

# The Forces of Intolerance Continue to Fight Against Minority Inclusion



## An FSIC & CIR Special Report

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# A Case for Inclusion



## FSIC Economic Inclusion Reverse Discrimination Defense Initiative

Over the years, the forces of intolerance have continued to thwart efforts to bring about economic inclusion and empowerment. From the [Croson](#) and [Adarand](#) cases, those who wish to stop African Americans from participating in the US economy have used the legal system to stop any efforts at affirmative action.

Recently, as the US tried yet again to come to grips with its long history of Racism, these forces have again sought to thwart the efforts of the government to provide opportunities to minorities.

Examples:

1. A group of white farmers have sued the USDA over its loan forgiveness program for farmers of color, claiming race-based discrimination.
2. A group of business owners and advocates in Tennessee and Texas have sued the Small Business Administration (SBA) when it gave a 21-day exclusive application opportunity to minority restaurants under the Restaurant Revitalization Fund. This is even though the data showed that less than 1% of SBA funds had been going to minority businesses.
3. A conservative group has filed a “reverse discrimination” lawsuit against the SEC over its board diversity proposal.

FSIC and its allies are organizing to find ways to combat these overtly racist activities. To combat this, we plan to: (1) draft Amicus briefs; (2) file lawsuits in places where minority businesses have been denied contracts or excluded, and (3) ask the Administration to deny federal funds from states who are discriminating against minorities.

## SCLC Legal Opinion



Southern Christian Leadership Conference

Dr. Martin Luther King Jr.  
*Founding President*

Dr. Charles Steele Jr.  
*President/CEO*

Rev. Bernard LaFayette Jr.  
*Chairman of the Board*

### **Award Disparity Cure Via Anecdotal Evidence**

To: Kevin Kimble, DC Bureau Chief

From: Charles Brooks, General Counsel

Date: July 9, 2021

The federal government has long attempted to implement policies to maximize procurement opportunities for small businesses owned and controlled by socially/economically disadvantaged individuals. In 1978 Congress amended the Small Business Act to require federal agencies to, among other things, negotiate annually in good faith with the Small Business Administration to establish prime and sub-contracting goals for these businesses.

The United States government created the Office of Federal Contract Compliance Programs. A minority contractor can avail themselves of agency level protests, however such actions have a very low success rate. The Government Accountability Office typically provides the next level of intervention where "limited discovery" is allowed. The Federal Acquisition Regulation requires an issued result within 100 days of the submission process. The effects of such policies have not created a class of minority contractors who are consistently utilized for federal government contract work. Minority owned businesses do not receive their fair share of available contracting opportunities.

The SCLC seeks the expansive power of the federal government to protect minority contractors in states which demonstrate overt hostility to minority rights.

The overwhelming majority of minority owned businesses reside in the Southeast. The SCLC tracks the impediments to achieving parity in the contracting sphere to mirror the states which attempt to impose restrictions on minority voting opportunities.

Contractors hired under personal services contracts operate like government employees. The federal government reported spending about 1.5 billion on personal services contracts for FYs 2011-2015. The Air Force, Army, Navy and USAID together were responsible for most of the reported spending.

The executive branch maintains the ability to enforce proper and proportional distribution of all federal contracts throughout the US. The SCLC proposes we emphasize compliance with equitable distribution of resources in states with large minority populations. Between January 1 and May 14, 2021, at least fourteen states enacted 22 new laws that restrict access to voting. The executive branch can increase scrutiny in any of the 14 states without the participation of the legislative branch. The SCLC seeks an executive order to emphasize majority contracting compliance in any state which passed a new wave of voter restrictions.

Sincerely,

Charles I. Brooks,  
General Counsel

## Supporting Articles

### **Inclusion, Equity, & Diversity Update – SEC Approves Nasdaq Rule on Board Diversity**

*By Philip Berkowitz, Corinn Jackson and Britney Torres on  
August 20, 2021  
Littler/Insight*

As companies focus on workforce inclusion, equity, and diversity (IE&D), they are under increasing pressure to assure that the membership of their boards reflects these values. The Securities and Exchange Commission (SEC) recently approved a rule proposed by Nasdaq that requires companies listed on its exchange to meet certain minimum diversity targets on their boards or explain in writing why they are not doing so. This “comply or explain” approach demands of corporations additional accountability for IE&D efforts, requiring them to navigate diversity and anti-discrimination considerations thoughtfully.

In the United States, implementing workforce quotas that mandate hiring on the basis of protected characteristics such as race, ethnicity, or gender is generally unlawful. While the law encourages voluntary diversity efforts, they are subject to careful judicial scrutiny to ensure that they do not constitute unlawful “reverse” discrimination. There has been an increase in investigations and related lawsuits as to whether diversity initiatives constitute unlawful discrimination.

Implementing even an aspirational goal can run the risk that recruiters, human resource professionals or hiring managers will feel compelled to inappropriately inject criteria such as gender or minority status into their decisions.

### **Evolving Trend: “Comply or Report”**

The move toward mandating that women and individuals from underrepresented groups serve on boards is nevertheless picking up speed, particularly under state law.

For example, California requires that, by the end of 2021, publicly held corporations with principal executive offices in California have at least one board member “who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or ... gay, lesbian, bisexual, or transgender.” That minimum increases in December 2022 to two if the corporation has five directors, and to three if the corporation has six or more directors. Penalties may be assessed against corporations that fail to report or do not comply with these board diversity requirements.

Similarly, New York has enacted the “Women on Corporate Boards Study” law, requiring domestic and foreign corporations “authorized to do business” in the state to report the number of directors appointed to their board and the number of directors who are female.

While no U.S. state other than California currently mandates a minimum number of female directors, at least eleven other states have enacted or are considering board diversity legislation that require disclosures about diversity on boards or in senior management.

### **New Nasdaq IE&D Rule**

Originally proposed in December 2020 and after significant public comment, the SEC announced its approval of Nasdaq’s board diversity rule on August 6, 2021.

The rule as adopted by the SEC follows the “comply or explain” approach. It requires certain Nasdaq-listed companies to disclose annually aggregated statistical information about board members’ voluntarily disclosed, self-identified gender, race, ethnicity, and LGBTQ+ status, in a prescribed format provided by Nasdaq. The information must be provided in a searchable format in the company’s proxy or information statement for its annual meeting of shareholders, in an Annual Report, or on the company’s website. If the information is provided on its website, the company must also submit the disclosure to the Nasdaq Listing Center no later than 15 calendar days after the company’s annual shareholders meeting.

The rule requires the companies to either include on their board of directors, or publicly disclose why their board does not include, a certain number of “diverse” directors. The rule defines “diverse” as (1) a director who self-identifies her gender as female, without regard to the individual’s designated sex at birth, (2) a director who self-identifies as one more or of the following categories: Black or African

American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander (“underrepresented minority”), or two or more races or ethnicities, or (3) is lesbian, gay, bisexual, transgender or a member of the queer community (“LGBTQ+”).

The rule also permits Nasdaq to offer certain listed companies access to “a network of board-ready diverse candidates” to help them meet the Board Diversity Objective Rule. Companies are not required to use the recruiting service, however, and Nasdaq will not penalize companies that choose not to do so.

Nasdaq has emphasized that the rule establishes a disclosure-based framework, and not a mandate or quota. It sets forth “aspirational diversity objectives.” Companies that fail to meet the objectives would need only explain why they do not. In contrast with the California law, the rule does not require any particular board composition or require a company to select directors based on their minority status.

The rule requires most Nasdaq-listed companies, other than those the rule designates as exempt and those with boards consisting of five or fewer members, to have at least two self-identified “diverse” board members of their board of directors or explain why they do not. At least one director must self-identify as female and at least one director must self-identify as an underrepresented minority and/or LGBTQ+.

There are additional and different requirements for smaller companies and newly listed companies in different markets, and the rule includes a phase-in compliance period. The rule also permits foreign issuers to note whether disclosure of the data required by the Board Diversity Disclosure Rule is prohibited under the company’s home country law.

## **Compliance**

In the United States, at least for the time being, adopting hiring or promotion quotas is generally unlawful in most instances. While increasing legislative pressure on employers in choosing board members may change this dynamic, mandating hiring quotas would likely face strong legal challenge from groups that perceive it as unlawful reverse discrimination.

Rules and laws related to board diversity are being implemented because, although workforces have become more diverse, boards generally have not, and approaches organizations have taken in the past may need to change. Making those changes will require balancing many considerations, including diversity goals and anti-discrimination laws.

## Did the Small Business Administration discriminate against white business owners?

By Gene Marks, Opinion Contributor — 06/24/21 05:00 PM EDT

The views expressed by contributors are their own and not the view of The Hill



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The Restaurant Revitalization Fund was setup as part of [President Biden](#)'s American Rescue Plan to provide much-needed money to restaurant owners who were devastated by the economic recession caused by the COVID-19 pandemic. The approximately \$29 billion fund is providing grants representing the difference between the revenues a restaurant recorded in 2020 and 2019 – a potentially substantial check for many – and is being doled out by the Small Business Administration (SBA).

Except there's a problem: it's probably discriminatory against white men.

That's the case being made by in [multiple lawsuits](#) filed last week by a group of business owners and advocates in Texas in Tennessee. They say that the program unfairly prioritizes the distribution of funds initially (for the first 21 days) to minority business owners and those in low- to moderate-income areas, who are statistically likely to be people of color. That, according to the plaintiffs, discriminates against everyone else.

[The suit claims](#) that non-minority business owners were "harmed" because they were "pushed to the back of the line," and because they were "treated differently because of their race and gender." The SBA grant program is further accused of "giving priority to certain groups" and putting "white male applicants at significant risk that, by the time their applications are processed, the money will be gone."

They're right; the money is gone.

The owners filed the suit after learning that much of the program's funding has been exhausted already and that few or no funds would be remaining for them. In response, a group of congressmen have already [begun talks](#) to add another \$60 billion to the fund, but these talks are still in preliminary stages and have a long way to go. As a result, nearly 3,000 restaurant owners have been notified that the funds they were approved to receive are in limbo until the lawsuit is resolved.

“You work so hard, and we made no money last year, like none,” Christine Ameigh, the owner of Christine’s Kitchens, a food hub and incubator in Madison, Wis., told the [Capital Times](#). “It was exciting to be able to continue to move forward with the new project. The money was going to help keep us alive and hire a staff person. There are different things we could have achieved with that money.”

Data show that minority businesses were more severely impacted by the COVID-related shutdowns and the resulting economic recession. Studies have also shown that it’s much more challenging for these same business owners to receive financing compared to their non-minority counterparts. But does that give them the right to receive these funds ahead of other business owners that were also significantly impacted, just because of the color of their skin or their gender?

“Under the guise of pandemic relief, the American Rescue Plan Act enables the federal government to engage in illegal and unconstitutional race and sex discrimination,” said Rick Esenberg, president and general counsel of the Wisconsin Institute for Law and Liberty, in a [May press release](#) announcing the suit. “This is ugly, pernicious, and toxic.”

It’s a tough issue. But I’m betting the courts will side with the plaintiffs. The SBA program is discriminatory. Although trying to do the just thing, the federal government probably went too far in shutting out a specific class of business owners rightly pursuing funds.

The good news is that it’s a fixable problem and it’s not like the government hasn’t been here before. Most government awards and contracts stipulate the inclusion of minority businesses. So, the answer would be to determine a more equitable distribution of funds, similar to the awarding of a government contract, which gives opportunities both to minorities (with benchmarks and targets) as well as everyone else.

What about more funding for the program? That’s also an answer, but one that raises budget concerns and also calls into question the necessity of more stimulus when the economy is rebounding strongly and many restaurants are challenged more with finding workers than getting financing. If those issues can be resolved, then getting money out to business owners who are truly in need would be the best solution possible.

*Gene Marks is founder of The Marks Group, a small-business consulting firm. He frequently appears on CNBC, Fox Business and MSNBC.*





## White farmers sue U.S. government over stimulus for 'socially disadvantaged farmers'



[Adriana Belmonte](#)

Senior Editor

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Yahoo Finance

A group of American farmers, all of them white, is [suing](#) the government for race-based discrimination, alleging that the U.S. Department of Agriculture (USDA)'s [loan forgiveness program for farmers of color](#) is a violation under the Constitution.

“All of my clients just want to be treated equally,” Daniel Lennington, deputy counsel and lead attorney for the lawsuit, told Yahoo Finance. “They’re not looking for any special treatment. If there is a loan forgiveness program, they want it to be open to everyone, regardless of race. And if the USDA would like to formulate the loan forgiveness program to help farmers who have a particular need, my clients would be all in favor of that.”

The program, which allocated roughly \$4 billion for "socially disadvantaged farmers, ranchers, or forest landowners," is part of a larger [stimulus bill](#) signed into law amid the coronavirus pandemic.

"Socially disadvantaged" in this case is [defined as](#) relating to groups "subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."

Agriculture Secretary Tom Vilsack previously [stated](#) that Biden administration policies aim to "root out whatever systemic racism and barriers may exist at the Department of Agriculture directed to Black farmers, socially disadvantaged farmers, and people who live in persistently poor areas of rural America."



*Agriculture Secretary Tom Vilsack holds a press briefing in the Brady Briefing Room of the White House in Washington, DC, on May 5, 2021. (Photo by Nicholas Kamm / AFP)*

Eligible farmers would see up to 120% of their outstanding debts paid off as a result of the [American Rescue Plan](#), with the extra 20% going toward taxes associated with the outstanding debt. An additional \$1.01 billion in the bill will be provided for outreach, training, education, technical assistance, grants and loans, and funding for improving land access.

Lennington asserted that the plaintiffs are "all for USDA fixing its past racism with programs that are targeted to the victims of that racism. We would love for USDA to go out and find those farmers it discriminated against, and even their children, and make it up to them. But this law is specifically not targeted to the victims of race discrimination."

The lawsuit argues that the Constitution "forbids discrimination by the federal government against any citizen because of his race." Therefore, according to the plaintiffs, any race-based classifications "must be subjected to the most rigid scrutiny."

John Boyd, president of the National Black Farmers Association, told Yahoo Finance that the lawsuit "shows the troubling pattern, and it looks like we're going back in time in history where they just don't want Blacks to have anything and be willing to be treated with dignity and respect. That's it."



*Farmer John W. Boyd Jr. criticized the lawsuit. (Photo by Scott J. Ferrell/Congressional Quarterly/Getty Images)\*

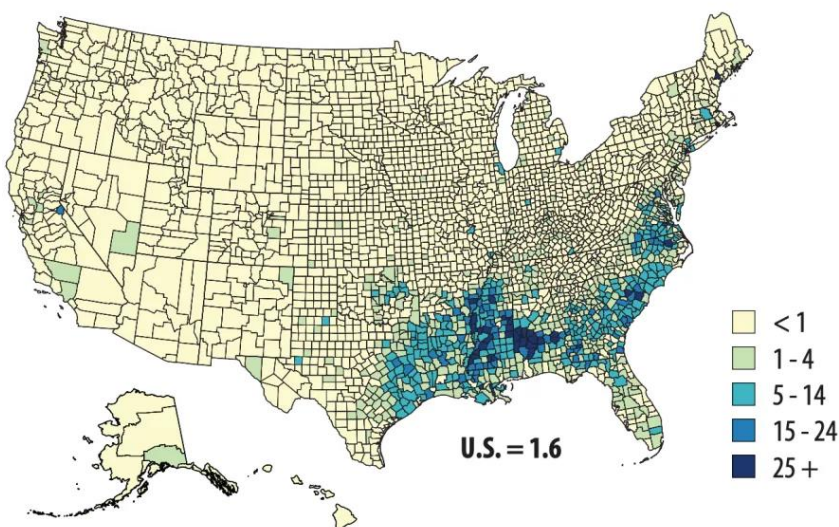
### **'Eight out of 10 Blacks in the state of Texas who applied for federal aid were denied'**

Boyd stressed that Black farmers were [facing problems](#) related to discrimination and lack of government support long before the pandemic.

“I’ve been trying to get debt relief for Blacks and other farmers of color for over 30 years,” he said. “This wasn’t a new request at all. When I first heard about the [new lawsuit], I immediately thought about history where Blacks were enslaved, Native Americans lost all their land at the great of many white men.”

There were nearly 1 million Black farmers in 1920, the most ever. As of April 2019, there are roughly 45,500 Black farmers, which account for 1.3% of the population, [the Guardian reported](#). Those farmers own just 0.52% of farmland in the country, while making less than \$40,000 a year (compared to white farmers who make over \$190,000 annually).

### Black-operated Farms as Percent of Total Farms, by County, 2017



*Note: Based on 32,910 farms with producers who identified themselves as black alone.*

Black farmers make up a relatively small but notable portion of American farm operators in the South. (Source: USDA)

The agriculture commissioner for the state of Texas, Sid Miller, [also filed a lawsuit](#) against the stimulus program for farmers of color, calling it unconstitutional.

Asked about Miller's lawsuit, Boyd noted that "eight out of 10 Blacks in the state of Texas who applied for federal aid were denied. So instead of filing a suit to complain for white farmers, why isn't he doing something to help Black farmers in his very own state obtain access to credit that USDA and other state agencies where he could be more helpful to farmers of color there?"

### 'There's a lot of hardship in the farming community'

Farmers across the country were struggling amid the Trump administration's [trade war with China](#), a top importer of American agricultural products, and then saw prices [plummet](#) in 2020 due to a lack of demand amid the coronavirus pandemic.

The Trump administration created the [market facilitation program \(MFP\)](#) to offset the effects of the trade war, directing about \$24 billion to American farmers. About [99.5%](#) of the initial payments went to white farmers.

In 2020, the USDA established the [Coronavirus Food Assistance Program \(CFAP\)](#) to provide billions in financial aid to farmers impacted by the coronavirus pandemic.

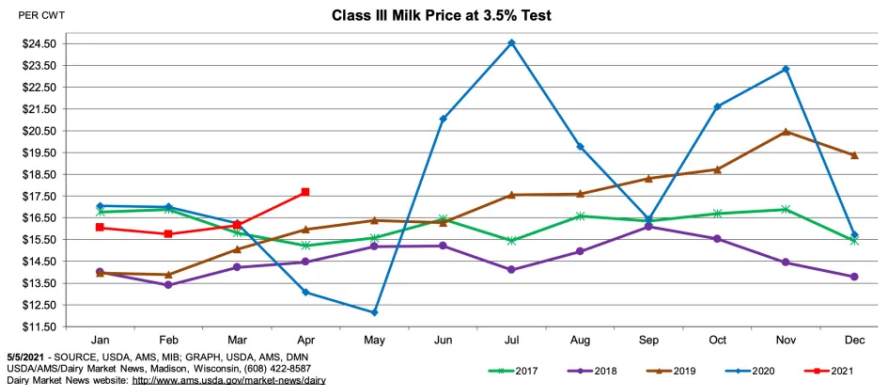


*People shop in the Dupont circle farmers market wearing masks as a precaution against COVID-19 in Washington, DC on July 26, 2020. (Photo by Daniel SLIM / AFP)*

The Environmental Working Group (EWG) [found](#) that as of October 2020, nearly 97% of the \$9.2 billion in CFAP aid that had been distributed went to white farmers. Furthermore, white farmers received on average eight times more in aid (\$3,398) than the average Black farmer (\$422).

According to Lennington, all of his clients have been “hurt very hard” by the pandemic. Additionally, he said, more than 50 farmers from around the country who’ve also suffered through the pandemic are interested in joining the lawsuit.

“Adam Faust, our lead plaintiff, had to reduce the supply of milk that he had because the prices of milk crashed when the pandemic struck,” Lennington said. “I’ve talked to other clients who have experienced very high fuel prices and fertilizer prices. Other clients have talked about how the price of ranching land has gone up.”



*Milk prices were very volatile in 2020. (Chart: USDA)*

Meat processing plants were also [ravaged by COVID-19](#), creating a major supply chain disruption for hog farmers. As of February 2020, at least 250 workers died from the virus, while more than 50,000 have been infected, ProPublica [reported](#). The number of cases forced many meatpacking facilities to close down temporarily, which created a major financial blow for meat producers.

“I’ve talked to a client who has hogs, and they had to euthanize several hundred hogs in one day because the price of pork fell dramatically when COVID struck,” Lennington said. “A lot of the pork processing plants had to shut down because the factory workers got COVID.”



*Farmer Ken Ries looks out over his hogs during a tour of hog farm in Ryan, Iowa, U.S., May 18, 2019. Picture taken May 18, 2019. REUTERS/Ben Brewer*

Another issue that the pandemic created, Lennington said, is a labor shortage in the agriculture sector.

“They’re having trouble finding workers,” he said. “The price of labor’s going up. Although you might look at the commodity prices and see they’re going up and think ‘it’s a good time to be a farmer,’ you also have to look at all of the inputs. So it’s very narrow profit margins on each acre of land right now.”

Overall, according to Lennington, the farmers bringing the lawsuit want to be able to apply for the stimulus.

“Our clients are simple farmers who want to be treated equally,” he said. “They do not want special treatment. They want to be able to apply for a program that anybody else can apply for and if they qualify, they would like a benefit. If they don’t qualify, they would not be disappointed. But the qualification can’t be based on race.”

*Adriana Belmonte is a reporter and editor covering politics and health care policy for Yahoo Finance. You can follow her on Twitter [@adrianambells](https://twitter.com/adrianambells) and reach her at [adriana@yahoofinance.com](mailto:adriana@yahoofinance.com).*