisal practices, appraisal outcomes still differ for properties in predominantly Black and Latino tracts relative to those in predominantly [w]hite tracts.").

44. 2021 FREDDIE MAC STUDY, *supra* note 43, at 2–3. These differences remained when controlling for other property and neighborhood characteristics. *Id.* at 3.

45. *See id.* at 6–10.

tract.[46] In other words, appraisers routinely restricted their search for comps to a narrower set of homes located closer to the subject property.[47] Understood in the context of residential segregation patterns, this data reveals that appraisers view neighborhood boundaries—and therefore comparable sales markets—in racial terms.[48] Other studies, consistent with these findings, comprise a growing body of evidence on the prevalence of racial discrimination in housing appraisals.[49]

This Article unfolds in three parts. Part II chronicles the historical developments leading to today's segregated housing landscape, with particular emphasis on the government's involvement in promoting, incentivizing, and perpetuating housing segregation in the twentieth century. Critical to this history is how the government introduced explicitly racist assumptions into the housing appraisal process. Informed by this background, Part II also describes the complex regulatory framework governing appraisals. This landscape has raised thorny legal questions, such as whether it violates the nondelegation doctrine, as Congress has arguably delegated authority to a nongovernmental industry group, The Appraisal Foundation, to promulgate appraisal standards.[50] To date, The Foundation and other industry players have largely operated in a way that shields their decision making from public input, a sharp contrast from the rulemaking requirements of the Administrative Procedure Act.[51] Building on this context, Part II also details recent reform proposals, including the PAVE task force's policy recommendations.

---

46. *Id.* at 6–7.

47. *See id.* In the Austins' case, the Amended Complaint illustrates this problem, discussing the appraiser's unreasonably narrow sample size from which she drew comps and the selection of unreasonable comps. *See* Tate-Austin Complaint, *supra* note 1, at 13–19.

48. *See* 2021 FREDDIE MAC STUDY, *supra* note 43, at 6–7.

49. *See, e.g.*, Gregory D. Squires & Ira Goldstein, *Property Valuation, Appraisals, and Racial Wealth Disparities*, POVERTY & RACE, May–Aug. 2021, at I, I–IV (citing studies); *see also* PERRY, ROTHWELL & HARSHBARGER, *supra* note 35, at 5; PAVE ACTION PLAN, *supra* note 16, at 51–54 (citing studies); NFHA APPRAISAL REPORT, *supra* note 23, at 17–20 (citing news reports and studies). One particularly interesting study is the Federal Housing Finance Agency's 2021 analysis of free-form comments in the "Neighborhood Description" section of appraisal reports. *See* Chandra Broadnax & James Wylie, *Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary*, FED. HOUS. FIN. AGENCY (Dec. 14, 2021), www.fhfa.gov/Media/Blog/Pages/Reducing-Valuation-Bias-by-Addressing-Appraiser-and-Property-Valuation-Commentary.aspx [https://perma.cc/DD2B-6XAG] (documenting a variety of explicit racial or racially coded phrases used to describe neighborhoods, including comments on ethnicity, languages, immigrants, cultural assimilation, history of "white flight," and amenities associated with particular races or ethnicities).

50. *See* NFHA APPRAISAL REPORT, *supra* note 23, at 5 ("Until recently, however, the appraisal industry seems to have escaped the type of regulation and scrutiny faced by other participants in the mortgage market. Our analysis finds that the appraisal industry has operated in a relatively closed, self-regulated framework."); *see also id.* at 35–40 (comparing congressional delegation of authority to The Foundation to the Dodd-Frank Act's delegation of rulemaking authority to the Consumer Financial Protection Bureau and considering whether The Foundation is an "agency" with notice and comment obligations under the Administrative Procedure Act).

51. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551–559.

Part III presents the legal case. Given the scarcity of legal literature and litigation manuals on appraisal discrimination, Part III collates a multitude of resources as a legal primer. It identifies and describes potential claims, with particular emphasis on the federal Fair Housing Act, Equal Credit Opportunity Act (ECOA), and related state-law claims. It explores who has standing, which actors in the appraisal industry are most likely to face liability, the differences between Fair Housing Act liability and ECOA liability, and the full extent of available remedies. Part III also analyzes the empirical body of appraisal-discrimination litigation. It describes two waves of litigation to enforce appraisal non-discrimination laws; a trickle of cases from the 1970s to 2019, and a new wave in the past three years. Reviewing the empirical evidence, Part III evaluates whether these cases have been "successful."

Finally, Part IV presents this Article's foremost contribution to the literature. It instills litigators—and their enforcement partners—with the tools to pursue effective litigation, which serves as another leverage point in the multifaceted public-private effort to interrupt systemic appraisal discrimination. It draws on interviews with experienced litigators and empirical case analysis to educate attorneys and help them anticipate and overcome the most challenging impediments to successful litigation. After reading Part IV, attorneys and their enforcement partners will be better prepared to identify meritorious cases, file complaints that will survive dispositive motions, and work with appraisers as expert witnesses. Fair housing investigators at all levels of government can also benefit from these lessons.

The harsh reality is that appraisal discrimination has not just endured, it has intensified and shows no signs of stopping. It survives not solely in isolated incidents, but in the legally sanctioned methodology that appraisers are trained to apply. Significant reform is needed to unmoor racial bias from appraisal practices. Litigation—in courts and administrative agencies—is a necessary part of a multifaceted strategy to reform appraisal practices.

II. RACIST APPRAISAL CRITERIA

Although the use of explicitly racist appraisal criteria is prohibited,[52]

52. *See* 42 U.S.C. §§ 3604–3605. Technically, current ethics rules for appraisals preclude unsupported conclusions based on race, which raises the question of what constitutes a "supported conclusion" based on race. This is problematic because it falls short of federal standards. Federal officials recently raised this concern to the Appraisal Standards Board. *See* Letter from Patrice Alexander Ficklin, Fair Lending Dir., Consumer Fin. Prot. Bureau, et al. to Michelle Czekalski Bradley, Chair, Appraisal Standards Bd. (Feb. 4, 2022), files.consumerfinance.gov/f/documents/cfpb_appraisal-discrimination_federal-interagency_comment_letter_2022-02.pdf [https://perma.cc/7BMW-4JZG] ("[T]he federal ban on discrimination under the FHAct and ECOA is not limited only to 'unsupported' conclusions.").

appraisers continue to consider race in assigning home values.[53] While today's Uniform Standards of Professional Appraisal Practice appear to be race-neutral, they nevertheless allow for, or even encourage, the consideration of racial demographics in a manner that leads to a quantifiable discriminatory effect, which is commonly referred to as the racial appraisal gap or market "value gap."[54] This Part describes the origins of racist appraisal criteria and its legacy today. It traces the history of the government's involvement in redlining and other practices that introduced and promoted racist appraisal criteria and describes the U.S. Department of Justice's litigation efforts in the 1970s to remove explicitly racist appraisal criteria from industry standards and training materials. It then considers how appraisers continue to recycle racist criteria through the "sales comparison approach" to home valuation.

To lay the foundation for the litigator's role in a multifaceted effort to ameliorate appraisal discrimination, this Part also describes the complex regulatory framework that governs the appraisal industry. Building on this context, it closes by summarizing recent recommendations for reforming the appraisal industry.

A. Origins

For decades, overtly racist criteria drove home appraisals.[55] Appraisers continued to consider race as a factor in their assessment even after Congress passed the Fair Housing Act in 1968, but they largely discontinued such practices after the U.S. Department of Justice sued industry defendants in the mid-1970s.[56] Even so, to this day, appraisers continue to consider race in assigning value.[57] While today's appraisal standards are race-neutral on their face,[58] they nonetheless allow for, or even encourage, racial demographics to be considered in a manner that leads to a measurable discriminatory effect in home values.[59]

To understand how race influences home values today, consider how appraisers were trained for decades. From the 1930s to 1970s, training manuals instructed appraisers to negatively assess race, emphasizing that homogeneous white neighborhoods were the most desirable.[60] The Mc-

53. Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. Times (Jan. 26, 2023), www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html [https://perma.cc/C2V4-CDSD].

54. *See, e.g.*, PAVE Action Plan, *supra* note 16, at 2.

55. *See* Robert G. Schwemm, *Housing Discrimination and the Appraisal Industry*, *in* Mortgage Lending, Racial Discrimination, and Federal Policy 365, 372–74 (John Goering & Ron Wienk eds., 1996).

56. *Id.*

57. *See* Kamin, *supra* note 53.

58. *See* Patrice Alexander Ficklin, *Appraisal Discrimination is Illegal Under Federal Law*, Consumer Fin. Prot. Bureau (Feb. 4, 2022), www.consumerfinance.gov/about-us/blog/appraisal-discrimination-illegal-under-federal-law [https://perma.cc/S47H-C6SA].

59. *See* PAVE Action Plan, *supra* note 16, at 2.

60. *See* Korver-Glenn, *supra* note 23, at 117–19; *see generally* Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 Urb. Affs. Q. 313, 313–31 (1979).

Michael's Appraising Manual urged appraisers to identify undesirable racial elements in the area.[61] Another contemporaneous manual instructed: "There is one difference in people, namely race, which can result in very rapid decline [in home values]."[62] In 1935, the American Institute of Real Estate Appraisers Manual stated: "To have the attributes of a good residential area, it is essential that protection be afforded against the infiltration of inharmonious racial groups . . . ."[63] Appraisers were trained to heavily consider race and other social data because the social characteristics of a home's present and prospective tenants influenced home value more than any other factor.[64]

Aspiring appraisers even studied racial hierarchies, which told appraisers to assign the highest value to racially and ethnically homogenous "English, Germans, Scotch, Irish, [and] Scandinavians"; assign somewhat lesser value to "North Italians," then "Bohemians or Czechs" then "Poles"; followed by "Lithuanians," "Greeks," "Russians, Jews (lower class)," "South Italians"; and finally to assign the lowest value to "Negroes" and "Mexicans."[65] Likewise, appraisers were trained that racially homogenous white neighborhoods were inherently more valuable than racially integrated neighborhoods.[66]

The federal government's underwriting instructions were equally explicit. Appraisers were instructed to investigate the area "to determine whether incompatible racial . . . groups are present, for the purpose of making a prediction regarding the probability of the location being invaded by such groups. If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes."[67] Although government and industry manuals evolved by the 1960s and 1970s to describe race and ethnicity in more "modern" ways, they still instructed appraisers to value racial homogeneity higher

---

61. *See* NFHA APPRAISAL REPORT, *supra* note 23, at 15–17 (quoting industry training manuals); *see also* Steve Dane, Dane Law LLC, Panel Presentation at NFHTA Forum: Strategies for Investigating Discriminatory Residential Appraisals (Sept. 15, 2021), www.hudexchange.info/trainings/courses/nfhta-forum-strategies-for-investigating-discriminatory-residential-appraisals [https://perma.cc/3YWN-A4LM] (quoting appraiser training materials).

62. NFHA APPRAISAL REPORT, *supra* note 23, at 15 (quoting FREDRICK MORRISON BABCOCK, THE VALUATION OF REAL ESTATE (1932)).

63. *Id.* (quoting AMERICAN INST. OF REAL ESTATE APPRAISERS, REAL ESTATE APPRAISAL 10 (1935)).

64. *See generally* AMERICAN INST. OF REAL ESTATE APPRAISERS, THE APPRAISAL OF REAL ESTATE (1967) [hereinafter THE APPRAISAL OF REAL ESTATE]; *see also* NFHA APPRAISAL REPORT, *supra* note 23, at 15 ("The causes of racial and ethnic conflicts are not the appraiser's responsibility. However, he must recognize the fact that values change when people who are different from those presently occupying an area advance into and infiltrate a neighborhood." (quoting THE APPRAISAL OF REAL ESTATE, *supra*)).

65. NFHA APPRAISAL REPORT, *supra* note 23, at 15 (quoting STANLEY L. MCMICHAEL, MCMICHAEL'S APPRAISING MANUAL 59 (3d ed. 1946) (citations omitted)).

66. *See generally* THE APPRAISAL OF REAL ESTATE, *supra* note 64; *see also* KORVER-GLENN, *supra* note 23, at 118.

67. NFHA APPRAISAL REPORT, *supra* note 23, at 15 (quoting FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT ¶ 937 (1938)).

than integration.[68] But the federal government did more than simply instruct appraisers to value white neighborhoods over Black neighborhoods. On a widespread scale, the federal government also intervened to promote, incentivize, and perpetuate racial segregation: "It notoriously separated people by race in public housing, systematically denied federally insured mortgages to communities of color, enforced private racial covenants, and bulldozed Black neighborhoods in the name of 'urban renewal' and 'slum clearance.'"[69] Moreover, there are many ways the federal government continues to promote residential segregation through the administration of government programs and activities related to housing and community development.[70]

In 1968, Congress passed the Fair Housing Act, which prohibited differential treatment based on race in housing transactions.[71] Even so, appraisers continued to use racist appraisal criteria until the U.S. Department of Justice sued industry defendants. In 1976, the U.S. Department of Justice sued the American Institute of Real Estate Appraisers (AIREA) and three other appraisal and mortgage industry

68. *See id.* at 16. For instance, a 1973 industry course outline stated: "Ethnological information also is significant to real estate analysis . . . . Information on the percentage of native-born whites, foreign whites, and non-white population is important, and the changes in this composition have a significance." *Id.* (citations omitted). It further instructed: "As a general rule, minority groups are found at the bottom of the socio-economic ladder, and problems associated with minority group segments of the population can hinder community growth." *Id.* (citations omitted).

69. *See* Abraham, *Segregation Autopilot*, *supra* note 26, at 1989 (citing sources); *see also* Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, ProPublica (June 25, 2015, 1:26 PM), www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law [https://perma.cc/QAE5-T7QJ] (describing the government's missed opportunity to reduce housing segregation after passage of the Fair Housing Act in 1968). For more on the government's influence on segregation, see William R. Tisdale, *Fair Housing Strategies for the Future: A Balanced Approach*, 4 Cityscape 147, 147 (1999) ("[I]rrefutable historical evidence suggests that racial isolation and segregation patterns do not result from natural selection, free choice, or mere happenstance. Nor are they significantly linked to economic factors. Rather, conscious and deliberate actions were taken to design, construct, and maintain policies and practices that impede equal access to housing opportunities. Those practices, coupled with contemporary acts and long-standing institutionalized discrimination, have drawn the current boundaries of racial segregation.").

70. *See generally* Abraham, *Segregation Autopilot*, *supra* note 26 (documenting how the federal government's regulatory and spending activities operate to promote residential segregation as if on autopilot); Lawrence J. Vale, Reclaiming Public Housing: A Half Century of Struggle in Three Public Neighborhoods (2002) (discussing federal housing policy). For a discussion of how local governments have promoted and maintained segregation, and their unique powers to reduce local segregation, see Jessica Trounstine, Segregation by Design: Local Politics and Inequality in American Cities 23–38 (2018).

71. *See* Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619). The Fair Housing Act prohibited a broad range of discriminatory activities related to housing transactions. *See id.* Twenty years later, Congress amended the Act to explicitly prohibit appraisal discrimination. Fair Housing Amendments Act of 1988, Pub. L. No. 100–430, 102 Stat. 1619 (codified as amended at 42 U.S.C. § 3605); *see also infra* Part III.B (explaining that the 1988 amendments largely codified the application of the Act's prohibition to appraisal discrimination consistent with judicial interpretation).

defendants.[72] The complaint in *United States v. AIREA* alleged that the defendants' appraisal and lending standards violated the Fair Housing Act of 1968 since they treated race and national origin as negative factors in determining home values and evaluating the soundness of potential home loans. The complaint further alleged that the defendants failed to take adequate steps to correct the continuing effect of past discrimination in such practices.[73] The central issue in the case was the manner in which the AIREA's appraiser education materials, and the industry more broadly, instructed appraisers to adjust a property's value "downward if the ethnic composition of the neighborhood to which it belonged was not homogenous."[74] This so-called principle of conformity "continued to be adhered to well into the 1970s, years after the passage of the 1968 Fair Housing Act."[75]

In a public settlement agreement in the AIREA lawsuit, the defendants agreed to adopt a series of policy statements that disclaimed the use of race as a negative factor.[76] For instance, the defendants agreed to adopt the following policy: "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 for [sic] a property is necessary for maximum value."[77] Additionally, the defendants also agreed to revise the standardized textbook and other instructional materials, and to add explanatory comments to its code of ethics.[78]

After the AIREA lawsuit, appraisal discrimination evolved. Even with facially race-neutral criteria, research shows that appraisers continue to emphasize neighborhood uniformity by using appraisal methods that "rehash[ed] the same ideas about neighborhood difference and social incompatibility as those in the FHA's *Underwriting Manual*, written 80 years prior."[79] Thus, "the explicitly racist logic characterizing official appraisal standards until 1976 was carried forward in unofficial yet widespread contemporary appraisal practices."[80]

How does this continue to happen? The primary way that appraisers systemically reinforce the racial value gap is by using the "sales comparison approach." This approach emerged in the 1930s and is still the prevailing method today. Problematically, the approach elevates the importance of a property's neighborhood "as equally or more important

72. United States v. Am. Inst. of Real Estate Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977).

73. *Id.* at 1076.

74. *See* Schwemm, *supra* note 55, at 372.

75. *Id.* (internal quotation omitted); *see generally* Harper v. Union Savings Ass'n, 428 F. Supp. 1254, 1269–70 (N.D. Ohio 1977) (cited as the only reported Title VIII case involving appraisal discrimination pre-*AIREA*).

76. *Am. Inst. of Real Estate Appraisers*, 442 F. Supp. at 1077.

77. *Id.*

78. *Id.*

79. KORVER-GLENN, *supra* note 23, at 125.

80. *Id.*

than the structure or condition of individual homes."[81] The sales comparison approach requires appraisers to rely on prior home sales in the vicinity of the appraised property as the "main determinant" of a home's value.[82] In other words, appraisers must exercise discretion in selecting the most comparable property sales. Appraisers themselves—not a neutral third party—decide where to draw neighborhood or "market" boundaries. Then, they exercise additional discretion in selecting comparable property sales. Finally, they exercise further discretion when applying upward and downward adjustments (to any aspect of the estimate, from the value per square foot to overall value) to reflect differences between the comparable properties.[83] This process is inherently problematic in that it requires appraisers to recycle racially driven historical values that were originally derived from explicitly racist (and now outlawed) criteria from the 1930s to the 1970s.[84] Moreover, in an industry that is almost entirely white and male,[85] appraisers may well interject their own implicit racial biases in exercising discretion in determining neighborhood boundaries, selecting comparable property sales, and making adjustments.

B. Regulatory Framework

The legal framework governing the appraisal industry is "a complex interplay of federal, state, and private entities."[86] It arises from the congressional response to the 1980s savings and loan crisis: the Financial In-

81. *Id.* at 118. Two alternative appraisal methods are the cost approach (which calculates the reproduction cost of the building, plus land value, minus physical depreciation) or the income approach (which calculates the value of income for income-generating properties). In the 1930s, the cost approach was the most common form, until federal agencies endorsed the alternative sales comparison approach as the preferred method. *Id.*; *see also* Appraisal Inst., Understanding the Appraisal 6–7 (2013), www.appraisalinstitute.org/assets/1/7/understand_appraisal_1109_(1).pdf [https://perma.cc/GRS6-4MBH].

82. Korver-Glenn, *supra* note 23, at 118.

83. For instance, in the Austins' case in Marin City, California, the defendant appraiser opined that she looked at several years of data and determined that houses in Marin City were worth "conservatively" 25% less per square foot than those in "surrounding areas," an estimate that she used to justify a substantial downward adjustment that drove her overall estimate of the Austins' property. Tate-Austin Complaint, *supra* note 1, at 17. The Austins allege that downward adjustment was "both statistically unsound and based on the racial demographics of Marin City." *Id.*

84. Korver-Glenn, *supra* note 23, at 117 ("At the very least, my data indicate that appraisers' ongoing use of the sales comparison approach recycles home values that were initially determined under the explicitly racist appraisal criteria used prior to the 1960s and 1970s.").

85. *See, e.g.*, NFHA Appraisal Report, *supra* note 23, at 26 ("According to the U.S. Bureau of Labor Statistics, about 96.5% of property appraisers are [w]hite and about 70% are men.") (citing data from 2021); *see id.* 69–70 (providing recommendations for creating a more diverse appraisal industry); *see also The Aging Appraiser*, Appraiser Blogs (Mar. 1, 2013), appraisersblogs.com/appraisal/the-aging-appraiser [https://perma.cc/4YBM-N6R7] (describing survey data showing 83% of appraisers self-identified as over age 41, with approximately half ages 51–70).

86. NFHA Appraisal Report, *supra* note 23, at 34; *see also* Edward V. Murphy, Cong. Rsch. Serv., RS22953, Regulation of Real Estate Appraisers 1–8 (2012) (detailing the key regulatory and industry players and regulatory changes arising out of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

stitutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[87] Through it, Congress established the Appraisal Subcommittee (ASC), a federal agency that monitors and reviews the practices of the primary industry actor, and The Appraisal Foundation (The Foundation), a nonprofit organization.[88] The ASC's responsibilities include supervising and enforcing state compliance with FIRREA, monitoring compliance with requirements established by federal financial institution regulatory entities, and maintaining a national registry of appraisers and appraisal management companies (AMCs).[89] While the ASC monitors The Foundation, it does not have direct enforcement authority, and thus it cannot modify or overrule The Foundation's decision making or the appraisal standards it issues.[90]

The Foundation, by contrast, is a private entity that predates the regulatory framework established under FIRREA.[91] The Foundation has three boards: the Board of Trustees, which is the primary governance body; the Appraisal Standards Board, which sets the Uniform Standards of Professional Appraisal Practice (USPAP); and the Appraiser Qualifications Board, which sets minimum criteria for appraiser credentialing.[92] The other key regulators are federal financial institution regulatory agencies such as the Federal Deposit Insurance Corporation (FDIC), which promulgates rules governing appraisals for "federally related transactions," and state government agencies, which license and certify appraisers, register AMCs, and are typically tasked with monitoring appraiser compliance with USPAP standards.[93]

Congress did not establish The Foundation or enact an enabling statute.[94] Rather, FIRREA refers to The Foundation's USPAP standards.[95] It provides that federal financial institutions' regulatory agencies shall promulgate rules that require appraisals "at a minimum . . . [to] be performed in accordance with generally accepted appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation."[96] The law also addresses state certification and licensing requirements for appraisers, requiring that real estate appraisers pass an examination administered by a state or

87. NFHA APPRAISAL REPORT, *supra* note 23, at 34 (citing 12 U.S.C. §§ 3331–3356 (amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, Pub. L. 115-174)).

88. NFHA APPRAISAL REPORT, *supra* note 23, at 35.

89. *Id.*

90. *See id.* at 34–40 (describing appraisal industry governance).

91. *Id.* at 35–36. Another key industry player is the Appraisal Institute, which is not directly affiliated with The Foundation. The Appraisal Institute is a professional association of appraisers established in 1932 that provides appraiser training. *About Us*, THE APPRAISAL INST., www.appraisalinstitute.org/about [https://perma.cc/WLB9-BY9A].

92. NFHA APPRAISAL REPORT, *supra* note 23, at 35.

93. *Id.*

94. *Id.* at 35–36.

95. *Id.*; 12 U.S.C. §§ 3331–3356.

96. 12 U.S.C. § 3339.

territory "that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualification Board of the Appraisal Foundation."[97] In short, federal law appears to incorporate The Foundation's appraisal standards by reference, but Congress did not provide guidance or otherwise address the major questions regarding the nature of the standards or credentialing criteria.[98]

This framework has raised serious questions about The Foundation's legal authority. While The Foundation actively promotes itself as the congressionally authorized "source of appraisal standards and qualifications,"[99] FIRREA's plain language is less clear. The law's roundabout delegation of congressional authority to a nonprofit industry group has generated recent calls for reform from fair housing advocates and others.[100] Among the questions raised are whether The Foundation's authority is strictly limited to "federally related transactions," whether The Foundation is an "agency" that is required to adhere to notice and comment obligations under the Administrative Procedure Act, and whether Congress violated the nondelegation doctrine by delegating appraisal standard-setting functions to a private entity.[101]

C. Calls for Reform

Since 2020, appraisal discrimination has generated substantial interest, and media outlets have amplified stories across the country.[102] Researchers have issued new findings that document the ongoing relevance and persistence of the racial appraisal gap.[103] The federal government has also called attention to the problem.[104] As a part of the Biden Administration's "whole of our Government" initiative to combat systemic racism, it established the Task Force on Property Appraisal & Evaluation

97. *Id.* § 3345(b).

98. *See* NFHA Appraisal Report, *supra* note 23, at 35–36, 48; *see, e.g.*, 12 U.S.C. §§ 3339, 3345(b).

99. *About Us*, The Appraisal Found., www.appraisalfoundation.org/imis/TAF/About_Us/TAF/About_Us.aspx?hkey=52dedd0a-de2f-4e2d-9efb-51ec94884a91 [https://perma.cc/BG7B-RS2K].

100. *See* NFHA Appraisal Report, *supra* note 23, at 34–40; *see also Devalued, Denied, and Disrespected: How Home Appraisal Bias and Discrimination Are Hurting Homeowners and Communities of Color*: *Hybrid Hearing Before the H. Comm. on Fin. Servs.*, 117th Cong. (2022); Press Release, U.S. Comm. on Fin. Servs., Waters Calls on Regulators and Industry to Hold Appraisers Accountable and Announces Plans for Legislation (Feb. 22, 2022), democrats-financialservices.house.gov/news/documentsingle.aspx?DocumentID=409146 [https://perma.cc/4CNS-4LS6]. In the PAVE report, federal agencies committed to developing legislation solutions. *See* PAVE Action Plan, *supra* note 16, at 5, 27.

101. NFHA Appraisal Report, *supra* note 23, at 35–39 (comparing the statutory text of the congressional delegation of authority to the Consumer Financial Protection Bureau in the Dodd-Frank Act to FIRREA's statutory reference to The Foundation's USPAP appraisal standards).

102. *See supra* note 14 (collecting news stories).

103. *See generally* Perry, Rothwell & Harshbarger, *supra* note 35; Korver-Glenn, *supra* note 23; Howell & Korver-Glenn, *supra* note 35; PAVE Action Plan, *supra* note 16; NFHA Appraisal Report, *supra* note 23.

104. *See* PAVE Action Plan, *supra* note 16, at 1.

Equity (PAVE).[105] Industry professionals and fair housing advocates have held public events, developed professional training tools, and issued policy reports to draw attention to the problem.[106] Federal lawmakers have introduced bills to tackle the most pressing issues in appraisal discrimination[107] and have brought additional attention to these issues through legislative hearings.[108] Some states are also considering legislation designed to curb appraisal discrimination.[109] At the municipal level, the City of Philadelphia, for example, has taken an active role in studying appraisal discrimination.[110] In 2021, it convened a Home Appraisal Bias Task Force, which released a detailed report of policy recommendations to reduce appraisal bias at the city level.[111] Its recommendations included "making the appraisal process more transparent so that biases can be spotted and addressed, educating appraisers and homeowners about appraisal bias, and hiring a more diverse group of home appraisers."[112]

This discourse has produced several concrete policy recommendations. They range from the overhaul of the regulatory framework and phasing out the sales comparison approach to more incremental policy changes like recruiting a more diverse appraiser workforce to reduce implicit bias among appraisers. This Section first considers the comprehensive recommendations then moves to more incremental reform proposals.

The most comprehensive reforms target the current regulatory frame-

---

105. *Id.*

106. *See, e.g.*, Congresswomen Maxine Waters & Marcia Fudge, Keynote Address at Brookings Inst. & Nat'l Fair Hous. All. Conference Examining Racial Bias in Home Appraisals: Screening of "Our America: Lowballed" (Jan. 12, 2023), www.brookings.edu/events/examining-racial-bias-in-home-appraisals-screening-of-our-america-lowballed [https://perma.cc/P7YS-GBF7].

107. *See, e.g.*, Real Estate Valuation Fairness and Improvement Act, H.R. 2553, 117th Cong. (2021); *see also* Brentin Mock, *Federal Legislation Could Tackle the Racial Gap in Home Appraisals*, BLOOMBERG (Mar. 1, 2022, 8:53 AM), www.bloomberg.com/news/articles/2022-03-01/bill-would-address-racial-bias-in-appraised-home-values [https://perma.cc/S5V4-AG6G].

108. *See Devalued, Denied, and Disrespected*, *supra* note 100; *Strengthening Oversight and Equity in the Appraisal Process: Hearing Before S. Comm. on Banking, Hous., & Urb. Aff.*, 117th Cong. (2022); *What's Your Home Worth? A Review of the Appraisal Industry: Hearing Before the Subcomm. on Hous., Cmty. Dev., & Ins. of the H. Comm. on Fin. Servs.*, 116th Cong. (2019).

109. *See, e.g.*, Nikita Biryukov, *Bill Advances That Would Bar Discrimination in Home Appraisals*, N.J. MONITOR (June 2, 2022, 3:50 PM), newjerseymonitor.com/2022/06/02/bill-advances-that-would-bar-discrimination-in-home-appraisals [https://perma.cc/TV4B-WKPX] (describing New Jersey State Senate Bill S4030, which would bar appraisers from assigning a lower value because of race and "create steep penalties for those who run afoul of the safeguards").

110. PHILA. HOME APPRAISAL BIAS TASK FORCE, FINAL REPORT AND RECOMMENDATIONS 1–12 (2022), www.reinvestment.com/wp-content/uploads/2022/07/PHL-HomeAppraisalBiasTaskForce_Report_July2022.pdf [https://perma.cc/4AUY-H6PY].

111. *Id.*

112. Cherelle L. Parker, Gregory D. Squires & Ira Goldstein, *Home Appraisals Are Biased. Here's How to Tackle This Problem in Philly.*, PHILA. INQUIRER (Aug. 4, 2022, 2:30 PM), www.inquirer.com/opinion/commentary/home-appraisal-racial-bias-philadelphia-20220804.html [https://perma.cc/CC2J-SGGF].

work, which lacks public accountability.[113] Fair housing advocates have thus far stopped short of calling on Congress or federal regulators to set appraisal standards; instead, these advocate are working collaboratively with appraisal industry partners to bring about more public oversight of The Foundation's operations.[114] Even so, fair housing advocates have raised troubling questions about whether Congress has unlawfully delegated authority to The Foundation and whether The Foundation's activities are governed by the Administrative Procedure Act.[115] For now, advocates are calling for more investigation into this structure—effectively asking congressional oversight committees to investigate this issue.[116] Likewise, advocates have pressed The Foundation itself to "enhance transparency and inclusiveness, and to improve the ability to issue USPAP Standards and Appraiser Criteria that benefit the whole of the housing market" by increasing public access to proposed revisions to the USPAP and appraiser qualifications standards.[117] The Foundation has the authority to meet this request by modifying public notice, public comment, and timetables.[118]

Regarding appraisal methodology, historical discrimination alone does not explain today's racial appraisal gap. Rather, the ongoing use of the sales comparison approach perpetuates—and magnifies—historical discrimination.[119] As one research team described the effect, "[E]ven after

113. *See, e.g.*, NFHA APPRAISAL REPORT, *supra* note 23, at 35–47; Georgia Kromrei, *The Appraisal Industry's Governance Problem*, HOUS. WIRE (Jan. 24, 2022, 7:00 AM), www.housingwire.com/articles/the-appraisal-industrys-governance-problem [https://perma.cc/6NZC-PEW9] (describing the problems with allowing the industry to "self-regulate," which has led to gaps in fair housing training and accountability); *see generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-147, REAL ESTATE APPRAISALS: APPRAISAL SUBCOMMITTEE NEEDS TO IMPROVE MONITORING PROCEDURES (2012).

114. *See* Symposium, *Promoting Trust for Fair and Affordable Housing*, APPRAISAL FOUND. (2020), www.appraisalfoundation.org/imis/TAFCore/Events/Event_Display.aspx?EventKey=TAFAI1220 [https://perma.cc/5X7J-CJNT] (training series by industry partners featuring fair housing researchers and advocates); *see generally* NFHA APPRAISAL REPORT, *supra* note 23, at 3 (acknowledging The Foundation's cooperation); NFHA APPRAISAL REPORT, *supra* note 23, at 5–12 (executive summary of recommendations); NFHA APPRAISAL REPORT, *supra* note 23, at 34–40 (raising questions about The Foundation's authority and calling for increased public accountability but not recommending the removal of its USPAP standard-setting authority); *Devalued, Denied, and Disrespected*, *supra* note 100 (testimony of Lisa Rice, President and CEO of National Fair Housing Alliance); Waters & Fudge, *supra* note 106 (racial bias in home appraisal panel including HUD Secretary Marcia Fudge, researchers, and fair housing advocates at event co-hosted by Brookings and the National Fair Housing Alliance).

115. *See* NFHA APPRAISAL REPORT, *supra* note 23, at 34–40.

116. *Id.*

117. *See id.* at 8.

118. *See, e.g.*, *id.* at 40–47 (recommendations on increasing public accountability and inclusion).

119. KORVER-GLENN, *supra* note 23, at 138–42 (describing the results of Howell & Korver-Glenn, *supra* note 35); *id.* at 139–40 ("To disentangle historical and contemporary appraisal practices, we used U.S. census data to run a statistical model called a dynamic panel model to examine changes in neighborhood home values over time, from 1980 to 2015. This model, which included Houston and 106 other U.S. metropolitan areas, allowed us to differentiate historical appraised values from contemporary racial composition and to estimate the extent to which contemporary appraising practices contribute to contemporary appraisal value inequality.").

accounting for historical appraisals, contemporary neighborhood racial composition continues to influence current appraisals—and the effect of neighborhood racial composition on contemporary appraisals is growing."[120] As such, the researchers recommended that appraisers discontinue the sales comparison approach or modify it to limit the influence of a neighborhood's racial makeup on the home value.[121] For example, The Foundation could institutionalize automated software that decouples homes from their neighborhood's racial context by showing appraisers comparable homes (in terms of home quality and size, schools, commute times, vacancy, poverty rates, and so on) across the metropolitan area.[122]

More incremental recommendations target the appraiser workforce. Many proposals call for diversifying the appraisal workforce and enhancing training to address bias and best practices. In 2021, the appraisal labor force was nearly 92% white and 55% male.[123] One appraiser has estimated that there are just 300 Black women appraisers, amounting to less than one-half of one percent of all appraisers.[124] The lack of racial and gender diversity among appraisers stands in stark contrast to the country's racial and gender composition and, as a result, the lived experiences of the people whose homes and neighborhoods appraisers evaluate. Reform proposals emphasize the need to reduce barriers to entry into the profession, such as streamlining the credentialing process and substituting alternative training and examination requirements for college degree requirements.[125] Additionally, these reform proposals highlight the importance of outreach to recruit more women and people of color.[126] In terms of training, fair housing advocates further emphasize that significantly more can be done to educate trainees and existing appraisers about the ways that appraisers routinely exercise discretion in ways that are not racially neutral, with an emphasis on best practices to reduce bias.[127] Ad-

120. *Id.* at 140.

121. *See, e.g.*, *id.* at 158 (State appraisal boards and appraisal management companies "should work together to discard and replace the neighborhood-centered sales comparison approach or modify it significantly.").

122. *See* The Appraisal Found., *Promoting Trust for Affordable Housing: Exploring Recent Valuation Research*, YOUTUBE (Dec. 10, 2020) [hereinafter *Exploring Recent Valuation Research*], www.youtube.com/watch?v=TDPKq_4Ohj8 [https://perma.cc/EVV8-ZG6R] (Elizabeth Korver-Glenn speaking on a panel hosted by The Foundation).

123. *See Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATS. (Jan. 23, 2023), www.bls.gov/cps/cpsaat11.htm [https://perma.cc/L5F8-BMH7]; *see also* Cherelle L. Parker, Ira Goldstein & Gregory D. Squires, *Home Appraisals Drive America's Racial Wealth Gap—95% of Philly's Appraisers Are White*, WHYY (Feb. 25, 2021), whyy.org/articles/home-appraisals-drive-americas-racial-wealth-gap-95-ofphillys-appraisers-are-white [https://perma.cc/Q7DK-8SCC].

124. Debra Kamin, *How Three Black Women Hope to Change the Home Appraisal Industry*, NY TIMES (Jan. 18, 2023), www.nytimes.com/2023/01/10/realestate/black-women-home-appraisal-industry.html [https://perma.cc/96PS-355J].

125. *See id.*

126. *See, e.g.*, NFHA APPRAISAL REPORT, *supra* note 23, at 40–47 (providing recommendations for increasing workforce diversity); *see also* Kamin, *supra* note 124 ("In New York State, the New York Mortgage Coalition is covering the cost of appraisal training and materials for dozens of aspiring Black appraisers, the majority of them women.").

127. *See* Kamin, *supra* note 124.

ditionally, more accurate and comprehensive training on the history of appraisal discrimination, fair housing laws, and appraiser liability could reduce discriminatory outcomes.[128]

Two appraisal bias researchers have framed their recommendations as the "three Rs": "Regulate practices, redress infractions, and revise procedures."[129] To "regulate," they suggest the U.S. Department of Housing and Urban Development (HUD) take a more active role in investigating appraisals, looking at systemic practices rather than individual acts of discrimination.[130] Moreover, in addition to HUD investigations, they strongly advocate for the public release of more data, a Uniform Appraisal Dataset, so researchers can also investigate systemic trends.[131] Government Sponsored Enterprises (GSEs) already possess substantial appraisal-related data that they could release to the public to increase public accountability and improve legal enforcement.[132] Often, researchers and advocates compare this approach to mortgage industry data.[133] Public release of data collected under the Home Mortgage Disclosure Act (HMDA) has enabled researchers to show trends in lending discrimination and therefore to design better policy solutions.[134] In terms of "redress," researchers advocate for more effective sanctions, fines, and reparations for infractions.[135] Finally, to "revise," researchers suggest regulators and the industry must revise standard appraisal procedures, particularly methodology, as described above.[136]

This wide spectrum of reform recommendations illustrates the breadth of thorny problems facing the appraisal industry, from questionable legal authority from Congress to promulgate industry standards to the insularity of the decision making process to the industry's lack of workforce diversity. Each of these problems contributes to persistent racial bias in the appraisal industry that manifests in the racial appraisal value gap. What remains to be seen is the political will to change the governance structure

---

128. *See id.*

129. *Exploring Recent Valuation Research*, *supra* note 122, at 34:47. Among the ideas, Korver-Glenn suggests appraiser procedures that use data that decouple houses from their immediate neighborhoods and return to the "cost approach," instead of sales comparison approach. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*; *see also* Squires, *supra* note 15 (describing the need for HMDA-like data for appraisals and explaining that the PAVE Task Force's recommendations did not call for public release of this data but only to consider its release).

134. *See, e.g.*, Squires, supra note 15; *see also* Squires & Goldstein, *supra* note 49, at II–III (offering recommendations like routine testing audits and replicating a 1994 Cleveland Federal Reserve Bank study that documented the racial appraisal value gap, and encouraging cities and nonprofits to work with "progressive" appraisers with a "solid reputation for serving diverse segments of their communities"). Other recommendations include more active enforcement by state licensing authorities, by imposing fines, suspensions, and terminating licenses. *See* Squires & Goldstein, *supra* note 49, at II–III.

135. *See Exploring Recent Valuation Research*, *supra* note 122, at 36:15.

136. *See id.* at 36:35.

and the industry's own willingness to adopt reforms that increase public accountability and racial inclusivity.

III. THE LEGAL CASE

A new wave of litigation has also emerged.[137] The trailblazers are a handful of non-profit fair housing organizations, many of which are funded by the Fair Housing Initiative Programs (FHIPs),[138] and cooperating private attorneys.[139] The U.S. Department of Justice has also weighed in.[140] Despite the renewed public discourse and litigation, there remains a scarcity of literature and other guiding sources to prepare advocates to investigate and litigate these cases.[141] Especially scarce is information emerging from more recent cases, from which litigators can draw lessons to improve their enforcement efforts. This Part explores the nuts, bolts, and nuances of appraisal discrimination litigation. It identifies the elements of claims for appraisal discrimination under federal and state law. It also explores potential parties, considering who has standing and which actors in the appraisal industry are most likely to face liability, as well as the differences in the types of liability. Additionally, it considers the range of available remedies. Finally, it examines the relatively small empirical body of appraisal discrimination litigation. It closes by evaluating whether past cases have been "successful" in terms of their empirical outcomes.

---

137. *See, e.g.*, NFHA APPRAISAL REPORT, *supra* note 23, at 33 ("[There has been a] recent uptick in appraisal discrimination claims being filed with HUD and in court."); *see also* Marilyn Odendahl, *HUD Complaints Allege Racial Bias in Indianapolis Home Appraisals*, IND. LAW. (May 4, 2021), www.theindianalawyer.com/articles/hud-complaints-allege-racial-bias-in-indianapolis-home-appraisals [https://perma.cc/3X6Y-MRXN].

138. HUD's Fair Housing Initiatives Program has four initiatives, largely driven by competitive grants to eligible organizations, often known as "FHIP" organizations. *See Fair Housing Initiatives Program (FHIP)*, U.S. DEP'T OF HOUS. & URB. DEV., www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHIP [https://perma.cc/V4HQ-MCEJ]. Other actors who may play a litigation or investigative role in appraisal discrimination are state attorneys general and state or local fair housing agencies, which are tasked with enforcing fair housing laws in partnership with HUD through the Fair Housing Assistance Program (FHAP). *See, e.g.*, *Fair Housing Assistance Program (FHAP)*, U.S. DEP'T OF HOUS. & URB. DEV., www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP [https://perma.cc/7EYC-U8SK]. For more on HUD-funded FHIP and FHAPs, see Jorge Andres Soto, *Fair Housing Programs*, NAT'L LOW INCOME HOUS. COAL., nlihc.org/sites/default/files/2014AG-222.pdf [https://perma.cc/NXV2-5A7X].

139. *How You Can Support Fair Housing*, FAIR HOUS. CTR. OF METRO. DET., www.fairhousingdetroit.org/fair-housing-support [https://perma.cc/7LB3-26M9]. "Cooperating attorneys" are private attorneys engaged in fair housing enforcement in cooperation with fair housing organizations. *See id.*

140. *See* Statement of Interest of the United States, Tate-Austin v. Miller, No. 3:21-cv-9319 (N.D. Cal. Feb. 14, 2022), ECF No. 28; Statement of Interest of the United States, Connolly v. Lanham, No. 1:22-cv-02048 (D. Md. Mar. 13, 2023) [hereinafter Connolly Statement of Interest], ECF No. 45-1.

141. Additionally, since the body of appraisal cases is small, litigators can draw lessons from fair lending, insurance, post-disaster, and similar contexts.

A. Nuts, Bolts & Nuances

This Section examines the foundational elements of a successful appraisal discrimination case. Most claims are based on a classic low-valuation fact pattern, meaning that a household—usually owned by a person of color or located in a predominantly non-white neighborhood—received a low appraisal under circumstances suggesting racial bias.[142] This Section begins by describing the most common causes of action. It then explores who has standing to sue and who is likely to face liability under these claims. It concludes by summarizing the universe of available remedies.

Claims. Three federal statutes are most prominently featured in appraisal discrimination cases: the Fair Housing Act,[143] the Equal Credit Opportunity Act,[144] and the Civil Rights Act of 1866.[145] In addition, plaintiffs may allege a violation of state nondiscrimination laws and tort claims like negligent misrepresentation.[146] The precise claims vary according to the facts and defendants involved. For instance, plaintiffs are likely to allege credit-related claims only when a lender relied on a discriminatory appraisal.[147]

The Fair Housing Act (FHA) provides the broadest coverage and is therefore the most common federal basis for a cause of action. The FHA's broadest provision is § 3604, which makes it unlawful to make housing "unavailable" or otherwise "deny" housing because of race.[148] Courts have held that this section applies to discriminatory appraisals.[149] In 1988, Congress added an explicit provision addressing appraisal dis-

142. *See, e.g.*, Schwemm, *supra* note 55, at 365 (The classic low-valuation fact pattern involves "a home in which the plaintiff had an interest was appraised too low to qualify for a particular mortgage loan, with the plaintiff alleging that the low appraisal was based on racial considerations and the defendant denying that race played any part in the appraisal.").

143. 42 U.S.C. §§ 3601–3619.

144. 15 U.S.C. § 1691.

145. Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (codified as amended at 42 U.S.C. §§ 1981–1982).

146. *See, e.g.*, Elzeftawy v. Pernix Grp., Inc., 477 F. Supp. 3d 734, 749 (N.D. Ill. 2020).

147. *See generally* Connolly Statement of Interest, *supra* note 140, at 7–12 (citing legal standards for lender liability).

148. 42 U.S.C. § 3604(a); *see also* Connolly Statement of Interest, *supra* note 140, at 7–8. (describing the breadth of the FHA) ("Moreover, the FHA's prohibitions are written 'in the passive voice—banning an outcome while not saying who the actor is, or how such actors bring about the forbidden consequence.'" (quoting N.A.A.C.P. v. Am. Fam. Mut. Ins. Co., 978 F.2d 287, 298 (7th Cir. 1992) and citing Meyer v. Holley, 537 U.S. 280, 285 (2003))).

149. *See, e.g.*, Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986) (stating that discriminatory appraisal may violate § 3604); *but see* Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 1105072, at *6–7 (N.D. Cal. Apr. 13, 2022) (citing Gibson v. Household Int'l, Inc., 151 F. App'x 529, 531 (9th Cir. 2005)) (dismissing the § 3604 claim for failure to state a claim on the basis that § 3605 is "the more appropriate vehicle" for appraisal discrimination claims); Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp. 1330, 1337 (N.D. Ind. 1987) (finding the claim was properly brought under § 3605 but not the broader § 3604). For more discussion of the applicability of § 3604 see Schwemm, *supra* note 55, at 369 n.21.

crimination.[150] Section 3605 prohibits discrimination in any aspect of "residential real estate-related transactions," which is defined broadly to include a wide variety of services related to the "making or purchasing of loans or providing other financial assistance . . . for purchasing, constructing, improving, repairing, or maintaining a dwelling," and the "selling, brokering, or *appraising* of residential real property."[151] At the same time, Congress added a separate subsection, § 3605(c), that states nothing in the FHA prohibits an appraiser from "tak[ing] into consideration factors *other than* race, color, [or other protected class status]."[152] However, HUD promulgated regulations to clarify that this means "consideration of any factor because of race [or other prohibited ground] *does* constitute a discriminatory housing practice."[153] The term "appraisal" is defined broadly to include any "estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction."[154] Moreover, the term "appraisal" encompasses both oral and written statements, regardless of whether these statements are "transmitted formally or informally."[155]

The FHA offers plaintiffs two potential theories of liability: discriminatory treatment and discriminatory effect.[156] These theories are not mutually exclusive and are often pleaded together.[157] However, "[w]hether appraisal practices may be challenged under a discriminatory-effect theory is unclear."[158] Given this lack of clarity, advocates continue to plead both FHA and state-law claims to support discriminatory effect

150. *See* 42 U.S.C. § 3605.

151. *Id.* § 3605(a)-(b) (emphasis added).

152. *Id.* § 3605(c) (emphasis added). Section 3605(c) provides that "[n]othing in this subchapter prohibits a person engaged in the business of furnishing appraisals of real property to take into consideration factors *other than* race, color, religion, national origin, sex, handicap, or familial status." *Id.* (emphasis added). "To a large extent, the current version of § 3605 simply reflects what had already been the law prior to the 1988 Amendments Act . . . . [W]hile there may be some situations where the modern version of [§ 3605] provides protection not available before, much of it merely clarified the Fair Housing Act's existing coverage." ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 18:7 (2022).

153. Implementation of the Fair Housing Amendments Act of 1988, 54 Fed. Reg. 3232, 3242 (Jan. 23, 1989) (to be codified at 24 C.F.R. pt. 100) (emphasis added); *see also* SCHWEMM, *supra* note 152, § 18:8 (discussing this provision).

154. 24 C.F.R. 100.135(b) (2022); *see generally* SCHWEMM, *supra* note 152, § 18:8.

155. 24 C.F.R. 100.135(b) (2022). The antidiscrimination provision is limited to appraisals made in a "commercial context," thus not diminishing an individual's First Amendment rights. 54 Fed. Reg., *supra* note 153, at 3243; *see generally* SCHWEMM, *supra* note 152, § 18:8.

156. *See generally* SCHWEMM, *supra* note 152, § 18:7.

157. *See, e.g.*, Complaint at 25–40, Nat'l Fair Hous. All. v. Evolve, LLC, No. 1:19-cv-01147 (D.D.C. Apr. 22, 2019) [hereinafter Evolve Complaint], ECF No. 1 (alleging disparate treatment and disparate impact under the FHA based on a policy that discriminated against renters with Housing Choice Vouchers).

158. SCHWEMM, *supra* note 152, § 18:8. For a discussion of the availability of the discriminatory effect theory of liability, see *infra* note 172.

liability.[159]

For discriminatory treatment claims, unlike discriminatory effect claims, the evidence must establish that the defendant acted with a discriminatory motive, which can be proven through direct or circumstantial evidence.[160] Whereas direct evidence "most typically takes the form of a facially discriminatory statement or policy" because it "expressly treats someone protected by the [Act] in a different manner than others,"[161] circumstantial evidence is "indirect evidence supporting a conclusion that something did or did not occur."[162] Since direct evidence has become increasingly rare, most cases rely solely on circumstantial evidence.[163]

As a threshold matter, litigators and courts sometimes misconstrue the relevant burdens. Thus, it is important to distinguish the plaintiff's burden

159. *See, e.g.*, Tate-Austin Complaint, *supra* note 1, at 18, 24 (alleging discriminatory effect in appraisal case, with emphasis on discriminatory effect under California state law).

160. *See* SCHWEMM, *supra* note 152, § 10:1 ("Within the disparate treatment category, the Court has distinguished between two types of discriminatory motive cases: (1) 'pretext' cases in which the defendant's decision was motivated by a single consideration, and the problem is to determine whether that consideration was a legitimate one or one condemned by the statute; and (2) mixed motive cases in which both legitimate and illegitimate considerations played a part in the defendant's decision. As with the distinction between disparate treatment and disparate-impact claims, this distinction among discriminatory motive claims does not preclude a plaintiff from alleging both a 'pretext' and a mixed motive claim in a single case."). Not all courts agree that the *McDonnell Douglas* burden-shifting framework is applicable to lending or appraisal discrimination claims. *See, e.g.*, Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 714–16 (7th Cir. 1998) (holding the *McDonnell Douglas* standard for establishing a prima facie case or race discrimination did not apply in the context of credit discrimination because the facts are distinguishable from a one-to-one candidate comparison in the employment law context); *see also infra* note 182 (discussing the *Latimore* decision).

161. Memorandum from Jeanine M. Worden, Assoc. Gen. Couns. for Fair Hous., U.S. Dep't Hous. & Urb. Dev., to Timothy Smyth, Deputy Assistant Sec'y for Enf't & Programs, U.S. Dep't Hous. & Urb. Dev. 1–2 (Sept. 4, 2018), www.hud.gov/sites/dfiles/FHEO/images/AJElementsofproofmemocorrected.pdf [https://perma.cc/MA58-G3HQ] ("Examples of direct evidence of discrimination include openly discriminatory statements during a verbal or written exchange between a landlord and a tenant, an advertisement for a rental property stating a discriminatory preference, and discriminatory rules and policies . . . . [A] discriminatory policy need not be in writing to be considered direct evidence. Direct evidence of a policy can also include oral statements or actions demonstrating the policy.").

162. *Id.* at 2 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)); *see generally* U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL § VI (2021), www.justice.gov/crt/fcs/T6Manual6 (detailing legal standards for proving intentional discrimination in the Title VI context).

163. *See, e.g.*, SCHWEMM, *supra* note 152, § 10:2 ("As more and more time has passed since the enactment of the Fair Housing Act, the likelihood of a case being made out on the basis of direct evidence has diminished. Thus, most modern Fair Housing Act cases have had to rely heavily, if not exclusively, on circumstantial evidence for proof of the defendant's discriminatory motive."); Schwemm, *supra* note 55, at 390 ("Due in large part to the reforms generated by [DOJ litigation against the appraisal industry], the evidence of discrimination in all of these cases has been circumstantial rather than direct. A typical case involves a low appraisal of a home in a minority or integrated neighborhood, with the plaintiff's evidence designed to show that the defendant's appraisal was not just low but insupportably so (based, for example, on an independent appraisal or the testimony of an expert witness), and that other suspicious factors were present as well (the defendant's having deviated, for example, from its normal business practices)."). Direct evidence would include facially discriminatory verbal or written statements made by the appraiser in the appraisal process (such as in the appraisal report form), regarding the plaintiff, dwelling, or neighborhood. *See* Memorandum from Worden to Smyth, *supra* note 161, at 2.

at the pleading or motion to dismiss stage from the plaintiff's evidentiary burden at the summary judgment stage. For disparate treatment claims, plaintiffs need only plead facts that plausibly allege discriminatory intent, not offer direct evidence or plead a prima facie case under the *McDonnell Douglas* burden-shifting framework. In other words, a plaintiff must simply allege facts plausibly showing that the defendant acted because of race.[164]

For instance, a plaintiff must allege that: (1) the plaintiff is a member of a protected class (or plaintiff is a person whose rights are otherwise protected under the Fair Housing Act),[165] or that the dwelling at issue is located in a majority non-white neighborhood (or both); (2) the appraisal was conducted pursuant to a housing transaction; (3) the appraisal was insupportably low; and (4) as a result of the low appraisal, the plaintiff was injured in some way, such as being denied a loan application or offered less favorable terms, or other circumstantial evidence exists from which discriminatory intent can be inferred.[166]

---

164. *See, e.g.*, Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415, 423 (4th Cir. 2018) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). In *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010), the plaintiff alleged that an appraiser unlawfully lowered the appraisal value because of her race, in violation of § 3605. The Seventh Circuit explained that the plausibility pleading standard "does not imply that the district court should decide whose version to believe, or which version is more likely than not," *id.* at 404, and therefore denied the motion for summary judgment because plaintiff had "pleaded enough to survive a motion under Rule 12(b)(6)" when she alleged that the "appraisal defendants knew her race" and that they "discriminat[ed] against her" in the home valuation. *Id.* at 406. The court reached the same conclusion with respect to the lender defendant. *Id.* at 405.

For additional discussion of the legal standards, see Connolly Statement of Interest, *supra* note 140, at 2–7 ("[Defendant] argues that, to state a claim of disparate treatment under the FHA or ECOA, the complaint must either (1) offer direct evidence of discriminatory intent or (2) plead a prima facie case under *McDonnell Douglas* . . . . This argument erroneously transposes a summary judgment standard to the pleading stage. Contrary to [Defendant's] assertions, a complaint must simply allege facts plausibly showing that the defendant acted because of race.").

165. Standing under the Fair Housing Act extends to aggrieved persons, which may mean a neighbor or other person injured by the challenged discriminatory treatment. *See* 42 U.S.C. § 3602(i).

166. These elements are an amalgam drawn from various sources. Courts are inconsistent and unclear about the specific elements, which vary by claim, such as a loan denial or unequal terms or conditions of a loan or other transaction. *See, e.g.*, Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 1105072, at *3–7 (N.D. Cal. Apr. 13, 2022) (describing the elements under § 3605 as (1) disparate treatment, such as unequal terms or conditions, (2) in a residential property transaction, (3) because of the aggrieved person's race (or other protected class status)). *See generally* Memorandum from Worden to Smyth, *supra* note 161, at 4 (citing cases and discussing prima facie elements for various types of fair housing claims). In a lending discrimination case involving indirect, circumstantial evidence, one approach is to divide the prima facie case into five elements: (1) complainant sought to finance housing in a predominantly non-white neighborhood (or complainant is non-white), (2) complainant applied for a loan to finance that housing, (3) an independent appraisal concluded that the value of the housing equaled the sale price, (4) the complainant was credit worthy, and (5) the lender rejected the loan. *See* Doane v. National Westminster Bank USA, 938 F. Supp. 149, 152 (E.D.N.Y. 1996); Steptoe v. Savings of America, 800 F. Supp. 1542, 1545–46 (N.D. Ohio 1992); Old West End Ass'n. v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987).

At the summary judgment stage, a plaintiff may prove a discriminatory treatment claim "by showing 'that a defendant had a discriminatory intent either directly, through direct or circumstantial evidence, or indirectly, through the inferential burden shifting method known as the *McDonnell Douglas* test.'"[167] Another court has described the options as three avenues: "A plaintiff can demonstrate discriminatory intent through direct [evidence,] . . . the *McDonnell Douglas* framework[,] or . . . a 'convincing mosaic' of circumstantial evidence."[168] The prima facie case under *McDonnell Douglas* is a "flexible evidentiary standard[,]" "not a pleading requirement."[169] The "requirements of a prima facie case can vary depending on the context" and "it may be difficult to define the precise formulation" prior to discovery.[170]

A discriminatory intent claim is likely to allege that the defendant took into account: (1) the plaintiff homeowner or buyer's race or ethnicity, or (2) the neighborhood's or location's racial or ethnic characteristics, or (3) both. Circumstantial evidence may include:

- Negative comments about the neighborhood (often found in the free-form section or addendum to an appraisal report);

For recent pleadings see Tate-Austin Complaint, *supra* note 1, at 22–23 (pleading elements of a fair housing claim); Connolly Complaint & Jury Demand 30–31, Connolly v. Lanham, No. 1:22-cv-02048 (D. Md. Aug. 15, 2022) [hereinafter Connolly Complaint], ECF No. 1 (same); Complaint & Jury Demand, Bailey v. Santander Bank, N.A., No. 3:23-cv-00129 (D. Ct. Feb. 1, 2023) [hereinafter Bailey Complaint], ECF No. 1 (same).

167. Corey v. Sec'y, U.S. Dep't of Hous. & Urban Dev. *ex rel.* Walker, 719 F.3d 322, 325 (4th Cir. 2013) (quoting Kormoczy v. HUD, 53 F.3d 821, 823–24 (7th Cir. 1995)).

168. Glenn v. Vilsack, No. 4:21-cv-137, 2022 WL 3012744, at *4 (N.D. Fla. June 29, 2022) (citing Lewis v. City of Union City, 918 F.3d 1213, 1220 (11th Cir. 2019)) (discussing an Equal Credit Opportunity Act claim).

169. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 510, 512 (2002); *see also* Woods v. City of Greensboro, 855 F.3d 639, 648 (4th Cir. 2017) (a plaintiff "need not plead facts sufficient to establish a prima facie case of race-based discrimination to survive a motion to dismiss").

170. *Swierkiewicz*, 534 U.S. at 512; *see also* Lindsay v. Yates, 578 F.3d 407, 416 (6th Cir. 2009) ("[T]he key question . . . is whether the plaintiffs have presented sufficient evidence to permit a reasonable jury to conclude [they] suffered an adverse housing action under circumstances giving rise to an inference of unlawful discrimination, not whether the *prima facie* elements specifically articulated in *McDonnell Douglas* . . . could be established." (quotations and citations omitted)); *see also* Budnick v. Town of Carefree, 518 F.3d 1109, 1114 (9th Cir. 2008) ("In lieu of satisfying the elements of a prima facie case, a plaintiff may also simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the challenged decision." (quotations and citations omitted)); Memorandum from Worden to Smyth, *supra* note 161, at 3 n.12; *Swierkiewicz,* 534 U.S. at 510 ("The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement."); L.C. v. LeFrak Org., Inc., 987 F. Supp. 2d 391, 400 (S.D.N.Y. 2013) ("Discriminatory intent may be inferred from the totality of the circumstances."); *see also id.* ("The initial burden of production under the *McDonnell Douglas* analysis is minimal." (quotations and citations omitted)). For a discussion of legal standards at the motion to dismiss and motion for summary judgment stages see *Xia v. 65 W. 87th St. Hous. Develop. Fund Corp.*, No. 20 Civ. 03576, 2020 WL 7230961, at *7–8 (S.D.N.Y. 2020) (citing cases) (discussing the pleading standard at the motion to dismiss stage) ("An inference of discrimination can be shown through circumstances demonstrating that a person or group is treated differently from others who are 'similarly situated.'"). *See generally Lindsay*, 578 F.3d at 414–20 (discussing legal standards at motion for summary judgment stage).

- Failure to include positive aspects of a neighborhood or incomplete analysis that overemphasizes negative aspects;
- Failure to follow Fannie Mae guidelines or USPAP standards;
- Failure to follow the defendant company's own established appraisal policies;
- Deviation from established or best practices;
- An unusual sequence of events;
- Selection of inappropriate comparable properties;
- Questionable adjustments to comparable property values;
- A pattern or location of comparable properties that suggests racial neighborhood demographics influenced the selection or statistical analysis suggesting different treatment based on neighborhood composition;
- Alternative appraisals estimating a higher value;
- Errors or sloppiness in the appraisal report, including expert witness testimony that the appraisal was defective;
- Statistical analysis suggesting differential treatment based on a protected status (particularly in the case of discriminatory effect);
- Differences in appraised values before and after a homeowner removes evidence of their race; and
- Pre-lawsuit communications or conduct.[171]

A second theory of liability under the Fair Housing Act is discriminatory effect, commonly known as disparate impact. Under this theory, discriminatory intent is not required.[172] Rather, the plaintiff must allege that a facially neutral policy or practice had a disparate impact on a protected class, such as race or ethnicity.[173] The most common evidence to support disparate impact claims is statistical evidence showing a disparate impact on a particular protected class.[174] Under a burden-shifting framework, a

171. *See* Dane, *supra* note 61 (citing Steptoe v. Savings of Am., 800 F. Supp. 1452 (N.D. Ohio 1992)); *see generally* Stephen M. Dane, *Investigating Claims of Discrimination in Housing Finance*, 28 J. MARSHALL L. REV. 371, 375–79 (1995) (describing methods of gathering evidence and potential sources). In the case of prelitigation communications or conduct, one example is the defendant's behavior after receiving notice of potential discrimination. In a non-appraisal example, the National Fair Housing Alliance warned Fannie Mae that its maintenance practices for real estate owned properties were discriminatory. *See* Nat'l Fair Hous. All. v. Fed. Nat'l Mortgage Ass'n, No. C 16-06969, 2019 WL 3779531, at *4–6 (N.D. Cal. Aug. 12, 2019). When Fannie Mae did not change its practices, a court found that conduct sufficient to show motive and denied in part Fannie Mae's motion to dismiss. *See id.* at *5–6 (describing Fannie Mae's "pre-suit conduct"). "Errors or sloppiness" can be tricky because a defendant may lean into sloppiness, arguing that the appraiser did not act with racial motivation but was simply bad at their job. *See, e.g.*, Schwemm, *supra* note 55, at 390 ("[T]he defense may simply be that subjective judgments led to the low appraisal. Indeed, even 'human error' can be a defense, for Title VIII does not require that appraisers be good at their jobs; it only requires that they not consider unlawful factors."). On the other hand, appraisals are a significant factor in the loan underwriting process and appraisals are carefully reviewed by underwriters.

172. *See* Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 524–25 (2015); *see also* 24 C.F.R. § 100.500 (2022) (defining the legal standards for proving discriminatory effect); Memorandum from Worden to Smyth, *supra* note 161, at 4–15.

173. *See supra* sources cited note 172.

174. *See, e.g.*, Evolve Complaint, *supra* note 157, at 30–31 (alleging disparate impact claim based on policy that discriminated against renters with vouchers).

plaintiff must be prepared to argue that less restrictive means are available to accomplish any business or other legitimate interest that the defendant may identify in response to the allegations.[175]

A second federal cause of action is the Equal Credit Opportunity Act (ECOA).[176] It prohibits "any creditor" from "discriminat[ing] against any applicant, with respect to *any aspect* of a credit transaction . . . on the basis of race [and other protected classes]."[177] Federal regulations provide that the ECOA prohibits appraisal discrimination.[178] Additionally, the Consumer Financial Protection Bureau (CFPB) has promulgated a

175. *See* 24 C.F.R. 100.500. HUD recently reinstated this regulation, which defines the legal framework for disparate impact claims. *See* Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. 19,450, 19,450 (Mar. 31, 2023) (to be codified at 24 C.F.R. pt. 100). In 2013, the Obama Administration first promulgated a disparate impact regulation. *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,459 (Feb. 15, 2013). In 2015, the Supreme Court recognized disparate impact claims as cognizable under the FHA, consistent with decades of case law from lower courts. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, 576 U.S. 519, 539 (2015). In 2020, however, the Trump Administration rolled back the Obama administration's rule, replacing the prior standards with a heightened motion to dismiss standard. *See* HUD's Implementation of the Fair Housing Act's Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020). In 2021, the Biden Administration revoked the Trump administration's rule and began a new notice-and-comment rulemaking process to promulgate new standards. *See* Reinstatement of HUD's Discriminatory Effects Standard, 86 Fed. Reg. 33,590 (June 25, 2021). HUD thus reinstated the disparate impact regulation in 2023. Reinstatement of HUD's Discriminatory Effects Standard, 88 Fed. Reg. at 19,450. For a summary of the litigation standards pre-dating the 2013 Obama-era rule, see Leland Ware & Steven W. Peuquet, *The Admissibility of Matched-Pair Testing Evidence in Fair Housing Cases Under* Daubert v. Merrell Dow Pharmaceuticals, Inc., 14 J. AFFORDABLE HOUS. & CMTY. DEV. L. 23, 27–28 (2004) (describing cases alleging disparate impact).

Some scholars have questioned whether disparate impact liability is available in appraisal discrimination cases. *See, e.g.*, SCHWEMM, *supra* note 152, § 18:8 ("Whether appraisal practices may be challenged under a discriminatory-effect theory is unclear."). The basis for this question is largely rooted in dicta in *Inclusive Communities*, which addresses the appraisal exception provision in 42 U.S.C. § 3605(c). *See Inclusive Communities*, 576 U.S. at 539 ("If a real-estate appraiser took into account a neighborhood's schools, one could not say the appraiser acted because of race. And by embedding [§ 3605(c)'s] exemption in the statutory text, Congress ensured that disparate-impact liability would not be allowed either."). However, other advocates offer a compelling case that such liability is available under federal law. *See, e.g.*, Steve Tomkowiak, Fair Hous. Ctr. of Metro. Detroit, *Recognizing and Addressing the Undervaluation of Homes in Minority Communities*, YOUTUBE (Mar. 29, 2023), www.youtube.com/watch?v=RWEmb2bL-R8 [https://perma.cc/H9ML-DTR4] (timestamp 1:16:30) (explaining "why [*Inclusive Communities*] should not be read to foreclose [the disparate impact] theory of liability as to appraisal practices").

176. 15 U.S.C. § 1691.

177. *Id.* § 1691(a) (emphasis added).

178. *See* 12 C.F.R. § 128.11(a) (2022) ("No [lender] may use or rely upon an appraisal of a dwelling which the [lender] knows, or reasonably should know, is discriminatory on the basis of the age or location of the dwelling, or is discriminatory per se or in effect under the Fair Housing Act of 1968 or the Equal Credit Opportunity Act."). Credit union regulations also prohibit appraisal discrimination. *Id.* § 701.31(b)(3) ("Consideration of any of the following factors in connection with a real estate-related loan is not necessary to a Federal credit union's business, generally has a discriminatory effect, and is therefore prohibited: (i) The age or location of the dwelling; (ii) Zip code of the applicant's current residence; (iii) Previous home ownership; (iv) The age or location of dwellings in the neighborhood of the dwelling; (v) The income level of residents in the neighborhood of the dwelling."). ECOA is implemented by the CFPB's Regulation B. *Id.* § 1002.1; *see also id.* § 1002.4(a) (prohibiting discrimination in "any aspect of a credit transaction").

regulation that requires creditors to provide applicants with free copies of appraisals and other written valuations developed in connection with a loan application.[179] In the appraisal context, a key distinction is that the ECOA is only applicable to creditors.[180] As such, plaintiffs generally only plead an ECOA violation when suing a lending institution (typically because the lender relied on a discriminatory appraisal despite the fact it knew or should have known it was discriminatory).[181] At least one appellate court has observed that the term "creditor" may be broad enough to encompass an appraiser.[182]

A third federal cause of action is available under the Civil Rights Act of 1866.[183] This cause of action has two parts (known by their codified sections of the U.S. Code). Section 1981 guarantees to all persons the same right as white citizens to make and enforce contracts.[184] Section 1982 provides all citizens the same right as white citizens to purchase, lease, sell, hold, and convey real and personal property.[185] These sections apply to intentional discrimination based on race, not discriminatory effect.[186] These causes of action are frequently pled in conjunction with FHA claims,[187] as they provide broader application, given that the FHA has certain exemptions.[188]

---

179. *See* Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), 78 Fed. Reg. 7215 (Jan. 31, 2013) (to be codified at 12 C.F.R. pt. 1002).

180. *See* 15 U.S.C. § 1691(a).

181. *See id.* Because pleading requirements under the ECOA are in flux, the plaintiff may need to argue some kind of agency principle, i.e., that the appraiser was the lender's agent as part of the "credit transaction." *See supra* note 175. For additional resources on when creditors may be held liable, see FANNIE MAE SINGLE FAMILY, SELLING GUIDE 506–08, 512–13 (2023), singlefamily.fanniemae.com/media/35886/display [https://perma.cc/WER3-9JE2] (describing "unacceptable appraisal practices" and lender responsibility to ensure "objective and unbiased appraisals"); FANNIE MAE, GUIDANCE FOR LENDERS AND APPRAISERS (2009), www.mdappraisers.org/file/Fannie_Mae_appraisalguidance-2009.pdf [https://perma.cc/H9V5-Z2UZ] (discussing lender standards); OFF. OF THE COMPTROLLER OF THE CURRENCY ET AL., INTERAGENCY FAIR LENDING EXAMINATION PROCEDURES (2009), www.ffiec.gov/PDF/fairlend.pdf [https://perma.cc/83ML-NP8P] (same); DEP'T OF HOUS. & URB. DEV., POLICY STATEMENT ON DISCRIMINATION IN LENDING (1994), www.govinfo.gov/content/pkg/FR-1994-04-15/html/94-9214.htm [https://perma.cc/3Y3S-2K2U] (same).

182. *See* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 716 (7th Cir. 1998) (Posner, C.J., dictum) (citing 12 C.F.R. § 202.2(1)) ("[W]hile the Equal Credit Opportunity Act imposes liability only on 'creditors[,]' the term may be broad enough to encompass an appraiser.").

183. Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (codified as amended at 42 U.S.C. §§ 1981–82).

184. 42 U.S.C. § 1981(a); *see* SCHWEMM, *supra* note 152, § 27:25 (detailing § 1981's substantive provisions).

185. 42 U.S.C. § 1982; *see* SCHWEMM, *supra* note 152, § 27:3 (comparing § 1982 with the FHA and detailing § 1982's substantive provisions).

186. *See, e.g.*, Steptoe v. Sav. of Am., 800 F. Supp. 1542, 1547 (N.D. Ohio 1992).

187. *See, e.g.*, Tate-Austin Complaint, *supra* note 1, at 24–25 (pleading claims for both §§ 1981 and 1982).

188. *See, e.g.*, 42 U.S.C. § 3607 (FHA exemptions for religious organization and private clubs). Most FHA exemptions arise with respect to property type under § 3604, and therefore may be less relevant in the appraisal context for claims under § 3605. *See generally*

Finally, other federal laws may apply. For instance, several federal laws impose recording and reporting requirements, which may either provide a cause of action or lead to helpful data during an investigation.[189]

State and local laws provide several additional causes of action. These claims include state fair-housing and fair-lending laws and tort-based claims. In the case of fair-housing claims, state laws often provide broader protections.[190] Additionally, state tort claims may be pleaded with discrimination claims. A large body of state-law negligence claims exists and has been litigated apart from discrimination allegations. However, these claims may nevertheless strengthen discrimination claims. Among these are actions for negligent misrepresentation, which require plaintiffs to allege (1) the defendant misrepresented a material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the misrepresented fact, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.[191] A variety of other tort claims may be available as supplemental claims.[192]

Standing. Because the Fair Housing Act provides the broadest basis for standing and is the common denominator in most appraisal discrimination cases, this Section focuses on standing for an "aggrieved person" under the FHA. The term "aggrieved person" is broadly defined to include anyone who "claims to have been injured by a discriminatory housing practice."[193] The Supreme Court has noted that the term "aggrieved

---

T.A. Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459, 466–67 (1969).

189. *See, e.g.*, SCHWEMM, *supra* note 152, § 18:1 (describing federal and state nondiscrimination statutes and regulations that may be applicable); *see generally* Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REFORM 527, 559–69 (1993) (describing the development of mortgage lending discrimination and identifying relevant legal authorities and proposals).

190. For example, California prohibits discrimination on the basis of gender expression and military status. *See, e.g.*, CAL. GOV'T CODE §§ 12940, 12955. In 2020, the Supreme Court interpreted sex discrimination to encompass sexual orientation discrimination under Title VII of the Civil Rights Act of 1964. Bostock v. Clayton County, 140 S. Ct. 1731, 1740 (2020). Since courts typically look to Title VII to interpret FHA claims, the federal FHA may also extend to sexual orientation discrimination. HUD has recently issued guidance to this effect under the Biden Administration. Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD to Enforce Fair Housing Act to Prohibit Discrimination on the Basis of Sexual Orientation and Gender Identity (Feb. 11, 2021), archives.hud.gov/news/2021/pr21-021.cfm [https://perma.cc/P5P5-YXL6]; *see also* Tate-Austin Complaint, *supra* note 1, at 23 (pleading a cause of action under California state law); *see generally* NFHA APPRAISAL REPORT, *supra* note 23, at 29 (discussing state laws and other prohibited bases of discrimination).

191. *See* Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 1105072, at *11 (N.D. Cal. Apr. 13, 2022) (reciting the elements under California state law); *see also* Tate-Austin Complaint, *supra* note 1, at 26 (alleging negligent misrepresentation under CAL. CIV. CODE § 1710). The district court has since dismissed the negligent misrepresentation claim. *See* Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 3590341, at *1–2 (N.D. Cal. Aug. 22, 2022).

192. *See generally* PETER T. CHRISTENSEN, RISK MANAGEMENT FOR REAL ESTATE APPRAISERS AND APPRAISAL FIRMS (2019) (discussing types of claims and the "mistakes" appraisers make that result in lawsuits).

193. 42 U.S.C. § 3602(i). A "discriminatory housing practice," refers to any prohibited act described in FHA §§ 3604–3606 and 3617. *Id.* § 3602(f).

person" in the FHA sweeps "as broadly as is permitted by Article III of the Constitution."[194] Aggrieved persons also include "individuals, corporations, associations of individuals, legal representatives, and a wide variety of other entities."[195]

In the appraisal discrimination context, the two categories of plaintiffs who are most likely to have standing are (1) the owner or would-be purchaser of an appraised property and (2) a fair housing organization with organizational-plaintiff standing.[196] Other potential "aggrieved parties" may include a real estate agent;[197] the buyer; a nearby neighbor who is injured by being deprived of the social, professional, and economic benefits of living in an integrated community;[198] or a municipality or other government unit that is similarly injured by the appraisal's effect on property values or the perpetuation of residential segregation in its jurisdiction.[199] Industry players, such as lenders that commission appraisals, may also have claims.[200] Appraisal Management Companies (AMCs) or individual appraisers may have claims against a lender or an AMC that applies overly restrictive overlays in their appraisal standards. Organizational plaintiffs, such as fair housing centers or FHIPs, can establish standing by alleging an injury to the organization in the form of frustration of efforts or diversion of their resources in responding to fair

194. Bank of Am. Corp. v. City of Miami, 581 U.S. 189, 197, 202–03 (2017) (holding that the phrase "aggrieved persons" does not narrow Fair Housing Act standing as compared to Article III standing, but the requirement that a plaintiff show proximate cause—which requires "some direct relation between the injury asserted and the injurious conduct alleged"—imposes a burden on plaintiffs to show more than a possibility that the defendant could have foreseen the harm).

195. SCHWEMM, *supra* note 152, § 12A:1 (discussing FHA standing).

196. *See, e.g.*, Hanson v. Veterans Admin., 800 F.2d 1381, 1384–86 (5th Cir. 1986) (individual homebuyer); Steptoe v. Sav. of Am., 800 F. Supp. 1542, 1547 (N.D. Ohio 1992) (homebuyers and their realtor); Old W. End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100, 1102 (N.D. Ohio 1987) (home sellers, realtor, and nonprofit association); Cartwright v. Am. Sav. & Loan Ass'n, 880 F.2d 912, 917–18, 918 n.13 (7th Cir. 1989) (homeowner and fair housing organization).

197. *See Steptoe*, 800 F. Supp. at 1544; *Old W. End Ass'n*, 675 F. Supp. at 1102.

198. *See, e.g.*, *Old W. End Ass'n*, 675 F. Supp. at 1102 (discussing standing of white persons who are injured by discriminatory practices under the *Trafficante* theory) ("The parties involved in the transaction underlying this suit are white. This factor, however, is irrelevant to the determination of defendants' motions for summary judgment. This court has previously found that non-minorities have standing to maintain discrimination actions for injuries suffered by them as a result of racially discriminatory practices." (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972)).

199. *See, e.g.*, City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1278 (11th Cir. 2015), *rev'd on other grounds*, 581 U.S. 189 (2017); *see also* SCHWEMM, *supra* note 152, § 12A:2 (discussing Supreme Court standing case law); *see also* SCHWEMM, *supra* note 152, § 12A:4 (discussing organizational standing). While municipal claims are relatively rare in the appraisal discrimination context, there are some examples. For instance, in 2014, Cook County, Illinois, sued Bank of America and other financial institutions for fair housing violations stemming from a "predatory and discriminatory scheme to strip equity from the homes of African American and Hispanic borrowers . . . and to foreclose disproportionately on their homes," that relied in part on appraisal inflation. County of Cook v. Bank of Am. Corp., 584 F. Supp. 3d 562, 565 (N.D. Ill. 2022) (granting motion for summary judgment in favor of defendants on disparate impact theory).

200. Lenders may be in a unique position because they may have access to data, such as other appraisals, commissioned within their network.

housing violations.[201] At all times, it is also important to recognize that federal regulators have authority to enforce actions for appraisal discrimination.

Defendants. There are four primary categories of defendants in appraisal cases: (1) individual appraisers, (2) appraisal firms, (3) AMCs, and (4) lenders.[202] While, "other persons, such as real estate brokers" who "use an appraisal report in establishing the sales price of dwelling" might also be liable,[203] this Section focuses on these four categories of defendants.

An investigation into appraisal discrimination typically begins with the appraiser, the actor who is most likely to have introduced bias into the valuation process. However, appraisers rarely act alone. Often, appraisers are employed by an appraisal firm, and this relationship may trigger *respondeat superior* and other state-law agency principles.[204] In addition to appraisal firms, AMCs serve as intermediaries between lenders and appraisers.[205] After the enactment of the Dodd-Frank Wall Street Reform and Consumer Protect Act, mortgage lenders and brokers may not attempt to influence the valuation of real property.[206] Thus, instead of contracting with appraisers directly, lenders contract with AMCs that in turn contract with licensed appraisers who serve the relevant geographic area.[207] Typically, states license and regulate AMCs, individual appraisers, and appraisal firms.[208] Federal law requires AMCs to review the ap-

---

201. *See* SCHWEMM, *supra* note 152, § 12A:5 (discussing organizational standing in the fair housing context). Fair housing organizations more easily meet the standards for injunctive relief and may be able to recover broader injunctive relief than individual plaintiffs. *See* Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. RICH. L. REV. 753, 828 (2006). There may be other aggrieved parties too. For instance, perhaps a lender loses a deal and associated fees because the appraisal is too low. *See* SCHWEMM, *supra* note 152, § 12A:5.

202. *See generally* SCHWEMM, *supra* note 152, § 12B.

203. Implementation of the Fair Housing Amendments Act of 1988, 53 Fed. Reg. 44,999 (Nov. 7, 1988); *see also* Hall v. Lowder Realty Co., 160 F. Supp. 2d 1299, 1318 (M.D. Ala. 2001) (upholding a claim under § 3605 against a real estate broker who relied on discriminatory appraisal in setting a listing price). Notably, real estate brokers may also be plaintiffs if they are damaged because a sale fell through. *See Hall*, 160 F. Supp 2d at 1313.

204. *See* Complaint at 4, Washington v. Wells Fargo Bank, No. 1:22-cv-764 (M.D.N.C. Sept. 13, 2022), ECF No. 1 (alleging lender and appraisal firm liability for the actions of their employees or agents); *see also* CAL. BUS. & PROF. CODE § 10232.6; DENNIS L. GREENWALD & STEVEN A. BANK, CALIFORNIA PRACTICE GUIDE: REAL PROPERTY TRANSACTIONS § 6:706.5 (Carol M. Clements ed., 2022) ("[Section 10232.6] does *not* apply where the licensed appraiser is an *employee of the broker*. (This apparently recognizes that a loan broker may be held vicariously liable for its employee-appraiser's negligent appraisal under normal *respondeat superior* principles applicable in any employer-employee relationship.)"); *see generally* Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141 (2020) (discussing the continued relevance of *respondeat superior* in the modern economy); Meyer v. Holley, 537 U.S. 280 (2003) (discussing *respondeat superior* liability under the Fair Housing Act); NFHA APPRAISAL REPORT, *supra* note 23, at 66–67 (discussing "Supervisory Appraisers" in the appraiser certification process).

205. *See* Tate-Austin Complaint, *supra* note 1, at 9.

206. *See* 15 U.S.C. § 1639(e); *see also* Tate-Austin Complaint, *supra* note 1, at 9.

207. *See* Tate-Austin Complaint, *supra* note 1, at 9.

208. *See* NFHA APPRAISAL REPORT, *supra* note 23, at 35.

praisers' work, regardless of whether the appraiser is an employee or independent contractor, to ensure services are performed in accordance with USPAP standards.[209] Finally, a lender may be liable if the lender denied a loan or otherwise modified the terms of financial services based on the appraisal; the lender is liable if it "knows or reasonably should know" that an appraisal improperly relies on race or some other prohibited factor.[210] A lender could be sued if it denies a homeowner's request for a new appraisal or deviates from its "reconsideration of value" (ROV) policy.[211] On the other hand, a lender may escape liability if it agrees to order a new appraisal.[212]

Administrative Complaints. Under the FHA and state-law equivalents, plaintiffs may elect to either file directly in court or file an administrative complaint with a federal or state agency with jurisdiction.[213] The newest wave of appraisal litigation has involved a considerable uptick in HUD administrative complaints.[214] The state agency that has seen the most active administrative filings is California's Department of Fair Employment and Housing.[215] Administrative complaints offer some strategic advantages to filing directly in court.[216] Even when an aggrieved party elects to file an administrative complaint, the party can remove the complaint and file it in a court of appropriate jurisdiction.[217] "The class of potential plaintiffs who may sue under § 3613 is the same as the class of potential [administrative] complainants to HUD under § 3610."[218]

Remedies. The available relief in these cases is broad, particularly avenues for tailored affirmative relief. Available damages include compensatory damages and punitive damages,[219] neither of which has any statutory

209. *See* 12 U.S.C. § 3353(a).

210. *See* 24 C.F.R. § 100.135(d) (2022); *see also* 53 Fed. Reg. 44,999, *supra* note 203 (discussing lender liability).

211. *See generally* 24 C.F.R. § 100.135.

212. *See, e.g.*, Fair Hous. Advocs. of N. Cal. v. Mehdipour-Mossafer, No. 202112-15608810 Cal. Dep't of Fair Employ. & Hous. (filed 2021).

213. *See* 42 U.S.C. § 3612(a)–(b).

214. *See, e.g.*, NFHA APPRAISAL REPORT, *supra* note 23, at 33 ("[T]here has been a recent uptick in appraisal discrimination claims being filed with HUD and in court.") (citing Marilyn Odendahl, *HUD Complaints Allege Racial Bias in Indianapolis Home Appraisals*, IND. LAW. (May 4, 2021), www.theindianalawyer.com/articles/hud-complaints-allege-racial-bias-in-indianapolis-home-appraisals [https://perma.cc/X8YH-47VD]). For a discussion of the substantial body of pending HUD administrative complaints alleging appraisal discrimination, see *infra* note 238.

215. *See, e.g.*, Fair Hous. Advocs. of N. Cal. v. Mehdipour-Mossafer, No. 202112-15608810 Cal. Dep't of Fair Employ. & Hous. (filed 2021).

216. *See* 42 U.S.C. § 3610(a)(1)(A)(i) (authorizing an aggrieved person to file a complaint with HUD); *see also* SCHWEMM, *supra* note 152, § 24:3 (describing the administrative complaint process).

217. *See* 42 U.S.C. § 3612(a); *see also* SCHWEMM, *supra* note 152, § 24:15 (discussing the "election-to-court" option). This differs from the employment context. Title VII requires aggrieved persons to file an administrative complaint with the EEOC as a prerequisite to filing in federal court. *See* 29 C.F.R. §§ 1614.105–06 (2022).

218. SCHWEMM, *supra* note 152, § 12A:1; *see also id.* § 12A:1 n.5–6 (comparing sections).

219. *See id.* § 25:3 (discussing available damages); *id.* at §§ 25:3–8 (discussing actual damages); *id.* at §§ 25:9–12 (discussing punitive damages). For examples of cases involving

limit.[220] Plaintiffs can also get injunctive relief and affirmative relief.[221] The most common forms of affirmative relief in these cases—typically reached in settlement agreements—are fair housing training,[222] self-testing or self-auditing systems,[223] quality control procedures and similar best practices,[224] revision or implementation of new policies such as ROV policies that govern the process of requesting a new appraisal,[225] and various forms of community relief, such as consumer education or reinvestment in injured communities.[226] Finally, reasonable attorney's fees and litigation costs are available.[227] HUD regulations provide similar relief during the administrative conciliation process.[228]

A recent high-profile settlement illustrates the potential remedies resulting from these cases. In October 2020, a Black woman filed a complaint with HUD, alleging that a creditor relied on a racially discriminatory appraisal.[229] In the complaint, which later became *HUD v. JPMorgan Chase Bank*, the complainant alleged that the appraiser under-

such damages, see Second Amended Complaint at 38–40, Eva v. Midwest Nat'l Mortg. Bank, 143 F. Supp. 2d 862 (N.D. Ohio 2001) (No. 1:00-cv-1918) [hereinafter Eva Complaint], ECF No. 123; Complaint at 10, Price v. Taylor, No. 3:08-cv-00420, 2012 WL 2568084 (N.D. Ohio 2012), ECF No. 1-2; Amended Complaint at 19–20, Swanson v. Citi, 706 F. Supp 2d 854 (N.D. Ill. 2009) (No. 1:09-cv-02344), ECF No. 21.

220. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1633 (as codified at 42 U.S.C. § 3613) (eliminating the $1,000 cap on punitive damages); SCHWEMM, *supra* note 152, § 25:9 (discussing the end of the punitive damages cap); *id.* § 25:4 n.9 (discussing actual damages).

221. *See* SCHWEMM, *supra* note 152, §§ 25:13–16 (discussing equitable relief). For examples of cases involving such damages, see Tate-Austin Complaint, *supra* note 1, at 26–27; *County of Cook v. Bank of Am. Corp.*, 181 F. Supp. 3d 513, 522–23 (N.D. Ill. 2015) (directing defendants to take all affirmative steps necessary to remedy the effects of the discriminatory conduct); *Eva v. Midwest Nat'l Mortg. Bank*, 143 F. Supp. 2d 862, 900–01 (N.D. Ohio 2001) (same). Fair housing organizations more easily meet the standards for injunctive relief and may be able to recover broader injunctive relief than individual plaintiffs. *See, e.g.*, Fair Hous. Advocs. of N. Cal. v. Mehdipour-Mossafer, No. 202112-15608810 Cal. Dep't of Fair Employ. & Hous. (filed 2021).

222. *See, e.g.*, Conciliation Agreement 4–5, HUD v. JPMorgan Chase Bank, N.A., FHEO No. 05-21-0635-8 (2021) (providing an example of mandatory training).

223. *See id.*

224. *See, e.g.*, *id.* at 4 (discussing quality control procedures).

225. *See, e.g.*, *id.* at 4–5 (discussing ROV policies). *See* NFHA APPRAISAL REPORT, *supra* note 23, at 77–78 (discussing the importance of ROV policies).

226. Community relief might include enjoining defendants to prevent future discrimination. *See generally* 28 AM. JUR. TRIALS 1 *Housing Discrimination Litigation* § 40, Westlaw (database updated Apr. 2023) (noting that in addition to damages, advocates can seek remedial provisions to deter defendants from subsequent wrongdoing); *see also* Barkley v. Olympia Mortg. Co., No. 04-cv-875, 2007 WL 2437810, at *23 (E.D.N.Y Aug. 22, 2007).

227. *See* 42 U.S.C. § 3613(c)(2); *see also* SCHWEMM, *supra* note 152, §§ 25:17–21 (discussing attorney's fees and costs and court authority to appoint counsel for either party and waive fees and costs for a party who is financially unable to bear these costs); *see also* Second Amended Complaint at 13–14, Lea v. U.S. Dep't of Agric., No. 1:10-cv-00029, 2011 WL 182698 (W.D. Ky. Jan. 19, 2011), ECF No. 85; Complaint at 3, Hood v. Midwest Sav. Bank, No. 2:04-cv-481, (S.D. Ohio June 7, 2004), ECF No. 1; Eva Complaint, *supra* note 219, at 38–40.

228. *See* 24 C.F.R. § 103.315 (2022).

229. Conciliation Agreement, *supra* note 222, at 2.

valued her home on account of her race.[230] Thereafter, the parties reached a Conciliation Agreement requiring JPMorgan Chase to (1) pay $50,000 in damages, (2) "re-review" its ROV process to ensure customers are informed of their ability to raise concerns about the appraisal, (3) offer mandatory fair lending training on appraisal discrimination to its employees—including more detailed training on its ROV process, and (4) revise its appraisal cover letter language to include a nondiscrimination statement about appraisals and provide a customer support number for reporting these issues, among other relief.[231]

Ultimately, appraisal discrimination cases present many decision points for litigators, including which available claims to plead under federal and state law, which plaintiffs are most likely to have standing, which defendants to name, and available remedies to seek. This Section reviews the claims, parties, and relief in a classic low-valuation discrimination case.

B. Empirical Data

Twenty-five years after the enactment of the Fair Housing Act, fair housing scholar Robert Schwemm analyzed the empirical body of appraisal discrimination litigation that had emerged.[232] He observed that "the Fair Housing Act's ban on appraisal discrimination has produced only a small amount of litigation" over its first twenty-five years.[233] Moreover, "[v]irtually all" appraisal cases have involved highly individualized allegations, and none had resulted in a victory on the merits for the plaintiff.[234]

Another twenty-five years have passed. This Section updates Schwemm's analysis, examining the empirical body of appraisal discrimination cases. Until 2020, appraisal litigation followed a similar pattern—a mere trickle of cases each decade. However, there has been a recent uptick in cases since 2020,[235] and fair housing organizations have initiated new appraisal investigations, suggesting more cases may be filed soon.[236]

This Section examines a universe of twenty-one federal cases, including three pending and eighteen adjudicated matters.[237] It does not include

230. *Id.*; *see also* Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Approves Agreement with JPMorgan Chase Resolving Claims of Race Discrimination in Appraisals (Mar. 8, 2021), archives.hud.gov/news/2021/pr21-037.cfm [https://perma.cc/9D94-FT8Z].

231. Conciliation Agreement, *supra* note 222, at 4–5.

232. *See* Schwemm, *supra* note 55.

233. *Id.* at 365.

234. *Id.* at 374.

235. *See, e.g.*, NFHA Appraisal Report, *supra* note 23, at 33.

236. Notes from fair housing investigation meetings and interviews with investigators and litigators between 2021 and 2022 are on file with the author. For a discussion of the substantial body of pending HUD administrative complaints, see *infra* note 238.

237. The twenty-one cases are: United States v. Am. Inst. of Real Est. Appraisers, 442 F. Supp. 1072 (N.D. Ill. 1977); Harper v. Union Sav. Ass'n, 429 F. Supp. 1254 (N.D. Ohio 1977); Hanson v. Veterans Admin., 800 F.2d 1381 (5th Cir. 1986); Jorman v. Veterans Admin., 830 F.2d 1420 (7th Cir. 1987); Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp. 1330 (N.D. Ind. 1987); Old W. End Ass'n. v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100 (N.D. Ohio 1987); Cartwright v. Am. Sav. & Loan Ass'n, 880 F.2d 912 (7th Cir. 1989);

pending administrative complaints.[238] I identified this body of cases by searching for all federal cases alleging appraisal discrimination, using Westlaw and LexisNexis case search functions.[239] Many, but not all, cases allege the classic low-valuation fact pattern. I have included both published and unpublished cases to expand the diversity of fact patterns, dispositive motions, and outcomes.[240] This allows me to draw more lessons for litigators based on patterns and offers context for the new wave of cases and administrative complaints.

The body of cases is limited to cases alleging fair housing claims because the Fair Housing Act is the "federal statute most clearly concerned with discrimination in home appraisals and because, although claims under § 1981[,] § 1982, [the] ECOA, and other laws may also be appropriate, no case has ever relied on these other laws to uphold a claim of appraisal discrimination without holding that the defendant's discrimination also violated the Fair Housing Act."[241]

Steptoe v. Sav. of Am., 800 F. Supp. 1542 (N.D. Ohio 1992); Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712 (7th Cir. 1998); Eva v. Midwest Nat'l Mortg. Bank, Inc., 143 F. Supp. 2d 862 (N.D. Ohio 2001); Hood v. Midwest Sav. Bank, 95 F. App'x 768 (6th Cir. 2004); Brown v. Interbay Funding LLC, 198 F. App'x 223 (3rd Cir. 2006); Barkley v. Olympia Mortg. Co., No. 1:04-cv-875, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007); Mathis v. United Homes, LLC, 607 F. Supp. 2d 411 (E.D.N.Y. 2009) (*Barkley* and *Mathis* were related cases and only counted once in this universe); Price v. Taylor, 575 F. Supp. 2d 845 (N.D. Ohio 2008); Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010); Complaint, Routen v. JPMorgan Chase Bank, N.A., No. 1:10-cv-02694 (N.D. Ill. Apr. 30, 2011), ECF No. 1 (dismissed pursuant to settlement Apr. 27, 2011) (*Swanson* and *Routen* were related cases and only counted once in this universe); Lea v. U.S. Dep't of Agric., No. 1:10-cv-00029, 2011 WL 182698 (W.D. Ky. Jan. 19, 2011); County of Cook v. Bank of Am. Corp., 181 F. Supp. 3d 513 (N.D. Ill. 2015); Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 3590341 (N.D. Cal. Aug. 22, 2022); Washington v. Wells Fargo Bank, N.A., No. 1:22-cv-764, 2023 WL 415483 (M.D.N.C. Jan. 25, 2023); Connolly Complaint, *supra* note 166; Bailey Complaint, *supra* note 166.

238. In response to a Freedom of Information Act (FOIA) request, HUD confirmed that it received 159 formal administrative complaints alleging appraisal discrimination between January 1, 2020 and September 26, 2022. According to its FOIA response, HUD has closed 39 cases and 120 cases remain open. One case was closed as duplicative of an open case. *See* Letter from Sandra Wright, Dep't of Hous. & Urb. Dev. (Apr. 26, 2023) (on file with author). Some administrative complaints are publicly available because complainants have posted them online or HUD has publicized a conciliation agreement. *See, e.g.*, Robinson Complaint, *supra* note 17; Conciliation Agreement, *supra* note 222 (explaining that HUD pursued the case on behalf of the original complainant).

239. This universe does not capture pre-litigation settlements and other allegations that did not result in formally filing an action. News articles on classic low-valuation fact patterns suggest that potential plaintiffs may have settled out of court. *See supra* sources accompanying note 14.

240. Using this method, it is possible that some cases exist that are not available on Westlaw or LexisNexis. This may be especially true if claims proceeded in state court or before electronic filing.

241. Schwemm, *supra* note 55, at 367. All cases except one include federal fair housing claims. The one exception is a case alleging discrimination under the Equal Credit Opportunity Act and Food, Conservation, and Energy Act of 2008. While the fact pattern in that case is highly individualized, it still reflects a similar low-valuation appraisal fact pattern and therefore sheds some light on how litigators have approached these cases. *See* Second Amended Complaint at 13, Corey Lea, Inc. v. U.S. Dep't of Agric., No. 1:10-cv-00029 (W.D. Ky. Feb. 19, 2010), ECF No 85.

Although the total number of cases is small, some useful patterns emerge. Over half of the cases allege a classic low-valuation fact pattern in which a plaintiff has an interest in a home, an appraiser issues a low appraisal that jeopardizes financing, and the plaintiff alleges the low appraisal was based on racial considerations.[242] In terms of outcomes, all but one of the cases that has faced a motion to dismiss has survived.[243] Six of eleven cases (54.5%) that have faced a motion for summary judgment have survived.[244] Six cases proceeded to trial, but plaintiffs did not prevail at trial in any of the cases.[245] Five cases settled, presumably providing at least some recovery for the plaintiffs.[246] Narrowing the universe of cases to the eleven classic low-valuation appraisal cases,[247] three are still pending.[248] Six of seven (85.7%) survived a motion to dismiss or otherwise proceeded past the motion to dismiss stage, and four of seven (57.1%) survived a motion for summary judgment or otherwise pro-

242. *See also* Schwemm, *supra* note 55, at 365 (defining a low-valuation fact pattern case).

243. *See e.g.*, Lea v. U.S. Dep't of Agric., No. 1:10-cv-00029, 2011 WL 182698, at *6 (W.D. Ky. Jan. 19, 2011) (granting a motion to dismiss).

244. For examples of courts granting dispositive motions for summary judgment in favor of defendants, see *Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712, 716 (7th Cir. 1998); *Hood v. Midwest Savings Bank*, 95 F. App'x 768, 780 (6th Cir. 2004); *Brown v. Interbay Funding LLC*, 198 F. App'x 223, 226 (3rd Cir. 2006); *County of Cook v. Bank of America Corp.*, 584 F. Supp. 3d 562, 565 (N.D. Ill. 2022). This universe of cases excludes *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), in which the U.S. Department of Justice challenged appraisal industry practices more broadly. It also excludes three settled cases. *See* Old W. End Ass'n v. Buckeye Fed. Sav. & Loan, 675 F. Supp. 1100 (N.D. Ohio 1987); Steptoe v. Sav. of Am., 800 F. Supp. 1542 (N.D. Ohio 1992); Swanson v. Citibank, N.A., 614 F.3d 400 (7th Cir. 2010). The parties in *Tate-Austin* reached a settlement before the defendants filed a motion for summary judgment. *See* Minute Entry, Tate-Austin v. Miller, No. 3:21-cv-09319 (N.D. Cal. Dec. 2, 2022), ECF No. 65 (revealing that the case failed to settle); Vanessa Romo, *Black Couple Settles Lawsuit Claiming Their Home Appraisal Was Lowballed Due to Bias*, NPR NEWS (Mar. 9, 2023, 2:21 PM), www.npr.org/2023/03/09/1162103286/home-appraisal-racial-bias-black-homeowners-lawsuit [https://perma.cc/CZ8H-MNGW].

245. *See* Harper v. Union Sav. Ass'n, 429 F. Supp. 1254, 1271 (N.D. Ohio 1977); Hanson v. Veterans Admin., 800 F.2d 1381, 1390 (5th Cir. 1986); Jorman v. Veterans Admin., 830 F.2d 1420, 1429 (7th Cir. 1987); Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp. 1330, 1342 (N.D. Ind. 1987); Cartwright v. Am. Sav. & Loan Ass'n, 880 F.2d 912, 927 (7th Cir. 1989); Barkley v. Olympia Mortg., No. 04-cv-875, 2007 WL 2437810, at *23 (E.D.N.Y. Aug. 22, 2007).

246. *See Old W. End*, 675 F. Supp. at 1106–07; *Steptoe*, 800 F. Supp. at 1549; Eva v. Midwest Nat'l Mortg. Bank, 143 F. Supp. 2d 862, 900–01 (N.D. Ohio 2001); *Barkley*, 2007 WL 2437810, at *23; *Swanson*, 614 F.3d at 407.

247. *See Hanson*, 800 F.2d at 1383–84; *Thomas*, 653 F. Supp. at 1342; *Steptoe*, 800 F. Supp. at 1544–45; *Latimore*, 151 F.3d at 713; *Brown*, 198 F. App'x at 224–25; *Swanson*, 614 F.3d at 402–03; *Lea*, 2011 WL 182698, at *1–2; Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 3590341, at *1–2 (N.D. Cal. Aug. 22, 2022); Washington v. Wells Fargo Bank, N.A., No. 1:22-cv-764, 2023 WL 415483 (M.D.N.C. Jan. 25, 2023); Connolly Complaint, *supra* note 166; Bailey Complaint, *supra* note 166.

248. *See Washington*, 2023 WL 415483, at *3; Connolly Complaint, *supra* note 166; Bailey Complaint, *supra* note 166. The Tate-Austin case recently settled. *See* Romo, *supra* note 244; *see also Lawsuit Alleging Race Discrimination in Home Appraisal Process Settled with Appraiser*, FAIR HOUSING HIGHLIGHTS, U.S. DEP'T HOUS. & URB. DEV. (May 2023), www.hudexchange.info/programs/nfhta/fair-housing-highlights [https://perma.cc/B9J3-RYY2].

ceeded to trial, with two of seven (28.6%) resulting in settlements.[249]

The four most recent federal actions, each filed since 2020, allege classic low-valuation fact patterns.[250] Likewise, each publicly available HUD administrative complaint I reviewed alleges a classic low-valuation fact pattern.[251] Since these low-valuation fact patterns currently appear to be the most common, this Section examines three cases that illustrate the evolution of low-valuation cases: *Latimore v. Citibank Federal Savings Bank*, *Tate-Austin v. Miller*, and *Duffy v. Citywide Mortgage Home Loans, LLC*.[252] In *Latimore*, the district court granted summary judgment in favor of the defendants and dismissed the action.[253] In *Tate-Austin*, the court denied the defendants' motion to dismiss on most claims[254] and the parties reached a confidential settlement ten months after filing suit.[255] The third case is a pending HUD administrative complaint.[256] This Section traces how plaintiffs have presented their claims and how the factfinder has evaluated those claims.

In *Latimore v. Citibank Federal Savings Bank*, the defendant bank denied a Black prospective borrower a home loan for a property in a neighborhood where over ninety percent of all residents were Black.[257] The basis of the bank's denial was the value of the collateral property relative to the loan sought.[258] The subject appraisal valued the house at $45,000, even though the prospective borrower, Helen Latimore, previously received an appraisal of $82,000 just ten months earlier.[259] Ms. Latimore notified the bank of the higher appraisal, which the bank reviewed, but the bank nevertheless declined to modify its lower appraisal amount of $45,000.[260] In response, Ms. Latimore filed a complaint against the bank and its appraiser for violations of the Fair Housing Act, ECOA, and various other federal and state civil rights and consumer protection statutes, alleging that the defendants improperly considered her race or the racial composition of her neighborhood in the appraisal and loan application

249. The court granted a motion to dismiss in *Lea*. *See Lea*, 2011 WL 182698, at *6. The court granted motions for summary judgment in favor of defendants in *Latimore* and *Brown*. *See Latimore*, 151 F.3d at 716; *Brown*, 198 F. App'x at 226. The parties settled in *Steptoe* and *Swanson*. *See Steptoe*, 800 F. Supp. 1542; *Swanson*, 614 F.3d at 400. In *Hanson* and *Thomas*, the parties proceeded to trial, but the defendants prevailed. *See Hanson*, 800 F.2d at 1390; *Thomas*, 653 F. Supp. at 1342.

250. *See Tate-Austin*, 2022 WL 3590341, at *1; *Washington*, 2023 WL 415483, at *1; Bailey Complaint, *supra* note 166, at 2–4.

251. *See, e.g.*, Duffy Complaint, *supra* note 17; Robinson Complaint, *supra* note 17; Conciliation Agreement, *supra* note 222.

252. *See, e.g.*, *Latimore*, 151 F.3d at 713; *Tate-Austin*, 2022 WL 3590341, at *1–2; Duffy Complaint, *supra* note 17.

253. *See Latimore*, 151 F.3d at 716.

254. *See Tate-Austin*, 2022 WL 3590341, at *2.

255. Romo, *supra* note 244.

256. Duffy Complaint, *supra* note 17. For a discussion of the substantial body of pending HUD administrative complaints alleging appraisal discrimination, see *supra* note 238.

257. *See* Latimore v. Citibank, F.S.B., 979 F. Supp. 662, 663 (N.D. Ill. 1997), *aff'd sub nom.* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712 (7th Cir. 1998).

258. *Latimore*, 151 F.3d at 713.

259. *Id.*

260. *Id.*

process.[261] In support of these allegation, she produced the $82,000 appraisal from the prior year, as well as an appraisal of $79,000 prepared a year later in connection with another loan application, and her expert witness's "reconstructive" appraisal of $62,000.[262] She also identified a comparator property that sold for $50,000 around the time of the low appraisal.[263]

The district court granted summary judgment for the defendants, noting that the plaintiff failed to "show that the defendants treated her materially differently than similarly situated white loan applicants or loan applicants from non-minority neighborhoods."[264] The court observed that the plaintiff's expert witness admitted that "the selection of comparable sales is an art, not a science, that adjustments are judgment-driven, and that he could support the adjustments [that the defendant appraiser] made."[265] Recognizing that a plaintiff "need not prove actual intent to discriminate" but "must show that race was a motivating consideration,"[266] the district court reviewed the remaining evidence concerning the value of the home and concluded that no reasonable factfinder could conclude that the defendants' appraisal methods were inconsistent depending on the race or neighborhood of the homeowners.[267] On appeal, the Seventh Circuit affirmed the district court's ruling in favor of the defendants.[268]

Latimore stands for the proposition that evidence that the appraisal was too low, by itself, is insufficient.[269] Under what is sometimes referred to by litigators as the "appraisal *plus*" standard, plaintiffs must produce more than comparable sales and alternative appraisals.[270] The "plus" must be some other evidence—direct or circumstantial—that indicates race played some role in decision making.[271] This may include any of the

261. *Id.*
262. *Id.* at 713–15.
263. *See Latimore*, 979 F. Supp. at 665.
264. *Id.*
265. *Id.* For commentary on the "art, not science" argument, *see infra* note 346.
266. *Latimore*, 979 F. Supp. at 666 (quoting Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp. 1330, 1338–39 (N.D. Ind. 1987)).
267. *Id.* at 669–70 ("In the present case there is no evidence that [the defendant appraiser] appraised Ms. Latimore's house using a different method than similarly situated houses owned by non-minorities or houses in non-minority neighborhoods. There is likewise no evidence that his appraisals consistently caused denials of loans to minorities or persons residing in minority neighborhoods, while resulting in approvals for non-minorities or people in non-minority neighborhoods." (citation omitted)).
268. *Latimore*, 151 F.3d at 716. The Seventh Circuit did not apply the *McDonnell Douglas* burden-shifting test on the basis that the facts were distinguishable from a one-to-one comparison in employment law. *See id. See also How You Can Support Fair Housing*, *supra* note 139 (discussing the *McDonnell Douglas* framework).
269. *See Latimore*, 151 F.3d at 715.
270. *See id.* at 716. Given the variation with the elements of an appraisal case, see *supra* note 166, not every court will necessarily follow the *Latimore* standard. Nevertheless, it may be prudent to assume that a court will require the plaintiff to produce a low appraisal *plus* additional evidence.
271. *See generally* SCHWEMM, *supra* note 152, § 10:2 (discussing circumstantial and direct evidence relating to a defendant's discriminatory motive in a fair housing case).

evidence described above in Part III.A, such as negative comments about the neighborhood,[272] deviation from established or best practices, or an unusual sequence of events.

A more recent case, *Tate-Austin v. Miller*, illustrates how litigators can build stronger cases under *Latimore*'s reasoning. The Austins were Black homeowners seeking to refinance their home.[273] After they received a surprisingly low appraisal of $995,000, the homeowners requested a new appraisal from their prospective lender.[274] The lender agreed and sent a new appraiser to the property.[275] Before the appraisal, the Austins "white-washed" their home by removing family photos revealing them to be Black, replacing them with photos of white people.[276] They also asked a white friend to pose as the homeowner and greet the appraiser.[277] The new appraisal came back nearly 50% higher at $1,482,500.[278] The Austins filed a lawsuit in federal court against the appraiser, appraisal firm, and appraisal management company (but not the lender, as the lender had cooperated by ordering a new appraisal).[279] The district court denied the defendants' motion to dismiss on most claims,[280] and the case settled within the year.[281]

Although the defendants have yet to file a motion for summary judgment, the Austins' Amended Complaint reflects lessons learned from *Latimore* and similar cases.[282] In addition to presenting a compelling factual narrative that explains how the history of redlining contributed to the segregation of the neighborhood at issue in the case, the Amended Complaint is very explicit about the "plus" evidence that goes beyond low appraisal value.[283] It enumerates "at least five indicia of racial bias" in the problematic appraisal.[284] The indicia of racial bias in *Tate-Austin* are

---

272. For an example of a negative comment, see *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1338–39 (N.D. Ind. 1987). In that case, plaintiffs introduced testimony stating the appraiser told the homeowner that "if the [plaintiff's] home were anywhere else it would be worth $100,000.00." *Id.* at 1339. "In any event, the court ultimately determined that [the negative comment]—even assuming it was made—did not reflect racial considerations, but, rather, the concern that [the plaintiff's home] was 'overimproved' for its neighborhood." Schwemm, *supra* note 55, at 381–82.

273. *See* Tate-Austin Complaint, *supra* note 1, at 12.

274. *Id.* at 13, 19.

275. *Id.* at 19.

276. *Id.*

277. *Id.*

278. *Id.* at 19–20.

279. *Id.* at 1, 3–4.

280. Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 1105072, at *11 (N.D. Cal. Apr. 13, 2022).

281. *See* Romo, *supra* note 244.

282. *See* Tate-Austin Complaint, *supra* note 1, at 13, 19; *see generally* Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712 (7th Cir. 1998).

283. Tate-Austin Complaint, *supra* note 1, at 5, 7–9, 15.

284. *Id.* at 13. The Amended Complaint states:

> Race was a motivating factor in Miller's unreasonably low valuation of the Austins' house, in violation of the Fair Housing Act and related federal and state laws. There are at least five indicia of racial bias in the Miller Appraisal: (1) unreasonably and inexplicably low market value ascribed to the Pacheco Street House; (2) unsupportable adjustments to value made based solely on

additional factors—beyond the challenged appraisal and any other comparative appraisals.[285] These indicia simultaneously build the case theory by explaining how racial considerations drove down the estimated value and giving additional evidence for the factfinder to understand how race operated in the appraisal process more broadly.[286]

As detailed in Part IV, a winning strategy in these cases will almost certainly involve collaboration with an expert witness with appraisal expertise who can identify potential circumstantial evidence in the appraisal itself and surrounding circumstances—such as the timeline—that may explain the low value. The Amended Complaint, in the Austins' case, reflects that expert assessment and fuels the case theory.[287] Among other things, the Amended Complaint breaks down the unsupportable adjustments, how they reflect the role that the racial composition of the neighborhood played in the appraisal, and how those adjustments drove the substantial downward departure from the other appraisals that the plaintiffs produced as evidence.[288]

A third case that illustrates a modern low-valuation fact pattern is an administrative action, *Duffy v. Citywide Home Loans, LLC*. In that case, Ms. Duffy originally purchased her home for $100,000.[289] Three years later, as housing demand grew, her house was appraised at $125,000 and $110,000.[290] Those appraisals left her with a "nagging suspicion that her house was lowballed."[291] Before a third appraisal, she decided to conceal her race.[292] She removed family photos and had a white friend pose as her brother for the appraisal inspection.[293] The third inspection came back at $259,000—more than double the previous appraisal.[294] Working with the Fair Housing Center of Central Indiana, she filed three administrative complaints with HUD in 2021: one against a lender, Citywide Home Loans, LLC, and its employees; a second against another lender, Freedom Mortgage, and its employees; and a third complaint against a

---

> the Pacheco Street House's location in Marin City; (3) the selection of properties as "comparable" based on racial demographics; (4) comments regarding the "distinct marketability" of Marin City; and (5) the race or perceived race of the homeowners.

Id.

285. *See id.*; *Latimore*, 151 F.3d at 715 ("Real estate appraisal is not an exact science, moreover, and so the fact that Citibank's appraisal was lower than someone else's does not create an inference of discrimination.").

286. *See* Tate-Austin Complaint, *supra* note 1, at 4–21; Tate-Austin v. Miller, No. 21-cv-09319, 2022 WL 1105072, at *11 (N.D. Cal. Apr. 13, 2022) ("Plaintiffs further allege that Miller's valuation was influenced by the [Austins'] race . . ., or the racial demographics of Marin City, or both and, as set forth in detail earlier herein, have pleaded facts sufficient to support that allegation." (alterations in original) (citations and quotations omitted)).

287. Tate-Austin Complaint, *supra* note 1, 4–11.

288. *Id.* at 9–21.

289. *See* Duffy Complaint, *supra* note 17; *see also* Planas, *supra* note 13.

290. Planas, *supra* note 13; *see also* Duffy Complaint, *supra* note 17, ¶ 8.

291. Planas, *supra* note 13.

292. *See* Duffy Complaint, *supra* note 17, ¶ 8.

293. *Id.*

294. *Id.*

third-party appraisal company and appraiser.[295]

Her administrative complaints allege discrimination based on race and color.[296] Among the relevant facts, the complaints state Ms. Duffy's race, specific facts demonstrating that respondents knew of her race, the steps she took to conceal her race during the third appraisal, and facts about the racial demographics of the neighborhood.[297] The complaints state that the subject property "is located in a historically African American neighborhood in Indiana," and that the appraiser "was purposely pulling comps for the appraisal that were not fair and were racially motivated."[298] Finally, the complaint details Ms. Duffy's efforts to raise her concerns about racial bias to the lenders and their responses, which consisted of defending the appraisals rather than modifying them or ordering new ones.[299]

While Ms. Duffy's complaints are still pending before HUD, the fact pattern and content of the complaints—particularly the comparative appraisals before and after removing the evidence of the complainant's race, reference to the complainant's race, and the racial demographics of the neighborhood—are representative of the new body of appraisal investigations and litigation that advocates are currently building.[300] All recent cases (post-2020) have a similar fact pattern, although not all cases involve explicitly concealing race.[301] Ms. Duffy's case illustrates a common fact pattern that is likely to support successful litigation, as detailed in Part IV. Regrettably, these fact patterns are not isolated incidents. Similar stories abound.[302]

Drawing lessons from these cases, several of Schwemm's observations resonate today. The first lesson is the relative rarity of appraisal cases.[303] Schwemm observed:

> [Although] it may well be that the appraisal industry is generally complying with [the Fair Housing Act] and that only the occasional renegade appraiser behaves in a way that results in litigation, it may also be that the industry has so insulated itself from traditional investigative and research techniques that it is able to engage in widespread discrimination without detection. Or the truth may lie somewhere in between.[304]

---

295. Planas, *supra* note 13; *see* Duffy Complaint, *supra* note 17, ¶ 7.

296. Duffy Complaint, *supra* note 17, ¶ 5. For a discussion of the substantial body of pending HUD administrative complaints alleging appraisal discrimination, see *supra* note 238.

297. *Id.* ¶ 8.

298. *Id.*

299. *See id.*

300. *See id.*

301. *Compare, e.g.*, Duffy Complaint, *supra* note 17, *with* Tate-Austin Complaint, *supra* note 1, at 19.

302. *See supra* sources accompanying note 14 (citing news articles).

303. *See* Schwemm, *supra* note 55, at 365.

304. *Id.* at 366.

In reviewing the first twenty-five years of cases, Schwemm observed the following about the appraisal industry:

> This is not the record of an industry that inspires great confidence in its commitment to voluntary compliance with the Fair Housing Act. As a result, it is not hard to imagine that many individual appraisers, particularly those schooled in pre-*AIREA* [1976 litigation against the appraisal industry] principles, may still be considering illegal factors in evaluating individual properties or neighborhoods, although this is likely to be done with a good deal more subtlety than in the past.[305]

Since Schwemm penned that observation, multiple studies have documented the otherwise unexplained home value gap that has grown, not shrunk.[306] Today, the overall lack of litigation is likely explained by a similar black-box veil over the appraisal process, which conceals evidence of discrimination or otherwise makes it difficult to prove.[307] The few victims who take extra, sometimes costly, steps to expose circumstantial evidence of racial bias are the few who have emerged to pursue litigation.[308] Even among those, for the reasons discussed in Part IV, litigators may not pursue their cases in court.

The second lesson is evidentiary. These cases suggest that proof has become increasingly difficult since the appraisal industry adopted facially race-neutral appraisal criteria:

> [A] plaintiff who alleges that an appraisal has been done or used in a discriminatory manner will, in the absence of direct evidence of discrimination, have to produce an expert witness to establish a circumstantial case by showing that the defendant's claimed "legitimate" reasons for its behavior are in fact not justified by the applicable professional standards.[309]
>
> . . . .
>
> Thus, [these FHA] cases demonstrate that a plaintiff who undertakes to prove a case of intentional appraisal discrimination faces a difficult task . . . . Additional litigation resources may yet produce successful appraisal cases under [the FHA]. Certainly these cases must seem daunting for the individual homeseeker-plaintiff to prosecute, for they require expert witnesses and other resources that are generally beyond the command of an individual litigant. But even a major commitment of additional enforcement resources may not guarantee success in this field.[310]

---

305. *Id.* at 389.

306. *See supra* sources and text accompanying notes 34–49 (citing studies).

307. *See, e.g.*, Squires & Goldstein, *supra* note 49, at II.

308. *See, e.g.*, Tate-Austin Complaint, *supra* note 1; Duffy Complaint, *supra* note 17.

309. Schwemm, *supra* note 55, at 383; *see also id.* at 382–83 (discussing the implications of *Old West End Ass'n v. Buckeye Federal Savings and Loan*, 675 F. Supp. 1100 (N.D. Ohio 1987), in which the court denied the defendants' motion for summary judgment because plaintiffs had produced sufficient evidence through an expert witness that none of the defendants' claimed justifications was based on a proper application of the relevant standards).

310. *Id.* at 391.

While this warning remains true, the newest wave of litigation has narrowed the scope of facts and theories to ones that are more likely than pre-2020 cases to survive summary judgment.[311] Accordingly, while these challenges still exist in prosecuting appraisal cases, there is reason to believe these cases may be one critical part of a multifaceted strategy to decrease and deter housing discrimination in the appraisal and lending industries.

IV. FIVE WAYS TO STRENGTHEN YOUR CASE

Appraisal discrimination cases could be—and are getting—stronger. This Part examines five concrete ways to strengthen these cases. It draws lessons from interviews with experienced litigators and docket analysis of appraisal discrimination cases, offering a set of observations about the most difficult challenges and best practices to overcome those challenges.

This Part looks beyond the archetypal challenges of civil rights litigation to the unique challenges of appraisal discrimination cases. From that vantage point, five impediments emerge: expertise, proof issues, investigation design, factfinder skepticism, and working with expert witnesses. Each Section offers concrete recommendations for avoiding or overcoming these impediments.

A. Building Institutional Expertise

The burden of enforcing the Fair Housing Act largely falls on "private attorneys general," meaning non-governmental actors who bring lawsuits as, and on behalf of, private individuals.[312] Today, the engines that drive fair housing enforcement are fair housing organizations, including Fair Housing Initiatives Programs (FHIPs), which are nonprofits that receive HUD grants to enforce fair housing laws.[313] In 2021, HUD funded 120 FHIPs nationwide.[314] Grant recipients include fair housing centers, legal aid societies, and other nonprofit advocacy organizations.[315] While many fair housing organizations employ attorneys, others are solely staffed by investigators, housing counselors, and other advocates, which requires

311. *See e.g.*, Tate-Austin Complaint, *supra* note 1, at 4–21.

312. *See* Abraham, *Fair Housing's Third Act*, *supra* note 26, at 58 ("For much of the Act's history, private action has been the backbone of anti-discrimination enforcement. Prior to 1988, the Act did not authorize HUD to take meaningful action to adjudicate complaints. Rather, it appears Congress assumed that the primary enforcement mechanism would be private action. Congress remedied that in 1988 by expanding HUD's authority to address residential discrimination. Since then, private actions have played a more complementary role in enforcement." (internal citations omitted)); *see also* Massey & Denton, *supra* note 30, at 197–212 (describing the enforcement weaknesses of the FHA before and after the Fair Housing Amendments Act of 1988).

313. *See supra* sources and text accompanying note 69; *see also Fair Housing Initiatives Program (FHIP)*, *supra* note 138.

314. Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Awards Over $47 Million to Fight Housing Discrimination (Sept. 2, 2021), archives.hud.gov/news/2021/pr21-132.cfm [https://perma.cc/29P6-Z55L].

315. *Id.*

them to refer any litigation to cooperating attorneys at private firms.[316] FHIPs vary widely in their expertise. Until recently, a coterie of four FHIPs has generated the most appraisal cases.[317]

The most immediate challenge to pursuing these cases is developing expertise. Investigators and attorneys must quickly become "experts" in an otherwise foreign industry, internalizing its jargon, operating procedures, ethical standards, and norms.[318] Few investigators have previously worked in or around the appraisal industry. Most investigators tend to have expertise in rental discrimination and some—but not all—in mortgage discrimination. Accordingly, the process of identifying and investigating colorable claims for appraisal discrimination is a learned expertise. To assess a case's merits, investigators and cooperating attorneys typically need to consult outside appraisal experts to detect indicia of racial bias. Many fair housing organizations lack the institutional expertise and effective investigative methods to screen appraisal cases. Relatedly, fair housing organization professionals may not have backgrounds in researching and interpreting census data or translating that data into visual maps. Data visualization tools help factfinders to understand how the appraiser took race into account—like how comparable sales were selected based on racial demographics.[319]

Three primary solutions emerge. First, fair housing organizations interested in pursuing these cases should write these costs into grant proposals, including HUD grants.[320] While this may be changing, many FHIPs do not currently budget for appraiser consultation fees, data analytics, or mapping software. Such costs should be anticipated early in litigation, in-

316. *See How You Can Support Fair Housing*, *supra* note 139 (discussing cooperating attorneys).

317. Historically, fair housing centers in two regions of the country—Toledo and Chicago—generated virtually all appraisal discrimination cases. *See* Schwemm, *supra* note 55, at 391. Today, two fair housing centers are taking the lead—the Fair Housing Center of Central Indiana and Fair Housing Advocates of Northern California. *See* FAIR HOUS. CTR. OF CENT. IND., THE STATE OF FAIR HOUSING IN INDIANA REPORT 14–17 (2019), www.fhcci.org/wp-content/uploads/2020/01/2019-State-of-Fair-Housing-Report.pdf [https://perma.cc/653M-7XAQ]; FAIR HOUS. ADVOC. OF N. CAL., ANNUAL REPORT: FISCAL YEAR 2021–2022 1–2, 4 (2022), www.fairhousingnorcal.org/uploads/1/7/0/5/17051262/final_-_annual_report_fy21-22.pdf [https://perma.cc/4RGV-MPWW].

318. *See, e.g.*, Dane, *supra* note 61, at 372–73 (on becoming an "expert" in this area); Lisa Rice, President & CEO, Nat'l Fair Hous. All., Panel Presentation at NFHTA Forum: Strategies for Investigating Discriminatory Residential Appraisals (Sept. 15, 2021), www.hudexchange.info/trainings/courses/nfhta-forum-strategies-for-investigating-discriminatory-residential-appraisals [https://perma.cc/3YWN-A4LM] (discussing the importance of learning the industry).

319. *See* NFHA APPRAISAL REPORT, *supra* note 23, at 13–14, 22.

320. HUD's newest notice of funding availability allows grantees to request federal funds to support investigations and employee training related to appraisal discrimination. *See* U.S. DEP'T OF HOUS. & URB. DEV., FAIR HOUSING INITIATIVES PROGRAM PRIVATE ENFORCEMENT INITIATIVE FR-6600-N-21-C 4–6 (2022) [hereinafter HUD PRIVATE ENFORCEMENT INITIATIVE], www.hud.gov/sites/dfiles/SPM/documents/Foa_Content_of_FR-6600-N-21-C.pdf [https://perma.cc/YG8J-8ZD2]; U.S. DEP'T OF HOUS. & URB. DEV., FAIR HOUSING INITIATIVE PROGRAM - FAIR HOUSING ORGANIZATION INITIATIVE FR-6500-N-21-B 3–5 (2021) [hereinafter HUD FHOI], www.hud.gov/sites/dfiles/SPM/documents/Foa_Content_of_FR-6500-N-21-B.pdf [https://perma.cc/HY2H-K3R5].

cluding at the investigation and case-screening stage, which should inform case selection, case theory development, and complaint drafting.[321]

Second, fair housing organizations should consider investing in non-traditional training for their investigations staff and possibly hiring people with backgrounds in data analytics or in the appraisal industry. Strategic efforts to bring these skills in-house could have a ripple effect. This expertise can inform investigation development, and case screening can be used to train any cooperating attorneys better and can ideally be leveraged within the fair housing community to train other investigators without this background. Data visualization is particularly useful. Knowing what data is available and relevant, and how to leverage it to tell the story of an appraiser's racially biased comp selection, may prove critical to developing a case theory and identifying triable issues that survive summary judgment.[322]

Third, or alternatively, a subset of fair housing organizations nationwide could prioritize and accept these cases as they develop more expertise, thus forming a specialized corps.[323] Empirically, a small group of organizations has led the fight against appraisal discrimination.[324] However, the small number of specialized organizations does not meet the need. Ideally, there should be at least one specializing organization in every HUD region.

B. Maximizing Proof

The emerging theme since the U.S. Department of Justice initiated litigation against the appraisal industry in 1976 is that it is difficult to prove racial motivation. As described in Part III, to survive summary judgment, plaintiffs will usually need to: (1) produce expert witness testimony to create a triable issue of fact by establishing circumstantial evidence that a plaintiff's race or racial composition of the neighborhood was considered in the appraisal process, *and* (2) under the so-called appraisal *plus* stan-

321. As HUD prioritizes appraisal enforcement, it could dedicate a specific fund for appraisal discrimination investigations. At a minimum, for FHIP organizations to maintain highly experienced fair housing professionals in this space, HUD should increase the FHIP Private Enforcement Initiative funding to account for these necessary enforcement expenditures. *See generally* HUD Private Enforcement Initiative, *supra* note 320.

322. FHIPs might leverage other resources to reduce consultation fees, such as working with universities who might provide services through an academic course, experiential practicum, or postgraduate fellowship. Some FHIPs have leveraged the relationships of their board of director members to identify people in the community with this expertise who might be willing to offer services at a pro bono or low bono rate. Additionally, FHIPs should consider approaching their state attorney general's office or the U.S. Department of Justice, which has authority to file a Statement of Interest of the United States or an action on behalf of the United States. *See, e.g.*, Statement of Interest of the United States, *supra* note 140.

323. One illustration of a successful coordinated enforcement effort is the historic settlement with Fannie Mae arising from the foreclosure crisis, which involved over twenty fair housing organizations. *See* Press Release, Nat'l Fair Hous. All., NFHA Reaches Historic Settlement with Fannie Mae (Feb. 7, 2022), nationalfairhousing.org/nfha-reaches-historic-settlement-with-fannie-mae [https://perma.cc/QPL5-VRAA].

324. *See supra* sources accompanying note 138.

dard, plaintiffs must produce more than just a low appraisal and a high appraisal.[325] Since a variety of factors can influence an appraisal, it is critical to isolate the elements that most suggest race is a factor. Plaintiffs can meet this threshold burden by providing either direct evidence that race played a role, which would include statements indicating race or racial demographics were considered, or circumstantial evidence, such as negative comments about the neighborhood (often found in the free-form section or addendum to an appraisal report), deviation from established or best practices, selection of inappropriate comparable properties, or a pattern or location of comparable properties that suggests racial neighborhood demographics influenced the selection, among others.[326]

Experienced litigators offer two recommendations for surmounting proof challenges. The first is improving testing for racial bias in appraisals. We need to retrofit traditional paired testing for the appraisal context. This is an ongoing effort in the fair housing community, detailed below. The second is improving how we identify and plead racial indicia. An effective complaint will identify racial indicia with specificity. These indicia may be buried in the appraisal report and neighborhood demographic data. In pleadings, drafters should couch the indicia in a narrative that explains the contextual history of redlining and how race is baked into the sales comparison approach and appraiser discretion is routinely used to draw neighborhood-based comparable "markets" based on race, whether appraisers consciously recognize it or not. Further historical context is discussed below regarding factfinder skepticism.

The *Tate-Austin* case provides a strong example of enumerating racial indicia to satisfy the "appraisal *plus*" standard. The Amended Complaint offers the following "plus" evidence:

> There are at least five indicia of racial bias in the Miller Appraisal: (1) unreasonably and inexplicably low market value ascribed to the Pacheco Street House; (2) unsupportable adjustments to value made based solely on the Pacheco Street House's location in Marin City; (3) the selection of properties as "comparable" based on racial demographics; (4) comments regarding the "distinct marketability" of Marin City; and (5) the race or perceived race of the homeowners.[327]

The indicia of racial bias in *Tate-Austin* are additional factors—beyond the challenged appraisal and any other comparative appraisals.[328] These indicia simultaneously build the case theory by explaining how racial considerations drove down the estimated value and by giving additional evi-

325. *See supra* Part III.B (discussing *Latimore* and the "appraisal *plus*" standard). As noted above, given the variation with the elements of an appraisal case, see *supra* note 166, not every court will necessarily follow the *Latimore* standard. Nevertheless, it may be prudent to assume that a court will require the plaintiff to produce a low appraisal *plus* additional evidence.

326. *See generally* SCHWEMM, *supra* note 152, § 10:2.

327. Tate-Austin Complaint, *supra* note 1, at 13.

328. *Id.*

dence for the factfinder to understand how race operated in the appraisal process more broadly.[329] The Amended Complaint in *Tate-Austin* reflects that expert assessment, and it fuels the case theory.[330] Among other things, the Amended Complaint breaks down the unsupportable adjustments, how they reflect the role that the racial composition of the neighborhood played in the appraisal, and how those adjustments drove the substantial downward departure from the other appraisals that the plaintiffs produced as evidence.[331]

Likewise, in *Connolly v. Lanham*, the complaint identifies racial indicia with specificity, beginning with a firm assertion that the appraisal was discriminatory:

> There is no race-neutral or legitimate business justification for Defendant Lanham's decisions . . . . Specifically, he [undervalued the home] because they are a Black couple in a generally white neighborhood, and because their home is adjacent to a majority Black area. This discrimination is apparent based on Lanham's actions and demeanor in dealing with Dr. Connolly and Dr. Mott; his refusal to compare the Churchwardens Home to others south of Northern Parkway in the whiter "heart of Homeland," as he called it, in contravention of proper appraisal standards (as well as his related decision to choose a home that is not actually in Homeland as a comparable); his failure to consider as comparables homes in Homeland north and south of Northern Parkway that were in fact similar to the Churchwardens Home; his excessive downward adjustments to the homes he selected as comparables; and his failure to make appropriate upward adjustments based on the condition and features of the Churchwardens Home.[332]

As this paragraph illustrates, effective pleadings should explicitly identify the specific circumstantial evidence from which a factfinder can infer racial bias.

C. Retrofitting Traditional Paired Testing

To overcome these evidentiary challenges, it is critical to design investigations that capture the best possible evidence.[333] One potential challenge is that the traditional "paired testing" paradigm in rental discrimination is a misfit for appraisal discrimination. In traditional paired testing: "[T]wo people are assigned fictitious identities and qualifications that are comparable in all key respects. The identities differ only on the characteristic (for example, race or presence of a disability) being tested. Each tester of a pair then applies for the same opportunity . . . and

329. *See id.* at 12–19.
330. *See id.*
331. *See id.*
332. Connolly Complaint, *supra* note 166, at 20.
333. Notably, this Section focuses on the evidentiary challenges present in typical appraisal discrimination cases. However, fair housing enforcement continues to evolve. While this Article focuses on testing-based investigative approaches, others exist or may emerge, such as data-driven and disparate-impact approaches that may shape future enforcement.

documents the interaction."[334] The Supreme Court has affirmed that testers have standing to sue, and courts routinely admit paired testing as evidence of discriminatory treatment.[335]

Home appraisals invert the equation. In rental or employment situations, multiple candidates apply for a housing or employment opportunity and are assessed by the same potentially biased decision maker. Controlling for other variables, paired testing reveals whether the same decision maker treats a candidate differently based on the protected status, such as the candidate's race.[336] By contrast, in appraisals, the potentially biased decision maker—the appraiser—is only going to appraise a house one time. Any comparable appraisal report is conducted by a different decision maker, one who may hold different biases, choose different comparatives, and potentially apply somewhat different methods.[337] Thus, it is more difficult to show that isolating the appraiser's racial bias—as opposed to other variables—contributed to the low appraisal value. In other words, introducing additional appraisals of a property is less probative evidence than traditional paired testing because it is less effective at isolating race or another protected class as the reason for the different treatment.

To overcome this evidentiary challenge, litigators must work with investigators from the early stages of detection. One technique is to generate several consecutive appraisals. For instance, when a homeowner suspects appraisal discrimination, an investigator might order a second and third subsequent appraisal by different appraisers.[338] Then, if applicable, if the homeowner suspects the homeowner's race influenced the appraisal estimate, the homeowner might then elect to "white-wash" the home before a fourth independent appraisal.[339] To generate additional

334. *Quantitative Data Analysis: Paired Testing*, URB. INST., www.urban.org/research/data-methods/data-analysis/quantitative-data-analysis/impact-analysis/paired-testing [https://perma.cc/SYY2-ABB9] ("For example, in a paired test focused on disability-based discrimination in the rental market, one person (referred to as the 'protected tester') would have a disability, and the other (the 'control tester') would not have a disability. Both testers would be assigned similar education levels, incomes, and family compositions. Both testers' assigned incomes would ensure they are qualified for the rental unit selected for testing; if a difference in characteristics exists, it makes the protected tester slightly more qualified. . . . Done well, the only important difference between the two testers will be the factor on which discrimination might occur.").

335. *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–78 (1982); *see generally* Steve Tomkowiak, *Using Testing Evidence in Mortgage Lending Discrimination Cases*, 41 URB. LAW. 319 (2009) (discussing the role of testing evidence in the lending context); Shanna L. Smith & Cathy Cloud, *The Role of Private, Nonprofit Fair Housing Enforcement Organizations in Lending Testing*, *in* MORTGAGE LENDING, RACIAL DISCRIMINATION AND FEDERAL POLICY 589 (John Goering & Ron Wienk eds., 1996) (same).

336. *See Quantitative Data Analysis*, *supra* note 334.

337. *See, e.g.*, Tate-Austin Complaint, *supra* note 1, at 2; Duffy Complaint, *supra* note 17, ¶ 8.

338. *See, e.g.*, Tate-Austin Complaint, *supra* note 1, at 18–19; Duffy Complaint, *supra* note 17, ¶ 8.

339. *See, e.g.*, Tate-Austin Complaint, *supra* note 1, at 19. This Article uses the phrase "white-wash," which is commonly used by the news media to describe the process of removing evidence of a family's race, like taking down family photos, to give the appearance that the family is white. In the context of the biases this process is intended to uncover, a

potential evidence, the investigator might ask the subsequent appraisers to critique the preceding appraisals, offering comments on any errors or deviations from USPAP standards or best practices.[340] Investigators might even prepare a short set of instructions or a form to guide appraisers to critique the preceding appraisals. This may unearth additional evidence.

Beyond testing, investigators can take additional steps to uncover evidence of racial indicia by scrutinizing the practices of the specific appraiser or appraisal firm. For instance, when an investigator receives a complaint about a specific appraiser, investigators should scrutinize the appraiser's track record to the extent possible. One litigator encourages investigators to inquire about an appraiser's reputation within the real estate community, particularly among realtors, banks and credit unions, community development agencies, municipal government, and other appraisers, and online public reviews like comments on the appraiser's website, third-party reviews, and social media.[341] Investigators should check internal records for prior complaints—both formal complaints made to government agencies, like state licensing and regulatory agencies, and nonprofit fair housing organizations—and informal complaints like newspaper articles or online reviews.[342] Discovery requests at later stages of litigation may also probe prior appraisals by the same appraiser, which can be analyzed for patterns of discriminatory behavior. Likewise, advocates should ask to see the contents of an appraiser's "standard" file regarding a specific neighborhood to see if it contains any racial code words or racial indicia. Ideally, advocates would compare the "standard" files across neighborhoods to detect any differences that may suggest racial bias.[343]

D. Overcoming Skepticism

Another formidable challenge is factfinder skepticism. Skepticism takes two forms. First is a judge or juror's reluctance to believe that racism played any role in a professional appraiser's estimate. Data show that many people struggle to accept that racism is still prevalent.[344] Second is a factfinder's skepticism based on the belief that "conservative val-

---

more appropriate term would be something akin to "Black erasure," which recognizes that the homeowner is taking steps to erase evidence of their race commonly associated with racial bias that would reduce the appraised value of their home.

340. *See* Tate-Austin Complaint, *supra* note 1, at 15–18 (discussing the appraiser's deviation from USPAP and professional standards and practices).

341. *See* Dane, *supra* note 61.

342. *See id.* Freedom of Information Act requests, or state equivalents, may also produce helpful information.

343. *See* Dane, *supra* note 61. For a discussion of the need for more appraisal data, similar to a HMDA disclosure for appraisals, see Squires, *supra* note 15 and accompanying text.

344. For instance, it is probably difficult for some factfinders to accept that the influence of racial bias in the appraisal process has grown since 1980, not decreased. *See supra* sources cited note 36 (discussing social science research on perceptions of contemporary racial bias).

uation techniques are generally appropriate for preloan appraisals,"[345] or that appraisals are an art, not a science, which means judges and jurors are willing to give leeway to appraisers before they are swayed that race was a motivating factor.[346]

To overcome factfinder skepticism, the litigator's challenge is to tell a story that makes race a natural explanation for the low appraisal.[347] The case theory, complaint narrative, and any argument and evidence presented at trial must be tailored to these skeptics. One technique employed by litigators in the *Tate-Austin* case is to trace the history from the 1930s to today, offering the audience a more informed understanding that race has played an integral role in appraisals for decades and the dominant sales comparison approach for estimating home values is built on racialized appraisals of the past:

> Through the 1970s, textbooks used to educate and train appraisers contained explicit instructions that (1) housing appraisals must start with an appraisal of the neighborhood, and (2) racially segregated, white neighborhoods were "desirable" neighborhoods. Houses located in predominantly white areas were assumed to be of the highest and best value, while houses located in predominantly non-white areas, or areas of diverse races, were assumed to be undesirable and of lower value. For example, the influential textbook written by Frederick Babcock in 1924 states that "the habits, character, the race . . . of the people are the ultimate factors of real estate value." Babcock went on to become a founding member of the American Institute of Real Estate Appraisers ("AIREA") and a head of underwriting for the Federal Housing Administration.

---

345. Schwemm, *supra* note 55, at 391; *see also id.* at 380 ("As in *Hanson* [*v. Veterans Administration*, 800 F.2d 1381 (5th Cir. 1986)], the principal lesson of *Jorman* [*v. Veterans Administration*, 654 F. Supp. 748 (N.D. Ill. 1986)] would seem to be the judicial skepticism of such claims, at least to the extent that the claims are predicated primarily on the allegation of pre-[DOJ litigation] principles are so 'ingrained' in the profession that they are still being adhered to. To prevail, plaintiffs must produce more compelling and specific evidence of the defendant's reliance on racial factors and not simply claim that appraisers in general have been unable to shed their commitment to [these] practices.").

346. Courts may also be swayed by the argument that appraisals are subjective. In the words of one court evaluating bench trial evidence, "Throughout his testimony, [the plaintiffs' appraiser expert witness] repeatedly stated that the process of appraising was more appropriately viewed as an art rather than an exact science . . . . [and] admitted that a substantial portion of an appraisal is based on the very subjective evaluations made by the individual appraiser." Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp 1330, 1334–35 (N.D. Ind. 1987); *see also* Swanson v. Citibank, N.A., 614 F.3d 400, 408 (7th Cir. 2010) (Posner, J., dissenting) ("We must assume that the appraisal was a mistake, and the house worth considerably more, as she alleges. But errors in appraising a house are common because 'real estate appraisal is not an exact science.'" (quoting Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 715 (7th Cir. 1998))). This argument may deserve limited weight, particularly in light of advances in appraisal methodology and data science that can help us to detect evidence of racial bias. Nevertheless, litigators need to be prepared to counter the argument that appraisals are subjective by gathering the best possible evidence of racial indicia in the appraisal process.

347. *See, e.g.*, THOMAS A. MAUET, TRIAL TECHNIQUES 22–27 (7th ed. 2007) (discussing how to develop a theory of the case that makes the preferred explanation as natural and believable as possible).

. . . .

> But the damage was already done. Property in Black neighborhoods and racially diverse neighborhoods reflect these low valuations that appraisers were trained to make. Most appraisers continue to evaluate a house's value by comparing it to houses in similar, proximate neighborhoods that have sold in the recent past ("comps"). The continued use of the sales comparison approach recycles home values that were initially determined using explicitly race-based criteria, and compounds the effects of decades of undervaluation of homes in non-white areas. Likewise, some appraisers, including defendants, have continued to use race-based criteria in assessing property value, including limiting comparisons to houses within areas of similar racial demographics and valuing predominantly white areas more highly than other areas. Redlining, disinvestment, and lower property tax revenue compounded the effects of lower appraised values in such neighborhoods.[348]

Second, increasingly insightful research explains how race operates in appraisals, which helps a factfinder to understand that this is a common, documented phenomenon. Litigators can draw on this data to demonstrate that it is natural to assume that appraisers routinely incorporate racial considerations into their estimates, even if they do not intend any harmful racial animus. For instance, pleadings or trial statements might point to the undercover reporting by Newsday on widespread racial steering by realtors, which shocked some audiences and prompted government responses.[349] This well-documented phenomenon opened the minds of many lawmakers across the country to the prevalence of an illegal practice that many assumed had largely subsided.[350] So too with appraisals. Advocates can draw on the growing body of evidence of appraisal discrimination's persistence to chip away at a factfinder's initial skepticism. The *Tate-Austin* complaint, for instance, cites social science research that documents how appraisers treat predominantly Black neighborhoods differently than predominantly white neighborhoods.[351] In one section, it describes how a federal government study documented widespread differential treatment by appraisers in how they choose comparable properties.[352]

---

348. Tate-Austin Complaint, *supra* note 1, at 6–8. The *Connolly* complaint uses a similar technique but focuses more on the historic exclusion based on race in the neighborhood at issue in the case and the use of the sales comparison approach. *See* Connolly Complaint, *supra* note 166, at 6–9 (discussing the neighborhood); *see id.* at 13–18 (discussing the sales comparison approach and unreasonable comparative properties).

349. *See* Ann Choi, Keith Herbert & Olivia Winslow, *Long Island Divided*, NEWSDAY (Nov. 17, 2019), projects.newsday.com/long-island/real-estate-agents-investigation [https://perma.cc/25SC-5G8A].

350. *See, e.g.*, Press Release, Kathy Hochul, New York Governor, Governor Hochul Signs Legislative Package to Combat Housing Discrimination (Dec. 21, 2021) (responding to Newsday's *Long Island Divided* exposé).

351. *See* Tate-Austin Complaint, *supra* note 1, 4–8.

352. *Id.* at 8 (describing the 2022 FREDDIE MAC STUDY, *supra* note 35, and explaining how similar appraisal bias operated in the Austins' case).

Next, the *Tate-Austin* complaint contextualizes the factual complaints in the case by dissecting the history of racism and racial demographics of the specific neighborhood in which the subject property is located, connecting the broader history to the site at issue in the case.[353] After discussing the racial demographics of the relevant community, the complaint describes the neighborhood relative to the region.[354] It concludes: "A competent, unbiased appraisal must look to additional areas outside of Marin City for relevant comps."[355] Thus, the *Tate-Austin* complaint connects the low appraisal directly to the racial demographics that informed its conclusions.

Finally, the complaint presents case-specific factual allegations about the relevant homeowners and property, ultimately connecting the market context and racial indicia in this case.[356] For instance, with respect to one indicator, the complaint explains the appraiser's comment about the municipality where the property is located:

> Miller states in her report that Marin City has a "distinct marketability which differs from the surrounding areas." Based on the racial demographics and history of Marin City, this phrase is coded based on race. Embedded in this statement are Miller's assumptions that Marin City is predominantly non-white; that white homebuyers would not be willing to consider purchasing a house located in Marin City; and, thus, Marin City is not comparable in marketability to surrounding areas. Each assumption is based on race. Marin City has such a small number of home sales from year to year that there is not a statistically significant and legitimate basis on which to conclude that it has a "distinct marketability." As the Miller report itself notes, there were only three sales of single-family homes in Marin City in the previous year and three the year before, likely because of the stability of homeownership within the area.[357]

The complaint goes on to break down the appraiser's chosen comps and downward adjustments that drove the defendant appraiser to signifi-

353. *Id.* at 4–21.

354. *Id.* at 9–10.

355. *Id.* ("Appraising a house located in Marin City, such as the Pacheco Street House, using comparisons of other property sales located exclusively or primarily in Marin City results in a skewed and race-based valuation of the property. Marin City has a long history of undervaluation based on stereotypes, redlining, discriminatory appraisal standards, and actual or perceived racial demographics. Choosing to use comps located in Marin City means that the valuation is dictated by these past sale prices, which were the direct product of racial discrimination. The use of such comps perpetuates the effects of discriminatory appraisal practices. Marin City also has a very small number of property sales every year. Relying exclusively or primarily on Marin City sales as comps is statistically unsound, because there are not enough to constitute a useful data set. The sample size of annual sales is too small to be reliable. Using Marin City sales as the primary source of comps is evidence of racial bias – *i.e.*, that the appraiser believes that Marin City's demographics make it so much less 'desirable' than surrounding areas that property in those areas cannot be used as comps.").

356. *See id.* at 13–18.

357. *Id.* at 14.

cantly undervalue the property by nearly one-half million dollars. For instance, one section alleges:

> Miller opined that she looked at several years of data and determined that houses in Marin City were worth "conservatively" 25% less per square foot than those in "surrounding areas." This adjustment was both statistically unsound and based on the racial demographics of Marin City. There are not enough property sales in Marin City to assert that there is any statistical average "price per square foot" for houses in Marin City as compared with Mill Valley or Sausalito . . . . Miller then made downward adjustments beyond the 25% reduction described above . . . . These unfounded adjustments resulted in Miller attributing a lower value to the Pacheco Street House than credible or reasonable. They can be explained only by race-based bias.[358]

Similarly, the complaint in *Connolly v. Lanham* explains how the appraiser "unjustifiably selected invalid, low-priced comparables."[359] Property by property, the complaint details why the selection of each comparable is not only flawed, but tainted by racial bias.[360] Moreover, the complaint illustrates the problem, property by property, using a table that lists each comparable property with a row titled "Illegitimate Negative Price Adjustments" and "Other" reasons why the comparable was unjustifiable.[361]

These complaints illustrate how pleadings can proactively tell a story designed to overcome a factfinder's initial skepticism that the appraiser took race into account or that a reasonable appraiser could have reached such a low estimate.

---

358. *Id.* at 17. ("Miller selected only three comps from outside of Marin City—one in Sausalito and two in Mill Valley. When evaluating the value of these three comps outside of Marin City, Miller made 'adjustments' to value based on, according to her, the differences in relative price per square foot between properties in Marin City on the one hand, and Sausalito and Mill Valley on the other. Miller opined that she looked at several years of data and determined that houses in Marin City were worth 'conservatively' 25% less per square foot than those in 'surrounding areas.' This adjustment was both statistically unsound and based on the racial demographics of Marin City. There are not enough property sales in Marin City to assert that there is any statistical average 'price per square foot' for houses in Marin City as compared with Mill Valley or Sausalito. In addition, price per square foot varies based on many factors, including quality of construction and amenities. Miller then made downward adjustments beyond the 25% reduction described above. Miller further reduced the value of the Pacheco Street house, concluding that it was worth nearly 28% less per square foot than the price per square foot of the allegedly comparable properties in Sausalito and Mill Valley. These unfounded adjustments resulted in Miller attributing a lower value to the Pacheco Street House than credible or reasonable. They can be explained only by race-based bias.").

359. Connolly Complaint, *supra* note 166, at 17.

360. *Id.* at 13–20.

361. *Id.* at 20. The Connolly complaint also makes particularly effective use of maps to educate its readers on the geographic boundaries, racial demographics, and location of comparables that are relevant to its narrative. *See id.* at 7, 9, 15, 27.

E. Harnessing Expert Witnesses

Working effectively with expert witnesses is an ever-present challenge. Appraisal discrimination cases pose some additional considerations. Expert witnesses are essential in these cases. Their expertise is useful during fact investigation and developing a case theory. Moreover, their testimony is usually necessary to survive summary judgment.[362]

Expert witnesses will typically be certified appraisers.[363] Collaborating with appraisers presents at least two unique challenges. The first is the appraiser's implicit bias. Researcher Elizabeth Korver-Glenn, in her book *Race Brokers: Housing Markets and Segregation in the 21st Century Urban America*, examines how appraisers are trained to do at least two things that introduce bias into the appraisal process.[364] The first is how they learn to draw "markets" from which to select comparable properties under the "sales comparison approach," the dominant appraisal method.[365] As such, they are taught to think a certain way. Whether they recognize it or not, appraisers often see markets in race-based terms. The second thing appraisers are trained to do is evaluate the property's value from the perspective of the "typical buyer," which appraisers often perceive as the "typical *white* buyer."[366]

In light of these practices, any appraiser—even one retained as an expert witness in a housing case—may be inclined to make similar race-based assumptions as the defendant appraiser. This risk may be heightened if the expert works in the same geographic region as the defendant appraiser and therefore holds views about certain neighborhoods by race, even if subconsciously.

A second potential challenge for experts is industry culture. Appraisers often work in a specific city or region in collaboration with a network of colleagues across firms. They rely on one another for business development. Moreover, under the current certification and training model, many start their careers under the formal or informal tutelage of other local appraisers. Thus, the nature of the field may make it difficult to identify appraisers willing to label another appraiser's work as biased.

---

362. For a discussion of the role of expert witnesses based on appraisal discrimination cases between 1968 and 1996, see Schwemm, *supra* note 55, at 390.

363. Other experts may be involved, depending on the facts and claims, FHIP staff training, and other factors. For instance, if the case alleges disparate impact, a data expert may be needed to explain the variables and calculations demonstrating a statistically significant disparate effect caused by the challenged policy or activity. Expert witnesses may be asked to prepare a report, sit for a deposition, or testify, but other experts may be critical to developing the case. *See supra* Part IV.A.

364. Korver-Glenn, *supra* note 23, at 116–20.

365. *Id.*; *see generally* Howell & Korver-Glenn, *supra* note 15 (presenting their research on the prevalence of racial bias in appraisals).

366. *See* Korver-Glenn, *supra* note 23, at 123–38 (drawing on interviews with appraisers evincing the assumption that the "typical buyer" is white); *see generally* Keeanga-Yamahtta Taylor, Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership (2019).

Advocates can prepare for these challenges by (1) anticipating that appraisers may be reluctant—and not well trained—to identify evidence of racial indicia in appraisal methods and (2) training or reorienting the appraisers in a manner that helps them detect racial indicia in the work of others. This may involve teaching appraisers to look for coded language, stereotypes, deviations from standard practice, and landmarks used to demarcate neighborhood "markets" based on race. Advocates should remain cognizant that the skepticism discussed in the preceding section also applies to appraisers.

Additionally, advocates can work with colleagues at fair housing organizations specializing in appraisal discrimination to identify cooperating appraisers who might teach advocates how to reorient appraisers to identify racial indicia.[367] Advocates should have a frank screening interview with a potential expert to discuss the nature of these cases and the difficulty of unearthing racial indicia, which will allow them to assess whether the expert is up to the task.

V. CONCLUSION

Racial disparities in appraisals continue to plague the U.S. housing market. Contrary to popular opinion, the disparity has grown in recent decades, not faded. Persistent appraisal discrimination has far-reaching and long-lasting consequences, from entrenching housing and school segregation to perpetuating the racial wealth gap. As new studies document how contemporary appraisal practices operate as systemic racism, more can be done to ameliorate this persistent problem. Lawsuits alleging appraisal bias are one piece of a multifaceted approach to combatting appraisal discrimination. As discussed in this article, litigators can learn from the small—but growing—body of appraisal bias cases, increasing their likelihood of success through litigation and their ultimate impact of deterring appraisal discrimination.

367. There are a growing number of professional groups of appraisers and other real estate professionals taking steps to reverse historic appraisal trends. *See, e.g.*, *What is a Realtist?*, NAT'L ASS'N OF REAL EST. BROKERS, www.nareb.com/faq/what-is-a-realtist [https://perma.cc/LD6N-BCXH] ("We have a special charge to make certain that communities of color are treated with dignity and respect."); Hazel Trice Edney, *Black Real Estate Professionals Recruit Black Appraisers to Combat Bias, Declare War on Black Homeownership Gap*, TENN. TRIBUNE (June 4, 2022), tntribune.com/black-real-estate-professionals-recruit-black-appraisers-to-combat-bias-declare-war-on-black-homeownership-gap [https://perma.cc/PG76-DB76]; *see also* KORVER-GLENN, *supra* note 23, at 143 (discussing the efforts of housing developers and real estate agents who have "adopted the people-oriented market rubric and alternate routines that emphasized the worth of people and neighborhoods of color").