

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 8

NUMBER 1

PIGFORD v. GLICKMAN AND THE REMNANTS OF RACISM

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[T]he law of inheritance was the last step to equality. . . . The family represents the estate, the estate the family, whose name, together with its origin, its glory, its power, and its virtues, is thus perpetuated in an imperishable memorial of the past and as a sure pledge of the future.¹

– Alexis de Tocqueville

I feel so proud to say from whence I have come—I was a sharecropper's daughter, but I became a principal, and my husband was the first elected Black judge in Dallas County.

– Johnnie Mae Blanton Brashear

This Article analyzes Pigford v. Glickman,² a class action lawsuit that exposed racial discrimination committed by the United States Department of Agriculture against Black farmers in its distribution of farm loans

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1. Alexis de Tocqueville, *Democracy in America*, 48 (1840).

2. See *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999); see also Claims Resettlement Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010) (appropriating funds); *In re Black Farmers Discrimination Litigation*, 856 F. Supp. 2d 1, 26-27 (D.D.C. 2011) (approving the settlement) (hereinafter collectively *Pigford*).

between 1983 and 1997. Although the lawsuit resulted in a settlement, evidence of insufficient relief and vestiges of discrimination led to additional lawsuits. I lay a foundation of historical context by focusing on Black farmers impacted by systemic discrimination. Revealing their stories exposes the incalculable cost of racism and the humanity behind the law. Then, I analyze Pigford and argue class members did not receive sufficient relief. Finally, I consider the legal landscape post-Pigford and propose solutions that confront the injustice experienced by class members and their descendants.

Introduction: The Pineywoods of East Texas

At the tender age of nine, John Henry Blanton³ started working as a sharecropper to help his family survive in Henderson, Texas.⁴ The oldest of three children, John took the responsibility to help his parents work the fields for food security and a home on the lands of the former plantation. In 1931, he married Fannie Mae Blanton⁵ and continued sharecropping for her former slaveowners on the outskirts of Longview, Texas. John worked the field every day—planting, harvesting, and keeping a small fraction of the income he earned after paying the landowner for food on the table and rent in a shotgun house.⁶ Fannie Mae⁷ worked in the landowner’s home—cooking, cleaning, and washing laundry in servitude to his white family.

The Blanton family had no sense of independence or agency during this period in their lives. They not only lived on a plantation owned by their employer, but also endured unwelcome intrusions in their personal lives. The landowner eagerly awaited the birth of their first daughter, and when she was born, the landowner informed the new parents she would be named Lucy Ann after his daughter Annie Lucy. John and Fannie kept their next

3. John Henry Blanton was born to Emma Blanton and Jim Blanton in 1899.

4. See, e.g., *Sharecropping*, THE EQUAL JUSTICE INITIATIVE (Nov. 21, 2018), <https://eji.org/news/history-racial-injustice-sharecropping/>.

5. Descendants of slaves, although they had a twenty year age difference, John and Fannie married out of necessity to survive harsh sharecropper conditions.

6. A shotgun house is a house in which all the rooms are in direct line with each other usually front to back. MERRIAM WEBSTER DICTIONARY (2021).

7. Fannie Mae Blanton, an orphan, was raised by her grandmother. She stood on apple crates to help her grandmother wash dishes in the landowner’s home. After her grandmother died, Fannie took over housework as a teenager shortly before her marriage to John. Her family lovingly nicknamed her “Scraps” because she received leftover food for her meals.

pregnancy a secret, and quickly named their second daughter Johnnie Mae⁸ to honor their respective family names.

The landowner kept a tight grip not only over the Blantons' family life, but also over John's survival. John frequently drove the landowner to late night meetings in the woods, and received stern instructions to remain in the car. One evening, John followed his employer to a clearing in the forest and confirmed his suspicion: a group of men cloaked in white were lynching a Black man. John confronted the landowner upon his return to the car and warned him John would never drive him to the woods again.

Sharecropping, slavery by another name, trapped many Black Americans in racialized poverty after emancipation,⁹ at times enforced through violence.¹⁰ Recently "freed" slaves were often paid unlivable wages to work on plantations in the same servitude forced upon their ancestors.¹¹ Despite these indignities, John and Fannie never complained. John worked the fields, and quietly saved extra money from cutting wood and building homes. Like most Black Americans, John was determined to take the first step towards financial stability: land.

As de Tocqueville opined, the path to economic equality required inheritable property, which was kept by those in power at all costs. John told his employer he intended to purchase land and begin an independent life with his family, but the landowner had other plans in store. He was powerful in the community—justice of the peace—and he kept John as a sharecropper for another year by telling every white landowner in town not to sell an acre of land to the Blantons.

Since land was like gold for newly freed Black Americans, no Black landowners could be persuaded to sell a single acre. After months of fruitless searching, John convinced Irene Blackburn to sell twenty-five acres of land at a reasonable price. As fate would have it, Irene, a white widow, was none other than the landowner's sister. The wealthy woman ignored her brother's demands. The landlord resisted losing the Blantons as tenants; he sought to have Irene committed to a mental institution in a

8. Johnnie Mae Blanton Brashear was born in 1937.

9. See *Racialized Poverty—The Legacy of Slavery*, THE EQUAL JUSTICE INITIATIVE (Dec. 23, 2016), <https://eji.org/news/history-racial-injustice-racialized-poverty/>.

10. "Red Summer" Longview County had a race riot on July 13, 1919, involving lynching. See, e.g., *African American Perspectives: Materials Selected from the Rare Book Collection*, Library of Congress <https://www.loc.gov/collections/african-american-perspectives-rare-books/articles-and-essays/timeline-of-african-american-history/1901-to-1925/> (last visited Dec. 15, 2021).

11. *Id.*

desperate attempt to nullify the land sale. His efforts failed, and the Blanton family entered a new era of economic freedom that changed the course of their lives.

John built a home from the ground up and started anew with his young family. No longer were his daughters forced to ride hours on a segregated bus to attend the school for Black children on the other side of town. No longer was Fannie forced to answer every beck and call of her ancestors' oppressors. No longer was John commanded to accept another man's heedless decisions that weighed heavily upon his family.

The Blantons cultivated a rich farm on their own land, which vastly improved their quality of life. Lucy graduated valedictorian of her class with a full scholarship and obtained a master's degree. Johnnie also graduated with a Master's degree in Education and desegregated schools after *Brown v. Board of Education*.¹² No longer trapped in a cycle of food insecurity, Fannie 'Scraps' Blanton flourished—becoming the best cook in town and the hostess of all family gatherings. John plowed the fields with horses from dawn until dusk and continued to work as a carpenter. John led his life with pride, knowing he achieved the unthinkable—providing unforeseen opportunities to his family and creating a legacy for his descendants.

Despite the extreme adversity the Blantons overcame to achieve land ownership and independent farming, racial discrimination permeated every facet of their social lives. After riding in the back of a bus into town, the family could only use the restroom or quench their thirst at the county courthouse. Black townspeople had one option for a hot meal: hotdogs or hamburgers from the back entrance of White's Kitchen. If they sought entertainment, they had to take the outdoor entrance to the upstairs balcony of the town theater. Any businesses available to the Blantons required them to use a separate entrance from white patrons, who refused any contact with Black townspeople. Black children received out of date textbooks and relied heavily upon the creative tenacity of their schoolteachers.

Nevertheless, John, Fannie, Lucy, and Johnnie flourished at their new home. John grew cotton on the land and paid his daughters to help pick cotton every summer. He gathered the cotton in the family wagon, and Lucy and Johnnie enjoyed laying in the bed of plush cotton as their father drove the wagon to the cotton gin. The Blanton girls rode horses, played games, and ran through the fields to make it home before sundown. The family ate wild plums, persimmons, and hickory nuts from the land, and

12. *Brown v. Board of Education*, 347 U.S. 483 (1954).

raised livestock to supply meat for their smokehouse. Every morning, Johnnie would sneak out the backdoor only to be chased to school by the family's flock of turkeys. A country girl, Johnnie teased her archnemeses fowl with sweetgum tree branches until one would meet its timely demise at Thanksgiving.

Even after the girls grew up, graduated from college, and started their own families, they faithfully returned to Longview for every family tradition and celebration. Lucy married Adelle Dixon and had a family of two children.¹³ Johnnie fell in love and married Berlaind 'Leon' Brashear,¹⁴ a law student, and had a family of three children.¹⁵ Every summer, Johnnie's children would stay with their grandparents in Longview chasing chickens and eating wild blackberries. Even after John and Fannie's passing, Lucy and Johnnie's families would reunite and celebrate holidays in Longview.

John and Fannie gave their inheritable land to their daughters upon their passing, and the Blanton descendants have enjoyed the fruits of their ancestors' labor ever since. To this day, Johnnie owns ten acres of the property in her name and visits the town frequently with her family. She is proud of the progress her parents made during their lifetime and the legacy they created through grit and perseverance. This precious property will continue to pass through generations of the Blanton family. Someday I will be given the responsibility to care for my ancestors' land.

Pigford v. Glickman and the Remnants of Racism

This Article proceeds in four parts. Part I provides the history of land dispossession by analyzing the post-emancipation landscape for Black Americans and the modern issues plaguing minorities in the farming industry. Historical context lays a foundation for the evident remnants of racism present in *Pigford*.¹⁶ Part II reviews what *Pigford* entailed through the lens of race, the relief sought by the plaintiffs, and the implementation

13. Lucy had two children: Kathryn and Carla.

14. Berlaind 'Leon' Brashear worked throughout his childhood to support his family after his father became blind. He enlisted in the Marines. Later he attended law school in 1961 using the G.I. Bill, while working part-time at the post office. Leon went on to become the first African American judge elected to the Dallas County Criminal Court.

15. Johnnie had three children: Rhonda, John, and Bradley.

16. See *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999); see also Claims Resettlement Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010) (appropriating funds); *In re Black Farmers Discrimination Litigation*, 856 F. Supp. 2d 1, 26-27 (D.D.C. 2011) (approving the settlement).

of the settlements. In Part III, I argue the plaintiffs did not receive sufficient relief—and analyze how and whether the law has changed after *Pigford*. I propose alternative legal solutions that address the historical injustice. In Part IV, I reflect on the current state of affairs for descendants of Black farmers—and consider what a *post-Pigford* society of agricultural economics and legal opportunities entails for the descendants of sharecroppers.

I. Land Dispossession and Residual Racism

After vast amounts of land were forcibly taken from Native Americans, enslaved Africans and African Americans cleared, planted, and harvested the farmland. The Emancipation Proclamation¹⁷ and the Thirteenth Amendment¹⁸ abolished slavery; however, freedmen¹⁹ had no clear path towards land ownership or transferrable wealth. In fact, some states resisted ratification while others passed laws explicitly prohibiting land ownership in retaliation.²⁰ White Americans often took farmland that made its way into Black American ownership through legal,²¹ extralegal,²² and violent means.²³

17. Emancipation Proclamation, January 1, 1863; Presidential Proclamations, 1791-1991; Record Group 11; General Records of the United States Government; National Archives.

18. U.S. Const. amend. XIII.

19. An emancipated slave; the ability to act without physical or legal restraint. BLACK'S LAW DICTIONARY (2019).

20. Roy Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, *Journal of Black Studies*, SEPTEMBER 2013 (citing Schweninger, L. (1997). *Black Property Ownership in the South 1740-1915*. Chicago: University of Illinois Press).

21. Vann R. Newkirk II, *This Land Was Our Land*, *THE ATLANTIC* (Sept. 29, 2019), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>.

22. *One Million Black Families in the South Have Lost Their Farms*, *THE EQUAL JUSTICE INITIATIVE* (Oct. 11, 2019), <https://eji.org/news/one-million-Black-families-have-lost-their-farms/>.

23. See, e.g., *African American Perspectives: Materials Selected from the Rare Book Collection*, Library of Congress, <https://www.loc.gov/collections/african-american-perspectives-rare-books/articles-and-essays/timeline-of-african-american-history/1901-to-1925/> (last visited Dec. 15, 2021); see also Eddie Faye Gates, *The Oklahoma Commission to Study the Tulsa Race Riot of 1921*, 20 *Harv. Black Letter L.J.* 83 (2004).

A. Late Nineteenth & Twentieth Century Landscape: Land Hunger

After the Civil War, freedmen were coerced and deceived into abusive contracts with white planters—former slaveowners—on plantations.²⁴ Many contracts included high-interest loans for the ability to finance a small farm on the plantation where they worked.²⁵ Freedmen were forced to pay for food and crops for their families.²⁶ After loan payments and food deductions, most families owed a debt to white planters—trapping them in a vicious cycle of poverty all too reminiscent of their former servitude.²⁷ Sharecroppers were only permitted to plant and harvest crops chosen by white landowners.²⁸ Violence and political pressure prevented their access to courts.²⁹ Freedmen had “no recourse in a legal system designed to maintain white supremacy,” and those who attempted to find protection through legal means endured violent reactions.³⁰

Even worse, many legal methods confiscated the precious land given to Freedmen and limited any expansion. The Homestead Act of 1862 prohibited any westward land acquisition to Black Americans.³¹ The Jim Crow policies that permeated the South reinforced segregation in towns and further limited access for Black families to new land.³² In 1910, the USDA estimated at least twenty-five thousand Black farm operators—a twenty percent increase within ten years.³³ In 1937, the year Johnnie was born, President Franklin D. Roosevelt’s New Deal imposed new discriminatory practices that ensured Black farmers’ small farms failed while large plantations thrived.³⁴ New Deal administrators not only ignored, but also “targeted poor [B]lack people—denying them loans and giving sharecropping work to white people.”³⁵

24. *One Million Black Families in the South Have Lost Their Farms*, THE EQUAL JUSTICE INITIATIVE (Oct. 11, 2019), <https://eji.org/news/one-million-Black-families-have-lost-their-farms/>.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Vann R. Newkirk II, *This Land Was Our Land*, THE ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>.

Although many Black Americans served in World War II, G.I. Bill benefits were often disregarded when Black veterans applied for low interest home and business loans.³⁶ Federal Housing Authority insurance policies excluded Black Americans from VA loan benefits and racially limited neighborhoods through redlining³⁷ policies.³⁸ By the 1970s, racial restrictions resulted in Black Americans having access to less than two percent of housing financed and insured with federal mortgage assistance.³⁹ The discrepancy between G.I. Bill benefits given to Black Americans and their white counterparts attests to the federal government's history of institutionalized racism and its deeply harmful impact on minority families.

From the 1950s until 1975, half a million Black farmers lost their livelihood and land by "illegal pressures applied through USDA loan programs [which] created massive transfers of wealth [from] Black to white farmers."⁴⁰ At least thirteen million acres of land were lost, and most cotton farms in the south disappeared altogether.⁴¹ When this discrimination and incalculable damage was reviewed in court, a judge acknowledged the "persuasive indictment of the civil rights records of the USDA."⁴² Moreover, the "USDA's 1998 National Commission on Small Farmers found conclusive evidence of discrimination."⁴³ This systemic discrimination gave rise to the underlying claim in *Pigford*, which will be addressed in Part II.

36. Hatcher, LaDavia S., *A Case for Reparations: The Plight of the African-American World War II Veteran Concerning Federal Discriminatory Housing Practices*, THE MODERN AMERICAN, Summer 2006, 18-24.

37. Redlining is credit discrimination (usually unlawful discrimination) by an institution that refuses to provide loans or insurance on properties in areas that are considered to be poor financial risks or to the people who live in those areas. BLACK'S LAW DICTIONARY (2019).

38. Hatcher, LaDavia S., *A Case for Reparations: The Plight of the African-American World War II Veteran Concerning Federal Discriminatory Housing Practices*, THE MODERN AMERICAN, Summer 2006, 18-24.

39. *Id.*

40. *One Million Black Families in the South Have Lost Their Farms*, THE EQUAL JUSTICE INITIATIVE (Oct. 11, 2019), <https://eji.org/news/one-million-Black-families-have-lost-their-farms/>.

41. *Id.*

42. *Pigford v. Glickman*, 185 F.R.D. 82, 103-04 (D.C. Dist. 1999).

43. Stephen Carpenter, *The USDA Discrimination Cases: Pigford, in Re Black Farmers, Keepseagle, Garcia, and Love*, 17 Drake J. Agric. L. 1, 10 (2012) (citing USDA, NAT'L COMM'N ON SMALL FARMS, A TIME TO ACT: A REPORT OF THE USDA NATIONAL COMMISSION ON SMALL FARMS 25-27 (1998)).

B. Modern Issues Impacting Black Farmers: Plantation Economics of the South

Despite remedies sought in court and social progress, Black Americans still face many barriers to success and economic equality. Before Black farmers experienced land dispossession in the twentieth century, one in seven farmers was Black.⁴⁴ Even today, despite historical improvement, Black Americans seeking farming opportunities are met with the same barriers their ancestors faced.⁴⁵ Whether it's discriminatory lending practices or rising costs, these obstacles not only prevent minorities from seeking a career in farming, but also prevent passing inheritable wealth to descendants.

The resurgence of Black farmers in the Northeast has been met with the same discrimination practices that plagued the *Pigford* generation. The primary obstacles, lending discrimination and rising costs, prevent many Black Americans from owning farmland and making a stable living. For instance, James Minton currently owns a twenty-acre farm lovingly called the "Triple J Farm" in Windsor, New York.⁴⁶ He is farming with the message "#MakeFarmersBlackAgain."⁴⁷ When interviewed, he emphasized the land is meant for his children and descendants to enjoy during his lifetime and after his passing.⁴⁸ The parcel of land houses maple trees, chickens, cows, fish, and a home. This land turned into a prosperous venture and facilitated a lucrative family business. When Jim's grandson moved in to help the business, the farm "went from selling 30 dozen eggs every couple of months to selling close to 200 dozen each week."⁴⁹

Minton recognizes he had a rare opportunity to own farmland compared to his Black neighbors in New York. Minton's farm is a tenth the acreage of the average farm in New York, and because smaller farms are less profitable, they are expensive to maintain. In contrast to most Black farmers in the area, Minton bought his land later in life after saving for decades to make his initial payment. Young Black farmers must frequently overcome student debt and low credit scores before accessing the credit necessary to

44. Jillian Forstadt, *'Make Farmers Black Again': African Americans Fight Discrimination To Own Farmland*, NPR (Aug. 25, 2020, 5:03 AM), <https://www.npr.org/2020/08/25/904284865/make-farmers-black-again-african-americans-fight-discrimination-to-own-farmland>.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

purchase farmland. In addition, farm equipment costs \$50,000 to \$100,000, yet another barrier to new farmers. The systemic barriers that facilitated *Pigford* still restrict Black farmers today. Olivia Watkins, President of the Black Farmer Fund, explained “Lenders tend to be less hesitant to lend certain amounts of money to people based on their *preexisting financial conditions*, which are determined by what opportunities and privileges people have had in the past to get to the point where they can purchase that land.”⁵⁰

In addition to facing barriers in the process to obtain land, many Black farmers encounter obstacles to maintaining a successful business. The largest Washington, D.C. Farmers Market was recently accused of denying Black farmers a space in its most profitable market.⁵¹ Among a list of over 150 vendors at Dupont Circle Market, only fifteen businesses were Black-owned despite years of voiced frustration from the local community.⁵² For example, Toyin Alli, a Black chef and business owner, received application rejections for seven years without explanation.⁵³ Alli assumed Dupont considered tenure and financial stability, yet her application’s detailed financial records still resulted in denials.⁵⁴ Although Alli sells at a nearby market, Dupont is well known as the most profitable among 33 farmers markets owned by the parent company across the mid-Atlantic region.⁵⁵

Limiting the potential revenue to mostly white farmers not only permeates racial discrimination in the farming industry, but also exacerbates the generational disparity between white and Black families. One Black vendor noted, “I know (white) farmers who’ve managed to get a guest slot at FreshFarm’s Dupont Circle market and made two months of revenue in a single morning.”⁵⁶ Moreover, Dupont is one of the few markets open all year, providing listed vendors more time to increase revenue and maintain a customer base. As of 2020, Black farmers make an average of only \$40,000 in contrast to a white farmer’s average of \$150,000 annually.⁵⁷ Although Dupont has expressed interest in increasing the

50. *Id.*, see also *2020 Black Farmer Fund Annual Report*, BLACK FARMER FUND, <https://www.blackfarmerfund.org/> (last visited Dec. 15, 2021) (emphasis added).

51. Jenny Splitter, *Largest D.C. Farmers Market Repeatedly Denied Spots To Black Vendors, Farmers Allege*, FORBES (June 15, 2020, 8:00 AM) <https://www.forbes.com/sites/jennysplitter/2020/06/14/racism-dc-largest-farmers-market/?sh=3f217e92575b>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

number of Black vendors, a lack of transparency and vague application criteria continues to frustrate Alli and other Black farmers in the community.⁵⁸

The federal government has a modern record of unfulfilled promises of financial relief to Black farmers. After *Pigford*, many farmers saw the 2003 opening of the USDA Office of the Assistant Secretary for Civil Rights as a step towards progress; however, the Trump administration left the position unfilled during its term in office.⁵⁹ In 2018, as a result of a trade war with China, farmers experienced unprecedented losses.⁶⁰ To mitigate the country's decrease in agricultural exports, the Trump administration created a subsidy program at an estimated \$46 billion and promised that financial relief would reach farmers.⁶¹ Unfortunately, relief never arrived to most Black farmers. The founder and president of the National Black Farmers Association asserted, "That money went predominantly to white farmers and large corporate farmers."⁶²

For most Black farmers, this stark reality of racially motivated mistreatment is normal, despite the *Pigford* settlements. Many Black farmers still face foreclosure due to the proven racial discrimination of the USDA. One Black farmer noted, "[w]e have lived under economic terrorism for decades."⁶³ Although the Farmers Home Administration ("FHA") ended in 2006, multitudes of Black farmers lost their homes, land, and livelihood at the hands of FHA agents that denied financial benefits given to white farmers.⁶⁴ The FHA agents recorded a distrust of Black farmers, and as a result, refused to give them the same "no-strings attached checks" white farmers received.⁶⁵ Instead, Black farmers received managed accounts that required FHA oversight, and encountered additional barriers before receiving access to funds.⁶⁶

Although local control may seem minor in theory, in practice, requiring a county supervisor's approval to make any financial decisions in a business

58. *Id.*

59. Patrice Gaines, *USDA Issued Billions in Subsidies This Year. Black Farmers are Still Waiting for Their Share*, NBC NEWS (Oct. 28, 2020, 1:26 PM) <https://www.nbcnews.com/news/nbcblk/usda-issued-billions-subsidies-year-black-farmers-are-still-waiting-n1245090>.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

facilitates lower profit margins and missed opportunities. Giving local USDA offices control places reliance on the county supervisors, who rarely represent the Black community and may have unchecked personal biases that influence their employment duties. One farmer experienced receiving a denial of farm equipment the county supervisor deemed unnecessary; he later drove sixty miles again to the local USDA office to receive a check for peanut seeds, only to find the county supervisor missing, resulting in missing the seed sale.⁶⁷

The amount of debt weighing down this farmer continues to have a detrimental impact on his financial stability. He has remained trapped in foreclosure for seventeen years, and for nine of those years, the government has garnished his Social Security benefits and tax refunds.⁶⁸ In 2017, the racial disparity of income documented by the USDA census was striking: Black farmers on average made \$3,505, while the national average of all farmers was \$43,053, and white farmers made \$43,608.⁶⁹ Although some Black farmers have recently received financial support through Covid-19 relief funds, many have not been so lucky.

In 2021, to address the detrimental impact of the pandemic on farmers, the USDA planned to give Black and minority farmers payments.⁷⁰ This payment plan would be implemented by Section 1005 of the four billion dollar loan forgiveness program in the American Rescue Plan Act passed by Congress.⁷¹ The debt relief program for Black farmers was met with opposition from 49 senators who voted to remove or reduce the amount of aid.⁷² Potential recipients included both Black farmers “and other farmers of color who are deemed ‘socially disadvantaged’ due to decades of well-documented discrimination at the hands of the USDA.”⁷³ The farmers,

67. *Id.*

68. *Id.*

69. Archiebald Browne, *Frozen USDA Funds yet Another Setback for Oklahoma's Black Farmers*, NONDOC, (Aug. 11, 2021) <https://nondoc.com/2021/08/11/frozen-usda-funds-yet-another-setback-for-oklahomas-black-farmers/>

70. Mike Jordan, *Black US Farmers Dismayed as White Farmers' Lawsuit Halts Relief Payments*, THE GUARDIAN, (June 22, 2021, 3:15PM) <https://www.theguardian.com/us-news/2021/jun/22/black-farmers-loan-payments>.

71. *Id.*

72. Seth Bodine, *Black Farmers Will Receive Stimulus Aid After Decades Of USDA Discrimination*, NPR (Mar. 17, 2021, 4:09PM) <https://www.npr.org/2021/03/17/978288305/black-farmers-will-receive-stimulus-aid-after-decades-of-usda-discrimination>.

73. Rekha Radhakrishnan, *Black Farmers Face Severe Economic Displacement if Critical USDA Debt Relief is Denied*, PUBLIC COUNSEL, (Oct. 12, 2021) <https://www>.

many of whom are Oklahomans, have told their stories of unmet need and frustration with their local USDA offices.⁷⁴ Drusilla James, a rancher in Oklahoma, has been repeatedly denied financial assistance from the FSA to clear her land.⁷⁵ A rancher in Oklahoma only received a small loan after multiple applications and called on Agriculture Secretary Tom Vilsack to give more assistance to Black farmers.⁷⁶

The funds were meant to further address the century long record of discriminatory practices and policies that disproportionately impacted Black farmers, and the exacerbated financial stress of the pandemic.⁷⁷ White farmers sued the USDA, claiming reverse discrimination, which resulted in an injunction being granted by federal courts.⁷⁸ In response, a USDA spokesperson asserted the organization “will continue to forcefully defend our ability to carry out this act of Congress and deliver debt relief to socially disadvantaged borrowers. . . . When the temporary order is lifted, USDA will be prepared to provide the debt relief authorized by Congress.”⁷⁹ This debt relief program is intended to assist Black Farmers with up to 120 percent of their outstanding loans, including taxes.⁸⁰ Agriculture Secretary Tom Vilsack further argued this program will “advance equity and address systemic discrimination in USDA programs.”⁸¹

Frozen USDA Covid-19 relief has not reached Black communities in Oklahoma. Alvin Lee, a Black farmer in Seminole County, Oklahoma owns 160 acres of land.⁸² Lee would have been an eligible beneficiary of the farmer relief in the American Rescue Plan Act, but the temporary injunction

publiccounsel.org/press-releases/black-farmers-face-severe-economic-displacement-if-critical-usda-debt-relief-is-denied/.

74. *Id.*

75. *Id.*

76. *Id.*

77. Mike Jordan, *Black US Farmers Dismayed as White Farmers' Lawsuit Halts Relief Payments*, THE GUARDIAN, (June 22, 2021, 3:15PM) <https://www.theguardian.com/us-news/2021/jun/22/black-farmers-loan-payments>.

78. *Id.*

79. Helena Bottemiller Evich, *USDA Will 'Forcefully Defend' Debt Relief for Farmers of Color After Judge's Order*, POLITICO (June 14, 2021, 1:20PM) <https://www.politico.com/news/2021/06/14/usda-defend-debt-relief-farmers-of-color-494348>.

80. *Id.*

81. *Id.*

82. Archiebald Browne, *Frozen USDA Funds yet Another Setback for Oklahoma's Black Farmers*, NONDOC, (Aug. 11, 2021) <https://nondoc.com/2021/08/11/frozen-usda-funds-yet-another-setback-for-oklahomas-black-farmers/>.

halted any relief intended for Lee.⁸³ After decades of discriminatory practices by federal agencies, many Black farmers have sought financial assistance elsewhere.⁸⁴ In 2020, the USDA approved loans for 37 percent of Black applicants in contrast to 71 percent of white applicants for a program that would assist farmers paying for land, equipment, and repairs.⁸⁵ After such a negative experience with the USDA, some Black farmers developed mistrust toward federal government assistance.

Although *Pigford* addressed aspects of racially discriminatory practices in the USDA, many issues have not been confronted. Willard Tillman, the executive director of the Oklahoma Black Historical Research Project, noted many farmers work multiple jobs to get by, and Black farmers will not give up their land despite legal obstacles.⁸⁶ When Black farmers are able to access FSA loans, many still encounter confusing procedures.⁸⁷ Black farmers lack representation on the committees that control federal loan procedures.⁸⁸ Inflexible loan terms limit Black farmers' long term business options; "most loans from the Farm Service Administration are limited to seven years, after which farmers are forced out of the program."⁸⁹ Unlike their white counterparts, Black farmers rarely have other credit options.⁹⁰ Consequently, after the seven year term, most Black farmers are forced to use predatory lenders or borrow from suppliers at exorbitant interest rates.⁹¹ Despite assistance from the USDA Advisory Committee on Minority Farmers, many Black farmers assume unfulfilled financial assistance will plague the next generation, too.⁹²

83. *Id.*

84. *Id.*

85. *Id.*

86. Archiebald Browne, *Frozen USDA Funds yet Another Setback for Oklahoma's Black Farmers*, NONDOC, (Aug. 11, 2021) <https://nondoc.com/2021/08/11/frozen-usda-funds-yet-another-setback-for-oklahomas-black-farmers/>.

87. *Id.*

88. Lloyd Wright, *Discrimination has Become a Fact of Life for Black Farmers—That Must End*, FORTUNE, (Oct. 9, 2020, 7:00AM) <https://fortune.com/2020/10/09/black-farmers-usda-racism-pigford/>.

89. *Id.*

90. *Id.*

91. *Id.*

92. Archiebald Browne, *Frozen USDA Funds yet Another Setback for Oklahoma's Black Farmers*, NONDOC, (Aug. 11, 2021) <https://nondoc.com/2021/08/11/frozen-usda-funds-yet-another-setback-for-oklahomas-black-farmers/>.

II. Pigford I & Pigford II: *the Devil's in the Details*

A. Pigford I: *the Claim, the Relief Sought, and Settlement Granted*

It all started for Timothy Pigford when he applied for a \$150,000 USDA loan to buy the farm on which he worked.⁹³ In 1976, Pigford grew “corn and soybeans on 75 leased acres in North Carolina.”⁹⁴ Although he received an operating loan to purchase seeds, fertilizer, and supplies, the USDA denied Pigford’s farm-ownership loan.⁹⁵ In 1984, Pigford testified before Congress, alleging racial discrimination in USDA policies; shortly afterwards, the USDA denied two additional loans.⁹⁶ Although Pigford filed an official discrimination complaint with the USDA, he continued to struggle financially, and was unable to remain current with his original operating loan.⁹⁷ Even worse, his electricity was turned off for a year; shortly afterwards, federal marshals seized his home to commence foreclosure proceedings.⁹⁸

After over a century of federal government discriminatory policies, the unequal hand dealt to Black farmers gained national attention in *Pigford v. Glickman* (“*Pigford I*”). *Pigford I* involved almost twenty-three thousand Black Americans in the class action lawsuit.⁹⁹ Timothy Pigford and 640 other Black farmers sued the USDA, alleging racial discrimination in direct violation of the Equal Credit Opportunity Act (ECOA).¹⁰⁰ Plaintiffs claimed the USDA not only discriminated against Black farmers during loan distribution, but also failed to investigate complaints of racial bias.¹⁰¹

The plaintiffs filed a complaint alleging that from January, 1983 until January, 1997, farm loan applicants were denied credit and participation in federal farm programs.¹⁰² Plaintiffs suspected discrimination in the denial of these requests, and filed written discrimination complaints with the

93. David Zuchino, *Farmer Who Sued USDA — and Won — Now Grappling with IRS*, SEATTLE TIMES, (Mar. 31, 2012) <https://www.seattletimes.com/nation-world/farmer-who-sued-usda-8212-and-won-8212-now-grappling-with-irs/>.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Pigford v. Glickman*, 185 F.R.D. 82 (D.C. Dist. 1999).

100. *Id.* at 89.

101. Lloyd Wright, *Discrimination has Become a Fact of Life for Black Farmers—That Must End*, FORTUNE, (Oct. 9, 2020, 7:00AM) <https://fortune.com/2020/10/09/black-farmers-usda-racism-pigford/>.

102. *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.C. Dist. 1999).

agency.¹⁰³ Such complaints were often ignored, and the defendants' failure to address the complaints violated both the Civil Rights Act of 1964 and the Equal Credit Opportunity Act.¹⁰⁴ The defendants either intentionally prolonged the review process for many years, conducted fake "ghost investigations," or failed to act at all.¹⁰⁵ USDA officials admittedly disbanded and dismantled the civil rights enforcement arm of the USDA, and further ignored plaintiffs' complaints.¹⁰⁶ Two federal reports in 1997 verified this misconduct.¹⁰⁷ For relief, the plaintiffs sought the actions to be reversed as arbitrary, an abuse of discretion, and not in accordance with the law.¹⁰⁸ They sought a declaratory judgment that they were denied equal credit, other farm program benefits, and full and timely enforcement of their civil rights.¹⁰⁹

On April 14, 1999, Judge Friedman considered the facts of the class action lawsuit and the disputed discrimination in the USDA local offices.¹¹⁰ After noting the putative class met certification requirements, the district court considered the terms of the consent decree.¹¹¹ Judge Friedman acknowledged that putting a monetary cap of \$50,000 did not fully address the damage done to someone who experienced discrimination at the hands of the government.¹¹² The district court noted it was probable that no amount of money could fully compensate class members for such acts of racial discrimination.¹¹³ Objectors to the settlement noted that \$50,000 was not full compensation in most cases.¹¹⁴ The district court reviewed the USDA's denial of credit and benefits, which had a devastating impact on Black farmers.¹¹⁵ According to the Census, the number of Black farmers declined from 925,000 in 1920 to only 18,000 in 1992.¹¹⁶ Many Black farms were foreclosed upon, and the families were forced out of farming.¹¹⁷

103. *Id.*

104. *Id.* at 88.

105. *Id.*

106. *Id.*

107. *Id.* at 85.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 95.

112. *Id.*

113. *Id.*

114. *Id.* at 99.

115. *Id.*

116. *Id.* at 87.

117. *Id.*

“The farmers [who] managed to stay on their property were often subject to humiliation and degradation at the hands of [USDA officials], and were forced to stand by, powerless as white farmers received preferential treatment.”¹¹⁸ Judge Friedman framed his analysis of the consent decree by considering the pattern of unfulfilled aid to the Black community. The government broke its promise of forty acres and a mule to emancipated Black farmers, and “[o]ver one hundred years later, the USDA broke its promise” to Black farmers again.¹¹⁹ However, Judge Friedman optimistically characterized the consent decree as “[a] first step that has been a long time coming, but a first step of immeasurable value.”¹²⁰ The district court approved and entered the consent decree.

According to the consent decree, there were three eligibility requirements.¹²¹ Eligible recipients were Black farmers who (1) farmed or attempted to farm between 1981 and 1996, (2) applied for farm credit or benefits with the USDA and experienced racial discrimination, and (3) filed a complaint on or before July 1, 1997, against the USDA for such racial discrimination.¹²²

The district court analyzed the two track mechanism provided to determine whether individual class members were victims of discrimination and, if so, which amount of monetary relief they may be entitled to receive.¹²³ Under Track A, class members only needed to meet a low burden of proof, but received limited relief in the amount of an automatic cash payment of \$50,000 and forgiveness of any debt owed to the USDA.¹²⁴ Track A claimants received relief through “loan forgiveness and offsets of tax liability” and needed to present evidence of discrimination.¹²⁵ To meet the evidence threshold, claimants were required to prove four conditions.¹²⁶ First, the claimant owned or leased, or attempted to own or lease, farm

118. *Id.* at 88.

119. *Id.* at 112.

120. *Id.* at 113.

121. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

122. *Id.*

123. *Pigford v. Glickman*, 185 F.R.D. 82, 105 (D.D.C. 1999).

124. *Id.* at 95.

125. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

126. *Id.*

land.¹²⁷ Second, the claimant applied for credit at a local USDA county office during the eligible period.¹²⁸ Third, the claimant's loan was serviced in a manner "less favorable than that accorded specifically identified, similarly situated white farmers."¹²⁹ Fourth, the less favorable treatment of claimant's loan application caused economic damage.¹³⁰

In contrast, Track B required a higher burden of proof, but the compensation was unlimited.¹³¹ Class members could prove their claims in a one day trial before an arbitrator, and, if successful, the amount of compensation was not capped.¹³² The court also noted Congress' "unprecedented action of tolling the statute of limitations" to provide broader relief to the Black farmers.¹³³ Although Track B provided claimants an opportunity to receive a larger payment, they were required to provide substantial documentation: evidence of actual damages by a preponderance of the evidence.¹³⁴

Late claims received review by an arbitrator only if the claimant requested permission to file a late claim by September 15, 2000.¹³⁵ The reason for late filing must have related to extraordinary circumstances, such as a natural disaster or a failure of the postal service.¹³⁶ Notably, lack of notice was expressly rejected as a reason for late filing due to reportedly sufficient notice of the settlement agreement in local areas.¹³⁷ A stark percentage of class members didn't receive a review of their cases on the merits due to late filing, which gave rise to *Pigford II*.¹³⁸ Out of 66,000 claims filed before the deadline, only 2,116 proceeded under the *Pigford I* settlement procedure.¹³⁹ This low rate of late claim acceptances indicates the notice provided was not reasonably effective.¹⁴⁰ Many class members

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Pigford v. Glickman*, 185 F.R.D. 96, 105 (D.D.C. 1999).

132. *Id.* at 97.

133. *Id.* at 104.

134. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* (citing *Notice Hearing*, 1-4. See also EWG Report, at Part 3).

suggested the class counsel not only provided inadequate notice to claimants, but also poorly managed the settlement.¹⁴¹ Judge Friedman warned the failure of plaintiff's lawyers to meet deadlines and inadequate representation "bordered on legal malpractice."¹⁴²

In 2000, the United States Court of Appeals for the District of Columbia reviewed the class action lawsuit on its merits.¹⁴³ The appellate court analyzed how the USDA administered programs and provided credit to farmers.¹⁴⁴ Although these programs were federally funded, any decisions to approve or deny applications occurred at a local county level.¹⁴⁵ County level review involved three to five committee members who were elected by local farmers and ranchers.¹⁴⁶

As a result, very few committee members were minorities.¹⁴⁷ Although the USDA had regulations in procedure to conduct oversight, this rarely occurred in reality.¹⁴⁸ The appellate court noted applications were historically processed at the county level, with very little oversight.¹⁴⁹ Moreover, the appellate court analyzed the underrepresentation and racial discrimination by county officials, and the resulting delayed or denied processing of applications for Black farmers.¹⁵⁰

The court acknowledged these discriminatory practices were expressly prohibited by both statute and regulation.¹⁵¹ Even more concerning, in 1996, the Secretary of Agriculture created a civil rights action team in order to investigate the allegations,¹⁵² still as of February 1997, the USDA admitted that a backlog of discrimination complaints still required attention.¹⁵³ The Black farmers that filed the class action lawsuit not only alleged damages from the discriminatory practices, but also noted further

141. *Id.* (citing Tom Burrell, President, Black Farmers and Agriculturalists Association, Inc., *Tom Burrell Lays out the Case of why Al Pires, Class Counsel, Must be Fired!*, available at http://www.bfaa.net/case_layout.pdf; see also EWG Report, at Part 3).

142. *Id.* (citing *Pigford v. Glickman*, No. 97-1978 and No. 98-1693 (D.D.C. April 27, 2001); see also *Pigford v. Veneman*, 292 F.3d 918, 922 (D.C. Cir. 2002)).

143. *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000).

144. *Id.*

145. *Id.* at 1213.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1214.

150. *Id.*

151. *Id.* at 1215 (citing 15 U.S.C. § 1691(a) (1994); 7 C.F.R. §§ 15.51, 15.52 (1999)).

152. *Id.*

153. *Id.*

damages from the dismantling of the USDA's Office of Civil Rights in 1983.¹⁵⁴ The appellate court affirmed the district court's approval of the consent decree.

The *Pigford I* settlement resulted in \$1.06 billion being issued to over 13,000 Black farmers.¹⁵⁵ Still, only 371 Black farmers received debt relief, an imperative solution to curing the devastating effect of decades filled with racial discrimination.¹⁵⁶ Even after settlement proceedings began, disagreement quickly arose concerning the financial impact of the relief on the plaintiffs. One of the early lawyers in *Pigford I* proposed making the settlement payments tax-free, but the federal government resisted.¹⁵⁷ Moreover, many of the issues during settlement implementation were exacerbated by “the gross underestimation of the number of claims that would actually be filed.”¹⁵⁸ Under Track A, only 69 percent of claims received approval.¹⁵⁹ Interest groups noted the low approval rate occurred in part because many claims failed the third requirement under Track A.¹⁶⁰ Proving Black farmers received less equal treatment than similarly situated white farmers required access to local USDA files.¹⁶¹ Claimants had to persuade local offices—which were controlled by employees with documented discriminatory practices—to give class counsel access to their

154. *Id.*

155. Brenan Sharp, *African American Farmer's Legal Battle to Save his Family Farm is Focus of 'Catfish Dream'*, AMERICAN BAR ASSOCIATION, (Set. 25, 2019) <https://www.americanbar.org/groups/journal/podcast/20190925-african-american-farmers-legal-battle-to-save-his-family-farm-is-focus-of-catfish-dream/>.

156. Lloyd Wright, *Discrimination has Become a Fact of Life for Black Farmers—That Must End*, FORTUNE, (Oct. 9, 2020, 7:00AM) <https://fortune.com/2020/10/09/black-farmers-usda-racism-pigford/>.

157. *Id.*

158. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf> (citing *Status of the Implementation of the Pigford v. Glickman Settlement*, hearing Before the House Committee on the Judiciary, Subcommittee on the Constitution, 108th Cong. at 1595 (2004) (letter from Michael K. Lewis, Arbitrator)).

159. *Id.*

160. *Id.* (citing Environmental Working Group, *Obstruction of Justice, USDA Undermines Historic Civil Rights Settlement with Black Farmers*, Part 4 (July 2004) available at <http://www.ewg.org/reports/blackfarmers/execsumm.php> (hereinafter EWG Report)).

161. *Id.*

USDA files.¹⁶² Only 62 percent of Track B claimants received approval or settled with a cash payment.¹⁶³

After settlement, many of the plaintiffs received much less than \$50,000; payments were quickly reduced by state and federal taxes related to forgiven USDA loans.¹⁶⁴ Pigford claimed a partial exemption; he also paid state taxes and his settlement did not include federal tax deductions.¹⁶⁵ As a result, over time his federal tax burden increased from \$120,000 to \$600,000 after adding penalties and fees.¹⁶⁶ Today, Pigford rents a small home and owns two 1995 cars bought shortly after the settlement.¹⁶⁷ He relies on Social Security benefits and his wife's teacher pension.¹⁶⁸ Sadly, his financial instability is worse than before *Pigford*; he's unable to own his own home or land.¹⁶⁹ Heartbreakingly, he told a reporter "All I ever wanted to do...was farm my own land."¹⁷⁰ That dream may never be realized for Pigford. New settlement proceedings began after the USDA admitted failure to investigate thousands of other Black farmers' claims in the 1990s.¹⁷¹

B. Pigford II: the Claim, the Relief Sought, & Settlement Granted

When *In re Black Farmers Discrimination Litigation* ("Pigford II") gave rise, the rate and operation of Black-owned farms revealed a bleak landscape. According to the National Black Farmer Association, its average member operated only 50 acres of farmland, compared to the average white Midwestern farmer's property of 1,000 acres.¹⁷² Even worse, agricultural subsidies given to Black farmers averaged a meager \$200, while white farmers owning large properties received \$1 million or more.¹⁷³

162. *Id.*

163. *Id.*

164. David Zucchini, *Farmer Who Sued USDA — and Won — Now Grappling with IRS*, SEATTLE TIMES, (Mar. 31, 2012) <https://www.seattletimes.com/nation-world/farmer-who-sued-usda-8212-and-won-8212-now-grappling-with-irs/>.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Frank McCoy, *The Root: No Aid For Black Farmers*, NPR, (Sept. 7, 2010, 8:08AM) <https://www.npr.org/templates/story/story.php?storyId=129696245>.

172. *Id.*

173. *Id.*

In 2010, an additional settlement of \$1.25 billion resulted from *Pigford II* claims.¹⁷⁴ Like *Pigford I*, the second class action case included two settlement process routes and involved a moratorium on foreclosures for most qualified land. After *Pigford I*, tens of thousands of claims were denied for missing the filing deadline.¹⁷⁵ *Pigford I* class members did not receive an unlimited amount of time to submit a claim; all claims had to be postmarked by October 12, 1999 to avoid the aforementioned late filing approval process.¹⁷⁶ As a result, many claimants had to file a petition for leave.¹⁷⁷ As the court noted, only 2,585 late filers—a mere four percent of the total submissions—received approval to pursue relief under the *Pigford I* consent decree.¹⁷⁸ This procedural denial prevented Black farmers from pursuing their claims and obtaining desperately needed relief.

In lieu of continuing *Pigford I* litigation, Congress provided a provision in the 2008 Farm Bill that gave such farmers a new right to sue.¹⁷⁹ Eligible claimants were Black farmers who (1) submitted a late-filing request between October 12, 1999 but before June 19, 2008 and (2) had not received a determination on the merits of their discrimination complaint.¹⁸⁰ After multiple lawsuits were filed, the claims were consolidated into a single case: *Pigford II*.¹⁸¹ A total of 34,000 out of 40,000 claims were considered eligible for review.¹⁸² The claims administrator subjected each claim to four or five reviews by individual hearing officers as an internal control design.¹⁸³ In addition to the claim review process, the Government Accountability Office and USDA Office of the Inspector General each conducted audits and data standardization.¹⁸⁴

Pigford II provided two avenues for relief: any Black farmer able to demonstrate suffering from racial discrimination and timely filing received

174. *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 6 (D.D.C. 2011).

175. Jasmin Melvin, *Black Farmers Win \$1.25 Billion in Discrimination Suit*, REUTERS, (Feb. 18, 2010, 3:20PM) <https://www.reuters.com/article/us-usa-farmers-pigford/black-farmers-win-1-25-billion-in-discrimination-suit-idUSTRE61H5XD20100218>.

176. *Id.* at 10.

177. *Id.*

178. *Id.* at 11.

179. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 9.

up to \$50,000 and debt relief; or a separate, longer claim process also available to farmers provided up to \$250,000 in damage awards.¹⁸⁵ No claims received payment until all 34,000 claims received a determination of validity and a final judicial review.¹⁸⁶ Nearly all claimants pursued the first avenue for relief, and the claims administrator estimated fifty to fifty-six percent of claims received approval, in contrast to sixty-nine percent under the Track A process of *Pigford I*.¹⁸⁷

In addition, any claims involving foreclosures would have foreclosure proceedings halted until claims were addressed, and payments were estimated to begin in 2011.¹⁸⁸ Still, the final amount for all plaintiffs depended on the actual amount of funds approved by Congress.¹⁸⁹ At the time of settlement, Attorney General Eric Holder asserted, “the plaintiffs can move forward and have their claims heard—with the federal government standing not as an adversary, but as a partner.”¹⁹⁰ The 2008 Farm Bill provided \$100 million, and the Obama Administration requested an additional \$1.15 billion from Congress, totaling in a \$1.25 billion settlement of *Pigford II* claims.¹⁹¹

III. Pigford’s Broken Promise

A. Local USDA: the Last Plantation

Although *Pigford* attempted to address systemic racial discrimination in the USDA, litigation failed to remedy the root of the injustice: localized discrimination, enforced by committees and employees with apparent impunity at local Farm Service Agency (“FSA”) offices. Timothy Pigford’s experience with racial discrimination at his local FSA office was far from unique. In 1883, Curtis Gentry reunited with his brother and bought 1,500

185. *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 11 (D.D.C. 2011).

186. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

187. *Id.*

188. Jasmin Melvin, *Black Farmers Win \$1.25 Billion in Discrimination Suit*, REUTERS, (Feb. 18, 2010, 3:20PM) <https://www.reuters.com/article/us-usa-farmers-pigford/black-farmers-win-1-25-billion-in-discrimination-suit-idUSTRE61H5XD20100218>.

189. *Id.*

190. *Id.*

191. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

acres of land in Shiloh, Alabama twenty years after emancipation.¹⁹² Like the Blanton family, the Gentry family continued to farm, and each new generation inherited the land to continue their ancestors' legacy.¹⁹³ Allen Gentry, Curtis' grandson, married Bernice Atchison and the couple started a family on 319 acres of farm land in 1959.¹⁹⁴ The couple raised eight children and created a lucrative family business by selling vegetable crops to local customers.¹⁹⁵

Upon receiving USDA pig breeder certification, the couple received a notice of federal loan eligibility to purchase farrowing pens.¹⁹⁶ The Gentry family helped white neighbors build farrowing pens purchased with USDA farm subsidies and hoped to mirror the success their white counterparts experienced.¹⁹⁷ In 1981, Bernice and Allen spoke with a tight-lipped representative at their local FSA office, Mr. Byrd, who claimed there were no loan applications available.¹⁹⁸ The couple returned to the office for follow ups, and each time received inconsistent information from Byrd.¹⁹⁹ On different occasions, he claimed (1) the couple had no reason to expand their farm, (2) they had to wait until local white farmers received USDA loans before the couple could even apply, and (3) the money was gone.²⁰⁰ The couple persevered, but for nearly a decade, Byrd refused their request for USDA subsidies for farrowing pens, farming equipment, fertilizer, and land purchases.²⁰¹ After a decade of denials, when the couple finally succeeded in submitting an application, Byrd tore the papers to shreds and sneered, "[racial epithet], ain't no money here for you."²⁰²

Bernice and Allen joined the *Pigford I* class action lawsuit after multiple discrimination complaints to the USDA Civil Rights Office went unanswered.²⁰³ Like Byrd, staffers at the USDA Civil Rights Office admitted to throwing discrimination complaints in the trash before the

192. Kali Holloway, *How Thousands of Black Farmers Were Forced Off Their Land*, (Feb. 9, 2022 10:20 PM) <https://www.thenation.com/article/society/black-farmers-pigford-debt/>.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 2.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (racial epithet omitted).

203. *Id.*

office was disbanded by the Reagan Administration.²⁰⁴ Meanwhile, at the county office in Alabama, Byrd kept his position without reprimand.²⁰⁵ The United State Commission on Civil Rights cited stark evidence from a USDA report, noting the neglect of Black farmers' applications not only blocked access to "critical federal funds," but also exacerbated "the displacement and impoverishment of the [Black] farmer."²⁰⁶

In *Pigford I*, the court voiced dismay and disappointment that the USDA refused to include an express promise to discontinue discrimination in the consent decree.²⁰⁷ An abandoned settlement term provided "in the future the USDA shall exert 'best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination.'"²⁰⁸ The court emphasized the defendants were not above the law, and were subject to constitutional protections and the own agency's regulations against racial discrimination.²⁰⁹ The agency's refusal to hold itself accountable to preventing future racial discrimination implied a lack of accountability. Moreover, the decision to leave the promise out of the consent decree exposes willful ignorance of the extent of the agency's shameful role in accelerating the disenfranchisement of the Black community from inheritable land.

Pigford I further warned the USDA's future actions would be closely scrutinized, not only by class members, but also "their now organized and vocal allies, by Congress and by the Court. If the USDA or members of the county committees are operating on the misapprehension that they ever again can repeat the events that led to this lawsuit, those forces will disabuse them of any such notion."²¹⁰ *Pigford I* put the USDA on notice to understand the gravity of local discrimination as cogs within the machine of systemic oppression. No express agency changes were documented to address racial discrimination committed by county committees and local representatives like Byrd.

Unfortunately, the relief sought by the Black farmers never reached some class members or their descendants. Bernice Atchison testified to

204. *Id.*

205. *Id.*

206. *Id.*, see also *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999).

207. *Pigford v. Glickman*, 185 F.R.D. 82, 112 (D.D.C. 1999).

208. *Id.* (citing Letter from the Court to Counsel, dated March 5, 1999; see Response Letter from the Parties to the Court, dated March 19, 1999)).

209. *Id.* (citing U.S. CONST. amend. V; 15 U.S.C. § 1691; 42 U.S.C. § 2000d; 7 C.F.R. §§ 15.1, 15.51).

210. *Id.*

Congress in 2004 to expose the failures of the *Pigford I* settlement.²¹¹ Despite being an outspoken class member, she never received debt cancellation.²¹² Claims were eligible for debt cancellation only if the class member received USDA loans; however, most Black farmers never received funding in the first place due to the agency's racist lending policies at both local and national levels.²¹³ No relief was available for Black farmers who were forced to seek loans from predatory lenders. As a result, many Black farmers lost their land to foreclosure, including Bernice, who lost over 250 acres of her land.²¹⁴ Her husband, Allen, died in 1992 before seeing the fruits of their labor.²¹⁵ When asked whether she believed her land would be retrievable, Bernice noted the land had been sold multiple times already.²¹⁶ Bernice wondered, "If I had gotten those loans, just think about where we would be today. Think about the assets that I would have today. That was *generational wealth*. Our wealth was taken away."²¹⁷

Lucious Abrams, another original litigant in *Pigford I*, discussed the importance of receiving USDA subsidies on time as a farmer during the twentieth century.²¹⁸ The industrialization of the farming industry made the success of individual farmers depend on credit lines and debt.²¹⁹ During every planting season, farmers had to borrow funds to plant their crops and would pay the loans after crops were harvested at the end of the season.²²⁰ Not receiving a loan on time would cause a late start to planting season or a complete crop loss if the farmer was unable to obtain an alternative loan.²²¹ The USDA loans rarely came on time for Lucious.²²² When describing loan disbursement delays, he noted, "They just stretch it out, and you don't get your money on time. You don't get enough money to operate—*just enough to hang yourself*."²²³

211. Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, (Feb. 9, 2022, 9:015AM) <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* (emphasis added).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (emphasis added).

The House Committee on Government Operations confirmed Lucious' suspicions in a scathing 1990 report, which found the USDA not only "categorically and systemically denied minority farmers access and full participation in the multitude of Federal Government programs designed to assist them," but also was "directly responsible for the loss of land and resources these farmers have experienced."²²⁴ Another study commissioned by the USDA's Civil Rights Action Committee determined the agency took three times longer to process loan applications from Black farmers compared to their white counterparts, and approved loans often never arrived to Black farmers, which made it nearly impossible to earn a profit farming.²²⁵

In 2010, *Pigford II* was accompanied by reported agency changes aimed at addressing the issues of local discrimination and lack of accountability.²²⁶ The USDA announced updates to the civil rights complaint program to provide staff dedicated to investigating complaints.²²⁷ Second, the agency hired a third-party firm to assess the service delivery program and identify issues preventing equal access.²²⁸ Third, the USDA implemented a 90 day suspension to review loans that may have involved discrimination.²²⁹ Finally, the agency initiated a series of civil rights trainings for field leadership, in addition to requiring such trainings for appointed and senior leadership.²³⁰

These reported changes may begin to address the agency's record of racial discrimination from a national scale; however, none of these measures appear to address the issue of racial discrimination at local FSA offices and among county committees.²³¹ The lack of local compliance and

224. *Id.* (citation omitted).

225. *Id.* (citing Memorandum from D.J. Miller & Associates, Inc. to the Farm Service Agency of the U.S. Department of Agriculture, *Producer Participation and EEO Complaint Process Study* (Mar. 4, 1996), https://static.ewg.org/reports/2021/BlackFarmerDiscriminationTimeline/1996_DJ-Miller-Report.pdf?_ga=2.228342301.1019448031.1617656647-1280996132.1617656646).

226. Press Release, Department of Justice, *Department of Justice and USDA Announce Historic Settlement in Lawsuit by Black Farmers Claiming Discrimination by USDA* (Feb. 18, 2010), <https://www.justice.gov/opa/pr/department-justice-and-usda-announce-historic-settlement-lawsuit-black-farmers-claiming#:~:text=The%20plaintiffs%20can%20move%20forward,are%20treated%20fairly%20and%20equally>.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

continued systemic racism in the USDA were confirmed when issues arising during the pandemic brought forth litigation in *Miller v. Vilsack*.

B. Miller v. Vilsack: Justice Undone

A recent case provides an alarming indication that the cycle of historical injustice against Black farmers is at risk of repeating itself, and a societal consensus is not on the horizon. In March 2021, in the midst of an unprecedented pandemic, the Biden administration set a coronavirus relief package: The American Rescue Plan Act. \$4 billion debt relief was intended for farmers who have suffered from discrimination but is now in dispute in *Miller v. Vilsack*.²³² Although the debt relief program caught the attention of white farmers who allege reverse discrimination, the actual measures proposed pale in comparison to the land lost.²³³ Economists from Duke University and Harvard Law School analyzed the relief package, and stated the relief is a mere pittance in comparison to the lost land's true value.²³⁴

In *Miller v. Vilsack*, which is pending in the United States District Court for the Northern District of Texas, white farmers in Texas allege the loan forgiveness payments to eligible minority farmers violate the U.S. Constitution.²³⁵ The court issued an injunction, temporarily halting the program, thereby placing minority farmers at risk.²³⁶ There are "a dozen similar lawsuits nationwide in what appears to be a coordinated effort"²³⁷ to prevent eligible farmers from receiving the debt relief desperately needed during an unprecedented pandemic. In response to the injunction, the Federation, a collective of Black farmers, landowners, and cooperatives, filed a motion to intervene as a defendant in *Miller v. Vilsack*.²³⁸

232. Kali Holloway, *How Thousands of Black Farmers Were Forced Off Their Land*, (Feb. 9, 2022 10:20 PM) <https://www.thenation.com/article/society/black-farmers-pigford-debt/>.

233. *Id.*

234. *Id.*

235. Rekha Radhakrishnan, *Black Farmers Face Severe Economic Displacement if Critical USDA Debt Relief is Denied*, PUBLIC COUNSEL, (Oct. 12, 2021) <https://www.publiccounsel.org/press-releases/black-farmers-face-severe-economic-displacement-if-critical-usda-debt-relief-is-denied/>.

236. *Id.*

237. *Id.*

238. Mem. of Law in Supp. of The Federation of Southern Cooperatives/Land Assistance Fund's Mot. to Intervene as a Def. (Oct. 12, 2021), <https://www.lawyerscommittee.org/wp-content/uploads/2021/10/2021-10-12-D93-1-Memo-ISO-Motion-to-Intervene.pdf>.

This nation's dark history of agricultural redlining "has been cruelly discriminatory to Black farmers, operating in conjunction with private discrimination in bank loan policies to threaten their very existence."²³⁹ Public Counsel's Opportunity Under Law Director, Mark Rosenbaum, further warned the loan forgiveness program at risk in this case "is a lifeline that is the difference between existence and extinction of the Black farmer."²⁴⁰ 2017 data reveals Black farmers only comprise 1.7 percent of farmers in the United States.²⁴¹ Rosenbaum emphasized the voices of Black farmers harmed by discrimination must not be silenced.²⁴² Moreover, it is imperative that "some measure of recompense for the racism experienced not be denied to individuals who seek only equal opportunity to work their land, to provide for their families and serve all of us."²⁴³

IV. Post-Pigford America: A Change Is Gonna Come

*I was born by the river, in a little tent, Oh, and just like the river,
I've been running ever since, It's been a long, A long time
coming, But I know a change gonna come, Oh, yes it will, It's
been too hard living, But I'm afraid to die, 'Cause I don't know
what's up there, Beyond the sky, It's been a long, A long time
coming, But I know a change gonna come, Oh, yes it will, I go to
the movie, And I go downtown, Somebody keep telling me, Don't
hang around, It's been a long, A long time coming, But I know, a
change gonna come, Oh, yes it will, Then I go to my brother,
And I say, brother, help me please, But he winds up, knockin' me,
Back down on my knees, Oh, there been times that I thought, I
couldn't last for long, But now I think I'm able, to carry on, It's*

239. Rekha Radhakrishnan, *Black Farmers Face Severe Economic Displacement if Critical USDA Debt Relief is Denied*, PUBLIC COUNSEL, (Oct. 12, 2021) <https://www.publiccounsel.org/press-releases/black-farmers-face-severe-economic-displacement-if-critical-usda-debt-relief-is-denied/>.

240. *Id.*

241. Kali Holloway, *How Thousands of Black Farmers Were Forced Off Their Land*, (Feb. 9, 2022 10:20 PM) <https://www.thenation.com/article/society/black-farmers-pigford-debt/>.

242. Rekha Radhakrishnan, *Black Farmers Face Severe Economic Displacement if Critical USDA Debt Relief is Denied*, PUBLIC COUNSEL, (Oct. 12, 2021) <https://www.publiccounsel.org/press-releases/black-farmers-face-severe-economic-displacement-if-critical-usda-debt-relief-is-denied/>.

243. *Id.*

*been a long, A long time coming, But I know a change gonna come, Oh, yes it will.*²⁴⁴

When Sam Cooke wrote *A Change is Gonna Come*, he engraved his pain in each word. In 1964, despite the insurmountable odds the Black community had overcome—enslavement, genocide, dehumanization—the average Black person in America still suffered in society. 1964 provided a unique snapshot in time for the progress achieved by the Black community. Many generations were birthed to parents who survived slavery and held steadfast determination to see their children flourish in the new unknown. Yet, despite the great progress achieved, the Black community was bound to those in power who attempted to hold them down at every turn. Those in power not only refused to help brethren off their knees, but also codified hate through Jim Crow laws. As Cooke sang, Black Americans knew change must come and longed for the day when light would shine upon their faces, ending the dark period of pain and suffering.

The Blanton family provided a picture of hope in even the darkest of times. Juxtaposed against the backdrop of enduring slavery, sharecropping, and witnessing lynching, John Blanton pulled his family from the depths of despair and let the light shine upon their faces from their own land. Even as the family made progress by leaps and bounds, they were constantly faced with dark reminders of the hate that held back their community. They would go downtown to enjoy a movie, and their white brethren would remind them—don't hang around. Still, the Blantons fearlessly proved they belonged in Longview, on their terms and by their own merits.

After the pain and suffering endured by generations of *Pigford* litigants, many unnamed, how does this nation envision agricultural economics and legal opportunities for Black farmers? Given the ongoing litigation in *Miller v. Vilsack*, and the criticism of *Pigford*, courts may not provide an effective avenue for relief. Although the settlements provided tangible relief to a fraction of eligible recipients in the *Pigford* settlements, is \$50,000 an adequate amount to remedy such suffering? The loss of inheritable land, the systemic oppression at a national level, and the racist attitudes at the local level, struck claimants with an incalculable injury. Moreover, ruined credit, loss of future opportunity, and stripped generational wealth collectively inflicted a permanent strike on the backbone of this country. The community that built the infrastructure of one of the wealthiest countries in the world now only comprises less than two percent of the farming industry.

244. Cooke, Sam, *A Change is Gonna Come, Ain't That Good News* (RCA Victor 1964).

Timothy Pigford and the *Pigford* litigants expose the dark reality: a legal avenue did not provide the relief they demanded and badly needed. A majority of Black farmers have lost their land to foreclosures, and still endure racial discrimination despite decades of litigation and support from legal allies.

Creative solutions outside of the courthouse must be considered to provide more adequate relief to Black farmers. Despite the pending litigation in *Miller v. Vilsack*, debt relief programs would provide desperately needed assistance to Black farmers, especially those who were forced to work with predatory lenders at unreasonable interest rates. In addition, many Black farmers have lost their land due to foreclosures, often at the hands of the federal government. Given the USDA's well-documented history in administering racist practices, the federal government has an obligation to remedy past wrongs. Providing relief in the form of foreclosure moratoriums for Black farmers and assisting with debt refinancing would make a deep and immediate impact on members of this vulnerable community. Moreover, providing programs focused on reasonable insurance premiums, new loan programs with transparent procedures, and other red-lining improvements should be considered by the federal government. Most importantly, the notion of trickle-down anti-discrimination policy updates places the USDA in an illusion of progress. The agency must confront the substantial evidence of local discrimination and provide effective measures to rip out the last remnants of racism in their local FSA offices.

Many of the generations that suffered under the *Pigford* systemic discrimination have died, without receiving remedy in the form of returned inheritable land or the monetary *equivalent*. As a result, there is a compelling need to consider reparations; reparations like those for past housing discrimination in cities such as Evanston, Illinois.²⁴⁵ In acknowledgment of harm directly caused by the city's housing discriminatory practices and inaction, the city council voted to approve the Local Reparations Restorative Housing Program.²⁴⁶ Many advocates of reparations for documented discrimination view this program and procedure as a national model for other local or national communities.²⁴⁷

245. Rachel Treisman, *In Likely First, Chicago Suburb Of Evanston Approves Reparations For Black Residents* (Mar. 23, 2021), <https://www.npr.org/2021/03/23/980277688/in-likely-first-chicago-suburb-of-evanston-approves-reparations-for-black>.

246. *Id.*

247. *Id.*

V. Conclusion

Litigation has proven an insufficient solution, and perhaps legislation will prove to be the most effective avenue. Yet *Miller v. Vilsack* warns that even if legislation is passed, equitable solutions can become tied up in litigation. Alternatively, the root of the problem has proven to remain in the USDA system at a local level. Given that control remains at local FSA offices, racial discrimination may continue to perpetuate the original issues that gave rise to the *Pigford* settlements. As a result, it is imperative to remove local control, require minorities receive equal access to local committee membership, and enforce strict anti-discrimination procedures at local offices. The USDA must smash the remaining vestiges of racism through defined objectives, accountability, and oversight by Congress.

If the USDA elected to create a national route, it would remain imperative to guard against discrimination permeating every facet of such a program. Certainly, an algorithm route would initially provide more objective review; however, facial recognition systems in the criminal legal system have proven that artificial intelligence is equally susceptible. Discrimination in coding could arise if the code creators are prejudiced, or if algorithms are created using white farmers as the template. When there is not a tenable legal solution to remedy the remnants of racism, society must confront this reality with acknowledgment and uplift those who have been historically trampled by racist government policies. “Not everything that is faced can be changed, but nothing can be changed until it is faced.”²⁴⁸

The law certainly changed after the *Pigford* settlements. Black farmers may not have brought the USDA to its knees, but they forced this nation to confront the remnants of racism in agricultural policy and administration. These litigants planted trees whose shade they may never enjoy; many class members knew they would not reap the benefits for which they fought. Still, *Pigford* claimants sought justice, in the hopes their descendants may inherit progress with the sun shining on their faces.

248. James Baldwin, *AS MUCH TRUTH AS ONE CAN BEAR; To Speak Out About the World as It Is, Says James Baldwin, Is the Writer's Job As Much of the Truth as One Can Bear* (June 25, 2022, 10:10 AM) <https://www.nytimes.com/1962/01/14/archives/as-much-truth-as-one-can-bear-to-speak-out-about-the-world-as-it-is.html>.