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

ROBERT HOLMAN, 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.	)	No. 1:21-cv-01085 JUDGE ANDERSON MAGISTRATE JUDGE YORK

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO CONTINUE PRELIMINARY INJUNCTION HEARING

Plaintiff respectfully responds in opposition to the government's motion to continue the preliminary injunction hearing. (Doc. 11.) The government's motion is based on the representation of counsel for the government that she has similar challenges in other district courts. She therefore requests additional time. Plaintiff, however, cannot afford to wait while his right to equal treatment under the law is irreparably harmed.

The government has commenced the process of race-based farm loan forgiveness. The government confirmed as much in a pleading filed by the government in another challenge to Section 1005 on June 8, 2021. *See Faust v. Vilsack*, No. 21-cv-548 (E.D. Wis., filed Apr. 29, 2021) (Doc. 17-2 at ¶¶ 29-30) (copy attached as Exhibit 1).

The ongoing payment inflicts an immediate and irreparable harm on Plaintiff. As related extensively in his memorandum in support of his request for a preliminary injunction, the Sixth Circuit recently issued an *emergency* preliminary injunction to an injured plaintiff under a similar program for "socially disadvantaged" restaurant owners. *Vitolo v. Guzman*, -- F.3d --, 2021 U.S. App. LEXIS 16101 (6th Cir. May 27, 2021). The Sixth Circuit wasted no time, expediting the appeal and issuing a resounding ruling that holds binding force in this case: "The plaintiffs are entitled to an injunction pending appeal." *Id.* at *24. More important when considering the government's motion to continue is the Court's finding regarding irreparable injury. *Id*. ("[A] finding of irreparable injury is mandated.") (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)). In sum, now that the government is actually treating Americans differently based on their race, the irreparable injury is ongoing. If anything, this Court should expedite the hearing, or at least order the government to halt further payments until the hearing.

Still more, this is a limited pot of funds that diminishes each day. *Id.* at *9-10 (noting the "real risk that the funds will run out"). Once the funds are expended, the government will argue that the case is moot. The government argued mootness in *Vitolo*, *id*. at *7, and in a similar challenge in the Northern District of Texas. *See Blessed Cajuns LLC v. Guzman*, Case No. 21-cv-777 (opinion provided previously as Doc. 7-5 at PageID 321) (government argues "the statutory provision that they challenged—the priority period subsection of § 5003—expired by its own terms approximately 24 hours after Plaintiffs filed their complaint"). The government should not be allowed to cause delay that it may one day use as a basis to deny Plaintiff relief.

Plaintiff appreciates how busy opposing counsel is, but it is still no basis for postponement. Counsel for the government has a busy month but reports no *actual* conflict with the Court's scheduled hearing on June 17, 2021. (Doc. 11 at PageID 354). The government has many fine

lawyers, many of them are already staffed in the Jackson Courthouse. The government's motion has five other attorneys listed, two of whom are signatories (and none of whom have related their schedules). (Doc. 11 at PageID 356.) If opposing counsel is overwhelmed, she should allow another lawyer to handle the matter. Plaintiff does not have time to spare but the government does have lawyers to spare.

Respectfully, the fact that opposing counsel has similar cases makes a response less onerous for the government to draft. The government has already filed two responses to requests for injunctive relief. *See Faust*, No. 21-cv-548 (E.D. Wis.) (Doc. 17) (copy attached as Exhibit 2); *Wynn v. Vilsack*, No. 21-cv-514 (M.D. Fla. May 18, 2021) (Doc. 22) (copy attached as Exhibit 3). The government needs only to modify them here. Opposing counsel reports that she needs to get up to speed on Sixth Circuit law (Doc. 11), but *Vitolo* makes it quite simple, laying out all of the relevant factors for an injunction and the necessary showing for state-sanctioned race preferences. In other Section 1005 cases, the government's lead argument is that an equal protection violation is not an irreparable harm. *See* Ex. 2 at 9; Ex. 3 at PageID 124, 127. In the Sixth Circuit, there is no need to argue. *See Vitolo*, 2021 U.S. App. LEXIS 16101, at *24.

Finally, a postponement would prejudice counsel for Plaintiff. They have already made travel arrangements, including a flight and two hotel rooms.

June 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below I filed the documents on the Court's electronic filing system. I future certify that I served the following persons in the manner indicated below.

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Dated: June 9, 2021.

Respectfully submitted,

s/ B. H. Boucek
BRADEN H. BOUCEK

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

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

DECLARATION OF WILLIAM D. COBB

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

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

5. Section 1005(a)(1) of ARPA provides "for such funds as may be necessary, to remain available until expended" to make the ARPA loan payments.
6. Section 1005(a)(2) of ARPA permits the Secretary of Agriculture to provide payments to a lender directly, to an eligible applicant, or a combination of both.
7. Section 1005(a)(3) of ARPA provides that the term "socially disadvantaged farmer or rancher" has the meaning given to the term in section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)).
8. Section 2501(a) of the Food, Agriculture Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)) defines a "socially disadvantaged farmer or rancher" as someone "who is a member of a socially disadvantaged group," which is further defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."
9. The 120 percent payment authorized by Section 1005 includes 100 percent toward loan indebtedness as of January 1, 2021, and an additional 20 percent of that indebtedness to eligible recipients.
10. FSA published a Notice of Funds Availability ("NOFA") in the Federal Register (86 FR 28329) on May 26, 2021 ("May 2021 NOFA"), announcing the availability of funds for eligible borrowers with eligible direct loans as authorized by section 1005 of ARPA, with the exception of direct loans that no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset.
11. The May 2021 NOFA announced that a subsequent NOFA is anticipated within 120 days, or by September 23, 2021, which will address guaranteed loans and direct loans that no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset.
12. Under the May 2021 NOFA, members of socially disadvantaged groups include, but are not limited to: American Indians or Alaskan Natives, Asians, Blacks or African Americans, Native Hawaiians or other Pacific Islanders, and Hispanics or Latinos. The Secretary of Agriculture will determine on a case-by-case basis whether additional groups qualify under this definition in response to a written request with supporting explanation.
13. Under the provisions of the May 2021 NOFA, eligible recipients do not need to take any action until receipt of a payment offer letter from FSA (form FSA-2601). FSA is identifying eligible recipients whose demographic designations in FSA systems qualifies them as socially disadvantaged based on race or ethnicity. Direct and guaranteed loan borrowers who have not previously provided demographic designations to FSA or believe their records are not accurate can contact their local FSA offices to verify their designations.

14. FSA anticipates sending an offer to most eligible recipients under the May 2021 NOFA within 45 days of the publication of the NOFA, or by July 10, 2021, although for recipients with accounts that require payment reversals, this process is likely to take longer, as explained further below.
15. Offer notices mailed to eligible recipients will explain:
    a. Eligibility based on current information in FSA records
    b. FSA's calculation of payments and proposed distribution of payments
    c. Loans that are not included as eligible loans and will retain unpaid balances (if any) (for example, Economic Emergency loans or loans closed or disbursed after January 1, 2021)
    d. Any eligible loans that will be addressed through the subsequent NOFA (for example, guaranteed loans).
16. Eligible recipients may accept the offer and conditions, schedule a meeting to discuss the offer with FSA prior to making a decision (for example to discuss the loan calculation), or decline the offer.
17. If an offer has not been responded to within 30 days, FSA will send a reminder letter, and make a phone call or send an email if that information is on file.
18. If an offer has not been responded to within 60 days, FSA will send a second reminder letter notifying the eligible recipient that a payment will not be processed unless contacted by the eligible recipient. Should FSA establish a final deadline to request a payment, it will be publicly announced, and final notification will be provided to eligible recipients at least 30 days in advance of the deadline.
19. If an offer is accepted, the amount to pay off the eligible direct loans will be applied directly to the eligible recipient's FSA loans and the additional 20 percent, which can be used by recipients to offset tax liabilities, will be paid directly to the eligible recipient.
20. Both the payment to FSA and the additional 20 percent to eligible recipients will be reported to the Internal Revenue Service (IRS) as income using form IRS-1099 G.
21. The estimates provided in the following paragraphs are calculated based on FSA's identification of accounts having one or more eligible recipients. An account may have more than one loan that qualifies for an ARPA payment associated with it.
22. To date, FSA has identified 15,416 eligible Farm Loan Program direct loan accounts with 28,918 outstanding eligible direct loans. The total unpaid principal and interest on those loans as of January 1, 2021, was $2,404,972,793. These numbers may increase if additional eligible recipients update their demographic information with FSA.
23. 6,836 of the Farm Loan Program direct loan accounts have payments made after January 1, 2021. These payments must be reversed from the account to establish an accurate outstanding indebtedness

on January 1, 2021, in order to calculate a payment in accordance with Section 1005 of ARPA. FSA estimates that these reversals will require up to 9 weeks to complete at an estimated rate of 700 to 800 eligible recipients per week.

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

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

26. Payments for the following eligible recipients will be addressed in the subsequent NOFA that will be issued by September 2021:

    a. As of May 19, 2021, FSA identified at least 2,377 accounts for eligible guaranteed Farm Loan Programs loan recipients with 3,519 outstanding eligible loans. The total unpaid principal and interest on those loans as of January 1, 2021, was estimated at $1,330,771,488. Payments for these eligible recipients will be addressed in the subsequent NOFA.

    b. As of May 24, 2021, FSA has identified 757 accounts for eligible direct Farm Loan Programs recipients with 1,489 loans with no collateral remaining that have been referred to the Department of Treasury for collection. The total unpaid principal and interest of these loans is $55,835,381.

27. Based on currently available information, USDA estimates that the loans covered by the NOFA that will be issued by September 23, 2021 comprise 12% of the total ARPA-eligible payments that will be made to eligible accounts once Section 1005 is fully implemented.

28. On Friday, May 28, 2021, to test the effectiveness of the procedures FSA established to deliver ARPA Section 1005 payments, FSA mailed five offer letters to eligible recipients in New Mexico. The state was selected based in part on having one of the larger volumes of direct loan borrowers eligible for ARPA and a high level of experienced staff. The eligible accounts were selected based on the borrowers being sole proprietorships rather than entities, and past interactions with FSA that reflected a willingness to be part of a pilot initiative.

29. On June 3, 2021, three of the five eligible recipients involved in the initial testing returned an accepted offer to FSA. Payments were processed for the three eligible test recipients on that date.

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

31. Based on this very small sampling, FSA anticipates an average of 7 days from mailing of an offer letter to receipt of an accepted offer.

32. Now that its procedures have been tested, FSA anticipates beginning to process and mail offer letters for 8,580 accounts on June 9, 2021. This number accounts for all eligible Farm Loan Program and Farm Storage Facility Loan accounts under the May 2021 NOFA, except for the 6,836 accounts requiring reversal of payments received after January 1, 2021, which may take up to 9 weeks to process.
33. FSA anticipates it will require an average of 1.5 hours per account for the designated employees to coordinate and complete the validation and verification of payment amounts, and to print, copy and mail offer letters. There are approximately 209 designated employees whose primary responsibility is to process offer letters and payments. If these employees complete an average of five offers letters per day, then roughly 1,045 offer letters can be mailed per day. Thus, theoretically, the initial 8,766 accounts would require 8.3 days to complete. However, eligible recipients and designated employees are not equally disbursed among states, so completion of mailings in each state may vary, with the longest time period estimated to be 14 days based on the number of designated employees in that state.
34. The same designated employees will be tasked with balancing the preparation of outgoing offer letters with processing incoming acceptances, as well as any questions that arise from eligible recipients about the offer letters.
35. Beginning the week of June 14, 2021, FSA anticipates mailing offer letters on the final 6,836 accounts that will require payment reversals, as these reversals are completed over an estimated 9-week period at an average of rate of 700-800 per week.
36. African American, American Indian/Alaskan Native, Asian, and Pacific Islander borrowers account for a disproportionate number of disaster set-aside requests processed by FSA. The disaster set-aside loan provision allowed farmers with USDA farm loans who were affected by COVID-19 to have their next payment moved to the end of the amortization schedule. Although the aforementioned borrowers account for roughly 17.5% of FSA direct loan accounts, they account for 24.5% of disaster set-aside requests.
37. Of the 15,602 eligible recipients under the May 2021 NOFA, 299 accounts with 925 loans are currently in bankruptcy proceedings. These recipients that are currently in bankruptcy are scheduled to be sent offer letters beginning June 9, 2021.
38. As of May 31, 2021, the ratio of White borrowers who are delinquent on an eligible FSA loan was 11%, compared to 37.9 % of African American/Black borrowers, 14.6% of Asian borrowers, 17.4% of American Indian/Alaskan Natives, and 68% of Hispanic borrowers. As explained in the Frequently Asked Questions posted on the USDA website at https://www.farmers.gov/americanrescueplan/arp-faq: "USDA is not taking any adverse actions on

any eligible borrowers who do not make payments." However, the Debt Collection Improvement Act prohibits loans to those delinquent on a Federal debt, and therefore an eligible recipient's eligibility for student loans, loans from the Small Business Administration, or loans from other Federal agencies could be adversely impacted by failure to make payments on eligible USDA loans before they are paid off under ARPA Section 1005.

39. A delay in these payments could result in the foreclosure on the farms of the eligible recipients, who account for a disproportionate number of foreclosures. African American, American Indian/Alaskan Native, Asian, Pacific Islander, and Hispanics accounted for 20-24% of foreclosures in Fiscal Year 17 through Fiscal Year 19 even though they only account for 17.5% of the direct loan portfolio. While FSA has suspended acceleration and foreclosure on direct loans due to COVID-19, FSA cannot prevent other lenders from pursuing foreclosure action. Third party foreclosure accounted for 40-65% of the foreclosure on FSA borrowers during Fiscal Years 2016 through 2020.
40. Currently, new FSA loan requests for ARPA-eligible applicants do not include ARPA-eligible FSA debt in the cash flow, security analysis or loan limit determinations. Eligible recipients of payments under Section 1005 may be approved for, and have been approved for, new FSA loans on the condition that the ARPA-eligible debt is paid in full prior to loan closing. Delays in these payments will delay the closing of these new FSA loans to such borrowers.

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

Executed this day of 8 June, 2021.

William D. Cobb

Digitally signed by WILLIAM COBB
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR A TEMPORARY RESTRAINING ORDER

In the midst of a global pandemic, Congress passed Section 1005 of the American Rescue Plan Act (ARPA) to alleviate the debt of certain socially disadvantaged farmers at a time of acute need. Congress did so based on strong evidence that socially disadvantaged farmers had been subject to decades of discrimination in U.S. Department of Agriculture (USDA) programs, such that when COVID-19 hit, they sat on the brink of foreclosure at higher rates than white farmers, and reporting that, despite those farmers' urgent need for relief, the vast majority of recent agricultural subsidies and pandemic relief did not reach socially disadvantaged farmers. Plaintiffs, a group of twelve farmers, who do not allege that they have been subject to USDA discrimination or left out of prior funding, have filed a motion seeking the immediate cessation of the program to prevent even one payment to a socially disadvantaged farmer, arguing that it is unconstitutional for Congress to provide such targeted assistance. Plaintiffs' motion should be denied.

The Supreme Court has recognized that the Government can use race-conscious measures where, as here, it concludes that groups of individuals have been subject to discrimination in government programs based on race and that government funding is perpetuating the effects of that discrimination along racial lines. Plaintiffs emphasize that COVID-19 did not discriminate on the basis of race, but impacted all farmers. But Congress relied on evidence to conclude that COVID-19 did not impact all farmers equally—it hit minority farmers the hardest. Compounding this, Congress also concluded that prior, race-neutral pandemic relief did not reach all farmers equally. In these circumstances, it is not unlawful for Congress to attempt to remedy harms resulting from this inequitable treatment and funding disparity by providing targeted relief to farmers who it determined were most in need of it and yet, largely did not receive it.

And it is certainly not a situation that warrants an immediate injunction. Plaintiffs' disagreement with the Government's distribution of funding to minority farmers is not a legally cognizable injury sufficient to establish standing—much less an irreparable one sufficient to warrant a temporary restraining order—where the majority of Plaintiffs do not even allege that they would seek debt payments and at times even disclaim wanting such relief. And to the extent any of the Plaintiffs do indicate that they want debt payments, their emergency motion should be denied for the simple reason that there is no immediate urgency to their request. Congress did not provide a finite sum for debt relief; rather, it expressly appropriated "such sums as may be necessary" to pay off certain direct or guaranteed USDA farm loans held by eligible farmers. Thus, even if this Court were later to conclude that there were some legal defect (constitutional or otherwise) in the criteria employed by USDA to determine eligibility for debt relief, the Court could fashion an appropriate remedy at that juncture, without any risk of statutory funds having been depleted in the meantime. Indeed, even aside from the fact that there is no statutory funding cap, any harm to Plaintiffs'

ability to obtain debt relief is not imminent, where USDA is just beginning to identify eligible borrowers and implement only part of the program.

Moreover, any harm Plaintiffs could possibly suffer in the absence of an injunction is decisively outweighed by the harm that would be wrought to the public interest if the Court granted Plaintiffs' request. Congress reasonably determined that minority farmers are in need of timely debt relief after decades of USDA discrimination and in the midst of a pandemic that disproportionately affected them, and that relief is just starting to be distributed. The views of twelve Plaintiffs, some of whom disclaim wanting any such relief themselves, should not be permitted to override Congress's determination and halt the distribution of payments to fellow Americans in need.

BACKGROUND

Defendants have detailed the background of this case in a previous brief filed in another lawsuit challenging Section 1005 of ARPA. For purposes of this opposition to Plaintiffs' motion for a temporary restraining order (TRO), Defendants briefly summarize that background below and respectfully refer the Court to that filing for more detail. *See* Defs.' Resp. in Opp'n to Plaintiff's Mot. for Prelim. Inj., Background (BG), *Wynn v. Vilsack*, No. 21-514 (M.D. Fla.), ECF No. 22 (filed June 4, 2021). A copy of this brief is attached as Exhibit A.

I. Discrimination Against Minority Farmers In USDA's Loan Programs, Its Lingering Effects, And Congress's Attempts To Remedy It

As explained more fully in the Government's brief in *Wynn*, the Farm Service Agency (FSA) provides direct and guaranteed loans to farmers and ranchers[1] who would otherwise be unable to obtain them from private lenders at reasonable rates and terms. *See* Ex. A, § BG I; 7 USC § 6932(b). Those loans assist farmers with buying or improving farm property, *id.* § 764.151,

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

provide credit and management assistance to help farmers run their farms, *id.* § 764.251, or help farmers resume operations after a disaster, *id.* § 764.351. *See* Ex. A, § BG I; 7 USC §§ 1923, 1942, 1963.

Although USDA's goal is to support all farmers equitably, it is "no secret" that its loan programs administered by FSA have historically been infected by discrimination against minority farmers.[2] Ex. A at 27; *see id.* § BG II. That unfortunate history is longstanding and well documented in numerous investigations and reports, testimony before Congress, and civil rights complaints and lawsuits by minority farmers against USDA spanning the past several decades. *See* Ex. A, § BG II. Congress has recognized this unfortunate history and has repeatedly attempted to remedy this discrimination and its lingering effects by race-neutral means. *See id.* § BG III. Through prior legislation, Congress modified who at USDA can make loan determinations and how, allocated funds to settle discrimination claims against USDA, permanently funded a program to increase USDA outreach to minority farmers, and created an entire civil rights office at USDA. *See id.*

Despite these efforts, Congress found that minority farmers continued to suffer the effects of discrimination in USDA programs, in particular its loan programs. *See id.* Congress also found that, due to the lingering effects of the longstanding discrimination in USDA programs against minority farmers, those farmers were in a far more precarious financial situation than non-minority farmers before COVID–19 hit. *See id.* Despite the particularly vulnerable position of minority

[2] As explained below, USDA defines "socially disadvantaged farmers and ranchers" (SDFRs) to include certain racial and ethnics minorities; herein, Defendants refer to SDFRs and minority farmers interchangeably.

farmers, lawmakers cited evidence that the overwhelming majority of recent, race-neutral agricultural subsidies and pandemic relief prior to ARPA did not reach minority farmers—again, in part due to the lingering effects of discrimination. *See id.*

II. The Enactment Of Section 1005 And Provision Of Debt Payments To Socially Disadvantaged Farmers And Ranchers

To address inequities in USDA's farm loan programs and unbalanced distribution of funding, Congress enacted Section 1005 of ARPA. *See* Pub. L. No. 117-2, § 1005 (March 21, 2021). Section 1005 appropriates "such sums as may be necessary" to pay up to 120 percent of certain direct or guaranteed USDA farm loans held by a "socially disadvantaged farmer or rancher" and outstanding as of January 1, 2021.[3] *Id.* § 1005(a)(1)-(2). For purposes of Section 1005, Congress gave the term "socially disadvantaged farmer or rancher" the same meaning as in Section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, codified at 7 USC § 2279(a). *See id.* § 1005(b)(3). That provision defines a "socially disadvantaged farmer or rancher" as "a farmer or rancher who is a member of a socially disadvantaged group," 7 USC 2279(a)(5), which is further defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities," *id.* § 2279(a)(6).

USDA has long interpreted "socially disadvantaged group[s]" under 7 USC § 2279 to include, at a minimum, the following five groups: American Indians or Alaskan Natives; Asians; Blacks or African Americans; Hispanics or Latinos; and Native Hawaiians or other Pacific Islanders. *See* 66 FR 21617 (Apr. 30, 2001) (interpreting 7 USC § 2279 to include those groups for

[3] Congress provided 20% over and above outstanding loan balances because State taxes eroded previous settlement payments to minority farmers. *See* 167 Cong. Rec. S1264 (Mar. 5, 2021) (Stabenow); David Zucchino, *Sowing Hope, Harvesting Bitterness*, LA Times (Mar. 23, 2012), https://perma.cc/V8TZ-C6RZ; *see also* USDA, ARPA Fact Sheet 2 (May 2021), https://perma.cc/KEV8-PYZK (explaining that the additional 20% "may be used for tax liabilities and other fees associated with payment of the debt").

purposes of Outreach and Assistance for SDFRs Program); 74 FR 31571 (July 2, 2009) (same for Conservation Reserve Program); 75 FR 27615 (May 14, 2010) (same for Risk Management Purchase Waiver). USDA confirmed in a Notice of Funds Availability published in the Federal Register on May 26, 2021 (NOFA), that SDGs would continue to "include, but are not limited to," those same five groups. USDA also announced in that Notice that other groups could be considered for inclusion on a case-by-case basis by the Secretary in response to a written request. *See* NOFA.[4]

USDA will implement Section 1005 in stages, with the majority of eligible loans being paid off in the coming months. Two separate NOFAs, including the first NOFA issued on May 26, 2021, will address the different types of loans eligible for ARPA payments and the distribution processes applicable to each. That first NOFA deals with all direct loans, except those that "no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset." NOFA; *see also* Declaration of William D. Cobb ("Cobb Decl."), attached hereto as Exhibit B, ¶ 10. The second NOFA, which USDA expects to publish by September 23, 2021, will address that narrow category of direct loans referred to Treasury, as well as qualifying guaranteed loans. *See* Cobb Decl. ¶ 11. USDA estimates that the loans covered by the first NOFA comprise roughly 88% of the total ARPA-eligible payments that will be made to eligible accounts once Section 1005 is fully implemented. *Id.* ¶ 25.

USDA is in the process of identifying and notifying individuals eligible to receive debt payments under the first NOFA and distributing those funds. As the NOFA explained, USDA is aiming to send those offer notices to eligible recipients of ARPA payments by July 10, 2019. *See* NOFA; Cobb Decl. ¶ 14. A subset of those loans, requiring reversals of loan payments made after

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

January 1, 2021, will take longer, or up to nine weeks to complete. *See* Cobb Decl. ¶¶ 22-24, 32, 35. To date, FSA has identified 15,602 eligible recipients covered by the first NOFA. *Id.* ¶¶ 22, 24, 37. "FSA anticipates beginning to process and mail offer letters for 8,580" accounts held by eligible recipients on June 9, 2021. *Id.* ¶ 32. FSA expects to begin sending letters to the eligible recipients on the remaining 6,836 identified accounts covered by the first NOFA on a rolling basis starting on June 14, 2021. *Id.* at 35.[5]

III. Procedural History

On April 29, 2021, Plaintiffs filed suit to challenge the USDA's implementation of Section 1005. *See* Compl., ECF No. 1.[6] Plaintiffs allege that they hold loans with USDA and would otherwise qualify for loan forgiveness under Section 1005 "except that [they are] white." Am. Compl. ¶ 8; *see also id.* ¶¶ 8-17. They claim that USDA's interpretation of "socially disadvantaged farmer or rancher" in Section 1005 to include farmers and ranchers who identify as "Black/African American, American Indian or Alaskan native, Hispanic or Latino, or Asian American or Pacific Islander," *id.* ¶ 44, "violate[s] the Equal Protection guarantee in the United States Constitution," *id.* ¶ 48.

On June 3, 2021, Plaintiffs filed a motion for a TRO, "to last until this Court rules on Plaintiffs' motion for a preliminary injunction, prohibiting Defendants from forgiving any loans pursuant to … Section 1005 …, *unless* Defendants begin administering the program without regard to the race or ethnicity of the indebted farmer or rancher," ECF No. 12, as well as a motion for a

[5] As the Cobb Declaration explains, these 6,836 accounts will take longer to process because the eligible account-holders made payments on their eligible loans after January 1, 2021, and FSA must reverse those payments to establish an accurate outstanding indebtedness before offering a specific payment amount to such recipients. *Id.* ¶ 23.

[6] Plaintiffs filed an amended complaint on May 19, 2021, adding additional plaintiffs among other things. *See* Am. Compl., ECF No. 7.

preliminary injunction, ECF No. 13. On June 4, 2021, this Court held a hearing on Plaintiffs' motion for a TRO. During the hearing, Plaintiffs' counsel took the position that one payment to a minority farmer under Section 1005 would constitute irreparable harm to Plaintiffs' interests. At the close of the hearing, the Court permitted Defendants to file a response to Plaintiffs' motion for a preliminary injunction by June 18, 2021, and a response to Plaintiffs' motion for a TRO by June 8, 2021.

ARGUMENT

I. Plaintiffs Have Not Satisfied Any Of The Requirements For The Extraordinary Relief They Seek.

A TRO is an "extraordinary and drastic remed[y] that should not be granted unless the movant, '*by a clear showing*, carries the burden of persuasion.'" *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2468194, at *2 (N.D. Ill. May 13, 2020), *aff'd,* 962 F.3d 341 (7th Cir. 2020), *cert. denied,* 2021 WL 1163867 (U.S. Mar. 29, 2021) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).[7] As with a motion for preliminary injunction, a plaintiff seeking a TRO must show "(1) some likelihood of succeeding on the merits, and (2) that it has no adequate remedy at law and will suffer irreparable harm if preliminary relief is denied." *Cassell v. Snyders*, 990 F.3d 539, 544–45 (7th Cir. 2021). "If these threshold factors are met," the court then proceeds to balance the harm to the moving party if relief is denied against "(3) the irreparable harm the non-moving party will suffer if preliminary relief is granted" and "(4) the public interest, meaning the consequences of granting or denying the injunction to non-parties." *Id.* at 545. The latter two factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiffs fail to carry their burden here.

[7] Hereinafter, all internal alterations, citations, omissions, quotations, and subsequent history are omitted unless otherwise indicated.

A. Plaintiffs Have Not Shown Irreparable Harm.

"A sine qua non for [preliminary] relief is proof of irreparable harm if the injunction is denied." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 553 (7th Cir. 2014). "For if the harm can be fully repaired in the final judgment, there is no reason to hurry the adjudicative process." *Id.* at 554. Thus, even where a plaintiff can establish a substantial likelihood of success on the merits—and Plaintiffs cannot, *see infra* Arg. I.B—preliminary relief is inappropriate without a showing of irreparable harm, *see Meek v. Archibald & Meek, Inc.*, 2021 WL 2036535, at *4 (N.D. Ill. May 21, 2021) ("Lack of irreparable harm is a sufficient basis to deny a plaintiff's request for a preliminary injunction."). Plaintiffs cannot make that showing.

Here, Plaintiffs contend that an "equal protection violation itself is an irreparable harm that warrants an injunction." Pls.' Mem. in Supp. of Mots. For TRO and Prelim. Inj. ("Pls.' Mem.") 23. That is incorrect. The logic of Plaintiffs' position would mean that in any case alleging an equal protection violation, a plaintiff would be able to make the irreparable harm showing necessary to warrant emergency relief. That is wholly inconsistent with the high bar that the courts have set for such a drastic remedy, and it is not supported—even by the sources Plaintiffs cite.

In support of their contention, Plaintiffs rely on the proposition that "when a 'deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary.'" Pls.' Mem. 23 (quoting Wright & Miller, 11A Fed. Prac. & Proc. § 2948.1 (3d. ed.). But as Plaintiffs' source notes, most courts so hold only in certain contexts, such as when "the right to free speech or freedom of religion" is involved. Wright & Miller, 11A Fed. Prac. & Proc. § 2948.1. Thus, as Plaintiffs later acknowledge, the Seventh Circuit, like most other courts, "has held that irreparable harm is presumed" only in cases involving First and Second Amendment rights and rights of privacy. Pls.' Mem. 25; *see, e.g., Ezell v. City of Chicago*, 651

F.3d 684, 699 (7th Cir. 2011) (explaining that "for *some* kinds of constitutional violations, irreparable harm is presumed," and citing allegations of irremediable First and Second Amendment rights as examples) (emphasis added)); *Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1018 (7th Cir. 1990) (explaining that Seventh Circuit has interpreted case finding irreparable harm due to loss of First Amendment freedoms "as limited to first amendment cases"). Thus, where Plaintiffs' claims do not implicate First or Second Amendment rights or rights to privacy, their alleged constitutional violation is not sufficient in and of itself to establish irreparable harm. *Ditton v. Rusch*, No. 14 C 3260, 2014 WL 4435928, at *5 (N.D. Ill. Sept. 9, 2014) ("[I]njury to constitutional rights does not *a priori* entitle a party to a finding of irreparable harm.") (holding as much even in a First Amendment context) (citing *Hohe v. Casey,* 868 F.2d 69, 73 (3d Cir. 1989) ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction.")).

This conclusion is evidenced by the fact that Plaintiffs cannot cite one case in the Seventh Circuit to support their overbroad proposition that every alleged deprivation of equal protection is *per se* sufficient to establish irreparable harm. Instead, they rely on out-of-context statements taken from out-of-circuit cases for the proposition that "multiple federal courts … have held that irreparable injury is presumed when the government discriminates on the basis of race." Pls.' Mem. 24 (citing cases). But even then, Plaintiffs' position is not supported by the case law. For instance, Plaintiffs cite an Eleventh Circuit case from 1984, *see id.* (citing *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984)), but the Eleventh Circuit explicitly rejected Plaintiffs' position six years later in a lawsuit challenging a set-aside for minority owned businesses, *see Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285–86 (11th Cir. 1990) ("The district court found that 'a continuation of the MBE

programs [would] result in an on-going violation of Plaintiffs' constitutional rights [which] ... by itself, is sufficient to show irreparable injury to the Plaintiffs.' … This is incorrect."). It explained that, as with the Seventh Circuit, "[t]he only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of first amendment and right of privacy jurisprudence." *Id.* The plaintiffs in *Wynn* (as noted, a case raising a substantially similar equal protection challenge to Section 1005) thus conceded that "[t]he Eleventh Circuit held several decades ago that an equal protection injury does not in and of itself constitute irreparable harm." Pls.' Mem. 22 n.17, *Wynn v. Vilsack*, No. 21-514, ECF No. 11 (citing *Ne. Fla. Chapter*, 896 F.2d at 1285–86).

Other cases Plaintiffs rely on are equally unhelpful to their position. Four of the cases Plaintiffs cite were not in a preliminary posture. The courts thus did not "presume[]" irreparable injury for purposes of a preliminary injunction based on allegations of racial discrimination, as Plaintiffs suggest, Pls.' Mem. 24; rather, they found the requisite injury for purposes of permanent injunctions after extensive proceedings and final determinations on the merits. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1025 (N.D. Cal. 1999); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982); *Small v. Hudson*, 322 F. Supp. 519, 528–29 (M.D. Fla. 1970); *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 292 (D.D.C. 2012). Indeed, in *San Francisco NAACP*, where the plaintiffs challenged an ethnically-based student assignment plan on equal protection grounds, the Court *denied* the plaintiffs' motion at the preliminary injunction stage on the basis that "plaintiffs had *not* shown irreparable harm sufficient to justify immediate injunctive relief," *id.* at 1025 (emphasis added). And in *DynaLantic*, where, like here, the plaintiffs challenged on equal protection grounds a provision that allocated benefits to "socially disadvantaged" individuals presumptively including

certain racial groups, the court not only denied the plaintiffs' motion for a preliminary injunction, *see* 885 F. Supp. 2d at 247, it ultimately denied the plaintiffs' facial challenge to the program altogether, *see id.* at 292. Plaintiffs' reliance on out-of-context snippets from out-of-circuit cases underscores the lack of authority for their contention that an alleged equal protection violation itself is sufficient to establish irreparable harm.[8]

Lastly on this score, Plaintiffs argue that the Court should presume irreparable harm based on an alleged equal protection violation because, like cases where the Seventh Circuit has applied such a presumption (*e.g.,* in the First Amendment context), Plaintiffs' alleged harm implicates "'intangible and unquantifiable interests' that cannot be compensated by monetary damages." Pls.' Mem. 25 (quoting *Ezell*, 651 F.3d at 699). To the extent Plaintiffs allege harm to those "intangible" interests, however, their allegations are insufficient to establish standing, much less irreparable harm. Plaintiffs try to have it both ways; at times, they claim to want an "equal shot" at debt relief, Pls.' Mem. 26, but at other times, they disclaim wanting debt relief at all, *see id.* (noting that they are "not ask[ing] this Court to order a particular remedy (such as requiring Defendants to forgive all of their loans as well)"). Indeed, Plaintiff Christopher Baird declares that "loan forgiveness would be at the expense of [his] neighbors" and "the American taxpayer" and that he does not want his farm to succeed "at the expense of anyone else." Baird Decl., ECF No. 14-2. He thus avers that he joined this lawsuit, not to receive debt relief under Section 1005, but

[8] For the same reason, there is no authority for Plaintiffs' position, expressed at the TRO hearing, that they suffer irreparable harm to their interests if even one minority farmer receives debt relief. Such a theory is akin to Plaintiffs' argument that their equal protection allegation is sufficient in and of itself to constitute irreparable harm. As set forth above, that is not the law. And the mere fact that the Government has provisionally conferred some benefit on one person but not on another does not demonstrate that emergency relief is justified. Rather, to demonstrate an "irreparable" injury that would justify an immediate injunction, Plaintiffs must show that any relief that would eventually be available through the ordinary channels of civil litigation would not be adequate to redress the alleged inequality. As noted, they do not do so here.

because he "believe[s] that treating another person differently because of their race or the color of their skin is wrong." *Id.* ¶ 10. Plaintiff Cheryl Ash similarly declares, "I just want the government to treat everyone equally, just like we do, regardless of my race." Ash Decl. ¶ 7, ECF No. 14-6. And aside from Plaintiff Teena Banducci, none of the Plaintiffs even indicate in their declarations that they want or would seek debt payments under Section 1005. But to the extent Plaintiffs do not seek debt payments under Section 1005, and bring this suit merely because they disagree with the Government relieving others' debts, they lack a concrete and particularized injury. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485–86 (1982) ("[O]bservation of conduct with which one disagrees ... is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.").[9] Thus, far from enabling this Court to presume irreparable harm, any injury based on Plaintiffs' "intangible and unquantifiable interests" in the equal distribution of debt relief, Pls.' Mem. 24, is an abstract generalized grievance insufficient to establish standing, *see Valley Forge*, 454 U.S. at 482–83.[10]

Finally, to the extent Plaintiffs do purport to want a "shot" at debt relief for socially disadvantaged farmers, Pls.' Mem. 25; *see also* Banducci Decl. ¶¶ 4, 8 (indicating that she had asked how to apply for relief under Section 1005 and declaring that she and her husband were "hoping …

[9] In *Valley Forge*, an organization dedicated to the separation of church and state sought to prevent the Government from transferring surplus property to a religious organization without payment on the basis of the Establishment Clause. In holding that the plaintiffs did not have standing, the Court also noted that the organization's claim that the Constitution had been violated was an "abstract injury" "amount[ing] to little more than [an] attempt[] to employ a federal court as a forum in which to air ... generalized grievances about the conduct of government." 454 U.S. at 482–83.

[10] To the extent Plaintiffs claim to suffer harm because they believe distribution of debt payments to minority farmers is "unfair," Banducci Dec. ¶ 8, such "'abstract psychic harm' … is insufficient to establish standing" as well. *Kushner v. Illinois State Toll Highway Auth.*, 575 F. Supp. 2d 919, 922–23 (N.D. Ill. 2008) (quoting *MainStreet Organization of Realtors v. Calumet City,* 505 F.3d 742, 745 (7th Cir.2007)).

[to] get some help"), they likewise cannot establish irreparable harm on the basis of any harm to that interest.[11] Plaintiffs are fundamentally mistaken in their assertion that they face irreparable harm because "[o]nce the money budgeted for [Section 1005] is spent," Pls.' Mem. 25, Defendants "will have accomplished their goal of race-based COVID relief" and "will have no reason" to provide "similar relief on an equitable basis to all, including white farmers," *id.* at 27. First, the "money budgeted" for Section 1005, Pls.' Mem. 25, is "such sums as may be necessary" to carry out the program. § 1005(a)(1). This is thus not a situation, like the two remaining cases Plaintiffs cite, where "[t]here is a real risk that the funds will run out," *Vitolo v. Guzman*, 2021 WL 2172181, at *3 (6th Cir. May 27, 2021) (granting TRO where socially disadvantaged program involved a finite appropriation for grants for restaurant owners to meet payroll and other obligations), or where there is "little hope of obtaining adequate compensatory or other corrective relief at a later date if the injunction does not issue," *O'Donnell Const. Co. v. D.C.*, 963 F.2d 420, 428 (D.C. Cir. 1992). The statute therefore lends no support to Plaintiffs' assertion that an immediate injunction is needed to preserve a finite pool of funds, and Plaintiffs have not shown that providing debt relief to minority farmers will affect the prospect that USDA could provide debt relief to them if they were determined to be eligible.

Second, and relatedly, any harm to Plaintiffs' interests is not "imminent," as it must be, *Meek* 2021 WL 2036535, at *4 ("The irreparable harm alleged must be actual and imminent, not merely speculative."), because USDA is just beginning to implement the first part of the program. As set forth in the Cobb Declaration, USDA is currently identifying eligible recipients, *see* Cobb Decl. ¶ 13, and implementing Section 1005 with respect to certain qualifying direct loans, *see id.*

[11] USDA has announced that it will determine on a case-by-case basis whether additional groups qualify as socially disadvantaged. *See* NOFA.

¶ 11. USDA anticipates sending offer notices to most eligible recipients by July 10, 2021, *see id.* ¶ 14, and based on an initial test of its procedures, anticipates that it will take seven days from the time of mailing to receive an acceptance of the offer, *see id.* ¶ 31. For approximately 44% of eligible recipients who require reversals of loan payments they made after January 1, 2021, however, USDA anticipates that the process will take longer, up to nine weeks. *See id.* ¶¶ 14, 23, 32, 37.[12] And USDA has not even issued a NOFA with respect to eligible guaranteed loans and certain direct loans that have been referred to Treasury for collection. *See id.* ¶ 26. For those loans, which, by USDA estimates, comprise roughly 12% of total ARPA-eligible payments, USDA anticipates issuing a NOFA by September 23, 2021. *See id.* ¶¶ 11, 27. Thus, even if Plaintiffs' theory were correct, any danger that Defendants will no longer have an incentive to provide broader debt relief once Section 1005 funds are allocated to minority farmers is plainly not imminent where those funds are statutorily unlimited and their allocation will take months. And it is certainly not so imminent as to warrant a TRO at the nascent stage of this case and program implementation. Plaintiffs have not carried their burden to establish irreparable harm. *See Meek*, WL 2036535, at *4 ("The relevant inquiry is whether, at the time the injunctive relief is to be issued, the party seeking the injunction is in danger of suffering irreparable harm.").

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

In addition to lacking an irreparable injury, Plaintiffs also have not shown that they are likely to succeed on the merits of their facial attack on Section 1005. Defendants intend to address Plaintiffs' particular merits arguments more fully in their opposition to Plaintiffs' motion for a preliminary injunction to be filed on June 18, 2021. For purposes of responding to Plaintiffs' TRO,

[12] There are 15,602 eligible recipients under the NOFA published in May, *see id.* ¶ 37, 6,836 of which will require payment reversals, *see id.* ¶ 23.

Defendants respectfully refer the Court to Defendants' opposition in *Wynn*, which shows that Plaintiffs are not likely to succeed on the merits of their equal protection claim. *See* Ex. A. As briefly summarized below, that opposition shows that the targeted debt payments in Section 1005 to minority farmers is a narrowly tailored remedy to serve the Government's compelling interests.

The Supreme Court has recognized, *inter alia*, two compelling interests that may justify the use of racial classifications. "The Government unquestionably has a compelling interest in remedying [its own] past and present discrimination." *United States v. Paradise*, 480 U.S. 149, 167 (1987). And "[i]t is beyond dispute that any public entity ... has a compelling interest in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality op.). Congress relied on both interests when it authorized the debt payments to SDFRs in Section 1005. *See* Ex. A, § BG III.B.

And Congress had a strong basis in evidence for concluding that both interests warranted the remedial action in Section 1005. *See id.* §§ BG III.A, Argument (Arg.) I.B.2. It pointed to significant statistical and anecdotal evidence, including studies, investigations, reports, prior lawsuits, and other sources, showing the unfortunate and longstanding history of discrimination against minority farmers, including in the very USDA loan programs at issue in this case. *See id.* §§ BG III.A, Arg I.B.2.[13] Those sources showed that minority farmers not only had less access to USDA farm loans as compared to their white counterparts, but also received smaller loan amounts, had those amounts arbitrarily reduced, were subject to inordinate approval wait times that adversely affected their ability to repay the loans, were denied opportunities to avoid foreclosure,

[13] Indeed, Plaintiffs themselves acknowledge "USDA's past discriminatory history," "its efforts to remedy that conduct," Pls.' Mem. 8, and that Congress previously passed legislation "to rectify USDA's prior intentional discrimination," *id.* at 11.

and were often assigned "supervised" loans that required white loan officers to approve and cosign every transaction. *See id.* §§ BG III.A, Arg I.B.2. Those sources also showed that minority farmers lacked adequate recourse to remedy those problems via the USDA's ineffective civil rights complaints process. All of this, the sources showed (and members of Congress concluded), contributed to a significant loss of minority-owned farmland and placed minority farmers in a worse financial position today than their white counterparts. *See id.* §§ BG III.A, Arg I.B.2. Congress also relied on evidence to conclude that its recent agriculture subsidies and pandemic relief efforts—which were administered in a race-neutral fashion—were exacerbating the effects of discrimination against minority farmers in USDA programs, where the vast majority of that funding did not reach minority farmers, despite their disproportionate need for such relief. *See id.* §§ BG III.A, Arg I.B.2; *see also supra* § Background I.

With this evidence in mind, Congress targeted the debt payments in Section 1005 to the minority groups that it determined had suffered discrimination in USDA programs and that had been largely left out of recent agricultural funding and pandemic relief. *See* Ex. A, § BG III.B. That remedy was narrowly tailored to serve the Government's compelling interests. *See id.* § Arg. I.B.3. First, the necessity for debt payments to minority farmers is firmly rooted in the evidence before Congress, showing longstanding discrimination against minority farmers in USDA programs, the effects of which were made even more acute by a pandemic that disproportionately affected them. *See id.* The necessity of that debt relief is underscored by the numerous race-neutral alternatives that Congress employed before enacting Section 1005, which it found had not provided an adequate remedy. *See id.* Second, the debt payments to minority farmers is both flexible and time-limited. *See id.* Third, the provision of debt payments to minority farmers—approximately 0.2% of the $1.9 trillion package in ARPA based on current estimates—does not

burden innocent third parties, namely white farmers, who have not suffered discrimination in USDA programs and who have disproportionately benefitted from prior agricultural and pandemic subsidies. *See id.* And fourth, the debt payments to minority farmers is not under- or over-inclusive because it is targeted to the groups that Congress determined had suffered from discrimination in USDA loan programs and had largely been left out of recent funding and relief efforts. *See id.*

In sum, as Defendants have shown, *see id.* § Arg. I.B, and will show in greater detail in opposition to Plaintiffs' motion for a preliminary injunction, the targeted debt payments in Section 1005 to minority farmers is a narrowly tailored remedy to serve the Government's compelling interests in remedying prior discrimination against minority farmers in USDA programs, including USDA's loan programs, and ensuring that the Government is not perpetuating the effects of that discrimination by continuing to distribute funding in a manner that largely fails to reach minority farmers.

C. The Injunction Plaintiff Seeks Is Contrary To the Public Interest.

Finally, the balance of the harms overwhelmingly favors Defendants, as the injunction Plaintiff seeks is manifestly contrary to the public interest. *See Nken*, 556 U.S. at 435 (pointing out that "[t]hese factors merge when the Government is the opposing party"); Pls.' Mem. 1 (seeking to enjoin the implementation of Section 1005 "immediately"). Congress passed Section 1005 based on its determination that timely debt relief for minority farmers was necessary to remedy the lingering effects of the well-documented history of USDA discrimination against them and to ensure that, unlike prior funding, pandemic relief actually reached them. *See* Ex. A, § BG III.A-B. And it did so based on evidence that minorities, and minority farmers in particular, were especially in need due to the disproportionate impact of COVID-19 on those communities and their lack of access to prior rounds of agricultural funding and pandemic relief. *See id.*

As noted, Congress has a compelling interest in remedying prior discrimination and in ensuring that its funds are not allocated in a manner that perpetuates that discrimination. *See id.* § Arg. I.B.1; *see also supra* Arg. I.B. The Government and the public have a strong interest in the implementation of the laws enacted by the duly elected representatives in Congress. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("Any time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). And the thousands of minority farmers, who, Congress noted, sat disproportionately on the brink of foreclosure when COVID-19 hit, and who were allocated this emergency debt relief, plainly have a strong interest in receiving those funds. As the Cobb Declaration explains, 299 accounts with eligible recipients to whom USDA anticipates sending offer notices are currently in bankruptcy proceedings, *see* Cobb Decl. ¶ 37, and minority farmers are delinquent on FSA loans at higher rates, and in some cases much higher rates, than white farmers, *see id.* ¶ 38. If payments to those farmers are halted, as Plaintiffs request, that could adversely affect those farmers' ability to obtain student loans, loans from the Small Business Administration, or loans from other federal agencies. *See id.* It will delay their closings on new FSA loans. *See id.* ¶ 40. And it could result in foreclosure on their farms by non-USDA lenders, which already account for a disproportionate number of foreclosures. *See id.* ¶ 39. All of those interests would be harmed if Plaintiffs were to obtain the immediate injunctive relief they seek.

Plaintiffs, on the other hand, are seeking to thwart the will of Congress and prevent timely payments to fellow Americans in need based largely on their own beliefs and unjustified fears about finite appropriations. But Plaintiffs' views do not outweigh those of Congress and the general public that elected them. And Plaintiffs have not shown that any economic interests they assert will be irreparably harmed by one-time payments to minority farmers, in particular where

the appropriation at issue is unlimited, and the implementation of Section 1005 is just beginning. Even if they had, the Government and the public's interests in remedying prior discrimination, ensuring the equitable and timely distribution of much-needed pandemic relief—a direct response to a national economic and public-health emergency of historic proportions—and seeing the implementation of duly enacted federal law, outweigh any possible harm to these twelve Plaintiffs' ideological and economic interests due to the implementation of Section 1005. Granting an injunction here would be directly at odds with the purpose such an extraordinary remedy is designed to serve: rather than preventing harm and preserving the status quo, Plaintiffs' requested relief would result in substantial prejudice to thousands of their fellow farmers nationwide who have a substantial interest in receiving the debt relief that they were allocated. *See* Cobb Decl. ¶¶ 36-40 (explaining that minority farmers have requested a disproportionate number of disaster set-aside requests due to the impacts of COVID-19 and the adverse impacts on those farmers if debt payments were to be delayed).

Indeed, the public interest weighs against an immediate halt of the implementation of Section 1005 even if one assumes that Plaintiffs' legal claims have merit. "When the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017). "The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand." *Id.* at 1699; *see Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 330 (2006) (explaining that "the touchstone for any decision about remedy is legislative intent"). An immediate halt to implementation of the program would be appropriate only if Plaintiffs could show, in addition to the other requisite showings, that Congress would prefer, as a remedy for any

constitutional violation, to provide *no* immediate relief for *any* minority farmers while the program is redesigned. As Plaintiffs themselves all but acknowledge, *see* Pls.' Mem. 29, there is no basis for concluding that delaying the provision of emergency relief to those farmers would be consistent with Congress's intent in enacting Section 1005. Plaintiffs therefore fail to show that their desired injunction would constitute an appropriate remedy under binding Supreme Court precedent.

II. Any Temporary Restraining Order Issued Should Be Limited To Plaintiffs.

If the Court were to enjoin any aspect of Section 1005 (and it should not), any such injunction should be limited. A remedy "must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018); *Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1094 (7th Cir. 1988) ("[T]he scope of injunctive relief must not exceed the extent of the plaintiff's protectible rights."). And an injunction should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiff[]." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

To the extent that Plaintiffs ask this Court to ensure that they will "have a fair shot at any amended version" of the program, *id.*, any relief should be limited to addressing the alleged injury to these Plaintiffs—and not to the "thousands of other farmers" across the country, *id.* at 24, who are not parties to this action and whose interests Plaintiffs lack standing to represent, *see McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (overruling district court that "wrote that it was appropriate to enjoin the entire program, despite the lack of class certification, in order to prevent the City from violating the Constitution" because "plaintiffs lack standing to seek—and the district court therefore lacks authority to grant—relief that benefits third parties"). For instance, even though Congress has already appropriated "such sums as may be necessary" to carry

out Section 1005, ARPA § 1005(a)(1), if the Court nevertheless had any doubts about the availability of funds for Plaintiffs at a later date, it could issue a limited injunction requiring the Government to set aside funds sufficient to pay off any of Plaintiff's qualified loans pending the outcome of this litigation. That limited injunction would ensure that Plaintiffs have any "shot" at debt relief that they could possibly want, and it would be consistent with the well-established principle that courts cannot grant relief to third parties not before them.

A limited injunction of that nature would also go farther toward preserving the status quo, which is of paramount concern when fashioning relief for purposes of a TRO. *Crue v. Aiken*, 137 F. Supp. 2d 1076, 1082 (C.D. Ill. 2001) ("A temporary restraining order … is an emergency remedy issued to maintain the status quo until a hearing can be held on an application for a preliminary injunction."). As noted, granting the immediate injunction Plaintiffs seek on a nationwide basis would upset the status quo for the thousands of minority farmers in need of the emergency relief authorized by Section 1005.

Finally, an injunction extending beyond these Plaintiffs would flout Supreme Court warnings against nationwide injunctions. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (Nationwide relief "take[s] a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch."); *see also City of Chicago v. Barr*, 961 F.3d 882, 936 (7th Cir. 2020) (Manion, J., concurring) (explaining that tailored relief "guards against a decision premised on faulty assumptions: that the parties presented the district court with the very best arguments on the merits; that no other jurisdictions' standards for injunctive relief would yield different results than in this case; … and that no trial judge sitting in the 93 other districts could possibly reach a different decision on these issues.").

Those warnings are particularly apt here where Section 1005 is being challenged in other courts and Plaintiffs are the only plaintiffs who have sought a TRO that would immediately halt consideration of these issues. [14]

CONCLUSION

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

Dated: June 8, 2021

Respectfully submitted,

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[14] If the Court were, nevertheless, inclined to issue some form of nationwide relief, again that relief should be tailored to preserve the status quo as much as possible. For instance, if the Court were to determine that any immediate disbursement of funds to minority farmers constituted irreparable harm, then it could tailor an injunction to preclude disbursement of funds during its consideration of the preliminary injunction motion, while allowing USDA to continue sending notices and processing return letters in the interim. That would allow USDA to take necessary steps to prepare funds for issuance as soon as the injunction is lifted, thereby minimizing the harm to minority farmers across the Nation who have a significant interest in receiving much-needed debt relief during the pandemic. Again, however, because the appropriation under Section 1005 is not finite, Plaintiffs have identified no sound basis for concluding that allowing USDA to continue disbursing funds to minority farmers will cause them any harm at all, much less irreparable harm.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SCOTT WYNN, an individual, *Plaintiff*, v. TOM VILSACK, in his official capacity as Secretary of the U.S. Department of Agriculture, *et al.*, *Defendants*.	No. 3:21–cv–00514–MMH–JRK

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Congress enacted Section 1005 of the American Rescue Plan Act (ARPA) to provide debt relief to socially disadvantaged farmers who it determined needed such relief due to decades of discrimination against them in U.S. Department of Agriculture (USDA) programs, the disproportionate impact of COVID-19 on them, and the failure of prior funding to reach them. Plaintiff, a white farmer who has been the recipient of thousands of dollars in USDA benefits—not the victim of USDA discrimination—seeks to enjoin USDA from providing debt relief to minority farmers because he alleges they will then gain an unfair advantage over him. Plaintiff's motion should be denied.

Plaintiff does not satisfy any of the requirements for such extraordinary relief. First, he cannot establish irreparable harm because he provides no evidentiary support for his conclusory allegation that he will suffer competitive disadvantage if USDA implements § 1005. He admits circuit precedent forecloses his ability to establish irreparable harm on the basis of his equal protection allegation. And he cannot rely on the irreparable nature of his alleged harm where he has not shown a harm in the first place.

Second, Plaintiff has not shown a likelihood of success on the merits of his equal protection claim. The Supreme Court has recognized that both of Congress's interests in enacting § 1005—remedying prior discrimination against minority farmers in USDA programs and ensuring that its funding does not serve to perpetuate the effects of that discrimination—are compelling. Congress had strong evidence, including testimony and reports spanning decades and up to the enactment of § 1005, documenting discrimination against minority farmers in USDA programs and its lingering effects,

thereby necessitating the remedial action in § 1005. And Congress narrowly tailored its remedy by directing one-time payments to the groups it found to have suffered such discrimination, only after trying race-neutral alternatives for decades.

Third, the balance of interests tilts decisively in favor of Defendants. Congress sought in § 1005 to provide debt relief to minority farmers disadvantaged by decades of discrimination in USDA programs and to ensure that, unlike prior funding—which went overwhelmingly to white farmers like Plaintiff—this funding did not perpetuate the effects of that discrimination at a time when minority farmers needed relief most. Those interests dwarf any alleged competitive disadvantage this single Plaintiff could possibly suffer due to implementation of § 1005.

BACKGROUND

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

USDA's Farm Service Agency (FSA) administers a variety of farm credit and benefit programs. *See* Consol. Farm and Rural Dev. Act, 7 USC §§ 1921, *et seq.*; 7 CFR § 2.42(a)(28). Like its predecessor the Farmers Home Administration (FmHA), FSA makes credit available to farmers who cannot obtain it from commercial institutions, 7 USC §§ 6932(b), including by making loans directly to farmers, *see id.*, and guaranteeing loans of commercial lenders up to 95%, 7 CFR § 762.129, to expand opportunities for farmers and ranchers, *id.* § 762.101.[1] These loans assist farmers with buying or improving farm property, *id.* § 764.151 ("farm ownership" loans), provide

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

credit and management assistance to help farmers run their farms, *id.* § 764.251 ("operating" loans), or help farmers resume operations after a disaster, *id.* § 764.351 ("emergency" loans). *See* 7 USC §§ 1923, 1942, 1963.

Local committees have been key to the administration of USDA loan programs, *see* 16 USC § 590h(b)(5), though their structure and role in those programs have changed, *see* Congressional Research Service (CRS), FSA Comms.: In Brief (Jan. 29, 2021) (FSA Comms.).[2] In 2002 and 2008, Congress adopted measures to ensure minority representation on the committees. *Id* at 2-3. And though county committees used to work with individuals to complete loan applications, make decisions about borrower eligibility and status, and determine loan amounts, *Garcia v. Johanns*, 444 F.3d 625, 628–29 (D.C. Cir. 2006), today they are uninvolved in the loan approval process, *see* FSA Comms. 3. Now, they generally advise USDA loan officers on regional issues, conduct outreach to farmers, provide education and training, and ensure Socially Disadvantaged Farmers and Ranchers (SDFRs) are fairly represented. *See id.*[3]

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

Although USDA aims to serve all farmers equitably,[4] decades of evidence shows that not all USDA stakeholders have benefitted equally from its services—particularly its farm loan services. *See infra* Argument (Arg.) II.B. In fact, the evidence

[2] *Available at* https://perma.cc/HA3L-PDPG.
[3] As explained below, USDA defines SDFRs to include certain racial and ethnics minorities; herein, Defendants refer to SDFRs and minority farmers interchangeably.
[4] *History and Mission*, FARM SERVICE AGENCY, https://perma.cc/B47X-MTCL.

indicates just the opposite: that throughout USDA's history and up to present day, minority farmers have been "hurt" more than helped due to discrimination in USDA's farm loan programs. Civil Rights at the [USDA]—A Report by the Civil Rights Action Team (CRAT) 6 (1997) (CRAT Rep.)[5]; *see also* Arg. II.B.

Minority farmers have long experienced inequities in FSA's administration of farm loans, including with respect to loan approval rates, amounts, and terms. *See* U.S. Commission on Civil Rights (USCCR), *The Decline of Black Farming in America* 84-85(1982) (1982 Rep.)[6] (discussing complaints of loan amounts being reduced or repayment schedules "accelerated without explanation"); *see also* CRAT Rep. 16 (discussing complaints of loans being "arbitrarily reduced" or not arriving as promised); Hr'g on the USDA's Civil Rights Prog. for Farm Prog. Participants before House Subcomm., Dep't Ops., Oversight, Nutrition, and Forestry, Comm. on Ag., 107th Cong. 23, 16-21, 33-35 (2002) (2002 Civil Rights Hr'g) (discussing disparities in loan processing times and approval rates for Hispanic farmers and discrimination complaints by "black, American Indian, [and] Hispanic" farmers). These experiences are recounted in numerous reports and the many administrative civil rights complaints filed by minority farmers. *See* Arg. II.B. But those complaints have failed to remedy individual experiences of discrimination in FSA's loan programs, because too often they languished in a growing backlog or went unanswered altogether. *See id.*

[5] *Available at* https://perma.cc/5DNF-PFJY.
[6] *Available at* https://perma.cc/CFE9-ANJ3.

These problems spawned a series of lawsuits against USDA by groups of minority farmers.[7] From 1997 and over the next decade, African-American, Native American, Hispanic, and female farmers alleged that USDA systematically discriminated against them in the administration of farm loans and other benefits and failed to investigate discrimination complaints. *See Pigford II*, 856 F. Supp. 2d at 8; Arg. II.B. Although USDA settled the lawsuits and has paid more than $2.4 billion to claimants, *see* Arg. II.B., State taxes eroded recoveries, debt relief was incomplete, and reports before Congress showed that the settlements have not cured the problems faced by minority farmers. *See* 167 Cong. Rec. S1264 (Mar. 5, 2021) (Stabenow).

Even after the lawsuits, investigations revealed that Socially Disadvantaged Groups ("SDGs") continued to experience discrimination with respect to the requirements, availability, and timing of FSA loans. *See* Arg. II.B (discussing Jackson Lewis LLP, "Civil Rights Assessment" (Mar. 31, 2011) (JL Report)).[8] Just this year, the Government Accountability Office (GAO) noted that "[c]oncerns about discrimination in credit markets … have long existed" and that, as a result, minority farmers continue to "ha[ve] less access to credit." GAO-21-399T, Fin. Servs.: Fair Lending, Access, and Retirement Sec. 1 (2021).[9] As these and other reports have documented,

[7] *Pigford v. Glickman* ("*Pigford I*"), No. 97-1978 (D.D.C.); *Keepseagle v. Veneman*, No. 99-03119 (D.D.C.); *Garcia*, No. 00-2445 (D.D.C.); *Love v. Glickman*, No. 00-2502 (D.D.C.); *In re Black Farmers Discrimination Litigation* ("*Pigford II*"), No. 08-mc-0511 (D.D.C.).
[8] *Available at* https://perma.cc/8X6Q-GZ5V.
[9] *Available at* https://perma.cc/3CWQ-B959.

discrimination in USDA's loan programs has contributed to a dramatic loss of minority-owned farmland. *See* Arg. II.B; *see, e.g.*, 1982 Rep. 176 (reporting that from 1920 to 1992, the number of all minority-owned farms fell from 925,000 to around 60,000).

III. CONGRESSIONAL RECOGNITION OF DISCRIMINATION AGAINST SOCIALLY DISADVANTAGED FARMERS IN USDA PROGRAMS AND PAST FAILURES TO REMEDY ITS LINGERING EFFECTS

The history of discrimination against minority farmers in USDA programs has not gone unnoticed by Congress. For decades, Congress has heard testimony and acknowledged such discrimination, during numerous hearings to understand and remedy its ongoing effects.[10] And in passing § 1005, Congress did so again.

The predecessor to § 1005 included findings highlighting the pattern of discrimination in USDA programs and its consequences for minority farmers. *See* S.278, "Emergency Relief for Farmers of Color Act of 2021," (intr'd Feb. 8, 2021). The bill noted that over the last century, Black farmers dwindled from 14 to two percent of all

[10] *See, e.g.,* Hr'g on USDA's Civil Rights Progs. and Responsibilities before The House Subcomm. on Dep't Ops., Oversight, Nutrition, and Forestry, Comm. on Ag., 106th Cong. 37 (1999) (Goodlatte) (recognizing that "[c]ivil rights at the [USDA] has long been a problem"); 2002 Civil Rights Hr'g 16, 18, 26 (hearing testimony about the disparities in loan processing times and approval rates for Hispanic farmers; underrepresentation of minorities in USDA; and continuing delays in the resolution of civil rights complaints); Hr'g to Review the USDA's Farm Loan Progs. before the Senate Comm. on Ag., Nutrition, and Forestry, 109th Cong. 800 (2006) (Karen Krub, Farmers' Legal Action Group, Inc.) ("[T]here is still no meaningful process for investigation and resolution of allegations of discrimination [against] FSA decision-makers."); Hr'g to Review Availability of Credit in Rural America before the House Subcomm. on Conserv., Credit, Energy, and Research, Comm. on Ag., 110th Cong. 8 (2007); Hr'g on Mgmt. of Civil Rights at the USDA before the House Subcomm. on Gov't Mgmt., Org., and Procurement, Comm. on Oversight and Gov't Reform, 110th Cong. 137 (2008) (hearing testimony about, and recognizing, the continued problem of USDA discrimination against minority farmers, including the inability of Native American and Hispanic farmers to receive loans; underrepresentation of minorities on county committees; and delayed processing of civil rights complaints, including allegations that complaints were shredded and not processed, all despite creation in 2002 of the Assistant Secretary of Civil Rights); House Ag. Comm. Hr'g on U.S. Ag. Policy and the 2012 Farm Bill (Apr. 21, 2010); House Ag. Comm. Hr'g on USDA Oversight 45, 50 (July 22, 2015).

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

Floor statements leading to the passage of § 1005 echoed those findings. As Chairman of the House Agriculture Committee, David Scott, put it, "[t]he systemic discrimination against … farmers of color by USDA is longstanding and well-documented and continues to present barriers for these producers to participate in the agricultural economy." 167 Cong. Rec. H765 (Feb. 26, 2021). He recounted "this history and the continuing challenges for these farmers" by summarizing over a dozen reports between 1965 and 2019, which showed how discrimination against them manifested at all levels of USDA—from lacking representation on county committees, to receiving disproportionately fewer farm loans, to being denied an adequate process for resolving civil rights complaints. *Id.* H765-66. Senator Cory Booker cited some of the same evidence in attributing the massive loss of Black-owned farmland to the "brutal legacy of discrimination by [USDA]." *Id.* S1265; *see also id.* S1262 (Stabenow) (citing studies estimating losses "at more than $120 billion in lost opportunities").[11]

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

At the same time, Congress acknowledged that its previous efforts to remedy

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

the lingering effects of discrimination against minority farmers in USDA programs "ha[d] fallen short." *Id.* S1262 (Stabenow). As Senator Stabenow explained, Congress began targeting USDA assistance to SDFRs during the agriculture credit crisis in the 1980s, created a program to provide outreach and technical assistance to SDFRs in 1990 (the "2501 Program"), and permanently funded the 2501 Program in 2018. *See id.* S1263-64. In response to the lawsuits brought by groups of farmers against USDA, Congress suspended statutes of limitations for Equal Credit Opportunity Claims in 1998, and in 2010, it provided $1.25 billion to ensure that those claimant groups received payments under their respective settlements. *See id.* S1264. Also in 2002, Congress created the Office of the Assistant Secretary for Civil Rights at USDA to ensure better compliance with civil rights laws. *See id.* And in 2014, it created a permanent Office of Tribal Relations under the Secretary of Agriculture. *See id.*

Despite these efforts, Congress found that minority farmers continued to suffer the effects of discrimination in USDA programs. Two GAO reports mandated by Congress in 2018 illuminated the extent of the problem, *see* GAO-19-539, Ag'l Lending: Info. on Credit & Outreach to [SDFRs] Is Limited 2 (2019)[12]; GAO-19-464, Indian Issues: Ag'l Credit Needs and Barriers to Lending on Tribal Lands (2019),[13] revealing that SDFRs still had "more difficulty getting loans and credit from USDA … [that] can help beginning farmers break into the business and help existing farmers

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

continue running their operations," S1264 (Stabenow) (citing Nat'l Young Farmers Coal., Cal. Young Farmers Rep. 32 (Apr. 2019)).[14]

Congress also found that, due to the lingering effects of the longstanding discrimination against minority farmers, "Black farmers and other farmers of color were in a far more precarious financial situation before the COVID–19 pandemic hit"—and a year into the pandemic, some "ha[d] simply not been able to weather the storm." *Id.* S1265-66 (Booker). For instance, Congress observed that a disproportionate number of Black, Hispanic, Asian-American, and Indigenous farmers were in default on their direct loans, putting farmers of color at risk of "facing yet another wave of foreclosures and potential land loss." *Id.* (citing statistics that 13% of borrowers with FSA direct loans were currently delinquent but that number increased to 35% for Black farmers and 24% for Hispanic, Asian-American, and Indigenous farmers); *see also id.* at S1264 (Stabenow explaining that SDFRs are more likely to have loans in default because they "are less likely to have the same access to adequate loan servicing … as their White counterparts" due to discrimination in USDA loan programs); Review of the Off. of the Assistant Sec'y for Civil Rights, Hr'g before the House Subcomm. On Nutrition, Oversight, and Dep't Ops., Comm. on Ag., 116th Cong. 25, 9 (2019) (2019 Civil Rights Hr'g) (Adams) (citing reports that Black farmers were subject to 13% of USDA foreclosures despite being less than 3 percent of direct loan recipients).

Despite the particularly vulnerable position of minority farmers, lawmakers

[14] *Available at* https://perma.cc/PEY5-Z253.

cited reporting that the overwhelming majority of recent agricultural subsidies and pandemic relief prior to ARPA went to non-minority farmers—again, in part due to the lingering effects of discrimination. Specifically, the reporting indicated that 99.4 percent of USDA's Market Facilitation Program (MFP) payments went to white farmers, *see* S1264-65; *see also id.* H766,[15] and nearly 97 percent of the $9.2 billion provided through USDA's first Coronavirus Food Assistance Program (CFAP) in 2020 likewise went to non-minority farmers, *see id.* S1264-65; H766.[16] Senator Stabenow explained that "[t]he diminished relationships between [SDFRs] and USDA as a result of both latent barriers and historic discrimination limit[ed]" SDFRs' access to, and participation in, USDA programs, such that "73 percent of Black farmers … were not even aware of the agricultural aid provisions of the[se] coronavirus rescue programs." *Id.* S1264.[17] A letter introduced into the record from 13 full-time professors who specialize in agricultural issues explained that federal farm programs "have perpetuated and exacerbated the problem," by preferring certain crops (those produced by white farmers) and "reward[ing] the largest farms the most" (those owned by white farmers),

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

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

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

thereby "distort[ing] credit, land, input costs, and markets" to the disadvantage of minority farmers. *Id.*[18]

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

On March 10, 2021, Congress passed ARPA, which provides widespread pandemic relief to the American people, including farmers. *See* Pub. L. No. 117-2 (2021). ARPA "takes a multipronged approach to tackle the public health and economic crises resulting from the COVID-19 pandemic." H.R. Rep. No. 117-7, 3 (2021). The House Report accompanying the bill shows that Congress was focused on the "most vulnerable communities … forced to bear the brunt of" the pandemic and resultant economic crisis "as underlying health and economic inequities grow worse." *Id.* at 2. Among those communities were minority farmers who had "received a disproportionately small share of the farm loans and payments administered by USDA as a result of … longstanding and widespread discrimination." *Id.* at 23.

As part of ARPA, Congress passed § 1005, which was designed to "provide targeted and tailored support for … farmers," CR H765 (Scott), who "have for many decades suffered discrimination by [USDA]," *id.* S1265 (Booker), and who had not benefited from prior pandemic relief efforts, *see id.* H1273 (Rep. Neal) (explaining

[18] In addition to most of the reports cited herein, the letter also attached and summarized the following sources documenting USDA discrimination: Hr'g on the Decline of Minority Farming in the United States, Comm. on Gov't Ops., U.S. House of Reps. (1990); D.J. Miller Disparity Study: Producer Participation and EEO Compl. Process Study), D.J. Miller & Associates report prepared for the USDA FSA (1996); USDA: Problems in Processing Discrim. Compls., GAO (2002); USDA: Recomms. and Options to Address Mgmt. Deficiencies in the Off. of the Assistant Secretary for Civil Rights, GAO (2008), https://perma.cc/YW73-83WE. *See* S1266-67.

Black farmers were not targeted by other Covid-19 legislation); *see also id.* S1264-65 ("Congress includes these measures to address the longstanding and widespread systemic discrimination within the USDA, particularly within the loan programs, against [SDFRs]."") (Stabenow); S.278, Sec. 4, ¶ (a)(1)-(2) (stating that its purpose was "to address the historical discrimination against [SDFRs] and … issues relating to … COVID–19 … in the farm loan programs[] and across the [USDA]").

Section 1005 provides funds to pay up to 120 percent of certain direct or guaranteed USDA farm loans held by a "socially disadvantaged farmer or rancher" and outstanding as of January 1, 2021.[19] *See* § 1005. For purposes of § 1005, Congress gave the term "socially disadvantaged farmer or rancher" the same meaning as in Section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990, codified at 7 USC § 2279(a). *See id.* § 1005(b)(3). That provision defines a "socially disadvantaged farmer or rancher" as "a farmer or rancher who is a member of a socially disadvantaged group," 7 USC 2279(a)(5), which is further defined as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities," *id.* § 2279(a)(6).

USDA has long interpreted "socially disadvantaged group[s]" to include the following five groups: American Indians or Alaskan Natives; Asians; Blacks or Afri-

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

can Americans; Hispanics or Latinos; and Native Hawaiians or other Pacific Islanders. *See* 66 FR 21617-01 (Apr. 30, 2001) (interpreting 7 USC § 2279 to include those groups for purposes of Outreach and Assistance for SDFRs Program); 74 FR 31571 (July 2, 2009) (same for Conservation Reserve Program); 75 FR 27615 (May 14, 2010) (same for Risk Management Purchase Waiver). USDA confirmed in a Notice of Funds Availability (NOFA) that SDGs would continue to "include, but are not limited to," those same five groups, while others could be considered for inclusion on a case-by-case basis by the Secretary in response to a written request. *See* NOFA.[20]

IV. PROCEDURAL HISTORY

On May 18, 2021, Plaintiff filed suit challenging USDA's implementation of § 1005. Doc. 1. Plaintiff, a farmer who identifies as white, alleges that he holds USDA loans and would qualify for debt relief under § 1005 but for the fact that he is white. *Id.* ¶ 4. He claims that USDA's interpretation of "socially disadvantaged farmer or rancher" in § 1005 to include farmers who identify as falling within one of the five aforementioned racial or ethnic groups, and not automatically white farmers like him, violates equal protection, *see id.* ¶¶ 19, 52-53. On May 25, 2021, Plaintiff filed a motion for preliminary injunction to enjoin USDA from enforcing § 1005. Doc. 11.

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

ARGUMENT

I. Plaintiff Has Not Shown That He Is Entitled To A Preliminary Injunction.

A preliminary injunction is a "drastic remedy not to be granted unless the movant clearly establishe[s] the burden of persuasion" on all four elements." *Davidoff & CIE, S.A. v. PLD Int'l Corp.*, 263 F.3d 1297, 1300 (11th Cir. 2001).[21] Namely, that (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury absent an injunction; (3) the threatened injury to him outweighs the damage an injunction would cause to the opposing party; and (4) the injunction would not be adverse to the public interest. *Swain v. Junior*, 961 F.3d 1276, 1284–85 (11th Cir. 2020). The latter two factors merge when the Government is the opposing party. *Id.* at 1293. "To carry [his] burden," the movant "must offer proof beyond unverified allegations in the pleadings"; "vague or conclusory affidavits" will not suffice. *Palmer v. Braun*, 155 F. Supp. 2d 1327, 1331 (M.D. Fla. 2001). Plaintiff has not carried his burden here.

A. Plaintiff Has Not Shown Irreparable Harm.

"A showing of irreparable harm is the *sine qua non* of injunctive relief." *N.E. Fla. Ch. of the Ass'n of Gen. Contractors of Am. v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Even where a plaintiff can establish a substantial likelihood of success on the merits—Plaintiff cannot, *see* Arg. I.B—injunctive relief is inappropriate without showing irreparable harm. *See Snook v. Tr. Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 486 (11th Cir. 1990).

[21] Herein, all internal alterations, citations, omissions, quotations, and subsequent history are omitted unless otherwise indicated.

Here, Plaintiff alleges that he will be irreparably harmed by the "unfair competitive [dis]advantage" he will suffer if USDA relieves the debt of minority farmers while he must continue to pay his USDA loans. PI Mot. 20. Plaintiff's unsupported allegation of competitive disadvantage—made only in his motion—is insufficient to carry his burden to establish irreparable harm. "Evidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented to support … a motion for a preliminary injunction." *Dragon Jade Int'l, Ltd. v. Ultroid, LLC*, 2018 WL 1833160, at *3 (M.D. Fla. Jan. 30, 2018) (quoting Charles Alan Wright, et al., 11A Fed. Practice and Proc. § 2949 (3d ed. 2017)). Plaintiff presents no such evidence.

Plaintiff's motion baldly alleges that he will suffer competitive disadvantage because, unlike minority farmers, he will be "required to continue to pay [his] farm loans." PI Mot. 20. But his declaration in support of his motion—the only support he provides—does not even allege that Plaintiff would suffer competitive disadvantage. *See* Wynn Decl., Doc. 12. A conclusory and unsupported allegation of competitive disadvantage in Plaintiff's motion simply does not suffice to establish irreparable harm for purposes of a preliminary injunction. *See Ne. Fla.*, 896 F.2d at 1285–86 (reversing lower court's finding of irreparable harm where movant presented nothing more than "[c]onjecture about a possibility of difficulties with damage computations," "a conclusory allegation of irreparable harm," and an assertion of speculative economic injury by his counsel; *Nivel Parts & Mfg. Co., LLC v. Textron, Inc.*, 2017 WL 1552034, at *2 (M.D. Fla. May 1, 2017) (movant failed to establish irreparable

harm "due to lost market share" where his declaration "consist[ed] mainly of conclusory statements and lack[ed] evidentiary support" and failed to "demonstrate that Nivel ha[d] lost market share ... or quantify Nivel's expected loss of market share").[22]

Rather than provide evidence to support his claim of harm, Plaintiff hangs his hat on the argument that his harm is irreparable because it "'cannot be undone through monetary remedies.'" PI Mot. 20 (quoting *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983); *see also id.* at 21 ("Mr. Wynn cannot seek monetary relief due to sovereign immunity.") (citing *Odebrecht Const., Inc. v. Sec'y, Fla. DOT.*, 715 F.3d 1268, 1289 (11th Cir. 2013)). But even if Plaintiff could show that his alleged harm were irreparable, he still must establish an actual or imminent harm "in the first place." *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 38 F. Supp. 3d 1365, 1379 (N.D. Ga. 2014). Holding otherwise would mean that a plaintiff who cannot obtain monetary relief from a governmental entity due to sovereign immunity would suffer irreparable harm no matter how unsupported and speculative his allegations of economic harm. That is not the law. *See GeorgiaCarry.Org*, 38 F. Supp. 3d at 1379 ("It is the showing" of a likely deprivation, "not merely the allegation of [it], that amounts to irreparable harm"); *see also Odebrecht*, 715 F.3d at 1288 (in addition to finding harm irreparable because of

[22] Plaintiff also has not shown that any alleged competitive disadvantage he might suffer is "imminent." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). USDA is currently identifying borrowers eligible to receive debt relief under § 1005 and intends to notify SDFRs with eligible direct loans of their eligibility by July 10, 2021. *See* NOFA. The required parties must then respond to USDA, certifying the information in the offer notice and accepting the offer before USDA will distribute any funds. *See id.* Only then could Plaintiff possibly even begin to suffer any competitive disadvantage.

sovereign immunity, finding three harms that were "actual and imminent").[23]

B. Plaintiff Has Not Shown That He Is Likely To Succeed On His Facial Challenge To Section 1005.

Plaintiff likewise cannot show that he is likely to succeed on the merits of his facial challenge to § 1005 on equal protection grounds. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). Thus, "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003). "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Id.* at 327.

Once the government shows that it had "a strong basis in evidence for its conclusion that remedial action was necessary," the plaintiff bears "[t]he ultimate burden … to demonstrate the unconstitutionality of an affirmative-action program." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277–78 (1986). To prevail on a facial challenge to a regulation, a plaintiff must establish "that no set of circumstances exists under which [it] would be valid." *GeorgiaCarry.Org, Inc. v. Ga.*, 687 F.3d 1244, 1255, n.19 (11th Cir. 2012).

[23] Plaintiff argues secondarily in a footnote that his alleged "denial of equal protection is also an irreparable harm." PI Mot. 22 n.17. But, as Plaintiff admits, that basis for irreparable harm is foreclosed by Circuit precedent. *See id.* (acknowledging as much) (citing *Ne. Fla.*, 896 F.2d at 1285–86).

Plaintiff claims that USDA's use of racial classifications violates equal protection. *See* Compl. ¶¶ 52-53. But the Supreme Court has recognized the government's compelling interests in remedying discrimination in agency programs and in ensuring that public funds are not allocated in a manner that perpetuates the effects of discrimination. Congress relied on strong evidence showing the unfortunate, but well-documented, history of discrimination against minority farmers in USDA programs, including its loan programs, and recent gaps in funding to those same minority groups. And the remedy the government adopted is time-limited, necessary to meet an acute need in this historic moment, and tailored to the groups that Congress observed had suffered discrimination in USDA programs and had not received prior funds, while allowing for the inclusion of other groups determined to be socially disadvantaged. USDA's use of racial classifications to relieve the debts of SDFRs is thus a permissible means to further the government's compelling interests.

1. Section 1005 Serves Compelling Government Interests.

The government's compelling interest in relieving debt of SDFRs is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination. Its reliance on these interests did not break new ground. "The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, 480 U.S. 149, 167 (1987). And "[i]t is beyond dispute that any public entity ... has a compelling interest in assuring that public dollars drawn from the tax contributions of

all citizens do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality op.); *see also Hershell Gill Consulting Eng'rs v. Mia.-Dade Cty*, 333 F. Supp. 2d 1305, 1316 (S.D. Fla. 2004).

The congressional record elaborates both concerns at length. *See supra* Background ("BG") III. And USDA has reiterated them. Indeed, Plaintiff acknowledges that USDA's stated goal in providing debt relief to minority farmers is to "address longstanding racial equity issues within [USDA]" and "respond to the cumulative impacts of systemic discrimination and barriers to access that have created a cycle of debt." Compl. ¶ 28 (quoting Opening Stmt. of Thomas J. Vilsack before House Comm. on Ag. (Vilsack Stmt.)).[24] Congress and USDA also expressed their interest in ensuring that funds are not allocated in a manner that perpetuates discrimination against minority farmers. *See* BG III. Members of Congress explained that minority farmers had been largely left out of prior agricultural funding (such as the MFP) and the pandemic relief in CFAP, *see id.*, and Secretary Vilsack stressed that the debt relief will help SDFRs "dealing with a disproportionate share of COVID infection rates, hospitalizations, death and economic hurt," Vilsack Stmt.

Thus, the government had compelling interests in adopting its "tailored approach" in § 1005 "to address these longstanding inequities" in USDA programs and congressional funding, made acute by a pandemic that disproportionately affected minority farmers. H.R. Rep. 117-7, 23.

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

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

The government need not make a "formal finding[] of discrimination" before adopting an affirmative action program, *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994), but it must have "a strong basis in evidence for its conclusion that such action was necessary" to further it compelling interests, *Croson*, 488 U.S. at 500, which it may establish through persuasive statistical data and anecdotal evidence, *Eng'g Contractors Ass'n of S. Fla. v. Metro. Dade Cty.*, 122 F.3d 895, 907 (11th Cir. 1997).

Here, the decades of investigations, testimony, and reports on which Congress relied when it enacted § 1005 provide a strong basis in evidence to support its conclusion that targeted debt relief was necessary to address the lingering effects of historic discrimination against minority farmers in USDA programs, which was exacerbated by COVID-19 and the relative failure of prior funding to reach those farmers.

a. *The Government's Persuasive Evidence of Longstanding Discrimination Against SDFRs in USDA Programs.* As set forth below, in enacting § 1005, Congress relied on a vast body of statistical and anecdotal evidence recounting discrimination against SDFRs in USDA programs.

Reports by USCCR in 1965 and 1982 shed light on inequities in USDA's farm loan programs, which "actively contributed to the [alarming] decline in the Black ownership of farmland." 1982 Rep. 176. USCCR reported that between 1970 and 1980, Black-operated farms had declined "57 percent—a rate of loss 2 1/2 times that for white-operated farms"—and that "almost 94 percent of the farms operated by blacks

ha[d] been lost since 1920." *Id.* FSA (through its predecessor FmHA) was largely to blame. 1982 Rep. 176-79.

For instance, FmHA consistently provided inferior loans—in terms of amounts and repayment terms—to Black farmers as compared to their white counterparts, which was consistent with its overall pattern of "follow[ing] local patterns of racial segregation and discrimination in providing assistance" to farmers. Equal Opportunity in Farm Progs., An Appraisal of Servs. Rendered by Agencies of the USDA, USCCR (1965) (1965 Rep.) 100.[25] Data "revealed that in terms of the size of loans, purposes for which loans were to be used, and technical assistance, FmHA did not provide services to black farmers comparable to those provided to similarly situated whites." 1982 Rep. at 9. What's more, USDA's civil rights complaints process—an otherwise "important tool to ensure that FmHA provide[d] equal opportunities for minority farmers," *id.* at 134—was too "ineffective" and "untimely" to provide adequate recourse, *id.* at 169. Investigation into the large number of civil rights complaints showed they were often stalled or not acted on at all. *Id.* at 166-70. The cost of this discrimination was often "the season's crop, and ultimately the[] farm[]." *Id.* at 173.

That is exactly what such discrimination cost many farmers, according to another civil rights report issued over a decade later. When a team of USDA leaders appointed by the Secretary of Agriculture—the Civil Rights Action Team ("CRAT")—reviewed USDA's civil rights problems in 1997, it heard Black, Hispanic,

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

Asian-American, and American Indian farmers tell of unexplained delays in processing their loan applications, arbitrary reductions in farm loans by county officials, and failures to receive promised loans at all, often leaving them "without enough money to repay suppliers and any mortgage or equipment debts." *Id.* at 3, 6-7, 15-16. Many minority farmers lost "significant amounts of land and potential farm income" as a result of these practices. *Id.* at 30; *id.* at 14 (reporting that "the number of all minority farms ha[d] fallen" significantly''—"from 950,000 in 1920 to around 60,000 in 1992"); *see also* 1982 Rep. 176 (reporting similar findings). Like the USCCR, the CRAT found that USDA's civil rights complaints process was an ineffective "system without accountability," where complaints often languished for years in a growing backlog or were left unanswered altogether. *Id.* at 24-25.[26]

Lack of administrative recourse for discrimination led to a series of lawsuits over the next decade by African-American, Native American, Hispanic, and female farmers, alleging that USDA had systematically discriminated against them on the basis of race, ethnicity, and gender in the administration of farm loans and other benefits and routinely failed to investigate administrative complaints about such discrimination. *See Pigford II*, 856 F. Supp. 2d at 8 (describing allegations by African-American farmers that USDA had "deprived countless farmers of desperately needed credit and payments under various aid programs," causing "severe financial losses and even, in

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

many cases, los[t] … land"); *Cantu v. United States*, 565 Fed. App'x 7 (D.C. Cir. May 27, 2014) (summarizing similar allegations in the other suits).

Though the cases settled, the court in *Pigford I* stressed that the claims, "though broad in scope, were no exaggeration"—it was clear by then that USDA had failed to "provide equal opportunity for all as the law requires." *Pigford II*, 856 F. Supp. 2d at 8 (quoting CRAT Rep. 6). Farmers in that case recounted not only being denied loans but also receiving them after "planting season was over, [when] the loans w[ere] virtually useless," or receiving supervised loans requiring a county supervisor's co-signature before funds could be withdrawn. *Pigford I*, 185 F.R.D. 82, 87 (D.D.C. 1999). To receive payments under the settlements, claimants had to substantiate these claims of discrimination with some level of evidence. *Pigford II*, 856 F. Supp. 2d at 9-10 (explaining the settlement's two-track system that awarded differing amounts depending on a "substantial evidence" or "preponderance of the evidence" showing); *see also Cantu*, 565 Fed. App'x at 8-9 (explaining processes in other cases). In the *Pigford* litigation alone, so many African-American farmers sought relief that Congress enacted special legislation extending the statute of limitations for administrative civil rights complaints, *see* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012 (2008), and then appropriated $1.25 billion to fund awards to successful claimants, *see* Claims Resolution Act of 2010, Pub. L. No. 111-291 (2010). To date, the government has paid more than $2.4 billion under settlement agreements with minority and female farmers who sufficiently substantiated their claims. *See Pigford I*, 97-cv-

1978, Doc. 1812, at 7; *Pigford II*, 08-mc-511, Doc. 378-1, at 4; *Keepseagle*, 99-cv-3119, Doc. 646, at 2; *Love*, 00-cv-2502, Doc. 248-1, at 4.

Even after the settlements, problems with discrimination in USDA programs lingered. In 2011, the firm Jackson Lewis LLP ("JL") was commissioned by Secretary Vilsack to assess the "effectiveness" of USDA agencies "in reaching America's diverse population in a non-discriminatory manner." JL Rep. i. After a thorough 18-month investigation and analysis, JL issued a 569-page report setting forth its findings and 234 recommendations. *See id.* at iv, viii. The report compiled substantial anecdotal evidence, depicting "a system where the deck was always stacked, not only against access to USDA programs, but also against [customers'] ultimate success" due to their status as minorities. *Id.* at viii.[27] It found that the evidence "substantiated claims of denial of equal program access and continuing institutional discrimination," *id.* at viii, which resulted in "a broad and longstanding negative impact on … SDGs—including the loss of scarce or irreplaceable farm lands," *id.* at 64.[28]

Like preceding reports, the JL Report again recounted persistent complaints that African-Americans, Hispanics, and Asians were discriminated against with respect to the availability, timing, and requirements for obtaining FSA loans. *See id.* at

[27] Relatedly, JL cited substantial statistical evidence that, in the every-day operations of each USDA agency reviewed, SDGs were under-represented to their detriment, *see id.* xxiii, including with respect to the FSA specifically, *id.* at 131; *see also id.* at 69-72. This contributed to "serious concerns as to both inequitable service delivery … and employment discrimination." *Id.* at 63.

[28] The JL Report included women in its groups of SDGs, along with Hispanics/Latinos; Blacks/African Americans; Asians; American Indians/Alaskan Natives; and Native Hawaiians/Pacific Islanders. *See id.* 66 n.33. Although USDA's interpretation of SDGs, consistent with the statutory definition, includes only racial and ethnic groups, Defendants rely herein on JL Report's many findings specific to the aforementioned racial and ethnic groups.

83-87. African-American farmers, for instance, complained of their loans being "doled out in small amounts by FSA or subject to dual signature" requirements, or having other supervision requirements not imposed on white farmers. *Id.* at 85-86 ("When loans are approved for African Americans, FSA tends to 'control the purse strings' (uses supervised accounts), and the same is not true for Whites who receive loans[.]").[29] Hispanic and Asian farmers similarly reported unfair treatment and being "stereotyped as … farm workers, rather than farm owners." *Id.* at 86-87. Additionally, the report found that USDA's discrimination complaints processing resulted in "what appear[ed] to be an almost foregone conclusion: in 97%+ of the claims, there [wa]s no finding of discrimination." *Id.* at xxv. It stressed that "most FSA employees" believed "that inequitable treatment of customers and potential customers is, at worst, a series of isolated and independent incidents." *Id.* at 66. That was incorrect, according to JL—in reality, "the inequities faced by SDGs have, over time, been systemic and ingrained in every-day FSA operations." *Id.*

b. The Government's Persuasive Evidence of Lingering Discrimination in USDA Programs. The inequalities described in the JL Report are reflected in recent reports that "continue to document the challenges and barriers faced by farmers of color due to race or ethnic discrimination or the legacy of such discrimination." CR S1263 (Stabenow). For instance, a 2017 study, cited by Chairman Scott before § 1005's enactment,

[29] In recent congressional testimony, Congress heard of black farmers receiving "'supervised' bank accounts which required white loan officers to co-sign every transaction." Comm. Hr'g on State of Black Farmers, 2021 WL 1154123 (2021) (John Boyd, Nat'l Black Farmers Ass'n) (March 25, 2021).

focused on "the challenges faced by Latinx farmers," including the "failure of agricultural agencies to engage in appropriate outreach or account for language barriers" with respect to them. H766 (citing L. Minkoff-Zern & S. Sloat, *A New Era of Civil Rights? Latino Immigrant Farmers and Exclusion at [USDA]*, AG. & HUMAN VALUES 34 (2017)) (attached as Ex. B). The study's conclusion: "These processes have succeeded in creating agricultural racial formations, resulting in the ownership and operation of US farms remaining in primarily white hands." Minkoff-Zern & Sloat, *A New* Era at 634.

Two additional GAO reports, generated at Congress's request, looked at the "challenges SDFRs reportedly face in obtaining agricultural credit[.]" GAO-19-539, 2. In the first report, GAO concluded that the "long-standing and well-documented" "allegations of unlawful discrimination against SDFRs in the management of USDA programs" were substantiated by the data and were continuing to affect SDFRs' ability to access credit. *Id.* at 28-29.[30] In the second report, specific to Native Americans, GAO noted that some Native American stakeholders believed "discrimination ... contribute[d] to the lack of commercial lending on tribal lands," which may also have "deter[ed] them from applying for credit" at all. GAO-19-464, 19-20.

That same year, Congress held a hearing on civil rights compliance at USDA "to ensure the Department ... functions equally for everyone it serves and employs,

[30] Specifically, SDFRs accounted for an estimated 17% of primary producers in USDA's 2015-2017 Agricultural Resource Management Surveys but only 13% of farms with loans and 8 percent of total outstanding farm debt. SDFR debt represented an estimated 9 percent of total farm ownership debt and 7 percent of total farm operating debt. Therefore, even though farm ownership debt comprised most outstanding SDFR farm debt (67%), SDFR primary producers were still less likely to have outstanding farm ownership debt than all other farmers and ranchers. GAO-19-539, 16.

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

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

c. The Government's Persuasive Evidence That Allocation of Prior USDA Funds Exacerbated the Effects of Longstanding Discrimination in USDA Programs. Congress also had a strong basis in evidence to conclude that, while COVID-19 was hitting minority farmers the hardest, recent agricultural funding and pandemic relief was unfortunately perpetuating historic inequalities, creating a need for targeted relief. Numerous sources have reported the pandemic's disproportionate impact on the health and welfare of

minorities in the United States. *See, e.g.*, COVID-19 Racial and Ethnic Health Disparities, CDC (Dec. 10, 2020), https://perma.cc/DJ3J-22DU. Congress recognized this, *see* H.R. Rep. No. 117-7, 2-3 (noting that the "most vulnerable communities" had been "forced to bear the brunt of" the pandemic and economic crisis), and that like other minority groups, minority farmers were particularly vulnerable, *see* CR S1265 ("[F]armers of color were in a far more precarious financial situation" than their white counterparts "before the COVID-19 pandemic hit.") (Booker). For instance, while "[a]pproximately 13 percent of borrowers with FSA direct loans [we]re currently delinquent on their loans," that number increased to 35% for Black farmers and 24% for Hispanic, Asian-American, and Indigenous farmers, meaning that minority farmers were on the precipice of "yet another wave of foreclosures and potential land loss." *Id.* S1266.

Despite their disproportionate need, Congress noted that although "[t]he USDA spends billions of dollars annually to provide crucial support to American agricultural producers," "agricultural producers belonging to racial or ethnic minority groups have received a disproportionately small share of the farm loans and payments administered by USDA as a result of the longstanding and widespread discrimination against these groups." H.R. Rep. No. 117-7, 23; *see also id.* at 12 (noting that such programs "continue to disproportionately benefit farmers who are not racial or ethnic minorities"). Indeed, as discussed, Congress cited reporting that the overwhelming majority of recent agricultural funding and pandemic relief had gone to white farmers. *See* BG III.A. The academic letter introduced into the record explained that these were

just the most recent examples of farm programs that "have perpetuated and exacerbated the problem" of discrimination against minority farmers by favoring large, non-minority landowners. CR S1266. Congress thus had a strong basis in evidence to conclude that its "tailored approach" in § 1005 was necessary "to address these longstanding inequities." H.R. Rep. 117-7, 23.

d. Plaintiff Does Not Undermine the Government's Persuasive Evidence. In light of the above, Plaintiff's assertion that Defendants cannot show that minority farmers have suffered racial discrimination in the general farming market or with respect to farm loans specifically, *see* PI Mot. 11-12, is simply unfounded. The evidence relied upon by Congress laid out the "well-documented" discrimination against minority farmers, who historically have received disproportionately fewer loans from FSA, in lower amounts, with less favorable terms, and with less access to loan servicing than their white counterparts; whose discrimination complaints languished or went unanswered; and who had been largely left out of prior COVID-19 relief efforts and other agricultural programs. *See* Arg. I.B.2.a-c. All of this evidence provides more than "good reason to believe" that the present effects of historical discrimination in USDA services, but especially in FSA's loan programs, necessitated targeted relief for minority farmers. *Ensley*, 31 F.3d at 1566. The evidence that Congress relied upon was specific and did not turn on "amorphous" concepts of "societal discrimination," as in other cases on which Plaintiff relies. *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

Similarly contradicted by the record is Plaintiff's assertion that Congress failed to credit previous efforts to remedy historical lending discrimination. PI Mot. 11-12.

Congress pointed to the shortcomings of previous settlements, and explained why other "case-by[-]case measures" had fallen short of remedying past discrimination and its cumulative effects. *See, e.g.,* CR S1264 (Stabenow). It further emphasized the present-day statistics showing continued disparities between minority and white farmers when it comes to farm ownership, the number of loans in default, rates of foreclosure, and access to credit and other USDA benefits. *See* BG III, Arg. I.B. Thus, Congress's prior actions do not undermine the strong basis in evidence that the lingering effects of historical discrimination warranted remedial relief today.

Finally, Plaintiff asserts that although Congress purported to address issues related to COVID-19, Congress did not consider any evidence related to the effect of COVID-19 on SDFRs. PI Mot. 14. Again, that assertion is belied by the record. Congress noted that due to discrimination in USDA programs, SDFRs were in a far worse position, facing the possibility of foreclosure at higher rates than before COVID-19 hit. *See* BG III.A. And Congress pointed to various statistics showing that minority farmers did not benefit from recent agricultural funding and prior pandemic relief, *see id.*, which only exacerbated the pre-existing disadvantages they faced and further necessitated the targeted debt relief in § 1005.

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

That targeted relief is narrowly tailored to further the government's compelling interests. Narrow tailoring requires that "the means chosen to accomplish the government's asserted purpose must be specifically and narrowly framed to accomplish that

purpose." *Grutter*, 539 U.S. at 333. To assess narrow tailoring, courts look to: "[i] the necessity for the relief and the efficacy of alternative remedies; [ii] the flexibility and duration of the relief, including the availability of waiver provisions; [iii] the relationship of the numerical goals to the relevant labor market; and [iv] the impact of the relief on the rights of third parties," *Paradise*, 480 U.S. at 171, as well as over- or under-inclusiveness, *see Croson*, 488 U.S. at 506. All of the pertinent factors show that USDA's provision of debt relief to minority farmers is narrowly tailored.

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

The necessity of the debt relief in § 1005 is underscored by the inefficacy of the race-neutral alternatives that Congress used before enacting § 1005. As explained, Congress changed the role of county committees in USDA loan programs and enacted

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

Second, in addition to being necessary, the debt relief for minority farmers is

both flexible and time-limited. Although five minority groups are included in USDA's definition of "socially disadvantaged groups," USDA's definition is "not limited to" those groups. NOFA, 6. Rather, the Secretary will consider written requests on a case-by-case basis to determine whether other groups should be eligible for debt relief. *See id.* The debt relief under § 1005 is also "a one-time occurrence," extended to SDFRs with qualified loans as of January 1, 2021. USDA's implementation of § 1005 is thus "flexib[le] in administration," *Fullilove v. Klutznick*, 448 U.S. 448, 460 (1980), and "temporary in application," *Paradise*, 480 U.S. at 178, thereby ensuring that the race-conscious measure endures no longer than necessary to serve its purposes.

Third, USDA's provision of debt relief to minority farmers does not impose an unacceptable burden on innocent third parties, namely white farmers. Plaintiff points to no evidence that white farmers were historically denied equal treatment by USDA—indeed, he himself has benefited from such programs, receiving over $180,000 in agricultural subsidies between 1995 and 2020, *see* https://perma.cc/3U5P-T6XD, including $9,590 in CFAP funding, *see* https://perma.cc/WU66-HUPZ. And Plaintiff does not address reports showing that the overwhelming and disproportionate majority of recent agricultural subsidies and pandemic relief before ARPA went to white farmers—and *not* minority farmers. *See* BG III.A. The temporary and comparatively small debt relief under § 1005[31] to relieve the sizeable burden minority farmers have long borne does not impose an impermissible one on white farmers, who have received

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

and continue to receive the vast majority of agricultural funding. *See* BG III.A; *Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 481 (1986) (finding 29.3% nonwhite union membership goal to remedy past discrimination had "only a marginal impact on the interests of white workers" where whites were "denied certain benefits available to their nonwhite counterparts" but still constituted "a majority of those entering the union").

Fourth and finally, USDA's provision of loan payments to minority farmers is neither over- nor under-inclusive. As explained, there is a large body of evidence that the minority groups included in USDA's definition of "socially disadvantaged groups" for purposes of § 1005 have suffered from discrimination in USDA programs with nation-wide scope. USDA has defined SDGs to include those same racial and ethnic groups since at least 2001. *See* BG III.B. And reporting before and since then has recounted discrimination in federal programs against *those* SDGs, including by addressing a particular SDG, *see, e.g.,* GAO 19-464 (addressing Native Americans); *see also* JL Rep., or SDGs as a whole as defined by the USDA, *see, e.g.,* GAO 19-539 at 1. Reporting also shows that recent agricultural funding has gone disproportionately to those who do not fall within USDA's definition of SDGs. *See* Jared Hayes, *USDA Data: Nearly All Pandemic Bailout Funds Went to White Farmers*, EWG (Feb. 18, 2021), https://perma.cc/PVZ7-QMFD. Where particular racial and ethnic groups have suffered discrimination in USDA programs and been largely left out of relief efforts, debt relief to those particular groups to ameliorate the effects of that discrimination and unequal funding is not over-inclusive. *See, Paradise*, 480 U.S. 149. Nor is the definition

underinclusive because it does not include white farmers. As noted, the evidence simply does not show (and Plaintiff does not argue) that white farmers have suffered the same history of discrimination as minority farmers or failed to receive recent funding.[32] Where Congress sought to remedy discrimination and funding inequities unique to minority farmers, § 1005 is not under-inclusive because it does not include white farmers who generally have not suffered the same discrimination and unequal treatment. *See Croson*, 488 U.S. at 506 (noting that if relief program was meant to compensate contractors for past discrimination, one might legitimately ask why they are forced to share the relief with those who were not shown to have been discriminated against).

None of Plaintiff's arguments undermine this showing. Plaintiff first argues that § 1005 is a "rigid race-based remedy" because "every farmer … who is a racial minority qualifies for loan forgiveness—regardless of evidence of need or past discrimination," while "a white farmer cannot qualify … no matter how significant his need or how dire his individual circumstances." PI Mot. 15-16. But Congress enacted § 1005, in part, because its previous efforts, "taken mostly on a case-by case basis," "ha[d] still not remedied the discrimination" against minority farmers in USDA programs. S1264 (Stabenow). Due to that discrimination, the disproportionate impact of COVID-19, and being largely left out of previous funding, Congress determined that those minority farmers were *acutely* in need of the debt relief in § 1005.[33] Moreover, the Supreme

[32] Indeed, as noted, Plaintiff has received very recent CFAP funding, on top of prior subsidies.
[33] And while the definition of SDG does not explicitly refer to economic disadvantage, the qualified loans being paid off are typically loans to farmers who cannot obtain credit through private industry.

Court has confirmed that Congress need not have limited that debt relief to identifiable victims of discrimination, as Plaintiff suggests. *See Loc. No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 516 (1986) ("[T]he voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination."). And other groups *can* qualify for debt relief under § 1005. *See* NOFA. There is thus no merit to Plaintiff's first argument. Plaintiff next argues that § 1005 is not narrowly tailored because it does not "target[] relief to those who were discriminated against" because it applies "to those who have *successfully acquired* farm loans, not those who were *unable* to obtain farm loans due to discrimination" and to racial groups "for which there is no evidence of past discrimination." PI Mot. 16-17. But the record of discrimination against minority farmers was not limited to their inability to obtain USDA loans. It shows that they have also received smaller loan amounts, had those amounts arbitrarily reduced, were subject to inordinate approval wait times that adversely affected their ability to repay the loans, were denied opportunities to avoid foreclosure, and were often assigned "supervised" loans that required white loan officers to approve and co-sign every transaction. *See* BG III, Arg. I.B.2. What's more, many minority farmers who have received loans in recent decades may not have been able to at all had it not been for *Pigford I*'s settlement condition that a successful claimant receive priority consideration for loan approval. *See Pigford I*, 185 F.R.D. at 96.

Moreover, Congress reasonably concluded that repaying existing loans was the most effective and efficient way to provide timely relief to minority farmers in the

midst of a pandemic that has disproportionately affected them. Thus, far from a "blunderbuss approach," PI Mot. 17, Congress targeted assistance to those acutely in need of it and in a manner designed to provide timely relief. It is also not the case that § 1005 provides relief to groups "for which there is no evidence of past discrimination." *Id.* at 17. As noted, Congress had before it numerous reports and testimony recounting discrimination in USDA programs against specific SDGs, *see, e.g.,* JL Rep. (reporting discrimination in USDA programs against each SDG group specifically, including Asians, Hawaiians, and Pacific Islanders), and SDGs as a whole, as defined by USDA.

Plaintiff also argues that Congress failed to consider race-neutral alternatives before it enacted § 1005 and suggests several Congress should have used. *See* PI Mot. 18-19. That is incorrect: Congress not only considered, but used for decades, race-neutral means to attempt to remedy discrimination in USDA programs against minority farmers. And while Congress need not have "exhaust[ed] … every conceivable race-neutral alternative" before employing a race-conscious one, *Grutter*, 539 U.S. at 309, Congress in fact tried alternatives similar to those Plaintiff suggests. For example, Plaintiff suggests that Congress could have "ramp[ed] up enforcement of antidiscrimination laws or enhance[ed] its oversight of USDA's lending practices." PI Mot. 19. But in 2002, Congress created an entire office at the Assistant Secretary level within USDA dedicated to enforcing civil rights, *see* https://www.usda.gov/oascr, and it has held numerous oversight hearings focused on civil rights issues at USDA, including in FSA and its loan programs, *see supra* n.6. Plaintiff suggests that Congress could have "allocated additional settlement funds or eliminated statutes of limitations

... for those who could show concrete evidence of discrimination." PI Mot. 19. But as Plaintiff's argument recognizes, Congress did just that, *see* S1264 (Stabenow), and it passed § 1005 because it found that such measures "did not adequately remedy the discrimination," *id.* Plaintiff also suggests that "if there was ongoing concern about the ability of minority farmers to access farm loans in the first place, Congress could have increased outreach or funding for such loans." PI Mot. 19. But Congress created, and permanently funded, the 2501 Program expressly for such types of outreach. *See* BG III.A. In sum, Plaintiff's arguments show that Congress in fact tried numerous race-neutral alternatives before providing the debt relief in § 1005, further illustrating that § 1005 is narrowly tailored. *See Fisher*, 136 S. Ct. at 2213.

C. The Injunction Plaintiff Seeks Is Contrary to the Public Interest.

Finally, the balance of the harms overwhelmingly favors Defendants, as the injunction Plaintiff seeks is manifestly contrary to the public interest. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (pointing out that "[t]hese factors merge when the Government is the opposing party"); PI Mot. 1 (seeking to prevent USDA "from enforcing the 'socially disadvantaged' provisions of Section 1005 of [ARPA]"). Congress passed § 1005 based on its determination that debt relief for minority farmers was necessary to remedy the lingering effects of the well-documented history of USDA discrimination against them and to ensure that, unlike prior funding, pandemic relief actually reached them. *See* BG III.A-B. And it did so based on evidence that minorities, and

minority farmers in particular, were especially in need due to the disproportionate impact of COVID-19 on those communities and their lack of access to prior rounds of agricultural funding and pandemic relief. *See id.*

As noted, Congress has a compelling interest in remedying prior discrimination and in ensuring that its funds are not allocated in a manner that perpetuates that discrimination. *See* Arg. I.B.1. Minority farmers, who, Congress noted, sat disproportionately on the brink of foreclosure when COVID-19 hit, plainly have a strong interest in receiving those funds. And the Government and the public have a strong interest in the implementation of the laws enacted by the duly elected representatives in Congress. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("Any time a [government] is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). All of those interests would be harmed if Plaintiff were to obtain the preliminary relief he seeks.

Plaintiff, on the other hand, is acting in his individual economic interest. He has not shown that his interests will be irreparably harmed by one-time payments to minority farmers. And even if he had, the government and the public's interests in remedying prior discrimination, ensuring the equitable and timely distribution of much-needed pandemic relief, and seeing the implementation of duly enacted federal law, easily outweigh any individual competitive disadvantage Plaintiff could possibly suffer as a result of the implementation of § 1005—a direct response to a national economic and public-health emergency of historic proportions.

II. Any Injunctive Relief Should Be Limited To Plaintiff.

If the Court were to enjoin any aspect of § 1005 (and the Court should not), any such injunction should be limited to Plaintiff. *See* PI Mot. 1 (requesting in the alternative that the Court enjoin Defendants "from limiting loan assistance to only [SDFRs] under Section 1005"). "The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018). Thus, the "plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Id.* at 1934. Principles of equity independently require that injunctions be no broader than "necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). Thus, where Plaintiff brings this lawsuit only on his own behalf, and on the basis of his alleged injury, any injunction should apply only to him. This is especially so where § 1005 is being challenged in three other federal courts, *Miller v. Vilsack*, No. 21-595 (N.D. Tex.); *Faust v. Vilsack*, No. 21-548 (E.D. Wis.); *Carpenter v. Vilsack*, No. 21-104 (D. Wyo.). *See Trump. v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (explaining that nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch") (Thomas, J., concurring).

CONCLUSION

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

DATED: June 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2021, I filed with the Court and served on opposing counsel through the CM/ECF system the foregoing document.

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