PREAPPROVAL BIAS: THE DISCRIMINATORY IMPACT OF FINANCING DISCLOSURES IN RESIDENTIAL REAL ESTATE OFFERS

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ABSTRACT

For decades, Black Americans were excluded from government programs for new homebuyers. Now that they can finally qualify for these loans, they cannot use them to compete.

In today's real estate market, sellers often require buyers to provide a pre-approval letter specifying the type of loan they plan to use and the amount they intend to finance. However, when the seller is evaluating multiple offers, this information, designed to indicate that a buyer is low risk, can disadvantage buyers without inherent wealth.

This is particularly the case for Black Americans, who disproportionately rely on government-backed FHA and VA loans. Those loans, although initially designed to expand homeownership, carry stigmas, appraisal challenges, and additional requirements that make them less attractive to sellers in bidding wars dominated by cash offers or buyers with significant down payments.

By examining the current housing shortage, market trends, stigmas, and seller stress, this Article illustrates why sellers are motivated to accept offers contingent on a prospective buyer's wealth rather than on the offer price in today's market. Then, by reviewing racially discriminatory housing policies of the past, this Article shows how decisions by sellers today inadvertently perpetuate historical segregation and the racial wealth gap. Section VII then explores the legal and political challenges that prevent minority housing advocates from addressing these issues, and Section IX recommends reforms that will hopefully make FHA and VA loans more competitive.

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INTRODUCTION

A young couple believes they are on the verge of a significant milestone: becoming the first in either of their families to own a home. They meet with lenders and receive a pre-approval letter indicating that, after reviewing their finances, the lender has determined they likely meet the requirements for a Department of Veterans Affairs ("VA") or Fair Housing Administration ("FHA") loan. They fell in love with a home within their budget in Ashland, Massachusetts. Located between Boston and Worcester, and rated "A" for public schools on Niche, Ashland is an ideal suburb for them.[1] But a new listing in Ashland is rare; only seven homes sold in this town of nearly nineteen thousand in April 2025.[2] Those homes averaged just twelve days on the market, and 71.4% sold for above asking price.[3] Not wanting to be outbid, the couple offers $20,000 over the asking price, includes an escalation clause committing to pay $10,000 more than any competing offer, and submits their pre-approval letter showing they can afford the home. Still, their offer is rejected in favor of another offer that is only $10,000 over the asking price. The reason? The other buyer paid in cash.

This scenario has become increasingly common in recent years as the inventory has been unable to meet demand. In 2021, during the Post-COVID housing frenzy, 24% of homes received 4 or more offers, and an astounding 74% received an all-cash offer or one with no financing contingency.[4] The trend toward cash offers has continued.[5] According to the National Association of Realtors ("NAR"), 29% of all sales in October 2025 were to

[1] *Ashland Public Schools*, NICHE, https://www.niche.com/k12/d/ashland-public-schools-ma [https://perma.cc/T6T2-JCTE]. This town was chosen as it is where I grew up and spent my entire childhood.

[2] *See Profile*, ASHLAND, https://www.ashlandmass.com/341/Profile [https://perma.cc/8FS6-9SL7] (listing house sale statistics).

[3] *Ashland, MA Housing Market,* REDFIN, https://www.redfin.com/city/29747/MA/Ashland/housing-market [https://perma.cc/9V3B-83BL]; *id.*

[4] Brooklee Han, *Study: 24% of Sellers Received Four or More Offers in 2021*, HOUSINGWIRE (Oct. 5, 2021), https://www.housingwire.com/articles/study-24-of-sellers-received-four-or-more-offers-in-2021 [https://perma.cc/2LQW-ZWLR]; Hannah Jones, *Cash is King: Trends in All-Cash Home Sales*, REALTOR.COM (Oct. 7, 2025), https://www.realtor.com/research/all-cash-sale-trends-h1-2025/#:~:text=All%2Dcash%20sales%20are%20especially,to%20sidestep%20steep%20borrowing%20costs [https://perma.cc/H4N6-57M9].

[5] Amethyst Marroquin, *The Cash Buyer and the Waltz of the Rising Rates: A Modern Market Tale*, NAT'L ASS'N OF REALTORS (Dec. 10, 2025), https://www.nar.realtor/blogs/economists-outlook/the-cash-buyer-and-the-waltz-of-the-rising-rates-a-modern-market-tale [https://perma.cc/44Q9-38A6].

all-cash buyers.[6] Statistically, buyers making all-cash offers or sizable down payments are more likely to be white.[7]

In today's market, limited inventory and concerns that a buyer may not get financing if the property underappraises lead many sellers to prioritize a hassle-free closing over the highest price when selling their homes. As a result, sellers commonly select the buyer most likely to reach the closing table quickly and without issue, even if that buyer is not the highest bidder.[8] These dynamics put buyers who rely on government-subsidized loans or those who cannot afford a large down payment at a significant disadvantage, which is disproportionately Black homebuyers.[9]

A pre-approval letter is intended to reassure the seller that the buyer is serious about the process, that their finances have been vetted, and that they are likely to secure the necessary financing to purchase the home.[10] However, when buyers are expected to disclose how they plan to finance a home, it places buyers who can afford only a small down payment or who are using a government loan, such as FHA or VA loans, at a significant disadvantage when trying to purchase a home in a real estate market that does not have enough inventory to meet demand. This impacts all buyers with limited wealth accumulation, which disproportionately impacts people of color. As a result, those buyers have been excluded from access to the type of wealth that allows for large, all-cash home purchases, with only the options of either renting a home or buying in predominantly neighborhoods of color.[11] This further segregates communities and expands the racial wealth gap.

First, Part I explains why sellers seek confirmation of a buyer's financing eligibility and distinguishes among pre-approval letters, pre-qualification letters, and proof of funds letters. Part II also compares cash offers, conventional loans, and government-subsidized loans, such as FHA and VA loans, and the roles that a pre-approval letter or a proof-of-funds letter plays when a buyer plans to submit an offer on a property.

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[6] *Id.*

[7] *See* discussion *infra* Section VIII(A).

[8] *See generally* Jessica Usman, *How To Convince A Seller To Accept Your Offer,* REDFINBLOG (Oct. 23, 2025), https://www.redfin.com/blog/how-to-convince-a-seller-to-accept-your-offer [https://perma.cc/3D3J-C69E] (discussing the ways a buyer can make their offer more likely to close quicker and how "sellers often value a smooth, certain closing over simply the highest bid.").

[9] *See* discussion *infra* Sections VI-VII.

[10] *See* discussion *infra* Section 0.

[11] *See* Barbara van Kerkhove, *Report Finds FHA/VA Lending Disproportionately Prevalent in Neighborhoods of Color*, Empire Just. Ctr. (July 19, 2012), https://empirejustice.org/resources_post/report-finds-fhava-lending-disproportionately-prevalent-in-neighborhoods-of-color [https://perma.cc/MA2L-5J99].

Parts III-VI analyze the current housing shortage crisis in the United States, which has made the market for entry-level housing extremely competitive and fueled bidding wars. They show why cash offers and large down payments create an unfair competitive advantage for some buyers and focus on how borrowers using FHA or VA loans are at a unique disadvantage.

Parts VII and VIII talk about how the history of racially motivated policies deliberately excluded Black Americans and helped cause the racial intergenerational wealth gap we see today. For this reason, the decision by many sellers and listing agents to place greater weight on the amount a buyer puts down than on the actual price not only harms FHA or VA loan borrowers but also constitutes a form of disparate-impact discrimination. Nevertheless, it seems unlikely that courts, federal agencies, or state laws will prevent sellers from considering how the buyer will finance the loan when comparing offers or acting against this form of disparate-impact discrimination in housing unless we see drastic reforms to the homebuying process.

Finally, Part IX recommends solutions that will make buying a home safer for all buyers and easier for sellers to focus on the offer price. These include bridging the gap between cash and financing buyers by implementing non-waivable contingencies and cooling-off periods for all buyers, removing some of the stringent property-qualification standards of VA and FHA loans, and committing to a campaign to dispel myths about government-backed loans. This also includes replacing the system of pre-approval and proof of funds letters with a standardized form and procedure for every eligible buyer, confirming to the seller that a certified banking officer has reviewed the buyer's finances and believes they would be able to obtain financing, but does not list what kind of financing that is.

This Article adds to the discussions regarding the United States housing shortage and the policies that perpetuate racial wealth inequality.[12] Compared to other discussions on disparate impact discrimination, this Article focuses on how the decisions that sellers and listing agents make in response to the current housing shortage crisis, trends in interest rates, buying habits of investors and seniors, and outdated policies on FHA and VA loans, are perpetuating decades of systemic segregation and wealth inequality in the country.[13]

[12] Similar to Matthew M. Cummings's piece, *Went With Another Offer*, which tackles the problems with NAR's policies on competitive entry-level housing that make real estate commissions less transparent and impact appraisals, this tackles another issue with competitive entry-level housing – sharing buyer financing can cause disparate impact discrimination. *See generally* Matthew M. Cummings, *Went With Another Offer: The Fallout of the NAR Settlement and Its Potential to Cut First-Time Homebuyers Out of the Housing Market*, 60 REAL PROP., TR. & REAL EST. L.J. 329 (2025).

[13] *See generally* Dana L. Kaersvang, *The Fair Housing Act and Disparate Impact in Homeowners Insurance*, 104 MICH. L. REV. 1993 (2006) (analyzing the disparate impact within the home insurance

I. FINANCIAL DISCLOSURE & COMMON FINANCING OPTIONS

One of the most important steps real estate agents recommend is obtaining a letter from a financial institution confirming a buyer's eligibility to purchase or finance a home.[14] This is usually either a proof of funds letter, if the buyer plans on buying a home with cash, or a pre-approval letter if they are seeking financing.[15]

A proof of funds letter verifies that the buyer has sufficient funds available to pay for the home.[16] A pre-approval letter documents that the bank has reviewed a potential buyer's assets, income, and credit and has determined that the buyer is eligible for a loan up to a specified amount.[17] Pre-approval is more extensive than a pre-qualification letter, which provides a rough estimate of someone's assets based on what they self-reported.[18] Because pre-approval is based on evidence from external sources of the buyer's financial eligibility, it typically provides greater assurance to a seller than a pre-qualification letter.[19]

Rather than waiting until a buyer is ready to submit an offer, it is not uncommon for real estate agents to require prospective buyers to obtain one of these letters before even showing them a property.[20] This serves multiple purposes. It signals to the agent that the prospective buyer is serious about purchasing a property and helps confirm the specific price range the buyer

underwriting process); *see also* Kerri Thompson, *Fair Housing's Trap Door: Fixing the Broken Disparate Impact Doctrine under the Fair Housing Act*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 435 (2017) (arguing for a change to the court standard used to determine disparate impact in housing); Tamica H. Daniel, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination under the Federal Fair Housing Act*, 98 GEO. L. J. 769 (2010) (examining how courts look at disparate impact with housing vouchers).

[14] *See Why First-Time Homebuyers Should Get Pre-Qualified*, S.D. HOUS., https://www.sdhousing.org/news-blog/why-first-time-homebuyers-should-get-pre-qualified [https://perma.cc/ZS5N-QCZJ].

[15] A proof of funds letter is a letter from a buyer's bank indicating that the buyer has the amount of funds needed to make the purchase. *See What Is a Proof of Funds Letter for Real Estate?*, FREEDOM MORTG., https://www.freedommortgage.com/learning-center/articles/proof-funds-letter-real-estate (last updated Sep. 2025) [https://perma.cc/U8MX-BFJD].

[16] *See id.*

[17] *See* Miranda Marquit, *How to Get Preapproved for a Mortgage*, BANKRATE (Jan. 21, 2026), https://www.bankrate.com/mortgages/pre-approval/#how-to-get [https://perma.cc/2A38-ARMG].

[18] *Id.*

[19] Kate Wood, *How to Buy a House: 15 Steps in the Homebuying Process*, NERDWALLET, https://www.nerdwallet.com/mortgages/learn/home-buying-checklist-steps-to-buying-house (last updated Mar 19, 2024) [https://perma.cc/S6XT-PKUX].

[20] *See* Stephanie Booth, *Is a Mortgage Pre-Approval Letter Necessary to Make an Offer on a House*, REALTOR (Feb. 8, 2024), https://www.realtor.com/advice/finance/is-a-mortgage-pre-approval-letter-necessary [https://perma.cc/8W58-JQ78] (quoting a Realtor stating "I do not look for homes with my buyers until they have a pre-approval letter from their lender. To me, it's that important.").

can afford.[21] It also ensures the buyer is prepared to submit an offer once they find a property they are in love with. Although not technically required, sellers typically expect a proof-of-funds letter or a pre-approval letter to be included with any offer.[22] And because these letters, especially pre-approval letters, may take days to obtain, buyers who wait risk losing out on fast-moving listings or missing offer deadlines.[23] Getting prepared prepares the prospective buyer for when an opportunity comes.

To determine the amount for which a prospective buyer may be pre-approved, the bank looks at a variety of documents such as: identification information (e.g., Social Security number or passport); proof of employment and income (e.g., bank statements for the past three months, two years of tax returns and W-2s, and verification of employment by employer and business documents if self-employed); proof of assets (e.g., investments, IRAs, and 401(k)s), outstanding debt, rental history and references, and a hard inquiry on the buyer's credit report(s)).[24] Pre-approval letters generally remain valid for up to ninety days, after which they must be renewed.[25] Also, obtaining a letter from the lender does not prevent a buyer from using another lender once an offer is accepted.[26]

II. FHA, VA, & CONVENTIONAL LOANS

There are various types of subsidized and unsubsidized loans available to buyers, with the most common options for first-time homebuyers being conventional loans, VA loans, and FHA loans.[27]

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[21] *See Why Does a Realtor Ask You to Get Pre-Approved*, Atl. Coast Mortg., https://www.atlanticcoastmortgage.com/why-does-a-realtor-ask-you-to-get-pre-approved [https://perma.cc/WC7P-7CBL].

> Many real estate agents aren't willing to waste their time touring window-shoppers who have no intention of buying, which is understandable . . . They want to focus their efforts on people who are prepared to make a serious offer . . . A preapproval helps you and agents narrow down your search to only properties that will fit into your price range.

Id.

[22] *See* Ana Staples, *How to Get Preapproved for a Mortgage*, CNBC (June 10, 2024), https://www.cnbc.com/select/why-you-need-a-mortgage-pre-approval/#:~:text=You'll%20position%20yourself%20as,upload%20or%20submit%20financial%20paperwork [https://perma.cc/Z27V-QFB2].

[23] *See* Marquit, *supra* note 17 (stating that "depending on your mortgage lender and your eligibility, it could take a few days or even a week to receive it").

[24] *See* Billy Lyons, *Documents Needed for Mortgage Pre-Approval*, GRIFFIN FUNDING (Feb. 2, 2024), https://griffinfunding.com/blog/mortgage/documents-needed-for-mortgage-preapproval [https://perma.cc/C2FS-SWTD]; *see also* Wood, *supra* note 19 (explaining home buying process).

[25] *See* Marquit, *supra* note 17.

[26] *See* Wood, *supra* note 19.

[27] *See* Anna Serio-Ali, *4 Popular Mortgage Loans for Homebuyers: Conventional, FHA, VA and Jumbo Loans*, AOL (Mar. 28, 2025), https://www.aol.com/finance/popular-mortgage-loans-for-

Of those loan options, the most common are conventional loans, which account for 57.8% of loan applications.[28] Conventional loans are unsubsidized and not backed by the federal government.[29] That being said, they do sometimes offer lower mortgage fees than government loans but have more stringent requirements for the borrower's income and credit score.[30]

To obtain a conventional loan, borrowers typically need a credit score of at least 620 or higher and a steady form of income.[31] Depending on the loan, the borrower must also be able to make a down payment of 3 to 20% if they do not want to pay mortgage insurance.[32] As of 2025, in most areas, the maximum amount someone can currently borrow with a conventional loan is $806,500, but it can increase up to $1,209,750 depending on the location.[33] If the borrower needs more than the maximum amount, they typically have to also apply for a jumbo loan.[34]

When discussing subsidized loans backed by the federal government, the most commonly used loans are FHA loans (comprising 30.2% of loan applications) and VA loans (comprising 11.4% of loan applications).[35]

FHA loans are loans backed by the Federal Housing Administration, which is part of the Department of Housing and Urban Development ("HUD").[36] These loans permit smaller down payments and are available to

homebuyers-161056698.html [https://perma.cc/ZC7N-2RJD]. There are more kinds of loans for residential buyers, such as renovation loans that allow you to include home improvement costs in the loan and jumbo loans for properties that exceed the allowable spending limits in the county. *See id.* (explaining jumbo loans); *see also* Wood, *supra* note 19 (describing renovation loans).

[28] Falen Taylor, *January New Home Purchase Mortgage Applications Decreased 6 Percent*, MBA (Feb. 20, 2025), https://www.mba.org/news-and-research/newsroom/news/2025/02/20/january-new-home-purchase-mortgage-applications-decreased-6-percent#:~:text=By%20product%20type%2C%20conventional%20loans,VA%20loans%20composed%2011.4%20percent [https://perma.cc/5RRA-CQFZ].

[29] Kacie Goff, *FHA vs. Conventional Loans: What's the Difference?*, BANKRATE (Madison Hoehn ed., Aug. 18, 2025), https://www.bankrate.com/mortgages/fha-vs-conventional-loans/#differences [https://perma.cc/P3W4-8JEH].

[30] *Id.*

[31] *Id.*

[32] *See* Serio-Ali, supra note 27; *id.*

[33] *FHFA Conforming Loan Limit Values Map*, U.S. FED. HOUS., https://www.fhfa.gov/data/dashboard/conforming-loan-limit-values-map [https://perma.cc/4289-6N3U].

[34] *See* Serio-Ali, *supra* note 27. This is a term used for loans that exceed the maximum amount allowed for a conventional loan and usually has higher borrowing costs than a standard conventional loan. *See* Rory Arnold, *What are Jumbo Loans and How Do They Work,* ROCKET MORTGAGE (Jan. 23, 2025), https://www.rocketmortgage.com/learn/jumbo-loan [https://perma.cc/32RL-MVPA].

[35] Taylor, *supra* note 28. Another commonly used subsidized loans are RHS/USDA loans. *Id.* These loans are for properties located in designated rural areas and amount for only roughly 0.5% of loan applications. *Id.*

[36] Goff, *supra* note 29.

borrowers with lower credit scores than most conventional loans.[37] Compared to the 620 credit score requirement of conventional loans, FHA allows a credit score of 580 or more to get a loan with only 3.5% down, or as low as a 500 credit score with 10% down.[38] If a borrower defaults on an FHA loan, the FHA will pay the lender the remaining balance.[39] However, these loans come with mandatory mortgage insurance premiums (MIPs).[40] This amounts to 1.75% of the loan amount at signing (but can be financed into the loan) and ongoing monthly insurance, typically between 0.5% to 0.75% of the loan-to-value ("LTV") of the property and will last for the entire loan if the LTV is greater than 90%.[41] As with conventional loans, there is a cap on the amount that can be borrowed, varying by location. As of 2025, those ranged from $524,225 to $1,209,750.[42] Despite these costs, FHA's low required credit scores make it a popular option for first-time homebuyers.

VA loans, on the other hand, are backed by the VA and are available only to veterans, active duty servicemembers, National Guard and Reserve members, and some surviving spouses.[43] Similar to conventional and FHA loans, there is a cap on the amount that can be borrowed, depending on location.[44] As of 2026, loan amounts were comparable to conventional loans, with most limited to $832,750 but increasing to $1,249,125 in high-cost areas.[45] Unlike FHA loans, VA loans do not require mortgage insurance or a down payment from the borrower.[46]

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[37] *Id.*

[38] *Id.*

[39] Tj Porter, *FHA vs. VA Loans: What's the Difference, and Which One Is Best For You?*, ROCKET MORTG., https://www.rocketmortgage.com/learn/fha-vs-va-loan (last updated Nov. 2, 2025) [https://perma.cc/YS4S-ACTE].

[40] *See id.* MIPs are an additional mortgage insurance that buyers have to pay for higher risk loans. Caroline Banton, *Mortgage Insurance Premium (MIP): Definition, Costs, Canceling*, INVESTOPEDIA (Jan. 12, 2025), https://www.investopedia.com/mortgage/insurance/qualified-insurance-premium [https://perma.cc/HXA3-GH6U].

[41] Goff, *supra* note 29. Loan to value ratio is the loan amount divided by the appraised value of the home. *See* Cummings, *supra* note 12, at 337-38.

[42] Kaitlin Davis, *FHA vs. VA Loans: Key Differences and How to Choose*, FREEDOM MORTG. (Dec. 16, 2025), https://www.freedommortgage.com/learning-center/articles/fha-loans-vs-va-loans [https://perma.cc/4XL3-YDZZ]; *see FHA Mortgage Limits*, U.S. DEP'T OF HOUS. & URB. DEV. (Feb. 25, 2026), https://entp.hud.gov/idapp/html/hicostlook.cfm [https://perma.cc/D2D6-L8TD].

[43] *See* Goff, *supra* note 29.

[44] *Id.*

[45] *2026 VA Loan Limit Calculator*, VETERANS UNITED (Feb. 25, 2026), https://www.veteransunited.com/education/tools/va-loan-limit-calculator/#:~:text=You%20Qualify%20For-,About%20VA%20Loan%20Limits,their%20zero%2Ddown%20buying%20power [https://perma.cc/P27N-E58H].

[46] *See* Goff, *supra* note 29.

III. AFFORDABLE HOUSING SHORTAGE REVIEW

Since the Great Recession, there has been a significant decline in the availability of housing for first-time homebuyers in the United States. [47] During the height of the 2008 financial crisis, the United States was building roughly 27% of the homes it had built in the years before the crisis.[48] Although more houses have been built since then, not enough have been built to compensate for those lost during the recession and match demand.[49] As a result, estimates indicate that the United States has a housing deficit of roughly two to three million homes.[50]

When new homes are built, developers tend to prioritize larger, more expensive homes for buyers with bigger budgets rather than smaller, more affordable ones.[51] The reason is straightforward: developers achieve a higher return on investment by building larger properties and selling them at higher prices.[52] Since the housing shortage is a problem across the entire market, demand remains strong even at higher price points. Therefore, developers are now more inclined to allocate resources to focus on larger rather than smaller homes. By comparison, in the 1940s, 70% of new construction was for homes 1400 square feet or less.[53] In 2022, only 8% of new homes were 1,400 square feet or less.[54]

To make matters even worse, developers are targeting the limited inventory of more affordable or smaller homes to meet the demand of wealthier buyers.[55] When the availability of empty land is limited, the most affordable options for many of these developers are to purchase lower-priced, pre-existing properties for their projects.[56] As a result, developers often tear

[47] *See* Michael Barbaro & Conor Dougherty, *How the Cost of Housing Became So Crushing*, N.Y. TIMES: THE DAILY (Sep. 24, 2024), https://www.nytimes.com/2024/09/24/podcasts/the-daily/housing-crisis-michigan.html?showTranscript=1 [https://perma.cc/J4MF-RZR6] (exploring housing crisis in United States); *see also* Emily Badger, *Whatever Happened to the Starter Home*, N.Y. TIMES: THE UPSHOT (Sep. 25, 2022), https://www.nytimes.com/2022/09/25/upshot/starter-home-prices.html#:~:text=Nationwide%2C%20the%20small%20detached%20house,1%2C400%20square%20feet%20or%20less [https://perma.cc/H4CN-KS6C] (attributing housing crisis to disappearance of affordable homes).

[48] *See* Barbaro & Dougherty, *supra* note 47 (explaining crisis).

[49] *See id.* (breaking down the differences).

[50] *See id.* (estimating shortage).

[51] Cummings, *supra* note 12, at 342-44.

[52] *Id.* at 344.

[53] Badger, *supra* note 47.

[54] *Id.*

[55] *See id.* (explaining how small homes increasingly replaced by "McMansions"); *see also* Barbaro & Dougherty, *supra* note 47 (detailing difficulty in building affordable homes).

[56] *See* Barbaro & Dougherty, *supra* note 47 (explaining developers more easily profit by "catering to the rich"); *see also* Badger, *supra* note 47 (noting that developers struggle to profit on small home builds).

down more affordable homes or turn them into larger ones, further shrinking the supply of affordable housing.[57]

The inventory shortage has also intensified competition, particularly from investors in rental properties. With many people priced out of homeownership, more individuals are forced to continue to rent as their families grow.[58] This incentivizes investors, who can regularly use cash to outbid other buyers and rent at a premium, to purchase and rent out single-family homes.[59]

Due to the aggressive rental demand, combined with the unusually low interest rates during the pandemic, many existing homeowners are deciding to hold onto their properties as rentals rather than selling when they move.[60] Between 2012 and March 2022, interest rates were at a historic low. [61] Between 1977 and 2008, the average annual interest rate for a thirty-year fixed mortgage never went below 5.83%.[62] From 2012 to 2019, the annual interest rates only went above 4% twice, with the highest being 4.54% in 2018.[63] During the pandemic, interest rates plummeted to the lowest rates in history, including the record-low rate of 2.65% in January 2021.[64] Following the rate spike in March 2022, rates have stayed much higher, averaging 6.77% between 2023 and 2004.[65]

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[57] *See* Badger, *supra* note 47.

[58] *See* Cummings, *supra* note 12, at 344 (explaining that people, who in the past would have bought a home, are forced to rent as they are incapable of buying a home).

[59] *See* Abha Bhattarai, *It's the Perfect Starter Home. But It's Only for Rent*, WASH. POST (Oct. 2, 2022), https://www.washingtonpost.com/business/2022/10/02/housing-build-to-rent-austin [https://perma.cc/EES6-CL9P] (describing developers buying entry-level homes to rent); Ashfaq Khan, Christian Weller, Lily Roberts & Micehla Zonta, *The Rental Housing Crisis Is a Supply Problem That Needs Supply Solutions*, CTR. FOR AM. PROGRESS (Aug. 22, 2022), https://www.americanprogress.org/article/the-rental-housing-crisis-is-a-supply-problem-that-needs-supply-solutions [https://perma.cc/VQ8D-VU6N] (detailing housing shortage); Barbaro & Dougherty, *supra* note 47 (explaining apartment rental explosion).

[60] *See* Tamara White, *Homeowners Are Refusing to Sell – And Are Becoming "Accidental Landlords" Instead*, YAHOO!, https://creators.yahoo.com/lifestyle/story/homeowners-are-refusing-to-selland-are-becoming-accidental-landlords-instead-044600968.html (last updated Apr. 12, 2026) [https://perma.cc/MQ8J-B78K].

[61] Peter Miller, *Mortgage Rate History | Chart & Trends Over Time 2026*, MORTG. REPS. (Feb. 20, 2026), https://themortgagereports.com/61853/30-year-mortgage-rates-chart [https://perma.cc/3Y4Z-JZN2].

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

Homeowners who were able to purchase or refinance before March 2022 have experienced what has become known as "golden handcuffs."[66] This is a common trend: homeowners refuse to sell their current homes because doing so would mean losing the historically low interest rate they obtained.[67] Instead of selling the home when it no longer meets their needs, these homeowners decided to either renovate their homes to meet those needs or to rent out those homes rather than sell them.

Some owners who did not receive low interest rates still decide to rent out their home rather than sell.[68] Renting may be more beneficial even to these homeowners, as even in 2024, the monthly mortgage payment on a new home was less than the monthly rental prices in many areas.[69] A property owner, even one with a high mortgage rate, can utilize the high costs created by rental demand to pay off a mortgage.[70] The owner is then left with an asset that regularly appreciates in value, and given the growing rental demand, may generate even more wealth.[71]

Furthermore, the real estate activities of older Americans have worsened the market for entry-level buyers.[72] Historically, older Americans were more likely to sell their homes as they moved into care facilities, became renters, or moved in with relatives.[73] As Americans live and work longer, baby boomers are no longer following the historical trends of people within their age bracket. According to a recent poll, the majority of boomers said they plan never to sell their homes. Boomers are also becoming more likely to buy homes later in life. Between 2011 and 2021, the number of people under the age of sixty-four who owned their homes decreased across

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[66] *See Low Mortgage Rates: Golden Handcuffs or Golden Opportunity?*, RENTERS WAREHOUSE (Feb. 26, 2024), https://www.renterswarehouse.com/education/low-mortgage-rates-golden-handcuffs-or-golden-opportunity [perma.cc/5F5B-MGSM].

[67] *Id.*

[68] WSJ PODCASTS, *More Homeowners Are Renting Out Their Homes Instead of Selling Them*, WALL ST. J. (Sep. 20, 2022, 3:00 PM), https://www.wsj.com/podcasts/google-news-update/more-homeowners-are-renting-out-their-homes-instead-of-selling-them/184f04e2-4d00-42e2-8743-5759b84a74c6 [perma.cc/QY4Q-A78T].

[69] *See Mortgage Payments Fall Lower Than Rent in 22 of the 50 Largest US Metros*, ZILLOW (Sep. 16, 2024), https://zillow.mediaroom.com/2024-09-16-Mortgage-payments-fall-lower-than-rent-in-22-of-the-50-largest-US-metros [perma.cc/9V8E-4549].

[70] *Id.*

[71] *See* Cummings, *supra* note 12, at 345-46 (discussing rental demand).

[72] *See* Keith Griffith, *Boomers Own 38% of America's Homes – but More Than Half Never Plan to Sell*, REALTOR (Sep. 19, 2024), https://www.realtor.com/news/trends/boomers-sell-homes-survey [perma.cc/Y9U8-CC7Z].

[73] *Id.*

the board.[74] However, the number of people *over* the age of sixty-five who owned their homes *increased* by 6.3%.[75]

In fact, for the first time in ten years, baby boomers surpassed millennials as the largest generation of homebuyers in 2023.[76] This is partially due to decisions to purchase vacation properties or invest in rentals, using the equity they have in their existing homes to compete as cash buyers.[77] According to a 2023 report, baby boomers (aged 58 to 76) accounted for the largest share of cash buyers.[78] Of those baby boomer homebuyers, the majority paid for their purchases in cash.[79] This is in stark contrast to the roughly 91% of first-time homebuyers who needed financing to purchase a property.[80]

IV. SELLERS MOTIVATED TO CREATE BIDDING WARS

If a seller needs the funds from the sale of their property immediately, it may not be worthwhile to wait for the highest offer or gradually lower the price.[81] If the seller is moving to another property, carrying two mortgages could be prohibitively expensive. As for new builds, developers might have outstanding debts or have taken out high-interest loans to finance the renovations or construction of the property, which also incentivizes immediacy over higher offers, since waiting costs more in property taxes and loan interest.[82] They might also need the funds to make their next property investment.[83]

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[74] *See* Elena Cox, *Boomers Are Hoarding All the Houses*, TRIAD CITY BEAT (Nov. 8, 2023), https://triad-city-beat.com/boomers-are-hoarding-all-the-houses [perma.cc/N3SG-YSYY] (providing data in chart titled "Americans are staying in their homes longer).

[75] *Id.* (providing data in chart titled "Americans are staying in their homes longer").

[76] *Id.* (showing data in chart titled "Boomers go on a buying spree").

[77] *See* Cummings, *supra* note 12, at 343-44; Melissa Dittmann Tracey, *Flexing Their Equity, Baby Boomers Are Driving the Housing Market*, NAT'L ASS'N OF REALTORS (Apr. 1, 2025), https://www.nar.realtor/magazine/real-estate-news/flexing-their-equity-baby-boomers-are-driving-the-housing-market [https://perma.cc/B74R-K3ZK].

[78] Cummings, *supra* note 12, at 342-44.

[79] *See* Jeremy Tanner, *One-Third of Home Buyers Are Paying in Cash – Who Are They?*, NEWSNATION (June 14, 2023, 7:21 PM), https://www.newsnationnow.com/nmw/one-third-of-home-buyers-are-paying-in-cash-who-are-they [perma.cc/PNT5-2628].

[80] Jessica Lautz, *Tackling Home Financing and Down Payment* Misconceptions, NAT'L ASS'N OF REALTORS (June 30, 2025), https://www.nar.realtor/blogs/economists-outlook/tackling-home-financing-and-down-payment-misconceptions [https://perma.cc/8T37-PHJJ].

[81] Cummings, *supra* note 12, at 340.

[82] *Id.*; *The Real Estate Beginners Guide to Carrying Costs in* 2025, GOLIATH, https://goliathdata.com/encyclopedia/the-real-estate-beginners-guide-to-carrying-costs-in-2025 [https://perma.cc/TC26-RBTX].

[83] Cummings, *supra* note 12, at 340.

Underpricing can therefore make the home-selling process less stressful. For a seller with young children or pets, a prolonged showing period—held in hopes of maximizing return—can be more of a hassle than it is worth. In such cases, sellers often underprice the property and set a specific deadline for the offer to be accepted, allowing them to step away for a long weekend and return to a pile of offers to choose from.

In markets where inventory is low and cannot meet demand, an underpriced new listing can stand out among comparable homes within that price range.[84] Whenever new listings come out, and a buyer decides what to see, underpricing stands out as a diamond in the rough and can create a sense of urgency, potentially compelling them to act aggressively to secure the home.[85] This creates a perception of the property having great value and could lead to a bidding war, driving prices higher than the initial undervaluation.[86]

In contrast, overpricing a home can hurt a listed property. [87] Not only will these properties draw little interest in markets with low demand, but they will also attract limited interest in markets with a limited supply.[88] In those markets, buyers are accustomed to bidding wars. They will assume the sellers are expecting to get more than asking and will instead focus their efforts on the homes that seem like a better value.[89]

Typically, homes garner the most interest when they are new listings.[90] If the property receives little interest when it was new or the seller takes a while to realize the price they are seeking is unrealistic, a sitting listing can carry a stigma with buyers, suggesting something is wrong with it since everything else sold so quickly.[91] For these reasons, many sellers are, justifiably, motivated to create bidding wars.

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[84] *See id.* at 341; Zillow, *Entry-Level Home Shoppers Most Likely to Face Bidding Wars This Spring*, PRNEWSIRE (Apr. 30, 2023), https://www.prnewswire.com/news-releases/entry-level-home-shoppers-most-likely-to-face-bidding-wars-this-spring-301802601.html [https://perma.cc/68RQ-FYNS]; The Elika Team, *The Secret: Strategic Underpricing for Higher Profits in Real Est.*, ELIKA REAL EST. (June 4, 2024), https://www.elikarealestate.com/blog/underpricing-real-estate/#:~:text=This%20stratagem%20proves%20particularly%20efficacious,to%20secure%20the%20coveted%20asset [perma.cc/5YEX-EQZQ].

[85] *See* The Elika Team, *supra* note 84.

[86] *See* Meera Pal, *Price Low to Sell High: Does This Home-Selling Strategy Actually Work?*, REALTOR (Aug. 21, 2022), https://www.realtor.com/advice/sell/price-low-to-sell-high-does-the-strategy-actually-work [perma.cc/9PQH-E4ZU].

[87] *See* Windermere Staff, *The Pitfalls of Overpricing Your Home*, WINDERMERE REAL EST. (Aug. 5, 2024), https://www.windermere.com/blog/the-pitfalls-of-overpricing-your-home [https://perma.cc/UVJ7-25JA].

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

V. WEALTH MATTERS MORE THAN PRICE IN BIDDING WARS

Cash is king in real estate, and, on average, over one in three homes bought in the United States is bought using cash. [92] When competing to purchase a property, being a "cash buyer" confers a distinct competitive advantage over other buyers.[93] In 2021, Redfin found that buyers who were able to make a "cash offer" (meaning they did not need to obtain a mortgage to purchase the property at their offer price) during a bidding war were four times more likely to get their offer accepted compared to those who needed financing.[94] With 91% of first-time homebuyers needing financing, this leaves the majority of first-time homebuyers at a significant disadvantage.[95]

A. Why Cash Is Fast and Has Fewer Hiccups

Cash offers are often more desirable because they can close faster and usually involve a more straightforward process. Even with a pre-approval letter, a financed buyer must still obtain formal approval through underwriting.[96] That process usually takes thirty to forty-five days (and sometimes longer), depending on the loan requirements and the complexity of the buyer's income and financial situation, including self-employment.[97] Although most of the buyer's financials should have been clarified during the pre-approval stage, the lender needs to be rechecked and verified again before there can be a "clear to close."[98] Only after receiving that clearance can a financed buyer actually close on a home.[99]

On the other hand, a cash buyer can quickly and easily prove they have the necessary financing. Although cash buyers should still retain counsel to

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[92] Brianna Crane, *Over 1 in 3 U.S. Homes Are Bought With Cash*, AXIOS (May 13, 2024), https://www.axios.com/2024/05/13/cash-buyers-redfin-report [https://perma.cc/QZ2H-X557]; Tali Bendzak, *How to Sell My House for Cash*, ZILLOW (Alycia Lucio ed. Nov. 26, 2019), https://www.zillow.com/learn/home-selling-process-for-all-cash-deal https://perma.cc/N76A-E75H] (explaining benefits of all-cash offer). *See* Lu Han & Seung-Hyun Hong, *Cash is King? Understanding Financing Risk in Housing Markets*, 28 REV. OF FIN. 2083, 2116 (2024).

[93] *See* Kate Wood, *Are Cash Offers Better for Sellers?*, NERDWALLET (Apr. 17, 2024), https://www.nerdwallet.com/article/mortgages/are-cash-offers-better-for-sellers [https://perma.cc/TS3X-GDPJ].

[94] Rebecca Safier, *How Homebuyers Can Compete with the Rise of All-Cash Offers*, CNET (Apr. 30, 2024, 2:00 PM), https://www.cnet.com/personal-finance/mortgages/advice/how-homebuyers-can-compete-with-the-rise-of-all-cash-offers [https://perma.cc/N36M-9BZ6].

[95] Lautz, *supra* note 80.

[96] *See* Wood, *supra* note 93.

[97] *Id.*

[98] *See* Victoria Araj, *Clear to Close: What to Expect and What Happens Next*, ROCKET MORTG. (Jan. 23, 2026), https://www.rocketmortgage.com/learn/clear-to-close [https://perma.cc/NQK2-VWRX].

[99] *See id.*

review title and transaction documents, they do not need lender approval or all the paperwork typically required to approve a loan. As a result, while financed transactions will need thirty or more days, many cash purchases can close within one to two weeks.[100]

B. Appraisal Anxiety

Another reason why all-cash offers and offers with significant down payments carry a competitive advantage is appraisal risk. An appraisal is an opinion of value by a licensed or certified appraiser.[101] This is typically done by visiting the property, inspecting its condition, and comparing it to market trends and recent sales of comparable properties.[102] Cash buyers generally do not need an appraisal. Most mortgage lenders, however, require one because the property secures the loan.[103] This appraisal process can become problematic in rapidly appreciating markets, where recent comparable sales do not accurately reflect current conditions.[104] Even when a buyer believes the price is fair and is willing to pay it, an appraiser might value the home lower and be unwilling to finance the purchase price.[105] From the seller's perspective, this is a genuine concern in rapidly changing real estate markets.[106] Cash offers substantially reduce that risk because they do not require an appraisal.[107]

All-cash buyers have an incredible advantage because they can purchase without an appraisal. But even among financed offers, buyers able to make significant down payments enjoy an advantage over those who cannot. This is because lower down-payment buyers need a higher loan-to-value ("LTV") ratio to secure financing.[108] The LTV is the amount of the

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[100] *See* Wood, *supra* note 93 (estimating cash and financing closing time); Theresa Stevens, *How Long Does It Take to Close on a House?*, LENDINGTREE (June 5, 2024), https://www.lendingtree.com/home/mortgage/how-long-should-it-take-to-close-on-a-house [https://perma.cc/99ZJ-5TPE] (estimating cash closing time).

[101] *See* Barbara Marquand and Robin Rothstein, *How a Home Appraisal Works and How Much It Costs*, NERDWALLET (Chris Jennings ed. Jan. 26, 2021), https://www.nerdwallet.com/article/mortgages/home-appraisal [https://perma.cc/9AYD-XEMF] (listing home appraisal checklist).

[102] *See id.* (listing home appraisal checklist).

[103] *Id.*

[104] *See* Wood, *supra* note 93 (explaining "appraisal gap").

[105] *See* Cummings, *supra* note 12, at 368 (discussing appraisal uncertainty).

[106] *Id.*

[107] *See* Wood, *supra* note 93 (highlighting benefits of cash offer).

[108] *See* Cummings, *supra* note 12, at 338.

loan divided by the appraised value of the property, so a higher down payment will reduce the necessity for a high appraisal value.[109]

Although a borrower can take out less, most conventional loans require an 80% LTV ratio to avoid Private Mortgage Insurance ("PMI") or a 97% LTV ratio to qualify for a loan with PMI.[110] For FHA loans, there must be at least a 96.5% LTV ratio.[111] On the other hand, a buyer using a VA with no money down must have the property appraised for at or above the purchase price.[112]

Therefore, if a borrowing buyer offers $500,000 for a property and plans on putting $250,000 (50%) and borrowing the other $250,000, they need the appraisal to be higher than $312,000 (which is $250,000/0.8) or $257,731.60 (which is $250,000/0.97) to get financing with PMI. If another borrowing buyer makes the same offer with a down payment of $15,000 and borrows the remaining 97%, then the appraisal value must be at or greater than $500,000. If the property is under-appraised, the borrower can put more down to cover the difference; however, this can be very difficult to do if the difference is several thousand dollars.[113] If the borrowing buyer cannot cover the difference, the seller must either agree to lower the purchase price or risk the buyer walking away for failing to get financing.[114]

Appraisal uncertainty is especially acute for low down payment borrowers because pricing is not always predictable. Sellers, buyers, real estate agents, or appraisers may struggle to accurately calculate property value.[115] There is a significant lag between when a property's sales price is listed, when an offer is accepted, and when the property closes, at which point the sales price becomes publicly available (or, in some states, it never becomes publicly available).[116] For example, the national average time from

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[109] *See Loan to Value Ratio (LTV)*, WALL ST. PREP (May 3, 2024), https://www.wallstreetprep.com/knowledge/loan-to-value-ltv [https://perma.cc/FE8Q-HLQ5].

[110] *See* Christian Allred, *What Is Loan-to-Value Ratio and How Is It Calculated?*, ROCKET MORTG. (June 23, 2025), https://www.rocketmortgage.com/learn/loan-to-value-ratio [https://perma.cc/87FZ-7LPT]; Cummings, *supra* note 12, at 338 (explaining PMI).

[111] *See* Cummings, *supra* note 12, at 338.

[112] *See id.* at 340; Allred, *supra* note 110.

[113] *See* Carla Ayers, *What Happens If the Appraisal Is Lower Than the Offer?*, ROCKET MORTG. (Apr. 18, 2024), https://www.rocketmortgage.com/learn/low-appraisal [https://perma.cc/F7EA-AEYG] (recommending tactics for low appraisals).

[114] *See id.* (discussing options after low appraisals).

[115] *See* Cummings, *supra* note 12, at 338-39.

[116] *See* Hannah Warrick, *Average Time to Sell a House in Massachusetts*, CLEVER (July 17, 2024), https://listwithclever.com/real-estate-blog/average-time-to-sell-a-house-in-massachusetts [https://perma.cc/PH5Z-V4TV]; *see also* Luke Babich, *9 Tips for Homebuyers in Non-Disclosure States*, HOUSINGWIRE (May 21, 2024), https://www.housingwire.com/articles/9-tips-for-home-buyers-in-non-disclosure-states [https://perma.cc/6VL4-UHRK] (listing non-disclosure states).

when a property is listed to close is eighty-six days.[117] Therefore, *in the best-case scenario*, an appraiser compares a property to one that received an offer several months ago.[118] This means, for example, when most properties are listed in the spring, they are being compared to properties that were sold in the fall, when prices are typically lower. [119] Therefore, when the market becomes aggressively competitive and prices continue rising, these financing buyers are restricted to outdated prices.[120]

This valuation confusion was further exacerbated by NAR's 2024 policy changes, adopted as part of a legal settlement regarding how a buyer's broker, who typically works for a brokerage firm, is paid.[121] Before 2024, the NAR required sellers (or their listing agent) to offer a blanket commission to the eventual buyer's brokerage firm to list the property on the Multiple Listing Service ("MLS").[122] This buyer's broker commission would be deducted from the seller's proceeds or the listing agent's commission.[123] Although this system allowed sellers to set the amount, the amounts were publicly available.[124] Hence, sellers were hesitant to offer prices too low to deter buyers' agents from showing it, resulting in standard rates across regions, typically 2%-4% of the purchase price.[125]

Although this system had issues that required reform, requiring the seller to pay the buyer's broker's commission was necessary for most financing buyers to afford an agent throughout the purchasing process.[126] Nevertheless, the NAR agreed to change its policies as part of a class action settlement.[127] Those changes included requiring buyers to reach a separate agreement with their real estate agents or brokers regarding the commission

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[117] *See* Rory Arnold, *How Long Does It Take to Sell a House?*, ROCKET MORTG. (July 1, 2025), https://www.rocketmortgage.com/learn/how-long-does-it-take-to-sell-a-house [https://perma.cc/K9JC-4TAS] (showing the average days on market are fifty-one and the average days to sell are thirty-five).

[118] *See* Cummings, *supra* note 12, at 338.

[119] *See* Jeff Ostrowski, *What Is the Best Time of Year to Sell a House?*, BANKRATE (Michele Petry ed., Feb. 10, 2025), https://www.bankrate.com/real-estate/best-time-to-sell-house [https://perma.cc/HQ4H-Q2SG] (showing how prices can vary depending on seasons or month property is on the market).

[120] *See id.* (showing an almost $20,000 median sale price difference between February and May).

[121] *See* Cummings, *supra* note 12, at 345-47. This is the service almost all real estate agents use to look at and list properties. *See id*.

[122] *See id.* at 345-46.

[123] *See id.* at 346.

[124] *See id.* at 346-47.

[125] *Id.*

[126] *Id.*

[127] *See* Evian White De Leon, *NAR Announces Proposed Settlement in Sitzer/Burnett and Moehrl Antitrust Cases*, MIAMI REALTORS (Mar. 21, 2024), https://www.miamirealtors.com/2024/03/15/nar-announces-proposed-settlement-in-sitzer-burnett-and-moehrl-antitrust-cases [https://perma.cc/75PY-8D83]; *id.* (discussing facts in case).

amount they agree to pay their brokers.[128] The policy changes still allowed sellers to pay for the buyer's broker's commission. But the amount a seller was willing to offer could no longer be advertised, and the parties were prohibited from publicly disclosing the amount the seller eventually paid.[129] As a result, when appraisers evaluate comparable properties, it may be unclear whether the sellers paid the buyer's broker's commission in that transaction.[130]

Given that most financing buyers cannot afford to pay a hefty commission to cover the cost of an agent at a brokerage firm upfront, they may instead offer a higher purchase price and request a seller pay the commission.[131] This was standard across all past purchases, but now those buyers are at greater risk of an underappraisal because not *every* sale includes this provision. This adjustment can distort apparent sales prices and increase under-appraisal risk when the appraiser compares the property to recent sales that sold for significantly less because they did not include a buyer's broker's commission credit in the purchase price.[132]

To illustrate this problem, if a home listed for $490,000 receives multiple offers, which offers would a seller be more likely to consider?

- Offer 1: A cash offer for $520,000 and does not need a buyer's broker fee concession. Since this is a cash offer, it does not have a minimum appraisal requirement;
- Offer 2: An offer for $525,000 where the buyer is putting $52,500 (10%) down on a conventional loan and does not need the seller to pay for their buyer's broker's commission. The property must therefore appraise for at least $487,413.40 or higher for this buyer to get financing;
- Offer 3: An offer for $543,000 where the buyer is putting $52,500 down on a conventional loan but needs the seller to pay $13,000 of the proceeds to cover their buyer's broker's fee (so you receive $530,000). The property must therefore appraise for at least $505,670.10 or higher for this buyer to get financing; or

[128] *See* Cummings, *supra* note 12, at 346-47.

[129] *See* De Leon, *supra* note 127 (noting key elements of NAR settlement); Settlement Agreement at ¶ 68(i)-(iii), Burnett v. Nat'l Ass'n of Realtors, No. 4:19-CV-00332 (W.D. Mo. Apr. 19, 2024); *see also NAR Settlement FAQs*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/the-facts/nar-settlement-faqs (last updated Oct. 17, 2025) [https://perma.cc/Q2WC-SSBS] (summarizing NAR settlement).

[130] *See* Cummings, *supra* note 12, at 346-47 (noting how the NAR Settlement decreases transparency in how buyer-brokers are inevitably paid).

[131] *See id.* at 364.

[132] *See id.* at 366.

- Offer 4: An offer for $548,000 on a VA loan with 0% down, but requires the seller to pay $13,000 of the proceeds to cover their buyer's broker's fee (so you receive $535,000). Since the loan is 0% down, the property must appraise for $548,000 or higher for this buyer to secure financing.[133]

Almost all sellers would consider the first two, even though they are the lowest offer amounts, and might not even consider the last two, the highest-priced offers, at all. Sellers, buyers, and their real estate agents are aware of this preference.[134]

This explains why many first-time homebuyers struggle to compete with investors and seniors who have equity, and why younger buyers are increasingly turning to their parents for financial support to compete, provided their parents have the necessary resources.[135] In 2017, *The Wall Street Journal* discussed a strategy where parents are outright giving their children money so they can compete as cash buyers or borrowers with significant down payments.[136] This is either done through their parents' own savings or by the parents taking out a home equity loan on their properties.[137] Then, parents purchase the home themselves and sell it to their children, or the parents give it to their children outright as a gift.[138] Although this level allows their children to compete with cash buyers, it only makes it tougher for those without parental support or wealth.[139]

VI. FHA AND VA LOANS ARE EVEN MORE UNATTRACTIVE TO SELLERS

The troubles facing all first-time homebuyers are even more pronounced when a homebuyer is using an FHA or a VA loan. According to a survey by the NAR, conducted by its agents, 89% of sellers would likely

133 *See id.* at 367.

134 *See id.* at 341.

135 *See* Leigh Kaming-Carder, *Millennials' New Weapon in Bidding Wars: A Parent's Home Equity*, WALL ST. J. (Oct 13, 1991), https://www.wsj.com/articles/millennialss-new-weapon-in-bidding-wars-a-parents-home-equity-1507645135 [https://perma.cc/KD3P-M844] (describing strategy).

136 *See id.*; *see also 59% of Recent Homebuyers Say Purchasing a House Is More Stressful Than Dating,* ADVISOR MAG. (Oct. 5, 2023), https://www.lifehealth.com/59-of-recent-homebuyers-say-purchasing-a-house-is-more-stressful-than-dating [https://perma.cc/B65A-GFQE] ("Baby Boomers recently overtook millennials as the largest homebuying generation, in large part because they've spent years building home equity, making it easier to buy another home even when mortgage rates are high.").

137 *59% of Recent Homebuyers Say Purchasing a House Is More Stressful Than Dating*, *supra* note 136.

138 *See* Kamping-Carder, *supra* note 135.

139 Cummings, *supra* note 12, at 341.

accept an offer from a buyer using a conventional loan.[140] On the other hand, less than a third of those sellers said they would also consider an offer from a buyer using an FHA or VA loan.[141] In fact, 6% outright stated that they would not even consider an FHA or VA offer.[142]

A significant issue is the "minimum property" requirements that government appraisers use when inspecting the home.[143] Buyers generally assume that the purchase price reflects the property's condition. While most rational buyers believe there will be problems with the property, many will request inspection contingencies, which are triggered if something significant and unexpected comes up, such as a foundational issue. Even if the inspector finds issues, a rational buyer who has already been outbid on multiple properties would be reluctant to even ask for a minor concession in price or repairs from the seller, let alone back out of a property for which they have already accepted an offer. Although it is not commonly advisable, many buyers may agree to waive a home inspection contingency altogether to make their offers more competitive.[144] Such a waiver is not an option for buyers of FHA and VA loans.

VA or FHA loan borrowers can obtain their own inspection; however, VA and FHA loans require an appraiser to evaluate the property and determine if it meets certain "minimum property" standards or requirements to be approved.[145] Many of these minimum standards are common in homes for entry-level buyers, with defects including not having a handrail anywhere with three or more steps (including front steps, porches, or decks); not having a railing on a deck or porch that is more than 1 foot off the ground; a roof with two or fewer years left in its expected life; floor coverings or appliances that have two or fewer years left in their expected useful life; large cracks in

[140] Laurie Goodman & Janneke Ratcliffe, *The Tight Housing Market Boxes Out Government-Insured Borrowers, Widening Homeownership Gaps*, URB. INST. (June 16, 2021), https://www.urban.org/urban-wire/tight-housing-market-boxes-out-government-insured-borrowers-widening-homeownership-gaps [https://perma.cc/X4TW-4LAU] (survey

[141] *Id.*

[142] *Id.*

[143] Brent Rasmussen, *Sellers Don't Like FHA Loans*, MORTG. SPECIALISTS (Mar. 3, 2023), https://mtg-specialists.com/sellers-dont-like-fha-loans/#:~:text=The%20other%20major%20reason%20sellers,them%20prior%20to%20the%20sale [https://perma.cc/H6E9-6WRV]. In order to get financing, FHA loans and VA loans require the property to be inspected and meet certain conditional requirements. Chris Birk, *FHA vs VA Loan: Key Differences and Which Is Better*, VETERANS UNITED (Dec. 13, 2024), https://www.veteransunited.com/education/va-loans-vs-fha-loans/#:~:text=your%20financial%20situation.-,Property%20Requirements,be%20the%20borrower's%20primary%20residence [https://perma.cc/2RHC-4GQ3]. FHA refers to this as "minimum property standards" and VA refers to it as "minimum property requirements. *Id*.

[144] *See* Cummings, *supra* note 12.

[145] *See* Birk, *supra* note 143.

driveways are being identified as a safety hazard; windows with cracks or not operating properly; loose or exposed wiring; cracks in walls or stains that might indicate a leak, and peeling or chipped paint on a home built before 1978 (which is roughly half of all single-family homes in the United States).[146]

No home is perfect, and these issues are prevalent and expected, especially when purchasing an older, entry-level home. Although most buyers would expect these imperfections and plan to take care of them on their own after buying the house, the government requires the seller to remedy these issues before the sale.[147] This can deter many sellers who are aware of the home's issues or worry that the government appraiser might uncover something unexpected, potentially slowing down the process or causing the transaction to fall through.[148]

These extra obstacles to getting financing approved are a major reason why sellers are more concerned about FHA or VA borrowers.[149] When a seller must complete certain repairs to bring the property up to the appraiser's standards, it slows down the closing process.[150] According to data collected from Ellie Mae's origination report during the first three months of 2021, it took roughly a week longer for buyers using FHA and VA loans to close on a property than those using a conventional loan.[151] Financed buyers are already at a significant disadvantage relative to cash buyers because

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[146] *See* Goodman & Ratcliffe, *supra* note 140 (listing common defects found by home inspections); Rasmussen, *supra* note 143 (explaining why sellers don't prefer FHA loans); *USDA/VA/FHA Appraisal Requirements*, MAPLE TREE FUNDING, https://www.mapletreefunding.com/wp-content/uploads/2014/12/Appraisal-Requirements.pdf#:~:text=Railings%20%2D%20The%20appraiser%20is%20going%20to,the%20stairs%20need%20vertical%20safety%20rails%20installed [https://perma.cc/W3FT-E6NY] (listing appraisal requirements).

[147] Borrowers might be able to take out an FHA 203(k) loan to pay for these repairs, but they typically require the buyer to hire a professional to do these repairs and can further delay the borrowing process. *See 203(k) Rehabilitation Mortgage Insurance Program*, U.S. DEPT. OF HOUS. & URB. DEV., https://www.hud.gov/hud-partners/single-family-mortgage-programs-203k#:~:text=Include%20but%20are%20not%20limited,accessibility%20for%20persons%20with%20disabilities [https://perma.cc/C7U4-9GU4]. For example, if the work requires more than $35,000 of work or any "structural" work, then the borrower needs to fill out more paperwork and hire a 203(k) consultant to oversee the renovations. *See generally* Tim Lucas, *FHA 203(k) Loan | Requirements & Guide 2025,* MORTG. REPS. (Jan. 9, 2025), https://themortgagereports.com/14946/fha-203k-loan-mortgage-lender-rates [https://perma.cc/HD26-DY28] (updated by Ryan Tronier and reviewed by Aleksandra Kadzielawski) (discussing how although the rule says up to $35,000, the loan actually requires a "buffer" of 15% of the total bid). For either kind of loan, it may further setback the process of getting the clear to close as more paperwork is needed.

[148] Rasmussen, *supra* note 143.

[149] *See* Goodman & Ratcliffe, *supra* note 140.

[150] *Id.*

[151] *Id.*

mortgage closings take longer; an extra week only compounds that disadvantage.

It is worth noting, however, that despite evidence from prior years and industry perceptions, FHA loans are no longer taking longer to close. In fact, according to a 2023 statement by former FHA Special Policy Advisor David Sanchez, FHA loans are closing faster than conventional loans.[152] This is potentially due to the modernization of FHA loan processing technology.[153] Nevertheless, stigma still persists within the real estate industry, causing many listing agents to advise their clients against accepting FHA offers based on fears of delay or hiccups in the process.[154]

To mitigate that risk, a buyer customarily puts a deposit down once the offer is accepted and/or once they enter into a purchase agreement, which is held by either the listing agent or the seller's attorney in escrow.[155] This deposit is intended to protect the seller if the buyer backs out.[156] Although the buyer might have contingencies to back out and get their deposit back, this is meant to give assurance to the seller in case the buyer experiences buyer's remorse.[157] Since these funds are generated before closing, the buyer must have those funds upfront.[158] The fund is typically around 5%, though the rate can vary depending on the market, and some buyers voluntarily put down more as a technique to make their offer more attractive.[159] This dynamic disadvantages buyers who put down a small down payment, since they may not be able to post a competitive earnest money deposit. For a VA

[152] *See* Graham Wood, *Overlooking FHA, VA Offers May Hurt Vulnerable Buyers*, NAT'L ASS'N OF REALTORS (May 9, 2023), https://www.nar.realtor/magazine/real-estate-news/bias-against-fha-va-loans-hurts-most-vulnerable-buyers [https://perma.cc/6JYQ-S3K3] (referring to this concept as "earnest money").

[153] *See* Sharon Cornelisson, *Mortgage Discrimination, Which Leads to Segregation, Needs to be Addressed*, COMMONWEALTH BEACON (Oct. 5, 2024), https://commonwealthbeacon.org/opinion/mortgage-discrimination-which-leads-to-segregation-needs-to-be-addressed [https://perma.cc/GAS7-25MS] ("[D]ata by ICE Mortgage Technology found that average time to close is actually shorter for FHA loans than for conventional loans – partly because the online mortgage companies that often originate FHA loans have technological advantages.").

[154] *Id.* ("[T]housands of sellers, advised by their agents, make the same decision to pick cash or conventional offers over the perceived hassle of working with an FHA buyer – a decision too often based on misperceptions rather than underlying truths."); *see also* Wood, *supra* note 152 (discussing the need to remove stigma).

[155] TJ Porter, *Earnest Money: What Is It and How Much Is Enough?*, ROCKET MORTG. (Sep. 9, 2025), https://www.rocketmortgage.com/learn/earnest-money [https://perma.cc/KPQ7-PQF2].

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* (stating benefits of using earnest money in competitive markets); *Deposit v. Down Payment Explained in Massachusetts*, BUYERS BROKERS ONLY, https://www.buyersbrokersonly.com/buying/massachusetts-home-purchase-deposit-versus-down-payment [https://perma.cc/99EH-TBBL] (stating average deposit percentage).

borrower planning to put 0% down, coming up with anywhere close to 5% of the purchase price can be nearly impossible, especially if they were planning on putting no money down.

VII. VA AND FHA LOAN INEQUALITY IMPACTS MORE BLACK BORROWERS

When VA and FHA loans cannot compete for housing, it puts first-time borrowers with lower incomes, less credit, and particularly less generational wealth at a significant disadvantage. Due to the United States' history of discrimination, particularly in housing, these kinds of loans are disproportionately used by people of color.[160] According to data on 2019 purchase originations, Black borrowers accounted for only 4.9% of conventional loans,[161] yet accounted for 15% of all FHA borrowers and 13.1% of all VA borrowers.[162]

Black borrowers have not always disproportionally used FHA and VA loan programs. In 1934, the Federal Housing Administration began insuring home mortgages, but it required the properties to be located within white-only neighborhoods.[163] Additionally, the loans focused on new suburban construction rather than older construction and newer builds in urban areas, which helped fuel "white flight" into suburbs.[164] Similar racial inequality plagues the history of VA loans. In 1944, the GI Bill, which provided low-interest loans for returning World War II veterans, was structured in a way that made it difficult for Black veterans to access its benefits fully.[165] Further, both the VA and FHA routinely backed housing initiatives that used racially restrictive covenants to prevent home sales to non-whites.[166] These programs and policies, such as redlining, racial covenants, steering, zoning, past appraisal bias, and bias in federal loan approvals, kept Black Americans out of the suburban housing boom and caused the deterioration of urban areas.[167] As the suburbs boomed, particularly in the 1950s and 1960s, homeownership more than doubled from under 30% to over 60%, with white applicants

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160 *See* Goodman & Ratcliffe, *supra* note 140.

161 *Id.*

162 *Id.*

163 La-Brina Almeida, *A History of Racist Federal Housing Policies*, MASSBUDGET & POL'Y CTR. (Aug. 6, 2021), https://massbudget.org/2021/08/06/a-history-of-racist-federal-housing-policies/#:~:text=The%20Federal%20Housing%20Administration%20(FHA,and%20other%20non%2DWhite%20communities [https://perma.cc/J7ET-QEYS].

164 *Id.*

165 *Id.*

166 *Id.*

167 *See* Cummings, *supra* note 12, at 345.

receiving 98% of federal loans.[168] Racist underwriting policies encouraged the expansion of white-only suburbs.

To further increase the value of homes in these white suburban areas, the National Interstate and Defense Highways Act constructed the Interstate Highway system, utilizing $25 billion over ten years, the largest public works project in U.S. history at that time.[169] The construction also focused deliberately on displacing Black and low-income families, either forcing people out by eminent domain or making those communities less desirable.[170] At the same time, the American Housing Act of 1949 authorized the use of eminent domain to clear "slums" for urban renewal projects.[171] By 1974, 300,000 families were displaced due to urban renewal projects under these programs, with the majority of those families being non-white.[172] In addition to this, Black displacement and the hypersegregation from government-supported white flight into the suburbs, fewer investments were made into neighborhoods that had more minorities, making the properties in these few communities with significant Black ownership appreciate at a much lower rate.[173]

Although many of these policies are no longer explicitly racial, their effects persist through intergenerational wealth, much of which derives from real estate.[174] While white American home ownership remained steady at around 70-74% for over three decades, Black American home ownership

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[168] Sam Fulwood III, *The United States' History of Segregated Housing Continues to Limit Affordable Housing*, CTR. FOR AM. PROGRESS (Dec. 15, 2016), https://www.americanprogress.org/article/the-united-states-history-of-segregated-housing-continues-to-limit-affordable-housing/#:~:text=Federal%20agencies%20financed%20nearly%20half,than%2060%20percent%20by%201960.&text=Of%20course%2C%20black%20applicants%20were%20left%20out [https://perma.cc/Q5BL-WGSA] ("Lenders, with the encouragement of the federal government, employed underwriting rules that preferred and sought to maintain racially white neighborhoods, a now discredited practice called redlining."). "By one analysis, 98 percent of the loans approved by the federal government between 1934 and 1968 went to white applicants." *Id*.

[169] Almeida, *supra* note 163.

[170] *Id.* (tracing history of racist housing policies); *see generally* Noel King, *A Brief History of How Racism Shaped Interstate Highways*, NPR (Apr. 7, 2021, 5:02 AM), https://www.npr.org/2021/04/07/984784455/a-brief-history-of-how-racism-shaped-interstate-highways#:~:text=Biden's%20plan%20includes%20$%20%20billion,took%20homes%20by%20eminent%20domain [https://perma.cc/KAU6-X7C2] (breaking down roel of eminent domain in highway construction). *See also* Farrell Evans, *How Interstate Highways Gutted Communities—and Reinforced Segregation*, HIST. (May 27, 2025), https://www.history.com/articles/interstate-highway-system-infrastructure-construction-segregation [https://perma.cc/4FRJ-WKT6] (examining construction of interstate highway system).

[171] Almeida, *supra* note 163.

[172] *Id.*

[173] *See* Cummings, *supra* note 12, at 345.

[174] *See id.*

remains under 50%.[175] In fact, between 1960 and 2017, the gap between Black and white ownership widened from 27 to 30 points.[176] A lot of the wealth that middle-class families pass to their children is through real estate.[177] This wealth disparity by race is tremendous, as shown by this table of the median wealth of White and Black families in thousands of 2019 dollars:

	White	Black
Under 35	$25,000	$600
35-54	$185,000	$40,100
Over 55	$315,000	$53,600

FIGURE 1. MEDIAN WEALTH FOR WHITE AND BLACK AMERICANS BY GIVEN AGE GROUP[178]

Based on the data, older white families hold substantially more wealth, meaning that white children are more likely to get meaningful inheritances and down payment assistance, or help competing with a cash offer.179

The competitive market dynamics described above, combined with the structural disadvantages of FHA and VA loans, can therefore reinforce segregation.[180] According to data collected by the Empire Justice Center, borrowers were twice as likely to receive FHA or VA-backed loans in communities of color as borrowers in predominantly white communities.[181] In Rochester, New York, for example, nearly 86% of all home buyers using home-purchase loans in communities of color used FHA and VA loans.[182] When FHA or VA loan borrowers, who are disproportionately Black, can only use those loans in communities of color, it keeps communities segregated. To make matters worse, investors have also targeted these areas for potential gentrification. A *Washington Post* report found that investors are targeting predominantly Black communities at nearly double the rate as

[175] *Id.*

[176] *Reducing the Racial Homeownership Gap*, URB. INST., https://www.urban.org/policy-centers/housing-finance-policy-center/projects/reducing-racial-homeownership-gap [https://perma.cc/NXA5-VPQD].

[177] *See* Cummings, *supra* note 12, at 347.

[178] See Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES (Sep. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html [https://perma.cc/DRA3-LE5R] (Figure 1).

[179] *See id.*

[180] *See* Cummings, *supra* note 12, at 345; van Kerkhove, *supra* note 11.

[181] *See* van Kerkhove, *supra* note 11.

[182] *See id.*

other zip codes.[183] When investors and cash buyers primarily compete against FHA- and VA-dependent buyers, they can often outbid them at a discounted price because there are fewer competing buyers with cash or high down payments.[184] As a result, this either depresses appraisal values or helps fuel the gentrification of these neighborhoods and contributes to the displacement of Black renters.[185]

Many white families were able to build intergenerational wealth through federally backed FHA and veteran programs, while Black families were systematically excluded—helping fuel the suburban segregation.[186] Today, even as Black families can rightfully gain access to these programs, the housing shortage and the dynamics of competitive entry-level housing markets either make these loans impossible to use or perpetuate segregation in many regions.

VIII. DOES IT VIOLATE DISCRIMINATION LAWS?

Although denying applicants with FHA or VA loans statistically impacts people of color the hardest, is it actually against the law? According to federal law and many state and local laws, it is illegal to discriminate in housing sales against someone due to their race, color, national origin, religion, sex (including sexual orientation and gender identity), familial status, disability, and, in many states and local jurisdictions, veteran status.[187]

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[183] *See* Kevin Schaul & Jonathan O'Connell, *Investors Bought a Record Share of Homes in 2021. See Where*, WASH. POST (Feb. 16, 2022), https://www.washingtonpost.com/business/interactive/2022/housing-market-investors [https://perma.cc/Q77T-5PAW].

[184] *See id.*

[185] *See id.* (showing how investors are targeting black neighborhoods); *Gentrification and Neighborhood Revitalization: What's the Differnce?*, NAT'L LOW INCOME HOUS. COAL. (Apr. 5, 2019), https://nlihc.org/resource/gentrification-and-neighborhood-revitalization-whats-difference [https://perma.cc/7646-XSVX] (explaining how gentrification targets neighborhoods of low property value and contributes to cultural displacement).

[186] *See* Cummings, *supra* note 12, at 345-47.

[187] *See* 42 U.S.C. § 3604 (listing federal protections); *Housing Discrimination Under the Fair Housing Act,* U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/helping-americans/fair-housing-act-overview [https://perma.cc/UHL9-3XD2]; *see also* Lauren Brasil, *HUD Announces Sexual Orientation & Gender Identity Are Protected By Federal Fair Housing Act*, FAIR HOUS. PROJECT (Feb. 9, 2021), https://www.fairhousingnc.org/newsletter/hud-announces-sexual-orientation-gender-identity-are-protected-by-federal-fair-housing-act [https://perma.cc/Q8HQ-ZGE5] (outlining Fair Housing Act protections for sexual orientation and gender identity). Although federal law does not explicitly state that veterans cannot be discriminated against in housing, veterans with disabilities are protected against discrimination under the Fair Housing Act. *See What Is the Housing Discrimination Based on Military Status?*, FAIR HOUS. JUST. CTR. (July 25, 2024), https://fairhousingjustice.org/wp-content/uploads/2024/07/ENGLISH-Military-Status-Jul-25-2024.pdf [https://perma.cc/JTN3-HGTP] (describing differences between New York and Federal housing law). Additionally, some states and local laws specifically prohibit veteran discrimination in housing.

While no state or federal law explicitly bars a seller or listing agent from discriminating against someone based on the loan they use, discrimination is not defined so narrowly. Still, though grounds may exist to challenge the actions of individual sellers for the racially discriminatory impacts of their actions, such challenges would face significant hurdles.[188]

A. Federal Level

In 2013, HUD created regulations under the Fair Housing Act, under which individuals could be held liable if their actions had a discriminatory effect, even if discrimination was not their intention.[189] This form of unintentional discrimination is commonly referred to as disparate impact discrimination.[190] The Fair Housing Act protects against forms of disparate impact discrimination, unless the act is "supported by a legally sufficient justification."[191] For there to be a legally sufficient justification, it must be "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent" and "[t]hose interests could not be served by another practice that has a less discriminatory effect."[192]

In a lawsuit regarding disparate impact claims in housing, the plaintiff must first prove that the practice caused or will predictably cause a "discriminatory effect" before the burden shifts to the defendant(s).[193] As discussed, Black buyers use FHA and VA loans at a disproportionately higher rate than white buyers.[194] Additionally, white buyers are more likely to use cash or to make a sizeable down payment on a conventional loan.[195] When listing agents advise their clients or sellers to make decisions based on a buyer's wealth, the size of the down payment, or the method of financing, such as an FHA or VA loan, it has a discriminatory effect.

Under HUD's regulations, once the discriminatory effect is proven, the burden shifts to the defendant to prove that making those decisions based on those grounds is legally sufficient. To do so, the defendant must provide supporting evidence that is more than merely "hypothetical or

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[188] *See* Jon Rehagen, *Fair Housing Act & VA Loans*, VETERAN (Dec. 1, 2025), https://veteran.com/fair-housing-act-va-loans [https://perma.cc/UD57-CHZT]; Fair Housing Act 42 U.S.C. §§ 3601-3631 (listing protected classes that do not include types of loans).

[189] *See supra* note 187 and accompanying text.

[190] *See* Daniel, *supra* note 13, at 781-82.

[191] 24 C.F.R. § 100.500 (2025).

[192] *Id.* at § 100.500(b)(1).

[193] *Id.* at § 100.500(c)(1).

[194] *See* Goodman & Ratcliffe, *supra* note 140.

[195] *See* Bhutta, Chang, Dettling & Hsu, *supra* note 178 (showing that white buyers are more likely to have greater intergenerational wealth and access to funds).

speculative."[196] This is done by showing "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[197] Listing agents and sellers tend to prefer cash offers because they can close more quickly, do not require lenders to review the buyer's income to verify the buyer's ability to pay, and do not require appraisals.[198] Sellers and listing agents also tend to prefer buyers with larger down payments for the same appraisal concerns.[199] Additionally, sellers and listing agents tend to avoid FHA and VA loans due to perceived longer closing windows, commonly lower earnest money deposits, and, most importantly, concerns about the minimum property requirements.

However, there is a serious risk that the court may no longer recognize disparate impact discrimination in housing under the FHA.[200] In 2015, the Supreme Court held, by a 5-4 vote, that disparate-impact discrimination was cognizable under the Fair Housing Act in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, but imposed restraints on it.[201] This case examined the impact of a low-income tax credit allocation system that resulted in a disparate impact on African-American residents.[202] Using case law regarding the disparate impact claims under Title VII and ADEA, the Court stated that any case regarding disparate impact discrimination in housing must be looked at in the same way as the business necessity rule for employment discrimination.[203] The Court acknowledged that disparate impact discrimination liability is meant "to eliminate the 'artificial, arbitrary, and

196 *Id.* at § 100.500(b)(2).

197 *Id.* at § 100.500(c)(2).

198 *See* discussion *supra* Sections I-V.

199 *Id.*

200 *See* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 559 (2015) (Alito, J., dissenting) (claiming disparate impact does not apply to FHA claims in dissent of a 5-4 ruling); *see generally* Mitchell E. Feldman, *Statistically Speaking: Restrictive Changes to Fair Housing Act Disparate Impact Liability*, 62 B.C. L. REV. 1321, 1355-1360 (2021) (breaking down high burden for plaintiffs in FHA claims regrading disparate impact in *Texas Department of Housing*).

201 *See Inclusive Communities Project, Inc*., 576 U.S. at 533-34. In the case, Inclusive Communities Project, Inc., a nonprofit that assisted low-income families in obtaining housing, sued the Texas Department of Housing and Community Affairs for the way the agency allocated federal low-income housing credits, which disproportionately placed affordable housing in "predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." *Id*. at 519.

202 *Id.* at 519.

203 *Id.* at 530-31 (citing Griggs v. Duke Power Co., 401 U.S. 424, 432-36 (1971) as announcing the rule for Title VII claims and Smith v. City of Jackson, 544 U.S. 228, 236 (2005) as announcing the rule in ADEA cases). The business necessity rule means that a company can have a well-intentioned policy which unintentionally causes a disparate impact on a protected class, provided that the policy is required to "fulfill a genuine business need." *Griggs*, 401 U.S. at 431-32.

unnecessary barriers,' without hindering legitimate interests."[204] However, the Court also recognized the need for some leeway to account for legitimate seller interests and relevant market factors.[205] Therefore, "absent 'robust causality' with a specific policy, statistical disparities alone will not support a claim for disparate impact under the [Fair Housing Act]."[206] Therefore, even though the Court recognized that disparate impact discrimination is cognizable under the FHA, it found that the burden of proof is high, especially since the Court will not ignore the legitimate reasons why those decisions were made.[207] Given the legitimate reasons for sellers and listing agents choosing offers from wealthier buyers, it would be difficult to meet the burden of disparate impact discrimination. [208] Additionally, two key developments make the success on these grounds even more remote.

First, the *Inclusive Communities Project, Inc.* was a narrow 5-4 decision. Justice Kennedy voted in favor, along with Kagan, Sotomayor, Breyer, and Ginsburg.[209] Three members of that majority are no longer on the bench, and two have been replaced by conservative justices.[210] On the other hand, in dissent, Justice Alito wrote an opinion that was joined by Chief Justice John Roberts, Justice Scalia, and Justice Thomas.[211] Of those justices, only Scalia is no longer on the bench.[212] This change is not likely to benefit Black homebuyers who suffer from disparate impact discrimination, but would instead revoke any protections that may be offered by the Fair Housing Act. In the dissenting opinion, Justice Alito stated that he did not believe that the Fair Housing Act of 1968 authorized an action of disparate impact discrimination at the time of the law's passage, "[a]nd nothing has happened since then to change the law's meaning."[213] Given the current makeup of the United States Supreme Court, there is a good chance that if presented with the opportunity, the Court would reverse the *Inclusive Communities Project,*

[204] Feldman*, supra* note 200, at 1340 (citing *Inclusive Communities Project, Inc.*, 576 U.S. at 521).

[205] *See* Feldman*, supra* note 200, at 1340 (summarizing *Texas Department of Housing* decision); *Inclusive Communities Project, Inc.*, 576 U.S. at 521 (discussing "leeway" afforded to housing authorities).

[206] *See id.*

[207] *See id.*

[208] *See* id; discussion *supra* Section IV-V.

[209] *See Inclusive Communities Project, Inc.*, 576 U.S. at 519.

[210] *See* Bernd Debusmann Jr, *How the Supreme Court Became a Political Battlefield*, BBC (July 2, 2024), https://www.bbc.com/news/articles/crg4rz6zedyo [https://perma.cc/BZD4-TS3Z] (breaking down the political makeup of the Supreme Court).

[211] *Inclusive Communities Project, Inc.*, 576 U.S. at 557-90 (Alito, J., dissenting). Thomas also wrote a separate dissenting opinion. *See id.* at 547-557 (Thomas, J., dissenting).

[212] *See* Debusmann Jr, *supra* note 210.

[213] *Inclusive Communities Project, Inc.*, 576 U.S. at 559 (Alito, J., dissenting).

Inc. decision and find that the Fair Housing Act does not apply to disparate impact discrimination.

Secondly, on April 23, 2025, the Trump Administration issued an executive order called *Restoring Equality of Opportunity and Meritocracy*.[214] This executive order announced that "[i]t is [now] the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible." By doing so, the executive order directed all federal agencies to "deprioritize enforcement of statutes (such as Title VIII of the Civil Rights Act of 1968, the Fair Housing Act) and regulations that include disparate impact liability."[215]

Despite the impact these decisions make on perpetuating segregated communities and furthering the wealth gap, there are legitimate non-discriminatory reasons why a seller would choose a cash offer over conventional loans or try to avoid FHA or VA loans that are unrelated to race, disability, or veteran status.[216] This is especially the case when a seller is evaluating multiple offers, which may be persuasive given the current composition of the Supreme Court and the stance of the Trump Administration on disparate impact discrimination.[217] Therefore, although Supreme Court precedent supports the existence of disparate impact discrimination in housing, the federal government is not currently pursuing any such claims. With the threat that the Court would potentially overturn the *Inclusive Communities Project, Inc.* decision in the future, and without the federal government currently addressing disparate impact discrimination, it would be up to state law for a suit to be filed.[218]

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[214] Exec. Order No. 14281, 90 Fed. Reg. 17,537 (Apr. 23, 2025).

[215] *Executive Order Will Eliminate Disparate Impact Liability*, NAT'L LOW INCOME HOUS. COAL. (Apr. 28, 2025), https://nlihc.org/resource/executive-order-will-eliminate-disparate-impact-liability [https://perma.cc/482W-A3JK]; *see also id.*

[216] *See* discussion *supra* Section IV-V.

[217] *See id.*; *Inclusive Communities Project, Inc.*, 576 U.S. at 557-590 (Alito, J., dissenting); Exec. Order No. 14281, 90 Fed. Reg. at 17,537 (denouncing disparate impact liability).

[218] An example of a state that allows disparate impact discrimination laws in housing is Massachusetts, but plaintiffs must satisfy "a high burden" for those claims. *See* Paul F. Hancock, *Not Starry-Eyed: Massachusetts Imposes Rigorous Standard on Fair Housing Disparate Impact Claims in Burbank Apartments*, K&L GATES (May 2, 2016), https://www.klgates.com/Not-Starry-Eyed-Massachusetts-Imposes-Rigorous-Standard-on-Fair-Housing-Disparate-Impact-Claims-in-iBurbank-Apartmentsi-05-02-2016#:~:text=Although%20Massachusetts%20now%20recognizes%20disparate,case%20of%20disparate%20impact%20lia [https://perma.cc/T2AQ-ZJN8] (summarizing Massachusetts standard for fair housing disparate impact claims); Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E.3d 394, 407 (2016) (acknowledging disparate impact claims in housing).

B. State Level

Although several states and localities ban income-based discrimination in various forms, it can be challenging in situations where the seller is considering multiple offers on a home purchase or where the property requires repairs.[219] Many of these laws were enacted to protect renters using government vouchers, and even where some jurisdictions extend "income-based" protections to home purchases, there is little indication that they would explicitly apply to "source of financing" discrimination.[220]

Even if FHA and VA loans fall under a state's income-based discrimination law, most sellers could list other reasons for rejecting the offer.[221] Instead, they are probably looking at other loans more favorably, either due to price, earnest funds down, fewer inspectional or contingency requirements, a lower chance of an appraisal issue, and/or the buyer's ability to close within a quicker time window.[222] Moreover, for strategic reasons, sellers often provide little or no explanation when rejecting an offer, and many of the details in the transaction are not listed.[223] Because sellers are not explicitly saying that "no FHA or VA loans allowed," they will likely be protected.[224] Thus, state income-based discrimination laws would probably fail to address the actual exclusion of FHA and VA borrowers in a meaningful way.

IX. CALL TO ACTION: BRIDGE THE GAP & STANDARDIZED LETTERS

Even if current anti-discrimination laws might not be the answer, state laws and regulations can still adopt policies aimed at practices that

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[219] *See generally* POVERTY & RACE RESEARCH ACTION COUNSEL, APPENDIX B: STATE, LOCAL, AND FEDERAL LAWS BARRING SOURCE-OF-INCOME DISTRIBUTION (2025), https://www.prrac.org/pdf/AppendixB.pdf [https://perma.cc/RCE3-TY98] (providing examples of localities with income-based discrimination laws).

[220] *See generally id.*; CAL. GOV'T CODE §12955 (West 2024) (protecting "source of income"); N.Y. EXEC. LAW § 296 (McKinney 2025) (prohibiting housing discrimination based on "lawful source of income"); *Source of Income Discrimination Is Against the Law*, N.Y. STATE, https://web.archive.org/web/20250430012436/https://dhr.ny.gov/nysdhr-source-income [https://perma.cc/7QVW-FJW4] (listing that sellers or listing agents cannot discriminate in postings or decisions based on income source of buyer); *see also* Cornelisson, supra note 153 (recommending that Massachusetts recognize "source of financing" discrimination to address mortgage discrimination against FHA borrowers as it does with "income based" discrimination against renters).

[221] *See* discussion *supra* Sections IV-VI.

[222] *See* discussion *supra* Section V.A.

[223] *See generally* Cummings, *supra* note 12 (discussing NAR policies on having a lack of commission credit transparency to avoid antitrust violations).

[224] *See* Victoria Araj, *Can a Seller Refuse an FHA Loan Offer?*, ROCKET MORTG. (Mar. 5, 2024), https://www.rocketmortgage.com/learn/can-sellers-refuse-fha-loan [https://perma.cc/2MC7-6SGX]. A seller may be able to say "property unlikely to be approved for FHA or VA financing". *See id.*

unintentionally perpetuate discrimination and inequality in housing. Similar laws have been passed that tackle practices with disparate impacts on race and gender discrimination, which include pay transparency in job postings laws, salary history bans, "ban the box" laws, and laws regarding hairstyles or beards in the workplace.[225]

In this circumstance, there needs to be government and industry action to level the playing field between cash buyers, those that need a conventional loan, and those that need a subsidized loan in this competitive real estate market. This includes efforts to standardize the closing window and loan process for all types of buyers, dispel myths surrounding subsidized loans, and modify the presentation of preapproval and proof-of-funds letters to make funding disclosure plans more transparent.

A. Level the field with More Buyer Rights

Cash offers enjoy two primary advantages over financed offers: they close faster, and they carry a lower risk of disruption from appraisal-related problems.[226] One solution is to protect all buyers by slowing down the process for everyone. This would include nonwaivable inspection-contingency windows and mandatory cooling-off periods.

Many states already have similar laws in place. For example, in Massachusetts, as part of the Affordable Housing Act, buyers are entitled to a home inspection, and real estate agents are prohibited from pressuring a waiver. [227] Additionally, the proposed House Bill 245 would give a buyer ten days to withdraw based on inspection results.[228] If given this time or longer, buyers could agree to begin the process of obtaining an appraisal and set a mortgage contingency soon thereafter. Requiring cash buyers to operate on the same timeline would help align the closing timelines for cash and financed offers.

Another option would be to give all buyers an automatic cooling-off period before a sale can be finalized. Cooling-off periods refer to a designated period of time after an offer is accepted during which the buyer

[225] *See generally* Hannah R. Weiser & Matthew M. Cummings, *Evolving Pay Transparency Law and the Case for Over Compliance*, NYU REV. EMPS. BENEFITS & EXEC. COMP., Aug. 1, 2024 (discussing pay transparency and salary history bans); Lucy Gubernick, *Erasing the Mark of Cain-An Empirical Analysis of the Effect of Ban-the-Book Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 FORDHAM URB. L.J. 1153, 1160 (2017) (explaining ban the box laws passed to address disparate impact of criminal justice and employment system on men of color); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2024) (Massachusetts' "ban the box" law).

[226] *See* discussion *supra* Section V.

[227] *See* Sandy Carroll, *Right to a Home Inspection without Pressure to Waive*, BERKSHIRE REALTORS (June 15, 2025), https://berkshirerealtors.net/right-to-a-home-inspection-without-pressure-to-waive-2 [https://perma.cc/6Z8K-JCVJ].

[228] H. 245, 193rd Gen. Ct., (Mass. 2023).

can cancel the transaction.[229] These laws are in place to prevent buyers from making drastic decisions without having time to fully consider the costs and implications.[230] There are already similar consumer protection laws at both the state and federal levels.[231] Common examples include cooling-off periods for timeshares, health clubs, door-to-door sales, or taking out a home equity loan or mortgage on a home someone already owns.[232] Purchasing a home, particularly a first home, is usually the most significant financial investment of an individual's life up to and is far more significant than the other types of sales already subjected to consumer protection measures.[233] Still, there are not many laws in the United States that provide cooling-off periods for real estate.[234]

Even Sections 1-23 of the Federal Trade Commission Act, which gives consumers three business days to cancel purchases of $25 or more made at home and purchases of $130 or more through "door-to-door sales," explicitly excludes real estate transactions.[235] These cooling-off periods are not uncommon around the world and are becoming more prominent. France, as well as in multiple provinces in Canada and states in Australia, have laws that pertain to cooling-off periods in residential real estate.[236] In fact, some

[229] *See What Is the Cooling Off Period in Real Estate,* ENTRY CONVEYANCING, https://entryconveyancing.com.au/what-is-cooling-off-period/#:~:text=How%20long%20is%20the%20cooling,off%20period%20for%20any%20sale [https://perma.cc/C9C3-PMFF].

[230] *Id.*

[231] *See A Massachusetts Consumer Guide to Shopping Rights*, MASS.GOV, https://www.mass.gov/guides/a-massachusetts-consumer-guide-to-shopping-rights [https://perma.cc/YK6K-JP6K] (discussing various cooling off periods in Massachusetts); Rule Concerning Cooling-Off Period For Sales Made at Homes Or At Certain Other Locations, 16 C.F.R. §§ 429.0-429.3 (2025) (discussing door-to-door sales).

[232] Right of Recission, 12 C.F.R. § 1026.23 (2025) (stating right of rescission); *§ 1026.23 Right of Rescission*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/rules-policy/regulations/1026/23/#a-1 [https://perma.cc/7JEF-3ZVE] (discussing loans with a security interest and stating that "the consumer may exercise the right to rescind until midnight of the third business day following consummation"); *A Massachusetts Consumer Guide to Shopping Rights*, *supra* note 231 (highlighting some consumer rights).

[233] *See* discussion *supra* note 232.

[234] Exceptions include the rule in New Jersey that provides buyers and sellers three business days to have an attorney review a real estate contract and potentially change or terminate it if the real estate contract was drafted by a real estate agent or five days for newly constructed property. *See* N.J. STAT. ANN. §46:3C-9 (2025) (stating five day for contract cancellation); N.J. ADMIN. CODE § 11:5-6.2 (2025) (stating three day attorney review); *see also Understanding New Jersey's 3-Day Rule for Attorney Review*, N.J. CLOSING GUIDE, https://njclosingguide.com/understanding-the-three-day-rule-of-attorney-review/#:~:text=To%20recap%2C%20the%20three%2Dday,both%20parties%20have%20signed%20it [https://perma.cc/PC2S-PKRG] (discussing the five day rule).

[235] *See* 16 C.F.R. §§ 429.0(a)(6).

[236] In Canada, British Columbia enacted a law that applies to most residential property sales for up to three days and Ontario enacted the Homeowner Protection Act, which would institute a ten day cooling

places, like France, allow all buyers of a personal residence up to ten days to back out of a real estate contract without penalty.[237]

Not only do these laws give consumers time to adequately assess whether they want to move forward with purchasing a property, but they also make cash offers less attractive.[238] If all buyers are theoretically "at risk" of backing out of the transaction for the first ten days after an accepted offer, then cash buyers are less of a "sure thing" compared to those getting a loan.

Additionally, this could slow down the process of a cash closing and give a buyer with due diligence the opportunity to initiate the paperwork immediately, schedule an appraisal date, and establish a mortgage contingency not long after the cooling-off period ends.

If the cooling-off period was fourteen days, the buyer could have their inspection within that time period and set a mortgage contingency a few days after that. This would mean that the seller might only have the sale in doubt for a few days longer for the financing buyer than they would for a cash buyer. More sellers would therefore place less emphasis on whether the offeror is using cash or minimal financing. As a result, even when a cash offer is on the table, sellers would give more consideration to offers made by buyers using conventional loans or subsidized loans, especially where their offer price is higher than the cash offer.

B. Change VA and FHA Policies

Another means of leveling the playing field would be to make the loan process for VA and FHA loans aligned with that of Fannie Mae, Freddie Mac, and other conventional loans. This would make sellers more likely to treat these specialized loans the same as traditional loans. In addition to simplifying the required paperwork, the primary way to achieve this is to modify the "minimum property requirements" of FHA and VA appraisals, focusing more on the current market value rather than the property's condition.[239]

off period. *See* Homeowner Protection Act S.O. 2024, c. 18 (Can.) (stating Ontario's cooling off law); Property Law Act, R.S.B.C. 1996, c.377 (Can.) (stating British Columbia's real estate right of rescission); Home Buyer Rescission Period Regulation, B.C. Reg. 175/2022 (Can.) (stating British Colombia's real estate cooling off period is ten days). In Australia, there are varying durations in six states of the seven states and territories. *See What Is the Cooling Off Period in Real Estate, supra* note 229 (breaking down the cooling off periods in Australia).

[237] *See* Ushma Mahindra, *Residential Real Estate Purchase in France*, GIAMBRONE & PARTNERS LLP (Sep. 8, 2022), https://www.giambronelaw.com/site/news-articles-press/library/articles/residential-real-estate-purchase-in-france? [https://perma.cc/22JA-PZGX].

[238] *See* Homeowner Protection Act, *supra* note 236; Property Law Act, *supra* note 236 (stating British Columbia's real estate right of rescission); Home Buyer Recession Period Regulation, *supra* note 236 (stating British Colombia's real estate cooling off period is ten days).

[239] *See* Goodman & Ratcliffe, *supra* note 140 (noting home inspection requirements primary reason FHA and VA loans "less attractive"); Dan Green, *FHA vs Conventional Loan | 2025 Rates and*

The current "minimum property requirements" of VA and FHA loans were designed to prevent buyers from purchasing uninhabitable homes; however, these requirements are unrealistic and potentially shut VA and FHA loan borrowers out of many markets.[240] While the underlying goal is sound, many of these issues do not impact habitability and are common in older homes. It is better to allow buyers to live with those minor imperfections or fix them over time than to prevent them from being able to buy a large segment of affordable homes. Therefore, policies should either eliminate the "minimum property requirements" or only keep severe ones that would actually make the property uninhabitable, such as a dilapidated foundation or a failed septic system; fewer sellers would be deterred from accepting FHA or VA Buyers.[241]

C. Dispel FHA and VA Loan Myths

Dispelling myths of FHA and VA loans by educating real estate professionals about the VA and FHA loan approval process and other misconceptions is crucial. There are legitimate reasons that make FHA and VA loans unattractive; much of the stigma around FHA and VA loans has been either exaggerated due to prior listing agents' dealings or is likely to change with policy adjustments. By educating listing agents about the process, agents can help sellers address common issues that arise before listing the property, thereby maximizing their potential profits. According to James Heaslet, Chief of Construction and Valuation at the VA, "[s]ellers care about price and terms and conditions of a contract'. . . Ultimately, agents need to focus on what their sellers want and need—and financing may not be one of their concerns."[242]

Yes, buyers who use subsidized loans are more likely to have their loan rejected during underwriting, but the likelihood is not drastically higher.[243] According to data from 2009 to 2021, an FHA loan is only 3.3% more likely to be rejected during underwriting than a conventional loan.[244]

Differences, MORTG. REPS. (Jan. 16, 2026), https://themortgagereports.com/17168/fha-conventional-97-low-downpayment-comparison [https://perma.cc/28LG-T5KL].

240 *See* Goodman & Ratcliffe, *supra* note 140 (citing common inspections); *see* also discussion *supra* Section IV (breaking down the unrealistic requirements to pass the conditional requirements for homes to get FHA or VA financing).

241 *See* Goodman & Ratcliffe, *supra* note 140 (explaining FHA and VA home inspection requirements); *see also* Green, *supra* note 239 (explaining deal falls through if appraisal uncovers any issues).

242 Graham Wood, *supra* note 152.

243 *See* discussion *supra* Section VI.

244 Brent W. Ambrose, James N. Conklin, Sonia Gilbukh & Luis A. Lopez *How the Source of Financing Discrimination Affects Housing Opportunities for FHA Buyers*, FED RSRV. BANK OF PHILA. 1,

With less stringent minimum property standards, they may be even lower.[245] Additionally, FHA and VA buyers are more likely to have already had offers rejected on multiple properties.[246] This might make them less likely to back out over minor inspectional issues because they do not know when they would get an offer accepted again.[247] If listing agents are aware that the differences between financing are trivial, more listing agents may advise their sellers to take an offer from a buyer with an FHA or VA loan, especially if that buyer offered a higher price.

Therefore, in the interest of both sellers and buyers, state licensing boards should try to educate real estate agents more about these kinds of loans and dispel these myths within the real estate profession. One approach is to require training on FHA and VA loan processes, either as part of initial licensure or through continuing education requirements. One way is that states could tell real estate agents to attend seminars that educate them about these loans and dispel myths, as part of their licensing.[248] Not only will this improve equity, it may benefit their borrowers, increase sale prices, and in turn, potentially increase their commissions.

D. Make Financial Disclosures During the Offer Stage More Uniform & Less Transparent

Most sellers and listing agents require buyers to provide either a pre-approval letter when they plan to use financing or a proof of funds letter when they intend to use cash to purchase the property. This is something that sellers should still be able to request, as it would help all parties understand that the buyer is likely to secure financing. However, the current system can hurt many buyers and sellers.

Not all banking institutions are required to follow the same process to produce a pre-approval letter.[249] Suppose a bank fails to properly verify a

3 (Oct. 16, 2024), https://www.philadelphiafed.org/-/media/frbp/assets/events/2024/housing-demand-workshop/6b_FinancingConstraints_Gilbukh [https://perma.cc/Z2V2-3CZZ].

[245] Goodman & Ratcliffe, *supra* note 140 (advocating for removing inspectional requirements).

[246] *See generally id.* (discussing how sellers are less likely to consider government insured offers).

[247] *See* Cummings, *supra* note 12, at 332 (analyzing desperation when buyers consistently get their offers rejected).

[248] *See* Graham Wood, *supra* note 152 (discussing hot practitioners need to become "better educated on FHA financing" and have "similar misunderstandings about VA loans."). Given real estate salesperson licensing is done through the state agencies, this course of action would need to be enforced by state law. *See License Reciprocity & License Recognition*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/license-reciprocity-license-recognition [https://perma.cc/PLK9-APY6] (reviewing state licensing and reciprocity rules).

[249] *See Get a Preapproval Letter*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/rules-policy/regulations/1026/23/ - a-1 (last updated Dec. 12, 2024) [https://perma.cc/UE4M-WJ35] (discussing differing banking procedures).

buyer's eligibility before issuing a pre-approval letter. In that case, a seller may accept an offer from a buyer who should never have received a pre-approval in the first place. Additionally, as discussed, when letters describe the type of financing, knowledge of the type of financing perpetuates inequality.[250] A possible solution is to redesign the financial disclosure letters that buyers provide to sellers. Rather than requiring proof of funds letters for cash buyers or pre-approval letters for borrowers, a standard letter from a licensed financial officer could be used, indicating that the officer has reviewed the buyer's financial information and determined that the buyer is highly likely to obtain financing. In this scenario, the law could require financial officers with specific certifications to authorize these letters and make it a requirement for all buyers to have this letter prepared. The essential element is that these letters do not disclose the type of loan for which the buyer is eligible, the size of the down payment, or whether the buyer is paying in cash.

In addition to creating this letter system, states could impose a cap on the size of the earnest funds a buyer may deposit (e.g., 3%). Further, they could make it illegal for buyers to disclose that they are paying by cash or putting down more than the 3%. Lastly, they could prohibit sellers from requesting that buyers disclose their financing for any publicly listed property. These changes would cause sellers to focus more on the actual price of the offer, rather than the kind of financing.

Laws designed to limit transparency between parties to prevent the perpetuation of inequalities are not abnormal. States and municipalities have enacted salary history laws that prohibit prospective employers from inquiring about an applicant's salary history to prevent the perpetuation of wage inequality.[251] Additionally, states have also implemented "ban the box" laws regarding criminal history to avoid disparities in certain racial groups, as individuals from these groups are more likely to be charged when accused of a crime.[252]

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[250] *See* discussion *supra* Sections IV-VIII (breaking down the reluctance of Sellers to accept loans from buyers using FHA or VA loans or ones with low down payments, which are disproportionately used by black homebuyers).

[251] *See* Weiser & Cummings, *supra* note 225, at 38.

[252] *See id*; Gubernick, *supra* note 225, at 1160 (detailing why states implement "ban the box" laws); MASS. GEN. LAWS ch. 151B at § 4 (prohibiting most employers from asking about applicant's criminal history). Also, it is worth comparing it to the Oregon statute that imposed a blanket ban buyer "love letters" in which the buyer tells the seller about themselves and how much they love the house, which was struck down in Federal Court under first amendment grounds. *See generally* Caroline Paige Lowery, *"Pick Me, Choose Me, Love Me"-The Buyers: The Impacts of Real Estate "Love Letters" on the First Amendment and Discrimination,* 91 UMKC L. REV. 659 (2023) (analyzing "love letter" ban); *see also* Total Real Estate Grp., Ltd. Liab. Co. v. Strode, 588 F.Supp.3d 1137, 1155 (D. Or. 2022) (concluding "love letter" statute inadequately tailored); *see also* John A. Snyder & Ronald M. Fields, *Oregon Ban on Home Buyers' 'Love Letters' to Sellers Violates First Amendment, Federal Court Rules*, JACKSONLEWIS

The housing loan system could be greatly improved if these reforms were enacted. The first option, outlined above, is to adopt the recommended reforms to the minimum property standards for FHA and VA loans. Alternatively, or in conjunction with these changes, states could create a system in which a seller can obtain certification from FHA or VA regarding the property's eligibility before listing it. In cases where a property would not pass a minimum-standards inspection, the seller may state that they cannot accept FHA or VA loan applicants.

A second reform would involve protecting buyers who use a loan that requires 0% down, namely, VA loans. For these buyers, states could create a system in which the lender provided the 3% down as a bond to the buyer. This would be a small loan that the buyer could roll into the loan, or would be responsible for if they backed out of the sale for an illegitimate reason, and the seller refused to return the funds.

The final recommendation is that states adopt a uniform rebate system for buyer-broker commissions. As discussed, recent changes to NAR commission practices now require buyers either to pay their agent out of pocket or to request that the seller cover the buyer-broker fee from the seller's proceeds.

To avoid the issue of buyer-broker commission payments, states should enact a system requiring sellers to return a portion of their proceeds to the buyer as a form of rebate.[253] This would be permissible under the state-action doctrine established by the Supreme Court in *Parker v. Brown*.[254] Under this doctrine, one can create policies that have an anti-competitive effect on a specific market, provided they serve the public welfare.[255] This action would be exempt from the Sherman Antitrust Act if it "serve[d] local ends and d[id] not discriminate against the [interstate] commerce" but "may

(Apr. 13, 2022), https://www.jacksonlewis.com/insights/oregon-ban-home-buyers-love-letters-sellers-violates-first-amendment-federal-court-rules [https://perma.cc/GZ6F-VHTV] (summarizing *Total Real Estate Group*). A similar bill banning "love letter" was also proposed in Rhode Island in 2022. *See* H. 7722, 2022 Gen. Assemb., Jan. Sess. (R.I. 2022) (prohibiting additional communication during real estate transaction); Alexandra Leslie, *RI Bil Would Ban 'Love Letters' from Hopeful Homebuyers*, WPRI (Apr. 5, 2022), https://www.wpri.com/money/ri-bill-would-ban-love-letters-from-hopeful-homebuyers [https://perma.cc/WCL7-4534].

253 *See* Cummings, *supra* note 12, at 374.

254 Parker v. Brown, 317 U.S. 341, 360 (1943). The case, *Parker v. Brown*, pertained a state law in California that controlled the prices and output of raisins within the state in order to limit competition. *Id.* at 344. The plaintiff in the case sued the Director of Agriculture in the state, claiming the state violated federal antitrust laws. *Id*. The Supreme Court upheld law, finding that federal antitrust laws does not apply to anti-competitive restraints on trade through state actions that serve the public welfare. *Id*. at 350-51.

255 *See* Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL'Y 203, 211-12 (2000).

materially affect it."[256] Furthermore, the Supreme Court has already held that the activities of real estate brokers and salespersons are not interstate commerce.[257] Therefore, a state could create an explicit rebate pricing structure in the legislation or grant authority to a state agency to determine the amount based on fluctuations in the real estate market or on pricing in the region where the property is located.[258]

Cummings provided the following model as an example:

Sale price under $250,000: buyer receives a rebate of $10,000 (4% of $250,000) out of the seller's proceeds;

- Sale price between $250,000- $500,000: buyer receives a rebate of $15,000 (3% of $500,000) out of the seller's proceeds;
- Sale price between $500,001- $600,000: buyer receives a rebate of $18,000 (3% of $600,000) out of the seller's proceeds;
- Sale price between $600,001- $700,000: buyer receives a rebate of $21,000 (3% of $700,000) out of the seller's proceeds;
- Sale price at or above $700,000: The buyer receives a rebate of $25,000 (3% of $750,000) from the seller's proceeds.[259]

Under this model, the commission amount is standardized across all offers, ensuring that buyers do not have to explicitly include it in their offers when competing against others. These efforts would help ensure that sellers have assurances that the offer they accept will likely receive financing and help close the unfair advantages that wealth confers on offer prices in real estate, which perpetuate racial wealth divides.

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[256] *Brown*, 317 U.S. at 360.

[257] *See* United States v. Nat'l Ass'n of Real Est. Bds., 339 U.S. 485, 488; *License Reciprocity & License Recognition, supra* note 248.

[258] *See* William Markham*, Antitrust Exemptions and Immunities,* THE L. OFF. OF WILLIAM MARKHAM, PC (2021), https://www.markhamlawfirm.com/law-articles/antitrust-exemptions-and-immunities-by-william-markham-2021 [https://perma.cc/M5PZ-2RQJ] (explaining protections for state agency actions)*; see also* Todd J. Zywicki et al., *Report of the State Action Task Force,* FED. TRADE COMM'N OFF. OF POL'Y PLANNING 12-24 (Sep. 1, 2003), https://www.ftc.gov/sites/default/files/documents/reports/report-state-action-task-force-recommendations-clarify-and-reaffirm-original-purposes-state-action/stateactionreport_0.pdf [https://perma.cc/C9W6-DD2U] (noting requirements for anticompetitive regulatory conduct must include active supervision by a governing body).

[259] Cummings, *supra* note 12, at 374. These numbers were based on Massachusetts averaging $662,254 in 2024. *Id.* A $25,000 rebate would be roughly 2.5% of a purchase price of $1 Million (within standard market rates), which is far above average home prices in the state. *Id.* "Once the prices reach this point, as long as the commission amounts are transparent, buyers and their brokers/agents could still discuss fees higher than the rebate." *Id*. at n.237

CONCLUSION

In today's real estate market, many young buyers, particularly those of color, find that the American dream is unattainable.[260] This is not the result of explicit racial discrimination, but rather a consequence of their pre-approval letter and financial disclosures.[261] Unfortunately, in today's real estate market, buyers cannot make an offer without revealing this information.[262]

Although one would assume a seller would accept the offer with the best price and terms, the buyer's wealth may outweigh the seller's.[263] Cash offers can close more quickly and with fewer hiccups than financing offers.[264] The less a buyer finances, the less the buyer appears to be a risk to the seller.[265] This is even more so for borrowers using FHA and VA loans, which carry a stigma that is mixed in reality and faulty perceptions.[266] As a result, most sellers avoid those borrowers when evaluating multiple offers.[267]

The avoidance of FHA loans, VA loans, and loans with significant financing impacts first-generation home buyers, who are disproportionately people of color, the most.[268] Even though this is a clear example of disparate impact discrimination, the courts will likely find it justified.[269] Therefore, state-level reforms are needed to shift purchases away from the amount of money the buyer has in their (or their parents') bank account and toward the highest actual offer.[270] Without such reforms, the homebuying process will continue to produce the same racial and wealth inequalities that earlier housing policies helped create.[271]

260 *See* discussion *supra* Sections III-VIII.

261 *See* discussion *supra* Sections I, V-VI, VIII.

262 *See* discussion *supra* Sections I, IX.D.

263 *See* discussion *supra* Section V.

264 *See id.*

265 *See id.*

266 *See* discussion *supra* Section VI.

267 *See id.*

268 *See* discussion *supra* Section VII.

269 *See* discussion *supra* Section VIII.A.

270 *See* discussion *supra* Section IX.

271 *See* discussion *supra* Sections VI-VIII.