The Inclusion Rider: Constitutional Analysis and Practical Application of Demanding Diversity throughout Hollywood

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INTRODUCTION

Mildred Hayes is a woman frustrated from injustice due to months passing without someone finding the perpetrator who committed the heinous crime against her daughter.1 So, she decides to post billboards illustrating her dissatisfaction with law enforcement.2 Mildred Hayes is a fictional character played by Frances McDormand in the movie Three Billboards Outside Ebbing, Missouri but Frances McDormand and her character have something in common: trying to remedy something they view as unjust.3 On March 4, 2018, Frances McDormand accepted her well-deserved “Best Actress” award for her performance in that very same movie.4 However, the real impact she made was through her acceptance speech.5 She ended the night with two words that sent the whole world

2. Id.
5. Frances McDormand’s speech touched upon the lack of representation in Hollywood and pointed out that there are many women that have stories to tell and projects that needed to be funded. That is when she introduced us to the term “inclusion rider.” Id.

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into a frenzy searching for their meaning. Those two words were “inclusion rider” and they were the most searched terms for Merriam-Webster Dictionary that night.

The term “inclusion rider” is powerful because it is a contractual provision that actors and actresses include in their contracts to demand diversity both on the screen and in other positions (casting, screenwriters, music) for groups that have been historically underrepresented in Hollywood. These underrepresented groups include women, people of color, members of the L.G.B.T.Q. community, and people with disabilities.

The term was initially originated by Dr. Stacy Smith, who strongly believes that it is past time for Hollywood to become more inclusive. Her advice to Hollywood involves three easy steps: (1) add five female speaking roles to each movie; (2) mandate interviews with females for director positions; and (3) have top actors and actresses demand a provision in their contract to mandate diversity known as the inclusion rider. Why is her voice important in this issue? Dr. Smith is the founder and director of the Annenberg Inclusion Initiative, which has conducted thorough research on gender equality in the entertainment industry for over a decade. The numbers from her findings are nothing short of disturbing. Through her research, Dr. Smith found women represented less than one-third of speaking characters in the top 100 grossing films in 2013. Furthermore, these numbers have not changed over the last seventy years. It may seem easy to shrug this off and argue that we are only talking about movies, but the impact the entertainment industry can

7. @MerriamWebster, TWITTER (Mar. 5, 2018, 12:47 AM), https://twitter.com/MerriamWebster/status/970521118166671360.
8. Dwyer, supra note 6.
11. Id.
14. Id.
15. See id.
have for people in reality throughout the world is profound.\textsuperscript{16} Research shows the way men portray women perpetuates stories that ultimately objectify women and promote "thin ideals", which lead to body dissatisfaction and self-objectification for women viewers.\textsuperscript{17} This information makes it easier to see the importance of representation in movies for certain classes of people.\textsuperscript{18} Clearly, this has been Dr. Smith's position for quite some time and the energy she has invested into creating a more inclusive Hollywood is paying off.\textsuperscript{19} There is a spotlight on the issue of diversity in Hollywood, now more than ever.\textsuperscript{20}

The push for inclusion and diversity comes at a delicate time in Hollywood.\textsuperscript{21} Typically, Hollywood has been dominated by males, more particularly, white males.\textsuperscript{22} For example, since the founding of the Oscars in 1929, there have been numerous white male directors who have been nominated and who have won the award for "Best Director."\textsuperscript{23} Since then, the award has been given out for ninety years.\textsuperscript{24} However, after the 2018 Oscars, there were only five African-American directors (all male) that had ever been nominated for "Best Director,"\textsuperscript{25} but not one single African-

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\textsuperscript{16} See Kimberlianne Podlas, \textit{The Tales Television Tells: Understanding the Nomos Through Television}, 13 TEX. WESLEYAN L. REV. 31, 38 (2006) ("[Pop culture] constitute[s] the very material from which we construct our realities, thus impacting what people do and believe.").

\textsuperscript{17} Smith, supra note 13.

\textsuperscript{18} Id. When women or people of color see how Hollywood, or the world expects them to be, it can lead to negative results. Id. Representation matters because it is important for each demographic to see themselves on screen and not only what Hollywood uses to show how people should look or act. See Podlas, supra note 16.


\textsuperscript{20} See Martin Belam & Sam Levin, \textit{Women Behind 'Inclusion Rider' Explains Frances McDormand's Oscar Speech}, THE GUARDIAN (Mar. 5, 2018), https://www.theguardian.com/film/2018/mar/05/what-is-an-inclusion-rider-frances-mcdormand-oscars-2018 ("After McDormand's speech, some actors immediately offered public support to the idea on social media, with Brie Larson committing to it.").


American director actually received the award.\textsuperscript{26} Those numbers do not get much better for women, as only five women have been nominated for "Best Director" with only one of them winning the award.\textsuperscript{27} To put that in perspective, eighty-nine out of the ninety award-winners for "Best Director" have been men, giving women a 1.1 winning percentage.\textsuperscript{28} These numbers illustrate the poor representation in Hollywood,\textsuperscript{29} but the diversity problem does not end there.

Recently, a controversy caused actress Scarlett Johansson to drop out of a movie because she was casted to play a transgender man.\textsuperscript{30} The outrage stemmed from the fact that a role that was designed for a transgender was being given to a cisgender,\textsuperscript{31} something many people feel to be offensive towards transgenders.\textsuperscript{32} Additionally, there is the problem of white-washing in Hollywood where white actors and actresses play roles that are meant to be non-whites.\textsuperscript{33} Numerous examples exist, from Jake Gyllenhaal playing a character of Middle Eastern descent in \textit{Prince of Persia: The Sands of Time}\textsuperscript{34} to Emma Stone playing a character of Chinese and Hawaiian descent in \textit{Aloha}.\textsuperscript{35} These brief examples help

\begin{itemize}
\item \textsuperscript{27} Carrie Wittmer, \textit{Greta Gerwig is the 5th Women to Be Nominated For a Best Director Oscar—Here Are All the Others}, BUS. INSIDER (Feb. 9, 2018), https://www.businessinsider.com/women-nominated-for-best-director-oscar-list-2018-1.
\item \textsuperscript{28} This is calculated by the amount of times the award has been won (1) divided by the amount of times the award has been given out (90) which equals 1.1 percent.
\item \textsuperscript{29} See Priscilla Frank, \textit{Representation In Hollywood Is Just As Depressing Today As It Was 10 Years Ago}, HUFFINGTON POST (July 31, 2017), https://www.huffingtonpost.com/entry/hollywood-diversity-women_us_597f6cabe4b02a8434b84967.
\item \textsuperscript{31} See \textit{Cisgender}, MERRIAM-WEBSTER (defining cisgender as being "a person whose gender identity corresponds with the sex the person had or was identified as having at birth").
\item \textsuperscript{34} Alex Eichler, \textit{Why Is a White Actor Playing ‘Prince of Persia’ Title Role?}, THE ATLANTIC (May 26, 2010), https://www.theatlantic.com/entertainment/archive/2010/05/why-is-a-white-actor-playing-prince-of-persia-title-role/345435/.
\end{itemize}
illustrate that there is a persistent problem within Hollywood when it comes to diversity. The focus then becomes whether there is a remedy out there that can address this diversity issue and result in real and meaningful change.

The inclusion rider is certainly a creative initiative that would mandate levels of diversity to be sought for the production and casting of movies. This may be a novel idea for Hollywood, but there are similar programs in other areas that promote or even mandate diversity. Initiatives like the National Football League’s Rooney Rule and Affirmative Action address disparities in representation for certain classes of people. These programs are examples of implemented initiatives used to tackle inequality. Some, such as controversial clinical psychologist Jordan Peterson, do not believe that mandating results for equal outcome is necessarily a good thing, rather it is equal opportunity that is desirable among people.

36. Mark R. Swiech, You’ll Never Work In This Town Again: Employment, Economics, and Unpaid Internships In the Entertainment and Media Industries, 49 LOY. L.A. L. REV. 475, 488 (2016) (“Hollywood, in particular, is routinely criticized for the lack of diversity in its ranks.”).


42. The Rooney Rule was developed because of the low percentage of minority head coaches and general managers. Stites, supra note 40. Similarly, Affirmative Action was created to level the playing field after years of denying minorities an education through “past . . . discrimination.” See Lisa E. Chang, Remedial Purpose and Affirmative Action: False Limits and Real Harms, 16 YALE L. & POL’Y REV. 59, 61 (1997).

While some may argue against the effectiveness of these programs, others may argue that promoting hiring practices based on race is illegal, calling it “reverse discrimination.” 44 Racial and gender equality has been a sensitive topic since the birth of our nation. 45 While there is one side that sees corrective measures as a way to fix inequality, there is the other side that argues favoring race, gender, and sexual orientation for certain job opportunities is discrimination even if it is used to rise up underrepresented classes. 46

The Supreme Court in Regents of University of California v. Bakke held that racial quotas set aside for minority students violates the Equal Protection Clause, but they were not precluded from considering race as a factor for admitted students. 47 The Court made it clear that racial quotas were not permissible for public entities by striking down the program. 48 However, the question of whether positions for certain underrepresented groups may be reserved is more open for private corporations, like studios in Hollywood. 49 This analysis requires a discussion of the state action doctrine 50 and a determination of whether the movie studios would be considered “state actors.” 51 If so, then the racial or gender quotas would be subjected to the strictest scrutiny of the court. 52 However, if this initiative were to encourage or mandate equal opportunity, and not necessarily equal outcome, then the contract language may have a better

44. In Re Birmingham Reverse Discrimination Emp. Litig., 20 F.3d 1525, 1533 (11th Cir. 1994).
48. Id.
49. The Fourteenth Amendment’s Equal Protection Clause prohibits public and state-operated companies from creating racial quotas when hiring or considering admission, but cannot restrict racial quotas implemented by private businesses. See The Civil Rights Cases, 109 U.S. 3, 11 (1883) (“It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.”).
50. Id. (holding that Congress lacked authority to regulate private affairs under the Fourteenth Amendment). Over the course of jurisprudence, if a private business is supported by state authority, then its policies could perhaps be restricted by the Constitution. See Michael J. Dittenber, Blackwater and Beyond: Can Potential Plaintiffs Sue Private Security Companies for Due Process Violations Via Exceptions to the State Action Doctrine, Including Through Section 1983 Actions?, 33 NOVA L. REV. 627, 640 (2009).
51. Dittenber, supra note 50, at 636. The question of whether movie studios are state actors or independent private entities is important when determining if they can enforce “racially discriminatory” or race-conscious policies. Id.
52. See Bakke, 438 U.S. at 279.
chance surviving judicial scrutiny.\textsuperscript{53} Similar to the Rooney Rule,\textsuperscript{54} this would require interviewing certain minorities like women, people of color, and members of the L.G.B.T.Q. community before making a final decision.

Assuming that the language in the inclusion rider conforms to certain statutory and constitutional language, the question then becomes whether these measures would be effective.\textsuperscript{55} There are many top actors and actresses, such as Michael B. Jordan, Brie Larson, Ben Affleck, and Matt Damon, that have already committed to adopting the inclusion rider in their contracts.\textsuperscript{56} However, this doesn’t necessarily fix the problem of equal representation due to the volume of actors and actresses in Hollywood.\textsuperscript{57} There may be many studios or executives that reject using actors and actresses calling for inclusion riders because they disagree with the philosophy of it, do not want to be handcuffed by those “restraints,” or just want to stay away from the “controversial” language in the provision.\textsuperscript{58} Whatever the reason may be, one can picture the inclusion rider becoming a promising idea rather than an effective initiative.\textsuperscript{59} Thus, appropriate steps need to be taken if advocates for a more inclusive Hollywood want to get their wish.

Towards the conclusion of this note there will be several proposals that can help successfully implement the inclusion rider to guarantee the

\textsuperscript{53} Id. at 326 (Brennan, J., concurring) (noting a program that considers race as one of many factors for admission is permissible).
\textsuperscript{54} See Stites, supra note 40.
\textsuperscript{55} The inclusion rider is a contractual provision that actors may demand in their contracts. See Dwyer, supra note 6. If studios wanted to stay away from that provision, then they could choose people that didn’t demand inclusion riders which could render the effort ineffective. Id.
\textsuperscript{57} There are over 30,000 working actors and actresses. This gives studios and film producers the upper hand because they have a pool of acting talent to choose from if they wanted to avoid using people that demand inclusion riders in their contracts. Actors, DATA USA, https://datausa.io/profile/soc/272011/ (last visited Oct. 15, 2019).
\textsuperscript{58} A contract provision that demands hiring based on racial or gender considerations makes the studio vulnerable to lawsuits from people who lost out on opportunities to minority candidates. See Christine Rosen, ‘Inclusion Riders’ Are Just Quotas (And They’re Never Going To Happen), WASH. EXAMINER (Mar. 5, 2018), https://www.washingtongexaminer.com/weekly-standard/inclusion-riders-are-just-quotas-and-theyre-never-going-to-happen.
\textsuperscript{59} If the inclusion rider were to be contract demand with individual actors/actresses then a film studio can elect to choose an actor with no such contract provision, rendering it powerless. Jonathan Christian, Are Inclusion Riders Problematic?, STUDY BREAKS (Apr. 25, 2018), https://studybreaks.com/tvfilm/inclusion-rider/.
positive effect on diversity that it seeks to achieve. The Academy can play a role in creating a more diverse film industry by providing incentives to studios and movie makers to adopt the inclusion rider language. Or perhaps, an independent commission can be created to ensure minimal levels of diversity are being reached, or that there are reasonable efforts to achieve those minimal levels. Unions like the Screen Actors Guild can help mandate this initiative. Or possibly an inclusive film production can be created to exclusively fund movies that implement the language of the inclusion rider.

I. THE DESIRE FOR DIVERSITY IN HOLLYWOOD

The lack of Academy Awards nominations and wins for women and people of color stems from their inadequate representation in the movie industry. In 2014, nearly 38 percent of the United States population was made up of minorities, but only 8 percent of writers for feature films were

60. While prominent actors like Michael B. Jordan and Brie Larson are vowing to adopt the inclusion rider, other methods like an independent commission or union might be more effective because they demand change coming from the top. See infra notes 61-63.

61. The Academy can give special consideration for top categories like Best Director, Best Film, and Best Actor/Actress to the films that adopt identical or similar language to the inclusion rider in order to give an incentive to promote diversity as they have shown an effort to recognizing minority nominees. Richard Guay, Why We Need Diversity Incentives for Film and Television, INDIEWIRE (Feb. 7, 2015), https://www.indiewire.com/2015/02/why-we-need-diversity-incentives-for-film-and-television-65329/ (discussing the use of incentive programs to promote inclusive hiring practices).

62. A supreme, independent commission could be created as a watchdog over all the film studios. They could create guidelines and rules that industries have to follow and/or give extra funding to films that contract with actors that demand the inclusion rider. Ben Child, Academy Poised For Radical Rule-Changes to Tackle Oscars Diversity Crisis, THE GUARDIAN (Jan. 21, 2016), https://www.theguardian.com/film/2016/jan/21/oscars-awards-diversity-crisis-african-american (stating that the Academy was considering other changes to voting rules to address the issue).

63. Unions In Hollywood, TV TROGOS, https://tvtropes.org/pmwiki/pmwiki.php/UsefulNotes/UnionsInHollywood (last visited Oct. 15, 2019) (stating that the Screen Actor’s Guild is one of Hollywood’s most prominent union). If they desired more diversity and opportunities for minorities in Hollywood, then they could demand provisions from film and TV studios that would meet the requirements of the inclusion rider. See Dwyer, supra note 6.


minorities (compared to 92 percent of white writers for feature films). Statistics like these led to the controversy that surrounded the 2015 Oscars when it was discovered that there were an overwhelming amount of white award nominees in each category. There are plenty of stories to be told that reach far beyond a white male’s perspective and there is a great desire to hear those stories. By 2018, there were plenty of movies nominated that centered around a minority culture, were produced by an individual who identifies as a minority, or both.

Jordan Peele received four Academy Award nominations for his film Get Out, which centered around an African-American man (portrayed by Daniel Kaluuya, who received a nomination for “Best Actor”) and the paranoia he feels around his girlfriend’s white rural family. It was the most profitable movie in 2017, reaching a “630 percent return on investment,” thus highlighting the demand for films with minority representation. Peele’s feature film had a budget of 4.5 million dollars and grossed well over 250 million dollars worldwide. Likewise, Lady Bird is a highly acclaimed film that featured a female director, Greta Gerwig, and centered around the relationship between a mother and


71. Id.

72. Wile, supra note 68.

73. Id.
The film became the most financially successfully movie for A24, an entertainment company, and maintained a 100 percent score after close to 200 reviews on Rotten Tomatoes. Additionally, there is The Big Sick which had a Pakistani-American male lead, Kumail Nanjiani, and followed the interethnic relationship between him and his girlfriend, Emily Gordon. The film received an Academy Award nomination for "Best Original Screenplay." More recently, the film Crazy Rich Asians featured an all-Asian cast. It grossed almost 175 million dollars domestically and the demographics of moviegoers reached far beyond the Asian community. Other honorable mentions include Black Panther and Wonder Women, showing that people want to hear and view stories from different perspectives, they want to see movies that represent themselves, and they are flooding the box office to see them.
In the age of #MeToo\textsuperscript{82} and post-Weinstein Hollywood,\textsuperscript{83} it is clear people within Hollywood are no longer satisfied with the status quo.\textsuperscript{84} The inclusion rider is an initiative that challenges the status quo and confronts the issue of diversity in Hollywood.\textsuperscript{85} This contract provision is not meant to limit the creativity of filmmakers because Hollywood is the perfect place for art and creativity and it has often rejected the idea that certain worlds or stories are limited to certain races, genders, or sexual orientations.\textsuperscript{86} An example of someone who follows this idea is provocative filmmaker Quentin Tarantino who has written movies about slavery and Nazis and has freely used controversial language in his films.\textsuperscript{87} Other examples include actors Nick Robinson and Lucas Hedges who both are straight men but play gay teenagers in the films Love, Simon and Boy Erased, respectively.\textsuperscript{88} There can be an argument raised that these are the exact roles that should be given to the underrepresented class of people (African-Americans should be the ones to write movies on the tragedies of slavery, members of the L.G.B.T.Q. community should play the roles of homosexuals) and it would be a valid one.\textsuperscript{89} However, the push for inclusion and diversity does not mean that straight plays only play straights, gays should only play gays, and writers should only write

\textsuperscript{82} The #MeToo era represents a time around the country where women, and even men, speak out about the abusive treatment, both sexual and nonsexual, that they have endured from powerful men. History & Vision, Me Too, https://metoomvmt.org/about/#history (last visited Oct. 15, 2019).

\textsuperscript{83} Harvey Weinstein was a film producer accused of using his star power and name recognition to force or coerce women to perform various sexual acts on him in exchange for favorable roles in movies. Other high-profile men who have been accused include Kevin Spacey, James Franco, and Louis C.K. Christen A. Johnson and KT Hawbaker. #MeToo: A Timeline of Events, CHI. TRIB. (Sept. 27, 2019), https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html.


about their own worlds and perspectives. Rather, this is a demand for more inclusiveness for minorities so that they have the opportunity to play in these roles or write these scripts. The momentum and desire behind a more diverse Hollywood is strong. Frances McDormand furthered that movement when she mentioned the inclusion rider at the end of her Oscars speech and a rider inclusion could certainly be the legal provision that creates a more inclusive entertainment industry. However, the issue remains whether mandating diversity and consideration of race, gender, and sexual orientation by employers will comply with statutory and constitutional standards.

II. LEGALITY OF THE INCLUSIVE RIDER

A. Mandating Diversity versus Promoting Diversity

The inclusion rider would act as a contract provision for actors and actresses to demand that the cast and crew of a film be an accurate representation of the world’s demographics and include a “proportionate number of women, minorities, LGBTQ individuals and people with disabilities.” Ivy Kagan Bierman, a lawyer who focuses on employment matters, believes that studios will look for contract language that seeks “reasonable efforts” to maintain diversity rather than demanding a quota or a specific percentage of diversity. This would be the safest way to include the equity provision within the contract because a quota system

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94. See Gratz v. Bollinger, 539 U.S. 244, 275 (2003). While promoting diversity is desirable and has been found to be a compelling state interest, the means used to reach that end must be narrow enough so that it does not violate the Equal Protection Clause. Id.

95. Judkis & Merry, supra note 37.

may be placed under great scrutiny if challenged in court.\textsuperscript{97} For example, assume the contract required the filmmakers to give “reasonable efforts” toward achieving a diverse cast and crew. Those filmmakers have the discretion to consider the race, gender, or sexual orientation as a “plus” for an applicant, rather than reserving spots for people based on those characteristics.

Conversely, if quotas were contractually required, then applicants who were not rewarded positions because certain openings were reserved for certain groups of people would have a viable Equal Protection Claim. To illustrate, if Michael B. Jordan includes in his contract a provision that says there must be five women, five people of color, and five members of the L.G.B.T.Q. community then there must be \textit{at least} five positions reserved for non-whites.\textsuperscript{98} One of those positions is left and it comes down to a well-qualified, albeit inexperienced woman and a white male who is just as well-qualified but has years of experience. Yet, the woman is chosen over the more experienced white male to satisfy the contract demands of Michael B. Jordan. Does the white male have a cause of action for discrimination? The Supreme Court has held that Title VII\textsuperscript{99} extends to protection of Caucasians by allowing reverse discrimination lawsuits for white people who lost out on a job opportunity.\textsuperscript{100} It may be prudent to avoid language that mandates racial or gender quotas because it could be put up against the court’s toughest scrutiny, and a quota system implemented in education has already been struck down as a violation of equal protection.\textsuperscript{101}

Indeed, perhaps the souther approach would be the former option which would adopt contractual language that requires the studios to make “reasonable efforts” to ensure diversity within the staff and production.\textsuperscript{102} However, even language like “reasonable effort” may have its shortcomings, both in terms of legality and effectiveness.\textsuperscript{103} This would

\begin{itemize}
\item \textsuperscript{97} Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 266 (1978).
\item \textsuperscript{98} This is assuming a studio can find five people who fit into all three classes of people. Realistically, there would need to be more than five spots reserved.
\item \textsuperscript{99} Employer discrimination on the basis of race, color, religion, sex, or national origin is prohibited. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-(2).
\item \textsuperscript{100} McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 296 (1976) (holding that Title VII protected Caucasians from unfair practices).
\item \textsuperscript{101} Bakke, 438 U.S. at 289-90.
\item \textsuperscript{102} Reisinger, \textit{supra} note 96.
\item \textsuperscript{103} “Reasonable efforts” is a subjective measure and can lead to disagreements between what the actor considered to be reasonable and what the studio believed to be reasonable, potentially leading to disputes over whether enough effort was used to ensure diversity. See Tess S. Skadegard Thorsen, \textit{7 Problems With Inclusion Riders}, \textit{Medium} (Mar. 21, 2018), https://medium.com/@tess_thorsen/7-problems-with-inclusion-riders-891f92e2c43c.\textsuperscript{104}
\end{itemize}
resemble the efforts of the Rooney Rule in the NFL by mandating equal opportunity and promoting diversity but not enforcing quotas. Despite the lack of quotas, the Rooney Rule is effective because of the threat of penalty if one circumvents or ignores the rule. In 2003, not long after the Rooney Rule was initiated, the Detroit Lions were fined 200,000 dollars for not interviewing any minority candidates before coming to a decision. What exactly would happen if a studio fails to make "reasonable efforts" in obtaining a diverse case and crew? Would the actor or actress withdraw from the film after time spent and having passed up other opportunities? It is tough to know whether a pragmatic actor or actress would do that. If one did try to pull out of a movie because of a conflict like this, then would a studio rethink casting those that carry the inclusion rider? Filmmakers, executives, and studios would be forced to weigh the cost and resources spent finding well-qualified and experienced people to fill out certain levels of diversity versus losing an A list actor or actress. Additionally, studios may have to include possible cost of litigation if they fail to satisfy their client's definition of "reasonable efforts" to maintain diversity.

One option leaves the studio open to reverse discrimination claims while the other may create more problems while not fixing the issue of diversity. If an actor or actress decided to be bold and push for a

105. Id.
108. See id.
109. See id.
110. Id.
111. Id. With many top actors and actresses like Michael B. Jordan, Ben Affleck, and Brie Larson committing to the inclusion rider, a studio would be contractually obligated to meet or take reasonable steps to meet minimal levels of diversity. Id. Failing to do so may result in a breach or the actor pulling out causing a delay in production. Id. Thus, it may be easier and more cost-effective for the studio to choose an actor or actress without the contract provision. Id.
112. See Thorsen, supra note 103. “Reasonable effort” is a subjective, ambiguous term and if the actor feels that a good-faith effort was not made then they may want to bring a cause of action in front of a court or arbitrator to demand specific performance or breach. Id. Litigation like this would be time-consuming, distracting, and costly. Id.
113. See In Re Birmingham Reverse Discrimination Employment Litigation, 20 F.3d 1525, 1536 (11th Cir. 1994). A studio enforcing racial quotas may lead to “reverse-discrimination” claims from white job candidates who feel they weren’t given the job due to the race-conscious program. Id. Alternatively, requiring “reasonable efforts” may lead to ambiguous and unpredictable requirements. See Thorsen, supra note 103.
contract provision that requires quotas that meet the level of diversity they desire, then it would be important to inquire into the constitutionality of the provision.\textsuperscript{114} The scope of the Constitution protects people from discrimination by the State and even extends to private businesses that involve "powers traditionally exclusively reserved to the State"\textsuperscript{115} or "entanglement" with the state.\textsuperscript{116} This inquiry will require an analysis of whether there is any entwinement or relationship between the Hollywood studios and the state, discrimination or a constitutional violation by the state and if so, then any claim as a result of this violation will be subjected to constitutional review.\textsuperscript{117}

B. State-Action in Hollywood

The first relevant inquiry into the legality of the inclusion rider is to consider whether there is state action involved.\textsuperscript{118} As previously mentioned, the United States Constitution protects individuals from discrimination by public businesses and any private business that is sponsored or funded by the state.\textsuperscript{119} However, the scope of protection does not extend to private people and enterprises.\textsuperscript{120} There are a couple ways of determining whether a business is participating in the market as an arm of the government, such as, considering whether the business is doing something that is a function of the government.\textsuperscript{121} Some popular examples in the past involved private entities that excluded certain races or classes of people from voting in pre-primary elections or by privatizing the electoral process altogether.\textsuperscript{122} Voting was found to be an important government function, thus a private organization that participated in the electoral process was barred from discriminating based on race because they served an important government function.\textsuperscript{123} Another way for a private business to be deemed a state actor is if "there is a sufficiently

\textsuperscript{114} Regent of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (explaining that quotas based solely on race have been deemed unconstitutional when it comes to reserved seats for education).


\textsuperscript{116} Dittenber, supra note 50, at 640.

\textsuperscript{117} Id. at 648.

\textsuperscript{118} Id. at 636-37. Determining whether film studios are state actors is important because they would then be constrained by the constitution. Id.

\textsuperscript{119} Id. The Fourteenth Amendment serves to restrict the government from discriminating based on race. Id. The State Action Doctrine extends that prohibition to private businesses that are funded, sponsored, and encouraged by the state. Id.

\textsuperscript{120} See The Civil Rights Cases, 109 U.S. 3, 7 (1883).


\textsuperscript{123} Terry, 354 U.S. at 462.
close nexus124 or encouragement by the state.125 This requires some kind of "symbiotic relationship between the [private entity] and the [state]."126 An example of a symbiotic relationship between a private business and the government, which qualifies the business as a state actor, is if the private business was operating on public property, given either tax breaks or exemptions by the government for its operation, and if the government has some kind of regulation or contract with the business.127 Using that example, the business would then be constitutionally prohibited from hiring and/or refusing to sell to people on the basis of sex, religion, or race.128

First, we can consider whether there is a government function involved. The question comes down to whether the private business is doing something that the government would have wanted done.129 Courts have ruled in the past that certain functions are clearly in the domain of the government, such as picking a candidate for an election130 or providing a park for public use.131 On the other hand, other functions, such as providing electricity, have been deemed to fall outside the government function exception.132 The Supreme Court has limited the government function exception "to include only those functions which are 'traditionally the exclusive prerogative of the State.'"133 Throughout the Supreme Court’s analysis on this issue, the Court has extended the public function exception to voting,134 "corporately owned town[s],"135 and discussed possible extension to issues like taxing and community protection; however, these matters have not been litigated.136 Most households in the country have electricity, its practically a necessity, but the Supreme Court refused to extend the government function exception

125. Reitman v. Mulkey, 387 U.S. 369, 375 (1967); see also Evans v. Abney, 396 U.S. 435, 457 (1970) (Brennan, J., dissenting ) ("[Reitman] announced the basic principle that a State acts in violation of the Equal Protection Clause when it singles out racial discrimination for particular encouragement, and thereby gives it a special preferred status in the law.")
128. Id. at 640-42.
129. See Jackson, 419 U.S. at 352.
133. Dittenber, supra note 50, at 638.
135. Dittenber, supra note 50, at 639.
136. Id. at 640.
to cover the supply of electricity.\textsuperscript{137} Logically, if providing electricity is not a function of the government, then it is likely that the production of movies, which needs electricity for viewing, would also not be considered a government function.\textsuperscript{138}

The second exception of entanglement and encouragement would be a much more valid argument to make.\textsuperscript{139} As mentioned before, when "the state and private actor have such a close relationship that the line between them becomes blurred" then state action is likely to be found.\textsuperscript{140} In \textit{Moose Lodge}, there was a private club that had a state-sponsored liquor license and only allowed members that were white.\textsuperscript{141} Despite the state giving the private club a liquor license, it was held that the relationship between the two entities was not strong enough to find state action because it was a private club on private land and the state did not mandate which classes of people were allowed to become members.\textsuperscript{142} When compared to the relationship between Hollywood and other states, there may be a stronger symbiotic relationship found for the following reasons. Most states in the country provide some kind of incentive, such as a tax credit, rebate, or grant, to entice a studio to film a movie or show in their state.\textsuperscript{143} States see the amount of money Hollywood can generate and they are eager to get into the filmmaking business by offering these incentives.\textsuperscript{144} These tax credits and incentives can be seen as encouraging studios to film in particular states in order for that state to monetarily benefit.\textsuperscript{145} There is a strong argument here for state action, subjecting film studios to the state-

\textsuperscript{137} Jackson, 419 U.S. at 358-59.
\textsuperscript{138} See id. In Jackson, the Court found that providing electricity is not a government function. Id. Electricity is practically a necessity for every household in the country; however, the Supreme Court found that businesses that provided electricity were not state actors, thus not restricted by the Due Process Clause. Id. Similarly, businesses that provide movie and TV shows would be even less likely to be considered a function of the government because it is not nearly as necessary as providing electricity. Id.
\textsuperscript{139} See Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). Government entanglement/entwinement would be an easier route to prove state action because a finding of a "symbiotic relationship" could be enough to construe film studios as state actors: Id.
\textsuperscript{140} Dittenber, \textit{supra} note 50, at 640.
\textsuperscript{141} Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 165 (1972).
\textsuperscript{142} Id. at 175-77.
\textsuperscript{145} See Norwood v. Harrison, 413 U.S. 455 (1973). The Supreme Court has held that granting financial aid to schools that promote racial discrimination intertwined the state with racial discrimination. Id. Here, state provides tax breaks to film studios that film in their states which would be seen as encouragement/entwinement. Id.
action doctrine.\textsuperscript{146} Thus, studios would not be free to discriminate or "reverse-discriminate"\textsuperscript{147} without being subjected to the constitutional analysis of the court.\textsuperscript{148}

C. Forms of Promoting Diversity

There are plenty of examples around the country of initiatives to create more diversity in certain areas, whether it be sports\textsuperscript{149} or education.\textsuperscript{150} The question a federal court must decide if a program that promotes diversity is challenged is whether the vehicle used to create diversity is constitutionally permissible.\textsuperscript{151} Over the years, the Supreme Court has held that racial classifications of any kind are "suspect" and would be subjected to the strictest scrutiny of the court.\textsuperscript{152} This means that if there are any policies or programs that show some kind of preference for a particular race or races, the policy can only be valid if it is "narrowly tailored to further compelling governmental interests."\textsuperscript{153} When it comes to education, it has long been accepted by the court that promoting diversity satisfies the compelling government interest prong of strict scrutiny.\textsuperscript{154} However, to achieve that interest, the law or program that

\textsuperscript{146} Annie McDonough, \textit{Why New York Gives TV and Film Companies a $400 Million Break}, \textit{City and State N.Y.} (Mar. 20, 2019), https://www.cityandstateny.com/articles/policy/technology/new-york-film-studio-tax-break.html. Giving a tax break to film studios and producers that shoot a film in a particular state provides an incentive or encouragement for the studio. \textit{Id.} This could thereby strengthen a case that a symbiotic relationship exists, qualifying the production company as a state actor. \textit{Id.} Thus, as a quasi-representative of the government, the film studios would be restrained by the commands of the Constitution and would be vulnerable to lawsuits by people who feel that race was used as a contributing factor resulting in the loss of job opportunities to minorities. \textit{Id.}

\textsuperscript{147} Donald T. Kramer, \textit{What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes – Public Employment Cases}, 168 A.L.R. Fed. 1 (2000). As mentioned earlier, reverse discrimination is when programs are put in place that promotes diversity by preferring racial minorities over white people. \textit{Id.}

\textsuperscript{148} Civil Rights Cases, 109 U.S. 3, 6 (1883). The Constitution extends protection to individuals from discrimination to government and state actors. \textit{Id.} If a private entity, like a film studio, is considered a state actor then they would be subjected to the restrictions of the Constitution. \textit{Id.}

\textsuperscript{149} Bram Maravent & Ben Tario, \textit{Leveling the Playing Field: Can Title VII Work to Increase Minority Coaching Hires In NCAA Athletics?}, 81 FLA. B. J. 42, 44 (2007) ("The rule . . . mandates that any NFL team with a head coaching vacancy is required to interview at least one minority candidate.").

\textsuperscript{150} Chang, \textit{supra} note 42, at 61. Affirmative action programs have been implemented by schools to address the racial disparity at their schools and to promote diversity. \textit{Id.}

\textsuperscript{151} Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 326 (1978). Racial quotas were found to be unconstitutional in \textit{Bakke}, but the consideration of race is permissible. \textit{Id.}

\textsuperscript{152} \textit{Id.} at 290-91.


\textsuperscript{154} Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2210 (2016).
promotes diversity by considering race must be narrowly tailored.\textsuperscript{155} The narrowly tailored requirement, when deciding an affirmative action case, has allowed the use of race to be a consideration of employees or applicants.\textsuperscript{156} However, race must be used as little as possible and it must be shown that other race-neutral alternatives would not achieve the state interest.\textsuperscript{157} The Court in \textit{Bakke} held that implementing a racial quota system for college applicants, regardless of the interest the state seeks to promote, is not constitutional.\textsuperscript{158} The same can be said for employment opportunities.\textsuperscript{159} In \textit{Wygant v. Jackson Bd. of Education}, a school district attempted to use a racial quota for consideration of layoffs in an effort to remedy historical discrimination by providing minority role models for young children.\textsuperscript{160} The Supreme Court found the quota to be unconstitutional because there wasn’t a relationship between previous discriminatory practices and the harm caused.\textsuperscript{161}

Cases like \textit{Bakke} and \textit{Wygant} illustrate the strict scrutiny the court applies when facing quota systems based on a racial preference.\textsuperscript{162} Therefore, it is unlikely that contractual language that demands a specified amount of diversity based on race, gender, sexual orientation, or disability would pass constitutional muster.\textsuperscript{163} The inclusion rider, whether it is mandated by the studios or contracted on an individual basis, would be better served if there are incentives or promotions of diversity rather than a mandated number of certain classifications.\textsuperscript{164} The following are two popular and controversial programs in the United States, which have attempted to remedy past discrimination by promoting diversity.\textsuperscript{165}

\begin{itemize}
  \item \textsuperscript{155} \textit{Id.} at 2208.
  \item \textsuperscript{156} \textit{Id.} at 2210.
  \item \textsuperscript{157} \textit{Id.} at 2208.
  \item \textsuperscript{158} Regents of Univ. of Cal. v. \textit{Bakke}, 438 U.S. 265, 320 (1978).
  \item \textsuperscript{159} See \textit{Wygant} v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986).
  \item \textsuperscript{160} \textit{Id.} at 272.
  \item \textsuperscript{162} See \textit{Wygant}, 476 U.S. at 280; see also \textit{Bakke}, 438 U.S. at 290-91.
  \item \textsuperscript{163} \textit{Wygant}, 476 U.S. at 283. \textit{Wygant} made clear that quota systems are unconstitutional even if it was meant to promote diversity because it was not “narrowly tailored.” \textit{Id.}
  \item \textsuperscript{164} Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2212 (2016); see Grutter v. Bollinger, 539 U.S. 306, 334 (2003). Other methods of promoting diversity, such as those in \textit{Grutter} and \textit{Fisher}, were found to be constitutional because the programs used race as a consideration under a holistic review and no minimum amount of diversity was required. \textit{Id.}
  \item \textsuperscript{165} Srites, \textit{supra} note 40; Chang, \textit{supra} note 42.
\end{itemize}
1) NFL’s Rooney Rule

In 1962, The American Sociological Association’s former President Hubert Blalock believed that the number of African-Americans in coaching or front office positions would remain stagnant despite a growing number of African-Americans in the NFL. Before the Rooney Rule was implemented in 2003, seventy-percent of NFL players were African-Americans, but thirty out of the thirty-two teams in the league were coached by white men. After the league mandated equal opportunity by compelling teams to interview at least one minority candidate when there was a head coaching vacancy, the representation of minority head coaches steadily grew, reaching a high-water mark of eight in 2011. The years since the implementation of the Rooney Rule have seen relatively low numbers of minority head coaches, but twenty-five percent of NFL head coaches were minorities as recently as 2017.

The Rooney Rule is similar to other programs that are implemented to promote diversity, such as affirmative action. However, the Rooney Rule was never really meant to be a form of affirmative action. Rather than focusing on equal outcome, like affirmative action seeks, the Rooney Rule is more concerned with the process of hiring coaches to ensure equal opportunity, which would hopefully address the problem of racial disparity. The Rooney Rule concerns itself with fair competition and practices to open up doors for minority candidates and allows the most

169. Id.
171. Id. at 263.
172. Id. at 262-63. For the NFL, if the Rooney Rule was used for equal outcome then it would mandate certain teams to hire certain races to maintain an equal balance. Id. Thus, there are 32 NFL teams and if equal outcome was mandated then the rule would only allow certain races to be interviewed when there is a head coaching vacancy to make sure each race is represented for head coaches. Id.
173. Id.
qualified candidate to get the job, without requiring quotas.\footnote{174} The absence of quotas makes it difficult for white coaching candidates to create a legal challenge because the rule does not require NFL teams to hire a minority head coach, it simply requires an interview be reserved for a minority candidate.\footnote{175} The Supreme Court has held that affirmative action policies are not legally vulnerable if it is remedial, poses no harm and does not bar white candidates from a position, and is temporary.\footnote{176} The NFL’s program meets this criteria because statistics prove that minority assistants were almost completely shut out from head coaching vacancies\footnote{177} prior to the Rooney Rule and the Rule is used as an attempt to remedy a wide disparity in the lack of African-American coaches.\footnote{178} Additionally, white coaching candidates are not facing discrimination nor are they barred from positions because the program does not require a person to be hired over them simply based off of race.\footnote{179} The format and sound application of the Rooney Rule would likely survive any legal challenges to it, notably because of a lack of quotas or compulsion.\footnote{180}

2) Affirmative Action

Affirmative action is defined as a business or governmental agency that gives special consideration to the hiring and promoting of racial minorities in an effort to remediate past discrimination against that minority.\footnote{181} This practice has long been controversial in the United States and has seen Equal Protection challenges for the last thirty years.\footnote{182} One large reason for the opposition to these programs is because they arguably discriminate against white people, something known as “reverse
discrimination,” and only serves to perpetuate discrimination rather than help put an end to it.\textsuperscript{183} However, this has not been enough to convince the Supreme Court to prohibit any type of racial consideration for applicants\textsuperscript{184} as these race-conscious programs require careful consideration.\textsuperscript{185} As previously mentioned, a quota system has already been ruled unconstitutional.\textsuperscript{186} Other forms of preference for minorities that consider race too heavily when making decisions have also been held to be incompatible with the Equal Protection Clause.\textsuperscript{187} There are acceptable forms of considering race for applicants, but they need to survive the highest scrutiny applied by the court.\textsuperscript{188} As previously mentioned, “the state bears the additional burden of establishing that it has a compelling interest that justifies the law and that the law or ordinance is narrowly tailored such that there are no less restrictive means available to effectuate the desired end.”\textsuperscript{189} The Supreme Court has long accepted “promoting diversity” as a compelling state interest that is deserving of some deference to the state to decide.\textsuperscript{190} However, the tough part comes when the court must consider whether the law is narrowly tailored.\textsuperscript{191} The state has a burden of showing that the race-neutral alternatives that are indeed available and workable would not further the goal of promoting diversity to be considered narrowly tailored.\textsuperscript{192}

Affirmative action differs from the Rooney Rule because policies that place a positive value on race rely on creating a more equitable

\begin{itemize}
\item \textsuperscript{183} Mitchell H. Rubinstein, \textit{The Affirmative Action Controversy}, 3 HOFSTRA LAB. L.J. 111, 115-16 (1985).
\item \textsuperscript{184} Bakke, 438 U.S. at 320 (1979).
\item \textsuperscript{185} Fisher, 136 S. Ct. at 2208 (“[T]he decision to pursue ‘the educational benefits that flow from student body diversity’ is . . . an academic judgment to which some . . . judicial deference is proper.”).
\item \textsuperscript{186} Bakke, 438 U.S., at 289.
\item \textsuperscript{187} Gratz, 539 U.S. at 275 (explaining that Michigan’s “selection index” scaled applicants on a point system that maxed out at 150 points. A certain amount of points were given to applicants based on factors like grades and quality of applicant’s high school. The unconstitutional consideration was the school’s policy of awarding twenty points for applicants who were a part of an underrepresented racial or ethnic minority groups).
\item \textsuperscript{188} Fisher, 136 S. Ct. at 2209.
\item \textsuperscript{189} GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE: CONSTITUTIONAL L. §862 (2nd ed. 2018).
\item \textsuperscript{190} See Fisher, 136 S. Ct. at 2208.
\item \textsuperscript{191} Gratz, 539 U.S. at 270 (citing Adarand Constr., Inc. v. Pena, 515 U.S. 200, 227 (1995)). Strict scrutiny requires that the program use “narrowly tailored measures that further compelling government interests.” \textit{Id.} Achieving diversity has generally been an accepted state interest but the quota system used in \textit{Bakke} and the points system based off race used in \textit{Gratz} were found to not be narrowly tailored. \textit{Id.} at 275; see Bakke, 438 U.S. at 320.
\end{itemize}
outcome. Thus, some people see race-conscious programs as an improvement for diversity around the country while others view it as a racially discriminatory practice. By doing more than simply giving people a chance to interview, courts are more likely to scrutinize the policy under the Equal Protection Clause because of the consideration of race in the review process. The strict scrutiny review process that race receives may become even more strict upon further consideration of this issue due to the confirmation of Justice Brett Kavanaugh to the Supreme Court. Justice Kavanaugh joins other notable critics of affirmative action on the Supreme Court bench. The current make-up of the Supreme Court could result in a stricter application of the "narrowly tailored" standard, thus leading to future challenges for race-conscious programs for employment or educational opportunities.

D. Application to the Inclusion Rider

The contractual language of the inclusion rider stipulates that the cast and crew must include a proportionate number of underrepresented class of people such as women, people of color, members of the L.G.B.T.Q. community, and people with disabilities. The inclusion rider, as a contractual provision, stretches beyond the parameters of the Rooney Rule because the provision would essentially reserve some spots in casting and crew for particular classes of people. However, it does not go as far as

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193. See Collins, supra note 104, at 872. The Rooney Rule was designed to give equal opportunity (minorities are guaranteed an interview) but there is no requirement of an equal outcome (i.e. there are 32 football teams. 16 must have minority head coaches). Id. This differs from Affirmative Action program where the goal is to develop a more diverse student body, which requires a more equitable outcome when it comes to accepted applicants. Id. at 905.

194. Giles Edwards, Abigail Fisher: Affirmative Action Plaintiff 'Proud' Of Academic Record, BBC (July 29, 2016), https://www.bbc.com/news/world-us-canada-36928990 ("I saw that there was a wrong that was happening, and I had the means and the opportunity to lend my name to this case.").


196. See Monica Levitan & LaMont Jones, Scholars Believe Supreme Court Likely to End Affirmative Action With Kavanaugh, DIVERSE (Sept. 13, 2018), https://diverseeeducation.com/article/126121/.

197. Id.

198. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978). Race-conscious programs, like affirmative action, are already subjected to strict scrutiny. Id. While institutions may want to achieve diversity or inclusion, language must be adopted to avoid lawsuits for possible Equal Protection violations. Id.

199. Judkis & Merry, supra note 37.

200. See id. The inclusion rider is meant to achieve "minimal levels" of diversity which may imply a requirement of some positions to be reserved for minorities. Id.
creating a racial quota.\textsuperscript{201} If there is to be real progress towards creating a more diverse Hollywood, the application and language of the inclusion rider becomes significant and must be drafted in order to stipulate a demand for the representation of the aforementioned groups.\textsuperscript{202} However, a movie studio would likely be considered a state actor. As such, it would be subjected to the constraints of the U.S. Constitution requiring the language of the inclusion rider to be consistent with the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{203}

Dr. Stacey L. Smith and the USC Annenberg Inclusion Initiative drafted a template for the inclusion rider.\textsuperscript{204} Their approach appears to be similar to the Rooney Rule as it seeks to achieve equal opportunity.\textsuperscript{205} It includes demands that “at least one female and one person from any other under-represented group” be given an audition for supporting roles and an interview for off-screen positions.\textsuperscript{206} Notably, there is no contractual obligation for a certain quota or percentage of each particular group to be hired.\textsuperscript{207} Rather, the language in the template for supporting roles included “good-faith consideration” and “reasonable efforts.”\textsuperscript{208} Any failure to comply with the contract in good faith would result in a monetary penalty of a specified amount given by the actor, which would be spent toward a scholarship fund used for filmmakers who are a part of underrepresented groups.\textsuperscript{209}

Let us assume that this would be the language that actors and actresses choose to adopt when they are contracting for their movies.

\textsuperscript{201} See Stacy L. Smith et al., Inclusion Rider Template, USC ANNENBERG INCLUSION INITIATIVE (Mar. 2018), http://assets.uscannenberg.org.s3.amazonaws.com/docs/inclusion-rider-template.pdf (explaining that unlike the program in Bakke, the contract provision does not specifically set aside a number or percentage of roles/employees to be hired).

\textsuperscript{202} Judkis & Merry, supra note 37 (explaining that the language of the inclusion rider must attempt to address the racial, gender, etc. divide by giving these underrepresented classes more opportunities in roles and positions that they have historically denied in Hollywood).

\textsuperscript{203} See supra Section III.A-B. As mentioned before, movie studios would likely be considered “state actors” because of the tax credit they receive from state governments for filming in their states. Id. Thus, they must conform to constitutional protections like the Equal Protection Clause. Id.

\textsuperscript{204} Smith et al., supra note 201.

\textsuperscript{205} See Smith et al., supra note 201, at 2. The proposed language of the inclusion rider requires interviews and auditions for certain groups which is what the NFL demands of its teams when it comes to head coaching hires. Id.

\textsuperscript{206} Id.

\textsuperscript{207} See id. (explaining that the language requires interviews/auditions and seeks good-faith efforts and affirmative action by casting and directors to hire people of certain groups, but no quota or minimum level is established).

\textsuperscript{208} Id.

\textsuperscript{209} Id. at 4.
Pursuant to the state-action doctrine, the contract between the actor and the film studio must conform with the Equal Protection Clause. We have discussed other programs for diversity like the Rooney Rule and affirmative action, both of which encourage diversity by considering race. The former has not had any successful lawsuits to preclude the usage of the program while the latter has seen the Supreme Court prohibit certain uses of the program that have reserved spots or points for admission for minority groups. Of these two programs, the inclusion rider is more similar to the Rooney Rule as it demands auditions or interviews for specified groups but makes no request for specific numbers or percentages to actually obtain a job in a supporting role or as an off-screen position.

We can revisit the problem suggested before to determine the validity of a hypothetical lawsuit. If an actor puts the inclusion rider in her contract and adopts the template language supplied by Dr. Stacey L. Smith, then an audition and interview will be reserved for a woman and another person from an underrepresented group. There is no limitation on interviews or auditions to be given, so there is no deprivation for other applicants, specifically to a straight white man. The contract does request studios to “affirmatively seek” to hire people of these groups for supporting roles which appears to contractually demand a studio to give preference to certain people based on gender, sexual orientation, race, and ethnicity. An applicant may be able to challenge the constitutionality of this provision arguing that there is a contractual preference for certain people.

210. Wilson R. Huhn, The State Action Doctrine and The Principal of Democratic Choice, 34 Hofstra L. Rev. 1379, 1387 (2006) (“[T]he state action doctrine emphasizes the word ‘state,’ and it is the idea that, with but one exception, the Constitution does not prescribe how private individuals or private organizations are to treat each other; rather, only governmental actions are subject to the requirements of the Constitution.”).

211. Id. at 1383, 1386 (“[T]he state action doctrine . . . focuses in part upon whose actions are subject to constitutional review, namely actions that are attributable to government.”).

212. Stites, supra note 40.

213. As of the 2018 NFL season, the Rooney Rule is in effect. Id.


216. See Smith et al., supra note 201.

217. Id. at 4.

218. See id.

219. Id. at 2.
based on race, gender, or sexual orientation violates the Equal Protection Clause.\textsuperscript{220}

The Supreme Court has faced equal protection challenges to each of these classifications and have set the standards for programs or laws that classify based on these classes.\textsuperscript{221} As mentioned before, strict scrutiny applies for racial classifications,\textsuperscript{222} but programs have passed this test when they seek to achieve diversity\textsuperscript{223} through means that involve race as little as possible.\textsuperscript{224} Here, the inclusion rider, similar to the challenged affirmative action programs, wants more diversity in movies and behind the scenes and uses race as a consideration for hiring, much like the programs mentioned in \textit{Grutter}\textsuperscript{225} and \textit{Fisher}\textsuperscript{226} For gender discrimination, the Supreme Court applies a relaxed standards of intermediate scrutiny.\textsuperscript{227} This means that a program or law is valid if there is an important state interest and the law is substantially related to that interest.\textsuperscript{228} For the inclusion rider, Dr. Smith laid out the numbers in Hollywood that illustrate the poor representation of women in film and especially behind the scenes.\textsuperscript{229} Therefore, it can be argued that there is

\begin{itemize}
\item \textsuperscript{220} A plaintiff could potentially file a lawsuit arguing that the term "affirmatively seek" to cast females, people of color, or other underrepresented classes gives preference based on race, gender, and sexual orientation, which violates the Equal Protection Clause. \textit{Id.}
\item \textsuperscript{222} See \textit{Loving}, 388 U.S. at 11 ("At the very least, the Equal Protection Clause demands that racial classifications ... be subjected to the 'most rigid scrutiny.'").
\item \textsuperscript{223} See \textit{Grutter v. Bollinger}, 539 U.S. 306, 321 (2003) (establishing "diversity as a compelling state interest").
\item \textsuperscript{224} See \textit{id.} at 333 ("The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'").
\item \textsuperscript{225} See \textit{id.} at 315-316 ("The policy requires ... an essay describing the ways in which the applicant will contribute to the life and diversity of the [l]aw [s]chool ... recogniz[ing] [the] 'many possible bases for diversity admission.'").
\item \textsuperscript{226} \textit{Fisher} v. Univ. of Tex., 136 S. Ct. 2198, 2206 (2016) ("The University did adopt an approach similar to the one in \textit{Grutter} ... race is given weight as a subfactor within the PAL.").
\item \textsuperscript{227} See \textit{Craig v. Boren}, 429 U.S. 211 (1976) (Powell, J., concurring) ("The decision of the case turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a 'fair and substantial relation' to this objective.").
\item \textsuperscript{228} See Gayle Lynn Pettinga, \textit{Rational Basis With Bite: Intermediate Scrutiny By Any Other Name}, 62 IND. L.J. 779, 784 (1987) ("The Court developed intermediate scrutiny to ... review statutes involving quasi-suspect classifications of gender ... Under this standard of review, classifications must be 'substantially related' to the achievement of 'important governmental objectives.'").
\item \textsuperscript{229} \textit{The Inclusion Rider: Legal Language For Ending Hollywood’s Epidemic of Invisibility}, USC ANNENBERG INCLUSION INITIATIVE, https://annenberg.usc.edu/research/aii (last visited Oct. 15, 2019) ("Across the 100 top-grossing films of 2016, 47 did not feature a single Black woman or girl

https://scholarlycommons.law.hofstra.edu/helj/vol37/iss1/6
an important interest to give women more opportunities and the inclusion rider clearly sets out to do just that.230 Lastly, the softest standard is applied when reviewing cases involving discrimination toward people based on sexual orientation, such as homosexuality, bisexuality, and transsexuality.231 The Supreme Court has held that the rational basis test applies for classifications based on sexual orientation, which means that so long as the legislative classification “bear[s] a rational relation to some independent and legitimate legislative end,” then it is constitutionally permissible.232 Furthermore, the Supreme Court has found that the “desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”233 This statement was referenced as a justification for striking down the Defense of Marriage Act’s (“DOMA”) applicability to the states where the Court found the rational basis test was not met for its classification on the basis of sexual orientation.234 Here, the proposed contractual provision “bears a rational relation to some legitimate end”235 as the L.G.B.T.Q. community has had difficulty finding adequate representation in Hollywood and the language in the inclusion rider attempts to address that.236

speaking on screen, 66 movies were devoid of Asian female characters, and a full 72 films erased Latinas . . . [m]ore generally, the percentage of females on screen in film has not moved in decades.”).

230. The numbers throughout this note illustrate the poor representation of females in Hollywood. Providing more diversity in this field would likely satisfy the lower scrutiny applied and the contractual provision is substantially related to the means sought as it seeks to get women more opportunities for auditions and interviews. See supra Introduction.


232. See Romer v. Evans, 517 U.S. 620, 632-33 (1996) (“By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”); see Jeremy B. Smith, The Flaws of Rational Basis With Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based On Sexual Orientation, 73 FORDHAM L. REV. 2769, 2770 (2005) (“[G]ay men and lesbians have not yet been treated as a suspect class and thus classifications based on sexual orientation have been historically subject to rational basis review.”).


235. Romer, 517 U.S. at 631.

236. Gwilym Mumford, Hollywood Still Excludes Women, Ethnic Minorities, LGBT and Disabled People, Says Report, THE GUARDIAN (Aug. 1, 2017), https://www.theguardian.com/film/2017/aug/01/hollywood-film-women-lgbt-hispanic-disabled-people-diversity (“Meanwhile, 1.1% of speaking characters were gay, lesbian or bisexual and no speaking character was identified as transgender.”). The inclusion rider adopts language to afford
Therefore, under the proposed language of the inclusion rider, it would likely be constitutionally permissible and survive any legal challenge against it because the desire of the provision is to address inequality and promote diversity which has been found to be a compelling interest that the Supreme Court is willing to recognize.

IV. EFFECTIVENESS OF THE INCLUSION RIDER

A. Deficiencies with Individual Actors Demanding Inclusion Rider

Assuming that the language of the inclusion rider is legal based on the constitutional analysis above, there still remains the question of effectiveness. The inclusion rider’s purpose is to address the lack of diversity in Hollywood. Interestingly enough, this premise of providing a more representative film industry is not always positively received. As mentioned above, affirmative action in schools was implemented to address previous racial discrimination and to promote diversity. The people who were “negatively” impacted by the program would then bring suit for an injunction to stop the use of race as a consideration for applicants. Therefore, a contact provision that demands the use of gender and racial considerations for casting and hiring would surely invite similar criticism.

237. When considering classifications, context is important. See Gomillion v. Lightfoot, 364 U.S. 339, 343-344 (1960) (“[I]n dealing with claims under the broad provisions of the Constitution, which derive content by an interpretative process of inclusion and exclusion, it is imperative that generalizations ... must not be applied out of context in disregard of variant controlling facts.”). That means the provisions would be viewed as inclusive initiatives when put up against the required scrutiny and have a greater chance of being found constitutionally permissible. Id.


239. See supra Section III.C.2.

240. See Dwyer, supra note 6.

241. Rosen, supra note 58.


243. See Grutter v. Bollinger, 539 U.S. 306, 317 (2003) (“Petitioner further alleged that her application was rejected because the Law School uses race as a ‘predominant’ factor ... [p]etitioner requested ... an injunction prohibiting the Law School from continuing to discriminate on the basis of race.”); see Fisher, 136 S. Ct. at 2207 (“Petitioner then filed suit alleging that the University’s consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants.”).

enough to deter movie studios from casting actors and actresses that demand the inclusion rider.  

For example, a movie studio wants to cast a high-profile male in *Movie X*. They are considering a couple of actors that have vowed to adopt the inclusion rider like Ben Affleck or Matt Damon. Conversely, they also are bringing in Jake Gyllenhaal and Jeremy Renner, actors who have not publicly announced that they would use the inclusion rider, for auditions. Assuming the template language for the inclusion rider is used, a monetary penalty specified by the actor is due if good faith efforts are not made to achieve the diversity sought in the contract. If there is public criticism of the inclusion rider, then movie studios will have to mull over the pros and cons of casting the actor with the inclusion rider, versus the actor that does not bring any controversy or penalty with their contract. It is a possibility that film studios would forego the inclusion rider in favor of an actor that would not carry any potential contractual burden. If this is the route that film studios decide to take, then the inclusion rider would be rendered ineffective and the desired goal of creating a more diverse, inclusive, and representative Hollywood would not be met.

Additionally, the language and enforcement of the inclusion rider could present issues for the parties that ultimately contract to it. Questions like “[w]ho will enforce the agreement?” and “[h]ow will damages be measured?” may arise. Consider this hypothetical: a high-

\[\text{an actress says that she’ll do a picture only if the company making it agrees to hire according to racial, ethnic, and gender quotas . . . then such an inclusion rider would be illegal.}^{245}\]


248. See Smith et al., *supra* note 201 (providing an inclusion rider template).

249. See id. at 4 (“If the determination is made that the studio has failed to comply in good faith with this Addendum . . . the studio shall make a contribution . . . to establish and endow a scholarship fund for filmmakers.”).


251. See id.

252. See id. (“Producers and financiers could simply seek out individuals whose contracts do not include the clause, rendering the actor’s efforts worthless.”).


254. *Id.*

255. *Id.*
profile white male actor agrees to star in a film and stipulates to the inclusion rider. The crew for the movie is at 588, which is the "average number of crew credits in the top 1,000 films between 1994 and 2013."\(^{256}\) Out of the 588 credits for the film, only 150 are considered to be a member of one of the underrepresented groups. The problem that arises in this hypothetical is the effectiveness of the inclusion rider. Unless the main actor was heavily involved in the hiring process, "[did] his own investigation" to determine whether the production company honored the contract, or was provided information by the minorities who were hired, it would be difficult to determine the inclusion rider's effectiveness.\(^{257}\) Furthermore, if the lead actor does determine that the levels of diversity aren't satisfactory, how does he prove that reasonable efforts weren't made?

The inclusion rider could be an excellent vehicle to give more representation to groups that have been historically underrepresented in film and television.\(^{258}\) However, a more effective approach may be to take the decision-making process away from the producers and filmmakers in Hollywood that have only helped perpetuate the white, male culture that has dominated Hollywood for years.\(^{259}\)

**B. How to Get Inclusive in Hollywood**

To solve a problem, one must recognize that there is a problem.\(^{260}\) When the NFL implemented the Rooney Rule, they were fully aware of the lack of minorities in front offices and leading teams.\(^{261}\) That is why the NFL, as a whole, took charge by enacting their policy and not leaving

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258. Dishman, supra note 19.


260. Dan Oswald, *Admitting You Have A Problem Is The First Step In Fixing The Problem*, HR DAILY ADVISOR (Feb. 11, 2013), https://hrdailyadvisor.blr.com/2013/02/11/admitting-you-have-a-problem-is-the-first-step-in-fixing-the-problem/ ("The first step in solving any problem is recognizing there is one.").

it up to the individual teams to try to remedy the problem.\textsuperscript{262} Similarly, many schools recognized past discrimination in their educational programs or the importance of diversity and decided to use race as a "plus" in order to enroll more minorities to create a diverse student body.\textsuperscript{263} Hollywood’s inclusion issue is well-known around the nation and there have been outspoken critics about the issue.\textsuperscript{264} This isn’t a new issue either, it has been a known problem for several years.\textsuperscript{265} The inclusion rider demand would be based on an individual basis, and there are some deficiencies with that.\textsuperscript{266} Instead, there are other ways to implement the inclusion rider language to effectively achieve the greater levels of diversity desired in Hollywood.

C. Possible Solutions

One possible solution may be implementing an independent commission as a "watchdog" to ensure diversity and inclusion is met with each individual production that has contracted for the inclusion rider. The commission would be tasked as an independent entity that can adopt the same language as the inclusion rider in an effort to mandate the inclusion rider throughout Hollywood. However, while this may be effective there would be questions raised about funding for the commission and whether its authority would be legitimate over the movie industry.

Another solution mentioned earlier suggested an incentive in the form of award considerations at the most prestigious award ceremony in the film industry, the Academy Awards.\textsuperscript{267} It can be suggested that "special consideration" could be given in each category to movies and productions that successfully implemented the inclusion rider. However, the chance to be given more consideration for an Academy Award is likely too broad and too fluid to actually create an incentive strong enough to

\textsuperscript{262} See Stites, supra note 40.
\textsuperscript{263} See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978) ("In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file.").
\textsuperscript{265} Michelle Lou, Hollywood Has Made ‘No Progress’ On Diversity In Over A Decade, Study Finds, HUFFINGTON POST (July 31, 2018), https://www.huffingtonpost.com/entry/hollywood-diversity_us_5b605fc1e4b0de86f49af757.
\textsuperscript{266} See Christian, supra note 59.
lure filmmakers to adopt the inclusion rider. Furthermore, the people who vote on the Academy Awards have not shown to be progressive.268

There is something else that drives and controls the decisions made in Hollywood and it is not the feeling of getting the artistic praise that they would receive if rewarded an Academy Award.269

D. Inclusion Production: An Inclusion Rider Studio

There is one thing that people in Hollywood base their decisions on more than anything else, and that is money.270 While plenty of actors and actresses do things that are altruistic, the guiding light for many producers and studios is money.271 Therefore, the most persuasive way to get more inclusive is by incentivizing it with funding.272 For example, if a studio like this existed, it can be called “Inclusion Production,” it would adopt the language set forth in the inclusion rider and would be willing to provide full or partial funding to any movie that contracts with it as long as they meet the contractual requirements that the inclusion rider demands. There may be directors and writers that decide to pitch their film ideas to Inclusion Production simply because they want to further the efforts to make Hollywood inclusive and that would certainly help the cause. However, there may be others that cannot find the money or may need more money in order to get production started and these filmmakers may be willing to contract for the obligation to make reasonable efforts for a diverse cast and set in order to get the necessary funds. It is possible (and likely) that offering money and funds for a project would yield a better use of the inclusion rider than having the terms individually contracted for by each actor and actress. Currently, there is no record of any verified use of an actor’s contract that includes language of the inclusion rider,273 which is why it may be helpful to look to other

270. JACK ROTHMAN, HOLLYWOOD IN WIDE ANGLE: HOW DIRECTORS VIEW FILMMAKING 133 (The Scarecrow Press, Inc. 2004).
271. See id.
272. See Guay, supra note 61.
alternatives. Money is valued highly in Hollywood and while a mega-production company like Netflix has rejected the use of the inclusion rider,\(^{274}\) they have the luxury of comfortably making films and television shows without any help as their market value stands north of 152 billion dollars.\(^ {275}\) But, for other directors or executives that struggle to find a "green-light"\(^ {276}\) for their movies or proper funding, Inclusion Production would offer a range of funding or investment in return for an agreement with a contract containing the inclusion rider.

While it may be the desire of a filmmaker to go with one of the six big production companies in the film industry (Universal, Columbia, Walt Disney, Paramount, Warner Bros., and 20\(^ {th}\) Century Fox),\(^ {277}\) it isn’t a guarantee that any of them will agree to finance and promote the movie. The Coen brothers are filmmakers who originally struggled to get one of their films financed for a budget less than a million dollars.\(^ {278}\) The Coen brothers had to seek “65 private investors” in order to make their first film.\(^ {279}\) Since then, they have released movies with over twenty million dollar budgets that have generated almost six times the revenue.\(^ {280}\) While the Coen brothers’ success allows them to easily secure finances, like most prominent filmmakers, there are plenty of young and relatively unknown directors or screenwriters looking for money from any source they can get it.\(^ {281}\) That is where Inclusion Production would help provide financial aid in exchange for the filmmaker to agree to make reasonable efforts to achieve diversity.\(^ {282}\)

The obvious questions are where will a new production come from and how will they be able to supply money for a new film. The solution to that problem can receive aid from the very people who have helped


\(^{278}\) See Bryan Sullivan, How To Finance An Independent Film, FORBES (June 8, 2016), https://www.forbes.com/sites/legalentertainment/2016/06/08/how-to-finance-an-independent-film/#193765967e34.

\(^{279}\) Id.


\(^{281}\) See Sullivan, supra note 278.

\(^{282}\) See Guay, supra note 61.
bring this issue, and the use of an inclusion rider, further into the public spotlight: the actors and actresses. Many top celebrities have committed to the inclusion rider language for their future contracts such as Matt Damon, Ben Affleck, Frances McDormand, Michael B. Jordan, and Brie Larson.\textsuperscript{283} The following is the net worth of these actors and actresses: Matt Damon has a net worth of 170 million dollars;\textsuperscript{284} Ben Affleck has a net worth of 130 million dollars;\textsuperscript{285} Michael B. Jordan has a net worth of 18 million dollars;\textsuperscript{286} Brie Larson has a net worth of 10 million dollars;\textsuperscript{287} and Frances McDormand has a net worth of 30 million dollars.\textsuperscript{288} If they collectively decided to pool their money, then they could use it as an investment to fund movies with the stipulation that the filmmaker agree to the inclusion rider for the cast and crew. At first, the money available may not be large due to the small group and the unknown likelihood of success, but the following are a few examples of movies with small budgets that exceeded box office expectations. One instance is \textit{Paranormal Activity}, which had a budget of approximately 15,000 dollars and grossed 193 million dollars.\textsuperscript{289} Similarly, \textit{The Blair Witch Project} had a budget of 60,000 dollars and made nearly 250 million dollars at the box office.\textsuperscript{290} Lastly, there is the movie mentioned several times previously, \textit{Get Out}, which had a 5,000 percent profit by turning a 4.5 million dollar

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budget into over 230 million dollars. These are examples of how an investment into a low-budget, unknown movie can result in great profits.

By creating a production company, these actors and actresses and anyone else who wants to contribute or "invest" can accomplish two things at one time. First and foremost, they can contract with screenwriters and filmmakers that give them power to mandate inclusion and diversity efforts made by their employees. The whole point of adopting the inclusion rider language in contracts was to address the lack of representation in Hollywood for many groups. The benefit from doing it as a production company rather than individual contracts is it shifts the power to the people who have decided to fight for this issue and provides a monetary incentive for filmmakers to reach certain levels of diversity. Other benefits these investors/donors would get out of an Inclusion Production include profit, recognition, and growth. If a low-budget film were to sign on with Inclusion Production and become a box-office success, then the profit could resemble the movies recently mentioned. This could potentially lead to more and more movies a year, creating money and providing steady jobs, opportunities, and roles for the classes that have been historically underrepresented in Hollywood.

These actors and actresses are worth millions of dollars and understand there is a diversity problem in Hollywood that needs to be addressed. While individually demanding the inclusion rider in their contracts may help further the goal to become more inclusive of women, people of color, people with disabilities, and members of the L.G.B.T.Q. community, there is only a limited amount of power and influence they have as actors. As mentioned earlier, executives and studios may philosophically oppose the inclusion rider or pragmatically assess the financial and public costs and burdens of agreeing to the inclusion rider, which would force them to look for an actor or actress that doesn’t have this contractual demand. Additionally, it is likely that a production company will generate more movies per year than the actors and actresses that ultimately demand the inclusion rider. Therefore, Inclusion Production would be able to provide more opportunities for historically

291. Id.
292. Dwyer, supra note 6.
295. See supra Section III.D.
underreported classes due to the higher volume of films released when compared to the number of movies actors make per year. For example, in 2018 Ben Affleck, Matt Damon, Brie Larson, Michael B. Jordan, and Frances McDormand came out with a combined four movies, not including those that were just cameos.\textsuperscript{296} Conversely, Universal Studios, a production company, released twenty-four films in 2018.\textsuperscript{297} This illustrates the bigger impact a studio can have implementing the inclusion rider rather than relying on a handful of actors that make two to three movies a year, at best.

Furthermore, using a production company to carry out the inclusion rider would further the cause for more representation for historically underrepresented groups because, presumably, an A-list actor like Matt Damon would not offer his role as the star of the film to one of the minority groups mentioned in the inclusion rider.\textsuperscript{298} An Inclusion Production company can make a bigger difference in this area because it would be the one with the decision-making power in the hiring of the cast and crew members. Consequently, those fighting for inclusion would have the opportunity and power to cast women, people of color, members of the L.G.B.T.Q. community, or people with disabilities for leading roles rather than supporting roles. Other production companies may contract with actors and actresses who demand the inclusion rider regularly but that does not necessarily lead to a more diverse film industry. The filmmakers may attempt to appeal to the progressive fanbase and consistently cast actors with the inclusion riders for the good public relations image only to "decide ... whatever penalty it may face is cheaper than honoring [the inclusion rider contract]."\textsuperscript{299}

The balance of power in Hollywood needs to shift if there is going to be real change that addresses the diversity issue in film. Dr. Stacey L. Smith’s idea for inclusion through a contract provision has brought much needed attention to the lack of representation in Hollywood, but it should only be the start of the initiative to find more jobs and roles for members of underrepresented groups.\textsuperscript{300} For the inclusion rider to have a


\textsuperscript{298} Chapman, supra note 253.

\textsuperscript{299} Id.

\textsuperscript{300} Smith et al., supra note 201.
widespread effect and beneficial impact, the actors and actresses who have vowed to stipulate the inclusion rider in their contracts should be the ones to take power. This shift in power can possibly be achieved through an investment or donation that would make those who truly seek more inclusion in Hollywood the decision-makers by creating an Inclusion Production company solely dedicated to funding movies with a diverse cast and crew.

CONCLUSION

Hollywood has a diversity problem when it comes to representation of certain groups in film and recognition of those groups as artists. It comes as no surprise that some call this to attention, including Frances McDormand, an Oscar-award winning actress, who publicly advocated for the use of the inclusion rider in her acceptance speech. This race-conscious contract provision, while susceptible to public and legal scrutiny, attempts to address the inequities of Hollywood. While the initiative is noble, the lack of power on the actor’s side and the uncertainties of practical effectiveness could deem it an ineffective tool. That is why the language of the inclusion rider should be made the focal point of its own Inclusion Production. It would be funded by donors and investors who are committed to creating and sustaining a diversified Hollywood that is more representative of the country it sits in. Inclusion Production would put those in power who make decisions based on furthering the goal of diversity rather than solely focusing on money. After a tumultuous few years for Hollywood, the film industry would benefit by shifting their focus to representing people in this country who have historically been underrepresented and underappreciated in film.

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301. See Harwell, supra note 293.
303. Dry, supra note 3.
304. Clegg, supra note 244.
305. Frank, supra note 29.

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Inclusion Initiative for their work and dedication towards furthering diversity in the entertainment industry.