

**Report of the ABA Antitrust Section Task Force on
Antitrust, Consumer Protection, and Diverse Consumers:
Volume I**

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Very truly yours,

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Introduction

The American Bar Association Antitrust Law Section's Antitrust, Consumer Protection & Diverse Consumers Task Force aims to bring together a diverse array of antitrust and consumer protection practitioners in state and federal government, private practice (both plaintiff-side and defense) and in-house counsel to research and analyze how diverse consumers interact with antitrust and consumer protection laws. The members of the Task Force represent a broad spectrum of insights and opinions that were valuable in identifying thought leaders to interview and publishing this preliminary report.

What do we mean when we talk about “diverse consumers” in this report? We use “diverse” here to mean people who are from communities of color, LGBTQ+, female, or members of other groups that have historically been disadvantaged, underserved, and disempowered. As for the second part, “consumers,” both antitrust (via the consumer welfare standard) and consumer protection (by its very name) have long focused on harms to people who buy goods and services as well as (at least in the case of antitrust) those who supply goods and services. We therefore use the broader meaning in this report to include workers and business owners as well, as a large percentage of consumers either work at or own businesses, which may suffer their own unique harms due to anticompetitive, fraudulent, or deceptive activity or privacy violations.

This preliminary report is timely as lawmakers and enforcers consider whether and to what degree laws and policies need to be revamped to address systemic racism while at the same time looking to push the bounds of antitrust law in new directions. For example, on January 20, 2021, President Biden signed Executive Order 13985, On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. This Executive Order requires all federal agencies to assess how their policies, programs, and enforcement measures might reinforce systemic barriers to opportunities for people of color, stating: “Each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups. Such assessments will better equip agencies to develop policies and programs that deliver resources and benefits equitably to all.”¹ Six months later, the Biden Administration followed up with Executive Order 14036, Promoting Competition in the American Economy, on July 9, 2021. In that Order, President Biden demanded a “whole-of-government” approach to restore a fair and open competitive marketplace, advising all federal agencies to combat what he describes as decades of consolidation and weakened competition in too many markets, which deny Americans the benefits of an open economy and widen racial, income, and wealth inequality.²

¹ Exec. Order No. 13,985, 86 Fed. Reg. 7009 (2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

², 86 Fed. Reg. 36987 (2021), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

Antitrust enforcers have reacted vigorously to these Executive Orders. Soon after the leadership of both the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) (together, the “antitrust agencies”) changed within the last year, they announced that they will be revising the merger guidelines and sought public input, including through a number of joint public forums, “to modernize the merger guidelines to better detect and prevent anticompetitive deals.”³ In addition, FTC Commissioner Rebecca Kelly Slaughter, one of the thought leaders the Task Force interviewed for this report, has been a vocal advocate for an antiracist approach that seeks to use the antitrust laws to combat racial inequity.⁴

Consumer protection has a longer and more robust history of specifically focusing on harm to diverse consumers than does antitrust, so there is a more extensive track record in terms of cases brought and initiatives. The FTC released a report in October of last year regarding its efforts to-date to address consumer protection issues that affect communities of color.⁵ And the CFPB since its inception has been instrumental in looking out for diverse consumers in the financial sector; just last year, the CFPB made clear that lenders cannot discriminate on the basis of sexual orientation or gender identity,⁶ and released a report examining the differential experience of different sub-groups of Asian Americans and Pacific Islanders in the mortgage markets.⁷ But this track record does not mean there is not still plenty of work to be done in the consumer protection space. For example, as recently as June 2022, a group of seven Democratic senators sent a letter to the FTC urging the agency “to use the full scope of its authority to protect members of Black communities, other communities of color and immigrant communities in the United States,” mainly focusing on the impact of technologies such as facial recognition and location data collection on minorities and proposing that the agency make “racial justice” a core value of its enforcement.⁸

³ *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, Fed. Trade Comm’n (Jan. 18, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers>.

⁴ Kushita Vasant, *U.S. FTC must be ‘actively anti-racist’ in antitrust enforcement, Commissioner Slaughter says*, mLex (July 20, 2022), <https://mlexmarketinsight.com/news/insight/us-ftc-must-be-actively-anti-racist-in-antitrust-enforcement-commissioner-slaughter-says>.

⁵ *Serving Communities of Color: A Staff Report on the Federal Trade Commission’s Efforts to Address Fraud and Consumer Issues Affecting Communities of Color*, Fed. Trade Comm’n (Oct. 2021), https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf.

⁶ CFPB Clarifies That Discrimination by Lenders on the Basis of Sexual Orientation and Gender Identity Is Illegal, Consumer Financial Protection Bureau (Mar. 9, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-clarifies-discrimination-by-lenders-on-basis-of-sexual-orientation-and-gender-identity-is-illegal/>.

⁷ Young Jo and Alexandra Dobre, *Data Point: Asian American and Pacific Islanders in the Mortgage Market*, Consumer Financial Protection Bureau (July 2021), <https://ssrn.com/abstract=3911559>.

⁸ Zach Schonfeld, *Senate Democrats press FTC to protect marginalized groups from marketplace discrimination*, The Hill (June 22, 2022), <https://thehill.com/homenews/senate/3532553-dem-senators-press-ftc-to-protect-marginalized-groups-from-marketplace-discrimination/>.

This document is Volume I of a two-part report outlining the different ways diverse consumers interact with antitrust and consumer protection laws. This volume describes how diverse consumers may be impacted by current antitrust and consumer protection enforcement (or lack thereof). Volume I also previews Volume II by recounting select thought leaders' perspectives on potential next steps to take in evaluating and remedying harms suffered by diverse consumers, particularly consumers of color, in the antitrust space. Volume II of the report, to follow during the 2022-2023 Section year, will delve more deeply into additional thought leader analyses and proposals from across both the antitrust and consumer protection worlds and with regard to not only consumers of color but also women and LGBTQ+ consumers.

The Ways Diverse Consumers Can Suffer Disproportionate Harm in the Antitrust and Consumer Protection Spaces

Diverse consumers are vulnerable to myriad antitrust and consumer protection-related harms. While in some cases, diverse and non-diverse consumers alike may be harmed by unlawful behavior, the historical and current challenges faced by diverse consumers may exacerbate the impact of the harm. In other cases, conduct that produces some benefit to consumers as a whole may nonetheless cause harm to diverse consumers in particular. Many of the consumer protection harms detailed in this section are very clear and well-established through research and case law. On the other hand, antitrust does not have as much of a tradition of expressly focusing on diverse consumers. Consequently, potential harms identified in that section are more diffuse and efforts to analyze and address them more in their infancy.

ANTITRUST

Historically, antitrust has been viewed as value neutral,⁹ so the antitrust laws generally have not been directed to address harms to diverse consumers in particular. A well-regarded treatise, for example, comments that antitrust law is “badly designed” to remedy so-called non-economic goals.¹⁰ While antitrust laws have been employed in the past to remedy harms to diverse groups, they have done so where the harm (such as discrimination based on race) overlaps with an activity widely recognized as causing economic harm (such as a group boycott) that is already reachable by settled antitrust doctrine.¹¹

⁹ Rebecca Kelly Slaughter, *Antitrust at a Precipice: Remarks of Commissioner Rebecca Kelly Slaughter*, FTC Office of the Comm'r (Nov 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

¹⁰ Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶1111 (5th Edition, 2022 Cum. Supp 2015-2021).

¹¹ See *Rowe Ent., Inc. v. William Morris Agency, Inc.*, No. 98 CIV. 8272 (RPP), 1999 WL 335139, at *4 (S.D.N.Y. May 26, 1999) (“[I]f the reason that two or more persons conspire to restrain trade is racism, there is no logical reason why a plaintiff cannot state an antitrust claim in addition to a civil rights claim,” provided a plaintiff has alleged the requisite elements); *Org. of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R.*, 579 F. Supp. 574, 604 (N.D. Ill. 1983) (rejecting the argument that plaintiffs cannot use the antitrust laws to achieve civil rights goals, where plaintiffs have alleged valid antitrust claims); *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (granting a preliminary injunction based in part on a Section 1 claim alleging the defendant Klan members had conspired to eliminate competition from Vietnamese fishermen through intimidation).

Nonetheless, various antitrust stakeholders, including several interviewed for this report, are increasingly recognizing that anticompetitive conduct may cause particular harms to diverse and marginalized communities. Discussion of these issues has even reached the Supreme Court: Justice Kavanaugh’s concurrence in *Nat’l Collegiate Athletic Ass’n v. Alston* highlighted the disparity between the actors perpetuating the anticompetitive conduct at issue (college presidents, athletic directors, coaches, NCAA executives) and the disempowered workers suffering the anticompetitive harm (student athletes, “many of whom are African American and from lower-income backgrounds”).¹² What follows is an enumeration of several types of competition harms that may have an outsized impact on diverse consumers and a brief discussion of what steps, if any, have been taken to date to address them.

Consolidation in Industries with Long-Standing Racial Inequities

There is nothing controversial in the statement that merger activity that leads to a highly concentrated industry can cause harm to consumers in the form of higher prices or lower quality products and services. But antitrust generally considers harm to consumers in a relevant market in the aggregate, e.g., all smartphone users in the United States or all purchasers of domestic scheduled air passenger service between New York and San Francisco, rather than broken down by race or local community. There is reason to believe, however, that if one had sufficient data to assess competitive harm at that micro-level, mergers in industries with long-standing racial inequities might cause proportionally greater harm in diverse communities.

Healthcare is one example. The antitrust agencies have cleared (or lost challenges to) a large number of hospital mergers and acquisitions over the years. One study concluded that due to this consolidation, most urban areas in the US now have between one and three large hospital systems—i.e., Boston (Partners), the Bay Area (Sutter), and Cleveland (Cleveland Clinic, University Hospital).¹³ According to another study by the same author that examined all hospital mergers in the United States over a five-year period, hospitals in geographic areas with fewer competitors have substantially higher prices—averaging 12 percent higher than hospitals with three or more potential competitors nearby and 7.3 percent higher if the hospitals have one other nearby potential competitor.¹⁴ This same study concluded that the average merger between two nearby hospitals (5 miles or closer) leads to a price increase of 6 percent and

¹² 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring) (“College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.”).

¹³ Martin Gaynor, *New Health Care Symposium: Consolidation and Competition In US Health Care*, Health Affairs (Mar. 1, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160301.053529/>.

¹⁴ *Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets*, 116th Cong., at 5 (2019), available at <https://docs.house.gov/meetings/JU/JU05/20190307/109024/HHRG-116-JU05-Bio-GaynorM-20190307.pdf> (statement of Dr. Martin Gaynor, Prof. of Economics, Carnegie Mellon University).

prices continue to rise for at least two years after the merger.¹⁵ (Note that these studies are not without critics, such as the American Hospital Association.¹⁶)

There have long been disparities between White people and people of color when it comes to healthcare. A recent study indicates that Black, Hispanic, and Native American/native Alaskan people tended to fare worse than White people in healthcare coverage, access, use, outcomes, and social determinants of health, among other measures.¹⁷ There are stakeholders who believe hospital consolidation may exacerbate these disparities. In comments in response to the joint DOJ/FTC request for information concerning modernizing merger enforcement,¹⁸ Community Catalyst, a non-profit health advocacy organization, argued that hospital consolidation has led to increased prices and increased medical debt, which disproportionately burdens the under- and uninsured and the shifting of resources away from and closing of hospitals in urban and rural communities of color, which undermines timely access to quality care.¹⁹

The financial services sector presents a similar situation with respect to consolidation. Bank mergers, in particular bank mergers involving smaller regional and community banks have been prevalent over the last several decades. As a result of this trend toward consolidation, while there were 9,354 FDIC-insured banks in 2002, there were only 4,796 such banks as of March 2022.²⁰ Community banks' share of all deposits and all bank branches has also shrunk dramatically.²¹ New bank entry has also drastically diminished.²²

¹⁵ *Id.*

¹⁶ Sean May, Monica Noether, & Ben Stearns, *Views from Hospital Leaders and Econometric Analysis - An Update* (Sept. 2019) (finding hospital mergers can lower costs and improve quality), <https://www.aha.org/system/files/media/file/2019/09/cra-report-merger-benefits-2019-f.pdf>; Melinda Hatton, "The Price Ain't Right" Ain't Right Again (May 21, 2018), <https://www.aha.org/news/blog/2018-05-21-price-aint-right-aint-right-again> (arguing that studies by Gaynor et al. on hospital prices and market structure are based on outdated data).

¹⁷ See Latoya Hill, Samantha Artiga, & Sweta Haldar, *Key Facts on Health and Health Care by Race and Ethnicity*, KFF (Jan. 26, 2022), <https://www.kff.org/racial-equity-and-health-policy/report/key-facts-on-health-and-health-care-by-race-and-ethnicity/>.

¹⁸ Request for Information on Merger Enforcement, FTC & DOJ (January 18, 2022), <https://www.regulations.gov/docket/FTC-2022-0003/document>.

¹⁹ Transcript, Fed. Trade Comm'n, FTC and DOJ Host Listening Forum on Effects of Mergers in Health Care Industry, at 15-16 (Apr. 14, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ-Listening-Forum-%20Health-Care-Transcript.pdf.

²⁰ *Quarterly Banking Profile Statistics at a Glance - Historical Trends*, FDIC (Mar. 31, 2022), <https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2022mar/fdic.pdf>.

²¹ See Vitaly Bord, *Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors*, Harvard Univ. (Dec. 1, 2018), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf.

²² The FDIC found that "between 1985 and 2011, 183 new institutions were chartered per year on average, compared with four per year between 2012 and 2019." *FDIC Community Banking Study*, FDIC (Dec. 2020), <https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf>; see also Robert Adams & Jacob Gramlich, *Where Have all the New Banks Gone: The Role of Regulatory Burden in New Charter Creation*, Fed. Reserve Board Fin. and Econ. Discussion Series (Dec. 16, 2014), <https://www.federalreserve.gov/econresdata/feds/2014/files/2014113pap.pdf> ("From 2009 to 2013 only 7 new banks were formed, fewer than 2 per year.").

And, as in the healthcare sector, there exists a history of racial disparity. Diverse consumers are less likely to have a bank account²³ and less likely to be able to obtain bank credit.²⁴ While the rise of online banking and financial technology might theoretically seem to alleviate these problems, many diverse consumers continue to rely on brick-and-mortar banks, in part because large swaths of the population, often concentrated in lower income areas, still do not have access to reliable broadband internet.²⁵

There is a question as to whether consolidation may be contributing to the durability of these disparities. A recent study by the Brookings Institute calculated the Herfindahl-Hirschman Index (HHI) scores for majority Black and Latino or Hispanic neighborhoods in comparison to majority white neighborhoods and determined that meaningfully less competition in the provision of financial services exists in the former.²⁶ That same study also found that majority Black neighborhoods were significantly less likely to have a bank branch and that those that did have one or more bank branches were more likely to have a branch closure than non-majority Black neighborhoods.²⁷ Another recent study found that acquisitions of small banks by large banks tends to lead to increased depositor fees, causing proportionally more lower income depositors to exit the banking system.²⁸

These examples suggest that it is worth examining whether at least some mergers in some industries have the potential to impose greater harm on at least some diverse consumers. More data would be required to suss out whether any individual merger has had or is likely to have a disparate impact on communities of color (or women or members of the LBGQT community). We will discuss thought leader recommendations in this area later in the report.

In at least some instances, antitrust enforcers have defined markets and remedies based specifically on the impact on female consumers. For example, in blocking the merger of Edgewell Personal Care Company and Harry's, Inc., the FTC noted that industry participants recognized "narrower markets along gender lines," such as women's wet-shave razors and

²³ *How America Banks: Household Use of Banking and Financial Services, 2019 FDIC Survey*, FDIC, at 12 (Oct. 2020), https://economicinclusion.gov/downloads/2019_FDIC_Unbanked_HH_Survey_Report.pdf ("unbanked rates were higher among lower-income households, less-educated households, Black households, Hispanic households, American Indian or Alaska Native households, working-age disabled households, and households with volatile income.").

²⁴ *Id.* at 52 ("Lower-income households, Black households, working-age disabled households, and households with volatile income were more likely to have been denied bank credit or not to have been given as much credit as requested (among households that had applied) or not to have applied for bank credit because of concerns about being turned down.").

²⁵ Kristen Broady, Mac McComas, & Amine Ouazad, *An analysis of financial institutions in Black-majority communities: Black borrowers and depositors face considerable challenges in accessing banking services*, Brookings (Nov. 2, 2021), <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *The Adverse Effects of Bank Mergers on Depositors*, *supra* Note 21, at 2-3.

women's system razors compared to those products for men. In each of those gender-defined markets, the FTC concluded that the merger would allow the combined entity to impose a SSNIP on consumers.²⁹ In 2001, several state AGs settled with Nine West, Inc., a manufacturer of women's shoes, over claims that Nine West had prevented retailers from offering discounts. The *cy pres* remedy sent settlement proceeds to various breast cancer and domestic violence awareness organizations because the judge found it would be too difficult to identify individual consumers.³⁰ And at least one study has found that the ability of merging entities to raise prices can depend on the gender of the firms' consumers, due to potential differences in different genders' willingness (depending on product attributes) to search for a substitute.³¹

Impacts on Minority-Owned Businesses

Not only might diverse purchasers of goods and services be disproportionately impacted by anticompetitive mergers and conduct, but diverse business owners may similarly face an uneven effect.³² To give a hypothetical example, a merger of two large grocery companies that results in lower prices and increased variety of products for certain consumers in the short-term could nonetheless contribute to smaller grocers in minority neighborhoods experiencing financial distress and even going out of business. Another example, in an article by thought leader Hal Singer, is a digital e-commerce platform with market power that could impose onerous terms on small businesses who sell on the platform³³ And some scholars have argued that the presence of a dominant player in a market can dampen start-up activity in that space, limiting the chances that a nascent competitor could eventually emerge to challenge the incumbent.³⁴

Of course, the harm in these situations is not limited to small businesses with minority ownership. But these phenomena could potentially exacerbate the already steeper hill that certain minority-owned businesses must climb. According to a McKinsey study, for example, Black-owned businesses tend to have lower revenues and be concentrated in low-growth

²⁹ Complaint, Edgewell Personal Care Co., FTC Docket No. 9390 (Feb. 2, 2020), at ¶¶ 29-32, https://www.ftc.gov/system/files/documents/cases/public_p3_complaint_-_edgewell-harrys.pdf.

³⁰ *Domestic Violence, Breast Cancer Awareness Groups Among Recipients of Antitrust Settlement Funds*, New York State Office of the Att'y Gen (Oct. 26, 2021), <https://ag.ny.gov/press-release/2001/domestic-violence-breast-cancer-awareness-groups-among-recipients-anti-trust>.

³¹ Lola Damstra, *Gender on the Agenda: Improving Inclusivity in Competition Analysis*, Oxera (July 2021), <https://www.oxera.com/wp-content/uploads/2021/07/Gender-on-the-agenda-improving-inclusivity-in-competition-analysis-3.pdf>.

³² While current antitrust law recognizes the potential anticompetitive harm from monopsony, there is broader discussion within the antitrust community about the extent to which monopsony harms should be an area of greater focus for enforcement. For the purpose of this report, we are including the possibility in the discussion.

³³ Hal Singer, *Antitrust Can Address Racial Inequities*, American Prospect (Feb. 10, 2021), <https://prospect.org/economy/antitrust-can-address-racial-inequities/>.

³⁴ See, e.g., Sai Krishna Kamepalli, Raghuram Rajan, & Luigi Zingales, *Kill Zone*, (Nat'l Bureau of Econ. Rsch Working Paper 27146) (May 2020), https://www.nber.org/system/files/working_papers/w27146/w27146.pdf.

industries.³⁵ Black business owners are more likely to locate their businesses in economically disadvantaged areas and have less access to financing, networks and mentors.³⁶ Indeed, Black start-up founders on average begin with \$35,000 compared to \$107,000 for White start-up founders, and only four percent of Black-owned businesses make it past the start-up stage.³⁷ These factors at least partially explain why nearly 60 percent of Black-owned businesses were in financial distress even before the COVID-19 pandemic hit, and twice as many Black-owned businesses than White-owned businesses closed in the initial months of the pandemic.³⁸ Women-owned businesses similarly face disproportionate challenges, typically receiving smaller loans (including Paycheck Protection Program loans at the height of the pandemic) and earning less revenue than their male-owned counterparts.³⁹

As with the previous section, there is a paucity of data that would shed light on the degree to which minority owned businesses experience special harm from anticompetitive conduct. As thought leaders suggest, as described later in the report, gathering data is a key next step.

The next few sections deal with harms to diverse consumers in their roles as workers. These areas—non-compete and no-poach agreements, occupational licensing, and labor organizing in the gig economy—while still only relatively recent areas of focus in antitrust, have nonetheless seen quite a bit of action in the last several years.

Non-Compete and No-Poach Agreements

Non-compete agreements limit the ability of an employee to work for an employer's competitors.⁴⁰ No-poach agreements are agreements between competitors not to solicit, recruit,

³⁵ *Building supportive ecosystems for Black-owned US businesses*, McKinsey Institute for Black Economic Mobility (Oct. 29, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/building-supportive-ecosystems-for-black-owned-us-businesses>.

³⁶ *Id.*

³⁷ *Id.* See also Robert W. Fairlie, Alicia Robb, & David T. Robinson, *Black and White: Access to Capital Among Minority-Owned Start-ups*, Nat'l Bureau of Econ. Rsch. (Nov. 2020), https://www.nber.org/system/files/working_papers/w28154/w28154.pdf.

³⁸ Claire Kramer Mills & Jessica Battisto, *Double jeopardy: COVID-19's concentrated health and wealth effects in Black communities*, Fed. Reserve Bank of New York (Aug. 2020), https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses.

³⁹ See, e.g., Biz2Credit, *Annual Women-Owned Business Study 2022* (Mar. 8, 2022), <https://www.biz2credit.com/research-reports/women-owned-business-study-2022>.

⁴⁰ See *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, Fed. Trade Comm'n (Jan. 9, 2020), <https://www.ftc.gov/news-events/events/2020/01/non-competes-workplace-examining-antitrust-consumer-protection-issues> (defining non-competes as "covenants in employment contracts that limit the ability of an employee to join or start a competing firm after a job separation"); Rebecca Kelly Slaughter, *New Decade, New Resolve to Protect and Promote Competitive Markets for Workers*, Fed. Trade Comm'n, at 2 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf (declining to use the term "agreement" because non-compete clauses are often unilaterally imposed on workers).

or hire employees from one another.⁴¹ President Biden’s July 2021 Executive Order called for the FTC to use its rulemaking power to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”⁴² In signing the order, President Biden drew attention to how these contractual clauses can be imposed on workers who do not have a college degree, despite the traditional defense that non-competes protect trade secrets held by employees with advanced degrees and access to highly technical information.⁴³ The president also characterized these workers as “disproportionately women and women of color.”⁴⁴ Civil servants and scholars have repeatedly argued that non-compete, no-poach and non-solicitation clauses not only affect the low-income consumers whose wages are suppressed, but also other diverse consumers who have fewer options in a marketplace where competition for labor, entrepreneurship, and access to services and goods is limited by restrictive contractual agreements.⁴⁵

Over the last several years, state and federal enforcers have been increasingly targeting restrictive contractual agreements—particularly those that affect low-income workers and consumers—for rulemaking, legislation, and litigation.

Federal agencies have been coordinating to study and limit non-compete and other clauses in labor and employment contracts. In 2021, the FTC solicited public comment on “non-compete clauses that prevent workers from seeking employment with other firms, and other one-sided contract terms that may exacerbate or lock in power disparities.”⁴⁶ A few months later, the FTC and DOJ held a two-day workshop, titled “Making Competition Work: Promoting Competition in Labor Markets,” at which the topic of non-competes, and their effects on low-income employees and diverse consumers, was central to much of the discussion.⁴⁷ On July 19, 2022, FTC and the National Labor Relations Board signed a Memorandum of Understanding that included a pledge

⁴¹ *Market Division or Customer Allocation*, Fed. Trade Comm’n, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/market-division-or-customer-allocation> (last accessed Aug. 8, 2022).

⁴² See Exec. Order No. 14,036, *supra* Note 2. <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

⁴³ See Transcript, The White House, Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/>.

⁴⁴ *Id.*

⁴⁵ See Transcripts, Fed. Trade Comm’n, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021), <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

⁴⁶ See Solicitation for Public Comment, Fed. Trade Comm’n (Aug. 5, 2021), <https://www.regulations.gov/document/FTC-2021-0036-0022>.

⁴⁷ See Transcripts, Fed. Trade Comm’n, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021), <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

to work together to “help to protect workers against unfair methods of competition” including “the imposition of one-sided and restrictive contract provisions, such as non-compete” clauses.⁴⁸ This increased antitrust agency focus as well as interagency cooperation have led to increased enforcement. For example, even though courts and enforcers have traditionally permitted non-competes in mergers and acquisitions, in November 2021, the DOJ filed a civil antitrust suit blocking a proposed merger and non-compete agreement to “protect customer access to essential pricing information.”⁴⁹ In June 2022, the FTC launched a complaint challenging an acquisition that would have decreased competition for gasoline and diesel pumps in several Michigan territories, including several low-income, rural markets.⁵⁰ The FTC argued the non-compete agreement included in the merger had no “reasonable procompetitive justification” and would “harm consumers.”⁵¹ Although enforcers have not filed any recent suits pertaining to non-compete agreements for low-wage workers, there has been increased enforcement of no-poach and non-solicitation agreements, closely related clauses that officials argue leads to an imbalance of worker bargaining power and a decrease of mobility for low-wage workers.⁵²

One well-known example of state enforcement against non-compete clauses is a series of cases involving fast-food franchise Jimmy John’s in 2016. In *People v. Jimmy John’s Franchise LLC*, Circuit Court of Cook County, Illinois, No. 2016-CH-07746, the Illinois Attorney General’s office argued Jimmy John’s had no legitimate business interest to impose non-compete agreements on its low-wage hourly workers.⁵³ Illinois Attorney General Lisa Madigan declared the settlement in this case helped “ensure Illinois’ workers have freedom to change jobs in order to seek better wages, further their careers and improve their lives.”⁵⁴ Jimmy John’s also entered into a settlement agreement with the Attorney General of New York.⁵⁵ The Washington Attorney

⁴⁸ See Nat’l Lab. Relations Board, Memo of Understanding (July 19, 2022), at <https://www.nlr.gov/sites/default/files/attachments/pages/node-7857/ftcnlrb-mou-71922.pdf>.

⁴⁹ See Justice Department Requires Substantial Divestitures and Waiver of Non-Compete for S&P to Proceed with its Merger with IHS Markit, Dep’t. of Just. (Nov. 12, 2021), <https://www.justice.gov/opa/pr/justice-department-requires-substantial-divestitures-and-waiver-non-compete-sp-proceed-its>.

⁵⁰ See Complaint, Arko Coro., FTC Docket No. 211-0087 at https://www.ftc.gov/system/files/ftc_gov/pdf/2110087GPMComplaint.pdf.

⁵¹ See *id.* at 4.

⁵² See Health Care Company Indicted for Labor Collusion, Fed. Trade Comm’n (Jan. 7, 2021), <https://www.justice.gov/opa/pr/health-care-company-indicted-labor-market-collusion>; DaVita Inc. and Former CEO Indicted in Ongoing Investigation of Labor Market Collusion in Health Care Industry (July 15, 2021), <https://www.justice.gov/opa/pr/davita-inc-and-former-ceo-indicted-ongoing-investigation-labor-market-collusion-health-care>; Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements, Dep’t. of Just. (Dec. 21, 2010), <https://www.justice.gov>

[/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation](https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation); Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements, Dep’t. of Just. (Sept. 24, 2010), <https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee>.

⁵³ See Madigan Announces Settlement With Jimmy John’s For Imposing Unlawful Non-Compete Agreements, Illinois State Office of the Att’y Gen. (Dec. 7, 2016), https://illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html.

⁵⁴ See *id.*

⁵⁵ See A.G. Schneiderman Announces Settlement With Jimmy John’s To Stop Including Non-Compete Agreements In Hiring Packets, New York State Office of the Att’y Gen. (June 22, 2016),

General's office investigation into Jimmy John's is said to have eliminated hundreds of no-poach agreements nationwide.⁵⁶

State Attorneys General have also led the way with regard to no-poach agreements that impact diverse consumers, uncovering no-poach provisions in franchise agreements of multiple fast-food companies that allegedly harmed employees and possibly franchisees. The Attorneys General asserted the "no-poach agreements hurt low-wage workers by limiting their ability to secure better paying jobs." Workers were alleged to have been prevented from switching jobs and locked into low-paying positions.⁵⁷ The Attorneys General secured settlements with several fast food companies including Dunkin', Arby's, Five Guys, and Little Caesars.⁵⁸ The companies were required to "stop including no-poach provisions in any of their franchise agreements and to stop enforcing any franchise agreements already in place."⁵⁹ Additionally, while not part of the settlement agreement, the Attorneys General also investigated whether no-poach agreements may harm franchisees who are prevented from hiring skilled employees from their competitors.

Illinois, Nevada, Oregon, Main, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, California, the District of Columbia and Washington have all passed laws over the past several years to bar non-compete agreements based on income, or outright absent limited exceptions.⁶⁰ Lawmakers have taken differing approaches to setting limitations based on income or status as an employee or independent contractor, or otherwise providing exceptions to their bans.⁶¹ States' approaches also varied as to which clauses are covered, who can enforce the laws, the burden of proof, and the extent of civil penalties.⁶² Recognizing the challenges created by this wide-ranging regulatory approach, Attorney Generals from 19 states joined to ask the FTC for a more comprehensive regulatory path through federal rulemaking.⁶³

Occupational Licensing

<https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete>.

⁵⁶ See AG Report: Ferguson's initiative ends no-poach practices nationally at 237 corporate franchise chains, Washington State Office of the Attorney General (June 16, 2020), <https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate>.

⁵⁷ Attorney General Letitia James Joins Multistate Settlement To Cease Fast Food Usage Of No-Poach Agreements, New York State Office of the Att'y Gen. (Mar. 12, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-letitia-james-joins-multistate-settlement-cease-fast-food-usage>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Transcripts, Fed. Trade Comm'n, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021), <https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Letter from Keith Ellison, Minnesota Attorney General, to Joseph Simons, Chairman, Fed. Trade Comm'n (Nov. 15, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/11%2015%2019%20Multistate%20FTC%20Non-Compete%20Letter%20FINAL.pdf>.

Occupational licensing is required in various professions, such as for lawyers, doctors, nurses, florists and cosmetologists. For many of these professions, occupational licensing is necessary to protect public health and safety. Over the years, however, there has been a significant increase in the number of occupations requiring licenses, and in some of these cases such licensing is said to have resulted in more harm to competition and livelihoods with little net benefit for protecting the public. Instead, in some industries, a state-sponsored occupational licensing requirement “reduces market competition and allows incumbents to collect higher profits than they would in the absence of the licensing.”⁶⁴

In 2017, the FTC created the Economic Liberty Task Force to address licensing regimes that suppress competition with “unnecessary and overbroad restrictions.”⁶⁵ The purpose of the Task Force was to evaluate occupational licensing requirements that were in the net causing more harm to competition in their relevant industries rather than protecting public health and safety. One industry of competition advocacy focus for the FTC that impacted the Black community was natural hair braiding.

Natural hair braiding is a “way of caring for tightly coiled Afro-textured hair naturally,” without chemical or heat products.⁶⁶ Some states consider hair braiding to be a part of cosmetology and therefore require natural hair braiders to obtain a cosmetology license. The purpose of a cosmetology license is to ensure public safety and proper sanitation training.⁶⁷ However, imposing such a burden on natural hair braiders does not appear to achieve those goals, while it also harms Black entrepreneurs, particularly Black women, and Black consumers in the process.

First, there is little public health and safety risk involved in braiding natural hair. It does not require the use of any dyes, chemicals, heat instruments or sharp instruments.⁶⁸ Second, the training required to be licensed had little relevance and application to natural hair braiders. The cosmetology schools’ curriculum provided little to no education and skills training on

⁶⁴ Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm’n, *From Hammurabi to Hair Braiding: The Ongoing Struggle for Economic Liberty*, Remarks at Institute for Justice National Economic Liberty Forum at 2 (Apr. 28, 2016), https://www.ftc.gov/system/files/documents/public_statements/946853/160428instituteforjustice.pdf.

⁶⁵ *FTC Launches New Website Dedicated to Economic Liberty*, Fed. Trade Comm’n, at 2-3 (Mar. 16, 2017), <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-launches-new-website-dedicated-economic-liberty>.

⁶⁶ Angela C. Erickson, *Barriers to Braiding: How Job-Killing Licensing Laws Tangle Natural Hair Care in Needless Red Tape*, Institute for Justice (July 2016), https://ij.org/wp-content/uploads/2016/07/Barriers_To_Braiding-2.pdf.

⁶⁷ Edward J. Timmons & Catherine Konieczny, *Untangling Hair Braider Deregulation in Virginia*, *Cato Journal* (Fall 2018), <https://www.cato.org/cato-journal/fall-2018/untangling-hair-braider-deregulation-virginia>.

⁶⁸ *Braiding Freedom, Standing Up for Natural Hair Braiders’ Right to Earn an Honest Living*, <http://braidingfreedom.com/braiding-initiative/standing-up-for-natural-hair-braiders-right-to-earn-an-honest-living/>.

African/Black hair braiding and natural styling.⁶⁹ Instead, hair braiders in some states were required to get 2,000 hours of training and pay about \$20,000 in tuition that had little value and relevance to the services they wished to offer.⁷⁰

Such licensing requirements can function as barriers to entry for natural hair braiders. For example, in 2019, in Louisiana there were 19 hair braiders while neighboring Mississippi had 2,600.⁷¹ The reason for the large variance—Louisiana imposes burdensome hair braiding licensing requirements whereas Mississippi exempts hair braiders from licensure. The Cato Institute found that after Virginia removed its restrictive hair braiding licensure, “Virginia counties experienced beauty shop growth at a rate approximately 7 percent higher than that in contiguous counties in bordering states.”⁷²

Today, about 18 states and Washington, DC continue to require either a cosmetology or braiding license for natural hair braiders.⁷³ In those states, removing license requirements could mean more braiders and more competition leading to lower prices and better access to services for consumers. Additionally, it would reduce economic barriers for Black entrepreneurs, especially Black women.

The Gig Economy and Independent Contractors

In 2021, 31 percent of current or recent gig workers (defined as those who receive work from digital platforms) identified such work as their “main job.”⁷⁴ According to a Pew report, Hispanic, Black, and Asian demographics made up the majority of gig workers in 2021, and lower-income Americans are more likely to participate in the gig economy.⁷⁵ As to the broader category of independent contracting, the number of “occasional independent workers” has been on the rise— from 12.9 million in 2017 to 23.9 million in 2021.⁷⁶ Between 2001 and 2016, one study has

⁶⁹ Tanya A. Christia, *Twisting the Dream*, Essence (Oct. 9, 2019), <https://www.essence.com/feature/natural-hair-braiding-regulations/>.

⁷⁰ Braiding: IJ Untangles Regulations for Natural Hair Braiders, Inst. for Justice (last accessed Aug. 8, 2022), <https://ij.org/issues/economic-liberty/braiding/>.

⁷¹ Dan Fagan, *Dan Fagan: Louisiana's rules on hair braiding licenses are 'oppressive and stifling,'* The Advocate (July 13, 2019), https://www.theadvocate.com/baton_rouge/opinion/dan_fagan/article_3534fd72-a405-11e9-a4d7-a3f68d52733e.html.

⁷² Edward J. Timmons and Catherine Konieczny, *Untangling Hair Braider Deregulation in Virginia*, Cato Journal (Fall 2018), <https://www.cato.org/cato-journal/fall-2018/untangling-hair-braider-deregulation-virginia>.

⁷³ Braider Opportunity and Freedom Act, Inst. for Justice, <https://ij.org/activism/legislation/model-legislation/model-braiding-law/> (last accessed July 29, 2022)

⁷⁴ Pew Research Center, *The State of Gig Work in 2021* (Dec. 8, 2021), <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>

⁷⁵ *Id.*

⁷⁶ Statista, Number of people working independently in the U.S. from 2017 to 2021, by frequency, (Oct. 6, 2021).

estimated that 55 percent of the increase in independent contracting was driven by female workers.⁷⁷

The protections available—and not available to—gig workers and independent contractors impact a number of worker (and thus consumer) demographics. Section 6 of the Clayton Act and certain sections of the Norris-LaGuardia Act exempt labor unions from antitrust scrutiny when they engage in protected activities such as strikes, and courts have recognized non-statutory exemptions so that collective bargaining does not run afoul of the antitrust laws.⁷⁸ However, courts have often (though not always) interpreted these provisions to encompass only those workers formally designated as employees. As FTC Chair Lina Khan emphasized in testimony submitted to the Senate in September 2021, workers who have “their work dictated by a firm yet are classified as non-employees” can face antitrust liability if they attempt to organize.⁷⁹ In that testimony, Chair Khan indicated the FTC would not pursue cases against such workers, but she noted that private plaintiffs remain free to bring such lawsuits. That, plus the fact that agency enforcement priorities inevitably change, can “chill worker organizing,” according to the Department of Justice, which set forth that view in an amicus brief to the National Labor Relations Board (NLRB) in a matter where the NLRB is reconsidering the standards for designating workers as employees.⁸⁰ In its Atlanta Opera amicus brief, the DOJ notes that courts have typically interpreted the labor exemptions to apply only to employees, and accordingly that the NLRB’s definition of an employee can matter a great deal to whether workers are able to organize.⁸¹ Furthermore, the amicus brief states that a lack of clarity can incentivize employers to purposefully misclassify employees.⁸²

The law in this space is still in flux. In April 2022, the First Circuit ruled that the Clayton Act and Norris-LaGuardia Act labor exemptions actually do protect independent contractors so long as a strike or labor dispute is about wages for labor, as opposed to prices for the sale of goods.⁸³ The Protect the Right to Organize Act (PRO Act), currently pending in Congress, would adopt California’s more generous standard for classifying workers as employees into federal law with regards to union organizing. If adopted, it could expand the labor exemption’s applicability to workers who before were characterized as independent contractors.⁸⁴

⁷⁷ Lim, Miller, Risch & Wilking, *Independent Contractors in the U.S.: New Trends from 15 Years of Administrative Tax Data*, at 29 (July 2019).

⁷⁸ Statement of Interest of the United States, at 1-2, *William Morris Endeavor Entertainment v. Writers Guild of America*, 478 F. Supp. 3d 932 (C.D. Cal. 2020).

⁷⁹ Lina Khan, Letter from FTC Chair Lina M. Khan to Chair Cicilline and Ranking Member Buck Regarding “Reviving Competition, Part 4: 21st Century Antitrust Reforms and the American Worker,” at 2 (Sep. 28, 2021).

⁸⁰ Amicus Brief of the U.S. Dep’t. of Just., at 5, *The Atlanta Opera*, 371 NLRB No. 45 (Dec. 27, 2021).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314-15 (1st Cir. 2022).

⁸⁴ Scott Nelson & Michael Redd, *Labor and Employment Perspectives on the Gig Economy – How the Pro Act and a New Labor Board Might Impact Gig Workers and their Employers*, Competition Policy International (July 20, 2022).

Until the law settles on the question of labor exemptions for independent contractors, independent contractors will face significant uncertainty should they attempt to organize.

CONSUMER PROTECTION

While using antitrust law to remedy harms to diverse communities is a relatively new approach, agencies are accustomed to using consumer protection law to help protect these communities. The FTC's mission is to protect all consumers from unfair and deceptive practices.⁸⁵ Given that agency research has found that consumers of color are more likely to be victims to certain types of fraud,⁸⁶ protecting these consumers is a necessary component of the FTC's mission. The FTC has accordingly brought many enforcement actions to halt conduct that disproportionately affects minority communities across various economic sectors.

The FTC has also undertaken research projects to better understand how fraud and other harmful practices affect communities. One recent FTC survey, for example, found that Blacks and Hispanics were more likely to have experienced fraud than non-Hispanic Whites.⁸⁷ FTC staff have also analyzed past FTC cases to determine that heavily Black areas have higher rates of victimization, including particularly high victimization for payday loan and student debt relief frauds.⁸⁸ Furthermore, the FTC has also published data from its Consumer Sentinel Network dataset,⁸⁹ which academics, researchers, and practitioners can join with other data to analyze how fraudulent conduct has impacted diverse communities.

Predatory Lending

As of 2017, "Latinx and African-Americans owed \$2.25 trillion in household debt, representing 17.3% of the \$13 trillion aggregate household debt."⁹⁰ Because mortgages are the largest component of household debt, even a single basis point of discrimination can have significant impact. Although the mortgage lending industry has been regulated and monitored for civil rights violations for decades, studies of mortgage lending show that, on average, "[a]ccepted

⁸⁵ *Serving Communities of Color: A Staff Report on the Federal Trade Commission's Efforts to Address Fraud and Consumer Issues Affecting Communities of Color*, Fed. Trade Comm'n (Oct. 2021), https://www.ftc.gov/system/files/documents/reports/serving-communities-color-staff-report-federal-trade-commissions-efforts-address-fraud-consumer/ftc-communities-color-report_oct_2021-508-v2.pdf.

⁸⁶ *Combating Fraud in African-American and Latino Communities: The FTC's Comprehensive Strategic Plan*, Fed. Trade Comm'n, at 1 (June 15, 2016), <https://www.ftc.gov/system/files/documents/reports/combating-fraud-african-american-latino-communities-ftcs-comprehensive-strategic-plan-federal-trade/160615fraudreport.pdf> (hereinafter "Combating Fraud Report").

⁸⁷ Keith B. Anderson, *Mass Market Consumer Fraud in the United States: A 2017 Update*, Staff Report of the Bureau of Economics at the FTC, at 69 (Oct. 2019), <https://www.ftc.gov/system/files/documents/reports/mass-market-consumer-fraud-united-states-2017-update/p105502massmarketconsumerfraud2017report.pdf>.

⁸⁸ Devesh Raval, *Who is Victimized by Fraud? Evidence from Consumer Protection Cases*, Fed. Trade Comm'n, at 19-20 (June 2, 2022), <https://deveshraval.github.io/victim.pdf>.

⁸⁹ Explore Data, Fed. Trade. Comm'n, <https://www.ftc.gov/news-events/data-visualizations/explore-data> (last visited July 29, 2022).

⁹⁰ Robert Bartlett, Adair Morse, et al., *Consumer-Lending Discrimination in the FinTech Era* (Nov. 2019), <https://faculty.haas.berkeley.edu/morse/research/papers/discrim.pdf>.

Latinx and African-American borrowers pay 7.9 and 3.6 basis points more in interest for home-purchase and refinance mortgages, respectively, because of discrimination,” at a cost to borrowers of more than \$765 million in extra interest per year.⁹¹ A 2021 study found that lenders gave fewer loans to Black applicants than White applicants even when their annual incomes exceeded \$100,000 and they had the same debt ratios, and high-earning Black applicants with less debt were rejected more often than high-earning White applicants who have more debt.⁹²

In recent years, enforcement actions have been brought against mortgage lenders alleging discrimination against African Americans and Latinos in consumer lending.⁹³ For instance, in July 2022, the Bureau of Consumer Financial Protection (CFPB), along with the DOJ, filed a complaint against a mortgage lender engaged in unlawful discrimination on the basis of race, color, or national origin against applicants and prospective applicants, by among things, redlining majority-minority neighborhoods in the Philadelphia Metropolitan area.⁹⁴ Similarly, the FTC has taken numerous actions against mortgage lenders that target African-American and Latinx consumers, including a mortgage loan modification operation that deceived distressed homeowners by falsely promising to prevent foreclosure and make their mortgages more affordable⁹⁵ and a lender that charged higher origination fees to African-American and Latinx consumers than non-Latinx White consumers, in violation of the Equal Credit Opportunity Act.⁹⁶

The payday loan industry also has a history of practices that adversely impact communities of color with low incomes.⁹⁷ A recent analysis of victim data from 23 law enforcement actions

⁹¹ See *id.* (noting discriminatory lending practices represent 11.5% of lenders’ average profit per loan).

⁹² Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, The Markup (Aug. 25, 2021), <https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms> (Aug. 25, 2021).

⁹³ See Combating Fraud Report, *supra* Note 86, at 12 n.59.

⁹⁴ Complaint, *Consumer Fin. Prot. Bureau v. Trident Mortgage Co., LP*, No. 2:22-cv-02936 (E.D.Pa., filed Jul. 27, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_trident_complaint_2022-07.pdf.

⁹⁵ See *FTC v. Consumer Defense LLC, et al.*, No. 2:18-cv-00030 (D. Nev., filed Jan. 19, 2018), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/172-3021-consumer-defense-llc-et-al>.

⁹⁶ See *FTC v. Gateway Funding Diversified Mortgage Services, L.P.*, 2:08-cv-05805-JD (E.D. Pa. Dec. 16, 2008), available at <https://www.ftc.gov/enforcement/cases-proceedings/0623063/Gateway-funding-diversified-mortgage-services-lp-gateway>. See also *FTC v. Golden Empire Mortgage, Inc.*, CV09-03227 (SHx) (C.D. Cal. May 7, 2009), available at <https://www.ftc.gov/enforcement/cases-proceedings/0623061/golden-empire-mortgage-inc-corporation-et-al-ftc>.

⁹⁷ See Aracely Panameño & Keith Corbett, *Wealth-Stripping Payday Loans Trouble Communities of Color*, Center for Responsible Lending (Oct. 2, 2008), <https://www.responsiblelending.org/payday-lending/research-analysis/az-payday-communities-of-color-10-2-final.pdf>; Graciela Aponte-Diaz, *State Research Shows That Payday Lending Stores Are Heavily Concentrated In African American and Latino Communities Across California*, Center for Responsible Lending (Dec. 9, 2016), <https://www.responsiblelending.org/media/state-research-shows-payday-lending-stores-are-heavily-concentrated-african-american-and>.

confirmed that “heavily black communities have substantially higher rates of victimization across almost all of the case groups.”⁹⁸

The FTC has sought redress from payday lenders that employ unfair, deceptive, and abusive debt collection practices in violation of the FTC Act; Truth In Lending Act; Electronic Fund Transfer Act; and Credit Practices Rule,⁹⁹ including actions against companies that locate themselves on Native American reservations, purportedly in an attempt to evade state and federal consumer protection laws.

One example of such an action came in 2020, when the FTC sued various companies that were operating a payday loan operation.¹⁰⁰ These companies allegedly operated by promising consumers, often those without much cash, short-term loans that would be repaid on a fixed payment schedule. However, according to the FTC complaint, consumers’ payments were only going towards interest, not paying down the principal, leaving them in debt longer than expected.¹⁰¹ Ultimately, the defendants settled the case in a \$114 million judgment, along with a final order banning them from future lending.

Working jointly, the FTC and DOJ secured a \$1.3 billion judgment halting a payday lending scheme operated by AMG Services, Inc. and Scott A. Tucker.¹⁰² According to the complaint, AMG Services and Tucker targeted consumers in distress. Claiming that they would charge payday loan borrowers a one-time fee, the defendants made multiple unauthorized withdrawals from consumer bank accounts and then falsely threatened those consumers with arrest, prosecution, or imprisonment for failing to pay.¹⁰³

Another area disproportionately affecting non-White consumers is student loan servicing. The CFPB has brought multiple actions against several student loan providers, including, for example, Discover Financial Services. In its latest action against Discover,¹⁰⁴ the CFPB found

⁹⁸ Dr. Davesh Raval, *Who is Victimized by Fraud? Evidence from Consumer Protection Cases*, Fed. Trade Comm’n, at 19 (Jun. 2, 2020), available at <https://deveshraval.github.io/victim.pdf>. Studies have shown that debt collection efforts and lawsuits impact a significantly higher percentage of minorities. See Urban Institute, *Debt in America: An Interactive Map*, <https://apps.urban.org/features/debt-interactive-map/>

?type=overall&variable=pct_debt_collections (Mar. 31, 2021) (credit bureau data indicates that 39% of people in predominantly communities of color have a debt in collections, compared with only 24% of those in predominantly White communities).

⁹⁹ Payday Lending, Fed. Trade Comm’n, <https://www.ftc.gov/news-events/topics/consumer-finance/payday-lending> (last visited Aug. 8, 2022).

¹⁰⁰ *FTC v. Lead Express, Inc.*, No. 2:20-cv-00840-JAD-NJK (D. Nev. filed May 11, 2020), available at <https://www.ftc.gov/enforcement/cases-proceedings/192-3208/lead-express-inc-harvest-moon-financial>.

¹⁰¹ Complaint, *Lead Express*, available at https://www.ftc.gov/system/files/documents/cases/1923208harvestmooncomplaint_0.pdf.

¹⁰² *FTC v. AMG Services, Inc.*, No. 212-cv-00536 (D. Nev., filed Apr. 12, 2012), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/112-3024-x120026-amg-services-inc>.

¹⁰³ Complaint, *AMG Services, Inc.*, available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120402amgcmpt.pdf>.

¹⁰⁴ CFPB Orders Discover Bank to Pay \$18.5 Million for Illegal Student Loan Servicing Practices, CFPB, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-discover-bank-to-pay-18-5-million-for-illegal-student-loan-servicing-practices/>.

that Discover misrepresented the minimum student loan payments consumers owed, the amount of interest consumers paid, and other material information, such as interest rates, payments, and due dates. The CFPB also found that Discover engaged in unfair acts and practices by withdrawing payments from consumers' accounts without valid authorization and by canceling or not withdrawing payments without notifying consumers. The FTC has been similarly aggressive. Since 2016, the FTC has brought dozens of enforcement actions against student loan debt relief operations, both individually and jointly with other states and the District of Columbia.

Auto-Financing

Another area where consumers of color are disproportionately affected is the sale and financing of cars. Studies have shown that non-White consumers can end up paying higher prices due to discrimination in auto financing.¹⁰⁵

As access to reliable transportation is essential to employment, education, housing, and necessary services such as healthcare, grocery stores, and banks, addressing discriminatory behavior in the auto-financing arena is critical. A report issued by the National Fair Housing Alliance found discriminatory treatment in auto lending to be pervasive. The report found that 62.5 percent of the time, non-White consumers who were more qualified than their White counterparts still received higher pricing offers from the dealer.¹⁰⁶ On average, non-White consumers paid over \$2600 more for their vehicle than the less-qualified White participants and were offered fewer financing options, rebates, and lower interest rates.¹⁰⁷ In addition to the pricing differences above, non-White consumers were given dismissive and disrespectful treatment more frequently than White testers. Such rates of discriminatory treatment are concerning and comparatively rare in similar audit-style investigations conducted in the mortgage lending industry. The regular enforcement of robust auto lending regulations, particularly those that are designed to fight discrimination, can benefit marginalized communities.

The question of unfair dealer markups on auto loans has been studied extensively since the early 1990s when Yale professor Ian Ayres first sent testers of various races and ethnicities to new car dealerships in Chicago and found that Black male testers were asked to pay more than twice the markup of White male testers.¹⁰⁸ Ayres conducted a follow-up study that corrected for weaknesses in the original methodology and used a new quantitative method of identifying the

¹⁰⁵ John W. Van Alst, *Time to Stop Racing Cars: The Role of Race and Ethnicity in Buying and Using a Car*, National Consumer Law Center (Apr. 2019), https://www.nclc.org/images/pdf/car_sales/report-time-to-stop-racing-carsapril2019.pdf; *see also* *Discrimination When Buying a Car: How The Color of Your Skin Can Affect Your Car-Shopping Experience*, National Fair Housing Alliance (Jan. 2018), <https://nationalfairhousing.org/wp-content/uploads/2018/01/Discrimination-When-Buying-a-Car-FINAL-1-11-2018.pdf> (hereinafter "NFHA Report").

¹⁰⁶ NFHA Report, *supra* Note 105, at 4.

¹⁰⁷ *Id.* (surveying eight dealerships in eastern Virginia, and using standard testing methods, sending a white person and a non-white person with better credit rating to the same dealership).

¹⁰⁸ Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

causes of discrimination; the results were the same, establishing that auto dealers systematically offered lower prices to White testers than to testers of other races and ethnicities.¹⁰⁹

A similar conclusion was reached in 2003, when a Vanderbilt professor investigated more than 1.5 million General Motors Acceptance Corporation (“GMAC”) loans and found that African-American customers were three times as likely to be charged a marked up interest rate on their auto loans as equally qualified White customers.¹¹⁰ According to the study, racial discrimination in auto lending was a rampant national phenomenon, regardless of the profession of the customer or the model of the car purchased.¹¹¹ This discrimination resulted in African-American customers paying hundreds of dollars more per month in auto payments, a phenomenon that could not be explained by creditworthiness or other legitimate business factors.¹¹²

Recently, both the CFPB and DOJ concluded that car dealerships’ practice of marking up interest rates for auto loans results in discrimination for minority buyers.¹¹³ In *Liberty Chevrolet*, an auto dealership and its general manager were found to have charged the average African-American and Latinx borrowers about \$163 and \$211 more in interest, respectively, than similarly situated White borrowers. According to the complaint, the defendants instructed employees to target these groups, and not White customers.¹¹⁴

Similarly, in *Tate’s Auto*, a group of four auto dealerships and their owner were alleged to have targeted citizens of the Navajo Nation and falsified consumers’ income and down payment information on vehicle financing applications and contracts.¹¹⁵ The FTC has brought actions against other auto dealers alleged to have engaged in deceptive advertising, including Spanish-language advertising. These include dealers that target non-English speakers by making enticing claims about sales price, monthly payment amount, and down payment amount in Spanish and other languages, while hiding additional material terms in English.¹¹⁶

¹⁰⁹ Ian Ayres, Further Evidence Of Discrimination In New Car Negotiations And Estimates Of Its Cause, 94 Mich. L. Rev. 109 (1995).

¹¹⁰ Mark A. Cohen, Report on the Racial Impact of GMAC’s Finance Charge Markup Policy, Aug. 29, 2003.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ NFHA Report, *supra* Note 105, at 8.

¹¹⁴ *FTC v. Liberty Chevrolet, Inc.*, No. 1:20-cv-03945 (S.D.N.Y. filed May 27, 2020), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3238-bronx-honda>.

¹¹⁵ *FTC v. Tate’s Auto Center of Winslow, Inc.*, No. 3:18-cv-08176 (D. Ariz., filed Aug. 1, 2018), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/162-3207-x180041-tates-auto-center>.

¹¹⁶ *FTC v. Universal City Nissan, Inc., et al.*, No. 2:16-cv-07329 (C.D. Cal., filed Sep. 29, 2016), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/142-3008-x160055-universal-city-nissan-inc-et-al> (alleging dealership used “yo-yo” financing tactics, i.e. using deception or other unlawful pressure tactics to coerce consumers that have signed contracts and driven off the dealership lots into accepting a different deal).

For-Profit Colleges

Research also shows that non-White students are targeted by for-profit colleges that use deceptive advertising to attract students who are ill-equipped to repay student loan debt and are likely to default.

For-profit colleges target non-White consumers effectively by promising access to economic opportunities that those consumers—many of whom are from lower-income neighborhoods—would not find elsewhere.¹¹⁷ Non-White consumers then enroll in programs at these for-profit institutions, only to find the promised opportunities have evaporated, leaving crushing debt behind.¹¹⁸ University of Phoenix, a well-known provider of online college degrees, used deceptive advertising to give the false impression that the school worked with Microsoft, Yahoo, Amazon, and other Fortune 500 companies to create job opportunities for its students.¹¹⁹ Similarly, Career Education Corporation, a vocational school, deceived lead generators that posed online as official U.S. military recruiters or as job-finding services.

A non-profit organization, the Student Borrower Protection Center, synthesized the problem of predation by for-profit colleges:¹²⁰

Predatory institutions and actors have capitalized on the language of the “education gospel” and the policies undergirding it to target low-income consumers, veterans, and communities of color with the allure of opportunity. These institutions often promise economic opportunity, yet in too many cases, the actual products they offer leave students worse off and with economic mobility further out of reach.¹²¹

Thousands of students enroll in for-profit colleges each year, with non-White students making up the majority.¹²² Nearly half of these students default on their student loans within 12 years,

¹¹⁷ Genevieve Bonadies, Joshua Rovenger, et al., *For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather Than Educate*, Harvard Law Review Blog (Jul. 30, 2018), <https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate/>.

¹¹⁸ Michael T. Nietzel, *A New Report Reveals The False Promises of For-Profit Colleges*, Forbes (Mar. 8, 2021), <https://www.forbes.com/sites/michaelt Nietzel/2021/03/08/a-new-report-reveals-the-false-promises-of-for-profit-colleges/?sh=5c4c8fa435fc>.

¹¹⁹ *FTC v. Univ. of Phoenix, Inc.*, No. 2:19-cv-05772 (D. Ariz., filed Dec. 10, 2019), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3231-university-phoenix-inc>.

¹²⁰ *Mapping Exploitation: Examining For-Profit Colleges as Financial Predators in Communities of Color*, The Student Borrower Protection Center, at 5 (July 2021), <https://protectborrowers.org/wp-content/uploads/2021/07/SBPC-Mapping-Exploitation-Report.pdf> (hereinafter “Mapping Exploitation”).

¹²¹ *Id.* See also *id.* at 6 (“Due to the intergenerational ways that wealth reproduces itself, Black and Latino borrowers are less able to rely on familial wealth to pay for their postsecondary education and are left to take on student debt at a rate that far outpaces their white peers”).

¹²² Board of Governors of the Federal Reserve System, *Survey of Household Economics and Decisionmaking* (May 23, 2022), <https://www.federalreserve.gov/consumerscommunities/shed.htm>. See also *Mapping Exploitation*, *supra* Note 120, at 9 (“For-profit schools enroll disproportionately high numbers of Black and Latino students, who account for nearly half of all for-profit students yet only one-third of all undergraduate students.”); *id.* at 9, n.68 (noting that majority-black zip codes are over 75% more likely to have a for-profit college; majority-Latinx zip codes are over 110% more likely to have a for-

leaving many with a debt that follows them throughout their lives and a financial burden that is extremely difficult to escape.¹²³

This rate of default among all for-profit entrants is nearly four times that of public two-year entrants (47 percent versus 13 percent), and non-White consumers bear the brunt.¹²⁴ Loan burdens have the potential to impact other parts of a student's life, making it more difficult to pay bills, buy a home, or save for retirement. This outcome results in a population that is financially worse off than when they first enrolled and disproportionately impacts people of color.¹²⁵

Scammers

Scammers use the promise of economic opportunity to target and exploit non-White consumers through a variety of scams. Pyramid schemes and other business opportunities are prevalent in non-White communities, particularly in African-American church and Latinx immigrant communities. These scams prey on the need for financial stability through debt-related frauds—credit repair scams, debt relief schemes, mortgage relief frauds, and advance fee loan offers.¹²⁶

Certain scams deliberately target the Latinx community by using Spanish language marketing, and law enforcement agencies have aggressively targeted these activities.¹²⁷ Other offers for business opportunities sometimes promote the possibility of earning money from home and without the need for skilled labor. For example, the FTC sued a telemarketer that misrepresented to Spanish-speaking women the opportunity to make money selling high-end designer merchandise.¹²⁸ Another telemarketing scheme targeted Spanish-speaking consumers with deceptive and abusive tactics to sell them products for learning English. The scheme

profit college; yet majority-white zip codes are almost 30% less likely to have a for-profit college) (emphasis added).

¹²³ Judith Scott-Clayton, *The Looming Student Loan Default Crisis is Worse Than We Thought*, Brookings Institute (Jan. 11, 2018), <https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/> (projecting default rates out through year 20, data suggests that “70 percent of black borrowers may ultimately experience default” and “the default rate among black graduates is more than five times the rate of white graduates (21 versus 4 percent)”).

¹²⁴ *Id.* (“[O]nly 4 percent of white graduates who never attended a for-profit defaulted within 12 years of entry, compared to 67 percent of black dropouts who ever attended a for-profit.”).

¹²⁵ Aspen Institute, *Worse Off Than When They Enrolled: The Consequence of For-Profit Colleges for People of Color* (Mar. 19, 2019), <https://www.aspeninstitute.org/blog-posts/worse-off-than-when-they-enrolled-the-consequence-of-for-profit-colleges-for-people-of-color/>.

¹²⁶ Combating Fraud Report, *supra* Note 86, at 7-22.

¹²⁷ See, e.g., *FTC v. First Time Credit Solutions*, CV15-01921-DDP-PJW (C.D. Cal. Mar. 16, 2015) available at <https://www.ftc.gov/enforcement/cases-proceedings/152-3114/first-time-credit-solution-corp-ftc-credit-solutions> (alleging the defendants promised credit repair services using phony affiliation with the FTC); *FTC v. Rincon Management Services LLC*, 511-cv01623-VAP-SP (C.D. Cal. Oct. 11, 2011) available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/10/111026rinconcmpt.pdf> (alleging the defendants falsely told Spanish-speaking consumers that they would be sued or arrested if they did not pay debts); *FTC v. RTB Enterprises, Inc.*, 4:14-cv-01691 (S.D. Tex. June 17, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/122-3086/rtb-enterprises-inc> (alleging debt collector bullied Spanish-speakers into paying debts and unnecessary fees).

¹²⁸ Combating Fraud Report, *supra* Note 86, at 17 n.63.

falsely represented that the sellers were affiliated with the government or a centro de ayuda (“help center”), or a Spanish-language radio station.¹²⁹

One scam that is prevalent among immigrant communities (which are often non-White) involves prepaid cards. This scam targets those who might not have a bank account because the prepaid cards can function as a substitute to a card issued by a bank. Prepaid cards are an important tool for consumers who are financially distressed or lack the credit rating to access traditional banking or financial services. Yet scammers routinely exploit these vulnerable consumers. For example, in November 2016, NetSpend settled with the FTC over allegations that it falsely marketed prepaid payment cards to African-Americans and Spanish-speaking consumers who might not be fully integrated into the formal banking system.¹³⁰ Rather than being able to use the prepaid cards as expected, consumers loaded funds onto the cards and then were unable to use them, all while those funds went to “inactivity” fees.¹³¹

Many of these scams are made even more effective because the scammers impersonate government officials to intimidate consumers into compliance. Scammers use threats of fines, arrest or deportation to frighten consumers (in many cases, immigrants) into making a quick payment.¹³² Another area of concern is the practice of government impersonation, which can target non-White communities. That was the case in the FTC’s complaint against *American Immigration Center*, where defendants had created websites to mimic U.S. immigration or citizenship authorities. Those websites ended up taking funds from consumers that were supposed to be used towards immigration application fees.¹³³

Bias in AI

As House Representative Yvette Clarke of New York noted in support the Algorithmic Accountability Act of 2022, “[w]hen algorithms determine who goes to college, who gets healthcare, who gets a home, and even who goes to prison, algorithmic discrimination must be treated as the highly significant issue that it is.”¹³⁴ It is not only the ubiquity of these tools that is of concern to lawmakers and enforcers, but also the long-term and far-reaching effects of algorithmic bias. “The act of designating someone as a likely credit risk (or bad hire, or reckless

¹²⁹ *Id.* at 13 (“Through the FTC’s Criminal Liaison Unit, the FTC referred this case to the DOJ and in 2020, five Peruvian nationals connected to the operation were extradited to the United States and faced a 55-count indictment of conspiracy, mail fraud, wire fraud, and extortion.”).

¹³⁰ *Id.* at 12.

¹³¹ *FTC v. NetSpend Corp.*, No. 1:16-cv-04203 (N.D. Ga., Nov. 10, 2016), *available at* <https://www.ftc.gov/legal-library/browse/cases-proceedings/132-3258-x170006-netspend-corporation>.

¹³² *See, e.g., FTC v. Centro Natural*, No. 14-23879-CIV (S.D. Fla. Oct. 20, 2014); *FTC v. Oro Marketing*, No. 2:13-CV-08843 (C.D. Cal. Dec. 3, 2013).

¹³³ *FTC v. Forms Direct, Inc., et al.*, No. 3:18-cv-06294 (N.D. Cal., Oct. 16, 2018), *available at* <https://www.ftc.gov/legal-library/browse/cases-proceedings/152-3272-american-immigration-center>.

¹³⁴ *See* Wyden, Booker and Clarke Introduce Algorithmic Accountability For Automated Decision Systems, Office of Sen. Ron Wyden (Feb. 3, 2022), <https://www.wyden.senate.gov/news/press-releases/wyden-booker-and-clarke-introduce-algorithmic-accountability-act-of-2022-to-require-new-transparency-and-accountability-for-automated-decision-systems>.

driver) raises the cost of future financing (or work, or insurance rates), increasing the likelihood of eventual insolvency or un-employability.”¹³⁵

Several lawmakers asked the FTC in June 2022 to establish rulemaking to use the full scope of its authority to protect communities of color and immigrants from “damaging practices involving online data and artificial intelligence.”¹³⁶ New bills, including the American Data Privacy and Protection Act (H.R. 8152) take aim at practices that handle data “in a manner that discriminates in or otherwise makes unavailable the equal enjoyment of goods or services on the basis of race, color, religion, national origin, sex, or disability.”¹³⁷ Legislative proposals and enforcement actions have been aimed at addressing discrimination in both algorithmic data inputs and outputs.

Some efforts target specific industries and markets. For example, the Interagency Task Force on Property Appraisal and Valuation Equity, composed of over a dozen federal agencies, recognized the potential for Automated Valuation Models to “aggravate[e] discriminatory practices.”¹³⁸ Indeed, an investigative report published by the Associated Press recently argued underwriting software for mortgages is more likely to reject mortgage applicants of color due to bias in the data included in its credit scoring algorithm.¹³⁹ This year, the Consumer Financial Protection Bureau outlined several proposals to prevent algorithmic bias in home valuations and to protect consumers from privacy abuses.¹⁴⁰ More recently, the DOJ sued Meta (formerly Facebook) arguing that its algorithm violated the Fair Housing Act by “steering ads for housing in majority-White neighborhoods disproportionately to White users and steering ads for housing in majority-Black neighborhoods disproportionately to Black users.”¹⁴¹ Private actors are also bringing suit. A Black homeowner recently sued Wells Fargo for algorithmic decision-making that led to the denial of more than half of all Black refinancing applications, while the National

¹³⁵ See Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. (Mar. 1, 2014), <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=4796&context=wlr>.

¹³⁶ See Letter from Elizabeth Warren & Edward J. Markey, United States Senators to The Honorable Lina Khan, Chair, Fed. Trade Comm’n (June 22, 2022), *available at* https://www.markey.senate.gov/imo/media/doc/letter_to_the_ftc_-_priorities_for_communities_of_color.pdf.

¹³⁷ See American Data Privacy and Protection Act, H.R. 8152, 117th Cong. § 2 (2022), at <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/BILLS-117hr8152ih.pdf>.

¹³⁸ See Action Plan to Advance Property Appraisal and Valuation Equity: Closing the Racial Wealth Gap by Addressing Mis-valuations for Families and Communities of Color, PAVE (Mar. 2022), <https://pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf>.

¹³⁹ See Emmanuel Martinez & Lauren Kirchner, *The secret bias hidden in mortgage-approval algorithms*, The Markup (Aug. 25, 2021), <https://apnews.com/article/lifestyle-technology-business-race-and-ethnicity-mortgages-2d3d40d5751f933a88c1e17063657586>.

¹⁴⁰ See *Consumer Financial Protection Bureau Outlines Options to Prevent Algorithmic Bias In Home Valuations*, Consumer Financial Protection Bureau (Feb. 23, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-outlines-options-to-prevent-algorithmic-bias-in-home-valuations/>.

¹⁴¹ See Complaint, *United States of America v. Meta Platforms, Inc., f/k/a Facebook, Inc.*, No. 1:22-cv-05187 (S.D.N.Y., filed June 21, 2022), *available at* <https://www.justice.gov/opa/press-release/file/1514026/download>.

Consumer Law Center recently sued SafeRent for allegedly violating the FHA by giving poor risk scores to potential rental applicants of color.¹⁴²

The Health Equity and Accountability Act of 2022 targets algorithmic bias in health care, establishing a Task Force to identify risks for artificial intelligence and algorithmic technologies to violate “civil rights, civil liberties, and [result in] discriminatory bias in health care access, quality, and outcomes.”¹⁴³ Meanwhile, the Equal Employment Opportunity Commission (EEOC) published guidance on algorithmic decision-making in May 2022, the same month that it filed a complaint against an employer for using a software that automatically disqualified applicants based on their age.¹⁴⁴

In the criminal justice system, controversies over algorithmic surveillance and predictive tools have raised alarms, including a recent case against U.S. Immigration and Customs Enforcement (ICE) that argued that algorithmic risk-assessment tools led to a shift from assessing 47% of all detainees as “low risk” to 3% being designated “low-risk,” leading to increased time in custody for many detainees.¹⁴⁵ Surveillance tools, including facial recognition software, have also been denounced for their discriminatory effects.¹⁴⁶ President Biden recently signed an Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, which among other things calls for “a study of facial recognition technology, other technologies using biometric information, and predictive algorithms, with a particular focus on the use of such technologies and algorithms by law enforcement, that includes an assessment of how such technologies and algorithms are used, and any privacy, civil rights, civil liberties, accuracy, or disparate impact concerns raised by those technologies and algorithms or their manner of use.”¹⁴⁷

¹⁴² See Emily Flitter, *A Black homeowner is suing Wells Fargo, claiming discrimination*, New York Times (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/business/wells-fargo-mortgages-discrimination-suit.html>; Complaint, *Douglas v. Saferent Solutions*, No. 1:22-cv-10800 (D. Mass., filed on May 25, 2022), available at <https://www.cohenmilstein.com/sites/default/files/Complaint%20-%20Louis%20v%20SafeRent%2005252022.pdf>.

¹⁴³ See Health Equity and Accountability Act of 2022, H.R. 7585, 117th Congress § 2 (2022), at <https://www.congress.gov/bill/117th-congress/house-bill/7585/>.

¹⁴⁴ See Guidance, *The Americans with Disabilities Act and the use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, U.S. Equal Employment Opportunity Commission (May 12, 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>; *EEOC v. iTutorGroup, Inc.*, No. 1:22-cv-02565-PKC-RLM (E.D.N.Y.).

¹⁴⁵ See Petition and Complaint, *Velesaca v. Decker*, No. 1:20-cv-01803 (S.D.N.Y., filed on Feb. 8, 2020), available at https://www.nyclu.org/sites/default/files/field_documents/complaint.pdf; Stipulation and Order of Dismissal and Settlement, *Velesaca*, No. 1:20-cv-01803 (S.D.N.Y., Mar. 10, 2022), available at https://www.nyclu.org/sites/default/files/field_documents/ecf_175_stipulation_and_order_of_dismissal_and_settlement_2022-03-10.pdf.

¹⁴⁶ See Complaint, *Renderos, et al. v. Clearview A1*, No. RG21091138 (Super. Ct. Cal., filed on Mar. 9, 2021), available at <https://justfutureslaw.org/wp-content/uploads/2021/03/2021-03-09-Complaint-vs-Clearview.pdf>.

¹⁴⁷ See Executive Order on Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety, The White House Briefing Room (May 25, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/05/25/executive-order-on-advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and-public-safety/>.

A Preview of Volume II - What Should be Done Going Forward?

This final section presents a preview of Volume II of this Report, which will be prepared and released during the upcoming Section year. In Volume II, we will share the views of a variety of additional thought leaders in the antitrust and consumer protection space with regard to what the law should (or should not) do to address the interests of diverse consumers going forward.

Members of the Task Force have identified thought leaders from both the public and private sectors and academia with expertise in the antitrust and consumer protection spheres. Task Force members have read their articles and commentary and will engage in dialogue with as many of them as possible. To date, members of the Task Force have interviewed several thought leaders with antitrust expertise with a focus on how antitrust can impact racial equality:

- Eric Cramer, Chairman, Berger Montague
- Joshua Davis, Shareholder, Berger Montague PC and Research Professor, U.C. Hastings College of the Law
- Professor Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at NYU School of Law
- Synda Mark, Acting Deputy Assistant Director of the FTC Office of Policy & Coordination
- Rebecca Kelly Slaughter, FTC Commissioner

These interviewees raised a number of issues and proposals for addressing them; some issues and suggestions were raised by multiple thought leaders.

A first is the need for greater outreach to and representation from diverse consumers among the antitrust legal community. Synda Mark identified bringing in more diverse voices to antitrust, both in terms of conducting more outreach to diverse communities and with respect to increasing diversity within the antitrust agencies. Eric Cramer made a similar point with regard to the private sector, arguing that plaintiff-side law firms need more diverse attorneys because judges in multi-district litigation have increasingly demanded it, and because a diverse workforce can facilitate retention of clients in a variety of practice areas. The FTC and DOJ have made progress in their efforts to reach out to diverse communities. In its 2022 Equity Action Plan, the DOJ has prioritized improving the Department's engagement with stakeholders in underserved communities and disadvantaged groups.¹⁴⁸

As for increasing the diversity of antitrust attorneys, there is much work to be done. In the DOJ Antitrust Division in October 2020, black attorneys represented only 2.9 percent of the lawyers; only 4.1 percent of the lawyers employed by the FTC Bureau of Competition as of October 2019

¹⁴⁸ Executive Order 13,985, The Department of Justice Equity Action Plan, U.S. Dep't of Justice, at 2 (2022), *available at* <https://www.justice.gov/doj/page/file/1494516/download>.

were black.¹⁴⁹ While statistics are not readily available for the private bar, it is also believed to be overwhelmingly white. Commissioner Slaughter has committed to making improvements at the FTC,¹⁵⁰ and DOJ has made some strides with regard to placing diverse attorneys in career staff leadership positions,¹⁵¹ but additional work is needed.

Another common theme was the need to gather data to better understand the scope and contours of how diverse consumers are being impacted. Professor Fox recommended a study either at the university level or under the FTC's market study authority under Section 6(b) of the FTC Act to assess whether particular industries or geographic areas have been significantly affected by discrimination. Commissioner Slaughter and Synda Mark echoed the need for more data to better assess the problem and focused on the potential for seeking relevant data in the merger context. Ms. Mark suggested that the agency reviewing a given merger could seek data to help it determine if the merger is likely to have an outsized impact on a particular community. Indeed, some of this work has already been undertaken as part of the FTC's Equity Action Plan.¹⁵²

Focusing merger analysis on the impact on diverse communities was another common proposal identified by some of the thought leaders interviewed. As mentioned above, merger analysis typically has looked at harm to consumers in the aggregate, but merger analysis could be reoriented to capture harms to sub-groups to assess whether there is an outsized impact on the economically or racially disadvantaged. According to Professor Fox, the existing Horizontal Merger Guidelines—presumably sections 4.1.4, Product Market Definition with Targeted Customers, and 4.2.2, Geographic Markets Based on the Locations of Customers—already provide an opportunity to identify such distinct sub-groups as separate markets. The FTC and DOJ are currently reviewing the Horizontal Merger Guidelines, so a revised version could be made even more explicit on this point. Ms. Mark indicated that the FTC is thinking about how it can systematically collect data about the impact of mergers on marginalized communities to inform, in particular, its case selection process.

Commissioner Slaughter made the point that the increased prices as a result of an anticompetitive merger have the potential to differentially impact affluent communities and lower income communities, including those of color. Framing the issue in terms of how to prioritize scarce enforcement resources, she imagined a situation in which the FTC is faced with two healthcare mergers, one that falls disproportionately on low-income and largely uninsured

¹⁴⁹ Curtis Eichelberger, For Black Antitrust Lawyers, Top DOJ, FTC Posts Remain Elusive, FTC Watch (Jan. 18, 2021), <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/for-black-antitrust-lawyers-top-doj-ftc-posts-remain-elusive>.

¹⁵⁰ Alexandra S. Levine, *Morning Tech*, Politico (Jan. 26, 2021), <https://www.politico.com/newsletters/morning-tech/2021/01/26/xi-jinping-tests-white-house-on-china-792980>.

¹⁵¹ See Leslie C. Overton, Melanie Kiser, and Tasneem U. Chowdhury, *How Antitrust Can Be More Anti-racist*, ABA Spring Meeting materials (2021).

¹⁵² Federal Trade Commission (FTC) Equity Action Plan, Fed. Trade Comm'n (2022), available at https://assets.performance.gov/cx/equity-action-plans/2022/EO%2013985_FTC_Equity%20Action%20Plan_2022.pdf.

communities of color and a second merger that involves high-end services to a well-insured majority White area, and the FTC only has sufficient available resources to conduct an in-depth investigation and potentially litigate one. Commissioner Slaughter posited that, in such a situation, the FTC should be able to consider which of the two communities benefits the most from preserving competition. Even if both mergers would result in services costing \$5 more, the community of color could be worse off than the affluent community since the marginal value to it of one dollar is higher, particularly where there is a large uninsured population that would need to pay out-of-pocket for healthcare.

Professor Davis gave a similar example, albeit outside the merger context. In his view, plaintiffs and prosecutors choosing between bringing a case concerning anticompetitive conduct affecting a luxury good or anticompetitive conduct affecting a necessary good should pursue the latter. In his view, in those cases, antitrust and diversity, equity, and inclusion principles are most aligned since the people who suffer the most antitrust harm are also likely to be the most disempowered. He noted that in such cases, plaintiffs and prosecutors would not necessarily have to raise diversity issues expressly as part of the claims, even though diverse consumers might disproportionately benefit from relief.

Commissioner Slaughter acknowledged that while antitrust is very good at quantifying harm in the aggregate, it is not as good at evaluating the degree to which that aggregate harm impacts different communities. She described the FTC's efforts to figure out how to do this in a fair and effective manner as an "evolving process."

Another idea raised in the merger context was that competition authorities could take steps to try to increase opportunities for minority-owned businesses as potential buyers of divested assets. Commissioner Slaughter indicated this is a relatively new area of thought for the FTC but noted that the FTC has partnered with the Small Business Administration to make the divestiture process more accessible to small and medium-sized businesses.¹⁵³ In Commissioner Slaughter's view, raising awareness among small and medium-sized businesses about the divestiture process is an important step because such businesses will not be able to compete for divestiture assets, let alone win them, if they do not even know about the process. Commissioner Slaughter did acknowledge a potential tension between the need to ensure that a divestiture buyer is capable of operating the divested assets to preserve the pre-merger level of competition and the need to encourage less traditional divestiture buyers to participate in the process.

Professor Fox discussed South Africa's express policy of promoting Black ownership in the merger context. Professor Fox explained that, in South Africa, the 2018 amendments of the Competition Act require the South African Competition Commission to consider, among other

¹⁵³ See Kushita Vasant, *US FTC must be 'actively anti-racist' in antitrust enforcement, Commissioner Slaughter says*, mLex (Jul. 20 2022), <https://mlexmarketinsight.com/news/insight/us-ftc-must-be-actively-anti-racist-in-antitrust-enforcement-commissioner-slaughter-says>.

things, “the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.”¹⁵⁴

Professor Fox pointed to the 2021 acquisition of Burger King South Africa as the first example of the Competition Commission blocking a merger solely on the grounds that it would have a “substantial negative effect” on the promotion of a greater spread of ownership.¹⁵⁵ In this case, Burger King South Africa was nearly 70 percent-owned by “historically disadvantaged persons” or HDPs, whereas the acquiring company was 100 percent White-owned. The Competition Commission found that the transaction would completely eliminate any HDP ownership in the surviving firm and blocked the transaction on those grounds.¹⁵⁶ Subsequently, the merging parties appealed the decision and a settlement was reached whereby the new entity would commit to hire 1,250 HDP employees, to create a five percent employee shared ownership plan, and, reportedly, to divest a portion of its supply chain to a HDP-owned business.¹⁵⁷

As Professor Fox put it, South Africa as a matter of merger policy has been willing to trade off some efficiency for equity, though she acknowledged that such policies can amount to a tax on mergers and could result in discouraging at least some mergers that would be beneficial in an efficiency sense to South Africa.

The South African example raises one more area some thought leaders suggested as a possible next step in how antitrust can address diverse consumers going forward, and that is through making protection of diverse consumers an express goal of antitrust law. South Africa, of course, offers the most muscular approach on this front.¹⁵⁸ The Competition Act, adopted shortly after the end of Apartheid, begins with the following:

“The people of South Africa recognise . . . [t]hat apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices. and unjust restrictions on full and free participation in the economy by all South Africans and [t]hat the economy must be open to greater ownership by a greater number of South Africans.”

The Act goes on to list among its explicit purposes, “to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy” and “to promote a greater spread of ownership, in particular to increase the ownership stakes of historically

¹⁵⁴ Competition Act of South Africa, § 12A(3)(e).

¹⁵⁵ Notification to Prohibit the Transaction involving the ECP Africa Fund IV LLC and ECP Africa Fund IV LLC and the Burger King (South Africa) RF (PTY) and Grand Foods Meat Plan (PTY) LTD (March 9, 2021) *available at* https://www.gov.za/sites/default/files/gcis_document/202203/46000gon1823.pdf.

¹⁵⁶ *Id.* at ¶¶ 17-22, 29-33, 38-40.

¹⁵⁷ See Competition Tribunal of South Africa, Case No. IM053Aug21 (Sept. 17, 2021), <https://www.comptrib.co.za/open-file?FileId=52741>.

¹⁵⁸ See generally Eleanor Fox, *South Africa, Competition Law, and Equality: Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed*, CPI Chronicle (Fall 2019), *available at* <https://ssrn.com/abstract=3876527>.

disadvantaged persons.”¹⁵⁹ As noted above, the 2018 amendments to the Competition Act cascaded these purposes into the substantive provisions of the law. In addition to requiring consideration of the promotion of small and medium-size enterprises and a greater spread of ownership in merger review as discussed above, the 2018 amendments also explicitly made price action that “imped[es] the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively” an independent ground for prohibited price discrimination even if it did not substantially prevent or lessen competition¹⁶⁰ and includes an exemption from the competition laws for conduct or agreements that promoted “the effective entry into, participation in or expansion within a market by small and medium businesses, or firms controlled or owned by historically disadvantaged persons.”¹⁶¹

Even with the apparent political consensus that the U.S. antitrust laws need updating, we recognize it is highly unlikely that we will see language like this added to the Sherman or Clayton Acts any time soon. But legislation is not the only way that antitrust law could be more explicitly aimed at protecting diverse consumers. As noted above, the revised merger guidelines could take this on, and the FTC could focus its rulemaking on harms that affect diverse consumers. The leaders of agencies have a strong hand in agenda-setting and directing scarce enforcement resources. Commissioner Slaughter has been quite vocal on this front, from speeches¹⁶² to Twitter:



¹⁵⁹ Competition Act, §§ 2(e) and (f).

¹⁶⁰ Competition Act, § 9(1)(ii).

¹⁶¹ Competition Act, § 10(3)(b)(ii).

¹⁶² Rebecca Kelly Slaughter, *Antitrust at a Precipice: Remarks of Commissioner Rebecca Kelly Slaughter*, Fed. Trade Comm’n Office of the Comm’r (Nov. 17, 2020), https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

Conclusion

Our goal in this Volume I has been to provide an introduction to examples of the actual and potential anticompetitive and consumer protection harms that could be faced by diverse consumers, and to give a sense of the direction we expect Volume II to take. We hope that this initial volume will contribute to debate, new ideas, and, eventually, action in this area, and look forward to engaging with thought leaders and the ABA Antitrust & Consumer Protection section membership in the coming year.