When Redlining Enforcement Crosses the Line:

The Legal and Constitutional Questions Raised by the Federal Government's Approach to Asserting Redlining Claims Under the Fair Housing Act and Equal Credit Opportunity Act

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Background on the Author:

Paul F. Hancock is a recognized expert in civil rights laws, with decades of experience in civil rights enforcement, including redlining cases at the Department of Justice's Civil Rights Division, where he led the department's fair-housing and fair-lending enforcement program, as well as in private practice. ABA engaged Mr. Hancock to prepare a legal analysis of the government's current and historical approach to redlining claims, not only because of his expertise but also because as both a former prosecutor and current defense lawyer, Hancock's practice emphasizes the fair, even-handed and effective enforcement of civil rights laws. In addition to his 27 years as a civil rights enforcement lawyer at the Department of Justice, he served as Florida Deputy Attorney General where he argued for the state Attorney General in the *Bush v. Gore* voting recount case. In private practice, Mr. Hancock has represented a wide range of clients focusing on financial institutions. He also has engaged in pro bono representation of civil rights plaintiffs on diverse issues of national importance such as school desegregation, religious freedom for prison inmates, housing discrimination, public accommodations discrimination and voting discrimination.

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I. Introduction

In recent years, banks have faced an onslaught of lawsuits filed by the United States Department of Justice (DOJ) and other federal agencies for "redlining." Redlining is an invidious practice in which a lender intentionally avoids offering home loans in a neighborhood because of the race or national origin of its residents. The American Bankers Association (ABA) and its members abhor the practice of redlining and member banks strive to offer home loans without regard to race, national origin, or other factors that have no bearing on creditworthiness. However, banks have been targeted by the DOJ's recent anti-redlining campaign for conduct that does not constitute redlining—and in a manner that raises serious legal and constitutional questions.

The DOJ[1] brings redlining cases under the Fair Housing Act[2] and the Equal Credit Opportunity Act,[3] which prohibit discrimination on race or national origin, but do not mention "redlining." Without direction from Congress, the guiding principles and components of unlawful redlining have evolved over the years from federal complaints and consent decrees.[4] Under this approach, redlining is what the DOJ says it is, without any external review by a court. And DOJ's approach is generally copied by other federal agencies as well as state and local enforcement officials.

The DOJ historically maintained that redlining involves intentional discrimination. The Consumer Financial Protection Bureau (CFPB) and the Office of the Comptroller of the Currency, the FDIC and the Federal Reserve Board (collectively, the banking agencies) consistently echoed this view in guidance and examinations. Thus, to establish redlining, the government must prove that the bank acted *because of* the predominant race or ethnicity of the residents of the neighborhood. The remainder of this paper discusses DOJ's approach, but the comments and criticisms should be understood to also apply to the redlining allegations brought by the banking agencies and the CFPB.

While the DOJ's early redlining cases reflected the understanding that redlining is a claim of intentional discrimination, over the years the DOJ has drifted away from that approach and now brings cases with little, if any, direct evidence of intentional discrimination. Instead, the DOJ has targeted banks for failing to "provide equal access" to home loans in minority areas, relying on a statistical analysis called the "proportional distribution test." That test involves comparing a lender's proportion of loans in minority census tracts to its loans in nonminority census tracts and then comparing that proportion to the average proportion for all lenders in those census tracts. If

[1] The bulk of redlining claims have been filed by the DOJ pursuant to its authority to enforce the Fair Housing Act, 42 USC § 3601 et seq. and the Equal Credit Opportunity Act, (ECOA), 15 USC § 1691 et seq. The Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC) also have brought claims pursuant to their authority to enforce ECOA. This paper focuses on the actions filed by DOJ since that agency primarily sets the standards that are applied currently.

[2] 42 U.S.C. § 3601 *et seq.*

[3] 15 U.S.C. § 1691.

[4] A consent decree is a negotiated settlement agreement between the parties, e.g., the DOJ and a bank. The parties typically reach a settlement agreement before the fact-finding process of a trial occurs, and the court then approves the settlement.

the target lender's proportional distribution falls below the average of other lenders, the DOJ may charge it with redlining.

Further, the DOJ's more recent cases sometimes appear to rely on a disparate impact theory instead of disparate treatment. These filings have included allegations that a bank's conduct was not justified by a business necessity or legitimate business considerations. The allegations in these complaints, coupled with the government's heavy reliance on statistical analyses with scant attention to the bank's intent, raise concern as to whether the government might be shifting to a disparate impact method of proof without directly acknowledging it.[5]

In any event, the DOJ's use of the proportional distribution test is a stark demand for a racial balance in lending, which is unconstitutional. The premise of the proportional distribution analysis is that all lenders—or at least all satisfying the DOJ and banking agencies' definition of a bank's "peers"—should receive a nearly equal percentage of their applications and originations from minority areas. In other words, the goal is a racial balance of applications and originations across all lenders.

For example, Lender A might originate 100 loans in minority areas and 1000 loans in nonminority areas and thus have a proportional distribution of 9% for minority areas (100 divided by 1100). Lender B might originate 100 loans in minority areas and 500 loans in non-minority areas and thus have a proportional distribution of 17% for minority areas (100 divided by 600). In such circumstances, Lender A might be accused of redlining and Lender B would not, even though their service to the minority areas is identical.

The premise of the proportional distribution test violates the U.S. Constitution and has been rejected as a proper method of enforcement in many areas of civil rights. The U.S. Supreme Court has repeatedly held that "'outright racial balancing' is 'patently unconstitutional.'"[6]

While unlawful, the DOJ's enforcement approach also improperly targets lenders who are doing a good job serving minority areas. That is because the result of the test is driven as much by loan volume in minority areas as it is by loan volume in nonminority areas. Thus, lenders can be accused of redlining simply because they are making a large volume of loans in non-minority areas. Absurdly, a lender could remedy this problem simply by reducing the number of loans it makes in non-minority areas. But that would do nothing to improve access to credit for residents of minority areas.

[5] On April 23, 2025, President Trump issued Executive Order 14281, *Restoring Equality of Opportunity and Meritocracy* (EO). 90 FR 17537 (Apr. 23, 2025). The EO announces that the government's policy is to "eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws and basic American ideals." The EO also states that disparate impact liability "all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability." The EO directs the Attorney General, the Department of Housing and Urban Development, the Consumer Financial Protection Bureau, the Federal Trade Commission "and the heads of other agencies responsible for enforcement of" the ECOA, the FHA" to evaluate pending proceedings and consent judgments and permanent injunctions that rely on disparate impact liability and "take appropriate action consistent with the policy of this order." 90 FR at 17537.

[6] *See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 233 (2023)

Moreover, the government's approach to redlining assures it of an endless supply of redlining claims. These claims are based on deviation from the average distribution of applications and loans between minority and non-minority areas and mathematics tells us that such deviations will always exist. The only way to end redlining claims would be to obtain the precise racial balance among all lenders that the government seems to demand. That, in turn, would require collaboration within the lending industry that itself would raise legal concerns.

Redlining is perhaps the most serious claim of discrimination that a bank can face, particularly when filed by the federal government. Banks charged with redlining experience great reputational damage. They also incur significant legal fees. Thus, banks typically enter into a settlement agreement with the government, to put the reputational harm behind them and avoid incurring even more in legal fees. These settlements are still costly for the bank, and the result is that the DOJ's proportional distribution approach never faces judicial review.

Recalibration of redlining enforcement is sorely needed. The DOJ (including the Civil Rights Division) is not an advocacy organization, but rather a law enforcement agency. It is responsible for enforcing the laws in an impartial, fair and balanced manner. It has seriously violated its neutral responsibilities in stretching legal theories beyond those permitted by judicial precedent and by pursuing claims against compliant lenders.

In light of President Trump's recent Executive Order directing agencies to "terminat[e] all such enforcement proceedings that do not comply with the Constitution, laws, or Administration policy," the DOJ should abandon its misplaced advocacy efforts and limit its actions and investigations to those institutions that truly are engaged in intentional discrimination. That may result in far fewer claims of unlawful redlining, which merely reflects the fact—as the ABA believes—that few banks are engaged currently in this invidious practice.

In addition, Congress should clarify that redlining is a form of intentional discrimination and direct the DOJ, the CFPB and the banking agencies to follow their examination procedures and other guidance on redlining.

II. Discussion

A. Background on Federal Responsibility for Redlining Enforcement

Responsibility for enforcing the FHA and ECOA in Federal court rests with the DOJ and the work is accomplished by the Housing and Civil Enforcement Section (Housing Section) in the DOJ's Civil Rights Division (Division). The DOJ primarily sets the standards for redlining claims; thus, this paper focuses on their approach. However, for the sake of completeness, the Department of Housing and Urban Development (HUD) shares with the DOJ an important role in enforcement of the FHA, although actions in court are prosecuted by the DOJ. The bank regulatory agencies (the Federal Reserve Board (FRB), the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC)) also play an important role in ensuring compliance among the institutions that they regulate, and they make referrals to the DOJ when a possible violation is identified. The CFPB does not have authority for enforcement of the FHA, but it does have authority for enforcement of ECOA. The CFPB also refers cases to the DOJ.

B. Summary of DOJ's Evolving Approach to Redlining Claims

The DOJ's approach to pursuing unlawful redlining has evolved over a period of more than 30 years. A summary of the evolution of the DOJ's theory in redlining cases is provided here, showing the DOJ's shift from a focus on cases with evidence of intentional discrimination to the current approach of "equal access," which relies on the proportional distribution test and in some cases, branch locations and loan officer placement.

In 1994, the DOJ filed the first lawsuit that squarely addressed the issue of redlining. The lawsuit was filed against Chevy Chase Federal Savings Bank (Chevy Chase) in Washington, D.C The action was highly controversial, with the DOJ facing criticism that it was improperly telling banks where to conduct business. The DOJ, however, presented what it believed to be strong allegations of intentional discrimination, including alleged direct instructions to loan officers to avoid business in minority areas. Responding to criticism from the banking industry, the U.S. Attorney General stated that: "We are not as concerned about where a bank branch is built or where a mortgage office is opened — but whether service in some form is provided." Janet Reno, U.S. Attorney General, Chevy Chase Press Conference (Aug. 22, 1994). In 1997, the DOJ brought its second redlining lawsuit, again relying on allegations of intentional discrimination, including instructions to avoid service in minority residential areas.

In these early cases, the government used data regarding loan originations by other lenders *to rebut* the defense of a lack of demand for mortgage loans from qualified borrowers in minority areas. However, the DOJ's approach shifted. Eventually, such a comparison morphed into the leading *basis for* the claim of redlining.

The comparison began to emerge as an affirmative part of the DOJ's claims in the early 2000s. The DOJ's redlining cases lacked the same stark allegations of intentional misconduct as the earlier filings. Instead, the DOJ relied upon allegations that the targeted banks manipulated their self-defined assessment areas under the Community Reinvestment Act (CRA) to exclude minority residential areas.[7] For the first time, the DOJ also relied on allegations that the targeted banks received a meaningfully lower percentage of their loan applications and originations from minority areas than did other lenders considered to be its peers. This type of analysis, which became known as the "proportional distribution analysis," assertedly supported a claim of intentional discrimination.

The DOJ continued with and refined this methodology in redlining prosecutions under President Obama and President Trump's first administration. In contending that a targeted bank received a lower percentage of applications or originations from minority areas than did peer lenders, the

[7] The Community Reinvestment Act (CRA), 12 USC § 2901 et seq., is designed to encourage banks to help meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, consistent with safe and sound operations. CRA regulations require banks to delineate the geographic area they serve and which the banking agencies will use to evaluate each bank's performance of its CRA obligations. These geographic areas are known as "assessment areas," and must include geographic areas where a bank has a branch or deposit-taking facility. *See* 12 CFR §§ 345.412; 228.41; and 25.41.

DOJ began and has continued to define "peers" as all lenders that received between 50% and 200% of the application or originations volume as the targeted institution.

The Biden administration sought to significantly expand redlining enforcement with the 2021 announcement of a New Initiative to Combat Redlining. U.S. Attorney General Merrick Garland stated that the initiative would encompass nonbanks as well as bank lenders. As a part of this initiative, the DOJ revised its definition of "unlawful redlining," asserting, for the first time, that a violation would exist not only when a lender refuses to offer home loans to minority areas but also when a lender fails to provide *equal access* to home loans in minority residential areas as compared to nonminority areas.

At first blush, the change in approach to alleging intentional redlining appears subtle: from allegations of a refusal to lend in minority areas to the failure to provide equal access. But the change is significant, since it seeks to focus the inquiry on the balance of loan applications and originations in minority and nonminority areas. This revised approach fits neatly with the proportional distribution analysis, which is designed to show that the targeted lender failed to provide equal access to minority residential areas. As noted, the DOJ's approach is unconstitutional.

Under President Biden, the DOJ followed through with its announcement and filed 15 lawsuits — a record number — presenting a claim of redlining, including two against nonbank lenders.[8] The lawsuits relied most heavily on two issues to support a conclusion of redlining. Perhaps most saliently, the DOJ relied on the proportional distribution analysis to assert that the targeted lender intentionally avoided providing equal access to home-financing services in minority areas. The complaints also place increased reliance on allegations regarding the absence of bank branches and offices in minority areas as alleged proof of redlining.

III.Flaws in the DOJ's Current Approach to Redlining

A. A Redlining Claim Requires Proof of Intentional Discrimination

As previously explained, redlining presents a claim of intentional discrimination and thus, proof of discriminatory intent must be present. It is true, of course, that a violation of the FHA can be established using the disparate impact approach (*Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, (2015)), but some claims under the FHA, by their very nature, rely upon allegations of intentional conduct. *See, e.g.*, *Vill. of Bellwood v. Dwivedi*, 895 F. 2d 1521, 1533 (7th Cir. 1990) (noting in a case founded upon accusations of racial steering "[w]e cannot imagine the practice. . . on which a disparate impact theory might be based in this case."). Redlining cases fall within this group; the concept of redlining is that lines are drawn around geographic areas in which a majority of the population is minority to indicate that the areas are to

[8] See Trident Mortgage Co., https://www.consumerfinance.gov/enforcement/actions/trident-mortgage-company-lp/; Fairway Independent Mortgage Corp., https://www.consumerfinance.gov/enforcement/actions/fairway-independent-mortgage-corporation/; Draper & Kramer Mortgage Corp., https://www.consumerfinance.gov/enforcement/actions/draper-kramer-mortgage-corporation/

be excluded from offering credit. The post-Depression era actions of the federal government in redlining communities were intentional, and the government has consistently described the claims as involving intentional conduct throughout fair lending enforcement.

For years, the government has referred to redlining as a form of *disparate treatment* — or intentional discrimination. For example, the Interagency Fair Lending Examination Procedures state: "Redlining is a form of illegal *disparate treatment* in which a lender provides unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic(s) of the residents of the area in which the credit seeker resides or will reside or in which the residential property to be mortgaged is located."[9]

Critically, disparate treatment claims have specific evidentiary burdens that must be established to state a claim, and *intent is an essential element* of a disparate treatment claim. As articulated by the U.S. Supreme Court in *Inclusive Communities*, in order to bring a disparate treatment claim, a "plaintiff *must* establish that the defendant had a discriminatory intent or motive. . . ." 576 U.S. at 524 (emphasis added). Moreover, intent requires more than an awareness of the consequences of a particular course of action. Intent means that a decision-maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

It is true that claims of intentional discrimination can be supported by circumstantial evidence. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Yet, as described below, there is a substantial basis for concern regarding whether the circumstantial facts asserted by the DOJ actually support a finding of intentional discrimination. A redlining claim should fail absent sufficient allegations and proof of discriminatory intent. However, as noted, at times it appears that the agencies are twisting redlining into a disparate impact claim, with their emphasis on the proportional distribution analysis. That analysis seems to call for racial balancing. Racial balancing stemming from disparate impact is discussed in Executive Order 14281, *Restoring Equality of Opportunity and Meritocracy*.[10] The Executive Order directs the government to review pending proceedings, regulations and consent orders for disparate impact claims and take "appropriate action" consistent with the EO.

B. The Proportional Distribution of Applications and Originations Is a Badly Flawed Method for Proving Redlining and Raises Constitutional Issues

Over the years, the government has dramatically expanded its reliance on the minority-area lending of *other* lenders in charging discrimination against a target of investigation. Initially, lenders would attempt to defend a redlining allegation by citing a lack of demand for loans in minority areas. In response, the DOJ cited data regarding loan originations by other lenders to rebut the bank's

[9] Federal Financial Institution Examination Council (FFIEC), *Interagency Fair Lending Examination Procedures*, at iv, https://www.ffiec.gov/pdf/fairlend.pdf Aug. 2009; *see also* FRB, *Consumer Compliance Handbook, Federal Fair Lending Regulations and Statutes Overview,* at 2; *see* Interagency Policy Statement on Discrimination in Lending (Apr. 15, 1994) (noting that "[r]edlining refers to the illegal practice of refusing to make residential loans or imposing more onerous terms on any loans made *because of* the predominant race, national origin, etc., of the residents of the neighborhood in which the property is located").

[10] 90 FR at 17537.

assertion of a lack of demand for credit in those areas. In more recent years, however, this legitimate purpose for comparison has become the leading basis for the claim of redlining.

The DOJ has also adjusted its definition of unlawful redlining to reflect this available proof. Initially, DOJ described the violation as a challenge to actions that intentionally avoided the servicing of [minority] residential areas." Complaint, *Chevy Case*, Civ. No. 1:94cv1829 at 12. Over time, the DOJ has changed the definition to encompass an alleged failure to provide *equal* access to mortgage loans in minority areas. Thus, marketing and granting credit in minority areas is not enough; lenders are targeted if the level of service is not equal to the level provided in non-minority areas.

DOJ has not explained the revised requirement of "equal access," but it fits neatly with the type of allegations on which the government has relied in the absence of direct evidence of intentional discrimination. The "proportional distribution analysis," in recent years, has been the primary factual basis for the claim of redlining. Redlining has been inferred when a lender failed to receive a proportion of its loan applications or loan originations that is reasonably similar to the proportion received by other lenders. Thus, the gravamen of "equal access" seems to be the achievement of a balance of minority-area lending that reasonably approximates that of peer lenders. While other facts, as described below, also are asserted to support the claim, it seems unlikely that those facts would independently support a claim of redlining if the targeted lender had a proportional minority-area distribution of applications and originations that was reasonably approximate to that of other lenders.

The application of the equal access theory can be presented with an easy example. If a hypothetical targeted lender received 10% of its loan applications from minority areas, and other lenders received 20% of their loan applications from minority areas, the targeted lender might be accused of redlining, assuming that the difference is statistically significant. As the approach was used initially, the government allowed the targeted lender to describe the other lenders, referenced as peers, with whom its minority-area lending might be evaluated, but the government later began to define the peers against whom the performance would be judged.

The "peer" definition that evolved, and is now commonplace, is based entirely upon loan application and origination volume.[11] Any lender with a volume of applications or originations within 50% to 200% of the targeted lender in the relevant geographic area is deemed to be a peer. It is common for the government to allege that 'Peer' lenders are similarly situated financial institutions that received between 50 percent and 200 percent of the target bank's annual volume of home loan applications. This definition of "peer" is twisted and misleading since the banks are determined to be "similarly situated" only because of the application-volume comparison. Factors that the financial service industry might use in evaluating lenders for comparison, such as asset size, geographies served, business model, or product offerings play no role in the determination of

[11] Data regarding both "applications" and "originations" can be relevant in a redlining inquiry. Application volume shows the results of marketing efforts and thus, any disparity in the volume of originations cannot be labeled the result of redlining. The bank must, of course, treat all applicants in a nondiscriminatory manner in underwriting the loan application. A lack of any meaningful disparity in origination volume can be a valid defense to a redlining claim even if the data shows an unfavorable disparity on the volume of applications; the data simply may mean that the lender is doing a better job than others in attracting qualified applicants.

peer lenders. Also, the comparison is not even limited to the same types of lenders, as nonbanks are determined to be peers of banks and other regulated lenders. A large national bank or a large nonbank lender might be considered a peer of a small community bank, which lacks the resources and product offerings to operate in a similar manner to the much larger institution.

Putting aside the method for identifying peers, it is critical to emphasize that the application of the proportional distribution analysis is *not* based on the *volume* of lending in minority areas (i.e., the number of applications and originations). Rather the government compares the *percentage* of the targeted lender's loan volume (either applications or originations) in minority areas, with the *percentage* of the minority-area volume of the alleged peers. The formula for computing the percentage divides the number of applications or originations in minority areas (numerator) by the total number of applications or originations (denominator). The percentage thus is driven both by the number of loans made in minority areas and the number of loans made in nonminority areas.

As an example, Lender A might originate 100 loans in minority areas and 1000 loans in nonminority areas and thus have a proportional distribution of 9% for minority areas (100 divided by 1100). Lender B might originate 100 loans in minority areas and 500 loans in nonminority areas and thus have a proportional distribution of 17% for minority areas (100 divided by 600). In such circumstances, Lender A might be accused of redlining and Lender B would not, even though their service to the minority areas is identical.

The starting premise of the proportional distribution analysis is that all lenders — or at least all satisfying the definition of "peers" — should receive a nearly equal percentage of their applications and originations from minority areas. In other words, the goal is a racial balance of applications and originations among all lenders, as the DOJ has made clear with its revised definition of "redlining," which encompasses circumstances in which the level of service between minority and nonminority areas is *not equal*.

Such a demand from the government violates the U.S. Constitution and has been rejected as a proper method of enforcement in many areas of civil rights. The U.S. Supreme Court has repeatedly held that "'outright racial balancing' is 'patently unconstitutional.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 233 (2023); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971); *Miliken v. Bradley*, 433 U.S. 267, 281 (1977); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–32 (2007); *Allen v. Milligan*, 599 U.S. 1, 28 (2023).

Moreover, even if it were appropriate to use an approach like the proportional distribution analysis as a guide or starting point, a claim of redlining cannot be based on statistics alone, *Inclusive Cmtys.*, 576 U.S. at 522, and as explained below, other allegations that the government regularly presents add little to the claim. Additionally, the Interagency Fair Lending Examination Procedures state that "[m]arket share analysis and other comparisons to competitors are insufficient by themselves to prove that an institution engaged in illegal redlining." FFIEC, *Interagency Fair Lending Examination Procedures*, at 38 (Aug. 2009).

The DOJ's approach to redlining reflects bad government policy because it can improperly capture lenders who are doing a good job in serving minority areas. As noted, the result of the test is driven as much by loan volume in minority areas as it is by loan volume in non-minority areas.

Thus, lenders can be accused of redlining simply because they are making a large volume of loans in non-minority areas. Notably, even lenders that make the largest number of loans in minority areas (compared to "peers") can be accused of redlining.

There are numerous nondiscriminatory reasons that a lender may have dominance in some geographic areas, and it is incongruous to base a claim of redlining primarily on evidence of dominance in non-minority-area lending. It makes little sense to claim that a lender can avoid redlining accusations by making fewer loans in nonminority areas.

Inexplicably, the government has refused to consider information about the *number* of applications and originations of a targeted lender compared to the number of applications and originations of peers, even though it is an important indicator of actual service to minority areas. The information is readily available as data collected and made public under the HMDA reveal the number of loan applications and loans originated by all reporting lenders within each MSA. Thus, it is not difficult to rank-order the lenders to show those receiving the largest number of applications and originating the largest number of loans in minority areas and those with lower volumes.

A lender accused of redlining may in fact receive a greater number of minority-area applications or originate a greater number of minority-area loans than an overwhelming majority of all lenders who have served the geographic area and still be accused of redlining. For example, Fairway Independent Mortgage, which was sued by the government for redlining in October 2024, released a press statement saying the government "refused to consider the fact that Fairway took more loan applications and made more loans, in terms of number of loan units, in majority-Black census tracts than any other non-bank lender with a physical presence in the Birmingham MSA."[12] If that assertion is true, the lender should not have been accused of redlining.

Notably, none of the government complaints asserting redlining under the proportional distribution analysis reveal the *number* of applications and originations that the targeted lender and peer lenders received from minority areas, including how the targeted lender ranks in a volume analysis.

Finally, under the government's approach to redlining, the claims will never end. Each claim is based on deviation from the average distribution of applications and loans between minority and nonminority areas, and mathematics tells us that such deviations always will exist. The only way to end it would be to obtain the precise racial balance among all lenders that the government seems to demand. That might require collaboration within the lending industry, which would raise other legal concerns.

C. The Relevance of Branch and Office Locations in Establishing Redlining Is Overstated

The issue of branch locations entered the fray initially because Chevy Chase asserted that it located branches in areas that it intended to serve, and it had no obligation to serve areas in which it did

[12] Another difficulty with the proportional distribution analysis is that it is a rear-view mirror method of evaluating compliance. A bank may know the distribution of its applications and loans between minority and nonminority areas as the year progresses, but it does not know the similar data for that of its peers until the HMDA data is released by the CFPB in the spring of the following year. Thus, the lender may already be facing an alleged violation before the data is available.

not have branches. Thus, allegations regarding the absence of branches in minority areas was considered by the government to be an element of the claim of intentional discrimination. The DOJ recognized that the issue of branch locations would be controversial and included the allegation in complaints primarily because banks contended that branch locations were relevant to areas in which they would do business. Thus, the U.S. Attorney General stated: “We are not as concerned about where a bank branch is built or where a mortgage office is opened—but whether service in some form is provided.” Similarly, a subsequent consent decree that resolved the claim specified: that the decree did not require the bank to establish a branch or office.

As time progressed, however, the government began to rely more heavily on the absence of branches or loan offices in minority areas as *independent* evidence of redlining. A review of recent complaints suggests that the government believes its analysis of branch and office locations to be a primary basis for the claim of redlining.

This presents concern for several reasons. The FHA prohibits discrimination in real estate-related credit transactions but imposes no requirement on banks or other businesses to locate branches or offices in certain locations. Nor does ECOA, even though it applies to credit transactions beyond housing-related transactions. In fact, the main products offered by bank branches, such as checking accounts and savings accounts, are not even covered by the FHA or ECOA. Bank regulatory agencies, of course, may have their own reasons for regulating the location of branches and offices, but that is separate and apart from the requirements of the FHA and ECOA.

Bank branch and mortgage office locations may impact mortgage lending operations and thus could have some relevance to a claim of redlining. But their relevance must be evaluated in the context of modern-day mortgage lending. Bank branches had greater relevance to a typical mortgage-lending operation at the time of the Chevy Chase filing than they do today. Consumers visit bank branches much less frequently than they did 30 years ago. In today’s market, online and phone applications are much more likely, and a consumer, with great frequency, obtains a mortgage from a bank without ever visiting a branch. (The government can easily study the relationship of branch locations to mortgage lending activity with data available under HMDA regarding method of application.)

A review of recent filings under the Initiative to Combat Redlining confirms the emphasis placed by government on branch locations but fails to even attempt to tie branch locations to the ability to obtain a loan. The connection is simply assumed. In no case has the government cited data on the frequency with which consumers visit a bank branch to obtain a mortgage loan, as opposed to seeking a loan online or by phone. Again, the government ignores available factual information, such as common consumer conduct in seeking mortgage loans, that might disprove its desired presumption of discrimination.

D. Other Facts Regularly Asserted by the Government Fail to Overcome the Major Flaws Described Above

The government regularly includes other allegations in redlining complaints that are designed to paint an unfavorable picture of the targeted lender. Allegations might include a failure to target advertising specifically to the minority community through minority-owned media, failure to reach out to real estate professionals serving minority areas, or inadequate fair lending training. It is difficult to imagine that these types of assertions would be considered an independent basis for a claim of redlining.

In the modern mortgage market, it also is difficult to assume that factors such as a failure to use specific media outlets would be tied to a failure to receive applications from minority areas. For example, a lender that advertises in a major newspaper in an MSA may reach a greater number of potential minority applicants than it would using a smaller, but more targeted, media outlet. As with other allegations, the government makes no effort to describe facts that might support the effect of the marketing practices, but it simply assumes the link to discrimination.

In more recent cases, the government has attempted to bolster its claim of intentional discrimination by alleging that the targeted lender was aware of analysis (such as those that seek to replicate the government's proportional distribution analysis) but failed to take corrective action. For example, in a recent action the government alleged that the bank knew it had redlining risk through reports that identified a lack of mortgage lending activity in majority-Black and Hispanic areas and lack of applications from Black and Hispanic borrowers. A similar approach was taken in another recent action — the government noted that the bank was aware that its lending underperformed its peers in minority areas

Under the proper legal standard, the government must show "more than an awareness of the consequences of a particular course of action" and demonstrate that the lender continued its practices because of its adverse effects on the minority area. *Pers. Adm'r of Mass.*, 442 U.S. at 279. None of the complaints attempt to make this link with facts. Also, this type of allegation assumes that the information available to the lender was a reasonable guide to compliance. A lender that sought to evaluate risk by replicating the government's approach to redlining likely would receive reports of little actual value, since the approach itself is so badly flawed.

E. The Government's Remedial Approach to Redlining Violates Constitutional and Statutory Standards

Further, the government has utilized a "cookie-cutter" remedial approach to redlining claims. In addition to requirements to increase outreach to minority communities, the government has required the targeted lender to implement special loan programs that provide more favorable terms for financing, such as a reduced interest rate, to the minority areas, or persons within the minority areas, than otherwise would be available. Such favorable treatment caused by race normally would violate the FHA and ECOA but may be permitted to the extent that it is remedial. The U.S. Supreme Court has noted that few circumstances permit race-based government action. "One is remediating *specific, identified* instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admissions, Inc.*, 600 U.S. at 207. (emphasis added).

At the same time, judicial standards require that remedial action be targeted to victims of discrimination, and it is questionable whether the government's typical allegations meet that standard. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). While the government "'may take remedial action when they possess evidence of past or present discrimination,' 'they must identify that discrimination. . . with some specificity before they may use race-conscious relief.'" *Id.* Moreover, "A generalized assertion of past discrimination in a particular industry or region is not adequate because it 'provides no guidance . . . to determine the precise scope of the injury it seeks to remedy.'" *Id.*

The redlining complaints commonly allege that the challenged conduct discriminated against and discouraged applicants and prospective applicants in majority-Black and Hispanic neighborhoods from applying for and obtaining home loans and other mortgage-related services. To the best of our knowledge, in no case has the government identified the specific persons who were denied or discouraged from seeking financing from the targeted lender.[13]

In settling claims by consent decree, the remedial favorable loan programs are not limited to identifiable persons who may have been denied or discouraged from seeking financing from the targeted lender—and that may cause the remedial provisions to be overturned in a legal challenge. Rather, the consent decrees make the special terms available to a much wider spectrum of people. For example, a recent consent decree provides that the special terms will be available to "qualified applicants," which include both persons seeking a mortgage for a primary-residential property in minority areas and persons residing in the minority areas seeking a primary-residential property outside of the majority minority areas Borrowers receiving this special benefit are not required to assert that they were denied or discouraged from seeking financing from the targeted bank because of the alleged redlining practices. It may be difficult to justify this approach under current legal standards.

Of course, these provisions are imposed by consent decrees agreed to by the targeted lender. But the reality is that the terms are dictated by the federal government as shown by the uniformity of remedial provisions across many different lenders.

The common practice of the government is to demand specific remedial provisions from a targeted lender without showing the lender the specific allegations that will be presented in the complaint. We are not aware of any instance in which the bank has received a copy of the complaint in advance of filing, nor in advance of agreeing to the terms of a consent decree. Thus, the required nexus between the terms of the consent decree and the bank's ability to remediate the legal violation asserted in the complaint is questionable. Indeed, if the government demands that a lender take race-based actions beyond what is necessary to remedy a violation, that demand is unconstitutional and may violate the FHA and the ECOA.

The government's approach to the secrecy of its allegations prior to consent to a resolution has caused some lenders to feel blind-sided when they finally are provided the complaint after filing. For example, some lenders have objected, after DOJ issues a press release, to the language used.

[13] At least one district court has recognized the need for identifying specific victims. In *CFPB v. Townstone Financial, Inc.*, the CFPB filed suit for violation of ECOA, contending that the defendant discouraged applicants on the basis of race from seeking or obtaining credit within the Chicago area. A discovery dispute arose when the CFPB attempted to identify persons who might have been deterred from seeking financing and the court ruled in favor of CFPB, requiring the defendant to produce documents "to the extent they concern[ed] the identification of, or communication with, prospective loan applicants and/or prospective employees." *CFPB v. Townstone Fin., Inc.*, Case No. 20C4176, 2022 WL 22896877 at *8 (N.D. Ill. 2022).

IV. Conclusion

There are many serious flaws to the approach that the DOJ has used to file claims of unlawful redlining. The factual premises in most circumstances fail to support a claim of intentional discrimination, and the filings cause great harm to lenders who are making concerted efforts to provide home-lending services in a nondiscriminatory manner. Corrective action within the DOJ is badly needed.

The DOJ (including the Civil Rights Division) is not an advocacy organization, but rather a law enforcement agency. It is responsible for enforcing the laws in an impartial, fair and balanced manner. It has seriously violated its neutral responsibilities in stretching legal theories beyond that permitted by judicial precedent and by pursuing claims against compliant lenders.

Rebalancing is needed. The DOJ should give serious consideration to the proper elements of a claim of redlining so as to limit its enforcement actions to those institutions that truly are engaged in intentional discrimination. That may result in far fewer claims of unlawful redlining, which merely reflects the fact — as the ABA believes — that few lenders are engaged in this invidious practice currently.

We call on the DOJ to work collaboratively with the ABA and other representatives of the mortgage industry to devise a reasoned approach for claims of redlining that reflects the modern-day lending industry and captures intentional discrimination.

We also call on Congress to clarify that redlining is a form of intentional discrimination and to direct the DOJ, the CFPB and the banking agencies to adhere to their own examination procedures and other guidance in reviewing lending patterns for potential redlining concerns.