IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

Matthew MORTON, *et al.*,

Plaintiffs,

v.

Thomas J. VILSACK, in his official capacity as Secretary of Agriculture, *et al.*

Defendants.

Case No. 3:21-cv-00540-NJR

DEFENDANTS' REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Section 1005 offers one-time relief targeted to groups suffering the still-lingering effects of the well-documented historical discrimination in the U.S. Department of Agriculture's farm loan programs. In their effort to contest the law's constitutionality, Plaintiffs misstate the relevant legal standards, conflate distinct steps of the legal analysis, and fail to meaningfully engage with or rebut the Government's extensive supporting evidence. The Court should enter judgment for Defendants.

ARGUMENT

I. Section 1005 is constitutional.

Congress enacted § 1005 to serve a compelling interest: remedying the lingering effects of well-documented historical discrimination in USDA Farm Services Administration's (FSA's) farm loan programs. Section 1005 is narrowly tailored to advance that interest by providing one-time relief on FSA-administered debt to members of those groups who suffered because of USDA's prior discrimination. Contrary to what Plaintiffs claim, § 1005 is consistent with the equal protection principles of the Fifth Amendment. Plaintiffs fail to carry their burden of proving that the program is unconstitutional.

A. The two-step strict scrutiny analysis.

At the outset, a clarification of the contours of the strict scrutiny analysis is in order, because many of Plaintiffs' arguments collapse the separate steps of that analysis and misstate the applicable legal standards. To determine whether a race-based program satisfies strict scrutiny, the Court must undertake a two-step inquiry. First, the Court must assess whether the Government has identified a compelling interest. Second, the Court asks whether the Government's scheme to advance that compelling interest is narrowly tailored to achieve it. *See, e.g.*, *Majeske v. City of Chicago*, 218 F.3d 816, 819 (7th Cir. 2000).

At the first step, the Court must give some deference to the Government's identification of a compelling interest. *See Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003) (giving deference to police about need for diversity); *see also Fisher v. Univ. of Tex. at Austin* ("*Fisher II*"), 136 S. Ct. 2198, 2208 (2016) (reiterating that "some, but not complete, judicial deference is proper" with regard to

Government's compelling interest judgment) (citation omitted). This deference recognizes that such determinations rest on weighty policy and value judgments made by a co-equal branch of Government. *See, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Plaintiffs are mistaken when they contend that such deference is contrary to Supreme Court precedent. In the plurality opinion Plaintiffs cite, the plurality criticized a dissenting opinion for urging deference at the *second* step of the strict scrutiny inquiry, narrow tailoring. *See* Pls.' Opp'n to Defs.' Mot. for Summ. J. & Reply in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Opp.") at 3, ECF No. 57; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 744 (2007) (plurality opinion) (citing *id.* at 821-22, 848-50, 864-66 (Breyer, J., dissenting) (discussing narrow tailoring)). As a *majority* of the Supreme Court made clear in *Fisher II*, courts must give due deference to the Government's assertion of a compelling interest. 136 S. Ct. at 2208. This deferential review at the first step means that the focus of the Court's inquiry is whether there was "sufficient proof of past discrimination" for Congress to conclude that a remedial measure was warranted. *Majeske*, 218 F.3d at 822; *Petit*, 352 F.3d at 1114. Congress's "factfinding process" is "generally entitled to a presumption of regularity and deferential review by the judiciary." *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 500 (1989); *see also Rothe Dev. Corp. v. U.S. Dep't of Def.*, 262 F.3d 1306, 1322 n.14 (Fed. Cir. 2001).

Only at the second step does the Court consider the remedial program's design. At that step, the Court assesses whether "[t]he means chosen to accomplish the [Government's] asserted purpose" are "specifically and narrowly framed to accomplish that purpose." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (citation omitted); *see Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 932, 953 (7th Cir. 2016) (setting out the relevant factors). While this analysis requires consideration of whether a "less restrictive remedy could be used," *Walker v. City of Mesquite*, 169 F.3d 973, 982 (5th Cir. 1999), the Government need not "exhaust[] . . . every conceivable race-neutral alternative," *Fisher II*, 136 S. Ct. at 2208 (quoting *Grutter*, 539 U.S. at 339); *cf. Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) (holding that strict scrutiny requires that Government regulation "be narrowly tailored, not that it be 'perfectly tailored.'" (citation omitted)).

Once the Government "has shown acceptable proof of a compelling interest in remedying

past discrimination and illustrated that its plan is narrowly tailored to achieve this goal," the burden shifts to the plaintiff to rebut that showing. *Majeske*, 218 F.3d at 820. This Plaintiffs have not done.

B. Section 1005 is supported by a compelling interest.

As is well established—and as Plaintiffs concede—redressing the lingering effects of the Government's own prior discrimination is undeniably a compelling interest. *See* Pls. Opp. at 4.[1] Contrary to Plaintiffs' assertions, the record here makes clear that, with § 1005, Congress sought to advance precisely that interest. *See, e.g.*, 167 Cong. Rec. S1217, S1264-65 (daily ed. Mar. 5, 2021) ("Congress includes the[] measures [in § 1005] to address the longstanding and widespread systemic discrimination within the USDA, [and] particularly within the loan programs, against [SDFRs]."); H.R. Rep. No. 117-7, at 12 (2021) ("Black farmers and other 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."); Opening Stmt. of Sec'y of Agric. Thomas J. Vilsack before House Comm. on Agric. (Mar. 25, 2021), https://perma.cc/3LWV-4SMF ("[Section 1005] provides debt relief for [SDFRs] to respond to the cumulative impacts of systemic discrimination and barriers to access that have created a cycle of debt.").

To prevail on summary judgment, the Government need not prove conclusively either that past discrimination occurred or that its effects still linger today. Instead, the Government must show that it had a "strong basis in evidence" for reaching those conclusions. *Midwest Fence*, 840 F.3d at 945.[2] While that standard is not precisely defined, various courts have compared it to a "prima facie"

[1] *See also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976) ("[A]meliorating the effects of past racial discrimination [is] a national policy objective of the highest priority[.]"); *Majeske*, 218 F.3d at 820 ("It is well-settled law in this Circuit that a governmental agency has a compelling interest in remedying its previous discrimination and the agency may use racial preferencing to rectify that past conduct."); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (similar); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) (similar); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 288 (1986) (opinion of O'Connor, J.) (similar); *United States v. Paradise*, 480 U.S. 149, 167 (1987) (similar).

[2] *See also Petit*, 352 F.3d at 1114; *Dean v. City of Shreveport*, 438 F.3d 448, 455 (5th Cir. 2006); *Majeske*, 218 F.3d at 820; *Wygant*, 476 U.S. at 289-90 (opinion of O'Connor, J.); *Concrete Works of Colo., Inc. v. City v. Cnty. of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994).

showing that discrimination has occurred. *See Croson*, 488 U.S. at 500 (noting that the legislature there lacked evidence "approaching a prima facie case" of discrimination by anyone in the construction industry); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 424 (D.C. Cir. 1992) ("[L]egislation must rest on evidence at least approaching a *prima facie* case of racial discrimination in the relevant industry."); *Stuart v. Roache*, 951 F.2d 446, 449-50 (1st Cir. 1991) (similar); *Builders Ass'n of Greater Chicago v. Cnty. of Cook*, 123 F. Supp. 2d 1087 (N.D. Ill. 2000) ("[O]nce the governmental entity has made a *prima facie* showing of the necessary interest, the plaintiff has the burden of overcoming the *prima facie* case by the greater weight of the evidence." (citing *Majeske*, 218 F.3d at 820)); *Kossman Contracting, Co. v. City of Houston*, No. CV H-14-1203, 2016 WL 11473826, at *17 (S.D. Tex. Feb. 17, 2016) (similar) (discussing cases). While there is no specific form of evidence required, the Government typically makes that showing through a combination of statistical and anecdotal evidence, although even statistical evidence alone may be adequate. *See Croson Co.,* 488 U.S. at 501; *cf. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (intentional discrimination may be shown through "circumstantial" or "direct evidence").[3]

Here, the Government presented reports and testimony spanning decades detailing both anecdotal and statistical evidence of discrimination within the USDA farm loans programs. *See, e.g.*, Expert Declaration of William D. Cobb ("Cobb Rpt.") ¶¶ 25-38, ECF No. 51-1 (discussing some reports and litigation); Expert Report of Alicia M. Robb, Ph.D. ("Robb Rpt.") at 16-37, ECF No. 48-7 (discussing reports, litigation, and congressional testimony). The Government also presented expert opinions and statistical analysis indicating that this discrimination continues to harm minority farmers in the present day. *See* Robb Rpt. at 38-109; *see generally* Cobb Rpt. As the Government's experts explained, USDA operates as a lender of last resort, and so denial of, or delays in, loans, disbursements, or loan modifications or other servicing options has the potential to devastate farmers' livelihoods—in ways that cause damage for decades to come. *See, e.g.*, Defs.' Br. in Supp. of Cross Mot. for Summ.

[3] *See also Midwest Fence*, 840 F.3d at 952–53 (statistical evidence bolstered by anecdotal evidence); *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1003 (3d Cir. 1993) (similar); *Majeske*, 218 F.3d at 822 (similar); *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023, 1046 (Fed. Cir. 2008) (similar).

J. & Resp. in Opp'n to Pls.' Mot. for Summ J. ("Defs.' Br.") at 11, ECF No. 51 (detailing congressional testimony that FSA's delay in processing loans for one farmer prevented the farmer from securing an adequate facility for her hogs to care for their offspring, which caused the death of 500 piglets[4]); Robb Rpt. at 3 ("Minority farmers may be harmed for decades after a discriminatory act."). Dr. Robb's expert report explained in detail how discrimination led to significant loss of minority-owned farmland and generational wealth, which contributes to minority farmers being underrepresented in farming, having less access to credit and government payments, having smaller farms, bringing in less income, experiencing higher rates of delinquency and foreclosure, and being distrustful of USDA. *Id.*at 40-108; *see also* Defs.' Br. at 12-19 (detailing the same). This evidence more than meets the Government's burden to show "strong evidence" supporting Congress's conclusion that the harms from past discrimination by USDA persist to this day. *See generally* Defs.' Br. at 8-26.

Despite this extensive evidence, Plaintiffs assert that the record does not support the Government's compelling interest in remedying the effects of its own past discrimination. Yet Plaintiffs' efforts to rebut the record evidence fail in three primary ways. *First*, Plaintiffs attempt to reframe the Government's compelling interest in order to compare it to measures in other cases that were aimed at remedying societal discrimination generally or achieving racial balancing. Pls.' Opp. at 3-6. But the record shows that the Government seeks to redress the lingering effects of its own past wrongs, and its remedy eschews any use of racial quotas, contrary to Plaintiffs' assertions. *Second*, Plaintiffs attack the Government's evidentiary basis for its compelling interest, *id.* at 6, 8-9, but their criticisms are speculative and wholly insufficient to undermine the Government's strong basis for concluding that the effects of discrimination persist today. *Third*, Plaintiffs lodge miscellaneous other critiques focused on whether § 1005 actually furthers the Government's compelling interest. Pls.' Opp. at 7-9. But here Plaintiffs conflate the two separate inquiries under strict scrutiny. Whether the Government's remedy adopted under § 1005 in fact furthers its compelling interest bears on whether

[4] Hr'g on the USDA's Civil Rights Prog. for Farm Prog. Participants before House Sub-comm., Dep't Ops., Oversight, Nutrition, and Forestry, Comm. on Agric., 107th Cong. 48-50 (2002), https://perma.cc/PN24-BXPP.

that remedy is narrowly tailored, *not* on whether the interest is itself compelling. None of Plaintiffs' arguments cast doubt on the strong evidentiary basis for the Government's legitimate and well-established compelling interest in remedying the lingering effects of discrimination in its own loan programs.

1. *Plaintiffs fail to show that the Government lacks a compelling interest in remedying the lingering effects of discrimination in USDA loan programs.*

At the start, Plaintiffs wrongly characterize the Defendants' asserted compelling interest as the kind of "amorphous" interest in remedying "societal discrimination" that the Supreme Court rejected in *Croson*. Pls.' Opp. at 4-5 (quoting *Croson*, 488 U.S. at 504). In *Croson*, the city of Richmond asserted an interest in remedying discrimination occurring in the construction industry nationwide. The Court found that legislators' references to past discrimination nationwide did not provide a strong basis in evidence that remedial action in *Richmond* was necessary. *Croson*, 488 U.S. at 499. As the Supreme Court put it, the city relied on no evidence of discrimination by "*anyone* in the Richmond construction industry." *Id.* at 500 (emphasis in original); *id.* (citing statements by legislators concerned with discrimination occurring in the construction industry in Pittsburgh, which were "of little probative value in establishing identified discrimination in the Richmond construction industry"). This type of "amorphous" interest asserted by the city in *Croson* stood in stark contrast to the specific, and compelling, interest approved in the Supreme Court's other cases—an interest in remedying identified "prior discrimination *by the government unit involved*." *Wygant*, 476 U.S. at 274 (emphasis added); *see also Croson*, 488 U.S. at 500; *McNamara*, 138 F.3d at 1222 ("[O]ne justification that passes muster under" strict scrutiny "is that the favored treatment is necessary to remedy unlawful discrimination in the past by the entity conferring the favor."). Here, the Government's interest plainly falls in the second category: The Government is targeting the effects of *its own* identified discrimination in *its own* programs, as specifically documented in numerous reports and testimony, and as reflected in a broad range of statistics. *See, e.g.*, 167 Cong. Rec. S1264-65 ("Congress includes the[] measures [in § 1005] to address the longstanding and widespread systemic discrimination within the USDA, [and] particularly

within the loan programs, against [SDFRs]."); Defs.' Br. at 8.[5]

Plaintiffs next erect a strawman by contending that—contrary to the Government's repeated assertions in this litigation and elsewhere—the Government's real interest is seeking "racial parity." *See* Pls.' Opp. at 3, 5-6. Plaintiffs appear to rest this argument on the Government's use of statistics to demonstrate existing disparities. *See id.* at 5. But use of statistical evidence to demonstrate the effects of past discrimination does not mean that the Government's interest is in "racial parity." To the contrary, statistical evidence of disparities has routinely been used to establish a compelling interest in remedying past discrimination. *See, e.g.*, *Croson*, 488 U.S. at 501 ("'There is no doubt that 'where gross statistical disparities can be shown they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination[.]'"); *Midwest Fence*, 840 F.3d at 952-53 (same); *Majeske*, 218 F.3d at 822 ("We have previously held that this combination of persuasive statistical data and anecdotal evidence adequately establishes a compelling governmental interest that justifies an affirmative action plan, *see McNamara*, 138 F.3d at 1223-24, and we do so again in this case."); *Rothe Dev. Corp.*, 545 F.3d at 1046 ("[B]oth statistical and anecdotal evidence are appropriate in the strict scrutiny calculus[.]"); *Contractors Ass'n of E. Pa.*, 6 F.3d at 1003 (noting that statistical evidence can be crucial to showing a strong basis in evidence).

In recasting the Government's interest as achieving "racial parity," Plaintiffs again misconstrue *Croson*. Plaintiffs apparently read that case to mean that whenever the Government relies to any degree on statistical comparisons to local population representation, it must be pursuing an impermissible interest in achieving "racial parity." Pls.' Opp. at 5-6. But Plaintiffs again confuse the Supreme Court's

[5] As Congress' jurisdiction—unlike a city's—is nationwide, when it establishes a strong basis in evidence for remedying the effects of its own discrimination, that compelling interests applies "nationwide, even if the evidence did not come from or apply to every State or locale in the Nation." *N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007) (quoting *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003)). Moreover, the Government's interest in redressing discrimination within an industry, even by third parties, may sometimes be a sufficiently compelling interest to justify a racial classification at the appropriate geographic level. *See, e.g.*, *Croson Co.*, 488 U.S. at 492 ("It is beyond dispute that any public entity, state or federal, 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.").

discussion of narrow tailoring with a discussion of compelling interest. In *Croson*, the Supreme Court observed that a program designed to meet a specific quota that matched local population rates relied on faulty assumptions and thus was not *narrowly tailored*. *Croson*, 488 U.S. at 507. But even setting aside Plaintiffs' analytical misstep of conflating a program's design with the compelling interest it is meant to further, Plaintiffs' "racial parity" argument fails because it is entirely untethered to the design of § 1005 and the evidence supporting it. The Government has not implemented a "quota," or anything similar, to match local populations. Rather, the Government has observed—in one of many different statistical analyses—the "gross statistical disparities" between the number of minority farmers and their corresponding share of population. *See Croson*, 488 U.S. at 501. In rural Texas, for example, Blacks constitute 11.8% of the population, but run only 3.2% of farms; and Hispanics constitute 37.6% of the population, but run only 11.3% of farms. Robb Rpt. at 53. And in California, Asians constitute 13.0% of the population, but run only 5.8% of farms. *Id.*[6] The Government's observation of the substantial statistical disparities—including with respect to minority representation in farming but also with respect to minority farmers' receipt of Government agricultural funds, average farm income, and other metrics, *id.* at 41-108—supports Congress's conclusion that past USDA discrimination is having ongoing effects, but it does not amount to the adoption of a quota.

In short, Plaintiffs fail to show that the Government's interest is anything other than what Congress said it is: to remedy the present-day effects of discrimination "within the USDA, [and] particularly within [FSA] loan programs." 167 Cong. Rec. S1264-65. That interest is undoubtedly compelling.

2. Plaintiffs fail to rebut the Government's strong basis in evidence supporting the necessity of a remedial measure.

As a separate line of argument, Plaintiffs attempt to undermine the Government's evidentiary basis for concluding that past discrimination is having lingering effects. But instead of "introduc[ing] 'credible, particularized evidence"' of their own, *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 271 (D.D.C. 2012) (quoting *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1175 (10th Cir.

[6] *See also* Robb Rpt. at 41-55 (giving additional examples, as well as national data).

2000)), Plaintiffs primarily resort to conclusory and speculative assertions about possible alternative reasons for the observed disparities between minority and non-minority farmers. These assertions are insufficient to satisfy Plaintiffs' burden of rebutting the Government's strong basis in evidence. *See Majeske*, 218 F.3d at 820.

Initially, although Plaintiffs question whether the effects of discrimination from roughly a decade ago might still linger today, Pls.' Opp. at 5-7, many courts have recognized just that. *See, e.g.*, *Stuart*, 951 F.2d at 452 ("[R]emedial action takes time, and discrimination may linger for many years[.]"); *Higgins v. City of Vallejo*, 823 F.2d 351, 358 (9th Cir. 1987); *Fountain v. City of Waycross*, 701 F. Supp. 1570, 1577 (S.D. Ga. 1988); *Rutherford v. City of Cleveland*, 179 F. App'x 366, 377 (6th Cir. 2006). And the evidence of lingering effects of past discrimination here is legion. *See generally* Defs.' Br. at 12-19; Robb Rpt. at 38-108; Cobb Rpt. ¶¶ 25-30. One example of those lingering effects is the disparities in the distribution of recent race-neutral relief programs, which failed to reach minority farmers in part because USDA's past discrimination has left them, on average, with smaller farms. *See* Robb Rpt. at 55-71. But the lingering effects are also evident in other data, including farm income and higher rates of foreclosure, as well as several other metrics. Robb Rpt. at 41-108; Cobb Rpt. ¶¶ 52-60.

Rather than confront this evidence directly, Plaintiffs simply assert that the Government has not met its burden, and they point to other courts' preliminary decisions concerning the constitutionality of § 1005 on review of a less developed record. *See* Pls.' Opp. at 7. Yet those courts did not have the benefit of the Government's expert reports. In her report, Dr. Robb summarized anecdotal evidence of USDA discrimination in several reports, in prior congressional hearings, and in past lawsuits, *see* Robb Rpt. at 16-37, and performed a detailed analysis of statistical data along various metrics, *id.* at 38-108. And Mr. Cobb described not only the agency's own data indicating minority farmers' underrepresentation in FSA's programs, but also the well-recognized distrust of USDA among members of those communities—which derives from the agency's prior discrimination and continues to hamper the efficacy of the agency's efforts to reach those communities today. Cobb Rpt. ¶¶ 52-57.

Whatever questions other courts had about the adequacy of the Government's evidence to

support its compelling interest, these expert analyses answer them. Critically, Dr. Robb's analysis shows that the Government's prior efforts to remedy the effects of discrimination have "fallen short," 167 Cong. Rec. S1262. *See* Robb Rpt. at 38-40 (detailing past congressional efforts to "address[] some of the underlying problems of USDA discrimination" and concluding that they had "not fully remedied the problematic effects of decades of USDA discrimination"). And Mr. Cobb confirms that, despite USDA's past efforts, significant disparities and mistrust persist. Cobb. Rpt. ¶¶ 52-57. To be sure, some metrics suggest limited improvement in minority farmers' position in certain areas, but the across-the-board disparities between minority and non-minority farmers, detailed at length in Dr. Robb's report, show that past government efforts have failed to solve the problem of discrimination's lingering effects. Robb Rpt. at 40 (finding that, based on "several metrics[,] . . . minority farmers suffer the lingering effects of past discrimination"). The expert reports thus fill in any perceived gaps in the evidentiary record to show the "inadequacy of past remedial measures," *see Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021), and establish the need for further relief—especially given that the Government need only show a "strong basis in evidence" for its conclusion, not affirmatively prove it. *Midwest Fence*, 840 F.3d at 945.

Plaintiffs fail to rebut this evidence. They ignore Mr. Cobb's expert report. And they offer only weak criticisms of Dr. Robb's report, none of which establish any deficiency in the Government's evidence. For instance, Plaintiffs object to Dr. Robb's conclusion that past discrimination in USDA's farm loans programs is a plausible cause of minority farmers generally having smaller farms today. *See* Robb Rpt. at 89. In doing so, they rely on their expert's statement that one data point "suggests that" farm size could be explained by minority farmers making less money in jobs off the farm and "may have nothing to do with discriminatory behavior by the USDA." Rebuttal Expert Report of Dr. Stephen G. Bronars at ¶ 51, ECF No. 49-1. *See* Pls.' Opp. at 9-10. But criticisms of this nature are categorically inadequate to defeat the Government's evidence. *See Midwest Fence*, 840 F.3d at 952 (finding that "speculative criticism about potential problems" with the Government's evidence does not satisfy a plaintiff's burden "to show a genuine issue of material fact as to whether the [Government] had a substantial basis in evidence for adopting" a remedial program); *Concrete Works of*

Colo. v. City & Cnty. of Denver, 321 F.3d 950, 991 (10th Cir. 2003) ("CWC cannot meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present 'credible, particularized evidence.'" (citation omitted)).

Plaintiffs also attempt to distinguish Dr. Robb's report from the one in *Midwest Fence* by asserting that the expert in that case controlled for "various independent variables." Pls.' Opp. at 10 (quoting *Midwest Fence*, 840 F.3d at 951). But that distinction fails because Dr. Robb also controlled for various independent variables—such as rural population rates, the proportion of new and beginning farmers across racial groups, number of days spent working off the farm, differences in crops grown, and other variables. *See* Robb Rpt. at 74-90. Although Plaintiffs contend that Dr. Robb should have made additional statistical comparisons, their expert largely fails to perform any analysis to show that such comparisons would render Dr. Robb's conclusions inaccurate. Plaintiffs thus do not raise a genuine dispute of material fact as to the adequacy of the Government's statistical evidence. *Midwest Fence*, 840 F.3d at 951 ("One major problem with [the plaintiff's expert] report is that [it] did not perform any substantive analysis of [its] own"); *Concrete Works*, 321 F.3d at 991 (noting that while the plaintiff "*hypothesized* that the disparities shown in the studies on which [the city] relie[d] could be explained by any number of factors other than racial discrimination," its expert "did not conduct its own marketplace disparity study controlling for the disputed variables . . . from which [the] court could conclude that such variables explain the disparities").

In any event, the "strong basis in evidence" standard does not require the Government "to negate all evidence of non-discrimination," *Concrete Works*, 321 F.3d at 991 (citation omitted), or even to "conclusively prove" that disparities are caused by past discrimination, *Midwest Fence*, 840 F.3d at 952-53 (quoting *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 241 (4th Cir. 2010)). It requires only that the Government provide "sufficient evidence" to support its finding that the past discrimination is having ongoing effects that warrant a race-based remedy. *Adarand Constructors*, 515 U.S. at 221. The Government has done so here. Ultimately, Plaintiffs' criticisms, which "merely nip at the edges of" Dr. Robb's expert report, "are insufficient to undermine" its statistical analysis. *Concrete Works*, 321 F.3d at 991. And Plaintiffs do not even confront Mr. Cobb's expert opinion discussing many of the

same statistical disparities and his extensive experience administering FSA's farm loan programs. These failures are fatal to Plaintiffs' efforts to manufacture a dispute of material fact.

3. Plaintiffs' remaining arguments are irrelevant to the compelling interest inquiry.

Finally, Plaintiffs make various assertions that the Government has not shown a compelling interest because it has allegedly failed to connect § 1005's relief to the interest it advances. *See* Pls.' Opp. at 7-9 (asserting that the Government "fail[s] to connect [§] 1005's debt relief to the concerns that [it] raise[s] in support of the need for remedial measures"); *id.* at 11 (objecting that the scope of relief provided by § 1005 is unconnected to the evidence supporting the Government's compelling interest). These arguments are misplaced, as they have no bearing on whether the Government has identified a compelling interest that is supported by a strong basis in evidence, but instead relate to whether the Government's remedy is narrowly tailored to the Government's interest as established by that evidence. *See, e.g.*, Pls.' Opp. at 8 (referencing portions of the *Wynn* court's discussion on under- and over-inclusivity in the narrow tailoring portion of the analysis). And, as explained below, they fail.

C. Section 1005 is narrowly tailored to serve that interest.

Like their challenge to the presence of a compelling interest, Plaintiffs' narrow tailoring arguments fail to meaningfully confront the Government's voluminous evidence showing the "persistent effects of past USDA discrimination." Cobb Rpt. ¶ 10; *see generally* Robb Rpt. In claiming that § 1005 constitutes "an arbitrary payout" based merely on race, Pls.' Opp. at 13, Plaintiffs ignore the detailed evidence from Defendants' experts who described the ways in which USDA's past discrimination has inflicted injury on entire communities—and explained the shortcomings of prior remedial measures that the Government has attempted. *Id.*; *see also* Robb Rpt. at 38-40 (concluding that prior efforts failed). This evidence, which Plaintiffs do not rebut, demonstrates that § 1005 was narrowly tailored because it was adopted only after other efforts were tried and found lacking; because it does not burden third parties; and because it is neither over- nor under-inclusive with respect to the injuries it aims to redress. *See Midwest Fence*, 840 F.3d at 942 (identifying these factors as guiding the narrow-tailoring inquiry).

1. Plaintiffs fail to rebut evidence showing that § 1005 was necessary because past efforts were inadequate.

The Government's experts detailed the failure of prior efforts to remedy the effects of past USDA discrimination and the necessity of the relief authorized by § 1005. Dr. Robb summarized "numerous initiatives that Congress has enacted over the last several decades in recognition of USDA's discriminatory behavior towards minority farmers and the resulting detrimental effects." Robb Rpt. at 38; *see also* Defs.' Br. at 20-22. Mr. Cobb also explained USDA's extensive prior efforts—above and beyond the administrative claims processes arising out of past settlements—"to address or remedy the documented history of discrimination in its farm loans programs, and that history's lingering effects," such as by "creating special outreach programs, entering into cooperative agreements with local organizations, establishing administrative processes for discrimination complaints, and otherwise adjusting the implementation of its programs." ¶ 39; *id.* ¶¶ 40-51 (detailing USDA's various efforts). Yet these efforts have proved inadequate. Dr. Robb set forth the many statistical metrics showing that minority farmers continue to "suffer the lingering effects of past discrimination in USDA's loan programs." Robb Rpt. at 40. And Mr. Cobb further explained that "minority communities continue to be under-represented in" various USDA programs and continue to distrust USDA. Cobb Rpt. ¶¶ 52-57. Thus, according to Mr. Cobb, "direct financial assistance" of the kind authorized under § 1005 "is necessary to address the lack of generational wealth that are observable in higher rates of delinquency, loan denial, application withdrawal, and foreclosure for minority communities" and "is integral in rebuilding trust between USDA and minority communities in a way that will make other USDA and FSA programs more effective overall." Cobb Rpt. ¶ 10. Dr. Robb similarly described how a program like § 1005 "is necessary" to pull minority farmers out of the "cyclical effects of prior discrimination." Robb Rpt. at 108. *See also* Defs.' Br. at 26-32.

Plaintiffs barely acknowledge these expert conclusions and entirely ignore the voluminous evidence of prior efforts by the Government to address the effects of discrimination. *See* Pls.' Opp. at 17-18. Instead, Plaintiffs assert in passing that USDA's experience with one specific program shows the value of "race-neutral alternatives such as providing advertising and technical assistance." Pls.'

Opp. at 18. But as Mr. Cobb explained in his report, the program Plaintiffs reference was highly unusual insofar as it granted the agency flexibility to invest significant funds "to reopen a recent program in order to address perceived gaps in distribution." Cobb. Rpt. ¶¶ 60, 83. No analogous opportunity exists to "address past inequities in Farm Loan Programs that have had longstanding lingering effects"—"incentive programs and increased outreach alone" are insufficient to address the full range of those effects. *Id.* ¶ 60. Further, as Mr. Cobb explained, "enhancements to outreach programs, additional investments to improve communications and interactions with minority farmers and applicants, automated loan services, and incremental changes to forms and regulations cannot in isolation address the lack of access to capital and the issues related to the dispossession of land that has persisted over many years." *Id.* ¶ 58. This expert conclusion, based on Mr. Cobb's extensive experience administering farm loan programs at the agency, stands in stark contrast to Plaintiffs' unadorned speculation about the adequacy of alternatives to § 1005.

Instead of confronting this evidence, Plaintiffs categorically claim that, notwithstanding the shortcomings of the Government's prior efforts, Congress should have devised some *other* means of remedying the lingering effects of USDA's discrimination. Pls.' Opp. at 18. Here, however, Plaintiffs fundamentally misunderstand the law. As the Supreme Court has observed, the Government need not demonstrate that it exhausted "every conceivable race-neutral alternative" before implementing race-conscious measures. *Grutter*, 539 U.S. at 339. Where, as here, Congress had before it a documented history of an agency's "serious, good faith consideration of workable race-neutral alternatives" demonstrating that those "available, workable race-neutral alternatives do not suffice," resort to a race-based classification is appropriate. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312-13 (2013) (internal quotes and citations omitted). Contrary to what Plaintiffs appear to suggest, Pls.' Opp. at 18, strict scrutiny does not restrict the Government to continue pursuing inadequate measures, *Fisher II*, 136 S. Ct. at 2214 (rejecting the plaintiff's proposed alternatives as not "available" or "workable" means of achieving university's compelling interest).

Ultimately, the necessity for § 1005's remedy is "firmly rooted in both the anecdotal and statistical evidence" introduced by the Government's experts, who documented the inadequacy of

prior alternative measures. *Majeske*, 218 F.3d at 824; *see also Midwest Fence*, 840 F.3d at 954 ("The necessity of relief overlaps our analysis of [the Government's] strong basis in evidence for believing [its] programs were needed to remedy lingering effects of discrimination."). Because Plaintiffs fail to rebut that evidence, their narrow tailing arguments collapse on these first two prongs of the inquiry.

2. Section 1005 satisfies the other narrow tailoring criteria.

Plaintiffs fare no better contesting the other factors courts typically consider in a narrow-tailoring analysis. *Midwest Fence*, 840 F.3d at 942 (considering flexibility, over- and under-inclusiveness, and burden on non-benefitted parties). To the contrary, a consideration of those factors reveals that § 1005 meets the criteria of a narrowly-tailored remedy.

First, and foremost, Plaintiffs' complaints that § 1005's remedy is both over- and under-inclusive again disregard the record evidence. Pls.' Opp. at 8, 12-13. As detailed by Mr. Cobb in his expert report, USDA's prior discrimination did not just injure the individual minority farmers who were denied loans; rather, it infected the relationship between the agency and entire communities. Cobb. Rpt. ¶¶ 55-56. The "widely publicized history of USDA discrimination has made it difficult for the agency and the communities it serves to overcome distrust," *id.* ¶ 55, and makes members of minority communities "more reluctant to engage with USDA and ask for farm loans in the first instance" or to participate in other farm programs, *id.* ¶ 57. This "lack of trust impacts the effectiveness of USDA's work" when interacting with minority farmers generally, *id.*, and ultimately serves to perpetuate the disparities that USDA's prior discrimination wrought. *See id.* ¶¶ 57-58 (explaining how a lack of trust on the part of minority communities results in failure of USDA programs to benefit socially-disadvantaged farmers). Dr. Robb, too, concluded that the data indicated that minority farmers were "discouraged borrowers." *See* Robb Rpt. at 102-107. Plaintiffs attempt to dismiss these facts as mere "broad brush" characterization. Pls.' Opp. at 12 n.7. But Mr. Cobb's evaluation is a detailed, thoroughly considered assessment, based on his decades of experience administering farm loan programs and his extensive knowledge of interactions between the agency and community groups. Cobb. Rpt. ¶¶ 56-58. Dr. Robb's conclusion is based on a review of direct loan application statistical data. Robb Rpt. at 102-107. And these detailed assessments—unrebutted by any contrary

evidence submitted by Plaintiffs—indicate that, to remedy the lingering effects of past discrimination, a remedy needs to reach the *entire* community, not just individuals previously denied loans. Cobb Rpt. at ¶¶ 56-58; *see also* Robb Rpt. at 102-07 (discussing how data showing that minority farmers have lower USDA loan application submission rates and higher withdrawal rates relative to non-minority farmers indicates that minority farmers have "learned [to] distrust" USDA, making them "discouraged borrowers").

Moreover, contrary to Plaintiffs' suggestion, Mr. Cobb's report provided factual detail explaining how the "one-time congressionally mandated extinguishment of government farm loans for minority farmers" serves to "engender trust in the agency that originated" those loans. Pls.' Opp. at 17 (emphasis removed). Describing the early reactions to the passage of § 1005, Mr. Cobb detailed how USDA learned "that community organizations and minority farmers saw § 1005 payments as aid that would help rebuild trust between USDA and minority communities." Cobb. Rpt. ¶ 89. Based on this type of information and his own extensive observations, Mr. Cobb explicitly opined that § 1005 will serve to rebuild trust and remedy "some of the persistent effects of past USDA discrimination which cannot be remedied by race-neutral programs alone." *Id.* ¶ 10. Plaintiffs have thus failed to undermine the connection between § 1005 and the problem Congress sought to remedy.

In light of all this evidence, Plaintiffs' observations that § 1005 does not reach farmers who were improperly denied loans yet provides relief to farmers who are successful and not in danger of foreclosure are immaterial. Pls.' Opp. at 13-14. As the cases Defendants cited in their opening brief demonstrate, lingering effects that create community-wide injury may appropriately be remedied by providing benefits on a group-wide basis. *See, e.g.*, *Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 482 (1986) (upholding order "benefitting individuals who are not the actual victims of discrimination"); *Wygant*, 476 U.S. at 287 (opinion of O'Connor, J.) ("[I]t is agreed [by the full Court] that a plan need not be limited to the remedying of *specific instances* of identified discrimination for it to be deemed sufficiently 'narrowly tailored[]' . . . to the correction of prior discrimination by the state actor." (citation omitted) (emphasis added)); *Croson*, 488 U.S. at 509 (noting that, in some cases, "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate

exclusion"); *see also Majeske*, 218 F.3d at 823 (affirming the constitutionality of a race-conscious remedial promotion plan that benefited all Black and Hispanic detectives even though evidence showed that some Black and Hispanic detectives suffered no discrimination in the past). Plaintiffs may disagree that this should be the legal standard, Pls.' Opp. at 14, but they cannot establish that the requirement of "individualized consideration" in educational affirmative action programs, *Grutter*, 539 U.S. at 334, prohibits Congress from addressing a community-wide injury through community-wide means.

As with the Government's compelling interest, the courts that have so far evaluated the tailoring of § 1005 have done so without the benefit of this factual record and the substantively unrebutted opinions by Defendants' experts. *See Wynn,* 545 F. Supp. 3d at 1282–83*; Holman v. Vilsack,* No 21-cv-1085, 2021 WL 2877915, at *8–10 (W.D. Tenn. July 8, 2021); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 476 (E.D. Wis. 2021); Order, *Miller v. Vilsack*, No. 21-cv-595, ECF No. 60 at 18–19 (July 1, 2021). Plaintiffs' reliance on those preliminary decisions is therefore unavailing. Pls.' Opp. at 15-16. To establish that § 1005 is over- and under-inclusive, Plaintiffs would have to meaningfully engage and rebut the factual record Defendants have offered. Plaintiffs have not done so.

Second, as a separate line of argument, Plaintiffs claim that § 1005's remedy is not narrowly tailored because it is inflexible. Pls.' Opp. at 12. But this argument largely ignores that the provision is designed to achieve the interest of repairing lingering economic damage from USDA's past discrimination and rebuilding trust in a highly efficacious and targeted way: by providing a one-time payment. This targeted relief stands in stark contrast to decades-long programs that risk over- and under-inclusion by continuing to benefit members of disadvantaged groups long after the initial implementation of that program has achieved some of the desired effects. *See, e.g.*, *Grutter*, 539 U.S. at 343 (noting the long timespan of affirmative action programs in higher education). Where, as here, "promptness in the administration of relief was plainly justified" by the inefficacy of past measures, the use of "temporary" and targeted relief is constitutionally permissible. *Paradise*, 480 U.S. at 180; *see also Sheet Metal Workers*, 478 U.S. at 487-88 (noting that relief of "limited duration" weighs in favor of constitutionality) (Powell, J., concurring).

Third, and finally, there is no plausible argument that Plaintiffs can make regarding § 1005 burdening non-minority farmers. Unlike, for example, the measure at issue in *Wygant*, USDA's provision of funds to members of minority groups does not require Plaintiffs (or any other non-minority farmer) to give up any of the benefits they have already received from USDA—including the more than $13,000 in agricultural subsidies distributed to each Plaintiff over the past decade, *see* Defs.' Br. at 33; *Wygant*, 476 U.S. at 283 (concluding that a burden requiring layoffs of non-minority teachers imposed an impermissible burden that resulted in "serious disruption of [non-minority teachers'] lives"). While Plaintiffs complain that it is "unjust" that they should not benefit from § 1005 relief as well, Pls.' Br. at 13 n.9, they do not assert that providing such funds to others actually burdens them at all. Nor could they. Section 1005 has no effect on Plaintiffs' ability to continue fully participating in in USDA loan and other benefits programs.

Because Plaintiffs fail to show that any of the established narrow-tailoring criteria render § 1005 improper, their challenge to the constitutionality of the provision must fail.

II. If the Court finds Section 1005 unconstitutional, the proper remedy is to extend its benefits, not to nullify the statute.

The Court should uphold § 1005's constitutionality. But if it does not, the Court should extend § 1005's benefits to the excluded plaintiffs, not "impose [a] hardship on beneficiaries whom Congress plainly meant to protect." *Califano v. Westcott*, 443 U.S. 76, 90 (1979).

As the parties agree, whether to extend § 1005's benefits to the excluded plaintiffs or to eliminate those benefits for all turns on which of the two courses—more debt relief or no debt relief—Congress would have taken "had it been apprised of the constitutional infirmity." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (citation omitted). Plaintiffs complain that there is "scarce support" for the notion that Congress would have preferred to provide benefits to a wider class of borrowers than to deny benefits to those it sought to aid. But as Defendants explained, there is ample support in the statute's design, structure, and overall purpose to conclude that Congress would have preferred that *more* farmers benefit from § 1005, not that *no* farmers do. *See* Defs.' Br. at 38-39. Plaintiffs appear to demand an explicit statement of such intent, but the question only arises because

Congress did not address any "constitutional infirmity," and so it did not indicate—one way or the other—which course it would have taken. The remedial inquiry necessarily requires the Court to make a prediction about what Congress *would* have done, not simply follow a legislative direction.

Plaintiffs further suggest a third possibility: that Congress might have "go[ne] back to the drawing board" and come up with a different program altogether. Pls.' Opp. at 19. To be sure, Congress has a nearly unlimited number of options for how to craft legislation, and it might have done any number of things. But this Court has no such legislative power, and instead is confined to remedying the Plaintiffs' equal protection injury, should they establish one.[7] In that respect, the Court has only two options: order that the scope of § 1005 be expanded, or nullify the statute.

As between those two options, the "proper course," *Westcott*, 443 U.S. at 89, is "[o]rdinarily," *Morales-Santana*, 137 S. Ct. at 1699, to "extend the coverage of the statute to include those who are aggrieved by the exclusion," *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result).[8] Plaintiffs give no reason to depart from the ordinary, proper course. Instead, their argument, boiled down, is simply that the law Congress actually passed did not provide for benefits for non-minority farmers. *See* Pls.' Opp. at 19-20. But no one disputes that—that is the impetus for this litigation—and the same could be said with respect to every other case in which a court extends a benefit to a group that Congress initially excluded.

In assessing which remedial course is appropriate, the Court must examine the evidence available. *Morales-Santana*, 137 S. Ct. at 1699 ("The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand."). Here, all evidence supports an expansion of

[7] Plaintiffs suggest, in a footnote, that the Court's remedial order would "require the Court . . . to issue money payments to [Plaintiffs]." Pls.' Opp. at 19 n.14. Not so. The Court's order, should it conclude that § 1005 is unconstitutional, will simply direct USDA to assess Plaintiffs' eligibility for § 1005's benefits without regard to their race or ethnicity. Thus, just as "sovereign immunity" was no obstacle to the relief ordered in any of the many cases that extended benefits to the excluded class, *see, e.g.*, *Westcott*, 443 U.S. 76; *Califano v. Goldfarb*, 430 U.S. 199 (1977), it is no obstacle here.

[8] *See also Goldfarb*, 430 U.S. 199 (extending survivors' benefits); *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (extending disability benefits); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (extending food stamps); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (extending military spousal benefits).

§ 1005's benefits. First, the unlimited appropriation indicates that Congress wanted to provide benefits to minority farmers without respect to the final cost. Second, expansion of the benefits is consistent with Congress's inclusion of § 1005 in a broad economic recovery and stimulus bill. Third, although Congress saw a special need for relief for minority farmers, nearly all borrowers who would stand to benefit from an expansionary remedy are facing financial difficulties to some extent, in that they cannot obtain private credit on reasonable terms. And finally, the total cost of such an expansion is both small relative to the total size of the American Rescue Plan Act[9] and also in line with previous decisions the Supreme Court has entered to remedy equal protection violations.

Accordingly, should this Court conclude that Plaintiffs have succeeded in their equal protection challenge, the Court should redress that injury by extending the statute's benefits to Plaintiffs.[10] To do otherwise "would impose hardship on beneficiaries whom Congress plainly meant to protect." *Westcott*, 443 U.S. at 90. *Cf. Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that 'a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" (citation omitted)).

CONCLUSION

For the reasons given above, and in Defendants' Motion for Summary Judgment, the Court should enter judgment for Defendants or, if the Court concludes § 1005 is unconstitutional, order that its benefits be extended to Plaintiffs without regard to race or ethnicity.

[9] Plaintiffs suggest the expanded program would exceed the cost of the recent MFP and CFAP programs. Pls.' Opp. at 20. Combined, those programs cost $54.2 billion. *See* Cobb Rpt. ¶ 59 n.7. Plaintiffs' reference to these programs costing "between 23 and 24 *million* dollars" Pls.' Br. at 20, appears to be a typographical error, and, in any event, is mistaken.

[10] Plaintiffs suggest that the government has "forfeited" any argument that relief should be limited to Plaintiffs. Pls.' Opp. at 20 n.15. It is difficult to see how the government could have forfeited this argument by, as the Plaintiffs concede, making it. But in any event it is black-letter law that equitable relief should go no further than necessary to redress the parties' established injury. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."). Plaintiffs' injury will be fully redressed by an order directing USDA to consider their eligibility for § 1005 debt relief without regard to the Plaintiffs' race or ethnicity.

Dated: March 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2022, I electronically filed the foregoing brief using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 29, 2022

/s/ Kyla M. Snow
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