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

Defendants.

Civil Action
No. 3:21-cv-00514-MMH-JRK

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Defendants' response brief confirms the extraordinary nature of Section 1005's farm loan repayment program. There is no dispute that Section 1005 employs crude racial classifications to determine which farmers will benefit from loan forgiveness: every minority farmer and rancher is eligible; every white farmer and rancher is not. While the Constitution barely countenances the use of race in an extremely narrow set of circumstances, Section 1005 makes race the dispositive factor for every farmer and rancher holding a farm loan. *See* Resp. Br. 12–13 (confirming Section 1005's exclusive focus on racial groups). As it stands, Section 1005's loan forgiveness program would exclude

an impoverished farmer who happens to be white, but would include any minority farmer with a farm loan.

Section 1005 contravenes the Constitution's promise of equal protection under the law, which requires the government to treat all persons as individuals. *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Section 1005 relies on precisely the type of "[r]ace-based assignments" that "treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.* at 911–12.

All of the factors for the issuance of a preliminary injunction are satisfied. *First*, Mr. Wynn is likely to prevail on the merits. Defendants do not dispute that Section 1005 is subject to strict scrutiny. But the government cannot show, as it must, that Section 1005's crude racial distribution of loan repayment is narrowly tailored to any compelling interest. *Second*, Mr. Wynn faces irreparable harm. The government has already begun the process for forgiving loans.[1] Thus, Mr. Wynn faces imminent harm in the form of monetary losses, competitive disadvantage, and the violation of his constitutional right to equal protection. All three harms are irreparable given the unavailability of

[1] The government's declaration in *Faust v. Vilsack*, 1:21-cv-00548-WCG, ECF No. 17-2 (Jun. 8, 2021) proves this point. The USDA has already processed payments, Cobb Decl. ¶¶ 28–30, and will do so for thousands of accounts this month. *Id.* ¶¶ 32–37. For the Court's convenience, the declaration is attached as Exhibit 1.

monetary relief. *Third*, Mr. Wynn satisfies the balance-of-harms and public-interest factors, which merge when the government is the opposing party. *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020). The public interest is always served when constitutional rights are protected. This Court should issue a preliminary injunction to maintain the status quo and to ensure that Mr. Wynn and others will be able to obtain meaningful relief.

ARGUMENT

I. Mr. Wynn Is Likely to Succeed on the Merits

"A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Defendants have nothing to justify a farm loan assistance program that doles out benefits solely on the basis of race.

Defendants concede that Section 1005's racial classification is subject to strict scrutiny, which means they have the burden to demonstrate that the classification is both narrowly tailored and furthers a compelling governmental interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). They can show neither here. Defendants cannot establish a compelling interest in remedying past discrimination because there is no "strong basis in evidence" to conclude that a program this broad is "remedial" today. *Shaw v. Hunt*, 517 U.S. 899, 910 (1996). They cannot show narrow tailoring because Section

1005's blanket race-based exclusion requires no individual determinations of need or past discrimination and extends assistance to members of racial groups regardless of whether those individuals have ever been discriminated against and even if any discrimination that they might have suffered has already been remedied.

A. Defendants Cannot Establish a Compelling Interest in Remedying Past Discrimination

Defendants focus on USDA's sordid history of racial discrimination, particularly against Black farmers. But they fail to connect that history to the supposed need to remedy racial discrimination against all minority farmers today. That missing link dooms Section 1005.

First, as Defendants readily admit, the federal government has already paid more than $2.4 billion in settlements to Black, Hispanic, Native American, and female farmers to settle various lawsuits brought over USDA's discriminatory administration of farm loans. Resp. Br. 23. Congress even loosened statutes of limitation to remove barriers for farmers that would have normally been time-barred from obtaining relief. *Id.* Because it already took comprehensive steps to remedy USDA's history of discrimination against minority farmers, Congress cannot now use that past discrimination to justify further racial discrimination. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 721 (2007) ("Once Jefferson County achieved

unitary status, it had remedied the constitutional wrong that allowed race-based assignments. Any continued use of race must be justified on some other basis."); *Clark v. Putnam Cty.*, 293 F.3d 1261, 1273 (11th Cir. 2002) ("The need for a race-based remedy in 1992 cannot be established by reliance on a 1982 wrong that has already been remedied.").

Defendants' evidence of continuing government discrimination in farm loans after the settlements is weak and anecdotal.[2] This evidence pales in comparison to the evidence that the Eleventh Circuit found *insufficient* in *Engineering Contractors*, which included the testimony of 25 witnesses who claimed they had been discriminated against and a sociological study that interviewed 78 businesses. *Engineering Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cty.*, 122 F.3d 895, 925 (11th Cir. 1997). Moreover, anecdotal evidence is meaningful "only when it [is] combined with and reinforced by sufficiently probative statistical evidence." *Id.* And the statistical evidence of any continuing discrimination in farm loans is weak or nonexistent. Data provided by FSA and included in the Jackson Lewis Report indicates that each minority group's direct loan participation in Fiscal Year 2010 "reasonably well

[2] For instance, one of the few concrete references to direct and ongoing discrimination is found in testimony by the head of the Hispanic Farmers and Ranchers of America, who was the lead plaintiff in a lawsuit against USDA. His testimony consisted of a second-hand account of having "heard of documents being destroyed" by USDA officials to deny Hispanics loans. 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) (testimony of Lupe Garcia).

reflected their respective Principal Operator populations." JL Report at xxi. If USDA continued to discriminate against minority farmers in the attainment of farm loans after paying out billions of dollars in settlements, that discrimination was conspicuously absent in the most relevant data.

Perhaps this is why Defendants pivot to arguing for an interest in addressing the "lingering effects of historic discrimination." Resp. Br. 20. This argument has no logical stopping point; it would permit Congress to continue employing racial discrimination until minority farmers reached economic parity with white farmers *even after* taking concrete action to remedy the federal government's past discrimination.[3] And it assumes without evidence that any racial disparities that exist even after identifiable discrimination has been remedied are the product of past discrimination. *Cf. Parents Involved*, 551 U.S. at 721 ("We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that the Constitution is not violated by racial imbalance in the schools, without more." (quotation marks omitted)). To adopt Defendants' argument would "effectively

[3] The Eleventh Circuit recently rejected a related argument, that past discrimination effectively prevents certain jurisdictions from enacting laws that would be valid elsewhere. *See Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1325 (11th Cir. 2021) ("[I]t cannot be that Alabama's history bans its legislature from ever enacting otherwise constitutional laws about voting. Surely, 'past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'" (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980))). The reason is the same—past discrimination cannot taint all further action. Once that discrimination has been remedied, the normal order must resume.

assure[] that race will always be relevant in American life, and that the 'ultimate goal' of eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race, will never be achieved." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (quotation marks omitted).

The Supreme Court has cautioned against such a broad understanding of remedial purpose. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (controlling opinion of Powell, J.) ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."). While Congress may employ a racial classification for the extremely limited purpose of remedying the government's own past discrimination, it may not continue to do so to address statistical disparities even after the government has remedied the specific instances of past discrimination. As the Supreme Court has recognized, "[p]ast wrongs to the black race . . . are a stubborn fact of history. And stubborn facts of history linger and persist." *Freeman v. Pitts*, 503 U.S. 467, 495 (1992). Yet, "though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities." *Id.* at 495–96. USDA's past discrimination cannot forever serve as a "strong basis in evidence" for Congress' present racial

discrimination, lest all statistical disparities be sufficient to justify disparate treatment on the basis of race. *See Greer's Ranch Café v. Guzman*, No. 4:21-cv-00651-O, 2021 WL 2092995, at *7 (N.D. Tex. May 18, 2021) (rejecting the invocation of statistical disparities in a similar context).

Second, Defendants cannot justify Section 1005's discrimination on the ground that recent farm aid has "exacerbated" the effects of USDA's past discrimination. Resp. Br. 27–29. Defendants do not contend that this aid was discriminatory—they merely say that it tends to favor large farms, and that the farmers who operate large farms are disproportionately white. *Id.* at 29. But the fact that large farms benefit disproportionately from existing farm aid does not justify the enactment of a race-based farm aid provision. Indeed, the Eleventh Circuit rejected a race-based contracting set-aside where "the demonstrated disparities were better explained by firm size than by discrimination." *Engineering Contractors*, 122 F.3d at 918.

Third, even assuming that the evidence Defendants provide might be useful in establishing a strong basis for remedial action, there is no indication in Section 1005 that Congress actually considered that evidence. The best evidence of what Congress considered is the proposed findings contained in SB 278, and much of Defendants' proffered evidence was not included there. Defendants rely heavily on various floor statements of Senators, but the Supreme Court recently noted that "floor statements by individual legislators

rank among the least illuminating forms of legislative history." *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017). While the floor statements may reflect what an individual Senator thought about the reasons for enacting Section 1005, they provide little evidence of what Congress actually considered, and certainly do not constitute the type of "legislative . . . findings of constitutional or statutory violations" typically required before Congress may embark on remedial legislation. *Bakke*, 438 U.S. at 307.

In short, Defendants' evidence for the necessity of remedial action includes: (1) undeniable evidence of past discrimination by USDA, remedied through a series of class action settlements, the establishment of administrative remedies, and the adoption of reforms within the department[4]; (2) scant anecdotal evidence of discrimination in years since the settlements, not buttressed by statistical imbalance in USDA's provision of farm loans; and (3) statistical disparities in the socioeconomic position of minority farmers

[4] The legislative sources that Defendants rely on show that the USDA has made exceptional strides to overcome any legacy of past discrimination. For instance, in 1997 a congressionally appointed Civil Rights Action Team made a series of 92 recommendations to the USDA. Just two years later all but three of the 75 recommendations that did not require congressional action were in the process of being implemented, and five of the other recommendations had been enacted by Congress. 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). Defendants similarly ignore the USDA's extraordinary outreach efforts to counties with large minority populations. 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) (describing special outreach to recruit minority representation on county committees).

compared to their white counterparts. This is insufficient to justify a racially discriminatory program in 2021. Since USDA has remedied its past discrimination, Defendants cannot rely on present disparities to establish a compelling interest for continuing to discriminate.

B. Section 1005's Rigid Racial Exclusion Is Not Narrowly Tailored to Any Valid Remedial Purpose

Even if the Court were to find that Congress had a strong basis in evidence for remedial action, Section 1005 is not narrowly tailored to any remedial purpose. This is underscored by Section 1005's inclusion of every USDA-recognized racial group except white farmers and ranchers. Apart from a few instances of anecdotal evidence, there is nothing in the record to demonstrate substantial discrimination against Asians or Pacific Islanders. On the contrary, the Jackson Lewis Report that Defendants rely on notes several times that Pacific Islanders are not even underrepresented in important areas, such as receipt of direct and guaranteed loans and in employees at FSA offices. JL Rpt. at xxi, 74, 185–86. This inclusion of random racial groups "suggests"—if not conclusively establishes—"that perhaps [Congress's] purpose [in enacting Section 1005] was not in fact to remedy past discrimination." *Croson*, 488 U.S. at 506.

The same is true of Congress' choice to *forgive all current farm loans*, a particularly poor fit for the problem Defendants describe. Defendants detail

the regrettable loss of minority-owned farmland and a decrease in the number of minority-owned farms due to lending discrimination by USDA. Resp Br. 20–22. But farm loan forgiveness in 2021 does little to remedy that problem, as it only benefits minority farmers who currently hold farm loans. And if it is true that USDA extended unfair or unequal lending terms to some minority farmers, then Congress could take more narrowly tailored actions such as requiring USDA to adjust the interest rate or other terms and conditions of any loans that are actually unfair. Extending blanket loan forgiveness to every minority farmer in the country is not narrowly tailored to the supposed justification of remedying USDA's past discrimination.

Defendants' arguments to the contrary do not withstand scrutiny. *First*, Defendants say that remedial action was necessary because past USDA 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." Resp. Br. 31. But if Congress wanted to help farmers acutely affected by COVID-19, or those at particular risk of foreclosure, it could have easily done so without a rigid racial classification.

Second, Defendants assert that the discriminatory farm loan forgiveness is *flexible* because the Secretary maintains discretion to consider other racial groups as socially disadvantaged. Resp. Br. 33. While in theory a farmer could send a letter to the Secretary requesting such recognition, in practice USDA

recognizes six racial/ethnic groups,[5] five of which Defendants have "long interpreted" as socially disadvantaged. Resp. Br. 12–13. Only white farmers are not so considered. Defendants' response brief also repeatedly attempts to draw a contrast between the purportedly privileged status of white farmers and the status of minority farmers, and ultimately acknowledges that Section 1005 is intended to benefit minority farmers at the exclusion of white farmers. Resp. Br. 33 (arguing that denying white farmers forgiveness does not impose an "impermissible" burden because white farmers have been the beneficiaries of other programs). There is no debate that Section 1005 currently excludes white farmers like Mr. Wynn, and there is little chance that Secretary Vilsack would accept a request to include white farmers as "socially disadvantaged." If everyone is considered socially disadvantaged, no one is.

Perhaps more importantly, where courts have credited the flexibility of a government program, it has been because the program allows for "individualized determinations" of disadvantaged status. *See Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 932, 945–46 (7th Cir. 2016). The Secretary's discretion does not extend that far—he cannot consider the appeal of a disadvantaged white farmer, only a general appeal that white farmers are disadvantaged as a group. The racial classification here is rigid and inflexible.

[5] Customer Data Worksheet, U.S. Dep't of Agric., https://www.farmers.gov/sites/default/files/documents/AD2047-01192021.pdf (Jan. 13, 2021).

Third, Defendants say the remedy is time-limited because it is a "one-time occurrence." Resp. Br. 33. But Section 1005 forgives all qualifying farm loans for minority farmers, not simply one loan or loans acquired before a certain date when discrimination was widespread. And under Defendants' theory, Congress could do the same thing again next year, or in five years, and assert the very same history of past discrimination and present socioeconomic disparities. The Court should not consider such a broad loan forgiveness program "time-limited" simply because it takes the form of a one-time payout.

Fourth, Defendants argue that the rigid racial classification is not over-inclusive. But the existence of class action settlements and administrative remedies that have provided more than $2.4 billion in compensation for victims of USDA's discrimination strongly cuts against any assertion that blanket discrimination is necessary for remedial purposes and that a case-by-case remedy is inadequate. Those remedies have provided benefits to actual victims of discrimination.[6] And while a remedial scheme may incidentally benefit some individuals who did not suffer direct discrimination, Section 1005 goes much further, even benefitting those who received monetary compensation for past discrimination. Defendants allude several times to helping those most acutely affected by COVID-19 and those in danger of foreclosure, but Congress could

[6] Defendants mention the *Pigford* settlement condition that each successful claimant receive priority for loan approval, Resp. Br. 36, but this is precisely the type of targeted condition that *would* be narrowly tailored to remedying past discrimination.

have done that without racial discrimination. The racial classification is over-inclusive both with respect to the asserted remedial purpose *and* any other legitimate purpose Congress might have had.

Fifth, Defendants assert that race-neutral methods have been ineffective at reducing racial disparities in "the number, amounts, and servicing of USDA loans for minority farmers as compared to non-minority farmers." Resp. Br. 32. But without evidence of ongoing racial discrimination, Congress is prohibited from using racial classifications to remedy statistical disparities until minority farmers and white farmers reach economic parity. Congress may use race-neutral methods to help farmers most in need of assistance (and those methods might disproportionately benefit minority farmers), but it may not discriminate on the basis of race.

II. Mr. Wynn Faces a Substantial Threat of Irreparable Harm

Mr. Wynn is a farmer excluded from a loan forgiveness program set to distribute funds this month and precluded from recovering monetary damages even if the Court issues judgment in his favor. That he faces "a substantial threat of irreparable injury" is obvious in principle and in practice. *Friedenberg v. Sch. Bd. of Palm Beach Cty.*, 911 F.3d 1084, 1090 (11th Cir. 2018).

Although the government disputes Mr. Wynn's assertion of harm, it does not dispute that any such harm would be irreparable. *See* Resp. Br. 16–17. Nor could it. As Mr. Wynn pointed out in his motion, "the inability to recover

monetary damages because of sovereign immunity renders the harm suffered irreparable." PI Mot. 20–21 (quoting *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013)).

Mr. Wynn faces several concrete harms. *First*, Mr. Wynn faces monetary harm from not having his loans forgiven under Section 1005. As would not be true if he were a different race, Mr. Wynn will be "required . . . to pay [his] farm loans and [is] therefore unable to use that capital for other investments or improvements." PI Mot. 20. The harm is especially pronounced for farmers like Mr. Wynn, who "have taken out multiple farm loans" from the Farm Service Agency, Wynn Decl. ¶ 5, whose "payments on [ ] outstanding farm loans use up a large portion of [their] monthly income," *id.* ¶ 6, and who "took a second job . . . to help with [their] financial situation." *Id.*

Second, Section 1005 will place Mr. Wynn at a competitive disadvantage in relation to farmers and ranchers who have their farm loans forgiven. Defendants criticize these allegations as "conclusory and unsupported," Resp. Br. 15, but Mr. Wynn averred that were it not for required payments on "several" outstanding farm loans, he could use "those funds to invest in [his] farm, expand [his] business, or support [his] family." Wynn Decl. ¶¶ 5–6. And Defendants concede that Section 1005 is intended to eliminate "pre-existing disadvantages" and level the playing field with (what it considered) "targeted debt relief" under Section 1005. Resp. Br. 30.

Third, Mr. Wynn faces harm from a violation of his right to equal protection under the Due Process Clause of the Fifth Amendment. True enough, the Eleventh Circuit is an outlier in that it does not automatically recognize an equal protection violation as an *irreparable* harm. *See* PI Mot. 22 n.17 (collecting cases). But that does not support the counterintuitive notion that racial discrimination inflicts no harm at all.[7] The violation of Mr. Wynn's right to equal protection inflicts a harm, and that harm is irreparable when combined with the unavailability of money damages.

Finally, these injuries are not just irreparable, but also imminent. Defendants paint a misleading timeline of Section 1005's implementation. Defendants note that they intend to notify all qualified borrowers of their eligibility by July 10, 2021. Resp. Br. 16 n.22. But USDA's own website notes that the FSA began sending letters to eligible Direct Loan borrowers on May 24, 2021, and that it anticipates that a letter will be processed in about three weeks.[8] Accordingly, the first loan assistance could begin to go out to

[7] In *N.E. Fla. Ch. of the Ass'n of Gen. Contractors of Am. v. Jacksonville*, the Eleventh Circuit affirmed the principle that an injury is irreparable if "it cannot be undone through monetary remedies." 896 F.2d 1283, 1285 (11th Cir. 1990). The court added that an ongoing violation of First Amendment rights does constitute irreparable injury because the "intangible nature" of free speech rights "could not be compensated for by monetary damages; in other words, plaintiffs could not be made whole." *Id.* And ostensibly because cities, unlike the federal government, are not entitled to sovereign immunity, the court noted that the city could "award lost profits or other monetary damages to compensate a contractor that has been wrongfully denied a contract." *Id.* at 1286.

[8] America Rescue Plan Debt Payments, U.S. Dep't of Agric., https://www.farmers.gov/sites/default/files/2021-05/american-rescue-plan-timeline-graphic3.pdf.

eligible borrowers as soon as the week of June 14.[9] A preliminary injunction is warranted to preserve the status quo. *See Burgos v. Univ. of Cent. Fla. Bd. of Trs.*, 283 F. Supp. 2d 1268, 1271 (M.D. Fla. 2003).

III. The Issuance of a Preliminary Injunction Is In the Public Interest

Because Mr. Wynn is likely to prevail on the merits of his claims, the public interest strongly favors a preliminary injunction.[10] It is well-established that "the public interest is served when constitutional rights are protected," *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019). And the public interest does not "support the [government's] expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (quotations omitted).

Defendants point to no authority that would deny a preliminary injunction of an unconstitutional law where the issuance of an injunction would benefit the plaintiff's "individual economic interest." Resp. Br. 39. And to be clear, Mr. Wynn seeks relief not just for himself, but for farmers and ranchers across the country in order to "'vindicat[e] the public interest in the

[9] Defendants do not contend that July 10 is when the letters will be *first* distributed. But even if that were the case, most eligible borrowers could receive loan assistance by the first week of August, well before Plaintiff could receive relief absent a preliminary injunction.
[10] Thus, it also satisfies the balance-of-harms factor, which merges with the public-interest factor when the government is the opposing party. *Swain*, 961 F.3d at 1293.

constitutional right of all citizens to be free from racial discrimination." *United States v. Mayton*, 335 F.2d 153, 158 (5th Cir. 1964).

Finally, Defendants argue that an injunction is not in the public interest because minority farmers are suffering as a result of the COVID-19 pandemic and any delay in implementing Section 1005 will cause these farmers harm. Resp. Br. 39. Yet Section 1005 does not provide relief to farmers on the basis of losses sustained during the pandemic, it provides relief on the basis of race.

IV. Broader Injunctive Relief Is Necessary to Preserve the Status Quo and Prevent Irreparable Harm

Mr. Wynn's complaint sought two alternative forms of relief—either invalidation of Section 1005 in its entirety, which would prohibit Defendants from distributing any farm loan aid under the statute, or invalidation of the racial classification only, which would permit all farmers to obtain loan assistance. *See* Compl., Prayer for Relief ¶¶ 2–3. A pause on all loan assistance under Section 1005 preserves the status quo and is necessary to ensure that the case can be decided on the merits and that the Court may order either type of relief in the future.[11]

[11] A pause in the implementation of Section 1005 is the only practical remedy at this stage. After all, a preliminary injunction prohibiting Defendants from excluding white farmers from the program would enable Mr. Wynn to receive complete relief before a disposition on the merits. Such preliminary injunctions are disfavored. *Miami Beach Fed. Savings & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958) ("We have repeatedly held that an order for a temporary injunction does not and cannot decide the merits of the case.").

Defendants argue that "any injunction should apply only to" Mr. Wynn. But an injunction maintaining the status quo cannot apply only to Mr. Wynn—such an injunction would have no effect. Because Mr. Wynn's injury is premised on unequal treatment on the basis of race, the only way to "redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), is to enjoin Defendants from making payments to others. And as several courts have recognized, "a court may impose the equitable relief necessary to render complete relief to the plaintiff, even if that relief extends incidentally to non-parties." *City of Chicago v. Barr*, 961 F.3d 882, 920–21 (7th Cir. 2020).

Broad geography-based injunctions are appropriate where they are necessary to afford relief to the plaintiff. *See Georgia-Pacific Consumer Prods. LP v. von Drehle Corp.*, 781 F.3d 710, 715 (4th Cir. 2015) (citing cases). This is one such case. If Section 1005's racial classification violates Mr. Wynn's equal protection rights, then loan repayments made to other farmers with qualifying loans on the basis of race do so as well. *See United States v. Hays*, 515 U.S. 737, 743–44 (1995) (explaining that the injury in an equal protection case accrues to "those person[s] who are personally denied equal treatment by the challenged discriminatory conduct" (cleaned up)). And if Defendants issue payments under Section 1005, then Mr. Wynn will suffer monetary and competitive harm. His competitors who qualify for forgiveness will be able to

use that money to invest in their farms, while he will have to continue paying off his substantial farm loan.

A nationwide preliminary injunction would ensure that Defendants' conduct in other jurisdictions would not violate Mr. Wynn's right to equal treatment. *See Washington v. Reno*, 35 F.3d 1093, 1103–04 (6th Cir. 1994) (affirming nationwide relief in favor of inmates at one federal prison that prohibited the federal Bureau of Prisons from funding a security system at *any* federal prison out of the prison commissary fund). But at the very least, Mr. Wynn is entitled to a district-wide or circuit-wide injunction. A circuit-wide injunction would at least forestall that harm with respect to his nearby competitors, although it would not fully remedy his monetary and competitive harm (nor his most basic equal protection injury). Even if the Court thinks a nationwide injunction inappropriate, it should at least issue a circuit- or district-wide injunction to protect Mr. Wynn against imminent harm. Either way, it is clear that the injunction that Defendants propose is woefully inadequate.

CONCLUSION

Plaintiff's Motion for Preliminary Injunction should be granted.

DATED: June 9, 2021.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION

s/ Wencong Fa

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2021, I submitted the foregoing to the Clerk of the Court via the District Court's CM/ECF system, which will provide notice of the filing of this document to all counsel of record.

s/ Wencong Fa
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Exhibit 1

P. Reply ISO Mot. for PI/Decl. of Cobb

Court: M.D. Fla. Case No. 3:21cv514-MMH

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EXHIBIT B

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

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

DECLARATION OF WILLIAM D. COBB

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Executed this day of 8 June, 2021.

William D. Cobb

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