

## **RATTLESNAKES, DEBT, AND ARPA § 1005: THE EXISTENTIAL CRISIS OF AMERICAN BLACK FARMERS**

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### INTRODUCTION

Black<sup>1</sup> farmers have sought just compensation from the United States Department of Agriculture (USDA) for decades.<sup>2</sup> Despite the USDA's acknowledgement that it has provided Black farmers with inferior access to loans and services,<sup>3</sup> proposals to pay farmers for past discrimination "have languished in controversy and red tape."<sup>4</sup> In the words of the fourth-generation farmer Lucious Abrams,<sup>5</sup> "[We] didn't have any idea we gonna [sic] be here twenty years later still fighting

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1. This essay follows the capitalization style of the Columbia Journalism Review for "Black" and "white." Mike Laws, *Why We Capitalize 'Black' (and not 'White')*, COLUM. JOURNALISM REV. (June 16, 2020), <https://www.cjr.org/analysis/capital-b-black-styleguide.php> [<https://perma.cc/GZQ6-QEMS>].

2. Emma Hurt, *The USDA Is Set to Give Black Farmers Debt Relief. They've Heard That One Before*, NPR (June 4, 2021), <https://www.npr.org/2021/06/04/1003313657/the-usda-is-set-to-give-black-farmers-debt-relief-theyve-heard-that-one-before> [<https://perma.cc/6U53-428U>].

3. See U.S. COMM'N ON CIV. RTS., EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE 106 (1965) [hereinafter EQUAL OPPORTUNITY IN FARM PROGRAMS] ("Negro borrowers receive smaller loans, both absolutely and in relation to their net worth, than white farmers similarly situated.").

4. Fred de Sam Lazaro & Simeon Lancaster, *Historically Denied 'Pivotal' Loans, Black Farmers Still Struggle to Get Support*, PBS NEWS HOUR (Dec. 7, 2021, 6:35 PM), <https://www.pbs.org/newshour/show/historically-denied-pivotal-loans-black-farmers-still-struggle-to-get-support> [<https://perma.cc/9CSB-M5TG>].

5. See Hurt, *supra* note 2 ("Lucious Abrams . . . [is] a fourth-generation farmer from Keysville, Ga. . . .").

... but through His grace and mercy we're still here, fighting for justice."<sup>6</sup> Abrams was a plaintiff in the landmark "*Pigford* settlement" that was reached in recognition of the decades of discriminatory practices by the USDA against Black farmers.<sup>7</sup> The suit resulted in \$2.3 billion in compensation paid out to the victims of the discrimination.<sup>8</sup> But Abrams, like thousands of other *Pigford* claimants, never collected.<sup>9</sup> As Abrams fought compensation denial in court, he also fought off foreclosure, and his federal loan debt ballooned.<sup>10</sup> Now, Abrams is watching the developments surrounding the American Rescue Plan Act (ARPA), enacted in 2021 and promising \$4 billion in loan forgiveness to "socially disadvantaged" farmers.<sup>11</sup> Like other Black farmers, Abrams is skeptical that relief will ever come.<sup>12</sup> "If you go and stick your hand in a hole and a rattlesnake bites it the first time, then you go back there a second time, it bites you the second time, what do you think you are going to do the third time?"<sup>13</sup>

The United States has thoroughly acknowledged its history of discrimination against Black farmers.<sup>14</sup> Government reports describe discriminatory loan practices,<sup>15</sup> underrepresentation of minority

6. Acres of Ancestry Initiative - Black Agrarian Fund, *Episode 17 | The Conspiracy Against Black Farmers* | *Luscious [sic] Abrams*, YOUTUBE (May 14, 2020), <https://www.youtube.com/watch?v=SivoK49-eqM> [<https://perma.cc/26FN-263G>] (starting at 4:07).

7. Christopher Walljasper, *Debt Relief for U.S. Minority Farmers Coming in June - USDA*, REUTERS (May 21, 2021, 11:49 AM), <https://www.reuters.com/business/finance/debt-relief-us-minority-farmers-coming-june-usda-2021-05-21> [<https://perma.cc/MMW2-HGAW>].

8. *Pigford Payouts to Black Farmers Reach \$2.3 B. Will There Be More?*, AGRI-PULSE (July 9, 2014, 10:07 AM) [hereinafter *Pigford Payouts*], <https://www.agri-pulse.com/articles/4200-pigford-payouts-to-black-farmers-reach-2-3-b-will-there-be-more> [<https://perma.cc/X5RA-CQZP>].

9. See Jessica Fu, *Covid-19 Stimulus Bill to Provide \$4 Billion in Debt Relief for Black Farmers, Other Farmers of Color*, COUNTER (Mar. 9, 2021, 2:57 PM), <https://thecounter.org/black-farmers-discrimination-debt-vilsack-american-rescue-plan-covid-19/> [<https://perma.cc/H5PT-Q2B7>] ("Despite his role in the case, Abrams has said that he was unjustly denied settlement from it."); Hurt, *supra* note 2 ("[J]ust under 7,000 [*Pigford* claimants] were flat out denied, and roughly 60,000 were rejected for being filed late.").

10. Hurt, *supra* note 2.

11. Walljasper, *supra* note 7.

12. See Hurt, *supra* note 2 (quoting U.S. Senator Raphael Warnock describing Abrams' and other Black farmers' "understandable" skepticism as a "deep distrust . . . built over years.").

13. Hurt, *supra* note 2.

14. See CIV. RTS. ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 6 (1997) [hereinafter CIVIL RIGHTS] ("USDA's painful history of individual and class action lawsuits, court orders, media exposés, numerous Congressional hearings, and reports depicts the Department as a stubborn bureaucracy that refuses to provide equal opportunity to all as the law requires.").

15. See EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 3, at 106.

producers on USDA county committees,<sup>16</sup> and the Reagan-era dismantling of the USDA Office of Civil Rights.<sup>17</sup> The USDA published a report detailing the agency's failure to remedy discrimination and mistreatment.<sup>18</sup> And, notably, Black farmers in the late 1990s fought for—and secured—one of the largest civil rights settlements in history.<sup>19</sup>

However, Black farmers continue to disappear. In the last century, the population of Black farmers has plummeted from nearly one million in 1920<sup>20</sup> to less than 50,000 today.<sup>21</sup> The landmark discrimination settlements of the 1990s, while providing necessary aid to many farmers, created logistical and legal barriers to recovery for many others.<sup>22</sup> Meanwhile, farmers continue to require capital; agricultural leaders like JohnElla Holmes, the Director of the Kansas Black Farmers Association, have found that “loans are . . . just pivotal.”<sup>23</sup> In fact, farm loans are “an integral part of the [modern] agricultural production process,” and up-front funding for crop production is essential for many farmers.<sup>24</sup>

On June 10, 2021, a rattlesnake bit Lucious Abrams's hand again. That day, a federal judge in Wisconsin halted all payments from the ARPA's loan forgiveness program.<sup>25</sup> The program offered loan forgiveness to socially disadvantaged farmers and ranchers (SDFRs), defined as those “belonging to groups that have been subject to racial

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16. See U.S. GOV'T ACCOUNTABILITY OFF., GAO/RCED-95-113R, MINORITIES AND WOMEN ON FARM COMMITTEES 2 (1995).

17. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-755T, U.S. DEPARTMENT OF AGRICULTURE: MANAGEMENT OF CIVIL RIGHTS EFFORTS CONTINUES TO BE DEFICIENT DESPITE YEARS OF ATTENTION 2 (2008) (“USDA . . . disbanded its Office of Civil Rights in 1983 and stopped responding to claims of discrimination.”).

18. CIVIL RIGHTS, *supra* note 14, at 2.

19. Hurt, *supra* note 2.

20. See U.S. DEP'T OF AGRIC., RBS RSCH. REP. 194, BLACK FARMERS IN AMERICA, 1865-2000: THE PURSUIT OF INDEPENDENT FARMING AND THE ROLE OF COOPERATIVES 24 (2002) [hereinafter BLACK FARMERS IN AMERICA].

21. U.S. DEP'T OF AGRIC., AC-17-A-51, 2017 CENSUS OF AGRICULTURE: UNITED STATES: SUMMARY AND STATE DATA 705 (2019).

22. Hurt, *supra* note 2.

23. Lazaro & Lancaster, *supra* note 4.

24. *Show Me the Money: A Primer on Agricultural Lending*, NAT'L AGRIC. L. CTR. (Sept. 15, 2020), <https://nationalaglawcenter.org/show-me-the-money-a-primer-on-agricultural-lending> [<https://perma.cc/58H5-WQKD>].

25. See *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021).

or ethnic prejudice.”<sup>26</sup> In particular, SDFRs include “farmers who are Black or African American, American Indian or Alaska Native, Hispanic or Latino, and Asian or Pacific Islander.”<sup>27</sup> White farmers had filed suit, alleging that the program therefore discriminated against them by excluding them from the debt relief on the basis of their race.<sup>28</sup> This and similar cases pose a new obstacle to much-needed relief. The existence of many Black farmers is at stake in the meantime.

This essay explores the plight of Black farmers in America and weighs potential paths forward given the challenges facing ARPA. It recounts a brief history of Black farming in the United States and addresses current legal challenges to § 1005 of ARPA, enacted by Congress to aid Black and other “socially disadvantaged” farmers. It concludes by analyzing possible strategies to provide aid to a dwindling Black farmer population.

### I. A BRIEF HISTORY OF BLACK FARMERS IN THE UNITED STATES

Black farming arose out of the Transatlantic slave trade.<sup>29</sup> In the 17th century, white planters sought labor in the land-abundant colonies of North America.<sup>30</sup> To meet their needs, planters began importing and enslaving Africans to work the fields of the American South.<sup>31</sup> By the 1860s, nearly 4 million enslaved people lived in the United States.<sup>32</sup> Of these, an estimated 3.6 million lived and worked on farms and

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26. *Socially Disadvantaged, Beginning, Limited Resource, and Female Farmers and Ranchers*, ECON. RSCH. SERV., U.S. DEP'T OF AGRIC. (Feb. 15, 2022), <https://www.ers.usda.gov/topics/farm-economy/socially-disadvantaged-beginning-limited-resource-and-female-farmers-and-ranchers/> [https://perma.cc/7JK8-DRSJ].

27. *Id.*

28. Amended Complaint at 13, *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (No. 1:21-cv-00548).

29. See Janet K. Wadley & Everett S. Lee, *The Disappearance of the Black Farmer*, 35 *PHYLON* (1960-) 276, 276–77 (1974) (“It was, in fact, a shortage of agricultural labor that caused the first entry of blacks into this country . . . . The abundance of land and the lack of labor led to the practice of extensive agriculture and the importation of more and more slaves.”).

30. Waymon R. Hinson & Edward Robinson, “*We Didn’t Get Nothing:*” *The Plight of Black Farmers*, 12 *J. AFR. AM. STUD.* 283, 284 (2008).

31. See *id.* at 284–85.

32. J. David Hacker, *From ‘20. and Odd’ to 10 Million: The Growth of the Slave Population in the United States*, 41 *SLAVERY & ABOLITION* 840, 840 (2020).

plantations.<sup>33</sup> While white planters owned the farms, Black hands tilled the land.<sup>34</sup>

After abolition, the majority of newly freed Black people had little experience outside of farm labor.<sup>35</sup> General William T. Sherman's promise of "40 acres and a mule," which would have offered "400,000 acres of confiscated Confederate land for freed slaves,"<sup>36</sup> was reversed by President Andrew Johnson after President Abraham Lincoln's assassination.<sup>37</sup> Many formerly enslaved Black workers therefore turned to sharecropping, "often working for former slaveholders"<sup>38</sup> and "remain[ing] ensnared in the virtual peonage" of the system.<sup>39</sup> Black farmers that managed to acquire their own small farms dealt with land "less fertile than property owned by whites," lower amounts of financing, and restrictions on crop choice by local lenders.<sup>40</sup> At the same time, segregation and Jim Crow laws, as well as widespread lynchings, harmed Black Americans as a whole.<sup>41</sup>

While at one point approaching one million, the Black farmer population has diminished significantly over the last century.<sup>42</sup> Some

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33. *Enslavement*, NAT'L HUMANS. CTR., <http://nationalhumanitiescenter.org/pds/maai/enslavement/text3/text3read.htm> [<https://perma.cc/YNP2-A6CT>].

34. *Pre-Civil War African-American Slavery*, LIBR. CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/national-expansion-and-reform-1815-1880/pre-civil-war-african-american-slavery/> [<https://perma.cc/4CUG-S2FZ>] ("[G]rowing cotton was very labor intensive and cotton growers [in the South] needed a large supply of labor to tend the fields. Enslaved African Americans supplied this labor.").

35. Wadley & Lee, *supra* note 29, at 278.

36. Sarah McCammon, *The Story Behind '40 Acres and a Mule'*, NPR: CODE SWITCH (Jan. 12, 2015, 6:02 PM), <https://www.npr.org/sections/codeswitch/2015/01/12/376781165/the-story-behind-40-acres-and-a-mule> [<https://perma.cc/3BHW-52P7>].

37. *Id.*

38. *Id.*

39. Hinson & Robinson, *supra* note 30, at 288.

40. PAMELA BROWNING, U.S. COMM'N ON CIV. RTS., ED-222604, *THE DECLINE OF BLACK FARMING IN AMERICA 19–20* (1982).

41. See J.E. Hansan, *Jim Crow Laws and Racial Segregation*, VCU LIBRARIES SOC. WELFARE HIST. PROJECT (2011), <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-and-racial-segregation/> [<https://perma.cc/GCM5-GU72>] (last visited Jan. 21, 2022) ("The majority of states and local communities passed 'Jim Crow' laws that mandated 'separate but equal' status for African Americans."); Hinson & Robinson, *supra* note 30, at 287 ("The terror of lynchings accompanied the legalization of segregation . . .").

42. See Summer Sewell, *There Were Nearly a Million Black Farmers in 1920. Why Have They Disappeared?*, THE GUARDIAN (Apr. 29, 2019, 4:00 AM), <https://www.theguardian.com/environment/2019/apr/29/why-have-americas-black-farmers-disappeared> [<https://perma.cc/96F7-KM37>] ("The number of black farmers in America peaked in 1920, when there were 949,889. Today, of the country's 3.4 million total farmers, only 1.3%, or 45,508, are black . . .").

factors were happenstance: a plunge in cotton prices,<sup>43</sup> the spread of the boll weevil,<sup>44</sup> the Great Depression,<sup>45</sup> technological advances that displaced Black workers,<sup>46</sup> and an increase in job opportunities outside of agriculture.<sup>47</sup> However, other factors were discriminatory, like economic relief programs extended mostly to white farmers.<sup>48</sup> Additionally, the failure of Black lending institutions reduced the ability of Black farmers to receive financing.<sup>49</sup> Black farm owners were often unable to afford new farming technologies<sup>50</sup> and “remained largely disconnected from agribusiness.”<sup>51</sup> Many Black farming cooperatives similarly failed by the 1970s.<sup>52</sup>

However, despite the many factors contributing to Black farmers’ decline in the 20th century, none seem as egregious as the discriminatory practices of the agency designed to serve farmers: the USDA.

## II. FACIALLY DISCRIMINATORY PRACTICES: THE USDA AND *PIGFORD*

Abraham Lincoln established the USDA in 1862, deeming it “[t]he People’s Department.”<sup>53</sup> However, “[t]he extent to which ‘the people’ have benefited from the USDA . . . has depended on their position within society.”<sup>54</sup>

Several governmental reports published in the late 20th century highlight the USDA’s discriminatory practices. In 1965, the U.S. Commission on Civil Rights (“Commission”) found that the USDA

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43. BROWNING, *supra* note 40, at 23.

44. *Id.* at 24 (citing Manning Marable, *The Land Question in Historical Perspective: The Economics of Poverty in the Blackbelt Rural South, 1865–1920*, in *THE BLACK RURAL LANDOWNER—ENDANGERED SPECIES* 16–17 (Eds. Leo McGee and Robert Boone, 1979)).

45. Wadley & Lee, *supra* note 29, at 279.

46. BROWNING, *supra* note 40, at 38.

47. BROWNING, *supra* note 40, at 25.

48. BROWNING, *supra* note 40, at 23.

49. BROWNING, *supra* note 40, at 24.

50. BROWNING, *supra* note 40, at 39.

51. Valerie Grim, *The Politics of Inclusion: Black Farmers and the Quest for Agribusiness Participation, 1945–1990s*, 69 *AGRIC. HIST.* 257, 258 (1995).

52. *Id.* at 265.

53. *About the U.S. Department of Agriculture*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/our-agency/about-usda> [<https://perma.cc/5K6P-6BFD>].

54. Adrienne Petty & Mark Schultz, *African-American Farmers and the USDA: 150 Years of Discrimination*, 87 *AGRIC. HIST.* 332, 332 (2013).

discriminated against Black farmers in its loan programs.<sup>55</sup> In 1970, the Commission found inadequacies in the USDA's civil rights compliance and enforcement.<sup>56</sup> A 1982 report stated that the USDA's lending arm "may [have been] involved in the very kind of racial discrimination that it should be seeking to correct," finding immediate need for intervention.<sup>57</sup> The following year, Ronald Reagan "eliminat[ed] the USDA civil rights investigative office,"<sup>58</sup> creating a massive "backlog of unresolved complaints."<sup>59</sup>

At the same time, political pressure "strongly encouraged [the USDA] to deal more fairly with [B]lack farmers."<sup>60</sup> By the mid-1990s, the USDA had formally acknowledged its discriminatory practices in a number of reports.<sup>61</sup> However, no report "satisf[ied] those seeking redress of past wrongs and compensation for losses suffered."<sup>62</sup>

Therefore, in 1997, Black farmers brought a class action lawsuit against the USDA claiming that the agency had denied or delayed farm loans on the basis of their race and was not responsive to discrimination complaints.<sup>63</sup> The parties agreed on a settlement in a case consolidating *Pigford* (known as *Pigford I*) and a related case, *Brewington v. Glickman*.<sup>64</sup> The U.S. District Court for the District of Columbia

55. See EQUAL OPPORTUNITY IN FARM PROGRAMS, *supra* note 3, at 106. The report notes that

The assistance rendered to Negroes by [the Farmers Home Administration] in the form of loans and technical assistance is consistently different from that furnished to whites in the same economic class . . . . There is reason to believe that the type of loans made and the technical assistance given to Negroes is limited by preconceptions held by county personnel of the FHA.

*Id.*

56. U.S. COMM'N ON CIV. RTS., FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT ii (1970).

57. BROWNING, *supra* note 40, at 179, 181.

58. Petty & Schultz, *supra* note 54, at 342.

59. TADLOCK COWAN & JODY FEDER, CONG. RSCH. SERV., RS20430, THE PIGFORD CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2 (2013), <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf> [<https://perma.cc/X6A3-KFZH>].

60. Grim, *supra* note 51, at 263.

61. See COWAN & FEDER, *supra* note 59, at 2 (noting that a 1997 Civil Rights Action Plan "acknowledged past problems and offered solutions for future improvements"); see generally CIVIL RIGHTS, *supra* note 14, at 58–92 (recommending action plans to aid USDA in instituting specified civil rights policies).

62. COWAN & FEDER, *supra* note 59; cf. Hurt, *supra* note 2 (noting that farmers instead had to seek compensation through the *Pigford* class action suit, which "was dubbed the largest civil rights class action settlement in U.S. history.").

63. *Pigford v. Glickman*, 185 F.R.D. 82, 86 (D.D.C. 1999).

64. *Id.* at 90–91, 113.

approved a consent decree,<sup>65</sup> and “disbursement of checks to qualifying farmers began on November 9, 1999.”<sup>66</sup> The settlement paid out \$1.06 billion.<sup>67</sup>

However, 31% of claimants were denied compensation.<sup>68</sup> Interest groups suggested that the consent decree requirements were too restrictive.<sup>69</sup> A swath of problems soon cropped up: thousands more farmers than expected filed claims; the farmers’ lawyers skipped the discovery phase, reducing access to USDA records that were ultimately necessary to collect compensation; the USDA filed objections to almost every case; and perhaps most concerningly, the farmers’ lawyers began missing court deadlines.<sup>70</sup> The presiding judge described the representation as approaching legal malpractice.<sup>71</sup>

Due to the large number of denials, Congress passed legislation in 2008 allowing late-filing claimants to petition for a determination in federal court.<sup>72</sup> *In re Black Farmers Discrimination Litigation*, known as *Pigford II*,<sup>73</sup> resulted in a \$1.25 billion settlement.<sup>74</sup>

Despite \$2.3 billion in *Pigford* payments, Black farmers have still not been made whole.<sup>75</sup> Lloyd Wright, former director of the USDA’s Office of Civil Rights, reportedly described *Pigford* as “a big promise that didn’t deliver much.”<sup>76</sup> Most farmers won payments of \$50,000 plus \$12,500 paid to the IRS in taxes.<sup>77</sup> Judge Paul Friedman stated that “it is probable that no amount of money can fully compensate class

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65. *Id.* at 113.

66. COWAN & FEDER, *supra* note 59, at 3.

67. Sam Robinson, *Settlement Payments for Black Farmers in Years-Old Lawsuit Now Released*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Feb. 18, 2014), <https://investigatamidwest.org/2014/02/18/settlement-payments-for-black-farmers-in-years-old-lawsuit-now-released> [<https://perma.cc/ZG6S-ED7P>].

68. *See* COWAN & FEDER, *supra* note 59, at 5.

69. *See* COWAN & FEDER, *supra* note 59, at 5.

70. Neely Tucker, *A Long Road of Broken Promises for Black Farmers*, WASH. POST (Aug. 13, 2002), <https://www.washingtonpost.com/archive/politics/2002/08/13/a-long-road-of-broken-promises-for-black-farmers/ecf2afeb-2029-4ec8-a45e-5123c3623cd2> [<https://perma.cc/W8Q6-6AVA>].

71. *Pigford v. Veneman*, 144 F. Supp. 2d 16, 19 (D.D.C. 2001).

72. COWAN & FEDER, *supra* note 59, at 7.

73. 290 F.R.D. 325 (D.D.C. 2012).

74. COWAN & FEDER, *supra* note 59, at 7.

75. Laura Reiley, *Relief Bill Is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say*, WASH. POST (Mar. 8, 2021, 8:15 PM), <https://www.washingtonpost.com/business/2021/03/08/reparations-black-farmers-stimulus> [<https://perma.cc/S4LS-N6B8>].

76. *Id.*

77. *Pigford Payouts*, *supra* note 8.

members for past acts of discrimination,” and “\$50,000 is not full compensation in most cases.”<sup>78</sup> Notably, only 4.8% of *Pigford I* went to debt relief.<sup>79</sup>

### III. CONGRESSIONAL ATTEMPTS TO REMEDY PAST DISCRIMINATION

Black farmers in the United States continue to bear the burden of generations of discrimination, particularly through high levels of debt.<sup>80</sup> The U.S. government has attempted to alleviate this burden.<sup>81</sup> This section describes recent legislation introduced by Congress to address the problem, as well as the resulting litigation that has hamstrung Congress’s efforts.

#### A. Legislation

In 2020 and 2021, members of Congress introduced and enacted separate legislation intended to compensate Black farmers for the past discriminatory practices of the USDA.<sup>82</sup>

In 2020, for example, lawmakers introduced the Justice for Black Farmers Act.<sup>83</sup> Reintroduced in 2021, the Act would have provided debt relief and land grant programs to Black farmers.<sup>84</sup> As of May 2022 the House bill was still in committee.<sup>85</sup>

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78. *Pigford v. Glickman*, 185 F.R.D. 82, 108 (D.D.C. 1999).

79. Reiley, *supra* note 75.

80. Alan Rappoport, *Banks Fight \$4 Billion Debt Relief Plan for Black Farmers*, N.Y. TIMES (May 19, 2021), <https://www.nytimes.com/2021/05/19/us/politics/black-farmers-debt-relief.html> [<https://perma.cc/QKG3-L28A>] (“Debt has been a burden on the back of many farmers and especially farmers of color.”).

81. *In Historic Move, USDA to Begin Loan Payments to Socially Disadvantaged Borrowers Under American Rescue Plan Act Section 1005*, U.S. DEP’T OF AGRIC. (May 21, 2021), <https://www.usda.gov/media/press-releases/2021/05/21/historic-move-usda-begin-loan-payments-socially-disadvantaged> [<https://perma.cc/DL8T-QBBG>].

82. *See Booker, Warren, Gillibrand, Smith, Warnock, and Leahy Announce Comprehensive Bill to Address the History of Discrimination in Federal Agricultural Policy*, CORY BOOKER (Feb. 9, 2021), <https://www.booker.senate.gov/news/press/booker-warren-gillibrand-smith-warnock-and-leahy-announce-comprehensive-bill-to-address-the-history-of-discrimination-in-federal-agricultural-policy> [<https://perma.cc/E2ZF-QREJ>]; *Statement from Agriculture Secretary Tom Vilsack on Congressional Passage of the American Rescue Plan Act*, U.S. DEP’T OF AGRIC. (Mar. 10, 2021), <https://www.usda.gov/media/press-releases/2021/03/10/statement-agriculture-secretary-tom-vilsack-congressional-passage> [<https://perma.cc/3MYB-HJ2Y>].

83. Justice for Black Farmers Act of 2021, H.R. 1393, 107th Cong. (2021).

84. *Id.*

85. *Id.*

In March 2021, Congress enacted a different law, the American Rescue Plan Act (ARPA), which aimed to provide broad relief from the continued impacts of COVID-19.<sup>86</sup> The omnibus bill included § 1005, which appropriated funds to the USDA to forgive “up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer.”<sup>87</sup> The USDA’s definition of socially disadvantaged groups includes farmers who identify themselves as “Black/African American, American Indian, Alaskan Native, Hispanic/Latino, Asian American, or Pacific Islander.”<sup>88</sup>

Under § 1005, applicants were able to check their demographic designation with the Farm Service Agency (FSA) and update or correct their records as needed regarding race and ethnicity.<sup>89</sup> Eligible borrowers were to receive a letter from FSA outlining FSA loan balances that would be paid and the additional payment amount the farmer would receive.<sup>90</sup> Once the applicant signed and returned the letter, FSA would begin issuing payments.<sup>91</sup> About three weeks after FSA received the signed letters, borrowers who qualified would have their eligible loan balances paid and would receive an additional payment of 20% of their total qualified loan debt to cover taxes.<sup>92</sup>

This process, however, raised potential constitutional concerns. The Supreme Court has long recognized that the Equal Protection Clause of the Constitution prohibits the federal government from discriminating on account of race.<sup>93</sup> While “remedial policies can *sometimes* justify preferential treatment based on race,”<sup>94</sup> the bar is high and “call[s] for the most exacting judicial examination.”<sup>95</sup> Strict scrutiny applies when racial classifications are used and can only be justified if they further a compelling governmental interest and are narrowly tailored to serve that interest.<sup>96</sup> Because § 1005 treated

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86. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

87. § 1005(a)(2), 135 Stat. 4, 12.

88. See *American Rescue Plan Debt Payments*, U.S. DEPT’ OF AGRIC., <https://www.farmers.gov/loans/american-rescue-plan> [<https://perma.cc/2ZDS-D54Q>].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

94. *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989)).

95. *Univ. of Cal. v. Bakke*, 438 U.S. 265, 291–92 (1978).

96. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995).

farmers differently based on their race, the provision was challenged for violating the Equal Protection Clause of the Constitution.<sup>97</sup>

### B. Current Litigation

In April and May 2021, white farmers who were “otherwise eligible for the loan-forgiveness program” in ARPA brought suit in the U.S. District Courts for the Eastern District of Wisconsin,<sup>98</sup> the Northern District of Texas,<sup>99</sup> and the Middle District of Florida.<sup>100</sup> In all three cases, the courts applied the compelling interest and narrow tailoring analysis of strict scrutiny to § 1005.<sup>101</sup>

As mentioned above, the Supreme Court has recognized that “remedial policies can *sometimes* justify preferential treatment based on race.”<sup>102</sup> In order to justify preferential treatment, the government must show that its proposed policy serves a compelling interest in remedying past discrimination, and that it is narrowly tailored to that effect. In a recent case, the Sixth Circuit summed up the current state of the law by stating that it would find such a compelling interest only where: (1) the policy targets “a specific episode of past discrimination,” (2) there is evidence of “intentional discrimination in the past,” not simply statistical disparities, and (3) the government participated in the past discrimination it now seeks to remedy.<sup>103</sup> With regard to narrow tailoring, two of the district courts that analyzed § 1005 of ARPA relied on *Grutter v. Bollinger*,<sup>104</sup> in which the Supreme Court held that the government must show that it engaged in “good faith consideration of workable race-neutral alternatives” and found that no workable race-

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97. See *Judge Certifies Two Classes in Lawsuit Challenging Minority Debt Relief Payments*, NAT'L AGRIC. L. CTR. (Aug. 3, 2021), <https://nationalaglawcenter.org/judge-certifies-two-classes-in-lawsuit-challenging-minority-debt-relief-payments/> [<https://perma.cc/T7J9-TG5E>].

98. Amended Complaint at 2, *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021) (No. 1:21-cv-00548).

99. Plaintiff's Class-Action Complaint at 1, *Miller v. Vilsack*, No. 4:21-cv-0595-O (N.D. Tex. Apr. 26, 2021).

100. *Wynn v. Vilsack*, 545 F. Supp. 3d 1271 (M.D. Fla. 2021).

101. See *id.* at 1277; *Faust v. Vilsack*, 519 F. Supp. 3d 470, 475 (E.D. Wis. 2021); Order at 15–16, *Miller v. Vilsack*, No. 4:21-cv-0595-O (N.D. Tex. Apr. 26, 2021).

102. *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality opinion); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

103. *Id.*

104. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

neutral alternative was adequate to achieve the compelling interest.<sup>105</sup> Additionally, narrow tailoring also requires that the policy not be overbroad nor underinclusive in its use of preferential treatment based on race.<sup>106</sup>

In June and July 2021, all three courts held that plaintiffs had satisfied the elements necessary for a preliminary injunction, including that they were likely to succeed on the merits.<sup>107</sup> In particular, Judge William C. Griesbach and Judge Reed O'Connor both concluded that the defendant's use of a race-based classification in the administration of § 1005 likely violated the plaintiffs' right to equal protection under the law.<sup>108</sup> Alternatively, Judge Marcia Morales Howard decided not to issue a final determination on whether the government could establish a compelling interest sufficient to warrant a form of race-based relief because she held that the government clearly failed to establish that § 1005 was narrowly tailored.<sup>109</sup>

As acknowledged by the Order in one of the cases, *Miller v. Vilsack*, the government had a high burden to overcome in establishing constitutionality of its race-based policy.<sup>110</sup> The government relied on legislative history in which Congress presented a "vast body of statistical and anecdotal evidence recounting discrimination against [socially disadvantaged farmers and ranchers (SDFRs)] in USDA programs."<sup>111</sup> Further, the government presented recent studies demonstrating lingering discrimination in USDA programs and continued disparate impacts on SDFRs.<sup>112</sup>

Despite extensive evidence and the USDA's self-admission of discrimination against Black farmers,<sup>113</sup> the court in *Miller* granted the plaintiffs' request for an injunction.<sup>114</sup> In particular, the court held that the government's argument failed because its recent evidence only

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105. *Id.* at 339; Order at 18, *Miller*, No. 4:21-cv-0595-O; *Faust*, 519 F. Supp. 3d at 476 (E.D. Wis. 2021) (citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)).

106. *Vitolo*, 999 F.3d at 362.

107. Order at 15, *Miller v. Vilsack*; *Faust*, 519 F. Supp. 3d at 476; *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021).

108. *Faust* at 476; Order at 15, *Miller v. Vilsack* (granting class certification and preliminary injunction).

109. *Wynn*, 545 F. Supp. 3d at 1281.

110. Order at 17, *Miller v. Vilsack*.

111. Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 21, *Miller*, No. 4:21-cv-0595-O.

112. *Id.* at 26–27.

113. *See supra* notes 55–62 and accompanying text.

114. Order at 23, *Miller*, No. 4:21-cv-0595-O.

demonstrated disparate impact as opposed to intentional discrimination by the USDA.<sup>115</sup> Further, the government's evidence which could support a finding of intentional discrimination was "too attenuated from any present-day lingering effects to justify race-based remedial action by Congress," thereby failing the compelling interest analysis.<sup>116</sup> Additionally, the government failed to persuade the court that the policy was narrowly tailored,<sup>117</sup> despite arguing that race-neutral attempts by Congress to correct discrimination by USDA in the past have been largely ineffective.<sup>118</sup>

Accordingly, classifying the government's interest in ARPA § 1005 as remedial may not be tenable with the government's present evidence. In *Miller*, the court found that the government did not show a compelling interest because it failed to provide either evidence of gross statistical disparities or intentional discrimination in current USDA programs.<sup>119</sup> Further, courts point to multiple issues with § 1005 as it is currently written which cause it to fail narrow tailoring analysis and appear to be difficult to overcome given how the statute is currently written.<sup>120</sup> Clearly, pervasive evidence of continued disparity and strong legislative intent to aid the plight of Black farmers in America is not enough to outweigh courts' hesitation to allow legislation that singles out Black farmers. As the law currently stands, such evidence and intent is insufficient to show a compelling interest in remedying the USDA's past discrimination, and ARPA § 1005 does not satisfy narrow tailoring analysis to address that goal. However, the plight of Black farmers remains. Any hope of relief will require either more creative and nuanced legislation from Congress or less

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115. *Id.* at 17.

116. *Id.*

117. *Id.* at 18.

118. Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Miller v. Vilsack*, No. 4:21-cv-0595-O, at 30 (N.D. Tex. June 2, 2021).

119. Order at 17, *Miller*, 4:21-cv-0595-O.

120. *See id.* at 19 ("[T]he statute's check-the-box approach to the classification of applicants by race and ethnicity is far different than the "highly individualized, holistic review" of individuals in a classification system permitted as narrowly tailored in a case like *Grutter*."); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 476 (E.D. Wis. 2021) ("The Section 1005 program is a loan-forgiveness program purportedly intended to provide economic relief to disadvantaged individuals without actually considering the financial circumstances of the applicant."); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1285–86 (M.D. Fla. 2021) (finding the loan-forgiveness program simultaneously overinclusive and underinclusive: overinclusive in that it provides debt relief to SDFRs who may have never have been discriminated against, and underinclusive in that it fails to provide relief to SDFRs who were "unable to obtain a farm loan due to discriminatory practices or who no longer [have] qualifying farm loans as a result of prior discrimination.").

rigidity from the judicial branch in their analysis of strict scrutiny. Given the outcome in all three cases, other legal avenues may need to be pursued.

As a fallback argument, the government could try classifying ARPA's interest as non-remedial. In *University of California v. Bakke*, when examining the constitutionality of the University of California's affirmative action program, the Supreme Court held that the non-remedial interest of diversity in the context of education constitutes a compelling governmental interest.<sup>121</sup> The Court then moved to narrow tailoring analysis, determining whether racial classifications were appropriate to promote diversity.<sup>122</sup> The Court held that race was "a single though important element" that could constitutionally be considered a "plus factor" in university admissions.<sup>123</sup> The opinion reasoned that race classification in this way did not insulate minority applicants from being compared with all other candidates, allowing for a holistic admissions process that took into account other qualities "likely to promote beneficial educational pluralism."<sup>124</sup> Therefore, a candidate that did not receive a "plus" on the basis of race would still be weighed fairly against others and have no basis to allege unequal treatment under the law.<sup>125</sup>

Analogous reasoning could be used to uphold the racial classifications in § 1005. Similar to *Bakke*, a court could find a compelling interest in encouraging diversity in the American farming industry.<sup>126</sup> The USDA identifies "[i]ntegrating [c]ivil [r]ights and [e]quity" as a goal of the agency.<sup>127</sup> In addition, the agency includes "provid[ing] economic opportunity" and "promot[ing] agriculture production that better nourishes Americans" as part of its vision statement, indicating an emphasis on economic growth.<sup>128</sup> Providing debt relief to Black farmers could contribute to economic growth; in fact, one study found that bringing Black farmers to parity with their

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121. *University of California v. Bakke*, 438 U.S. 265, 314–15 (1978).

122. *Id.* at 315–16.

123. *Id.* at 315.

124. *Id.* at 317.

125. *Id.* at 318.

126. *See id.* at 315.

127. *Our Commitment to Equity*, U.S. DEPT OF AGRIC., <https://www.usda.gov/equity> [<https://perma.cc/8E5E-94F7>].

128. U.S. DEPT OF AGRIC., *supra* note 53.

peers could generate \$5 billion in economic value.<sup>129</sup> In the context of agriculture, courts could recognize § 1005 as furthering the non-remedial compelling interests of equity or economic growth that is relevant to the needs of the U.S. agriculture.<sup>130</sup> However, the narrow tailoring requirement may still act as a barrier to such an argument, since race is not merely a “plus factor” under § 1005. To pass narrow tailoring test, Congress could amend the statute to make race a “plus factor” instead of a determining factor. Alternatively, a court practicing constitutional avoidance could require that the racial classifications used by the government to administer the program be merely a “plus” factor when farmers are being selected for debt-forgiveness under § 1005, but such an interpretation might contradict the plain language of the statute.<sup>131</sup>

The viability of this reading could potentially be found in the language used in the USDA’s Notice of Funds Availability — “[m]embers of socially disadvantaged groups include, *but are not limited to*: American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos” and *additional groups may qualify on a case-by-case basis* per the determination of the Secretary of Agriculture.<sup>132</sup> Therefore, the text may be interpreted as giving preference to the listed groups, while not making funding determinations exclusively on that basis. Race and ethnicity might then be considered a plus factor among the other factors considered in pursuit of the compelling government interest.<sup>133</sup>

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129. Daniel Aminetzah, Jane Brennan, Wesley Davis, Bekinwari Idoniboye, Nick Noel, Jake Pawlowski, and Shelley Stewart, *Black Farmers in the US: The Opportunity for Addressing Racial Disparities in Farming*, MCKINSEY & CO. (Nov. 10, 2021), <https://www.mckinsey.com/industries/agriculture/our-insights/black-farmers-in-the-us-the-opportunity-for-addressing-racial-disparities-in-farming> [<https://perma.cc/Q33W-RUH3>].

130. U.S. DEP’T OF AGRIC., *supra* note 53.

131. See American Rescue Plan Act, Pub. L. No. 117-2, 135 Stat. 4, 12 (2021) (noting that the secretary “shall” provide a payment to socially disadvantaged farmers); *see also id.* at 135 Stat. 13 (defining “socially disadvantaged farmers” with reference to 7 U.S.C. § 2279(a)(5)–(6), which confines that definition to “group[s] 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.” Food, Agriculture, Conservation, and Trade Act of 1990, 7 U.S.C. § 2279(a)(5)–(6)).

132. Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA); 86 Fed. Reg. 100 (May 26, 2021). Available at <https://www.govinfo.gov/content/pkg/FR-2021-05-26/pdf/2021-11155.pdf> [<https://perma.cc/AUA3-QKHV>] (*italics added*).

133. The authors note that more analysis regarding the Equal Protection Clause and the *Bakke* case is necessary for the potential argument to be made with full force. We present the

## IV. POTENTIAL PATHS FORWARD

If ARPA fails strict scrutiny under the Equal Protection Clause, a number of paths forward exist, with varying levels of feasibility and effectiveness. This section discusses two proposals in particular: (1) Congress could enact new legislation targeting small farms to indirectly benefit Black farmers, or (2) Congress could pass legislation that simply includes white farmers.

A. *Target Smaller Operations*

If constitutional issues surrounding § 1005 persist, Congress could enact separate legislation that provides debt relief based on a different classification: farm size. Classification based on farm size rather than race does not raise the same Equal Protection Clause issues.<sup>134</sup> Black-owned farms tend to be “disproportionately smaller” than other farms; in 2017, only 7 percent of Black-owned farms had incomes of over \$50,000, while 25 percent of all farms passed this threshold.<sup>135</sup> Bills of this type have been introduced recently; in fact, Representative Sean Patrick Maloney and Senator Kirsten Gillibrand introduced legislation called the Relief for America's Small Farmers Act in June 2021 that “would provide direct relief to small farmers to help alleviate crippling debt.”<sup>136</sup> The Act would have offered up to \$250,000 in debt forgiveness to farmers with average gross adjusted incomes of less than \$300,000 over the previous five years.<sup>137</sup> As of May 2022, the bill was still sitting in committee.<sup>138</sup> Black farmers’ associations could focus their efforts on advocating for the passage of this bill. Alternatively, a reconciliation bill could replace the language of § 1005 to target small farms to effectuate some of the provision’s legislative purpose while passing constitutional muster.

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argument as a possible starting point to a last-ditch effort in the non-remedial category that may be built upon with further analysis.

134. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

135. Hiroko Tabuchi & Nadja Popovich, *Two Biden Priorities, Climate and Inequality, Meet on Black-Owned Farms*, N.Y. TIMES (Feb. 18, 2021), <https://www.nytimes.com/2021/01/31/climate/black-farmers-discrimination-agriculture.html> [<https://perma.cc/YC2T-RBMQ>].

136. *Photo Release: Maloney Discusses Economic Recovery with Local Farmers, Introduces Targeted Relief Legislation*, REPRESENTATIVE SEAN PATRICK MALONEY (June 8, 2021), <https://seanmaloney.house.gov/media-center/press-releases/photo-release-maloney-discusses-economic-recovery-with-local-farmers> [<https://perma.cc/MPE9-2G4V>].

137. *Id.*

138. Relief for America’s Small Farmers Act, H.R. 3782, 117th Cong. (2021).

However, a bill of this kind would undermine concerns voiced in ARPA's legislative history.<sup>139</sup> Legislators have highlighted that facially race-neutral legislation has not effectuated its purpose in recent attempts to address the past discrimination of the USDA against Black farmers; for example, Senator Debbie Stabe stated that ARPA § 1005 was meant to recognize the “longstanding systematic discrimination against farmers of color by USDA” and that Congress’s “case-by-case efforts thus far have not done enough.”<sup>140</sup> Similarly, Senator Cory Booker stated that the “USDA spends billions of dollars each year to provide much needed support to American farmers” and “the majority of funds went to nonminority farmers.”<sup>141</sup>

*B. Amend ARPA to be Inclusive of White Farmers.*

Alternatively, Congress could amend ARPA to avoid the constitutional issues that arise from race classifications. In fact, leaked materials from the House Committee on Agriculture show that Democrats in Congress are considering amending § 1005 by replacing it with a debt-repayment program “to ‘at risk’ and ‘economically distressed’ farmers.”<sup>142</sup> The new language would encompass white farmers who have not suffered the same rampant discrimination by the USDA as Black farmers.<sup>143</sup> Thus, this language change would also effectively undermine the concerns voiced in ARPA's legislative history.<sup>144</sup> However, given the difficulty in enacting laws aimed directly at Black farmers, broader legislation may be necessary to provide critical debt relief and aid for Black farmers in the meantime.

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139. *Small and Minority Farm Program - Frequently Asked Questions*, N.C. DEP'T OF AGRIC. & CONSUMER SERVS., <http://www.ncagr.gov/SmallFarms/FAQs.htm#:~:text=A%20Small%20Farm%2C%20according%20to,in%20gross%20income%20per%20year> [<https://perma.cc/TQ27-TN7A>].

140. *See* 167 CONG. REC. S1264 (daily ed. Mar. 5, 2021) (statement of Sen. Deborah Stabenow).

141. *See* 167 CONG. REC. S1266 (daily ed. Mar. 5, 2021) (statement of Sen. Cory Booker).

142. Safiya Charles, *After a Last-Ditch Lawsuit is Filed in Texas, Black Farmers Wait to Learn the Fate of USDA's Imperiled Debt Relief Program*, COUNTER (Oct. 26, 2021, 1:46 PM), <https://thecounter.org/lawsuit-miller-versus-vilsack-texas-black-farmers-usda-debt-relief/> [<https://perma.cc/2LTM-TH3B>].

143. *See id.* (“Broadening the bill’s language would mean that the new designations would also apply to white farmers who have not suffered the same longstanding discrimination.”).

144. *See supra* notes 139–140 and accompanying text (referencing selected statements from ARPA's legislative history).

## CONCLUSION

The rattlesnake continues to bite Black farmers. Despite recent Congressional efforts, debt relief is still out of reach. Meanwhile, the lingering effects of discrimination by the USDA continue to eviscerate the population of Black farmers. Our current legal system does not provide a clear avenue to specifically redress past wrongs to Black farmers. If our traditional understanding of strict scrutiny for racial classifications, reflected in current litigation, does not change, reparative legislation will face an uphill battle. Either courts must begin to modernize and allow for legislation that specifically rights long-time burdens from past wrongs, or lawyers and legislators must find another path to make Black farmers whole. Until they do, Black farmers hang in the balance.