No. 24-____

In the Supreme Court of the United States

ROBERT HOLMAN,

Petitioner,

v.

BROOKE ROLLINS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX

WILLIAM E. TRACHMAN
Counsel of Record
Alexander R. Khoury
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
wtrachman@mslegal.org

BRADEN BOUCEK
KIMBERLY HERMANN
SOUTHEASTERN LEGAL FOUNDATION
560 West Crossville Rd. Suite 104
Roswell, Georgia 30075

Counsel for Petitioner

May 5, 2025

Appendix

Table of Contents

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT HOLMAN,

Plaintiff-Appellant,

> No. 23-5493

THOMAS J. VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency,

Defendants-Appellees.

On Petition for Rehearing En Banc

United States District Court for the Western District of Tennessee at Jackson.

No. 1:21-cv-01085—S. Thomas Anderson, District Judge.

Decided and Filed: February 3, 2025

Before: STRANCH, LARSEN, and DAVIS, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC:

Braden H. Boucek, Kimberly S. Hermann, SOUTHEASTERN LEGAL FOUNDATION, Roswell, Georgia, William E. Trachman, MOUNTAIN STATES LEGAL FOUNDATION, Lakewood, Colorado, for Appellant. **ON RESPONSE:** Jeffrey E. Sandberg, Thomas Pulham, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Daniel P. Lennington, WISCONSIN INSTITUTE FOR LAW & LIBERTY, Milwaukee, Wisconsin, David C. Tryon, Alex M. Certo, Thomas J. Gillen, THE BUCKEYE INSTITUTE, Columbus, Ohio, for Amici Curiae.

The court delivered an order denying the petition for rehearing en banc. THAPAR, J. (pp. 3–10), delivered a separate opinion dissenting from the denial of the petition for rehearing en banc, in which BUSH, LARSEN, NALBANDIAN, and READLER, JJ., concurred.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision.

The petition was then circulated to the full court.* Less than a majority of the judges voted in favor of rehearing en banc. Judge Larsen would grant the petition for the reasons stated in her original dissent

---

* Judge Ritz is recused from participation in this case.

and for those stated in Judge Thapar's dissent to this order of denial.

Therefore, the petition is denied.

DISSENT

THAPAR, Circuit Judge, dissenting. COVID-19 didn't discriminate against farmers based on the color of their skin. But the federal government did. The government conditioned a farmer's eligibility for COVID-era debt relief on his race. And the government favored certain races without any evidence of past discrimination against them. Apparently, COVID was a crisis not to be wasted—a chance to play racial favorites when distributing public funds. Luckily, the Constitution stood in the way.

Now, an American who challenged the government's racial discrimination in court, Robert Holman, seeks to recover attorney's fees for his efforts. The government says it shouldn't have to pay up because its legal defense of its racial discrimination was "substantially justified." But binding precedent said otherwise. Disregarding that precedent, a panel of our court sided with the government over Judge Larsen's thoughtful dissent. We should have granted rehearing en banc to fix this egregious error, and I respectfully dissent from our refusal to do so.

I.

Robert Holman's family has farmed Tennessee soil for four generations. Along with his dad, Holman

grows corn and soybeans. In recent years, he took out two loans from the Department of Agriculture (USDA) to buy farming equipment. Given the pandemic's impact on the price of corn and soybeans, it became especially hard for farmers like Holman to pay back their loans.[1]

When Congress and President Biden created a debt relief program for farmers in the American Rescue Plan Act of 2021, Holman had hope. But that hope was soon dashed when he found out that the relief was not available for anyone with the wrong skin color.

Normally, the color of an American's skin doesn't block his access to government benefits. But it did here. The Act provided debt relief only to "socially disadvantaged" farmers. Pub. L. No. 117-2, § 1005(a)(2), 135 Stat. 4, 12 (2021). It defined "socially disadvantaged" farmers solely with reference to whether they were members of a group that's "been subjected to racial or ethnic prejudice." 7 U.S.C. § 2279(a)(5)–(6). The USDA determined that members of socially disadvantaged groups include but are not limited to: "American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos." Notice of Funds Availability, 86 Fed. Reg. 28329, 28330 (May 26, 2021). All told, if not for his white skin, Holman would have qualified for the USDA's debt relief.

---

[1] *See Tennessee Agricultural Sectors Taking a Hit from COVID-19, UT Inst. of Agric.* (Aug. 13, 2020), https://utianews.tennessee.edu/tennessee-agricultural-sectors-taking-a-hit-from-covid-19/.

So he sued. Holman challenged the USDA's race-based determination of who counts as a "socially disadvantaged" farmer deserving of debt relief. He sought a preliminary injunction, and the government opposed his motion. The district court granted Holman preliminary relief. Congress then repealed the relevant portion of the American Rescue Plan, thereby mooting the case. The parties stipulated to dismissal.

Holman then moved for attorney's fees under the Equal Access to Justice Act (EAJA). To get those fees, Holman had to be a "prevailing party." 28 U.S.C. § 2412(d)(1)(A). But the government could avoid paying fees if its defense of the racially discriminatory debt relief program was "substantially justified" or if "special circumstances" would "make an award unjust." *Id.*

The district court found that Holman was not a "prevailing party" since he received only preliminary relief. When Holman appealed, the panel affirmed the district court's judgment without reaching the

"prevailing party" question.[2] Instead, the panel concluded that Holman didn't deserve fees because the government's position was "substantially justified." Judge Larsen dissented.

II.

A.

For the government's litigating position to be substantially justified, it must be reasonable. *Pierce v. Underwood*, 487 U.S. 552, 565, 566 n.2 (1988). So, in reaching a substantial justification determination, we "analyze why the government's position failed in court." *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (Roberts, J.). If the government's position flouted "controlling case law," it isn't substantially justified. *Griffith v. Comm'r of Soc. Sec.*, 987 F.3d 556, 564 (6th Cir. 2021) (quoting *Taucher*, 396 F.3d at 1174). The government's position here contradicted binding precedent. Thus, it wasn't substantially justified.

The USDA expressly discriminated against citizens based on their race when distributing COVID-

[2] The Supreme Court is considering a case this term that tees up whether the winner of a preliminary injunction in a case that's later mooted is a "prevailing party." See *Lackey v. Stinnie*, No. 23-621 (4th Cir. Argued Oct. 8, 2024). The Court's resolution of that case, which centers on 42 U.S.C. § 1988, will apply with full force to the statutory language at issue here, 28 U.S.C. § 2412(d)(1)(A). *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 603 n.4 (2001). *Lackey's* impact remains unclear. Regardless of *Lackey*, the "primary responsibility for the Sixth Circuit's errors rests with the Sixth Circuit." *Shoop v. Cunningham*, 143 S. Ct. 37, 44 (2022) (Thomas, J., dissenting from denial of certiorari).

era debt relief. Thus, precedent made clear that the debt relief program had to surmount the high bar of strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). That meant that in addition to satisfying narrow tailoring requirements, the government needed to "show that favoring one race over another [was] necessary to achieve a compelling state interest." *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021).

What was the compelling interest? Allegedly, remedying the USDA's past racial discrimination and halting its continuing effects.

For such an interest to be valid, precedent left no doubt that the government had to provide actual evidence of past intentional discrimination. *Id.* at 361. That evidence is essential. It helps us differentiate between permissible remedial efforts that target specific episodes of past intentional discrimination and impermissible efforts that strive to remedy societal discrimination writ large. *Id.* Without such evidence, remedying the discrimination of yesterday becomes "an amorphous" and thus impermissible "end." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007).

And that precedent exists for a good reason. The Constitution is no friend to racial discrimination. Under our Constitution, Americans are individuals of equal worth, not indistinguishable members of racial groups. When the government crafts policies at odds with that core truth, precedent rightly requires the government to come armed with evidence justifying its actions.

But the government showed up here all but empty-handed. For Native Hawaiians and other Pacific Islanders, the government offered no evidence of past discrimination at all. That failure alone provides sufficient reason to conclude that the government's position wasn't "substantially justified" considering "controlling case law." *Taucher*, 396 F.3d at 1174.

Meanwhile, the government's evidence of past racial discrimination against Asians was inadequate. The government first pointed to statistics indicating that Asian farmers defaulted on their loans more frequently than other farmers. It also relied on two reports from 1997 and 2011 noting that Asian farmers had complained that the USDA hadn't treated them fairly. Precedent made clear that such evidence couldn't support the government's racial classifications.

To begin, precedent established that the 1997 report was too dated to support an interest in remedying past discrimination. *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) (noting that seventeen-year-old evidence of discrimination can't support a compelling-interest finding). Precedent also made clear that the statistical disparities in loan delinquency couldn't themselves establish a compelling interest in remedying past discrimination. *Vitolo*, 999 F.3d at 361–62. Nor did the complaints of unfair treatment documented in the reports cut it. Evidence that some farmers felt the USDA had treated them unfairly is not evidence that the USDA intentionally discriminated against them because of the color of their skin. Instead, such complaints amount to "vague reference[s] to a 'theme' of governmental

discrimination," which are "not enough" to establish a compelling governmental interest in remedying past discrimination. *Id*. at 362.

In short, when it comes to race, precedent tightly constrains the government's ability to play favorites. And for good reason. "It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (opinion of Roberts, C.J.). The Constitution's ideal is colorblind government policy. But the government hasn't always lived up to that ideal. And when the government tries to right its past racial wrongs, it cannot be too careful. If it isn't precise, attempts to remedy racial wrongs risk repeating them. Thus, there must be direct evidence of past intentional discrimination and proof that the government's attempt to write race back into our law is narrowly tailored to rectify past harms. Because the government's defense of giving racial preferences to Asians flouted that precedent, its position wasn't substantially justified.

In fact, the government's choice to lump "Asians" into a single racial bloc at the outset was indefensible. The USDA scheme treated "Asians" as a single racial unit. "Asians" is a strikingly loose racial category, capturing Japanese, Chinese, Koreans, Vietnamese, Indians, Kazakhs, and many others. Thus, the government fought for a scheme that painted with a broader racial brush than even the 1890 census—which grouped Americans into categories like "white," "black," "mulatto," "quadroon," "octoroon," "Chinese,"

"Japanese," and "Indian."[3] When it comes to Asians, the USDA's conception of race is less refined than that of the 1890 census takers. If those who used the racially stigmatizing term "octoroon" can grasp that "Asians" aren't all the same, surely the government today can too.

The USDA's reductionist racial categories open the door to more discrimination. If all these groups can be housed under the single "Asian" umbrella, the government can provide preferential treatment to one of these groups today because it intentionally discriminated against a different group yesterday. That is not right.[4]

To see why, consider the government's discrimination against Japanese Americans during World War II. By forcing Japanese Americans into internment camps, the government discriminated against them because of their race. To remedy this past intentional discrimination, President Ronald Reagan signed legislation to "make restitution to those individuals of Japanese ancestry who were interned." Civil Liberties Act, Pub. L. No. 100-383, § 1(4), 102 Stat. 903 (1988). So, decades ago, the government made up for past racial discrimination by

---

[3] History: 1890, U.S. Census Bureau, https://web.archive.org/web/20090929132248/http:/www.census.gov/history/www/through_the_decades/index_of_questions/1890_1.html (last updated Sept. 1, 2009).

[4] What's more, the same is true for "Pacific Islanders." As far as I can tell, this term includes everyone who hails from Hawaii to the Cocos Islands—a group capturing areas with hundreds of ethnic groups and languages. According to the government's logic, Melanesians, Micronesians, and Polynesians—just to name a few—are all the same.

paying those it had harmed.

But by the government's logic today, it could point to internment of Japanese Americans as evidence of past discrimination and then pay reparations to all Asians. Neither the Constitution nor the precedent interpreting it supports such a capacious definition of race.

B.

To be sure, the government did marshal evidence of past intentional discrimination against black farmers. But precedent put the government on notice that when it "promulgates race-based policies, it must operate with a scalpel," not a sledgehammer. *Vitolo*, 999 F.3d at 361. Evidence of past discrimination against African Americans couldn't justify defending present discrimination in favor of Native Hawaiians, Asians, or any other group. If it did, then the government could come before the court and cite past intentional discrimination against one racial group to justify discrimination in favor of any other racial group today. The Constitution stands in the way of such nonsense.

In other words, the government can't sneak in racial discrimination in favor of one group on the back of evidence of past racial discrimination against another. Had the USDA only discriminated in favor of, say, Native Hawaiians and other Pacific Islanders, its defense of that discrimination would not be substantially justified—there's no evidence. Bundling a baseless racial preference with a more defensible, evidence-backed racial preference doesn't change anything.

When the government distributes benefits, the Constitution demands that it treat us as individuals, not members of interchangeable racial groups. And precedent made that crystal clear when the government litigated this case. Therefore, its litigating position was inexcusable, not substantially justified.

III.

This case warranted en banc review. The panel opinion blessed a baseless defense of the government's discrimination. Litigating positions that defy precedent are not substantially justified. Saying otherwise does violence to the substantial justification standard—it's permissive, not toothless.

And this case presents "questions of exceptional importance." Fed. R. App. P. 40(b)(2)(D). The government tells us that this case is not noteworthy because it deals with a small, fact-bound attorney's fees dispute.

But it's exceptionally important that we correctly interpret fee-shifting standards that, when properly applied, disincentivize discrimination. If an agency is on the wrong side of a court's prevailing-party determination, the EAJA requires the agency to pay up. See 28 U.S.C. § 2412(d)(4). Financial penalties for unsuccessful attempts at racial discrimination should make agencies less eager to discriminate in the first place. And that agency might have to answer to Congress when the next appropriations bill is on the table. On the other hand, if an agency knows that its failed gambits can be recast in court as "substantially justified," it will be more apt to try its hand at playing racial favorites; the costs would be low. Shaping

federal agencies' incentive structures when they consider whether to racially discriminate is exceptionally important.

Similarly, watering down the substantial justification standard will discourage challenges like Holman's to unlawful congressional or agency action, even when plaintiffs know they have a strong case on the merits. It's exceptionally important that we not disincentivize such suits.

Further, leaving the panel opinion on the books risks confusing district courts. As an appellate court our job is to synthesize and clarify legal doctrines so district courts can apply them in an accurate and efficient manner. What are district courts to think now? On the one hand, we have told them that the government's litigating position is not substantially justified if it skirts controlling precedent. On the other hand, this case endorses a litigating position that disregards controlling precedent as "substantially justified." We're speaking out of both sides of our mouth. And in service of what? Giving the government a pass at treating Americans differently because of their race. We should have cleaned up our own mess rather than leaving it to district courts to sort out.

* * *

Some in the federal government saw the instability unleashed by COVID as a crisis not to be wasted. They saw it as an opportunity to write race back into the law.

But they forgot that dividing ourselves by race in the United States Code and the Federal Register will divide us by race in the real world. They forgot that

"every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part). And they forgot that history has not looked kindly at the government's attempts to use emergencies as excuses to discriminate. *See Korematsu v. United States*, 323 U.S. 214 (1944), overruled by *Trump v. Hawaii*, 585 U.S. 667 (2018). As Justice Harlan observed, "[t]he Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis . . . may suggest." *Downes v. Bidwell*, 182 U.S. 244, 384 (1901) (Harlan, J., dissenting). A crisis doesn't justify turning our backs on his teaching that the Constitution "is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

When the government concocts policies that violate this core truth, its defenses of those policies are not "substantially justified." They are without foundation in the Constitution. I respectfully dissent from the denial of rehearing en banc.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT HOLMAN,

Plaintiff-Appellant,

> No. 23-5493

THOMAS J. VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Tennessee at Jackson.

No. 1:21-cv-01085—S. Thomas Anderson, District Judge.

Decided and Filed: September 23, 2024

Before: STRANCH, LARSEN, and DAVIS, Circuit Judges.

COUNSEL

ON BRIEF: Braden H. Boucek, Kimberly S. Hermann, SOUTHEASTERN LEGAL

FOUNDATION, Roswell, Georgia, William E. Trachman, MOUNTAIN STATES LEGAL FOUNDATION, Lakewood, Colorado, for Appellant. Jeffrey E. Sandberg, Thomas Pulham, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

STRANCH, J., delivered the opinion of the court in which DAVIS, J., joined. LARSEN, J. (pp. 14–22), delivered a separate dissenting opinion.

OPINION

JANE B. STRANCH, Circuit Judge. This appeal concerns a litigant's petition for fees under the Equal Access to Justice Act (EAJA). Plaintiff Robert Holman successfully obtained a preliminary injunction freezing a debt-relief program that used racial categories to remedy prior discrimination against farmers and ranchers. Following additional proceedings, but before final judgment, Congress repealed the challenged program. Holman now seeks fees associated with the litigation. The district court denied that request because, in its view, Holman was not a "prevailing party" under the EAJA. We neither adopt nor definitively reject that conclusion. Instead, we find that the Government's position during the litigation was "substantially justified" within the EAJA's meaning. On that basis, we AFFIRM the judgment below.

I. BACKGROUND

In March 2021, President Biden signed into law the American Rescue Plan Act, which provided

various forms of emergency assistance in the COVID-19 pandemic's wake. Section 1005 of the Act was a debt-relief program for "socially disadvantaged" farmers and ranchers. It authorized the Secretary of Agriculture to pay to Black, American Indian/Alaskan Native, Hispanic, Asian, and Hawaiian/Pacific Islander farmers and ranchers up to 120 percent of certain farm loans previously issued by the United States Department of Agriculture (USDA). The congressional record explains that the legislation was designed to provide targeted relief for farmers against whom the USDA had historically discriminated and for whom prior pandemic relief efforts had failed.

A number of challenges to Section 1005 were filed. In Tennessee, farmer Robert Holman filed a complaint and motion to preliminarily enjoin the program in early June 2021, alleging that he would have been eligible for Section 1005's benefits but for his race. His preliminary injunction motion argued that Section 1005 should be halted nationwide because Defendants—heads of the USDA and its subagency the Farm Service Agency, collectively the Government—could not satisfy the strict scrutiny applied to racial classifications under the Fifth Amendment's Equal Protection Clause and because other injunction-related factors favored his position. The Government agreed that strict scrutiny applied, but contended that Section 1005 was nonetheless constitutional and that other considerations weighed against issuing an injunction.

Meanwhile, similar litigation was proceeding in other courts. On June 10, 2021, a district court in Wisconsin entered a temporary restraining order barring the USDA from forgiving any loans pursuant

to Section 1005. *Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021). On June 23, a Florida district court preliminarily enjoined Section 1005 nationwide. *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021). And on July 1, a district court in Texas both enjoined the Government from considering race under Section 1005 and certified a class action of all farmers and ranchers excluded from Section 1005 by the "socially disadvantaged" criterion. *Miller v. Vilsack*, No. 4:21-cv-0595-O, 2021 WL 11115194, at *3, 12 (N.D. Tex. July 1, 2021).

The district court granted Holman's preliminary injunction motion on July 8, 2021. It reasoned that the Government had failed to make the strict scrutiny showing that Section 1005 was narrowly tailored to serve a compelling governmental interest. The district court further explained its view that an injunction was necessary to protect Holman from irreparable injury and that the public interest weighed in favor of injunctive relief, but also acknowledged that an injunction could cause substantial harm to others—namely, socially disadvantaged farmers who sought access to Section 1005's funds. Finally, despite expressing reservations about issuing a nationwide injunction, the court found that alternative relief would be unworkable and enjoined the Government from implementing Section 1005 in its entirety.

On January 26, 2022, the district court granted the Government's motion to dismiss counts two and three of Holman's complaint, in which Holman had argued that the USDA planned to illegally make Section 1005 funding recipients eligible for future relief programs. The Government contended that with these counts dismissed, Holman's case presented materially

identical issues to the Texas class action litigation where Holman was necessarily a class member, so a stay of Holman's case was necessary to prevent inconsistent rulings. On February 16, the district court granted the Government's stay motion.

Half a year later, with this case still stayed, the Inflation Reduction Act became law and repealed Section 1005. The parties agreed that Section 1005's repeal mooted Holman's challenge and, accordingly, stipulated to the case's dismissal. Holman then moved for fees and costs as a "prevailing party" under the EAJA. *See* 28 U.S.C. § 2412(d)(1)(A). The district court denied the motion, reasoning that because the "temporary and revocable" nature of the injunctive relief previously awarded to Holman provided him "with nothing lasting," Holman was not a prevailing party within the EAJA's meaning. Holman timely appealed.

II. ANALYSIS

The EAJA modifies the American legal system's default rule "that each party pays its own costs and attorney's fees." Griffith v. Comm'r of Soc. Sec., 987 F.3d 556, 563 (6th Cir. 2021). Under the EAJA, a "prevailing party" in a civil case against the United States is entitled to "fees and other expenses" and certain "costs" unless "the position of the United States was substantially justified" or "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The parties dispute all three aspects of § 2412(d)(1)(A)—whether (1) Holman was a prevailing party, (2) the Government's litigating position was substantially justified, and (3) special circumstances otherwise preclude a fees award. Finding the first two

issues sufficient to resolve the case, we take them up in turn.[1]

A. Prevailing Party

We review a plaintiff's entitlement to prevailing party status de novo. Miller v. Caudill, 936 F.3d 442, 448 (6th Cir. 2019). To be a prevailing party, "a plaintiff must have 'been awarded some relief by the court.'" Tenn. State Conf. of NAACP v. Hargett, 53 F. 4th 406, 410 (6th Cir. 2022) (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 603 (2001)).[2] Beyond that baseline requirement, whether a claimant who "prevails in one sense (by receiving a preliminary injunction) but not in another sense (by failing to obtain a final judgment when the case becomes moot)" is entitled to prevailing party status "requires a 'contextual and case-specific' response." *Roberts v. Neace*, 65 F.4th 280, 284 (6th Cir. 2023) (quoting *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010)). Generally, preliminary

---

[1] Although the district court's conclusion that Holman was not a prevailing party meant that it did not reach the substantial-justification or exceptional-circumstances issues, both parties have had a "full and fair opportunity to address" these questions and urge us to reach them as necessary. *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 205 (6th Cir. 2011).

[2] As the district court recognized, interpretations of the phrase "prevailing party" in cases involving 42 U.S.C. § 1988 and the EAJA are equally applicable to both statutes. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) ("The standards set forth in this opinion [concerning § 1988 fee awards] are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'"); *Bryant v. Comm'r of Soc. Sec.*, 578 F.3d 443, 449 (6th Cir. 2009).

injunctions alone are insufficient to show that a party prevailed within the EAJA's meaning. *Id.* "But a preliminary injunction may well suffice if it mainly turns on the likelihood-of-success inquiry and changes the parties' relationship in a material and enduring way." *Id.*

Both parties present weighty arguments on this question. The Government contends that because orders entered by other courts had already halted Section 1005's implementation nationwide, *see, e.g.*, *Wynn*, 545 F. Supp. 3d at 1295, the injunction in this case did not "directly benefit the 'plaintiff by modifying the defendant's behavior toward him'" and was accordingly not "material." *Hargett*, 53 F.4th at 410 (quoting *McQueary*, 614 F.3d at 598 (cleaned up)). It further argues that Holman's relief was not "enduring" because it gave him no "irrevocable" benefit; both before and after the injunction, Holman could not access Section 1005's funds. The district court agreed that Holman was not a prevailing party, largely focusing on his failure to obtain irrevocable relief.

Holman notes, however, that several relevant considerations point in his direction. For example, there is no question that the district court's preliminary injunction opinion mainly turned "on the likelihood-of-success inquiry." *Roberts*, 65 F.4th at 284. Further, we have previously explained that in determining "whether a claimant directly benefitted from litigation, we usually measure the plaintiff's gain based on the relief requested in his complaint, not based on the practical significance of the relief obtained." *McQueary*, 614 F.3d at 602. This reasoning suggests that the preliminary injunction, which

granted Holman the relief requested in his motion, may have been material even though—because of the previously issued injunctions—it did not require the Government to immediately change its behavior.

As for whether his relief was enduring, Holman observes that the thirteen-month-long injunction here was in place longer than in several cases in which the plaintiff was deemed the prevailing party. *See, e.g., G.S. ex rel. Schwaigert v. Lee*, No. 22-5969, 2023 WL 5205179, at *6 (6th Cir. Aug. 14, 2023) (finding an injunction lasting as little as two-to-six months sufficiently lengthy to qualify a plaintiff as a prevailing party); *Hargett*, 53 F.4th at 410-11 (same as to an injunction that lasted seven months). The injunction's "nature," moreover, was not "ill-considered, hastily entered, or tentative"—it neither "maintain[ed] the status quo without addressing the merits" nor was "later overturned, repudiated, or vacated." *Roberts*, 65 F.4th at 284. Finally, Holman contends that the injunction did provide irrevocable relief by preventing the harm caused each day by Section 1005: his "inability to compete on equal footing" with others for funding. *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993).

Determining "whether or when the winner of a preliminary injunction may be treated as a 'prevailing party'" is always a "thorny" undertaking. *McQueary*, 614 F.3d at 596. Considering the record and both parties' substantial arguments, we conclude only that determining a plaintiff's prevailing party status is particularly fraught where, as here, he succeeds in preliminarily enjoining a statute or rule but cannot use that injunction to take any specific action. We

instead resolve the issue of Holman's entitlement to EAJA fees on a clearer ground: whether the Government's litigating position was substantially justified.

B. Substantial Justification

Even if a litigant is a prevailing party under the EAJA, he is not entitled to fees if "the position of the United States was substantially justified." 28 U.S.C. § 2412 (d)(1)(A). The Government bears the burden of demonstrating substantial justification, *Griffith*, 987 F.3d at 563, which requires the position to "be 'more than merely undeserving of sanctions for frivolousness,'" *id*. (quoting *Pierce v. Underwood,* 487 U.S. 552, 565 (1988)). But it need not represent a winning argument. Id. Instead, the position need only be "justified to a degree that could satisfy a reasonable person" such that "a reasonable person could think it correct." *Id*. (quoting *Pierce*, 487 U.S. at 565, 566 n.2).

What "matter[s] most" to the substantial justification analysis is "the actual merits of the Government's litigating position." Id. (quoting *United States ex rel. Wall v. Circle C. Constr., LLC*, 868 F.3d 466, 471 (6th Cir. 2017)). The merits of that position are considered "as a whole." Id. at 564 (quoting *Amezola-Garcia v. Lynch*, 835 F.3d 553, 555 (6th Cir. 2016)); *see also Comm'r, Immigr. & Naturalization Serv. v. Jean,* 496 U.S. 154, 160 (1990) (noting that the substantial justification inquiry considers the entire litigation and "operates as a one-time threshold for fee eligibility"). In doing so, we recognize the difference "between cases in which 'the government lost because it vainly pressed a position flatly at odds with the controlling case law' and cases in which 'the

government lost because an unsettled question was resolved unfavorably.'" *Griffith*, 987 F.3d at 564 (quoting *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (Roberts, J.)) (internal quotation marks omitted).

In addition to the merits of the Government's position, other "'objective indicia' of reasonableness" may be relevant, though not dispositive. *Id.* at 563 (quoting *Wall*, 868 F.3d at 471). These indicia include whether the Government's position follows a string of losses or successes, *id.*, as well as "the stage at which the proceedings were resolved," *Dvorkin v. Xonzales*, 173 F. App'x 420, 424 (6th Cir. 2006) (quoting *United States v. 2323 Charms Road*, 946 F.2d 437, 440 (6th Cir. 1991)).

As an initial matter, the Government urges us to adopt a presumption that its position is substantially justified whenever it defends a federal statute. That presumption, the Government argues, flows from its "duty to defend the constitutionality of statutes whenever reasonable arguments can be made in their defense." But the EAJA directs the court to examine the justification for the Government's "position," not its conduct. 28 U.S.C. § 2412(d)(1)(A). At best, therefore, the Government's duty to defend Section 1005 "explains . . . why [it] took the position it did," but it does not answer the "question under [the] EAJA" of "whether that position was substantially justified." *Taucher*, 396 F.3d at 1175 (Roberts, J.). The Government's claimed presumption, moreover, could effectively insulate it from liability even when defending unreasonable positions—a result fundamentally at odds with the EAJA's "specific purpose" of eliminating "for the average person the

financial disincentive to challenge unreasonable governmental actions." *Jean*, 496 U.S. at 163. As a result, though we need not deem the Government's duty to defend irrelevant in every substantial-justification inquiry, we decline to adopt a presumption that the Government is substantially justified anytime it defends a federal statute.

Instead, we return to the considerations outlined in our caselaw, starting with the Government's merits position during the central aspect of this litigation: that the district court should not preliminarily enjoin Section 1005. It was Holman's burden as the movant to "present 'a clear showing'" that the injunctive-relief factors weighed in his favor. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). Considered within the EAJA's framework, this burden means that the Government's position was substantially justified "if 'a reasonable person could think it correct'" that Holman had not made the requisite clear showing of likely success necessary to receive injunctive relief. *Griffith*, 987 F.3d at 563 (quoting *Pierce*, 487 U.S. at 566 n.2).

The first issue in Holman's preliminary injunction motion—the likelihood of success on the merits—turned on the constitutionality of Section 1005's relief for socially disadvantaged farmers. Like all programs that differentiate based on race, Section 1005 was subject to strict scrutiny. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 326-27 (2003); *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021). The Government therefore had to show that the program was narrowly tailored to further a compelling governmental

interest. *Fisher*, 570 U.S. at 310. Holman misapprehends this standard by positing that the Government was required to "present evidence of current, intentional discrimination when seeking to uphold a racial preference scheme." To the contrary, remedying the effects of past discrimination constitutes a compelling governmental interest where the remedial policy targets specific episodes of past discrimination and there is evidence that the Government intentionally participated in that discrimination. *Vitolo*, 99 F.3d at 361; *see Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) ("There is no question that remedying the effects of past discrimination constitutes a compelling governmental interest."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).[3] Narrow tailoring, in turn, requires the Government to show "serious, good faith consideration of workable race-neutral alternatives," but "does not require exhaustion of every conceivable" alternative. Fisher, 570 U.S. at 312 (quoting Grutter, 539 U.S. at 339) (emphasis omitted).

Acknowledging the high bar set by strict scrutiny, the Government presented substantial record evidence to defend the program's constitutionality.

---

[3] Though cases decided after the Government articulated its position do not affect the substantial-justification analysis, *see Griffith*, 987 F.3d at 565-66, we observe that the Supreme Court has recently reiterated that remedying past intentional discrimination constitutes a compelling interest. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023) (specifying that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" is a compelling interest).

Some of the Government's evidence regarding its compelling interest addressed past discrimination against minority groups generally. For example, a 1997 report contained evidence that the USDA had "done more to hurt than to help small and minority farmers" because many minority farmers' loan applications and discrimination complaints languished within the Agency. A 2011 Civil Rights Assessment "substantiated" continued "claims of denial of equal program access" by minority applicants and suggested the existence of "continuing institutional discrimination" by the Agency. And a 2019 governmental report explained that "allegations of unlawful discrimination against [socially disadvantaged farmers and ranchers] in the management of USDA programs are long-standing and well-documented." These reports represent evidence of past discrimination by the USDA against socially disadvantaged farmers generally.

Building on that evidence, the Government also provided examples of past discrimination by the USDA against many specific groups. As detailed in governmental reports and federal litigation terminating in substantial settlements, the USDA had a history of dealing reluctantly with and denying loans to Black farmers; loans that were issued, moreover, were often provided at unfavorable times or contained burdensome requirements not imposed on non-Black farmers. Hispanic farmers stated that they had been "stereotyped as being farm workers, rather than owners," and received "inconsistent or incomplete" information from the USDA; one farmer said Hispanic growers had been "systematically excluded" from USDA programs. Asian farmers were

among those who alleged in the late 1990s that the USDA had hurt rather than helped minority farmers, and some reported in 2011 "a general consensus . . . that they are not always treated fairly by the USDA." And in 2019, Native American farmers reported that "discrimination [has] contribute[d] to the lack of commercial lending on tribal lands"; similar allegations resulted in a large settlement between the USDA and Native farmers and ranchers.

Finally, to support its argument that Section 1005 was narrowly tailored to addressing the compelling interest in remedying this identified past discrimination, the Government pointed to "the inefficacy of the race-neutral alternatives that Congress tried for years before enacting § 1005", the time-limited nature of the Section 1005's relief, and the administrative difficulty of quickly administering relief to minority farmers disproportionately harmed by the pandemic.

In short, the Government placed before the district court a "strong basis in evidence for its conclusion that remedial action" in the form of Section 1005 "was necessary." *Drabik*, 214 F.3d at 735 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). It pointed to "specific episode[s] of past discrimination" against socially disadvantaged farmers and ranchers, statistical and anecdotal "evidence to establish intentional discrimination," and examples of the USDA's role in "the past discrimination it now seeks to remedy." *Vitolo*, 999 F.3d at 361. Finally, it explained Congress's view as to why "race-neutral alternatives"— some of which had already been tried, and others of which were impractical—constituted insufficient remedies.

Fisher, 570 U.S. at 312 (quoting *Grutter*, 539 U.S. at 339).

In granting a preliminary injunction, the district court ultimately rejected these arguments. In doing so, it rightly recognized the difficulty of satisfying strict scrutiny and evaluated an issue—when and how the Government may permissibly act to remedy past discrimination—that was "controversial, thorny, and unsettled" at the time and remains so today. *Vitolo*, 999 F.3d at 366 (Donald, J., dissenting). That thorniness flows in part from the legal tests in this area of the law, many of which are matters of degree rather than cleanly drawn lines. For example, when do statistical disparities between racial groups, which may be insufficient by themselves to show intentional discrimination, nonetheless represent sufficiently probative "evidence [of] intentional discrimination" that a court may infer intent? *See id.* at 361. And how many options must the Government evaluate to show a "serious, good faith consideration of race-neutral alternatives?" *See Fisher*, 570 U.S. at 312 (quoting *Grutter*, 539 U.S. at 339). That thoughtful judges could, on this record, readily reach different answers on these and other questions suggests that the Government "lost because an unsettled question was resolved unfavorably," not because it "vainly pressed a position flatly at odds with the controlling case law." *Griffith*, 987 F.3d at 564 (quoting Taucher, 396 F.3d at 1173) (internal quotation marks omitted).

The dissent concludes otherwise primarily by relying on *Vitolo*, which explained that a race-conscious program is unconstitutional where the Government provides "little evidence of past intentional discrimination against the many groups to

whom it grants preferences." 999 F.3d at 361. But here, as chronicled above, the Government provided evidence of intentional USDA discrimination against socially disadvantaged farmers and ranchers generally, and buttressed that evidence with specific examples of intentional discrimination against nearly every group included in the socially disadvantaged category. That is categorically distinct from the evidentiary presentation in *Vitolo*, which did "not identify specific incidents of past discrimination" and relied entirely on "general social disparities." *Id.* at 361-62. Nor is this a case in which the Government provided "absolutely no evidence of past discrimination" against most of the categories included in a race-conscious program. *J.A. Croson Co.*, 488 U.S. at 506 (emphasis removed). The notion that the Government was clearly required, at the preliminary injunction stage, to provide specific examples of intentional discrimination against every category included in a race-conscious program is also difficult to square with the Supreme Court's instruction that narrow tailoring does not demand perfection. *See Fisher*, 570 U.S. at 312; *Grutter*, 539 U.S. at 339; accord *J.A. Croson Co.*, 488 U.S. at 510 (holding that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a . . . government's determination that broader remedial relief is justified."). It was Holman's duty to make a clear showing of likely success on the merits, *Skrmetti*, 83 F.4th at 471—but here, "a reasonable person could think" that the Government's evidence supporting Section 1005's constitutionality sufficiently undermined Holman's required showing. *Pierce*, 487

U.S. at 566 n.2. As a result, the Government's position on this aspect of the litigation was substantially justified.

Governing precedent, moreover, requires us to consider the entirety of the Government's "arguments made during litigation" in determining whether its "whole position" was substantially justified. *Id.* And other aspects of the litigation, not addressed by the dissent, reinforce the reasonableness of the Government's position "as a whole." *Id.* (quoting *Amezola-Garcia*, 835 F.3d at 555). In opposing the injunction motion, for instance, the Government contended that the injunctions against Section 1005 already issued by other courts eliminated the threat of irreparable harm to Holman. Although the district court rejected this argument, some courts have "concluded that once another district court has entered the same relief" sought by a plaintiff, that plaintiff is "no longer able to demonstrate the irreparable harm that [is] needed to justify the extraordinary relief requested" by a preliminary injunction. *Faust v. Vilsack*, No. 21-C-548, 2021 WL 2806204, at *3 (E.D. Wis. July 6, 2021) (collecting cases). It was not unreasonable for the Government to raise this argument against Holman's motion.

The Government also won a later motion to dismiss the second and third counts of Holman's complaint, which encompassed his claims that the USDA was planning to illegally make Section 1005 funding recipients eligible for future debt relief. This aspect of the litigation was less "prominent" than the preliminary injunction motion, through which Holman successfully enjoined Section 1005. *Griffith*, 987 F.3d at 564 (quoting *EEOC v. Memphis Health*

Ctr., 526 F. App'x 607, 615 (6th Cir. 2013)). Nonetheless, this part of the Government's position was not only reasonable but ultimately meritorious.

Holman observes that before the district court decided the preliminary injunction motion, the Government had already suffered a "string of losses" in other courts, which "can be indicative" of the unreasonableness of the Government's position. *Pierce*, 487 U.S. at 569. But this and other "objective indicia" of the Government's position, while "relevant," matter less than "the actual merits of the Government's litigating position"—a position that, as shown above, was substantially justified. *Griffith*, 987 F.3d at 563 (quoting *Wall*, 868 F.3d at 471). And other objective criteria support the Government's position, including "the stage in which the proceedings were resolved." *Dvorkin*, 173 F. App'x at 424 (quoting *2323 Charms Road*, 946 F.2d at 440). Because each of the decisions concerning Section 1005 were issued in a preliminary posture, no court had definitively deemed the program unconstitutional. Thus, not only do those decisions matter less than the actual merits of the Government's litigating position, but their import is lessened by their posture.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the judgment of the district court.

DISSENT

LARSEN, Circuit Judge, dissenting. A "prevailing party" in a civil case against the United States is entitled to fees and costs unless the government's position was "substantially justified" or "special circumstances make an award unjust." So, to get fees and costs, Holman must show that he is a prevailing party. Even if he does, though, the government may avoid paying if it shows that its position was substantially justified or that special circumstances make an award unjust. The majority, rightly recognizing that the prevailing-party issue is difficult, instead concludes that the government's position was substantially justified. I cannot agree. I first explain that disagreement and then tackle the more difficult question of whether Holman is a prevailing party. I then address the special-circumstances question. I conclude that Holman is a prevailing party because the preliminary injunction in this case turned primarily on the likelihood of success on the merits and afforded enduring and material relief; the government's position was not substantially justified because it was flatly at odds with controlling caselaw; and no special circumstances make an award unjust. Holman is therefore entitled to fees and costs, so I respectfully dissent.

I.

Section 1005 of the American Rescue Plan Act authorized the USDA Secretary to "provide a payment in an amount up to 120 percent of the outstanding

indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021, to pay off [direct and guaranteed farm loans]." Pub. L. No. 117-2, § 1005(a)(2) (2021). USDA defined "socially disadvantaged" based on race, extending debt relief to Black, American Indian/Alaskan Native, Hispanic, Asian, or Hawaiian/Pacific Islander farmers and ranchers, without any consideration of need. 86 Fed. Reg. 28,329, 28,330 (May 26, 2021). Holman, who does not fall into any of the above racial categories, sued and obtained a preliminary injunction, temporarily enjoining the implementation of the debt-relief program. Section 1005 was then repealed in the Inflation Reduction Act. Pub. L. No. 117-169, § 22008 (2022). That mooted the case, and the parties stipulated to dismissal.

Holman then moved for fees and costs under the Equal Access to Justice Act, 28 U.S.C. § 2412. Under that statute, a "prevailing party" in a civil case against the United States is entitled to fees and costs unless the government's position was "substantially justified" or "special circumstances make an award unjust." *Id*. § 2412(d)(1)(A). The district court denied Holman's motion—concluding that he is not a prevailing party.

II.

A.

The government is not required to pay fees and costs when it shows that its position was "substantially justified." Id. A position is substantially justified if "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988). The

"actual merits" of the position is what "matter[s] most." *Griffith v. Comm'r of Soc. Sec.*, 987 F.3d 556, 563 (6th Cir. 2021). The position must be better than one "merely undeserving of sanctions," though it need not ultimately prove correct. *Id.* (quoting *Pierce*, 487 U.S. at 566).

The majority concludes that the government has shown that its position was substantially justified. I disagree.

1.

Section 1005 authorized debt relief based on race. Pub. L. No. 117-2, § 1005 (2021); 86 Fed. Reg. 28,329, 28,330 (May 26, 2021). That makes it presumptively invalid. *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (citing U.S. Const. amend. XIV). The government can overcome that presumption only if it shows that the racial discrimination was narrowly tailored to achieve a compelling government interest. *Id*. This standard (strict scrutiny) is "very demanding" and one which "few programs will survive." *Id*.

In the district court, the government accepted that strict scrutiny applied to this claim and argued that it had a "two-fold" compelling interest: "to remedy the lingering effects of prior discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination." The Supreme Court has said that "remedial policies can sometimes justify preferential treatment based on race." *Vitolo*, 999 F.3d at 361 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (plurality); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995)). At a minimum, though, there

must be a specific episode of past intentional discrimination on the part of the government against a particular group—disparate impacts are not enough. *Id.*

2.

The government, of course, does not have a compelling interest in remedying past discrimination that never happened. And when a government program seeks to remedy past discrimination against a number of different groups, it bears the burden to demonstrate "past intentional discrimination against the many groups to whom it grants preferences." *Id.* (faulting the "schedule of racial preferences detailed in the government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—[a]s not supported by any record evidence at all"). The majority concludes that the government provided evidence of USDA discrimination against "many specific groups" defined as "socially disadvantaged." Maj. Op. at 9 (emphasis added). But what about the others? The government referred to no evidence of past intentional discrimination by USDA against Native Hawaiian and Pacific Islander farmers and ranchers. And the government relied only on broad assertions and statistical disparities to show discrimination against American Indian, Asian, and Native Alaskan farmers and ranchers. We might assume that such discrimination happened, but that is not enough. *See Vitolo*, 999 F.3d at 362 ("[W]hen it comes to general social disparities, there are simply too many variables to support inferences of intentional discrimination."). The government cannot claim a compelling interest in remedying

discrimination without first showing that the discrimination happened. *Croson*, 488 U.S. at 505. That is reason enough to conclude that its position was not substantially justified.

That is not to say, in this preliminary posture, that the government made no compelling-interest showing. I agree with the majority that the government cited evidence of past intentional discrimination against Black farmers and ranchers. But if the government is going to use racially exclusionary measures as a remedy, the government's policy must be narrowly tailored to that particular interest. And "a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications." *Vitolo*, 999 F.3d at 362. Here, the program extends debt relief to farmers and ranchers in groups never shown to have been discriminated against. Giving Native Hawaiian farmers and ranchers debt relief cannot remedy past discrimination against Black farmers and ranchers. The glaring "mismatch" between means and ends is far too much for strict scrutiny to bear. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2168 (2023). There is no "reasonable basis in law and fact" to find this policy narrowly tailored. *Pierce*, 487 U.S. at 566 n.2.

The majority contends that the Government was not "clearly required, at the preliminary injunction stage, to provide specific examples of intentional discrimination against every category included in [its] race-conscious program." Maj. Op. at 11. The Supreme Court says otherwise. To justify a "resort to race-based government action," the government had to show that it was "remediating specific, identified

instances of past discrimination that violated the Constitution or a statute." *Students for Fair Admission, Inc.*, 143 S. Ct. at 2162 (emphasis added). And the preliminary posture of the litigation does not absolve the government of its burden. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429–30 (2006). Absent at least some specific evidence of intentional discrimination against each racial group, the government cannot show a compelling remedial interest in benefitting that group. It has not shown there is anything to remedy. *See Croson*, 488 U.S. at 505–06. The government's position—that § 1005 should not be preliminarily enjoined—was not substantially justified because the government presented arguments "flatly at odds with the controlling case law." *Griffith*, 987 F.3d at 564 (quoting *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005)) (cleaned up).

B.

Because I disagree that the government's position was substantially justified, I turn to the prevailing-party issue. In general, obtaining a preliminary injunction does not make a plaintiff a "prevailing party." *Planned Parenthood Sw. Ohio Region v. DeWine*, 931 F.3d 530, 538 (6th Cir. 2019). But, in cases that are later dismissed as moot, a preliminary injunction may suffice when it (1) turns primarily on the likelihood of success on the merits and affords (2) "enduring" and (3) "material" relief. *Miller v. Caudill*, 936 F.3d 442, 448 (6th Cir. 2019). The inquiry is "case-specific," but we have tended to treat relief as enduring when it is "irrevocable" and as material when it "directly benefits" the plaintiff. *Id.*; *see McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir.

2010).

Although the question is not free from doubt, I believe that Holman is a prevailing party because the preliminary injunction in this case turned primarily on the likelihood of success on the merits and afforded enduring and material relief.

1.

As the majority finds, "there is no question that the district court's preliminary injunction opinion mainly turned on the likelihood-of-success inquiry." Maj. Op. at 5 (cleaned up). Holman clears this first hurdle with ease.

2.

Whether the relief was enduring is a more difficult question. We have said that relief is enduring when it is "irrevocable." *Miller*, 936 F.3d at 448. Accordingly, we have found enduring relief where preliminary injunctions enabled plaintiffs to: attend church, *Roberts v. Neace*, 65 F.4th 280, 284 (6th Cir. 2023); register voters, *Tenn. State Conf. of NAACP v. Hargett*, 53 F.4th 406, 410–11 (6th Cir. 2022); prescribe mifepristone, *Planned Parenthood*, 931 F.3d at 541–42; get married, *Miller*, 936 F.3d at 448–49; and receive in-person education, *G.S. ex rel. Schwaigert v. Lee*, 2023 WL 5205179, at *6 (6th Cir. Aug. 14, 2023). In each of those cases, the preliminary injunction afforded relief that was in some sense realized during the pendency of the injunction. In contrast, we did not find enduring relief where a preliminary injunction temporarily prevented enforcement of a statute criminalizing protests at funerals when the plaintiff had not identified a

funeral at which he planned to protest. *McQueary v. Conway*, 508 F. App'x 522, 523–24 (6th Cir. 2012); *McQueary v. Conway*, 2012 WL 3149344, at *3 (E.D. Ky. Aug. 1, 2012). We distinguished a Seventh Circuit case, *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000), in which the plaintiffs wanted to protest at a particular event, and the injunction enabled them to do so. *McQueary*, 508 F. App'x at 524.

The cases above make clear that relief is enduring only if it is irrevocable. *See Miller*, 936 F.3d at 448. That distinction is consistent with out-of-circuit caselaw. *See Thomas v. Nat'l Science Found.*, 330 F.3d 486, 488–93 (D.C. Cir. 2003); *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1084–86 (8th Cir. 2006).

To determine whether the preliminary injunction afforded Holman irrevocable relief, we must ask whether Holman benefitted from the injunction before the case was mooted. *Irrevocable, Black's Law Dictionary* (12th ed. 2024) ("committed beyond recall"). Or to ask the question differently, would Holman have benefitted even if the injunction had ultimately been vacated? I believe the answer is "yes." The preliminary injunction delayed the debt-relief program. That secured a period of equal treatment, during which all borrowers were continuing to accrue interest, and decreased the present value of the debt-relief program.

It is important to remember the nature of the harm in a case like this. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the plaintiff challenged an admissions program that reserved spots in the entering medical-school class for minorities. *Id.* at 279. The Supreme Court explained

that the plaintiff was harmed regardless of whether he would have been admitted to the class absent the challenged program. *Id.* at 280 n.14. The race-based exclusion from consideration was a harm separate and apart from any practical consequence of the exclusion. So too in other race-based set-aside programs. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The harm in cases like this is "the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.*

The denial of equal treatment, i.e., the "discrimination itself," causes "serious non-economic" harm. *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). Because that harm is "not co-extensive with any substantive rights to the benefits denied the party discriminated against," it can be remedied "by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* That means that Holman's equal-protection harm could be remedied either by denying *everyone* debt relief (leveling down), or by allowing Holman to participate on a race-neutral basis in the debt-relief program (leveling up). In this case, the court ordered the level-down remedy.

Holman argues that afforded him the irrevocable benefit of "[d]ay-by-day" equal treatment. Appellant Br. at 23–24. He might be right. The preliminary injunction, at minimum, ensured that no one got debt relief during its pendency. Holman was therefore not being discriminated against. The benefit of those days of equal treatment "could not be reversed." *Thomas*, 330 F.3d at 493; *see Heckler*, 465 U.S. at 739–40.

The counterargument is that the harm in this case is more appropriately tied to dollars—not days. The argument goes: The preliminary injunction merely delayed the spending of money, and because reversal of the preliminary injunction would have meant that the entire appropriation could later have been spent in a discriminatory manner, Holman avoided no harm. I don't think that's right on these facts. Section 1005 authorized the Secretary to make debt-relief payments based on amounts owed as of January 1, 2021. Pub. L. No. 117-2, § 1005(a)(2) (2021). At minimum, the preliminary injunction delayed those payments. In the interim, all borrowers were continuing to accrue interest that was not part of the outstanding indebtedness as of January 1, 2021. Plus, aside from any increase in interest expense, delay itself has a cost. *See Atl. Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 384 (1998) (explaining the "time value of money," *i.e.*, "the fact that a dollar today is worth more than a dollar tomorrow" (cleaned up)). So, even if the equal-protection harm in this case were merely a function of the value of the debt-relief program, the preliminary injunction irreversibly reduced that too.

The preliminary injunction in this case delayed debt-relief payments. That secured a period of equal treatment, meant that that all borrowers continued to accrue interest, and decreased the present value of the debt-relief program. That relief is irrevocable and, therefore, enduring.

3.

Whether the relief was material is also complicated. We have said that relief is material when it "directly benefits the plaintiff by modifying the

defendant's behavior toward him." *NAACP*, 53 F.4th at 410 (cleaned up); *see Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992). So, preventing the government from implementing a program that causes an injury would ordinarily qualify. Here, though, there were already two nationwide injunctions against the program. *See Faust v. Vilsack*, 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021). The government argues that the relief was therefore not material. Is a defendant's behavior changed by an injunction enjoining something already enjoined? As a practical matter, no. But we have said that "the magnitude of a party's obtained relief does not dictate the outcome of the prevailing-party inquiry." *Planned Parenthood*, 931 F.3d at 541. Rather, the "touchstone" of the inquiry is whether there has been a meaningful "alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Tchrs. Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989). As a result, we look to the "relief requested in the complaint," "not the practical significance of the relief obtained." *McQueary*, 614 F.3d at 602 (cleaned up).

In *McQueary*, for example, the plaintiff obtained a preliminary injunction preventing enforcement of two provisions of law that prohibited certain protests. *Id*. The defendant argued that the relief was not material because there were yet other provisions of law, not challenged in that case, that also prohibited the protests. *Id*. This court was unmoved and said that the relief was material even if it had no practical significance. *Id*.

Like the plaintiff in *McQueary*, Holman obtained the relief he requested in his complaint—albeit preliminarily. That seems like enough. However, unlike in *McQueary*, the relief Holman requested in his complaint had, in a sense, already been ordered by other courts. I do not think that changes the outcome here, though. Those other decisions might have been reversed on appeal or otherwise have failed to convert into permanent injunctions; the parties, for example, might have settled, or the scope of the injunctions might have been narrowed. *See, e.g., Commonwealth v. Biden*, 57 F.4th 545, 556–57 (6th Cir. 2023); *California v. Azar*, 911 F.3d 558, 583–85 (9th Cir. 2018). The relief in this case meant that Holman had the ability to enforce his injunction and was protected regardless of what happened in those other cases. Although somewhat difficult to square with the "modifying the defendant's behavior" formulation, the relief in this case was clearly a meaningful alteration of the legal relationship between the parties that directly benefitted Holman. Because this court's cases teach that our focus should be on the "relief requested in the complaint," not its "practical significance," I think that the relief obtained here qualifies as material. *McQueary*, 614 F.3d at 602.

C.

The government may still avoid paying fees and costs if it shows that "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). We look to general "equitable considerations" in evaluating this exception. *Sakhawati v. Lynch*, 839 F.3d 476, 478 (6th Cir. 2016). The government argues that there are three special circumstances here, but each falls short.

First, the government repackages its material-relief argument that the preliminary injunction provided no benefit beyond the already-existing nationwide injunctions. That argument is unavailing here for the same reasons it was unavailing there: Holman obtained the relief he requested in his complaint, which gave Holman added protection independent of those other cases. Second, the government notes that it was defending the constitutionality of a statute and contends that it is wrong to penalize an agency for complying with its statutory obligations. Whatever the policy merits of the government's argument, there is nothing in the Equal Access to Justice Act that supports a statutory-defense exception. Third, the government suggests that an award would be unjust because some of the fees Holman seeks are for work that occurred after the preliminary injunction entered. That is not a concern at this stage, though, because it does not mean that "an award" would be unjust. 28 U.S.C. § 2412(d)(1)(A). Rather, it goes to calculating "reasonable attorney fees." Id. § 2412(d)(2)(A); see Sakhawati, 839 F.3d at 480.

In this case, no special circumstances make an award unjust.

* * *

My best read of our cases is that Holman is entitled to fees and costs because he is a prevailing party, the government's position was not substantially justified, and no special circumstances make an award unjust. I therefore respectfully dissent.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5493

ROBERT HOLMAN,

Plaintiff - Appellant,

v.

THOMAS J. VILSACK, in his official capacity as Secretary of the United States Department of Agriculture; ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency,

Defendants - Appellees.

Before: STRANCH, LARSEN, and DAVIS, Circuit Judges.

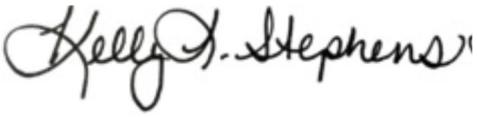
JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Jackson.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

Appendix D

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

ROBERT HOLMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; and ZACH DUCHENEAUX in his official capacity as Administrator of the Farm Service Agency,	)	**21-cv-1085-STA-jay**
	)	
Defendants,	)	

ORDER DENYING PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

Plaintiff Robert Holman filed this action to challenge the United States Department of Agriculture's implementation of § 1005 of the American Rescue Plan Act of 2021 ("ARPA"). Section 1005 appropriated funds to pay certain USDA farm loans held by "socially disadvantaged" farmers and

ranchers. "Socially disadvantaged" was defined as a "farmer or rancher who is a member of" a group "whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities" – specifically American Indians or Alaskan Natives; Asians; Blacks or African Americans; Hispanics or Latinos; and Native Hawaiians or other Pacific Islanders. Plaintiff asserted that he would have been eligible for debt relief for his farm loans under § 1005 but for the fact that he does not fall within one of the racial or ethnic groups considered "socially disadvantaged." He filed suit asserting that § 1005 violated the equal protection component of the Fifth Amendment's Due Process Clause, and he sought declaratory and injunctive relief, costs and fees, and nominal damages.

Plaintiff moved for a preliminary injunction. After a hearing and with opposition from the Government, the Court granted Plaintiff's request and enjoined disbursement of § 1005 funds on a nationwide basis pending resolution of the case on the merits on July 8, 2021. This Court's injunction was preceded by similar preliminary injunctions in the Middle District of Florida, *Wynn v. Vilsack*, 3:21-cv-514 (M.D. Fla. June 23, 2021), and in the Northern District of Texas, *Miller v. Vilsack*, 4:21-cv-595 (N.D. Tex. July 1, 2021). *Miller* certified two classes at the same time that it entered class-wide preliminary relief. Plaintiff was a member of the classes in *Miller*. The Court initially denied the Government's motion to stay pending the outcome of the *Miller* class action but then reconsidered that decision and stayed the matter.

On September 6, 2022, the Government filed a

notice that § 1005 had been repealed by the Inflation Reduction Act of 2022, thus mooting the actions challenging § 1005. *See* Pub. L. No. 117-169, § 22008 (2022). Consequently, the *Miller* class action was dismissed. Subsequently, the parties in this case submitted a joint stipulation of dismissal, and judgment was entered on September 15, 2022.

Plaintiff has now filed a motion for attorney fees and costs pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, and Local Rule 54.1. (ECF No. 85.) Plaintiff seeks fees, costs, and expenses in the amount of $44,117.00. The Government has responded and opposes the motion. (ECF No. 88.) Plaintiff has filed a reply to the Government's response. (ECF No. 91.) Subsequently, the Court entered an order requiring additional briefing by the parties in light of *Tennessee State Conf. of NAACP v. Hargett*, 53 F.4th 406 (6th Cir. 2022). (ECF No. 93.) In that decision, a divided panel upheld the district court's award of attorney fee to the plaintiffs as prevailing parties even though the Tennessee legislature repealed the statutory provisions that the district court had enjoined, thereby rendering the lawsuit moot.[1] The Government has filed its

[1] The motion for attorney fees in *Hargett* was brought under 42 U.S.C. § 1988, whereas the present motion is brought under the EAJA. However, the Supreme Court has stated that the standards applicable to § 1988 fee awards "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *see also Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 581-83 (2008) (applying § 1988 fee decisions to EAJA fee matter); *INS v. Jean*, 496 U.S. 154, 161 (1990) (applying *Hensley* to EAJA award).

additional briefing (ECF No. 94), as has Plaintiff. (ECF No. 95.) For the reasons set forth below, Plaintiff's Motion is **DENIED**.

Under the EAJA, the Court shall "award to a prevailing party . . . fees and other expenses . . . incurred by the party in any civil action . . ., including proceedings for judicial review of agency action, brought by or against the United States . . ., unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). "The party seeking fees bears the burden of proving that it was a prevailing party with respect to the work done to generate them." *United States v. Tennessee*, 780 F.3d 332, 336 (6th Cir. 2015). The Government then bears the burden of proving that its position was substantially justified or that special circumstances make an award unjust. *Caremore, Inc. v. NLRB*, 150 F.3d 628, 629 (6th Cir. 1998).

Plaintiff contends that he is entitled to attorney fees because he is the prevailing party in this action since he obtained a preliminary injunction even though the injunction was later mooted by the repeal of § 1005. He also contends that the Government's defense of § 1005 was not substantially justified, and he argues that there are no special circumstances that would make an EAJA award unjust. The Government has responded, inter alia, that Plaintiff was a member of the *Miller* class, and, by the time this Court entered a preliminary injunction, Plaintiff's interests were already protected by the nationwide injunction in *Wynn* and the class-wide injunction in *Miller*. The Government also asserts that it had a duty to defend

§ 1005 and, therefore, its position was substantially justified. [2]

It is undisputed that the only "success" that Plaintiff obtained in this Court was the issuance of the preliminary injunction. After the preliminary injunction was issued, the Court stayed discovery, dismissed Plaintiffs' additional loan-forgiveness claims, and then stayed the case pending resolution of the *Miller* class action. Ultimately, as mentioned above, the entire case was dismissed by a joint stipulation of the parties. Therefore, the issue for the Court is whether obtaining a preliminary injunction, without more, elevates a plaintiff to prevailing party status in light of the ruling in *Hargett*. The Court finds that it does not in that *Hargett* did not change the well-established law of this circuit.

To be considered a prevailing party, a litigant must have "receive[d] at least some relief on the merits of his claim" amounting to "a court-ordered change in the legal relationship between the plaintiff and the defendant." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 603-04 (2001) (internal quotation marks and alterations in original omitted). Prior to *Hargett*, it was well-settled that a plaintiff who "wins a preliminary injunction and nothing more" is almost never a prevailing party,

---

[2] Because the Court has found that Plaintiff is not a prevailing party for the purpose of an award of EAJA attorney fees, the Court need not reach the issue of whether the Government's position was substantially justified or whether Plaintiff should receive an award of costs. See 28 U.S.C. § 2412(a)(1) (allowing a "prevailing party" to recover from the government certain costs associated with the litigation under the EAJA).

see McQueary v. Conway, 614 F.3d 591, 604 (6th Cir. 2010) ("*McQueary I*"), and *Hargett* did not change this general principle. *See Hargett*, 53 F.4th at 410 (relying on the guidance of *McQueary I* and *Buckhannon* in determining whether the plaintiff in that case was a "prevailing party").

The Supreme Court has identified "the material alteration of the legal relationship of the parties" as the "touchstone of the prevailing party inquiry," *Texas State Teachers Ass'n v. Garland Indep. School District*, 489 U.S. 782, 792-93 (1989) - and "for an alteration of legal relationships to be considered material, . . . a plaintiff must 'receive at least some relief on the merits of his claim.'" *Biodiversity Conservation All. v. Stem*, 519 F.3d 1226, 1231 (10th Cir. 2008) (emphasis in original) (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)). Thus, while preliminary injunction recipients may sometimes be prevailing parties, the nature of preliminary relief, which usually does not create lasting change in the legal relationship between the parties, "will generally counsel against fees." *McQueary I*, 614 F.3d 597, 600-01 (quoting *Sole v. Wyner*, 551 U.S. 74, 86).

The Supreme Court has specifically rejected the catalyst theory "under which a plaintiff 'prevailed' if he 'achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct,' such as a legislative repeal of a challenged statutory provision." *McQueary I*, 614 F.3d at 597 (quoting *Buckhannon*, 532 U.S. at 601-02). That is, "'a voluntary change in the defendant's conduct,' such as a legislative repeal of a challenged statutory provision, . . . does not amount to a 'court-ordered change in the legal relationship' between the plaintiff

and defendant, as required to establish prevailing-party status." *McQueary I*, 614 F.3d at 597 (quoting Buckhannon, 532 U.S. at 603-04).[3] Instead, the Sixth Circuit applies a "contextual and case-specific inquiry" to determine if a party who obtained only a preliminary injunction is entitled to attorney fees. *McQueary I*, 614 F.3d at 601. This approach asks whether the plaintiff obtained a change to "the legal relationship between the parties" that was "court-ordered, material," and "enduring." *Miller v. Caudill*, 936 F.3d 442, 448 (6th Cir. 2019). A change is court-ordered if it is caused by the preliminary injunction and not the defendant's voluntary change in conduct. *Id*. It is material if it "directly benefit[s]" the plaintiff by altering the defendant's conduct toward him, and it is enduring if it is "irrevocable, meaning it . . . provided [the] plaintiff[] with everything [he] asked for." *Id*.

To illustrate this approach, the Government relies on the following cases. In *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000), protestors obtained a preliminary "injunction to exercise their First Amendment rights at a specific time and place," *i.e.*, the 1996 Democratic National Convention, and that injunction gave the protestors everything they needed. That is, the protestors wanted to protest at the Convention, and the preliminary injunction allowed them to do so. Thus, an award of attorney fees was appropriate in *Young*. *See McQueary I*, 614 F.3d

---

[3] Additionally, a plaintiff cannot claim to be a prevailing party if its success is ultimately "reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole*, 551 U.S. at 83. Those factors are not present in this case.

at 599 (explaining the holding in Young).[4]

In *Miller v. Caudill*, the Court of Appeals found that same sex couples who obtained a preliminary injunction that gave them the immediate opportunity to obtain marriage licenses – and they did, in fact, obtain marriage licenses and wed - were prevailing parties because that opportunity was the relief they sought and could not be taken away by any future action of the defendants. 936 F.3d at 449 ("[T]he injunction gave plaintiffs all the court-ordered relief they needed, [such that] the issuance of the marriage licenses mooted [the] request for them," and the Clerk could not "retroactively . . . nullify the marriage licenses plaintiff[s] had already obtained."). Accordingly, "[t]he relief plaintiffs obtained – the unobstructed opportunity to secure pre- alteration marriage licenses – therefore stemmed from the preliminary injunction, not from the legislature's or [defendant's] later voluntary actions." *Id*.

As a counterpoint to *Young and Miller*, the Government cites *McQueary v. Conway*, 2012 WL 3149344, at *3 (E.D. Ky. Aug. 1, 2012) ("*McQueary II*"), *aff'd*, 508 F. App'x 522 (6th Cir. 2012). In that case, the plaintiff challenged provisions of Kentucky law limiting protests at funerals. The district court granted the plaintiff's motion for a preliminary injunction, concluding that he had shown a likelihood

---

[4] *McQueary I* also cited the case of *Watson v. County of Riverside*, 300 F.3d 1092, 1095–96 (9th Cir. 2002) (affirming an award of attorney fees when a government employee who sought to exclude an unconstitutionally obtained report from an administrative hearing obtained a preliminary injunction that "irrevocably excluded the report).

of success on the merits. The Kentucky General Assembly then repealed the challenged provisions, which mooted the plaintiff's case before he obtained any permanent relief. The district court initially denied the plaintiffs' request for an award of attorney fees; however, the Sixth Circuit reversed that decision while clarifying the appropriate prevailing party analysis. On remand in *McQueary II*, the district court applied a context-specific analysis and again concluded that the plaintiff was not a prevailing party. The district court found that the plaintiff was not a prevailing party because his "claim for permanent relief did not become moot when a particular event occurred" but, instead, because Kentucky "voluntarily repealed the challenged provisions" before the court ordered permanent injunctive relief. 2012 WL 3149344, at *2.

Unlike the protestors in *Young*, the *McQueary* plaintiff did not seek relief allowing him to protest "at a specific time and place." *Id.* Instead, "[h]e sought a permanent injunction that would enjoin the Defendant from enforcing the challenged provisions at all funerals." *Id.* The court explained that, when injunctive relief is linked to a particular event, as in *Young*, "preliminary relief becomes, in effect, permanent relief after the event occurs. After the passage of the event, the preliminary injunction can no longer be meaningfully revoked," and the court cannot order any further relief. *Id.* at *3. Preliminary relief like that awarded in *McQueary*, which enjoined Kentucky "from enforcing . . . challenged provisions only while [the plaintiff's] claim for permanent relief was pending," was "truly temporary and revocable." *Id.* at *2-3. It could be either undone or made

permanent by a court order on the merits. Thus, as long as the court had not "permanently enjoin[ed] the state from enforcing the challenged provisions," there was "more [it] could do for" plaintiff. *Id*. at *2. The plaintiff did not receive all the relief sought through a permanent injunction; instead, permanent relief came by way of Kentucky's voluntary repeal of the challenged provision. Ultimately, "the defendant's voluntary conduct could not serve as the basis for an award of attorney fees. Id. The Sixth Circuit affirmed this decision in *McQueary v. Conway*, 508 F. App'x 522, 524 (6th Cir. 2012) ("*McQueary III*").

In *Hargett*, the plaintiffs obtained a preliminary injunction against enforcement of a Tennessee statute "imposing a raft of new requirements upon persons or organizations conducting voter registration activities in the State." 53 F.4th at 408. A few months later, the Tennessee legislature repealed the challenged provisions, and the plaintiffs dismissed the case. *Id*. at 409. However, prior to the legislative action, the "plaintiffs were able to conduct voter-registration drives for seven months during the runup to the 2020 election, unburdened by the requirements of the" enjoined law. *Id*. at 410-11. Thus, the injunction gave the plaintiffs something that could not later be taken away.

In the present case, the Court agrees with the Government that the decision in Hargett is consistent with the principles outlined in the McQueary cases and that Hargett did not alter the governing framework for assessing whether a preliminary injunction grants sufficient relief to render Plaintiff a "prevailing party." Here, Plaintiff received preliminary relief that was by nature "temporary and

revocable," i.e., an injunction precluding the Government from implementing § 1005 until a decision on the merits of the case could be rendered. Unlike the injunction obtained in Hargett or Miller, the injunction in this case provided Plaintiff with nothing lasting – no permanent change of status, no irrevocable benefit, and no enduring opportunity to profit from the Court's order. *See, e.g., McQueary II*, 2012 WL 3149344, at *2 (contrasting an injunction for a "specific" act or occasion with an injunction that seeks to stop the defendants "from enforcing the challenged" law universally). Any relief that Plaintiff now has because of § 1005's repeal is the result of a voluntary act of Congress and not a court order. As Plaintiff failed to obtain any "court-ordered, material, enduring change in the legal relationship between the parties," *Miller*, 936 F.3d at 448, he is not eligible for attorney fees, and his motion is **DENIED**.

IT IS SO ORDERED.

s/ **S. Thomas Anderson**
S. THOMAS ANDERSON
UNITED STATES
DISTRICT JUDGE
Date: April 4, 2023.

Appendix E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

ROBERT HOLMAN,
Plaintiff,

JUDGMENT IN A CIVIL CASE

vs.

THOMAS J. VILSACK, ET AL.,
Defendant.

CASE NO: 21-1085-STA-jay

DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the STIPULATION of Dismissal entered on September 14, 2022, this cause is hereby DISMISSED without prejudice.

APPROVED:

s/ S. Thomas Anderson

CHIEF JUDGE UNITED STATES DISTRICT COURT

DATE: 9/15/2022

THOMAS M. GOULD
Clerk of Court

s/Maurice B. BRYSON

(By) Deputy Clerk

Appendix F

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

ROBERT HOLMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; and ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency,	)	**21-cv-01085-STA-jay**
	)	
Defendants,	)	

JOINT STIPULATION OF DISMISSAL

In light of the repeal of Section 1005, the Parties agree that Plaintiff's challenge to Section 1005 is moot and therefore stipulate to dismiss this action without prejudice. See Fed. R. Civ. P. 41(a)(1)(A)(ii). Plaintiff reserves the right to file subsequent motions for cost and attorneys' fees.

Dated: September 14, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

LESLEY FARBY
Assistant Branch Director
Civil Division, Federal Programs Branch

/s/ Kyla M. Snow
KYLA M. SNOW (Ohio Bar No. 96662)
Trial Attorney
United States Department of Justice Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20005
Tel: (202) 514-3259 / Fax: (202) 616-8460
Kyla.snow@usdoj.gov

Counsel for Defendants

s/ B.H. Boucek
BRADEN H. BOUCEK
TN BPR No. 021399
GA Bar No. 396831
Southeastern Legal Foundation
560 W. Crossville Road, Suite 104
Roswell, GA 30075
Telephone: 770/977-2131
bboucek@southeasternlegal.org

WILLIAM E. TRACHMAN*
CO. Bar No. 45684
Mountain States Legal Foundation
2596 S. Lewis Way
Lakewood, Colorado 80227
Telephone: (303) 292-2021
Facsimile: (303) 292-1980
wtrachman@mslegal.org
*Appearing Pro Hac Vice

Counsel for Plaintiff

Appendix G

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

ROBERT HOLMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; and ZACH DUCHENEAUX, in his official capacity as Administrator of the Farm Service Agency,	)	**21-cv-01085-STA-jay**
	)	
Defendants,	)	

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Robert Holman, a non-minority[1] farmer in Union City, Tennessee, filed this action against Thomas J. Vilsack, Secretary of the United States

---

[1] The complaint alleges that the USDA has Plaintiff's race on file as white and that he "would generally be considered white or Caucasian." (Cmplt. p. 3, ECF No. 1.)

Department of Agriculture ("USDA"), and Zach Ducheneaux, Administrator of the Farm Service Agency ("FSA"), seeking a declaratory judgment that Section 1005's loan forgiveness program in the American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005 (2021) ("ARPA"), is violative of the Fifth Amendment's Equal Protection Clause under the United States Constitution and seeking to enjoin the program. The Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this case presents a substantial question of federal law, specifically whether Section 1005 of the ARPA, facially and as applied, violates the Constitution's guarantee of equal protection of the law.

Section 1005 of the ARPA allots funds for debt relief to "socially disadvantaged" farmers and ranchers.[2] The USDA interprets the phrase "socially disadvantaged" to mean the racial classifications of "Black, American Indian/Alaskan Native, Hispanic, or Asian, or Hawaiian/Pacific Islander." *See American Rescue Plan Debt Payments FAQ*, Question 1, https://www.farmers.gov/americanrescueplan/arp-faq. The program erases the debts of those farmers falling within the specified racial classifications who took out qualifying loans and provides an additional 20% to cover tax liabilities, thus providing a payment in an amount up to 120% of the outstanding indebtedness, without any consideration of need. Qualifying loans are either USDA direct loans or USDA backed loans. Farmers, such as Plaintiff, who have USDA loans and who are white/Caucasian are

[2] Although Section 1005 refers to both "farmers and ranchers," the parties have focused on farmers in their briefing.

not considered to be socially disadvantaged and, thus, are not eligible for debt relief regardless of their individual circumstances. The Government has not disputed that Plaintiff, as the holder of two USDA direct farm loans, would be eligible for debt relief if he was a member of one of the specified racial classifications.

Defendants Vilsack and Ducheneaux are responsible for the implementation of Section 1005. Defendant Vilsack, as Secretary of Agriculture, is responsible for leading the USDA, which includes the FSA. Defendant Ducheneaux, as Administrator of the FSA, oversees Section 1005. Defendants are sued in their official capacities.

On June 6, 2021, Plaintiff filed a motion for preliminary injunction (ECF No. 7) pursuant to Rule 65 of the Federal Rules of Civil Procedure, asking the Court to preliminarily enjoin Defendants from enforcing Section 1005. Defendants have filed a response to the motion (ECF No. 31), and Plaintiff has filed a reply to the response. (ECF No. 36.) With the Court's permission, the National Black Farmers Association ("NBFA") and the Association of American Indian Farmers ("AAIF") have submitted a brief as amicus curiae in opposition to Plaintiff's motion for preliminary injunction.[3] (ECF No. 34.)

---

[3] The NBFA and AAIF have also filed a conditional motion for leave to intervene as defendants in this matter. However, because, at present, NBFA and AAIF purport to share the same objective as the Government in defending the challenged law, the organizations have requested that the Court defer consideration of the motion until such time as developments in this lawsuit indicate that the organizations' interests diverge from the Government's. (ECF No. 27.)

A hearing on Plaintiff's motion was held on June 29, 2021, with both parties represented by counsel. No testimony was taken, although Plaintiff's Declaration (ECF No. 7-3) was admitted as an exhibit. After reviewing the briefs, statements and arguments by counsel at the hearing, and the entire record, for the reasons discussed below, the Court **GRANTS** Plaintiff's motion for a preliminary injunction.[4]

History/Background of Section 1005

As explained by Defendants, Congress enacted Section 1005 to provide debt relief to "socially disadvantaged" farmers holding certain USDA loans in an attempt to remedy "the lingering effects of the unfortunate but well-documented history of racial discrimination" in USDA loan programs.[5] (Resp. p. 1, ECF No. 31.) Congress considered evidence that "discriminatory loan practices at USDA have placed minority farmers at a significant disadvantage today;" statistically these farmers generally own smaller farms, have disproportionately higher delinquency rates, and are at a significantly higher risk of foreclosure than non-minority farmers. (*Id*.) Defendants contend that Congress concluded that paying off qualifying USDA loans of minority farmers[6]

---

[4] This Court has authority to order injunctive relief and other relief that is necessary and proper pursuant to 28 U.S.C. §§ 2201 and 2202.

[5] Plaintiff has not disputed the USDA's long-term history of racially discriminatory practices.

[6] Defendants have used the terms "socially disadvantaged farmers" and "minority farmers" interchangeably. However, as explained above, not all "minority famers" are included in the definition of "socially disadvantaged farmers."

was "necessary to further its interests in remedying the lingering effects of racial discrimination in USDA loan programs and ensuring that its pandemic relief efforts did not perpetuate those lingering effects." (*Id.* at pp. 1 – 2.)

According to Defendants, "decades of evidence shows that not all USDA stakeholders have benefitted equally from its services — particularly its farm loan services," and the evidence indicates "that throughout USDA's history minority farmers have been 'hurt' more than helped due to discrimination in USDA's farm loan programs." (*Id.* at p. 3 (relying on "A Report by the Civil Rights Action Team" (CRAT) 6 (1997) ("CRAT Report"))). To support their proposition that "[m]inority farmers have long experienced inequities in FSA's administration of farm loans, including with respect to loan approval rates, amounts, and terms," Defendants have cited a 1982 report from the U.S. Commission on Civil Rights, *The Decline of Black Farming in America* 84-85, the 1997 CRAT Report, and the 2002 Civil Rights Hearing on the USDA's Civil Rights Program for Farm Program Participants. (Id.)

Defendants also point to a "series of lawsuits against USDA by groups of minority farmers" beginning in 1997 and continuing over the next decade. "African-American, Native American, Hispanic, and female farmers alleged that USDA systematically discriminated against them in the administration of farm loans and other benefits and

failed to investigate discrimination complaints."[7] (*Id.* at p. 4 (listing *Pigford v. Glickman* ("*Pigford I*"), No. 97-1978 (D.D.C.); *Keepseagle v. Veneman*, No. 99-03119 (D.D.C.); *Garcia*, No. 00-2445 (D.D.C.); *Love v. Glickman*, No. 00-2502 (D.D.C.); *In re Black Farmers Discrimination Litigation* ("*Pigford II*"), No. 08-mc-0511 (D.D.C.) (collectively "*Pigford*")). According to Defendants, "[a]lthough USDA has settled the lawsuits and paid more than $2.4 billion to claimants, State taxes eroded recoveries, debt relief was incomplete, and reports before Congress have shown that the settlements did not cure the problems faced by minority farmers." (*Id.*) Even after the lawsuits, a 2011 report – Jackson Lewis LLP, "Civil Rights Assessment" (Mar. 31, 2011) ("JL Report") – showed that socially disadvantaged groups "continued to experience discrimination with respect to the requirements, availability, and timing of FSA loans." (*Id.*) A 2021 Government Accountability Office report commented on long-existing "concerns about discrimination in credit markets" and surmised that minority farmers continued to have less access to credit. (*Id.*)

Defendants rely on a 1982 agriculture report to link "discrimination in USDA's loan programs" to "a dramatic loss of minority-owned farmland. (*Id.* at p. 5 (citing Arg. II.B; 1982 Rep. 176 (reporting that from 1920 to 1978, the number of all minority-owned farms

---

[7] There has been no explanation as to why female farmers were not included within the ambit of Section 1005 even though female restaurant owners were included in the restaurant portion of the ARPA. Additionally, little to no evidence has been presented concerning discrimination toward Hawaiian/Pacific Islander farmers.

fell from 926,000 to less than 60,000))). Moreover, "over the last century, Black farmers dwindled from 14 to two percent of all farmers and lost about 80% of their land." (*Id*. at pp. 5-6.)

According to Defendants, Congress considered this report, and others,[8] which show "the pattern of discrimination in USDA programs and its consequences for minority farmers" when passing

---

[8] (Resp. at p. 5 n.8 (citing Hr'g on USDA's Civil Rights Progs. and Responsibilities before The House Subcomm. on Dep't Ops., Oversight, Nutrition, and Forestry, Comm. on Ag., 106th Cong. 37 (1999) (Goodlatte) (recognizing that "[c]ivil rights at the [USDA] has long been a problem"); 2002 Civil Rights Hr'g 16, 18, 26 (hearing testimony about the disparities in loan processing times and approval rates for Hispanic farmers; underrepresentation of minorities in USDA; and continuing delays in the resolution of civil rights complaints); Hr'g to Review the USDA's Farm Loan Progs. before the Senate Comm. on Ag., Nutrition, and Forestry, 109th Cong. 800 (2006) (Karen Krub, Farmers' Legal Action Group, Inc.) ("[T]here is still no meaningful process for investigation and resolution of allegations of discrimination [against] FSA decision-makers."); Hr'g to Review Availability of Credit in Rural America before the House Subcomm. on Conserv., Credit, Energy, and Research, Comm. on Ag., 110th Cong. 8 (2007); Hr'g on Mgmt. of Civil Rights at the USDA before the House Subcomm. on Gov't Mgmt., Org., and Procurement, Comm. on Oversight and Gov't Reform, 110th Cong. 137 (2008) (hearing testimony about, and recognizing, the continued problem of USDA discrimination against minority farmers, including the inability of Native American and Hispanic farmers to receive loans; underrepresentation of minorities on county committees; and delayed processing of civil rights complaints, including allegations that complaints were shredded and not processed, all despite creation in 2002 of the Assistant Secretary of Civil Rights); House Ag. Comm. Hr'g on U.S. Ag. Policy and the 2012 Farm Bill (Apr. 21, 2010); House Ag. Comm. Hr'g on USDA Oversight 45, 50 (July 22, 2015)).

Section 1005. (*Id*. (citing S.278,[9] "Emergency Relief for Farmers of Color Act of 2021")).

In their response, Defendants ask the Court to consider "previous efforts to remedy discrimination against minority farmers in USDA programs and its lingering effects" which have purportedly "fallen short." (*Id*. at pp. 6-7.) In particular, in 1990 Congress created a program "to provide outreach and technical assistance" to help minority farmers and then permanently funded the program in 2018. (*Id*. at p. 7.) In 1998 Congress suspended statutes of limitations for Equal Credit Opportunity Act claims; in 2010, it provided $1.25 billion to ensure that *Pigford II* claimants received settlement payments; in 2002 it created an Office of the Assistant Secretary for Civil Rights at USDA to ensure better compliance with civil rights laws; and in 2014 it created a permanent Office of Tribal Relations at USDA. (*Id*.) Defendants contend that, despite these efforts, socially disadvantaged farmers continue to have difficulty getting loans and credit from the USDA. (*Id*.)

Defendants note that Congress found that, even before the pandemic, "Black farmers and other farmers of color were in a far more precarious financial situation," than non-minority farmers, and, "a year into the pandemic, some 'ha[d] simply not been able to weather the storm.'" (*Id*.) Statistically, "a disproportionate number of Black, Hispanic, Asian-American, and Indigenous farmers were in default on their direct loans, putting farmers of color at risk of 'facing yet another wave of foreclosures and potential

[9] S.278 was the predecessor of Section 1005.

land loss.'" (*Id*. at p. 8.)

Defendants have provided evidence purportedly relied on by lawmakers to show that "the overwhelming majority of recent agricultural subsidies and pandemic relief prior to ARPA went to non-minority farmers, despite minority farmers occupying a more vulnerable financial position." (*Id*.) For example, "reporting indicated that nearly the entirety of USDA's $25 billion Market Facilitation Program (MFP) payments, and almost all of the $9.2 billion provided through USDA's first Coronavirus Food Assistance Program (CFAP), went to non-minority farmers." (*Id*. (citations omitted.)) According to Defendants, Congress found that this disparity was "partly due to the lingering effects of discrimination in USDA programs." (*Id*. at pp. 8-9.) Defendants reference a letter from thirteen agriculture professors who explained that federal farm programs "have perpetuated and exacerbated the problem" of discrimination, by preferring crops that tend to be produced by white farmers and "rewarding" large farms "which are predominantly owned by white farmers." (*Id*. at p. 9.)

Congress passed Section 1005 of the ARPA to "provide targeted and tailored support for … farmers," CR H.765 (Scott), who "have for many decades suffered discrimination by [USDA],' *id*. S.1265 (Booker), and had not benefited from prior pandemic relief efforts, *id*. H.1273 (Rep. Neal) (explaining as much with respect to Black farmers); *id*. S.1264-65 ('Congress includes these measures to address the longstanding and widespread systemic discrimination within the USDA, particularly within the loan programs, against [socially disadvantaged famers].')

(Stabenow); S.278, Sec. 4, ¶ (a)(1)-(2) (stating that § 1005 addressed 'historical discrimination against' socially disadvantaged farmers and 'issues relating to … COVID-19 … in the farm loan programs')." (*Id*. at p. 10.)

Arguments

Plaintiff, a white farmer with two USDA loans that had outstanding balances as of January 1, 2021, contends that the government should be enjoined from carrying out Section 1005's farm loan forgiveness program because it is entirely based on race, and the denial of a government benefit based on race is a violation of the right to be treated equally under the law. He argues that, because he can show that he faces a colorable constitutional violation, a preliminary injunction is appropriate.

Defendants have responded that Congress enacted Section 1005 to remedy the lingering effects of long-standing racial discrimination in USDA programs. They claim that, in doing so, Congress looked at evidence that discriminatory loan practices at the USDA placed minority farmers at a significant disadvantage pre-pandemic and that minority farmers' positions were made worse by the pandemic, which disproportionately burdened them. Defendants argue that, in authorizing debt relief in Section 1005, Congress adopted a measure that was narrowly tailored to remedy the lingering effects of discrimination in USDA programs and to correct the ways prior funding had perpetuated those lingering effects.

Legal Standard and Analysis

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). It is an "extraordinary and drastic" remedy, and "[t]he party seeking [it] bears the burden of justifying such relief." *Am. Civil Liberties Union Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 642 (6th Cir. 2015). The Sixth Circuit Court of Appeals recently reiterated the standard for issuing a preliminary injunction.

> We consider four factors in determining whether a preliminary injunction should issue: (1) whether the moving party has shown a likelihood of success on the merits; (2) whether the moving party will be irreparably injured absent an injunction; (3) whether issuing an injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L.Ed.2d 550 (2009). In constitutional cases, the first factor is typically dispositive. *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (order) (per curiam). That's because "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). And no cognizable harm results from stopping unconstitutional conduct, so "it is always in the public interest to prevent violation

> of a party's constitutional rights." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) (citation omitted). We thus focus our analysis on the plaintiffs' likelihood of success on the merits.

Vitolo v. Guzman, 999 F.3d 353, 360 (6th Cir. May 27, 2021).

Likelihood of Success on the Merits

At the outset, the Court notes that four cases in particular have informed its decision: Vitolo (enjoining the restaurant relief portion of the ARPA), which is binding precedent for this Court, and Faust v. Vilsack, 2021 WL 2409729 (E.D. Wis. June 10, 2021) (enjoining Section 1005's farm loan relief portion of the ARPA), Wynn v. Vilsack, 2021 WL 2580678 (M.D. Fla. June 23, 2021) (same), and Miller v. Vilsack, No. 4:21-cv-0595-O (N.D. Tex., July 1, 2021), which are persuasive.[10] All four courts determined that the plaintiff had shown, inter alia, a likelihood of success on the merits in challenging portions of the ARPA that purportedly violated the plaintiff's equal protection rights by allocating funds based on race (and in Vitolo also based on gender) and enjoined the distribution of those funds. At the hearing in this Court, the parties agreed that the evidence that was presented in Faust and in Wynn is

[10] Although decisions from other circuits are not binding on this Court, those opinions may constitute persuasive authority. See Moldowan v. City of Warren, 578 F.3d 351, 381 n. 9 (6th Cir. 2009).

the same as the evidence presented in this case.[11]

The parties also agree that, because Section 1005 on its face makes a distinction among applicants for relief on the basis of race, it must satisfy strict scrutiny – that is, it must be narrowly tailored to serve a compelling state interest. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), and reiterating that "all racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny.") Under strict scrutiny, the government has the burden of proving that racial classifications "are narrowly tailored measures that further compelling governmental interests." *Johnson*, 543 U.S. at 505. "When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003). Thus, the government must adopt "the least restrictive means of achieving a compelling state interest," *McCullen v. Coakley*, 573 U. S. 464, 478 (2014), "rather than a means substantially related to a sufficiently important interest." *Americans for Prosperity Foundation v. Bonta*, __ S. Ct. __, 2021 WL 2690268 (July 1, 2021).

Because "[g]overnment policies that classify people by race are presumptively invalid," and "[t]o overcome that presumption, the government must show that favoring one race over another is necessary to achieve

[11] The hearing pre-dated the Miller decision.

a compelling state interest," *Vitolo*, 999 F.3d at 360, the Court begins by looking at the Government's asserted compelling state interest in its race-based farm loan forgiveness program. Defendants have offered as "a compelling interest" the need to remedy past discrimination suffered by "socially disadvantaged" farmers at the hands of the USDA. It is undisputed that the USDA has a sad history of discriminating against certain groups of farmers based on their race. The evidence in the record reveals systemic racial discrimination by the USDA (and in particular the FSA) throughout the twentieth century which has compounded over time, resulting in bankruptcies, land loss, a reduced number of minority farmers, and diminished income for the remaining minority farmers. Defendants argue that Section 1005 is necessary to reverse the years of economic discrimination against minority farmers. However, *Vitolo*, *Faust*, *Wynn*, and *Miller* all rejected systemic racial discrimination as a compelling state interest to support race-based legislation.

In *Vitolo*, the Sixth Circuit explained when the government may attempt to remedy past discrimination by using preferential treatment based on race.

> First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." [*City of Richman v.*] *J.A. Croson Co.*, 488 U.S. [469] at 498, 109 S. Ct. 706 [1989]; *see also Adarand*, 515 U.S. at 226, 115 S. Ct. 2097; *Aiken v. City of Memphis*, 37 F.3d 1155, 1162–63

> (6th Cir. 1994) (en banc) (explaining that societal discrimination is not enough to justify racial classifications and that there must be prior discrimination by the governmental unit involved).
>
> Second, there must be evidence of intentional discrimination in the past. *J.A. Croson Co.*, 488 U.S. at 503, 109 S. Ct. 706 (requiring an "inference of discriminatory exclusion"). Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination. *See Aiken*, 37 F.3d at 1163; *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992).
>
> Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government "show[s] that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination. *J.A. Croson Co.*, 488 U.S. at 492, 109 S. Ct. 706 (plurality opinion). But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

Vitolo, 999 F.3d at 361.

Here, Defendants cannot meet the first prong because the evidence does not show that Section 1005 targets a specific episode of past discrimination. Defendants have pointed to statistical and anecdotal evidence of a history of discrimination by the USDA. But it is well settled that a "generalized assertion that there has been past discrimination in an entire industry" cannot establish a compelling interest. *J.A. Croson Co.*, 488 U.S. at 498; *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality opinion) ("remedying past societal discrimination does not justify race-conscious government action"). Moreover, as recognized in *Wynn*, "[d]ue to the significant remedial measures previously taken by Congress, for purposes of this case, the historical evidence does little to address the need for continued remediation through Section 1005." *Wynn*, 2021 WL 2580678, at * 5. Any evidence that there is such a need "is not tied in any way to a governmental interest in affording [socially disadvantaged farmers] broad race-based debt relief and does not support a finding that USDA continues to be a participant, passive or active, in discrimination."[12] *Id.*

Also, although Defendants have asserted that the majority of funding in pandemic relief efforts did not

---

[12] Defendants will have the opportunity to present such evidence at a trial on the merits. *See Wynn*, 2021 WL 2580678, at *6 n.9 ("On a more fully developed record, the Government may be able to establish that despite past remedial efforts the harm caused by the disgraceful history of discrimination by the USDA in farm loans and programs is ongoing or that the Government is in some way a participant in perpetuating that discrimination such that further narrowly tailored affirmative relief is warranted.")

reach minority farmers, they have not provided evidence of "specific episodes" of present intentional discrimination by Defendants. At the hearing, Defendants conceded that Congress attempted to remedy the lingering effects of historic discrimination when enacting Section 1005 and did not rely on specific present-day discrimination occurring at the USDA.

In *Wynn*, Judge Marcia Morales Howard analyzed the evidence presented by Defendants on this issue and found it to be lacking.

> [T]he Government cites to two statistics related to recent USDA programs that have disproportionately benefited White farmers. The first statistic shows 99.4% of relief under USDA's Market Facilitation Program (MFP) went to White farmers. The second statistic shows 97% of the $9.2 billion in pandemic relief provided through USDA's Coronavirus Food Assistance Program in 2020 went to nonminority farmers. Even taking these statistics at face value, they are less useful than they may appear to be. The first statistic is qualified by the fact that: "[a]pproximately seven percent of the funds went to entities owned by corporations or individuals whose race was not reported." The report also identifies farm size and specific crops—namely, soybeans—as being the target of MFP funding, not racial identity. As to the second statistic, both parties at least

> tacitly acknowledge the 2020 relief went primarily to nonminority farmers because the legislation targeted large farms that were disproportionately owned by nonminority farmers — not because the relief efforts were facially discriminatory. Where a race-neutral basis for a statistical disparity can be shown, the Court can give that statistical evidence less weight. Here, the statistical discrepancies presented by the Government can be explained by non-race related factors — farm size and crops grown — and the Court finds it unlikely that this evidence, standing alone, would constitute a strong basis for the need for a race-based remedial program.

Wynn, 2021 WL 2580678, at *6 (citations omitted). *See also Hilbert v. Ohio Dep't of Rehab. & Corr.*, 121 F. App'x 104, 110 (6th Cir. 2005) (explaining in an alleged racial discrimination employment context that, although statistical data, if unrebutted, can create an inference of discrimination, such data must not only show a significant disparity between two groups, but must also "eliminate the most common nondiscriminatory explanations for the disparity." (citations omitted)). Defendants have presented no additional evidence to this Court than that presented in *Wynn*, and, as discussed above, Defendants stated at the hearing that the evidence before this Court is the same as the evidence presented in *Wynn*. "An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the

government enacted or administered those policies in a discriminatory way." *Vitolo*, 999 F.3d at 362.

As for the second prong, other than statistical disparities, Defendants have presented no evidence of current intentional discrimination by Defendants, and they acknowledged this lack of evidence at the hearing. Instead, Defendants attempted to rely on statistical and anecdotal evidence, even though this type of evidence to show intentional discrimination has been rejected by the Sixth Circuit. *See Vitolo*, 999 F.3d at 361 ("When the government promulgates race based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government are not nearly enough.")[13]

Looking at the third prong, the Court finds evidence that the USDA played a role in past discrimination toward socially disadvantaged farmers but no evidence of current discrimination by the USDA. That is, no evidence has been presented that the USDA or FSA played a role in creating the disparities in pandemic relief given to minority farmers versus non-minority farmers.

---

[13] The *Vitolo* court distinguished between cases based on racial statistical disparities involving a single decisionmaker, such as when a city hires one race at a disproportionate rate, and statistics showing "general social disparities" because "there are simply too many variables to support inferences of intentional discrimination." *Vitolo*, 999 F.3d at 362. Although *Vitolo* addressed societal discrimination, the court also considered whether the government had shown a compelling interest in remedying past industry-wide discrimination. *Id*. at pp. 361-62.

Accordingly, Defendants here, as in *Vitolo*, have failed to establish that the government has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications.

However, even when the government has shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory legislation must be narrowly tailored to further that interest. *Id*.

> For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S. Ct. 2325, 156 L.Ed.2d 304 (2003); *J.A. Croson Co*., 488 U.S. at 507, 109 S. Ct. 706. This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the compelling interest. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312, 133 S. Ct. 2411, 186 L.Ed.2d 474 (2013). In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications. *J.A. Croson Co*., 488 U.S. at 507–08, 109 S. Ct. 706; *Gratz v. Bollinger*, 539 U.S. 244, 273–75, 123 S. Ct. 2411, 156 L.Ed.2d 257 (2003).

Vitolo, 999 F.3d at 362 – 63. "[T]he strict scrutiny standard ... forbids the use even of narrowly drawn racial classifications except as a last resort." *J.A. Croson Co.*, 488 U.S. at 519 (Kennedy, J., concurring).

Here, Defendants have not presented any race-neutral alternatives that Congress considered when discussing Section 1005. Instead, they contend that the loan relief program is narrowly tailored to its constitutional aims because race-neutral alternatives have failed. However, as pointed out in *Vitolo*, in attempting to mitigate the failure of prior pandemic relief efforts to reach socially disadvantaged farmers (minority and female restaurant owners in *Vitolo*), Congress could have given priority to those farmers who did not receive prior pandemic aid instead of passing race-based legislation. ("But an obvious race-neutral alternative exists: The government could grant priority consideration to all business owners [farmers] who were unable to obtain needed capital or credit during the pandemic.") "Because these race-neutral alternatives exist, the governments use of race is unconstitutional." *Vitolo*, 999 F.3d at 363.

The *Vitolo* court also looked at whether the legislation at issue in that case was underinclusive or overinclusive and found that it was both.

> For example, individuals who trace their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. This scattershot approach does not conform to

> the narrow tailoring strict scrutiny requires.

Id. at 363-64. Under Section 1005, "Black, American Indian/Alaskan Native, Hispanic, or Asian, or Hawaiian/Pacific Islander" farmers qualify for debt relief but not farmers of other races or ethnicities regardless of their financial condition and regardless of whether they obtained any financial relief during the pandemic.

The *Wynn* court also specified ways in which Section 1005 is both underinclusive and overinclusive. For instance, Section 1005 benefits only those socially disadvantaged farmers who received qualifying USDA farm loans, "but the evidence of discrimination provided by the Government says little regarding how this particular group of [socially disadvantaged farmers] has been the subject of past or ongoing discrimination." *Wynn*, 2021 WL 2580678, at *7. Additionally,

> [a]lthough the Government argues that Section 1005 is narrowly tailored to reach small farmers or farmers on the brink of foreclosure, it is not. Regardless of farm size, [a socially disadvantaged farmer] receives up to 120% debt relief. And regardless of whether [a socially disadvantaged farmer] is having the most profitable year ever and not remotely in danger of foreclosure, that [a socially disadvantaged farmer] receives up to 120% debt relief. Yet a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief.

> Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005.

Id. The *Wynn* court also commented on the dearth of evidence of prior discrimination by the USDA in farm loans toward Asians, Native Hawaiians, and Pacific Islanders, groups which are included in Section 1005, thus leading to an inference that Section 1005 is overinclusive as well as being underinclusive. *Id*. at *10. Finally, "there is little evidentiary support for the magnitude of relief provided by Section 1005 — up to 120% debt relief to all [socially disadvantaged farmers] with qualifying farm loans — which appears to duplicate or in some instances exceed the relief provided to those who actually suffered the well-documented historic discrimination Congress sought to remedy through prior settlements" such as *Pigford*.

> To the extent Section 1005 is intended to address the alleged erosion of prior relief identified by Senators Booker and Stabenow in their floor statements, the Government presents no evidence that the recipients of Section 1005's relief are the same persons or in any way — but race — similarly situated to the persons that received the previous, potentially inadequate relief. Nor does it explain how providing this debt relief to current loan holders is narrowly tailored to address the concern of previously inadequate relief. On the record before the Court at this stage in the case, it does not appear that Section 1005 is narrowly

> tailored such that it "eliminates no more than the exact source of the 'evil' it seeks to remedy."

Id. (citation omitted).

Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but no evidence was presented that Congress ever engaged "in a genuine effort to determine whether alternative policies could address the alleged harm" here. *Vitolo*, 999 F.3d at 362. As indicated in *Faust*, "[t]he obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin." *Faust*, 2021 WL 2409729, at *3.

The *Faust* court listed ways in which Congress could have implemented race-neutral programs to help farmers in need of financial assistance "such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources." *Id*. at *3. Because "[n]arrow tailoring requires evaluating the "efficacy of alternative [race-neutral] measures," *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion), and Congress did not do so, the Court finds that Section 1005 is not narrowly tailored to remedy the ills that Congress sought to alleviate.

However important the goal of eliminating the vestiges of prior race discrimination, and it is

important, the government's efforts cannot withstand strict scrutiny. Therefore, Plaintiff has shown a likeliness of success on the merits at trial.

Irreparable Injury[14]

Section 1005(a)(1) appropriates "out of amounts in the Treasury not otherwise appropriated, such sums as may be necessary, to remain available until expended …." Plaintiff contends that, if the Court does not halt all payments, then the limited funds available will be depleted by the time this case is resolved, and he will suffer irreparable harm. Defendants counter that the funds are not limited and that, if Plaintiff prevails at trial, he can be made whole by being made eligible for debt relief.[15] In rejecting that argument, the *Miller* court noted that "[w]hile the Government may at times act like it, the public fisc is not bottomless, and at any time, Congress may turn off the spigot." *Miller*, No. 4:21-cv-0595-O at p. 20 (citing *Baker v. Concord*, 916 F.2d 744, 749 (1st Cir. 1990)).

Not only is the "public fisc" not "bottomless," there are strong indications that Section 1005's "bottom" is $4 billion.[16] Plaintiff maintains that Section 1005's

---

[14] Even though, in constitutional cases, a finding of likelihood of success on the merits "is typically dispositive," *Vitolo*, 999 F.3d at 360 (citing *Roberts*, 958 F.3d at 416), the Court has considered the remaining factors in its analysis.

[15] Defendants also contend that Plaintiff has not shown a need for debt relief under Section 1005. Because Section 1005 is not based on need, this argument is unavailing.

[16] At the hearing, Defendants stated that the $4 billion figure was arrived at by calculating the amount needed to pay off the qualifying loans held by socially disadvantaged farmers.

language stating that funds for debt relief will be expended "out of amounts in the Treasury not otherwise appropriated" indicates some limit to the funds. Additionally, at the hearing, Plaintiff pointed out that public statements surrounding Section 1005 indicated that $4 billion was available for farm debt relief. *See, e.g., Delta Farm Press*, 2021 WLNR 18455848 (June 8, 2021) (noting Defendant Vilsack's testimony that $4 billion would be given away to socially disadvantaged farmers); *The Daily Citizen* (Dalton, GA), 2021 WLNR 17135549 (May 26, 2021) (relying on statements by Defendant Vilsack and United States Senator Raphael Warnock that the "U.S. Department of Agriculture will begin doling out $4 billion in payments to farmers of color as part of the most recent COVID-19 relief package."); *International New York Times*, 2021 WLNR 16517301(May 22, 2021) ("The Congressional Budget Office estimated that the loan forgiveness provision would cost $4 billion over a decade."); *Reuters News* (May 21, 2021) ("The U.S Agriculture Department said on Friday it will start erasing an estimated $4 billion dollars in debt to minority farmers in June, as it seeks to address racial discrimination.").

The Faust court discussed the subject of the amount of funding provided by Section 1005.

> While there is no explicit cap on the funds allocated to the loan-forgiveness program, based on current estimates, 0.2% of the $1.9 trillion package in the ARPA has been allocated to the program. Defendants sent offer letters to eligible farmers and ranchers as early as May 24, 2021. On June 9, 2021, Defendants sent

> offer letters to 8,580 farmers, and intend to send another 6,836 letters beginning June 14, 2021. Defendants indicate that it will take an average of seven days to receive an accepted offer and that the FSA will process payment immediately upon receipt of the offer. Defendants have already started to forgive loans, and the 8,580 farmers and ranchers who were sent offer letters represent approximately 49% of the loans that will be forgiven under the program. **The entire $3.8 billion that has been allocated to the program may be depleted before briefing and consideration of the motion for a preliminary injunction.**

Faust, 2021 WL 2409729, at *4 (emphasis added and citations to the record omitted).

The Court concludes that, while it is not clear that relief under Section 1005 is limited to $4 billion, it not believable that Congress intended to appropriate open-ended funding. Therefore, if the program is not enjoined, even if Plaintiff is later determined to be eligible for the program, he would suffer irreparable injury in the likely case that all the funds allotted for the program would have already been spent.

Next, Defendants contend that rather than enjoining the program, the Court could, at a later date, "re-write" Section 1005 to include Plaintiff. That is, instead of withdrawing benefits from the favored class ("socially disadvantaged farmers"), the Court could extend benefits to the excluded class (white

farmers such as Plaintiff). In support of their argument, Defendants rely on the Supreme Court's decision in *Califano v. Westcott*, 443 U.S. 76 (1979). In that case, the Supreme Court looked at a federal statute that provided benefits to families whose fathers had become unemployed but denied those same benefits when mothers lost their jobs, and the Court ultimately expanded the statute to include mothers as well as fathers. *Id*. at 79. Prior to 1968, the provision of assistance to families whose dependent children were deprived of support because of a parent's unemployment was gender neutral. *Id*. at 79-80. In 1968, as part of a revision to the Social Security Act, Congress added the gender qualification to the statute. *Id*. at 80. The Court upheld the lower court's remedy of "extension rather than invalidation" because the Social Security Act's "strong severability clause" … "evidence[d] a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largesse." *Id*. at 90.

In *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006), the Court considered when it was appropriate "to devise a judicial remedy that does not entail quintessentially legislative work." 546 U.S. at 330. The Court looked to *Westcott* to find that "the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Id*. (quoting *Westcott*, 443 U.S. 94 (Powell, J., concurring in part and dissenting in part)). "After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to

no statute at all?" *Ayotte*, 546 U.S. at 330 (citations omitted).

The legislative intent of Section 1005 is to remedy past discrimination suffered by those farmers defined as "socially disadvantaged" and to give those farmers a more level playing field with non-minority farmers. Opening eligibility for debt relief to all farmers would gut that intent. Additionally, Defendants have not pointed to a severability clause in the ARPA or Section 1005 to show that Congress would rather have race-neutral debt relief for farmers than no debt relief at all. Accordingly, the Court finds that *Westcott* does not support Defendants' argument.

Defendants also contend that there is no need for a preliminary injunction in this case because the courts in *Faust* and *Wynn* have already enjoined Section 1005's distribution of funds. However, Defendants have given no assurance that they will not appeal those decisions. Moreover, *Faust*, *Wynn*, and *Miller* are all out-of-circuit decisions, and the standard for issuing an injunction in the Sixth Circuit is not necessarily the same as in other circuits. And, as the *Miller* court noted, "the existence of overlapping injunctive relief from other courts does not serve to automatically eliminate irreparable harm in parallel litigation, and the Government cites no authority to suggest otherwise." *Miller*, No. 4:21-cv-0595-O at p. 21.

Finally, Plaintiff will be irreparably harmed if he is denied his constitutional right to equal protection. *Vitolo* was clear that the impairment of a constitutional right supports a finding of irreparable injury. *Vitolo*, 999 F.3d at 365 (quoting *Bonnell v.*

Lorenzo, 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.")).[17] Therefore, even if Plaintiff obtained financial relief after a trial on the merits, he would have suffered irreparable harm merely by the deprivation of his constitutional rights during the pendency of this matter.

Substantial Harm to Others

Defendants contend that Plaintiff has not shown that any injury to him absent an injunction would outweigh the harm to the socially disadvantaged farmers who are at a disproportionately higher risk of foreclosure and whose economic position in the midst of the pandemic worsens the longer payments are delayed. While this factor militates in favor of not granting the injunction, the potential economic harm to minority farmers is lessened by the USDA's present policy of not foreclosing on USDA direct loans, as acknowledged by Defendants at the hearing. Additionally, the USDA has encouraged private lenders not to foreclose on their loans.

---

[17] The parties disagree as to whether a farmer who receives debt forgiveness under Section 1005 will be eligible for future debt forgiveness under 7 U.S.C. § 2008h(c), which prohibits the USDA from providing debt forgiveness on a direct loan to any person who has previously received debt forgiveness. *See* 7 U.S.C. § 2008h(c). The Court need not decide the dispute at this juncture based on Plaintiff's statement at the hearing that he is not relying on this point of law as a basis for his motion for injunctive relief.

Public Interest[18]

This factor weighs in favor of granting the injunction. Plaintiff is asserting a violation of the Equal Protection Clause, and, as reiterated by Vitolo, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Vitolo*, 999 F.3d at 360 (quoting *Déjà vu of Nashville*, 274 F.3d at 400 (citation omitted)).

Summary and Conclusion

The Court finds that Plaintiff has shown a substantial likelihood that he will prevail on his claim that Section 1005 violates his right to equal protection under the law. Absent action by the Court, socially disadvantaged farmers will obtain debt relief, while Plaintiff will suffer the irreparable harm of being excluded from that program solely on the basis of his race. Despite the arguments of Defendants, the Court cannot re-write Section 1005 and order that Plaintiff receive equivalent relief. While an injunction may harm socially disadvantaged farmers, the Court has balanced the equities and determines that they favor enjoining Section 1005. The Court agrees with Judge Howard's reasoning that "the remedy chosen and provided in Section 1005 appears to fall well short of the delicate balance accomplished when a legislative enactment employs race in a narrowly tailored manner to address a specific compelling governmental interest." *Wynn*, 2021 WL 2580678, at *17.

---

[18] The factors of irreparable harm and the public interest "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Although this Court has reservations about issuing a nationwide injunction, in this type of case such an injunction is warranted.[19] As explained by Judge Howard,

> Here, despite exploring any possible more narrow option, the Court cannot identify any relief short of enjoining the distribution of Section 1005's payments and debt relief that will maintain the status quo and provide Plaintiff the opportunity to obtain any relief at all. As noted by the Supreme Court, "[o]nce a constitutional violation is found, a federal court is required to tailor the scope of the remedy to fit the nature and extent of the constitutional violation." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S.

---

[19] In her decision, Judge Howard noted some of the criticism of nationwide injunctions.

> [T]he Court proceeds with great caution in determining that an injunction that will have nationwide effect is warranted. Justices Gorsuch and Thomas have questioned a district courts' authority to enter nationwide injunctions, *see, e.g., Dep't of Homeland Sec. v. N.Y.*, —— U.S. ——, 140 S. Ct. 599, 599-601, 206 L.Ed.2d 115 (2020) (concurring opinion); *see also Trump v. Hawaii*, —— U.S. ——, 138 S. Ct. 2392, 2423, 201 L.Ed.2d 775 (2018) (noting the "disposition of the case makes it unnecessary to consider the propriety of the nationwide scope of the injunction," leaving the question unresolved), and courts and scholars have been critical of their use. *See Trump*, 138 S. Ct. at 2429 (collecting scholarly articles criticizing the issuance of nationwide preliminary injunctions).

Wynn, 2021 WL 2580678, at *17 (footnotes omitted).

> 406, 420, 97 S. Ct. 2766, 53 L.Ed.2d 851 (1977) (internal quotations and citations omitted); *see also Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L.Ed.2d 176 (1979) (noting, in the context of a nationwide class action, "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."). Plaintiff has shown a likelihood of success on the merits of his claim that Section 1005 is unconstitutional and, if implemented, would deprive him of his right to equal protection under the law. The implementation of Section 1005 will be swift and irreversible, meaning the only way to avoid Plaintiff's irreparable harm is to enjoin the program. The Court can envision no other remedy that will prevent the likely violation of Plaintiff's constitutional right which absent an injunction cannot be remedied in this action.

Wynn, 2021 WL 2580678, at *17 (footnotes omitted). *See also Faust* at *5 (quoting *City of Chicago v. Barr*, 961 F.3d 882, 916–17 (7th Cir. 2020) ("While universal injunctions are rare, they 'can be necessary to provide complete relief to plaintiffs, to protect similarly-situated nonparties, and to avoid the chaos and confusion that comes from a patchwork of injunctions.'")) *Faust* also found that a nation-wide injunction was appropriate because "Defendants' proposal to set aside funds to pay off any of Plaintiffs'

qualified loans is unworkable. If the USDA forgave Plaintiffs' loans, it would be required to forgive every farmer's loan, since the only criteria for loan forgiveness is the applicant's race."[20] *Id.* Therefore, the only way to preserve the status quo is for the Court to issue a nationwide injunction.

Accordingly, Plaintiff's motion for a preliminary injunction is **GRANTED**, and Defendants are hereby enjoined from implementing Section 1005. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees, and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further orders of the Court.

The government has not opposed Plaintiff's request that the Court waive the bond requirement. Therefore, Plaintiff will not be required to post a bond or other security.

No later than fourteen (14) days from the entry of this order, the parties must confer and submit to the undersigned Judge's ECF inbox a proposed scheduling order in word processing format. A scheduling conference will be set by separate order.

---

[20] The plaintiffs in Miller were granted class certification and did not seek a nationwide injunction. *Miller*, No. 4:21-cv-0595-O at p. 22.

IT IS SO ORDERED.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

Date: July 8, 2021

Appendix H

Statutory Provisions and regulatory provisions

1. 28 USCA § 2412 provides:

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which

specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award

under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a

cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent

domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5)(A) Not later than March 31 of the first fiscal year beginning after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and

Recreation Act, and every fiscal year thereafter, the Chairman of the Administrative Conference of the United States shall submit to Congress and make publicly available online a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection.

(B) Each report under subparagraph (A) shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.

(C)(i) Each report under subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to a nondisclosure provision.

(ii) The disclosure of fees and other expenses required under clause (i) shall not affect any other information that is subject to a nondisclosure provision in a settlement agreement.

(D) The Chairman of the Administrative Conference of the United States shall include and clearly identify in each annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report--

> **(i)** any amounts paid under section 1304 of title 31 for a judgment in the case;
>
> **(ii)** the amount of the award of fees and other expenses; and
>
> **(iii)** the statute under which the plaintiff filed suit.

(6) As soon as practicable, and in any event not later than the date on which the first report under paragraph (5)(A) is required to be submitted, the Chairman of the Administrative Conference of the United States shall create and maintain online a searchable database containing, with respect to each award of fees and other expenses under this subsection made on or after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, the following information:

> **(A)** The case name and number, hyperlinked to the case, if available.
>
> **(B)** The name of the agency involved in the case.
>
> (**C)** The name of each party to whom the award was made as such party is identified in the order or other court document making the award.
>
> **(D)** A description of the claims in the case.
>
> **(E)** The amount of the award.
>
> **(F)** The basis for the finding that the position of the agency concerned was not substantially justified.

(7) The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or a court order.

(8) The head of each agency (including the Attorney General of the United States) shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information

requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7).

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of this section of costs enumerated in section 1920 of this title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

2. 7 U.S.C. § 2279(a)(5) provides:

Socially Disadvantaged Farmers and Ranchers Policy Research Center

The Secretary shall award a grant to a college or university eligible to receive funds under the Act of August 30, 1890 (7 U.S.C. 321 et seq.), including Tuskegee University, to establish a policy research center to be known as the "Socially Disadvantaged Farmers and Ranchers Policy Research Center" for the purpose of developing policy recommendations for the protection and promotion of the interests of socially disadvantaged farmers and ranchers.

3. 7 U.S.C. § 2279(a)(6) provides:

Evaluation criteria

In making grants or entering into cooperative agreements under this subsection, the Secretary shall evaluate, with respect to applications for the grants or cooperative agreements--

(A) relevancy;

(B) technical merit;

(C) achievability;

(D) the expertise and track record of 1 or more applicants;

(E) the consultation of beginning farmers and ranchers in design, implementation, and decisionmaking relating to an initiative described in paragraph (1);

(F) the adequacy of plans for--

(i) a participatory evaluation process;

(ii) outcome-based reporting; and

(iii) the communication of findings and results beyond the immediate target audience; and

(G) other appropriate factors, as determined by the Secretary.

4. 42 U.S.C. § 1988(b) provides:

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious

Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

5. American Rescue Plan Act Section 1005 provides (March 11, 2021):

(a) PAYMENTS.—

(1) APPROPRIATION.—In addition to amounts otherwise available, there is appropriated to the Secretary for fiscal year 2021, out of amounts in the Treasury not otherwise appropriated, such sums as may be necessary, to remain available until expended, for the cost of loan modifications and payments under this section.

(2) PAYMENTS.—The Secretary shall provide a payment in an amount up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher as of January 1, 2021, to pay off the loan directly or to the socially disadvantaged farmer or rancher (or a combination of both), on each—

(A) direct farm loan made by the Secretary to the socially disadvantaged farmer or rancher; and

(B) farm loan guaranteed by the Secretary the borrower of which is the socially disadvantaged farmer or rancher.

(b) DEFINITIONS.—In this section:

(1) FARM LOAN.—The term "farm loan" means—

(A) a loan administered by the Farm Service Agency under subtitle A, B, or C of the Consolidated Farm and Rural Development Act (7 U.S.C. 1922 et seq.); and

(B) a Commodity Credit Corporation Farm Storage Facility Loan.

(2) SECRETARY.—The term "Secretary" means the Secretary of Agriculture.

(3) SOCIALLY DISADVANTAGED FARMER OR RANCHER.—The term "socially disadvantaged farmer or rancher" has the meaning given the term in section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)).

6. Inflation Reduction Act Section 22008 provides (August 16, 2022):

SEC. 22008. REPEAL OF FARM LOAN ASSISTANCE.

7. Notice of Funding Availability, (86 Fed. Reg. 28329) (May 26, 2021)

AGENCY: Farm Service Agency, Department of Agriculture (USDA).

ACTION: Notification of funding availability.

SUMMARY: The Farm Service Agency (FSA) is issuing this first notice announcing the availability of funds for eligible borrowers with direct loans under the Farm Loan Programs (FLP) and Farm Storage Facility Loan Program (FSFL) as authorized by section 1005 of the American Rescue Plan Act of 2021 (ARPA). A subsequent notice addressing guaranteed loans and remaining loan balances eligible under section 1005 will be published within 120 days of publication of this NOFA. FSA will pay 120 percent of direct loan balances outstanding as of January 1, 2021, for socially disadvantaged farmers and ranchers as that term is defined by section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990.

DATES:

Funding availability: Implementation will begin May 26, 2021

Comment Date: We will consider comments on the Paperwork Reduction Act that we receive by: July 26, 2021.

ADDRESSES: We invite you to submit comments on the information collection request. You may submit comments by any of the following methods, although FSA prefers that you submit comments electronically through the Federal eRulemaking Portal:

- Federal eRulemaking Portal: Go to http://www.regulations.gov and search for Docket ID FSA-2021-0005. Follow the online instructions for submitting comments.
- Mail: Bruce Mair, Direct Loan Servicing Branch Chief, Farm Loan Programs, Farm Service

Agency, USDA, 1400 Independence Ave. SW, Stop 0523, Washington, DC 20250. In your comment, specify the docket ID FSA-2021-0005.

All comments received, including those received by mail, will be posted without change and publicly available on http://www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Bruce Mair; telephone: (202) 720-1645; or by email: bruce.mair@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 1005 of the American Rescue Plan Act of 2021 (ARPA) provides funding and authorization for FSA to pay up to 120 percent of direct and guaranteed loan outstanding balances as of January 1, 2021, for certain loans of socially disadvantaged farmers and ranchers as that term is defined in section 2501(a) of the Food, Agriculture Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)). See ARPA section 1005(b)(3). Section 2501(a) defines a socially disadvantaged farmer or rancher as someone who is a member of a socially disadvantaged group, which is further defined as a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities. See 7 U.S.C. 2279(a)(5)-(6). Through this notice, FSA is announcing the immediate implementation of section 1005 of ARPA for eligible direct loan FLP and FSFL borrowers who are socially disadvantaged farmers or ranchers, as defined by section 2501(a).

A separate NOFA will be issued specifying the

timeframes and requirements for guaranteed loans and direct loans that no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset. All eligible direct loan borrowers are included in this initial announcement except those who no longer have collateral or an active farming operation. These borrowers often have more complicated cases and may not have the same opportunities to invest in their farming operation to manage tax liabilities. FSA expects these cases to account for approximately 5 percent of eligible direct loan borrowers. Procedures for payments to these borrowers will be addressed in a subsequent NOFA, which will also include eligible guaranteed loan borrowers. For eligible direct loan borrowers who also have guaranteed loans, their guaranteed loans will be handled through the subsequent NOFA.

Definitions

The following definitions apply to this Notice:

Adjustment is a form of debt settlement that reduces the financial obligation to FSA, conditioned upon the completion of payment of a specified amount at a future time. An adjustment is not a final settlement until all payments have been made under the agreement.

Bankruptcy estate is a legal entity created upon the filing of any case under Title 11 of the United States Code, 11 U.S.C. 101-1532, consisting of the legal and equitable interests in property of a debtor.

CONACT means the Consolidated Farm and Rural Development Act, as amended (7 U.S.C. 1921-2009cc-

18).

Cooperative means an entity that has farming as its purpose, whose members have agreed to share the profits of the farming enterprise and is recognized as a farm cooperative by the laws of the state in which the entity will operate a farm.

Corporation means a private domestic corporation created and organized under the laws of the state in which it will operate a farm.

Direct Loan means a loan funded and serviced by FSA as the lender.

Eligible direct loan means a debt that had an outstanding balance on January 1, 2021, and is any of the following:

- FLP direct loan issued under subtitles A, B, or C of the CONACT, including Conservation loans, Emergency loans, Farm Ownership loans (including Down Payment loans), Grazing loans, Irrigation and Drainage loans, Operating loans (including Youth loans and Microloans), and Soil and Water loans;
- FLP direct non-program loan and Softwood Timber Loans where the original loan was issued under the CONACT; or
- FSFL loan.

Eligible recipient means an individual or entity that is:

- A borrower or co-borrower on FSA eligible direct loans on January 1, 2021; *28330 all eligible direct loan borrowers are included in this initial announcement except those who no longer have collateral or an active farming operation and whose loan has been previously referred to the Department

of Treasury for debt collection for offset; and

- A member of a socially disadvantaged group as reflected on FSA records at the time a payment is made. For entities and married couples, at least one individual personally liable as a borrower or co-borrower for the debt must be a member of a socially disadvantaged group; or
- An estate of a deceased eligible recipient.

Entity means a corporation, partnership, joint operation, cooperative, limited liability company, or trust.

Estate is a legal entity created as a result of a person's death and consists of the property of the deceased. The estate pays any debts owed by the deceased and distributes the balance of the estate's assets to the beneficiaries of the estate.

FLP means Farm Loan Programs, the FSA programs to make, guarantee, and service loans to family farmers authorized under the CONACT and implemented through the FSA regulations in 7 CFR parts 700-774.

FSFL means Farm Storage Facility Loans, the FSA program to make and service loans for farm storage facilities authorized by the CCC Charter Act (15 U.S.C. 714-714p) and the Food, Conservation and Energy Act of 2008 (7 U.S.C. 7971 and 8789) and implemented through the FSA regulations in 7 CFR part 1436.

Guaranteed loan means a loan made pursuant to subtitles A, B, or C of the CONACT and serviced by a lender for which FSA has entered into a Lender's Agreement and for which FSA has issued a loan

guarantee. This term also includes guaranteed lines of credit.

Joint operation means an operation run by individuals who have agreed to operate a farm or farms together as an entity, sharing equally or unequally land, labor, equipment, expenses, or income, or some combination of these items. The real and personal property is owned separately or jointly by the individuals.

Limited Liability Company means a business structure combining the pass-through taxation of a partnership or sole proprietorship with the limited liability of a corporation organized pursuant to the laws of the state in which it will operate a farm.

Offer notice means the letter sent to eligible borrowers that will notify them of the payment amount, obtain direct deposit payment information and verifying eligible and ineligible loans.

Partnership means an entity consisting of two or more individuals who have agreed to operate a farm as one business unit. The entity must be recognized as a partnership by the laws of the State in which the partnership will operate a farm. It also must be authorized to own both real and personal property and to incur debt in its own name.

Primary borrower means the borrower who was designated as the operator of the farm or ranch when the loan was closed. For formal entities, the primary borrower is the entity while members are co-borrowers. For informal joint operations, at the time of application the applicants designate the individual identified as the primary borrower.

Recapture is the amount that FSA or lenders are entitled to recover from a direct or guaranteed loan borrower in consideration for FSA or the lender writing down a portion of their direct or guaranteed loan debt when the loan was secured by real estate and the real estate increased in value. Recapture also includes the act of collecting shared appreciation.

Socially Disadvantaged Farmer or Rancher means a farmer or rancher who is a member of a socially disadvantaged group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities, as defined by section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)). Members of socially disadvantaged groups include, but are not limited to:

- American Indians or Alaskan Natives;
- Asians;
- Blacks or African Americans;
- Native Hawaiians or other Pacific Islanders; and
- Hispanics or Latinos.

The Secretary of Agriculture will determine on a case-by-case basis whether additional groups qualify under this definition in response to a written request with supporting explanation.

Sole Proprietor means a business owned and operated by an individual with no legal distinction between the owner and the business.

Trust means an entity that under applicable state law meets the criteria of being a trust of any kind but does

not meet the criteria of being a farm cooperative, private domestic corporation, partnership, or joint operation.

Determining Amount of Payments

ARPA section 1005 permits the Secretary of Agriculture to provide payments to a lender directly to pay off an eligible loan, to an eligible recipient, or a combination of both. Payments for eligible direct loans will be equal to 120 percent of the outstanding indebtedness owed on eligible direct loans as of January 1, 2021. Undisbursed balances of eligible direct loans will not count toward the outstanding indebtedness owing as of January 1, 2021.

In order to determine the amount of the payment, FSA will make adjustments for eligible recipients with the following types of cases:

- Where FSA has entered into an adjustment agreement with the borrower, the adjustment agreement will be reversed and the payment to the eligible borrower will be calculated on the full debt as of January 1, 2021, rather than on the lesser amount owing on the adjustment agreement.

- Shared Appreciation Agreement: the recapture amount will be waived.

Initial Notification Process

Eligible recipients do not need to take any action until receipt of a payment offer from FSA. However, eligible recipients may, if necessary, update their demographic information in FSA records by contacting their Local FSA Service Center. Within 45 days of the publication of this NOFA, FSA anticipates sending an offer notice to eligible recipients with

eligible direct loans. The offer notice will explain:

- Eligibility based on the current information on record;
- FSA's calculation of payments, including proposed distribution of payments;
- Remaining balances on loans that are not included as eligible direct loans (if any) (for example, Economic Emergency loans or loans disbursed after January 1, 2021);
- Any eligible loans that will be addressed through a subsequent NOFA (that is, guaranteed FLP loans and direct loans that no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset); and
- That borrowers should be aware of potential implications of receipt of direct payments during bankruptcy.

The offer notice will be sent to the primary borrower and eligible recipient(s) and will provide three options:

(1) Accept the offer and conditions;

(2) Schedule a meeting to discuss with FSA before making a decision (for example to discuss the loan calculation, if an error is identified); or

(3) Decline the offer.

Only the eligible recipient(s) must sign the document either accepting or declining to initiate the payments.

The eligible recipient(s) must certify the information in the offer notice. Acceptance of the offer indicates concurrence with the payment calculations and the

indicated distribution of funds, and verification as eligible recipient(s).

If an offer has not been formally accepted or declined after 30 days, FSA will send a reminder letter and make a phone call or send an email if that contact information is on file. If a response to accept or decline an offer is not received after 60 days from the date of the initial offer, FSA will provide a second reminder notification to those borrowers that a payment will not be processed unless contacted by the eligible recipient. Should FSA establish a final deadline, it will be publicly announced and a final notification will be provided to borrowers at least 30 days in advance of the deadline.

Distributing Payments

FSA will distribute payments as follows:

(1) The amount to pay off the eligible direct loan(s) will be directly applied to such loans by FSA; and

(2) The additional 20 percent will be paid in accordance with the offer notice.

Any payment will be issued electronically as stated in the offer notice. FSA will credit payments as of January 1, 2021, and ensure payments made on accounts after January 1, 2021, are reversed and refunded to customers that have accepted the payment. Refunds will occur at the time the direct loan payoff is being completed. If the loan was paid in full after January 1, 2021, the ARPA payment will be calculated based on the balance outstanding as of January 1, 2021.

Both the payment to FSA to payoff outstanding loans and the additional 20 percent to the borrower will be

reported to the Internal Revenue Service (IRS) as income using form IRS-1099 G, in accordance with applicable requirements. Borrowers should consult with a tax professional to discuss any tax implications. ARPA is subject to appeal rights pursuant to 7 CFR parts 11 and 780.

USDA will work with non-governmental organizations (NGO) funded through FSA Cooperative Agreements to provide technical assistance. Technical assistance by USDA and its cooperators will be provided to borrowers free of charge. Borrowers are not required or expected to pay any fees to access these ARPA benefits.

The USDA makes no representation whether any payment directly to a borrower in a pending bankruptcy case constitutes property of the bankruptcy estate. Borrowers should consult bankruptcy professionals or counsel to discuss the impact of bankruptcy on any payments received under ARPA.

Paperwork Reduction Act Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), FSA is requesting comments from interested individuals and organizations on the information collection request associated with ARPA. After the 60-day period ends, the information collection request will be submitted to the Office of Management and Budget (OMB) for a 3-year approval to cover ARPA information collection.

To start the ARPA information collection approval, prior to publishing this document, FSA received emergency approval from OMB for 6 months. The

emergency approval covers ARPA information collection activities.

Title: American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA),

OMB Control Number: 0560-New.

Type of Request: New Collection.

Abstract: This information collection is required to support all ARPA information collection requests to provide payments to the eligible borrowers under section 1005 of ARPA. FSA will provide the loan information, the calculation of payments, and other required information to the borrower to review and to sign the offer to indicate acceptance or rejection of the offer.

For the following estimated total annual burden on respondents, the formula used to calculate the total burden hour is the estimated average time per response multiplied by the estimated total annual responses.

Public reporting burden for this information collection is estimated to include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed and completing and reviewing the collections of information.

Type of Respondents: FLP direct and FSFL borrowers.

Estimated Annual Number or Respondents: 24,000.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Responses: 24,000.

Estimated Average Time per Response: 15 minutes.

Estimated Total Annual Burden on Respondents: 6,000 hours.

FSA is requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of FSA, including whether the information will have practical utility;

(2) Evaluate the accuracy of the FSA's estimate of burden including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this document, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

Environmental Review

The environmental impacts have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321-4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508), and the FSA regulation for compliance with NEPA (7 CFR part 799).

As previously stated, ARPA includes provisions for paying up to 120 percent of direct and guaranteed loan balances as of January 1, 2021, for FSA borrowers who belong to socially disadvantaged groups as defined in section 2501(a) of the Food, Agriculture Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a)). The limited discretionary aspects of ARPA do not have the potential to impact the human environment as they are administrative. Accordingly, these discretionary aspects are covered by the FSA Categorical Exclusions specified in 7 CFR 799.31(b)(1)(xiii) (partial or complete release of loan collateral) and 799.31(b)(1)(xvii) (restructuring of loans and writing down of debt).

No Extraordinary Circumstances (§ 799.33) exist. As such, the implementation of ARPA and the participation in ARPA do not constitute major Federal actions that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or *28332 environmental impact statement for this action and this document serves as documentation of the programmatic environmental compliance decision for this federal action.

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Catalog of Federal Domestic Assistance, to which this document applies is 10.136.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights

regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250-

9410 or email: OAC@usda.gov.

USDA is an equal opportunity provider, employer, and lender.

Zach Ducheneaux,

Administrator, Farm Service Agency.

[FR Doc. 2021-11155 Filed 5-24-21; 8:45 am]

BILLING CODE 3410-05-P

8. Equal Access to Justice Act, PL 96–481 (HR 5612), PL 96–481, OCTOBER 21, 1980, 94 Stat 2321

TITLE II–EQUAL ACCESS TO JUSTICE ACT

Sec. 201. This title // 5 USC 504 // may be cited as the " Equal Access to Justice Act".

FINDINGS AND PURPOSE

Sec. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—,

(1) to diminish the deterrent effect of seeking

review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

9. 42 U.S.C. § 12205

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

10. 42 U.S.C. § 3613(c)(2)

(c) Relief which may be granted

(2) In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

Appendix I — Congressional Reports:

1. H.R. Rep. No. 94-1558 (1976)

THE CIVIL RIGHTSATTORNEY'S FEES AWARDS ACT OF 1976

September 15, 1976-Committed to the Committee of the Whole House on the State of the' Union and ordered to be printed

Mr. DRINAN, from the Committee on the Judiciary, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 154601]

The Committee on the Judiciary, to whom was referred the bill (H.R. 15460) to allow the awarding of attorney's fees in certain civil rights cases, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

* * *

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. Incarcerated *Men of Allen County v. Fair*, 507 F.2d 281 (6th, Cir. 1974); *Parker v. Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc.,*

v. Board of' Education of the City of New' York, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief such as an injunction, is needed. *E.g., Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), cert denied, 409 U.S. 982 (1972): see also *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Eses v. Dwyer*, 358 U.S. 202 (1958).

A prevailing defendant may also recover its fees when the plaintiff seeks and obtains, a voluntary dismissal of a groundess complaint, *Corcoran v. Columbia Broadcasting System*, 11 'F.2d 575 (96 Cir. 1941), as long as the other factors noted earlier, governing awards to defendants are so. Finally, the courts have also awarded counsel fees to a plaintiff who successfully concludes a class action suit even though that individual was not granted any relief. *Porham v. Southwestern Bell Telephone Co.*, *supra*; *Reed v. Arlington Hotel Co., Inc.*, 476 .2d 721 (8thCir. 173).

Furthermore, the 'word "prevailing" is not intended to require the entry of a *final* order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." *Bradley v. Richmond School Board*, 416 U.S. 69k, 723 (1974) see also, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Such awards pendente lite are particularly important in

protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidelines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees . . ." *Bradley v. Richmond School Board*, *supra* at 722 n. 28.

2. H.R. Rep. No. 96-1005 (1980)

SMALL BUSINESS EQUAL ACCESS TO JUSTICE ACT

MAY 16, 1980.—Ordered to be printed

Mr. SMITH of Iowa, from the Committee on Small Business, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 6429 which on February 5, 1980, was referred jointly to the Committee on Small Business and the Committee on the Judiciary]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business to whom was referred the bill (H.R. 6429) entitled "Small Business

Equal Access to Justice Act," having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

TITLE I-SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY

SEC. 101. Title II of Public Law 94-305, approved June 1976 (90 Stat. 669; 15 U.S.C. 684b) is amended as follows:

(a) by striking all of section 202 after the semicolon in subsection (9) and inserting the following:

"(10) determine the desirability of developing a set of rational, objective criteria to be used to define small business, and to develop such criteria, if appropriate; and

"(11) advise, cooperate with, and consult with the Attorney General of the United States, Federal agencies, and the Chairman of the Administrative Conference, in order to facilitate collective relief afforded to small businesses under the Small Business Equal Access to Justice Act;" and

(b) by adding the following new sections and renumbering the remaining sections accordingly:

* * *

BACKGROUND AND INTRODUCTION

The committee's Subcommittee on SBA and SBIC Authority and General Small Business Problems held 3 days of hearings on this bill, April 17, 23 and May 1.

During these hearings testimony was received in support of this bill from individual small business owners who have encountered difficulties with the Federal Government, trade associations, and other private and Government witnesses.

Throughout the hearings the committee was provided with numerous examples of Government actions against individual small business owners that were indefensible. Many witnesses stated that they had been frustrated by the maze of the agency review processes. All too frequently, the review process of an agency was unknown to the private citizen. Consistently, the committee was told of agency insensitivity to the problems of the small business community. Without exception, small business owners indicated this legislation would be beneficial to them and would enable many of them to better defend themselves and fight unwarranted Government charges that previously have gone unchallenged.

Based on the hearings, a number of refining amendments were considered and accepted by the subcommittee during makeup. Significant discussions occurred concerning the eligibility for award of fees in the case of a settlement, a withdrawal of the case by the Government and a partial decision for a private party. Additionally, the eligibility of an intervenor for reimbursement and the standards to be used to determine the Government liability were carefully considered.

The definition of a prevailing party posed a difficult problem. The subcommittee members, in response to testimony, deleted the word "prevailing"

from the statute in order to clearly indicate that a final decision by an agency or the court against the Government was not an essential requirement for the award of costs and fees associated with the dispute.

The subcommittee believed that in addition to those private parties who prevail on all issues in litigation or by final administrative order, a party also should be eligible for recovery if he obtains a favorable settlement, a voluntary dismissal, or where he may be deemed to have prevailed due to a decision in his favor or prevailed on less than all the issues or if the amount of the judgment against his was only a fraction of the amount the Government sought.

The subcommittee also added the phrase “direct and personal interest" to the definition of "eligible party for costs and fees” to insure that only a party that has been or will be injured can benefit under the statute. The subcommittee determined to specifically exclude intervenors.

* * *

WHEN A CLAIM CAN BE MADE

The bill would require that in order to be eligible for an award of costs and fees, either a plaintiff or defendant must have "prevailed." Substantial discussion on the definition of "prevailing" led your committee to remove the word from the bill in order to more clearly indicate that a final decision on the merits is not the only instance where an award may be made. The committee intends that awards shall not be limited to a favorable decision by an administrative law judge, agency, department or multidepartment review board or court. It expects that an award may

be made where a settlement or a dismissal, either voluntary or directed, has occurred in favor of a private party or where the private party has prevailed on less than all the issues.

A party could also be deemed to have prevailed for purposes of fee award prior to a final judgment. For example, fees may be awarded on the basis of an interim order which is central to the case or where an interlocutory appeal is sufficiently significant or discrete to be treated as a separate unit. Your committee intends that the occasions where an award may be made shall be broadly construed.

WHEN A CLAIM CAN BE DENIED

Your committee intends that costs and fees shall be awarded to an eligible private party in a civil dispute when the private party has prevailed, unless the Government can show that its action was substantially justified or that special circumstances make an award unjust. This standard balances the constitutional obligation of the executive branch to faithfully execute the laws with the public's interest in the vindication of private rights.

The test of whether a Government action is substantially justified would be essentially one of reasonableness. Where the Government can show that its case had a reasonable basis, both in law and in fact, no award would be made. In this regard, the strong deterrents to contesting Government action that currently exists require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has easier access to and knowledge of the facts in question. Your

committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action that for a private party to marshal the facts to prove that the Government was unreasonable.

3. H.R. Rep. No. 96-1418 (1980)

EQUAL ACCESS TO JUSTICE ACT

SEPTEMBER 26, 1980—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 265]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (S. 265) entitled "Equal Access to Justice Act", having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

* * *

B. THE PREVAILING PARTY

Under existing fee-shifting statutes, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that

has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case, *Foster v. Boorstin*, 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F. 2d 575, (9th Cir. 1941); or even if he does not ultimately prevail on all issues, *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. A fee award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker v. Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit", *Van Ftoomwissen v. Xerox Corp.*, 503 F. 2d 1131, 1133 (9th Cir. 1974).

The bill as reported by the Committee on the Judiciary is essentially the same as the Senate passed bill. However, several changes were made, which are noted below:

1. To add a limit of 500 employees to the eligibility requirement of any business party who prevails and seeks fees. This figure is consistent with the limit set by the White House Conference on Small Business.

2. To add an exclusion from the net worth ceiling for an organization described in section 501(c)(3) of

the Internal Revenue Code of 1954.

3. To limit administrative proceedings to "adversary adjudications" in which the position of the U.S. is represented. It is basic fairness that the United States not be liable in an administrative proceeding in which its interests are not represented.

4. To exclude administrative proceedings under the Social Security Act. There was much discussion whether the United States should be liable when it is a named party and represented in a civil action under the Social Security Act. The Committee decided that civil actions should be covered.

5. To make the effective date October 1, 1981. This amendment served two purposes. It removed the bill from the scrutiny of the House Budget Committee since it will not take effect until fiscal year 1982 (October 1, 1981). The delay of a year will provide time for the committees with jurisdiction over tax matters to enact a separate bill. The Senate bill had delayed tax matters for 6 months. The Committee has received correspondence from the Ways and Means Committee opposing the inclusion of tax cases and indicating that they will be commencing hearings in early October on the subject.

6. To allow recovery of fees from the agencies or from the U.S. Treasury, and to authorize appropriations for that purpose. The Senate bill had provided that funds for most of this bill come from the agencies involved, and that no appropriations could be made for this specific purpose. This restriction was opposed as unduly punitive (there is an accounting procedure in the reporting section), and would result in a forced appropriation. This amendment insures

that the prevailing party will be awarded a fee if it meets the requirements in the bill. It also keeps the language providing payment for "bad faith" actions by the agency involved.

7. To provide for consultation between the Chairman of the Administrative Conference of the U.S. and the Chief Counsel for Advocacy of the Small Business Administration on the annual report.

8. To have an "adjudicative officer" making the fee determination.

4. H.R. Rep. No. 96-1434 (1980) (Conf. Rep.)

SMALL BUSINESS ASSISTANCE AND REIMBURSEMENT FOR CERTAIN FEES

SEPTEMBER 30, 1980.—Ordered to be printed

Mr. SMITH of Iowa, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 5612]

The committee of conference on the disagreeing votes for the two Houses on the amendments of the Senate to the bill (H.R. 5612) to amend section 8(a) of the Small Business Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its diagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

* * *

14. AGENCY ACTIONS-AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

The Senate bill requires a Federal agency or department that conducts an adversary adjudication to award to a prevailing party other than the United States fees and other expenses incurred by that party unless that adjudicative officer finds that the agency's position was substantially justified or that special circumstances make an award unjust.

The Senate bill also requires a party seeking an award of fees and other expenses to submit an application for them within thirty days of final disposition of the adjudication, including a showing of eligibility and an itemized statement of the amount claimed.

The Senate bill further provides that the amount of any award may be reduced, or eliminated, to the extent that the prevailing party unduly unreasonably protracted final resolution of the matter in controversy.

The House bill contains no comparable provision, but the Senate provision is virtually identical to a provision in S. 265 as reported by the House Judiciary Committee.

The conference substitute adopts the Senate provision.

The conferees direct the United States to pay attorney fees and other expenses to a prevailing party

other than the United States in an agency adversarial adjudication unless the position of the government is found to be not substantially justified or where special circumstances make the award unjust. An adversarial adjudication is one in which the agency position is represented by counsel or otherwise. The phrase "prevailing party" is not to be limited to a victor only after entry of a final judgment following a full trial on the merits; its interpretation is to be consistent with the law that has developed under existing statutes.

A party may be deemed prevailing if the party obtains a favorable settlement of his case, *Foster v. Boorstin,* 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F. 2d 575 (9th Cir. 1941); or even if the party does not ultimately prevail on all issues, *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. An award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker v. Matthews*, 411 F. Supp. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal "sufficiently is significant and discrete to be treated as a separate unit", *Van Hoomissen v. Xerox Corp.*, 503 F. 2d 1131, 1133 (9th Cir. 1974).

5. H.R. Rep. No. 98–992 (1984)

EQUAL ACCESS TO JUSTICE ACT
AMENDMENTS

SEPTEMBER 6, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 5479]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary to whom was referred the bill (H.R. 5479) to amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * *

SECTION-BY-SECTION ANALYSIS

SECTION 1

The first section contains six subsections.

Subsection (a) provides that section 504(a)(1) of title 5, United States Code, is amended by striking out "as a party to the proceeding" and adding the following language at the end of the subsection:

> The decision of the adjudicative officer on the application for fees and

> other expenses shall be the final administrative decision under this section.

The first change made by this subsection clarifies an issue that has spawned a considerable amount of litigation. [1] The issue is whether the United States may be relieved of liability to pay attorney's fees and reasonable expenses merely by showing that its position "as a party" in an adversary adjudication or court proceeding is substantially justified. The effect of this change coupled with the new definition of "position of the agency" contained in subsection (c)(4) clarify the Congressional intent that the "position of the agency" is much broader than the litigation position, and includes actions and omissions of an agency which led to the adversary adjudication.[2] An omission which may be relevant includes the failure of an agency or its staff to act based on a statutory, regulatory, or constitutional duty. Thus, fee awards may be made to an eligible, prevailing party unless the agency can show that its position, including the underlying agency action which led to the adjudication, was substantially justified. These changes, including the conforming changes in section 2 relating to civil actions, will assure that fee awards are made using the same standard in civil actions and adversary adjudications. In addition, the amendment

---

[1] See cases cited in note 14, supra.

[2] The Committee rejects the narrow interpretation explained Relations in *Spencer v. National Labor Board*, 712 F.2d 539 (D.C. Cir. 1983), and several other courts, and agrees with the dissent (J. Wald) contained in *Del Manufacturing Company v. US.*, et al., 723 F.2d 980, 986-89 (D.C. Cir. 1983).

will make clear that the Congressional intent is to provide for attorney fees when an unjustifiable agency action forces litigation, and the agency then tries to avoid such liability by reasonable behavior during the litigation. This clarifying amendment is not meant to preclude government attorneys from asserting jurisdictional or technical defenses (e.g., statute of limitations or mootness).

* * *

SECTION 2

Section 2 of the bill contains many subsections which are analogous to those contained in section 1. Section 1 relates to administrative proceedings, while section 2 relates to court proceedings. In addition, section 2 contains some additional amendments not found in section 1.

* * *

"Prevailing party," in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

The Committee adopted this amendment to clarify the status of condemnation actions under the Act. Condemnation actions are cases in which the United States acquires private property by eminent domain and the property owners litigate the amount to be paid as compensation. Until recently, the courts had been

unanimous in holding that the Act did not apply to condemnation cases. However, two recent courts of appeals decisions 80 have held that EAJA does apply to condemnation cases, thus creating the need for the amendment. The amendment relating to condemnation cases has two purposes. First, it makes clear that condemnation cases are covered by the Act. Second, it provides a standard for determining who the prevailing party would be in such actions.

Under this amendment, a party would be regarded as a prevailing party when the amount it is awarded by the court lies at least halfway between the highest amount testified to on behalf of the Government and the highest amount testified to on behalf of the opposing party. In other words, the prevailing party is the one whose testimony in court is closer to the award. If the award is exactly in the middle, it gives the benefit to the property owner. This amendment applies only to values testified to in court. It would have no application to settlement negotiations or agreements. In fact, the amendment expressly denies the status of prevailing party to any party who obtains a judgment by settlement. Thus, it is presumed that any claim for expenses and fees under the Act which a party might have asserted in the event of trial would be considered by the parties in their negotiations and that an appropriate allowance, if any, would be made in the settlement amount agreed upon, so that a final judgment achieved through settlement shall foreclose thereafter the assertion of any such claim.

The Committee expects that this amendment will terminate the uncertainty which currently exists due to continuing litigation over who is the prevailing party in condemnation actions. The Committee also

hopes that the amendment will result in bringing the Government and the property owner closer together in their land valuations, since they would both have the extra incentive of being determined the prevailing party under the Equal Access to Justice Act.

Nothing in the definition of "prevailing party" for purposes of Social Security cases or condemnation proceedings is meant to limit the definition of "prevailing party" under other circumstances. The Act, as originally enacted, has an expansive view of the term "prevailing party."[3]

6. H.R. Rep. No. 99-120 (1985)

EQUAL ACCESS TO JUSTICE ACT AMENDMENTS

MAY 15, 1985.-Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2378]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2378) to amend section 504 of title 5, United States Code, and section 2412 of title 28, United States Code, with respect to awards of expenses of certain agency and court proceedings, and

---

[3] See H. Rept. 1418, 96th Cong., 2d sess. 11 (1980); and House Hearings on Attorneys Fees, 96th Cong., supra note 21

for other purposes, having considered the same with a forum present report favorably by voice vote, thereon with an amendment and recommend that the bill as amended do pass.

* * *

"Prevailing party," in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

The Committee adopted this amendment to clarify the status of condemnation actions under the Act. Condemnation actions are cases in which the United States acquires private property by eminent domain and the property owners litigate the amount to be paid as compensation. Until recently, the courts had been unanimous in holding that the Act did not apply to condemnation cases. However, two recent courts of appeals decisions[4] have held that EAJA does apply to condemnation cases, thus creating the need for the amendment. The amendment relating to condemnation cases has two purposes. First, it makes clear that condemnation cases are covered by the Act. Second, it provides a standard for determining who the prevailing party would be in such actions.

Under this amendment, a party would be regarded as a prevailing party when the amount it is awarded

---

[4] If a settlement is reached and the fee award is not part of the settlement, then the thirty-day period would commence on the date when the proceeding is dismissed pursuant to the settlement or when the adjudicative officer approves the settlement.

by the court lies at least halfway between the highest amount testified to on behalf of the Government and the highest amount testified to- on behalf of the opposing party. In other words, the prevailing party is the one whose testimony in court is closer to the award. If the award is exactly in the middle, it gives the benefit to the property owner.

This amendment applies only to values testified to in court. It would have no application to settlement negotiations or agreements. In fact, the amendment expressly denies the status of prevailing party to any party who obtains a judgment by settlement. Thus, it is presumed that any claim for expenses and fees under the Act which a party might have asserted in the event of trial would be considered by the parties in their negotiations and that an appropriate allowance, if any, would be made in the settlement amount agreed upon, so that a final judgment achieved through settlement shall foreclose thereafter the assertion of any such claim.

The Committee expects that this amendment will terminate the uncertainty which currently exists due to continuing litigation over who is the prevailing party in condemnation actions. The Committee also hopes that the amendment will result in bringing the Government and the property owner closer together in their land valuations, since they would both have the extra incentive of being determined the prevailing party under the Equal Access to Justice Act.

Nothing in the definition of "prevailing party" for purposes of condemnation proceedings is meant to limit the definition of "prevailing party" under other circumstances. The Act, as originally enacted, has an

expansive view of the term "prevailing party".[5]

7. S. Rep. No. 94-1011 (1976)

CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT

JUNE 29 (legislative day, JUNE 18), 1976.—
Ordered to be printed

Mr. TUNNEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2278]

The Committee on the Judiciary, to which was referred the bill (S. 2278) to amend Revised Statutes section 722 (42 U.S.C. § 1988) to allow a court, in its discretion, to award attorneys' fees to a prevailing party in suits brought to enforce certain civil rights acts, having considered the same, reports favorably thereon and recommends that the bill do pass.

* * *

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park*

---

[5] See H. Rept. 1418, 96th Cong., 2d sess. 11 (1980); and House Hearings on Attorneys Fees, 96th Cong., supra note 8.

Enterprises, Inc., 390 U.S. 400, 402 (1968).[6] Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F. 2d 951 (5th Cir. 1972). (A fee award to a defendant's employer, was held unjustified where a claim of racial discrimination, though meritless, was made in good faith.) Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes. *United States Steel Corp. v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974), aff'd, 9 E.P.D. 10,225 (3d Cir. 1975). This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278. Similar standards have been followed not only in the Civil Rights Act of 1964, but in other statutes providing for attorneys' fees. E.g., the Water Pollution Control Act, 1972 U.S. Code Cong. & Adm. News 3747; the Marine Protection Act, Id. at 4249-50; and the Clean Air Act, Senate Report No. 91-1196, 91st *Cong.*, 2d Sess., p. 483 (1970). See also *Hutchinson v. William Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943) (Fair

---

[6] In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, In the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e.g., *Shelly v. Kramer*, 334 U.S. 1 (1948).

Labor Standards Act).

In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See *Bradley, supra; Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Moreover, for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.*, 523 F. 2d 1005 (2d Cir. 1975), and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); *Thomas v. Honeybrook Mines, Inc.*, 428 F. 2d 981 (3d Cir. 1970); *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975).

In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which S. 2278 applies are to be fully enforced.' We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance. Fee awards are therefore provided in cases covered by S. 2278 in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is

intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity,7 from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not -be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. (9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, "for all time reasonably expended on a matter." *Davis, supra; Stanford Daily, supra*, at 684.

This bill creates no startling new remedy-it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys fees which had been going on for years prior to the Court's May decision. It does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure

compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

8. S. Rep. No. 96-253 (1979)

EQUAL ACCESS TO JUSTICE ACT

JULY 20 (legislative day, JUNE 21), 1979.—Ordered to be printed

---

Mr. DECONCINI, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2651]

The Committee on the Judiciary, to which was referred the bill (S. 265) to provide for equal access to justice, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

PURPOSE OF THE BILL

The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking

review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and the disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other costs against the United States, unless the Government action was substantially justified. Additionally, the bill ensures that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. This change will allow a court in its discretion to award fees against the United States to the same extent it may presently award such fees against private parties.

* * *

C. PREVAILING PARTY

Under existing fee-shifting statutes, the definition of prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case, *Foster v. Boorstin,* 561 F. 2d 340 (D.C. Cir. 1977); if the plaintiff has sought a voluntary dismissal of a groundless complaint, *Corcoran* v. *Columbia*

Broadcasting System, Inc., 121 F. 2d 575 (9th Cir. 1941); or even if he does not ultimately prevail on all issues, *Bradley* v. *School Poard of the City of Richmond,* 416 U.S. 696 (1974).

In cases that are litigated to conclusion, a party may be deemed "prevailing" for purposes of a fee award in a civil action prior to the losing party having exhausted its final appeal. A fee award may thus be appropriate where the party has prevailed on an interim order which was central to the case, *Parker v. Matthews,* 411 F. Supp. 1059, 1064 (D.D.C. 1976), or where an interlocutory appeal is "sufficiently significant and discrete to be treated as a separate unit", *Van Hoomissen v. Xerox Corp.,* 503 F. 2d 1131, 1133 (9th Cir. 1974).

CONCLUSION

Providing an award of fees to a prevailing party represents one way to improve citizen access to courts and administrative proceedings. When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment. Thus, by allowing an award of reasonable fees and expenses against the Government when its action is not substantially justified, S. 265 provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, S. 265 helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation *und* the unreasonable exercise of

Government authority.

In this context, the committee believes that S. 265 serves the public interest and justifies an exception to the American rule that each party must bear his own costs in litigation. This is particularly so since the general statutory exception for awards against the United States represents a limited experiment. The bill has a sunset provision which repeals the relevant amendments to titles 5 and 28 at the end of 3 years. At that time, it is expected that the cost and impact of the legislation will be reviewed

9. 9. S. Rep. No. 98-586 (1984)

EQUAL ACCESS TO JUSTICE ACT

AUGUST 8 (legislative day, AUGUST 6), 1984.—
Ordered to be printed

Mr. GRASSLEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 919]

The Committee on the Judiciary, to which was referred the bill (S. 919) to amend the Equal Access to Justice Act, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

* * *

B. The meaning of "position of the United States"

The EAJA provides that "a court (or agency) shall award to a prevailing party other than the United States, fees and other expenses . . . incurred by that party in any civil action brought by or against the United States. . .unless the court (or adjudicative officer of the agency) finds the position of the United States was substantially justified." Three years of litigation under the EAJA have resulted in conflicting determinations over the construction of the term "position of the United States" necessitating clarification.

The district courts are nearly evenly split on the interpretation of this term as are the circuit courts of appeal. Some courts have held that in determining whether the position of the United States was substantially justified, the government position to be scrutinized is that taken in the litigation itself. *Spencer v. N.L.R.B.*, 712 F. 2d 539 (D.C. Cir. 1983); *Tyler Business Services v. N.L.R.B.*, 695 F. 2d 73 (4th Cir. 1982); *Ellis v. United States*, 711 F. 2d 1571 (Fed. Cir. 1983); *United States v. 2,116 Boxes of Boned Beef*, 726 F. 2d 1481 (10th Cir. 1984).

Others have reasoned that the government's position to be evaluated includes, in addition to the litigation stance the underlying government action giving rise to the litigation. *Natural Resources Defense Council v. U.S.E.P.A.*, 703 F. 2d 700 (3rd Cir. 1983); *Rawlings v. Heckler*, 725 F. 2d 1192 (9th Cir. 1984). Testimony received from the Small Business Administration was especially helpful in the Committee deliberations on this subject.

In the usual case, "it makes no functional difference how (a court) conceives of the government's

'position' because the litigation position of the United States will almost always be that its underlying action was legally justifiable." *Spencer*, 712 F. 2d at 551-52. However, the approach that is most faithful to the aims of the EAJA is one that evaluates both the agency's underlying posture that led to the litigation and the actual litigation conduct of the government. The Committee explicitly recognizes this in Section 2412 of the bill and thus clearly resolves any ambiguity that existed heretofore. A corresponding change is made in Section 504 which allows an administrative law judge to examine the underlying conduct at the agency level.

The primary concern of Congress in enacting the EAJA was to provide an incentive for parties, aggrieved by unreasonable governmental action, to undertake litigation to vindicate their rights, as well as to deter arbitrary or unjustified agency action. The legislative history of the EAJA is replete with references to administrative abuses which Congress sought to limit through enactment of an attorney fee-shifting device. *NRDC*, 703 F. 2d at 714 (Thompson, J. concurring); *see e.g.,* where a small businessman spent $3,000 to successfully contest a $25 fine from OSHA; another who spent $30,000 in legal fees to beat back a Labor Department demand for $54,000 in back pay. Cong. Rec. S. 13690 daily ed., Sept. 26, 1980 (statement of Mr. DeConcini).

The EAJA rests on the premise that certain parties "may be deterred from seeking review of . . . unreasonable governmental action because of the expense involved in securing the vindication of their rights . . .(the bill's purpose) is to reduce the deterrents (thus assuring) that administrative

decisions reflect informed deliberation." H. Rep. No. 1418, 96th Cong. 2d Sess. 12 (1980).

Congress expressly recognized "that the expense of correcting error on the part of the Government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of Federal authority." *Id*. at 10. The "Government error" referred to is not one of the Department of Justice's representatives litigating the case, but is rather the government action that led the private party to the decision to litigate. Although it is true that Congress referred to the litigating position of the United States during its discussion of the "substantial justification" question, Congress never contemplated situations "in which the litigation position is essentially an apology for its administrative action forcing the litigation." *NRDC*, 703 F. 2d at 715.

Indeed, to follow an interpretation that "position of the United States" refers only to the government's litigation stance is to imply that no matter how outrageously improper the agency action, and no matter how intransigently a wrong position has been maintained by the agency prior to the litigation, and no matter how many times the same agency repeats the same offense, the statute has no application as long as employees of the Department of Justice act reasonably when they appear in court. *NRDC*, 703 F. 2d at 706, 715. There have been numerous gross examples of the results that obtain from consideration of only the government's "litigation" position. *Alspach v. District Director of Internal Revenue Service* 527 F. Supp 225 (D. Md. 1981); Del Manufacturing Co. v. U.S. 723 F. 2d 980 (D.C. Cir. 1983); *Clark v. U.S.*, 3 Cl. Ct. 194 (1983); *Hill v. U.S.*, 3 Cl. Ct. 428 (1983);

Greenberg v. U.S., 1 Cl. Ct. 406 (1983).

In addition, focusing solely on the litigation stance of the government frustrates Congress' intent to have a party who received a favorable settlement, be considered a prevailing party and therefore eligible for fees. As the NRDC court explained:

> If the Department of Justice offers to settle a case its litigation position cannot be faulted . . .The references to settlements (in the legislative history) makes "position plain that of the United States" must have been meant to include not only the litigation position, which will more often than not be determined by the Justice Department, but also the agency position which made the lawsuit necessary. *NRDC*, 703 F. 2d at 708.

Adoption of this view will not deter settlement offers b7 the Justice Department, since it will still be in the government's interest to settle tenuous factual or legal cases. The extent of government liability that would be incurred upon immediate surrender would ordinarily be minimal, i.e., the private party's fees for preparing a complaint (or answer) and supporting papers. Only where the government conducts a vigorous defense of an untenable agency action will the award be large. Nevertheless, the effect of this potential liability on the decisions of the government and the plaintiff (or defendant) would further the essential purposes of the EAJA. For its part, the government would have an added incentive to resolve disputes before the point at which the plaintiff is entitled to go to court. As it stands under the

alternative interpretation, the government has no such incentive; it can remain intransigent throughout the administrative process and hope that the individual is unwilling to undertake the expense of challenging its action in court. If the government loses its gamble and finds itself in court nonetheless, it can then simply give up at no cost whatsoever. Yet this is precisely the kind of bullying that Congress hoped to deter by enacting EAJA. Del Manufacturing, supra, (Wald, J., dissenting).

Some have expressed concern that the bill's clear statement of "position" as including the underlying agency action will discourage or preclude Justice Department litigators from asserting legal defenses unrelated to the agency's conduct. However, since the bill's definition merely includes the underlying action and is not limited to only that 'position," Justice Department attorneys can continue to assert jurisdictional or technical defenses (statute of limitations, mootness, etc.). Should they succeed on the merits of the defense the government will likely not be liable under the EAJA at all. If these arguments fail, they will be individually evaluated as to whether they represent a substantially justified litigation position.