Christina M. Martin, OSB #084117
Lead Counsel
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
CMartin@pacificlegal.org

Wencong Fa, Cal. Bar No. 301679*
Daniel M. Ortner, Cal. Bar No. 329866*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
WFa@pacificlegal.org
DOrtner@pacificlegal.org

Glenn E. Roper, Colo. Bar No. 38723*
Pacific Legal Foundation
1745 Shea Center Dr., Suite 400
Highlands Ranch, Colorado 80129
Telephone: (916) 419-7111
GERoper@pacificlegal.org

Attorneys for Plaintiffs
** pro hac vice*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PENDLETON DIVISION

KATHRYN DUNLAP and JAMES DUNLAP,

Plaintiffs,

v.

THOMAS J. VILSACK, in his official capacity as U.S. Secretary of Agriculture; ZACH DUCHENEAUX, in his official capacity as Administrator, Farm Service Agency,

Defendants.

Case No. 2:21-cv-00942-SU

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION PURSUANT TO FRCP 65

REQUEST FOR ORAL ARGUMENT

Plaintiffs move pursuant to Fed. R. Civ. P. 65 for a preliminary injunction enjoining Defendants Tom Vilsack, in his official capacity as U.S. Secretary of Agriculture, and Zach Ducheneaux, in his official capacity as Administrator of the Farm Service Agency, from enforcing the "socially disadvantaged" provisions of Section 1005 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4. Defendants should be enjoined from providing any further loan assistance to "socially disadvantaged" farmers and ranchers under Section 1005 until the merits of Plaintiffs' claims can be resolved. Pursuant to LR 7-1(a)(1), Plaintiffs' counsel conferred with Emily Newton and Michael Knapp, attorneys for the U.S. Department of Justice who are representing Defendants in related cases and are expected to represent Defendants in this case. The relief sought in this motion is opposed.

As further explained in the accompanying memorandum and declarations by Plaintiffs Kathryn and James Dunlap, a preliminary injunction is proper because all of the factors for the issuance of a preliminary injunction are satisfied here. (1) Plaintiffs are likely to succeed on the merits of their claims, (2) Plaintiffs would suffer an irreparable harm absent a preliminary injunction, and (3) both the balance-of-the-equities and the public interest factors, which merge in a case where defendants are government officials, weigh in favor of issuing the preliminary injunction. The Court should therefore issue a preliminary injunction without requiring a bond.

DATED: June 29, 2021.

Respectfully submitted,

By /s/ Christina M. Martin
Christina M. Martin, OSB #084117
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
CMartin@pacificlegal.org

Wencong Fa
Cal. Bar No. 301679*
Daniel M. Ortner
Cal. Bar No. 329866*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
WFa@pacificlegal.org
DOrtner@pacificlegal.org

Glenn E. Roper
Colo. Bar No. 38723*
Pacific Legal Foundation
1745 Shea Center Dr., Suite 400
Highlands Ranch, Colorado 80129
Telephone: (916) 419-7111
GERoper@pacificlegal.org

Attorneys for Plaintiffs Kathryn and James Dunlap
** pro hac vice*

Christina M. Martin, OSB #084117
Lead Counsel
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
CMartin@pacificlegal.org

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Daniel M. Ortner, Cal. Bar No. 329866*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
WFa@pacificlegal.org
DOrtner@pacificlegal.org

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Pacific Legal Foundation
1745 Shea Center Dr., Suite 400
Highlands Ranch, Colorado 80129
Telephone: (916) 419-7111
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Defendants.

Case No. 2:21-cv-00942-SU

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Section 1005 of the American Rescue Plan Act of 2021 provides loan assistance to a subset of farmers[1] based on a single characteristic: their race. It assumes that all farmers and ranchers who are Black/African American, American Indian, Alaskan native, Hispanic/Latino, Asian American, or Pacific Islander are "socially disadvantaged," and it requires Defendants to provide them with a payment of 120 percent of their outstanding qualifying farm loans as of January 1, 2021.[2] White farmers are categorically excluded from such payments, regardless of their individual circumstances. Plaintiffs Kathryn and James Dunlap are ineligible for loan assistance under Section 1005 solely because they are white.

This Court should issue a preliminary injunction against enforcement of the "socially disadvantaged" provisions of Section 1005. Plaintiffs are likely to succeed on the merits of their claims. Because Section 1005 distributes benefits by race, it is presumed unconstitutional. To sustain the statute, Defendants must show that its racial classification is narrowly tailored to further a compelling governmental interest. While the government may in some limited circumstances use racial classifications to redress specific instances of racial discrimination, Section 1005's crude racial exclusion is not narrowly tailored to further such an interest.

Plaintiffs also meet the other requirements for a preliminary injunction. Their injury is irreparable because it involves a violation of their constitutional rights and because money

[1] Plaintiffs use "farmers" to refer to "farmers and ranchers."

[2] The outstanding balance is paid off in full, then the farmer or rancher is paid an additional 20 percent, which is intended to cover "tax liabilities and other fees associated with payment of the debt." *American Rescue Plan Debt Payments*, U.S. Dep't Agric., https://www.farmers.gov/americanrescueplan (last visited June 26, 2021). Qualifying farm loans include most loans issued or guaranteed by the USDA's Farm Service Agency (FSA), including direct ownership loans, operating loans, and farm storage facility loans. *See* Pub. L. No. 117-2, § 1005(a)(2), (b)(1), 135 Stat. 4.

damages are unavailable due to sovereign immunity. The harm resulting from Plaintiffs' constitutional injury far outweighs any harm Defendants might suffer if they are unable to enforce an unconstitutional statute. And because Plaintiffs' constitutional rights hang in the balance, the issuance of an injunction pending a decision on the merits is in the public interest. In short, preliminary injunctive relief is warranted to ensure that funds are not distributed under Section 1005 in violation of the Constitution's guarantee of equal protection under the law.

The U.S. District Court for the Middle District of Florida recently granted a preliminary injunction in another farmer's challenge against Section 1005. *See* Decision and Order Granting Plaintiff's Motion for Preliminary Injunction, ECF No. 41, *Wynn v. Vilsack*, No. 3:21-cv-00514-MMH-JRK (M.D. Fla. June 23, 2021) (attached as Exhibit 1). The court held that all the factors for obtaining a preliminary injunction were satisfied and issued a nationwide injunction preventing Defendants from distributing payments under Section 1005.[3] Similarly, the U.S. District Court for the Eastern District of Wisconsin issued a temporary restraining order temporarily halting payments under Section 1005. *See* Decision and Order Granting Plaintiffs' Motion for a Temporary Restraining Order, ECF No. 21, *Faust v. Vilsack*, No. 21-C-548 (E.D. Wis. June 10, 2021) (attached as Exhibit 2). This Court should adopt the reasoning of the courts in Florida and

[3] The Florida court's decision poses no barrier to this Court's independent authority to issue a preliminary injunction; indeed, it is persuasive authority in favor of such an injunction. In 2019, for example, four district courts—including this Court—issued parallel preliminary injunctions against the United States Department of Health and Human Services' Protect Life Rule. *See Washington v. Azar*, No. 1:19-cv-03040-SAB (ECF No. 54) (E.D. Wash. Apr. 25, 2019) (nationwide injunction); *Oregon v. Azar*, No. 6:19-cv-00317 (ECF No. 142) (D. Or. Apr. 29, 2019) (nationwide injunction); *California v. Azar*, No. 3:19-cv-01184-EMC (ECF No. 103) (N.D. Cal. Apr. 26, 2019) (injunction limited to the named plaintiffs); *City and County of Baltimore v. Azar*, No. 1:19-cv-01103-RDB (ECF No. 43) (D. Md. May 30, 2019) (injunction limited to the named plaintiffs).

Wisconsin, which show that Section 1005's loan assistance program plainly discriminates on the basis of race and violates the equal protection component of the Due Process Clause.

BACKGROUND

I. Section 1005 of the American Rescue Plan Act of 2021

A. Text and Operation of Section 1005

Section 1005[4] directs the Secretary of Agriculture to "pay off" the outstanding farm loans of each "socially disadvantaged farmer or rancher . . . in an amount up to 120 percent of the outstanding indebtedness . . . as of January 1, 2021." § 1005(a)(2). A "socially disadvantaged farmer or rancher" is "a farmer or rancher who is a member of a socially disadvantaged group." § 1005(b)(3) (incorporating the definition in 7 U.S.C. § 2279(a)(5)). A "socially disadvantaged group" is "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." 7 U.S.C. § 2279(a)(6).

The United States Department of Agriculture (USDA) has made clear that "socially disadvantaged groups include . . . : American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos."[5] That list mirrors other USDA regulations defining the term "socially disadvantaged group."[6] It also includes every race and ethnicity on USDA's official Customer Data Worksheet except for

[4] All citations to "Section 1005" or "§ 1005" refer to § 1005 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

[5] *Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA)*, 86 Fed. Reg. 28,329 (May 26, 2021).

[6] *See, e.g.*, 7 C.F.R. § 760.107(b)(1) ("Socially disadvantaged groups include the following and no others unless approved in writing . . . : (i) American Indians or Alaskan Natives, (ii) Asians or Asian–Americans, (iii) Blacks or African Americans, (iv) Native Hawaiians or other Pacific Islanders, and (v) Hispanics."); *id.* § 1410.2(b) (same).

"White."[7] And although women farmers are considered "socially disadvantaged" under many USDA regulations, *see, e.g.*, 7 C.F.R. § 7.3; 7 C.F.R. § 718.2; 7 C.F.R. § 761.2(b), Section 1005 applies only to race and does not include women farmers in its definition of socially disadvantaged.

B. Congressional Purpose in Enacting Section 1005

Congress did not include findings to explain its purpose in enacting the race-based loan assistance provisions in Section 1005. Yet the proposed (but never enacted) Senate Bill 278, which included a "debt forgiveness" provision similar to Section 1005, may shed light on congressional intent. *See* Emergency Relief for Farmers of Color Act of 2021, S. 278, 117th Cong. ("SB 278") (introduced February 8, 2021).

The stated purpose of SB 278's proposed debt forgiveness provision was twofold: "to address the historical discrimination against socially disadvantaged farmers and address issues relating to the Coronavirus Disease 2019 (COVID-19)." *Id.* § 4(a). SB 278 included broad proposed findings on alleged "systemic racism that has hindered farmers of color for generations" and an alleged "pattern of discrimination at the Department of Agriculture against Black farmers, Indigenous farmers, and farmers of color." *Id.* § 2(3), (10).

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[7] *See* Customer Data Worksheet (form AD-2047) at 1, https://www.farmers.gov/sites/default/files/documents/AD2047-01192021.pdf (listing five races: "American Indian/Alaskan Native," "Native Hawaiian/Other Pacific Islander," "Asian," "White," and "Black/African American"—and two ethnicities: "Hispanic or Latino" or "Not Hispanic or Latino").

USDA could theoretically designate additional racial groups as socially disadvantaged. *See Notice of Funds Availability*, 86 Fed. Reg. at 28,330 ("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."). But in doing so, it cannot consider disadvantaged circumstances of individual farmers, only the status of racial groups as a whole. And there is no realistic possibility that Secretary Vilsack would accept a request to include white farmers as "socially disadvantaged."

To support these broad assertions, SB 278 listed various factors, everything from the historical removal of Native Americans from traditional lands, to title issues arising from Black farmers' distrust of the legal system during Reconstruction and Jim Crow, to USDA's discrimination against Hispanic farmers in credit and loan transactions. *Id.* § 2(2)–(9). It also stated that "numerous reports over 60 years have shown a consistent pattern of discrimination at the Department of Agriculture against Black farmers, Indigenous farmers, and farmers of color." *Id.* § 2(10).

SB 278 did not, however, include any specific findings or examples of discrimination against farmers who are Asian American or Pacific Islander. And despite its stated goal of "address[ing] issues relating to" COVID-19, SB 278 did not include any proposed findings about COVID-19, such as an assertion that USDA prevented "socially disadvantaged" farmers from accessing pandemic-related relief funds.

C. The Federal Government's Response to Alleged Historical Discrimination Against Minority Farmers

For decades, there has been an extensive federal response to allegations of discrimination by USDA against minority farmers. As one example, the 1990 Farm Bill established the Outreach and Assistance for Socially Disadvantaged Farmers and Ranchers Program (known as the "2501 Program"). *See* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 2501, 104 Stat. 3359. According to USDA, the 2501 Program is intended to "provide outreach and technical assistance for underserved farmers, ranchers, and foresters" and "has awarded 533 grants totaling more than $138 million."[8] These grants have "helped reach socially disadvantaged

[8] *Socially Disadvantaged Farmers and Ranchers*, https://www.usda.gov/partnerships/socially-disadvantaged-farmers-and-ranchers (last visited June 25, 2021). Plaintiffs request that the Court take judicial notice of all information contained on government websites cited in this motion. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) ("It is appropriate to take judicial notice of this information, as it was made publicly available by government entities . . . and

agricultural producers—farmers who have experienced barriers to service due to racial or ethnic prejudice."[9] The 2018 Farm Bill substantially expanded funding for the 2501 Program. *See* Agricultural Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490.

Additionally, USDA has paid massive sums—more than $2.4 billion—to settle class action lawsuits alleging that it engaged in lending discrimination, including against African-American, Hispanic, and Native American farmers. Perhaps best known is the *Pigford* litigation, where USDA paid out around $1 billion to a class of approximately 23,000 Black farmers under a consent decree. *See Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999) (approving consent decree), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000). A subsequent class action settlement provided relief for Black farmers who were too late to file claims under *Pigford*. *See In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011), *as amended* (Nov. 10, 2011) (approving settlement). Similarly, in *Keepseagle v. Veneman*, a court approved a class action settlement in a case brought by Native American farmers. *See* Order, *Keepseagle v. Vilsack*, No. 99-cv-3119 (D.D.C. Apr. 28, 2011). And the Department of Justice and USDA have established an administrative process to resolve the claims of Hispanic farmers who asserted that they were discriminated against when seeking USDA farm loans.[10]

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neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein.").

[9] *Id.*

[10] *See* Press Release, *Department of Justice and USDA Announce Process to Resolve Discrimination Claims of Hispanic and Women Farmers* (Feb. 25, 2011), https://www.justice.gov/opa/pr/department-justice-and-usda-announce-process-resolve-discrimination-claims-hispanic-and-women; *see also* Defs.' Eleventh Status Report, *Cantu v. United States*, No. 1:11CV00541 (D.D.C. Oct. 26, 2015) (explaining that the administrative process had approved 3,210 claims made by women and Hispanic farmers and ranchers).

Congress has strongly supported these settlement efforts. In 1998, Congress suspended application of the two-year statute of limitations, allowing claimants to assert decades-old instances of discrimination. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (1998). The 2008 Farm Bill stated that it was the "sense of Congress" that all pending discrimination claims and class actions brought against USDA should be "resolved in an expeditious and just manner." Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14011, 122 Stat. 1651. Accordingly, that bill (1) imposed a moratorium on acceleration and foreclosure proceedings against farmers who alleged discrimination by USDA and (2) appropriated $100 million to settle the *Pigford* discrimination claims. *Id.* § 14012. Just two years later, Congress appropriated an additional $1.15 billion for that purpose. Claims Resolution Act of 2010, Pub. L. No. 111-291, § 201, 124 Stat. 3064.

D. Defendants' Subsequent Proffer of Evidence

In briefs filed with other courts that have considered this issue, Defendants have attempted to provide additional evidence that they contend supports Section 1005. As the district court in *Wynn* noted, the government cited reports contending that, as a whole, minority farmers have a harder time obtaining credit due to a host of factors, including smaller farm sizes, weaker credit histories, and lack of clear title to land. *Wynn v. Vilsack*, No. 3:21-cv-00514-MMH-JRK, ECF No. 41 at 12–13. The Court noted that because the government "fail[ed] to connect those barriers to prior or ongoing discrimination by USDA or to a need for complete debt relief," the reports did "little to move the needle in the Government's favor." *Id.*

II. Plaintiffs and Procedural History

Plaintiffs Kathryn and James Dunlap raise cattle and grow hay on their Oregon farm. Declaration of Kathryn Dunlap (K. Dunlap Decl.) ¶¶ 2–3; Declaration of James Dunlap (J. Dunlap

Decl.) ¶¶ 2–3. They jointly hold two farm loans that, but for the Dunlaps' race, would qualify them for loan assistance under Section 1005. K. Dunlap Decl. ¶ 4; J. Dunlap Decl. ¶ 4. But because Plaintiffs are white, they are categorically ineligible for assistance. Plaintiffs filed this lawsuit to vindicate their right to equal treatment under the law. *See* ECF No. 1.

Prior to the orders issued in Florida and Wisconsin, USDA began processing a small number of payments under Section 1005. *See* Cobb Decl. ¶¶ 28–32, ECF No. 17-2, *Faust v. Vilsack*, No. 21-C-548 (attached as Exhibit 3). And although the orders issued to date have been nationwide in scope, this scope may be altered on appeal since Defendants have consistently argued that relief should be limited to the individual plaintiffs themselves. Moreover, the orders do not prevent Defendants from processing applications. Thus, Defendants may send out payments the instant that an injunction is lifted or even modified in scope. Plaintiffs therefore bring this motion for a preliminary injunction.

STANDARD OF DECISION

To secure a preliminary injunction, Plaintiffs must show that they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

ARGUMENT

I. Plaintiffs Are Likely to Prevail on the Merits

Plaintiffs are likely to prevail on their claim that the "socially disadvantaged" provisions of Section 1005 violate both the Fifth Amendment's Due Process Clause and the Administrative Procedure Act. *See* Compl., ECF No. 1, ¶¶ 54–71. Section 1005 distributes benefits on the basis

of race. "Any governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc* (Aug. 21, 1997), *as amended* (Aug. 26, 1997). All such classifications are subject to strict scrutiny because they are "simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (internal quotations omitted).

The strict scrutiny test is exacting and rarely satisfied. To sustain Section 1005's racial discrimination, Defendants must show that the statute's racial classification both (1) furthers a compelling governmental interest and (2) is narrowly tailored to further that interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 220 (1995). They cannot do either.

A. Section 1005 Does Not Further a Compelling Interest

The compelling interest requirement is designed to ascertain whether the government "is pursuing a goal important enough to warrant use of a highly suspect tool." *Johnson v. California*, 543 U.S. 499, 506 (2005) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.)). The Supreme Court has recognized only one relevant interest compelling enough to justify racial classifications: remedying the effects of past or present de jure discrimination. *Parents Involved*, 551 U.S. at 720–22.[11] To establish a compelling interest in remedying the effects of de jure discrimination, Defendants cannot rely on a "mere assertion that . . . remedial action is required." *Miller v. Johnson*, 515 U.S. 900, 922 (1995). Instead, they must show that Congress had

[11] Obtaining the educational benefits of diversity in higher education might also be a compelling interest, *see Parents Involved*, 551 U.S. at 722, but that is plainly inapplicable here.

"a strong basis in evidence to conclude that remedial action was necessary." *Shaw v. Hunt*, 517 U.S. 899, 910 (1996). Defendants cannot make such a showing here, for three main reasons.

First, "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." *Croson*, 488 U.S. at 498. Here, Congress made no findings as to how many minority farmers have suffered racial discrimination in any "relevant market"—be it farming in general or farm loans in particular. *Id.* at 502. And even if the proposed findings in SB 278 are considered as an indication of congressional intent,[12] SB 278 failed to credit the federal government's significant and sustained efforts to remedy historical lending discrimination. As discussed above, *supra* Background Part I.C., USDA's 2501 Program has awarded over $100 million in grants in an effort to assist "farmers and ranchers who have experienced barriers to service due to racial or ethnic prejudice." And the federal government has paid out over $2.4 billion to settle and resolve *Pigford*, *Keepseagle*, and other litigation regarding alleged loan discrimination, including against Black, Native American, Hispanic, and women farmers. Congress has supported these efforts by suspending statutes of limitation and allocating settlement funds.

These efforts undermine any current interest in enacting the loan assistance plan in Section 1005 to remedy past lending discrimination by USDA. *Cf. Parents Involved*, 551 U.S. at 721 (noting that once the defendant school district "achieved unitary status" and thereby "remedied the constitutional wrong that allowed race-based assignments," "[a]ny continued use of race must be justified on some other basis").[13] As the *Wynn* Court recently pointed out, "for the Government to

[12] Congress's purpose is uncertain, as Section 1005 does not include any findings or explanation for its loan assistance program. In related litigation, Defendants have sought to justify Section 1005, in part, by using the interests referenced in SB 278.

[13] As two federal district courts have now found, any evidence of continuing government discrimination in farm loans after the settlements is weak and anecdotal. *See, e.g.*, *Wynn v. Vilsack*,

show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA's past discrimination or that the Government remains a passive participant in discrimination in USDA loans and programs." *Wynn v. Vilsack*, No. 3:21-cv-00514-MMH-JRK, ECF No. 41 at 11.

Second, the assertion (such as can be found on a USDA website)[14] that "socially disadvantaged farmers have faced systemic discrimination with cumulative effects" does not provide a compelling interest that can justify Section 1005's race-based distinction. *See also* SB 278 § 2(3) (alleging "systemic racism that has hindered farmers of color for generations"). More than 40 years ago, the Supreme Court rejected the use of race-conscious remedies to combat "systemic injustice" because it was "an amorphous concept of injury that may be ageless in its reach into the past." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (controlling opinion of Powell, J.). And as the Ninth Circuit has explained, "claims of general societal discrimination . . . cannot be used to justify race-conscious remedial measures." *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 1002 (9th Cir. 2005); *see also Shaw*, 517 U.S. at 909–10 ("[A]n effort to alleviate the effects of societal discrimination is not a compelling interest."). In short, a racial classification can only be appropriate to remedy specific instances of the government's past or present discrimination, not generalized "cumulative effects" of supposed "systemic discrimination."

No. 3:21-cv-00514-MMH-JRK, ECF No. 41 at 12 (noting that the "actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory"); *Faust v. Vilsack*, No. 21-C-548, ECF No. 21 at 5 ("Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts.").

[14] *AskUSDA – American Rescue Plan of 2021* (May 14, 2021), https://ask.usda.gov/s/article/American-Rescue-Plan-Act-of-2021.

As the Ninth Circuit explained, "to establish that an affirmative action plan is justified by a compelling government interest, there must be some showing of prior discrimination *by the governmental unit involved*." *Airth v. City of Pomona*, 216 F.3d 1082 (9th Cir. 2000) (unpublished) (emphasis added). A contrary rule would have "no logical stopping point." *W. States Paving Co.*, 407 F.3d at 1002 (quoting *Croson*, 488 U.S. at 498). It would permit Congress to continue employing racial discrimination at least until minority farmers reached economic parity with white farmers, *even after* the federal government has taken concrete action to remedy its past discrimination. It would also "effectively assure[ ] that race will always be relevant in American life, and that the 'ultimate goal' of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race, will never be achieved." *Croson*, 488 U.S. at 495 (plurality opinion) (quotation marks omitted).

For precisely this reason, the courts in *Wynn* and *Faust* granted preliminary relief against the enforcement of Section 1005, finding that "Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination" and that Defendants' "summary of statistical disparities" was inadequate. *See, e.g.*, *Wynn v. Vilsack*, No. 3:21-cv-00514-MMH-JRK, ECF No. 41 at 12 (noting that the "actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory"); *see also Faust v. Vilsack*, No. 21-C-548, ECF No. 21 at 5 (E.D. Wis. Jun. 10, 2021). Indeed, the *Wynn* Court explained that "statistical discrepancies presented by the Government can be explained by non-race related factors—farm size and crops grown" rather than racial discrimination. *Wynn v. Vilsack*, No. 3:21-cv-00514-MMH-JRK, ECF No. 41 at 14. Thus, "[e]ven taking these statistics at face value, they are less useful than they may appear to be." *Id.*

Third, although SB 278 indicated that it was intended to "address issues relating to the Coronavirus Disease 2019 (COVID-19)," SB 278, § 4(a), that cannot provide a compelling interest for Section 1005's race-based distinction. Neither SB 278 nor Section 1005 mention COVID-19 again or provide any evidence—let alone a "strong basis in evidence"—regarding the effect of COVID-19 on "socially disadvantaged" farmers. More fundamentally, responding to a disease or pandemic has never been recognized by the Supreme Court as a permissible basis for government discrimination on the basis of race.

B. Section 1005 Is Not Narrowly Tailored

Even if there were a compelling interest that could justify a race-based loan assistance program, a racial classification is so suspect that it may be legitimate only as "a last resort to achieve a compelling interest." *Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment); *accord id.* at 735 (majority opinion) (favorably citing "last resort" language). Narrow tailoring analysis "involves a careful judicial inquiry" into whether the government could further its asserted interest "without using racial classifications." *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013). As the Ninth Circuit has explained, "Congress may not merely intone the mantra of 'discrimination' to satisfy the 'searching examination' mandated by equal protection. Rather [the court] must evaluate the evidence congress considered . . . to ensure that it had a 'strong basis in evidence for its conclusion that remedial action was necessary.'" *W. States Paving Co.*, 407 F.3d at 991 (quoting *Adarand*, 515 U.S. at 223). Here, that "searching examination" shows that Section 1005's race-based restriction is not narrowly tailored, in at least three ways.

1. Section 1005 uses a rigid race-based remedy

The rigid and categorical nature of Section 1005's loan assistance program shows that it is not narrowly tailored. Both the Supreme Court and the Ninth Circuit have warned in the context

of race-based set asides in public contracting that strict race-based quotas cannot be narrowly tailored to any compelling interest. *Croson*, 488 U.S. at 507–08; *W. States Paving Co.*, 407 F.3d at 994 ("A quota system is the hallmark of an inflexible affirmative action program."). That is primarily because rigid quotas are over-inclusive—they dole out benefits even to those members of the favored groups who never suffered discrimination. *Croson*, 488 U.S. at 508 (critiquing a quota system because "a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race" and declaring that it was "obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination"); *see also Builders Ass'n of Greater Chi. v. Cty. of Cook*, 256 F.3d 642, 647 (7th Cir. 2001*)* ("Anyone of recent foreign origin might be able to demonstrate that he or she was a victim of ethnic discrimination, but to presume such discrimination merely on the basis of having an ancestor who had been born in the Iberian peninsula is unreasonable."). If anything, Section 1005's blanket race-based farm loan forgiveness program is *more* over-inclusive than a contracting set-aside because *every* farmer or rancher who is a racial minority qualifies for loan forgiveness—regardless of evidence of need or past discrimination. Far from being a "last resort," under Section 1005, race is the primary criterion on which the loan repayments are based.

Yet Section 1005 does not allow members of the non-favored group (here, white farmers) any avenue to prove social disadvantage. That is a marked contrast with the federal contracting preference for "disadvantaged business enterprises" (DBEs), which the Ninth Circuit held narrowly tailored in part because "a firm owned by a non-minority can qualify as a DBE if the owner can demonstrate that he is socially and economically disadvantaged," and also because a net-worth limitation "ensures that wealthy minorities who have not encountered discriminatory impediments do not receive an unwarranted windfall." *W. States Paving Co.*, 407 F.3d at 995.

Here, Section 1005's rigid racial classification not only renders the statute over-inclusive, but also *under-inclusive*, as a white farmer cannot qualify for loan assistance under the statute no matter how dire his individual circumstances. Such a categorical racial classification with no relationship to real-world discrimination or economic need is not narrowly tailored.

2. Section 1005 arbitrarily benefits members of certain racial groups

Relatedly, Section 1005 cannot be narrowly tailored because of its "haphazard inclusion of minority groups" who "have not encountered discriminatory barriers." *W. States Paving Co.*, 407 F.3d at 999 (emphasizing that a government entity "that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks *and* Asian–Americans *and* women" (quoting *Builders Ass'n of Greater Chi.*, 256 F.3d at 646)). Although proposed findings in SB 278 refer to alleged instances of historical lending discrimination against Black and Hispanic farmers, Section 1005 provides loan assistance for every minority race—including Asian Americans and Pacific Islanders, for whom SB 278 provides no particularized evidence of discrimination. *See Wynn v. Vilsack*, No. 3:21-cv-00514-MMH-JRK, ECF No. 41 ("Section 1005 provides debt relief to groups including Asians, Native Hawaiians, and Pacific Islanders, groups for which the evidence of prior discrimination by the USDA in farm loans, programs and services appears to be exceedingly thin.").

In fact, farmers who are members of *any* racial or ethnic group recognized by USDA other than "White" qualify for loan assistance under Section 1005, regardless of whether there is evidence that group members have suffered racial discrimination in farm loan administration. This "random inclusion of racial groups . . . suggests"—if not conclusively establishes—"that perhaps [Congress's] purpose [in enacting Section 1005] was not in fact to remedy past discrimination." *Croson*, 488 U.S. at 506.

Further, the arbitrary benefit extended to minority farmers (payment to farmers of 120 percent of eligible loan balances) does not target the problem described in SB 278 (that some minority farmers have historically been discriminated against in applying and qualifying for farm loans). Indeed, by definition, Section 1005's loan assistance program can only apply to those who have *successfully acquired* farm loans, not those who were *unable* to obtain farm loans due to discrimination.[15] That blunderbuss approach necessarily and arbitrarily excludes those who would have suffered most from lending discrimination, making it an exceedingly poor fit for remedying the problem alleged by Defendants. *See Wynn v. Vilsack*, No. 3:21-cv-00514-MMH-JRK, ECF No. 41 at 27 ("While the Government argues that a remedy for past discrimination need not be limited to remedying specific instances of discrimination, . . . it fails to explain how a remedy that by its own terms may have the effect of excluding past victims of the very discrimination it seeks to remedy is actually tailored, narrowly or not, to remedy that discrimination."). If it is true that USDA extended unfair or unequal lending terms to some minority farmers, then Congress could take more narrowly tailored actions such as requiring USDA to adjust the interest rate or other terms and conditions of any loans that are actually unfair. Extending blanket loan forgiveness to every minority farmer in the country is not narrowly tailored to the supposed justification of remedying USDA's past discrimination.

3. Section 1005 ignores available race-neutral alternatives

The narrow tailoring analysis requires Defendants to engage in "serious, good faith consideration of workable race-neutral alternatives" that would allow them to achieve the interest they believe to be compelling. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). This will ordinarily

[15] *See American Rescue Plan Debt Payments FAQ*, https://www.farmers.gov/americanrescueplan/arp-faq (last updated May 21, 2021) ("If you do not have a current farm loan, you are not eligible for debt relief under Section 1005 . . . .").

involve proof "that Congress had carefully examined and rejected race-neutral alternatives." *Croson*, 488 U.S. at 507. Yet here, there is no indication that Congress considered race-neutral alternatives before selecting a blanket policy of loan repayment for all farmers who are racial minorities.

That omission is especially devastating because such alternatives appear readily available. If Congress believed that there was ongoing lending discrimination that disproportionately affected minority farmers, it could have tailored a remedy to meet that problem. For example, as the *Faust* court explained, Congress could "require[e] individual determinations of disadvantaged status or giv[e] priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources." *Faust v. Vilsack*, No. 21-C-548, ECF No. 21 at 6. Even if these alternatives would have required additional investigation or the dedication of additional administrative resources, an "interest in avoiding the bureaucratic effort necessary to tailor remedial relief . . . cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. at 508. Congress's failure to consider available alternatives is convincing proof that Section 1005's loan assistance program is not narrowly tailored.

II. Plaintiffs Will Suffer Irreparable Harm Without a Preliminary Injunction

Where Plaintiffs allege an ongoing deprivation of their constitutional rights, courts generally presume irreparable harm. *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") The Ninth Circuit has indicated that this presumption applies to equal protection clause violations. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (concluding that an equal protection violation causes irreparable harm because "it is not apparent"

how money damages could remedy "unconstitutional discrimination"); *see also Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020) (stating that an equal protection violation creates a "dispositive presumption" of irreparable harm). Thus, absent a preliminary injunction, Plaintiffs face a substantial threat of irreparable harm.

In addition, Plaintiffs face irreparable harm because farmers who have their farm loans forgiven under Section 1005 will gain an unfair competitive advantage over those, like Plaintiffs, who are required to continue to make payments on their farm loans and are therefore unable to use that capital for other investments or improvements. Even if the Court eventually invalidates Section 1005, that would not reinstitute any loans forgiven for competitors during the pendency of the litigation and therefore cannot restore the status quo. *See Faust v. Vilsack*, No. 21-C-548, ECF No. 21 at 9 ("Once a loan is forgiven, it cannot easily be undone.").[16] And although there is a nationwide preliminary injunction currently in place, courts have not hesitated to issue overlapping preliminary injunctions. *See Washington v. Azar*, No. 1:19-cv-03040-SAB (ECF No. 54) (E.D. Wash. Apr. 25, 2019) (nationwide injunction); *Oregon v. Azar*, No. 6:19-cv-00317 (ECF No. 142) (D. Or. Apr. 29, 2019) (nationwide injunction); *California v. Azar*, No. 3:19-cv-01184-EMC (ECF No. 103) (N.D. Cal. Apr. 26, 2019) (injunction limited to the named plaintiffs); *City and County of Baltimore v. Azar*, No. 1:19-cv-01103-RDB (ECF No. 43) (D. Md. May 30, 2019) (injunction limited to the named plaintiffs). After all, Plaintiffs would suffer irreparable harm the moment an injunction were to be vacated or even modified in scope.

[16] The district court in *Faust* also noted that a specified portion of the $1.9 trillion American Rescue Plan has been allocated to farm loan assistance, and "the 8,580 farmers and ranchers who were sent offer letters represent approximately 49% of the loans that will be forgiven under the program." *Faust v. Vilsack*, No. 21-C-548, ECF No. 21 at 7. Accordingly, it is entirely possible that in the absence of an injunction, all of the funds currently allocated to the program may be depleted. *Id.* at 8.

Plaintiffs' injuries are also irreparable because they cannot seek monetary relief due to Defendants' sovereign immunity. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009), *vacated on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. California*, *Inc.*, 565 U.S. 606 (2012) ("We are persuaded that because the Hospital Plaintiffs and their members will be unable to recover damages against the Department even if they are successful on the merits of their case, they will suffer irreparable harm if the requested injunction is not granted."). *See also April in Paris v. Becerra*, 494 F. Supp. 3d 756, 770 (E.D. Cal. 2020) ("Where . . . sovereign immunity bars a financial recovery, monetary injury may be irreparable."); *Calvillo Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1106 (N.D. Cal. 2018) ("Where sovereign immunity bars certain types of damages, those damages can constitute irreparable harm."). Thus, a preliminary injunction is necessary to ensure that Plaintiffs are able to secure full relief. *See Faust v. Vilsack*, No. 21-C-548, ECF No. 21 at 8 ("Plaintiffs' injuries are also irreparable in light of Defendants' sovereign immunity and Plaintiffs' inability to seek damages.").

III. The Balance of Harms and Public Interest Weigh in Plaintiffs' Favor

The irreparable harms that Plaintiffs will suffer without a preliminary injunction outweigh any harm that the preliminary injunction would cause Defendants. This is clear because the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see also Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations."). Moreover, Defendants cannot show that an injunction would cause them any direct harm, since it would simply prevent them from providing loan assistance in a race-based fashion. And Defendants have declared "that they will not foreclose on any delinquent loans and that banks holding USDA-backed loans will

not foreclose on them." *Faust v. Vilsack*, No. 21-C-548, ECF No. 21 at 8. Thus, a preliminary injunction would not put minority farmers who might otherwise receive payments under Section 1005 at risk of foreclosure. By contrast, absent a preliminary injunction, Plaintiffs would suffer an irreparable violation of their constitutional rights.

Similarly, because Section 1005 violates Plaintiffs' constitutional rights, an injunction is in the public interest. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Because Plaintiffs have established a strong likelihood of success on the merits of their constitutional claim, the public interest weighs in favor of a preliminary injunction to restrain Defendants from enforcing a likely unconstitutional statute.

IV. No Security Should Be Required

No bond should be required in this case. "Federal courts have consistently waived the bond requirement in public interest . . . litigation, or required only a nominal bond." *Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1198 (D. Or. 2012) (citing *People of State of Calif. ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319 (9th Cir. 1985)). Moreover, Plaintiffs have established a strong likelihood of success on the merits given Defendants' explicit reliance on race, a highly suspect classification, and this "tips in favor of a minimal bond or no bond at all." *Van De Kamp*, 766 F.2d at 1326. Finally, "the bond amount may be zero if there is no evidence the party will suffer damages from the injunction," and that is the case here. *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). There is therefore no need for a bond or other security.

CONCLUSION

The Motion for a Preliminary Injunction should be granted.

DATED: June 29, 2021.

Respectfully submitted,

By /s/ Christina M. Martin
Christina M. Martin, OSB #084117
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, Florida 33410
Telephone: (561) 691-5000
CMartin@pacificlegal.org

Wencong Fa
Cal. Bar No. 301679*
Daniel M. Ortner
Cal. Bar No. 329866*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
WFa@pacificlegal.org
DOrtner@pacificlegal.org

Glenn E. Roper
Colo. Bar No. 38723*
Pacific Legal Foundation
1745 Shea Center Dr., Suite 400
Highlands Ranch, Colorado 80129
Telephone: (916) 419-7111
GERoper@pacificlegal.org

Attorneys for Plaintiffs Kathryn and James Dunlap
** pro hac vice*

CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 6,395 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

/s/ Christina M. Martin
Christina M. Martin, OSB #084117

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2021, I caused the foregoing to be served via U.S. Priority Mail (certified) on the following parties:

Thomas J. Vilsack, Secretary
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

Zach Ducheneaux, Administrator
Farm Service Agency
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Acting U.S. Attorney Scott Erik Asphaug
c/o Civil Process Clerk
1000 SW Third Ave Suite 600
Portland, Oregon 97204

/s/ Christina M. Martin
Christina M. Martin, OSB #084117

Exhibit 1

P. Mot. for Prelim. Injunct./Order, Wynn v. Vilsack

Court: D. Or. Case No. 2:21cv942-SU

Pacific Legal Foundation
930 G Street
Sacramento CA 95814 – 916.419.7111

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SCOTT WYNN, an individual,

Plaintiff,

v. Case No. 3:21-cv-514-MMH-JRK

THOMAS J. VILSACK, in his official capacity as U.S. Secretary of Agriculture and ZACH DUCHENEAUX, in his official capacity as Administrator, Farm Service Agency,

Defendants.

ORDER

THIS CAUSE is before the Court on Plaintiff's Motion for Preliminary Injunction (Doc. 11; Motion) filed May 25, 2021, Defendants Response in Opposition to Plaintiff's Motion for Preliminary Injunction (Doc. 22; Response) filed June 4, 2021, and Plaintiff's Reply in Support of Motion for Preliminary Injunction (Doc. 23; Reply) filed June 9, 2021.[1] On June 16, 2021, the Court held a hearing on the Motion at which the parties argued their respective positions. Accordingly, the Motion is ripe for review.

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[1] The Court also considered the brief filed by the National Black Farmers Association (NBFA) and Association of American Indian Farmers (AAIF). (Doc. 25; Amicus Brief).

I. Background

In this action, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), [2] which provides debt relief [3] to "socially disadvantaged farmers and ranchers" (SDFRs). (Doc 1; Complaint). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120% of the indebtedness, as of January 1, 2021, of an SDFR's direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section 1005 incorporates 7 U.S.C. § 2279's definition of an SDFR as "a farmer of rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). A "socially disadvantaged group" is defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are "Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander." Complaint at ¶ 3; see also U.S. Dep't of Agric., American Rescue Plan Debt Payments, https://www.farmers.gov/americanrescueplan (last visited June 22, 2021). White or Caucasian farmers and ranchers do not.

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[2] Pub. L. No. 117-2, 135 Stat. 4.

[3] At the hearing, counsel for the Government took exception to the Court's use of the term "loan forgiveness," arguing the relief is properly categorized as "debt relief." (Doc. 37; Hearing Transcript at 48). To avoid confusion, the Court will use the term debt relief throughout this Order to refer to the relief provided to SDFRs in Section 1005.

Plaintiff is a White farmer in Jennings, Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. Complaint ¶ 9. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the United States Department of Agriculture (USDA) and head of the FSA, in their official capacities. Id. ¶¶ 10-11. In his two-count Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment's Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA) (Count II). See generally Complaint. Plaintiff seeks (1) a declaratory judgment that Section 1005's provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys' fees and costs. Id. at 20-21.

II. Legal Standard

A preliminary injunction is an extraordinary and drastic remedy. See McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998); see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."); Davidoff & CIE, S.A. v. PLD Int'l Corp., 263 F.3d 1297, 1300 (11th Cir. 2001). Indeed, "[a] preliminary injunction is a powerful exercise of judicial authority in advance of

trial." Ne. Fla. Chapter of Ass'n of Gen Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1284 (11th Cir. 1990). This is particularly true with respect to preliminary injunctions of legislative enactments, which "must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." Id. at 1287. This is because such injunctions "interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits . . . ." Id.; see also Robinson v. Attorney General, 957 F.3d 1171, 1178-79 (11th Cir. 2020) ("[t]he chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." (internal quotations and citation omitted)).

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter, 555 U.S. at 20. The Eleventh Circuit recently described the heavy burden on a party seeking preliminary injunctive relief as follows:

> A district court may grant a preliminary injunction only if the moving party establishes that: (1) [he] has a substantial likelihood of success on the merits; (2) [he] will suffer an irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the

> opposing party; and (4) the injunction would not be adverse to the public interest.

Gonzalez v. Governor of Georgia, 978 F.3d 1266, 1270-71 (11th Cir. 2020); see also Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc). However, the court also instructed that "the third and fourth factors merge when, as here, the Government is the opposing party." Id. at 1271 (internal quotations and citation omitted).

The movant, at all times, bears the burden of persuasion as to each of these requirements. See Ne. Fla., 896 F.2d at 1285. In deciding whether a party has met its burden, "[a] district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995) (internal quotations and citation omitted); see also Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc., 304 F.3d 1167, 1171 (11th Cir. 2002) ("Preliminary injunctions are, by their nature, products of an expedited process often based upon an underdeveloped and incomplete evidentiary record."). Notably, a party's failure to establish any one of the essential elements will warrant denial of the request for preliminary injunctive relief and obviate the need to discuss the remaining elements. See Pittman v. Cole, 267 F.3d 1269, 1292 (11th Cir. 2001) (citing Church v. City of Huntsville,

30 F.3d 1332, 1342 (11th Cir. 1994)); Del Monte Fresh Produce Co. v. Dole Food Co., 148 F. Supp. 2d 1326, 1339 n.7 (S.D. Fla. 2001).

III. Discussion

a. Likelihood of Success

Beginning with the first element required to obtain preliminary injunctive relief, Plaintiff contends that the record before the Court shows that he has a likelihood of success on the merits of his claim that Section 1005 is unconstitutional because it violates his right to equal protection under the law. Motion at 10. This element is often considered the most important factor in granting preliminary injunctive relief. See Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986).

Since Section 1005 is a race-based governmental action, it is subject to strict scrutiny. Grutter v. Bollinger, 539 U.S. 306, 326 (2003). As noted by the Supreme Court,

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion). Indeed, the Supreme Court instructs that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995).

"Although all government uses of race are subject to strict scrutiny, not all are invalidated by it." Grutter, 539 U.S. at 326-27; see also Adarand, 515 U.S. at 237 (seeking to "dispel the notion that strict scrutiny is strict in theory, but fatal in fact." (internal quotations and citations omitted)). To survive strict scrutiny, a law must serve a compelling governmental interest and be narrowly tailored to further that interest. Adarand, 515 U.S. at 227 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."). Thus, Plaintiff's likelihood of success in this action turns on whether Section 1005 satisfies these requirements.

i. Compelling Governmental Interest

In the Response, the Government states that its "compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of 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." Response at 18. In cases applying strict scrutiny, the Eleventh Circuit has instructed:

> In practice, the interest that is alleged in support of racial preferences is almost always the same—remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest.

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations omitted). Thus, to survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. Id. at 1565. The law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cnty., the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained:

> A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy. However, a governmental entity can justify affirmative action by demonstrating gross statistical disparities between the proportion of minorities hired and the proportion of minorities willing and able to do the work. Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.

Id. (internal quotations and citations omitted). Also, the court reaffirmed the Ensley Branch court's conclusion that although the Constitution requires strong evidence of discrimination to justify the need for a race-based remedy, a proponent of such a remedy need not have produced such evidence before adopting the remedy. Id. at 911 (quoting Ensley Branch, 31 F.3d at 1565). As such, the Government is not precluded from presenting post enactment evidence to establish a compelling governmental interest in this case. Id.

Here, to establish the requisite evidence of discrimination, the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress' request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress.[4] See Response at 6-13 (citing

[4] Plaintiff contests the Government's ability to rely on such evidence, arguing there is no basis to determine what evidence Congress relied on when it passed Section 1005. See Motion at 4-6; Reply at 8-9. However, formal findings by a government entity "need neither precede nor accompany the adoption of affirmative action." Ensley Branch, 31 F.3d at 1565; see also Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (rejecting any formal findings requirement). In reaching that conclusion in the public employer context, the Eleventh Circuit allowed the Government to justify its affirmative action plans post-hac using any evidence available to it. Ensley Branch, 31 F.3d at 1568 ("If the City and Board can now show strong evidence of the need for affirmative action in a department, then future affirmative action in that department is justified."); see also Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992) ("The law is plain that the constitutional sufficiency of a state's proffered reasons necessitating an affirmative action plan should be assessed on whatever evidence is presented, whether prior to or subsequent to the program's enactment."); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1004 (3d Cir. 1993) (observing that "[b]ecause injunctions are prospective only, it makes sense to consider all available evidence . . . including prospective evidence."). That said, there are several categories of evidence that are less significant than others. For example, any floor statement made by legislators advocating for Section 1005's passage that are not backed by statistical or anecdotal evidence should likely be afforded little or no weight. See N.L.R.B. v. SW General, Inc., 137 S. Ct. 929,

floor statements made by Senators Corey Booker (Booker Floor Statement), Debbie Stabenow (Stabenow Floor Statement), and others in the Congressional Record from March 5, 2021, reported at S.1262-66.). This evidence consists of substantial evidence of historical discrimination that predates remedial efforts made by Congress and, to a lesser extent, evidence the Government contends shows continued discrimination that permeates USDA programs.

The historical evidence includes things such as a dramatic decrease in minority owned farms from 1920 to 1992; USDA's discriminatory treatment of SDFRs when they applied for loans through USDA, resulting in lower approval rates among minority farmers; when loans were offered, they were frequently for reduced amounts compared to the amount sought by SDFR applicants and on less favorable terms; inequities in how the loans of minority farmers were serviced by USDA; lack of SDFR representation on local USDA committees that were responsible for overseeing USDA loan programs; and concerted efforts by USDA to ignore complaints of discrimination made by minority farmers. Response at 3-6, 20-25 (collecting evidence). It is undeniable—and notably uncontested by the parties—that USDA had a dark history of past discrimination against minority farmers. Compare id. with Reply at 4.

943 (2017) (noting "floor statements by individual legislators rank among the least illuminating forms of legislative history.").

Based on the historical evidence of discrimination, Congress took remedial measures to correct USDA's past discrimination against SDFRs. These measures included implementation of the "2501 Program" to increase outreach to SDFRs; entering into multiple class action settlements with various SDFR groups and awarding approximately $2.4 billion in relief to those who were discriminated against; extending the statutory limitations period for individuals to file discrimination claims against USDA; creating formal officers that are responsible for ensuring compliance with civil rights laws and nurturing relationships among SDFR populations; and adopting measures to increase SDFR participation on local USDA committees. Response at 7-8. Due to the significant remedial measures previously taken by Congress, for purposes of this case, the historical evidence does little to address the need for continued remediation through Section 1005. Rather, for the Government to show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA's past discrimination or that the Government remains a "passive participant" in discrimination in USDA loans and programs. See Eng'g Contractors, 122 F.3d at 911. This is where the evidence of continued discrimination becomes crucial, and may be inadequate.

The Government contends its prior measures were insufficient to remedy the effects of past discrimination because "state taxes eroded recoveries, debt

relief was incomplete, and reports before Congress showed that the settlements have not cured the problems faced by minority farmers." Response at 5 (citing Stabenow Floor Statement). However, the actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory. For example, the Government points to the insufficiency of USDA's prior outreach efforts to SDFRs that has resulted in a general distrust among SDFRs in government programs. Stabenow Floor Statement (citing statistic that 73% of Black farmers were not aware of pandemic relief programs available to them due to poor efforts at outreach and lingering distrust of USDA). While this evidence could support a need for greater outreach efforts such as those provided for in Section 1006 of the ARPA, it is not tied in any way to a governmental interest in affording SDFRs broad race-based debt relief and does not support a finding that USDA continues to be a participant, passive or active, in discrimination.

The Government also relies on three reports by the Government Accountability Office. Two reports from 2019[5] document a number of barriers that make it more difficult for SDFRs to obtain financing—including smaller farm sizes, weaker credit histories, and lack of clear title to land—but similarly

[5] GAO-19-464, INDIAN ISSUES: Agricultural Credit Needs and Barriers to Lending on Tribal Lands (May 2019); GAO-19-539, AGRICULTURAL LENDING: Information on Credit and Outreach to Socially Disadvantaged Farmers and Ranchers is Limited (July 2019).

fail to connect those barriers to prior or ongoing discrimination by USDA or to a need for complete debt relief.[6] The Government also cites to a recent report from 2021,[7] but that report does not add any new evidence as it merely echoes the findings of the two 2019 reports as part of a more general discussion of minority owned businesses' limited access to credit. Thus, from an evidentiary standpoint, these reports do little to move the needle in the Government's favor.[8]

The Government also contends SDFRs received a disproportionately low proportion of pandemic relief assistance authorized in prior legislation, thereby suggesting it remains a passive participant in discrimination. Response at 9-10. Specifically, the Government cites to two statistics related to recent USDA programs that have disproportionately benefited White farmers. The first statistic shows 99.4% of relief under USDA's Market Facilitation Program (MFP) went to White farmers. Response at 10 (citing N. Rosenberg, USDA Gave

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[6] Notably, both 2019 reports include qualifying language regarding the limited nature of information regarding SDFRs access to credit. Both reports also include recommendations to remedy the barriers identified, none of which include absolute debt relief, much less debt relief awarded strictly on the basis of race.

[7] GAO-21-399T, FIN. SERVS.: Fair Lending, Access, and Retirement Sec. (Feb. 24, 2021).

[8] The Government's reliance on the Jackson Lewis report does not fill the gap. Jackson Lewis, LLP, "Civil Rights Assessment" (Mar. 31, 2011). Notably, the Jackson Lewis report found SDFR "participation reasonably well reflected their respective Principal Operator populations," with respect to FSA loan programs and, with respect to Rural Development loan programs, SDFR "participation for all groups exceeded their respective rural populations, with some by substantial margins." Id. at xxi. Also, despite presenting numerous detailed recommendations to address the challenges faced by SDFRs, none included outright debt relief.

Almost 100 Percent of Trump's Trade War Bailout to White Farmers, Farm Bill Law Enterprise (July 24, 2019)). The second statistic shows 97% of the $9.2 billion in pandemic relief provided through USDA's Coronavirus Food Assistance Program in 2020 went to nonminority farmers. Stabenow Floor Statement at 1264 (citing J. Hayes, USDA Data: Nearly all Pandemic Bailout Funds Went to White Farmers, Envir'l Working Group (Feb. 18, 2021)). Even taking these statistics at face value, they are less useful than they may appear to be.

The first statistic is qualified by the fact that: "[a]pproximately seven percent of the funds went to entities owned by corporations or individuals whose race was not reported." N. Rosenburg, supra. The report also identifies farm size and specific crops—namely, soybeans—as being the target of MFP funding, not racial identity. Id. As to the second statistic, both parties at least tacitly acknowledge the 2020 relief went primarily to nonminority farmers because the legislation targeted large farms that were disproportionately owned by nonminority farmers—not because the relief efforts were facially discriminatory. See Response at 10; Reply at 8. Where a race-neutral basis for a statistical disparity can be shown, the Court can give that statistical evidence less weight. Eng'g Contractors, 122 F.3d at 923. Here, the statistical discrepancies presented by the Government can be explained by non-race related factors—farm size and crops grown—and the Court finds it unlikely that

this evidence, standing alone, would constitute a strong basis for the need for a race-based remedial program.

Additionally, the Government argues that SDFRs were in a more precarious financial position headed into the pandemic due to prior discrimination, citing evidence of higher delinquency and foreclosure rates among SDFRs compared to nonminority farmers. Booker Floor Statement (citing statistics that 13% of FSA direct loan recipients are currently delinquent, but that group is made up of 35% of Black farmers and 24% of Hispanic, Asian-American, and Indigenous farmers). The problem with the Government's reliance on this evidence lies in the fact that the statistical evidence for the Government's broader proposition is lacking. The Government has not connected SDFRs disproportionate delinquency status to actual discrimination by USDA outside of conclusory remarks made in support of the legislation. Courts must be wary of finding statistical disparities untethered to evidence of discrimination sufficient grounds for implementation of a race-based program. See Croson, 488 U.S. at 499-500 (criticizing the district court's reliance on speculative statistics and finding they did not amount to evidence of discrimination).

On the record presented here, the Court expresses serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005's race-based remedial action.

The statistical and anecdotal evidence presented appears less substantial than that deemed insufficient in Eng'g Contractors, which included detailed statistics regarding the governmental entity's hiring of minority-owned businesses for government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts. Id. at 912. To the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the GAO Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to White farmers. Nevertheless, at this stage of the proceedings, the Court need not determine whether the Government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation.[9] This is because, assuming the Government's evidence establishes

[9] While the Court expresses reservations regarding the sufficiency of the Government's evidence of a compelling governmental interest supporting the need for further broad ongoing relief, the Court recognizes that this record – consisting only of a complaint and briefing and evidence pertinent to the Motion for Preliminary Injunction – is limited. On a more fully developed record, the Government may be able to establish that despite past remedial efforts the harm caused by the disgraceful history of discrimination by the USDA in farm loans and programs is ongoing or that the Government is in some way a participant in perpetuating that discrimination such that further narrowly tailored affirmative relief is warranted.

the existence of a compelling governmental interest warranting some form of race-based relief, for the reasons discussed below, Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest.

ii. Narrow Tailoring

Even if the Government establishes a compelling governmental interest to enact Section 1005, Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. The narrow tailoring requirement ensures that "the means chosen 'fit' th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Croson, 488 U.S. at 493 (plurality opinion). "The essence of the 'narrowly tailored' inquiry is the notion that explicitly racial preferences ... must be only a 'last resort' option." Eng'g Contractors, 122 F.3d at 926 (quoting Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993)); see also Croson, 488 U.S. at 519 (Kennedy, J., concurring) ("[T]he strict scrutiny standard ... forbids the use even of narrowly drawn racial classifications except as a last resort."). In determining whether a race-conscious remedy is appropriate, the Supreme Court instructs courts to examine several factors, including the necessity for

the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." U.S. v. Paradise, 480 U.S. 149, 171 (1987).

Here, little if anything about Section 1005 suggests that it is narrowly tailored. As an initial matter the Court notes that the necessity for the specific relief provided in Section 1005—debt relief for all SDFRs with outstanding qualifying farm loans as of January 1, 2021—is unclear at best. As written, Section 1005 is tailored to benefit only those SDFRs who succeeded in receiving qualifying farm loans from USDA, but the evidence of discrimination provided by the Government says little regarding how this particular group of SDFRs has been the subject of past or ongoing discrimination. See Section III(a)(i), supra.[10] Thus, the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident.

More importantly, Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision

[10] Although the Government argues that historical discrimination against SDFRs also included things such as higher interest rates, less advantageous loan terms, and delayed approvals, the record evidence does not appear to show that SDFRs with current loans suffered such discrimination.

applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group[11] who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120% debt relief—and no one else receives any debt relief. Although the Government argues that Section 1005 is narrowly tailored to reach small farmers or farmers on the brink of foreclosure, it is not. Regardless of farm size, an SDFR receives up to 120% debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120% debt relief. Yet a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005.

At the preliminary injunction hearing, the Government cited the Eleventh Circuit decision in Cone Corp. v. Hillsborough Cnty., 908 F.2d 908, 910 (11th Cir. 1990) as support for a finding that Section 1005 is a constitutional exercise of Congress' authority, but a review of the differences between the

[11] Presently, this means only the five racial classifications addressed above. See Section I, supra. However, an individual can petition the Secretary to deem his or her group socially disadvantaged. See Response at 13; see also Hearing Transcript at 27-28 (noting various petitions being made to the Secretary to declare additional ethnic groups as socially disadvantaged for purposes of Section 1005). As noted previously, the definition of a socially disadvantaged group is limited and extends only to a "group that has been subjected to racial or ethnic prejudice because of their identity as a member of a group without regard to their individual qualities." 7 U.S.C. § 2279(a)(6).

affirmative action scheme reviewed in Cone Corp. only highlights the failure of Section 1005. In Cone Corp., the Eleventh Circuit reviewed the entry of summary judgment and a permanent injunction against a county that implemented a minority business enterprise (MBE) program designed to promote the use of minority-owned businesses on certain county construction projects. 908 F.2d 908, 910 (11th Cir. 1990). Under the program, after evaluating available data regarding a project and the number of qualified MBE contractors available in a given area, the county would set a goal for MBE participation on the project before soliciting bids for it. Id. If there were not at least three qualified MBEs in the relevant area, no MBE participation goal would be set for that project. Id. Also, low bidders that did not satisfy the MBE participation goal had an administrative review process during which the low bidder could qualify to be awarded the contract by meeting other established race neutral criteria. Id. at 911.

Seeing substantial similarity between the county's MBE program and that found unconstitutional in Croson, the district court entered summary judgment against the county and enjoined the use of the MBE program. Id. at 911-12. On appeal, the Eleventh Circuit found that decision to be in error. Id. at 912. In doing so, the court pointed to several critical factors that distinguished the county's MBE program from that rejected in Croson: (1) the county had tried to implement a less restrictive MBE program for six years

without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in Croson, the county's program did not benefit "groups against whom there may have been no discrimination," instead its MBE program "target[ed] its benefits to those MBEs most likely to have been discriminated against . . . ." Id. at 916-17. Section 1005's inflexible, automatic award of up to 120% debt relief only to SDFRs stands in stark contrast to the flexible, project by project Cone Corp. MBE program.

The Eleventh Circuit's decision in Ensley Branch is also instructive as to the contours of race-based relief that would be sufficiently narrowly tailored to withstand constitutional scrutiny. There, in considering the constitutionality of consent decrees that contained race-based annual goals and long-term goals, the court contrasted the remedy provided in those decrees with programs that provided narrowly tailored relief. Ensley Branch, 31 F.3d at 1569. First, the court pointed to Howard v. McLucas, 871 F.2d 1000 (11th Cir. 1989), in which it explained:

> we applied strict scrutiny to a consent decree provision that reserved a certain number of promotions for blacks. The number of promotions reserved matched the number of promotions that had been lost by blacks due to past discrimination. The "set aside"

> was thus narrowly tailored to correct the precisely identified effects of past discrimination.

Ensley Branch, 31 F.3d at 1569 (internal citations omitted). Next, the court turned to Cone Corp., noting that although the MBE program included a minority participation goal, the county "would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses." Id. In this way the court observed the county's MBE program "had been carefully crafted to minimize the burden on innocent third parties." Id. (citing Cone Corp., 908 F.2d at 911). Rejecting the race-based goals contemplated in the Ensley Branch decrees, the court concluded that the decrees "lack both the extreme specificity of the Howard plan and the generous flexibility of the Cone Corp. plan. They are not narrowly tailored." Id. at 1569-70.

Section 1005 appears to suffer from similar deficiencies. Unlike the Howard plan, the 120% debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the Cone Corp. MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in Croson and other similar cases. See In re Birmingham

Reverse Discrimination Employment Litigation, 20 F.3d 1525, 1548 (11th Cir. 1994) (finding requirement that 50% of all promotions to lieutenant be filled by "qualifying blacks" not narrowly tailored); Gratz v. Bollinger, 539 U.S. 244, 271-72 (2003) (rejecting as not narrowly tailored a law school admissions policy that automatically distributed "20 points to every single applicant from an 'underrepresented minority' group," which had "the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant.").

Moreover, on the record before the Court, it appears that in enacting Section 1005 Congress relies, albeit without any ill intention, on present discrimination to remedy past discrimination. But the Eleventh Circuit disapproved of such a course of action in Ensley Branch. 31 F.3d at 1553-56. There the court noted that despite having been ordered years earlier to implement a nondiscriminatory selection process, the City of Birmingham continued to use a discriminatory test to make hiring and promotion decisions. Id. Never having fixed the test, the solution proposed to address the ongoing effects of the city's discriminatory practices involved instituting a race-based quota system for promotions to ensure racial parity. Id. at 1572. The Eleventh Circuit unequivocally rejected such a plan as constitutionally inappropriate, stating

> By permitting the continued use of discriminatory tests, the decrees compound the very evil they were designed to eliminate. The Constitution will not allow such a discriminatory construct. One color of discrimination has been painted over another in an effort to mask the peeling remnants of prejudice past, leaving a new and equally offensive discoloration rather than a clean canvas.

Id. at 1572-73; see also In re Birmingham, 20 F.3d at 1548 (rejecting the use of a strict racial quota system for promotion within a city department, noting the approach was "designed to achieve government-mandated racial balancing—[which is] the perpetuation of discrimination by government."). To allow the perpetuation of discrimination in such a manner would undermine the Supreme Court's "ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race . . . ." Croson, 488 U.S. at 495.[12] If the compelling interest sought to be remedied by the legislature through Section 1005 is continued discrimination in USDA loans and programs, then relief directed at ending that discrimination would appear to be more narrowly tailored than providing complete and automatic debt relief on the basis of race.

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[12] The use of race to achieve parity has long been considered a slippery slope that reinforces prejudice rather than eliminates it. See Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 298 (1978) (plurality opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth."). The Government's own positions in this case appear to fall prey to this evil, as they require certain broad assumptions to be made about all SDFRs in order to avoid close scrutiny. See, e.g., Hearing Transcript at 52-53 (suggesting, among other things, that it is "unlikely" any SDFR will receive a double benefit under prior pandemic relief and Section 1005 because minority farmers tend to have smaller farms, bring in less revenue, and are less credit worthy and therefore excluded from obtaining loans in the private market).

Additionally, on this record, it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship. For example, a new SDFR who applied for and received the only farm loan he or she ever sought on terms equivalent or even better than those given to other farmers is entitled to up to 120% debt relief despite never having faced any of the discrimination catalogued by the Government. This is highly likely, as the Government conceded at the preliminary injunction hearing that the farm loans that will qualify for repayment "are generally loans by folks new to the industry, starting their farms, things like that." Hearing Transcript at 52-53. Additionally, Section 1005 provides debt relief to groups including Asians, Native Hawaiians, and Pacific Islanders, groups for which the evidence of prior discrimination by the USDA in farm loans, programs and services appears to be exceedingly thin. The overinclusive nature of the relief casts doubt on its necessity. Croson, 488 U.S. at 506 ("The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation."). see also O'Donnell Const. Co. v. District of Columbia, 963 F.2d 420, 427 (D.C. Cir. 1992) (noting that the inclusion of groups for whom there is no history of discrimination raises doubts as to the remedial nature of a government's plan).

Moreover, there is little evidentiary support for the magnitude of relief provided by Section 1005—up to 120% debt relief to all SDFRs with qualifying farm loans—which appears to duplicate or in some instances exceed the relief provided to those who actually suffered the well-documented historic discrimination Congress sought to remedy through prior settlements. See, e.g. Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) aff'd, 206 F.3d 1212 (D.C. Cir. 2000).[13] To the extent Section 1005 is intended to address the alleged erosion of prior relief identified by Senators Booker and Stabenow in their floor statements, the Government presents no evidence that the recipients of Section 1005's relief are the same persons or in any way—but race—similarly situated to the persons that received the previous, potentially inadequate relief. Nor does it explain how providing this debt relief to current loan holders is narrowly tailored to address the concern of previously inadequate relief. On the record before the Court at this stage in the case, it does not appear that Section 1005

[13] In Pigford, a consent decree was entered that provided victims of USDA discrimination between January 1, 1981 and January 1, 1997 two alternatives for obtaining relief. 185 F.R.D. at 95. Claimants who proceeded under "Track A" would receive $50,000 in a capped monetary award if they could provide some evidence of discrimination, while claimants who proceeded under "Track B" were not subject to the monetary cap but were required to meet the more exacting preponderance of the evidence standard in establishing discrimination. Id. at 95-97. Successful claimants under either track received loan forgiveness of their USDA loans and tax payments made on their behalf in the amount of 25% of the total debt forgiveness and cash payment. Id. at 97. However, subsequent stipulations and court orders interpreting the consent decree limited the debt forgiveness available to claimants to amounts incurred after the first date of discrimination. See Pigford v. Schafer, 536 F. Supp. 2d 1, 5 (D.D.C. 2008). Therefore, although some Pigford claimants received complete loan forgiveness of their USDA loans, the relief afforded in Pigford was not as expansive as Section 1005's debt relief provision.

is narrowly tailored such that it "eliminates no more than the exact source of the 'evil' it seeks to remedy." Frisby v. Schultz, 487 U.S. 474, 485 (1988). Rather, it appears to be rigidly overinclusive in both its reach and its remedy.

Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination. While the Government argues that a remedy for past discrimination need not be limited to remedying specific instances of discrimination, Hearing Transcript at 53, or include an individualized determination of prior discriminatory treatment, it fails to explain how a remedy that by its own terms may have the effect of excluding past victims of the very discrimination it seeks to remedy is actually tailored, narrowly or not, to remedy that discrimination. Section 1005's debt relief also does not increase SDFR representation within USDA; address alleged discrepancies in the way USDA has serviced farm loans held by SDFRs or change how they will be serviced in the future; help SDFRs who were denied funding for farm loans; improve access to farm loans for SDFRs; or restore farms or land to SDFRs who have had their farms taken away through discriminatory foreclosure practices—all of which are concerns the Government raises in support of the need for remedial measures.

The Government attempts to justify Section 1005's broad race-based relief without any showing of past harm or any effort to craft a more narrowly tailored remedy by arguing that Congress wanted to get relief to SDFRs quickly because they are disproportionately on the brink of foreclosure. Hearing Transcript at 50. However, the Eleventh Circuit has explicitly rejected what it describes as "administrative convenience" as a substitute to finding "a narrowly tailored means to remedy prior discrimination." In re Birmingham, 20 F.3d at 1548 ("We can imagine nothing less conducive to eliminating the vestiges of past discrimination than a government separating its [people] into two categories, black and non-black, and allocating a rigid, inflexible number of promotions to each group . . . ."); see also Gratz, 539 U.S. at 275 ("the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."). The court also has instructed that while a more narrowly tailored approach may be administratively burdensome, "minimizing inconvenience is not a constitutional value." Ensley Branch, 31 F.3d at 1574 ("[t]he Constitution does not put a price on constitutional rights, in terms either of time or money. The rights guaranteed by the Constitution are to be made effective in the present.") (alteration in original). Thus, the use of race based on an intention to act quickly does not overcome the failure to identify and provide a remedy that is narrowly tailored

to address the specific interest the Government has found to be a compelling interest.[14]

Finally, there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005. The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy USDA's discrimination against SDFRs. Response at 7-8. However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately to White farmers. Response at 10 (citing floor statements that in turn reference an advocacy group's findings that 97% of the

[14] There are many ways in which Section 1005 could have been more narrowly tailored to address pandemic-related concerns. For example, USDA already implemented a foreclosure and eviction moratorium and a broad forbearance policy for Direct and Guaranteed loans, which constitutes a narrowly tailored remedy that keeps farmers facing financial hardships from losing their farms or falling further behind on their payments. See, e.g., Press Release No. 0026.21, USDA Extends Evictions and Foreclosure Moratorium to June 30, 2021 and Provides Additional Guidance for Servicing Loans Impacted by COVID-19 (Feb. 16, 2021). Congress could then have targeted the approximately 13% of farmers currently delinquent on their farm loans, which are made up of approximately 35% Black farmers and 24% Hispanic, Asian-American, and Indigenous farmers, as opposed to targeting 100% of all SDFRs without regard for their individual financial positions. Laws targeting small farms or specific crops that were left out of prior relief bills would also represent narrowly tailored relief, even though, according to the Government, that relief would disproportionately benefit SDFRs.

$9.2 billion in USDA pandemic relief went to White farmers). However, as discussed above, the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race. Response at 10; Reply at 8.[15]

To satisfy the narrow tailoring requirement, "given the odious nature of race-based decisionmaking, race-neutral alternatives should be considered before a government implements an affirmative action plan using race as the sole criteria upon which [decisions] are based." In re Birmingham, 20 F.3d at 1545-46; see also Eng'g Contractors, 122 F.3d at 927 ("[i]f a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem."). The record before the Court does not show that Congress undertook that consideration when enacting Section 1005. Indeed, the statements by legislators that prior efforts by Congress have been insufficient to remedy past discrimination appear to be more akin to the "perfunctory" findings found to be entitled to little weight in Eng'g Contractors, 122 F.3d at 927-28.[16] Thus, on the current record, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, Plaintiff is likely to show that Congress "failed to give serious good faith consideration

[15] And a remedy for the disparity could be a targeted allocation of the remaining pandemic relief.

[16] As noted in footnote 4 supra, these statements, in the absence of supporting evidence are of limited value.

to the use of race and ethnicity-neutral measures" to achieve the compelling interest supporting Section 1005. Ensley Branch, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a "last resort," but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the Court is not persuaded that the Government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest. The constitutional right to equal protection guarantees that racial classifications will be permitted only with "the most exact connection between the justification and classification." Wygant, 476 U.S. at 280. The evidence regarding Section 1005's enactment presents some connection between the justification and the race-based relief but falls short of presenting an "exact connection." Moreover, Section 1005 does not appear to contain any of the hallmarks of a narrowly tailored race-based affirmative action plan, such as those identified in Howard, 871 F.2d at 1008-11, and Cone Corp., 908 F.2d at 916-17. Rather, it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or irradicate the evils of

discrimination that remain following Congress' prior efforts to remedy the same. Therefore, the Court is satisfied that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest. As such, Plaintiff has shown a strong likelihood of success on his equal protection and APA claims.

b. Irreparable Harm

Regardless of a party's showing of a likelihood of success, a party seeking preliminary injunctive relief must show that he or she will suffer irreparable harm if the Court does not issue an injunction. See Ne. Fla., 896 F.2d at 1285. Indeed, "[a] showing of irreparable harm is the sine qua non of injunctive relief." Id. (reversing a grant of preliminary injunctive relief absent irreparable harm). The asserted irreparable harm "must be neither remote nor speculative, but actual and imminent." Id.; see also Winter, 555 U.S. at 21-22 (noting a preliminary injunction may not be entered "based only on a possibility of irreparable harm"). The Eleventh Circuit has instructed:

> An injury is "irreparable" only if it cannot be undone through monetary remedies. "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Id. (quoting Sampson v. Murray, 415 U.S. 61, 90 (1974)). Notably, more than conclusory allegations of irreparable harm or speculative assertions of economic injury will be sufficient to warrant the extraordinary relief of a preliminary injunction.

Plaintiff argues he will suffer three distinct forms of irreparable harm in this case: (1) monetary harm because of his exclusion from the loan assistance provided to SDFRs; (2) intangible harm related to the alleged violation of his right to equal protection under the law; and (3) competitive disadvantage. Hearing Transcript at 11-17. With respect to Plaintiff's claim of irreparable harm by virtue of the loss of competitive advantage, the Government argues that his declaration fails to show that he will suffer any such harm. Response at 14-16. The Court agrees. Plaintiff has not provided any evidence in support of his conclusory statement of future competitive disadvantage. He has not alleged to whom he sells his farm products, whether any of his competitors qualify as SDFRs, whether any of his competitors intend to seek loan assistance under Section 1005, or to what extent loan assistance would result in his competition gaining a competitive advantage against him. As such, it is impossible to conclude with any certainty that Plaintiff will actually suffer competitive disadvantage as a result of Section 1005 or to what extent. While it is certainly possible and perhaps even likely that Plaintiff competes with at least one SDFR who will receive loan assistance under Section 1005, the need

for such an inference renders the alleged harm speculative, and therefore insufficient for purposes of obtaining a preliminary injunction. See Ne. Fla., 896 F.2d at 1285.

In finding that, on the record before the Court, Plaintiff's alleged competitive disadvantage harm is speculative the Court does not suggest that at trial Plaintiff could not present evidence that he will suffer a competitive disadvantage as a result of the one-time transfer of wealth contemplated by Section 1005 and actual monetary harm as a result. Of course, if Plaintiff were to present evidence of such damages, he would be barred from being awarded any compensation due to sovereign immunity. Nevertheless, the Court finds that the current evidence is insufficient to support a conclusion that Plaintiff's alleged loss of competitive advantage is actual and imminent, and thus it cannot justify the extraordinary remedy of preliminary injunctive relief.

As to his claims of either monetary harm or the violation of his constitutional right, the Government argued at the hearing that neither is irreparable because either can be remedied at the conclusion of the case. At the hearing, the Government argued that, although sovereign immunity would bar an award of money damages, if Plaintiff prevails, his harm could be remedied by giving him specific equitable relief under the APA—i.e., the debt relief he seeks in the Complaint. Hearing Transcript at 58-66. Specifically, the Government argued that the Court can award Plaintiff the same debt relief

being provided to SDFRs at the end of this case. Id. at 59-61. While Plaintiff's counsel did "not necessarily disagree," he noted that he was not familiar with and had not reviewed the authority on which the Government relied for this argument as it was not cited in the Response. Id. at 69.

As support for its contention, the Government relied on Bowen v. Mass., which involved a review of the Secretary of Health and Human Services' decision to disallow a state's reimbursement request under a federal healthcare program. 487 U.S. 879, 882-83 (1988). However, that case and others like it involve eligibility determinations for funds to which the plaintiffs were entitled to receive under a specific law. See id. at 893; see also America's Cmty. Bankers v. F.D.I.C., 200 F.3d 822, 830 (D.C. Cir. 2000) (noting the purpose of a similar award was "an attempt to restore to the plaintiff that to which it was entitled from the beginning."). In other words, in those cases the plaintiffs alleged a deprivation of a benefit Congress intended for them to receive. In such cases, upon a finding that the government has deprived a plaintiff of a specific benefit to which the plaintiff was entitled under the law, the APA authorizes an award of specific relief, i.e., an award of the specific funds to which the plaintiff was entitled under the statute. See America's Cmty. Bankers, 200 F.3d at 829.

Here, the Court has no authority to award Plaintiff any debt relief under Section 1005. The statute as written by Congress unambiguously authorizes the expenditure of funds for loan assistance only to SDFRs or other qualifying

socially disadvantaged groups. There is no way to construe the law to provide debt relief to a White farmer. The Court has no authority to rewrite the law to extend that assistance to persons that Congress did not intend to benefit. See Aptheker v. Sec. of State, 378 U.S. 500, 515 (1964) ("It must be remembered that although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not carry this to the point of perverting the purpose of a statute or judicially rewriting it." (internal quotations, alterations, and citations omitted)); U.S. v. Stevens, 559 U.S. 460, 481 (2010) (noting courts "may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction." (citations omitted)); cf. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1738 (2020) (noting "only the words on the page [of a law] constitute the law adopted by Congress and approved by the President."). To do so would run afoul of separation of powers principles, which dictate that Congress, through the Appropriations Clause, has the constitutional authority to allocate funds. See America's Cmty. Bankers v. F.D.I.C., 200 F.3d 822, 830 (D.C. Cir. 2000) (noting the "separation of powers encroachment" that would result if courts were to control the appropriation of funds in cases involving program eligibility). Thus, contrary to the contention of the Government, if Plaintiff prevails in this action, the Court has no authority to order that he be given debt relief equal to that given to the SDFRs under Section 1005.

The Government also argues that Plaintiff's exclusion from debt relief under Section 1005 does not amount to any harm at all. See Response at 15-17 (focusing primarily on Plaintiff's alleged competitive disadvantage). The Court disagrees. The harm he purports to suffer is the denial of his right to equal protection–his exclusion, solely on account of his race, from eligibility for an extraordinary government benefit under Section 1005. This constitutional harm is a real harm. Indeed, the Supreme Court has recognized in the context of a standing analysis, that the injury in an equal protection case is "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate ability to obtain the benefit . . . the injury is the inability to compete on an equal footing." Gratz, 539 U.S. at 262 (internal citations and quotations omitted). Thus, that injury—the unequal treatment based solely on race—and not merely Plaintiff's inability to benefit from Section 1005 is the harm Plaintiff will suffer in the absence of injunctive relief.

Satisfied that Plaintiff's alleged constitutional injury is actual harm for purposes of obtaining a preliminary injunction, the question becomes whether Plaintiff has shown that the specific constitutional harm he will suffer is irreparable harm. The Government contends that circuit precedent unequivocally answers the question in the negative. As stated by the Eleventh Circuit:

> No authority from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation. In this case, no witnesses or other evidence was submitted on the issue of irreparable injury. The only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of first amendment and right of privacy jurisprudence. The rationale behind these decisions was that chilled free speech and invasions of privacy, because of their intangible nature, could not be compensated for by monetary damages; in other words, plaintiffs could not be made whole. The facts of this case do not fit the rationale of these decisions. This case involves neither a first amendment nor a right of privacy claim; and the damage to plaintiff here is chiefly, if not completely, economic.

Ne. Fla., 896 F.2d at 1285-86 (citations omitted); see also Siegel v. LePore, 234 F.3d 1163, 1177-78 (11th Cir. 2000) (collecting cases). While on its face Ne. Fla. appears to resolve this issue in the Government's favor, a closer reading of the case calls that conclusion into doubt.

The significant distinction between the present case and Ne. Fla. is that, in Ne. Fla., the plaintiffs stood to suffer "chiefly, if not completely, economic" damage for which they could obtain monetary relief. 896 F.2d at 1286 (noting that "contractors can, by taking reasonable steps, quantify their claims for the purpose of seeking monetary relief from the City"). Ne. Fla. did not involve a situation where the chief harm was an intangible constitutional violation for which damages cannot be measured, and even if they could, there could be no monetary remedy. See id. Other courts in this circuit, and the Eleventh Circuit

itself, have distinguished Ne. Fla. on this basis, finding the unavailability of money damages in the Eleventh Amendment context can render harm irreparable for purposes of obtaining preliminary injunctive relief. See, e.g., Odebrecht Const., Inc. v. Prasad, 876 F. Supp. 2d 1305, 1320-21 (S.D. Fla. 2012) aff'd Odebrecht Const., Inc. v. Fla. Dept. of Transp., 715 F.3d 1268, 1288 (11th Cir. 2013) (distinguishing Ne. Fla. and finding "[w]hen a plaintiff faces significant economic harm but cannot sue the state of Florida for money damages, harm is irreparable as a matter of law." (internal citations and quotations omitted)); cf. ABC Charters, Inc. v. Bronson, 591 F. Supp. 2d 1272, 1310 (S.D. Fla. 2008) (collecting out-of-circuit cases in support of the proposition that irreparable harm can be presumed where the Eleventh Amendment bars a plaintiff from recovering money damages). In fact, the rationale that led the Eleventh Circuit to recognize a presumption of irreparable harm in First Amendment and right of privacy cases—namely, the inability for money damages to make a plaintiff whole in those instances and the intangible nature of the harm—supports a finding that the Plaintiff's constitutional harm in this case is irreparable. See Ne. Fla. 896 F.2d at 1285-86; Odebrecht Const., 715 F.3d at 1288. Thus, the Court rejects the Government's contention that Plaintiff's constitutional harm cannot be irreparable harm as a matter of law.

Nevertheless, the Court does not go so far as to suggest that a showing of a violation of the right to equal protection would give rise to a presumption of

irreparable harm. The Court has no need to consider that question, because under the unique circumstances of this case, Plaintiff has shown that the specific harm he stands to suffer here in the absence of an injunction is indeed irreparable.

As discussed above, the Court cannot rewrite Section 1005 to include White farmers like Plaintiff; those decisions are left to Congress. See Stevens, 559 U.S. at 481 ("To read [the law] as the Government desires requires rewriting [by Congress], not just reinterpretation[by the Court]."). Thus, the Court cannot order the Government to provide Plaintiff with the debt relief that it has chosen to give to SDFRs but not to him. Even if the Court could rewrite the law, it would be creating a new program that Congress did not intend.[17] Judicially rewriting Section 1005 to create a debt relief program that would include a White farmer and ordering the Government to provide Plaintiff debt relief from it would not be monetary relief through inclusion in a governmental program, as urged by the Government. Hearing Transcript at 59-61. Rather, it would be an alternate form of money damages. In Bowen, the Supreme Court made the following observation:

> The term money damages, 5 U.S.C. § 702, we think, normally refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to substitute for a suffered loss, whereas

[17] Specifically, Congress only appropriated "such sums as may be necessary, to remain available until expended, for the cost of loan modifications and payments under [Section 1005]"—that is, "payment[s] in an amount up to 120 percent of the outstanding indebtedness of each [SDFR] as of January 1, 2021 . . . ." Section 1005(a).

> specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled. Thus, while in many instances an award of money is an award of damages, occasionally a money award is also a specie remedy.

487 U.S. at 895 (quoting Maryland Dept. of Human Resources v. Dept. of Health and Human Services, 763 F.2d 1441, 1446 (D.C. Cir. 1985)) (internal quotations, alterations, and citations omitted); see also Modoc Lassen Indian Housing Authority v. U.S. Dept. of Housing and Urban Development, 881 F.3d 1181, 1196-98 (10th Cir. 2017) (outlining the distinction between monetary relief and money damages in the context of the APA). Here, Section 1005 unambiguously creates a debt relief program for the benefit of SDFRs, not Plaintiff. As such, any award of debt relief to Plaintiff cannot originate from Section 1005; it must come from a substitute source and would constitute a substitute remedy. Therefore, such relief would be an award of money damages and any award of money damages in this case is barred by sovereign immunity.

Plaintiff has established that he has a substantial likelihood of success on the merits of his claim that Section 1005 violates his constitutional right to equal protection. The violation of this right is imminent because in the immediate future, the Government will provide up to 120% debt relief to qualifying SDFRs, but not to Plaintiff solely because of his race. This, he has shown, is an actual constitutional harm that cannot be undone. Absent an injunction, if Plaintiff prevails in establishing that Section 1005's debt relief

violates his constitutional right, he will have no remedy. The debt relief cannot be clawed back or undone, the Court will have no power to order Congress to provide the substitute remedy of debt relief not authorized by Section 1005, and sovereign immunity will preclude any award of money damages. In short, Plaintiff will have no remedy at all. Under the specific circumstances of this case, Plaintiff has shown that the constitutional harm he stands to suffer, which cannot be undone by money damages and for which no other remedy exists, constitutes an irreparable harm for which injunctive relief is proper. For these reasons, the Court finds Plaintiff has met his burden of establishing that absent an injunction, he will suffer irreparable harm if the Government proceeds with the debt relief authorized under Section 1005.

c. Balance of Equities

As a final consideration in determining the need for a preliminary injunction, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Winter, 555 U.S. at 24 (quoting Amoco Production Co. v. Village of Gambell, AK, 480 U.S. 531, 542 (1987)); see also Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (noting "[i]t is ultimately necessary ... to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large" before ruling on the necessity for a preliminary injunction). In exercising this "sound discretion,

courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Winter, 555 U.S. at 24 (quoting Weinberger v. Romero–Barcelo, 456 U.S. 305, 312 (1982)). This is particularly true where the potential injunctive relief impacts a legislative enactment. Ne. Fla., 896 F.2d at 1284.

Plaintiff argues the public interest element is satisfied because Section 1005 is an unconstitutional infringement on every citizen's right to be free from racial discrimination of any kind. Reply at 17-18. Indeed, the Eleventh Circuit has held "the public interest is served when constitutional rights are protected." Democratic Exec. Comm. of Fla. v. Lee, 915 F.3d 1312, 1327 (11th Cir. 2019); see also Fla. Businessmen for Free Enterprise v. City of Hollywood, 648 F.2d 956, 959 (11th Cir. 1981) ("The public interest does not support the city's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional."). The Government responds by citing the public's interest in enforcing the laws enacted by its democratically selected representatives. Response at 39 (citing 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."). The Government, NBFA, and AAIF also highlight the significant detriment SDFRs will face if Section 1005 cannot be implemented. Some SDFRs have made plans in anticipation of Section 1005's debt relief and entered into

agreements with the understanding that their farm loan balances would be paid. Amicus Brief at Exs. C and D; see also Response at Ex. A ¶ 40 (noting FSA is excluding loan balances owed by SDFRs in its loan application review process and has approved new farm loans on the understanding that Section 1005 would be implemented in full).

In weighing the interests identified by the parties, the Court returns to core aspects of this case. To the extent Section 1005 is discriminatory, it will result in an imminent, one-time act of discrimination that cannot be remedied through an award of monetary damage or other relief in this case. It also cannot be reversed after the fact, as the Government has no way to recover the debt relief once it is paid out. The effect on Plaintiff of such a large-scale debt relief program will not be quantifiable in the near future, if at all. Meanwhile, the Government's interests are largely conditioned on Section 1005 being constitutional. If the statute in fact violates the Constitution, the Government does not have a legitimate interest in its implementation regardless of whether it was passed through the democratic process. Likewise, if Section 1005 is discriminatory, SDFRs have no legitimate right to the proceeds of a facially unconstitutional legislative enactment. While the Government argues Plaintiff's interest as an individual could not possibly outweigh the interests of thousands of SDFRs, this argument ignores the fact that Plaintiff challenges the very premise that the Constitution permits the specific race-based debt

relief provided under Section 1005 to proceed at all, regardless of how well-intended the program may be or how many beneficiaries stand to be impacted. In light of Plaintiff's strong likelihood of success at this stage of the proceedings, and the Court's finding that absent an injunction he is likely to suffer irreparable harm, the Court finds that the balance of equities weigh in favor of maintaining the status quo by issuing a preliminary injunction.

IV. Conclusion

In enacting Section 1005, Congress expressed the intention of seeking to remedy a long, sad history of discrimination against SDFRs in the provision and receipt of USDA loans and programs. Such an intention is not only laudable it is demanded by the Constitution. See Wygant, 476 U.S. at 277. But in doing so, Congress also must heed its obligation to do away with governmentally imposed discrimination based on race. Id. "These related constitutional duties are not always harmonious, reconciling them requires [Congress] to act with extraordinary care." Id. On the record before the Court, it appears that in adopting Section 1005's strict race-based debt relief remedy Congress moved with great speed to address the history of discrimination, but did not move with great care. Indeed, the remedy chosen and provided in Section 1005 appears to fall well short of the delicate balance accomplished when a legislative enactment employs race in a narrowly tailored manner to address a specific compelling governmental interest.

For purposes of this Motion, Plaintiff has established a substantial likelihood that he will prevail on his claim that Section 1005, as written, violates his right to equal protection under the law. He also has shown that absent an injunction, all SDFRs with qualifying farm loans will receive up to 120% debt relief and he will suffer the harm of being excluded from eligibility for that debt relief program solely on the basis of his race. That harm, he has shown, is irreparable. The debt relief given to the SDFRs cannot be undone, the Court cannot order that Plaintiff receive equivalent relief, and money damages are precluded. The harm will be complete and its effects will be cast in stone. Only a preliminary injunction halting the distribution of payments and debt relief under Section 1005 can give Plaintiff an opportunity to obtain any redress. Such an injunction certainly impacts the SDFRs counting on the debt relief. But the Court has carefully balanced the equities and is convinced that they favor the halting of a program that is significantly likely to violate the constitutional guarantee of equal protection under the law.

In reaching this conclusion, the Court proceeds with great caution in determining that an injunction that will have nationwide effect is warranted. Justices Gorsuch and Thomas have questioned a district courts' authority to enter nationwide injunctions, see, e.g., Dep't of Homeland Sec. v. N.Y., 140 S. Ct. 599, 599-601 (2020) (concurring opinion); see also Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (noting the "disposition of the case makes it unnecessary

to consider the propriety of the nationwide scope of the injunction," leaving the question unresolved), and courts and scholars have been critical of their use. See Trump, 138 S. Ct. at 2429 (collecting scholarly articles criticizing the issuance of nationwide preliminary injunctions). This Court has never gone so far as to issue such an injunction and is firmly of the view that a narrow injunction that maintains the status quo in the specific circumstances of the plaintiff before the Court and nothing more is the appropriate remedy.

Here, despite exploring any possible more narrow option, the Court cannot identify any relief short of enjoining the distribution of Section 1005's payments and debt relief that will maintain the status quo and provide Plaintiff the opportunity to obtain any relief at all. As noted by the Supreme Court, "[o]nce a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 420 (1977) (internal quotations and citations omitted); see also Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (noting, in the context of a nationwide class action, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."). Plaintiff has shown a likelihood of success on the merits of his claim that Section 1005 is unconstitutional and, if implemented, would deprive him of his right to equal protection under the law. The implementation of Section 1005 will be swift and irreversible, meaning the

only way to avoid Plaintiff's irreparable harm is to enjoin the program.[18] The Court can envision no other remedy that will prevent the likely violation of Plaintiff's constitutional right which absent an injunction cannot be remedied in this action.

In recognition of the magnitude of the effect of the injunction entered here, the Court will require the parties to proceed with the greatest of speed in reaching a final adjudication in this case. The parties must immediately present the Court with a proposed schedule to complete any discovery that may be required on an expedited basis as well as a swift deadline for the submission of dispositive motions.

Accordingly, it is

ORDERED:

1. Plaintiff's Motion for Preliminary Injunction (Doc. 11) is **GRANTED**.

2. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are

[18] The Court reaches this conclusion without regard to any incidental benefit to other similarly situated White farmers.

immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.[19]

3. Plaintiff is not required to provide a bond or other security before this preliminary injunction becomes effective.[20]

4. No later than **June 29, 2021**, the parties must confer and submit to the Court a proposed expedited schedule to resolve the merits of this action.

DONE AND ORDERED in Jacksonville, Florida this 23rd day of June, 2021.

MARCIA MORALES HOWARD
United States District Judge

lc29
Copies to:

Counsel of Record
Pro Se Parties

[19] The Court's injunction prohibits the distribution of payments, loan assistance, or debt relief, but does not enjoin Defendants from continuing to prepare to effectuate the relief under Section 1005 in the event it is ultimately found to be constitutionally permissible.
[20] Defendants did not request a bond nor did they provide any evidence that they will suffer monetary losses as a result of the injunction.

Exhibit 2

P. Mot. for Prelim. Injunct./Order, Faust v. Vilsack

Court: D. Or. Case No. 2:21cv942-SU

Pacific Legal Foundation
930 G Street
Sacramento CA 95814 – 916.419.7111

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ADAM P. FAUST, et al.,

Plaintiffs,

v. Case No. 21-C-548

THOMAS J. VILSACK, et al.,

Defendants.

DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Twelve plaintiffs, who reside in nine different states, including Wisconsin, brought this action against the Secretary of Agriculture and the Administrator of the Farm Service Agency (FSA), seeking to enjoin officials of the United States Department of Agriculture (USDA) from implementing a loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA). Plaintiffs assert that Section 1005 denies them equal protection of the law because eligibility to participate in the program is based solely on racial classifications. This matter comes before the Court on Plaintiffs' motion for a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. For the following reasons, the motion will be granted.

The American Rescue Plan Act of 2021 was enacted on March 11, 2021. H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated "such sums as may be necessary" to pay for the cost of loan modifications and payments to "socially disadvantaged" farmers and ranchers. § 1005(a)(1). Under Section 1005, "the Secretary shall provide a payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher

as of January 1, 2021, to pay off the loan directly or to the socially disadvantaged farmer or rancher." § 1005(a)(2). Loans eligible for forgiveness include direct farm loans made by the Secretary or farm loans guaranteed by the Secretary. *Id.* The term "socially disadvantaged farmer or rancher" has the meaning given in 7 U.S.C. § 2279(a). § 1005(b)(3). Under that statute, "socially disadvantaged farmer or rancher" means a farmer or rancher who is a member of a "socially disadvantaged group." § 2279(a)(5). "Socially disadvantaged group" is then 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." § 2279(a)(6). In other words, the loan forgiveness program is based entirely on the race of the farmer or rancher.

Defendants have interpreted "socially disadvantaged farmer or rancher" to include individuals "who are one or more of the following: Black/African American, American Indian, Alaskan native, Hispanic/Latino, Asian, or Pacific Islander." *American Rescue Plan Debt Payments*, U.S. DEPARTMENT OF AGRICULTURE, *available at* https://www.farmers.gov/americanrescueplan (last visited June 7, 2021). The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, "Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. . . . After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA." *Id.* It advises that, in June 2021, the FSA will begin to process signed letters for payments, and "about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20% of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt." *Id.*

Plaintiffs are twelve white farmers and ranchers from nine different states. Plaintiffs moved for a temporary restraining order seeking to enjoin the purportedly unconstitutional race-based program before all of the money is distributed. Defendants responded to the motion on June 8, 2021, and Plaintiffs filed a reply brief the following day. The motion is now ripe for the Court's consideration.

A temporary restraining order, as opposed to a preliminary injunction, is sought and heard on an emergency basis. The purpose of a temporary restraining order is to preserve the status quo pending the complete briefing and consideration of a motion for a preliminary injunction. *See Geneva Assurance Syndicate, Inc. v. Med. Emergency Servs. Assocs.*, 964 F.2d 599, 600 (7th Cir. 1992) ("The essence of a temporary restraining order is its brevity, its ex parte character, and . . . its informality."). In general, the showing required for a temporary restraining order and a preliminary injunction are the same. Specifically, a plaintiff must show that "(1) without this relief, it will suffer 'irreparable harm'; (2) 'traditional legal remedies would be inadequate'; and (3) it has some likelihood of prevailing on the merits of its claims." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 637 (7th Cir. 2020) (quoting *Courthouse News Serv. v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018)). If a plaintiff makes such a showing, the court proceeds to a balancing analysis, to determine whether the balance of harm favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests. *Id.* A temporary restraining order "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d 432, 437 (7th Cir. 2005) (internal quotation marks and citations omitted).

Plaintiffs challenge the USDA's use of race classifications for allocating funds under the loan-forgiveness program as violative of the equal protection guarantee in the United States

Constitution. They assert that they are likely to succeed on their claim. "The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 570 U.S. 744, 774 (2013). "Government policies that classify people by race are presumptively invalid." *Vitolo v. Guzman*, --- F.3d ---, 2021 WL 2172181, at *4 (6th Cir. May 27, 2021) (citing U.S. Const. amend. XVI; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 234–35 (1995)). "[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) (citations omitted). Under this standard, "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand*, 515 U.S. at 227). Because the program grants privileges to individuals based solely on their race, strict scrutiny applies.

Defendants assert that the government has a compelling interest in remedying its own past and present discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. Dkt. No. 17 at 16. "The government has a compelling interest in remedying past discrimination only when three criteria are met." *Vitolo*, 2021 WL 2172181, at *4; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion). The Sixth Circuit recently summarized the three requirements as follows:

> First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." *J.A. Croson Co.*, 488 U.S. at 498. . . . Second, there must be evidence of *intentional* discrimination in the past. *J.A. Croson Co.*, 488 U.S. at 503. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination. . . . Third, the government must have had a hand in the

> past discrimination it now seeks to remedy. So if the government "shows that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of a local industry," then the government can act to undo the discrimination. *J.A. Croson Co.*, 488 U.S. at 492. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles.

Vitolo, 2021 WL 2172181, at *4–5 (alterations omitted).

Here, Defendants lack a compelling interest for the racial classifications. Defendants assert that "Congress targeted the debt payments in Section 1005 to the minority groups that it determined had suffered discrimination in the USDA programs and that had been largely left out of recent agricultural funding and pandemic relief." Dkt. No. 17 at 17. But Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry. *Id.* at 16–17. But Defendants cannot rely on a "generalized assertion that there has been past discrimination in an entire industry" to establish a compelling interest. *J.A. Croson Co.*, 488 U.S. at 498; *see also Parents Involved*, 551 U.S. at 731 (plurality opinion) ("remedying past societal discrimination does not justify race-conscious government action"). Defendants' evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities. *Id.* at 17. Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts. "An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way." *Vitolo*, 2021 WL 2172181, at *5. Defendants have failed to establish that it has a compelling interest in remedying the effects of

past and present discrimination through the distribution of benefits on the basis of racial classifications.

In addition, Defendants have not established that the remedy is narrowly tailored. To do so, the government must show "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but they have not shown that Congress engaged "in a genuine effort to determine whether alternative policies could address the alleged harm" here. *Vitolo*, 2021 WL 2172181, at *6. The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin.

The Section 1005 program is a loan-forgiveness program purportedly intended to provide economic relief to disadvantaged individuals without actually considering the financial circumstances of the applicant. Indeed, Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race. On this record, Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests. The Court concludes that Plaintiffs are likely to succeed on the merits of their claim that Defendants' use of race-based criteria in the administration of the program violates their right to equal protection under the law.

Next, the Court finds that Plaintiffs will suffer irreparable harm absent a temporary restraining order. Defendants make the extraordinary argument that racial discrimination inflicts no harm at all. Though Defendants assert that Section 1005 is intended to help socially disadvantaged farmers affected by COVID-19, it does not provide relief based on losses sustained during the pandemic. Instead, the only consideration in determining whether a farmer or rancher's loans should be completely forgiven is the person's race or national origin. Plaintiffs are completely excluded from participation in the program based on their race. If the Court does not issue an injunction, the USDA will spend the allocated money and forgive the loans of minority farmers while the case is pending and will have no incentive to provide similar relief on an equitable basis to others. Plaintiffs are excluded from the program based on their race and are thus experiencing discrimination at the hands of their government.

Defendants assert that, even if Plaintiffs suffer irreparable harm, the harm is not imminent because the USDA is "just beginning" to administer the program and the funds are "statutorily unlimited." Dkt. No. 17 at 14–15. Congress has apportioned "such sums as may be necessary" to pay for the program. § 1005(a)(1). While there is no explicit cap on the funds allocated to the loan-forgiveness program, based on current estimates, 0.2% of the $1.9 trillion package in the ARPA has been allocated to the program. Defendants sent offer letters to eligible farmers and ranchers as early as May 24, 2021. On June 9, 2021, Defendants sent offer letters to 8,580 farmers, and intend to send another 6,836 letters beginning June 14, 2021. Dkt. No. 17-2, ¶¶ 32, 35. Defendants indicate that it will take an average of seven days to receive an accepted offer and that the FSA will process payment immediately upon receipt of the offer. *Id.* ¶¶ 29–31. Defendants have already started to forgive loans, and the 8,580 farmers and ranchers who were sent offer letters represent approximately 49% of the loans that will be forgiven under the program. The

entire $3.8 billion that has been allocated to the program may be depleted before briefing and consideration of the motion for a preliminary injunction. Plaintiffs' injuries are also irreparable in light of Defendants' sovereign immunity and Plaintiffs' inability to seek damages. For these reasons, the Court finds that Plaintiffs will suffer irreparable harm absent a temporary restraining order.

Finally, the Court considers the irreparable harm Defendants will suffer if preliminary relief is granted and the public interest. These factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Here, the public interest and balance of harms weigh in Plaintiffs' favor. The public interest would be served by the entry of a temporary restraining order, as it is "always in the public interest to prevent the violation of a party's constitutional rights." *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001). Because Plaintiffs have established a strong likelihood that Section 1005 of the ARPA is unconstitutional, the public interest favors the issuance of a temporary restraining order. Although Defendants assert that thousands of minority farmers have a strong interest in expeditiously receiving funds under the program, they acknowledge that there is no true urgency, as certain loan payments may take up to nine weeks to process. Dkt. No. 17 at 15. There is no reason that a temporary halt on payments will cause any harm. Defendants have advised that they will not foreclose on any delinquent loans and that banks holding USDA-backed loans will not foreclose on them. Though Defendants would be enjoined from allocating funds to eligible farmers and ranchers under a temporary restraining order, they would not be prevented from identifying eligible recipients, mailing notices, accepting and reviewing applications, responding to inquiries and providing guidance regarding the program, and making other determinations. The purpose of a temporary restraining order is to preserve the

status quo pending a decision on the merits. Once a loan is forgiven, it cannot easily be undone. A narrow temporary restraining order resolves any threat of serious delay. The Court finds that the public interest and balance of equities weigh in favor of Plaintiffs.

Plaintiffs have satisfied the elements necessary to obtain a temporary restraining order. Defendants argue that any temporary restraining order should be limited to Plaintiffs and not the thousands of other farmers across the country. They suggest that the Court issue a limited injunction requiring that the government set aside funds to pay off Plaintiffs' qualified loans pending the outcome of the litigation. While universal injunctions are rare, they "can be necessary to provide complete relief to plaintiffs, to protect similarly-situated nonparties, and to avoid the chaos and confusion that comes from a patchwork of injunctions." *City of Chicago v. Barr*, 961 F.3d 882, 916–17 (7th Cir. 2020) (internal quotation marks and citations omitted). A nation-wide injunction is appropriate in this case. Defendants' proposal to set aside funds to pay off any of Plaintiffs' qualified loans is unworkable. If the USDA forgave Plaintiffs' loans, it would be required to forgive every farmer's loan, since the only criteria for loan forgiveness is the applicant's race. Plaintiffs estimate that this would increase the cost of the program to $400 billion. Dkt. No. 19 at 3. In addition, nothing would prevent Plaintiffs from amending the complaint to add other farmers and ranchers as plaintiffs to this action. To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper.

Rule 65(c) provides that a court may issue a temporary restraining order "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The

Court finds that no security shall be required because Defendants did not request such security and have provided no evidence that they will suffer financial loss from a temporary restraining order.

For these reasons, Plaintiffs' motion for a temporary restraining order (Dkt. No. 12) is **GRANTED**. Defendants are enjoined from forgiving any loans pursuant to Section 1005 until the Court rules on Plaintiffs' motion for a preliminary injunction.

SO ORDERED at Green Bay, Wisconsin this 10th day of June, 2021.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

Exhibit 3

P. Mot. for Prelim. Injunct./Cobb Decl.

Court: D. Or. Case No. 2:21cv942-SU

Pacific Legal Foundation
930 G Street
Sacramento CA 95814 – 916.419.7111

EXHIBIT B

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

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

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

[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.

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. 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.
22. To date, 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 $2,404,972,793. These numbers may increase if additional eligible recipients update their demographic information with FSA.
23. 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 to complete at an estimated rate of 700 to 800 eligible recipients per week.

24. To date, FSA has identified 186 eligible Farm Storage Facility Loan accounts with 253 outstanding eligible direct loans. These numbers may increase if additional eligible recipients update their demographic information with FSA.

25. Based on currently available information, USDA estimates that the loans covered by the May 2021 NOFA comprise 88% of the total ARPA-eligible payments that will be made to eligible accounts once Section 1005 is fully implemented.

26. 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.

27. 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 ARPA-eligible payments that will be made to eligible accounts once Section 1005 is fully implemented.

28. 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.

29. 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.

30. On June 7, 2021, the fourth eligible test recipient returned an accepted offer. That payment was processed on Tuesday, June 8, 2021.

31. 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.

32. Now that its procedures have been tested, FSA anticipates beginning to process and mail offer letters for 8,580 accounts on June 9, 2021. This number accounts for all eligible Farm Loan Program and Farm Storage Facility Loan accounts under the May 2021 NOFA, except for the 6,836 accounts requiring reversal of payments received after January 1, 2021, which may take up to 9 weeks to process.
33. 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 8,766 accounts would require 8.3 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.
34. 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.
35. Beginning the week of June 14, 2021, FSA anticipates mailing offer letters on the final 6,836 accounts that will require payment reversals, as these reversals are completed over an estimated 9-week period at an average of rate of 700-800 per week.
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. Of the 15,602 eligible recipients under the May 2021 NOFA, 299 accounts with 925 loans are currently in bankruptcy proceedings. These recipients that are currently in bankruptcy are scheduled to be sent offer letters beginning June 9, 2021.
38. 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.

39. A 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.
40. 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 8 June, 2021.

William D. Cobb

Digitally signed by WILLIAM COBB
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