

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.<sup>1</sup> These loans assist farmers with buying or improving farm property, *id.* § 764.151 (“farm ownership” loans), provide

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<sup>1</sup> 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.).<sup>2</sup> 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.*<sup>3</sup>

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

Although USDA aims to serve all farmers equitably,<sup>4</sup> 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

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<sup>2</sup> Available at <https://perma.cc/HA3L-PDPG>.

<sup>3</sup> As explained below, USDA defines SDFRs to include certain racial and ethnics minorities; herein, Defendants refer to SDFRs and minority farmers interchangeably.

<sup>4</sup> *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.)<sup>5</sup>; *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.)<sup>6</sup> (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.*

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<sup>5</sup> Available at <https://perma.cc/5DNF-PFJY>.

<sup>6</sup> Available at <https://perma.cc/CFE9-ANJ3>.

These problems spawned a series of lawsuits against USDA by groups of minority farmers.<sup>7</sup> 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)).<sup>8</sup> 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).<sup>9</sup> As these and other reports have documented,

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<sup>7</sup> *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.).

<sup>8</sup> Available at <https://perma.cc/8X6Q-GZ5V>.

<sup>9</sup> 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.<sup>10</sup> 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

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<sup>10</sup> *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”).<sup>11</sup>

**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

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<sup>11</sup> 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)<sup>12</sup>; GAO-19-464, Indian Issues: Ag’l Credit Needs and Barriers to Lending on Tribal Lands (2019),<sup>13</sup> 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

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<sup>12</sup> Available at <https://perma.cc/5RD6-24VH>.

<sup>13</sup> 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)).<sup>14</sup>

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

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<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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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<sup>15</sup> 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.*

<sup>16</sup> 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>.

<sup>17</sup> 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.*<sup>18</sup>

**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

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<sup>18</sup> 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: Recoms. 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.<sup>19</sup> *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-

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<sup>19</sup> 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.<sup>20</sup>

#### **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.

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<sup>20</sup> 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).<sup>21</sup> 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).

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<sup>21</sup> 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”).<sup>22</sup>

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

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<sup>22</sup> 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”).<sup>23</sup>

**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. Peña*, 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).

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<sup>23</sup> 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.)).<sup>24</sup> 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.

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<sup>24</sup> 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 its 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.<sup>25</sup> 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,

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<sup>25</sup> 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.<sup>26</sup>

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

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<sup>26</sup> *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.<sup>27</sup> 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.<sup>28</sup>

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

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<sup>27</sup> 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.

<sup>28</sup> 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[.]”).<sup>29</sup> 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,

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<sup>29</sup> 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.<sup>30</sup> 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,

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<sup>30</sup> 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<sup>31</sup> to relieve the sizeable burden minority farmers have long borne does not impose an impermissible one on white farmers, who have received

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<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> Moreover, the Supreme

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<sup>32</sup> Indeed, as noted, Plaintiff has received very recent CFAP funding, on top of prior subsidies.

<sup>33</sup> 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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138 S. Ct. 1916 (2018) .....40

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539 U.S. 306 (2003)..... 17, 31, 37

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556 U.S. 418 (2009).....38

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715 F.3d 1268 (11th Cir. 2013) .....16

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155 F. Supp. 2d 1327 (M.D. Fla. 2001) .....14

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185 F.R.D. 82 (1999)..... 23, 24, 37

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<i>Reno v. Flores</i> , 507 U.S. 292 (1993).....	17
<i>Siegel v. LePore</i> , 234 F.3d 1163 (11th Cir. 2000) .....	16
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7 U.S.C. §§ 1921, <i>et seq.</i> .....	2
7 U.S.C. § 1923 .....	3
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## A new era of civil rights? Latino immigrant farmers and exclusion at the United States Department of Agriculture

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**Abstract** In this article we investigate how Latino immigrant farmers in the Mid-Atlantic region of the United States navigate United States Department of Agriculture (USDA) programs, which necessitate standardizing farming practices and an acceptance of bureaucracy for participation. We show how Latino immigrant farmers' agrarian norms and practices are at odds with the state's requirement for agrarian standardization. This interview-based study builds on existing historical analyses of farmers

of color in the United States, and the ways in which their farming practices and racialized identities are often unseen by and illegible to the state. This disjuncture leads to the increased racial exclusion of immigrant farmers from USDA opportunities. Such exclusions impede the transition to a "new era of civil rights," as has been proclaimed by USDA leadership. Although efforts to address institutionalized racism on a national level may be genuine, they have failed to acknowledge this schism between rural Latino immigrants and the state, thereby inhibiting a meaningful transition in the

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

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

### Introduction

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

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

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

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

According to official USDA agricultural census data, the number of farms with principal operators of “Spanish, Hispanic, or Latino origin,” grew from 50,592 in 2002 to 55,570 in 2007. In 2012, the number increased again, to 67,000 farms, a twenty-one percent increase over 5 years, Latinos making up three percent of all principle operators.<sup>2</sup> Of those 67,000 Latino farm operators, the vast majority

<sup>1</sup> For more information on the Socially Disadvantaged Applicant Program, see [http://www.fsa.usda.gov/FSA/webapp?area=home&sub\\_ject=prod&topic=sfl](http://www.fsa.usda.gov/FSA/webapp?area=home&sub_ject=prod&topic=sfl).

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

(64,439), were the primary farm business owners as well. Comparatively, Asian principle operators also grew 21% in that period, although they make up less than 1% of all farmers overall. Black principle operators grew 12%, still making up only one point four percent of all farmers nationally. In contrast, during the same period the population of white principle operators fell 5% and overall the number of farmers dropped four percent (USDA 2014). As many Latino farmers transition from working as laborers in others’ fields to positions as farm owners and operators, they, along with other farmers of color, represent the new face of a flourishing generation of farmers.

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

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

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

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

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

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

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

as a result of the lawsuits mentioned above, the USDA has devoted new funding to support farmers identified as socially disadvantaged, such as minority farmers, Latino farmers included. This support may also reach Latino immigrant farmers indirectly through new programs and funding available to nonprofits outreaching and providing agricultural assistance in their communities.

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

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

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

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

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

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

These farmers, despite the avowed support to help them from the state, struggle with the same types of racialized boundaries in US agriculture as previous generations of

<sup>6</sup>This is with the exception of the work of Miriam Wells (1996), whose groundbreaking research in the 1970s and 80s shed light on the class and race-based struggles of Mexican and Japanese immigrants in California agriculture.

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

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

### Citizenship, race, and legibility

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

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

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

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

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

A set of lawsuits targeting the USDA over the past fifty years have documented the ways that farmers of color

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

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

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

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

## Methods and procedures

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

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

The interviews with outreach and advocacy workers were done in English and include staff from three regional farmers’ markets with a high percentages of Latino farmers, The Latino Farmers and Ranchers Association, the Rural Coalition, Telemon Foundation, Virginia Cooperative Extension, and the USDA. At the USDA, we

interviewed staff that work in the office of Advocacy and Outreach and the Socially Disadvantaged Farmers and Ranchers Program in Washington DC and the NRCS and FSA local offices in Virginia. Additionally, we interviewed staff that work at the federal level on the Hispanic and Women Farmers and Ranchers discrimination suit and claims process at the USDA. All nonprofit outreach workers at the nonprofits spoke Spanish, most as native speakers. Only one person we spoke with at the USDA federal offices spoke Spanish. There was no one working in the local offices in this region that spoke Spanish.<sup>8</sup>

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

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

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

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

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

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

### Time, labor, and spatial control

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

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

variety. These growing practices are harder to quantify and monitor by existing standards, and ultimately make it more difficult for Latino farmers to fit into the boxes created by USDA's programs.

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

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

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

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

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

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

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

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

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

peppers, black peppers, purple peppers, green peppers, white, orange—all the colors.

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

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

I also offer this cover crop program for them. That program is through... it's a state program. But most of them- the cover crop has to stay on the land, between certain planting dates and certain dates that you have to destroy. And that date, the destroyer date is after. Because they start planting around February first: the beginning of February they start discing their land, preparing their land. And that cover crop has to stay on there until the middle of March. And that's not good for vegetable farmers at all because they need that time, they need that land. When it's ready to go, they're ready to go.

So the cover crops work better for the grain farmers?

Yes. I have offered several times. I go out there and just try to push the program. And they say no, it's just not good for them because of the rules and regulations of the cover crop program.

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

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

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

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

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

### Paperwork and standardization

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

opportunities due to intimidation. For others, it may be the ultimate reason they stall in the process and fail to obtain the grant, loan, or insurance package.

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

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

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

reasons specifically. One farmer relayed this lack of awareness,

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

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

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

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

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

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

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

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

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

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

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

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

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

### Towards a new era of inclusion

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

Unfortunately, in our work we have found that despite claims of increased racial equality from the federal offices of the USDA, little on the ground change is being made in local and regional offices to directly help Latino immigrants overcome obstacles in order to transition from the role of farmworker to farmer in the United States. The processes of monitoring and standardization, as currently required by USDA programs, exacerbate the racial exclusion of immigrant farmers from state programs, and ultimately, from the advantages other farmers receive. This uneven rural development must be understood in context of

the historical relationship between Latino immigrants and the state as well as through the lived experiences of those struggling within a system where their practices are not deemed readable. Today's Latino immigrant farmers follow this pattern of racialized others being left out of system where some practices are deemed legible, and therefore legitimate, and others are not.

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

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

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

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

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

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

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