**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**EASTERN DIVISION**

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| **ROBERT HOLMAN,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **No. 1:21-cv-01085-STA-jay** |
| | ) | |
| **THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; and ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency,** | ) | |
| | ) | |
| **Defendants.** | ) | |

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**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

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## INTRODUCTION

Congress enacted § 1005 of the American Rescue Plan Act (ARPA), which provides debt relief to socially disadvantaged farmers holding certain U.S. Department of Agriculture (USDA) loans, to remedy the lingering effects of the unfortunate but well-documented history of racial discrimination in USDA loan programs. In doing so, Congress considered strong evidence that discriminatory loan practices at USDA have placed minority farmers at a significant disadvantage today: these farmers generally own smaller farms, have disproportionately higher delinquency rates, and are at a significantly higher risk of foreclosure than non-minority farmers. Congress found that minority farmers' diminished position was only made worse by a global pandemic that disproportionately burdened them and the general failure of recent agricultural and pandemic relief to reach them. In authorizing the debt relief in § 1005, Congress thus adopted a measure narrowly tailored to remedying the lingering effects of discrimination in USDA loan programs at a time of acute need, and to correct the ways prior funding had perpetuated those effects by remaining largely beyond minority farmers' reach.

Plaintiff, a self-identified white farmer who does not allege that he has been effected by historic discrimination in USDA loan programs or that he was left out of prior relief efforts (in fact, he has received thousands of dollars in agricultural funds), seeks to preliminarily enjoin § 1005's implementation on the ground that it violates his equal protection rights. But he fails to meet the requirements for the extraordinary relief he seeks. At the start, Plaintiff has not shown that he is substantially likely to succeed on the merits of his claims. Plaintiff's first equal protection claim challenging § 1005's implementation fails because he has not rebutted Congress's strong evidence supporting its conclusion that paying off minority farmers' qualifying USDA loans was necessary to further its interests in remedying the lingering effects of racial discrimination in USDA loan programs and ensuring that its pandemic relief efforts did not perpetuate those

lingering effects. And Plaintiff's remaining two claims, based on allegations that USDA is providing "debt forgiveness" to SDFRs and then allowing them to obtain future USDA loans, likewise fail as they have no basis in law or fact. The relief provided by § 1005 is not "debt forgiveness" as that term is statutorily defined and thus does not implicate future loan eligibility.

The equitable factors also weigh decisively in Defendants' favor. First, Plaintiff has not established irreparable harm, as the funds appropriated under § 1005 are not limited and will not expire—which means that Plaintiff can obtain any monetary relief he seeks at the end of this case (if he shows that he is entitled to it). And any harm is also not imminent, as the agency is currently enjoined from distributing funds. *See Wynn v. Vilsack*, No. 3:21-cv-514 (M.D. Fla.), ECF No. 41 (June 23, 2021) ("*Wynn* Op."). Second, Plaintiff has not shown that any injury to him absent an injunction would outweigh the grave harm to the socially disadvantaged farmers who are at a disproportionately higher risk of foreclosure and whose dire economic position in the midst of a global pandemic only worsens the longer payments are delayed. The Court should deny Plaintiff's request for such extraordinary relief.

## BACKGROUND

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

USDA's Farm Service Agency (FSA) administers a variety of farm credit and benefit programs. *See* 7 USC §§ 1921, *et seq.*; 7 C.F.R. § 2.42(a)(28). Like its predecessor the Farmers Home Administration (FmHA), FSA makes credit available to farmers who cannot obtain it from commercial institutions, 7 USC § 6932(b), including by making loans directly to farmers, *see id.*, and guaranteeing loans of commercial lenders up to 95%, 7 CFR § 762.129.[1] These loans may assist farmers with buying or improving farm property, *id.* § 764.151, operating their farms, *id.* §

[1] For ease of reference, Defendants use "farmers" to include "farmers and ranchers."

764.251, or resuming operations after a disaster, *id.* § 764.351, among other things. While local committees have been key in administering USDA loan programs, their structure and role in those programs have changed. *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 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 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

[2] *Available at* https://perma.cc/HA3L-PDPG.
[3] *Available at* https://perma.cc/5DNF-PFJY.
[4] *Available at* https://perma.cc/CFE9-ANJ3.

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, African-American, Native American, Hispanic, and female farmers alleged that USDA systematically discriminated against them in the administration of farm loans and other benefits and failed to investigate discrimination complaints. *See Pigford II*, 856 F. Supp. 2d 1, 8 (D.D.C. 2011); Arg. II.B. Although USDA has settled the lawsuits and paid more than $2.4 billion to claimants, 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 settlement of those 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" (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 minority farmers continue to "ha[ve] less access to credit." GAO-21-

[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.).
[6] *Available at* https://perma.cc/8X6Q-GZ5V.

399T, Fin. Servs.: Fair Lending, Access, and Retirement Sec. 1 (2021).[7] As these and other reports document, 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 DISCRIMINATION AGAINST SOCIALLY DISADVANTAGED FARMERS IN USDA PROGRAMS AND PAST FAILURES 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," (intr'd Feb. 8, 2021). It noted that over the last century, Black

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[7] *Available at* https://perma.cc/3CWQ-B959.

[8] *See, e.g.,* Hr'g on USDA's Civil Rights Progs. and Responsibilities before The House Subcomm. on Dep't Ops., Oversight, Nutrition, and Forestry, Comm. on Ag., 106th Cong. 37 (1999) (Goodlatte) (recognizing that "[c]ivil rights at the [USDA] has long been a problem"); 2002 Civil Rights Hr'g 16, 18, 26 (hearing testimony about the disparities in loan processing times and approval rates for Hispanic farmers; underrepresentation of minorities in USDA; and continuing delays in the resolution of civil rights complaints); Hr'g to Review the USDA's Farm Loan Progs. before the Senate 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 America before the 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 the 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 creation in 2002 of the Assistant Secretary of Civil Rights); House Ag. Comm. Hr'g on U.S. Ag. Policy and the 2012 Farm Bill (Apr. 21, 2010); House Ag. Comm. Hr'g on USDA Oversight 45, 50 (July 22, 2015).

farmers dwindled from 14 to two percent of all farmers and lost about 80% of their land, *id.* § 2, ¶ 5(A)-(C). Congress attributed such losses to minority farmers to various "civil rights violations by the Federal Government," including discrimination at USDA, *id.* ¶¶ 1(B), 2-15.

Floor statements leading to the passage of § 1005 echoed those findings. As Chairman of the House Agriculture Committee David Scott put it, "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 showing how discrimination manifested at all levels of USDA—resulting in little to no minority representation on county committees, disproportionately fewer loans for minority farmers, and denial of adequate processes 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 other minority farmers to the "brutal legacy of discrimination by [USDA]." *Id.* S1265; *see also id.* S1262 (Stabenow) (citing studies estimating "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 the Longstanding Discrimination Against Socially Disadvantaged Farmers at USDA.

At the same time, Congress acknowledged that its previous efforts to remedy discrimination against minority farmers in USDA programs and its lingering effects "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

[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.

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

Despite these efforts, Congress has recently found that minority farmers continue 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, Congress observed that a disproportionate number of Black, Hispanic, Asian-American, and Indigenous

[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.

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 showing that 13% of borrowers with FSA direct loans were currently delinquent and that this number increased to 35% for Black farmers and 24% for Hispanic, Asian-American, and Indigenous farmers); *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, despite minority farmers occupying a more vulnerable financial position. Specifically, the reporting indicated that nearly the entirety of USDA's $25 billion 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

[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

lingering effects of 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 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 certain crops that tend to be produced by white farmers and "reward[ing] the largest farms," which are predominantly owned by white farmers, "the most." *Id.* All of this, the academics stated, 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 grew 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

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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.

[16] In addition to most of the reports cited herein, the letter also attached and summarized the following sources documenting USDA discrimination: Hr'g on the Decline of Minority Farming in the United States, 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 & Associates report prepared for the USDA FSA (1996); USDA: Problems in Processing Discrim. Compls., GAO (2002); USDA: Recomms. and Options to Address Mgmt. Deficiencies in the Off. of the Assistant Secretary for Civil Rights, GAO (2008), https://perma.cc/YW73-83WE. *See* S1266-67.

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 had not benefited from prior pandemic relief efforts, *id.* H1273 (Rep. Neal) (explaining as much with respect to Black farmers); *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) (stating § 1005 addressed "historical discrimination 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] 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 U.S.C. § 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 U.S.C. § 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)

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

(interpreting 7 U.S.C. § 2279 to include those groups for purposes of Outreach and Assistance for SDFRs Program); 74 Fed. Reg. 31567 (July 2, 2009) (for Risk Management Purchase Waiver); 75 Fed. Reg. 27165 (May 14, 2010) (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. 86 Fed. Reg. 28329 (May 26, 2021).

For purposes of implementing the ARPA loan payments at issue, Congress directed that the Treasury make available to the Secretary of Agriculture "such sums as may be necessary, to remain available until expended, for the cost of loan modifications and payments under" § 1005. ARPA § 1005(a)(1). Eligible recipients need not apply to receive § 1005 loan payments, but they must formally accept USDA's offer, conveyed in letters to identified eligible borrowers, to receive such relief. *See* Declaration of William D. Cobb ¶¶ 13, 13-19 ("Cobb Decl.") (attached as Exhibit A). USDA is in the process of identifying and notifying individuals eligible to receive debt payments under this NOFA, although it is not disbursing payments. *Id.* ¶¶ 13-14, 21.

## IV. PROCEDURAL HISTORY

On June 2, 2021, Plaintiff filed suit, challenging USDA's implementation of § 1005. Comp., ECF No. 1. Plaintiff holds direct FSA loans and alleges that he would otherwise qualify for § 1005 payment for that loan except for the fact that "he is white." *Id.* ¶ 69. He asserts that USDA's interpretation of "socially disadvantaged farmer or rancher" in § 1005 to include farmers and ranchers who identify as falling within specific racial groups violates the constitutional guarantee of equal protection. *Id.* ¶¶ 64-74. Plaintiff also brings two other claims alleging that § 1005 loan payments constitute "debt forgiveness" as defined by a pre-ARPA statute, and that those payments trigger a statutory bar against future USDA loan eligibility for farmers whose USDA debts are forgiven. *Id.* ¶ 75-85. Plaintiff asserts that USDA is violating that statute, and equal

protection principles, because it is selectively waiving that eligibility bar, allowing SDFRs who receive § 1005 payments—but not other farmers whose debts are forgiven—to remain eligible for future USDA loans. *Id.* He seeks injunctive and declaratory relief on all three claims. *Id.* On June 6, Plaintiff moved for a preliminary injunction asking the Court to immediately "halt[] Section 1005." Pl.'s Mot. for Prelim. Inj. (Pl.'s Mot.) 13, ECF No. 7-1.

At the same time, similar equal protection challenges to § 1005's implementation are being litigated in seven other courts. In six courts, plaintiffs have moved for preliminary injunctions. On June 10, one court granted a temporary restraining order (TRO), *Faust v. Vilsack*, 21-cv-548 (E.D. Wis.), ECF No. 21. On June 23, another court issued a nationwide injunction that prohibits USDA from distributing loan payments but allows it to continue sending offer letters to eligible recipients and taking other actions "to prepare to effectuate the relief under § 1005 in the event that it is ultimately found to be constitutionally permissible." *Wynn* Op. 49 n.19.

## ARGUMENT

### I. Plaintiff Has Not Satisfied The Requirements For The Extraordinary Relief He Seeks.

To determine whether to grant a preliminary injunction, courts consider "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642 (6th Cir. 2015).[18] A preliminary injunction is an "extraordinary and drastic" remedy, and "[t]he party seeking [it] bears the burden of justifying such relief." *Id.* Plaintiff fails to carry his burden here.

[18] Herein, all internal alterations, citations, and subsequent history are omitted unless indicated.

**A. Plaintiff Is Not Likely to Succeed on the Merits of His Claims.**

Plaintiff cannot show a likelihood of success on the merits of his claims, and the Court should deny his motion on that basis alone. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Although Plaintiff's preliminary-injunction motion presents merits arguments only on the first of the three claims raised in his Complaint, he relies on his allegations pertaining to all three in support of the remaining, equitable preliminary-injunction factors. As Plaintiff is unlikely to succeed on the merits of any of his claims, Defendants address the merits of each below.

**1. Claim 1: Denial of Equal Protection Based on USDA's Interpretation of SDFR**

In Plaintiff's first claim, he contends that the Government's use of race and ethnicity in determining who is eligible for § 1005 loan payments violates equal protection. He is wrong. "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 the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Id.* at 327. Ultimately, a plaintiff bears the burden of demonstrating the unconstitutionality of the Government's race-based remedial measures adopted to further a compelling interest. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986); *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994) (once the Government produces evidence supporting constitutionality of race-conscious relief, challenging party "retains the ultimate burden of proving its unconstitutionality").

Plaintiff fails to satisfy that burden. Rather than engaging with the particular circumstances in this case, he resorts to conclusory assertions that the outcome in *Vitolo v. Guzman*—which dealt

with a distinct government program based on distinct record evidence—somehow controls here. *See* 2021 WL 2172181 (6th Cir. May 27, 2021). Plaintiff's refusal to address the substantial record evidence before Congress here, which revealed longstanding discrimination in USDA loan programs and its lingering effects, is fatal to his claim. In ignoring that record, Plaintiff fails to undermine Congress's strong basis in evidence that § 1005 debt relief to SDFRs is narrowly tailored to remedying (and not perpetuating) the lingering effects of discrimination at USDA.

**i. The Government's Provision of Debt Payments to SDFRs Serves Compelling Government Interests.**

The Government's compelling interest 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. "The Government unquestionably has a compelling interest in remedying past and present discrimination." *United States v. Paradise*, 480 U.S. 149, 167 (1987); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1009 (6th Cir. 1992). And "[i]t is beyond dispute that any 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.); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000).

The congressional record elaborates these concerns at length. *See supra* BG III. And USDA has reiterated them. In hearings leading to § 1005's enactment, Agriculture Secretary Vilsack testified 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.).[19] 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. Members of Congress explained that minority farmers had been largely left out of prior race-neutral agricultural funding such as the MFP and the pandemic relief in CFAP, *see id.*, and 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.

**ii. The Government Had Strong Evidence that Remedial Action Was Necessary To Further Its Compelling Interests.**

The Government's compelling interests in adopting § 1005 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 Co.*, 488 U.S. at 500. "No *formal* finding of past discrimination by the governmental unit involved is necessary to determine that a compelling interest exists, … but there must be strong or convincing evidence of past discrimination by that governmental unit." *Aiken*, 37 F.3d at 1162-63. The Government may rely on a combination of statistical and anecdotal evidence to support its use of a race-conscious program. *See Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2212 (2016). In fact, statistical evidence may in some cases be sufficient on its own "to show a strong basis in evidence for concluding that remedial action is constitutionally justified." *United Black Firefighters*, 976 F.2d at 1010. But even when gross statistical disparities are not "*conclusive* as to a finding of discrimination," a plaintiff carries the burden of "present[ing] evidence to rebut the inference" of

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

discrimination arising from such statistics, "thus defeating the validity of the affirmative action plan." *Id.* at 1011.

Here, the decades of investigations, testimony, and reports on which Congress relied when it enacted § 1005 provide a strong basis in evidence to support its conclusion that it was necessary to provide targeted debt relief to minority farmers. Plaintiff fails to rebut that evidence.

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 by USDA in the administration of its 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, 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.) at 100.[20] Data "revealed that in terms of the size of loans, 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

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

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.[21]

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 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

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

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, lost title to their farms"); *Cantu v. United States*, 565 F. App'x 7, 8-9 (D.C. Cir. 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 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 in all of these lawsuits who sufficiently substantiated their allegations of discrimination. *See Pigford I*,

97-cv-1978, ECF No. 1812, at 7; *Pigford II*, 08-mc-511, ECF No. 378-1, at 4; *Keepseagle*, 99-cv-3119, ECF No. 646, at 2; *Love*, 00-cv-2502, ECF No. 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 [minority customers'] ultimate success." *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. 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.[22]

Like preceding 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, for instance, complained of their loans being "doled out in small amounts by FSA or subject to dual signature" requirements, or having other supervision requirements that were not imposed on

[22] 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 rely herein on JL Report's many findings specific to the aforementioned racial and ethnic groups.

white farmers. *Id.* at 85-86 ("When loans are approved for African Americans, FSA tends to 'control the purse strings' (uses supervised accounts), and the same is not true for Whites who receive loans[.]").[23] Hispanic and Asian farmers similarly reported unfair treatment and being "stereotyped as … farm workers, rather than farm owners." *Id.* at 86-87. And American Indians and Alaskan Natives received a disproportionately smaller share of farm loan dollars as compared to their percentage of principal operator population nationwide. *Id.* at 435. 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 described 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 Minkoff-Zern & Sloat, *A New Era of Civil Rights? Latino Immigrant Farmers and Exclusion at [USDA]*, AG. & HUMAN VALUES 34 (2017)) (attached as Ex. B). The study concluded: "These processes

[23] In recent congressional testimony, Congress heard of black farmers receiving "supervised bank accounts which required white loan officers to co-sign every transaction." Comm. Hr'g, State of Black Farmers, 2021WL1154123 (2021) (John Boyd, Nat'l Black Farmers Ass'n) (Mar. 25, 2021).

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, 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. 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 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 reiterated that minority farmers, including tribal members, "had less access to credit than other agricultural businesses." *Id.* at 1, 2-3. All of this and additional evidence relied upon by

Congress in passing § 1005 was than sufficed to justify its conclusion that past discrimination in USDA loan (and other) programs was causing ongoing, negative effects.

*c. The Strong Evidence That Allocation of Recent USDA Funds 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 the "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 precipice of "yet 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, Congress cited reporting that the overwhelming majority of recent agricultural funding and pandemic relief had not reached minority farmers, in large part due to the diminished relationships between SDFRs and USDA, the diminution of minority farms due to discrimination, and agricultural programs that tend to favor large farms. *See* BG III.A. The academic letter to Congress also explained that these were just the most recent examples of farm programs "perpetuat[ing] and exacerbate[ing] 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. Plaintiff's Conclusory Arguments Do Not Rebut the Government's Strong Basis in Evidence.* Plaintiff bears the burden of rebutting the evidence on which Congress relied to conclude that it had a compelling interest in remedying, and not perpetuating, the lingering effects of decades-long discrimination at USDA. *Aiken*, 37 F.3d at 1162-63. Yet Plaintiff makes no attempt at any rebuttal here. The entirety of his argument consists of the blanket assertion that the Government lacks a compelling interest in remedying "societal discrimination." Pl.'s Mot. at 7. That ignores the voluminous evidence, outlined above, of specific instances of prior discrimination within USDA programs in particular—and in its loan programs more specifically.

The evidence illustrates the various shapes discrimination took in those loan programs. Minority farmers received smaller loan amounts; had those amounts arbitrarily reduced; received loans on a significantly delayed schedule, which negatively impacted seasonal crops; had their repayment schedules "accelerated without explanation"; were denied loan servicing that could have provided them with options to avoid default and foreclosure; and were assigned "supervised" loans that required white loan officers to approve and co-sign every transaction. *See* BG III; Arg

I.B.2. This well-established history of 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 that bring in less revenue, disproportionately higher rates of delinquency and foreclosure, and less access to credit, among other things—were the lingering effects of past discrimination that Congress had a compelling interest in remedying. *Cf. Paradise*, 480 U.S. at 170 n.20 (finding that the "racial imbalances in the Department [we]re properly characterized as the effects of the Department's past discriminatory actions"). In addition, reporting that recent MFP funding and CFAP relief largely failed to reach minority farmers also gave Congress good reason to conclude that it had become a "passive participant" in a discriminatory system that consistently benefited white farmers over minority farmers, and it had a compelling interest in no longer contributing to, but "dismantl[ing]," that system. *Croson*, 488 U.S. at 492.

All of this shows that the Government had a strong basis in evidence to support its adoption of a remedy specific to USDA's loan programs, where discrimination against minority farmers had most frequently occurred and its effects were most acutely felt. Remedying the lingering effects of that history of discrimination in a specific government programs is undoubtedly "a national policy objective of the highest priority." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976); *Adarand*, 515 U.S. at 237 ("[B]oth 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."); *Paradise*, 480 U.S. at 169 (race-conscious policy was necessary "to eradicate the continuing effects of [public safety department's] own discrimination"). As Plaintiff makes no effort to rebut this evidence, he fails to show that the

Government lacks a compelling interest in remedying the documented, lingering effects of discrimination specific to the administration of USDA loan programs. *Aiken*, 37 F.3d at 1163.

**iii. The Provision of Debt Relief to Minority Farmers Is Narrowly Tailored to Serve the Government's Compelling Interests.**

The targeted relief provided 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 Croson*, 488 U.S. at 506. These factors show that USDA's provision of debt payments to minority farmers 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 that often resulted in minority farmers receiving loans in lower amounts and with adverse terms as compared to non-minority farmers. *See* Arg. I.B.2. That discrimination, and its lingering effects, 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 were 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 with outstanding USDA loans was thus necessary to remedy the effects of USDA discrimination against them, made even more acute by a pandemic that disproportionately affected them. *See* Vilsack Stmt. And it was necessary to ensure that these funds (unlike prior funds) were not allocated in a manner that perpetuated existing inequities. *See id.*

The necessity of this debt relief is underscored by the inefficacy of the race-neutral

alternatives that Congress tried for years before enacting § 1005. *See Fisher*, 136 S. Ct. at 2213 (race-conscious admissions program was narrowly tailored where university failed to achieve compelling interest after trying to do so for seven years via race-neutral means). 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 that minority farmers were still unaware of USDA resources, including recent pandemic relief, *see* BG III.A. Most recently, Congress created the MFP program and CFAP to help farmers adversely impacted by tariffs and the pandemic; and yet reporting showed 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.*

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. 86 Fed. Reg. 28330. 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. Plaintiff points to no evidence that white farmers generally (or that he in particular) were historically denied equal treatment by USDA. In fact, Plaintiff himself has received more than $100,000 in agricultural subsidies just in the last decade. *See* https://perma.cc/C7Y8-SC5V. Nor does Plaintiff address the reports showing that the overwhelming and disproportionate majority of recent agricultural subsidies and pandemic relief before ARPA remained out of minority farmers' reach. *See* BG III.A. The temporary and comparatively small debt relief under § 1005[24] 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 funding. *See* BG III.A; *Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481 (1986) (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

[24] The MFP alone is a $25.1 billion program, while USDA estimates that payments under § 1005 will be roughly over $4 billion. *See* https://perma.cc/R69N-AL5K.

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 groups. Some reports have singularly focused on one particular group. For instance, some earlier reports focused on concerns related to African Americans, 1965 Rep., 1982 Rep., CRAT Rep.; the GAO has analyzed credit issues specific to Native Americans, *see* GAO 19-464; and other reports looked to the plight of Hispanics, Minkoff-Zern & S. Sloat, *A New Era*. Other publications have investigated obstacles faced by all groups included in USDA's definition of SDG as a whole. *See* CRAT Rep.; JL Rep.; GAO 19-539. And recent reports on the distribution of agricultural funding showed that it had gone disproportionately to those who do not fall within USDA's definition of SDGs. *See* Jared Hayes, *USDA Data: Nearly All Pandemic Bailout Funds Went to White Farmers*, EWG (Feb. 18, 2021), https://perma.cc/PVZ7-QMFD. Thus, the Government tailored § 1005 to the specific racial and ethnic groups who, all of the reports showed, had suffered discrimination in USDA programs and been largely left out of relief efforts. It is not overinclusive to include each group affected by discrimination and its lingering effects, *see Paradise*, 480 U.S. 149; nor is it underinclusive to leave out white farmers who have not suffered the same history of discrimination and lingering effects, *see Croson*, 488 U.S. at 506 (noting that if relief program was meant "to compensate black contractors for past discrimination, one may legitimately ask why" remedial relief must be shared with those who were not shown to have been discriminated against).

None of Plaintiff's arguments undercuts the conclusion that § 1005 loan payments are a narrowly tailored form of relief. At the outset, Plaintiff contends that Congress should have adopted a remedy that "simply grant[ed] priority consideration" for loan payments "to all [farmers]

who have not yet received coronavirus relief funds." Pl.'s Mot. at 8. That type of relief, however, would come up short for at least two reasons. For one, it would not address Congress's compelling interest in reversing the many effects of longstanding discrimination in USDA loan programs. That minority farmers were largely left out of prior pandemic relief due to USDA discrimination that led to their having disproportionately smaller farms is just one effect of that discrimination. Other effects include, as Congress recognized, the fact that minority farmers had for decades received disproportionately smaller loans on delayed schedules and with adverse terms—without the benefit of USDA outreach and loan servicing that could have provided them with options to avoid delinquency and foreclosure. All of that has resulted in minority farmers generally holding smaller farms, having higher delinquency rates, and sitting on the brink of foreclosure at a higher rate than white farmers. Section 1005 seeks to address these and other multi-layered effects of historic discrimination at USDA loan programs; not receiving pandemic funds is just one of many such effects. For another, distributing funds based on individualized inquiries, as Plaintiff suggests, would undermine the Government's interest in moving "with alacrity" to provide timely and meaningful relief to minority farmers disproportionately in need of it, in the midst of an unprecedented global health crisis. *See Paradise*, 480 U.S. at 172. That is not a workable alternative. *See id.* at 171-77, n.28 (approving of a race-conscious measure that provided for "immediate promotions" of black officers in order to compensate for past delays, and rejecting alternative remedies as ineffective because they could not have been administered swiftly enough).

Similarly without merit is Plaintiff's assertion that the program is underinclusive because it does not include all farmers who did not receive prior pandemic relief. But Congress found that its prior funds remained largely out of reach to minority farmers because longstanding discrimination in USDA programs led them to have disproportionately smaller farms (as

confirmed in the 2019 GAO Report and elsewhere in the record) and resulted in a system that tends to favor large farms generally owned by white farmers. With § 1005, Congress sought to remedy the lingering effects of *that* historical discrimination and *that* discriminatory system. That Congress did not cast a broader net to include all farmers who did not receive CFAP funding just shows that the remedy it adopted in § 1005 is narrowly tailored to the problem it identified. With that problem in mind, the debt relief in § 1005 is not underinclusive because it did not include other farmers who Plaintiff does not allege have experienced the same historical discrimination in USDA loan programs and, as a result, were not left out of prior relief efforts.

Equally unpersuasive is Plaintiff's argument that § 1005 is overinclusive because it provides relief to farmers who may have been successful claimants in *Pigford* and other settlements. In enacting § 1005, Congress considered compelling evidence that prior settlements failed to provide complete relief to victims of discrimination, including because they were eroded by state taxes and left victims with burdensome tax debt. S1264 (Stabenow) (citing Zucchino, *Sowing Hope*, *supra* n.19). Indeed, Congress enacted § 1005 partly because these prior efforts, "taken mostly on a case-by case basis," "ha[d] still not remedied the discrimination" against minority farmers in USDA programs, as evidenced by their disadvantaged position today. *Id.*

Finally, Plaintiff's question as to "why these particular racial groups" were included in USDA's definition of SDFR, Pl.'s Mot. at 8, is already answered by the record before Congress—a record which Plaintiff fails to engage with at all. His reliance on *Vitolo* is mistaken, as that case involved an entirely separate program, based on a different record from the one supporting § 1005. And Plaintiff is wrong to assert that the § 1005 program is governed by *Vitolo* because it adopts a "scattershot" approach to providing relief that includes certain minority and ethnic subgroups as beneficiaries of the program but not others. *See* Pl.'s Mot. at 8. Plaintiff appears to be relying on

a passage in *Vitolo* in which the court found fault with government regulations that targeted only certain subsets of minority groups for benefits and not others, without explanation. 2021 WL 2172181, at *7 (citing 13 C.F.R. § 124.103). But those regulations do not apply to USDA, and the *Vitolo* court's finding in that regard is thus inapposite here. For purposes of § 1005, USDA provides debt relief to SDFRs who self-identify as falling within one of the racial or ethnic groups included in its definition of SDFR. *See* Cobb Decl. ¶¶ 12-13, 15. And that definition was adopted based on the robust record evidence before Congress showing how each minority group has suffered historic discrimination in the administration of USDA loan programs and continue to suffer the adverse effects of that discrimination today.

Plaintiff does not identify, in this case, where the record is lacking as to specific SDFRs. Nor can he do so. As just explained, the many reports before Congress at times analyzed the condition of one specific minority group, while others focused on those included in USDA's definition of SDG as a whole. The JL Report alone provides 674 pages of findings and analysis based on an 18-month investigation into the experiences of all minority farmers included within USDA's definition of SDFR. Myriad other reports considered by Congress in the hearings leading to § 1005's enactment report similar findings with respect to specific racial groups, or all minority groups as a whole. All together, these studies, reports, and investigations provide strong evidence that each group recipient of § 1005 loan payments has suffered from discrimination and its lingering effects. The program, in short, is narrowly tailored, and Plaintiff fails to show otherwise.

**2. Claims Two and Three: Denial of Equal Protection and "Illegally Allowing Future Eligibility" to Socially Disadvantaged Farmers Who Receive Debt Relief**

Plaintiff does not address the merits of claims two and three in his preliminary-injunction motion, but he relies on them substantially as a basis for irreparable harm, both to himself and to

the socially disadvantaged farmers § 1005 "aimed to help." Pl.'s Mot. at 8-10, 12. Because Plaintiff cannot prevail on the merits of these claims, they do not support his allegations of harm.

In claims two and three, Plaintiff alleges that USDA plans to allow those who receive § 1005 loan payments to remain eligible for future USDA loans, despite a statutory prohibition against providing or guaranteeing loans to those whose debts have been forgiven. Compl. ¶¶ 75-85. According to Plaintiff, § 1005 payments constitute "debt forgiveness" under a pre-ARPA statute, and if an SDFR accepts such a payment, they should be statutorily prohibited from obtaining another USDA loan. *Id.* Nonetheless, Plaintiff asserts, USDA intends to "disregard" that statutory bar to allow SDFRs who receive § 1005 loan payments to remain eligible for future USDA loans. Compl. ¶ 81; Pl.'s Mot. at 10 (explaining that USDA is "informing individuals that they remain eligible for future loans on its [§ 1005] FAQ page"). Plaintiff argues that, in doing so, USDA violates the statute and his right to equal protection, as USDA is not waiving that bar for farmers whose loans are forgiven in other ways. He seeks a "declaratory judgment that providing further loans to those who receive [debt] forgiveness is illegal and unconstitutional, both facially and as applied." Compl., Relief Requested at B.

These claims lack merit because they are based on the incorrect premise that, through § 1005, USDA is providing "debt forgiveness" as that term is statutorily defined. Plaintiff correctly asserts that the Secretary is generally (with some exceptions not relevant here) prohibited from making or guaranteeing loans to borrowers who have received "debt forgiveness." 7 U.S.C. § 2008h(b)(1). But the loan payments provided under § 1005 do not constitute "debt forgiveness" and thus do not fall within that statutory prohibition. To qualify as "debt forgiveness," a loan must be reduced or terminated "in a manner that results in a loss to the Secretary." 7 U.S.C. § 1991(a)(12)(A). Section 1005 payments do not result in any loss to the Secretary, because

Congress appropriated funds to the Secretary from "the Treasury" to cover the full "cost of loan modifications and payments under" that Section. ARPA § 1005(a)(1). The cash payments coming from the Treasury's funds will completely pay off SDFRs' eligible loans under § 1005—and those Treasury payments guarantee that the Secretary will remain whole. Because the payments under § 1005 do not result in any loss to the Secretary, they do not fall within the meaning of "debt forgiveness" for purposes of the statutory bar against providing or guaranteeing future loans.

Plaintiff's contrary position that § 1005 loan payments are "debt forgiveness" triggering the statutory bar on future loan eligibility rests entirely on a House provision that did not make it into ARPA as enacted. The proposed language stated that "the provision of a payment under" § 1005 "to a socially disadvantaged farmer or rancher shall not affect the eligibility of such farmer or rancher for a farm loan after the date on which the payment is provided." *See* American Rescue Plan Act of 2021, 117 H.R. 1319, Title I, § 1005(3). Plaintiff says that language shows that Congress "[o]bviously" did not "intend[] to provide loan forgiveness at the expense of forever rendering the 'socially disadvantaged' farmer ineligible for future loans," but that Congress inadvertently left "intact the prohibition on future loans" for recipients of § 1005 debt relief when it failed to include that language in ARPA as enacted. Pl.'s Mot. at 9.

But Plaintiff's assertion that Congress inadvertently barred § 1005's beneficiaries from eligibility for receiving future USDA loans is not only implausible—it is contrary to the pre-ARPA statutory definition of "debt forgiveness." Plaintiff's theory "lacks persuasive significance, because several equally tenable inferences may be drawn from" the omission of that sentence, "including the inference that the existing legislation" already addressed the issue and rendered the proposal superfluous. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Here, the most likely explanation for the provision's absence from the enacted version of ARPA is that

Congress concluded it was unnecessary because § 1005 does not result in a loss to the Secretary and thus does not constitute "debt forgiveness," as that term is statutorily defined. In sum, Plaintiff's allegations in claims two and three that § 1005 relief constitutes "debt forgiveness" are contrary to law and fact. Plaintiff thus cannot show that he is substantially likely to prevail on these claims and consequently, that he is entitled to the preliminary injunction he requests.

**B. Plaintiff Fails to Show a Substantial Likelihood of Irreparable Harm.**

Plaintiff also fails to show a substantial likelihood of irreparable harm, "the hallmark of injunctive relief." *Patton v. Shelby Cty. Sheriff's Dep't*, 2021WL640833, at *11 (W.D. Tenn. Feb. 18, 2021). Plaintiff must show that absent an injunction he "will suffer actual and imminent harm rather than harm that is speculative or unsubstantiated." *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006).

Under current circumstances, any harm Plaintiff could possibly face is not "actual and imminent," much less irreparable. Plaintiff sues to enjoin § 1005 payments from "being dispensed," Pl.'s Mot. at 11, but USDA is already subject to a nationwide injunction prohibiting disbursement of those payments, *See Wynn* Op. Where the challenged action has already been enjoined, courts have recognized that a redundant preliminary injunction would be a misuse of judicial resources. *See, e.g.*, *Nat'l Urb. League v. DeJoy*, 2020WL6363959, at *8 (D. Md. Oct. 29, 2020). The equitable power to enter an injunction should be reserved for those circumstances necessary to avert irreparable harm. Where the challenged action could not be expected to occur, a second injunction would serve no function.

Even if the *Wynn* preliminary injunction were not in place, no injunction would be warranted here, because Plaintiff's alleged harms are not irreparable. Plaintiff asserts that irreparable harm should be presumed because he is likely to succeed on his equal protection claim. Pl.'s Mot. at 10. Not so. As illustrated above, USDA's provision of debt relief to SDFRs is

narrowly tailored to further the Government's compelling interests in remedying the lingering effects of well-documented, historic discrimination in USDA loan programs, and ensuring that pandemic relief is not distributed in a way that perpetuates those lingering effects. Plaintiff is unlikely to succeed on his equal protection challenges to § 1005; therefore, the constitutional nature of Plaintiff's claims provides no basis for irreparable injury.

But even if Plaintiff could show a likelihood of success on the merits of any of his claims, that would not establish irreparable harm without more, under the facts of this case. While some courts in this Circuit have found that a likelihood of success on the merits of a constitutional claim mandates a finding of irreparable harm, they have done so in factual circumstances appreciably distinct from this case. In *Obama for America v. Husted*, for instance, the court found that the plaintiffs were likely to succeed on their claim that the State of Ohio's changed voting laws impermissibly burdened the right to vote in violation of equal protection. 697 F.3d at 425-27. In support of that claim, the "Plaintiffs introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting" because of the changed law. *Id.* at 431. Given that the right to vote, once lost, is impossible to compensate, the court found the "restriction on the fundamental right to vote" an "irreparable injury" in and of itself. *Id.* at 436. Here, however, Plaintiff does not allege an inability to exercise a discrete fundamental right; he complains instead that other farmers are the beneficiaries of funds that he believes he should receive as well. But he fails to show how further delaying distribution of needed funds to others will remedy any harm to him. Similarly, in *Vitolo*, the court found that the plaintiffs alleging an equal protection violation faced the very real prospect that they would be unable to access the limited funds at issue before they ran out. 2021 WL 2172181, at *1 ("The key to getting a grant is to get in the queue before

the money runs out."). Despite Plaintiff's insistence to the contrary, the same is not true here given the terms of the congressional appropriation.

Indeed, Plaintiff asserts—incorrectly—that he will be independently irreparably harmed absent an injunction because the funds appropriated under § 1005 are "fleeting," such that if the Court does not "promptly halt" (or further delay) "all payments," those funds may run out before this case is resolved. Pl.'s Mot. at 10. Presumably, he is concerned that if the Court rules in his favor at the end of the case—and in doing so determines that the funding criteria must be broadened for Section 1005 to be constitutional—then any such ruling would come too late because the funds will likely evaporate by then. But ARPA's text belies Plaintiff's unsupported assertion that the money appropriated for debt relief may run dry. Congress appropriated "such sums as may be necessary, to remain available until expended," to cover the cost of loan payments provided by § 1005. ARPA § 1005(a)(1). That provision clarifies that funds will neither run out nor expire. By allocating "such sums as may be necessary," Congress placed no limit on the amounts to be made available to pay off qualifying loans under § 1005. And by providing that funds shall "remain available until expended," Congress placed no deadline for their expenditure. *See, e.g.*, *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"); *see also* Gen. Acc. Off., 1 *Principles of Fed. Appropriations L.* 5-7, 5-8 (2d ed. 1991). Therefore, Plaintiff's insistence that the Court must halt (or further delay) implementation of § 1005 to prevent those funds from running out has no merit.[25]

[25] Additionally, even accepting Plaintiff's argument that the funds at issue could somehow be depleted—but, again, they cannot—Plaintiff's alleged harm on that basis would not be imminent, given the time it will take for USDA to implement Section 1005 and issue payments. *See generally*

Contrary to the *Wynn* district court's recent conclusion, the fact that the statute as drafted provides only for payments to "socially disadvantaged farmers and ranchers" would not be a bar to providing effective constitutional relief at the end of the case. *See Wynn* Op. 34-36. In other cases where an equal protection claim ultimately succeeds on the merits, the Supreme Court has "repeatedly affirmed District Court judgments ordering that [federal financial] benefits be paid to members of an unconstitutionally excluded class." *Califano v. Westcott*, 443 U.S. 76, 89 (1979). Whether to enjoin a program or instead expand it to additional groups turns on the legislature's intent. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017); *cf. Westcott*, 443 U.S. at 89-90 (affirming decision that "ordered extension, rather than invalidation, by way of remedy" where "an injunction suspending the program's operation would impose hardship on beneficiaries whom Congress plainly meant to protect"). Thus, should this Court ultimately determine at the conclusion of this case that extension of benefits to additional classes of persons is necessary, it will be empowered to do so.[26]

Finally, the Court should reject Plaintiff's counterfactual assertion that an immediate injunction will prevent irreparable harm to those Congress "aimed to help" through Section 1005, because (Plaintiff says) it would keep socially disadvantaged farmers from unwittingly accepting

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Cobb Decl. USDA has issued only one of two NOFAs that will address all loans eligible for debt relief, and the agency a months-long administrative process for identifying eligible recipients under each NOFA, processing letters, and disbursing payments. *Id.* ¶¶ 13-19, 27, 29-35.

[26] Plaintiff also asserts that Defendants' sovereign immunity precludes him from recovering damages. Pl.'s Mot. at 11. But damages are beside the point, because Plaintiff does not claim any past harm for which he would be entitled to damages; he seeks forward-looking injunctive relief. If he proves that such relief entitles him to receive § 1005 payments, then sovereign immunity would not bar recovery. *Bowen v. Mass.*, 487 U.S. 879, 892, 895 (1988) (APA's waiver of sovereign immunity for "relief other than money damages" does not preclude recovery of "specific remedies" such as "monetary relief" if such relief is "the very thing to which [the plaintiff] was entitled"); *Westcott*, 443 U.S. at 89-90 (collecting cases in which Supreme Court approved rulings that expanded access to statutory financial benefits as a remedy for equal protection violation).

"loan forgiveness" that would bar them from receiving future loans. Pl.'s Mot. at 9. As explained above, Plaintiff's "debt forgiveness" theory is wrong as a factual and legal matter. Because USDA is not providing debt forgiveness through Section 1005 that would implicate any statutory bar to future loan eligibility, there is no basis for Plaintiff's contention that an injunction will somehow protect the recipients of Section 1005 loan payments. In fact, as discussed below, an injunction would cause substantial harm to those denied the debt relief to which they are entitled.

**C. The Balance of Equities and Public Interest Favor Defendants.**

On the last factors, the balance of harms overwhelmingly favors Defendants, as the injunction Plaintiff seeks is manifestly contrary to the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("These factors merge when the Government is the opposing party."). Plaintiff's only point on these factors is a summary assertion that a preliminary injunction is necessarily in the public interest simply because he alleges the violation of a constitutional right. Pl.'s Mot. at 12. That ignores the substantial public interest—recognized by Congress—in ensuring that minority farmers have access to the funds necessary to prevent further harm caused by discrimination and exacerbated by a global pandemic, and the significant, real-world harms minority farmers may suffer due to a continued delay in obtaining that debt relief.

The Government and the public have a strong interest in the implementation of the laws enacted by their elected representatives. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("Any time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). Here, that interest is even more compelling, given Congress's conclusion that swift debt relief to minority farmers is necessary to remedy prior discrimination in USDA loan programs, which has only been exacerbated by a global pandemic and the failure of prior relief to reach minority farmers. *Supra* Arg. I.A.1. And the thousands of minority farmers entitled to that relief plainly have a strong interest in receiving those funds

without delay. Indeed, hundreds of eligible recipients to whom USDA anticipates sending offer notices are currently in bankruptcy proceedings, *See* Cobb Decl. ¶ 33, and minority farmers are delinquent on FSA loans at higher rates—in some cases much higher rates—than white farmers, *see id.* ¶ 37 (explaining that current USDA data shows African American delinquency rate three times that of white borrowers; Hispanic delinquency rate six times that of white borrowers; Asian, American Indian, and Alaskan Natives also delinquent at a higher rate). Further delaying relief to those farmers could result in foreclosure of their farms by non-USDA lenders, *id.* ¶ 38, and prevent them from obtaining new loans from FSA or other federal agencies, *id.* ¶ 37, 39.

Finally, the public interest weighs against any further injunction even assuming Plaintiff's legal claims have merit. "When the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Morales-Santana*, 137 S. Ct. at 1698. "The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand." *Id.* at 1699; *see also Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). Further delay of implementation of § 1005 would be appropriate only if Plaintiff could show, in addition to the other requisite preliminary injunction showings, that Congress would prefer as a remedy for any constitutional violation to provide no immediate relief for *any* minority farmer while the program is redesigned. There is no basis for concluding that further delaying the provision of emergency relief to those farmers would be consistent with Congress's intent in enacting § 1005. Plaintiff thus fails to show that his desired injunction constitutes an appropriate remedy under binding Supreme Court precedent.

## II. If The Court Were to Conclude That An Injunction Is Warranted—and It Is Not—Any Such Injunction Should Be Limited To Plaintiff.

Should this Court determine that any form of injunctive relief is necessary (and it should not), any such injunction should be limited to this Plaintiff. A remedy "must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and an injunction should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Nationwide injunctions in particular should be avoided, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring), especially where, as here, similar cases are pending in multiple courts.

The Court may provide an immediate remedy that is specific to Plaintiff's particular injury by issuing a limited injunction requiring the Government to set aside funds sufficient to pay off any of Plaintiff's qualified loans pending the outcome of this litigation. If the Court had any doubt about whether Section 1005 funds might run out during the pendency of this case—but again, they will not, *supra* Arg. I.B.—setting aside funds sufficient to cover Plaintiff's loans would ensure that he could obtain debt relief should he demonstrate that he is entitled to it. Plaintiff argues that this narrow relief would fail to maintain the status quo, but in fact it is the disruptive nationwide injunction that Plaintiff seeks that would continue to alter the status quo for farmers expecting swift payments, *supra* Arg. I.C., while doing nothing to alter Plaintiffs' position as one who has no expectation in those funds (and no alleged financial need to receive them).

## CONCLUSION

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

DATE: June 24, 2021

Respectfully submitted,

JOSEPH C. MURPHY, JR.
Acting United States Attorney

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# EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TENNESSEE**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **ROBERT HOLMAN,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **No. 1:21-cv-01085-STA-jay** |
| | ) | |
| **THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; and ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency,** | ) | |
| | ) | |
| **Defendants.** | ) | |

## DECLARATION OF WILLIAM D. COBB

1. My name is William D. Cobb. I am over 21 years of age and fully competent and duly authorized to make this declaration. The facts in this declaration are based on my personal knowledge and are true and correct.
2. I have been employed by the United States Department of Agriculture ("USDA") Farm Service Agency ("FSA") for over 37 years. I am presently Deputy Administrator for Farm Loan Programs for the FSA and I am stationed in Washington, District of Columbia. As Deputy Administrator for Farm Loan Programs, I oversee the Farm Loan Programs policies and activities within FSA.
3. I am familiar with the statutory authorities, regulations, policies, and procedures that govern Farm Loan Programs[1] operations and loans as well as Farm Storage Facility Loans.[2]
4. Section 1005 of the American Rescue Plan Act ("ARPA"), enacted on March 11, 2021, authorizes USDA to pay up to 120% of the outstanding indebtedness, as of January 1, 2021, of certain FSA

[1] Farm Loan Programs are administered primarily under the Consolidated Farm and Rural Development Act of 1961 ("CONACT"), as amended (7 U.S.C. 1922, et seq.). A potential borrower must show inability to obtain sufficient credit elsewhere to qualify for a majority of these types of loans.
[2] Farm Storage Facility Loans are administered under the Commodity Credit Corporation ("CCC") Charter Act (15 U.S.C. 714, et seq.) and the Food and Conservation, and Energy Act of 2008 (7 U.S.C. 7971 and 8789). A potential borrower need not show inability to obtain credit elsewhere to qualify for these types of loans.

Direct and Guaranteed Farm Loans and Farm Storage Facility Loans held by socially disadvantaged farmers or ranchers.

5. Section 1005(a)(1) of ARPA provides "for such funds as may be necessary, to remain available until expended" to make the ARPA loan payments.
6. Section 1005(a)(2) of ARPA permits the Secretary of Agriculture to provide payments to a lender directly, to an eligible applicant, or a combination of both.
7. Section 1005(a)(3) of ARPA provides that the term "socially disadvantaged farmer or rancher" has the meaning given to the term in section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)).
8. Section 2501(a) of the Food, Agriculture Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)) defines a "socially disadvantaged farmer or rancher" as someone "who is a member of a socially disadvantaged group," 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."
9. The 120 percent payment authorized by Section 1005 includes 100 percent toward loan indebtedness as of January 1, 2021, and an additional 20 percent of that indebtedness to eligible recipients.
10. FSA published a Notice of Funds Availability ("NOFA") in the Federal Register (86 FR 28329) on May 26, 2021 ("May 2021 NOFA"), announcing the availability of funds for eligible borrowers with eligible direct loans as authorized by section 1005 of ARPA, with the exception of direct loans that no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset.
11. The May 2021 NOFA announced that a subsequent NOFA is anticipated within 120 days, or by September 23, 2021, which will address guaranteed loans and direct loans that no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset.
12. Under the May 2021 NOFA, members of socially disadvantaged groups include, but are not limited to: American Indians or Alaskan Natives, Asians, Blacks or African Americans, Native Hawaiians or other Pacific Islanders, and Hispanics or Latinos. The Secretary of Agriculture will determine on a case-by-case basis whether additional groups qualify under this definition in response to a written request with supporting explanation.
13. Under the provisions of the May 2021 NOFA, eligible recipients do not need to take any action until receipt of a payment offer letter from FSA (form FSA-2601). FSA is identifying eligible recipients whose demographic designations in FSA systems qualifies them as socially disadvantaged based on race or ethnicity. Direct and guaranteed loan borrowers who have not previously provided

demographic designations to FSA or believe their records are not accurate can contact their local FSA offices to verify their designations.

14. FSA anticipates sending an offer to most eligible recipients under the May 2021 NOFA within 45 days of the publication of the NOFA, or by July 10, 2021, although for recipients with accounts that require payment reversals, this process is likely to take longer, as explained further below.
15. Offer notices mailed to eligible recipients will explain:
    a. Eligibility based on current information in FSA records
    b. FSA's calculation of payments and proposed distribution of payments
    c. Loans that are not included as eligible loans and will retain unpaid balances (if any) (for example, Economic Emergency loans or loans closed or disbursed after January 1, 2021)
    d. Any eligible loans that will be addressed through the subsequent NOFA (for example, guaranteed loans).
16. Eligible recipients may accept the offer and conditions, schedule a meeting to discuss the offer with FSA prior to making a decision (for example to discuss the loan calculation), or decline the offer.
17. If an offer has not been responded to within 30 days, FSA will send a reminder letter, and make a phone call or send an email if that information is on file.
18. If an offer has not been responded to within 60 days, FSA will send a second reminder letter notifying the eligible recipient that a payment will not be processed unless contacted by the eligible recipient. Should FSA establish a final deadline to request a payment, it will be publicly announced, and final notification will be provided to eligible recipients at least 30 days in advance of the deadline.
19. If an offer is accepted, the amount to pay off the eligible direct loans will be applied directly to the eligible recipient's FSA loans and the additional 20 percent, which can be used by recipients to offset tax liabilities, will be paid directly to the eligible recipient.
20. Both the payment to FSA and the additional 20 percent to eligible recipients will be reported to the Internal Revenue Service (IRS) as income using form IRS-1099 G.
21. Consistent with court orders, USDA is not currently disbursing Section 1005 loan payments to eligible recipients. Also consistent with those orders, USDA is identifying eligible recipients of loan payments, sending offer letters, and carrying out all other administrative tasks to be ready to swiftly disburse payments whenever an injunction against doing so is lifted.
22. The estimates provided in the following paragraphs are calculated based on FSA's identification of accounts having one or more eligible recipients. An account may have more than one loan that qualifies for an ARPA payment associated with it.

23. As of May 24, 2021, FSA has identified 15,416 eligible Farm Loan Program direct loan accounts with 28,918 outstanding eligible direct loans. The total unpaid principal and interest on those loans as of January 1, 2021, was $2,403,972,793. These numbers may increase if additional eligible recipients update their demographic information with FSA.
24. 6,836 of the Farm Loan Program direct loan accounts have payments made after January 1, 2021. These payments must be reversed from the account to establish an accurate outstanding indebtedness on January 1, 2021, in order to calculate a payment in accordance with Section 1005 of ARPA. FSA estimates that these reversals will require up to 9 weeks from May 26, 2021, to complete at an estimated rate of 700 to 800 eligible recipients per week.
25. As of May 19, 2021, FSA has identified 186 eligible Farm Storage Facility Loan accounts with 253 outstanding eligible direct loans. The total unpaid principal and interest on those loans as of January 1, 2021, was $13,301,000. These numbers may increase if additional eligible recipients update their demographic information with FSA.
26. Based on currently available information, USDA estimates that the loans covered by the May 2021 NOFA comprise 88% of the total number of ARPA-eligible payments and 64% of the total dollar amount of projected payments that will be made to eligible accounts once Section 1005 is fully implemented.
27. Payments for the following eligible recipients will be addressed in the subsequent NOFA that will be issued by September 2021:
    a. As of May 19, 2021, FSA identified at least 2,377 accounts for eligible guaranteed Farm Loan Programs loan recipients with 3,519 outstanding eligible loans. The total unpaid principal and interest on those loans as of January 1, 2021, was estimated at $1,330,771,488. Payments for these eligible recipients will be addressed in the subsequent NOFA.
    b. As of May 24, 2021, FSA has identified 757 accounts for eligible direct Farm Loan Programs recipients with 1,489 loans with no collateral remaining that have been referred to the Department of Treasury for collection. The total unpaid principal and interest of these loans is $55,835,381.
28. Based on currently available information, USDA estimates that the loans covered by the NOFA that will be issued by September 23, 2021 comprise 12% of the total number of ARPA-eligible payments and 36% of the total dollar amount of projected payments that will be made to eligible accounts once Section 1005 is fully implemented.
29. On Friday, May 28, 2021, to test the effectiveness of the procedures FSA established to deliver ARPA Section 1005 payments, FSA mailed five offer letters to eligible recipients in New Mexico. The state was selected based in part on having one of the larger volumes of direct loan borrowers

eligible for ARPA and a high level of experienced staff. The eligible accounts were selected based on the borrowers being sole proprietorships rather than entities, and past interactions with FSA that reflected a willingness to be part of a pilot initiative.

30. On June 3, 2021, three of the five eligible recipients involved in the initial testing returned an accepted offer to FSA. Payments were processed for the three eligible test recipients on that date.
31. On June 7, 2021, the fourth eligible test recipient returned an accepted offer. That payment was processed on Tuesday, June 8, 2021.
32. Based on this very small sampling, FSA anticipates an average of 7 days from mailing of an offer letter to receipt of an accepted offer.
33. After testing its procedures, FSA began to process and mail offer letters for up to 10,451 accounts on June 21, 2021. This number accounts for all eligible Farm Loan Program and Farm Storage Facility Loan accounts currently identified under the May 2021 NOFA, except for the 3,897 accounts still requiring reversal of payments received after January 1, 2021 as of May 24, 2021 (these reversals may take up to 6 more weeks to process at an average of rate of 700-800 per week), as well as 299 accounts in bankruptcy and 955 accounts with other complexities that require additional time to process.
34. FSA anticipates it will require an average of 1.5 hours per account for the designated employees to coordinate and complete the validation and verification of payment amounts, and to print, copy and mail offer letters. There are approximately 209 designated employees whose primary responsibility is to process offer letters and payments. If these employees complete an average of five offers letters per day, then roughly 1,045 offer letters can be mailed per day. Thus, theoretically, the initial 10,451 accounts would require 10 days to complete. However, eligible recipients and designated employees are not equally disbursed among states, so completion of mailings in each state may vary, with the longest time period estimated to be 14 days based on the number of designated employees in that state.
35. The same designated employees will be tasked with balancing the preparation of outgoing offer letters with processing incoming acceptances, as well as any questions that arise from eligible recipients about the offer letters.
36. African American, American Indian/Alaskan Native, Asian, and Pacific Islander borrowers account for a disproportionate number of disaster set-aside requests processed by FSA. The disaster set-aside loan provision allowed farmers with USDA farm loans who were affected by COVID-19 to have their next payment moved to the end of the amortization schedule. Although the aforementioned borrowers account for roughly 17.5% of FSA direct loan accounts, they account for 24.5% of disaster set-aside requests.

37. As of May 31, 2021, the ratio of White borrowers who are delinquent on an eligible FSA loan was 11%, compared to 37.9 % of African American/Black borrowers, 14.6% of Asian borrowers, 17.4% of American Indian/Alaskan Natives, and 68% of Hispanic borrowers. As explained in the Frequently Asked Questions posted on the USDA website at https://www.farmers.gov/americanrescueplan/arp-faq: "USDA is not taking any adverse actions on any eligible borrowers who do not make payments." However, the Debt Collection Improvement Act prohibits loans to those delinquent on a Federal debt, and therefore an eligible recipient's eligibility for student loans, loans from the Small Business Administration, or loans from other Federal agencies could be adversely impacted by failure to make payments on eligible USDA loans before they are paid off under ARPA Section 1005.
38. A further delay in these payments could result in the foreclosure on the farms of the eligible recipients, who account for a disproportionate number of foreclosures. African American, American Indian/Alaskan Native, Asian, Pacific Islander, and Hispanics accounted for 20-24% of foreclosures in Fiscal Year 17 through Fiscal Year 19 even though they only account for 17.5% of the direct loan portfolio. While FSA has suspended acceleration and foreclosure on direct loans due to COVID-19, FSA cannot prevent other lenders from pursuing foreclosure action. Third party foreclosure accounted for 40-65% of the foreclosure on FSA borrowers during Fiscal Years 2016 through 2020.
39. Currently, new FSA loan requests for ARPA-eligible applicants do not include ARPA-eligible FSA debt in the cash flow, security analysis or loan limit determinations. Eligible recipients of payments under Section 1005 may be approved for, and have been approved for, new FSA loans on the condition that the ARPA-eligible debt is paid in full prior to loan closing. Delays in these payments will delay the closing of these new FSA loans to such borrowers.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this day of 24 June, 2021.

USDA
William D. Cobb

Digitally signed by WILLIAM COBB
DN: c=US, o=U.S. Government, ou=Department of Agriculture, cn=WILLIAM COBB, 0.9.2342.19200300.100.1.1=12001000062109
Date: 2021.06.24 13:29:32 -04'00'
Adobe Acrobat version: 2021.005.20048

# Exhibit B

Agric Hum Values (2017) 34:631–643
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# A new era of civil rights? Latino immigrant farmers and exclusion at the United States Department of Agriculture

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Abstract In this article we investigate how Latino immigrant farmers in the Mid-Atlantic region of the United States navigate United States Department of Agriculture (USDA) programs, which necessitate standardizing farm- ing practices and an acceptance of bureaucracy for participation. We show how Latino immigrant farmers' agrarian norms and practices are at odds with the state's requirement for agrarian standardization. This interview-based study builds on existing historical analyses of farmers of color in the United States, and the ways in which their farming practices and racialized identities are often unseen by and illegible to the state. This disjuncture leads to the increased racial exclusion of immigrant farmers from USDA opportunities. Such exclusions impede the transition to a ''new era of civil rights,'' as has been proclaimed by USDA leadership. Although efforts to address institutionalized racism on a national level may be genuine, they have failed to acknowledge this schism between rural Latino immigrants and the state, thereby inhibiting a meaningful transition in the

fields, and con- tinuing a legacy of unequal access to agrarian opportunities for non-white immigrant farmers.

Keywords Immigrant farming · Race in agriculture · Latino farmers · United States Department of Agriculture (USDA)

## Introduction

Following a United States Department of Agriculture (USDA) staff member in her white sedan with government plates, we drove our own unmarked rental car through a winding country highway. We passed corn and soybean fields, farmhouses, and a small downtown with a few local businesses. We drove up a gravel driveway and parked behind the USDA car. Trailing the staff member, a white female soil conservationist, we walked unannounced onto a farm with a few acres of diverse vegetables, a farmhouse, a shed, and a hoop house. The hoop house had been financed through a grant from the USDA's National Resource Conservation Service (NRCS), giving the staff member rights to visit the property and inspect the structure and property randomly for the first 3 years, to validate that it is up to code and being used properly.

USDA staff in the Northern Neck of Virginia promotes the hoop house, or ''high tunnel'' installation program to local vegetable farmers. These tunnel-shaped greenhouses allow farmers to start their seeds and get their crops to market earlier in the season. The USDA covers the entire cost of the hoop house. In exchange, the farmer must agree to keep it in production for a minimum of three years, maintain meticulous records of their growing practices and finances, and allow USDA officials onto their property unannounced. This program is one of a variety of financial assistance opportunities for small and medium scale fruit and vegetable farmers through the USDA's NRCS and Farm Service Agency (FSA). These agencies offer a

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variety of loans, grants, and crop insurance programs, which vary year to year. Although the USDA targets his- torically discriminated against populations, including Latinos, as part of their Socially Disadvantaged Applicant Program for guaranteed, direct operating, and direct farm loans, not many Latino farmers take advantage of them.[1]

The farm we visited is owned and operated by a Mexican immigrant farmer, one of a small number of Latino farmers in Virginia who directly participates in a USDA funded program. Latino farmers have a low rate of inclusion in USDA programs nationally. In 2012, the census recorded 79,807 farm operators of Hispanic/Latino origin. One hundred and sixty-five Commodity Credit Corporation loans, 3244 Conservation Reserve, Wetland Reserve, Farmable Wetlands, or Conservation Reserve Enhancement program payments, and 13,276 other federal farm program payments were awarded to Latino operators. Respectively, that indicates a 0.2, 4, and 17% inclusion rate for each program. Comparatively, the census recorded 2,034,439 white farm operators in 2012. They participated in the same loan programs at a rate of 0.6, 14, and 34% (USDA 2014). From these numbers, Latino farmers utilized USDA loans and other direct assistance programs at about one-third to a half of the rate of white farmers. This is regardless of the fact that they are a growing presence among new farmers in the United States.

According to official USDA agricultural census data, the number of farms with principal operators of ''Spanish, Hispanic, or Latino origin,'' grew from 50,592 in 2002 to 55,570 in 2007. In 2012, the number increased again, to 67,000 farms, a twenty-one percent increase over 5 years, Latinos making up three percent of all principle operators.[2] Of those 67,000 Latino farm operators, the vast majority (64,439), were the primary farm business owners as well. Comparatively, Asian principle operators also grew 21% in that period, although they make up less than 1% of all farmers overall. Black principle operators grew 12%, still making up only one point four percent of all farmers nationally. In contrast, during the same period the population of white principle operators fell 5% and overall the number of farmers dropped four percent (USDA 2014). As many Latino farmers transition from working as laborers in others' fields to positions as farm owners and operators, they, along with other farmers of color, represent the new face of a flourishing generation of farmers.

In response to a number of civil rights lawsuits against the USDA on behalf of African American, Hispanic, Native American, and female farmers, US Secretary of Agriculture Tomas Vilsack (2009) has proclaimed a ''new era of civil rights,'' for the agency.[3] Despite this procla- mation and the fact that their numbers are growing, immigrant farmers are still not extended the same oppor- tunities as other farmers, due to the fact that their practices are often incompatible with the standardization and bureaucracy required to be properly acknowledged and supervised by the USDA. Their direct market approach, planting of diverse crops, reliance on family labor, and lack of record keeping stand in contrast to the dominant model of US industrial agriculture.[4]

It is not simply the size or scale of their farms that bars them from accessing USDA resources, although that certainly limits what is available to them. The farmers in this study have limited formal education, literacy, and English language skills, and are therefore exceptionally daunted by the paperwork necessary for government grant, loan, and insurance applications. Additionally, it is not routine for Latino immigrant farmers to record and track their own farming progress and decisions in writing. In contrast, their farming knowledge tends to be documented and disseminated through word of mouth. As has been the case for other farmers who do not replicate state-sanctioned or dominant forms of farming, these practices and forms of agrarian knowledge sharing may be interpreted as unsci- entific, or ''illegible'' to the state, and therefore not deemed worthy of acknowledgement (Scott 1998), or in this case,

[1] For more information on the Socially Disadvantaged Applicant Program, see http://www.fsa.usda.gov/FSA/webapp?area=home&subject=prod&topic=sfl.

[2] These numbers do not tell us how many are first generation immigrants. The number of operators that were also owners before 2012 is not available. We would argue Latino immigrants are generally being undercounted in these numbers. Almost none of the farmers we interviewed had heard of the Agricultural Census. Many farm on rented land, often under informal agreements. Even those that own their land rarely live on the farm. Given their histories of immigration, many are resistant to filling out government paperwork. Additionally, Hispanic/Latino is considered an ethnicity, not a race, by the Census, and if they check this box they must also choose a race, such as White, Black, or Native American, none of which are representative of the farmers we interviewed. In discussions with Census of Agriculture Staff who outreach to Hispanic/Latino populations, it was confirmed that although they have increased outreach to all groups deemed socially disadvantaged farmers in recent years, they also agreed that the farmers discussed in this study are still underrepresented in the census. Despite these issues, the census is still the best comprehensive national agricultural data we have to date and provides context for racial and ethnic shifts occurring in US agriculture.

[3] Lawsuits include the *Pigford v. Glickman* and *Brewington v. Glickman* class action lawsuits for African American farmers, The *Keepseagle v. Vilsack* settlement for Native American farmers, and The Hispanic Farmers and Ranchers and Female Farmers and Ranchers claims processes. More information can be found at http://www.outreach.usda.gov/settlements.htm.

[4] We are not claiming that family labor is inherently a better system or more equitable, only that it is evidence of a particular form of farming. Hiring family labor by no means ensures labor justice on the farm. In particular, family labor can reinforce patriarchal agrarian relations and patterns (See Feldman and Welsh 1995; Reed et al. 1999; Riley 2009).

acceptable for funding. Many small scale diversified crop and vegetable farmers run up against the same challenges when looking for government resources, yet for the immigrant farmers in this study, the expectation for standardized practices are compounded with the above mentioned lack of formal education, literacy, and English abilities. These barriers are made worse by their distrust of US government agencies, as related to their immigration experiences.

The dominant industrial model promoted by the USDA has long been problematic for smallholding farmers as well as more diversified growers, regardless of race, ethnicity, or citizenship status. As Earl Butz, the secretary of agri- culture under US President Richard Nixon, infamously told the country, farmers should ''Get big or get out.'' Butz's policies, and those of USDA leadership since, have focused on supporting the large-scale production of commodity crops, corn and soy in particular, mainly through commodity price supports and crop insurance programs.[5] These decisions are not just made at the agency level. US agricultural policy is largely set by the United States Farm Bill, which is voted on by Congress every five years. By setting priorities and outlining fiscal parameters, the Farm Bill contributes to the prioritization of large-scale industrial production, and deprioritizes the needs of smallholders, ''specialty'' crop growers (mainly fruit and vegetable producers), and other diversified growers (Ahearn et al. 2005; Clapp and Fuchs 2012; Dimitri et al. 2005; DuPuis 2002; among others).

Conversely, scholars have argued that the USDA has a history of democratic planning and resource distribution, including many agency leaders and other individuals who have worked explicitly with farmers of color, African-American farmers in particular (Couto 1991; Gilbert 2015). These arguments directly contend with Scott's monolithic description of the state. As such a large government agency, there is no one consistent way staff or leadership interacts with the public. Despite the generally industrial focus of USDA funds, there are USDA opportunities for small-scale farmers, as well as for those that have been deemed sustainable, or socially disadvantaged by the agency. The Sustainable Agriculture and Research (SARE) program offers USDA sponsored grants and outreach in each state. Additionally, the USDA conducts research and development related to local food initiatives, such as farmers' markets, which are the primary markets for the Latino immigrant farmers included in this study. In this way, the farmer participants of this research have indirectly benefitted from the support of local and direct market ini- tiatives funded by the agency. Finally, in recent years, and as a result of the lawsuits mentioned above, the USDA has devoted new funding to support farmers identified as socially disadvantaged, such as minority farmers, Latino farmers included. This support may also reach Latino immigrant farmers indirectly through new programs and funding available to nonprofits outreaching and providing agricultural assistance in their communities.

In our research, we have encountered USDA staff who are actively engaged with farming communities of color and some who specifically focus on Latino farmers. Unfortunately, these practices were not the norm, and the staff who actively pursue opportunities to work with Latino immigrant or socially disadvantaged farmers expressed that there was a lack of structural support from the agency in that pursuit. Although there are USDA programs targeted to sustainable or diverse growers, this information cannot reach the farmers if they are not on the radar of the state in the first place. It is also notable that in The Mid-Atlantic, the region that is the focus of this article, neither the farmers nor the NRDC staff we interviewed ever men- tioned opportunities available to farmers that might be a better fit for them given their diverse growing practices, such as SARE programs.

The existence of Latino immigrant farmers is often unknown or overlooked in day-to-day on the ground USDA operations. In beginning research with Latino farmers, the first author made cold phone calls to USDA regional headquarters in five states across the United States, including Virginia, New York, California, Minnesota, and Washington. In each case, when the author first called and asked to speak someone who works with ''Latino farmers,'' the person on the end of the line responded as if the caller had asked about Latino *farmworkers,* not farm business owners. The author consistently had to explain, ''I am looking to speak with someone in your office that might work with immigrant *farmers*, as in farm business owners, not laborers.'' Even in regions where Latino farmers exist in significant numbers, it took substantial explanation to start a conversation where USDA staff understood the specific group of farmers the author was interested in dis- cussing. They were either unaware that Latino farmers existed in their region or were so accustomed to thinking of Latino immigrants as agricultural workers that they disre- garded their encounters with Latino farmers until probed directly.

The lacking awareness of Latino immigrant farmers among USDA staff is also reflected in the scholarly literature on Latinos in agriculture in the United States. There is a growing body of geographical, anthropological, and sociological research on farm labor, which critically engages with the politically produced vulnerability and exploitation of the immigrant body. This literature contributes to our understanding of historical and modern-day

[5] For more information on practice support programs see: http://www.fsa.usda.gov/programs-and-services/price-support/Index.

labor conditions in the agri-food system, necessary for gaining a comprehensive picture of the political economy of food production and advocating for workers' rights throughout the food system. In particular, this work investigates the relationship between the Latino immigrant worker and the state, providing nuanced analysis of how US national policy and immigration agencies reinforce unjust working conditions and a racialized work force (See Allen 2008; Brown and Getz 2008; Guthman and Brown 2015; Gray 2013; Holmes 2013; Mitchell 1996; Sbicca 2015; and many others). Yet, critical analysis of Latino workers thus far does not include the possibility that some immigrant workers are in fact advancing in this agrarian class system. Further, there has been almost no compre- hensive inquiry of how Latino immigrant farm owners are experiencing state apparatuses.[6] This research makes this needed intervention, exploring how Latino farmers interact with the state through their engagement, or lack thereof, with the USDA.

This article addresses why Latino farmers are so unlikely to participate in USDA direct financial assistance programs, despite their growth as a new group of farmers, and particularly as a group that the USDA declares they want to support. We contend that the standardization of practices and bureaucracy inherent in receiving USDA assistance stand in stark opposition to the agrarian norms and practices of Latino immigrant farmers in the Mid-At- lantic, and act to hinder their participation in USDA opportunities. The requirements of standardization help to maintain a racialized class boundary in US agriculture today, and play a large role in preventing Latino immigrant farmers from moving up the agricultural ladder.[7] While monitoring and recording farmer activities is necessary at some level for the USDA to assure that funds are used appropriately, the extent to which farmers are asked to track activities and comply with standardization is impos- sible for most immigrant farmers. If their differential practices and limited literacy and linguistic abilities are not considered, these farmers will never be able to take full advantage of the programs they so desperately need.

These farmers, despite the avowed support to help them from the state, struggle with the same types of racialized boundaries in US agriculture as previous generations of farmers of color (Daniel 2013; Gilbert et al. 2002). Notwithstanding these challenges, many Latino immigrant farmers are prevailing against the odds. We contextualize this work in the historical roots of the relationship between farmers of color and the USDA and subsequent discord between their farming practices and those supported by government agencies. We show this discord through stories told by immigrant farmers themselves, highlighting the ways in which they express discomfort with and suspicion of state requirements. In particular, we underline the ways that Latino immigrant farmers' language and literacy limit their ability to directly take part in USDA programs and how those barriers interact with existing categories and requirements for assistance. Lastly, we propose recommendations for increasing institutional support for Latino immigrant farmers in US agriculture. We hope this work contributes to academic and policy discussions concerning immigration, identity, and improvement of government support programs for farmers of color.

## Citizenship, race, and legibility

The US has a long history of constituting citizenship, and related rights to land and resources, through whiteness. Previous groups of immigrants and farmers of color have been excluded from full citizenship rights in the US due to state sanctioned policies, which are reinforced through daily experiences of racial exclusion. Non-white immigrant farmers have been explicitly dispossessed of land and capital, in many cases due to their racial and citizenship status (Chan 1989, Foley 1997; Matsumoto 1993; Minkoff-Zern et al. 2011; Wells 1991, 1996). The Alien Land Laws in the early twentieth century excluded Japanese immigrants from holding land and forced practicing farmers off property they were already cultivating (Matsumoto 1993). Southeast Asian farmers in California are currently being disproporationately punished and discriminated against through the enforcement of labor laws, which do not recognize their family labor practices (Minkoff-Zern et al. 2011; Sowerwine et al. 2015). These processes have succeeded in creating agricultural racial formations, resulting in the ownership and operation of US farms remaining in primarily white hands.

The unjust and uneven consequences of agricultural racial formations are not limited to immigrants of color; there is a long and well-recorded history of discrimination against US-born farmers of color in the United States, particularly African American and Native American farmers (See Clearfield 1994; Daniel 2013; Gilbert et al. 2002; Grim 1996; Payne 1991; Ponder 1971; Simon 1993; and many others). This discrimination has ranged from overtly racist treatment at local and federal USDA offices

[6] This is with the exception of the work of Miriam Wells (1996), whose groundbreaking research in the 1970 s and 80 s shed light on the class and race-based struggles of Mexican and Japanese immi- grants in California agriculture.

[7] We do not mean to imply that USDA practices or requirements are the only factors limiting the advancement of Latino immigrant farmers. There are many other barriers, including lack of access to capital, land, and markets, which are also related to their educational, linguistic, and citizenship limitations. These barriers are compounded by the standardization and bureaucracy required by the state in order to access programs and assistance.

to deficient literacy assistance, legal counsel, and advertisement of available opportunities to help non-white farmers access and maintain their land and markets (Gilbert et al. 2002).

Historian Pete Daniel (2013) draws on Scott's legibility argument to explain USDA discrimination against black farmers in the civil rights era, providing historical context within which to understand USDA policy and practice today. African American farmers in the United States, like Latino and other immigrant farmers of color, have been displaced from their livelihoods many times over. For many, this displacement occurred historically through the capture and enslavement of their ancestors from their homelands, and more recently, as landowners and tenant farmers, whose systematic discrimination by the USDA contributed to black farmers' ninety-three percent decline from 1940 to 1974. Daniel argues that black farmers' cultivation techniques were seen as adversarial to the modernist vision of agriculture in the 1930s. They gener- ally operated small subsistence-based farms, and agricul- tural knowledge was passed through the generations by word of mouth. The New Deal's Agricultural Adjustment Administration worked to make the ''rural countryside legible'' by compiling information and statistics on farms across the nation (9). Large farms and grid-like orderly homesteads were idealized as the form to spread modern agricultural technologies. The USDA proceeded to map, structure, and make rural America visible in order to ensure a transition to agrarian efficiency. Black farming operations did not fit this model of efficiency and modernism and therefore were not considered for subsidies and grants. Due to competition from industrial farmers with government support, thousands of black farmers were dispossessed from their land over the following decades. This prefer- ential treatment functioned in conjunction with explicit racist conduct (Daniel 2013).

Alternately, many scholars have critiqued Scott's argument concerning the state as an overly homogenous account, and lacking in nuance. Contrasting with Daniels, Gilbert (2015) specifically addresses the ways that various arms of the USDA have historically engaged people of color in land-use planning and for resource distribution. Similarly, Couto (1991) has shown the ways the FSA worked with Black farmers during the New Deal era, to help them transition from tenant to owner. Both of these studies point to the importance of recognizing variation among USDA actors and branches. Unfortunately, our research shows that these historical moments in the USDA have been brief and have not sustained a comprehensive approach to democratizing land access and ownership across racial lines in the US.

A set of lawsuits targeting the USDA over the past fifteen years have documented the ways that farmers of color have been structurally discriminated against by the agency. In 1999, a class action lawsuit was settled by black farmers, alleging racial discrimination by the USDA between 1981 and 1996, while applying for farm loans and assistance. In 2000, another class action suit was filed against the USDA on behalf of Hispanic Farmers and Ranchers that were discriminated against from 1981 to 2000, also while applying for USDA loans. The USDA admitted to discrimination and this case is currently being settled via a claims process, where farmers are eligible to receive from $50,000 to $250,000 (Hispanic and Women Farmers and Ranchers Claims and Resolution Process 2012; Martinez and Gomez 2011). According to our contact with the Office of General Counsel at the USDA, the Claims Administrator received over 50,000 claims. As of July 2015, the USDA approved 14.4% of the claims, while the rest were rejected. They provided a one-line explanation to farmers whose claims were not accepted: ''You failed to provide sufficient documentation, or the documentation that you provided was not sufficient to meet the requirements under the Framework'' (Zippert 2015). As we will discuss below, this statement reflects many Latino farmers' general lack of standardization and documentation practices, which we argue, are necessary in order to be deemed legible in the eyes of the USDA.

As is evidenced by the growing numbers of Latino immigrant farmers, those under pressure to conform often continue to create alternative agrarian spaces. Wells' (1996) research on the struggle of Mexican immigrants in California agriculture in the 1970s and 1980s illustrates the ways Latino farmers' practices have been persisting in this context. Her work confirms historical commonalities between African American and Latino immigrant farmers in terms of how their farming practices contrast with more standardized state farming models. Wells' study also reflects our own findings, described below, that Mexican and other Latino immigrants prefer to make their farming decisions independently and find technical advice from governmental outsiders unsuitable to their own experiences and practices. Additionally, Wells observes that immi- grants' lack of material resources and formal education to invest in their farm businesses leads them to be more dependent on particular ''knowledge systems,'' which dif- ferentiate them from white farmers (138). Our research builds on her work in demonstrating the disjuncture between immigrants' agrarian practices and those rewarded by state authorities.

This article advances literature on immigration and racial discrimination in agriculture, shedding light on the ways that the USDA's processes are promoted as univer- sally accessible or color-blind, while they in fact maintain racial and ethnic divides in agriculture. Applying the notion of illegibility to the practices of Latino farmers, we

explore how government expectations of modernization largely function as gatekeepers to agricultural development and growth, despite individual and structural efforts to create inclusivity. In the case of Latino immigrants, farmers marginalized by state authorities are still rising in numbers and drawing on their own agrarian knowledge and norms to preserve their agrifood traditions and lifestyles. These farmers are cultivating in a way that contributes to local economies and ecosystems, as well as creating more a culturally diverse populace of US farm owners. Although they are currently making their businesses work, many function on the edge of economic stability. Without government support and acknowledgement of these differences in agrarian practice, their livelihoods and farm businesses may not survive in the long-term.

## Methods and procedures

This article is based on semi-structured interviews with 18 immigrant farmers and 20 interviews with staff of programs that advocate for and work with low resource and ''socially disadvantaged'' farmers, as well as participant observation of farms and at farmers markets in the Mid-Atlantic region. Fieldwork took place June 2013–July 2014. This study is part of a larger comparative project, including interviews with over seventy Latino immigrant farmers, as well as twenty-seven interviews with actors in non-state programs, six extension agents, and fourteen United States Department of Agriculture (USDA) staff/ agents in Virginia, California, New York, Minnesota, and Washington states from 2011 to 2016.

The first author conducted all research with the assistance of five student research assistants, in Spanish and English. The second author was a research assistant. Research assistants translated interviews conducted in Spanish to English. Although neither of the authors are native Spanish speakers, both speak Spanish fluently. Farmer interviews took place at their farms, homes, and farmers' markets. We also conducted participant observation at farms and farmers' markets. To meet farmers, we attended conferences and markets where immigrant farmers sell. We also met farmers through other immigrant farmers, farmer training/incubator organizations, extension agents, USDA staff, farmers' market managers, and other groups that outreach to immigrant farmers. Specific locations and names will remain anonymous.

The interviews with outreach and advocacy workers were done in English and include staff from three regional farmers' markets with a high percentages of Latino farmers, The Latino Farmers and Ranchers Association, the Rural Coalition, Telemon Foundation, Virginia Cooperative Extension, and the USDA. At the USDA, we interviewed staff that work in the office of Advocacy and Outreach and the Socially Disadvantaged Farmers and Ranchers Program in Washington DC and the NRCS and FSA local offices in Virginia. Additionally, we interviewed staff that work at the federal level on the Hispanic and Women Farmers and Ranchers discrimination suit and claims process at the USDA. All nonprofit outreach workers at the nonprofits spoke Spanish, most as native speakers. Only one person we spoke with at the USDA federal offices spoke Spanish. There was no one working in the local offices in this region that spoke Spanish.[8]

Interviews with farmers were conducted in Spanish and took place at their farms, homes, and markets where they sell. Fifteen of the eighteen farmers we interviewed live in the Northern Neck of Virginia, an agricultural region located three hours south of Washington DC. There are approximately 30 Latino immigrant families farming in the region. All but two interviewed in the Northern Neck are part of an extended family living in the region, originally from Jalisco, Mexico. These immigrants represent one half to two-thirds of the fruit and vegetable farmers in this region, almost all with farmworker backgrounds, according to estimates by farmers themselves and local United States Department of Agriculture (USDA) and extension staff. The other two farmers live and farm in Prince George's County, Maryland, a suburb of Washington DC, where their farms are surrounded by residential homes.

Farmers we interviewed emigrated from Mexico (16), El Salvador (1), and Guatemala (1). In a few instances we interviewed adult children of immigrant farmers who work on the family farm, when their parents were not available. All identify as Latino or Hispanic. In this article we use the term Latino, although participants in interviews used Latino/Hispanic interchangeably. They are almost all resident aliens or naturalized citizens, and have been in the United States for approximately twenty years. Some came before the Immigration Reform and Control Act of 1986, which provided many undocumented immigrants who had arrived before 1982 with legal status. Participants were never asked directly about their documentation status, although some participants alluded to crossing the border illegally. All except for one adult spoke Spanish as their first language and minimal English. Many have children who are teenaged or young adults and speak English.

Farmers interviewed have been operating their own farms for a range of 2–20 years. They all farm on a rela- tively small-scale (ranging from three to eighty acres, with most between 2 and 20), practice integrated pest manage- ment (low chemical input), grow diverse cropping systems,

[8] Nationally, there are USDA staff in local office that speak Spanish. For the larger project, we were able to interview two in Washington State.

and use primarily family labor. They sell the majority of their produce through direct sales at farmers' markets, although two farms also sell portions of their product to a wholesaler or a packinghouse.

We define a farmer foremost as someone that identifies him or herself as a farmer (*campesino*, *agricultor*, or *ranchero* in Spanish). More specifically, one who currently owns their farm business, so as to differentiate them from a farm laborer, who works for an employer. They must also perform at least some of the manual labor on the farm. They do not need to own the land they farm, or the machinery they use. While most in this region own the land they are farming, they all started by renting originally. We did not include a sales minimum for inclusion in this study, only that they must be selling at least some of their crops and self-identify as a farmer.[9] Five of the farmers inter- viewed have off-farm jobs in farm work, construction, and other industries, which they balance by soliciting help from nuclear and extended family members to support the farm. They all make at least some, if not all, of their income from their own farming business.

## Time, labor, and spatial control

If a visitor knows where to look, they might be able to tell an immigrants' field from their neighbors'. In contrast to the monocropped, uniform rows of wheat and corn, which line most of the side of country highways in this region, the Latino immigrants' fields include huge varieties of produce, each row different from the next. Among the cultivated crops, plants such as *purselane* (also known as *verdolaga* or pigweed), seen as a common weed by US- born farmers, is left to grow between the rows. Farmers harvest it for their Latino customers and themselves to consume in soups and stews. Juxtaposing the perfectly managed rows of grain, grown by mid-scale white farmers, and kept meticulously free of wild plants by regular doses of pesticides and pest resistant genetically modified seeds, the immigrant farmer's fields show signs of agroecological variety. These growing practices are harder to quantify and monitor by existing standards, and ultimately make it more difficult for Latino farmers to fit into the boxes created by USDA's programs.

All farmers interviewed saw starting their own farm as a way to regain independence over their daily lives and labor, in the face of their limited material wealth and political standing. In contrast to their experience as farm- workers, they have the ability to choose when to rise, what to plant, and how to pick their crops, as long as they operate a productive farm. Cultivating using practices that reflect their own experience reasserts immigrant farmers' control over their own labor. To protect this autonomy, many of the farmers we spoke with shied away from interactions with the state where they may be subjected to standardizing their practices to match a particular form of farming.

Each farmer interviewed has a unique story, but they all share the common experience of previously working as farm laborers. One farmer recounted his journey of starting his own business, which provides insight into why immi- grant farmers place such importance on maintaining independence,

> When I decided to work for myself, I was working for someone else. I saw that after I worked for him for about five years, and he was becoming successful, making a lot of money. And I stayed the same, earning six dollars an hour… One day I said to him, 'To start, this is good. But now I see that you're just there doing nothing, and I don't make anything. I don't make money, I'm the only one working.' Because I was the only employee he had… He had at least two-hundred, five-hundred thousand dollars in earnings that I had made for him. And I said, 'No, I'm killing myself for you. It's over. I'm going to start my own business.' And that's how it happened.

This farmer, without access to standard bank loans due to his lack of well documented income history and related low credit score, started a farm by saving his small earn- ings, as did all other farmers in this study whose access to loans was scant. Beginning by renting a small plot, and slowly saving enough to buy land, he started with almost nothing in terms of capital investment and depended on his experience, knowledge, self-exploitation, and family labor to advance his business.

Their personal histories of exploitation as workers motivate immigrant farmers to seek more control over their daily activities and decision-making power concerning their land. All of the farmers we spoke with relayed the physical and emotional challenges of farming, as it requires consecutive months of intensive labor, oftentimes 12 h a day, seven days a week. They expressed that not being ensured a paycheck at the end of the week is a precarious way to live. One farmer explained, ''Here we live just from

[9] The National Agricultural Statistics Service defines a farm as any business ''from which $1000 or more of agricultural products were sold or would normally be sold during the year'' (USDA 2014). Since the Census only requires a $1000 sales minimum, and all the farmers we interviewed are selling regularly at farmers' markets and other informal venues, we assume they are all selling at least that much in the year, so there should not be a discrepancy in definitions. To be considered an ''actively engaged farmer,'' according to the Farm Service Agency of the USDA, and therefore benefit from their farm programs, one must significantly contribute to agriculture in the form of, ''capital, land, and/or equipment, as well as active personal labor and/or active personal management.'' Individual contributions to the farm operations must be ''identifiable and documentable; as well as separate and distinct from the contributions made by any other partner, stockholder or member'' (Farm Service Agency 2015).

the land. There's no one paying us $8 an hour. There's no one paying us.'' As independent business owners, they are subject to the unpredictability of the market. As farmers, they are additionally vulnerable to uncertain weather and climate conditions. Overwhelmingly, though, the satisfaction that comes with making their own decisions keeps them farming, regardless of the struggles. As one farmer shared, ''I feel happy that it's *my* business, that we can make our own decisions.'' Even in the most difficult times, the desire to maintain control over one's labor and growing practices transcends the daily obstacles of small-scale farming.

On their farms and in their businesses, farmers avoid cultivation systems imposed upon them by outsiders, be they wholesalers who would tell them what to plant and how much (in order to secure a market), or government officials whose programs require particular crops and techniques to qualify for assistance, as described in the cover crop and hoop house program below. All the farmers interviewed plant diverse fruits and vegetables, an impor- tant strategy for selling directly to customers at farmers' markets, their primary outlet for sales. Some noted they sold to their extended community as well, as part of a more informal market. Rarely did we hear of them selling to restaurants or local stores, as luxury crop buyers usually go with more socially connected and better-marketed white farmers, and contracts with large grocery chains go through a wholesale purchaser, requiring larger quantities than they grow. Generally, they are able to avoid selling through a middleman or outlets that would require reducing their diversity or standardizing their practices. Growing diverse crops is also often reflective of their previous farming experience in Mexico and Central America, although climates, markets, crop varieties, and other resource availability differs greatly.

One farmer, who grows a diversity of crops, from standard farmers' market produce like kale and heirloom tomatoes to less common products for the region, like peanuts and purple potatoes, told us that growing a variety of crops is an important strategy for attracting customers at the market,

> When you bring more to the market, more people come to buy… Because if I just bring melon, or I don't bring squash, people are only going to buy that, and that's it. But if I bring a little bit of everything, people will come buy one thing and then another… The more varieties you plant, the better. That's why we have a little bit of white potatoes, red, yellow, purple, and then white, purple, and red sweet potato. And then when they go to market and there are all the different colors, everything looks pretty. Red peppers, black peppers, purple peppers, green peppers, white, orange—all the colors.

Like many of the other farmers we interviewed, he also planted Latin American crop varieties, in addition to ones well known to American customers. They grow and sell herbs like *pápalo* and *chipilin*, *pipián* (a squash variety), *tomatillos*, and hot *chiles*, which are hard to find in many parts of the United States. They produce these for their own consumption, as well as for Latino customers, and the occasional US-born or white customers who know how to cook Latin American food or are adventurous chefs.

Yet their choice to cultivate diverse cropping systems, which work well for direct markets and reflect their own experience as farmers pre-immigration, are not supported by the USDA programs made available to them in their local offices. For example, the local office in the Northern Neck region offers a cover crop assistance program, sub- sidized through state funds. But as the staff from the local NRCS office told us, this program is not tailored to their needs as diversified fruit and vegetable farmers,

> I also offer this cover crop program for them. That program is through… it's a state program. But most of them- the cover crop has to stay on the land, between certain planting dates and certain dates that you have to destroy. And that date, the destroyer date is after. Because they start planting around February first: the beginning of February they start discing their land, preparing their land. And that cover crop has to stay on there until the middle of March. And that's not good for vegetable farmers at all because they need that time, they need that land. When it's ready to go, they're ready to go.
>
> So the cover crops work better for the grain farmers?
>
> Yes. I have offered several times. I go out there and just try to push the program. And they say no, it's just not good for them because of the rules and regulations of the cover crop program.

This example of poor seasonal fit with available NRCS programs could be equally true for any fruit or veg- etable farmer in the region. Yet for Latino immigrant farmers, who have fewer farming options, due to their limited access to capital investment, land, and markets, this misalignment reinforces an existing inequality for already disenfranchised farmers.

In another example, in order to participate in the hoop house program, in addition to being subject to random visits, providing a detailed log of what is planted, how much was spent, and how much profit was made; farmers must also plant particular crops according to USDA

guidelines. Farmers must prepare and adhere to an operation and maintenance plan, which includes particular instructions as to proper irrigation and planting practices and erosion control. This plan has to be reviewed and approved by a NRCS official. While the few farmers who participate in the program did not express frustration at these requirements, others stayed away from government offices because they did not want to have to answer to outside authorities. One farmer who chose to participate in the hoop house program conveyed both gratitude and frustration,

> We were planting tomatoes, because they're very particular. They [the USDA] want certain stuff. You can't go ahead and do anything you want with them [the hoop houses]… And it's good help. I'm not saying it doesn't help, but we've managed to come so far on our own.

While the farmer expressed gratitude for the financial assistance, she also questioned if the planting restrictions are worth the support. The requirement for standardization feels like a relinquishment of some part of her agrarian autonomy, or the ability to make all farming decisions as she wishes. Even for those that succeed in securing state resources, they seem unsure about the decision to work within certain rules and regulations. However, most farm- ers never looked into USDA programs due to their suspi- cion of the government and government officials. This discomfort was compounded by their inability to navigate state bureaucracy. In the section below, we discuss the challenges they face as immigrants with limited English abilities and minimal formal education, contending with the paperwork of state-sponsored programs.

## Paperwork and standardization

As can be expected from any government institution, the USDA requires extensive paperwork before, during, and after taking advantage of their loans, grants, or insurance options. When farmers were asked what they think the greatest challenge is for Latino farmers accessing USDA programs, most mentioned the paperwork. This discomfort stems from their general distrust of the US government, coupled with the fact that most Latino immigrant farmers have limited English skills, as well as reading and writing abilities, even in their native language. Although white farmers may also be resistant to paperwork and general bureaucracy, the fact that most farmers we interviewed did not have an education past middle school, means they are lacking the literacy skills necessary to fill out the required paperwork in any language. For many, this means they may never enter the door of the USDA to inquire about opportunities due to intimidation. For others, it may be the ultimate reason they stall in the process and fail to obtain the grant, loan, or insurance package.

Of all the farmers interviewed, only three had successfully used USDA programs- two had grants for hoop houses from the NRCS and one had crop insurance, secured through his local USDA Risk Management Agency office. One farmer also applied for a hoop house and been accepted into the program, but had yet to receive the funds. Local staff are aware of the Latino farmer presence in the area and lacking participation in programs. They discussed with us the ways they tried to conduct outreach, yet were very clear that without a Spanish speaker in the office, their abilities were limited. The local extension agent speaks minimal Spanish and helps Latino farmers access educa- tional materials, but was unable to entice them to apply for USDA funds or programs. A local USDA staff member told us that there must be 10% participation in USDA programs in the region for bilingual forms to be made available. However, it is unlikely there will ever be more than 10% participation if the paperwork is not made available in Spanish in the first place. This catch-22 rep- resents a structural problem within the USDA, which aggravates the already tenuous history of USDA discrimination.

Although some forms are available in Spanish online, finding them is difficult and availability is inconsistent. For example, selected forms for the FSA are available in Spanish on the USDA national site, but not on the Vir- ginia or Maryland state sites specifically (although other states, such as Texas and New York have them on their state sites). For the FSA national site, one must go through an exhaustive search to find the translated forms. To find them, the user must go to the FSA main site, find the link to FSA ''Fact Sheets'' under the ''Newsroom'' link, which is listened under the ''FSA Home'' site. The whole search must be done in English. Then you have to choose from a drop down menu in English to get the translated links. Even then, only a small fraction of all available English forms are available translated. The NRCS national site is somewhat more user friendly for Spanish speakers, with a page specifically dedicated to the forms in Spanish, including Spanish instructions to access the forms.

Without Spanish-speaking outreach abilities, most farmers never hear about the programs available. When asked about the USDA, most farmers interviewed were unaware of opportunities accessible to them. USDA FSA loans are designed for farmers who struggle with traditional bank loans and are meant to be a farmers' first line of credit. Although many farmers interviewed told us they were unable to get access to credit from regular banks, they were unaware that USDA loan programs existed for these

reasons specifically. One farmer relayed this lack of awareness,

> The truth is that I don't know what they [the USDA] have… We were told that in Warsaw [Virginia], in the department of environment, where the applica- tions are, that one can fill something out so that they can give you a big greenhouse. However, I only learned about this year. I just didn't know.

Even those who speak nearly perfect English still find the forms intimidating. One immigrant farmer, who has obtained US citizenship, told us,

> I tried in the past to get a small operating loan. And I didn't feel confident enough to fill out the application by myself because there were a lot of questions I didn't know.

Since attempting to apply for her first USDA loan, as described above, she has since applied for another loan that she successfully secured with the assistance of the local FSA staff. Yet, the level of confidence needed to walk into a government office where a huge stack of paperwork awaits is unrealistic for most, especially when understood in context of the tense relationship between most rural Latino immigrants and the state, given their histories of immigration. As noted in the methods section, although most of the farmer participants in this study are documented, many of them got their legal paperwork after crossing the border illegally in the early 1980s. They are all part of a local immigrant community, which includes both documented and undocumented individuals.

Another farmer, who has 60 acres in production, a large vegetable farm for the region, was the only farmer interviewed who had crop insurance. He told us that it took three trips to the offices to get the proper paperwork filled out. He does not read nor write in English or Spanish and found the process intimidating and frustrating, as well as time consuming, beyond what he felt he could afford as the owner and manager of a family-run farm.

The fact that paperwork, and the related language barrier, is the greatest impediment to aid for immigrant farmers is well understood by USDA staff in these coun- ties. One local USDA staff member explains,

> Most of our [Latino] producers- used to have some come in the office. They don't come in anymore. I think it's English. Because we had one that couldn't speak English, and he would always bring his son in here. And then the forms. We have some forms that are in Spanish, but most of our forms aren't. I think it's…where they're used to dealing with more cash than a lot of paperwork. I think they find the paperwork a little overwhelming.

In addition to noting that the written forms them- selves are a technical challenge, she highlights that immigrant farmers are not accustomed to operating in bureaucratic environments. Even if the forms were in Spanish, their limited formal education makes the pro- cess of filling out paperwork extremely daunting. They are not accustomed to excessive paperwork from their experience as farmers in Mexico, or as farmworkers in the United States.

Even after the initial application for participation in a program is filed, there can be a large amount of follow up paperwork over a long period of time. For example, to participate in the hoop house program, one farmer told us, ''What you have to do is keep a log of how much you spent, what you're getting out of it, and your profit out of it. So that's something that we had to do.'' Another farmer who participated in the program said, ''They were very strict and limited to certain stuff [we could plant]… It's very complicated paperwork.'' They were both grateful for the program support, but expressed that the paperwork was an extra burden on top of their already busy schedules. Those that did use USDA programs also noted that their children, who are often born and educated in the US, were typically responsible for filing this paperwork. They were most comfortable with the language and the formalities of crop documentation, which their parents struggle to navi- gate. For those farmers without grown or teenaged children to help with the paperwork, participation in such programs was an even greater barrier.

A former staff member at the USDA's Socially Disadvantaged Farmer and Rancher Program at the federal level expressed that although the administration was making attempts to be more inclusive of immigrants and other farmers of color, the changes being made are equivalent to offering ''coffee and donuts,'' rather than addressing uneven access at the local level. She stated that the out- reach to socially disadvantaged farmers such as Latino and Black farmers, as a result of the discrimination claims, does not provide the technical assistance that farmers really need,

> 'Here have a cookie and some coffee, honest we'll give you a loan.' But then they leave. And actually, 'No honest, we won't give you a loan,' because nobody actually stopped eating the donut and the coffee and figured out how to get financed, because that would be hard work…'Here's information about the USDA. Hey, by the way, the USDA doesn't discriminate anymore. And we really hope that when you come to our office you'll meet someone that looks like you and treats you with respect, and if they don't, here's your civil rights.' But not, 'So let's sit down with your tax return now.'

In her view, despite the genuine intention of creating more inclusive programs at the federal level, in effect, the USDA's claims of making institutional change to combat historic discrimination are merely rhetoric. She argues that to improve opportunities for disadvantaged farmers, they need technical assistance. In our research, we found that sufficient technical assistance would include linguistic training for local staff and outreach and continued support for farmers with discrepancies in language and literacy.

Lengthy paperwork, required initially when a farmer applies for USDA assistance and throughout the process of utilizing the loan or program, proves to be a barrier to Latino immigrant farmers in accessing state support. Lan- guage barriers and uneven formal educational experience aggravate their general wariness of government authority even further. When immigrant farmers cannot speak the language and do not feel confident with the procedures required of them to access programs, this can be interpreted as a problem of legibility. Furthermore, their own agricultural practices and ways of sharing knowledge are not easily recorded in USDA forms. Their planting schedules and cultivation cycles tend to not fit the standardized format the state paperwork requires. It is a lack of translation, both linguistic and cultural, that function to keep Latino immigrant farmers away from USDA offices. It is only by recognizing these disjunctures that the USDA can truly move forward and into a new more inclusive era.

## Towards a new era of inclusion

Under Vilsack's guidance, the USDA has taken several steps working towards a new vision of equality at the federal level. Since 2009, they have provided civil rights trainings to employees, established the Office of Advocacy and Outreach to aid beginning and socially disadvantaged farmers, and claim to be working towards resolving civil rights lawsuits inherited from previous administrations. The department has also vowed to be an equal opportunity employer and create a workforce, which ''represents the full diversity of America'' (USDA 2015).

Unfortunately, in our work we have found that despite claims of increased racial equality from the federal offices of the USDA, little on the ground change is being made in local and regional offices to directly help Latino immigrants overcome obstacles in order to transition from the role of farmworker to farmer in the United States. The processes of monitoring and standardization, as currently required by USDA programs, exacerbate the racial exclusion of immigrant farmers from state programs, and ultimately, from the advantages other farmers receive. This uneven rural development must be understood in context of the historical relationship between Latino immigrants and the state as well as through the lived experiences of those struggling within a system where their practices are not deemed readable. Today's Latino immigrant farmers follow this pattern of racialized others being left out of system where some practices are deemed legible, and therefore legitimate, and others are not.

As previously mentioned, programs that are developed for the specific needs of diversified fruit and vegetable, or specialty crop growers, already exist within the USDA. There are also microloan programs available through the FSA, which are also designed for ''nontraditional'' farmers and require less paperwork, and could be greatly helpful for Latino immigrants as they transition to farm ownership. Additionally, an office of Minority and Socially Disadvantaged Farmers Assistance (MSDA) has been established within the FSA with the express purpose of assisting farmers such as those who participated in this study. These programs are a great start to making government-supported programs available to immigrant growers. Regrettably, due to social divides and language and educational barriers, these programs are unknown to those most in need of assistance.

Of course, some paperwork and state monitoring are necessary for programs to function and for farmers to be held accountable. We do not suggest that these procedures can or should be simply abolished. Rather, these processes must be streamlined to take account of differences in growing practices, linguistic and literacy capabilities, and the need for farmers to maintain autonomy on multiple levels, if they are to build the trust that is so sorely lacking. Programs should be amended to account for differential growing seasons for diverse crops. Technologies such as camera phones could be better utilized for documentation purposes, in contrast to lengthy written paperwork; an idea suggested to us by an extension worker in New York. In all our discussions with USDA and other outreach staff there was an interest in these changes being made to accommodate ''non-traditional'' farmers in the US.

We do not claim that the USDA is the only institutional boundary for Latino immigrant farmers, nor the only place improvements can and should be made. Immigrant farmers struggle with access to capital, outreach and access to markets, general business skills, and many other management practices. But the USDA is the only state institution that claims to provide economic opportunities for rural communities and agricultural producers of the United States. While there are many entrepreneurial and non-profit ventures that focus on advancement for and training of small farmers, farmers of color, and immigrant farmers, they are often working on shoestring budgets, with varying levels of accountability to their clients, and have limited access to resources and markets themselves. The USDA

does support many of these projects through grants, but making access to direct services from the USDA to farmers more equitable must also be a focus of improvement if services are going to reach farmers of all racial and ethnic backgrounds.

Latino immigrant farmers are challenging historical racial legacies in farming in the United States despite the odds, and persisting in new markets and climates that are seemingly unattainable. The USDA has the opportunity to support their growth as farmers, but in order for programs and funding to reach the most financially disadvantaged beginning farmers, the agency must do more to recognize the challenges immigrant farmers experience in the current system. A productive first step in addressing the long-standing fear of state authority is certainly the recognition of its existence, yet more must be done to truly make services and financial support available. To start, USDA staff in local offices need better support for linguistic and cultural translations, and outreach must focus on making farmers feel safe and included. This support must be available consistently throughout the United States, and not just in offices where farmers are already participating. For this to happen, awareness must improve more broadly at the national level where decisions are made, such as in the debating of the US Farm Bill. Individuals at the local level are powerless if federal leadership does not make concrete changes to procedures and funding steams to support these changes. To truly transition to a new age of civil rights, elected officials and leadership at the United States Department of Agriculture must look closely at local conditions and challenges that individual groups of socially disadvantaged farmers face and make clear and grounded changes to include them.

To create a more racially diverse agricultural system in the United States, there is work to be done by scholars and practitioners alike. This paper asks researchers and critical theorists to better recognize the persistence of non-white farmers in order build on our understanding of agricultural transitions and racial formations. Using the lens of legibility, we have investigated how Latino immigrant farmers are commonly excluded from state supported opportunities, further marginalizing them from agricultural success and stability. The state and civil society are by no means separate entities, and many within the USDA are actively working on creating reforms with regards to their history of racism. Yet until these institutional norms are challenged, many farmers of color, and immigrant farmers in particular, will continue to struggle with agrarian class mobility and land and food producing industries with remain in primarily white hands.

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