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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

LEISL M. CARPENTER, Plaintiff, v. THOMAS J. VILSACK, in his official capacity as Secretary of the United States Department of Agriculture, and ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency, Defendants.	Case No. 0:21-cv-00103-NDF **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO LIFT STAY AND TO DISMISS AS MOOT, MEMORANDUM IN SUPPORT THEREOF [ECF NO. 37 AND 38]**

President Biden signed the American Rescue Plan Act on March 11, 2021. *See* Pub. L. No. 117-2, § 1005 (2021). Section 1005 of that law provided COVID-19 debt relief of up to 120% of debt to farmers and ranchers, based on their race. Subsequently, several lawsuits were filed against Section 1005, including one in the Eastern District of Wisconsin, which was filed on April 29, 2021. *See Faust v. Vilsack*, 1:21-cv-00548-WCG (D. Wisc., Apr. 29, 2021). On June 10, 2021, Judge Griesbach of that court issued the first order halting the implementation of Section 1005. *See Faust v. Vilsack*, 519 F. Supp. 3d 470, 475 (D. Wisc., 2021) ("Here, Defendants lack a compelling interest for the racial classifications."); *see id.* at 478 ("Defendants are enjoined from forgiving any loans pursuant to Section 1005 until the Court rules on Plaintiffs' motion for a preliminary injunction.").

By that time, however—June 10, 2021—Defendants had unfortunately already begun implementing Section 1005. They provided debt relief on at least 4 loans based exclusively on race, apparently accounting for at least around $1 million. *See* Declaration of William D. Cobb, *Faust v. Vilsack*, 1:21-cv-00548-WCG (filed June 8, 2021) (Exhibit 1); Brasher, *Democrats add farm debt relief to climate funding as Senate passage nears*, at 2 (Aug. 6, 2022) (Exhibit 2) ("USDA made nearly $ 1 million in forgiveness payments before the program was shut down."). They had also at least offered to provide forgiveness on a fifth loan. And USDA had likely credited back hundreds of loan payments to certain borrowers, again based solely on the race of the borrower. Plaintiff, of course, was ineligible for any of these benefits; she therefore suffered differential treatment on the basis of her race, which has never been remedied. And the mere repeal of Section 1005 does not suffice to undo her injuries stemming from prior implementation of the statute.

To this day, there has never been a full account of USDA's implementation of Section 1005. However, the Court may take notice that the government has offered no declaration—to meet its heavy burden now—stating that due to the repeal of Section 1005, all previous implementation of Section 1005 has been unwound, and that the playing field has been appropriately equalized, without regard to race. *See* ECF 38, at 7 (stating only that Section 1005 was never "fully" implemented).

Thus, this Court may still grant that relief to Plaintiff, and restore constitutional balance. *See Miller v. Vilsack*, No. 4:21-cv-0595-O, *20 (N.D. Tex., July 1, 2021) (Exhibit 3) ("Plaintiffs are suffering a continuing and irreparable injury based on the direct effects of the race- and ethnicity-based application process.").[1] Such relief constitutes *prospective* relief, and does not require a waiver of sovereign immunity, *see Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), or even an amendment of the Complaint, because Plaintiff's prayer for relief has never been limited to merely asking the Court to strike down Section 1005. This Court should thus permit the case to proceed apace, in order to vindicate Plaintiff's constitutional rights.

STANDARD OF REVIEW

"[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). By contrast, "[a]s long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot." *Id.* at 172 (emphasis added). The burden is on the government to establish mootness; and that burden is a heavy one, when the government relies on its own conduct. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) ("That burden is

[1] Note that this Order is not available on Westlaw.

'heavy' where, as here, the only conceivable basis for a finding of mootness in the case is the respondent's voluntary conduct.") (internal brackets and quotation marks omitted); *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010) ("Voluntary actions may, nevertheless, moot litigation if two conditions are satisfied: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) *interim relief or events have completely and irrevocably eradicated the effects of the alleged violation*.") (emphasis added) (internal quotation marks omitted); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, No: 19-CV-205-NDF, 2020 WL 10356243, *3 (D. Wyo., Feb. 13, 2020) (same).

"It is no small matter to deprive a litigant of the rewards of its efforts … Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). Here, the government fails to meet the exceedingly high standard of "absolutely clear." Unless Defendants can carry their burden of establishing that it has restored the state of play that existed prior to the implementation of Section 1005—or that Plaintiff and others similarly situated are entitled to similar benefits as those who received debt relief under Section 1005—there is more for this Court to do. *See also American Wild Horse Preservation Campaign v. Jewell*, No: 14–CV–0152–NDF, 2015 WL 11070090, *5 (D. Wyo., Mar. 3, 2015) (reversed on other grounds) ("Because of this, and assuming Petitioners prevail on the merits, a determination can be issued with real-world effect, whether it is an order to return horses or to cure a procedural irregularity. Therefore, Petitioners' claims are not moot.").

ARGUMENT

Under the Equal Protection principles of the Fifth Amendment, the government has a duty not only to enact laws equally, but to generally maintain its benefits programs equally, without regard to race. *See Regents of University of California v. Bakke*, 438 U.S. 265, 289-90 (1978) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."); *see also Vitolo v. Guzman*, 999 F.3d 353, 366 (6th Cir. 2021) ("It has been twenty-five years since the Supreme Court struck down the race-conscious policies in *Adarand*. And it has been nearly twenty years since the Supreme Court struck down the racial preferences in *Gratz*. As today's case shows once again, the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

Under Section 1005, Plaintiff was treated unequally because of her race. Every court to consider the question has held that Section 1005 was likely unconstitutional. But the government argues that this case is moot because USDA will not further implement Section 1005; in other words, the government merely avers that will not inflict additional injuries onto the Plaintiff under Section 1005.

But Defendants fail to establish that merely forgoing inflicting new injuries suffices for mootness. And because this Court may yet remedy Plaintiff's ongoing injury by requiring Defendants to claw back unconstitutional payments, Defendants have not "completely and irrevocably eradicated the effects of the alleged violation," and cannot establish that this matter is moot. *See Rio Grande Silvery Minnow*, 601 F.3d at 1110 ("The crucial question is whether granting a present determination of the issues offered will have some effect in the real world.") (internal

quotation marks omitted); *see also Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2012) ("[W]here a plaintiff seeks a declaratory judgment against his opponent, he must assert a claim for relief that, if granted, would affect the behavior of the particular parties listed in his complaint.").

I. Defendants Engaged in Race-Based Implementation of Section 1005 Before June 10, 2021, and Injured Plaintiff.

At the outset, there is no doubt that Section 1005 was a race-based program. Section 1005 of ARPA expressly contemplated that the federal government would treat farmers and ranchers differently based on race. *See Holman v. Vilsack*, No. 21-1085-STA-jay, 2021 WL 2877915, *1 (W.D. Tenn., Jul 8, 2021) ("Farmers, such as Plaintiff, who have USDA loans and who are white/Caucasian are not considered to be socially disadvantaged and, thus, are not eligible for debt relief regardless of their individual circumstances."); *see id.* at *9 ("Under Section 1005, 'Black, American Indian/Alaskan Native, Hispanic, or Asian, or Hawaiian/Pacific Islander' farmers qualify for debt relief but not farmers of other races or ethnicities regardless of their financial condition and regardless of whether they obtained any financial relief during the pandemic."); *Miller v. Vilsack*, No. 4:21-cv-0595-O, *2 (N.D. Tex., July 1, 2021) ("Plaintiffs held qualifying FSA loans on January 1, 2021 but are white, making them ineligible for the funds under the Act.") (attached as Exhibit 3); *Faust*, 519 F. Supp. 3d at 476 ("Defendants make the extraordinary argument that racial discrimination inflicts no harm at all.").

Defendants undeniably provided COVID-19 loan forgiveness under Section 1005, based on race before being enjoined. *See Faust*, 519 F. Supp. 3d at 477 ("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."). Thus, implementation of Section 1005 occurred, and was ongoing until the order in *Faust* on June 10, 2021.

The Court in Wisconsin cited a June 8, 2021 declaration filed by USDA employee William D. Cobb in the *Faust* Matter. *See* Exhibit 1. In the Declaration, Mr. Cobb made the following statements:

> 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*.

Exhibit 1, at ¶¶ 28-30 (emphasis added). Thus, Defendants have acknowledged that at least 4 loans were forgiven under Section 1005, prior to the program's implementation being halted, with an additional offer to forgive a fifth loan pending as of June 8, 2021. Additional payments may have been made before Section 1005 was halted, although even 4 or 5 loans being forgiven is sufficient to end the Court's inquiry into mootness.

Note that Mr. Cobb's Declaration was signed and submitted on June 8, 2021—two days prior to the Temporary Restraining order being entered. Additional payments may have been processed in those days. *See also* Exhibit 1, at ¶ 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.") (emphasis added). Indeed, the Wisconsin court issued a temporary restraining order because it recognized that USDA was trying to move as quickly as possible. *Faust*, 519 F. Supp. 3d at 477

("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.").

On top of the loan forgiveness payments, Mr. Cobb indicated that USDA planned to reverse prior payments made by Section 1005 recipients, at a rate of 700-800 borrowers per week:

> 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.*

Exhibit 1, at ¶ 23 (emphasis added). While it is currently unknown how many borrowers were actually credited back their payments made after January 1, 2021, it hardly matters. At this point, the government has failed to carry its substantial burden of showing that the case is moot, and that these payment reversals were themselves reversed.

By contrast, there can be no doubt that Defendants' forgiveness of some loans based solely on race injured Plaintiff. *See, e.g.*, *Miller v. Vilsack*, Exhibit 3, at 20 ("Plaintiffs are suffering a continuing and irreparable injury based on the direct effects of the race- and ethnicity-based application process."). Indeed, several courts enjoined Section 1005 because they held that even a partial deprivation of constitutional rights was technically irreparable. *Wynn v. Vilsack*, 545 F.Supp.3d 1271, 1290 (M.D. Fla., 2021) ("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."); *Holman*, 2021 WL 2877915, *12 ("Therefore, even if Plaintiff obtained financial relief after a trial on the merits, he would have suffered irreparable harm merely by the deprivation of his constitutional rights during the pendency of this matter.").

Until the government addresses the loan payments that have already been dispensed, Plaintiff continues to be injured. Moreover, the recipients of Section 1005 benefits have no right to keep the ill-gotten gains of their race-based loan forgiveness, even if it is difficult for the government to remedy its unconstitutional program once it commenced. *See Wynn*, 545 F. Supp. 3d at 1293 ("Likewise, if Section 1005 is discriminatory, SDFRs have no legitimate right to the proceeds of a facially unconstitutional legislative enactment."); *Miller v. Vilsack*, Exhibit 3, at 22 ("[T]he inherent harm from an unlawful government-run racially discriminatory program is detrimental to the public interest.").

Indeed, a ruling that the instant dispute is moot would create perverse incentives for public officials: they would have an interest in doing as much unconstitutional activity as quickly as possible, with as little transparency as possible, before invidious race discrimination could be enjoined by courts, followed by a simple repeal of the program. That cannot be the appropriate result. In the end, the government has inflicted an ongoing injury, one that it has failed to satisfy its burden of proof of showing it has resolved.

II. There is no Bar to Courts Remedying the Effects of Unconstitutional State Action After Repeal of a Program.

The government's ongoing injury is redressable. It is firmly within this Court's power to order the Defendants to unwind, to the best of their ability, the implementation of Section 1005. Moreover, sovereign immunity is not a bar to relief, because plaintiffs seek prospective relief only.

Courts have long held that it is plainly permissible to order government officials to undo the constitutional damage that they have done in the past. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and

flexibility are inherent in equitable remedies."); *see id.* at 16-17 ("[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.").

There is no *per se* bar to courts correcting ongoing injuries merely because the injury had its genesis in the past. *See Milliken v. Bradley*, 433 U.S. 267, 290 (1977) ("That the programs are also 'compensatory' in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system. We therefore hold that such prospective relief is not barred by the Eleventh Amendment."). And the waiver of sovereign immunity found in 5 U.S.C. § 702 applies to equitable suits for specific relief, even when such relief would require monetary payments. *See, e.g., Zellous v. Brouadhead Assocs.*, 906 F.2d 94 (3d Cir. 1990) (a plaintiff seeking a payment that they are entitled to is not barred under sovereign immunity); *Texas American Banc-shares v. Clarke*, 740 F. Supp. 1243 (N.D. Tex. 1990) (a plaintiff may recover funds that he is entitled to under federal law). Surely, the same is true for unwinding payments that were made in violation of the Constitution.

Indeed, in numerous contexts, courts have held that government actors owe a duty to correct the wrongs of the past, if an injury lingers. *See Thomas S. by Brooks v. Flaherty*, 902 F.2d 250, 255 (4th Cir. 1990) ("If the present conditions under which class members live do not meet constitutional requirements as explained in *Youngberg*, or if a patient is presently suffering from unconstitutional conditions imposed while in the hospital, the decree provides appropriate prospective relief."); *see id.* at 255 ("The decree addresses the present needs of the patients."); *Ayala v. Armstrong*, No. 1:16-cv-00501-BLW, 2017 WL 3659161, *2 (D. Idaho, Aug. 24, 2017)

("Here, the State of Idaho's past unconstitutional acts have led to 'continuing conditions of inequality' for same-sex couples who desired to marry but were unconstitutionally denied that right by the State of Idaho.").[2]

The fact that the Defendants invoke sovereign immunity is of no matter. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949) ("A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional."); 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States…").

A court may freely impose duties on public officials to prospectively comply with the Constitution, even if that means correcting past mistakes. *See Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007) ("Here, the injunctions Flint seeks as related to past violations serve to expunge from University records the 2003 censure and 2004 denial of his Senate seat, which actions may cause Flint harm."); *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir. 2007) ("We are specifically required by *Ex parte Young* to examine whether there exists an ongoing violation of federal law.") (internal citation omitted); *Clark v. Cohen*, 794 F.2d 79, 84 (3d Cir. 1986) ("Given the square holding in *Milliken II* that a federal court may order state officials to fund from the state treasury remedial measures found necessary to undo the harmful effects of

[2] Defendants' efforts to defend Section 1005 have also been substantially undermined by the program's repeal. While no court ever accepted USDA's argument that Section 1005 was likely to survive strict scrutiny, courts at least evaluated those arguments seriously. There is hardly any colorable argument that there is a compelling government interest pursued by a narrowly tailored means in partially implementing a statute that is later repealed.

past constitutional violations, we hold that the Commonwealth defendants' eleventh amendment argument is meritless.").

To be sure, some courts have suggested that "clawing back" the loan forgiveness offered by Section 1005 is *impractical*. *See Wynn*, at 1292 ("The debt relief cannot be clawed back or undone …"). However, these statements are *dicta* that once bore on the necessity for implementing a stay-put injunction, owing to the difficulties involved with providing relief after-the-fact. *See Wynn*, 545 F. Supp. 3d at 1292 ("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."). But the government has never averred that it is actually impossible to undo its implementation of Section 1005. Even if it were difficult, this Court can plainly order the government to address its constitutional infraction, to the best of its ability. *Accord Wynn*, 545 F. Supp. 3d at 1295 ("As noted by the Supreme Court, 'once 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.'").

In any event, the government may not sustain an argument regarding mootness based on mere impracticality alone. *See Chafin*, 568 U.S. at 176 ("However small that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save this case from mootness.") (internal brackets and quotation marks omitted); *id.* at 177 ("Such relief would of course not be fully satisfactory, but with respect to the case as whole, even the availability of a partial remedy is sufficient to prevent a case from being moot.") (internal brackets and quotation marks omitted); *U.S. v. Hahn*, 359 F.3d 1315, 1323 (10th Cir. 2004) (en

banc) ("Further, the Supreme Court has held that even the availability of a partial remedy is sufficient to prevent a case from being moot.") (internal quotation marks omitted).

Separately, and admittedly, in ruling on a motion for stay, the court in *Holman* suggested that forgiving only 4 loans under Section 1005 was a *de minimis* constitutional injury. *See Holman v. Vilsack*, 582 F. Supp. 3d 568, 581 (W.D. Tenn. 2022) ("[T]he approval was limited to four recipients as part of a processing test. Any injury suffered by Plaintiff as the result of this limited approval is *de minimis*.").

With respect to the court in *Holman*, constitutional injuries are never *de minimis*. First, as a matter of the factual record, no court—including the *Holman* court—has ever had before it the full record of the implementation of Section 1005, before it was enjoined on June 10, 2021. But second, and more importantly, the weight of precedent strongly suggests that there is no such thing as a *de minimis* exception to an injury caused by invidious racial discrimination. *See, e.g.*, *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712 (9th Cir. 1997) ("More important, we can find no authority, and appellees have cited none, for a *de minimis* exception to the Equal Protection Clause. … Race discrimination is never a 'trifle.'"); *Berkley v. U.S.*, 287 F.3d 1076, 1088 (Fed. Cir. 2002) (relying on *Monterey Mechanical*); *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 814 (7th Cir. 2001) ("Although the effect on the student from this relatively minor and transitory discrimination might well have been minimal, especially when compared with the situations in more pervasive and enduring educational discrimination, our faithfulness to constitutional principles does not permit us to overlook it or to declare it a *de minimis* matter."); *Lewis v. Woods*, 848 F.2d 649, 651 (5th Cir. 1988) ("A violation of constitutional rights is never *de minimis*, a phrase meaning so small or trifling that the law takes no account of it."); *Fennell v. Marion*

Independent School Dist., 963 F. Supp. 2d 623, 635-36 (W.D. Tex. 2014) (relying on the above cases to hold that being "criticized and embarrassed" in front of classmates stated an equal protection injury); *Brazell-Hill v. Parsons*, No. 2:17-cv-912, 2020 WL 4748545, *10 (S.D. Oh., Aug. 17, 2020) ("[D]ifferential treatment on the basis of race by school officials is a constitutional violation, and there is no exception for 'de minimus violations.'"); *accord Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 351 (D.C. Cir. 1998) ("While there is a textual basis under Title VII for drawing such a line, the Equal Protection Clause would not seem to admit a *de minimis* exception."); *Martinson v. Menifee*, No. 02 Civ. 9977(LTS)(HBP), 2007 WL 2106516, *9 (S.D.N.Y., Jul 18, 2007) ("Unlike claims of retaliation, there is no *de minimis* qualification constraining a plaintiff's ability to sustain claims brought under the Equal Protection Clause."); *Thomas v. Bartow*, No. 10-C-557, 2010 WL 11619701, *1 (E.D. Wisc., Jul. 20, 2010) (denying a prisoner's claim that he was denied ice cream to due to his race on *Iqbal* grounds, while still noting that "there is no such thing as a *de minimis* exception to the Equal Protection Clause…") (internal quotation marks omitted).

Plaintiff's injury—which is ongoing to this day—is not alleviated at all by the idea that she was treated differently based on her race only 4 or 5 times, and not thousands of times, as was the government's original plan. *See Vitolo*, 999 F.3d at 364 ("It is indeed a sordid business to divide us up by race. And the government's attempt to do so here violates the Constitution.") (internal quotation marks and citations omitted); *Wynn*, 545 F. Supp. 3d at 1290 ("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.").

No reason exists that prevents the government from redressing its constitutional injury.

III. Defendants' Cases Are Inapposite.

Defendant cites several cases for the general proposition that the repeal of a statute challenged by a plaintiff ordinarily triggers the mootness doctrine. However, none of the cases involve an equal protection challenge where the government engaged in invidious race discrimination prior to the repeal of a statute, and failed to unwind its misconduct.

In *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472 (1990), for instance, an Illinois bank holding company challenged a Florida law under the dormant commerce clause. When Congress amended the Bank Holding Company Act of 1956, it undercut the very claim asserted in the case. The Supreme Court thus held that the challenge was moot. *See id.* at 477 ("[T]he only evidence of Continental's stake in the outcome was its application to establish and operate an ISB. … Thus, the stake represented by that application was eliminated by the 1987 amendments to the BHCA, which make it clear that no matter how the Commerce Clause issues in this suit are resolved the application can constitutionally be denied."). *Lewis*, however, did not pertain to a situation like this one, where the government already has inflicted an injury that remains ongoing.

In *Kremens v. Bartley*, 431 U.S. 119 (1977), the Court evaluated a suit by mental health patients between the ages of 15 and 18, which challenged Pennsylvania's laws governing commitment to Pennsylvania mental health institutions. When Pennsylvania's law changed in the middle of the appeal, the Supreme Court held that the plaintiffs had obtained all of the relief that they sought. *Id.* at 129 ("These concerns were eradicated with the passage of the new Act, which applied immediately to all persons receiving voluntary treatment."); *id.* at 129 ("After the passage of the Act, in no sense were the named appellees 'detained and incarcerated involuntarily in mental hospitals,' as they had alleged in the complaint."). Plaintiff has not obtained all the relief she

sought. By contrast to the plaintiffs in *Kremens*, continues to seek the unwinding of Section 1005 to correct an ongoing constitutional injury.

In *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 415 (1972), the Supreme Court dismissed as moot a challenge to a Florida law exempting certain church property from taxation. There, the Court held that because the challenge sought exclusively declaratory relief with respect to the taxation statute, and because Florida has amended the statute, the case was to be remanded with leave to amend the pleadings. *Id.* at 414-15 ("The only relief sought in the complaint was a declaratory judgment that the now repealed [statute] is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed."). By contrast, Plaintiff here has sought significantly more relief than merely the repeal of Section 1005.

Similarly, in *Camfield v. City of Okla. City*, 248 F.3d 1214 (10th Cir. 2001), the plaintiff challenged a law that precluded video rental stores from carrying an Oscar-award winning film due to alleged child pornography in the film. When the law was amended to change the scope of the law, the plaintiff's case was mooted because he had accomplished all that he had sought. *Id.* at 1223 ("Here, the Legislature deleted the 'simulated sex' language from section 1021.2 that Camfield argues is overbroad."). By contrast, Plaintiff has not yet obtained the remedy of unwinding the extant and ongoing differential treatment based on race that was caused by implementing Section 1005.

In *American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 909 F.3d 329 (10th Cir. 2018), the court dismissed as moot a challenge to Utah's permitting and registration

requirements for professional fundraising consultants. After the District Court had ruled for the Defendants, Utah amended its law. Because the new law no longer covered the plaintiff, the court deemed the case completely moot. *Id.* at 331 ("[D]uring the appeal, Utah substantially revised its law, prompting officials to concede that the new restrictions do not apply to Rainbow."). Here, by contrast, the government has never averred that Section 1005 was never implemented, or that its implementation has been fully unwound such that Plaintiff is no longer injured.

Last, Defendants cite *Kansas Judicial Review v. Stout*, 562 F.3rd 1240 (10th Cir. 2009). This case actually supports Plaintiff's theory of the case. *See id.* at 1246 ("In deciding whether a case is moot, *the crucial question is whether granting a present determination of the issues offered will have some effect in the real world*.") (emphasis added) (internal ellipses, quotation marks, and brackets omitted). In the case, the Tenth Circuit noted that certain canons of the Kansas Judicial Code were challenged as unconstitutional, but later repealed. *Id.* at 1246 ("As plaintiffs readily concede, in adopting the new canons, the Kansas Supreme Court completely eliminated the challenged portion of the Clause."). But the court noted that this was true only because an *old* injury had ceased with the repeal. *Id.* at 1246 ("[A]ny injury caused by the old Pledges and Commits Clauses has ceased because they are no longer in effect—the old canons thus cannot possibly chill the *future* speech of the plaintiffs.") (original emphasis). That is not the case here.

Plaintiff contends that her injury continues to this day. And there can be no doubt that an order by this Court to unwind payments made under Section 1005 will "have some effect in the real world." *Accord Vitolo,* 999 F.3d at 359 ("Mootness is a high hurdle. … What's more, the government must show that it has completely and irrevocably eradicated the effects of the program's race and sex preferences.") (internal quotation marks omitted). Here, as a factual matter,

the government has not established that it has completely and irrevocably eradicated the effects of its previous implementation of Section 1005.

IV. The Plaintiff's Prayer Requests Relief Other than Striking Down Section 1005.

Plaintiff's complaint was filed on May 24, 2021. Of course, she had no knowledge that only days later, despite having filed her complaint, Defendants would begin forgiving loans on the basis of race. Nevertheless, the prayer for relief in her complaint fairly encompasses the unwinding of the implementation of Section 1005:

> A. Enter a declaratory judgment that the racial classifications under Section 1005 of the ARPA are unconstitutional under the Equal Protection principles of the Fifth Amendment of the United States Constitution.
>
> …
>
> F. In the alternative, enjoin Defendants from enforcing Section 1005 of the American Rescue Plan Act in its entirety and enjoining Defendants from distributing loan assistance under Section 1005 to farmers and ranchers.
>
> …
>
> I. Grant Plaintiff such other and further relief as the Court deems appropriate.

ECF 1, at 14. In the complaint, Plaintiff asks the Court to declare that Section 1005 imposed unlawful racial classifications. There is no reason why that must logically preclude unwinding racial classifications that occurred before the statute was repealed. She further asked the Court to enjoin Defendants from enforcing Section 1005 "in its entirety," which Plaintiff avers must include implementation that continues to injure Plaintiff. And, at a minimum, the Court is entitled to offer Plaintiff such other and further relief as it deems appropriate.

There can be no doubt that Defendants were on notice that Plaintiff was trying to prevent Section 1005 from unlawfully discriminating against her, in any form. *Accord Xiong v. Knight Transporation, Inc.*, 77 F.Supp.3d 1016, 1026 (D. Colo. 2014) ("The Court therefore finds that Ms. Xiong's prayer for relief sufficiently put the defendant on notice that she sought all interest to which she would be entitled under the law."). And, at worst, the Federal Rules of Civil Procedure unambiguously support Plaintiff's position. *See* F.R.C.P. 54(c) ("Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."); *Turner v. A. Passmore & Sons Inc.*, 341 Fed. Appx. 363, 367 (10th Cir. 2009) ("Again, this rule stresses the federal rules' simplification of procedure and rejection of formalism."); *Reynolds v. Slaughter*, 541 F.2d 254, 256 (10th Cir. 1976) ("Under the rule, which has been liberally applied, the court is not restricted to the relief set out in the pleadings; rather, it should grant the relief which is consistent with the pleadings or proof."). Indeed, the Court's duty extends to granting Plaintiff relief if she is entitled to as much. *See Kaszuk v. Bakery and Confectionery Union and Industry Intern. Pension Fund*, 791 F.2d 548, 559 (7th Cir. 1986) ("Rule 54(c) has been liberally construed, leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the facts proved.").

CONCLUSION

Section 1005 unconstitutionally discriminated against Plaintiff based on her race. Plaintiff's injury continues if others who are similarly situated experienced a windfall based on their race. Defendants cannot come close to meeting their burden to establish that it is "absolutely clear" that the case is moot; indeed, the weight of the evidence is on the other side of the coin. For

these reasons, the Court should deny the government's motion to the extent it seeks dismissal of this matter.

Dated: September 27, 2022.

Respectfully submitted,

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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2022, I caused a true and correct copy of the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF system which sent notification of such filing to all counsel of record of this matter.

/s/ William E. Trachman
William E. Trachman

EXHIBIT 1

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
DN: c=US, o=U.S. Government, ou=Department of Agriculture, cn=WILLIAM COBB, 0.9.2342.19200300.100.1.1=12001000062109
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EXHIBIT 2

Democrats add farm debt relief to climate funding as Senate passage nears

08/06/22 8:57 PM

By Philip Brasher (/authors/1-philip-brasher)

A revised climate funding package Democrats are pushing through the Senate this weekend scraps a debt relief program for minority farmers that was blocked by the courts and replaces it with new programs earmarked for "distressed" USDA borrowers as well as farmers the department has discriminated against.

The new version of the bill (http://www.agri-pulse.com/ext/resources/pdfs/inflation_reduction_act_of_2022-212.pdf), dubbed the Inflation Reduction Act, earmarks $3.1 billion for aid to distressed holders of guaranteed and direct loans.

Another $2.2 billion would be provided for payments of up to $500,000 each to farmers who "experienced discrimination" prior to Jan. 1, 2021, in USDA farm lending programs. The payments would be based on "consequences experienced from the discrimination."

The original debt relief program that was part of the American Rescue Plan Democrats forced through Congress in 2021 (https://www.agri-pulse.com/search?exclude_datatypes%5B%5D=directory&exclude_datatypes%5B%5D=classified&exclude_datatypes%5B%5D=file&page=8&q=%22minority+farmers%22&user_id=6) offered payments worth 120% of a minority farmers' loan balance. Several judges ruled that basing the loan forgiveness on a farmer's race was unconstitutional (https://www.agri-pulse.com/articles/16022-usda-halts-minority-farmer-debt-relief-after-judges-order). USDA made nearly $1 million in forgiveness payments before the program was shut down.

USDA would have through fiscal 2031 to use the new funding.

The legislation cleared a key hurdle Saturday evening when Vice President Kamala Harris broke a 50-50 tie to bring the revised text up for debate. A final vote was not expected before early Sunday after debate on a series of largely symbolic votes on GOP amendments.

"This is one of the most comprehensive and impactful bills Congress has seen in decades: it will reduce inflation, it will lower prescription drug costs, it will fight climate change, it will close tax loopholes, and it will reduce—reduce—the deficit," said Senate Majority Leader Charles Schumer, D-N.Y. Republicans countered that the bill would do virtually nothing to reduce inflation and would impose new taxes that would indirectly affect middle-class Americans.

Related Articles

House Ag Democrats advance ag stimulus package as GOP attacks minority farmer debt relief

Focus turns to farm bill, CCC for climate funding as Biden plan withers

The legislation, which represents a major win for President Joe Biden's goal of slashing U.S. greenhouse gas emissions in half by 2030, includes more than $20 billion to expand the adoption of climate-related farming practices, plus another $20 billion in USDA-run energy and forestry programs.

The bill's clean energy tax incentives include a new clean fuels tax credit for low-carbon biofuels.

Democrats from western states also secured in the revised bill $4 billion in funding for the Bureau of Reclamation to help water users cope with the impact of drought.

The revised bill also replaces some other assistance in the American Rescue Plan earmarked for underserved farmers.

The provisions would provide $125 million for outreach, mediation, financial training and other assistance on "issues concerning food, agriculture, agricultural credit, agricultural extension, rural development, or nutrition to underserved farmers, ranchers, or forest landowners, including veterans, limited resource producers, beginning farmers and ranchers, and farmers, ranchers, and forest landowners living in high poverty area."

The bill would provide another $250 million in grants and loans to organizations that help improve land access for underserved farmers, ranchers and forest landowners.

Philip Brasher

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SID MILLER, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-0595-O**
	§	
TOM VILSACK, *in his official capacity as Secretary of Agriculture,*	§	
	§	
Defendant.	§	

ORDER

Before the Court are Plaintiffs' Motion for Class Certification (ECF Nos. 12–13), filed June 2, 2021; the Government's Response (ECF No. 28), filed June 11, 2021; Plaintiffs' Reply (ECF No. 41), filed June 18, 2021; Plaintiffs' Motion for Preliminary Injunction (ECF Nos. 17–18), filed June 2, 2021; the Government's Response (ECF No. 27), filed June 11, 2021; and Plaintiffs' Reply (ECF No. 42), filed June 18, 2021. Plaintiffs seek a preliminary injunction to enjoin the Department of Agriculture from providing loan forgiveness to farmers and ranchers on the basis of race or ethnicity. *See* Inj. Mot., ECF No. 18. Having considered the briefing, relevant facts, and applicable law, and for the reasons set forth below, the Court **GRANTS** both motions.

I. BACKGROUND

Plaintiffs are Texas farmers and ranchers seeking to enjoin the United States Department of Agriculture from administering a recently enacted loan-forgiveness program under section 1005 of the American Rescue Plan Act of 2021 (ARPA). That Act appropriated funds to the USDA and required the Secretary to "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 qualifying Farm Service Agency (FSA) loans. ARPA, Pub. L. No. 117-2, § 1005 (2021). To be

eligible under the program, an applicant must be a "socially disadvantaged farmer or rancher" as defined in section 2501(a) of the Food, Agriculture Conservation, and Trade Act of 1990 (codified at 7 U.S.C. § 2279(a)). *See id.* That statute provides that a "'socially disadvantaged farmer or rancher' means a farmer or rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). It defines "socially disadvantaged group" as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." *Id.* § 2279(a)(6). In announcing a Notice of Funds Availability, the USDA stated that those 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." Notice of Funds Availability, 86 Fed. Reg. 28,330 (May 26, 2021).

Plaintiffs held qualifying FSA loans on January 1, 2021 but are white, making them ineligible for the funds under the Act. *See* Inj. Mot. 1–2, ECF No. 18-4; 1–2, ECF No. 18-5; 1–2, ECF No. 18-6; 1–2, ECF No. 18-7. On April 26, 2021, Plaintiffs filed a class action to enjoin the program as a violation of equal protection under the United States Constitution and a violation of Title VI of the Civil Rights Act of 1964. *See* Compl. 6, ECF No. 1. In the alternative, Plaintiffs argue in Claims Two and Three, that, as a matter of statutory interpretation, "socially disadvantaged group" must be construed to include white ethnic groups that have experienced discrimination and individuals who have any discernible trace of minority ancestry. *See id.* at 7–9. After filing their Complaint, Plaintiffs filed the present Motion for Class Certification and Motion for Preliminary Injunction on June 2, 2021. *See* Class Cert. Mot., ECF Nos. 12–13; Inj. Mot., ECF Nos. 17–18. After responses and replies, the motions are ripe for the Court's

consideration. *See* Class Cert. Resp., ECF No. 28; Inj. Resp., ECF No. 27; Class Cert. Reply, ECF No. 41; Inj. Reply, ECF No. 42.

II. LEGAL STANDARD

A. Class Certification

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)) (internal quotation marks omitted). The party seeking class certification "bear[s] the burden of proof to establish that the proposed class satisfies the requirements of Rule 23." *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832, 837 (5th Cir. 2012). "The decision to certify is within the broad discretion of the court, but that discretion must be exercised within the framework of rule 23." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981)). A district court must "look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination'" of the certification issues. *Stukenberg*, 675 F.3d at 837 (quoting *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 548 (5th Cir. 2003)).

Federal Rule of Civil Procedure 23 governs whether a proposed class falls within this limited exception. "To obtain class certification, parties must satisfy Rule 23(a)'s four threshold requirements, as well as the requirements of Rule 23(b)(1), (2), or (3)." *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 523 (5th Cir. 2007). Rule 23(a)'s four threshold requirements are

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four threshold conditions are "commonly known as numerosity, commonality, typicality, and adequacy of representation." *Flecha v. Medicredit, Inc.*, 946 F.3d 762, 766 (5th Cir. 2020) (citing Fed. R. Civ. P. 23(a)) (additional citation and internal quotation marks omitted). Additionally, the Fifth Circuit has articulated an "ascertainability" doctrine implicit in Rule 23. *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23."). "To maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (per curiam) (citations omitted).

Rule 23(b)(2) applies where the four threshold requirements are met and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This requirement is satisfied "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360.

B. Preliminary Injunction

To prevail on an application for a preliminary injunction, the movant must show: (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest. *See Canal Authority of State of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

To qualify for a preliminary injunction, the movant must clearly carry the burden of persuasion with respect to all four requirements. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). If the movant fails to establish any one of the four prerequisites to injunctive relief, relief will not be granted. *See Women's Med. Ctr. of Nw. Hous. v. Bell*, 248 F.3d 411, 419 n.15 (5th Cir. 2001). A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. *See* Fed. R. Civ. P. 65(c).

The decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (citing *Canal*, 489 F.2d at 572). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). Even when a movant satisfies each of the four *Canal* factors, the decision whether to grant or deny a preliminary injunction remains discretionary with the district court. *Miss. Power & Light*, 760 F.2d at 621.

III. ANALYSIS

A. Class Certification

Plaintiffs move to certify two classes under Federal Rule of Civil Procedure 23(b)(2):

Class	Class Representatives

1	All farmers and ranchers in the United States who are encountering, or who will encounter, racial discrimination from the United States Department of Agriculture on account of section 1005 of the American Rescue Plan Act	Plaintiffs Greg Macha, James Meek, Jeff Peters, and Lorinda O'Shaughnessy
2	All farmers and ranchers in the United States who are currently excluded from the definition of 'socially disadvantaged farmer or rancher,' as defined in 7 U.S.C. § 2279(a)(5)–(6) and as interpreted by the Department of Agriculture	All named Plaintiffs

1. Rule 23(a)

i. Numerosity

Plaintiffs argue that the number of white farmers and ranchers facing discrimination from the USDA on account of their race or ethnicity easily exceeds the numerosity threshold, as evidenced by 2017 census data showing some 239,351 white farmers and ranchers in Texas and 1,963,286 nationwide. *See* Class Cert. Mot. 5, ECF No. 13. Plaintiffs also point to the same data to show that there are an estimated 21,000 holders of qualifying FSA loans nationwide who do not qualify as "socially disadvantaged." *See id.* The Government does not contest the numerosity of the proposed classes. *See* Class Cert. Resp., ECF No. 28.

Courts have regularly certified classes far fewer in number than the tens of thousands of potential plaintiffs here. *See, e.g.*, *Mullen*, 186 F.3d at 625 ("[T]he size of the class in this case—100 to 150 members—is within the range that generally satisfies the numerosity requirement."). The actual number of class members is not necessarily "the determinative question, for '(t)he proper focus (under Rule 23(a)(1)) is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors.'" *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981) (quoting *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981)). "[A] number of facts other than the actual or

estimated number of purported class members may be relevant to the 'numerosity' question; these include, for example, the geographical dispersion of the class, the ease with which class members may be identified, the nature of the action, and the size of each plaintiff's claim." *Zeidman*, 651 F.2d at 1038 (citing *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)).

Here, Plaintiffs' unchallenged evidence demonstrates classes of plaintiffs sufficiently large and for whom joinder would be impracticable, if not impossible, due to size, geographic dispersion across the nation, and the inclusion of future members. Accordingly, the Court finds that Plaintiffs have satisfied the numerosity requirement for certification of both proposed classes.

ii. Commonality

Plaintiffs "seek to litigate a question of law common to all members of each of the two classes: does the United State Department of Agriculture violate the Constitution and Title VI of the Civil Rights Act of 1964 by limiting eligibility for government benefits to 'socially disadvantaged farmers or ranchers'?" Class Cert Mot. 6, ECF No. 13. Plaintiffs further contend that "[t]his question affects all class members because each of them is subject to discrimination on account of their race, as each of them is excluded from the definition of 'socially disadvantaged farmers or ranchers' because they are white." *Id.* The Government disagrees, arguing that there is no common legal question between the different claims Plaintiffs bring. *See* Class Cert. Mot. 13, ECF No. 28. With regard to the second class, the Government indicates that, because there are multiple programs for "socially disadvantaged farmers or ranchers," and the use of race in a benefit program must be narrowly tailored, no commonality can exist for the class members who are not included in that definition, as it necessitates individualized considerations for each of those programs. *See id.* at 15.

"In order to satisfy commonality under *Wal-Mart*, a proposed class must prove that the claims of every class member 'depend upon a common contention . . . that is capable of classwide resolution.'" *Stukenberg*, 675 F.3d at 838 (quoting *Wal-Mart*, 564 U.S. at 350). This occurs where "the contention is 'of such a nature . . . that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Stukenberg*, 675 F.3d at 838 (quoting *Wal-Mart*, 564 U.S. at 350). Put plainly, "Rule 23(a)(2) requires that all of the class member[s'] claims depend on a common issue of law or fact whose resolution 'will *resolve* an issue that *is central to the validity* of each one of the [class member's] claims in one stroke.'" *Stukenberg*, 675 F.3d at 840 (quoting *Wal-Mart*, 564 U.S. at 350). And a court's "obligation to perform a 'rigorous analysis'" of the commonality prong may "entail some overlap with the merits of the plaintiff's underlying claim." *Stukenberg*, 675 F.3d at 840 (quoting *Wal-Mart*, 564 U.S. at 350).

The Court concludes that the proposed classes satisfy the commonality requirement. The complained-of discrimination by the USDA constitutes more than a common grievance with a particular legal provision, deemed insufficient for commonality by the Supreme Court in *Wal-Mart*. *See* 564 U.S. at 350 ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law." (citation and internal quotation marks omitted)). Answering Plaintiffs' substantive legal question will provide a common answer for all class members regarding a common issue of law: the availability of USDA program benefits to them absent racial and ethnic discrimination. *See DeOtte v. Azar*, 332 F.R.D. 188, 198 (N.D. Tex. March 30, 2019) (distinguishing its facts from *Stukenberg*, in which plaintiffs asserted "various harms, the risk of experiencing those harms, and the violation of constitutional rights in various ways"

(internal quotation marks omitted)). Resolution of the alleged conflict between, on the one hand, programs for "socially disadvantaged farmers or ranchers" and, on the other, Constitutional equal protection provides a common answer to a narrow question of law based in a specific alleged injury "in one stroke." *Wal-Mart*, 564 U.S. at 350. Accordingly, Plaintiffs have satisfied the commonality requirement for certification of both classes.

iii. Typicality

Plaintiffs argue that, not only are their claims typical, they are precisely the same as those of all members of the proposed classes. *See* Class Cert. Mot. 7, ECF No. 13. The Government focuses on Plaintiffs' alternative Claims Two and Three and alleges that proceeding on a class basis will not be economical, as there will be a need to litigate each member's unique inclusion in a disadvantaged group or an individual assessment of each government program that benefits "socially disadvantaged farmers or ranchers." *See* Class Cert. Resp. 16–18, ECF No. 28.

"The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982). "Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* "[T]he test for typicality is not demanding. It focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Mullen*, 186 F.3d at 625 (citations omitted). "[T]he critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality."

James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2001) (quoting 5 James Wm. Moore et al., *Moore's Federal Practice* P 23.24[4] (3d ed. 2000)).

For similar reasons supporting commonality, the Court rejects the Government's arguments on typicality. First, Plaintiffs only seek classwide relief on Claim One and pleaded Claim Two and Three in the alternative. *See* Compl., ECF No. 1. Second, any fact-specific inquiries regarding a putative class member's challenge does not prevent certification of the class itself because, to the extent they are even necessary, these individualized membership or government program assessments can be made after class certification. *See, e.g.*, *Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329, 334 (5th Cir. 2019) (requiring only that the plaintiff demonstrate "that the class is adequately defined" and "provide sufficient objective criteria from which to identify class members" (citation and internal quotation marks omitted)). Denying certification on this basis would be especially improper in cases like these, where the proposed classes seek only injunctive and declaratory relief regarding enforcement of a statute, and the usual complications of class certification and phased litigation of suits for money damages do not apply. *See, e.g.*, *Rice v. City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974) ("[T]he precise definition of the [Rule 23(b)(2)] class is relatively unimportant. If relief is granted to the plaintiff class, the defendants are legally obligated to comply, and it is usually unnecessary to define with precision the persons entitled to enforce compliance."); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 431 n.28 (5th Cir. 1998) (citing Hebert B. Newberg & Alba Conte, *Newberg On Class Actions* § 4.41, at 4-51 to 52 (3d ed. 1992) and noting differing approaches to certification and litigation of individual trials for damages). Accordingly, Plaintiffs' claim is typical for both proposed classes.

iv. Adequacy of Representation

For the final Rule 23(a) factor, Plaintiffs argue that there are no conflicts of interest among the class members with respect to Claim One, the only claim on which Plaintiffs seek classwide relief. *See* Class Cert. Mot. 7–8, ECF No. 13. They contend "[a] classwide injunction will serve only to protect the class members' constitutional rights, as well as rights guaranteed under the Civil Rights Act of 1964[,]" conceding that classwide relief would not be appropriate for Claims Two and Three. *Id.*; *see* Class Cert. Reply 8, ECF No. 41. In response, the Government claims that, in seeking to prohibit the use of the socially-disadvantaged definition in USDA programs, Plaintiffs have a conflict in seeking to represent members who cannot opt out from any judgment that will necessarily bind the entire Rule 23(b)(2) class. *See* Class Cert. Resp. 18, ECF No. 28.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). "Adequacy encompasses three separate but related inquiries (1) 'the zeal and competence of the representative[s'] counsel'; (2) 'the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees'; and (3) the risk of 'conflicts of interest between the named plaintiffs and the class they seek to represent.'" *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 412 (5th Cir. 2017) (citing *Feder v. Elec. Data Sys. Corp.*, 429 F.3d 125, 130 (5th Cir. 2005)). "[The] requirements [of commonality and typicality] . . . tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *Falcon*, 457 U.S. at 158 n.13. Throughout litigation, the court "must continue carefully to scrutinize the adequacy of representation and withdraw certification if such representation is not furnished." *Grigsby v. N. Miss. Med. Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978).

Here, Plaintiffs have carried their burden to show that they will adequately represent the interests of class members similarly situated in zealously pursuing the requested relief. All indications are that Plaintiffs are willing and able to control the litigation and to protect the interests of absent class members. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982). Given the Court's conclusion as to the commonality and typicality prongs, *supra*, and because the Government has not shown any conflicts of interest, issues with competency of counsel, or other issues suggesting inadequacy of Plaintiffs' representation as to Claim One, the Court finds that Plaintiffs will adequately represent members of the proposed classes in pursuit of that claim.

v. Ascertainability

Plaintiffs argue that both proposed classes are ascertainable under Fifth Circuit law. *See* Class Cert. Reply 10, ECF No. 41. They contend that nothing is imprecise or vague about the proposed classes, as a potential plaintiff is either "encountering racial discrimination on account of section 1005, or he isn't" and is "either included with the definition of 'socially disadvantaged farmer or rancher,' or he's not." *Id.* The Government argues that both proposed classes are imprecise. *See* Class Cert. Resp. 21–22, ECF No. 28. For the first class, the Government submits that it is unclear whether it would include, for example, individuals who fall within the definition of a socially disadvantaged farmer or rancher but claim discrimination based on other factors, such as accessibility to program services. *See id.* As for the second class, the Government argues that it "is not limited to those who have suffered any injury as a result of the fact that they do not fall within the definition of a 'socially disadvantaged farmer or rancher.'" *Id.* at 22.

While not a requirement of Rule 23, courts only certify classes ascertainable under objective criteria. *DeBremaecker*, 433 F.2d at 734 (citations omitted).[1] "There can be no class action if the proposed class is amorphous or imprecise." *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 n.5 (5th Cir. 2007). "[T]he court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding." *Frey v. First Nat'l Bank Sw.*, 602 F. App'x 164, 168 (5th Cir. 2015) (citations omitted). The Fifth Circuit has upheld the ascertainability of a class even when a definition necessitates individualized membership assessments that might *follow* litigation, so long as the class definition is sufficiently clear. *See, e.g., Mullen v. Treasure Chest Casino*, 186 F.3d 620, 624 (5th Cir. 1999).

The Court finds that the proposed classes are ascertainable. The ascertainability inquiry is significantly relaxed for Rule 23(b)(2) certifications like this one. *See In re Monumental Life Ins. Co.*, 365 F.3d 408, 413 n.6 (5th Cir. 2004). Contrary to the Government's argument, "district courts do not err by failing to ascertain at the Rule 23 stage whether the class members include persons and entities who have suffered 'no injury at all.'" *In re Deepwater Horizon*, 739 F.3d 790, 811 (5th Cir. 2014). Plaintiffs here only seek classwide relief on their claim that section 1005 violates equal protection and Title VI, and the proposed definitions are sufficiently clear to identify class members at some stage of the proceeding for that claim. *See Frey*, 602 F. App'x at 168. As such,

[1] Ascertainability may not be applicable in the Rule 23(b)(2) context. *See, e.g., Shelton v. Bledsoe*, 775 F.3d 554, 563 (3rd Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief."); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) ("The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context."); *Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004) ("[W]hile the lack of identifiability [of class members] is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2)."). However, the Fifth Circuit has yet to endorse this view shared by other circuit courts. The Court need not decide whether it applies here, because the class is ascertainable.

both proposed classes are ascertainable. Accordingly, the Court concludes that Plaintiffs have satisfied the elements for class certification under Rule 23(a) and need only address whether the elements of Rule 23(b) are satisfied.

2. Rule 23(b)

Plaintiffs move for class certification under Rule 23(b)(2). *See* Compl. 9, ECF No. 1. The Government argues that the requirements of Rule 23(b)(2) are not met because the USDA has not acted or refused to act on any request by Plaintiffs for debt relief under section 1005. *See* Class Cert. Resp. 19–20, ECF No. 28. It argues that Plaintiffs have "the opportunity to seek inclusion of those groups by submitting a written request with supporting explanation" for consideration by the Secretary on a case-by-case basis. *Id.* at 20. For this reason, any denial of benefits would necessarily vary from group to group and Plaintiff to Plaintiff. *See id.*

The Government misconstrues the requirements of Rule 23(b)(2). A class action filed pursuant to Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) does not require "common issues," only "common behavior by the defendant towards the class." *In re Rodriguez*, 695 F.3d 360, 365 (5th Cir. 2012). "Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment.

Here, the USDA acts on grounds that apply generally to the classes in administering the debt-relief program in a racially discriminatory way, as required by the statute. Plaintiffs seek an injunction stopping the USDA from providing loan forgiveness to individuals based on their race

or ethnicity. *See* Inj. Mot. 1, ECF No. 18. As required, "a single injunction or declaratory judgment" here "would provide relief to each member of the" classes. *Wal-Mart*, 564 U.S. at 360. Because granting the requested relief would apply generally to the classes as a whole, the Court finds that Rule 23(b)(2) is satisfied.

B. Preliminary Injunction

1. Substantial Likelihood of Success on the Merits

Plaintiffs contend they are substantially likely to succeed on the merits of their constitutional challenge, as prioritized compensation for minorities for past discrimination by society is foreclosed as a matter of law. *See* Inj. Mot. 3–4, ECF No. 18 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). The Government concedes its prioritization scheme is race-based but maintains that it is allowed to use racial classification to remedy the lingering effects of past racial discrimination against minority groups—a "well-established" compelling government interest. *See* Inj. Resp. 26–27, ECF No. 27 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)). The Government also submits that Congress narrowly tailored the law to achieve that compelling interest, considering the history of discrimination against minority farmers and specific gaps in pandemic-related funding for those racial groups. *See id.* The Court disagrees.

As other courts to consider this issue already have, the Court concludes that Plaintiffs are likely to succeed on the merits of their claim that the Government's use of race- and ethnicity-based preferences in the administration of the loan-forgiveness program violates equal protection under the Constitution. *See Faust v. Vilsack*, No. 21-C-548, 2021 WL 2409729, at *3 (E.D. Wis. June 10, 2021); *Wynn v. Vilsack*, No. 3:21-CV-514-MMH-JRK, 2021 WL 2580678, at *12 (M.D. Fla. June 23, 2021). "Government policies that classify people by race are presumptively invalid." *Vitolo v. Guzman*, Nos. 21-5517/5528, 2021 WL 2172181, at *4 (6th Cir. May 27, 2021) (citing

U.S. Const. amend. XIV; *Adarand*, 515 U.S. at 235). It is the Government's burden to establish that its race-based distribution of taxpayer money is narrowly tailored to achieve a compelling interest. *See Adarand*, 515 U.S. at 227. To do so, it must provide a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)). In an analogous case, the Sixth Circuit summarized the Government's burden as follows: (1) the policy must target a specific episode of past discrimination, not simply relying on generalized assertions of past discrimination in an industry; (2) there must be evidence of past intentional discrimination, not simply statistical disparities; and (3) the government must have participated in the past discrimination it now seeks to remedy. *Vitolo*, 2021 WL 2172181, at *4–5.

Instead of demonstrating a strong basis, the Government's evidence of a compelling interest is a mixed bag. On the one hand, the Government points to cases where the USDA settled claims for past discrimination, leading Congress to enact special legislation addressing the civil rights complaints. *See* Inj. Resp. 32–33, ECF No. 27. On the other hand, the Government admits that the USDA is not currently discriminating against any socially disadvantaged farmers or ranchers. *See* Inj. Hearing Tr. Instead, it points to evidence of past intentional discrimination that, it argues, has produced lingering effects that continue to negatively affect these groups. *See id.* For example, it cites a 1982 report from the United States Commission on Civil Rights to show that the Farmers Home Administration (FmHA), the predecessor to the FSA, provided inferior loans and services to blacks as compared to whites. *See* Inj. Resp. 30, ECF No. 27. However, the same report details that the FmHA provided its loans based on credit-worthiness and did not have "jurisdiction to make loans for social purposes." *See* USCCR Rep. 19 (1982). Likewise, evidence from a 2011 investigation highlighted statistics on racial disparities in access to USDA programs

and services and racial under-representation in USDA employment. *See* JL Rep. (2011). While this investigation yielded "concerns as to both inequitable service delivery, . . . employment discrimination" and "negative impact[s]" on minority farmers and ranchers, lacking was direct evidence of causation tying these results to government discrimination. *Id.* at 64, 131; *see also Croson*, 488 U.S. at 505 ("[I]t is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate."). The same is true for evidence cited by the Government showing that a disproportionately low number of black farmers were aware of and provided funds from the USDA's Market Facilitation Program and first Coronavirus Food Assistance Program administered during the Trump administration. *See* Inj. Resp. 18–19, ECF No. 27.

All of this evidence shows disparate impact but requires an inference of intentional discrimination by the USDA or its agencies. *See Croson*, 488 U.S. at 503 (statistical disparity alone, absent a gross disparity, is insufficient to establish intentional discrimination); *Vitolo*, 2021 WL 2172181, at *4–5 ("there must be evidence of intentional discrimination in the past" at the hands of the government). Additionally, the Government puts forward no evidence of intentional discrimination by the USDA in at least the past decade. *See* Inj. Resp., ECF No. 27; Inj. Hearing Tr. To find intentional discrimination, then, requires a logical leap, as well as a leap back in time. In sum, the Government's evidence falls short of demonstrating a compelling interest, as any past discrimination is too attenuated from any present-day lingering effects to justify race-based remedial action by Congress. *See Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification").

Even if the evidence clearly established historical governmental discrimination to give rise to a compelling interest, the Government must then show that its proposed remedy in the race-exclusionary program is narrowly tailored. *See id.* In the racial classifications context, narrowly tailored means explicit use of even narrowly drawn racial classifications can be used only as a last resort. *See Croson*, 488 U.S. at 519. This requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Government's claim that new race-based discrimination is needed to remedy past race-based discrimination is unavailing. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) (plurality opinion) ("remedying past societal discrimination does not justify race-conscious government action"). Namely, it is founded on a faulty premise equating equal protection with equal results. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results."). As it argues, past, race-neutral attempts by Congress to correct perceived discrimination were ineffective in achieving parity in number, amounts, and servicing of USDA loans by race. *See* Inj. Resp. 39, ECF No. 27. The Court is skeptical of racial "parity" arguments, as they tend to sound a lot like racial balancing, something abhorrent to the concept of equal protection. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978). In any event, the Government's evidence does not support the conclusion that these disparities are the result of systemic discrimination justifying the use of race classifications here.

As pointed out by Judge Howard considering the same issue, the loan-forgiveness program is simultaneously overinclusive and underinclusive: overinclusive in that the program provides debt relief to individuals who may never have experienced discrimination or pandemic-related hardship, and underinclusive in that it fails to provide any relief to those who have suffered such discrimination but do not hold a qualifying FSA loan. *See Wynn v. Vilsack*, 2021 WL 2580678, at

*10. The Government also wants to have it both ways in arguing that the appropriated funds are limitless, therefore Plaintiffs cannot establish irreparable harm, *see infra*, yet are limited enough that Congress was justified excluding some farmers and ranchers from the debt-relief program based on their race and ethnicity. *See* Inj. Hearing Tr. In short, the statute's check-the-box approach to the classification of applicants by race and ethnicity is far different than the "highly individualized, holistic review" of individuals in a classification system permitted as narrowly tailored in a case like *Grutter*. 539 U.S. at 337; *see also Fisher v. U. of Tex.*, 136 S. Ct. 2198, 2214 (2016). Because the Government has not demonstrated a compelling interest or a narrowly tailored remedy under strict scrutiny, the Plaintiffs have shown a substantial likelihood of success on the merits.

2. Substantial Threat of Irreparable Harm

Plaintiffs contend that they "will suffer irreparable harm absent a preliminary injunction because the entirety of funds Congress appropriated under section 1005 will be unavailable to them," and "there is no mechanism to 'claw back' this money once the government dispenses it." Inj. Mot. 4, ECF No. 18. The Government responds that either Plaintiffs are eligible socially disadvantaged farmers or ranchers, in which case their claim to the appropriated funds will be unaffected by an injunction, or they are ineligible, in which case an "injunction to further delay distribution of needed funds to *others* who do fit within the definition still will not remedy any harm to Plaintiffs." Inj. Resp. 24–24, ECF No. 27. The Government contends that, if Plaintiffs succeed on the merits of their claim, the Court could order debt relief from the program funds; therefore, any harm at this stage is reparable. *See id.* at 45–46. To show immediate and irreparable harm, Plaintiff must demonstrate he is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). "[H]arm is irreparable

where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). But "the mere fact that economic damages may be available does not always mean that a remedy at law is 'adequate.'" *Id.* An injunction is appropriate only if the anticipated injury is imminent and not speculative. *See Winter*, 555 U.S. at 22.

Here, Plaintiffs are suffering a continuing and irreparable injury based on the direct effects of the race- and ethnicity-based application process. An ongoing constitutional deprivation can be sufficient to establish irreparable harm. *See Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 470 (N.D. Tex. 2012) ("[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable [harm] is necessary."). Aside from that, there is the risk that any Plaintiffs who do establish the right to relief on the merits will be unable to access program funding by the time they receive a judgment in their favor. The Government suggests that the appropriated funds are limitless and will last long enough for Plaintiffs to access them if and when they secure a judgment on the merits. *See* Inj. Hearing Tr. The limited nature of Congressional appropriations both in terms of time and money suggest otherwise. While the Government may at times act like it, the public fisc is not bottomless, and at any time, Congress can turn off the spigot. *See Baker v. Concord*, 916 F.2d 744, 749 (1st Cir. 1990) ("Public funding to assist the disadvantaged is, of course, not limitless.").

Second, "our constitutional structure does not permit [courts] to 'rewrite the statute that Congress has enacted.'" *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016). Thus, contrary to the Government's argument, if Plaintiffs were to prove at the merits stage that they are ineligible under the program but that the program violates equal protection, this Court is unable to provide a remedy as part of a judgment in favor of Plaintiffs extending debt relief to them under the statute. To do so would be a violation of the Appropriations Clause and the plain

text of section 1005 of the ARPA, which explicitly limits how the appropriated funds may be spent. *See* ARPA, Pub. L. No. 117-2, § 1005 (2021) (only authorizing payments to "socially disadvantaged farmers" as defined in in section 2501(a) of the Food, Agriculture Conservation, and Trade Act of 1990). *See* U.S. Const. art. I, § 9, cl. 7; *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 ("no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."). Given the Government's sovereign immunity and Plaintiffs' inability to seek damages retrospectively, these injuries are irreparable.

Finally, although the Government argues that any injunctive relief is unnecessary so long as injunctions on the same issue are in place from other courts, the existence of overlapping injunctive relief from other courts does not serve to automatically eliminate irreparable harm in parallel litigation, and the Government cites no authority to suggest otherwise. *See, e.g.*, *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017). Additionally as it concerns the scope of relief, Plaintiffs do not seek nationwide relief here, as the Government seems to suggest. *See* Inj. Resp. 46, ECF No. 27. Plaintiffs agree on the impropriety of a universal injunction and only seek relief tailored to any classes certified under Rule 23. *See* Inj. Reply 14–15, ECF No. 42.

Accordingly, the Court concludes that Plaintiffs face a substantial threat of irreparable harm absent a preliminary injunction because Plaintiffs are experiencing race-based discrimination at the hand of government officials and will be barred from even being considered for funding from the program as a result of this discrimination.

3. Balance of Hardships and the Public Interest

The Court next considers whether the threatened injury to Plaintiffs outweighs any damage to the Government and the public from the proposed preliminary injunction.[2] Plaintiffs argue that a "preliminary injunction will not only alleviate the financial harms that are being inflicted the plaintiffs, but it will also eliminate the injury to their constitutional right to be free from racial discrimination at the hands of the government." Inj. Mot. 6, ECF No. 18. Plaintiffs submit that, if an injunction is granted, any harm to socially disadvantaged farmers and ranchers could only come from the Government's choice to shut off funding to everyone in lieu of awarding loan forgiveness without considering race or ethnicity. *See id.* at 5. The Government disagrees, maintaining that Congress determined that timely debt relief for minority farmers was necessary to remedy past discrimination by the USDA. *See* Inj. Resp. 42, ECF No. 27.

The Government again fails to adequately explain how the exclusion of certain races and ethnicities from consideration for loan forgiveness benefits the already eligible socially disadvantaged farmers and ranchers or the public at large. Even if it could, the inherent harm from an unlawful government-run racially discriminatory program is detrimental to the public interest. *See Bakke*, 438 U.S. 265, 289–90 ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."). The Court finds that Plaintiffs suffer an ongoing constitutional injury from the irreversible act of government-sanctioned racial discrimination and that, on balance, this harm weighs in favor of immediate injunctive relief here.

4. Bond

[2] The Court considers the balance of hardships and public interest factors together as they overlap considerably. *See Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

Rule 65(c) provides that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any part found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The amount of security required "is a matter for the discretion of the trial court," and the Fifth Circuit has held district courts have discretion to "require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (citing *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)). In determining the appropriate amount, the Court may elect to require no security at all. *See Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996); *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 235 (S.D. Tex. 2011) (citing *EOG Resources, Inc. v. Beach*, 54 F. App'x 592 (5th Cir. 2002)). The Court finds no evidence that the Government will suffer any financial loss from a preliminary injunction, so there is no need for Plaintiffs to post security in this case.

IV. CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiffs have met their burden for class certification and certifies both proposed classes.[3] Additionally, Plaintiffs have met their burden demonstrating the need for a preliminary injunction in this case. Accordingly, the Court **GRANTS** Plaintiffs' Motion for Class Certification (ECF No. 12), **GRANTS** Plaintiffs' Motion for Preliminary Injunction (ECF No. 17), and **ENJOINS** Defendants Tom Vilsack, and the United States Department of Agriculture and their officers, agents, servants, employees, attorneys,

[3] Plaintiffs Greg Macha, James Meek, Jeff Peters, and Lorinda O'Shaughnessy may proceed in this case as representatives of themselves and "all farmers and ranchers in the United States who are encountering, or who will encounter, racial discrimination from the United States Department of Agriculture on account of section 1005 of the American Rescue Plan Act."

All named Plaintiffs may proceed in this case as representatives of themselves and "all farmers and ranchers in the United States who are currently excluded from the definition of 'socially disadvantaged farmer or rancher,' as defined in 7 U.S.C. § 2279(a)(5)–(6) and as interpreted by the Department of Agriculture."

designees, and subordinates, as well as any person acting in concert or participation with them from discriminating on account of race or ethnicity in administering section 1005 of the American Rescue Plan Act for any applicant who is a member of the Certified Classes. This prohibition encompasses: (a) considering or using an applicant Class Member's race or ethnicity as a criterion in determining whether that applicant will obtain loan assistance, forgiveness, or payments; and (b) considering or using any criterion that is intended to serve as a proxy for race or ethnicity in determining whether an applicant Class Member will obtain loan assistance, forgiveness, or payments.

SO ORDERED this **1st day** of **July 2021**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE