IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ADAM P. FAUST, *et al.*, *Plaintiffs*, v. THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, *et al.*, *Defendants*.	)	Civil Action No. 21-cv-548-WCG

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Based on strong evidence of longstanding discrimination against minority farmers in USDA's farm loan programs and the lingering effects of that discrimination, including evidence that minority farmers had been largely left out of recent funding and pandemic relief, Congress enacted Section 1005 of the American Rescue Plan Act ("ARPA"). That section provides debt relief to minority farmers, who, Congress found, were at higher risk of delinquency and foreclosure on their farms in the midst of a global pandemic. Plaintiffs are white farmers who object to the Government's effort to remedy the lingering effects of discrimination because the Government used a race-conscious remedy to do so. They seek to further delay pandemic relief designated for minority farmers, despite failing to provide any basis to question Congress's conclusion that minority farmers were largely left out of prior relief efforts. Plaintiffs' motion should be denied.

Plaintiffs cannot show irreparable harm. Because the funds appropriated under Section 1005 are not limited and will not expire, Plaintiffs can obtain any monetary relief they seek at the conclusion of this case if they are entitled to it. And there is no support in Seventh Circuit case law for Plaintiffs' claim that their alleged equal protection violation is *per se* irreparable harm. By contrast, the injunction Plaintiffs seek would impose grave harms on minority farmers: those in bankruptcy proceedings would not get debt relief, those seeking future FSA loans will have their closings delayed, and those disproportionately at risk of foreclosure could lose their farms.

The evidence of prior discrimination against minority farmers in USDA loan programs is vast. The constitutional questions presented here are important. That evidence, and those questions, deserve a full hearing on the merits, and Plaintiffs' motion for preliminary injunction should be denied, where its issuance would harm thousands of minority farmers, but its denial will not inhibit Plaintiffs from obtaining what they seek, if they ultimately show they are entitled to it.

BACKGROUND

I. USDA'S FARM SERVICE AGENCY AND FARM LOAN PROGRAMS

Like its predecessor the Farmers Home Administration, the Farm Service Agency (FSA) provides direct and guaranteed loans to farmers and ranchers[1] who would otherwise be unable to obtain them from private lenders at reasonable rates and terms. *See* 7 USC § 6932(b). While local committees have been key in administering USDA loan programs, *see* Congressional Research Service (CRS), FSA Comms.: In Brief (Jan. 29, 2021) (FSA Comms.);[2] in 2002 and 2008, Congress adopted measures to ensure minority representation on local committees, *id* at 2-3, and the committees' role in USDA loan eligibility and approval processes has been limited, *see Garcia v. Johanns*, 444 F.3d 625, 628–29 (D.C. Cir. 2006); FSA Comms. 3.

II. THE HISTORY OF DISCRIMINATION AGAINST SOCIALLY DISADVANTAGED FARMERS IN USDA PROGRAMS

Although USDA aims to serve all farmers equitably, decades of evidence shows that not all USDA stakeholders have benefitted equally from its services—particularly its farm loan services. *See infra* Argument (Arg) II.B. In fact, the evidence indicates just the opposite: that throughout USDA's history and up to present day, minority farmers have been "hurt" more than helped due to discrimination in USDA's farm loan programs. Civil Rights at the [USDA]—A Report by the Civil Rights Action Team (CRAT) 6 (1997) (CRAT Rep.)[3]; *see also* Arg II.B.

Minority farmers have long experienced inequities in FSA's administration of farm loans, including with respect to loan approval rates, amounts, and terms. *See* U.S. Commission on Civil Rights (USCCR), *The Decline of Black Farming in America* 84-85(1982) (1982 Rep.)[4] (discussing

[1] For ease of reference, Defendants use "farmers" to include "farmers and ranchers."
[2] *Available at* https://perma.cc/HA3L-PDPG.
[3] *Available at* https://perma.cc/5DNF-PFJY.
[4] *Available at* https://perma.cc/CFE9-ANJ3.

complaints of loan amounts being reduced or repayment schedules "accelerated without explanation"); *see also* CRAT Rep. 16 (discussing complaints of loans being "arbitrarily reduced" or not arriving as promised); Hr'g on the USDA's Civil Rights Prog. for Farm Prog. Participants before House Subcomm., Dep't Ops., Oversight, Nutrition, and Forestry, Comm. on Ag., 107th Cong. 23, 16-21, 33-35 (2002) (2002 Civil Rights Hr'g) (discussing disparities in loan processing times and approval rates for Hispanic farmers and discrimination complaints by "black, American Indian, [and] Hispanic" farmers). These experiences are recounted in numerous reports and the many administrative civil rights complaints filed by minority farmers. *See* Arg II.B. But those complaints have failed to remedy individual experiences of discrimination in FSA's loan programs: too often they languished in a growing backlog or went unanswered altogether. *See id.*

These problems spawned a series of lawsuits against USDA by groups of minority farmers.[5] From 1997 and over the next decade, those groups alleged that USDA systematically discriminated against them in the administration of farm loans and other benefits and failed to investigate discrimination complaints. *See In re Black Farmer, Discrimination Litig., (Pigford II)*, 856 F. Supp. 2d 1, 8 (D.D.C. 2011); Arg II.B. Although USDA settled the lawsuits and has paid more than $2.4 billion to claimants, *see* Arg II.B., State taxes eroded recoveries, debt relief was incomplete, and reports before Congress have shown that the settlements did not cure the problems faced by minority farmers. *See* 167 Cong. Rec. S1264 (Mar. 5, 2021) (Stabenow).

Even after the lawsuits, investigations revealed that Socially Disadvantaged Groups ("SDGs") continued to experience discrimination with respect to the requirements, availability, and timing of FSA loans. *See* Arg II.B (discussing Jackson Lewis LLP, "Civil Rights Assessment"

[5] *Pigford v. Glickman* ("*Pigford I*"), No. 97-1978 (D.D.C.); *Keepseagle v. Veneman*, No. 99-03119 (D.D.C.); *Garcia*, No. 00-2445 (D.D.C.); *Love v. Glickman*, No. 00-2502 (D.D.C.); *In re Black Farmers Discrimination Litigation* ("*Pigford II*"), No. 08-mc-0511 (D.D.C.).

(Mar. 31, 2011) (JL Report)).[6] Just this year, the Government Accountability Office (GAO) noted that "[c]oncerns about discrimination in credit markets … have long existed" and that, as a result, minority farmers continue to "ha[ve] less access to credit." GAO-21-399T, Fin. Servs.: Fair Lending, Access, and Retirement Sec. 1 (2021).[7] As these and other reports have documented, discrimination in USDA's loan programs has contributed to a dramatic loss of minority-owned farmland. *See* Arg II.B; *see, e.g.*, 1982 Rep. 176 (reporting that from 1920 to 1978, the number of all minority-owned farms fell from 926,000 to less than 60,000).

III. CONGRESSIONAL RECOGNITION OF THAT DISCRIMINATION AND CONGRESS'S FAILURE TO REMEDY ITS LINGERING EFFECTS

The history of discrimination against minority farmers in USDA programs has not gone unnoticed by Congress. For decades, Congress has heard testimony and acknowledged such discrimination during numerous hearings to understand and remedy its ongoing effects.[8] And in passing § 1005, Congress did so again. The predecessor to § 1005 included findings highlighting the pattern of discrimination in USDA programs and its consequences for minority farmers. *See* S.278, "Emergency Relief for Farmers of Color Act of 2021" (Feb. 8, 2021). The bill noted that over the last century, Black farmers dwindled from 14 to two percent of all farmers and lost about

[6] *Available at* https://perma.cc/8X6Q-GZ5V.
[7] *Available at* https://perma.cc/3CWQ-B959.
[8] *See, e.g.,* Hr'g on USDA's Civil Rights Progs. and Respons. before House Subcomm. on Dep't Ops., Oversight, Nutrition, and Forestry, Comm. on Ag., 106th Cong. 37 (1999) (Goodlatte) ("Civil rights at the [USDA] has long been a problem."); 2002 Civil Rights Hr'g 16, 18, 26 (hearing testimony about disparities in loan processing times and approval rates for Hispanic farmers; underrepresentation of minorities in USDA; and continuing delays in resolving civil rights complaints); Hr'g to Review the USDA's Farm Loan Progs. before Sen. Comm. on Ag., Nutrition, and Forestry, 109th Cong. 800 (2006) (Karen Krub, Farmers' Legal Action Group, Inc.) ("[T]here is still no meaningful process for investigation and resolution of allegations of discrimination [against] FSA decision-makers."); Hr'g to Review Availability of Credit in Rural Amer. before House Subcomm. on Conserv., Credit, Energy, and Research, Comm. on Ag., 110th Cong. 8 (2007); Hr'g on Mgmt. of Civil Rights at the USDA before House Subcomm. on Gov't Mgmt., Org., and Procurement, Comm. on Oversight and Gov't Reform, 110th Cong. 137 (2008) (hearing testimony about, and recognizing, the continued problem of USDA discrimination against minority farmers, including the inability of Native American and Hispanic farmers to receive loans; underrepresentation of minorities on county committees; and delayed processing of civil rights complaints, including allegations that complaints were shredded and not processed, all despite creating in 2002 the Assistant Secretary of Civil Rights); House Ag. Comm. Hr'g on U.S. Ag. Policy and 2012 Farm Bill (Apr. 21, 2010); House Ag. Comm. Hr'g on USDA Oversight (July 22, 2015).

80% of their land. *Id.* § 2, ¶ 5(A)-(C). The findings attributed those losses to various "civil rights violations" by the Government, including persistent discrimination at USDA. *Id.* ¶¶ 1(B), 2-15.

Floor statements leading to the passage of § 1005 echoed those findings. As Chairman Scott put it, "[t]he systemic discrimination against … farmers of color by USDA is longstanding and well-documented and continues to present barriers for these producers to participate in the agricultural economy." 167 Cong. Rec. H765 (Feb. 26, 2021). He recounted "this history and the continuing challenges for these farmers" by summarizing over a dozen reports between 1965 and 2019, which showed how discrimination against them manifested within USDA—from lacking representation on county committees, to receiving disproportionately fewer farm loans, to being denied an adequate process for resolving civil rights complaints. *Id.* H765-66. Senator Cory Booker cited some of the same evidence in attributing the massive loss of Black-owned farmland, and economic disadvantages of minority farmers, to the "brutal legacy of discrimination by [USDA]." *Id.* S1265; *see also id.* S1262 (Stabenow) (citing studies estimating losses "at more than $120 billion in lost opportunities").[9]

A. Congress Concludes that Its Previous Efforts Failed To Address—and Indeed Perpetuated—the Disparities Caused By Longstanding USDA Discrimination.

At the same time, Congress acknowledged that its previous efforts to remedy the lingering effects of discrimination against minority farmers in USDA programs "ha[d] fallen short." *Id.* S1262 (Stabenow). As Chairman Stabenow explained, Congress began targeting USDA assistance to SDFRs during the agriculture credit crisis in the 1980s, created a program to provide outreach and technical assistance to SDFRs in 1990 (the "2501 Program"), and permanently funded the 2501 Program in 2018. *See id.* S1263-64. In response to the lawsuits brought by groups of farmers

[9] M. Gordon, "Revolution is Based on Land: Wealth Denied via Black Farmland Ownership Loss" (Dec. 17, 2018) (Tufts University), https://perma.cc/YJ9U-KC7E; USDA, *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity, Rural Amer.* at 55-57 (2002), https://perma.cc/FG7J-YJEQ.

against USDA, *supra* Background ("BG") II, Congress suspended statutes of limitations for Equal Credit Opportunity Act claims in 1998, and in 2010, provided $1.25 billion to ensure that those claimant groups received settlement payments. *See id.* S1264. In 2002, Congress created the Office of the Assistant Secretary for Civil Rights at USDA to ensure better civil rights compliance. *See id.* And in 2014, it created a permanent Office of Tribal Relations at USDA. *See id.*

Despite these efforts, Congress found that minority farmers continued to suffer the effects of discrimination in USDA programs. Two GAO reports mandated by Congress in 2018 illuminated the extent of the problem. *See* GAO-19-539, Ag'l Lending: Info. on Credit & Outreach to [SDFRs] Is Limited 2 (2019)[10]; GAO-19-464, Indian Issues: Ag'l Credit Needs and Barriers to Lending on Tribal Lands (2019).[11] Those reports revealed that SDFRs still had "more difficulty getting loans and credit from USDA … [that] can help beginning farmers break into the business and help existing farmers continue running their operations," S1264 (Stabenow) (citing Nat'l Young Farmers Coal., Cal. Young Farmers Rep. 32 (Apr. 2019)).[12]

Congress also found that, due to the lingering effects of the longstanding discrimination against minority farmers, "Black farmers and other farmers of color were in a far more precarious financial situation before the COVID–19 pandemic hit"—and a year into the pandemic, some "ha[d] simply not been able to weather the storm." *Id.* S1265-66 (Booker). For instance, Members observed that a disproportionate number of Black, Hispanic, Asian-American, and Indigenous farmers were in default on their direct loans, putting farmers of color at risk of "facing yet another wave of foreclosures and potential land loss." *Id.* (citing statistics that 35% of Black farmers and 24% of Hispanic, Asian-American, and Indigenous farmers were delinquent on their FSA direct

[10] *Available at* https://perma.cc/5RD6-24VH.
[11] *Available at* https://www.gao.gov/assets/gao-19-464.pdf.
[12] *Available at* https://perma.cc/PEY5-Z253.

loans compared to a 13% rate among all such borrowers); *see also id.* at S1264 (Stabenow) (explaining that SDFRs are more likely to have loans in default because they "are less likely to have the same access to adequate loan servicing … as their White counterparts" due to discrimination in USDA loan programs); Review of the Off. of the Assistant Sec'y for Civil Rights, Hr'g before the House Subcomm. On Nutrition, Oversight, and Dep't Ops., Comm. on Ag., 116th Cong. 25, 9 (2019) (2019 Civil Rights Hr'g) (Adams) (citing reports that Black farmers were subject to 13% of USDA foreclosures despite being less than 3 percent of direct loan recipients).

Moreover, lawmakers cited reporting that the overwhelming majority of recent agricultural subsidies and pandemic relief prior to ARPA went to non-minority farmers. Specifically, the reporting indicated that nearly the entirety of USDA's Market Facilitation Program (MFP) payments, *see* S1264-65; *see also id.* H766,[13] and almost all of the $9.2 billion provided through USDA's first Coronavirus Food Assistance Program (CFAP), went to non-minority farmers, *see id.* S1264-65; H766.[14] This disproportionate allocation of funding, Congress again found, was partly due to the lingering effects of systemic discrimination in USDA programs. Chairman Stabenow explained that "[t]he diminished relationships between [SDFRs] and USDA as a result of both latent barriers and historic discrimination limit[ed]" SDFRs' access to, and participation in, USDA programs, such that "73 percent of Black farmers … were not even aware of the agricultural aid provisions of the[se] coronavirus rescue programs." *Id.* S1264.[15] Additionally, a

[13] Citing N. Rosenberg, *USDA Gave Almost 100 Percent of Trump's Trade War Bailout to White Farmers*, Farm Bill Law Enterprise, https://perma.cc/T7SY-TZQM. In 2018 and 2019, FSA was authorized to distribute up to $25.1 billion through the MFP to assist producers directly affected by retaliatory tariffs by China. The MFP is reportedly the single largest subsidy to farmers and, according to the Farm Bill Law Enterprise, it "has almost exclusively benefitted white men and their families." *Id.*

[14] Citing J. Hayes, *USDA Data: Nearly All Pandemic Bailout Funds Went to White Farmers*, Envir'l Working Group (EWG) (Feb. 18, 2021), https://perma.cc/PVZ7-QMFD. CFAP was created in 2020 pursuant to the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") to assist producers who faced market disruptions due to COVID-19. It consisted of $16 billion in direct support to producers and $3 billion to buy agricultural products and re-distribute them to Americans in need. *See USDA Announces [CFAP]*, USDA (Apr. 17, 2021), https://perma.cc/B7N9-PTRE.

[15] Citing Fed'n of S. Coops/Land Assist. Fund, Ann. Rep. 4 (2020), https://perma.cc/94PY-HSM6.

letter introduced into the record from 13 full-time professors who specialize in agricultural issues explained that federal farm programs "have perpetuated and exacerbated the problem" of discrimination, by preferring crops that tend to be produced by white farmers and the largest farms, which are predominantly owned by white farmers. *Id.* All of this, the academics concluded, had "distort[ed] credit, land, input costs, and markets" to the disadvantage of minority farmers. *Id.*[16]

B. Congress Enacts Section 1005 To Remedy The Effects of Discrimination in USDA Programs and Avoid Perpetuating Its Effects.

On March 10, 2021, Congress passed ARPA to provide widespread pandemic relief to the American people. *See* Pub. L. No. 117-2 (2021). The House Report accompanying the bill shows that Congress was focused on the "most vulnerable communities … forced to bear the brunt of" the pandemic and resultant economic crisis "as underlying health and economic inequities grow worse." H.R. Rep. No. 117-7, 2 (2021). Among those communities were minority farmers who had "received a disproportionately small share of the farm loans and payments administered by USDA as a result of … longstanding and widespread discrimination." *Id.* at 23.

As part of ARPA, Congress passed § 1005, which was designed to "provide targeted and tailored support for … farmers," CR H765 (Scott), who "have for many decades suffered discrimination by [USDA]," *id.* S1265 (Booker), and who had not benefited from prior pandemic relief efforts, *see id.* H1273 (Rep. Neal) (explaining as much with respect to Black farmers); *see also id.* S1264-65 ("Congress includes these measures to address the longstanding and widespread systemic discrimination within the USDA, particularly within the loan programs, against [SDFRs].") (Stabenow); S.278, Sec. 4, ¶ (a)(1)-(2) (purpose to address "historical discrimination

[16] In addition to most of the reports cited herein, the letter also attached the following sources documenting USDA discrimination: Hr'g on the Decline of Minority Farming in the U.S., Comm. on Gov't Ops., U.S. House of Reps. (1990); D.J. Miller Disparity Study: Producer Participation and EEO Compl. Process Study), D.J. Miller & Assocs (1996); USDA: Problems in Processing Discrim. Compls., GAO (2002); USDA: Recomms. and Options to Address Mgmt. Deficiencies in Off. of Assistant Secretary for Civil Rights, GAO (2008), https://perma.cc/YW73-83WE.

against [SDFRs]" and "issues relating to … COVID–19 … in the farm loan programs").

Section 1005 authorizes funds to pay up to 120 percent of certain direct or guaranteed USDA farm loans held by a "socially disadvantaged farmer or rancher" and outstanding as of January 1, 2021.[17] *See* ARPA § 1005. For purposes of § 1005, Congress gave the term "socially disadvantaged farmer or rancher" the same meaning as in Section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, codified at 7 USC § 2279(a). *See id.* ARPA § 1005(b)(3). That provision defines a "socially disadvantaged farmer or rancher" as "a farmer or rancher who is a member of a socially disadvantaged group," 7 USC § 2279(a)(5), which is further defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities," *id.* § 2279(a)(6).

USDA has long interpreted "socially disadvantaged group[s]" to include the following five groups: American Indians or Alaskan Natives; Asians; Blacks or African Americans; Hispanics or Latinos; and Native Hawaiians or other Pacific Islanders. *See* 66 FR 21617-01 (Apr. 30, 2001) (interpreting 7 USC § 2279 to include those groups for purposes of Outreach and Assistance for SDFRs Program); 74 FR 31567 (July 2, 2009) (same for Risk Management Purchase Waiver); 75 FR 27165 (May 14, 2010) (same for Conservation Reserve Program). USDA confirmed in a Notice of Funds Availability (NOFA) that SDGs would continue to "include, but are not limited to," those same five groups, while other groups could be considered for inclusion on a case-by-case basis by the Secretary in response to a written request. *See* NOFA.[18]

IV. PROCEDURAL HISTORY

On April 29, 2021, Plaintiffs filed suit challenging USDA's implementation of § 1005.

[17] Congress provided the additional 20% because State taxes had eroded previous settlement payments to minority farmers. *See* S1264 (Stabenow) (citing David Zucchino, *Sowing Hope, Harvesting Bitterness*, LA Times (Mar. 23, 2012)), https://perma.cc/V8TZ-C6RZ.

[18] *Available at* https://perma.cc/A35E-UANV.

Plaintiffs allege that they would otherwise qualify for debt relief under § 1005 "except that [they are] white." Am. Compl. ¶ 8. They claim that USDA's interpretation of "socially disadvantaged farmer or rancher" in § 1005 to include farmers and ranchers who identify as "Black/African American, American Indian or Alaskan native, Hispanic or Latino, or Asian American or Pacific Islander" "violate[s] the Equal Protection guarantee in the United States Constitution," *id.* ¶¶ 24-25, 27, 52, 57. On June 3, 2021, Plaintiffs filed motions for a temporary restraining order (TRO) and preliminary injunction. ECF 12-13. On June 4, 2021, this Court held a hearing on Plaintiffs' TRO motion, permitted Defendants to respond to it by June 8, 2021, and permitted Defendants to respond to Plaintiffs' motion for a preliminary injunction by June 18, 2021. On June 10, 2021, the Court entered a TRO and enjoined Defendants from making any payments under § 1005 until it rules on the preliminary injunction motion. ECF 21 at 10 (Op.).[19]

ARGUMENT

I. Plaintiffs Do Not Satisfy Any Of The Requirements For A Preliminary Injunction.

A preliminary injunction is an "extraordinary and drastic remed[y] that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion" on the required elements. *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2468194, at *2 (N.D. Ill. May 13, 2020).[20] Plaintiffs fail to carry their burden here.

A. Plaintiffs Have Not Shown Irreparable Harm.

As explained in Defendants' opposition to Plaintiffs' motion for a TRO, irreparable harm is "a sine qua non for [preliminary] relief," *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 553 (7th Cir. 2014), and Plaintiffs have not carried their burden to establish this essential element based

[19] Under current Federal Rule of Civil Procedure 65(b)(2), the TRO would expire in 14 days, or on June 24, 2021, unless the Court, "for good cause, extends it for a like period or the adverse party consents to a longer extension."
[20] Herein, all internal alterations, citations, omissions, quotations, and subsequent history are omitted unless indicated.

on either of the two injuries they allege, *see* Defs.' Opp'n to Pls.' Mot. for a TRO 9-15, ECF 17 ("Defs.' Opp'n"). Plaintiffs first attempt to rely on monetary harm, arguing that, "if a majority of the money [appropriated to implement § 1005] is spent," then they will not be able to obtain debt relief under § 1005. Reply Mem. in Supp. of Mot. for TRO 3, ECF 19 ("Pls.' Rep."). But any monetary harm Plaintiffs could possibly suffer is not irreparable. As explained, Congress appropriated "such sums as may be necessary, to remain available until expended," to implement § 1005. ARPA § 10005(a)(1); *see* Defs.' Opp'n 2-3. That belies Plaintiffs' unsupported assertion that the money appropriated to implement § 1005 is limited. Indeed, Congress's use of the phrase "to remain available until expended," means that it will remain available even beyond this fiscal year. *See Shoshone-Bannock Tribes of Fort Hall Rsrv. v. Shalala*, 988 F. Supp. 1306, 1330 (D. Or. 1997) (recognizing that appropriation to "remain available until expended" is not a "cap" but instead, "segregate[s] such funds for 'no year' status which has no fiscal year limitation or expiration date"). There is thus not a point at which "the majority of the money" will be spent.[21]

Moreover, as explained, Plaintiffs' alleged monetary harm is also not "imminent" where USDA anticipates that implementation of the program will take months. *See* Defs.' Opp'n 14-15. Based on their calculation that 49% of eligible loans will be paid during the first phase of USDA's implementation of the program under § 1005, Plaintiffs jump to the conclusion that "almost *half* of the money budgeted for the … program could be spent before the Government *even responds* to the preliminary injunction motion." Pls.' Rep. 1. That is incorrect on multiple grounds. First, as noted, there is no finite amount of money "budgeted for" the program. Second, as explained,

[21] Plaintiffs also argue that the proper remedy—"eliminating the racial criteria" and "requir[ing] USDA to forgive the loans of *every farmer* in the United States"—will not be an available remedy because it will increase the program cost "from an estimated $4 billion … to $400 billion." Pls.' Rep. 3. Plaintiffs overstate the estimated cost of the program were it extended to all farmers with otherwise qualifying loans under § 1005; USDA estimates that doing so would cost $31 billion—not $400 billion. *See* https://perma.cc/S5BZ-DM59; *available at* https://perma.cc/CH6Z-KV44. In any event, Plaintiffs' argument is based on their incorrect view that they are entitled to seek relief on behalf of every farmer in America. *See* Pls.' Rep. 3. They are not. *See* Defs.' Opp'n 21; *infra* Arg II.

44% of eligible accounts in the first phase of the program (which Plaintiffs estimate are 49% of program loans) require payment reversals that could take up to nine weeks to process. *See* Defs.' Opp'n 14-15. And third, because guaranteed loans have a significantly higher maximum loan limit, the percentage of *money* (as opposed to accounts) to be allocated during the second phase of implementation constitutes 36% of the total dollar amount estimated to be spent under the program. *See* Decl. of William Cobb ¶¶ 22, 23, 26, ECF 14-2. As a result, in addition to the fact that any monetary harm to Plaintiffs is not irreparable, even on Plaintiffs' own terms, any such harm is also not imminent where the majority of funds currently estimated to be paid out under the program will, again, not be expended for some time. *See id.* ¶¶ 11, 23, 32.

The Court's finding to the contrary was based on a factual error. In entering the TRO, the Court read Defendants' estimate that debt payments to minority farmers constitute about 0.2% of the $1.9 trillion package in ARPA as an implicit cap on funding and, on that basis, concluded that "the entire $3.8 billion that has been allocated to the program may be depleted before" consideration of the preliminary injunction. Op. 7-8. But Defendants noted the fact that anticipated debt relief to minority farmers under § 1005 is a tiny fraction of the relief provided in ARPA, not to suggest that the funding under § 1005 is capped—as explained, it is not—but to show that the debt relief is narrowly tailored and pales in comparison to prior subsidies and pandemic relief that minority farmers were largely left out of. *See* Defs.' Opp'n 17. Because the Court's factual premise that "$3.8 billion … has been allocated to the program," Op. 8, is incorrect, so too is its conclusion that Plaintiffs suffer irreparable harm because that money "may be depleted" before the conclusion of this case, *id.*

The Court otherwise concluded that "Plaintiffs' injuries are … irreparable in light of Defendants' sovereign immunity and Plaintiffs' inability to seek damages." *Id.* But Plaintiffs'

inability to obtain damages due to sovereign immunity is beside the point. Plaintiffs have not claimed any past harm for which they would be entitled to damages. Instead, they seek forward-looking injunctive relief to gain access to the programmatic funds under § 1005. *See* Pls.' Rep. 2-3. That is relief they could obtain at the end of this case, if they show that they are entitled to it. As explained in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the waiver of sovereign immunity in the Administrative Procedure Act (APA),[22] while limited to "relief other than money damages," 5 U.S.C. § 702, does not foreclose "specific remedies" that "attempt to give the plaintiff the very thing to which he was entitled," which, in some cases, may be money owed under a federal program, *Bowen*, 487 U.S. at 895. Thus, Plaintiffs' inability to obtain damages against the Government does not preclude their being made whole at the end of this case if they can show they are entitled to payments under § 1005, and thus cannot be the basis for irreparable harm. *See E. St. Louis Laborers' Loc. 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 703 (7th Cir. 2005) (injury is irreparable "only if it cannot be remedied through a monetary award after trial").[23]

Plaintiffs otherwise continue to attempt to establish irreparable harm on the basis that their alleged "equal protection violation itself is an irreparable harm that warrants an immediate injunction." Pls.' Rep. 3. As explained, the Seventh Circuit has never held that even a substantially likely equal protection violation is itself sufficient to establish irreparable harm. Defs.' Opp'n 10-13. Plaintiffs thus cannot cite one case in the Seventh Circuit supporting their position, and even the out-of-circuit cases that they cite largely run contrary to it. *See id.*

Plaintiffs argue in response that Defendants "have no good answer to the Sixth Circuit's

[22] Plaintiffs rely on the waiver of sovereign immunity under the APA. *See* Am. Compl. ¶ 20.

[23] If, on the other hand, Plaintiffs concede that they are ineligible to receive loan payments under § 1005 because they are not SDFRs, but complain that this form of targeted assistance is unconstitutional, then a preliminary injunction to further delay distribution of needed funds to *others* who *do* fit within the definition still will not remedy any harm to Plaintiffs. Thus, whether they claim to be eligible recipients of the funds or not, no preliminary injunction is necessary to prevent depleting § 1005 funds. They fail to show irreparable harm on this basis.

recent decision in *Vitolo v. Guzman*, 2021 WL 2172181 at *8 (6th Cir. May 27, 2021) … or the D.C. Circuit's decision in *O'Donnell Constr. Co. v. D.C.*, 963 F.2d 420, 428–29 (D.C. Cir. 1992). Pls.' Rep. 3. Neither of those cases is in the Seventh Circuit, and neither is applicable here. With respect to *Vitolo*, the Court relied for its finding of irreparable harm on Sixth Circuit precedent, stating broadly that "if … a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *Vitolo*, 2021 WL 2172181, at *8 (citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)).[24] As explained, however, most circuits, including the Seventh, do not take such a broad view, and instead, have held that imminent threats to only *certain* constitutional rights—importantly, not equal protection—are sufficient to establish irreparable harm at the preliminary stage. *See* Defs.' Opp'n 9-10.[25] The D.C. Circuit opinion Plaintiffs cite is even less helpful to them because the basis for the court's irreparable harm finding was *not* the alleged equal protection violation, but its finding that damages could not adequately compensate the plaintiff. *See O'Donnell*, 963 F.2d at 429. As explained, any inability to obtain damages here does not mean, as it did in *O'Donnell*, that Plaintiffs cannot be made whole at the end of this case.

Plaintiffs otherwise fault Defendants for not addressing "the Supreme Court's recognition in *Shaw* and *Northeastern Florida Chapter of Associated General Contractors* that the primary injury 'in an equal protection case … is the denial of equal treatment' itself." Pls.' Rep. 4. But of course, whether an alleged denial of equal treatment is sufficient to establish a legally cognizable

[24] Importantly, the program at issue in *Vitolo* also involved a limited appropriation, and the Court found that there was "a real risk that the funds w[ould] run out." 2021 WL 2172181, at *3. As explained, that is not the case here.

[25] The Seventh Circuit explained in *Ezell v. Chic.*, 651 F.3d 684 (7th Cir. 2011), that irreparable harm is presumed with respect to certain rights because of "the intangible nature of the benefits flowing from the exercise of those rights," "the fear that, if those rights are not jealously safeguarded, persons will be deterred … from exercising those rights," and the fact that such infringements are not compensable, *id.* at 699. As Plaintiffs indicate in their TRO Reply, the benefit at least some of them seek is access to programmatic funds under § 1005. *See* Pls.' Rep. 2-3. That benefit is not intangible and is compensable, and Plaintiffs are not being deterred from exercising any constitutional rights. As such, not only has the Seventh Circuit never held that irreparable harm should be presumed in the case of even a substantially likely equal protection violation, but the rationale for such a presumption does not apply here.

injury for standing purposes—the import of the Supreme Court cases Plaintiffs cite—is different from whether an alleged equal protection violation is sufficient to establish irreparable harm. It is not, and Plaintiffs can cite no authority in the Seventh Circuit holding otherwise.[26]

B. Plaintiffs Have Not Shown that They are Likely to Succeed on the Merits.

Plaintiffs likewise cannot show a likelihood of success on the merits of their Equal Protection Claim. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). Thus, "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003). "When race-based action is necessary to further a compelling governmental interest, such action does not violate … equal protection so long as the narrow-tailoring requirement is also satisfied." *Id.* at 327.

"Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional." *Majeske v. Chic.*, 218 F.3d 816, 820 (7th Cir. 2000). "To successfully rebut the government's evidence, a challenger must introduce 'credible, particularized evidence' of its own." *Midwest Fence Corp. v. U.S. Dep't of Transp.*, 84 F. Supp. 3d 705, 721 (N.D. Ill. 2015). "This can be accomplished by providing a neutral explanation for [a] disparity …, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or present[ing] contrasting statistical data." *Id.* "Conjecture and unsupported criticisms of the government's methodology are insufficient." *Id.*

[26] Nor did the Court's TRO Order cite any such authority.

1. The Debt Payments to SDFRs Serve Compelling Government Interests.

The Government's compelling interest in providing debt payments to SDFRs is two-fold: to remedy the lingering effects of prior discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination. Its reliance on these interests did not break new ground. "It is well-settled" that an agency "has a compelling interest in remedying its previous discrimination and the agency may use racial preferencing to rectify that past conduct." *Majeske*, 218 F.3d at 820. And "[i]t is beyond dispute that a[] public entity ... has a compelling interest in assuring that public dollars drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality op.).

The congressional record elaborates both concerns at length. *See supra* BG III. And USDA has reiterated them. In hearings leading to § 1005's enactment, Agriculture Secretary Thomas J. Vilsack told Congress that providing debt relief to minority farmers would "address longstanding racial equity issues within [USDA]" and "respond to the cumulative impacts of systemic discrimination and barriers to access that have created a cycle of debt." Opening Stmt. of Thomas J. Vilsack before House Comm. on Ag. (Vilsack Stmt.).[27] He emphasized that historic discrimination has "plague[d] the programs at the USDA, especially [] the Farm Loan Program." *Id.* At the same time, Congress and USDA expressed an interest in ensuring that current pandemic-relief funds are not allocated in a manner that perpetuates discrimination against minority farmers, as had been the case with distribution of recent funds to farmers. *See* BG III. Secretary Vilsack stressed that debt relief authorized by § 1005 would help SDFRs "dealing with a disproportionate share of COVID infection rates, hospitalizations, death and economic hurt." Vilsack Stmt.

[27] *Available at* https://perma.cc/3LWV-4SMF.

2. The Government Had Strong Evidence that Remedial Action Was Necessary.

The Government's compelling interests were supported by a strong basis in evidence that remedial action was necessary to address long-standing discrimination in USDA programs and its lingering effects. *See Croson*, 488 U.S. at 500. The Government "does not need definitive proof of discrimination," *Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 932, 945 (7th Cir. 2016), but may rely on a "combination of persuasive statistical data and anecdotal evidence" to "adequately establish[] a compelling governmental interest that justifies" a race-conscious remedial measure, *Majeske*, 218 F.3d at 820.

a. *The Strong Evidence of Longstanding Discrimination Against SDFRs in USDA Programs.* In enacting § 1005, Congress relied on a vast body of statistical and anecdotal evidence recounting discrimination against SDFRs in USDA programs. Initial reports by USCCR in 1965 and 1982 shed light on the specific inequities in USDA's farm loan programs, which "actively contributed to the [alarming] decline in the Black ownership of farmland." 1982 Rep. 176. USCCR reported that between 1970 and 1980, Black-operated farms had declined "57 percent—a rate of loss 2 1/2 times that for white-operated farms"—and that "almost 94 percent of the farms operated by blacks ha[d] been lost since 1920." *Id.* FSA (through its predecessor FmHA) was largely to blame. 1982 Rep. 176-79.

For instance, FmHA consistently provided inferior loans—with respect to amounts and terms—to Black farmers as compared to white farmers, which was consistent with its overall pattern of "follow[ing] local patterns of racial segregation and discrimination in providing assistance" to farmers. Equal Opp'y in Farm Progs., An Appraisal of Servs. Rendered by Agencies of the USDA, USCCR (1965) (1965 Rep.) 100.[28] Data "revealed that in terms of the size of loans,

[28] *Available at* https://perma.cc/34HP-5V9P.

purposes for which loans were to be used, and technical assistance, FmHA did not provide services to black farmers comparable to those provided to similarly situated whites." 1982 Rep. at 9. Moreover, USDA's civil rights complaints process—an otherwise "important tool to ensure that FmHA provide[d] equal opportunities for minority farmers," *id.* at 134—was too "ineffective" and "untimely" to provide adequate recourse, *id.* at 169. Investigation into the large number of civil rights complaints showed they were often stalled or not acted on at all. *Id.* at 166-70. The cost of this discrimination was often "the season's crop, and ultimately the[] farm[]." *Id.* at 173.

That is exactly what such discrimination cost many minority farmers, according to another civil rights report issued over a decade later. When a team of USDA leaders appointed by the Secretary of Agriculture—the Civil Rights Action Team ("CRAT")—reviewed USDA's civil rights problems in 1997, it heard Black, Hispanic, Asian-American, and American Indian farmers tell of unexplained delays in processing their loan applications, arbitrary reductions in farm loans by county officials, and failures to receive promised loans at all, often leaving them "without enough money to repay suppliers and any mortgage or equipment debts." *Id.* at 3, 6-7, 15-16. Many minority farmers lost "significant amounts of land and potential farm income" as a result of these practices. *Id.* at 30; *id.* at 14 (reporting that "the number of all minority farms ha[d] fallen" significantly''—"from 950,000 in 1920 to around 60,000 in 1992"); *see also* 1982 Rep. 176 (reporting similar findings). Like the USCCR, the CRAT found that USDA's civil rights complaints process was an ineffective "system without accountability," where complaints often languished for years in a growing backlog or were left unanswered altogether. *Id.* at 24-25.[29]

Lack of administrative recourse for discrimination led to a series of lawsuits over the next decade by African-American, Native American, Hispanic, and female farmers, alleging that USDA

[29] *See also* USDA OIG, *Rep. for Secretary on Civil Rights Issues – Phase I*, (1997), https://perma.cc/NK6B-W2CL.

had systematically discriminated against them on the basis of race, ethnicity, and gender in the administration of farm loans and other benefits and routinely failed to investigate administrative complaints about such discrimination. *See Pigford II*, 856 F. Supp. 2d at 8 (describing allegations by African-American farmers that USDA had "deprived countless farmers of desperately needed credit and payments under various aid programs," causing "severe financial losses and even, in many cases, los[t] … land"); *Cantu v. United States*, 565 F. App'x 7 (D.C. Cir. May 27, 2014) (summarizing similar allegations in the other suits).

Though the cases largely settled, the court in *Pigford I* stressed that the claims, "though broad in scope, were no exaggeration"—it was clear by then that USDA had failed to "provide equal opportunity for all as the law requires." *Pigford II*, 856 F. Supp. 2d at 8. Farmers in that case recounted not only being denied loans but also receiving them after "planting season was over, [when] the loans w[ere] virtually useless," or receiving supervised loans requiring a county supervisor's co-signature before funds could be withdrawn. *Pigford v. Glickman, (Pigford I)*, 185 F.R.D. 82, 87 (D.D.C. 1999). To receive payments under the settlements, claimants had to substantiate these claims of discrimination with some level of evidence. *Pigford II*, 856 F. Supp. 2d at 9-10 (explaining the settlement's two-track system that awarded differing amounts depending on a "substantial evidence" or "preponderance of the evidence" showing); *see also Cantu*, 565 F. App'x at 8-9 (explaining processes in other cases). In the *Pigford* litigation alone, so many African-American farmers sought relief that Congress enacted special legislation extending the statute of limitations for administrative civil rights complaints, *see* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012 (2008), and then appropriated $1.25 billion to fund awards to successful claimants, *see* Claims Resolution Act of 2010, Pub. L. No. 111-291 (2010). To date, the government has paid more than $2.4 billion under settlement agreements with

claimants who sufficiently substantiated their claims of discrimination in farm loan-making and servicing. *See Pigford I*, 97-cv-1978, ECF 1812, at 7; *Pigford II*, 08-mc-511, ECF 378-1, at 4; *Keepseagle*, 99-cv-3119, ECF 646, at 2; *Love*, 00-cv-2502, ECF 248-1, at 4.

Even after these settlements, problems with discrimination in USDA programs lingered. In 2011, Secretary Vilsack commissioned the firm Jackson Lewis LLP ("JL") to assess the "effectiveness" of USDA agencies "in reaching America's diverse population in a non-discriminatory manner." JL Rep. i. After a thorough 18-month investigation and analysis, JL issued a 674-page report setting forth its findings and 234 recommendations. *See id.* at iv, viii. The report compiled substantial anecdotal evidence, depicting "a system where the deck was always stacked, not only against access to USDA programs, but also against [customers'] ultimate success" due to their minority status. *Id.* at viii. It contained substantial statistical evidence that, in the every-day operations of each USDA agency reviewed, SDGs were under-represented to their detriment, *see id.* xxiii, including with respect to the FSA specifically, *id.* at 131; *see also id.* at 69-72.[30] And it found that the evidence "substantiated claims of denial of equal program access and continuing institutional discrimination," *id.* at viii, which resulted in "a broad and longstanding negative impact on … SDGs—including the loss of scarce or irreplaceable farm lands," *id.* at 64.[31]

Like prior reports, the JL Report recounted the persistent complaints that African-Americans, Hispanics, and Asians were discriminated against with respect to the availability, timing, and requirements for obtaining FSA loans. *See id.* at 83-87. African-American farmers complained of their loans being "doled out in small amounts by FSA or subject to dual signature" requirements not imposed on white farmers. *Id.* at 85-86 ("When loans are approved for African

[30] This raised "serious concerns as to both inequitable service delivery" and "employment discrimination." *Id.* at 63.
[31] The JL Report included women in its groups of SDGs, along with Hispanics/Latinos; Blacks/African Americans; Asians; American Indians/Alaskan Natives; and Native Hawaiians/Pacific Islanders. *See id.* 66 n.33. Defendants primarily rely herein on JL Report's many findings specific to the aforementioned racial and ethnic groups.

Americans, FSA tends to 'control the purse strings' (uses supervised accounts), and the same is not true for Whites who receive loans[.]").[32] Hispanic and Asian farmers similarly reported unfair treatment and being "stereotyped as … farm workers, rather than farm owners." *Id.* at 86-87. Additionally, the report found that USDA's discrimination complaints processing resulted in "what appear[ed] to be an almost foregone conclusion: in 97%+ of the claims, there [wa]s no finding of discrimination." *Id.* at xxv. It stressed that "most FSA employees" believed "that inequitable treatment of customers and potential customers is, at worst, a series of isolated and independent incidents." *Id.* at 66. That was incorrect, according to JL—in reality, "the inequities faced by SDGs have, over time, been systemic and ingrained in every-day FSA operations." *Id.*

b. The Strong Evidence of Lingering Discrimination in USDA Farm Loan Programs. The inequalities cited in the JL Report are reflected in recent reports that "continue to document the challenges and barriers faced by farmers of color due to race or ethnic discrimination or the legacy of such discrimination." S1263 (Stabenow). For instance, a 2017 study focused on "the challenges faced by Latinx farmers," including the "failure of agricultural agencies to engage in appropriate outreach or account for language barriers" with respect to them. H766 (citing L. Minkoff-Zern & S. Sloat, *A New Era of Civil Rights? Latino Immigrant Farmers and Exclusion at [USDA]*, AG. & HUMAN VALUES 34 (2017)), ECF 17-1. The study's conclusion: "These processes have succeeded in creating agricultural racial formations, resulting in the ownership and operation of US farms remaining in primarily white hands." Minkoff-Zern & Sloat, *A New* Era at 634.

Two additional GAO reports, generated at Congress's request, looked at the "challenges SDFRs reportedly face in obtaining agricultural credit[.]" GAO-19-539, 2. In the first report,

[32] Congress recently heard of black farmers receiving "'supervised' bank accounts which required white loan officers to co-sign every transaction." State of Black Farmers, Fin. Servs. Comm. Hr'g, 117th Cong. (Stmt. of John Boyd, Nat'l Black Farmers Ass'n) (March 25, 2021), 2021 WL 1154123 (2021).

GAO concluded that the "long-standing and well-documented" "allegations of unlawful discrimination against SDFRs in the management of USDA programs" were substantiated by the data and were continuing to affect SDFRs' ability to access credit. *Id.* at 28-29.[33] In the second report, specific to Native Americans, GAO noted that some Native American stakeholders believed "discrimination ... contribute[d] to the lack of commercial lending on tribal lands," which may also have "deter[ed] them from applying for credit" at all. GAO-19-464, 19-20.

That same year, Congress held a hearing on civil rights compliance at USDA "to ensure the Department ... functions equally for everyone it serves and employs, regardless of race, gender, ethnicity, or any other protected class." 2019 Civil Rights Hr'g 1 (Fudge). By that time, the "controversial history on civil rights at USDA" was "no secret." *Id.* Congress repeated some of the same concerns about discrimination that motivated its, and USDA's, prior efforts to revise the Department's programing, including the higher foreclosure rates for black farmland, *id.* at 9, and the faster decline of farm ownership "for black farmers than for other farmers," *id.* at 8.

In 2021, GAO released another report summarizing "more than a decade of [its] work" on issues related to income security and underscoring the "racial and income disparities in access to financial services and availability of credit," including among "minority farmers and ranchers." GAO-21-399T, at 1. Drawing from previous reports and incorporating updated data, GAO concluded that minority farmers, including tribal members, "had less access to credit than other agricultural businesses." *Id.* at 1, 2-3 (statistics illustrating that they "received a disproportionately small share of farm loans and agricultural credit"). All of this and additional evidence relied upon by Congress in passing § 1005 was more than sufficient to justify its conclusion that there has been

[33] Specifically, in USDA surveys between 2015-2017, SDFRs accounted for an estimated 17% of primary producers but only 13% of farms with loans and 8% percent of total outstanding farm debt. And even though farm ownership debt comprised most outstanding SDFR farm debt (67%), SDFRs were still less likely to have outstanding farm ownership debt than all other farmers. GAO-19-539, at 16.

discrimination against minority farmers in USDA loan (and other) programs.

c. The Strong Evidence That Allocation of Prior Funding Perpetuated the Effects of Longstanding Discrimination in USDA Farm Loan Programs. Congress also had a strong basis in evidence to conclude that, while COVID-19 was hitting minority farmers the hardest, recent agricultural funding and pandemic relief was unfortunately perpetuating historic inequalities, creating a need for targeted relief. Numerous sources have reported the pandemic's disproportionate impact on the health and welfare of minorities in this country. *See, e.g.*, COVID-19 Racial and Ethnic Health Disparities, CDC (Dec. 10, 2020), https://perma.cc/DJ3J-22DU. Congress recognized this, *see* H.R. Rep. No. 117-7, 2-3 (noting that "most vulnerable communities" had been "forced to bear the brunt of" the pandemic and economic crisis), and found that minority farmers were in a particularly vulnerable position, *see* CR S1265 ("[F]armers of color were in a far more precarious financial situation" than their white counterparts "before the … pandemic hit.") (Booker). For instance, while "[a]pproximately 13 percent of borrowers with FSA direct loans [we]re currently delinquent on their loans," that number increased to 35% for Black farmers and 24% for Hispanic, Asian-American, and Indigenous farmers, meaning that minority farmers were on the brink of "another wave of foreclosures and potential land loss." *Id.* S1266.

Despite minority farmers' disproportionate need for monetary relief, Congress noted that although "USDA spends billions of dollars annually to provide crucial support to American agricultural producers," "agricultural producers belonging to racial or ethnic minority groups have received a disproportionately small share of the farm loans and payments administered by USDA as a result of the longstanding and widespread discrimination against these groups." H.R. Rep. No. 117-7, 23; *see also id.* at 12 (noting that such programs "continue to disproportionately benefit farmers who are not racial or ethnic minorities"). Indeed, as discussed, because of the diminished

relationships between SDFRs and USDA, the diminution of minority farms due to USDA discrimination, and agricultural programs that tend to favor large farms, Congress cited reporting that the overwhelming majority of recent agricultural funding and pandemic relief had not reached minority farmers. *See* BG III.A. The academic letter also explained that these were just the most recent examples of farm programs that "have perpetuated and exacerbated the problem" of discrimination against minority farmers by favoring large, non-minority landowners. CR S1266. Congress thus had a strong basis in evidence to conclude that its "tailored approach" in § 1005 was necessary "to address these longstanding inequities." H.R. Rep. 117-7, 23.

d. Plaintiffs Fail to Undermine the Government's Evidence. In response to this strong basis in evidence supporting the Government's conclusion that discrimination against minority farmers in USDA programs and its lingering effects justify the race-conscious remedy in § 1005, Plaintiffs do not offer "credible, particularized evidence" of their own, as they are required to do. *Midwest Fence*, 84 F. Supp. 3d at 721. Rather, they simply mischaracterize the Government's evidence, by alleging that it is "not recent" or that it relies on "generalized allegations of discrimination within society and agriculture." Mem. in Supp. of Mots. for TRO and PI ("Pls.' Mem.") 16, ECF 14. But those assertions are false, and such "unsupported criticisms of the government's methodology are insufficient" to carry Plaintiffs' ultimate burden to rebut the Government's evidence and show that § 1005 is unconstitutional. *Midwest Fence*, 84 F. Supp. 3d at 721.

At the outset, there is no merit to Plaintiffs' position that the Government's reliance on "statistical and anecdotal evidence" of discrimination in USDA programs against minority farmers somehow fails to satisfy applicable evidentiary requirements, Pls.' Rep. 8: the Seventh Circuit has repeatedly "held that [a] combination of persuasive statistical data and anecdotal evidence adequately establishes a compelling government interest that justifies an affirmative action

plan." *Majeske*, 218 F.3d at 822. There is also no merit to Plaintiffs' insistence that the Government's evidence goes only to "generalized allegations of discrimination within society and agriculture." Pls.' Mem. 16; *see also* Pls.' Rep. 8. To the contrary, the Government relied on myriad specific instances of prior discrimination within USDA's loan (and other) programs and the lingering effects of that discrimination—including disparities in delinquency and foreclosure rates—to justify its remedial relief specific to those loan programs. *See supra* BG III; Arg I.B.2.

With those arguments dispensed with, Plaintiffs' compelling interest argument boils down to their contention that the Government cannot rely on evidence of past discrimination to support an interest in remedying its documented lingering effects. *See* Pls.' Mem. 8. But that argument ignores the Supreme Court's recognition that the Government has compelling interests in remedying "both the practice and the lingering effects of racial discrimination against minority groups in this country" and "is not disqualified from acting in response to it." *Adarand*, 515 U.S. at 237.[34] And there is significant evidence in the record showing that discrimination in USDA programs against minority farmers has had such lingering effects.

The evidence before Congress in enacting § 1005 sadly confirms that minority farmers had been the victims of past discrimination in USDA's loan programs: that they received smaller loan amounts; had those amounts arbitrarily reduced; had their loans significantly delayed, negatively impacting that season's crop; had their repayment schedules "accelerated without explanation"; were denied loan servicing that could have provided them with options to avoid default and foreclosure; and had been assigned "supervised" loans that required white loan officers to approve and co-sign every transaction. *See* BG III; Arg I.B.2. That long and well-established history of

[34] *See also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) ("the end of ameliorating the effects of past racial discrimination, a national policy objective of the highest priority"); *United States v. Paradise*, 480 U.S. 149, 170 (1987) (race-conscious policy was necessary "to eradicate the continuing effects of its own discrimination").

discrimination in USDA's loan programs gave Congress good reason to conclude that the stark statistical disparities between minority farmers and white farmers today—showing that minority farmers have disproportionately smaller farms and bring in less revenue, have disproportionately higher rates of delinquency and foreclosure, and have less access to credit, among other things—were the result of past discrimination that it had a compelling interest in remedying. *See Paradise*, 480 U.S. at 170 (finding that the "racial imbalances in the Department [we]re properly characterized as the effects of the Department's past discriminatory actions").

This strong evidence of discrimination in USDA farm loan programs and its lingering effects stands in stark contrast to the evidence presented in the cases Plaintiffs rely on. *See* Pls.' Mem. 16-17. In *Builders Association of Chic. v. County of Cook*, for instance, the government conceded that there was "*no* specific evidence of pre-enactment discrimination to support" its race-conscious remedial measure. 256 F.3d 642, 645 (7th Cir. 2001) (emphasis added). And in *Brunet v. City of Columbus*, the court rejected the government's reliance on 14-year-old-evidence, without more, to justify its compelling interest in remedying discrimination, particularly because the plaintiff presented specific counter-evidence to rebut the government's conclusion that those prior statistical disparities were caused by discrimination. 1 F.3d 390, 409 (6th Cir. 1993); *see also Hammon v. Barry*, 826 F.2d 73, 76 (D.C. Cir. 1987) (finding 18-year-old evidence of discrimination insufficient to justify race-conscious remedy when current statistics showed consistent, positive hiring practices). In contrast, the Government cites to hearings discussing continuing issues with USDA's complaints resolution process in 2008 and 2019. It also cites studies in 2017, 2019, and 2021; hearings in 2008, 2012, and 2019; and funding gaps in 2018, 2019, and 2020—all showing the lingering effects of that discrimination on minority farmers. *See* BG III; Arg I.B.2. Plaintiffs' unsupported allegation that the Government has not provided

"recent" evidence of USDA discrimination against minority farmers and its lingering effects is simply incorrect—and wholly insufficient to rebut the Government's showing.

In granting Plaintiffs' motion for a TRO, the Court relied on many of the same arguments that Plaintiffs advance, but respectfully, that reliance is misplaced. First, the Court concluded that "Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination." Op. 5. As noted, however, Defendants are not confined to remedying only past or present discrimination; the Supreme Court has long recognized that the Government has a compelling interest in remedying the lingering effects of past discrimination. And in that regard, the record is not limited to a single episode of past discrimination; it shows that the program under § 1005 targets the lingering effects of thousands of episodes of prior discrimination. The record includes, *inter alia*, four lawsuits resolving thousands of discrimination complaints against the USDA; a 674-page report as recent as 2011, recounting not only thousands of civil rights complaints, but 14,000 backlogged complaints pending at FSA alone, *see* JL Rep. 95; hearings in 2008 and 2019 discussing the numerous civil rights complaints at the USDA and ongoing issues with their resolution, *see* BG III; Arg I.B.2; *supra* n.9; and congressional findings in the predecessor bill to § 1005, the House Report accompanying ARPA, and floor statements by multiple Members of Congress pointing to the numerous reports over decades and up to 2021, recounting the discrimination against minority farmers in USDA's loan programs and its lingering effects—all of which Congress relied on in passing § 1005, *see* BG III; Arg I.B.2.

Second, the Court concluded that "Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry" and "rely on a 'generalized assertion that there has been past discrimination in an entire industry' to establish a compelling interest." Op. 5 (citing *Croson*, 488 U.S. at 498). That is incorrect. As noted above, Defendants are relying

on copious evidence of the long and well-established history of discrimination in specific USDA farm loan and subsidy programs. And the statistical disparities Defendants point to on are both the result of that particular discrimination, and oftentimes pertain specifically to USDA's farm loan programs. *See, e.g.,* S1266 (Booker) (citing statistics showing higher rates of delinquency for minority borrowers with FSA direct loans); *supra* n.34 (noting disparities between the percentage of minorities in the primary producer population and their percentage of loans and total outstanding farm debt), n.38 (citing numerous statistical disparities related to particular groups in USDA programs); Cobb Decl. ¶ 39 (explaining that African American, American Indian/Alaskan Native, Asian, Pacific Islander, and Hispanics accounted for 20-24% of foreclosures in FY2017 through FY2019 even though they only account for 17.5% of the direct loan portfolio).

Remedying the lingering effects of discrimination in USDA programs, not to mention USDA's farm loan programs, is also not overbroad. In faulting Richmond for relying on "a generalized assertion that there ha[d] been past discrimination in an entire industry," the Supreme Court was focused on the fact that Richmond was limited to "rectify[ing] the effects of identified discrimination within its jurisdiction," and it took issue with the fact that the city was relying on a finding of "nationwide discrimination in the construction industry" that had "extremely limited" "probative value … for demonstrating the existence of discrimination in Richmond." *Croson*, 488 U.S. at 504, 509. Congress's jurisdiction is not so limited, and the statistical evidence it relied on has no such disconnect: it, along with the wealth of evidence in the record, shows nationwide issues of discrimination in USDA programs, specifically in its farm loan programs, and the lingering effects of that discrimination. And where Congress had evidence before it that minority farmers "were [being] systematically exclud[ed]" from agricultural funding and pandemic relief as a result, "it could take action to end the discriminatory exclusion." *Id.* at 509.

Third, and finally, the Court concluded that Defendants had failed to establish a compelling interest in providing debt relief to minority farmers because "[a]side from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts." As noted, however, the record submitted by the Government contains a vast body of evidence sufficient to provide a strong basis in evidence for Congress to have concluded that prior discrimination led to lingering negative effects on minority farmers that warranted the remedial relief in § 1005.[35] That is the first of the two compelling interests identified by the Government.

The second—Congress's compelling interest in ensuring that its funding does not perpetuate the effects of discrimination—does not require a showing that the Government intentionally distributed funding in a discriminatory manner in order for Congress to be permitted to avoid doing so in the future. Such a rule would create the perverse result that even if Congress realized that its funding would perpetuate the effects of discrimination, it could not act to remedy that problem until it had already distributed funding in a discriminatory manner. That is not the law. Instead, it is enough for Congress to have recognized that it had become a "passive participant" in a discriminatory system. *Croson*, 488 U.S. at 492.[36]

And here, it did. The evidence recited above shows that discrimination in USDA programs resulted in diminished relationships between SDFRs and USDA officials, as well as the current state where SDFRs have disproportionately smaller farms and less revenue. That evidence also shows that federal farm programs favor large farms, and hence, those generally owned by non-

[35] The Government "does not need definitive proof of discrimination," nor to "prove" that statistical disparities "were caused by discrimination," to justify a race-conscious program. *Midwest Fence Corp.*, 840 F.3d at 945.
[36] *Builders Ass'n of Greater Chic. v. Cty. of Cook*, 256 F.3d 642 (7th Cir. 2001), is not to the contrary. That case confirms that where, as here, Congress knew that its funding would perpetuate the effects of USDA discrimination, it was "entitled to take remedial action" to avoid becoming "complicit" in the discriminatory system. *Id.* at 645.

minority farmers. These factors, Congress found, resulted in minority farmers being largely left out of recent MFP funding and the pandemic relief in CFAP. Once Congress recognized that it had become a passive participant in that discriminatory system, it had a compelling interest in no longer contributing to, but "dismantle[ing]," that system. *See id.*

3. The Provision of Debt Relief to Minority Farmers Is Narrowly Tailored.

The targeted relief in § 1005 is also narrowly tailored to further the Government's compelling interests. To assess narrow tailoring, courts look to: "[i] the necessity for the relief and the efficacy of alternative remedies; [ii] the flexibility and duration of the relief, including the availability of waiver provisions; [iii] the relationship of the numerical goals to the relevant labor market; and [iv] the impact of the relief on the rights of third parties," *Paradise*, 480 U.S. at 171, as well as over- or under-inclusiveness, *see Midwest Fence Corp.*, 84 F. Supp. 3d at 728. All of the pertinent factors show that debt relief under § 1005 is narrowly tailored.

First, the necessity for USDA's remedial action is firmly rooted in the evidence set forth above, showing longstanding discrimination against minority farmers in USDA programs. *See* Arg I.B.2. That discrimination contributed to a situation where minority farmers were hit hardest by COVID-19, such that they were on the brink of foreclosure at higher rates than white farmers, and yet, got short-changed again, reportedly receiving a tiny fraction of CFAP funds less than a year after being largely left out of the single largest U.S. agricultural subsidy. *See* BG III.A. Targeted relief to minority farmers was thus necessary to remedy the discriminatory effects on minority farmers, made even more acute by a pandemic that disproportionately affected them, *see* Vilsack Stmt. (explaining disproportionate impacts on SDFRs), and to ensure that, unlike prior rounds, public funds were not allocated in a manner that perpetuated existing inequities.

The necessity of the debt relief in § 1005 is underscored by the inefficacy of the race-neutral alternatives that Congress tried before enacting § 1005. As explained, Congress changed

the role of county committees in USDA loan programs and enacted measures to achieve greater minority representation on those committees in 2002 and 2008, *see* BG I; and yet testimony and reporting, as recent as one month before Congress passed § 1005, shows continuing disparities in the number, amounts, and servicing of USDA loans for minority farmers as compared to non-minority farmers. *See id.* III.A. Also, in 2002, Congress created an Assistant Secretary of Civil Rights at USDA to address the agency's poor civil rights record; and yet subsequent testimony and reports showed continuing issues in processing civil rights complaints, *see* Arg I.B.2, including "inconsistencies and missing information in [USDA] data" and a dearth of findings of wrongdoing as recently as 2019, *see* 2019 Civil Rights Hr'g (Fudge). Congress created the 2501 Program in 1990 to increase minority farmers' awareness of, and access to, USDA resources, and permanently funded the program in 2018; and yet recent reporting indicated minority farmers were still unaware of USDA resources, including recent COVID-19 relief, *see* BG III.A. And most recently, Congress created the MFP program and CFAP to help farmers adversely impacted by the pandemic; and yet, Congress relied on reporting that the vast majority of the billions in funding under those programs did not reach minority farmers due to structural biases in federal farm programs. *See id.* Where Congress has tried for decades to use race-neutral means to remedy the effects of discrimination against minority farmers, the relative failure of those race-neutral efforts shows the necessity for this race-conscious one. *See Fisher v. U. of Tex.*, 136 S. Ct. 2198, 2213 (2016) (race-conscious admissions program was narrowly tailored where university failed to achieve compelling interest after trying for seven years via race-neutral means).

Second, in addition to being necessary, the debt relief for minority farmers is both flexible and time-limited. Although five minority groups are included in USDA's definition of "socially disadvantaged groups," USDA's definition is "not limited to" those groups. NOFA, 6. Rather,

the Secretary will consider written requests on a case-by-case basis to determine whether other groups should be eligible for debt relief. *See id.* The debt relief under § 1005 is also "a one-time occurrence," extended to SDFRs with qualified loans as of January 1, 2021. USDA's implementation of § 1005 is thus "flexib[le] in administration," *Fullilove v. Klutznick*, 448 U.S. 448, 460 (1980), and "temporary in application," *Paradise*, 480 U.S. at 178, thereby ensuring that the race-conscious measure endures no longer than necessary to serve its purposes.

Third, USDA's provision of debt relief to minority farmers does not impose an unacceptable burden on third parties, namely white farmers. Plaintiffs point to no evidence that USDA has denied equal treatment to white farmers. And they do not address reports showing that the overwhelming and disproportionate majority of recent agricultural subsidies and pandemic relief before ARPA went to white farmers, BG III.A, including some of the Plaintiffs in this case. The temporary and comparatively small debt relief under § 1005 to relieve the sizeable burden minority farmers have long borne does not impose an impermissible burden on white farmers, who Congress found had been the overwhelming beneficiaries of recent agricultural funding. *See* BG III.A; *Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481 (1986) (finding 29.3% nonwhite union membership goal to remedy past discrimination had "only a marginal impact on the interests of white workers" where whites were "denied certain benefits available to their nonwhite counterparts" but still constituted "a majority of those entering the union").

Fourth and finally, USDA's provision of loan payments to minority farmers is neither over- nor under-inclusive. As explained, there is a large body of evidence that the minority groups included in USDA's definition of "socially disadvantaged groups" for purposes of § 1005 have suffered from discrimination in USDA programs with nationwide scope. USDA has defined SDGs to include those same racial and ethnic groups since at least 2001. *See* BG III.B. And reporting

before and since then has recounted discrimination in federal programs against *those* SDGs, including by addressing a particular SDG, *see, e.g.,* GAO 19-464 (addressing Native Americans); *see also* JL Rep., or SDGs as a whole as defined by USDA, *see, e.g.,* GAO 19-539 at 1. Congress relied on reporting that shows that recent agricultural funding and pandemic relief has disproportionately failed to reach those same groups. *See* Arg III.A, *supra* n.15. Where particular racial and ethnic groups have suffered discrimination in USDA programs and have been largely left out of relief efforts, debt relief to those particular groups to ameliorate the effects of that discrimination and unequal funding is not over-inclusive. *See, Paradise*, 480 U.S. 149. Nor is the definition under-inclusive because it does not include white farmers. As noted, the evidence simply does not show—and Plaintiffs do not contend—that white farmers have suffered the same history of discrimination as minority farmers or failed to receive recent funding. Where Congress sought to remedy the effects of discrimination unique to minority farmers, § 1005 is not under-inclusive because it does not include white farmers who generally have not suffered the same negative effects. *See Croson*, 488 U.S. at 506 (noting that if relief program was meant "to compensate black contractors for past discrimination, one might legitimately ask why" remedial relief must be shared with those who were not shown to have been discriminated against).

In arguing that providing debt relief to minority farmers is not narrowly tailored, Plaintiffs make five primary arguments, none of which undermine narrow tailoring. First, Plaintiffs argue that Defendants "could have used any number of targeted alternatives" and point to USDA's settlements with minority farmers as one such example. Pls.' Mem. 18. As discussed, however, Congress has been using race-neutral alternatives for over thirty years, including by recently allocating $35 billion in race-neutral agricultural funding and pandemic relief. But it found that such alternatives had not worked to remedy—and indeed, exacerbated—the lingering effects of

USDA discrimination. With regard to the settlements specifically, Members of Congress noted that the "[c]laims adjudication simply was not effective" because the *Pigford* settlement payments were eroded by state taxes and the loan forgiveness under that settlement resulted in unbearable tax debt, and a very small percentage of the potential claimants in *Keepseagle* even applied through the process that pertained to them because they were difficult to reach and tended to be older in age. S1264 (Sen. Stabenow). More generally, based on the strong evidence set forth above, Congress concluded that despite the settlements and its prior efforts to remedy the lingering effects of USDA discrimination against minority farmers, those effects persisted. *See, e.g.,* H. Rep. 117-7 (explaining continued inequitable allocation of funding "[d]espite multiple lawsuits, numerous government reports," and the programs it created since the 1980s). Plaintiffs' suggestion that Congress should try again a claims settlement process that it tried and found wanting does not undermine the Government's showing that § 1005's debt relief is narrowly tailored.

The Court similarly faulted Defendants for not using other race-neutral alternatives. But the Government either considered or indeed tried the alternatives the Court suggested before enacting § 1005. The Court found that the Government did not "consider[] the financial circumstances" of those to whom it provided debt relief. Op. 6. That is incorrect. As explained, the types of loans that Congress targeted in § 1005 are direct and guaranteed loans that the borrowers would otherwise be unable to obtain from private lenders at reasonable rates and terms. *See* Defs.' Opp'n 3; Cobb Decl. ¶ 3. Indeed, but-for USDA's guarantee on the private loans covered by § 1005, minority farmers would not have obtained those loans. *See* 7 CFR 762.120(h)(1). As the Eleventh Circuit explained in *Cone Corp. v. Hillsborough Cty.*, 908 F.2d 908 (11th Cir. 1990), targeting debt relief to those borrowers who could not obtain such loans in the private market shows that the relief went to farmers who likely have not overcome the effects

of USDA discrimination, *see id.* at 917. Thus, not only did Congress consider the financial situation of those to whom it provided debt relief, its provision of debt relief to those most likely still suffering the effects of that discrimination shows that its remedy is narrowly tailored. *See id.*

The Court also found that the Government could have "require[ed] individual determinations of disadvantaged status." Op. 6. But once the Government has provided a strong basis in evidence to conclude that past discrimination occurred and its lingering effects persist, the Government is not required to conduct individual determinations. *See Paradise*, 480 U.S. at 166 ("It is now well established that governmental bodies … may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination.").[37] And such individualized determinations would not have been a workable race-neutral alternative where one of Congress's purposes in § 1005 was to move "with alacrity" to get debt relief to minority farmers in the midst of a global pandemic. *Paradise*, 480 U.S. at 172.

The Court otherwise posits that the Government could also have "provide[d] better outreach, education, and other resources," or "giv[en] priority to loans of farmers or ranchers that were left out of previous pandemic relief." Op. 6. But Congress created, and permanently funded, the 2501 Program expressly for outreach to SDFRs. *See* BG III.A. And in Section 1006 of ARPA, Congress provided additional funding for such outreach and education, and provided other resources to SDFRs. Again, Congress provided the additional remedy in § 1005 to get timely monetary relief to minority farmers based on data showing that they were the most likely to be in default or subject to foreclosure on their loans. While Congress need not have "exhaust[ed] … every conceivable race-neutral alternative" before employing a race-conscious one, *Grutter*, 539

[37] *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1896) ("[T]he Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor.") (O'Connor, J., concurring).

U.S. at 309, it indeed exhausted every one of Plaintiffs' or the Court's suggested alternatives.

Second, Plaintiffs argue that the debt relief to minority farmers is over-inclusive because it targets relief that typically goes to newer farmers, or farmers who obtained loans, both of whom Plaintiffs presume did not experience USDA discrimination. Pls.' Mem. 19-20. But remedies for past discrimination may include reasonable race-conscious relief that benefits individuals who were not "the actual victims of past discrimination." *Loc. 28*, 478 U.S. at 447. And the record of discrimination against minority farmers was not limited to their inability to obtain USDA loans: it shows they received smaller loan amounts, had those amounts arbitrarily reduced, were subject to inordinate approval wait times that adversely affected their ability to repay the loans, and were denied loan servicing that could have helped them avoid delinquency and foreclosure. *See* BG III, Arg I.B.2. What's more, many minority farmers who have received loans in recent decades may not have been able to at all had it not been for *Pigford II*'s settlement condition that a successful claimant receive priority consideration for loan approval. *See Pigford I*, 185 F.R.D. at 96.

Third, Plaintiffs argue that debt relief to minority farmers is over-inclusive because Defendants have not provided sufficient evidence of discrimination against Asians, Hawaiians, or Alaskan Natives. Pls.' Mem. 19-20. That is incorrect. As noted, numerous reports in the record speak of discrimination in USDA programs against minority farmers, SDGs, or SDFRs generally, *see, e.g.,* JL Rep.; GAO 19-539; the findings in those studies thus pertain equally to the three groups Plaintiffs identify, as they are included in the definition of SDGs and SDFRs. There is also significant evidence in the record pertaining to all three groups specifically, as shown by just *some* of the data in the body of evidence Congress relied on.[38] While the Seventh Circuit allows for

[38] *See, e.g.,* JL Rep., Exec. Summ. xxiii (Asians underrepresented in FSA's national workforce), 71 (charts showing underrepresentation of Native Hawaiians/Pacific Islanders in USDA workforce, in FSA county workforce nationwide, and among FSA county executive directors nationwide), 74, 433-34, 436 (*significant* disparities between the principal operator populations of American Indians/Alaskan Natives and their receipt of farm program funds, direct loan dollars,

"some variation in the extent of disadvantage" among groups benefited by a race-based program, *Midwest Fence Corp.*, 840 F.3d at 945, there is regardless, sufficient evidence in the record to support the conclusion that those groups needed debt relief too.

Fourth, Plaintiffs argue that the debt relief to minority farmers in § 1005 is "woefully underinclusive" because it benefits some Asians or Blacks, but not others. Pls.' Mem. 21. That is, again, incorrect. The regulations that Plaintiffs rely on for that proposition do not apply to USDA programs. *See id.* (citing 13 CFR § 124.103, 32 CFR § 191.3, and 28 CFR § 42.402). Further, as explained in the NOFA and Cobb Declaration, eligible borrowers who accept offers for debt relief under § 1005 will self-certify their race or ethnicity, and if they believe that their race or ethnicity is recorded in FSA records incorrectly, they can contact their local FSA office to verify their designation. *See* NOFA; Cobb Decl. ¶¶ 13, 15. Thus, the program under § 1005 does not "inexplicably pick" minorities within minority groups, as Plaintiffs suggest, Pls.' Mem. 21; instead, it relies on recipients to self-certify whether they fall within one of the SDGs.

Fifth, USDA's categories for distributing debt relief under § 1005 are not underinclusive because "they exclude women farmers." *Id.* As Plaintiffs concede elsewhere, women are not

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and guaranteed loans in Arizona), 185-87, 271, 487-88, 490, 492, 494, 528, 531-32, 548, 553 (underrepresentation across USDA and within particular USDA offices among American Indian/Alaskan Natives and Native Hawaiian/Pacific Islanders), 296 (general consensus among Southeast Asians that they were discriminated against by parts of USDA), 434-35 (Asians' share of the population benefitting from farm programs and farm program dollars "lagged substantially behind their respective Principal Operator populations"; in FY2010, American Indians/Alaskan Natives made up 1.57% of principal operators but only 0.45% of recipients of farm programs and only 0.36% of farm program dollars); 461 (Asians and American Indians/Alaskan Natives included as "diversity enhancement priority" for FSA guaranteed loans and farm programs), 525 (Asians and Native Hawaiians/Pacific Islanders underrepresented on a Department-wide basis); CRAT Rep. 6 (Asian-American and Native American farmers among groups who said USDA had done more to hurt than to help minority farmers), 9 (USDA employee reporting that Asian-Pacific employees "'get reprisal' when they voice their concerns to top management"), 19 (chart showing very small numbers (in some regions, zero) of Asian American/Pacific Islanders and Native American/Alaskan Natives on FSA county committees), 28 (concern among Asian-American farmers that USDA was not considering cultural differences when delivering its programs), 38 (Asian-Pacific American employees saying they "feel invisible," have a hard time getting promoted, believe that in addition to a "glass ceiling," there is a "sticky floor" for them because they cannot rise above the GS-12 level, and that managers used employees' accents as excuses to hold them back); 1982 USCCR Rep. 108 (noting disparities in the provision of USDA loans and disaster relief to Asian farmers).

"exclude[d]" from receiving debt relief. *See id.* (citing Administrator Ducheneaux, explaining that although gender is not a criteria in and of itself, women are included among beneficiaries). And Congress's choice to use a definition of socially disadvantaged group that hinges on racial or ethnic prejudice for the implementation of this program, *see* ARPA § 1005(b)(3) (adopting definition at 7 U.S.C. § 2279), but not others, *see* Pls.' Mem. 21, shows that it was narrowly calibrating its remedy to the most pressing problem it identified. *See, e.g.,* H. Rep. 117-7 at 12 (showing Congress was focused "on racial or ethnic minorities" disproportionately left out of funding).

C. A Further Injunction is Contrary to the Public Interest.

Finally, the balance of harms weighs heavily in Defendants' favor. Congress enacted the debt relief under § 1005 based on evidence that minority farmers, who had been left out of prior pandemic relief, were acutely in need of such relief to weather the pandemic storm that only exacerbated the lingering effects of USDA discrimination. Defs.' Opp'n 18-19. The public—and especially the farmers expecting debt relief—have a significant interest in its timely distribution.

For purposes of the TRO, the Court found in favor of Plaintiffs on this factor based in part on Plaintiffs' representation that USDA has "ordered" lenders providing USDA-backed loans not to foreclose on delinquent borrowers, Pls.' Rep. 4-5. Op. 8. That is incorrect. While USDA has advised that it will not foreclose on delinquent borrowers of direct loans, and has "*ask[ed]* lenders to suspend all adverse actions for all SDA guaranteed loan borrowers," Ex. A (emphasis added), "FSA cannot prevent other lenders from pursuing foreclosure action," Cobb. Decl. ¶ 39. And given that "40-65% of the foreclosure[s] on FSA borrowers from 2016 to 2020" were enforced by third parties (and not FSA), *id.*, there is every reason to conclude that a further "halt on payments will cause … harm," Op. 8, especially to borrowers who are delinquent on their loans.

That minority farmers are disproportionately delinquent on their USDA loans underscores

the exigency of these potential harms. Asian, American Indian, and Alaskan Native borrowers are delinquent at a disproportionate rate, Cobb Decl. ¶ 37; African American borrowers are delinquent at a rate more than three times that of White borrowers, *id.* ¶ 38; and Hispanic borrowers are delinquent at a rate more than six times that of their White counterparts, *id.* ¶ 37. And nearly 300 eligible recipients are currently in bankruptcy proceedings. *Id.* ¶ 37. Plaintiffs do not dispute these statistical disparities or attempt to show that they, too, face a threat of foreclosure or other concrete harm to their farming operations. Instead, they merely assert that they will be injured, in an abstract sense, by the provision of debt relief to any farmer—even one on the other side of the country (who may be at risk of losing her farm). That does not outweigh the significant, real-world harms minority borrowers may suffer due to a continued delay in debt relief.

In light of all this, it is wrong to infer from the necessary time it will take to implement the program that there is "no true urgency" behind the provision of debt relief to eligible borrowers. *See* Op. 8. While the time it takes to identify eligible recipients, process letters, and disburse payments should allay Plaintiffs' speculative fears that a limited pot of funds will run dry during the pendency of this case, *see* Defs.' Opp'n 14-15, they do not undermine USDA's concern with the plight of minority farmers who will suffer from undue delay of payments, *see* Cobb Decl. ¶¶ 36-40, or USDA's commitment to administering debt relief as quickly as its procedures allow, *see id.* ¶¶ 28-32, 35. An injunction further delaying payments contravenes the public interest.

II. Any Further Injunction Should Be Limited To Plaintiffs.

If the Court were to grant Plaintiffs' motion, any further injunction should be limited to Plaintiffs. Nationwide injunctions present the "real hazard" of forum shopping, "truncate the process of judicial review," *City of Chic. v. Barr*, 961 F.3d 882, 916 (7th Cir. 2020), and prevent legal issues "from percolating through the federal courts," *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018), in a way that allows for "trial judge[s] sitting in … other districts" to "possibly reach a

different decision," *Barr*, 961 F.3d at 936 (Manion, J., concurring)—all of which provides for better decisionmaking at each level of judicial review. All of these factors weigh against nationwide relief here, where § 1005 is challenged in seven other courts, the parties have not been afforded time sufficient to present "the very best arguments on the merits," *Barr*, 961 F.3d at 936, and the evidence of discrimination in USDA programs against minority farmers spans decades.

It is also inconsistent with limits on judicial authority. *See McKenzie v. Chic.*, 118 F.3d 552, 555 (7th Cir. 1997) (overruling district court that enjoined the entire program, despite the lack of class certification, to prevent a constitutional violation, because "plaintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties"). Justice Thomas thus recently urged courts to take "a more narrow approach" whenever one "is available." *Hawaii*, 138 S. Ct. at 2425 (Thomas, J., concurring). A narrower approach is available here. Should the Court have any concern about funds being available for Plaintiffs at the end of this case, the Court could order Defendants to set aside such funds. *See* Defs.' Opp'n 22. The Court found doing so would be "unworkable" because USDA would then "be required to forgive every farmer's loan" and Plaintiffs could simply add additional plaintiffs. Op. 9. But an order requiring USDA to pay off every farmer's otherwise qualifying loan would contravene the standing principles articulated in *McKenzie*. And the fact that Plaintiffs could add additional plaintiffs does not permit the contravention of constitutional principles. The Court also found a nationwide remedy appropriate "[t]o ensure Plaintiffs receive complete relief and … similarly-situated non-parties are protected." Op. 9. Justice Thomas rejected such reasoning as inconsistent "with the historical limits on equity and judicial power." *Hawaii*, 138 S. Ct. at 2429. Setting aside funds for Plaintiffs who seek it would ensure—if there could be any doubt—that they could obtain the relief they seek at the end of this case. There is no need or basis for a nationwide injunction.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

Dated: June 18, 2021

Respectfully submitted,

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EXHIBIT A

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United States Department of Agriculture

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Programs

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MAR 2 4 2021

Dear Guaranteed Lender,

The American Rescue Plan Act of 2021 was signed into law on March 12, 2021, by President Joseph Biden. Section 1005 of the Act provides for farm loan assistance for Socially Disadvantaged Farmers and Ranchers (SDA). This section of the Act directs the United States Department of Agriculture (USDA) Secretary to provide a payment of up to 120 percent of the outstanding indebtedness of each SDA farmer or rancher as of January 1, 2021, to pay off the loan directly or to the SDA farmer or rancher on each direct or guaranteed farm loan made by the Secretary and administered by the Farm Service Agency (FSA).

Section 1005 also uses the definition of "social disadvantaged farmer or rancher" found in the Food, Agriculture, Conservation, and Trade Act of 1990. This Act describes an SDA farmer or rancher as *a farmer or rancher who is a member of a socially disadvantage group*. The term "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities", and doesn't consider women to be part of that group.

The Secretary and FSA are establishing a process to carry out those payments.

While we do so, **we are encouraging lenders and borrowers to continue normal loan activities on all loans that are in "current" status.** FSA recognizes that the calculation of the payment amount will be based on the outstanding indebtedness as of January 1, 2021, and any subsequent reduction in indebtedness as a result of payments received after that date will not reduce the amount of the payment the borrower receives.

As you are likely aware, on January 26, 2021, the USDA suspended all adverse actions for all direct loan borrowers during the COVID-19 pandemic. At that time, we also encouraged guaranteed lenders to be flexible and consider similar limits, on liquidations in particular. We are now **asking lenders to suspend all adverse actions** for all SDA guaranteed loan borrowers until the Secretary and FSA have established a process to carry out payments under Section 1005.

If your institution has opted to proceed with a liquidation, please be reminded that 7 CFR §762.149(c) requires Standard Eligible Lenders (SEL) and those approved under the Certified Lender Program (CLP), **to obtain FSA approval of their liquidation plan**. Preferred Lender Program (PLP) lenders **must submit a liquidation plan** as required by the lender's agreement. See 7 CFR §762.149(b)(2). FSA may request lenders transfer all rights and interests to FSA to allow FSA to liquidate the loan. See 7 CFR §762.149(c)(3).

For any loans you may have in, or entering the liquidation phase, **please notify USDA prior to taking any further action** so that FSA may exercise its authority to assume the liquidation process. This notification should include, at a minimum, the borrower name(s), amount of principal, interest, and fees due, and date of the next scheduled action. This information should be sent to Bill Cobb, Deputy Administrator for Farm Loan Programs via email at ARP1005@usda.gov.

In addition to those loans in, or entering the liquidation stage, in order to inform our loan payment process development, **please complete and return the attached spreadsheet to ARP1005@usda.gov with all guaranteed borrower information no later than April 16, 2021**. For any loans that are in any stage of delinquency **please indicate your willingness to forestall any further action while we develop the payment process.** Documentation of the submitted loan balances may be requested at a later date for audit purposes.

Thank you for your patience and cooperation as we develop the processes to implement the Act and work toward our common goal of serving America's agriculture producers.

If you have any questions, please contact me or Bill Cobb.

Sincerely,

Zach Ducheneaux

Zach Ducheneaux
Administrator
Farm Service Agency
202-941-4675
zach.ducheneaux@usda.gov

Attachment